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**Datasheet for the decision  
of 4 April 2025**

**Case Number:** T 1320/23 - 3.2.07

**Application Number:** 15827487.8

**Publication Number:** 3174804

**IPC:** B65D1/02, C08L67/03

**Language of the proceedings:** EN

**Title of invention:**

LIGHTWEIGHT BASE FOR CARBONATED BEVERAGE PACKAGING

**Patent Proprietor:**

The Coca-Cola Company

**Opponent:**

Krones AG

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(b), 83, 112(1)(a)

**Keyword:**

Grounds for opposition - insufficiency of disclosure (no)  
Sufficiency of disclosure - undue burden (no) - main request  
(yes)  
Referral to the Enlarged Board of Appeal - admissibility (no)  
- suspension of first-instance proceedings (no)

**Decisions cited:**

T 0312/88, T 0182/89, T 0500/89, T 0019/90, T 0516/99,  
T 0792/00, T 0063/06, T 0491/08, T 0338/10, T 0518/10,  
T 2119/14, T 0347/15, T 0059/18, T 1333/20, T 1076/21

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number:** T 1320/23 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 4 April 2025**

**Appellant:**

(Patent Proprietor)

The Coca-Cola Company  
One Coca-Cola Plaza, NW  
Atlanta, GA 30313 (US)

**Representative:**

Dehns  
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London EC4M 7NG (GB)

**Respondent:**

(Opponent)

Krones AG  
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93073 Neutraubling (DE)

**Representative:**

Grünecker Patent- und Rechtsanwälte  
PartG mbB  
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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 15 May 2023  
revoking European patent No. 3174804 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**

E. Mille

**Members:**

A. Cano Palmero

B. Paul

## **Summary of Facts and Submissions**

- I. The patent proprietor (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division revoking European patent No. 3 174 804.
- II. The opposition had been filed against the patent in its entirety on the grounds for opposition pursuant to Articles 100(a) EPC (novelty and inventive step) and 100(b) EPC (sufficiency of disclosure).
- III. The patent proprietor initially requested
- that the decision under appeal be set aside, and that the patent be maintained as granted (main request),
- or, in the alternative,
- that the patent be maintained according to any of auxiliary requests 1 to 3 filed during opposition proceedings.
- IV. The opponent (respondent) initially requested
- that the appeal be dismissed,
- or, in the event that the board came to the conclusion that the patent as granted fulfilled the requirements of Article 83 EPC,
- that the case be remitted to the opposition division for further prosecution,
- or, in the event that the case is not remitted to the opposition division for further prosecution,
- that the patent be revoked.

- V. In order to prepare the oral proceedings scheduled upon the parties' requests, the board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA. The board indicated that the the patent as granted appeared to be sufficiently disclosed. The decision under appeal was likely to be set aside and the case could be remitted to the opposition division for further prosecution.
- VI. With its letter dated 23 July 2024 in reply to the board's communication the patent proprietor agreed with a remittal of the case.
- VII. The opponent replied in the substance to the board's communication with letter dated 28 August 2024.

In its letter the opponent further requested

that the proceedings be stayed, and  
that three questions be referred to the Enlarged Board of Appeal under Article 112(1)(a) EPC, if the board were to find that the patent as granted meets the requirements of Article 83 EPC;

and further submitted document D10 (**Dissertation "Durchgängige dreidimensionale Simulation des zweistufigen Streck-blasprozesses", Wolfgang Papst**).

- VIII. Oral proceedings before the board took place on 4 April 2025. During the oral proceedings, the opponent submitted a fourth question to be referred in addition to those previously submitted.

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

for the patent proprietor:

that the decision under appeal be set aside, and  
that the patent be maintained as granted (main  
request),

or, in the alternative,  
that the case be remitted to the opposition  
division for further prosecution,

or, in the alternative,  
that the patent be maintained according to any of  
auxiliary requests 1 to 3 filed during opposition  
proceedings;

for the opponent:

that the appeal be dismissed,  
or, in the event that the board came to the  
conclusion that the patent as granted fulfilled  
the requirements of Article 83 EPC,

that the proceedings be stayed, and  
that four questions be referred to the Enlarged  
Board of Appeal under Article 112(1)(a) EPC

or, in the alternative,  
that the case be remitted to the opposition  
division for further prosecution.

X. For further details of the oral proceedings reference  
is made to the minutes thereof. The order of the  
present decision was announced at the end of the oral  
proceedings.

XI. The lines of argument of the parties are dealt with in  
detail in the reasons for the decision.

XII. Independent claim 1 according to the patent as granted (main request) with the feature labelling used by the parties reads as follows:

"M1 A PET carbonated soft drink container comprising a lightweight base, wherein the base is characterized by the following features:

M2 a) an area/weight ratio ( $A/W$ ), wherein  $A/W$  is from about 2200 to about 3400 sq mm/g;

M3 b) a weight percentage/area percentage ratio ( $W\%/A\%$ ), wherein  $W\%/A\%$  is from about 0.90 to about 1.30;

M4 c) a first percent(%) crystallinity measured around a gate diameter within 10 mm, wherein the first percent crystallinity is greater than or about 10%;

M5 d) a second percent(%) crystallinity measured at a distance of greater than or about 15 mm from the gate, wherein the second percent crystallinity is at least or about 70% crystallinity of the sidewall of the container;

M6 e) a percent(%) trans content measured around the gate diameter within 10 mm, wherein the percent trans content is at least or about 65%; and

M7 f) a thickness ratio calculated as the thickness at 5 mm from gate divided by thickness at 10 millimetres from the gate of less than or about 3.5."

## Reasons for the Decision

1. *Document D10 - Admittance, Article 13(2) RPBA*
- 1.1 With its letter dated 28 August 2024, the opponent submitted document D10, *i.e.* after notification of the communication under Article 15(1) RPBA.
- 1.2 The submission of document D10 therefore constitutes an amendment to the opponent's appeal case, the admittance of which is subject to the presence of exceptional circumstances, justified with cogent reasons as set out in Article 13(2) RPBA.
- 1.3 The opponent argued that the board stated for the first time in the proceedings with its preliminary opinion, that there were still no verifiable facts to substantiate the objection raised under Article 83 EPC, despite the submission during opposition proceedings of document D3 ("**Bottles, Preform and Closures, A Design Guide for PET Packaging, Second Edition**", Ottmar Brandau, 19 June 2012).
- 1.4 According to the opponent, no further submission on the lack verifiable facts was necessary in the opposition proceedings as, in accordance with established case law, the requirement for evidence substantiating verifiable facts had already been satisfied by submitting document D3.
- 1.5 The board is not persuaded by the opponent's arguments for the following reasons.
  - 1.5.1 Firstly, the board does not agree that the submission of D10 could be justified by the preliminary opinion of the board. Indeed, this preliminary opinion follows the



arguments presented by the patent proprietor in point 5 of the statement setting out the grounds of appeal, where it was *inter alia* pleaded that the skilled person would understand from D3 that the features of claim 1 of the patent as granted could be carried out, so that this document could not constitute verifiable facts showing and/or proving that the invention could not be put into practice. The board is thus of the view that the opponent could have submitted the further evidence of D10 at least when forming its appeal case with the reply to the statement setting out the grounds of appeal, but it chose not to do so.

1.5.2 Secondly, the board notes that the circumstances in the present case are even more severe since the submission of document D10 after the notification of the communication under Article 15(1) RPBA in an attempt to prove verifiable facts to substantiate a lack of sufficiency of disclosure was directed to the patent as granted. The board is convinced that the opponent not only could but most importantly should have formed its complete case on Article 83 EPC already during opposition proceedings. Due to the opponent's course of action, the consideration of document D10 could not be dealt with by the opposition division and the patent proprietor, and consequently the decision under appeal is not based thereon.

1.6 In sum, since the opponent has not justified with cogent reasons that there were exceptional circumstances for the submission of new evidence for the first time after notification of the communication under Article 15(1) RPBA, in order to substantiate the Article 83 EPC objection, document D10 is not considered in the appeal proceedings under Article 13(2) RPBA.

2. *Main request (patent as granted) - Sufficiency of disclosure, Articles 100(b) and 83 EPC*
- 2.1 The opposition division found that the invention according to the subject-matter of claim 1 as granted (and according to all auxiliary requests) could not be carried out by the skilled person, so that the requirements of Article 83 EPC were not met.
  - 2.1.1 In particular, the opposition division concluded that although the skilled person could carry out each of parameters M2 to M7 individually, obtaining all six parameters simultaneously required an undue burden of trial and error. Indeed, modifying any of parameters M2 to M7 would have influenced the other parameters, such a "whole experimentation program" would be needed.
- 2.2 The board disagrees with the findings of the opposition division and with the arguments of the opponent for the following reasons. It is established jurisprudence of the Boards of Appeal that an objection of lack of sufficiency of disclosure presupposes that there are serious doubts substantiated by verifiable facts. **The burden of proof is upon the opponent(s)** to establish on the balance of probabilities that a person skilled in the art, using their common general knowledge, would be unable to carry out the invention (see the Case Law of the Boards of Appeal of the European Patent Office [CLB], 10<sup>th</sup> edition 2022, II.C.9, first two paragraphs, in particular in relation to T 19/90 and T 182/89).
- 2.3 The opponent argued however, that this principle does not apply in cases where the application as originally filed does not contain any embodiment or other technical information from which it was plausible that

the claimed invention could be carried out. In such cases, only a weak presumption of sufficiency of disclosure exists. Furthermore, if there were serious doubts as to the possibility of carrying out and repeating the invention the burden of proof shifted to the patent proprietor. This applied all the more so if, as in the present case, the opponent could demonstrate by means of arguments that the invention according to the patent as granted could not be carried out without undue burden over the whole area claimed. Therefore, in the present case, the patent proprietor had to show whether the features of the invention according to claim 1 were practicable. In sum, since none of the embodiments of the patent in suit cover the language of the independent claim, The burden of proof was to be shifted to the patent proprietor.

- 2.4 The board notes that it is not disputed that the patent in suit contains no embodiment with all the features of independent claim 1, so it can be agreed with the opponent that the situation in the present case is that of a weak presumption of sufficiency of disclosure.
- 2.5 However, contrary to the opponent's arguments, it is also established case law of the Boards of Appeal that even in the case of weak presumption of sufficiency of disclosure, the burden of proof **does not automatically shift to the patent proprietor**, but rather the opponent still bears the burden to argue in a plausible manner that the common general knowledge would not enable the skilled person to carry out the invention (see CLB, *supra*, II.C.9.1 and decision T 1333/20, point 1.2.2 of the reasons).
- 2.6 In addition, according to decision T 1076/21, point 1 of the reasons, the burden of proof regarding the

facts, arguments and evidence on the substance (which initially lies with the opponent) does not shift to the proprietor just because the patent has been revoked due to an alleged insufficient disclosure. It is down to the patent proprietor to substantiate on appeal why that decision is wrong. The burden of proof on the substance (and in consequence the benefit of the doubt), however, is only shifted when the opposition division's assessment that the presented facts, arguments and evidence were sufficient to discharge the opponent's burden of proof turns out to be correct.

- 2.7 In the present case it is the board's view, that the conclusion of the opposition division that the common general knowledge proved that a whole experimentation program would be necessary to carry out the invention is incorrect and not based on verifiable facts, for the following reasons.
- 2.7.1 The opponent's alleged doubts are mainly based on the disclosure of document D3 which allegedly constitutes a proof of the common general knowledge that there are no models that can reproduce the moulding of a preform into a desired container design during a blow moulding process, so that this is a misunderstood ("black art") technology without a closed mathematical or empirical model (see pages 47 and 48 of D3, and reply to the statement setting out the grounds of appeal, point 2.2). Furthermore, according to the opponent, page 59 of D3 proved that the parameters M4 and M5 could not be adjusted without influencing parameters M2, M3 and M6, or M7.
- 2.7.2 The opponent further referenced case law and argued that when many critical parameters are to be attained, there has to be at least a guidance and adequate

information in the patent on how to achieve these. In the absence of such guidance, the skilled person is faced with an undue burden, contrary to the requirements of Article 83 EPC (CLB, *supra*, II.C.6.7 and decisions T 792/00, T 312/88 and T 516/99). In addition, the opponent argued that if the patent proprietor considered the distinguishing features inventive, that was a clear sign that the skilled person would have to become inventive to carry out the invention.

2.7.3 The board disagrees. It is true that D3 states that tiny variations in process parameters could affect the outcome and that no simulation could guarantee a desired container design, but this cannot constitute a verifiable fact that would result in the conclusion that a whole experimentation program is needed to achieve certain container features, let alone that these features cannot be carried out individually or simultaneously.

2.7.4 While it can be agreed that a certain degree of interaction among the features could be present, the board is rather convinced by the view of the patent proprietor that the skilled person, with the help of their common general knowledge, would apply a systematic approach and modify in a first step the parameters relating to the preform to achieve features M2, M3 and M7. In subsequent steps the skilled person would be able to control and modify *in turn* the strain hardening process and the heat-set process to achieve features M4, M5 and M6. As convincingly argued by the patent proprietor, this iterative process does not extend beyond a reasonable amount of trial and error and does not require in the board's view a whole

experimentation or research programme that could result in an undue burden.

2.7.5 The opponent's argument that the skilled person would have to become inventive in order to put into practice allegedly inventive features is also not convincing. Indeed, the board notes that the knowledge of the skilled person is different when assessing the compliance of Article 83 EPC on one hand and Article 56 EPC on the other hand. In particular, when assessing sufficiency of disclosure, the skilled person knows the invention, the question is whether it can be carried out or not. In contrast, when assessing inventive step, the skilled person has no knowledge of the invention and the question is whether they could arrive at the subject-matter claimed in an obvious manner in view of the prior art and common general knowledge.

2.7.6 In this light, the board concludes that the opponent has not provided verifiable facts or submitted plausible arguments that could demonstrate in a convincing manner the alleged insufficiency of disclosure of the patent in suit. The board is rather convinced by the patent proprietor's arguments that the skilled person, with the help of common general knowledge, would not face an undue burden in carrying out the invention. In particular, the board is convinced that the skilled person, with help of its common general knowledge, would face at the most an iterative process which does not extend beyond trial and error, but would not have to become inventive or face an undue burden in order to carry out the invention.

2.7.7 The board thus concludes that in the present case, although it is uncontested that the patent does not

specifically teach how the set of features of claim 1 as granted is put into practice, and a weak presumption for sufficiency of disclosure is present, the opponent has neither convincingly demonstrated, with plausible arguments, that the common general knowledge would not enable the skilled person to provide a PET carbonated soft drink container according to the invention nor has it submitted serious doubts, substantiated by verifiable facts that could demonstrate the skilled person is not able to carry out the invention.

- 2.8 The patent proprietor has thus convincingly demonstrated the incorrectness of the decision under appeal on the finding of lack of sufficiency of disclosure. The ground for opposition under Article 100(b) EPC therefore does not prejudice the maintenance of the patent as granted. Consequently, the decision under appeal must be set aside.

3. *Request of the opponent to stay the proceedings and refer questions to the Enlarged Board of Appeal, Article 112(1)(a) EPC*

- 3.1 The opponent requested with letter dated 29 August 2024 that, if the board considered that the patent as granted met the requirements of Article 83 EPC, the proceedings be stayed and the following questions be referred to the Enlarged Board of Appeal (in German):

*"Q1: Besteht nur eine schwache Vermutung für die Ausführbarkeit, muss die Einsprechende dann durch Vorlage von Beweismitteln die Nichtausführbarkeit der Erfindung belegen oder ihre Argumente mit Beweisen untermauern, um eine Beweislastumkehr zulasten der Patentinhaberin zu bewirken?;*

*Q2: Genügt es für die Umkehr der Beweislast bei schwacher Vermutung für die Ausführbarkeit der Erfindung, wenn die Einsprechende unter Rückgriff auf die Rechtsprechung darlegt, dass aus ganz grundsätzlichen Erwägungen der Fachmann erfinderisch tätig werden müsste, um die Erfindung umzusetzen?;*

*Q3: Genügt es zur erneuten Umkehr der Beweislast von der Patentinhaberin auf die Einsprechende, nachdem Letztere durch Vorlage von Fachwissen und Argumenten in einem Fall schwacher Vermutung für die Ausführbarkeit Zweifel an der Ausführbarkeit unter Art. 83 EPÜ vorgetragen hat, wenn die Patentinhaberin ihrerseits ohne Vorlage von Beweisen ein im Streitpatent nicht offenbartes Verfahren zum Bestimmen der notwendigen Prozessparameter behauptet, das aus ihrer Sicht ausführbar ist?"*

3.2 During the oral proceedings before the board, the opponent additionally requested the following question to be referred to the Enlarged Board of Appeal (in German) :

*Q4: In einem Fall schwacher Vermutung für die Ausführbarkeit, genügt es, wenn die Einsprechende anhand von Fachwissen belegt, dass ein von der Patentinhaberin behauptetes Verfahren nicht, wie von der Patentinhaberin behauptet, im verfügbaren Fachwissen offenbart ist, um die Beweislast für die Bekanntheit und die zum erfindungsgemäßen Erfolg führende Durchführbarkeit des Verfahrens ohne unzumutbaren Aufwand auf die Patentinhaberin umzukehren?"*



3.3 These four questions Q1 to Q4 are translated by the board into English as follows:

Q1: If there is only a weak presumption for sufficiency of disclosure, must the opponent then prove the insufficiency of the invention by submitting evidence or substantiate its arguments with evidence in order to shift the burden of proof to the patent proprietor?;

Q2: Is it sufficient for the reversal of the burden of proof in the case of a weak presumption of sufficiency of disclosure of the invention if the opponent demonstrates, with reference to the case law, that based on very fundamental considerations the skilled person would have to exercise inventive skills in order to carry out the invention?;

Q3: Is it sufficient to reverse the burden of proof once again from the patent proprietor to the opponent, after the latter has raised doubts as to sufficiency under Article 83 EPC by presenting common general knowledge (technical knowledge) and arguments in a case of weak presumption of sufficiency, if the patent proprietor, in turn asserts, without submitting evidence, a method for determining the necessary process parameters that is not disclosed in the patent in suit but which, in its view, can be carried out? ;

Q4: In a case of a weak presumption of sufficiency of disclosure, is it sufficient for the opponent to demonstrate on the basis of common general knowledge that a method asserted by the patent proprietor is not, as alleged by the patent proprietor, disclosed in the available common

general knowledge, in order to shift the burden of proof to the patent proprietor to demonstrate that the method is known from the common general knowledge and can be successfully used to carry out the claimed invention without undue burden?

- 3.4 The opponent argued that a referral of these questions to the Enlarged Board of Appeal was justified in order to ensure uniform application of the law and to enable the clarification of legal questions of fundamental importance. According to the opponent, contrary to established case law of the Boards of Appeal in cases of a weak presumption for sufficiency of disclosure, the board in the present case seemed to set unreasonably high standards of evidence to the opponent in order to reverse the burden of proof to the patent proprietor.
- 3.5 With regard to question Q1, the opponent referred to decision T 338/10. In this decision the opponent had already stated, merely based on arguments, why the requirements for sufficiency were not met. The competent board held that these arguments alone were sufficient to shift the burden of proof to the patent proprietor, since there was a weak presumption of sufficiency of disclosure. In decision T 63/06, the competent board concluded that there was only a weak presumption of sufficiency and that it was sufficient to raise serious doubts that the person could not carry out the invention by presenting, for example, comprehensible and plausible arguments. A similar situation in which it was found by the respective boards of appeal that the burden of proof born by the opponent was very low if there was only a weak presumption of sufficiency and that a plausible argumentation alone was sufficient without the

submission of any evidence followed also from decisions T 518/10, T 491/08, T 347/15, T 59/18 and T 2119/14.

- 3.5.1 The board does not see a need to refer question Q1 to the Enlarged Board of Appeal. As it has been reasoned in points 2.5, 2.6 and 2.7.7 above, even in the case of a weak presumption of sufficiency of disclosure, the burden of proof does not automatically shift to the patent proprietor, but rather the opponent still bears the burden to argue in a plausible manner that the common general knowledge would not enable the skilled person to carry out the invention. The burden of proof on the substance (and in consequence the benefit of the doubt), however, is only shifted when the presented facts, arguments and evidence are sufficient to discharge the opponent's burden of proof.
- 3.5.2 The board is thus of the view that, in cases of a weak presumption of sufficiency of disclosure, **there is not an absolute need to submit evidence or substantiate arguments with evidence in order to shift the burden of proof to the patent proprietor**. In principle, plausible arguments showing that the common general knowledge would not enable the skilled person to carry out the invention are sufficient. This seems to be the common ground of the parties and the board in the present case. The matter of dispute in the case at hand is however whether the arguments presented by the opponent are plausible and convincing to the board or not.
- 3.5.3 Since the board is able to answer question Q1, a referral of this question is not seen as necessary.
- 3.6 Regarding question Q2, the opponent referred *inter alia* to decision T 500/89, where it was found that a particular combination of parameters generally known in

the prior art could be considered inventive. In this case, the skilled person had to become inventive in order to carry out the invention, which amounted to an undue burden contrary to the requirements of Article 83 EPC.

- 3.6.1 The board does not see a need to refer question Q2 to the Enlarged Board of Appeal either. As already concluded, see point 2.7.5 above, the fact that a combination of parameters could involve an inventive step does not automatically mean that the skilled person has to become inventive in order to carry out the invention. In other words, an opponent can always attempt to demonstrate, also with reference to the case law, that for very fundamental considerations the skilled person would have to exercise inventive skills in order to carry out the invention. However, the alleged existence of an undue burden when carrying out inventive features cannot be considered as a "very fundamental" consideration.
- 3.7 Questions Q3 and Q4 are of no relevance for the case at hand in view of the above findings of point 2. above, since neither the burden of proof has been shifted to the patent proprietor, nor has the opponent convincingly proven on the basis of common general knowledge that a method alleged by the patent proprietor is not disclosed in the available common general knowledge.
- 3.8 In view of the above considerations, none of questions Q1 to Q4 are to be referred to the Enlarged Board of Appeal. Consequently, there is no need to stay the proceedings, as requested by the opponent.

4.        *Remittal of the case to the opposition division,  
Articles 11 RPBA and 111(1) EPC*

4.1        The parties requested that the case be remitted to the opposition division for further prosecution should the board come to the conclusion that the ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the patent as granted. The board is aware that, according to Article 11 RPBA, a remittal for further prosecution should only be undertaken, exceptionally, when special reasons apply.

4.2        The board notes that the decision under appeal dealt only with the ground for opposition under Article 100(b) EPC. In an *obiter dictum* (see point IV of the decision under appeal), the opposition division gave its opinion regarding further grounds for opposition under Article 100(a) EPC (novelty and inventive step). However, as correctly indicated by the opponent in point 2.1 of the reply to the statement setting out the grounds of appeal, it is not apparent from the *obiter dictum* that the opponent's submissions dated 22 December 2022 on these grounds for opposition had been considered. Indeed, the content of the *obiter dictum* seems to be a repetition of the opposition division's preliminary opinion given in the annex to the summons for oral proceedings before the opposition division .

4.3        Against this background, after considering all the relevant circumstances of the case at hand, the board comes to the conclusion that the issues relevant to the grounds for opposition in accordance with Article 100(a) EPC (novelty and inventive step), cannot be decided upon without undue burden (cf. explanatory

notes to Article 11 RPBA, Supplementary publication 2 - OJ EPO 2020, 46, 54).

- 4.4 Consequently, the board is convinced that there are special reasons within the meaning of Article 11, first sentence, RPBA that apply, and that it is appropriate, following the parties' requests, to remit the present case to the opposition division for further prosecution based on the patent as granted, in accordance with Article 111(1) EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request of the opponent for the proceedings to be stayed and for a referral of questions to the Enlarged Board of Appeal is refused.
3. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

E. Mille

Decision electronically authenticated