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**Datasheet for the decision  
of 4 March 2022**

**Case Number:** T 0735/19 - 3.3.03

**Application Number:** 13821912.6

**Publication Number:** 2936216

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A45C11/00, C08L83/04, A61F9/00

**Language of the proceedings:** EN

**Title of invention:**

OPHTHALMIC DEVICES FOR DELIVERY OF BENEFICIAL AGENTS

**Patent Proprietor:**

CooperVision International Limited

**Opponent:**

Novartis AG

**Headword:**

**Relevant legal provisions:**

RPBA 2020 Art. 13(2)

EPC Art. 54

**Keyword:**

Late-filed line of defence - admitted (no)

Late-filed request - admitted (no)

Novelty - multiple selection (no)

**Decisions cited:**

T 0247/20, T 2271/18, T 0140/15

**Catchword:**



**Beschwerdekammern**

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Case Number: T 0735/19 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 4 March 2022**

**Appellant 1:** CooperVision International Limited  
(Patent Proprietor) Delta Park  
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**Representative:** Abel & Imray LLP  
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**Appellant 2:** Novartis AG  
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**Representative:** Breuer, Markus  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 January 2019 concerning maintenance of the  
European Patent No. 2936216 in amended form.**

**Composition of the Board:**

**Chairman** D. Marquis  
**Members:** M. Barrère  
W. Ungler

## Summary of Facts and Submissions

- I. The appeal of the patent proprietor and the opponent lie against the interlocutory decision of the opposition division concerning maintenance of European Patent number 2 936 216 in amended form on the basis of the claims of the third auxiliary request filed during oral proceedings on 23 November 2018 and an amended description.
- II. The contested decision was also based on a main request (filed during oral proceedings) as well as on a first and a second auxiliary request (filed respectively as second and third auxiliary requests with letter of 21 September 2018).
- III. The following documents were *inter alia* cited in the opposition division's decision:
- HBP6: US 7 477 366 B2  
HBP14B: Package Insert, Proclear Multifocal Toric (omafilcon A) Soft (hydrophilic) Contact Lenses for Daily Wear  
HBP16: WO 98/30248 A2  
HBP17: US 2008/0314767 A1  
HBP20: WO 2006/085351 A1
- IV. In that decision the opposition division held, among others, that:
- The subject-matter of claim 1 of the main request was novel over HBP6 because this document did not disclose a contact lens comprising phosphorylcholine (PC) groups and an anionic

polymer (multiple selections). The same conclusion applied to the first to third auxiliary requests.

- V. With the statement setting out the grounds of appeal the patent proprietor (appellant 1) requested that the decision under appeal be set aside and the opposed patent be maintained on the basis of a main request. In the alternative maintenance of the patent in amended form on the basis of one of the first to third auxiliary requests was requested.

The main request and the first to third auxiliary requests correspond respectively to the main request and the first to third auxiliary requests as dealt with in the contested decision.

- VI. With the statement setting out the grounds of appeal the opponent (appellant 2) requested that the decision under appeal be set aside and that the patent be revoked.

- VII. The following evidence was filed by appellant 1 with its rejoinder to the grounds of appeal of appellant 2:

Decl-YS2: Declaration of Yuan Sun dated 27  
September 2019

- VIII. With letter of 1 July 2020 appellant 1 further requested maintenance of the patent in amended form based on a fourth and a fifth auxiliary request.

- IX. The Board specified issues to be discussed at oral proceedings in a communication dated 29 November 2021 containing the preliminary opinion of the Board.

X. With letter of 9 December 2021, appellant 1 filed a sixth auxiliary request.

XI. Oral proceedings were held before the Board on 4 March 2022 by video conference.

During oral proceedings, appellant 1 interchanged the second and third auxiliary requests and appellant 2 requested that appellant 1's new line of defence in the context of novelty as well as the sixth auxiliary request not be admitted to the proceedings.

XII. Appellant 1 requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or in the alternative that the patent be maintained in amended form on the basis of one of the first, third and second auxiliary requests, all filed with the statement of grounds of appeal, or on the basis of one of the fourth and fifth auxiliary requests filed with letter of 1 July 2020 or on the basis of the sixth auxiliary request filed with letter of 9 December 2021.

XIII. Appellant 2 requested that the decision under appeal be set aside and that the patent be revoked.

XIV. Claim 1 of the main request read as follows:

"1. An unworn contact lens immersed in a packaging solution and sealed in a package, said contact lens comprising:

(a) a hydrogel comprising integral phosphorylcholine groups; and

(b) a releasable ionic agent electrostatically bound to the phosphorylcholine groups, wherein the ionic agent:

(i) is polyionic, being a cationic polymer comprising at least 4 cationic groups or an anionic polymer comprising at least 4 anionic groups; or

(ii) comprises at least one guanidinium group; or

(iii) is both polyionic and comprises at least one guanidinium group."

Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the ionic agent is:

(i) a cationic polymer comprising at least 4 cationic groups,

(ii) an anionic polymer comprising at least 4 anionic groups

or comprises:

(iii) at least one guanidinium group.

Claim 1 of the third auxiliary request differs from claim 1 of the main request in that the ionic agent is:

(i) polyionic, being a cationic polymer comprising at least 4 cationic groups or an anionic polymer comprising at least 4 anionic groups; or

(ii) both polyionic and comprises at least two guanidinium groups.

Claim 1 of the second auxiliary request differs from claim 1 of the main request in that the ionic agent is:

(i) an anionic polymer comprising at least 4 anionic groups

or comprises:

(iii) at least one guanidinium group.

Claim 1 of the fourth auxiliary request differs from claim 1 of the main request in that the ionic agent:

(i) is an anionic polymer comprising at least 4 anionic groups or

(ii) comprises at least two guanidinium groups.

Claim 1 of the fifth auxiliary request differs from claim 1 of the main request in that the ionic agent:

(i) is an anionic polymer comprising at least 4 anionic groups.

Claim 1 of the sixth auxiliary request differs from claim 1 of the main request in that the ionic agent:

(i) is PHMB, epsilon polylysine, polyquaternium-55, polyarginine or polystyrene sulfonate; or

(ii) comprises at least two guanidinium groups.



The remaining claims of these requests are not relevant to the present decision.

XV. The arguments of appellant 1, insofar as relevant to the decision, may be summarised as follows:

**(a) Main request**

**(i) Novelty over HBP6**

Line of defence put forward in the rejoinder to the statement of grounds of appeal

Multiple selections from different lists were necessary to arrive at the subject-matter of claim 1:

selection of a lens comprising PC groups,

selection of a liquid which was a buffered saline solution or comprised a surfactant and

selection of carboxymethyl cellulose (CMC).

Furthermore, CMC was a wetting agent for silicone contact lenses. A PC-containing lens according to HBP6 would however not require a wetting agent. The skilled person would therefore not combine a PC-containing lens according to HBP6 with CMC.

Hence, there was no direct and unambiguous disclosure in HBP6 of a lens comprising PC groups being packaged in a solution comprising CMC.

Line of defence put forward in the letter of  
9 December 2021 (hereinafter the "new line of  
defence")

Claim 1 required that the ionic agent be "electrostatically bound" to the PC groups. There was no evidence in HBP6 that the combination of CMC with a contact lens comprising PC groups would inevitably lead to an electrostatic binding between the CMC and the PC groups. In fact, for electrostatic binding to occur with an ionic agent, the packaging solution needed to have a low ionic strength.

Claim 1 was therefore novel over HBP6.

**(ii) Admittance of the new line of defence**

In its statement of grounds of appeal, appellant 2 initially raised an objection of lack of novelty based on HBP6 in combination with HBP16. However, in the communication under Rule 15(1) RBPA, the Board's objection was based on HBP6 alone.

The objection based on HBP6 alone was a new objection and constituted an amendment of the appeal case. Appellant 1 was therefore entitled to react thereto by filing new requests and presenting new arguments.

Furthermore, a successful objection of lack of novelty required that a prior art document disclosed all claimed features in combination.

The feature of claim 1 "electrostatically bound" was always present in the claims of the opposed patent. The opposed patent disclosed a method for testing whether an ionic agent was electrostatically bound to the PC

groups as well as the conditions favorable for achieving high uptake of the ionic agent in the contact lens body. It was clear that the "electrostatic binding" was not necessarily an implicit feature of HBP6. It was therefore only normal for a patentee to question whether a feature of the claims was disclosed in the prior art.

Finally, in order to show that claim 1 was novel over HBP6, it was sufficient to argue that a single feature of claim 1 was not disclosed in the prior art. In the present case, the patent proprietor relied on the argument that multiple selections were necessary to arrive at the subject-matter of claim 1. However, the Board did not follow this reasoning in its preliminary opinion, resulting in a change of circumstances that forced the patentee to point to other distinguishing features between claim 1 and HBP6.

**(b) Auxiliary requests 1-5**

**(i) Novelty over HBP6**

The arguments put forward for the main request applied *mutatis mutandis* to auxiliary requests 1-5.

**(c) Auxiliary request 6**

**(i) Admittance**

In its statement of grounds of appeal, appellant 2 initially raised an objection of lack of novelty based on HBP6 in combination with HBP16. However, in its communication under Rule 15(1) RBPA, the Board's objection was based on HBP6 alone.

The objection based on HBP6 alone was a new objection and constituted an amendment of the appeal case. Appellant 1 was therefore entitled to react thereto by filing a new request.

Moreover auxiliary request 6 was only based on features of the claims as granted and clearly overcame the objection of lack of novelty over HBP6 alone without creating new issues.

Auxiliary request 6 should therefore be admitted to the appeal proceedings.

XVI. The arguments of appellant 2, insofar as relevant to the decision, may be summarised as follows:

**(a) Main request**

**(i) Novelty over HBP6**

Claim 32 of HBP6 disclosed a package including a liquid a contact lens comprising PC groups. Furthermore the description of HBP6 mentioned that the liquid could include CMC corresponding to a polyanionic agent (b) according to claim 1. Hence a single selection (selection of CMC as additive in the liquid) was necessary to arrive at the subject-matter of claim 1.

Therefore claim 1 lacked novelty over HBP6.

**(ii) Admittance of the new line of defence**

During opposition and appeal proceedings appellant 1 never contested that the features of claim 1 were individually disclosed in HBP6 but only claimed that multiple selections were necessary to arrive at the

subject-matter of claim 1. With letter of 9 December 2021 appellant 1 argued for the first time that HBP6 did not disclose a contact lens wherein the PC groups were "electrostatically bound" to the CMC as ionic agent. This new line of defence was not justified and constituted a change of the appeal case requiring from appellant 2's side to carry out further investigations.

Furthermore, appellant 1 misinterpreted the objection of lack of novelty raised initially by appellant 2 in its statement of grounds of appeal. It was clear that this objection was based on HBP6 alone. The reference to HBP16 was only a typing error. Therefore the circumstances of the appeal did not justify the admittance of the new line of defence in the appeal proceedings.

**(b) Auxiliary requests 1-5**

**(i) Novelty over HBP6**

The arguments put forward for the main request applied *mutatis mutandis* to auxiliary requests 1-5.

**(c) Auxiliary request 6**

**(i) Admittance**

Appellant 1 misinterpreted the objection of lack of novelty raised initially by appellant 2 in its statement of grounds of appeal. It was clear that this objection was based on HBP6 alone. The reference to HBP16 was only a typing error. Therefore the filing of auxiliary request 6 was not justified by the circumstances of the appeal.

Moreover claim 1 of auxiliary request 6 included features which never played a role in the appeal proceedings but raised new issues under Article 123(2) EPC.

Therefore, auxiliary request 6 should not be admitted to the appeal proceedings.

## **Reasons for the Decision**

Main request

1. Novelty over HBP6

1.1 Admittance of a new line of defence

1.1.1 In its statement of grounds of appeal, appellant 2 argued that claim 1 was anticipated by HBP6 and in particular by the disclosure of the hydrogel contact lens comprising phosphorylcholine groups disclosed in claim 32 dependent on claim 16 read in combination with the passage on column 7, line 29 *et seq.* (see statement of grounds, page 12, point 7). Specifically appellant 2 contested the finding of the opposition division according to which multiple selections were necessary to arrive at the subject-matter of claim 1 (see contested decision, point 1.5.4).

In its rejoinder to the statement of grounds of appellant 2, appellant 1 justified why the decision of the opposition division would be correct in view of the multiple selections.

Furthermore, in reply to the preliminary opinion of the Board, appellant 1 also argued that HBP6 did not disclose a contact lens wherein the ionic agent was "electrostatically bound" to the PC groups (see letter of 9 December 2021, page 2, penultimate paragraph to page 4, first paragraph).

Appellant 2 requests that this new line of defence (as set out in appellant 1's letter of 9 December 2021) not be admitted in the appeal proceedings.

- 1.1.2 The notification of the summons to oral proceedings is dated 25 June 2021, i.e. after the entry into force of the revised version of the Rules of Procedure of the Boards of Appeal on 1 January 2020. Therefore, in view of the transitional provisions laid out in Article 25 (1) and (3) RPBA 2020, Article 13 RPBA 2020 applies to the present case.

The admittance of an amendment to the appellant 1's case is therefore subject to the provisions of Article 13(2) RPBA 2020, which provide that amendments to a party's case made after notification of oral proceedings are not to be taken into account unless exceptional circumstances, justified by cogent reasons, exist.

The test under Article 13(2) RPBA 2020 is a two-fold one. The first question is whether the submission objected to is an amendment to a party's appeal case. If that question is answered in the negative, then the Board has no discretion not to admit the submission. If, however, that question is answered in the positive, then the Board needs to decide whether there are exceptional circumstances, justified by cogent reasons, why the submission is to be taken into account.

- 1.1.3 The first question to be answered by the Board is therefore whether the line of defence based on the alleged missing feature "electrostatically bound" constitutes an amendment of appellant 1's case.

An amendment to a party's appeal case is a submission which is not directed to the requests, facts, objections, arguments and evidence relied on by the party in its statement of grounds of appeal or its reply. In other words: it goes beyond the framework established therein. See T 247/20, Reasons 1.3.

With regard to the objection of lack of novelty over HBP6, the opposition division held that multiple selections were necessary to arrive at the subject-matter of claim 1: selection of a polyanionic polymer according to claim 1 and selection of a contact lens comprising PC groups (see contested decision, point 1.5.4). This line of defence was followed by appellant 1 during opposition proceedings as well as in appeal proceedings (see minutes of the oral proceedings before the opposition division, point 3.1 and rejoinder to the statement of grounds of appeal, points 4.1 to 4.4).

Before notification of the preliminary opinion of the Board, it was never disputed that the features of claim 1 were disclosed individually in HBP6. Specifically, it was not disputed that, if the ionic agent of HBP6 was contacted with the PC-containing contact lens of HBP6, the ionic agent would then necessarily become "electrostatically bound" to the PC groups. It was only with the letter of 9 December 2021 that appellant 1 contested for the first time in appeal proceedings that HBP6 disclosed that the ionic agent was



"electrostatically bound" to the PC groups of the contact lens.

Thus, whereas the contested decision and the grounds of appeal only pertained to the question of whether or not the features of claim 1 were disclosed in combination in HBP6, appellant 1 contested for the first time that a particular feature of claim 1 was disclosed at all.

This new line of defence of appellant 1 was not part of the opposition proceedings or appeal proceedings (at the outset of the appeal). In the Board's view, it opens questions which were not dealt with by the opposition division or by appellant 2 (neither in the statement of grounds for appeal nor in the reply thereto). In particular, the admission of the new line of defence into the proceedings at this late stage of the appeal proceedings would deprive appellant 2 of the opportunity to provide additional evidence regarding the presence of electrostatic binding of CMC with the PC groups of the contact lens without requiring a postponement of the oral proceedings. The discussion initiated by the new line of defence would thus raise complex questions and go beyond the initial factual framework of the opposition and appeal proceedings.

During oral proceedings, appellant 1 relied for the first time on HBP16, HBP17, HBP14b, HBP20 and Decl-YS2 as supporting evidence for the argument that the combination of CMC and a PC containing lens would not necessarily and inevitably lead to an electrostatic binding as defined in the patent (see paragraphs [0009] and [0015]). While the reference to these documents can be seen as late, the Board does not have to take a decision on the admittance of this new argument, because the question to be answered is not whether HPB6

discloses directly and unambiguously the feature "electrostatically bound" but whether the new line of defence may be admitted to the proceedings. In other words, the Board does not dispute that the new line of defense may have merit but only contests the admittance of the new line of defence at a late stage of the proceedings.

Appellant 1 further argued that novelty could only be denied if all features of claim 1 were disclosed in the prior art. Therefore all features of claim 1 were part of the discussion from the onset of the opposition proceedings.

While the requirements for novelty are acknowledged by the Board, it is nevertheless the responsibility of appellant 1 to explain why the novelty objection of appellant 2 is incorrect and thereby to present a complete case (Article 12(3) RBPA 2020). If the disclosure of a specific feature is not objected to either in opposition proceedings or at the beginning of the appeal proceedings, it constitutes a change of the factual framework of the appeal to contest it at a later stage.

For these reasons, the Board considers that the new line of defence of appellant 1 invoking a new distinguishing feature (which was never contested in the course of the opposition proceedings and at the outset of the appeal, raises complex issues and would require additional evidence from appellant 2) is a significant amendment of appellant 1's case.

- 1.1.4 The second question to be answered is whether there are exceptional circumstances, supported by cogent reasons,

which justify the admittance of the new line of defence in the appeal proceedings.

- (a) According to appellant 1, the initial objection of lack of novelty raised by appellant 2 was based on document HBP6 in combination with HBP16 (third paragraph from the end of page 2 of the letter of appellant 1 dated 9 December 2021). It was only in the preliminary opinion of the Board that a new objection of lack of novelty based on HBP6 alone was raised. This new objection would justify that appellant 1 had to provide further arguments.

The Board cannot follow the justification of appellant 1 for the following reasons:

Contrary to appellant 1's view, the statement of grounds of appeal of appellant 2 addresses lack of novelty of claim 1 of the main request on the basis of HBP6 alone (see statement of grounds of appeal of appellant 2, page 12, last paragraph to page 13, sixth paragraph). That passage mentions the disclosure of an hydrogel contact lens comprising phosphorylcholine groups disclosed in claim 32 dependent on claim 16 of HBP6 read in combination with the passage on column 7, line 29 *et seq.* Page 13 of the statement of grounds of appeal of appellant 2 indeed contains an additional reference to document HBP16 in a later paragraph but it is apparent that the novelty objection of appellant 2 is not limited to the combination of HBP6 and HBP16 only, especially since the conclusion of appellant 2 on novelty only refers to HBP6. Furthermore, appellant 2 challenged the contested decision, which concerned a novelty objection over HBP6 alone (see contested decision, points 1.5.2-1.5.4).

Therefore the Board considers that the objection of lack of novelty based on HBP6 alone was already part of the opposition proceedings and it was addressed again by appellant 2 in its statement of grounds of appeal. For this reason the new line of defence brought forward by appellant 1 cannot be considered a reaction to an objection raised for the first time by the Board since it was present at the onset of the appeal proceedings.

(b) Appellant 1 further submitted that the Board's preliminary opinion did not follow the contested decision. In particular, the Board did not agree that multiple selections were necessary to reach the subject-matter of claim 1. This constituted a change of circumstances that forced the patent proprietor to point to other distinguishing features between claim 1 and HBP6.

The Board does not consider that this second explanation qualifies as exceptional circumstance within the meaning of Rule 13(2) RBPA 2020. Indeed it is established case law that a preliminary opinion provided by a Board is predominantly intended to give the parties an opportunity to thoroughly prepare their arguments in response to it but not to file new submissions. Amendments submitted in response to such a preliminary opinion cannot give rise to "exceptional circumstances" within the meaning of Article 13(2) RBPA 2020. See T2271/18, Reasons 3.3. The fact that a Board may ultimately not be convinced by a party's previous submission is a foreseeable possibility for the party and therefore does not constitute a new, and certainly not an unexpected, development of the proceedings. See T 140/15, Reasons 4.1.7.

(c) For these reasons, the Board cannot recognise any exceptional circumstances justifying the admittance of the new line of defence into the proceedings.

1.1.5 Hence, the new line of defence is not admitted into the proceedings (Article 13(2) RPBA 2020).

1.2 Assessment of novelty over HBP6

Appellant 2 argued that the subject-matter of claim 1 was not novel over HBP6. In particular claim 32 dependent on claim 16 of HBP6 disclosed a hydrogel (a) according to claim 1 while the description (see HBP6, column 7, line 31) mentioned that the liquid might include CMC corresponding to a polyanionic agent (b) according to claim 1. Hence claim 1 would lack novelty over D1.

Appellant 1, in agreement with the opposition division, held that multiple selections were necessary to arrive at the subject-matter of claim 1:

- selection of a lens comprising a phosphorylcholine group,
- selection of a liquid which is a buffered saline solution or comprises a surfactant and
- selection of CMC as wetting agent.

Besides, a PC-containing lens according to HBP6 would not require a wetting agent such as CMC.

The Board cannot follow the appellant 1's arguments for the following reasons:

Claim 32 of HBP6 discloses a package comprising a lens immersed in a packaging liquid, said lens comprising PC groups. Even though other forms of lenses immersed in a packaging liquid are also disclosed in HBP6 (appellant 1 mentioned the lens of claim 30 of HBP6 in the fourth paragraph of his letter of 9 December 2021), the disclosure of claim 32 dependent on claim 16 stand on its own as an individualised embodiment of HBP6 and is, as such, not a selection within HBP6 towards a contact lens (a) according to claim 1 immersed in a solution.

The packaging liquid is further specified in the description of HBP6 where it is disclosed that the liquid can contain surfactants and other agents (see column 7, lines 17-33). In the list of possible agents the use of CMC is mentioned (see column 7, line 31). It was not disputed between the parties that CMC corresponded to an anionic polymeric agent according to claim 1. The only selection within HBP6 to arrive at the subject-matter of claim 1 is therefore the choice of CMC as an agent in the packaging liquid in the list of column 7.

Contrary to the appellant 1's view, HBP6 does not mention that CMC is related to a specific contact lens or to a specific solution. Instead the general passage in column 7, lines 17-33 implies that CMC as an agent of the liquid may be used in combination with any packaging solution and any contact lens within the ambit of HBP6 and therefore with the disclosure of claim 32 dependent on claim 16. Thus, HBP6 alone does not teach away of combining a PC containing lens with CMC (even if CMC were used as a wetting agent and the lens were already wetttable).

For these reasons, the Board considers that only one selection is necessary to arrive at the subject-matter of present claim 1. The subject-matter of claim 1 is therefore not novel over HBP6.

Auxiliary requests 1 to 5

2. Novelty over HBP6

Both parties in appeal had no additional and separate arguments on novelty for claim 1 of auxiliary requests 1 to 5.

Claim 1 of said requests only differs from claim 1 of the main request in that the ionic agent was limited to more specific embodiments (reference is made to point XIV. of the facts and submissions). However in auxiliary requests 1 to 5 (as well as in the main request), the ionic agent could be "an anionic polymer comprising at least 4 anionic groups". For the main request, it was not disputed that the CMC of HBP6 corresponded to said anionic polymer. Thus, the Board has no reason to come to a different conclusion in view of auxiliary requests 1 to 5 (see point 1.2 of the present decision).

Therefore the subject-matter of claim 1 of auxiliary requests 1 to 5 lacks novelty over HBP6.

Auxiliary request 6

3. Admittance

Auxiliary request 6 was filed by appellant 1 with its letter of 9 December 2021, after the Board's communication pursuant to Article 15(1) RPBA 2020.

Appellant 2 requests that auxiliary request 6 not be admitted into the proceedings.

The admittance of the auxiliary request 6 is subject to the provisions of Article 13(2) RPBA 2020, which provide that amendments to a party's case made after notification of oral proceedings are not to be taken into account unless exceptional circumstances, justified by cogent reasons, exist.

Appellant 1 justified the filing of auxiliary request 6 with the following arguments:

- (a) It was only in the preliminary opinion of the Board that a new objection of lack of novelty based on HBP6 alone was raised. This new objection would justify the filing of a new request.
- (b) The Board did not agree that multiple selections were necessary to reach the subject-matter of claim 1. This constituted a change of circumstances that forced the patent proprietor to file a new request.

As detailed above (see reason 1.1.4), the Board cannot follow the appellant 1's arguments for the following reasons:

With regard to argument (a), the Board considers that the objection of lack of novelty based on HBP6 alone was part of the opposition proceedings and was addressed again by appellant 2 in its statement of grounds of appeal. For this reason the filing of auxiliary request 6 cannot be considered a reaction to an objection raised for the first time by the Board.



With regard to argument (b), the fact that a Board may not be convinced by a party's previous submission is a foreseeable possibility for the party and therefore does not constitute a new, and certainly not an unexpected, development of the proceedings.

For these reasons, the Board cannot recognise any exceptional circumstances justifying the admittance of auxiliary request 6 into the proceedings.

Hence, auxiliary request 6 is not admitted into the proceedings (Article 13(2) RPBA 2020).

4. Since none of the requests of appellant 1 is allowable, the patent is to be revoked.

## 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:



B. ter Heijden

D. Marquis

Decision electronically authenticated