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

Case Number: T 0776/20 - 3.2.07

Application Number: 14739936.4

Publication Number: 3071485

IPC: B65B31/00, B65B31/04,
B65B9/067, B65B51/30

Language of the proceedings: EN

Title of invention:

FORM FILL SEAL PROCEDURE FOR PACKAGING ARTICLES IN BAG FILLED
WITH AIR

Patent Proprietor:

World Licenses B.V.

Opponent:

Boost Holding AG

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 83, 84, 123(2)
RPBA 2020 Art. 12(2), 12(6)

Keyword:

Amendments - allowable (yes) - extension beyond the content of the application as filed (no)

Claims - interpretation of ambiguous terms - clarity (yes)

Sufficiency of disclosure - (yes)

Novelty - (yes)

Late-filed objection - should have been submitted in first-instance proceedings (yes) - admitted (no)

Inventive step - (yes)

Decisions cited:

G 0003/14, T 0182/89, T 0019/90

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 0776/20 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 4 May 2022

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
27 January 2020 concerning maintenance of the
European Patent No. 3071485 in amended form.**

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 to maintain European patent No. 3 071 485 in amended form on the basis of the then auxiliary request 1.
- II. The opposition was directed against the patent in its entirety and based on all grounds for opposition pursuant to Article 100(a) to (c) EPC.
- III. In preparation for oral proceedings, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the appeal was likely to be dismissed.
- IV. Oral proceedings before the Board took place on 4 May 2022. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.
- V. The final requests of the parties are as follows,

for the appellant

that the decision under appeal be set aside and
that the patent be revoked in its entirety;

for the respondent (patent proprietor)

that the appeal be dismissed, *i.e.* that the patent
be maintained in the amended form held by the

opposition division to meet the requirements of the EPC,

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 7 with the reply to the statement of grounds of appeal.

VI. The lines of arguments of the parties are dealt with in detail in the reasons for the decision. They are focused on the following aspects:

- added subject-matter, clarity and sufficiency of disclosure of claim 1 of the patent as maintained by the opposition division (Articles 123(2), 84 and 83 EPC);

- novelty of the subject-matter of claim 1 of the patent as maintained by the opposition division over the content of the disclosure of documents D2, D4 and D12 (Article 54 EPC);

- admittance of the inventive step objections based on the following combinations of documents:

D4 as closest prior art in combination with the teaching of D5,

D2 as closest prior art in combination with the teaching of D4

(Article 12(6), second sentence, RPBA 2020);

- inventive step of the subject-matter of claim 1 of the patent as maintained by the opposition division (Article 56 EPC) over the following combinations of documents:

D1, D5 or D6 as starting point in combination with the teaching of D2 and

D1 as closest prior art in combination with the teaching of D4.

VII. Independent **claim 1** according to the patent as maintained by the opposition division (main request) with the feature analysis used by the parties reads as follows:

- 1.A** Procedure for packaging articles,
- 1.A1** wherein the articles are not immediately recognizable from its packaging, comprising the steps of:
 - 1.B** providing a packaging sheet having a longitudinal extension and two longitudinal edges;
 - 1.C** moving said packaging sheet forward along a direction of forward movement substantially parallel to said longitudinal extension;
 - 1.D** arranging a plurality of articles on said packaging sheet at a reciprocal distance along said direction of forward movement;
 - 1.E** moving said longitudinal edges close to each other to form a substantially tubular section of said packaging sheet having an open extremity and said articles inside;
 - 1.F** blowing air in said substantially tubular section through said open extremity;
 - 1.G** sealing said longitudinal edges together longitudinally;
 - 1.H** sealing transversally said substantially tubular section downstream and upstream of each of said articles to form a plurality of closed packages
 - 1.H1** containing said articles and
 - 1.H2** substantially swollen with air

1.H3 so as to avoid that potential buyers can immediately recognize the article without removing the package.

VIII. Since the wording of the claims according to auxiliary requests 1 to 7 is not relevant for the present decision, there is no need to reproduce it here.

Reasons for the Decision

1. *Patent as maintained by the opposition division - Amendments, Article 123(2) EPC*

1.1 The appellant argued in points C.1 and C.2 of the statement of grounds of appeal that the amendment made in claim 1 of the patent as maintained by the opposition division, by replacing the originally claimed expression

"Procedure for packaging articles..."

with

"Procedure for packaging articles, wherein the articles are not immediately recognizable from its packaging,..."

results in an unallowable intermediate generalization which contravenes the requirements of Article 123(2) EPC.

1.1.1 The basis indicated by the respondent for such a feature does not support, according to the appellant, the above identified amendments.

This alleged basis is the original description page 1, lines 15 to 18, where it is specified that

"...in some cases the article contained in the bag consists of a so-called **"surprise product"**, that is, **an object that is distributed on the market** so as not to be immediately recognizable from its packaging and that **is discovered only after purchasing once the bag has been removed.**"

The introduction of the feature that the article is not immediately recognizable from its packaging, in combination with the omission of the other features that further characterise the "surprise product", namely that the articles are

- i) distributed on the market, and
- ii) discovered only after purchasing once the bag has been removed,

results in an unallowable intermediate generalization.

In other words, the formulation of the claim as maintained by the opposition division covers non-originally disclosed procedures for packaging articles which (while not being immediately recognizable from its packaging) are not distributed on the market and are not only discovered after purchasing once the package has been removed. For example, in the situation in which an article is packaged according to the procedure according to claim 1 as maintained by the opposition division, whereby the package contains visual graphical information of the content of the package, the article could be discovered before the purchase, contrary to the original disclosure.

- 1.1.2 The Board is not convinced by the arguments of the appellant for the following reasons.

Once a general article is packaged (such as in original claim 1), this article is either "immediately recognizable" from the package (because of graphical information on the package or because of a matching shape), or not, in which case this article is a surprise article and falls within the scope of the claim as maintained by the opposition division. The provision of graphical visual information on the package is not only absent in the wording of claim 1 as maintained, but also would come into contradiction with feature 1.A1, so that the Board is convinced that the embodiment suggested by the appellant does not fall within the subject-matter of the claim. In conclusion, by omitting the features i) and ii) in the claim, the skilled person is not confronted with new technical information as the one originally disclosed, so that the requirements of Article 123(2) EPC are not infringed.

- 1.2 The appellant further argued in point C.3 of the statement of grounds of appeal that the addition at the end of claim 1 as maintained by the opposition division (features 1.H2 and 1.H3) that the closed packages are "... substantially swollen with air so as to avoid that potential buyers can immediately recognize the article without removing the package." results also in an unallowable intermediate generalisation.

- 1.2.1 The basis indicated by the respondent for such a feature is the original page 1, lines 27 to 29, where it is further specified that the articles can can be

transported and distributed under greater safety conditions for their integrity.

The appellant argues that the introduction of the feature relating to the immediate recognition of the products in combination with the omission that the safety conditions for the integrity of the products is increased results in an infringement of Article 123(2) EPC. In particular, the requirements needed for achieving greater safety transport conditions go beyond a mere substantial swelling step of the packages.

- 1.2.2 The Board is not persuaded by this view. Indeed, as correctly found by the opposition division in point 3.2.6 of the reasons for the decision under appeal with regard to the patent as granted (see also paragraph n° 43 of the reply to the statement of grounds of appeal) the feature that the package is swollen with air necessarily implies that the safety conditions are increased, even if these safety conditions are increased by a minimal amount. In other words, it is not apparent that the fact that the package is swollen with air makes the transport and distribution of articles less safe for the packaged articles, or under which circumstances this could be the case, so that the requirement of achieving greater safety conditions is inherently achieved by the substantial swelling step. Therefore, the skilled person is not confronted by the omission of this feature with technical information which is not immediately derivable from the originally filed documents. Furthermore, the fact that this additional advantage is not present in the claim does not amount to an infringement of Article 123(2) EPC, since the claim is directed to method which needs to be defined only through its method steps and in this case

the achieved omitted advantage is a necessary consequence of these steps.

1.3 As regards the last objection of Article 123(2) EPC brought forward by the appellant in point C.3 of the statement of grounds of appeal, that claim 1 as maintained by the opposition division defines that some arbitrarily selected aims are achieved by one arbitrarily selected specific step (namely by swelling of the packages) while in the description it is disclosed that the above mentioned aims are achieved by the complete procedure, the respondent argued that this objection has been filed for the first time in appeal proceedings and requested to not admit it. On the other hand, the appellant argues in the first sentence of point C.3 of its statement of grounds of appeal that "in the decision it is not mentioned that in the opposition proceedings further issues as to Article 123(2) EPC have been addressed and discussed".

1.3.1 However, as the Board is convinced that this objection does not succeed on its merits, and that there is no infringement of Article 123(2) EPC (see point 1.3.2), the question of its admittance does not need to be addressed.

