

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 11 January 2022**

Case Number: T 0183/18 - 3.2.07

Application Number: 06830861.8

Publication Number: 2070553

IPC: A61L2/20, A61L2/26, B65D77/20,
B65B55/18

Language of the proceedings: EN

Title of invention:

ASEPTIC CONTAINER, EQUIPMENT AND METHOD FOR OBTAINING SAID
CONTAINER

Patent Proprietor:

Ulma Packaging Technological Center, S.Coop.

Opponent:

MULTIVAC Sepp Haggenmüller SE & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 56, 84
RPBA 2020 Art. 13(1), 13(2)
RPBA Art. 12(4)

Keyword:

Amendment to appeal case

Late-filed auxiliary requests - admitted (yes)

primary object of appeal proceedings to review decision -

appeal case directed to requests on which decision was based
(yes)

Late-filed objection - should have been submitted in first-
instance proceedings (yes)

Decisions cited:

G 0003/14

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0183/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 11 January 2022

Appellant: MULTIVAC Sepp Haggenmüller SE & Co. KG
(Opponent) Bahnhofstrasse 4
87787 Wolfertschwenden (DE)

Representative: Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
80802 München (DE)

Respondent: Ulma Packaging Technological Center, S.Coop.
(Patent Proprietor) B° Garagaltza 51
Oñati
20560 Guipuzcoa (ES)

Representative: Igartua, Ismael
Galbaian S. Coop.
Garaia Parke Teknologikoa
Goiru Kalea 1
20500 Arrasate-Mondragón (ES)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 22 December 2017 rejecting the opposition filed against European patent No. 2070553 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
A. Beckman
S. Watson
C. Brandt

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division rejecting the opposition and maintaining European patent No. 2 070 553 as granted and sought the revocation of the patent in its entirety.
- II. The patent proprietor (respondent) defended the patent as granted in accordance with the decision under appeal or in amended form on the basis of auxiliary requests 1 to 4.
- III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020 according to which the appellant had convincingly demonstrated the incorrectness of the contested decision, and none of the auxiliary requests of the respondent appeared to be admissible.
- IV. With letter of 1 December 2021 the respondent submitted new auxiliary requests 5 and 6.
- V. Oral proceedings before the Board took place on 11 January 2022. During oral proceedings the respondent filed a new **seventh auxiliary request** together with an amended description.

The appellant finally requested

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

The respondent finally requested

that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the **seventh auxiliary request** and the amended description (columns 1 to 11, 16:30h) and figures 1 to 8, submitted during the oral proceedings (time-stamp 16:30h).

At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

VI. The following evidence submitted during opposition proceedings will be mentioned in the present decision:

D8: EP 1 417 139 B1
D11: DE 198 28 381 A1
D16.0-D16.11: evidence of first public prior use
Z1-Z5: evidence of second public prior use.

VII. The lines of arguments of the parties relevant for the present decision are dealt with in detail in the reasons for the decision.

VIII. Claim 1 of the **seventh auxiliary request** reads as follows (amendments over granted claim 8 are in bold or strike-through, emphasis added by the Board):

"Equipment for obtaining an aseptic container **according to any of claims 1 to 7 for containing objects for medical and/or pharmaceutical use, the aseptic container comprising a closing sheet (10) for sealing an interior of said container, the closing sheet (10) comprising a first sheet (7) configured to be traversed**

by ethylene oxide and a second sheet (8) of impermeable material, the first sheet (7) being obtained from a first reel (7') of film of material that is permeable to ethylene oxide and the second sheet (8) being obtained from a second reel (8') of film of impermeable material, wherein the first sheet (7) is longitudinally sealed to the second sheet (8) through a straight sealing line (18), thus forming a single closing sheet (10), wherein said sealing line (18) is formed by the overlapping of a first edge (7'') of the first sheet (7) and a first edge (8'') of the second sheet (8) and the perimetric edges of the closing sheet (10) are formed by a second edge (7''') of the first sheet (7) and a second edge (8''') of the second sheet (8), the aseptic container comprising a body (1) of impermeable material defining a housing (6') configured to contain an object (6), comprising a closing sheet (10) configured to seal the housing (6'), the perimetric edges of said closing sheet (10) being heat sealed to outer edges (1'') of the body (1) of the container in its entire perimeter, wherein the body (1) of the container is configured to be obtained from a sheet of multilayer film of polyester and/or polypropylene, the housing (6') being defined by means of thermoforming or molding of said body (1),

the equipment comprising a frame (3), characterized in that it comprises:

- a lower reel (1') comprising a film of impermeable material configured to obtain a body (1) of the container,
- a plurality of clamps (2) configured to hold two opposite perimetric edges of the film of impermeable material of the lower reel (1'),

- a forming mold (4) configured to thermoform a housing (6') in the reel of film of impermeable material which will form a body (1),
- a first reel (7') comprising a film of material that is permeable to ethylene oxide,
- a second reel (8') comprising a film of an impermeable material,
- sealing jaws (9) configured to heat seal a longitudinal edge of the film of permeable material of the first reel to a longitudinal edge of the film of impermeable material of the second reel, through a sealing line, to form a closing sheet (10) comprising a first sheet (7) of material that is permeable to ethylene oxide and a second sheet (8) of impermeable material, the first sheet (7) and the second sheet (8) being overlapped through a first edge (7") and (8"), respectively, forming the mentioned sealing line (18),
- a welding device (11) configured to heat weld the film of impermeable material of the second reel (8'), in a plurality of weld points (19), to the film of impermeable material configured to obtain a containing body of the container in outer edge (1 ") of the body (1),
- a first sealing mold (12) configured to heat seal a second edge (7"'') of the first sheet (7) to the outer edges (1") of the body (1), through a first area, at a first sealing temperature,
- a second sealing mold (12') configured to heat seal a second edge (8"'') of the second sheet (8) to the outer edges (1") of the body (1), through a second area, at a second sealing temperature different from the first sealing temperature."

Reasons for the Decision

1. *Transitional provisions*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), with the exception of Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Admissibility of the seventh auxiliary request*

2.1 According to the appellant the seventh auxiliary request, having been submitted during oral proceedings before the Board, represented a late change in the respondent's case for the following reasons:

2.2 Contrary to what had been argued by the respondent when submitting this request, claim 1 of the seventh auxiliary request changed the respondent's case because it did not correspond to granted claim 8. This was because it contained, to replace the reference to granted claims 1 to 7, more than the text of granted claim 1, as the feature "the equipment" was repeated at the end of the characterizing portion thereof.

2.3 The change of the case of the respondent was also evident because claim 1 raised the following new clarity issues.

2.3.1 The wording "the equipment comprising a frame (3), characterized in that it comprises", which was not present in granted claim 8, due to the addition of "the equipment" raised doubts as to whether "it comprises"

in the amended claim refers to the equipment or to the frame.

- 2.3.2 The expression "for obtaining aseptic containers for containing objects for medical and/or pharmaceutical use" contains three "suitable for" in a row. This expression, was not present in the granted claims, because granted claim 8 only contained "for obtaining an aseptic container".

The added formulation with **two additional "for"** (see claim 1: "for obtaining an aseptic container for medical and/or pharmaceutical use" raised doubts on the intended use for which the claimed equipment was suitable for.

- 2.3.3 The clarity of the formulation of claim 1 of the seventh auxiliary request was also open to objection because the features "first reel" and "second reel" are introduced both in the preamble, and in the characterizing portion by an indefinite article ("a") thereby raising doubts as to whether the first and second reels of the preamble correspond to those mentioned in the characterizing portion or not.

- 2.4 As the seventh auxiliary request raised new objections, the appellant requested not to admit the seventh auxiliary request into appeal proceedings in accordance with Articles 13(1) and 13(2) RPBA 2020.

- 2.5 The Board disagrees with the appellant.

- 2.5.1 The argument of the appellant that the case of the respondent changed because claim 1 of the seventh auxiliary request does not correspond to granted claim 8 is not convincing.

This is because the formulation of present claim 1 corresponds to the text of granted claim 8 with the inclusion of the text of granted claim 1 replacing the reference to granted claims 1 to 7 (see the text in bold in point VIII above), whereby the repetition of "the equipment" at the end of the preamble merely and evidently serves editorial purposes, as this repetition does not introduce any obscurity but rather helps to understand that "it comprises" refers to the equipment, and not to the frame.

- 2.5.2 Concerning the further alleged unclarities identified by the appellant in present claim 1 the Board notes the following.

The expression "for obtaining aseptic containers for containing objects for medical and/or pharmaceutical use" was clearly also present in granted claim 8, as it is inevitably obtained when the explicit reference to granted claim 1 is replaced by the text of granted claim 1. Therefore a skilled reader would have encountered the same contested sequence of "suitable for" in a row and to interpret it in order to understand, when reading granted claim 8, the intended use for which the claimed equipment was suitable for.

The same applies to the presence of the formulation "a first reel" and "a second reel" both in the preamble (lines 10 and 11), and in the characterizing portion (lines 31 and 32). Clearly a skilled reader, when trying to make technical sense out of the text of granted claim 8, also had to decide whether the first and second reels named in granted claim 1 (those of the preamble of present claim 1) were the same first and second reels named in granted claim 8 (now in the characterizing portion of present claim 1).

The Board therefore disagrees with the opponent who argued that the insertion of the complete text of granted claim 1 into granted claim 8 introduces obscurities which were not present in the granted claims, and that for this reason the seventh auxiliary request was not to be admitted into appeal proceedings.

The Board has no doubts that claim 1 corresponds to granted claim 8 and that the remaining claims of the seventh auxiliary request are the remaining apparatus claims of the patent as granted. The Board notes that according to the established case law (see the order of G3/14) the claims of a granted patent may not be examined for compliance with the requirements of Article 84 EPC.

- 2.5.3 In the present case the respondent's appeal case, as submitted with the seventh auxiliary request, is still directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based.

Submitting the seventh auxiliary request does not change the factual and legal framework of the respondent's position, and cannot thus be considered as an amendment to their appeal case.

Granted claim 8 was discussed in the appealed decision (point II.4.2), objected to by the appellant (page 16 of the statement of grounds) and defended by the respondent (reply, point 2 at page 9).

There is no change of the respondent's appeal case because the discussion thereof does not extend beyond the review of the decision under appeal, which,

according to Article 12(2) RPBA 2020, is the primary object of appeal proceedings.

- 2.5.4 Articles 13(1) and 13(2) RPBA 2020, on the basis of which the appellant requested not to admit the seventh auxiliary request into the proceedings, are applicable only in the presence of an amendment to a party's appeal case.

As however the Board concluded that this request does not represent a change of the respondent's appeal case, the precondition for the application, requested by the appellant, of Articles 13(1) and 13(2) RPBA 2020 is missing, and the seventh auxiliary request is admitted into appeal proceedings.

3. *Allowability of the seventh auxiliary request - Admissibility of the inventive step objection to claim 1*

- 3.1 According to point II.4.2 of the appealed decision the subject-matter of granted claim 8 was considered inventive over the combination of the teachings of documents D8 and D11. This reasoned finding, however, has not been contested by the appellant so that the issue of inventive step of the claimed subject-matter in view of a combination of the teachings of documents D8 and D11 is not an object of the present appeal proceedings.

- 3.2 During oral proceedings the appellant raised an objection of lack of inventive step against claim 1 of the seventh auxiliary request taking one of the prior uses (see documents D16.0-D16.11, Z1-Z5) as the starting point, and further considering the teaching of

document D11.

3.3 The respondent requested not to admit these patentability attacks into the appeal proceedings.

3.4 As the same lines of argument regarding a lack of inventive step were already submitted against granted claim 8 with the statement setting out the grounds of appeal (see page 16 thereof), the discussion on admissibility has to be based on Article 12(4) RPBA 2007.

According to Article 12(4) RPBA 2007 it is at the Board's discretion not to admit new objections that could have been submitted in the opposition proceedings.

The appellant has not explained why these new objections, raised against a granted claim whose patentability was already disputed before the opposition division and discussed in the appealed decision (see point II.4.2), could not have been filed before the opposition division, and could only be submitted in appeal proceedings.

The Board therefore decided not to admit these new patentability attacks into appeal proceedings, following the principle that the purpose of an appeal is to review the decision of the opposition division and not to address issues which have not been dealt with in opposition proceedings (see Case Law of the Boards of Appeal, 9th edition 2019, V.A.4.11.3 f)).

3.5 Because the appellant's only objection to the seventh auxiliary request was not admitted into the appeal proceedings and in the absence of any other objection

obvious to the Board, the claimed subject-matter of the seventh auxiliary request is found to meet the requirements of the EPC.

4. *Amendments to the description*

4.1 The appellant argued that the description as amended by the respondent during oral proceedings did not comply with the requirements of Article 84 EPC, because paragraphs [0012], [0019] and [0030] described subject matter which did not support claim 1 of the seventh auxiliary request.

According to the appellant, lack of support arose because paragraph [0012] did not make immediately apparent that the invention was limited to equipment, and did not extend to containers.

The use of parentheses in the first sentence of paragraph [0019] also gave the impression that the materials specified in claim 1 (polyester, polypropylene) were not essential features of the invention.

Moreover, lack of support was also evident in the case of paragraph [0030], which was not amended, because the equipment disclosed therein did not correspond to the claimed one, due in particular to differences in the welding device.

4.2 The Board disagrees.

There can be no doubts for a skilled reader that the invention does not extend to containers such as those described in paragraph [0012], and to materials different from polyester and polypropylene (paragraph

[0019]) because paragraph [0001] of the description has been adapted to unequivocally clarify that the invention relates to equipment according to claim 1.

The Board also notes that the equipment disclosed in paragraph [0030] of the description of the granted patent clearly did not correspond to the claimed equipment when the patent was granted, as is apparent from the differences in the welding device between this equipment and the equipment of granted claim 8.

Amending the equipment described at paragraph [0030], which was not according to the invention already in the granted patent, to make it compliant with the new amended independent claim, clearly goes beyond the scope and the purpose of adapting the description to the amendments made to the claims during appeal proceedings.

- 4.3 As a consequence of the above the appellant failed to convincingly demonstrate that the amended description, because of paragraphs [0012], [0019] and [0030] thereof, does not comply with the requirements of Article 84 EPC.

5. *Conclusions*

In view of the aforementioned considerations and findings the Board concludes that, while the decision under appeal is to be set aside, the patent can be maintained in amended form on the basis of the documents received during the oral proceedings.

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 as amended in the following version:

Description:

Columns 1 to 11 received during oral proceedings of
11 January 2022 (16:30h)

Claims:

No. 1 to 4 received during oral proceedings of
11 January 2022 as 7th auxiliary request

Drawings:

Figures 1 to 8 received during oral proceedings of
11 January 2022 (16:30h).

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated