

Internal distribution code:

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

**Datasheet for the decision
of 17 February 2022**

Case Number: T 0479/20 - 3.2.07

Application Number: 13773257.4

Publication Number: 2906474

IPC: B65B31/02

Language of the proceedings: EN

Title of invention:

APPARATUS WITH FACING BELL MEMBERS, FOR MODIFIED ATMOSPHERE
PACKAGING OF PRODUCTS PLACED IN TRAYS

Patent Proprietor:

Gruppo Fabbri Vignola S.p.A.

Opponent:

MULTIVAC Sepp Haggemüller SE & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54(3), 83, 123(2)
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - lack of patentability (yes)

Novelty - (no)

Amendment after summons - cogent reasons (no) - exceptional
circumstances (no) - taken into account (no)

Sufficiency of disclosure - (yes)

Amendments - added subject-matter (no)

Decisions cited:

T 0019/90, T 0431/03, T 1408/04, T 1389/10, T 1946/10,

T 2619/11

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 0479/20 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 17 February 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: Gruppo Fabbri Vignola S.p.A.
(Patent Proprietor) Via per Sassuolo 1863
41058 Vignola (IT)

Representative: Manna, Sara
Società Italiana Brevetti S.p.A.
Piazza di Pietra, 39
00186 Roma (IT)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 January 2020
rejecting the opposition filed against European
patent No. 2906474 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Cano Palmero
V. Bevilacqua

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 against European patent No. 2 906 474 as granted and requested revocation of the patent in suit.
- II. The opposition was directed against the patent in its entirety and based on the grounds for opposition pursuant to Articles 100(a) and (b) EPC (lack of novelty and inventive step, lack of sufficiency of disclosure).
- III. The patent proprietor (respondent) submitted with its reply to the statement of grounds of appeal auxiliary requests 1 to 10, which correspond to auxiliary requests 2 to 11 filed during the opposition proceedings.
- IV. With letter of 2 October 2020, the appellant submitted arguments and further requested that auxiliary requests 1 to 10 not be admitted into the proceedings.
- V. The respondent filed observations with letter dated 3 November 2020 in response to the letter of the appellant of 2 October 2020.
- VI. In preparation for oral proceedings, scheduled upon the parties' requests, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the decision was likely to be set aside, and that the case could be remitted to the opposition division with the order to maintain the

patent with the claims according to auxiliary request 1.

VII. Both parties responded on the substance to the Board's communication pursuant to Article 15(1) RPBA 2020, the appellant with letter of 4 October 2021 and the respondent with letter of 19 November 2021, whereby the appellant conditionally requested that the case be remitted to the opposition division for further prosecution.

VIII. Oral proceedings before the Board took place on 17 February 2022. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

IX. The final requests of the parties are as follows,
for the appellant:

that the decision be set aside and
that the patent be revoked, and
in the event that the Board intends not to admit
any lines of attack against the main request or,
especially against any of the auxiliary
requests,
that the case be remitted to the first instance for
the Opposition Division to deal with these lines of
attack - especially where these lines of attack
have already been raised in the first instance or
could not have been raised in the first instance.

for the respondent:

that the appeal be dismissed, *i.e.* that the patent
be maintained as granted,

or, in the alternative,
when setting aside the decision under appeal, that
the patent be maintained in amended form according
to one of the sets of claims filed as auxiliary
requests 1 to 10 with the reply to the statement of
grounds of appeal, which correspond to auxiliary
requests 2 to 11 filed during the opposition
proceedings.

X. The lines of arguments of the parties relevant for the
present decision are dealt with in detail in the
reasons for the decision. These lines of arguments are
focused on following points:

- Review of the decision under appeal on the ground of
opposition under Articles 100(a) and 54(3) EPC with
regard to the patent as granted;
- Admittance under Article 13(2) RPBA 2020 of the
objections of lack of inventive step of claim 1
according to auxiliary request 1;
- Objections under Articles 83 and 123(2) EPC with
respect to auxiliary request 1.

XI. Independent **claim 1** according to the **patent as granted**
(main request), with the feature identification used by
the parties, reads as follows:

- "A. Apparatus with facing bell members (1, 8),
- B. for modified-atmosphere packaging of products (M)
placed in trays (V, V'),
- C. which comprises means for the cyclic positioning of
an extended portion of barrier film (H) between the
said two open bell members and over trays
- D. housed with gasket means (13) in the seats (110) of
the bottom bell member,

- E. which also comprises means (F1, F2) for moving the said bell members towards each other, to close between them the said film (H)
 - F. and to close under and at a suitable distance from this latter the edge of the tray (V, V'),
 - G. apparatus of the type that, when the bell members are closed, they form therein two volumes not directly communicating,
 - H. one of which is formed by the internal chambers (2, 9) of the same bell members that communicate freely with each other via circuits (16, 3), for example peripheral,
 - I. while the other volume is formed by the main chambers (P) of the trays (V, V') with the product (M),
 - J. wherein the said chambers (P) are connected with a portion of their perimeter to holes (26) and to a dedicated circuit (27, 127, 227) for the controlled introduction of process gases
 - K. and are connected with another portion of their same perimeter to discharge holes (24, 124) for implementation of the air extraction and washing steps,
- characterized by
- L. comprising internal valve means to enable the main chambers (P) of the trays to communicate, or not, with the said internal chambers (2, 9) of the bell members,
 - M. to balance the differences in pressures between the said two volumes (2, 9 and P) during the sequence of steps of the vacuum and exchange cycle of the gases required to produce packaging of the type known as Modified Atmosphere Packages (MAP)."

XII. Claim 1 according to auxiliary request 1 corresponds to claim 1 as granted with the features of claim 2 as granted incorporated at the end of the claim, namely:

"N. wherein said balancing valve means are of one-way type and are automatic, as they are controlled by the differences in pressure existing upstream and downstream thereof."

XIII. As the wording of auxiliary requests 2 to 10 is not relevant for this decision, it is not necessary to reproduce it here.

Reasons for the Decision

1. *Patent as granted - Novelty in view of document D8 (WO 2013/004699 A1), Articles 100(a) and 54(3) EPC*
- 1.1 It is common ground that document D8 discloses features A to K. The features under dispute are thus features L and M.
- 1.2 Feature L, "internal valve means"
- 1.2.1 The opposition division found in point 3.4.1 of the decision under appeal that D8 fails to disclose "internal valve means" in the sense of feature L of claim 1 as granted. According to the opposition division, the drawings of the contested patent show that these valve means are indeed housed within the space enclosed by the internal bell members. Furthermore when reading a claim the same terms have to be given the same meanings. Feature H refers to the volume enclosed by the bell members by calling it

"internal chambers", thus referring to something which is really located within an enclosure. Therefore, the term "internal valve means" designates valve means enclosed by the internal chambers of the bell members. The respondent supports this view and further points out that this interpretation is consistent with the description and the drawings, which present the valve means, in particular the membrane valve as defined by the film (H) and the holes (24, 124), inside the bells (e.g. figures 1-2 and 4-7; paragraph [0002], lines 45-50 and 50-57; paragraph [0007], lines 37-52). Such an interpretation in view of the description and the drawings is consistent with the established jurisprudence (see Case Law of the Boards of Appeal [CLB], 9th edition 2019, II.A.6.3.3). Therefore, the term "internal" can only denote a volume or space "inside the bells", so that D8 does not anticipate such **internal** valve means.

- 1.2.2 The Board disagrees. As correctly put forward by the appellant, the feature "internal" in claim 1 as granted must be read as requiring merely that the valve means are internal to the apparatus, but not necessarily inside the bell members. The Board underlines that the wording of claim 1 as granted is clear in this respect, its subject-matter makes technical sense and is devoid of any technical incorrectness or inaccuracies, so that the description and the figures cannot be used to interpret the claim, including the term "internal", in any other way. A particular interpretation of the same term in the description and the drawings is not a valid reason to ignore the clear linguistic structure of a claim and to interpret it differently (see CLB, *supra*, II.A.6.3.1, third paragraph, and decision T 431/03, point 2.2.2 of the reasons). The Board is thus of the

view, that D8 discloses an apparatus with "internal" valve means 18, 28 in the sense of claim 1 as granted.

1.3 Feature L, "to communicate"

1.3.1 In point 3.4.2 of the decision under appeal, the opposition division reached the conclusion that the feature "to communicate, or not, with" has to be seen in the context of the whole disclosure of the patent and interpreted in the sense that this term not only requires the provision of a pathway along which gas could flow but the flow of gas as such, whereby this flow of gas comprises a single stream of gas in one direction only flowing from one end to the other (whereby D8 discloses two streams of gas in the same direction to the same end point, namely the buffer (121)).

1.3.2 The Board cannot follow this reasoning. As acknowledged by the opposition division in point 3.4.2.d, the term "communicating or not" is unambiguous, and cannot be understood in any other way than that the two "communicated" parts are fluidically connected and that there are means provided that potentially enable the establishment of a flow of gas from one part to the other. Again, in the presence of a clear technical term, the description and the figures cannot be used to interpret the claim. In the decisions cited by the respondent, *inter alia* T 1946/10 and T 1408/04, the description and the drawings were used to interpret unclear technical expressions or to clarify ambiguities in the claims, which is a situation different from the one of the present case, in which the claims are clear. The Board is thus of the view, that D8 discloses an apparatus comprising internal valve means 18, 28 to enable the main chambers (P) of the trays to

communicate, or not, with the said internal chambers (2, 9) of the bell members, in the sense of feature L of claim 1 as granted.

1.4 Feature M

1.4.1 The opposition division held in point 3.4.3 of the decision under appeal that feature M does not only require that the apparatus **is potentially suitable** to carry out the balancing of the differences in pressures between the said two volumes (2, 9 and P) during the sequence of steps of the vacuum and exchange cycle of the gases but also that that the apparatus **has to be configured** to carry this balancing out. According to the opposition division the apparatus of document D8 is not configured to do so, and therefore feature M is not anticipated by this document. The respondent follows the view of the opposition division and also remarks that claim 1 has to be read by a person skilled in the art with a mind willing to make technical sense out of it and to arrive at an interpretation which is technically sensible and takes into account the whole disclosure of the patent. The expression "to balance" clearly indicates the effective capability of the apparatus to perform that function, so that not only a generic suitability is required, but also physical limitations and a specific configuration are required by the claim. The respondent, referring to T 1389/10, concludes that since D8 would require modifications for the stated purpose of balancing, such as reversing the sense of the valves and removing the vacuum circuit, it cannot be considered as anticipating the feature M of granted claim 1.

1.4.2 The Board is not persuaded by this reasoning and is of the view that the apparatus of D8 is suitable to

provide a balance of the differences in pressure between the volumes in both vacuum and gas exchange steps, namely by regulating accordingly the valves 28 and 18 connected by the element 121 (see page 7, lines 1-5). In this respect, the Board specifically notes that D8 does not further specify the types of valves used, so that the argument that the sense of the valves must be reversed in order to fall within the scope of the claim is not convincing. Furthermore, the Board is not convinced that the apparatus of D8 with a vacuum circuit would still not anticipate the subject-matter of claim 1 as granted. In view of the above, the arguments brought forward by the respondent and present in the decision under appeal that the apparatus of D8 is not apt to perform the the balancing of pressures, appear to be mere allegations. Contrary to the situation in decision T 1389/10, the apparatus of D8 is suitable for the stated use and furthermore would require, under the Board's view, no further physical modification to provide a pressure balance in both the vacuum and gas exchange steps. As correctly put forward by the appellant, D8 even specifically describes this suitability at least in the vacuum phase in page 7, line 5. In view of the above, the Board concludes that D8 also anticipates feature M of claim 1 as granted.

- 1.5 In summary, document D8 anticipates all features of claim 1 as granted, so that the requirements of novelty (Article 54(3) EPC) are not met. Contrary to the findings of the opposition division, the ground of opposition according to Article 100(a) EPC prejudices the maintenance of the patent as granted.

2. *Auxiliary request 1 - Admittance of the objections under Article 56 EPC, Article 13(2) RPBA 2020*

2.1 The appellant argued for the first time at the oral proceedings before the Board that the subject-matter of claim 1 of auxiliary request 1 lacked inventive step in view of document D6 (**DE 10 2007 047 058 A1**) as closest prior art in combination with the teachings of either D1 (**WO 2011/124548 A1**) or D5 (**US 3,481,100**).

2.2 These lines of attack constitute an amendment of the appellant's case which has been made after notification of the summons to oral proceedings, and therefore its admittance is subject to Article 13(2) RPBA 2020, which states that such an amendment shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified by cogent reasons by the party concerned.

2.3 The appellant did not provide any reasons of any kind for making these objections for the first time at the oral proceedings before the Board. In the absence of any exceptional circumstances the Board concludes that these objections on inventive step are not admitted into the proceedings under Article 13(2) RPBA 2020.

3. *Auxiliary request 1 - Sufficiency of disclosure, Article 83 EPC*

3.1 The appellant argued in page 5, paragraph 2, of its letter of 2 October 2020 that claim 1 of auxiliary request 1 does not meet the requirements of Article 83 EPC since the term "said balancing valve means" introduced into claim 1 of auxiliary request 1 does not have any antecedent.

3.2 The Board disagrees. Quite apart from the fact that the Board is convinced that the alleged lack of antecedent could at the most amount to an unclear term, the appellant has not provided verifiable facts substantiating serious doubts that the skilled person would be not able to carry out the invention, as it is required for a successful objection on sufficiency of disclosure (see CLB, *supra*, II.C.9, first two paragraphs, in particular in relation to T 19/90). In addition, the Board agrees with the respondent that the skilled person would not be confronted with any undue burden when carrying out the invention under any possible interpretation of the claim.

3.3 The Board thus concludes that auxiliary request 1 meets the requirements of sufficiency of disclosure under Article 83 EPC.

4. *Auxiliary request 1 - Added subject-matter, Article 123(2) EPC*

4.1 The appellant argued that, since original dependent claims 4, 5, 9 and 10 solely depended on claim 1, and therefore had not been disclosed in conjunction with original claim 2, the dependent claims 3, 4, 8 and 9 according auxiliary request 1 contravene the requirements of **Article 123(2) EPC**. In particular, as a result of the incorporation of claim 2 into claim 1 as originally disclosed, claims 3, 4, 8 and 9 of auxiliary request 1 now include the features of original claim 2, whereas these combination of features was not originally disclosed. In addition, the separate features of these claims are not mentioned in the description. It follows that the skilled person is presented with new technical information other than originally disclosed in view of auxiliary request 1.

- 4.2 The Board is not persuaded by the arguments of the appellant for the following reasons.
- 4.2.1 It is established jurisprudence that, when assessing the allowability of amendments under Article 123(2) EPC, the so-called "gold standard" is to be applied, namely to assess what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed. It is also established case law that the structure of the claims should not be disproportionately considered in detriment of what was really disclosed to the skilled person (see CLB, *supra*, II.E.1.3.1, and T 2619/11). In this respect, the Board additionally notes that there is no apparent contradiction or incompatibility among the features of original claim 2 and those of original claims 4, 5, 9 and 10.
- 4.2.2 In the case at hand, and as correctly put forward by the respondent, the application as originally filed deals with **one single embodiment** of the claimed apparatus in which the features of the dependent claims are presented in combination (see the original passages equivalent to the description paragraphs [0002], [0006] and [0007] of the patent as granted).
- 4.3 In view of the above, the Board is convinced that the skilled person is not presented with new technical information extending beyond the original disclosure due to the new combination of features, so that the claims according to auxiliary request 1 meet the requirements of Article 123(2) EPC.

5. *Amendment of the description*

During the oral proceedings before the Board, the respondent submitted a new description page 2 in order to bring the description in conformity with the set of claims according to auxiliary request 1. The appellant confirmed it had no objections with respect to this amended description.

6. *Conclusions*

6.1 In view of the above, the Board concludes that the appellant has convincingly demonstrated the incorrectness of the decision under appeal in its findings that the ground of opposition pursuant to Article 100(a) EPC in combination with Article 54(3) EPC does not prejudice the maintenance of the patent as granted. Consequently, the decision under appeal has to be set aside.

6.2 Additionally, none of the admissibly raised objections made by the appellant prejudices the maintenance of the patent in amended form in accordance with auxiliary request 1, so that a patent can be maintained as amended in that version.

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:

Claims:

1 to 9 according to auxiliary request 1 filed with letter dated 5 August 2020,

Description, pages:

2 received during oral proceedings of 17 February 2022,
3-6 of the patent specification,

Drawings, figures:

1 to 7 of the patent specification.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated