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**Datasheet for the decision
of 30 October 2023**

Case Number: T 0842/22 - 3.2.07

Application Number: 15732969.9

Publication Number: 3116802

IPC: B65D85/32

Language of the proceedings: EN

Title of invention:

PACKAGING UNIT WITH LOCK AND ADJUSTED LABEL, AND METHOD FOR
PACKING PRODUCTS

Patent Proprietor:

Huhtamaki Molded Fiber Technology B.V.

Opponents:

"DINOPOL" Spółka z ograniczona odpowiedzialnoscia
Brødrene Hartmann A/S

Headword:

Relevant legal provisions:

EPC Art. 56, 83, 99(1), 100(c), 123(3)
EPC R. 76(2), 80
RPBA 2020 Art. 11, 12(6)

Keyword:

Admissibility of opposition - (yes)
Grounds for opposition - fresh ground for opposition (yes) -
subject-matter extends beyond content of earlier application
(yes)
Inventive step - auxiliary request (yes)
Sufficiency of disclosure - auxiliary request (yes)
Amendments - broadening of claim (no)
Amendment occasioned by ground for opposition - amendments
allowable (yes)
Remittal to the department of first instance
Remittal - (no)
Remittal - special reasons for not remitting the case

Decisions cited:

G 0007/93, T 1800/20

Catchword:



Beschwerdekammern

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Case Number: T 0842/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 30 October 2023

Appellant 1: "DINOPOL" Spółka z ograniczona odpowiedzialnością
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Appellant 2: Brødrene Hartmann A/S
(Opponent 2) Ørnegårdsvej 18
2820 Gentofte (DK)

Representative: Budde Schou A/S
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Respondent: Huhtamaki Molded Fiber Technology B.V.
(Patent Proprietor) Zuidelijke Industrieweg 3-7
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Representative: Verdijck, Gerardus
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 February 2022
rejecting the opposition filed against European
patent No. 3116802 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Patton
Members: V. Bevilacqua
 E. Mille

Summary of Facts and Submissions

- I. Appeals were filed by both opponents against the decision of the opposition division to reject their oppositions against European patent No. 3 116 802.
- II. The opposition division found that the oppositions were admissible and that none of the admissibly raised grounds for opposition (Article 100(a) EPC in combination with Articles 54 and 56 EPC and Article 100(b) EPC) prejudiced the maintenance of the patent as granted.

The opposition division did not admit the late-filed ground for opposition of unallowable extension (Article 100(c) EPC) into the opposition proceedings.

- III. The following documents, mentioned in the appealed decision, are referred to in the following:

D1: "Rodzina kluczem do sukcesu - Sulfidowo"
D2: "Omni-Pac Die umweltfreundliche Verpackung"
D3: WO 2013/164664.
D4: "Community Design 000009097-0002"
D5: DE 10 206 051 450 A1
D6: "Bio Eierschachteln Omni Pac Swing"
D7: "Gallus Culinarius - Hendl und Eier Für Gourmets"
D8: EP 2 492 215 A1
D13: EP 1 923 332 A.

The following document, submitted with the letter of opponent 1 dated 5 January 2023, is also mentioned in the present decision :

D2d-oppo1: Screenshots from the website <https://www.yumpu.com/en/document/view/4864593/the-environmentally-friendly-packaging-omni-pac>.

IV. In preparation for oral proceedings the Board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020 to which appellant 1 (opponent 1) responded with submissions of 19 July 2023, appellant 2 (opponent 2) with submissions of 18 August 2023 and the respondent (patent proprietor) with submissions of 30 August 2023.

The respondent also filed, with its above identified submissions, the following document:

D14: Written declaration of Mr. van der Gang of 28 August 2023

Appellant 2 reacted thereto with submissions of 15 September 2023, to which drawings of a hypothetical embodiment of the claimed invention were annexed.

The respondent then filed a further submission, dated 10 October 2023, together with the following document:

D15: Written declaration of Mr. van der Gang of 10 October 2023.

V. Oral proceedings before the Board took place on 30 October 2023. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes.

VI. The final requests of the parties are as follows:

for the appellants 1 and 2:

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

for the respondent:

- that the opposition of opponent 1 be rejected as inadmissible,
- that both appeals be dismissed, and the patent be maintained as granted (main request),
- if the ground of opposition of unallowable extension (Article 100(c) EPC) is admitted into appeal proceedings, that the case be remitted to the opposition division for further prosecution,
- if the decision is set aside, that the patent be maintained in amended form according to one of the following sets of claims, in the following order:

auxiliary requests MRA, I to VI, MR', MRA',

submitted with the reply to the statements setting out the grounds of appeal,

auxiliary requests I' to VI',
filed with the respondent's submissions dated 10 March 2023,

auxiliary requests MR'', MRA'',
submitted with the reply to the statements setting out the grounds of appeal and

auxiliary requests I'' to VI'',
filed with the respondent's submissions dated 10 March 2023.

