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**Datasheet for the decision  
of 2 February 2022**

**Case Number:** T 2120/18 - 3.4.03

**Application Number:** 10175344.0

**Publication Number:** 2296451

**IPC:** H05K3/24, H01L23/488

**Language of the proceedings:** EN

**Title of invention:**

Terminal structure, printed wiring board, module substrate,  
and electronic device

**Patent Proprietor:**

TDK Corporation

**Opponent:**

Atotech Deutschland GmbH

**Relevant legal provisions:**

RPBA Art. 12(4)

RPBA 2020 Art. 11

EPC Art. 111(1), 113(1), 52(1), 54(1), 54(2)

EPC R. 79(1)

Guidelines for examination 2016, E-VII, 1.6

**Keyword:**

Substantial procedural violation - (no)  
Remittal to the opposition division for further prosecution -  
(no)  
Novelty - claim 1 as granted - (no)  
Auxiliary request could and should have been filed during the  
opposition proceedings - admitted (no)

**Decisions cited:**

G 0012/91, T 0936/09

**Catchword:**

1. An opposition division's rejection of a request for extension of the time limit indicated in its communication under Rule 79(1) EPC does not terminate the opposition proceedings. Therefore, a patent proprietor is in a position to respond to the notice of opposition beyond the expired time limit or, at least, request the rejection of the opposition as well as oral proceedings. The patent proprietor must anticipate that an opposition division may issue its decision after expiration of the time limit (see Reasons 4.5, 4.6 and 4.9).
2. There is no legal basis for a duty on the part of the opposition division to notify the patent proprietor in advance of its intention to reach a decision, even if that decision concerns the revocation of the patent (see Reasons 4.8, 4.10 and 4.11).
3. If a patent proprietor chooses not to file any submissions during the opposition proceedings but to present them only with its statement of grounds of appeal, this amounts to bringing an entirely fresh case in appeal proceedings. This is at odds with the primary object of the appeal proceedings to review the decision under appeal in a judicial manner. Consequently, a board has the discretion under Article 12(4) RPBA 2007 not to admit the patent proprietor's defence submissions into the appeal proceedings. This does, however, not necessarily lead to revocation of the patent. The decision under appeal is still to be reviewed by the board, which might overturn the impugned decision, for example if it is not convinced by the reasons given by the opposition division or in the event of a substantial procedural violation (see Reasons 5.5 and 5.6).



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 2120/18 - 3.4.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.03**  
**of 2 February 2022**

**Appellant:** TDK Corporation  
(Patent Proprietor) 3-9-1, Shibaura,  
Minato-ku,  
Tokyo 108-0023 (JP)

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

**Respondent:** Atotech Deutschland GmbH  
(Opponent) Intellectual Property  
Erasmusstraße 20  
10553 Berlin (DE)

**Representative:** Atotech Deutschland GmbH & Co. KG  
Patent Management  
Erasmusstraße 20  
10553 Berlin (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 26 June 2018  
revoking European patent No. 2296451 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** T. Häusser  
**Members:** M. Ley  
G. Decker

## **Summary of Facts and Submissions**

- I. The appeal concerns the decision of the opposition division to revoke European patent 2 296 451 under Article 101(2) EPC.
- II. In the notice of opposition the patent was opposed on the grounds of lack of novelty and inventive step (Articles 100(a), 52(1), 54 and 56 EPC), insufficiency of disclosure (Article 100(b) EPC) and extension of subject-matter beyond the content of the application as originally filed (Article 100(c) EPC).
- III. In a communication under Rule 79(1) EPC dated 22 March 2017, the opposition division requested that the patent proprietor file its observations within a period of four months.

With a letter dated 24 July 2017, the patent proprietor submitted a request "to extend the deadline for filing observations in reply to the opposition as received by two months". As a justification, the proprietor indicated the "very high number of documents (E1 to E25), which partially are in German and concern internal information generated by the opponent".

This request for extension of time limit was rejected by the opposition division in a letter dated 1 August 2017 on the grounds that the reasons given in the request were not sufficient. Reference was made to the Guidelines for Examination in the EPO, Part E-VII, 1.6, and to "OJ EPO 5/2016, A42, No.4" relating to the "Notice from the EPO concerning the opposition procedure as from 1 July 2016".

IV. The decision revoking the patent was issued on 26 June 2018. The opposition division decided that the subject-matter of claim 1 as granted lacked novelty (Articles 52(1), 54(1) and (2) EPC) over the disclosure of document E2 (WO 2008/092708 A1) (see sections 3.1 to 3.6 of the impugned decision) and over the disclosure of other documents (see section 4. of the impugned decision).

The opposition division explained in section "III. Further remarks" of the impugned decision that the above conclusions were reached based on the following assumptions: that the subject-matter of claim 1 had a basis in the application as originally filed; and that the patent disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The opposition division further noted additional objections under Article 100(a) EPC in combination with Article 56 EPC.

V. The appellant-patent proprietor (hereinafter: the proprietor) requests as a main request that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution.

As an auxiliary measure, the proprietor requests that the decision under appeal be set aside, that novelty of the claims as granted be acknowledged and that the case be remitted to the opposition division for further prosecution.

As a further auxiliary measure, the proprietor requests that the decision under appeal be set aside and that the patent be maintained as granted.

As a further auxiliary measure, the proprietor requests that the decision under appeal be set aside, that novelty of the claims according to a first auxiliary request filed with the statement setting out the grounds of appeal be acknowledged and that the case be remitted to the opposition division for further prosecution.

As a further auxiliary measure, the proprietor requests that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims of the first auxiliary request.

- VI. The respondent-opponent (hereinafter: the opponent) requests that the appeal be dismissed.
  
- VII. In a communication pursuant to Article 15(1) RPBA 2020 dated 6 October 2021, the board informed the parties of its preliminary view: the proprietor's main request was not to be granted as there was no violation of the proprietor's right to be heard by the opposition division, and the board intended to exercise its discretion under Article 12(4) RPBA 2007 not to admit the proprietor's defence submissions regarding the claims as granted into the appeal proceedings.

Preliminarily taking into account the statement setting out the grounds of appeal, the opponent's reply thereto and the proprietor's written submissions filed with the letter dated 20 December 2019, the board provided its preliminary opinion that the grounds under Article 100(c) and (a) EPC prejudiced the maintenance of the European patent (see points 11. to 14. of the board's communication pursuant to Article 15(1) RPBA 2020). Claim 1 as granted added subject-matter that was not disclosed in the application as originally filed.

Consequently, the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent. Furthermore, its subject-matter lacked novelty (Articles 52(1), 54(1) and (2) EPC) over, *inter alia*, document E2.

Moreover, the board preliminarily agreed with the opponent that the set of claims according to the first auxiliary request could and should have been filed during the opposition proceedings. The board did not intend to admit the first auxiliary request into the appeal proceedings under Article 12(4) RPBA 2007, which was applicable pursuant to Article 25(2) RPBA 2020.

VIII. Using the opposition division's numbering, claim 1 as granted has the following wording:

1. *A terminal structure (14) comprising:*
  - 1.1 *a terminal (12)*
    - 1.1.1 *having a conductor containing at least one metal selected from the group consisting of gold, silver, and copper,*
  - 1.2 *a first layer (52) containing phosphorus and nickel disposed on the conductor, and*
  - 1.3 *a second layer (54)*
    - 1.3.1 *having a nickel/phosphorus atomic ratio smaller than that of the first layer and*
    - 1.3.2 *containing Ni<sub>3</sub>P disposed on the first layer;*
  - 1.4 *a third layer (56)*
    - 1.4.1 *containing (Cu, Ni)<sub>6</sub>Sn<sub>5</sub> on the second layer and*
    - 1.4.2 *being a plating film formed by performing electroless nickel plating, electroless palladium plating, and electroless gold plating in this order, and*

- 1.5 *then heating the plating film together with a solder (70) disposed on the third layer of the terminal;*
- 1.3.3 *wherein the second layer has a thickness of 0.4 to 1.0  $\mu\text{m}$  and*
- 1.4.3 *the third layer has a thickness of 1.5 to 2.5  $\mu\text{m}$ .*

Claim 1 according to the first auxiliary request comprises the features of claim 1 as granted and the following feature added after feature 1.4.3:

- 1.6 *, wherein the second layer has a part where the  $\text{Ni}_3\text{P}$  content becomes higher as the solder is nearer.*

### **Reasons for the Decision**

- 1. The appeal is admissible.

#### **Proprietor's main request for remittal of the case to the opposition division for a complete evaluation**

- 2. The proprietor argued that it had "not been provided with the required opportunity to defend the patent in first instance opposition proceedings" and that it had not been given "the required opportunity to provide counter arguments in relation with the assertions brought forward by the opponent" (see the statement setting out the grounds of appeal, page 2, paragraphs 5 and 6).

The Guidelines required the opposition division to invite the parties as often as required to provide written submissions in order to reach a position in



which a decision could be handed down. By rejecting the proprietor's request for an extension of the time limit, the opposition division had deprived the proprietor of the opportunity to evaluate the opposition and develop a response.

The proprietor was aware of the fact that the rejection of the extension request did not terminate the opposition proceedings. However, it was of the view that "a specific form to further structure first instance opposition proceedings" was available to the opposition division, namely an "[i]nvitation to the patentee, with an indication of a two months term, that the patentee has the option to either defend the patent" or "has the option to allow the Opposition Division to close the case by announcing that the patentee does not agree with the text of the patent as granted". The proprietor compared this "invitation" with the procedure of "further processing" in examination proceedings. During oral proceedings before the board, the proprietor argued that said invitation should be sent by analogy with the communication issued by the EPO in the event of an applicant failing to reply to a communication from the examining division or failing to pay a fee.

In the present case, the opposition division did not issue such an invitation. It should have done so, however, given the following circumstances:

(1) The opposition division had deviated from the examining division's findings in relation to the evaluation of E2 (called "D1" by the examining division) without any "further secondary evidence such as experimental reports or secondary references disclosing relevant information". This was "clearly a situation" where the EPO had to provide the proprietor

"with the opportunity to respond to the changed evaluation concerning document E2".

(2) A relevant portion of the prior art was composed of "'internal' documents originating from the opponent", which the opposition division considered prior art. The documents contained clear and unmistakable indications such as "internal and confidential". The proprietor should have been given the opportunity to comment.

(3) No decision should have been reached without providing the proprietor with the option to defend the patent in relation to the alleged experimental reproduction of the prior art.

(4) The opposition division had an obligation to inform the proprietor of its intention to conclude first-instance opposition proceedings. Indeed, neither the Guidelines for Examination in the EPO nor the "novel regulations concerning opposition proceedings" provided "any legal basis that a patentee who's [sic] extension of term request had been denied [...] is no longer in a position to receive further information from the Opposition Division about the process". The representative of the proprietor had always received an invitation in opposition cases where an extension request had been denied.

(5) In a non-negligible number of cases, the EPO was unable to ensure that submissions made were "forwarded to the correct file". Hence, any division of the EPO should ensure, before reaching any final decision, through brief communications or telephone enquiries, that all relevant submissions had been considered.

During the oral proceedings before the board, the proprietor added that the opposition division should have enquired whether the proprietor was still interested in the opposed patent, because the proprietor *de facto* showed its interest in defending

the patent by requesting an extension of time limit. In accordance with the Guidelines, the opposition division had discretion to issue a final decision, and it exercised this discretion incorrectly.

3. The opponent requested that the proprietor's request for a remittal of the case to the opposition division for a complete evaluation be rejected.

The proprietor was not active during the opposition proceedings and merely requested an extension of the time limit to provide its observations. That request was rejected by the opposition division. No loss of rights had arisen due to the opposition division's rejection of the proprietor's request. It would have been possible for the proprietor to submit its observations on the notice of opposition even after the rejection of its request for extension of time limit or, at least, to request the rejection of the opposition and oral proceedings. The opposition division's decision was issued eleven months after the rejection of the request for extension of time limit. The proprietor thus had the opportunity to provide counter-arguments against the notice of opposition.

It would not be appropriate for a party to be able to lengthen opposition or appeal proceedings by remaining inactive. A remittal of the case to the opposition division, as requested by the proprietor, would *de facto* extend the period of four months indicated in the communication pursuant to Rule 79(1) EPC dated 22 March 2017 to the date of filing of the statement of grounds of appeal (6 October 2018).

According to the Guidelines, D-VI, 3.1, the opposition division is to invite the parties as often as is

necessary to clarify the substance of the case, i.e. until the opposition division has sufficient information to decide the case. This was the position after receipt of the notice of opposition and the absence of any reply from the proprietor. The proprietor should have anticipated that a decision would be possible – see also the Guidelines E-VIII, 1.6, last paragraph.

The opponent was not aware of any invitation to be issued by the opposition division following rejection of a request for an extension of a time limit. Nor was it aware of any legal basis for informing the parties that a decision would be issued.

The Guidelines, E-VIII, 1.6, made it clear that the failure by the proprietor to reply to the communication from the opposition division did not lead to any legal consequence. Instead, the opposition proceedings would continue to the next stage, which could be a decision, as in the present case.

The proprietor should have anticipated that, in view of the notice of opposition, the opposition division might deviate from the examining division's findings with respect to novelty over a given prior art (e.g. document E2). The proprietor could have requested oral proceedings in order to obtain the opposition division's preliminary opinion. In such oral proceedings, the opposition division would have heard the proprietor's submission with respect to its doubts regarding the availability of certain prior-art documents as well as the experimental reproduction of the prior art (E7a and E8).

The opposition division had no obligation to contact the proprietor before issuing its decision in order to reassure itself that the proprietor's reply to the notice of opposition had not been lost due to an allegedly poor internal organisation of the EPO.

4. The board agrees with the opponent's position.

4.1 The proprietor essentially argued that,

- as its request for an extension of time limit was rejected,
- as it did not receive an invitation as described in the statement of grounds of appeal, page 3, second paragraph, and
- as it was not informed that a decision revoking the patent would be reached,

it had not been afforded an opportunity to provide its counter-arguments against the opponent's assertions. In other words, the proprietor apparently objected that its right to be heard (Article 113(1) EPC) had not been granted.

4.2 If the proprietor's right to be heard had indeed been violated, that would constitute a procedural violation justifying a remittal of the case to the department of first instance – Article 111(1), second sentence, EPC, and Article 11 RPBA 2020.

4.3 The opposition division used its discretion to reject the request for extension of time limit, as it did not consider the reasons given in the request dated 24 July 2017 to be sufficient. Reference was made to "Guidelines EPO, Part E-VII 1.6" and to "OJ 5/2016, A.42, no.4", both stating that extensions

of time limits are granted only in exceptional cases with duly substantiated requests.

4.4 The opposition division's refusal of the proprietor's extension request appears to be problematic because it did not give any specific reasons why it considered the reasons for the request insufficient. However, the consequence of a possible error in the exercise of its discretion not to extend the time limit would (merely) be that late submissions by the proprietor could not be disregarded. In the absence of any submissions by the proprietor during the opposition proceedings, however, the opposition division's possible lack of proper reasoning has no effect.

4.5 It is common ground that the rejection of the extension request did not terminate the opposition proceedings. Therefore, as the non-compliance with the four-month time limit did not lead to a direct legal consequence to the detriment of the proprietor, and as the opposition division did not decide on the opposition until eleven months after the refusal of the extension request, the proprietor was still in a position to respond to the notice of opposition well beyond the time limit.

4.6 Consequently, the board agrees with the opponent that it would have been possible for the proprietor to submit its observations on the notice of opposition even after the rejection of its request for extension of time limit, or, at least, request the rejection of the opposition as well as oral proceedings. This would have been possible until the date on which the decision that was to be notified was handed over to the EPO postal service by the decision-making department's formalities section – see G 12/91, Headnote. Even after

the rejection of the request for extension of time limit, the proprietor could have sent a short letter to the opposition division to confirm its intention to reply to the notice of opposition within, for example, two months. The board is of the firm belief that a written statement of this type is to be taken into account by an opposition division before issuing any decision on the opposition.

- 4.7 Therefore, the opposition division's refusal of the extension request did not violate the proprietor's right to be heard.
- 4.8 Furthermore, the board is not aware of a legal basis for an invitation from the opposition division - as described by the proprietor - to be sent to the proprietor. The proprietor did not indicate any legal basis for said "specific form to further structure first instance opposition proceedings" in its written submissions or during oral proceedings.

If, for example, an applicant does not reply in due time to an examining division's communication under Article 94(3) EPC, the EPO communicates the loss of rights (deemed withdrawal under Article 94(4) EPC) to the applicant under Rule 112(1) EPC. In such cases, the EPO also normally indicates possible legal remedies, such as further processing under Article 121 EPC and Rule 135 EPC. On the other hand, there is no obligation for a patent proprietor to file observations or amend the patent in response to an opposition division's communication under Rule 79(1) EPC. Furthermore, there are neither sanctions nor a loss of rights if a patent proprietor remains silent. Thus, the board does not agree with the proprietor that the latter should have

received an invitation from the opposition division by analogy with the "procedure of further processing".

- 4.9 The board is of the view that the proprietor could have anticipated that the opposition division would issue its decision after expiration of the four-month time limit indicated in the communication under Rule 79(1) EPC – see also the Guidelines for Examination in the EPO, version of November 2016, E-VII, 1.6, penultimate paragraph: "*The failure of a party to reply to a communication from the Opposition Division within the period set does not lead directly to any legal consequence. However, the opposition proceedings will proceed to the next stage, and this could be a decision under Art. 101(2) or Art. 101(3).*".

Article 101(1) EPC requires that the opposition division should invite the parties, as often as necessary, to file observations on communications received from another party or issued by itself. The board agrees with the opponent that, in the present case, the opposition division had sufficient information to decide the case. The proprietor could not have expected any further invitation to file observations according to Article 101(1) EPC.

- 4.10 Moreover, the board is of the view that the proprietor could not have been surprised that, in view of the arguments provided in the notice of opposition and the absence of any counter-arguments from the proprietor, the opposition division deviated from the findings of the examining division. It could not have been surprised that the opposition division considered the pieces of evidence provided by the opponent to have been made available to the public or that it took into



account the experimental reproduction (E7a in combination with E8).

More specifically, the fact that the opposition division's view concerning document E2 differed from that of the examining division did not constitute circumstances that entailed the need to notify the proprietor in a further communication. An opposition division is composed of at least two persons not included in the composition of an examining division (see Article 19(2), first sentence, EPC). Consequently, it is in the nature of things that the opposition division can come to a different conclusion on the same matter.

4.11 Lastly, the board is unaware of the alleged non-negligible number of cases in which the submission from a party did not reach the relevant department of the EPO. In any case, the allegation that letters sent by the parties could be lost within the EPO is hypothetical. It did not occur in the present case and is therefore irrelevant.

4.12 Thus, the board agrees with the opponent that the proprietor's main request should not be granted as there was no violation of the proprietor's right to be heard.

### ***Claims as granted***

5. Admission of the proprietor's defence submissions – Articles 12(4) RPBA 2007 and 25(2) RPBA 2020

5.1 Under Article 12(4) RPBA 2007 (applicable according to Article 25(2) RPBA 2020), the board has the power "*to hold inadmissible facts, evidence or requests which*

*could have been presented ... in the first instance proceedings*". This provision enables the boards to penalise a party in the event of infringement of its duty to facilitate the first-instance proceedings, i.e. a failure to display due cooperation through the submission of facts, evidence and requests in the manner required by a certain point in the proceedings. It thus serves to ensure compliance with the requirement of a fair procedure and to expedite processing of the case. The duty to facilitate proceedings applies equally to opponents (with respect to the submission of their objections) and patentees (with respect to their means of defence) (see *Case Law of the Boards of Appeal of the European Patent Office*, 9th Edition 2019, V.A.4.11.1).

- 5.2 In its communication pursuant to Article 15(1) RPBA 2020, point 10., the board informed the proprietor of its preliminary view that it was minded not to take into account its defence submissions regarding the claims as granted.
- 5.3 During oral proceedings, the opponent agreed with the board's preliminary view.
- 5.4 In its letter dated 30 December 2021, the proprietor did not provide any arguments as to why its submissions made for the first time in the statement setting out the grounds of appeal or in its letter dated 20 December 2019 should be admitted into the appeal proceedings.

During oral proceedings, the proprietor argued that not admitting its defence submissions would correspond to the case of a patent proprietor declaring to the

opposition division that it did not agree with the text of the patent as granted.

5.5 The board notes that a European patent is to be revoked if the patent proprietor states in opposition or appeal proceedings that it no longer approves the text in which the patent was granted – see *Case Law of the Boards of Appeal of the European Patent Office*, 9th Edition, 2019, III.B.3.3, first paragraph. On the other hand, a decision not to take into account the proprietor's submissions under Article 12(4) RPBA 2007 does not necessarily lead to the revocation of the patent. The decision under appeal is still to be reviewed by the board, which might overturn the impugned decision, e.g. if it is not convinced by the reasons given by the opposition division or in the event of a substantial procedural violation. It cannot be said that the two situations invoked by the proprietor during oral proceedings are identical. Thus, the board is not convinced that the proprietor's statement during oral proceedings is a valid argument in favour of its submissions being admitted.

5.6 As stated above (see points 4.5 and 4.6), the proprietor was required and was also in a position to present its defence submissions during the first-instance proceedings. However, the proprietor chose not to file any submissions during those proceedings but to present them only with its statement of grounds of appeal. This behaviour amounts to bringing an entirely fresh case in appeal proceedings, which is at odds with the primary object of the appeal proceedings to review the decision under appeal in a judicial manner.

A patent proprietor may choose not to respond in substance at all to the opposition, for example by

filing arguments or amended claims, or may choose not to complete its submissions at the stage of the first-instance proceedings but to present or complete its case only in the notice of appeal or the statement setting out the grounds of appeal. In either scenario, it will then need to face the prospect of being held to account for such conduct by the board when, for example, exercising its discretion under Article 12(4) RPBA 2007 – see also T 936/09, point 9. of the Reasons.

Hence, the board maintains its preliminary view and exercises its discretion under Article 12(4) RPBA 2007 not to admit the proprietor's defence submissions regarding the main request into the appeal proceedings.

6. Novelty - Articles 52(1), 54(1) and (2) EPC

The opposition division held that the subject-matter of claim 1 as granted lacked novelty, *inter alia*, over document E2 – see the Reasons for the Decision, points 3.3 to 3.6.

The board agrees with the opposition division's conclusion.

As a side note, even taking preliminarily into account the statement setting out the grounds of appeal as well as the opponent's reply thereto and the proprietor's written submissions filed with the letter dated 20 December 2019, the board agreed in its communication pursuant to Article 15(1) RPBA 2020 with the opposition division (see sections 12 and 13.1) that the subject-matter of claim 1 as granted lacked novelty over document E2.

### **Admission of the proprietor's first auxiliary request**

- 6.1 In the statement setting out the grounds of appeal, the proprietor referred to its arguments relating to the main request and added that, as outlined in paragraph [0014] of the patent, feature 1.6 provided improved drop strength.
- 6.2 The opponent requested that the proprietor's first auxiliary request be rejected as late-filed. It was not filed as a reaction to new submissions from the opponent or to a new document. Instead, the aim was to render claim 1 novel over the prior art already cited in the notice of opposition. The claims according to the first auxiliary request should have been filed during the opposition proceedings.
- 6.3 The board agrees with the opponent that the set of claims according to the first auxiliary request could and should have been filed during the opposition proceedings. It therefore does not admit said auxiliary request into the appeal proceedings under Article 12(4) RPBA 2007 (Article 25(2) RPBA 2020).
7. In view of the above considerations, the board cannot grant any of the proprietor's requests and sees no reasons to overturn the opposition division's decision.

The appeal must therefore fail.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

T. Häusser

Decision electronically authenticated