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Datasheet for the decision of 27 February 2014

Case Number: T 0801/13 - 3.2.02

Application Number: 01114582.8

Publication Number: 1145729

IPC: A61M25/00, A61M25/01

Language of the proceedings: EN

Title of invention:
A ready-to-use urinary catheter assembly

Patent Proprietor:
Coloplast A/S

Opponents:
Hollister Limited
Dansac A/S

Headword:

Relevant legal provisions:
EPC Art. 76(1), 84, 100, 101(3)(a), 123(2)
EPC 1973 Art. 100, 102(3)
EPC 1973 R. 25

Keyword:
Amendments - added subject-matter (no)
Claims - clarity (yes)
Remittal to the department of first instance - (yes)

Decisions cited:
G 0001/93, T 0468/09, T 1574/05, T 2125/10, T 0301/87, T 0853/02, T 1906/11, T 0667/08

Catchword:

Europäisches Patentamt
European Patent Office
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Case Number: T 0801/13 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 27 February 2014

Appellant: (Patent Proprietor)	Coloplast A/S Holtedam 1 3050 Humlebaek (DK)
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Respondent: (Opponent 1)	Hollister Limited 21 Holborn Viaduct London EC1A 2DY (GB)
Representative:	Anderson, Robert J. Hogan Lovells International LLP Atlantic House 65 Holborn Viaduct GB-London EC1A 2FG (GB)
Respondent: (Opponent 2)	Dansac A/S Lille Kongevej 304 3480 Fredensborg (DK)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 18 January 2013 revoking European patent No. 1145729 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman E. Dufrasne
Members: P. L. P. Weber
D. Ceccarelli

Summary of Facts and Submissions

I. The appeal by the patent proprietor is against the decision of the opposition division posted on 18 January 2013 to revoke European patent EP-B-1145729 because of non-compliance with Articles 123(2), 76 and 84 EPC.

II. Claim 1 of the main request reads as follows:

"*1. A urinary catheter assembly comprising at least one urinary catheter (1) having on at least a part of its surface a hydrophilic surface layer (6) intended to produce a low-friction surface character of the catheter by treatment with a liquid swelling medium prior to use of the catheter and a catheter package (7, 16, 29, 34, 42, 46, 51, 51') made of a gas impermeable material and having a cavity (11,18, 39, 48, 53) for accommodation of the catheter (1, 58, 69), characterized in that the cavity accommodates said liquid swelling medium for provision of a ready-to-use catheter assembly.*"

III. The notice of appeal was filed on 27 March 2013 and the appeal fee paid on the same day. The statement of the grounds of appeal was filed on 28 May 2013.

IV. Application EP-A-1145729 leading to the patent at issue in the present appeal proceedings was filed as a divisional of EP-A-0923398 on 18 June 2001. The decision to grant was taken on 5 October 2001 for the parent application. The divisional application as originally filed was identical to the parent application as originally filed.

V. For the patent at stake in the present proceedings (based on the above-mentioned divisional application) a first decision was taken by the present Board (T 0468/09). In that decision the Board dealt with an objection under Article 100(b) EPC and concluded that disclosure was sufficient.

For the patent (EP-B-0923398) based on the parent application, in two decisions by the present Board (T 1574/05 and T 2125/10) it was concluded that the subject-matter of claim 1 was inventive.

VI. Oral proceedings were held on 27 February 2014. The final requests of the parties were the following:

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of the main request, or in the alternative on the basis of one of auxiliary requests 1 to 8 all filed with letter dated 28 May 2013.

Respondent 1 (opponent 1) requested that the appeal be dismissed or, if the decision under appeal is set aside, that the case be remitted to the department of first instance for further prosecution. It further requested that auxiliary requests 1 to 3, 5, 6 and 8 filed with letter dated 28 May 2013 be not admitted in the proceedings.

Respondent 2 (opponent 2) requested that the appeal be dismissed or, if the decision under appeal is set aside, that the case be remitted to the department of first instance for further prosecution. It further requested that auxiliary requests 1 to 4, 6 and 8 filed

with letter dated 28 May 2013 be not admitted in the proceedings.

VII. The wording of claim 1 according to the main request is the same as that of claim 1 according to the main request in the impugned decision (see above) and also the same as that of claim 1 of the main request in the former appeal proceedings (T 0468/09).

VIII. The arguments of the appellant can be summarised as follows:

Added subject-matter

The important test for determining whether the requirements of Article 123(2) EPC were respected was whether the person skilled in the art was presented with new information as compared to the content of the application as originally filed.

Looking at the embodiment described on page 4, lines 10 to 19, at claim 5 of the application as filed and even at figures 1 and 2, it was clear that the cavity and the compartment could form one single space. How that space was referred to was not decisive. For the person skilled in the art there was no additional technical information presented by the omission of one of the two words.

It had also to be noted that in the description page 4, lines 10 to 19, where it was stated that the compartment could be entirely integrated with the cavity, the requirement that the package as a whole be made of gas impermeable material was not present. The essential reason for the presence of a gas impermeable material was to avoid or prevent the evaporation of the

liquid swelling medium. This was repeated several times in the description, for instance on page 10 where it was mentioned that the package had to have the ability to protect the coating from drying out. This feature that the package had to be made of gas impermeable material had to be read in the light of the technical context. In particular, the presence of one single space implied that the catheter with the activated surface or the liquid swelling medium had to be protected from drying out. Moreover the definition of gas impermeability was given on page 3, lines 20 to 26.

In the application as originally filed, e.g. in claim 1, it was clearly mentioned that the compartment accommodated the liquid swelling medium. As a consequence, when the compartment and the cavity formed a single space, the liquid swelling medium was accommodated in the cavity. This specific wording did not need to be present in the application as originally filed.

As to the feature of immediate activation, this would only be the case in one of the two embodiments covered by the claim, since when the spongy material was present there was no immediate activation. In other words, this limitation was not necessary.

Claim 5 of the application as originally filed recited one way of carrying out the general teaching which was mentioned on page 4. Therefore it was not necessary to take over all the other features somehow in relation with claim 5 as originally filed.

For the reasons above, the requirements of Article 76(1) and 123(2) EPC were met.

Clarity

Objections under Article 84 EPC were not mentioned in Article 100 EPC. In other words, lack of clarity was not a ground of opposition. It was established case law that clarity could only be examined in relation to the amendments made during the opposition proceedings and/ or opposition appeal proceedings. Other features or other claims were not open to discussion. The objection relative to the omission of "compartment" in claim 1 or in claim 7 was not a result of the amendment, and therefore this objection was not admissible. It would also be inadmissible under Article 13(1) RPBA as late filed.

As to the objection raised in relation to the amendment introduced into claim 1, a definition of gas impermeable was given in the patent, so there was no justifiable objection under Article 84 EPC.

IX. The arguments of the respondents can be summarised as follows:

Added subject-matter

The description of the application as filed comprised two series of embodiments, a first series in which the package as a whole was made of gas impermeable material, and a second series in which the compartment was separated and in the latter case only the compartment walls were made of gas impermeable material. The present patent was only concerned with the first series, as illustrated for instance in figures 1, 4 and 6. However, all these embodiments had a compartment for the liquid swelling medium and a

cavity for the catheter, and the package was said to be made as a whole of gas impermeable material.

According to decision G 1/93 of the Enlarged Board of Appeal, the purpose of Article 123(2) EPC was to avoid an applicant or patent proprietor improving its position by claiming subject-matter and obtaining protection for it although it was not disclosed in the application as filed. There was also ample case law which forbade the "cherry picking" (or intermediate generalisations). However, this was exactly what was happening here.

As a matter of fact, in present claim 1 of the main request the following features were missing: throughout the description of the first series of embodiments it was mentioned that the package as a whole was made of gas impermeable material. It was further mentioned that a compartment was present and that the compartment was in a liquid flow communication with the cavity. There was no disclosure in the application as filed of any embodiment in which both elements were not present. In present claim 1 it was mentioned that the package was made of gas impermeable material. This was a different concept from the concept of the package as a whole being made of gas impermeable material, since it encompassed embodiments in which the package could only be partially made of gas impermeable material. In this way the patent proprietor was trying to broaden the scope of the patent in an undue manner.

Furthermore, the wording that the cavity accommodated the liquid swelling medium could not be found anywhere in the application as filed. Throughout the application as filed the liquid swelling medium was said to be in the compartment. Even if one relied on claim 5 as

filed, in which the cavity and the compartment were said to be the same, a lot of features would still be missing from present claim 1, since claim 5 as filed was dependent on claims 3, 2 and 1.

Also in the embodiment recited on page 9, starting line 32, where it was mentioned that it was not necessary to use a spongy material to retain the liquid swelling medium, it was not mentioned that there was no compartment any more.

The same was true for the embodiment described in connection with and shown in figure 1. There again a cavity and a compartment were mentioned. The application as filed never mentioned that one of the cavity and the compartment was not present any more. On the contrary, the present wording of claim 1 also covered embodiments without any compartment or with the compartment but which was not integrated in the cavity.

The embodiment described on page 4, lines 10 to 19, in which the compartment was said to be integrated in the cavity, required additionally that the low friction surface was immediately activated during the manufacturing process.

The present wording even covered the situation in which the catheter was in the compartment or in an extra package within the cavity.

It was thus clear that when looking closely at what the patent proprietor was doing, it could only be concluded that it was trying to claim a different invention from those which were originally disclosed, and hence contravened Articles 76 and 123(2) EPC.

Clarity

The wording "made of" used in claim 1 became unclear when read in connection with the wording of claim 2 in which the package was said to be made "as a whole" of gas impermeable material. What could "made of" mean other than that the package as a whole was made of the latter material? Either the wording of claim 1 was unclear because it meant something different from "as a whole", or claim 2 was unnecessary.

In addition, the absence of the word compartment made the scope of the claim 1 unclear. Claim 7 was also unclear, because it used the wording "said compartment", but no compartment had been defined before in the claims. It was noted in this context that once an amended claim was examined, the opponents and/ or the Board were entitled to raise lack of clarity in respect of every feature of the claim, not only the features linked to the amendment.

Hence, claim 1 had also to be rejected because it did not fulfil the requirements of Article 84 EPC.

The objection of lack of support raised in writing was not pursued.

Reasons for the Decision

1. The appeal is admissible.

2. Divisional application EP-A-1145729 on which the present patent is based was filed on 19 June 2001, when Rule 25 EPC 1973 applied and required the divisional application to be filed whilst the earlier European patent application was pending. Since the decision to

grant was taken on 5 October 2001 for the parent application, the divisional was filed in due time.

3. The divisional application as originally filed is identical with the parent application as originally filed. In the following, for ease of citation (the paragraphs are numbered), the Board will refer to published divisional application EP-A-1145729.

The applications (divisional and parent) as originally filed being identical, any relevant interpretation of common content as decided in T 1574/05, T 2125/10 or T 0468/09 is binding for the present case.

Technical field of the invention and general content of the description as originally filed.

4. Urinary catheters are essentially of two types: indwelling catheters which are meant to remain in the urethra for a longer period of time and which are in general inserted in hospital and intermittent catheters which are meant for introduction into the urethra in particular by the patient for a single emptying of the bladder and then taken out again after the emptying. The intermittent catheters can further be subdivided into catheters being lubricated with a gel or another lubricant and catheters having a hydrophilic surface which needs to be activated (by water or saline solution) to demonstrate its low friction properties. With prior-art catheter assemblies of this latter type the patient needs water, has to pour the water into the package cavity accommodating the catheter and wait for the swelling of the hydrophilic coating in order to obtain a catheter ready to use. Depending on the quality of the water used as liquid swelling medium, risks of infection exist.

The invention as presented in the introductory part of the description [0008] aims at allowing users to prepare the catheter for use wherever they are without the need to find water or to carry water with them in another receptacle, without the constraint of having to pour water into the package cavity containing the catheter, and without associated risk of infection.

The general concept of the invention is to propose an assembly comprising a catheter package for accommodation of the catheter and the liquid swelling medium (in a gas impermeable compartment) so that the liquid necessary to activate the low friction hydrophilic surface of the catheter is always available together with the catheter in that package. Of course the gas impermeability has to be adapted to the intended shelf-life time for such products [0010].

The original description presents two series of embodiments. In the general part of the description the first series of embodiments is described starting from paragraph [0011] and the second series of embodiments is described starting from paragraph [0022]. In the part of the description in which specific embodiments are described in more detail, embodiments of the first series are described starting from paragraph [0026] and figure 1, and embodiments of the second series are described starting from paragraph [0046] and figure 7.

The essential difference between the two series of embodiments is summarised, e.g. in paragraph [0045] which reads as follows:

"*Whereas, in the embodiments described so far the compartment for the liquid swelling medium is in direct*

liquid flow communication with the cavity narrowly surrounding the catheter tube, which requires the package as a whole to be made of a gas-impermeable material, the compartment for the swelling liquid may alternatively be separated from the catheter cavity in such a way that the liquid flow communication there between is not established, until preparation of the catheter is performed prior to the intended use. Thereby, only the swelling medium compartment itself needs to have walls of a gas-impermeable material preventing leakage of the swelling medium by diffusion, whereas the wall parts of the package surrounding the catheter may be made of a relatively cheaper liquid tight material."

5. The wording of claim 1 according to the main request being the same as that of claim 1 according to the main request in the impugned decision and also the same as that of claim 1 of the main request in the former appeal proceedings (T 0468/09), the interpretation of claim 1 given in the decision of the Board in points 4.3 and 4.4 is relevant here. The Board considered that the wording of the claim covered both the embodiment of figures 1 and 2 (point 4.3) in which the catheter is in a cavity and the end portion of the cavity (or compartment) contains a spongy material retaining the liquid swelling medium until it is pressed out of the spongy material and flows into the cavity in order to prepare the low friction surface ([0011] to [0013] and [0029] to [0032]), and the embodiment not shown in the figures in which the liquid swelling medium is put into the cavity directly during the manufacturing process (point 4.4) without the presence of any spongy material ([0014] and[0037]).

The last part of claim 1, which requires *that the cavity accommodates said liquid swelling medium for provision of a ready-to-use catheter assembly*, does not define whether the liquid swelling medium is in a storing element (as the spongy material 14) in the cavity and/or whether the low-friction surface layer is in an activated state or not.

However, in the Board's opinion the wording of claim 1 clearly does not cover the embodiments in which the liquid swelling medium would be in a completely closed and separated compartment, as in the second series of embodiments in which only the compartment is made of gas impermeable material and not necessarily the rest of the package. This is expressed in claim 1 by the fact that the *catheter package* (should be) *made of a gas impermeable material* and by the fact that it is specified *that the cavity accommodates said liquid swelling medium*. In the context of the patent this can only mean that the liquid swelling medium is so to say without barrier in the cavity, as is the case in the embodiments according to figures 1 and 2 and when the swelling medium is injected into the cavity during the manufacturing process before welding together the sheets forming the package [0037].

Added subject-matter

6. The respondents/opponents considered that since throughout the description concerning the first series of embodiments it was mentioned that the package as a whole should be made of gas impermeable material, present claim 1 contravened Article 123(2) EPC, because it only recited that the package should be made of that material.

The Board does not share this opinion.

The Board shares the opinion expressed e.g. in T 1906/11 and T 0667/08 that, when deciding on issues of added subject-matter, it is essential to identify the actual teaching conveyed by the original disclosure, i.e. the technical information that the person skilled in the art would have derived from its content considered in its entirety. In other words, a strict literal support is not what is required by Article 123(2) EPC. What is required is that when read by the person skilled in the art there is no new technical teaching in the amended version as compared to the application as filed.

In the present case it is readily apparent that the application as filed makes a clear difference between on the one hand the embodiments of the first series according to which the catheter and the liquid swelling medium are in a single space within the package (be it with or without storage body for the liquid swelling medium) and in which single space the liquid swelling medium can freely flow, and on the other hand the embodiments of the second series in which the liquid swelling medium is isolated from the catheter in a separate compartment and cannot flow into the cavity containing the catheter until the compartment is somehow broken or opened.

It is further clear that the function of the gas impermeability of the material used is to avoid evaporation of the liquid swelling medium. This is explained in paragraph [0010]: "*The term "gas impermeable" material should be understood in this context to mean any material that will be sufficiently tight against diffusion by evaporation of the actual*

liquid swelling medium for a period..." but also in paragraph [0037] where it is mentioned that: "*Due to the gas-impermeability of the package 7 it is not necessary to use a body 14 of spongy material to accommodate the liquid swelling medium... The package will itself prevent the coating from drying out and preserve the low friction character of the surface coating to keep the catheter in a ready to use condition at all times.*" Or in paragraph [0014] it is indicated that: "*The gas-impermeable walls of the package will then protect the activated coating from drying out and provide a long time preservation of the low friction surface characteristic of the catheter until the moment of actual use.*" By contrast and again in paragraph [0045] it is explicitly mentioned in relation to the second series of embodiments that: "*Thereby, only the swelling medium compartment itself needs to have walls of a gas-impermeable material preventing leakage of the swelling medium by diffusion, whereas the wall parts of the package surrounding the catheter may be made of a relatively cheaper liquid tight material.*"

Hence, for the person skilled in the art it is amply clear from the original description that the technical function of the gas impermeable material is to prevent evaporation of the liquid swelling medium for a predetermined length of time before use of the catheter. For this reason this material is used everywhere for the package, or for the compartment, where there is a risk of evaporation or diffusion of the liquid swelling medium. In other words, this material is used along the whole space enclosing the catheter and the liquid swelling medium in the first series of embodiments (one described option to achieve that being to start from two sheets of a gas

impermeable thermoplastic film material ([0029]) and to weld them together) but only around the compartment containing the liquid swelling medium in the second series of embodiments.

Hence, in the opinion of the Board when claim 1 recites that *the package (should be) made of gas impermeable material*, for the person skilled in the art it means that everywhere where there is a risk of evaporation of the liquid swelling medium the package should be made of such material. Nothing else can be meant by this wording and this is fully supported by the application as filed, as demonstrated above.

7. The respondents/opponents also submitted that there was no basis in the application as filed for the feature that the cavity accommodates the liquid swelling medium. It was always the compartment which did so. And even in the case of a single space, part of the space could be the compartment and another part the cavity.

The Board does not share this opinion.

In paragraph [0014] of the application as filed it is mentioned that "*the compartment for the liquid swelling medium may be entirely integrated with the cavity for the catheter...*". Claim 5 of the application as filed includes the same teaching, namely "*that said cavity constitutes itself said compartment...*".
In the specific embodiment according to figures 1 and 2 the part where the spongy material is stored is called the widened end section 12 or compartment ([0029] to [0033]) and in the embodiment without spongy material ([0037]) it is not mentioned whether the end section still exists or not. Moreover, it is also apparent in

figures 1 and 2 that the "*cavity*" and the "*end section or compartment*" form a single space.

Therefore, in all these embodiments the "cavity" and the "compartment" form a single space. It follows that when the liquid swelling medium is in this single space, it is within the cavity and/or within the compartment. In such a case, the Board considers it pointless and even confusing to draw an artificial distinction between a part of the space which would be called "cavity" and another part of the space which would be called "compartment". All the more because the general statements in [0014] and in claim 5 do not specify any particular relationship between the two; only in figure 1 is the one shown behind the other. Moreover, it also is self-evident that there is liquid flow communication between the "compartment" and the "cavity", as there is only one space.

The present wording that the cavity accommodates the liquid swelling medium therefore does not contain any teaching not already present in the mentioned embodiments.

8. The respondents/opponents further objected that compared to the version of originally filed claim 1, present claim 1 included added subject-matter since the feature that the package includes a compartment having walls of a gas impermeable material had been deleted and replaced by the catheter package (should be) made of a gas impermeable material.

As already mentioned above, for the person skilled in the art, one teaching of the application as filed is that gas impermeability must be present where the liquid swelling medium may evaporate. Therefore it is

not necessary to mention the walls of the compartment, since claim 1 covers only embodiments in which the compartment and the cavity form a single space. Thus, the walls of the compartment and the package surrounding that space are the same.

In addition, in the detailed description of the embodiments of the first series the walls of the package are never mentioned.

In paragraph [0029] it is mentioned that the *package* 7 *formed by two sheets 8 and 9 of a gas impermeable thermoplastic film material such as...*
Nothing is mentioned about walls of a compartment.

In [0037] it is mentioned that: *Due to the gas-impermeability of the package 7 it is not necessary to use a body 14 of spongy material to accommodate the liquid swelling medium*. Further down in the paragraph it is mentioned that: *The package will itself prevent the coating from drying out and preserve the low friction character of the surface coating to keep the catheter in a ready to use condition at all times*.

Hence, as already explained, in these embodiments it is the package which fulfils the function of avoiding the drying out of the low friction surface coating or of evaporation of the liquid swelling medium. The walls and their gas impermeability do not have to be mentioned in claim 1.

9. The respondents/opponents considered that even if claim 5 of the application as filed mentioned that the cavity itself might constitute the compartment, other features were mentioned in claim 5 and in the claims on which claim 5 was dependent, so that present claim 1

also contravened Article 123(2) EPC because it did not recite these other features. The same applied to paragraph [0014] mentioning that the compartment could be integrated with the cavity but also reciting other additional features such as the immediate activation of the hydrophilic surface layer after completion of the production process.

The Board does not share this analysis. For the embodiments in which there is one single space for the cavity and the compartment, present claim 1 corresponds almost word-for-word to claim 1 of the application as filed.

In claim 1 of the application as filed the compartment was said to accommodate the liquid swelling medium and now it is the cavity which is said to do so. As explained above, both statements are equivalent when the cavity and the compartment form one single space. And as further explained above, when there is a single space the walls of the compartment (which are said to be gas impermeable in claim 1 of the application as filed) and the walls of the package enclosing that single space are merged. Thus, for the specific case where the cavity and the compartment form a single space, which was already covered by the wording of claim 1 of the application as filed, the wording of claim 1 has been specified. Moreover, at least for the reason that several embodiments described in the application as filed exhibit this feature of a single space for the cavity and the compartment, there is no need to take over other features of one of the embodiments to satisfy the requirements of Article 123(2) EPC. This would be an undue restriction of the scope of the claim, in view of the more general teaching.

10. Therefore claim 1 according to the main request satisfies Article 123(2) EPC. Since the divisional application as originally filed was identical to the parent application as originally filed, claim 1 according to the main request also complies with Article 76(1) EPC.

Clarity

11. The respondents/opponents submitted that the wording of claim 1 was not clear, since it was not clear what was meant by the wording "made of gas impermeable material" used in claim 1, especially when read in conjunction with claim 2 which required the package "as a whole" to be made of such material. Additionally, since once a claim had been amended a lack of clarity objection could be raised against any feature, it was further considered that claim 1 was not clear because the compartment was not mentioned and claim 7 was not clear because it mentioned "said compartment" but no compartment was ever defined before in the claims.

The Board would like to point out the legal framework in this context.

Article 100 EPC and Article 100 EPC 1973 both mention the same exhaustive list of the grounds for opposition: "*Opposition may only be filed on the grounds that:*"(emphasis added). The list of grounds which follows does not include Article 84 EPC or any wording equivalent to the wording of that article. Clarity and support as defined in Article 84 EPC therefore do not form a ground for opposition and hence cannot be used against the claims of a granted patent to start opposition proceedings.

Article 101(3)(a) EPC and Article 102(3) EPC 1973 both indicate that "*If the Opposition Division is of the opinion that, taking into consideration the amendments made by the proprietor of the European patent during the opposition proceedings, the patent and the invention to which it relates meet the requirements of this Convention, it shall decide to maintain the patent as amended, provided...*"(emphasis added).

Even if this wording might give the impression that all parts of an amended patent can be objected to as not meeting the requirements of any article or rule of the EPC and hence, in our case, that any feature of any claim could be objected to under Article 84 EPC, it is established case law that this wording has to be understood as meaning that objections based on the requirements of articles other than Article 100 EPC must arise out of the amendments made. This means in particular that a lack of clarity objection cannot be raised against a feature already in the claim of the patent as granted (e.g. T 0301/87 (OJ EPO 1990, 335), T 0853/02, reasons 3.1.1) which is not affected by amendments made in opposition proceedings.

It follows that the objection of lack of clarity raised against the absence of a compartment in claim 1 or against the wording of claim 7 is not allowable, i.e. is not to be examined.

Concerning the lack of clarity objection in relation to the present wording "made of" in claim 1 as compared to the former wording "as a whole made of", the Board has explained above that in its opinion it is clear to the person skilled in the art having read the patent as a whole that the present wording is to be understood as

meaning that the gas impermeable material has to be present everywhere where evaporation or diffusion of the liquid swelling medium has to be prevented. In other words, it means that parts of the package not concerned by possible evaporation of the liquid swelling medium may be made in another material. The second wording is then self-explanatory in that it requires the whole of the package, or every part of the package, to be made of gas impermeable material.

Thus, claim 1 of the main request fulfils the requirements of Article 84 EPC.

12. Since all parties requested that the case be remitted to the department of first instance for further prosecution, and no circumstances are apparent from the file for doing otherwise, the Board sees no reason not to allow this request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution on the basis of the main request filed with letter dated 28 May 2013.

The Registrar: The Chairman:

D. Hampe E. Dufrasne

Decision electronically authenticated