- VII. The arguments of the parties are dealt with in detail in the reasons for the decision.
- VIII. Independent claim 1 of the **Main Request** (patent as granted) reads as follows (the features added with respect to claim 1 as originally filed are in bold, those deleted are struck through, emphasis added by the Board):

"Packaging unit (2, 48) made of moulded pulp for products like eggs, comprising:

- a bottom part (4) provided with compartments (26) for individual products;
- a cover part (14) comprising top (24), front (18) and rear (22) surfaces with the front surface comprising one or more openings (29);
- a first locking element extending upwardly from the bottom part defining a cam (31) with an at least partly downwardly facing locking plane (156) with a length and a width **that extends outwardly downwards**, such that the length of the cam partly extends through the opening (29) in the front surface of the cover part in a closed position of the packaging unit; and
- a label (36, 44, 50) provided on the cover part, **characterized in that: wherein**

- the label is provided with a curved cut (38, 46, 52) that is configured to enable the cam to partly extend through the opening in the cover part and remain substantially behind the label seen in a front view of the packaging unit in a closed position."

Independent claim 1 of **auxiliary request MRA** reads as follows (the features added with respect to claim 1 of the main request are in bold, those removed are struck through, emphasis added by the Board):

"Packaging unit (2, 48) made of moulded pulp for products like eggs, comprising:

- a bottom part (4) provided with compartments (26) for individual products;
- a cover part (14) comprising top (24), front (18) and rear (22) surfaces with the front surface comprising one or more openings (29);
- a first locking element extending upwardly from the bottom part defining a cam (31) with an at least partly downwardly facing locking plane (156) **with having** a length and a width, **wherein the locking plane that** extends outwardly downwards, such that the length of the cam partly extends through the opening (29) in the front surface of the cover part in a closed position of the packaging unit; and
- a label (36, 44, 50) provided on the cover part, characterized in that the label is provided with a curved cut (38, 46, 52) that is configured to enable the cam to partly extend through the opening in the cover part and remain substantially behind the label seen in a front view of the packaging unit in a closed position."

The wording of the claims of the further auxiliary requests is not relevant for the decision.

Reasons for the Decision

1. Admissibility of the opposition of appellant 1
 - 1.1 The opposition division found, in the decision under appeal (see point II.1 of the Reasons), that the opposition filed by appellant 1 was admissible, because the ground of opposition of lack of novelty based on document D1 (Article 100(a) EPC) had been sufficiently substantiated.
 - 1.2 In their reply to the statements setting out the grounds of appeal, the respondent reiterated the objection regarding the inadmissibility of the opposition of appellant 1, explaining that the novelty objection based on D1, as formulated in the notice of opposition, was not sufficiently substantiated because it relied exclusively upon the figures contained in the document.

According to the respondent, it was not possible to understand the arguments of appellant 1, due to the low quality of the figures of document D1. Because of that, the opposition of appellant 1 should have been rejected as inadmissible by the opposition division.

- 1.3 The Board is not convinced by the arguments of the respondent. The allegation that the quality of document D1 is not sufficient for assessing whether the features of granted claim 1 are derivable therefrom does not prove that the decision of the opposition division in respect of admissibility of the opposition of appellant 1 was not correct (appealed decision, point II.1.1).

On the contrary, the Board, after having reviewed point

2.1 of the notice of opposition of appellant 1, is convinced that the merits of the case set out therein can be assessed in a meaningful manner, because the notice of opposition contains an adequate indication of the relevant facts, evidence and arguments relied upon.

The issue, raised by the respondent, that it is not possible to understand the notice of opposition of appellant 1 because, due to the low quality of the figures, it is not possible to clearly identify the features discussed therein, does not have an impact on the sufficiency of the notice of opposition, but rather on the strength of the appellant's case.

However, according to the established case law (see the Case Law of the Boards of Appeal, 10th Edition 2022, CLB in the following, IV.C.2.2.8 d)) and correctly argued by appellant 1, the strength of the arguments contained in a notice of opposition has to be clearly distinguished from sufficiency thereof.

This means that an opposition may still be admissible even if the indication of facts, evidence and arguments given therein is not conclusive or correct.

As a consequence of the above, the respondent failed to convincingly demonstrate that the opposition of appellant 1 is not admissible (Article 99(1) and Rule 76(2)c) EPC).

2. Fresh ground of opposition - Article 100(c) EPC

2.1 During the oral proceedings before the Board the appellants objected to the admission into the proceedings of the written declarations D14 and D15 provided by the respondent. There is, however, no need

to discuss the issue of their admittance in the present decision, since, even if their content is taken into account, to the benefit of the respondent, the ground for opposition according to Article 100(c) EPC raised by the appellants is found to be admissible and to prejudice the maintenance of the patent as granted, as set out below (see point 2.7.4 of this decision).

2.2 Claim 1 of the main request (patent as granted) comprises the following features:

"- a first locking element extending upwardly from the bottom part defining a cam with an at least partly downwardly facing locking plane with a length and a width **that extends outwardly downwards**, such that the length of the cam partly extends through the opening in the front surface of the cover part in a closed position of the packaging unit",

whereby the highlighted wording "that extends outwardly downwards" represents an addition with respect to claim 1 as originally filed.

2.3 Appellant 2 argued, for the first time, five days before the oral proceedings before the opposition division (with letter dated 2 July 2021), that claim 1 defined, after the amendment, a cam with an at least partly downwardly facing locking plane with a width that extends outwardly downwards.

This meant, according to appellant 2, that the claim encompassed embodiments in which the width of the locking plane increased in a direction outwardly downwards.

As the originally filed documents nowhere mentioned such an increasing width of the locking plane, claim 1

extended beyond the content of the originally filed documents.

- 2.4 The opposition division noted that the grounds according to Article 100(c) EPC had not been raised before and that therefore the above objection introduced a fresh ground of opposition. Having found that the above objection was not *prima facie* relevant, the opposition division decided not to admit it into opposition proceedings.

The opposition division based its *prima facie* analysis on the assumption that the contentious feature,

"a length and a width that extends outwardly downwards"

could not be read by a skilled person as encompassing the allegedly non-disclosed embodiments to which appellant 2 refers, in which the width of the locking plane increases outwardly while sloping in a downward direction (appealed decision, section II.3.1.1).

This was because a width extending outwardly downwards would not have been "clear", "coherent" and "technically consistent" with the subsequent feature of claim 1

"such that the length of the cam partly extends through the opening in the front surface of the cover part in a closed position of the packaging unit" (appealed decision, section II.3.1.2).

- 2.5 Appellant 2 requested that the Board overrules the above discretionary decision of the opposition division and admit the fresh ground of opposition into appeal proceedings.

According to appellant 2 the opposition division did not apply the criterion of *prima facie* relevance in a reasonable way.

This was because the clearly formulated feature "a length and a width that extends outwardly downwards" was not interpreted in a reasonable way by the opposition division.

- 2.6 The respondent replied that the decision not to admit this fresh ground into the proceedings was based on the correct criteria and that these criteria (*prima facie* relevance) were applied correctly and in a reasonable way.

This was because the finding of the opposition division was correct, that the claim interpretation upon which the objection of unallowable extension was based did not make technical sense, as it was at odds with the subsequent features of the claim.

The objection was also based upon a claim interpretation which was not logical.

This interpretation also resulted in structural features, as shown by documents D14 and D15, which were impossible to realise in the technical field of the patent in suit.

- 2.7 It is established case law that, in an appeal against a decision taken by a department of first instance in exercise of its discretion, it is not for the Board to review all the facts and circumstances of the case as if it was in that department's place and decide whether or not it would have exercised discretion in the same way. The Board should overrule the way in which the

opposition division exercised its discretion in reaching a decision in a particular case only if the Board concludes that the opposition division did so in accordance with the wrong principles, without taking the right principles into account or in an arbitrary **or unreasonable way**, thereby exceeding the proper limits of its discretion (CLB, V.A.3.4.1 b; G 7/93, OJ EPO 1994, 775).

In the present case, however, the Board exceptionally follows the arguments of appellant 2, requesting to set aside the discretionary decision of the opposition division and to admit its objection of added subject-matter, for the following reasons.

- 2.7.1 The opposition division's *prima facie* assessment on whether the contentious feature, which was added to originally filed claim 1, extends beyond the content of the application as filed was not based on an analysis of the content of the application as filed, but rather on the assumption that a skilled reader would have disregarded, for reasons of clarity, those embodiments which were indicated by appellant 2 as being now explicitly taught but not originally disclosed.

The clear and explicit wording "a length and a width that extends outwardly downwards" was construed, by the opposition division, as meaning that it is rather the length, not the width, which extended outwardly downwards.

The Board concurs with appellant 2 that clarity is not the correct basis for assessing added subject-matter and further that the above interpretation is not reasonable, as it goes beyond the literal meaning of the contentious feature, and against the general

principles set out in the case law (CLB, II.A.6.1), according to which the wording of a claim should be read and interpreted on its own merits and given its broadest technically sensible meaning.

2.7.2 The opposition division motivated this claim interpretation with the need to keep consistency with the subsequent feature of the claim, which reads

"such that the length of the cam partly extends through the opening in the front surface of the cover part in a closed position".

The claim interpretation at the basis of the objection raised by appellant 2 is however, *prima facie*, not at odds with the subsequent feature of the claim, because the restriction on the length of the cam mentioned in said subsequent feature clearly does not relate to the width of the cam.

2.7.3 The argument of the respondent that the claim interpretation of appellant 2 is not logical, because a width, being a distance measured along a straight line, cannot extend in two distinct directions ("outwardly", and "downwardly") at the same time is not convincing.

This is because the claim interpretation at the basis of the objection raised by appellant 2 is that the width extends, in the sense that it increases, in only one direction, whereby this direction is inclined outwardly, meaning away from the front surface of the cover part of the packaging unit, and downwardly.

2.7.4 The respondent also argues, referring to documents D14 and D15, that the interpretation at the basis of the objection raised by appellant 2 would be discarded by a

skilled person because it defines packaging units which cannot be made of moulded pulp, because of the geometry of the cam.

Based on the above allegation the respondent submits that the findings of the opposition division that this interpretation would not be considered by a skilled person, were correct in substance.

2.7.5 This line of argument is also not convincing.

The arguments put forward by the respondent, along with documents D14 and D15, fall short of demonstrating the impossibility of producing a packaging unit made of moulded pulp with a cam with an at least partly downwardly facing locking plane having a width that extends outwardly downwards.

This is because these documents can only provide evidence on the issues encountered, when trying to produce the packaging units depicted therein, with the means available to their author.

Therefore, D14 and D15, while potentially informative on specific methods and resources for producing packaging units, cannot definitively prove the broader impossibility of producing packaging units made of moulded pulp with a cam with an at least partly downwardly facing locking plane having a width that extends outwardly downwards.

In addition, as argued by appellant 2, claim 1 is a product claim and, since the way it is produced is not part of the claim, no manufacturing method for producing it can be excluded, including also as argued

by appellant 2, processing steps after moulding for providing the cam as claimed on the packaging unit.

In conclusion, even by taking into account the content of the written declarations to the benefit of the respondent, these do not convincingly prove that it is impossible to create a packaging unit as claimed.

2.8 In view of the above, the Board concludes that the opposition division, when taking the discretionary decision not to admit the late-filed objection of added subject-matter, did not apply the criterion of *prima facie* relevance in a reasonable way. Hence, the late-filed ground of opposition based on Article 100(c) EPC was wrongly not admitted into the proceedings by the opposition division and is to be considered as forming part of the legal and factual framework of the appeal proceedings.

3. Request for remittal

3.1 The respondent requested, during oral proceedings before the Board, that if the ground of opposition of unallowable extension (Article 100(c) EPC) was admitted into appeal proceedings, the case be remitted to the opposition division for further prosecution.

This request was motivated with the argument that the Board interpreted the wording of claim 1 differently from the opposition division, namely in a substantially broader sense, resulting in a fresh case, and in an undue burden for the Board and the respondent.

3.2 According to Article 11 RPBA 2020 a Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special

reasons present themselves for doing so, whereby, as a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

In the present case, no such fundamental deficiency was indicated by the respondent when they requested remittal.

Furthermore, the fact that the Board in reviewing the decision under appeal arrives at different conclusions from those of the opposition division cannot be seen as special reasons which would justify remittal.

According to the established case law (CLB, V.A.9.1.2) a Board should not remit a case if it can decide all the issues without undue burden.

In the present case, after having reviewed the arguments submitted by the parties in relation to the admitted ground of opposition based on Article 100(c) EPC, the Board came to the conclusion that the issues relevant thereto could be discussed with the parties and decided upon by the Board without undue burden (see the following section of the present decision).

4. Main Request - Added subject-matter

4.1 Appellant 2 argues that the originally filed documents do not disclose any embodiment in which the width of the locking plane increases while sloping outwardly in a downward direction and concludes that claim 1 of the Main Request, extends beyond the content of the originally filed documents.

4.2 The respondent referred to page 2, lines 3 to 5 of the original description as the basis for this amendment.

4.3 The Board disagrees with the respondent.

The sentence at page 2, lines 3 to 5 of the original description reads as follows:

"The first locking element extends upwardly from the bottom part, thereby defining a cam structure with an at least partly downwardly facing locking plane having a length and a width."

There is no mention, in this passage, that the at least partly downwardly facing locking plane of the locking element has a width that extends outwardly downwards in the sense that the width increases, in a direction outwardly downwards.

In the absence of any disclosure of an at least partly downwardly facing locking plane of the locking element having a width that extends outwardly downwards the main request cannot be allowed as claim 1 provides a new technical teaching to the skilled person and, hence, extends beyond the content of the application as originally filed (Article 100(c) EPC).

5. Auxiliary request MRA - Admittance

5.1 Appellant 1 argued that the respondent failed to explain, in section VIII.2.1 of its reply to the statements setting out the grounds of appeal, how the amendments made to claim 1 of auxiliary request MRA could overcome any objection raised against claim 1 of the main request.

Auxiliary request MRA, according to appellant 1, has therefore not been substantiated, and should not be admitted into appeal proceedings.

- 5.2 The Board disagrees. According to the established case law (CLB, V.A.5.12.6) auxiliary requests, if filed without any explanation, may not be deemed inadmissible, even if no explanation as to why amendments have been filed is given, when they are self-explanatory. This condition is met in the present case, because claim 1 of auxiliary request MRA only differs from claim 1 of the main request in that the feature
"downwardly facing locking plane with a length and a width that extends outwardly downwards"
has been replaced with
"downwardly facing locking plane having a length and a width, wherein the locking plane extends outwardly downwards".

This amendment is self-explanatory, because there is now no feature which could be seen as defining a cam with an at least partly downwardly facing locking plane with a width that extends outwardly downwards.

This amendment was also explained in point VIII.2.1 on page 26 of the reply to the statements setting out the grounds of appeal. The purpose of filing auxiliary request MRA was to overcome the objection of unallowable extension discussed above.

- 5.3 Appellant 2 also requested not to admit this auxiliary request arguing as follows.

Auxiliary request MRA was filed in the first-instance proceedings but not decided upon.

Following the *ratio decidendi* of case T 1800/20, such a request is not automatically admitted in the appeal proceedings. It has first to be examined whether it was admissibly submitted and maintained in the first-instance opposition proceedings.

For appellant 2 this was not the case, because this request was filed on 5 July 2021, only two days before the oral proceedings before the opposition division, and thus after the final date (7 May 2021) for making written submissions and/or amendments as set out in the summons of 6 October 2020.

5.4 The Board does not share appellant 2's view.

This request was filed in reaction to the late-filed ground of opposition raised for the first time in the submissions of 2 July 2021 of appellant 2 and, hence, could not have been filed before the final date for making written submissions and/or amendments as set out in the summons of 6 October 2020.

Furthermore, auxiliary request MRA was re-filed with the reply to the statement setting out the grounds of appeal, i.e. in due time in the appeal proceedings. In view of the outcome of the opposition proceedings with respect to the main request the Board cannot even see any reason which would justify that the request should have been submitted in the opposition proceedings.

In view of the above, the auxiliary request MRA is admitted into the appeal proceedings.

6. Auxiliary request MRA - admittance of objections

During the oral proceedings before the Board the respondent objected to the admittance of the objections raised by the appellants against claim 1 of auxiliary request MRA on the basis of Rule 80 EPC and Articles 123(3), 83 and 56 EPC. Since none of the objections was found to prejudice the maintenance of the patent on the basis of auxiliary request MRA for the reasons given below, there is no need to discuss the issue of their admittance in the present decision.

7. Auxiliary request MRA - Compliance with Rule 80 EPC

7.1 Appellant 1 argued that the respondent failed to explain which ground of opposition occasioned the amendment made to claim 1 of auxiliary request MRA.

This request therefore violates the requirements of Rule 80 EPC.

7.2 The Board disagrees. As already discussed in section 5.2 above, the last sentence at page 26 of the reply to the statements setting out the grounds of appeal explains that auxiliary request MRA was filed in order to overcome the objection of unallowable extension, as discussed above. Hence, the requirements of Rule 80 EPC are fulfilled.

8. Auxiliary request MRA - Compliance with Article 123(3) EPC

8.1 Appellant 1 also argued that as in claim 1 of auxiliary request MRA the restriction on the width has been removed, the width could now have any form whereas in claim 1 of the patent as granted, it could only extend

outwardly downwards. This amendment thus extended the scope of protection in violation of Article 123(3) EPC.

8.2 The Board disagrees because the amendment made to claim 1 of auxiliary request MRA restricts the scope of protection by merely selecting one of the two embodiments which were encompassed by claim 1 of the patent as granted (main request).

9. Auxiliary request MRA - Compliance with Article 83 EPC

9.1 Appellant 1 argued that the packaging unit claimed in claim 1 of the main request is not disclosed in such a way that a skilled person would be able to make it in practice (statement of grounds of appeal, section IV, pages 20 and 21), because if the cam element of document D4 cannot be combined with the curved-out sections shown in document D2 without causing ruptures of the label at the ends thereof, also in the claimed packaging unit the label would also be inevitably ruptured.

During oral proceedings before the Board, appellant 1 explained that the above objection also held against claim 1 of auxiliary request MRA.

9.2 The Board, notes that this objection of lack of sufficiency of disclosure submitted with the statement setting out the grounds of appeal of appellant 1 had not been raised and maintained during opposition proceedings, and has not been discussed in the appealed decision.

This objection is however not convincing, because, according to the established case law of the Boards of Appeal, the burden of proof for establishing

insufficient disclosure in inter partes proceedings generally lies with the opponent, who must demonstrate that a skilled reader of the patent, using their common general knowledge and without undue effort, would not be able to implement the invention (CLB, II.C.9).

Irrespective of what may happen when the cam element of document D4 is combined with the curved-out sections shown in document D2, it is incumbent upon appellant 1 to at least credibly demonstrate why the general knowledge of a skilled person would not be sufficient to implement the claimed features in practice.

In the present case appellant 1 failed to substantiate its allegation that in the claimed packaging unit the label would be inevitably ruptured.

10. Auxiliary request MRA - Inventive step, starting from D13 in combination with D2
- 10.1 During the oral proceedings before the Board the respondent objected to the admittance of documents D13 and D2d-oppo1 into the appeal proceedings and also argued that D2 did not belong to prior art. Since none of the objections based on these documents was found to prejudice the maintenance of the patent on the basis of auxiliary request MRA for the reasons given below, there is no need to discuss in the present decision the issue of admittance of D13 and D2d-oppo1 into the proceedings or the issue of whether D2 belongs to the prior art.
- 10.2 Both appellants raised, against claim 1 of auxiliary request MRA, the same objection of lack of inventive step which was raised against claim 1 of the main

request starting from D13 in combination with the teaching of D2.

According to the appellants, considering the characterizing portion of claim 1 as being the distinguishing feature over the packaging unit disclosed in document D13 (as in the appealed decision, see sections II.5.2 and II.6.2), the subject-matter of claim 1 of auxiliary request MRA could not be considered to involve an inventive step.

Based on this feature the problem to be solved can be formulated as how to maximize the label surface, to increase the area on which information could be displayed (patent in suit, paragraph [0010]).

To solve this problem, a skilled person would have considered the teaching of document D2, which clearly belongs to the same technical field as the patent in suit as it also discloses a packaging unit made of moulded cardboard having a first locking element extending upwardly from the bottom part defining a cam. According to the appellants, and contrary to what was found by the opposition division, an at least partly downwardly facing locking plane of the cam, as claimed, is straightforwardly derivable from the figures of document D2.

The skilled person would have immediately recognized from the figure on page 2 of D2 that by using a label with a curved cut it would have been possible to also cover the locking openings, maintaining the front view of the label substantially intact, without compromising the locking capabilities.

The skilled person would have done that also because paragraph [0013] of D13 suggests that the label should extend above the front surface of the cover part, to maximize the printable area for informative or decorative purposes (see also D13, paragraph [0004]).

The opposition division's reasoning that the skilled person would have refrained from this combination in order to not compromise the locking capabilities are not convincing because, as clearly shown in D2, the curved cut has the effect of eliminating any interference between the label and the locking element extending through an opening covered by the label.

The skilled person would see the advantages of this teaching and have no practical difficulties in applying it to the packaging unit disclosed in D13. In this way they would arrive at the subject-matter of granted claim 1 without having to exercise any inventive skill.

Consequently the subject-matter of this claim does not involve an inventive step.

10.3 The respondent convincingly demonstrated that the subject-matter of claim 1 of auxiliary request MRA is inventive over the combination of documents D13 and D2, for the following reasons.

10.3.1 The Board follows the argumentation of the respondent that claim 1 of auxiliary request MRA is new over D13 also because D13 fails to disclose a locking plane.

This is because, as convincingly explained by the respondent during oral proceedings, figure 7 of D13, being a cross section, could only disclose a locking element extending upwardly from the bottom part

defining a cam (12) with an at least partly downwardly facing locking **surface** which, in the depicted cross-section, is shown as being curvature-free.

This figure does not however allow a skilled reader to conclude that this locking surface is curvature-free in any possible direction.

As a consequence of that D13 fails to disclose a locking plane, as claimed in claim 1 of auxiliary request MRA.

- 10.3.2 As correctly noted by the opposition division (see section II.5.1 of the decision), the locking surface of the locking element of D2 is not visible, a skilled person cannot conclude that the figures of this document show an at least partly downwardly facing locking plane, as claimed.

As there is also no information in the text of either of documents D2 or D2d-oppo1 in relation to the shape or properties of this locking surface, the argumentation of appellant 1 according to which this feature is implicitly disclosed is also not convincing.

For the above reasons the subject-matter of claim 1 of auxiliary request MRA which contains a "locking plane" is novel over the packaging unit disclosed in D2.

- 10.3.3 Based on the above findings, according to which neither the packaging unit disclosed in D13, nor the packaging unit disclosed in D2 comprise the feature: "locking plane", the Board fully concurs with the respondent that a combination of the teachings of these two documents cannot result in an obvious manner in a

packaging unit having a cam with an at least partly downwardly facing locking plane, as claimed.

11. Auxiliary request MRA - Inventive step, starting from D2 or D6 in combination with D8

11.1 Both appellants argued that the same feature distinguished the subject-matter of claim 1 of auxiliary request MRA from the packaging units disclosed in D2 and D6, namely, as discussed above, the presence of a "locking plane", and that this feature solved the problem of improving locking of the packaging unit through the locking cam.

According to the appellants, starting from either D2 or D6, as a locking plane is derivable from each of documents D8, D3, D13 and D4, as a measure for improving locking of a packaging unit, the subject-matter of claim 1 of auxiliary request MRA does not involve an inventive step over each of these combinations (see also the appealed decision point II. 6.3, dealing with the main request).

Appellant 2 argued that a skilled person starting from D2 or D6 would, when seeking to improve the locking, consult D8, and in particular paragraphs [0024] and [0025] of this document and arrive at the subject-matter of claim 1 of auxiliary request MRA in an obvious manner.

When discussing the combination of D2 or D6 with document D8 appellant 2 interpreted the last sentence of paragraph [0023] of document D8 as also disclosing embodiments in which the length of the cam partly extended through the opening in the front surface of the cover part in a closed position of the packaging

unit, thereby penetrating the label.

This is because, according to appellant 2, the mention, in this passage, that in the preferred embodiment the length of the cam is not sufficient to extend through the opening in the front surface of the cover part in a closed position of the packaging unit implies the (implicit) disclosure of further embodiments, in particular a contrario that the cam extends through the opening.

The skilled person aiming to improve the locking of the packaging unit of D2 or D6 would immediately recognize that having a longer locking plane of the cam is particularly advantageous, and the skilled person would have no practical difficulties in applying this teaching to the packaging unit of D2 or D6. In this way they would arrive at the subject-matter of claim 1 of auxiliary request MRA without having to exercise any inventive skill.

11.2 The Board is not convinced by the above argumentation. There is no implicit disclosure, in the last sentence of paragraph [0023] of document D8, of any cam being long enough to partly extend through the opening in the front surface of the cover part in a closed position of the packaging unit.

This is because, according to the established case law (CLB, I.C.4.3) an alleged disclosure can only be considered "implicit" if it is immediately apparent to the skilled person that nothing other than the alleged implicit feature forms part of the subject-matter disclosed, meaning that any person skilled in the art would objectively consider it as necessarily implied in

the explicit content, e.g. in view of general scientific laws.

Document D8, on the contrary discloses that in order to achieve an effectively locked, but at the same time attractive packaging system (D8, paragraphs [0066] and [0067]), the locking element 46 should not penetrate the label.

A skilled person seeking to improve the locking would therefore not, when looking in D8 for the features which improve locking, isolate the distinguishing feature of a locking plane as the only feature solving this technical problem.

This means that the skilled person applying the teaching of D8 to a packaging unit according to D2 or D6 would not arrive at the subject-matter of claim 1, but rather come to a packaging unit with a shorter cam than that claimed, not extending through the opening.

The resulting packaging unit would therefore comprise a first locking element which does not correspond to the claimed one, which extends upwardly from the bottom part defining a cam with an at least partly downwardly facing locking plane having a length and a width, wherein the locking plane extends outwardly downwards, such that the length of the cam partly extends through the opening in the front surface of the cover part in a closed position of the packaging unit.

Based on the above, the Board concurs with the respondent that a combination of the teachings of these documents cannot lead in an obvious manner to the subject-matter of claim 1 of auxiliary request MRA.

12. Auxiliary request MRA - Inventive step, starting from D2 or D6 in combination with D3

12.1 Concerning the combination of D2 or D6 with D3, appellant 1 argued that D3, at page 4, lines 4-12 clearly disclosed that a downwardly and outwardly extending retainment flap provided a locking function which is "reliable and stable" (see line 12). The skilled person would therefore apply the downwardly and outwardly extending retainment flap in order to improve locking.

The shorter extent of the locking cam, also disclosed in this passage, would however not be incorporated, because this feature is not functionally related to the previous one, as it seeks to solve a completely different technical problem (see page 4, lines 30-32 of D3).

12.2 The Board is not convinced by the above argumentation, because D3 explicitly hints at the presence of a synergetic effect between these two features, which together achieve a reliable locking device which can be hidden behind a label.

As correctly found by the opposition division when discussing inventive step of claim 1 of the main request (see point II.6.1 at page 17 of the appealed decision, and also the paragraph bridging pages 18 and 19), the embodiment disclosed at page 4 of D3 teaches away from having a cam extending through the opening, as claimed in claim 1.

This is because according to this embodiment of D3 the retainment flap is to be configured for not extending beyond the front surface of the cover part when the

cover part is in its closed position (see also page 11, lines 6-8 of document D3). As a consequence of the above, if the skilled person were to apply the teaching of D3 to a packaging unit according to D2 or D6, they would not arrive at the subject-matter of claim 1, but rather to a packaging unit with a short cam part, which did not extend through the opening.

The combination of the teachings of documents D2 or D6 with those of document D3 does not therefore cast doubts on inventiveness of the subject-matter of claim 1 of auxiliary request MRA.

- 13. Auxiliary request MRA - Inventive step, starting from D2 or D6 in combination with D13
 - 13.1 Concerning the combination with D13, appellant 2 argues that the way in which the outwardly downwards extending locking plane (see element 12, at figure 7) is depicted (in thicker, more bold black lines) clearly conveys the information that this feature improves locking.
 - 13.2 The Board disagrees.

Based on the above findings (see section 10.3.1 above), according to which also the packaging unit disclosed in D13 does not comprise the feature: "locking plane", a combination of the teachings of D2 or D6 with that of D13 cannot result, irrespective of which document is chosen as the starting point, in a packaging unit having a cam with a locking plane, as claimed.

Therefore the skilled person starting from either D2 or D6 would not arrive, on the basis of the teachings of document D13, at the subject-matter of claim 1 of

auxiliary request MRA, without having to exercise any inventive skill.

14. Auxiliary request MRA - Inventive step, starting from D2 or D6 in combination D4

14.1 Appellant 2 argued only in writing that D4 (see figure 6 on page 4) clearly showed that the locking plane of the cam had a downwardly and outwardly extending locking plane.

No technical information would be needed for the skilled person (or even a common user) to recognize that a locking cam with a downwardly and outwardly extending locking plane would inevitably increase the locking effect.

14.2 The Board disagrees, because it is not evident how the skilled person would be able to identify, from figure 6 of D4, the technical teaching to which the opponent refers in its inventive step argumentation. As a consequence of the above, the Board concludes that D4 does not provide any incentive for the skilled person to combine the teaching of D4 with any of documents D2 or D6 (see also the appealed decision, point II.6.3, dealing with the main request).

15. Further inventive step objections

15.1 Besides the objections discussed above further inventive step objections were raised by the appellants in their statements of grounds which were not discussed in the appealed decision.

In particular appellant 2 contested inventive step starting from either D5 or D7, in combination with each

of D3, D4, D8 and D13 (statement of grounds, section IV).

15.2 As requested by the respondent, the Board decided not to admit these objections, for the following reasons.

These objections are all directed against the subject-matter of granted claim 1 and were all first raised in the statements setting out the grounds of appeal, without any explanation as to why they were not submitted during the opposition proceedings.

According to Article 12(6), second sentence, RPBA, the Board shall not admit objections which should have been submitted in the proceedings leading to the decision under appeal unless the circumstances of the appeal case justify their admittance.

The Board cannot see any circumstances in the present appeal case, also because the appellants did not submit any, which would justify admitting new objections against a granted claim at the outset of appeal proceedings.

The appellants also did not provide any justification as to why these objections, which were raised against the main request (patent as granted), should be admitted against auxiliary request MRA.

As a result, these objections are not admitted into the appeal proceedings (Article 12(6), second sentence, RPBA)

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division with the order to maintain the patent in the following version :

**Claims 1 to 15 of auxiliary request MRA filed with the reply to the statements setting out the grounds of appeal dated 19 October 2022;
Description pages of the patent specification;
Drawings sheets of the patent specification.**

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated