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**Datasheet for the decision
of 10 May 2023**

Case Number: T 1482/21 - 3.2.02

Application Number: 15158482.8

Publication Number: 3005948

IPC: A61B10/00, A63H27/10,
A61B5/155, A61B5/15, B65B3/00

Language of the proceedings: EN

Title of invention:

APPARATUS, SYSTEM AND METHOD FOR FILLING CONTAINERS WITH
FLUIDS

Patent Proprietor:

Tinnus Enterprises, LLC

Opponents:

Play Fun Toys B.V.
Koopman International B.V.

Headword:

Relevant legal provisions:

EPC Art. 16, 21(1), 21(2), 56, 84, 87(1), 89, 90(1), 94(1),
107, 123(2), 114(1), 122(3)
EPC R. 10, 52(2), 124, 136(1), 136(4)
RPBA 2020 Art. 6(4)

Keyword:

Re-establishment of rights - priority period
Competence of the receiving section - re-establishment of rights
Priority - partial priority (yes)
Inventive step (yes)
Claims - clarity (yes)
Amendments - added subject-matter (no)
Minutes of oral proceedings - request to correct minutes (refused)

Decisions cited:

G 0001/11, R 0007/17, J 0003/13, T 0212/97, T 0642/97,
T 0468/99, T 0263/05, T 1721/07, T 1891/20

Catchword:

Based on its competence for the examination on filing and as to formal requirements up to the time when the Examining Division becomes responsible, the Receiving Section is under Rule 136(4) EPC also competent to decide on a request for re-establishment of rights in respect of the priority period. If the Receiving Section grants such a request, its decision becomes final immediately. Other departments of the EPO such as an Opposition Division or a technical Board of Appeal which decide on questions of priority in other, subsequent proceedings are prevented from reviewing and overturning the Receiving Section's decision granting the request for re-establishment of rights (Reasons 2.2-2.2.12).



Beschwerdekammern

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Case Number: T 1482/21 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 10 May 2023

Appellant: Koopman International B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 August 2021 concerning maintenance of the
European Patent No. 3005948 in amended form.**

Composition of the Board:

Chairman	N. Obrovski
Members:	S. Böttcher
	S. Dennler
	A. Martinez Möller
	Y. Podbielski

Summary of Facts and Submissions

I. Opponent 2 filed an appeal against the interlocutory decision of the opposition division to maintain the patent in amended form according to the main request filed during oral proceedings before the opposition division on 10 March 2021.

II. Oral proceedings before the Board took place on 10 May 2023.

The further party as of right (opponent 1) did not attend the oral proceedings as announced in their letter dated 13 December 2022. The oral proceedings took place in the absence of that party pursuant to Rule 115(2) EPC and Article 15(3) RPBA 2020.

III. The appellant (opponent 2) requested that the decision be set aside and the patent be revoked.

The respondent (patent proprietor) requested that the patent be maintained on the basis of the new auxiliary request filed on 28 April 2023.

IV. By letter of 31 May 2023 the appellant requested that the minutes of the oral proceedings be amended. The respondent did not comment on this request.

V. The following documents are relevant to this decision.

P1 US 61/937083
P2 US 61/942193
D2 FR 2 911 512
D4 US 2013/226219
D16 US 5,127,867

- D18 US 2008/0121309
- D30 US 5 014 757
- D31 US 2005/0004430 A1
- D32 GB 2 344 057
- D38 US 3,580,303
- D39 Gleysteen M.D., J J. (2016). 'Review article. A history of intragastric balloons.' *Surgery for Obesity and Related Diseases*, 12, 430-435.
- D40 'Intragastric Balloon', Bray, G.A. & Bouchard, C (2014) *Handbook of Obesity, Clinical Applications* (Volume 2. Fourth Edition. Pages 422-423), Boca Raton, USA: CRC Press.
- D41a Zubrowski, Bernie, "Balloons. Building and experimenting with inflatable toys" HarperTrophy, 1990, ISBN: 978-0688083243
- D41b Debrun, M.D., G. et al., "Endovascular Occlusion of Vertebral Fistulae by Detachable Balloons with Conservation of the Vertebral Blood Flow", *Radiology*, Vol. 130, No. Issue 1, 1979
- D41c US 179236 (A), 29.12.1899
- D41d Salter's Chemistry Club, "HYDROGEN BALLOONS", 6 November 2007, [cited 24.07.2020] Available from: [http://resources.schoolscience.co.uk/Salters/pdfs/volone/SCC1_Prac21.pdf]
- D41d' Wayback machine (Internet Archive), "Hydrogen Balloons", [cited 25.07.2020] Available from: [https://web.archive.org/web/20071106215307/http://resources.schoolscience.co.uk/Salters/pdfs/volone/SCC1_Prac21.pdf]
- D41e US 600967 (A), 29.12.1899
- D41f Questacon, "Model of a lung" 24.08.2011, [cited 27.07.2020] Available from: [<https://youtu.be/CBv2BqqAydE>]
- D41g Sarah, "Home Wine-making Getting Started" 21.01.2013, [cited 22.08.2020] Available from: [<http://arwz.com/ssblog/2013/01/21/homewine->

- making-getting-started/]
- D41h Central Board of Secondary Education, "Biology. Unit-1. Life Processes" Delhi, India: CBSE-International, 02.06.2012
- D41i Ruhland, Peta, "Coopers Home Brew Kit" 18.03.2008, [cited 12.07.2020] Available from [https://www.coroflot.com/PetaRuhland/Coopers-Home-Brew-Kit-Uni]
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- D41k Parker, Louise, "The OPAL DIY Weather Kit" 02.03.2011, [cited 24.07.2020] Available from: [https://www.slnnr.org.uk/documents/projects/opal/Weather%20kit.pdf]
- D41l Gupta, Arvind, "Balloon Pump" 16.01.2010, [cited 25.07.2020] Available from: [http://www.arvindguptatoys.com/arvindgupta/toys/pdf/balloonpumpdoit.pdf]
- D41l' Visio Spark, "Visio Spark Last Modified Time Checker", [cited 25.07.2020] Available from: [visiospark.com/last-modified-time-checker]
- D41m Gupta, Arvind, "Simple Rocket" 18.05.2011, [cited 24.07.2020] Available from: [https://youtu.be/_h61FBLJDhE]
- D41n Gupta, Arvind, "Balloon Bugle" 26.08.2013, [cited 24.07.2020] Available from: [https://youtu.be/qtWHqd6sGfs]
- D41o Gupta, Arvind, "CD-Hovercraft" 05.12.2009, [cited 24.07.2020] Available from: [https://youtu.be/cYlyY6Hel8]
- D41p Anthony, Dorothy, "How Air Moves In and Out of the Lung" 01.02.2002, [cited 11.07.2020]

Available from: [<https://mypages.iit.edu/~smile/bi9203.html>]

- D41p' Internet Archive, "WayBack Machine" , [cited 22.08.2020] Available from: [https://web.archive.org/web/20091101000000*/https://mypages.iit.edu/~smile/bi9203.html]
- D41q Gupta, Arvind, "Spinning Balloon" 03.01.2014, [cited 24.07.2020] Available from: [<https://youtu.be/W4AHA4nN6fo>]
- D41r NASA, "Mars Exploration. Is There Water on Mars?" 27.06.2013, [cited 25.07.2020] Available from: [https://www.nasa.gov/pdf/58223main_Is_There.Water.on.Mars.pdf]
- D41r' Visio Spark, "Visio Spark Last Modified Time Checker", [cited 25.07.2020] Available from: [visiospark.com/last-modified-time-checker]
- D41s Dice, David et al., "The Pressure-Volume Behaviour of Gas in a Balloon" 03.10.2009, [cited 24.07.2020] Available from: [<http://www.digipac.ca/chemical/gaslaws/ThePressureInABalloon.htm>]
- D41s' Visio Spark, "Visio Spark Last Modified Time Checker" [cited 25.07.2020] Available from: [visiospark.com/last-modified-time-checker]
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- D41x Design Squad Global, "4-Wheel Ballon Car" 14.09.2012, [cited 26.07.2020] Available from:

- [<https://youtu.be/K8hu5Y-9AZ8>]
- D41y Moore, Ashley, "Hands-on Science Fun with Balloon Boats" 30.09.2012, [cited 26.07.2020] Available from: [<https://www.lifewithmoorebabies.com/2012/09/balloon-boats.html>]
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- D42a Merriam-Webster, Cambridge University Press, and Oxford University Press, "adjacent (dictionary meanings)", [cited 23.07.2020] Available from: [merriam-webster.com, dictionary.cambridge.org and lexico.com]
- D42b Merriam-Webster, Cambridge University Press, and Oxford University Press, "juxtapose (dictionary meanings)", [cited 23.07.2020] Available from: [merriam-webster.com, dictionary.cambridge.org and lexico.com]
- D43a Judgement of the Dutch Patent Court in Tinnus et al. vs Koopman, nullifying EP 3 005 948 B1
- D43b Partial translation of D43a

VI. Claim 1 of the new auxiliary request reads as follows.

"An apparatus comprising:
a housing (12) comprising a threaded opening at a first end (A) and a plurality of holes (26) at a second end (B); and
a plurality of hollow tubes (16), wherein each hollow tube (16) is attached to a respective hole of said plurality of holes (26),
wherein all of the hollow tubes of the apparatus extend from said housing to respective tube ends at where the

tube ends present a plurality of adjacent inflatable containers (18), wherein each tube end is removably joined to a respective one of said inflatable containers in a sealed manner by an elastic ring (20) disposed around a neck of the inflatable container, and wherein the tubes facilitate the simultaneous filling of the inflatable containers with a liquid, said elastic rings being configured to each slide with the corresponding inflatable container when each inflatable container is detached from the corresponding hollow tube and, upon removal of the inflatable container from the corresponding tube, to constrict the neck of the inflatable container, sealing it with the liquid inside."

Claim 3 of the new auxiliary request reads as follows.

"The apparatus of claim 2 wherein the first end (A) of the housing has a threaded inner surface (22) at the threaded opening."

Claim 7 of the new auxiliary request reads as follows.

"The apparatus of claim 6, wherein the elastic rings (20) are configured to permit removal and sealing of the containers (18) substantially simultaneously."

Claim 9 of the new auxiliary request reads as follows.

"A method of filling a plurality of inflatable containers simultaneously with a liquid, comprising: attaching a housing (12) to a liquid source, wherein the housing comprises a threaded liquid inlet and a plurality of holes (26) separated from the liquid inlet, and further comprises a plurality of hollow

tubes (16) each hollow tube (16) being attached to a respective hole of the plurality of holes (26), all of the hollow tubes (16) extending from said housing (12), in a juxtaposed manner, to respective distal tube ends, each tube end providing a liquid outlet opening that is in liquid connection with the liquid inlet, said tube ends presenting a plurality of juxtaposed inflatable containers (18), each container being removably attached to a respective tube end of the plurality of hollow tubes and about the liquid outlet of its respective hollow tube end, wherein an elastic ring (20) clamps a neck of each inflatable container in a sealed manner to a corresponding one of the hollow tubes;

supplying a liquid from the liquid source to the housing via the liquid inlet, substantially simultaneously filling the plurality of inflatable containers with the liquid, and detaching the plurality of inflatable containers from the plurality of hollow tubes, wherein when each inflatable container is detached from the corresponding hollow tube, the elastic rings slide with their respective inflatable container and, upon removal of the inflatable containers from their respective tube, seal their respective inflatable container with the liquid inside by constricting the neck of their respective inflatable container."

VII. The appellant's arguments relevant to the decision can be summarised as follows.

Priority

According to the Receiving Section's decision of 14 January 2016, which had been taken following a request for re-establishment of rights by the former

applicant and now respondent, the application had been deemed to have been filed during a period of 12 months from the earlier application. This decision - and hence also the claimed priority - was not valid, in particular due to the Receiving Section's alleged lack of competence to take this decision. Moreover, it should in any case be possible to assess and review all preconditions for an entitlement to priority in opposition and opposition appeal proceedings, including whether or not the period of 12 months pursuant to Article 87(1) EPC had been observed.

Moreover, the combination of features in claims 1, 2, 3, 7 and 9 of the patent as granted was not disclosed in P1 or P2. Hence, the invention as defined by these claims was not the same invention as the one disclosed in P1 and P2, resulting in a lack of priority of at least these claims.

More specifically,

- P1 and P2 disclosed a housing with a threaded opening, while in claim 1 the feature "threaded" had been omitted and claim 9 defined a housing having a liquid inlet instead of a threaded opening;
- P1 and P2 disclosed a housing with a second end being opposite to the first end, while in claim 1 the feature "opposite" had been omitted and claim 9 defined a housing having a plurality of holes separated from the liquid inlet;
- neither P1 nor P2 disclosed the feature "in a juxtaposed manner" of claim 9;
- neither P1 nor P2 disclosed the features of claim 2;

- neither P1 nor P2 disclosed the features of claim 3, in particular an additional opening;
- neither P1 nor P2 disclosed the features of claim 7.

Clarity

It was not clear whether the threaded inner surface defined in claim 3 was provided in addition to the threaded opening of claim 1 or whether the definition of a threaded inner surface was redundant. Hence, claim 3 was either not clear or not concise.

Added subject-matter

According to claim 3 a threaded inner surface was provided in addition to the threaded opening already defined in claim 1. This was not disclosed in the application as originally filed.

Furthermore, the following features infringed Article 123(2) EPC.

- a) "all the hollow tubes extend from said housing to respective tube ends" of claims 1 and 9,
- b) "said elastic rings are configured to slide..." of claims 1 and 9,
- c) "the elastic rings are configured to constrict the neck of the container" of claim 1,
- d) "the elastic rings are configured to permit removal and sealing of the containers substantially simultaneously" of claim 7,
- e) "all of the hollow tubes extending from said housing, in a juxtaposed manner" and "said tube ends presenting a plurality of juxtaposed inflatable

containers" of claim 9.

As to point a), Figure 1 referred to by the opposition division disclosed the feature "all the hollow tubes extend from said housing to respective tube ends" only in connection with the features "balloons" and "different lengths of the tubes". The omission of these features constituted an unallowable intermediate generalisation.

As to point b), the passage at page 12, lines 35 to 36, of the application as originally filed did not refer to elastic rings but to elastic valves. Furthermore, this passage did not disclose that the rings were configured to slide with the containers.

As to point c), from the passage at page 11, lines 4 to 7, of the application as originally filed, it could not be derived that the rings were configured to constrict the neck of the container since the term "they" in line 7 referred to the other embodiments mentioned in the preceding sentence.

As to point d), it could not be derived from the original application documents that the containers of the apparatus were all removed substantially simultaneously and (after that) were all sealed simultaneously. The passage at page 14, lines 8 to 14, merely disclosed that the containers were filled simultaneously, and that they could be removed when they had received a desired size.

As to point e), the term "juxtaposed" used in claim 9 was not necessarily synonymous with "adjacent" used in claim 1 (D42a and D42b). The passage at page 6, lines 1 to 3, forming the only written basis for the term

"juxtaposed", did not relate to the embodiment of claim 9. Moreover, this passage only referred to balloons and not to tubes. Hence, there was no basis for a juxtaposed arrangement of the tubes and containers as defined in claim 9.

Hence, claims 1, 3, 7 and 9 did not meet the requirements of Article 123(2) EPC.

Inventive step starting from D18

The subject-matter of claims 1 and 9 lacked an inventive step starting from D18 in combination with the common general knowledge or D2.

D18 disclosed an apparatus that was intended for the simultaneous filling of a plurality of balloons with water (Figures 12 and 13; claim 1 and paragraphs [0027] and [0028]).

The subject-matter of claims 1 and 9 differed from this apparatus only in that it comprised elastic rings which were suitable to slide with the balloons and to constrict their necks.

The objective technical problem could either be regarded to save time needed to seal the balloons or to provide an alternative for the balloon ties and seals mentioned in D18 (paragraphs [0029], [0088], [0112], [0113], [0033], [0153] and [0132]).

The person skilled in the art would, based on their common general knowledge as exemplified in any of documents D38 to D41y, obviously apply elastic rings around the nozzle and balloon necks of the apparatus of D18 so that the rings closed the balloons upon removal.

The resulting combination of an apparatus with balloons and elastic rings fell within the definitions of claim 1 and claim 9, making the invention obvious.

Moreover, D2 disclosed a balloon filling apparatus with elastic rings 11 clamping a neck of a balloon 2 at an end of a tube 6, and closing the balloon upon removal from the tube by constricting the neck (page 5, lines 13-17). The balloon was inflated with a fluid (generic for liquid and gas; page 1, lines 6-7). D2 aimed to provide a solution for the tying of balloons, which was faster than the known manual tying (page 1, lines 22 to 24). The person skilled in the art would therefore be motivated to apply the solution of D2 to the apparatus of D18.

It was unlikely that the elastic ring would roll off, due to the high coefficient of friction between a latex balloon and an elastic ring, usually also made of latex. Moreover, a preferred nozzle of D18 had grooves which would hold the elastic ring (Figure 29). Even if the problem of rolling off would occur, a skilled person would adjust the nozzle of D18 in such a way that the elastic ring would not roll off, e.g. by reducing the taper. This was a routine workshop modification. In fact, D18 explicitly taught that various shapes of the nozzles might be used (paragraph [0079]).

The person skilled in the art would also apply the way that D2 taught for attaching the balloon to the nozzle (Figures 2 and 3). When in the inverted position as shown in Figure 3, the water pressure would push the balloon out of the nozzle without the need to use the push stick 12 shown in Figure 12. Since D18 taught that the nozzles 3 could be any kind of nozzles (paragraphs

[0079] and [0100]) and since D2 disclosed that the inflation tube 6 could be attached to an inflator, i.e. an apparatus (page 4, lines 16 to 19), the person skilled in the art would even envisage replacing the nozzle of D18 by the inflation tube of D2.

The person skilled in the art had a strong reason to apply the teaching of D2, because of the explicit statements in D2 that the proposed use of elastic rings was quicker than closing the balloon by hand (page 1, lines 15 to 24). Moreover, they would recognize that the advantage obtained by the solution of D2 was gained times four if applied to all four nozzles of the apparatus of Figure 12 of D18. Hence, D2 prompted the person skilled in the art to apply elastic rings around the balloons and nozzles of D18, or to replace the nozzles of D18 by the inflation tubes - including the balloons and elastic rings - of D2.

Hence, the apparatus according to claim 1 and the method according to claim 9 were rendered obvious. This was also acknowledged by the Dutch Patent Court in a parallel nullification suit (D43a and D43b).

Inventive step starting from D16

The subject-matter of claims 1 and 9 lacked an inventive step starting from D16 in combination with the common general knowledge or any of D2, D30, D32 or D38.

D16 disclosed an apparatus with a housing in the shape of a pole 30. Plugs 28, 38, 44, 46 and 88 formed a plurality of hollow tubes attached to the housing at a hole. Balloons 20, 36, 40, 42 and 84 were attached to ends of the respective plugs. The rubber bands 226

could be regarded as elastic rings each clamping a neck of a balloon in a sealing manner to a corresponding tube.

D16 did not disclose that the rubber bands were configured to slide with each balloon when the balloon was detached from the tube and to constrict the neck of the balloon to seal it. As it was commonly known that elastic rings were capable of closing containers, the person skilled in the art would use this knowledge to adapt the rubber bands of D16 such that they sealed.

The subject-matter of claim 1 was also obvious in view of D16 in combination with any of D2, D30, D32 or D38. In order to solve the problem of avoiding balloon deflation when taken off its plug/tube, the person skilled in the art would learn from each of these documents that the same elastic ring which held an inflatable container on its filling tube was also capable of sliding with the container from the tube, and subsequently seal the inflatable container with a fluid inside. They would thus be motivated to adjust the rings of D16, and would arrive at an apparatus falling under the scope of claim 1 in an obvious manner.

Furthermore, all apparatus and method steps of claim 9 were disclosed in D16, apart from filling the balloons with a liquid rather than a gas. Based on the generic disclosure in D16 of fluids, it required no inventive skills to fill the balloons of D16 with water. Hence, the subject-matter of claim 9 also lacked an inventive step.

Inventive step starting from D31

The subject-matter of claims 1 and 9 also lacked an inventive step starting from D31 in combination with the common general knowledge or D4.

D31 disclosed an endoscopic device for inserting a balloon in the stomach of a person (paragraphs [0002], [0031] to [0033]). The balloon 1 was engaged to a guide pipe 3 by a rubber band 2 which sealed and released the balloon from this guide pipe after a proper amount of air was introduced into the balloon (Figures 2, 3 and 7). The only difference to the subject-matter of claims 1 and 9 was that D31 disclosed a single tube (the inner guide pipe 3) with a single balloon instead of a plurality of tubes with adjacent balloons. When faced with the problem that one balloon with the maximum recommended size was not sufficient to treat a specific obese patient, a person skilled in the art would simply use a second balloon inserted through the second channel of the endoscope, and fill both balloons simultaneously with salt water.

Furthermore, the person skilled in the art would learn from D4 (paragraphs [0098] [0109] and [0159], Figure 32) to insert multiple balloons to increase the volume in a stomach of a patient. Moreover, D4 taught to use one guide pipe per balloon. The person skilled in the art would thus obviously adapt the device of D31 by using a second guide pipe with balloon and elastic ring to insert that into the second channel of the endoscope, and arrive at an apparatus within the scope claim 1, and the method of claim 9 without an inventive step.

Objections starting from D24/D27

The former main request lacked novelty and an inventive step based on D24/D27. In view of the invalid priority of the claimed subject-matter, D24/D27 belonged to the prior art. Starting from the assumption that the priority of P1 and P2 was not or only partially valid, i.e. at most valid with regard to a housing with a threaded opening/inlet, the sole differentiating feature between D24/D27 and the independent claims was that the opening/liquid inlet of the housing was not threaded. Knowing that the threaded opening/liquid inlet in a housing of a Bunch-o-Balloons water balloon filling apparatus was used to connect the apparatus to a water hose with a threaded connector, it would have been obvious for the skilled person to provide a water balloon filling apparatus with a non-threaded opening/liquid inlet.

Request for amendment of minutes of oral proceedings

The presentation of facts in the minutes was incorrect, as far as the (non-)maintenance of the objections of insufficiency of disclosure was concerned.

The objections of insufficiency of disclosure that had been made in writing against the original main request were equally applicable against the new auxiliary request. In fact, in the oral proceedings the appellant had maintained these objections, but had decided not to plead them again, and had requested the Board to take a decision based on the written part of the procedure. The respondent had declared to also not plead about the insufficiency of disclosure objections, and to be satisfied with a decision based on the written procedure.

Incidentally, and in accordance with the minutes, the

novelty objections had not been maintained by the appellant.

The minutes therefore incorrectly stated that "The appellant did not maintain the objections of insufficiency of disclosure and the novelty objections which had been presented in writing against the main request". The minutes, in agreement with the actual events in the oral proceedings according to the appellant, should read here: "The appellant maintained the objections of insufficiency of disclosure which had been presented in writing against the main request, and did not maintain the novelty objections which had been presented in writing against the main request.", or similar.

The Board in fact had taken a decision on the sufficiency of disclosure of the (new) main request.

Furthermore, the last paragraph on page 3 of the minutes stated:

"The respondent then filed a corresponding amended version of the description, to which neither the appellant nor the Board objected."

This was an incorrect representation of this part of the oral proceedings. Namely, after an amended version of the description had been presented, the appellant had objected by indicating some further parts of the description requiring amendment, and one of these objections had been allowed by the Board, and had resulted in a further (hand-written) amendment.

In summary, it was requested that the minutes of the oral proceedings be corrected, and that the written

decision be based on the corrected minutes.

VIII. The respondent's arguments relevant to the decision can be summarised as follows.

Priority

The Receiving Section found in its decision of 14 January 2016, which had been taken following a request for re-establishment of rights by the former applicant and now respondent, that the application had been deemed to have been filed during a period of 12 months from the earlier application. This decision was valid.

Furthermore, the invention as defined by claims 1, 2, 3, 7 and 9 of the patent as granted was the same invention as the one disclosed in P1 and P2.

Hence, the priority of P1 and P2 had been validly claimed.

Clarity

The alleged lack of clarity of claim 3 was not caused by an amendment of the claims during the opposition proceedings and was thus not open to examination by the Board. The feature "the first end of the housing has a threaded inner surface at the opening" was already included in claim 3 of the patent as granted.

Added subject-matter

The person skilled in the art would understand that claim 3 further specified the thread as being on the inner surface of the opening. Hence, claim 3 did not

define a second thread and did not include added subject-matter.

As to point a), the person skilled in the art would recognize from Figures 1 and 2 of the application as originally filed that all the tubes extend from the housing to the inflatable containers.

As to point b), it was inherent in the disclosure of the description (page 12, lines 35 and 36) that in order for the elastic rings to constrict the neck of the containers, then the rings must also be arranged to slide.

As to point c), the feature "the elastic rings being configured to constrict the neck of the container" was clearly disclosed in the description of figures 1 and 2 in the application as originally filed (page 12, lines 35 to 36).

As to point d), the person skilled in the art could derive from various passages of the description (page 9, line 36, to page 10, line 3; page 12, lines 24 to 25; page 12, lines 35 to 36; page 13, lines 34 to 36; page 14, lines 6 to 14) that the elastic rings were configured to permit removal and sealing of the containers substantially simultaneously. As such, the application as filed explicitly taught that the containers were filled and expanded substantially simultaneously and subsequently slid off the tubes when they reached the desired volume of fluid and were consequently sealed simultaneously.

As to point e), the person skilled in the art would understand that Figures 1 and 2 unambiguously disclose hollow tubes and water filled balloons being arranged

in a juxtaposed manner.

Hence, claims 1, 3, 7 and 9 met the requirements of Article 123(2) EPC.

Inventive step starting from D18

D18 failed to disclose the feature "said elastic rings being configured to each slide with the corresponding inflatable container when each inflatable container is detached from the corresponding hollow tube and, upon removal of the inflatable container from the corresponding tube, to constrict the neck of the inflatable container, sealing it with the liquid inside".

D18 already disclosed in paragraphs [0029], [0088], [0112] and [0113] suitable means for tying the balloons, such as balloon ties or ribbons. Even if the person skilled in the art would seek an alternative for these means, as alleged by the appellant, and arbitrarily select elastic rings to replace the disclosed balloon ties and/or ribbons, there was no suggestion of the feature that "each tube end is removably joined to a respective one of said inflatable containers in a sealed manner by an elastic ring disposed around a neck of the inflatable container" of claim 1. The statement that "a single operator can operate multiple nozzles at the same time" (paragraph [0028] of D18) did not mean that a balloon was attached to each nozzle in order to simultaneously fill all the balloons.

In order to solve the further alleged problem of saving time for sealing the balloons, the person skilled in the art would have considered the teaching of D18

itself and used the disclosed balloon ties and ribbons.

Therefore, starting from D18, the person skilled in the art would have no incentive to modify the teaching of D18 in the manner proposed by the appellant.

Furthermore, there was no suggestion or hint that would lead them to the claimed subject matter.

The appellant's allegation that the person skilled in the art could have used their common general knowledge to apply elastic rings around the nozzle and balloon necks was based on an ex post facto approach.

D2 disclosed the use of a free-standing cylindrical inflation body 6 through which an inflatable bag 2 was poked by a push rod 12. An elastic ring 11 was twisted to several loops around the neck of the balloon before it was filled with air or helium.

The teaching of D2 was not applicable to that of D18 since it was not clear how the balloons of D18 could be placed through the nozzles. Contrary to the appellant's allegation, the person skilled in the art would not select only the feature of the elastic rings from the teaching of D2 since they would not arbitrarily cherry-pick isolated features from the description without considering the teaching as a whole.

As such, a combination of D18 with that of D2 would not lead the person skilled in the art to the subject-matter of claim 1.

Hence, the claimed subject-matter was inventive starting from D18.

Inventive step starting from D16

The subject-matter of claims 1 and 9 did not lack an inventive step over D16 in combination with the common general knowledge or any of D2, D30, D32 or D38.

D16 was directed to preventing detachment of the balloons from the plug extensions of the arm. It did not disclose that the elastic rings were configured to each slide with the corresponding balloon and to seal them upon removal from the post. In fact, D16 rather taught away from detaching the balloons by providing additional mechanisms for enhanced engagement (column 8, lines 60 to 67). Hence, D16 was not a suitable starting point, and the person skilled in the art would not combine the teaching of D16 with that of any of D2, D30, D32 or D38.

Inventive step starting from D31

D31 could not be treated as the closest prior art as it did not belong to the same or a closely related technical field as the subject-matter of claims 1 and 9 and was not directed to a similar purpose or effect.

The combination of the teaching of D31 with that of D4 would not result in the subject-matter of claims 1 or 9 as none of these documents disclosed or suggested a housing comprising an opening at a first end and a plurality of holes at the second end, and a plurality of hollow tubes, wherein each hollow tube was attached to a respective hole of said plurality of holes.

Hence, the subject-matter of claims 1 and 9 involved an inventive step in view of D31 in combination with the common general knowledge or D4.

Request for amendment of minutes of oral proceedings

The respondent did not file any submissions as to this issue.

Reasons for the Decision

1. Subject-matter of the patent

The patent relates to an apparatus and method for filling a plurality of inflatable containers with a liquid, e.g. to fill a large number of water balloons simultaneously (Figures 1 to 4).

According to claim 1, the apparatus has a housing 12 comprising an opening at a first end and a plurality of holes at a second end. A plurality of hollow tubes 16 extend from the holes of the housing, each tube end being removably joined to an inflatable container 18 in a sealed manner by an elastic ring 20. Upon removal of the containers from the tubes, the elastic rings slide with the container and constrict the neck of it, thereby sealing it with the liquid inside.

Claim 9 relates to a method of using an apparatus similar to that of claim 1 to fill a plurality of containers with a liquid and detaching them from the hollow tubes.

2. Priority and inventive step objection against the new auxiliary request starting from D24/D27

2.1 While the appellant did not maintain its novelty objections against the new auxiliary request, the

inventive step objection starting from D24/D27 was not withdrawn in relation to that request.

2.2 Within 12 months from filing the earlier applications

2.2.1 Following a request for re-establishment of rights by the former applicant and now respondent, the Receiving Section held in its decision of 14 January 2016 that the application was deemed to have been filed during a period of 12 months from the earlier application. For the following reasons, the Board considers that the Receiving Section was competent to take the decision of 14 January 2016 on the respondent's request for re-establishment of rights.

2.2.2 Under Article 16 EPC in conjunction with Rule 10 EPC the Receiving Section is responsible for the examination on filing and as to formal requirements of a European patent application up to the time when the Examining Division becomes responsible for the examination of the European patent application under Article 94(1) EPC. In the present case search started on 15 February 2016 and the request for examination was only filed on 20 January 2017. Hence, when the Receiving Section took its decision of 14 January 2016, it was still responsible for the examination on filing and as to formal requirements.

2.2.3 Under Article 90(1) EPC, the examination on filing and as to formal requirements includes the examination whether the application satisfies the requirements for the accordancy of a date of filing. If these requirements are fulfilled, a date of filing must be accorded. Both steps, i.e. the examination whether the requirements for the accordancy of a date of filing are fulfilled and, if that is so, the accordancy of a date

of filing fall under the Receiving Section's competence.

- 2.2.4 Under Article 89 EPC, the date of priority counts as the date of filing for certain purposes. Under Rule 52(2) EPC, a declaration of priority shall preferably be made on filing the European patent application, i.e. at a time when the Receiving Section is responsible for the examination on filing and as to formal requirements.
- 2.2.5 Under Rule 136(4) EPC, the department competent to decide on the omitted act shall decide on the request for re-establishment of rights. In the case in hand, the omitted act was the filing of the application within the priority period of 12 months pursuant to Article 87(1) EPC. Based on its competence for the examination on filing and as to formal requirements up to the time when the Examining Division becomes responsible, the Receiving Section was under Rule 136(4) EPC also competent to decide on the request for re-establishment of rights in respect of the priority period. Pursuant to Rule 136(1), second sentence, EPC, the priority period can be subject to re-establishment of rights.
- 2.2.6 If the Receiving Section *rejects* a request for re-establishment of rights in respect of the priority period, an applicant can lodge an appeal against this decision with the Legal Board of Appeal (Article 21(1) and (2) EPC; see, for example, J 3/13). If the Receiving Section *grants* a request for re-establishment of rights in respect of the priority period, the applicant is not adversely affected under Article 107 EPC. As there is no other party to the proceedings before the Receiving Section than the applicant, a

positive decision on such a request thus becomes final immediately.

2.2.7 As an interim conclusion, the Board therefore considers that the Receiving Section was competent to take the decision of 14 January 2016 on the respondent's request for re-establishment of rights in respect of the priority period, and that this decision is final.

2.2.8 Another question to be answered is whether the Receiving Section's decision of 14 January 2016 granting the request for re-establishment of rights is binding for the Receiving Section only, or whether it also prevents other departments of the EPO such as an Opposition Division or a technical Board of Appeal which decide on questions of priority in other, subsequent proceedings from reviewing and overturning the Receiving Section's decision granting the request for re-establishment of rights. For the following reasons, the latter is the case.

2.2.9 Firstly, the effect of granting a request for re-establishment of rights is specifically regulated in Article 122(3) EPC. According to this provision, if a request for re-establishment of rights is granted, the legal consequences of the failure to observe the time limit concerned are deemed not to have ensued. The wording of Article 122(3) EPC does not limit the effect of granting a request for re-establishment of rights to the proceedings in which the decision to grant that request was taken.

2.2.10 Secondly, while an examination of the same patentability requirements under Article 114(1) EPC may be undertaken by different departments in different proceedings (e.g. first in examination and then in

opposition proceedings), a decision on re-establishment of rights presupposes that there is a corresponding request to be decided upon. In the case in hand, such a request was neither present in the opposition nor in the opposition appeal proceedings. Rather, it was only made in the proceedings before the Receiving Section, and decided upon only in these proceedings. As the Legal Board of Appeal is under Article 21(2) EPC exclusively competent to review decisions of the Receiving Section (G 1/11, Reasons 9, second paragraph), neither the Opposition Division nor the present technical Board of Appeal have any power to review the Receiving Section's decision on re-establishment of rights. They may also not do so indirectly by reassessing the same matter again of their own motion.

2.2.11 Thirdly, any subsequent reopening of a favourable decision of the Receiving Section on re-establishment of rights would lead to considerable legal uncertainty for the party whose request was granted. It would also be in conflict with the principle of protection of legitimate expectations, as a party whose request for re-establishment of rights was granted in *ex parte* proceedings has every reason to believe that it can rely on this decision in its subsequent procedural conduct.

2.2.12 In conclusion, the Opposition Division was correct in saying that it had to acknowledge the Receiving Section's decision to grant the request for re-establishment of rights in respect of the priority period.

2.3 The same invention

2.3.1 The Board agrees with the appellant that P1 and P2 solely and consistently disclose a housing with a threaded opening or a threaded liquid inlet. The passages referred to by the respondent (page 3, lines 2 to 4 and lines 8 to 9; page 5, lines 1 to 2 of P1) have to be read in their respective context which relates to the embodiment having a threaded opening (page 4). Hence, this feature is not presented as optional in P1.

2.3.2 Therefore, the person skilled in the art cannot derive directly and unambiguously any non-threaded opening from P1 or P2. Consequently, in accordance with G 2/98, the "same invention criterion" is fulfilled by the present application only by subject-matter having a housing with a threaded opening (claim 1) or a threaded liquid inlet (claim 9). Thus, priority of P1 and P2 can only be claimed for such subject-matter (partial priority).

2.3.3 The appellant further argued that the invention as defined by claims 1, 2, 3, 7 and 9 of the patent was not the same invention which was disclosed in P1 and P2 since

- P1 and P2 disclosed a housing with a second end being opposite to the first end, while in claim 1 the feature "opposite" had been omitted and claim 9 defined a housing having a plurality of holes separated from the liquid inlet;

- neither P1 nor P2 disclosed the feature "in a juxtaposed manner" of claim 9;

- neither P1 nor P2 disclosed the features of claim 2;

- neither P1 nor P2 disclosed the features of claim 3,

in particular an additional opening;

- neither P1 nor P2 disclosed the features of claim 7.

2.3.4 For the following reasons, these features of the patent - which are also reflected in the claims of the new auxiliary request - can be derived directly and unambiguously from P1 and P2.

2.3.5 The Board holds that P1 discloses on page 4 a housing including an opening at the first end and an array of holes at a second end, without any reference to the second end being opposite to the first end.

2.3.6 The juxtaposed arrangement of the tubes and the containers as defined in claim 9 can be derived from Figures 1 and 2 of P1.

2.3.7 The feature that the outermost perimeter of the first end of the housing is smaller in length than the outermost perimeter of the second end of the second end of the housing as defined in claim 2 can also be derived from Figures 1 and 2 of P1.

2.3.8 The Board considers the feature that "the first end has an opening and a threaded inner surface at the threaded opening" as defined in claim 3 has to be understood that the opening specified in claim 1 has a threaded inner surface. This can be derived from Figure 2 and page 4 of P1.

2.3.9 The feature that "the elastic rings are configured to permit removal and sealing of the containers substantially simultaneously" as defined in claim 7 can be derived from page 4, lines 6 to 9, of P1.

- 2.4 Inventive step objection starting from D24/D27
 - 2.4.1 As indicated above, the appellant withdrew its novelty objections against the new auxiliary request, but not its inventive step objection starting from D24/D27.
 - 2.4.2 However, in view of the Board's conclusion on the partial validity of priority as set out above and the limitation of the claimed subject-matter in the new auxiliary request to subject-matter for which priority can be validly claimed - i.e. to subject-matter having a housing with a threaded opening (claim 1) or a threaded liquid inlet (claim 9) - D24/D27 are not prior art for this subject-matter, since they were published after the filing date of P1 and P2. Hence, the appellant's inventive step objection starting from D24/D27 cannot be successful for this reason alone.
- 3. New auxiliary request - clarity
 - 3.1 Dependent claim 3 further specifies the housing in that the thread is provided at the inner surface of the opening. Hence claim 3 does not lack conciseness. The addition of the term "threaded" before "opening" does not introduce a lack of clarity either.
 - 3.2 As to the appellant's objection that the wording "at the threaded opening" (instead of "in the threaded opening") implied that the threaded inner surface could be a further inner surface of the housing adjacent to the opening, it is noted that the preposition "at" was already present in claim 3 of the patent as granted and may, pursuant to G 3/14, not be examined for compliance with the requirements of Article 84 EPC. The addition of the term "threaded" does not have any impact in this regard.

3.3 Hence, claim 3 meets the requirements of Article 84 EPC.

4. New auxiliary request - added subject matter

4.1 As mentioned above, dependent claim 3 further specifies the housing in that the thread is provided at the inner surface of the opening, as disclosed in Figure 2. Hence, contrary to the appellant's view, claim 3 does not define a further threaded surface that was provided in addition to the threaded opening of claim 1.

4.2 The feature "all the hollow tubes extend from said housing to respective tube ends" of claims 1 and 9 is disclosed in Figure 1. The omission of the features "balloons" and "different lengths" does not constitute an unallowable intermediate generalisation since there is no functional link between these features and the feature "all of the tubes".

4.3 The feature "said elastic rings are configured to slide..." of claims 1 and 9 is implicitly disclosed in the description as originally filed (page 12, lines 35 to 36), although this passage refers to elastic valves. According to the description (page 11, first paragraph), elastic rings such as O-rings are a specific type of elastic valves.

From the statement that the containers may slide off the tubes it follows that the elastic rings, which hold the containers to the tubes (page 10, lines 33 to 35), have to be configured to slide with the containers.

4.4 Basis for the feature "the elastic rings are configured to constrict the neck of the container" can be found in

the passage on page 11, lines 4 to 9, of the description as originally filed. The term "they" (page 11, line 7) is meant to encompass also the embodiments having O-rings or rubber bands.

4.5 The feature "elastic rings are configured to permit removal and sealing of the containers substantially simultaneously" of claim 7 can be derived directly and unambiguously from the application as originally filed. The passages on page 9, line 36 to page 10, line 3 and page 12, lines 35 and 36 essentially explain that after the containers have been filled with fluid, they will be individually sealed upon removal from the hollow tubes, while the passage at page 13, lines 34 to 36 mentions containers that are filled and sealed substantially simultaneously. Hence, a substantially simultaneous sealing of the containers is made possible upon removal from the hollow tubes and the sealing is performed by the constriction of the elastic rings. The whole procedure is also repeated on page 14, lines 6 to 14. This constitutes a clear and unambiguous disclosure of a substantially simultaneous filling and expanding of the containers. As the containers will be filled substantially simultaneously, they will fall off substantially simultaneously, or are at least removable substantially simultaneously and are consequently substantially simultaneously sealed upon removal. It is also pointed out that the use of the term "substantially" implies a certain tolerance, which encompasses possible small removal time variations for all containers due to material tolerances, or difference in tube lengths and slight weight.

4.6 A juxtaposed (i.e. placed side by side) arrangement of the containers and tubes as defined in claim 9 can be derived from Figures 5 and 6. The Board considers

"juxtaposed" to be equivalent to "adjacent" in the context of the present patent.

4.7 Hence, the claims of the new auxiliary request meet the requirements of Article 123(2) EPC.

5. New auxiliary request - lack of inventive step in view of D18 in combination with common general knowledge or D2

5.1 D18 discloses an apparatus for filling water balloons that can be attached to a water tap (Figures 1, 12 and 13). During use, an operator of the apparatus attaches a balloon to a nozzle 3 and fills it with water by opening the egress valve 5. The balloon is then removed from the nozzle and tied manually, e.g. by ribbons that are provided on a storage unit (paragraphs [0028] and [0029]) or by another tying device (paragraph [0100]). As acknowledged by the appellant, the apparatus does not comprise elastic rings disposed around the neck of the balloons when they are attached to the nozzles.

Furthermore, D18 does not disclose that at any time each of the nozzles is joined to a balloon in a sealed manner by an elastic ring in order to simultaneously fill all the balloons with water.

5.2 The Board does not agree with the appellant that the objective technical problem could be regarded as saving time needed to seal the balloons or to provide an alternative for the balloon ties and seals mentioned in D18.

The apparatus of D18 is not pre-assembled with a plurality of balloons being attached to the nozzles before the apparatus is used. Rather, the operator has

to attach each balloon manually to the respective nozzle during use. The Board considers that selecting an appropriate elastic ring, namely, a ring that is configured to seal the balloon after removal from the nozzle, and disposing this ring around the neck of the balloon when attaching it to the nozzle, is more cumbersome and does not save time compared to the procedure performed in D18.

Since D18 already discloses several ways of sealing the balloons (paragraphs [0029], [0088], [0112] and [0113]), the person skilled in the art would not seek an alternative for these ties and seals.

The Board considers that the objective technical problem to be solved is rather to provide a device and a method to fill and seal a plurality of balloons more quickly.

- 5.3 The Board acknowledges that the person skilled in the art knows, for instance from any of documents D38 to D41y', that elastic rings can be applied around the nozzle and the neck of the balloon so that the ring closes the balloon upon removal. However, the person skilled in the art would not be motivated by their common general knowledge to attach a balloon to each nozzle of the apparatus, to apply an elastic ring to each balloon neck and to fill all of the balloons simultaneously with water.

The statement that the apparatus of D18 allows for filling more than one water balloon at a time (paragraph [0027]) cannot be considered a teaching directed to providing each nozzle of the apparatus with a balloon and filling all the balloons simultaneously with water.

Hence, the person skilled in the art would not be motivated by their common general knowledge to modify the apparatus or the method of D18 in the way as defined in claims 1 and 9, even when D38 to D41y' - which were referred to as evidence of common general knowledge by the appellant (see pages 19 to 20 of the statement of grounds of appeal) - were considered. Documents D42a/b and D43a/b do not relate to common general knowledge.

5.4 The teaching of D2 does not render the subject-matter of claims 1 and 9 obvious either.

D2 relates to a method of filling a balloon 2 with a fluid such as air or helium and sealing it by twisting an elastic ring 11 around the neck of the balloon after it has been inserted in a cylindrical inflation body 6. The balloon is then filled with the fluid and removed from the inflation body (page 4, line 26, to page 5, line 17, Figures 1 to 7).

To perform the method described in D2, it is essential that the balloon is attached in several preparatory steps to a cylindrical inflation body which is open at both ends. In fact, the balloon is pushed through the tube from the inside. This could not be implemented at the conical nozzles of D18 which are attached to the conduit ends. Hence, the person skilled in the art would not consider combining the teaching of D2 with that of D18 and replacing the nozzles by inflation tubes. There is also no reason why the person skilled in the art would adjust the nozzle by reducing the taper. Rather, the person skilled in the art would have to isolate from D2 only the final configuration of Figure 6 to get closer to the invention. The Board

considers that this assumption is based on hindsight.

Furthermore, D2 discloses to fill and seal one single balloon at a time. Hence, even if the person skilled in the art took from D2 only the teaching of Figure 6 concerning the attachment of a balloon to a tube by an elastic ring for filling and sealing it, D2 did not prompt them to attach a balloon to all four of the nozzles of the apparatus shown in Figure 12 of D18 by means of an elastic ring and to fill all the balloons simultaneously with water.

5.5 Thus, the subject-matter of claims 1 or 9 involves an inventive step in view of a combination of D18 with the common general knowledge or D2.

6. New auxiliary request - lack of inventive step in view of D16 in combination with common general knowledge or any of D2, D30, D32 and D38

6.1 D16 relates to versatile networks of multiple spout balloons for decorative purposes (column 1, lines 11 and 12). Figure 1 shows a view of a network of thin walled, resilient balloons; Figure 7 shows an arrangement with removable arm and plug extensions; and Figure 8 shows a plug arrangement with an associated rubber band for holding balloons onto the plug (column 4, lines 23 to 47). The plugs 220 have the function to provide an airtight engagement of the balloons (column 2, lines 29 to 30), and the rubber band 226 is used to further secure the balloon spout to the plug (column 8, lines 60 to 63, Figure 8).

Hence, D16 does not disclose that the elastic rings are configured to each slide with the corresponding balloon when each balloon is detached from the corresponding

tube and, upon removal of the balloon from the corresponding tube, to constrict the neck of the balloon. Furthermore, the balloons of D16 are inflated with a gas such as air. The filling of the balloons with water or another liquid is not mentioned in D16.

Moreover, D16 does not disclose a threaded opening at a first end of the housing.

- 6.2 The Board notes that D16 teaches away from detaching and sealing the balloons by sliding movement of the elastic rings with the balloons. D16 does not at all refer to detaching the balloons from the plugs, let alone to sealing them upon removal. The passages mentioned by the appellant (column 3, lines 32 to 33; column 5, lines 10 to 12; column 9, lines 38 to 40) relate to removal of a plug with the balloons but not to detachment of the balloons from the plugs.
- 6.3 Hence, starting from D16, the person skilled in the art would not be confronted with the problem of avoiding that a balloon deflates when taken off its plug, as argued by the appellant. Therefore, it is irrelevant whether any of D2, D30, D32 or D38 discloses that an elastic ring which holds an inflatable container on its filling tube is also capable of sliding with the container from the tube and subsequently seal the inflatable container. The person skilled in the art would anyway not be prompted to modify the device of D16 such as to provide elastic rings that are configured to slide with the respective balloon and to constrict the neck of the balloon.
- 6.4 Although D16 refers to fluids other than air or helium (column 2, lines 60 to 63), the filling of the balloons with water or another liquid is not mentioned in D16.

Given the decorative purpose of the apparatus of D16, the person skilled in the art would not envisage filling the balloons with water. Hence, the method steps of claim 9 are neither disclosed in D16 nor rendered obvious by this document.

- 6.5 It follows that the subject-matter of claims 1 and 9 involves an inventive step in view of D16 in combination with common general knowledge or any of D2, D30, D32 and D38.
7. New auxiliary request - lack of inventive step in view of D31 in combination with common general knowledge or D4
- 7.1 D31 discloses an endoscopic device for introducing a balloon in a patient's stomach. The Board considers that the endoscope cannot be regarded as a housing with a threaded opening at a first end and a plurality of holes at a second end, as alleged by the appellant with reference to Figure 10C. In any case, D31 does not disclose a tube which is attached to one of these holes. The appellant refers to the inner guide 3. However, the inner guide 3 is inserted through a biopsy channel of the endoscope and can slide inside. Hence, it is not attached to a hole at the distal end of the endoscope.
- 7.2 Since D4 does not disclose this feature either and since this feature is not rendered obvious by the common general knowledge, the combination of D31 with the common general knowledge or D4 does not result in the subject-matter of claims 1 or 9.
- 7.3 Hence, the subject-matter of claims 1 and 9 does not lack an inventive step in view of the combination of

D31 with the common general knowledge or D4.

8. Amendment of the description

Neither the appellant nor the Board had objections against the version of the amended description which was in the end filed by the respondent during the oral proceedings before the Board.

9. Request for amendment of the minutes of the oral proceedings before the Board

9.1 By submission dated 31 May 2023, the appellant requested a correction of the minutes as indicated in point VII. above. For the reasons set out below, the Board does not adhere to this request. As the request was made before the issuing of the present written decision, it is dealt with herein (see T 1891/20, Reasons 1.1 and 1.4).

9.2 Pursuant to Rule 124(1) EPC, minutes of oral proceedings are to be drawn up, containing the essential points of the oral proceedings and the relevant statements made by the parties. Under Article 6(4) RPBA 2020, the minutes of oral proceedings are to be drawn up by a member of the deciding Board or the registrar, as designated by the chair.

9.3 As explained in T 1891/20, Reasons 2.3, it is in the discretion of the minute-writer what to consider "essential" or "relevant" (T 212/97, Reasons 2.2; T 642/97, Reasons 9.3; R 7/17, Reasons 23). A summary of the arguments made by the parties during the oral proceedings is usually not included in the minutes (T 1721/07, Reasons 17; see also T 263/05, Reasons 8.7). Moreover, the Board is responsible for

deciding on what needs to be recorded in the minutes, not the parties (T 468/99, Reasons 1.5; T 1721/07, Reasons 15).

9.4 According to the unanimous recollection of all five members of the Board, the representative of the appellant explicitly stated in the oral proceedings before the Board that he did not maintain the objections as to insufficiency of disclosure and lack of novelty against the new auxiliary request. The appellant thus requests the insertion of a paragraph into the minutes which is, according to the unanimous recollection of all five members of the Board, factually incorrect. For the sake of completeness, the Board additionally notes that the appellant did not make any submissions as to insufficiency of disclosure in the entire oral proceedings (i.e. not in the context of the main request, which was subsequently withdrawn by the respondent, either), and that the Board provided in point 3 of its communication under Article 15(1) RPBA 2020 reasons why it did not consider the objections on insufficiency of disclosure which had been raised by the appellant in the written proceedings convincing.

9.5 As to the adapted description, the minutes state that "The need for adaptation of the description to the claims of the new auxiliary request was discussed." According to the unanimous recollection of all five members of the Board, the appellant initially argued that several passages of the description needed adaptation only some of which, however, were also considered by the Board to be in need of adaptation.

As pointed out above, a summary of the arguments provided by the parties is usually not included in the

minutes. It is thus neither incomplete nor incorrect that the minutes state that, after discussion of the need for adaptation, the Board "provided the parties with its conclusion on the required adaptations." The respondent then filed an amended version of the description corresponding to the Board's conclusion, and the appellant explicitly confirmed that it did not have any objections against this version. The Chairman stressed that this meant that the additional objections against the description which had been raised at the beginning of the discussion on adaptation would not be dealt with in the written decision, and the appellant agreed.

9.6 The Board notes that it is immaterial whether, in the course of the discussion on the adaptation of the description, all adaptations to the description which were considered necessary by the Board were implemented by the respondent in one go or in multiple, subsequent steps. What matters is that the final version of the adapted description which was in the end filed by the respondent in the appeal proceedings - and which is attached to the minutes - is the one against which the appellant had no objections. This is correctly reflected in the minutes.

9.7 The request for amendment of the minutes of the oral proceedings is therefore refused.

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: 1-10 of the new auxiliary request filed with the submission dated 28 April 2023

Description: pages 2 to 8 filed during the oral proceedings before the Board

Drawings: Figures 1 to 10 of the patent specification.

The Registrar:

The Chairman:



A. Chavinier-Tomsic

N. Obrovski

Decision electronically authenticated