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**Datasheet for the decision  
of 8 September 2021**

**Case Number:** T 0099/16 - 3.2.07

**Application Number:** 10155973.0

**Publication Number:** 2218654

**IPC:** B65D81/26, B65D69/00,  
B65D73/00, B65D1/24, B65D51/18

**Language of the proceedings:** EN

**Title of invention:**  
Cap and container assembly

**Patent Proprietor:**  
CSP Technologies, Inc.

**Opponent:**  
Clariant Produkte (Deutschland) GmbH

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56  
RPBA 2020 Art. 12(1)(a), 12(2), 13(1)

**Keyword:**

Discretion of opposition division to admit late-filed evidence  
- overrule (no)  
Basis of proceedings - decision under appeal  
Main request - inventive step - (no)  
Auxiliary requests - amendment to appeal case - justification  
by party (no)

**Decisions cited:**

T 0617/16, T 2603/18, T 0163/13, T 0634/16

**Catchword:**



**Beschwerdekammern**

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Case Number: T 0099/16 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 8 September 2021**

**Appellant II:**  
(Patent Proprietor)

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
20 November 2015 concerning maintenance of the  
European Patent No. 2218654 in amended form.**

**Composition of the Board:**

**Chairman** A. Pieracci  
**Members:** G. Patton  
R. Cramer

## Summary of Facts and Submissions

- I. European patent No. 2 218 654 B1 (hereinafter "the patent") relates to a plastic container and cap assembly for storing moisture-sensitive items.
- II. An opposition was filed against the patent as a whole, based on Article 100(a) EPC (lack of novelty and inventive step).

The opposition division held that

- claim 1 of the then main request (patent as granted) lacked inventive step; and that
- the then auxiliary request 1 fulfilled the requirements of the EPC.

Both the patent proprietor and the opponent lodged an appeal in the prescribed form and within the prescribed period against the opposition division's decision to maintain the patent in amended form on the basis of then auxiliary request 1.

- III. Summons to oral proceedings were sent on 9 July 2019 and, in a communication pursuant to Article 15(1) RPBA 2020 dated 3 February 2020, the board provided its preliminary, non-binding opinion to the parties that *inter alia* the main request (patent as granted) was lacking inventive step.

The board further observed that:

- the version of the patent as upheld by the opposition division was no longer pursued by the patent proprietor; and

- the admissibility of auxiliary requests 1 to 6 filed by letter dated 10 January 2017 was questionable.

In reaction, the patent proprietor stated in their letter dated 18 March 2020 their intention to pursue the patent as upheld by the opposition division, and the opponent contested the admissibility of this request by letter dated 6 April 2020.

With the communication dated 12 May 2020 the board further informed the parties of its preliminary opinion on their arguments.

Oral proceedings were held on 8 September 2021. For matters that arose during the oral proceedings, in particular the issues discussed with the parties and their requests, reference is made to the minutes.

The order of the present decision was announced at the end of the oral proceedings.

IV. The opponent (hereinafter "appellant I") requested

that the decision under appeal be set aside and that the patent be revoked.

The patent proprietor (hereinafter "appellant II") requested

that the decision under appeal be set aside and that the patent be maintained as granted (**main request**), subsidiarily that the appeal of the opponent be rejected and the patent be maintained on the basis of the set of claims of **auxiliary request 1**, which

corresponds to the version of the patent upheld by the opposition division,  
further subsidiarily that the patent be maintained on the basis of the sets of claims of one of auxiliary requests 1 to 6 filed with the letter of 10 January 2017 and renumbered as **auxiliary requests 2 to 7**.

V. Claim 1 of the **main request** reads as follows with the feature numbering 1.1 to 1.15 used by the parties:

- 1.1 A plastic container and cap assembly
  - 1.2 for storing moisture-sensitive items,
  - 1.3 the cap comprising: a base portion (24)
  - 1.4 with an outer periphery (25)
  - 1.5 adapted to extend over at least a portion of the container (14),
  - 1.6 a skirt (26) depending downwardly from the base portion (24),
  - 1.7 a lip seal member (30) positioned interior to the skirt (26) and depending downwardly from the base portion (24),
  - 1.8 wherein the container (14) has an opening (20) bounded by a lip (22) extending upwards from the container (14),
  - 1.9 wherein the skirt (26) is configured at a location on the base portion (24) that allows the skirt to enter into a closing relationship with the lip (22)
  - 1.10 in which the skirt (26) fits over a periphery of the lip (22),
  - 1.11 wherein the lip seal member (30) is adapted to abut an interior side of the lip (22), when the cap (12) is in a closed position,
- characterized in that
- 1.12 the assembly comprises a hinge (16) attaching

- the cap to the container,
- 1.13 the skirt (26) has a distal end (27) that is provided with an inward extension (28),
  - 1.14 the lip (22) has an outward facing extension (23),
  - 1.15 the inward extension (28) and the outward extension (23) are adapted to abut and interlock to form a moisture tight seal.

In view of the outcome on admissibility of auxiliary requests 1 to 7 there is no need to recite the wording of their claims 1.

VI. The following document considered in the opposition proceedings is relevant to the present decision:

E11: JP 9-315448 A with the corresponding translation in English E11'.

The contested patent is based on a divisional application of the earlier European patent application No. 03 773 225.2 published as EP 1 567 425.

VII. Appellant I essentially argued as follows (the arguments are discussed in more detail in "Reasons for the Decision" below):

*Main request*

E11 was a suitable closest prior art for the subject-matter of claim 1 of the main request for assessing inventive step. Should feature 1.15 be regarded as a distinguishing feature over E11, an inventive step could not be recognised on the basis of this unclear feature.

*Auxiliary request 1*

No justification was provided for re-filing auxiliary request 1 with the letter dated 18 March 2020. Auxiliary request 1 was therefore to be regarded as inadmissible.

*Auxiliary requests 2 to 7*

No justification was provided for filing auxiliary requests 2 to 7 with the letter dated 10 January 2017. Auxiliary requests 2 to 7 were therefore to be regarded as inadmissible.

- VIII. Appellant II essentially argued as follows (the arguments are discussed in more detail in "Reasons for the Decision" below):

*Main request*

E11 did not disclose features 1.1, 1.2, 1.8 to 1.12 and 1.14 and, hence, could not represent a suitable closest prior art for claim 1 of the main request for assessing inventive step. Since the distinguishing features were neither disclosed nor suggested by E11, an inventive step for the subject-matter of claim 1 of the main request was to be recognised in view of E11 alone.

*Auxiliary request 1*

Auxiliary request 1 had always been in the appeal proceedings and, hence, was to be considered as being admissible.



*Auxiliary requests 2 to 7*

Auxiliary requests 2 to 7 were filed as a reply to appellant I's reply and were thus to be considered as being admissible.

**Reasons for the Decision**

1. Main request

In view of Article 12(2) RPBA 2020, which states that the primary object of the appeal proceedings is to review the decision under appeal, the discussion of the main request at the oral proceedings focused on appellant II's appeal which contested the finding of the decision under appeal, point II.17, that the subject-matter of claim 1 of the main request lacks inventive step in view of E11 alone. Other objections raised by appellant I against claim 1 of the main request were therefore not dealt with, e.g. lack of novelty.

In this respect, appellant II relied on their written submissions at the oral proceedings.

Under these circumstances, the board - having once again taken into consideration all the relevant aspects concerning said issue - sees no reason to deviate from its preliminary opinion, provided in its two communications dated 3 February 2020 (point 4.2) and 12 May 2020 (page 3, second and fourth items), that E11 is in the appeal proceedings and that the subject-matter of claim 1 of the main request lacks inventive

step in view of E11 alone for the reasons given hereafter.

- 1.1 E11 and its translation in English E11' were filed by appellant I in the opposition proceedings by letter dated 18 February 2014, i.e. after the nine-month opposition period specified in Article 99(1) EPC, see decision under appeal, point I.7. Regarding appellant II's request, filed late in the appeal proceedings by letter dated 18 March 2020, to "neglect" E11, the board considers that the opposition division applied the correct criteria of *prima facie* relevance in a reasonable manner, see decision under appeal, point II.2.1. Hence, the board does not see any reason why it should overrule the way in which the opposition division exercised its discretion and, hence, E11 is in the appeal proceedings (see also Case Law of the Boards of Appeal, 9th Edition 2019, Chapter V.A.3.5.1.b).

In addition, since E11 and E11' were admitted by the opposition division and therefore became part of the opposition proceedings, the board considers that they could not be excluded from the appeal proceedings pursuant to Articles 12(1)(a) and 12(2) RPBA 2020 (see T 617/16, point 1.1.1 of the reasons, and T 2603/18, point 1 of the reasons, and also Case Law of the Boards of Appeal, *supra*, chapter V.A.3.5.4).

The Board notes that appellant II acknowledged at the oral proceedings that document E11 is in the proceedings (see page 2 of the minutes of the oral proceedings).

- 1.2 Contrary to appellant II's view, the board is of the opinion that E11 represents a suitable closest prior art since it lies within the same technical field as

that of claim 1 of a plastic container and cap assembly suitable for storing items, including items which are moisture sensitive; see decision under appeal, point II.17.2. In this respect, the definition of moisture-sensitive in paragraph 47 of the contested patent is directed to the "moisture ingress of the container". It does not provide any indication enabling a definition as to how moisture-sensitive the items to be stored by the claimed assembly should be.

Furthermore, claim 1 of the main request does not exclude squeezable containers like that of E11.

#### 1.3 Features 1.1 and 1.2

According to appellant II, the squeezable containers of E11 would not be air-tight and, hence, would in general not be suitable for moisture-sensitive items as claimed.

The board cannot accept appellant II's view because their argument amounts to a mere allegation. Due to the fact that there are no limitations in claim 1 regarding the moisture-sensitive items to be stored, in particular how moisture-sensitive they should be, the assembly of E11 is unambiguously suitable for storing moisture-sensitive items (see decision under appeal, point II.17.2 again).

#### 1.4 Features 1.8 to 1.12 and 1.14

With respect to features 1.8 to 1.12 and 1.14, the issue at dispute between the parties relates to the interpretation of claim 1 of the main request, namely whether the container of claim 1 is to be seen as being

exclusively formed in a single part or possibly also in multiple parts.

Appellant II argues that there is no clear and explicit disclosure in the patent referring to a multiple-part container. There is, however, also no indication that the container in accordance with the invention has to be formed exclusively in a single part.

Furthermore, as put forward by appellant I, Figure 2 of the contested patent showing an embodiment according to the invention discloses a cap and a container which are both formed in two parts. Hence, a multiple-part cap and a multiple-part container are not excluded from claim 1.

In view of this, the board concurs with the decision under appeal, points II.16.2 and II.16.4, that the multiple-part container of E11 comprising the assembling body (11) and the container body (1) falls within the scope of a container in accordance with claim 1 of the main request. Hence, features 1.8 to 1.12 and 1.14 are disclosed in E11, contrary to appellant II's view.

- 1.5 Undisputed by the parties in opposition proceedings as well as in appeal proceedings is that E11 discloses features 1.3 to 1.7 and 1.13, see decision under appeal, point II.16, in particular point II.16.6.
- 1.6 In view of the above, the only feature of claim 1 that could possibly be considered as representing a distinguishing feature over E11 is feature 1.15, see decision under appeal, point II.17.3.

1.7 According to appellant II, feature 1.15, which is broadly formulated, would be limited by the definition given in paragraph 47 of the description of the patent.

However, T 163/13, points 3.1 to 3.7 of the reasons, of the same board in an another composition, concluded for exactly the same definition given in paragraph 47 of the patent that the definition lacks clarity since essential parameters are missing, such as the type of desiccant, its prior preparation and the volume of the container, see more specifically point 3.4 of the reasons. Hence, even by taking into account the definition of paragraph 47, the moisture-tight seal of feature 1.15 is not clearly defined. Therefore, inventive step cannot be recognised on the basis thereof.

1.8 Hence, the board cannot find fault in the reasoning and the conclusion of the decision under appeal, point II. 17, that the subject-matter of claim 1 of the main request lacks inventive step in view of E11 alone (Article 56 EPC).

2. Auxiliary request 1

2.1 By letter dated 10 January 2017, appellant II explicitly stated their requests on page 2 as follows:

*"- It is requested to set aside the decision of the Opposition Division dated 20 November 2015 and to maintain the patent as granted.*

*- Auxiliary, it is requested to maintain the patent in amended form based on the amended claims of the respective auxiliary request enclosed to this letter.*

*- Further, oral proceedings are requested."*

In its communication pursuant to Article 15(1) RPBA 2020 dated 3 February 2020, point 6, item 2, the board observed:

*"- that the version of the patent held by the opposition division to meet the requirements of the appeal is no longer pursued by the patent proprietor".*

In reply to the board's communication, appellant II stated by letter dated 18 March 2020:

*"that the Patent Proprietor confirms that he still intends to pursue the patent as maintained by the opposition division, i.e. according to the first auxiliary request of the first instance proceedings. This auxiliary request, of course, forms the first auxiliary request. The numeration of any following auxiliary request has to be adjusted accordingly. Thus, former auxiliary requests 1 to 6 become auxiliary requests 2 to 7. "*

As mentioned in the board's communication dated 12 May 2020, point 4, item 1:

*"Admissibility of former auxiliary request 1 as maintained by the opposition division (now "renamed" auxiliary request 1 again in appeal proceedings) is at stake (Articles 12(4), 13(1) and 13(3) RPBA 2007 and Article 13(1) RPBA 2020)."*

2.2 At the oral proceedings before the board, appellant II argued that their intention had always been to defend the version of the patent as maintained by the opposition division, i.e. auxiliary request 1. This was

clear from the fact that they invested a great deal of effort in presenting complete lines of argument in order to defend this request in their reply to appellant I's statement of grounds dated 22 July 2016. They never explicitly abandoned auxiliary request 1, such that it had always been in the appeal proceedings. There was an obvious mistake in the numbering of the auxiliary requests in the letter dated 10 January 2017 that they corrected by letter dated 18 March 2020. The mistake in the letter dated 10 January 2017 was all the more obvious since there was no occurrence in the appeal proceedings since their letter dated 22 July 2016, i.e. no letter from the appellant's side or from the board, which could have justified their modifying their intention to pursue the version of the patent as maintained by the opposition division.

In view of the above reasons, auxiliary request 1 had always been in the appeal proceedings and, hence, was not to be considered as deemed re-filed by letter dated 18 March 2020.

- 2.3 The board does not share the appellant's view for the following reasons, which were discussed at the oral proceedings.

Appellant II's letter dated 10 January 2017 clearly recites on page 2 the requests in their entirety, i.e. including the request to hold oral proceedings, and in a logical order. With respect to the auxiliary requests, reference is made therein only to the amended claims of the respective auxiliary request **enclosed with this letter**, i.e. auxiliary requests 1 to 6 renumbered as auxiliary requests 2 to 7 by the subsequent letter from appellant II dated 18 March 2020. Hence, no wrong numbering can be derived

from the letter dated 10 January 2017 as far as the auxiliary requests are concerned, and the version of the patent as maintained is neither explicitly nor implicitly mentioned therein.

Hence, the allegedly obvious mistake in the letter of 10 January 2017 arises neither from the letter itself nor from the fact that no change in the appeal file occurred between appellant II's letters dated 22 July 2016 and 10 January 2017. As a matter of fact, a party is entitled to change their requests at any time during the proceedings without justification when it concerns withdrawals, whether tacit or not. As a result, there was no reason to doubt whether the letter of 10 January 2017 reflected the real intention of appellant II at that time.

Moreover, neither in their letter of 18 March 2020, nor at any other moment before the oral proceedings did the patent proprietor try to explain that the letter of 10 January 2017 contained a mistake and did not signify a change of mind. This was argued for the first time at the oral proceedings.

Since the maintenance of the version of the patent as upheld by the opposition division was not comprised in the requests filed on 10 January 2017, auxiliary request 1 is considered to be re-filed with letter dated 18 March 2020.

- 2.4 The revised Rules of Procedure of the Boards of Appeal (RPBA 2020) entered into force on 1 January 2020. Subject to the transitional provisions (Article 25 RPBA 2020), the revised version also applies to appeals pending on the date of the entry into force. As a consequence, Article 13(1) RPBA 2020 applies in the



present case (see e.g. T 634/16, points 7 to 14 of the reasons). The board drew the attention of the parties to Article 13(1) RPBA 2020 in the communications of 3 February 2020 and 12 May 2020.

Article 13(1) RPBA 2020 states that any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board.

Since the re-filing of auxiliary request 1 was done after the parties' replies, even after the board's communication pursuant to Article 15(1) RPBA 2020, a justification from appellant II for its admissibility into the appeal proceedings is mandatory. Even if the RPBA 2007 had still been applicable, a justification would have been necessary in order for the board to judge whether it should exercise its discretion under Article 13 RPBA 2007 in favour of the patent proprietor.

2.5 However, appellant II did not provide any valid justification for the re-filing of auxiliary request 1 after the board's communication but relied solely on their "obvious mistake" arguments, so that the request cannot be admitted into the proceedings already for this reason alone (Article 13(1) RPBA 2020).

3. Auxiliary requests 2 to 7

3.1 Auxiliary requests 2 to 7 were filed for the first time with the appellant II's letter dated 10 January 2017, after filing the reply to appellant I's statement of grounds of appeal and after expiry of the period in Article 12(1) (b) RPBA 2007. Therefore they were not

part of the submissions to be taken into account under Article 12(4) RPBA 2007, but constituted an amendment to appellant II's case. Hence, as in the case of auxiliary request 1, Article 13(1) RPBA 2020 applies, see point 2.4 above.

3.2 Appellant II argued at the oral proceedings that auxiliary requests 2 to 7 were based on the non-admitted auxiliary request 1, i.e. their claims 1 were merely further restricted with respect to claim 1 of auxiliary request 1. Furthermore, that they had been filed only six months after the reply of 22 July 2016, without any change in the file in the interim, and three years before the board's first communication. They did not imply any procedural delay. They were to be considered as a legitimate reply to appellant I's reply and, hence, part of the proceedings. At the time of their filing, the board's criteria, set in the then valid Rules of Procedures of the Boards of Appeal (2007) for admitting late-filed requests, were not as strict as now in RPBA 2020. For these reasons, auxiliary requests 2 to 7 were to be admitted into the appeal proceedings.

Appellant II further argued that, if the list of requests in letter of 10 January 2017 was considered valid and complete (and thus did not include auxiliary request 1), it was contradictory to not admit auxiliary requests 2 to 7 which were explicitly mentioned in said list of requests and were actually filed with said letter.

3.3 The board does not share appellant II's view for the following reasons discussed at the oral proceedings.

As already mentioned under point 3.1 above, Article 13(1) RPBA 2020 applies. In order to take into account that RPBA 2020 entered into force after the actual filing of auxiliary requests 2 to 7, the attention of appellant II was drawn to the lack of justification for the late filing of these requests in the communication of 3 February 2020 (point 5.1). Therefore appellant II had the opportunity to provide in a timely manner a justification as required by Article 13(1) RPBA 2020.

However, appellant II's arguments merely reflect the course of the appeal proceedings and do not constitute a justification for the late-filing of auxiliary requests 2 to 7 with the letter dated 10 January 2017. Said letter was filed nearly six months after the parties' replies and is therefore an amendment to appellant II's case according to Article 13(1) RPBA 2020, irrespective of whether or not something happened in the interim and of how far in advance of the oral proceedings it was filed.

Finally, a party is entitled to modify their requests at any point in time of the proceedings. However, the admissibility of any new late-filed requests can be questioned. With its letter dated 10 January 2017, appellant II omitted auxiliary request 1 (see point 2 above) and filed for the first time new auxiliary requests 2 to 7. The question of admissibility of auxiliary request 1, re-filed with letter dated 18 March 2020, is independent of the question of admissibility of auxiliary requests 2 to 7 filed for the first time with the letter of 10 January 2017. The board cannot see why there would be a contradiction between the assessment of admissibility of auxiliary request 1, on the one hand, and of auxiliary requests 2 to 7, on the other hand.

In the absence of valid justification for their late-filing, auxiliary requests 2 to 7 are not admitted into the proceedings (Article 13(1) RPBA 2020).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

A. Pieracci

Decision electronically authenticated