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**Datasheet for the decision  
of 11 September 2020**

**Case Number:** T 0483/17 - 3.2.08

**Application Number:** 12175578.9

**Publication Number:** 2511544

**IPC:** F16C19/38, F03D11/04,  
F16C33/36, F16C35/063

**Language of the proceedings:** EN

**Title of invention:**

Retainer segment of roller bearing for supporting main shaft  
of wind-power generator

**Patent Proprietor:**

NTN Corporation

**Opponent:**

Aktiebolaget SKF

**Headword:**

**Relevant legal provisions:**

RPBA Art. 12(4), 13(1), 13(3)

RPBA 2020 Art. 13(1), 25

EPC Art. 54, 123(2), 123(3)

**Keyword:**

Late-filed document - admitted (yes)

Novelty - public prior use (no)

Amendments - broadening of claim (no) - added subject-matter  
(no)

Late-filed evidence - admitted (no)

Late-filed argument - amendments after arrangement of oral  
proceedings

**Decisions cited:**

T 0472/92

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0483/17 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 11 September 2020**

**Appellant:** Aktiebolaget SKF  
(Opponent) 415 50 Göteborg (SE)

**Representative:** Kohl, Thomas  
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**Respondent:** NTN Corporation  
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**Representative:** Bockhorni & Brüntjen Partnerschaft  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 23 December  
2016 rejecting the opposition filed against  
European patent No. 2511544 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** C. Herberhold  
**Members:** A. Björklund  
C. Schmidt

## **Summary of Facts and Submissions**

- I. The opponent (appellant) filed an appeal against the opposition division's decision to reject the opposition.
- II. Oral proceedings took place before the Board on 11 September 2020.
- III. At the end of the oral proceedings, the relevant requests were as follows:

The appellant requested that the decision under appeal be set aside and that European patent No. 2 511 544 be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed and that the patent be maintained as granted (main request) or that the patent be maintained on the basis of one of the auxiliary requests 1 to 4', filed by letter dated 6 September 2017 (auxiliary requests 1 to 4) or by letter dated 18 March 2020 (auxiliary requests 3' and 4'). It further requested that documents D6 and D7 as well as documents PU1-B\*, PU1-C\*, PU1-D\*, PU-1Ad and PU1-G ("prior-use documents"), submitted with the statement of grounds of appeal, not be admitted into the proceedings.

- IV. Independent claims

Claim 1 of the main request (patent as granted), with feature designations as per the opposition proceedings, reads:

- F1 "A retainer segment (11a, 11b, 11c, 11d)  
F2 provided for a roller bearing (31a)  
supporting a main shaft (66) of a wind-power  
generator,  
F3 having a pocket (13a, 13b, 13c) to house a  
roller (34a),  
F4 and arrangeable to be continuously lined with  
adjacent retainer segments (11a, 11b, 11c,  
11d) in a circumferential direction,  
**characterized in that**  
F5.1 said retainer segment (11a, 11b, 11c, 11d) is  
formed of a resin  
F5.2 containing a filler material  
F5.3 to lower a thermal linear expansion  
coefficient."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the following feature has been added at the end:

"..., wherein a filling rate of said filler material in said resin is 20% by weight to 40% by weight."

The further auxiliary requests played no part in the present decision.

V. The following documents are relevant to the decision.

- D6: JP 2005-61434 A  
D6\*: Machine translation of D6  
D7: JP 2003-336642 A  
D7\*: Machine translation of D7  
PU1-A Invoice dated 23 May 2006  
PU1-B Technical drawing "Radial-Kegelrollenlager"  
BT2-8125 A/HA1

PU1-C Technical drawing "Innenring, Rollen und Käfig" AJ-BT2-8125 A-1/HA3

PU1-D Technical drawing "Kegelrollenlager Kunststoff-Segmentkäfig" CJ-BT2-8125

PU1-E Excerpt of specification 1054077 "Lieferstandard 1054077 Kunststoff-glasfaserverstärktes Polyetheretherketon. Granulat und Fertigteil"