1.3.2 Indeed, the Board cannot agree that claim 1 as granted defines that only the swelling step of the packages achieves only one selected aim of the original application. On the contrary, all the method steps in the claim including among others the longitudinal seaming, transversal seaming and swelling are drafted as being mandatory so that they all necessarily contribute, in combination, to the final result, which is a method for packaging articles that are not immediately recognizable from its packaging and wherein

potential buyers cannot immediately recognize the article without removing the package, as it is stated in the claim, or as a necessary consequence, that safety and integrity of the products during storage and transportation is improved. The claimed method does therefore not leave open the possibility that only one arbitrarily selected method step achieves one or the other aim, regardless of whether this aim is mentioned in the claim or not.

2. *Patent as maintained by the opposition division - Clarity, Article 84 EPC*

2.1 The Board agrees with the appellant in that the term "immediately" was not part of the granted claims and as such is subject to an examination - according the decision G 3/14 - under Article 84 EPC.

2.2 The appellant further argues in point D of its statement of grounds of appeal that the scope of the claim is unclear since it is not defined within which time frame the article inside the package may not be recognized in order not to be "immediately" recognizable. The respondent requested to not admit this objection.

2.3 Moreover, the appellant argued during the oral proceedings before the Board that according to the description paragraphs [0006] to [0008] the term "immediately" covers also the possibility of sensing the package by touching, which leaves the skilled person in doubt on how this "immediately recognizing" should be interpreted. The respondent requested to not admit this new line of attack.

2.4 The Board disagrees with the arguments of the appellant and substantially concurs with the respondent that the skilled reader being aware of the normal meaning of the term "immediately" can clearly interpret and understand claim 1 as maintained by the opposition division. It is true that this meaning of the term "immediately" might be of a rather general nature and could encompass an undefined amount of time or even touching the package in an attempt to recognise the article inside. However, these interpretations could at the most lead to a broad scope of protection sought by the claim, which does not automatically amount to a lack of clarity (see Case Law of the Boards of Appeal [CLB], 9th edition 2019, II.A. 3.3).

2.5 In view of this, the question of admittance of the objection and of the new line of attack made for the first time during the oral proceedings before the Board is not relevant for the decision and therefore does not need to be further addressed.

3. *Patent as maintained by the opposition division - Sufficiency of disclosure, Article 83 EPC*

3.1 The appellant argued in point E of its statement of grounds of appeal that the skilled person would not be capable, in view of the content of the patent, of carrying out the invention. In particular, in point E.1 of the statement of grounds of appeal the appellant notes that the patent is silent on how it can be avoided that potential buyers can immediately recognize the article without removing the package, *i.e.*, how recognition of the articles inside the packages by human senses - including sight, hearing, smell, taste or by touching the package - is avoided simply by means of swelling the packages as it is defined in claim 1.

In point E.2 the appellant argues that the patent is silent as to how much air is required inside the packages in order to be substantially swollen compared to not being substantially swollen and that the intended aim of making the articles not recognizable until the package is opened could also be achieved without inflating air into the package. Finally, in point E.3 the appellant indicates that there is no teaching in the disclosure as to when a section is substantially tubular and when not, as required by the invention.

- 3.2 The Board is not convinced by the arguments of the appellant for the following reasons.
 - 3.2.1 According to the jurisprudence of the Boards of Appeal an objection of lack of disclosure presupposes that there are serious doubts substantiated by verifiable facts. The burden of proof is upon the opponent/appellant to establish on the balance of probabilities that a person skilled in the art, using his common general knowledge, would be unable to carry out the invention (see CLB, *supra*, II.C.9, first two paragraphs, referring to *i.a.* T 19/90 and T 182/89).
 - 3.2.2 The Board especially notes that the invention is directed to a method for packaging articles with certain method steps which include blowing air in a tubular section and sealing longitudinally and transversally the said tubular section of a packaging sheet. The result is a plurality of closed packages, swollen with air, each containing an article. The skilled reader understands from the combination of the features of the claim that the sentence "so as to avoid that potential buyers can immediately recognize the article without removing the package" merely limits the

subject-matter of the claim and the protection sought by the invention in the sense that the amount of air blown in the tubular section has to be sufficient to make the shape of the package and of the packed article different. It can be agreed with the appellant that depending on the boundary conditions such as type of article (e.g. an article that gives off a strong odour or produces a characteristic sound) and packaging material (e.g. a transparent material or a package with the information of the packed article), the articles may be immediately recognizable without removing the package, and that independent of the amount of air introduced in the packaging. The question in the present case as regards to sufficiency of disclosure is not whether the step of swelling air achieves always the effect of making the articles not immediately recognisable in all situations, but rather whether the skilled person is in place of carrying out the invention by performing the claimed method steps, including swelling air into the package, for which the protection is sought. In the absence of any serious doubts, substantiated with verifiable facts, the Board is convinced that the skilled person can carry out the invention as defined by claim 1 as maintained by the opposition division.

- 3.2.3 The objections that a skilled person would not be capable of providing a substantially swollen packaging with substantially tubular section are also not convincing. With its argumentation, the appellant seems to question the limits of the subject-matter of claim 1 set by the features "substantially swollen with air" and "substantially tubular" thereby raising rather a clarity issue, and not an objection of sufficiency of disclosure. It has to be noted that the clarity of these features that cannot be examined in view of

G 3/14, since they were part of the granted version of claim 1. Apart from this, as correctly put forward by the respondent in paragraph n° 16 of the reply to the statement of grounds of appeal, the appellant has not provided serious doubts substantiated by verifiable facts that the skilled person cannot carry out the claimed method steps thereby arriving to a sealed package with a tubular section, swollen with air.

3.2.4 The additional argument of the appellant in point E.2 of the statement of grounds of appeal that the intended aim of the invention (that the articles are not recognizable for the buyers from the outside) could also be achieved without inflating air into the package, is, in the Board's view, not relevant for the question whether the skilled person could carry out the invention (*i.e.* blow air to obtain a substantially swollen package) according to the claim.

4. *Patent as maintained by the opposition division - Novelty of claim 1, Article 54 EPC*

4.1 The appellant argued that documents **D2 (US 2,160,367 A)**, **D4 (WO 2011/064689 A1)** and **D12 (WO 2014/075940 A1)** anticipate the subject-matter of claim 1 as maintained by the opposition division.

4.2 Contrary to the appellant's view, the Board is of the preliminary opinion that none of these documents discloses at least the step of

1.D: "arranging a plurality of articles (3) on said packaging sheet (2) at a reciprocal distance (D) along said direction of forward movement (A);".

- 4.2.1 With regard to document **D2**, the appellant argued that figure 2 shows that at least some articles introduced in the tube rest directly on the flattened portion E, so that an arrangement of the articles on the packaging sheet is anticipated by this document. The Board disagrees and concurs with the respondent (see paragraph n° 104 of the reply to the statement of grounds of appeal) that the articles in **D2** are never arranged on the packaging sheet. On the contrary, the articles are dropped into an open bag formed of the packaging sheet. Such an introduction of the articles into the bags being formed in the vertical direction cannot be considered as an arrangement of a plurality of articles on the packaging sheet in the sense of the claim.
- 4.2.2 As regards **D4**, the Board is of the view that the opposition division correctly found in point 10.2.1 of the decision under appeal that the articles are not arranged on the packaging sleeve, but rather are maintained in suspension while the packaging sleeve wraps the articles from above followed by a subsequent seaming on the bottom side. Contrary to the argument of the appellant, this "floating" of the articles cannot be considered as an arrangement of the articles on the packaging sheet.
- 4.2.3 Finally, the appellant indicated that at least figure 5 of **D12** clearly shows that the articles 2 are arranged on the packaging sheet 13, so that feature 1.D is anticipated by this document. The Board again disagrees. Indeed, it is clear from figures 2 to 5 of **D12** that the articles are not arranged on the packaging sheet before the longitudinal edges are brought close to each other to form the tubular section of the package as required by claim 1 as maintained by the

opposition division. On the contrary, the packaging sleeve in **D12** comes from the top side of the articles and then sealed longitudinally on the bottom, so that no arrangement of the articles on the packaging sheet takes place.

5. *Patent as maintained by the opposition division - Inventive step of claim 1, Article 56 EPC*

5.1 The appellant argued that the subject-matter of claim 1 as maintained by the opposition division would be obvious

- in view any of documents **D1 (WO 2010/131063 A1)**, **D5 (US 3,958,390 A)** or **D6 (JP S 54-6682 A)** as closest prior art in combination with the teaching of **D2**;
- in view of **D1** as closest prior art in combination with the teaching of **D4**;
- in view of **D4** as closest prior art in combination with the teaching of **D5**; or
- in view of **D2** as closest prior art in combination with the teaching of **D4**.

5.2 *D1, D5 or D6 as closest prior art in combination with the teaching of D2*

5.2.1 The respondent requested the Board to exercise its discretion to not admit these lines of attack under Article 56 EPC. Furthermore, these lines of attack have not been substantiated (see paragraphs n° 180, 186, 256 and 286 of the reply to the statement of grounds of appeal).

5.2.2 However, as the Board is convinced that none of these lines of attack demonstrate an infringement of

Article 56 EPC, the question of their admittance does not need to be addressed. The reasons are as follows.

- 5.2.3 It is common ground that the subject-matter of claim 1 as maintained by the opposition division differs from the known procedures of the documents **D1**, **D5** or **D6** at least in that air is blown in the packaging rather than an inert gas and that the packages are substantially swollen with air (features 1.F and 1.H2).
- 5.2.4 In the appellant's view, these distinguishing features would solve the objective technical problem of providing an alternative to the inert gas. Document **D2** provides the skilled person the teaching that the use of **dry air** is an appropriate alternative to the inert atmospheres used in **D1**, **D5** or **D6**, so that the the skilled person, seeking for an alternative gas to be introduced into the packages, would thus replace the inert gases of the known processes with air thereby arriving at the subject-matter of claim 1 as maintained in an obvious manner.
- 5.2.5 The Board disagrees. As correctly put forward by the respondent, **D2** does neither disclose nor suggest a swelling or inflating of the package, but rather discloses to cause a flow of a desired gas (e.g. dry air) into the receptacle partially or completely to displace the air therein (see page 1, left column, lines 20 to 34 and page 2, right column, lines 37 to 41 of D2). It follows that starting from any of documents **D1**, **D5** or **D6** the skilled person would not be taught in view of **D2** to substantially **swell the package with air** as required by feature 1.H2, and therefore would not arrive at the subject-matter of claim 1 as maintained by the opposition division in an obvious manner.

5.3 *D1 as closest prior art in combination with the teaching of D4*

5.3.1 The appellant argued that, starting from the embodiment of figure 16 of **D1** as closest prior art, the distinguishing feature that air is blown in the package (features 1.F and 1.H2) would be rendered obvious by the teaching of **D4**, which hints the skilled person that the pouch can be flushed with air as the protective medium, thereby arriving at the subject-matter of claim 1 in an obvious manner.

5.3.2 The Board disagrees. As correctly found by the opposition division in point 12.2.2 of the reasons for the decision under appeal. The teachings for packing an article of D1 and D4 are not compatible with each other. While in D1 the packaging foil is provided from below by a roll and is folded into a longitudinally extending hose-like package with the articles arranged thereon and the gas supply occurs close to the introduction of the articles into the package, in D4 the packed article is held permanently in suspension within the outer package, a back seal is applied in the transverse direction and then the air blown into the package before an end seal is applied. As a consequence, the skilled person would not be hinted to apply the teachings of D4, in particular the step of swelling air into the package, in the known process of D1 for technical incompatibility. Therefore, the subject-matter of claim 1 of the patent as maintained by the opposition division is inventive in view of D1 and D4.

5.4 *Admittance of the lines of attack based on D4 as closest prior art in combination with the teaching of D5 and on D2 as closest prior art in combination with the teaching of D4*

5.4.1 The respondent argued (see paragraph n° 221, 222 and 235 to 237 of the reply to the statement of grounds of appeal), that the lines of attack based on the combinations of **D4** with **D5** and **D2** with **D4** have been raised for the first time in appeal proceedings and requested to not admit them into the appeal proceedings.

5.4.2 The appellant indicated that, contrary to the respondent's view, these lines of attack were presented against the patent as granted in opposition proceedings, namely in point 5.6 of the letter dated 5 September 2019. These lines of attack would equally apply in their substance to the claims as maintained by the opposition division.

5.4.3 The Board notes that these lines of attack had not been duly substantiated even with regard to the patent as granted in the letter dated 5 September 2019 and that the appellant confirmed that these lines of attack had never been raised - and maintained - against the set of claims which the opposition division found to meet the requirements of the EPC. In doing so, the opposition division could not decide in this regard.

5.4.4 Considering that the primary object of the appeal proceedings is that of reviewing the decisions of the administrative departments of the EPO (cf. Article 12(2) RPBA 2020), and that in accordance with Article 12(6), second sentence, RPBA 2020 the Board shall not admit objections which should have been

submitted, or which were no longer maintained in opposition proceedings, the the lines of attack based on the combinations of **D4** with **D5** and **D2** with **D4** are not admitted into appeal proceedings under Article 12(6), second sentence, RPBA 2020.

6. *Conclusion*

It follows from the above that the appellant has not provided admissible and convincing objections that could demonstrate the incorrectness of the decision under appeal. Thus, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated