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**Datasheet for the decision
of 30 July 2024**

Case Number: T 0846/22 - 3.2.02

Application Number: 16191743.0

Publication Number: 3300753

IPC: A61M15/00

Language of the proceedings: EN

Title of invention:

METERED DOSE INHALER FOR DISPENSING AEROSOL DOSES

Patent Proprietor:

Presspart GmbH & Co. KG

Opponent:

European Oppositions Limited

Headword:

Relevant legal provisions:

EPC Art. 56, 58, 83, 99(1), 104(1)
Section 1169 UK Companies Act 2006

Keyword:

Admissibility of opposition - acting on behalf of a third party - entitlement to file an opposition (yes)
Sufficiency of disclosure - (yes)
Inventive step - (yes)
Apportionment of costs - abuse of procedure - (no)

Decisions cited:

G 0003/97, G 0003/99, G 0001/13, T 0475/07, T 0184/11

Catchword:



Beschwerdekammern
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Case Number: T 0846/22 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 30 July 2024

Appellant: European Oppositions Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 January 2022 concerning the maintenance of
European Patent No. 3300753 in amended form**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: D. Ceccarelli
Y. Podbielski

Summary of Facts and Submissions

- I. The opponent appealed against the Opposition Division's decision that, account being taken of the amendments made by the patent proprietor during the opposition proceedings according to auxiliary request 1, the European patent and the invention to which it relates met the requirements of the EPC.
- II. The Board summoned the parties to oral proceedings and provided its preliminary opinion.
- III. By letter of 29 July 2024, the appellant informed the Board that it would not attend the oral proceedings.
- IV. Oral proceedings took place on 30 July 2024 without the appellant.

The appellant had requested in writing that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the decision under appeal be set aside and the opposition be held inadmissible. They also requested that the appeal be rejected as inadmissible, or that the appeal be dismissed. In the alternative, the respondent requested that the patent be maintained on the basis of one of auxiliary requests 1 to 4 filed with the reply to the statement setting out the grounds of appeal. Furthermore, they requested that the appellant be ordered to pay the respondent's costs arising from participation in the opposition and appeal proceedings (first request for apportionment of costs) and that the appellant be ordered to pay the respondent's costs for the

preparation of the oral proceedings in view of the appellant's non-attendance at the oral proceedings (second request for apportionment of costs).

V. The following documents are mentioned in this decision:

D1: GB 2506385 A

D2: WO 2016/030844 A1

D3: WO 2005/009325 A2

VI. Claim 1 of the request found allowable by the Opposition Division reads as follows:

"Metered dose inhaler for dispensing aerosol doses comprising:

an actuation housing (2) adapted to receive a canister (4) which is configured to move from a rest position to an activation position in which a valve (7) of the canister (4), positioned at a valve end (8) of the canister (4), is depressed against a bottom portion (9) of the actuation housing (2) such that an aerosol dose is released,

a mechanical dose counter (10) comprising an indicator member which is constructed and arranged to undergo a predetermined count-indicating motion when an aerosol dose is released,

a triggering unit (11, 11', 11'', 11''') for triggering at least one electrical switch (12) when the canister (4) is moved from the rest position to the activation position, whereby an electrical signal is generated, and

a processing unit (19) for processing the signal generated by the switch (12) upon being triggered, wherein the actuation housing (2) further comprises a mouthpiece (3) for inhalation of the aerosol,

characterized in

that the triggering unit (11, 11', 11'', 11''') is positioned within the actuation housing (2) opposite to the mouthpiece (3), wherein the actuation housing (2) is adapted to receive the canister (4) in between the triggering unit (11, 11', 11'', 11''') and the mouthpiece (3) and,

that the triggering unit (11, 11', 11'', 11''') comprises trigger members (13, 13a, 13b) for triggering the at least one electrical switch (12), wherein the trigger members (13, 13a, 13b) are designed as flexible tongues (14) each having an end portion (15)."

Claims 2 to 12 are dependent claims.

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

Admissibility of the appeal

The appeal had been filed and the appeal fee paid in timely manner. The appeal was admissible.

Sufficiency of disclosure

The invention as defined in claim 1 of the request found allowable by the Opposition Division was not sufficiently disclosed. The patent only disclosed an arrangement with two trigger members which operated on two respective switches. There was neither any teaching nor any pointer or suggestion in the patent for the person skilled in the art about the possibility of implementing any different arrangements, for example arrangements including any arbitrary combination of two or more trigger members with two or more switches, such

arrangements being covered by claim 1 of the request found allowable by the Opposition Division.

Inventive step

The subject-matter of claim 1 of the request found allowable by the Opposition Division lacked an inventive step when starting from D1, in combination with common general knowledge or D2, and when starting from D2, in combination with common general knowledge, D1 and/or D3. Moreover, some documents which the Opposition Division had not admitted into the proceedings should be admitted into the appeal proceedings.

Starting from D1, the provision of a plurality of trigger members could be regarded as a minimal constructional variation. Electromechanical actuator 202 shown in Figure 2 of D1 was essentially the same or equivalent to at least one of the flexible tongues required by claim 1. The objective technical problem should be formulated as being how to provide an alternative configuration or design for any trigger members.

The provision of a plurality of trigger members as claimed was therefore obvious from the common general knowledge of the person skilled in the art.

Moreover, maintaining compactness was not the specific purpose of D1, which only referred to "compact size" in paragraph [0007], on page 2. Maintaining compactness was, at most, a general goal in the inhaler industry. The fundamental purpose of D1 was to minimise power requirements for recording inhaler events. The triggering units of D1 and D2 were intrinsically

similar, D2 was as concerned about dose monitoring as D1 and there was no reason to believe that a modification of D1 based on D2 would undermine the lower power consumption goals of D1. It followed that D1 and D2 were compatible and combinable in an obvious way.

Starting from D2, the provision of a mechanical dose counter comprising an indicator member which is constructed and arranged to undergo a predetermined count-indicating motion when an aerosol dose is released was obvious in view of common general knowledge. Claim 1 did not specify the location of the mechanical dose counter, and therefore this feature could not justify an inventive step in synergy with the feature of the trigger unit with the triggering members. Moreover, D1 taught the provision of a mechanical dose counter as claimed. Mechanical dose counters and electric/electronic dose counters could well coexist in compact inhalers, and mechanical dose counters could be located at locations entirely different from that of D1. If need be, the person skilled in the art would have adapted the housing, canister and trigger unit of D1 in view of the teaching of D3.

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

Admissibility of the opposition and the appeal

The admissibility of the opposition had to be examined *ex officio* in every phase of the opposition and ensuing appeal proceedings. The opposition in the current case had to be considered inadmissible since the appellant, a UK company, was a "dormant company" and had been a

"dormant company" at the time of filing the opposition. Under UK law, a company or association could be "dormant" if it was not doing business and did not have any other income, for example investments, as defined by Section 455 of the UK Companies Act.

The appellant had not been entitled to conduct any business and had not been active at the time of filing the opposition, during the entire opposition proceeding and even at the time when the appeal was filed. Hence, it could not be equated to a legal person.

Moreover, the opposition should be considered inadmissible because the appellant's involvement in the case had to be regarded as circumventing the law by abuse of procedure, and as a dormant company the appellant could not have appointed and paid any authorised representative to act on its behalf, as this would have meant acting beyond its allowed transactions.

Although the fact that the appellant was acting on behalf of a third party did not, as such, render the opposition inadmissible, it was evident that the opposition had been filed in the name of a dormant company to avoid any liability on the part of the real opponent for any possible costs in the event of the Opposition Division ordering a different apportionment of costs in favour of the respondent for reasons of equity. Circumventing possible remedies given to the parties by Article 104 EPC amounted to an abuse of procedure and so rendered the opposition inadmissible *per se*.

Furthermore, the acts of filing an opposition and appointing a representative were beyond the

transactions allowed for a dormant company. For this reason, it was highly questionable whether a representative could be properly authorised. No power of attorney had in fact been filed. Hence, it had to be assumed that the opposition had been filed by a non-authorised representative, which also rendered the opposition inadmissible. As a consequence, the appeal was inadmissible too.

The current case was different from the case underlying T 184/11, in which the opponent was not acting as a straw man for others and the representative had been empowered.

Sufficiency of disclosure

The invention as defined in claim 1 of the request found allowable by the Opposition Division was sufficiently disclosed. The patent disclosed an embodiment with two trigger members and two switches. On the basis of the teaching of the patent as a whole, the person skilled in the art would have been able to carry out the invention for the possible combinations of the number of trigger members and the electrical switches that were covered by the wording of the claim.

Inventive step

The subject-matter of claim 1 of the request found allowable by the Opposition Division was inventive in view of D1 to D3. The appellant had not discussed in detail other documents which the Opposition Division had not admitted into the proceedings.

Starting from D1, this document did not disclose a triggering unit that comprised trigger members for

triggering at least one electrical switch, wherein the trigger members were designed as flexible tongues each having an end portion.

The technical effect of these distinguishing features was that the trigger members were reliably deflected upon vertical movement of the canister and were thus able to reliably trigger the switches while at the same time the vertical movement of the canister was not impeded.

Neither D1 nor common general knowledge provided any prompting towards the distinguishing features for providing the technical effect.

Moreover, the person skilled in the art would have had no reason to implement the trigger members together with the electrical switches disclosed in D2 in the inhaler according to D1.

According to D1, it was necessary to maintain the compact size of dispensing devices (paragraph [0007]). It was also desirable to minimise the need for regulatory approval, which required any device recording usage patterns and time of usage to have minimal power requirements to mitigate the need for larger power sources or complex circuitry and additional cost (paragraph [0007]). Moreover, according to D1, the small footprint of the event recordal device allowed conventional inhalers to be used without any modifications (paragraph [0061]). Implementing the trigger members according to D2 in the inhaler according to D1 would have gone against the requirements of maintaining a compact size and minimal power consumption of the event recordal device according to D1.

Thus, the person skilled in the art, starting from D1, would not have combined the teachings of D1 and D2.

Starting from D2, this document did not disclose a mechanical dose counter comprising an indicator member constructed and arranged to undergo a predetermined count-indicating motion when an aerosol dose is released.

The effect of the distinguishing features was that the dose counting function was reliably provided by the mechanical dose counter wherein additional functions such as monitoring or evaluation functions could be realised by the additional triggering unit as well as the processing unit (paragraph [0012] of the patent).

Thus, the objective technical problem can be formulated as providing a metered dose inhaler with a reliable dose counting function as well as additional functions such as monitoring functions (paragraph [0009] of the patent).

In view of common general knowledge, D1 and/or D3, the person skilled in the art would not have arrived at the subject-matter of claim 1 of the request found allowable by the Opposition Division without an inventive step. D1 and D2 taught that mechanical dose counters added significant costs and could be inaccurate (paragraph [0004] of D1 and [0005] of D2). D3 did not disclose a mechanical dose counter.

Requests for apportionment of costs

The respondent's costs from the first and second instance proceedings were to be charged to the

appellant and a corresponding order to apportion costs was to be issued, because these costs were incurred culpably by the appellant's abuse of procedure with the aim of circumventing possible remedies given to the parties by Article 104 EPC.

Moreover, in view of T 475/07, the respondent's costs incurred for the preparation of the oral proceedings before the Board had to be charged to the appellant, because it was only the evening before that it had informed the Board of its intention not to participate in the oral proceedings. The appellant had not in any way informed the respondent. Had the respondent been informed, the costs for the preparation of at least part of the oral proceedings would not have been incurred, in view of the Board's preliminary opinion, which was favourable to the respondent in respect of a number of issues.

Reasons for the Decision

1. Admissibility of the opposition and the appeal

The respondent argued that the opposition and the appeal were not admissible.

1.1 It submitted that the appellant, a UK company, had been a "dormant company" under UK law at the time of filing the opposition and had never changed this status. This meant that the appellant was not entitled to conduct any business and could not be equated to a legal person.

Under Article 99(1) EPC "any person may give notice to the European Patent Office of opposition [...] in

accordance with the Implementing Regulations". "Any person" is to be interpreted in line with Article 58 EPC as "any natural or legal person, or any body equivalent to a legal person by virtue of the law governing it" (G 3/99, point 9 of the Reasons, G 1/13 point 2.3.3 of the Reasons).

The status of a legal person as such, i.e. the question as to whether it has capacity to sue or be sued, is a matter of national law. The right to bring opposition proceedings, to take part in such proceedings, to file an appeal and to take part in appeal proceedings is, by contrast, a matter of procedural law governed by the EPC (G 1/13, point 5.3 of the Reasons with reference to G 3/97, point 2.1 of the Reasons).

The respondent questioned the status of the appellant as a legal person as such. Hence, it has to be established whether the appellant, the company European Oppositions Limited, in particular at the time of filing the notice of opposition and the notice of appeal, had the status of a legal person.

Section 1169 of the Companies Act 2006 which applies throughout the UK defines a dormant company. A company is dormant during any period in which it has no significant accounting transactions. A dormant company can be reactivated. Engaging in significant transactions may result in a dormant company losing its dormant status.

Although inactive, a dormant company is not struck off, but remains on the Companies House register. This means that a dormant company maintains the status of a legal person. The Board agrees with the conclusion drawn to this effect in T 184/11 (point 2.2 of the Reasons).

It follows that the appellant had the status of a legal person at the time of filing the notice of opposition and throughout the opposition and appeal proceedings. The respondent's argument in this respect is therefore not convincing.

- 1.2 The respondent also argued that the appellant could not have paid the opposition or the appeal fee and could not have appointed an authorised representative. Moreover, it was evident that the appellant had been acting on behalf of a third party with the intention of avoiding any liability for possible costs apportioned to the appellant under Article 104 EPC. This amounted to an abuse of procedure.

However, whether the appellant engaged in transactions which could have led to the loss of its dormant status goes beyond the assessment of its status as a legal person. The assessment of potential financial relationships between a dormant company and an appointed representative is of no relevance to establishing the legal status of the company as a legal person either.

Moreover, the opponent's representative was appointed in accordance with the requirements of the EPC. Hence, there is no reason for the Board to doubt that the representative was duly authorised. The remaining provisions under the EPC for the admissibility of the opposition and appeal, including the payment of the relevant fees, were also complied with.

As regards the contention that the appellant had been acting on behalf of a third party with the intention of avoiding any liability for possible costs apportioned

to the appellant under Article 104 EPC, the Board notes that acting on behalf of a third party cannot be seen as a circumvention of the law unless further circumstances are involved (G 3/97, point 3.2 of the Reasons) and there is no requirement under the EPC that a party be equipped with sufficient financial means to comply with a merely hypothetical costs order. Moreover, the EPC does not offer the patent proprietor any kind of guarantee that an opponent will be able in fact to reimburse costs awarded against him (G 3/97, point 3.2.6 of the Reasons).

For these reasons, the Board does not see any abuse of procedure by the appellant which might render the opposition and/or the appeal inadmissible.

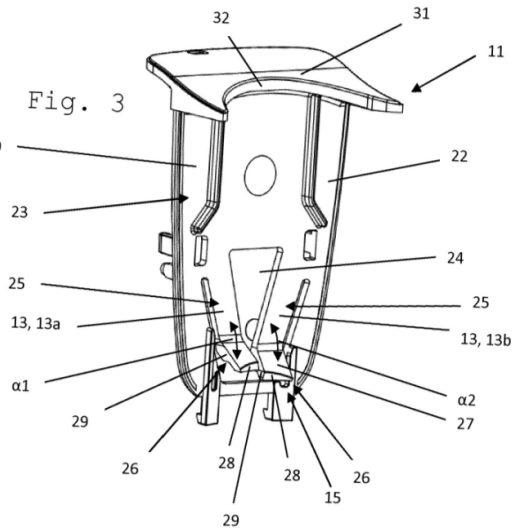
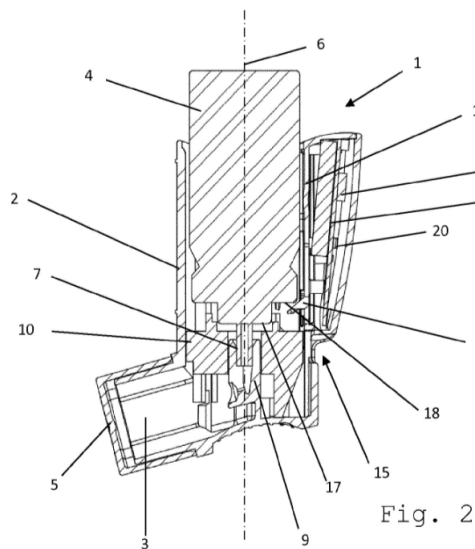
1.3 In conclusion, the respondent's requests that the decision under appeal be set aside and the opposition be held inadmissible or that the appeal be held inadmissible must be refused.

2. The subject-matter of the patent

The patent relates to a metered dose inhaler for dispensing aerosol doses. The doses are to be taken into the body of a patient upon inhalation, via the nose or mouth, and then delivered to the lungs. Metered dose inhalers are typically used for the treatment of respiratory infections and disorders. Asthma treatment is a particularly commonly use (paragraph [0003] of the patent).

A metered dose inhaler according to claim 1 of the request found allowable by the Opposition Division and a triggering unit of the inhaler according to the claim are schematically depicted in Figures 2 and 3 of the

patent, reproduced below.



The claimed metered dose inhaler comprises an actuation housing (2), a mechanical dose counter (10), a triggering unit (11) and a processing unit (19).

The actuation housing comprises a mouthpiece (3) for inhalation of the aerosol and is adapted to receive a canister (4) configured to move from a rest position to an activation position. In the activation position a valve (7) of the canister, positioned at a valve end of the canister, is depressed against a bottom portion (9) of the actuation housing such that an aerosol dose is released.

The mechanical dose counter comprises an indicator member constructed and arranged to undergo a predetermined count indicating motion when an aerosol dose is released.

The triggering unit is positioned within the actuation housing opposite to the mouthpiece and is adapted to receive the canister in between the triggering unit and

the mouthpiece. The triggering unit is for triggering at least one electrical switch when the canister is moved from the rest position to the activation position. This generates an electrical signal. The triggering unit also comprises trigger members (13, 13a, 13b) for triggering the at least one electrical switch. The trigger members are designed as flexible tongues each having an end portion.

The processing unit is for processing the signal generated by the switch upon being triggered.

According to the patent (paragraphs [0012] to [0014]) it is advantageous in terms of reliability and energy consumption to have both a mechanical dose counter for the basic counting function and an electrical trigger unit in combination with a processing unit for additional functions such as monitoring or evaluation functions.

3. Sufficiency of disclosure

The appellant argued that the patent only disclosed an arrangement with two trigger members which operated on two respective switches and that there was no teaching about how the skilled person could implement any different arrangements including any arbitrary combination of a plurality of trigger members with a plurality of switches. Hence, the subject-matter of claim 1 of the request found allowable by the Opposition Division was not sufficiently disclosed.

This objection is not convincing. While it is true that the patent discloses in detail embodiments with two trigger members (13) and two switches (12), the person skilled in the art would have known how to provide

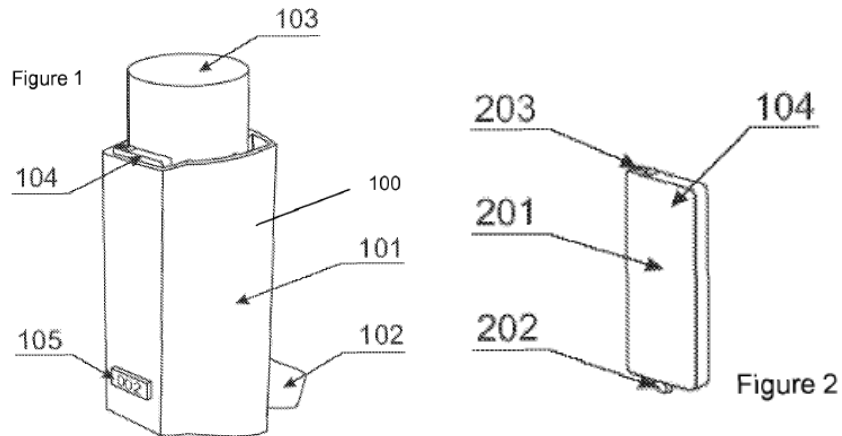
other combinations of trigger members and switches, as this is a matter of common mechanical design. The embodiments shown in Figures 3 to 10 show different arrangements of trigger members which the person skilled in the art would have considered when devising other embodiments as claimed.

It follows that the appellant's objection of lack of sufficiency (Article 83 EPC) does not prejudice maintenance of the patent on the basis of the request found allowable by the Opposition Division.

4. Inventive step

4.1 Starting from D1 in combination with common general knowledge or D2, the appellant argued against claim 1 of the request found allowable by the Opposition Division involving an inventive step.

It is common ground that D1 discloses (Figures 1 and 2 reproduced below and paragraphs [0059] to [0064]) a metered dose inhaler (100) comprising an actuation housing (101) with a mouthpiece (102) and adapted to receive a canister (103), a mechanical dose counter (105), a triggering unit (104) positioned within the actuation housing opposite to the mouthpiece for triggering at least one electrical switch (by a single actuator 202), and a processing unit.



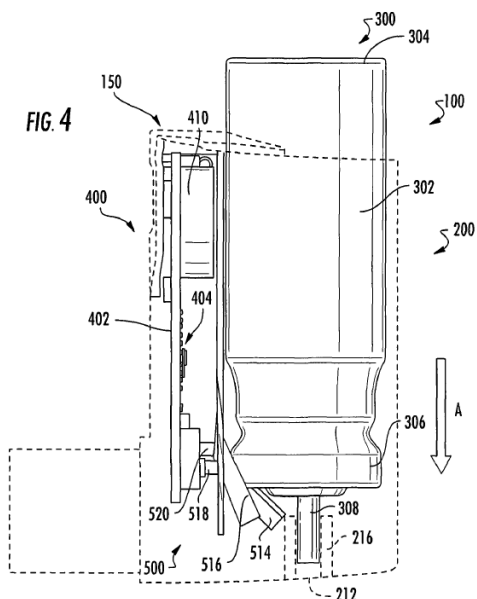
D1 does not disclose that the triggering unit comprises trigger members designed as flexible tongues each having an end portion for triggering the electrical switch.

The technical effect of the distinguishing feature is that more parameters of an actuation can be recorded, such as the speed of actuation of the inhaler (paragraph [0017] of the patent).

This solves the objective technical problem of better monitoring delivery of the aerosol doses to a patient by the triggering unit. The problem formulated by the appellant, i.e. how to provide an alternative configuration or design for any trigger members, is not acceptable as it does not take the technical effect of the distinguishing feature into account.

4.1.1 The person skilled in the art would have had no incentive from common general knowledge to provide more than one trigger member in order to solve the objective technical problem. There is simply no evidence in this respect.

4.1.2 D2 discloses a metered dose inhaler with a triggering unit comprising two trigger members designed as flexible tongues (514 and 516, Figure 4, reproduced below) each having an end portion for triggering electrical switches. Paragraph [0046] teaches that such trigger members make it possible to monitor more parameters of the actuation of the metered dose inhaler.



While D2 seems to address the problem of providing better monitoring of the delivery of the aerosol doses, it has to be noted that D1 stresses the advantages of the possibility of retrofitting a conventional metered dose inhaler with a triggering unit. The triggering unit, denoted "event recordal device", can be "inserted into a conventional inhaler as an add-on device or module. The small footprint of the event recordal device allows conventional inhalers to be used with no modifications" (paragraph [0061]). Accordingly, D1 teaches that while it is desirable to "provide accurate information regarding the usage patterns and times of the usage" (paragraph [0005]), "it is necessary to

maintain the compact size of dispensing devices. It is also desirable to minimize the need for regulatory approval which would increase the costs associated with the device" (paragraph [0007]). Hence, the appellant's argument that maintaining compactness was merely a general goal in the inhaler industry is not convincing. Maintaining compactness is specifically taught as an important requirement by D1.

On the basis of this disclosure, the person skilled in the art would not have implemented the relatively cumbersome triggering unit disclosed in D2 in the metered dose inhaler of D1, because this would have gone against this important requirement taught by D1.

It follows that the appellant's objection of lack of inventive step (Article 56 EPC) starting from D1 is not successful.

4.2 The appellant also argued starting from D2 in combination with common general knowledge, D1 and/or D3.

It is common ground that D2 does not disclose a mechanical dose counter in addition to the triggering unit for triggering electrical switches.

This distinguishing feature addresses the objective technical problem of improving the reliability and energy consumption of a metered dose inhaler. This is because the mechanical dose counter can be used for the basic counting function, and an electrical trigger unit in combination with a processing unit can be used for additional functions such as monitoring or evaluation functions (paragraphs [0012] to [0014] of the patent).

The appellant's argument that the person skilled in the art would have implemented the distinguishing feature in the device of D2 in view of the teaching of D1, common general knowledge or D3 is not convincing. None of D1, common general knowledge or D3 teaches the provision of a mechanical dose counter for solving the objective technical problem. D1 mentions a mechanical dose counter only as a standard component of a conventional metered dose inhaler. D3 does not disclose a mechanical dose counter at all. It is therefore irrelevant whether mechanical dose counters and electric/electronic dose counters could coexist or where a mechanical dose counter could be implemented in the inhaler of D2. The person skilled in the art would not have had any motivation for such implementation.

It follows that the appellant's objection of lack of inventive step (Article 56 EPC) starting from D2 is not successful either.

4.3 In conclusion, the appellant's objections of lack of inventive step (Article 56 EPC) do not prejudice maintenance of the patent on the basis of the request found allowable by the Opposition Division.

In reaching this conclusion, it is of no relevance to establish whether the "at least one electrical switch" is part of the subject-matter of claim 1, as questioned by the appellant.

It is not necessary to consider the admissibility of some documents which the Opposition Division had not admitted into the proceedings either, since the appellant has not raised any objection on the basis of these documents in the appeal proceedings.

5. Requests for apportionment of costs

The respondent requested that the Board apportion some of the costs it had incurred to the appellant.

According to Article 104(1) EPC, each party to the opposition proceedings must bear the costs it has incurred, unless, for reasons of equity, a different apportionment should be ordered.

- 5.1 The respondent argued that its costs from the first and second instance proceedings should be charged to the appellant because these costs were incurred through an abuse of procedure by the appellant, namely acting throughout the opposition and appeal proceedings whilst being a dormant company.

However, the Board has concluded that there was no abuse of procedure in this respect. It follows that this respondent's request has to be refused.

- 5.2 The respondent also argued that, in view of T 475/07, its costs incurred for the preparation of the oral proceedings before the Board should be charged to the appellant.

The Board notes that, although it would have been appropriate for the appellant to inform the respondent and the Board of its intention not to participate in the oral proceedings at an earlier time, the oral proceedings would have had to take place anyway. This is because of the respondent's requests for oral proceedings "in the event that the Board of Appeal does not intend to set aside the decision of the first instance" (Reply, point 1). Hence, in contrast to the case underlying T 475/07, the appellant's conduct had

no impact on the necessity of holding oral proceedings.

As regards the respondent's argument with reference to the Board's preliminary opinion, it is pointed out that, even when all the parties attend the oral proceedings, it is possible that not all the issues addressed in the preliminary opinion will be discussed, since for some of them the parties may refer to their written submissions. Moreover, the respondent could not be sure that the preliminary opinion, given its preliminary nature, would be maintained in the oral proceedings. Deciding not to be prepared for an issue which could potentially be discussed at the oral proceedings, irrespective of the Board's preliminary view on the issue, always involves some risk and it is the parties' responsibility to decide what to prepare for. In any case, it could not be asserted beforehand that the Board's preliminary opinion would have rendered the oral proceedings unnecessary.

For these reasons, the Board does not consider it equitable to order the apportionment of costs in favour of the respondent. Hence, this request by the respondent has to be refused too.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The requests for apportionment of costs are refused.

The Registrar:

The Chairman:



L. Stridde

M. Alvazzi Delfrate

Decision electronically authenticated