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**Datasheet for the decision
of 24 July 2025**

Case Number: T 2615/22 - 3.2.02

Application Number: 18175805.3

Publication Number: 3431010

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

Opponent:

Koopman International B.V.

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 76(1), 83, 123(2), 112(1) (a)
EPC R. 99(1) (c), 99(2)
RPBA 2020 Art. 11, 12(2), 12(3)

Keyword:

Amendments - main request and main request A - added subject-matter (yes) - auxiliary request 1 - added subject-matter (no)
Sufficiency of disclosure - auxiliary request 1 (yes)
Novelty - auxiliary request 1 (yes)
Referral to the Enlarged Board of Appeal - (no)
Remittal - (yes)
Notice of appeal - subject of the appeal

Decisions cited:

G 0001/97, G 0001/09, T 0167/93, T 1099/06, T 0079/07,
T 1495/09, T 1316/20, T 1482/21, T 0498/21, T 1777/14,
T 1828/19

Catchword:

Catchword of T 1482/21 confirmed; see Reasons 8-8.26.



Beschwerdekammern

Boards of Appeal

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Case Number: T 2615/22 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 24 July 2025

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
31 October 2022 concerning maintenance of the
European Patent No. 3431010 in amended form.

Composition of the Board:

Chairman A. Martinez Möller
Members: S. Böttcher
N. Obrovski

Summary of Facts and Submissions

- I. Both the opponent and the patent proprietor filed an appeal against the interlocutory decision of the Opposition Division that the patent was to be maintained on the basis of auxiliary request 7 filed during the oral proceedings on 27 September 2022.
- II. Oral proceedings before the Board took place on 24 July 2025.
- III. The opponent requested that the decision be set aside and that the patent be revoked.

The patent proprietor requested that the decision be set aside and that the patent be maintained as granted (main request) or, alternatively, on the basis of one of main request A and auxiliary requests 1, 1A, 2, 2A, 3, 3A, 4 and 4A, filed on 23 August 2021; auxiliary requests 5 and 5A, filed on 22 April 2022; and auxiliary requests 6 and 7, filed on 27 September 2022.

- IV. The following documents are relevant to this decision.

- P1 US 61/937083 (priority document)
- P2 US 61/942193 (priority document)
- P3 US 14/492487 (priority document)
- D6 FR 2 911 512
- D7 Kickstarter pages (<https://www.kickstarter.com/projects/bunchoballoons/bunch-oballoons-100-water-balloons-in-less-than-1>)
- D8 Internet article, ABC news (<http://abcnews.go.com/lifestyle/father-creates-genius-waterballooninvention/story?id=24698486>), 24 July 2014

D9 Video published on the Kickstarter page and on ABC News, (<https://www.youtube.com/watch?v=JxrGNE78y-o>)

D10 Video by NBC's "TODAY", posted on YouTube (see: <https://www.youtube.com/watch?v=00L5SAkgj98>), 31 July 2014

D11 Screenshot from YouTube page showing D10, 31 July 2014

D12 Video posted by LuckyPennyShop.com on YouTube (<https://www.youtube.com/watch?v=S1DaXYT6O2A>)

D13 Screenshot from YouTube page showing D12, 5 August 2014

D14 Internet article, CNN Money (<http://money.cnn.com/2014/07/29/smallbusiness/bunch-oballoons-kickstarter/index.html>), 30 July 2014 (initial publication date, 29 July 2014)

D15 US 5 014 757

D16 US 2005/0004430

D17 US 2008/0121309

D18 GB 2 344 057

D19 US 3,580,303

D27c US 179236 (A)

D27e US 600967 (A)

Legal opinion by Derk Visser

V. Claim 1 of the main request and of auxiliary request 1 reads as follows (adopting the numeration used in the appealed decision).

"[1] An apparatus for simultaneously filling a plurality of inflatable containers with liquids comprising:

[A] a housing (12) having

[A1] a first end (A) at which there is an opening configured for connection to a fluid supply, and

[A2] a plurality of holes from which a plurality of hollow tubes (16) extend,

[B] each of the plurality of hollow tubes (16) having a respective one of the plurality of inflatable containers (18) removably attached at an end thereto to facilitate substantially simultaneous filling of the plurality of containers from the fluid supply, characterised in that:

[C] each one of said plurality of inflatable containers is clamped about the end of its respective one of the plurality of hollow tubes by an elastic ring,

[D] the elastic rings are configured to release the inflatable containers from their respective hollow tubes when the inflatable containers have reached a desired size, by one or more of:

- i) the inflatable containers falling off the tube;
- ii) manual shaking the inflatable containers off the tube by a user; and
- iii) the inflatable containers being manually pulled away from the tube by a user,

[E] and each elastic ring is configured to seal its respective one of the plurality of inflatable containers upon detachment of the inflatable container from its corresponding hollow tube."

VI. Claim 3 of the main request and of main request A reads as follows.

"The apparatus of claim 1 or claim 2 wherein the holes are arranged in an array, and optionally wherein the opening has an effective diameter and the array of holes has an effective diameter, and wherein the effective diameter of the array of holes is greater than the effective diameter of the opening."

VII. Claim 14 of the main request and claim 13 of auxiliary request 1 read as follows.

"A method for simultaneously filling a plurality of inflatable containers (18) with liquids comprising at least the steps of:

- A. attaching a housing (12) to a liquid supply via an opening at a first end (A) of the housing, said housing further comprising a plurality of holes from which a plurality of hollow tubes (16) extend, each of the plurality of hollow tubes (16) having a respective one of the plurality of inflatable containers removably attached at an end thereto to facilitate substantially simultaneous filling of the plurality of containers from the fluid supply, and wherein each one of said plurality of inflatable containers is clamped about the end of its respective one of the plurality of hollow tubes by an elastic ring configured to restrict detachment of the inflatable container from the hollow tube,
- B. simultaneously filling each of said plurality of inflatable containers with liquid,
- C. detaching the plurality of inflatable containers from their respective tube ends when the inflatable containers have reached a desired size by one or more of:
 - i) falling off the tube;
 - ii) manual shaking by a user; or
 - iii) being manually pulled away from the tube by a user, and
- D. allowing the elastic rings to seal the plurality inflatable containers with the liquid inside after release from the hollow tubes."

VIII. Claim 2 of auxiliary request 1 reads as follows.

"The apparatus of claim 1 wherein the housing has a second end (B) at where the plurality of hollow tubes

extend from the plurality of holes, and optionally wherein the second end of the housing is located opposite to the first end of the housing."

IX. Claim 3 of auxiliary request 1 reads as follows.

"The apparatus of claim 1 or claim 2 wherein the holes are arranged in an array."

X. The opponent's arguments can be summarised as follows.

Main request - claims 1 and 14 - added subject-matter

Feature D defined that the elastic rings were configured to release the inflatable containers by one or more of three steps: falling off, manual shaking by a user, pulling away by a user. These steps had been disclosed as method steps in the parent application only (e.g. [0104], [0105], and, in part, method claims 16 and 17). In the absence of a direct reference between the apparatus and method claims, method features could not be added to an apparatus claim.

The definition of feature D, that the elastic rings were configured to release the containers when having reached a desired size, represented an intermediate generalisation because the relevant disclosure of the rings was in combination with other factors, like the coefficient of friction and the shape and diameter of the hollow tubes.

Hence, feature D of claim 1 and the corresponding feature of claim 14 represented an unallowable intermediate generalisation.

Feature A2 defined that the housing had a plurality of

holes, without any indication of the position of these holes, whereas the parent application only disclosed that these holes were at a second end of the housing. Therefore, claim 1 as amended covered embodiments where the holes were distributed over different parts of the housing and even embodiments with holes at the same first end where the opening was located.

Claim 14 of the parent application did not provide a basis for this feature as it was a method claim which defined a housing independently from the apparatus claims. The apparatus claims and method claims defined different embodiments of the alleged invention, and these embodiments could not be combined without any indication that they should be combined.

Hence, claims 1 and 14 of the main request did not meet the requirements of Article 76(1) EPC.

Main request - claim 3 - added subject-matter

The parent application disclosed an array of holes only in a specific embodiment, wherein the holes were at a second end, and it did not disclose any diameters of the opening and the array. Leaving out the "second end" represented an unallowable intermediate generalization, and claiming diameters resulted in extension of subject matter as these had not not been disclosed at all.

Hence, claim 3 of the main request did not meet the requirements of Article 76(1) EPC.

*Main request A and auxiliary request 1 -
Article 12(3) RPBA*

Contrary to the requirements of Article 12(3) RPBA, the

proprietor had not made an explicit request for a patent to be granted on the basis of one of the claim sets of main request A and auxiliary request 1. Moreover, in the notice of appeal, the proprietor only requested the maintenance of the patent as granted, and under Rule 99(1)(c) EPC, this request defined the subject of the proprietor's appeal. Hence, the proprietor's appeal case should be restricted to its request to maintain the patent as granted.

Main request A - added subject-matter

The objections raised against the main request also applied to main request A.

Auxiliary request 1 - added subject-matter

The objections raised against the main request also applied to auxiliary request 1.

Auxiliary request 1 - sufficiency of disclosure

Feature D of claim 1 was not sufficiently disclosed as the patent did not disclose what a "desired size" was. Furthermore, the patent did not disclose the amount of manual shaking necessary to result in the containers falling off the tubes. The person skilled in the art was therefore not able to configure an elastic ring to release the containers when they had reached this desired size by falling off or manual shaking.

Hence, the requirements of Article 83 EPC were not met.

Questions to be referred to the Enlarged Board of Appeal

Questions on the consequences of a decision by the Receiving Section on re-establishment of rights with regard to the twelve-month period under Article 87(1) EPC and on the Receiving Section's competence to take such a decision should be referred to the Enlarged Board of Appeal.

These questions concerned the issue of whether all conditions of Article 87(1) EPC could be part of opposition proceedings and which division of the EPO was competent to decide on a request to restore the priority year. Each point, on its own, was a point of law of fundamental importance, with impact on both the current and future proceedings.

Furthermore, T 167/93 and T 1099/06, on the one hand, and T 1482/21, on the other, presented conflicting decisions on the binding effect of decisions of departments of first instance on other departments.

Hence, the referral of questions to the Enlarged Board of Appeal under Article 112(1)(a) EPC was justified.

Auxiliary request 1 - priority - twelve-month period

The patent was not entitled to the priority of P1 and P2 because the parent application had been filed outside the twelve-month term of Article 87(1) EPC. The Receiving Section was not competent to decide on the request for re-establishment of rights, and it did not correctly apply the all due care criterion in its decision.

The legal opinion by Derk Visser concluded that the decision of the Receiving Section on re-establishment of the priority right could not have any binding effect

on subsequent opposition or opposition appeal proceedings. A Board being bound by a first-instance decision was contrary to the procedural framework of the EPC and contrary to established case law.

Auxiliary request 1 - priority - same invention

The invention as defined by claims 1 and 13 of auxiliary request 1 was not the same invention disclosed in P1 and P2 since:

- P1 disclosed a housing with a threaded opening at the first end, while in claims 1 (feature A1) and 13 the characteristic "threaded" had been omitted
- P1 disclosed a housing having a plurality of holes at a second end being opposite to the first end, while in claims 1 (feature A2) and 13 the features "second end" and "opposite" had been omitted
- P1 disclosed that the hollow tubes were attached to the holes, while in claims 1 and 13 the tubes extended from the holes without specifying whether they were attached to the holes
- P1 did not disclose that the elastic rings were configured to release the inflatable containers from their respective hollow tubes, i.e. that the rings had specific properties facilitating removal from the tubes in the any of the claimed manners (feature D)

Hence, the priority of P1 and P2 could not validly be claimed.

Auxiliary request 1 - novelty

Since the priority of P1 and P2 was not validly claimed, the subject-matter of claims 1 and 13 lacked novelty in view of the Bunch-o-Balloons products as disclosed in documents D7 to D14, disclosing an

apparatus as claimed in claim 1 and a method as claimed in claim 13.

Auxiliary request 1 - inventive step starting from D17

D17 disclosed all features A, A1, A2 and B of claim 1, as well as the corresponding apparatus elements of claim 13. Moreover, part of feature C of claim 1 was disclosed.

The distinguishing features, which corresponded to what was defined in the characterising part of claim 1, solved the problem of enabling a quick closing of the containers once they are filled with fluid.

A person skilled in the art looking for a way to tie balloons more quickly, or simply looking for an alternative, would know from their common general knowledge (as exemplified in D27c, D27e, D19, D15 and D16) that an elastic ring was suitable for that purpose. Such rings were well known, both in the relevant general technical field and in neighbouring and broader general fields.

Starting from Figure 12 of D17, or any of the other embodiments of D17, such as the one in Figure 4, the person skilled in the art would also solve the problem by combining the apparatus of D17 with D6 as:

- D17 and D6 were in the same field of technology, despite the fact that D17 related to liquids and gases and D6 to gases and fluids in general
- D6 provided explicit statements which gave the person skilled in the art an expectation that the teaching of D6 would solve the technical problem of D17
- D6 solved the technical problem by teaching to provide an elastic ring around the neck of a balloon on

a tube and stating that this resulted in quicker, easier and more economical closing of a balloon than in the prior art

Neither the method steps which were also part of D6 nor the tapered shape of the nozzles of D17 would have prevented the person skilled in the art from combining the teaching of D6 with that of D17. This combination fell within the scope of claims 1 and 13.

Hence, the subject-matter of claims 1 and 13 did not involve an inventive step in view of D17 in combination with the common general knowledge or D6.

Remittal of the case to the Opposition Division

There was no undue burden and no special reasons referred to in Article 11 RPBA which justified a remittal of the case to the Opposition Division. The issues of novelty in view of the Bunch-o-Balloons products and inventive step starting from them were closely related. The issue of partial priority was mentioned in the reply to the proprietor's statement of grounds of appeal, and arguments as to inventive step starting from the Bunch-o-Balloons products were provided.

Hence, the case should not be remitted to the Opposition Division.

- XI. The patent proprietor's arguments can be summarised as follows.

Main request - claim 1 - added subject-matter

Basis for the omission of the feature "second end"

could be found in claim 14 of the parent application. Claim 14 did not require that the holes be arranged at a second end of the housing but merely separated from the opening.

The feature "the elastic rings are configured to release the containers from their respective tubes" was directly and unambiguously disclosed in the description of the parent application on page 12, line 14, to page 13, line 2, and on page 14, lines 6 to 14. The omission of additional features like the coefficient of friction or the shape of the tubes did not constitute an unallowable intermediate generalisation.

Hence, claim 1 of the main request met the requirements of Article 76(1) EPC.

Main request - claim 3 - added subject-matter

Page 10, lines 17 to 32, of the parent application disclosed that attachment of the plurality of tubes to the second end was optional.

Figure 2 disclosed an apparatus in which the effective diameter (i.e. the length of the line through the centre of a circle) of the array of holes was greater than the effective diameter of the opening.

It was inherent from claim 1 as granted that the plurality of holes was not provided at the first end of the housing.

Hence, claim 3 of the main request met the requirements of Article 76(1) EPC.

Main request A and auxiliary request 1 -

Article 12(3) RPBA

In its notice of appeal and its statement of grounds of appeal (page 1), the patent proprietor requested maintenance of the patent as granted or on the basis of any auxiliary request. Main request A and all the further auxiliary requests were referred to on pages 14 to 24 of the statement of grounds of appeal. Hence, the requirements of Rule 99(1)(c) EPC and Article 12(3) RPBA were fulfilled.

Main request A - added subject-matter

The submissions put forward with regard to the main request also applied to main request A.

Auxiliary request 1 - added subject-matter

The submissions put forward with regard to the main request also applied to auxiliary request 1.

Auxiliary request 1 - sufficiency of disclosure

The term "desired size" in claims 1 and 13 had to be interpreted broadly in that when having reached a certain size, the elastic rings released the containers if one or more of the three options defined in the claims were fulfilled. It was assumed that, for a given apparatus, it would be possible to establish whether these criteria were met.

There were several options for arranging a tight elastic ring over the container and the tube. These options were a matter of ordinary skills of the person skilled in the art. There was no contradiction between feature C, concerning the clamping of the ring, and

feature E, specifying the sealing characteristics of the ring.

Thus, the invention was sufficiently disclosed to be carried out by the person skilled in the art.

Questions to be referred to the Enlarged Board of Appeal

There was no conflicting case law that justified a referral of questions to the Enlarged Board of Appeal.

Auxiliary request 1 - priority - twelve-month period

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 patent proprietor, that the application had been deemed to have been filed within twelve months from filing of the earlier application.

This decision was within the competence of the Receiving Section. The Opposition Division did not have legal authority to question a decision taken by the Receiving Section on the parent application.

Hence, a valid decision was taken by the Receiving Section, and this decision could not be challenged during opposition proceedings.

Auxiliary request 1 - priority - same invention

The invention as defined by claim 1 of auxiliary request 1 was the same invention as the one disclosed in P1 and P2.

P1 disclosed that the opening of the housing was suitable for engagement with any liquid supply tube. Hence, a non-threaded opening (for non-threaded supply tubes) was implied by the disclosure of P1.

It was clear from claim 1 that the housing had an opening at a first end and that the plurality of holes were not arranged at that first end. Hence, it was inherent from the claim that they were located at a second end of the housing. Furthermore, on page 4, P1 made reference to a second end of the housing without indicating that this end was opposite the first end.

Moreover, P1 did not require attachment of the tubes to the housing. P1 merely disclosed that the hollow tubes extended from the holes.

The features concerning the configuration of the elastic rings to release the containers from the tubes (feature D of claim 1) of auxiliary request 1 could be derived from pages 1 and 5 and Figures 1 and 2 of P1.

The subject-matter of claim 1 did not cause the addition of new technical information over the disclosure of P1 (or P2), and therefore the priority from P1 and P2 was validly claimed.

Auxiliary request 1 - novelty

The references cited by the opponent to support its allegations were not unequivocally established to be comprised in the state of the art and did not unambiguously disclose each of the claimed features.

Hence, the subject-matter of claims 1 and 13 was novel.

Auxiliary request 1 - inventive step starting from D17

Claim 1 was directed towards an apparatus for simultaneously filling a plurality of inflatable containers with liquids comprising various features in a specified arrangement. This arrangement and the features of the claimed invention were not disclosed, taught or even suggested in D17.

The combination with D6 was based on hindsight.

The person skilled in the art would not put a balloon on each nozzle of the device of Figure 12 of D17.

Hence, the subject-matter of claim 1 was inventive in view of a combination of D17 with common general knowledge or D6.

Remittal of the case to the Opposition Division

In accordance with Article 12(2) RPBA, the primary purpose of the appeal proceedings was to review the decision under appeal.

As the issue of inventive step starting from the Bunch-o-Balloons videos had not been addressed in the decision under appeal, remittal of the case to the Opposition Division was justified.

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).

The apparatus has a housing 12 comprising an opening at a first end which can be connected to a fluid supply. A plurality of tubes, each having an inflatable container attached at an end, extend from a plurality of holes of the housing. An elastic ring clamps each inflatable container about the end of its respective hollow tube.

The elastic rings are configured to release the inflatable containers, upon filling with fluid, from their respective hollow tubes when they have reached a desired size, by one or more of:

- i) the inflatable containers falling off the tube
- ii) manual shaking of the inflatable containers off the tube by a user
- iii) the inflatable containers being manually pulled away from the tube by a user

Each elastic ring is further configured to seal its respective inflatable container upon detachment.

The apparatus allows for quickly and simultaneously filling and sealing a plurality of inflatable containers.

Claim 14 of the patent as granted 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. Main request - claim 1 - added subject-matter

2.1 The description of the application underlying the current patent is identical to the description of the parent application as originally filed and includes the claims of the parent application as "clauses". Hence, if the requirements of Article 76(1) EPC are met, the requirements of Article 123(2) EPC are also met.

2.2 Feature 2A of claim 1 (omission of the feature "second end") does not contravene the requirements of Article 76(1) EPC.

As argued by the opponent, claim 1 discloses subject-matter where the holes are distributed over different parts of the housing and can even be arranged at the first end where the opening is located.

However, support for such an embodiment can be found in claim 14 of the parent application disclosing that the housing comprises a plurality of holes "separated from" the opening. According to this disclosure, the holes may be arranged anywhere as long as they are separated from the opening. A hole can even be regarded as separated from the opening if it is next to the opening.

2.3 Feature D ("the elastic rings are configured to release the containers from their respective tubes") does not represent an unallowable intermediate generalisation.

This feature is disclosed on page 12, lines 19 to 30, and page 14, lines 6 to 12, of the parent application,

without any reference to any additional features as the shape of the tube ends.

The Board does not agree with the opponent that method features cannot be added to an apparatus claim. Each case must be assessed using the gold standard to determine whether the amendment results in added subject-matter.

In claim 1, the configuration of the elastic rings is specified by reference to their function, namely to release the containers from the tubes by one or more specified ways. This function of the rings can be derived directly and unambiguously from the above-mentioned passages of the parent application.

2.4 Hence, claim 1 meets the requirements of Article 76(1) EPC.

3. Main request - claim 3 - added subject-matter

3.1 The first part of claim 3 meets the requirements of Article 76(1) EPC. It can be derived from page 10, lines 17 to 32, of the parent application that the holes can be configured in an array without being arranged at a second end of the housing.

3.2 However, the second part of claim 3 does not meet the requirements of Article 76(1) EPC.

The term "effective diameter" allows various interpretations. Even if "effective diameter" is interpreted as referring to the diameter of a circular area covered by the opening and by the array of holes, it requires the array of holes to be substantially circular.

The passage of the description which is considered most relevant (page 10, line 25) compares the size of ends A and B, but without indicating which fraction of each end is occupied by the opening or the array, respectively, let alone saying anything about the shape of the array. It cannot be unambiguously derived from Figure 1 or 2 that the array of holes is circular and not, for example, formed by two rows of holes/tubes.

Hence, it cannot be derived directly and unambiguously from the parent application as originally filed that the array of holes has an effective diameter.

3.3 Thus, claim 3 does not meet the requirements of Article 76(1) EPC.

4. Main request A and auxiliary request 1 -
Article 12(3) RPBA

The patent proprietor's notice of appeal includes the request that the patent be maintained as granted (main request) or on the basis of any auxiliary request. Furthermore, on page 1 of its reply to the opponent's statement of grounds of appeal, the patent proprietor requested that the patent be maintained as granted (main request) or on the basis of any auxiliary request. On pages 14 to 20 of this submission, the patent proprietor addressed the allowability of main request A and auxiliary request 1.

The requirement of Article 12(3) RPBA that the reply must expressly specify all the requests relied on is also met.

The requirement under Rule 99(1)(c) EPC that the notice of appeal must contain "a request defining the subject of the appeal" is already met where the notice states "we hereby appeal" against the impugned decision or the like (see T 796/23, Reasons 1, T 498/21, Reasons 1.3, and T 1777/14, Reasons 1.2). The subject of the appeal which must be contained in the notice of appeal according to Rule 99(1)(c) EPC is different from the extent of the appeal which must be contained in the statement of grounds of appeal according to Rule 99(2) EPC. If an appellant specifies the extent of the appeal contrary to Rule 99(2) EPC already in the notice of appeal, it is possible to then deviate therefrom in the statement of grounds of appeal (see T 1828/19, Reasons 1.2.1). Hence, contrary to the opponent's assertion, the patent proprietor did not irrevocably limit itself to the maintenance of the patent as granted by not specifying the auxiliary requests already in the notice of appeal.

5. Main request A - added subject-matter

Claim 3 of main request A is identical to claim 3 of the main request. Since this claim includes added subject-matter, main request A is not allowable.

6. Auxiliary request 1 - added subject-matter

6.1 In auxiliary request 1, the objections under Article 76(1) EPC are overcome as the relevant part of claim 3 has been deleted. Claim 8 of the patent as granted, to which an added-matter objection had also been raised, has also been deleted in auxiliary request 1.

6.2 The opponent did not raise any further objections of added subject-matter.

7. Auxiliary request 1 - sufficiency of disclosure

The person skilled in the art can, with a given apparatus, find out that the elastic rings release the containers when they have reached a certain size. The fact that the patent does not disclose the exact size or the amount of shaking necessary to result in the containers falling off the tubes does not prevent the person skilled in the art from carrying out the invention. A certain amount of trial and error required to determine these parameters is acceptable.

Hence, the invention as defined in claim 1 is sufficiently disclosed to be carried out by the person skilled in the art. The requirements of Article 83 EPC are met.

8. Auxiliary request 1 - priority - twelve-month period

8.1 The parent application of the contested patent was filed on 10 March 2015, i.e. more than twelve months after the filing dates of P1 and P2. Upon a request for re-establishment of rights under Article 122 EPC, the Receiving Section decided on 14 January 2016 to restore the priority period.

8.2 The opponent argued that the patent was not entitled to the priority of P1 and P2 because the parent application had been filed outside the twelve-month term of Article 87(1) EPC. It considered that the Receiving Section had not been competent to take the decision on the request for re-establishment of rights and that the Receiving Section had not correctly

applied the all due care criterion in its decision. Hence, the Receiving Section's decision granting re-establishment of rights in the application proceedings should be set aside in the opposition appeal proceedings.

- 8.3 In its letter of 4 October 2023, the opponent referred to the decision by the present Board in a different, five-member composition in case T 1482/21 (relating to the patent granted on the parent application) and submitted a legal opinion by Derk Visser. This legal opinion does not address the Receiving Section's competence to take a decision on re-establishment of rights, but only concerns whether or not a decision of the Receiving Section on re-establishment of rights is open for review in opposition proceedings and subsequent opposition appeal proceedings.
- 8.4 The Opposition Division in the present case held that it did not have "legal authority to question a decision taken by the Receiving Section for the parent application".
- 8.5 The Board in its present composition does not see any reason to deviate from the conclusions and the reasoning of the Board in decision T 1482/21. In that decision, the Board held 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" (Reasons 2.2.7) and that this "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" (Reasons 2.2.8). In accordance with these conclusions, the Board agrees that the Opposition Division had to acknowledge the Receiving Section's decision to grant the request for re-establishment of rights in respect of the priority period.

- 8.6 With regard to whether the Receiving Section was competent to decide on the request for re-establishment of rights in respect of the priority period, the present Board concurs with T 1482/21, Reasons 2.2.2 to 2.2.5. It is stated there that 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 case at hand, when the Receiving Section took its decision on re-establishment of rights, it was still responsible for the examination on filing and as to formal requirements. 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 accordance of a date of filing. 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. when the Receiving Section is responsible for the examination on filing and as to formal requirements.
- 8.7 Particular reference is made to T 1482/21, Reasons 2.2.5, which states that the omitted act was the filing of the application within the priority

period of twelve 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.

8.8 As to whether a positive decision of the Receiving Section on re-establishment of rights is open for review in opposition proceedings and subsequent opposition appeal proceedings, the Board does not consider the arguments presented by the opponent and in the legal opinion submitted by it convincing. These arguments are largely based on the assumption that there is no legal basis for the granting of a request for re-establishment of rights by the Receiving Section or, for that matter, by any other department of first instance, becoming final and binding. This assumption is not correct.

8.9 As set out in T 1482/21, Reasons 2.2.6, 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 the applicant is the only party to the proceedings before the Receiving Section, a favourable decision on such a request is not appealable and becomes final immediately. As further set out in T 1482/21, Reasons 2.2.10, only an *adverse* decision by the Receiving Section on a request for re-establishment of rights can be appealed, namely by the applicant to the Legal Board of Appeal, which is under Article 21(2) EPC exclusively competent for such a review. Furthermore, as set out in T 1482/21, Reasons 2.2.9, the effect of granting a request for re-establishment

of rights is regulated in Article 122(3) EPC. Under 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.

- 8.10 In the oral proceedings before the Board, the opponent submitted that the Board's written preliminary opinion in the present case had in its opinion not yet sufficiently addressed the arguments in the legal opinion on the nature of opposition proceedings and the case law on *res iudicata* following T 167/93 and T 1099/06. These aspects were discussed in detail during the oral proceedings before the Board, and addressed hereafter.
- 8.11 With regard to the nature of opposition proceedings, the opponent and the legal opinion submitted by it stressed that application and opposition proceedings are independent from each other. That is correct. However, this weakens rather than strengthens the opponent's line of argument.
- 8.12 As confirmed by the Enlarged Board of Appeal, opposition proceedings are not designed to be a continuation of examination proceedings (G 3/14, Reasons 80). This also means that, legally speaking, opposition proceedings must not be understood as any kind of appeal proceedings in relation to the proceedings before the Receiving Section and the Examining Division. Accordingly, an Opposition Division does not have the power to review and set aside a procedural decision taken in these proceedings. Rather, the purpose of opposition proceedings is to give "any person" the opportunity to challenge the validity of a granted European patent within nine months of

publication on the basis of a limited number of grounds for opposition listed in Article 100 EPC.

- 8.13 The present Board thus agrees with what was stated in T 79/07, Reasons 15, namely that opposition is not a legal remedy in the classical sense and that it does not have the effect of transmitting the case to a superior tribunal. Under the EPC, the Opposition Division has the competence to decide that the opposition is rejected as inadmissible, that the opposition is rejected, that the patent is revoked or that the patent is maintained in amended form. The Opposition Division does not, however, have any appellate jurisdiction to set aside a decision of the Examining Division (or, as the present Board adds, of the Receiving Section), and there is also no inherent competence of an Opposition Division to do so (with regard to the latter see T 79/07, Reasons 17 and 22, and T 1495/09, Reasons 7, last paragraph).
- 8.14 Reference is also made to T 1316/20, Reasons 1.5.4, which confirmed that not all possible irregularities in an application can be reviewed in opposition proceedings, not even all substantive ones (such as lack of clarity), but only those which are listed as grounds for opposition in Article 100 EPC. As set out in T 1482/21, Reasons 2.2.10, an examination of the same substantive patentability requirements - which qualify as grounds for opposition - may be undertaken by different departments in different proceedings (e.g. first in examination and then in opposition proceedings), and there is indeed no binding effect in that regard. Most of the case law cited in the legal opinion submitted by the opponent concerns these circumstances. It is therefore beside the point. This is because the decision in question, i.e. the Receiving

Section's decision on re-establishment of rights, does not concern the assessment of a substantive requirement under the EPC which qualifies as a ground for opposition. It concerns a purely procedural matter which was decided in *ex parte* proceedings in the then applicant's favour.

- 8.15 The opponent further argued that the granting of the re-establishment of rights had consequences for the validity of the priority and thus possibly also on patentability, which could be reviewed in opposition proceedings. In that regard, the Board notes the following.
- 8.16 Firstly, it was the decision of the drafters of the EPC 2000 to include the priority period in the periods with regard to which re-establishment of rights may be requested (which had previously not been possible under Article 122(5) EPC 1973), providing under Rule 136(1), second sentence, EPC a specific time limit of two months after expiry of the priority period for any such request.
- 8.17 Secondly, the fact that a purely procedural matter may have ramifications on whether a patent exists, does not change its qualification as a procedural matter. By way of comparison, reference is made to a department of first instance erroneously assessing in an applicant's favour that a certain fee was paid, that the requirements for further processing are met, or that the requirements for re-establishment of rights with regard to, e.g. the time limit for requesting further processing, are met. This may result in a patent coming into existence which may otherwise not have been granted. Nevertheless, such possible irregularities in the patent grant procedure do not qualify as a ground

for opposition and therefore cannot be reviewed in opposition proceedings or subsequent opposition appeal proceedings. More specifically regarding re-establishment of rights, whether or not an applicant or its representative acted in the application proceedings with all due care required by the circumstances is not a ground for opposition.

8.18 As to the case law on *res iudicata* according to T 167/93 and T 1099/06, it was essentially argued by the opponent and in the legal opinion put forward by it that the concept of *res iudicata* was narrow in scope and required that several criteria be met. In particular the criteria that the decision had to be taken by a tribunal and that the parties and their capacities had to be the same were not fulfilled with regard to a decision taken by the Receiving Section and subsequent opposition (appeal) proceedings. For the following reasons, this line of argument is not persuasive either.

8.19 The concept of *res iudicata* as presented in T 167/93 and T 1099/06 only concerns the "[t]he binding effect of Board of Appeal decisions" (T 1099/06, Reasons 1; see also T 167/93, Reasons 2), more specifically whether a decision taken by a Board of Appeal in examination appeal proceedings - on substantive patent law requirements qualifying as a ground for opposition - has a binding effect on the deciding body in subsequent opposition and opposition appeal proceedings. The Enlarged Board in G 1/97, Reasons 2(e), penultimate paragraph also confirmed the limited scope of decision T 167/93.

8.20 The question addressed in T 167/93 and T 1099/06 - concerning substantive patent law requirements

qualifying as a ground for opposition - is entirely different from the question in the present case, which concerns whether a final positive decision by the Receiving Section on a request for re-establishment of rights, i.e. on a purely procedural matter, may be reviewed and set aside in opposition proceedings and opposition appeal proceedings.

- 8.21 As set out above, the reason why an Opposition Division in opposition proceedings and a Board of Appeal in opposition appeal proceedings is prevented from reviewing and overturning a Receiving Section's decision granting the request for re-establishment of rights is mainly because these bodies can only act within the limits of their competences under the EPC, which do not include reviewing and setting aside final procedural decisions taken in the proceedings before the Receiving Section. This has nothing to do with whether such decisions qualify as *res iudicata* within the meaning of T 167/93 and T 1099/06.
- 8.22 Moreover, in G 1/09, Reasons 4.2.2, the Enlarged Board of Appeal embraced an understanding of *res iudicata* according to which "the final (*res iudicata*) character of a first-instance decision (Rechtskraft) will only ensue upon expiry of the time limit for filing an appeal". G 1/09 concerned a decision by the Examining Division, which is clearly not a "tribunal" as referred to in T 167/93 and T 1099/06. While the underlying legal question was different, this shows that the term *res iudicata* is in the case law of the Boards of Appeal not always used as it was understood in T 167/93 and T 1099/06.

- 8.23 The present Board also agrees with the statement in T 1482/21, Reasons 2.2.11, according to which 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. 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.
- 8.24 The opponent argued that a binding effect of a favourable decision on re-establishment of rights taken by an authority of first instance was entirely unknown in the legal orders of the Contracting States. This is not correct. By way of example, the Board refers to Rule 320(7) RoP-UPC, under which there is no right to appeal from an order rejecting an application for re-establishment of rights or from an order granting re-establishment of rights; and to § 238(3) German ZPO, according to which the granting of re-establishment of rights is not appealable (the term "unanfechtbar" in the original German text in the official public translation being translated to "final"). These provisions show that decisions on requests for re-establishment of rights are treated differently to decisions on, in particular, substantive matters.
- 8.25 While the aforementioned provisions concern decisions by courts of first instance rather than by administrative authorities of first instance, the Board further notes that § 123(4) German PatG is applicable in proceedings before both the German Patent and Trade Mark Office and the German Federal Patent Court, and also provides that the granting of re-establishment of rights - which is under the German PatG also possible

with regard to the priority period - is "unanfechtbar", i.e. final and not appealable (as to the binding effect of a favourable decision on a request for re-establishment on later court proceedings see BeckOK PatR/Hofmeister, 37th edition 01.08.2025, PatG § 123 Rn. 40) .

- 8.26 The conclusion in point 8.5 above, namely that the Opposition Division had to acknowledge the Receiving Section's decision to grant the request for re-establishment of rights, only excludes the subsequent assessment of the issue that was the subject of a final procedural decision by the Receiving Section which it was competent to take (i.e., in the present case and in the words of the opponent, whether the applicant and its representative acted in the application proceedings with all due care required by the circumstances). Hence, the arguments in the legal opinion submitted by the opponent according to which questions of priority may generally be assessed in opposition proceedings are also beside the point.
9. Questions to be referred to the Enlarged Board of Appeal
- 9.1 Whether to refer a question to the Enlarged Board of Appeal under Article 112(1)(a) EPC is a discretionary decision by the Board (see Case Law of the Boards of Appeal of the EPO, 11th edn. 2025, V.B.2.3.2).
- 9.2 To the Board's knowledge, there are no conflicting decisions of the Boards of Appeal, neither on whether a Receiving Section is competent to take a decision on re-establishment of rights with regard to the priority period, nor on whether a Receiving Section's decision granting a request for re-establishment of rights may

be reviewed and set aside in opposition appeal proceedings. Moreover, in view of the entirely different situations assessed in T 167/93 and T 1099/06, on the one hand, and in T 1482/21, on the other (see point 8.20 above), these decisions do not present conflicting decisions either. As the present Board also sees itself in a position to deal with these matters by reference to the law, the request for referral to the Enlarged Board of Appeal is refused.

10. Auxiliary request 1 - priority - same invention

10.1 P1 and P2 solely and consistently disclose a housing with a first end at which a threaded opening is located and a second end at which the plurality of holes are located. The passages referred to by the proprietor (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 context, which relates to the embodiment having a threaded opening (page 4). Hence, this feature is not presented as optional in P1. Therefore, in P1 and P2, there is neither an explicit nor an implicit disclosure of a non-threaded opening. Furthermore, P1 and P2 only disclose an arrangement of the holes at the second end.

10.2 P1 and P2 consistently disclose that the tubes are attached to (or connected to or inserted into) the holes. Hence, in P1 and P2, the tubes are separate parts and joined to the housing during the manufacturing process. However, the feature of claim 1 "a plurality of holes from which a plurality of hollow tubes extend" does not include this limitation but encompasses tubes that are integrally formed with the housing (as disclosed in paragraphs [0089] and [0093] of the current patent). Therefore, claim 1 comprises

subject-matter that cannot be derived from P1 and P2.

10.3 Consequently, in accordance with G 2/98, the "same invention criterion" is fulfilled by the current patent only by the part of claims 1 and 14 having a threaded opening and a second end of the housing at where the plurality of hollow tubes are attached to the holes. Thus, priority of P1 and P2 can only be claimed for this part of the claim (partial priority).

10.4 The opponent further argued that the invention as defined by claim 1 (concerning the configuration of the elastic rings (feature D)) of auxiliary request 1 was not the same invention disclosed in P1 and P2.

For the following reasons, this feature can be derived directly and unambiguously from P1 and P2.

10.5 The features concerning the configuration of the elastic rings (feature D of claim 1) can be directly and unambiguously derived from the Overview section on page 1, the last paragraph of page 3 and the first paragraph of page 5 of P1. These passages make clear that the elastic rings seal the inflatable containers with the liquid inside upon their removal from the hollow tubes.

11. Auxiliary request 1 - novelty in view of the Bunch-o-Balloons product disclosed in any of D7 to D14

11.1 D9 and D12 show the device as defined in P1 and P2, i.e. having a housing with a threaded opening and a second end where the plurality of hollow tubes are attached to the holes (and not integrally formed with the housing, as can be seen at 2:00 of D12).

11.2 However, as mentioned above, the patent can claim the priority from P1 and P2 only for subject-matter having a threaded opening and a second end of the housing where the plurality of hollow tubes are attached to the holes.

11.3 Hence, for this part of the claim, D7 to D14 do not form part of the prior art since they were published after the filing date of P1 and P2.

For other parts of the claims, i.e. for subject-matter having a non-threaded opening or in which there is not a second end of the housing where the plurality of tubes are attached to or inserted into the holes, the videos belong to the prior art. However, the subject-matter of these parts of claims 1 and 13 is not anticipated by D9 or D12 since the videos do not disclose such a housing. The websites and screenshots in D7, D8, D10, D11, D13 and D14 do not show such a housing either.

11.4 Hence, the subject-matter of independent claims 1 and 13 does not lack novelty over the Bunch-o-Balloons products shown in any of D7 to D14.

12. Auxiliary request 1 - inventive step starting from D17

12.1 D17 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]). The apparatus does not comprise elastic rings clamping

the balloons about the end of a respective nozzle.

Furthermore, D17 does not disclose that at any time each nozzle has a respective inflatable container removably attached at an end of it to facilitate simultaneous filling of the plurality of containers from the fluid supply.

- 12.2 The Board does not agree with the opponent that the objective technical problem could be regarded as saving time needed to seal the balloons.

The apparatus of D17 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 and placing 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 D17.

- 12.3 The objective technical problem to be solved is instead to provide a device and a method to fill and seal a plurality of balloons simultaneously more quickly.

- 12.4 The person skilled in the art knows, for instance from any of documents D27c, D27e, D19, D15 and D16 referred to by the opponent, that elastic rings can be applied around the nozzle and the neck of the balloon so that the ring seals the balloon upon detachment. 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 of D17, to apply an elastic ring to each balloon neck and to fill all the balloons simultaneously with water.

The statement that the apparatus of D17 allows for filling more than one 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 D17 in the way defined in claims 1 and 13, even when D27c, D27e, D19, D15 and D16 - which were referred to as evidence of common general knowledge by the opponent - were considered.

12.5 The teaching of D6 does not render the subject-matter of claims 1 and 13 obvious either.

D6 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 D6, it is essential that the balloon be 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 on the conical nozzles of D17, which are attached to the conduit ends. Hence, the person skilled in the art would not consider combining the teaching of D6 with that of D17 and replacing the nozzles with 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 extract from D6 only the final configuration of Figure 6 to get closer to the invention. This assumption is based on hindsight.

Furthermore, D6 discloses filling and sealing one balloon at a time. Hence, even if the person skilled in the art took from D6 only the teaching of Figure 6 on the attachment of a balloon to a tube by an elastic ring for filling and sealing it, D6 did not prompt them to attach a balloon to all four nozzles of the apparatus shown in Figure 12 of D17 by means of an elastic ring and to fill all the balloons simultaneously with water.

- 12.6 Thus, the subject-matter of claims 1 and 13 involves an inventive step in view of a combination of D17 with the common general knowledge or D6.

13. Remittal of the case to the Opposition Division

13.1 The question whether the subject-matter of the parts of claims 1 and 13 which cannot claim priority from P1 and P2 involve an inventive step over any of D7 to D14 in combination with common general knowledge or D17 has not been addressed in the opposition proceedings.

13.2 The primary purpose of the appeal proceedings is to review the decision under appeal in a judicial manner (see Article 12(2) RPBA 2020). In the case at hand, no decision exists for this outstanding issue. Contrary to the opponent, the Board does not consider the issues of novelty in view of the Bunch O Balloons disclosures D7 to D14 and inventive step starting from them to be closely related. For the assessment of inventive step, it is necessary to apply the problem-solution approach, taking the distinguishing features into account.

The Board considers that these circumstances constitute special reasons within the meaning of Article 11 RPBA for remitting the case to the Opposition Division.

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 for further prosecution.
3. The request for referral to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:



G. Magouliotis

A. Martinez Möller

Decision electronically authenticated