PU1-A\* Invoice dated 23 May 2006 without redacted passages

PU1-Aa Confirmation of delivery on 23 May 2006 by logistics company "Geis" from 13 June 2006

PU1-Ab SKF-Internal dispatch order dated 22 May 2006

PU1-Ac SKF-internal loading list dated 22 May 2006

PU1-B\* Technical drawing "Radial-Kegelrollenlager" BT2-8125 A/HA1 **with less redaction**

PU1-C\* Technical drawing "Innenring, Rollen und Käfig" AJ-BT2-8125 A-1/HA3 **with less redaction**

PU1-D\* Technical drawing "Kegelrollenlager Kunststoff-Segmentkäfig" CJ-BT2-8125 **with less redaction**

PU1-G Declaration on Oath of Mr Clement, dated 13 April 2017

PU1-Ad Returned packing list "Paklijst" dated 6 January 2017

VI. The appellant essentially made the following arguments:

*Admission of the documents filed in appeal*

At the time of the sale, the documentation of sales and products was kept on paper by the opponent. They had filed the documentation which was available, but

redacted important trade secrets. This documentation did already sufficiently prove the public prior use.

The opposition division's provisional opinion had been that the public prior use was proven by the documents filed during the opposition proceedings. Surprisingly, in the oral proceedings, the opposition division decided that the prior use was not sufficiently proven. The appellant thus filed further documents in response to the decision, and these should be admitted into the appeal proceedings.

Indeed, the drawings filed in appeal were exactly the same as those filed during the opposition proceedings, merely with less information redacted. The affidavit and the returned packing list were supporting evidence to further establish the public prior use.

*Main request - Novelty in view of public prior use*

The sales receipt PU1-A and A\* indicated the particular designation of a specific kind of bearing which had been sold to Hansen Transmissions and this specific bearing existed in one version only, whereas the trade name for the long-established family of bearings was "Nautilus". The numbers in the second and third lines of this invoice were product numbers and item numbers of the client and had been added at their request. The dispatch order PU1-Ab was based on a Lotus Notes mail template of 7 September 2004 and had been printed on 22 May 2006.

The evidence filed proved that, on 23 May 2006, five "Waelzlager" with the designation BT-28125 A/HA1 were shipped to Hansen Transmissions in Lommel (BE) in the context of a normal sale, i.e. not a test sale or a

sale under an implicit or explicit secrecy agreement. In this context the additional designations U60-BT28125E501L and 40 mentioned in PU1-A or A\* were internal product numbers added on the customer's request.

The documents PU1-B or B\* to PU1-D or D\* were the construction drawings of the specific bearing shipped to Hansen Transmissions. On all three documents the product designations "BT2-8125 A/HA1" (PU1-B or B\*), "AJ-BT2-8125 A-1/HA3" (PU1-C or C\*) or "CJ-BT2-8125" (PU1-D or D\*) appeared. They showed an overview of the bearing, then the inner ring, rollers and plastic cage in more detail, and finally the segmented plastic cage. The drawing PU1-B or B\* had a table listing the parts making up the bearing and their designations. The more detailed drawing PU1-C or C\* had precisely the designation of the cone listed in the table in the drawing PU1-B or B\*. The drawing PU1-C or C\* had a table listing the parts of the cone including the plastic cage. Drawing PU1-D or D\* showed the cage and had precisely the designation of the cage listed in the table from PU1-C or C\*.

In the drawing PU1-D, it was indicated that the material of the bearing cage was "PEEK nach 1054077", an internal standard of the appellant filed in redacted form as PU1-E which was defined shortly before the drawing PU1-D was made. Such standards did not change regularly and it was this specific material which was used for the cage of the bearing shipped to Hansen Transmissions. Page 12 of this standard disclosed that the PEEK according to this standard had a glass fibre content of around 14 %wt. Such filler material inherently lowered the thermal expansion coefficient of the plastic cage compared to pure PEEK.



The bearing delivered to Hansen Transmissions thus exhibited all the features of granted claim 1.

The information hidden in the bottom lower part of the drawings PU1-B, which was still partly hidden in the less redacted drawing PU1-B\*, concerned various tolerances and plays in relation to the cage which were important trade secrets. They did not indicate that any alternative cages could be used in the bearing of the prior use, however.

The affidavit PU1-G did not contain any information about the cage since the undersigned was an application engineer specialising in suitable bearings for specific applications and not a product engineer who would know the internal details of specific bearings.

*Auxiliary request 1 - extension of subject-matter and protection*

Claim 1 of auxiliary request 1 was a combination of the features of original claims 1 and 5. In the application as originally filed, this combination of features was not disclosed in combination with the features of the other dependent claims; however, these combinations were claimed in auxiliary request 1 since the other dependent claims had not been deleted. This was an inadmissible extension beyond the content of the application as filed.

These newly introduced combinations could also be considered to extend the protection conferred since they covered subject-matter which was not covered by the patent as granted.

*Auxiliary request 1 - prima facie novelty over D7*

D7 was *prima facie* highly relevant since it disclosed a retainer segment depriving the subject-matter of claim 1 of novelty. It should therefore be admitted into the proceedings.

Figure 12 disclosed a bearing cage having two retainer halves. Each half was a retainer segment which could be lined up with other retainer segments, which were asymmetrically divided into smaller sections, to form a retainer for rollers for a wind-power generator bearing. Such power generators existed from the mW to MW range and had various speeds of rotation. The segment from D7 was thus suitable for wind power generator bearings.

As disclosed in paragraphs [0008] and [0018] of the translation D7\*, the retainer segment was made of PEEK with 8-40% reinforcing fibres.

The subject-matter of claim 1 therefore lacked novelty over the retainer segment from D7.

*Auxiliary request 1 - inventive step*

The objection of lack of inventive step of the subject-matter of claim 1 of auxiliary request 1 was raised, but not discussed in the opposition proceedings. The objection was *prima facie* relevant, not complex and it should therefore be admitted into the proceedings.

The subject-matter of claim 1 differed from the retainer segment of the prior use PU1 in that the filling rate of the filler material was 20 to 40 %wt.

This solved the problem of increasing the impact strength. The claimed solution to this problem was obvious in view of common general knowledge or D7.

VII. The respondent essentially made the following arguments:

*Admission of the documents filed in appeal*

The bearings from the alleged prior use were expensive parts and normally had a long warranty. It was thus to be expected that a sale of them was documented in considerable detail, for example with documents such as technical specifications, operation manuals and the offer. A large company, such as the opponent, would normally have systematic documentation of such information and this should have been available at the time of filing of the opposition, around seven years after the alleged prior use. It was not plausible that such documentation did not exist, while at a later time information about exact numbers of further sales could be filed in an affidavit. To convincingly prove the prior use, this evidence should have been provided to corroborate what was sold.

Instead of such documentation the appellant-opponent chose to file heavily redacted drawings and a redacted bill. The documents filed within the opposition period were not sufficient to establish the alleged prior use and the proprietor had already pointed this out during the opposition proceedings. The less redacted documents PU1-B\*, PU1-C\*, PU1-D\*, the affidavit PU1-G and the returned packing list PU1-Ad should therefore have already been filed in the opposition proceedings and were not to be admitted into the appeal proceedings as they were filed late.

*Main request - Novelty in view of public prior use*

Regardless of whether the documents filed in the appeal proceedings were taken into account, the prior use of a retainer segment according to granted claim 1 of the patent in suit was not proven.

Due to the kind of product sold, it was not plausible that an offer with a technical specification was irretrievable. There were also further inconsistencies in the evidence submitted.

The respondent sold bearings having different retainers and the designation BT2-8125 A/HA1 on the invoice PU1-A or A\* could in fact be nothing more than a trade name for a family of bearings available in different versions, in particular having different retainer cages, similar to a car where the model name did not define the exact technical specifications or equipment.

Furthermore, the bearings on the invoice were sold in limited quantities of three under the item 0001/0004B, and two under the item 0002/0004C, such that it had to be assumed that they were for testing purposes and that a tacit secrecy agreement existed. This was underlined by the fact that on the invoice, the designation BT2-8125 A/HA1 was followed by two additional lines of type designations, U60-BT28125E501L and 40, which strengthened the assumption that the delivered bearings were special and deviated from the standard bearings with the designation BT2-8125A alone.

Furthermore, the drawings did not provide a seamless chain of evidence since essential details were missing. Both the drawing PU1-B and the less redacted drawing

PU1-B\* had areas with information in the bottom left area concerning the cage. There was a long redacted section beginning with the word "Käfig" which was too long to just indicate a kind of tolerance, as could be seen in the fields "Axialluft", "Radialluft" and "Käfigluft in Umfangsrichtung", where the redacted section was considerably shorter. The length of the redacted section instead suggested it was a designation of the cage, similarly to the "Abstandshülsen" whose designation was indicated in the drawing. It was therefore not proven that the bearings in the drawings PU1-B or B\* were equipped with the cage in the drawings PU1-D or D\*.

Moreover, standards changed over time and the standard referred to in PU1-D and D\* was thus not necessarily the redacted standard filed as PU1-E, but instead the reference could have referred to another standardised PEEK with different properties. It was therefore not proven that the cage in PU1-D or D\* was made of PEEK reinforced with 14 %wt glass fibres. This was underlined by the fact that the drawing in PU1-C and C\*, which was made 9 months after the drawing in PU1-D or D\*, specified that the cage was made of PEEK without specifying that it was PEEK containing glass fibres, which would have been indicated by PEEK-GF, as could be seen under point 2 of page 1 in the standard filed as PU1-E.

Moreover, the affidavit PU1-G did not contain any information about the cage, which was surprising since the engineer signing the affidavit would surely have known which cage the sold bearings had. It was especially surprising since the affidavit was filed in order to prove that the bearings sold to Hansen Transmissions had a cage reinforced with glass fibres.

The fact that it said nothing about the material of the cage of the sold bearings was a further sign that these bearings did not have a cage made of PEEK reinforced with glass fibres.

However, should the Board come to the conclusion that a prior use of a bearing with a retainer segment according to the drawings PU1-D or D\* made of the material of the standard filed as PU1-E could be considered proven, it was acknowledged that such prior use did deprive the subject-matter of claim 1 of novelty.

*Auxiliary request 1 - extension of subject-matter and protection*

Claim 1 of auxiliary request 1 was based on the combination of granted claims 1 and 5.

It restricted the scope of the claim and thus did not contravene Article 123(3) EPC.

Furthermore, it was clear to the skilled person from the general disclosure on page 5, paragraph 5 of the original application that the filling rate now defined in claim 1 was a feature which could be combined with the features of the other dependent claims.

*Auxiliary request 1 - prima facie novelty over D7*

Document D7 was mentioned in the published patent. The appellant should therefore have already filed an objection of lack of novelty based upon this document in the opposition proceedings. It was then filed for the first time in the opposition proceedings and should

not be admitted into the proceedings since it was filed late.

Furthermore, it was not *prima facie* relevant. The bearing from D7 was adapted for gearboxes of vehicles and thus did not meet the requirements of bearings for the main shaft of a wind power generator. Additionally, only two retainer segments were mentioned in this document.

*Auxiliary request 1 - inventive step*

The objection under Article 56 EPC had not been raised in the appeal proceedings until the end of the oral proceedings. It was therefore filed very late and should not be admitted into the proceedings according to Article 13(2) RPBA 2020.

The subject-matter of claim 1 therefore involved an inventive step.

## **Reasons for the Decision**

### 1. Admission of the documents filed in appeal

The documents PU1-B\*, PU1-C\*, PU1-D\*, PU1-G and PU1-Ad were filed with the grounds of appeal in response to the impugned decision, in which the opposition division, contrary to their preliminary opinion, found that the documents on file in the opposition proceedings did not prove a prior use of a retainer segment according to claim 1 of the patent in suit. In particular, in points 2.4.2 to 2.4.3 of the decision the opposition division expresses doubt about the "chain of evidence" derivable from documents PU1-B to

PU1-D due to the partial deletions and removal of content in these documents.

The filing of documents PU1-B\*, PU1-C\*, PU1-D\*, which correspond to documents PU1-B, PU1-C and PU1-D with less redaction, and of PU1-G and PU1-Ad, which are directed to providing the information considered by the opposition division to be missing from the already provided evidence of the very same sale, is thus seen as a legitimate response by the appellant. These documents are therefore admitted into the proceedings (Article 12(4) RPBA 2007 in conjunction with Article 25(2) RPBA 2020).

2. Main request - Novelty in view of public prior use

2.1 Since the sale and delivery of five roller bearings from the appellant/opponent (SKF) to a third party (Hansen Transmissions) is completely out of the sphere of the respondent/patent proprietor (NTN Corp.), according to the case law of the Boards of Appeal, proof has to be provided "up to the hilt". The determination of the prior use thus requires that the facts giving rise to the prior use must be established without gaps (see T 472/92, OJ 1998, 161, point 3.1 of the Reasons); however, this does not mean that the opponent has to provide each and every theoretically possible piece of evidence. Instead, it is sufficient that the evidence put forward convinces the Board.

On the other hand, a prior use has not been sufficiently proven if the proprietor successfully pointed out any inconsistencies or drew attention to any gaps in the opponents chain of proof (see T 472/92, op. cit.).



2.2 Applying these principles, the Board considers it established that the alleged prior use took place.

The provided documents sufficiently prove that, on 23 May 2006, five "Waelzlager" with the designation BT-28125 A/HA1 and a total weight of 13.900 kg were transported by Hans Geis GmbH + Co from the appellant (opponent) SKF in Schweinfurt (DE) via Aachen to Hansen Transmissions in Lommel (BE) and were charged at €43 760.58 per unit. Furthermore, the Board is convinced that the engineering drawings according to appendix B, C and D - provided with corresponding product designation numbers - show the items actually sold.

2.3 The doubts about the prior use expressed by the opposition division in points 2.2.3.1 and 2.2.3.2, page 5 of the contested decision, and the arguments provided by the respondent (patent proprietor) do not point out a gap in the opponent's chain of proof for the following reasons:

2.3.1 Even if the opponent had submitted a bank statement concerning the payment for the delivered bearings, the transaction would merely have been proven even more "up to the hilt"; however, this does not change the facts already established (see point 2.2 above). A further possibly existing piece of evidence not having been provided does not reduce the significance of the evidence actually submitted. The same applies to the respondent's further allegation that, due to the kind of product, it was not plausible that an offer with technical specification was irretrievable.

2.3.2 The fact that the date "07-09-2004" is printed on the "Versandauftrag", appendix PU1-Ab, has been

sufficiently explained by the appellant (opponent). The explanation given, namely that 7 September 2004 was the day when the form was created and 23 May 2006 was the day when it was actually used in the current case, is convincing and cannot be invalidated by mere reference to the unusual nature of the two dates.

2.3.3 The different designations "0001/0004B" and "0002/0004C" (although the quality of the filed invoices is not particularly high, it can be seen that the last one actually is "4G") on the invoice PU1-A or A\* appear under "regel", which is indeed unclear. However, all items have exactly the same "Omschrijving", i.e. designation and price. The Board is therefore convinced that the invoice relates to only one type of bearing and that five bearings of the same type were delivered. The respondent's assumption that the separate items of three and then two bearings pointed to a sale for testing purposes and the further assumption that it could therefore be assumed that there was an at least tacit secrecy agreement therefore has no basis. Furthermore, the appellant has given a convincing explanation of the additional designations U60-BT28125E501L and 40 in the second and third lines of the "Omschrijving", namely that they are product numbers which were added on the customer Hansen Transmissions' request.

2.4 The respondent also doubted that Mr Clement, in his declaration on oath dated 13 April 2017 (PU1-G), was able to reproduce all the details about the delivery of bearings more than 10 years ago and pointed out that the appellant, who obviously pre-formulated this declaration, must have had more information/documents than it was willing to submit in these proceedings. However, Mr Clement's affidavit is not needed to

convince the Board that five bearings designated "BT-28125 A/HA1" have been delivered from SKF to Hansen Transmissions. Therefore any "inconsistency" within this declaration is of no relevance.

2.5 The respondent also disputed that the technical drawings according to appendixes PU1-B or B\* to PU1-D or D\* corresponded to the allegedly sold items. It argued that due to the redactions in appendix PU-1B and B\* it was not clear that the cage in appendixes PU1-D and D\* in fact corresponded to or was identical to the cage shown in appendix PU1-B and B\*.

2.5.1 In this respect the Board is convinced by the respondent's argumentation that documents PU1-B or B\* to PU1-D or D\* were the construction drawings of the specific bearing sold and delivered to Hansen Transmissions and that the bearing cage of this bearing was made of the material "PEEK nach 1054077", as indicated in drawing PU1-D or D\*.

The Board notes in this context that the drawings PU1-B and B\* of the cross section of the complete bearing carry the same product designation "BT2-8125 A/HA1" as the bearings on the invoice PU1-A. The table of parts of this drawing list a "Cone" designated "AJ-BT-8125 A-1/HA3". The respective drawings PU1-C and C\* showing the "inner ring, rollers and cage" have exactly this product designation. They in turn list a plastic cage, corresponding to the retainer segment of the patent in suit, having the designation "CJ-BT2-8125" as part of this. The drawings PU1-D or D\* showing a "Kunststoff-Segmentkäfig" have exactly this designation. They also indicate the material (of the cage) as "PEEK nach 1054077". Against this background, the time difference

of nine months between the dates indicated on PU1-C and C\* and PU1-D or D\* is of no particular significance.

The above numbers are very specific indicators which consistently identify the product in consecutive engineering drawings. They thus cannot be compared to general model names for products like cars, for which the customer subsequently chooses the exact specification, e.g. a particular engine or gear box. Indeed, the trade name of the prior use bearing is "Nautilus", and not the long product designation on the engineering drawings. There is thus no indication that the product identified by this number could be provided with different retainers made of a material different from PEEK according to standard 1054077.

2.5.2 Furthermore, due to a "standard" (albeit an internal one) having the very purpose of standardizing, the appellant's argument that standard 1054077 could have changed within the short time between its definition and the sale of the prior use bearing is not convincing. The standard PU1-E clearly mentions PEEK-GF as the material on page 1, under point 2 "Werkstoff". Thus the information "PEEK nach 1054077" on the drawing PU1-D or D\* implies the material to be PEEK-GF, which is then further specified on page 12(13), "Tabelle 3", to comprise 14+-1 wt% glass fibres.

2.6 Finally, the Board is not convinced by the respondent's argumentation that, due to the redaction in appendixes PU1-B and B\*, it was not proven "up to the hilt" that any alternative cages, i.e. cages made of other materials, could have been used in the bearing of the prior use. The respondent pointed to the "Abstandshülsen" identified with their designation in the top left part of the drawing and submitted that the

long redacted part following "Käfig" in the drawing PU1-B\* could describe alternative cages ("Käfigsegmente"). However, the "Abstandshülsen" and "Scheiben", which have their respective designations indicated directly in the drawings, are listed with exactly the same designations in the table of parts of the bearing. Thus, if the redacted part following "Käfig" were hiding a designation number, this number would, for consistency reasons, also be found in the table of parts. This is not the case.

Instead, the indications in the lower left corner under the heading "Kontrolle der Käfigelemente" all relate to sizes and dimensions. This applies to the information given for "Axialluft" and "Radialluft", for example, as well as to the information given for "Käfigluft in Umfangsrichtung". In this context, it would not be consistent if, contrary to all other information given in this part of the drawing, the redacted information about the "Käfig" did not contain information on sizes and dimensions but on materials.

2.7 The Board thus comes to the conclusion that the prior use is sufficiently proven and that retainer segments according to drawings PU1-D or D\* formed of PEEK according to standard 1054077 (PU1-E) were made available to the public. As also accepted by the appellant, such retainer segments exhibit all the features of claim 1, which is thus not novel.

3. Auxiliary request 1 - extension of subject-matter and protection

Claim 1 of auxiliary request 1 contains the features of granted claims 1 and 5. Contrary to the appellant's submission, the protection conferred by the claim has

thus not been extended but limited compared with the granted claim 1. The requirements of Article 123(3) EPC are therefore fulfilled.

The general disclosure on page 5, paragraph 5 of the application as originally filed teaches the skilled person that the filling rate in this paragraph and as defined in claim 1 of auxiliary request 1 does not exclude a combination with other features. The skilled person would instead understand that the features of original claims 1 and 5, or of this paragraph, could be combined with the features of the remaining dependent claims. The requirements of Article 123(2) EPC are therefore also fulfilled.

4. Auxiliary request 1 - Admissibility of D7 and novelty

Document D7 was mentioned in the granted patent and therefore already known to the appellant at the time of filing the opposition. It was, however, filed for the first time with the grounds of appeal and was therefore filed late. Its admission into the proceedings is thus at the discretion of the Board (Article 12(4) RPBA).

However, the retainer segment in D7 does not *prima facie* deprive the subject-matter of claim 1 of novelty for the following reasons:

Feature F4 of claim 1 specifies that the retainer segment is arrangeable to be continuously lined with adjacent retainer segments in a circumferential direction. The skilled person would understand this wording to mean that the retainer segment and at least two further retainer segments of the same kind are arrangeable in a circumferential direction.

The retainer in Figure 12 of D7 is, however, divided into two halves. D7 does not give any indication regarding the use of asymmetric retainer segments of different sizes as alleged by the appellant, nor is there any indication that the person skilled in the art would imply such constructions when considering the disclosure of D7. The retainer segment in D7 is thus only disclosed to be lined up with one further segment of the same kind. It therefore does not *prima facie* deprive the subject-matter of claim 1 of novelty.

For this reason, the Board decided not to admit D7 and the objection of lack of novelty in view of this document into the proceedings (Article 12(4) RPBA 2007 in conjunction with Article 25(2) RPBA 2020).

5. Auxiliary request 1 - Admissibility of inventive-step objection

The appellant raised an objection of lack of inventive step starting from prior use PU1 at the latest possible opportunity, namely at the end of the oral proceedings before the Board.

Auxiliary request 1 was filed by the respondent with its reply to the grounds of appeal and it corresponds to auxiliary request 1 of the opposition proceedings. It was therefore known to the appellant long before the oral proceedings in the appeal proceedings. The fact that the objection had already been put forward in opposition proceedings does not imply that it is part of the appeal proceedings. It instead proves that the objection could (and should) have been raised earlier in the appeal proceedings. There are no exceptional circumstances which justify the objection being raised only at this late stage of the appeal proceedings, and

the appellant has not put forward any cogent reasoning for admitting this objection either.

Furthermore, although the objection is based on documents which are part of the appeal proceedings, it constitutes a completely new line of attack, which took both the respondent and the Board by surprise and which cannot reasonably be expected to be dealt with at such late stage of the proceedings.

The Board therefore decided not to admit the inventive-step objection starting from the prior use PU1 into the proceedings (Article 13(1), 13(3) RPBA 2007 in conjunction with Article 13(1) and Article 25(3) RPBA 2020).

6. For the reasons given above, none of the objections raised prejudice the maintenance of the patent according to auxiliary request 1.



## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in the following version:
  - claims 1 to 6 of auxiliary request 1, filed by letter dated 6 September 2017,
  - columns 1 to 25 of the description as filed at the oral proceedings before the Board,
  - Figures 1 to 24 as granted.

The Registrar:

The Chairman:



C. Moser

C. Herberhold

Decision electronically authenticated