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**Datasheet for the decision
of 8 March 2017**

Case Number: T 0329/13 - 3.2.07

Application Number: 07766609.7

Publication Number: 2040987

IPC: B65D5/66, B65D85/10

Language of the proceedings: EN

Title of invention:

A RIGID PACKET WITH A HINGED LID

Patent Proprietor:

G.D S.p.A.

Opponent:

Focke & Co. (GmbH & Co. KG)

Headword:

Relevant legal provisions:

EPC Art. 54(1), 56, 84

RPBA Art. 12(4)

Keyword:

Late-filed evidence - admitted (yes)

Claims - clarity (yes)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

T 1174/03

Catchword:



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Case Number: T 0329/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 8 March 2017

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
12 December 2012 concerning maintenance of the
European Patent No. 2040987 in amended form.**

Composition of the Board:

Chairman K. Poalas
Members: G. Patton
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division to maintain European patent No. 2 040 987 in amended form.

Notice of opposition had been filed against the patent as a whole and was based on the ground of lack of inventive step (Article 100(a) EPC). The ground of lack of novelty pursuant to Article 100(a) EPC was introduced into the proceedings by the opposition division in accordance with Article 114(1) EPC.

- II. The board provided the parties with its preliminary non-binding opinion, dated 13 December 2016 and annexed to the summons to oral proceedings, that claim 1 of the patent as maintained by the opposition division appeared to meet the requirements of Article 84 EPC, that the board intended to admit into the proceedings document D8 filed for the first time with the statement setting out the grounds of appeal, that the subject-matter of claim 1 of the patent as maintained appeared to be novel over D1 and that the inventive step objections based on the combination of the teaching of D1 with one of the teachings of documents D2 to D7 did not appear to render obvious the subject-matter of claim 1 of the patent as maintained. The issue of whether the combination of the teachings of D8 and D1 would render obvious the subject-matter of claim 1 of the patent as maintained was left open for discussion at the oral proceedings.

With its submissions dated 31 January 2017 the appellant withdrew its request for oral proceedings and announced that it would not attend them. It did not comment on the board's preliminary opinion as to the

clarity objection, the admittance of D8 into the proceedings, the novelty objection and the inventive step objections based on the combination of the teaching of D1 with one of the teachings of documents D2 to D7. On the other hand, it further developed its inventive step objection based on the combination of the teaching of D8, which it considered to be the closest prior art, with the teaching of D1.

With its submissions dated 8 February 2017 the respondent (patent proprietor) did not contest the board's preliminary opinion and argued that the subject-matter of claim 1 of the patent as maintained was not obvious starting from D1 as closest prior art in combination with the teaching of D8.

III. Oral proceedings before the board took place on 8 March 2017, for the course of which reference is made to the minutes.

Since the duly summoned appellant, as announced with its above-mentioned submissions, did not attend, the oral proceedings were continued without the appellant in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

The appellant requested in its written submissions that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed.

IV. Claim 1 of the patent as maintained by the opposition division reads as follows (amendments with respect to claim 1 of the patent as granted are shown in bold or strikethrough):

"A rigid packet with a hinged lid, comprising a container (10), also a lid (12) attached pivotably to the container (10) along a hinge (19) and pivotable thus between a position in which the container is open and a position in which the container is closed, the closed packet appearing prismatic in shape and substantially triangular in section, said packet also comprising locking means (27), positioned on a front corner edge (26) to coincide with an area, remote from the hinge (19), along which two side faces of the prism are joined, by which the lid (12) is retained in the closed position; said locking means (27) comprising an engagement member (28) operating between the container (10) and the lid (12); characterized in that the engagement member (28) ~~comprises a shaped portion (29) of the front corner edge (26) associated with the container (10) or with the lid (12)~~ **consists of a shaped portion presented by the front corner edge (26) of the container or of the lid (12), integral with the container (10) or with the lid (12)**, extending respectively toward the lid (12) or toward the container (10), and insertable in a recess (30) afforded respectively by the lid (12) or by the container (10)."

V. The following documents from the opposition proceedings are of relevance for the present decision:

- D1: WO-A-01/44077, cited in paragraph 5 of the contested patent;
- D2: US-A-2 619 276;
- D3: DE-A1-29 40 421;
- D4: US-A-2 848 152;
- D5: JP-S-53-006732U;
- D6: DE-B4-196 48 240; and

D7: FR-A-2 596 730.

The following document was cited for the first time together with the statement setting out the grounds of appeal:

D8: US-A-4 526 317

VI. The appellant argued essentially as follows:

Admission of D8 into the proceedings

D8 should be admitted into the proceedings because it was *prima facie* highly relevant for assessing inventive step for the subject-matter of claim 1.

Clarity

Claim 1 was unclear because it did not specify whether the claimed container also comprised the frame, as was usually the case for cigarette packets.

Novelty

Given that claim 1 did not clarify whether the container also comprised the frame, that the engagement member 69 depicted in figure 15 of D1 was positioned on the frame and that the packet depicted in figure 15 of D1 also disclosed the other features of claim 1, the subject-matter of claim 1 lacked novelty over D1.

Inventive step - starting from D1

Starting from the packet depicted in figure 15 of D1 as closest prior art, the only distinguishing feature of

claim 1 was that the engagement member was positioned on the container and not on the frame.

The claimed configuration did not lead to a specific effect and so represented a mere alternative to the disclosed one. There were however only two possibilities for the positioning of the engagement member, namely either on the frame or on the container. These were both known to the skilled person. The skilled person would select one of said two alternatives depending on the need, without the exercise of any inventive activity.

The fact that the positioning of the engagement member on the container was known to the person skilled in the art was documented in D2 to D7. The skilled person would apply the engagement member on the front corner edge of the container of D1, since the engagement member was already positioned on the front corner edge of the triangular-section packet of D1. By doing so the skilled person would arrive at the claimed subject-matter in an obvious manner. Further, D4 showed engagement members positioned on front corner edges of a packet.

Inventive step - starting from D8

D8 disclosed all the technical features of claim 1. The non-technical feature ("substantially triangular in section") related to the design of the packet and so should be disregarded in the assessment of inventive step.

The skilled person would immediately realise that the technical disclosure of D8 could be applied to other types of cross-section, depending on the need.

In applying this disclosure to the triangular-section packet known from D1, the skilled person would automatically arrange the engagement member on the front corner edge of said packet. The skilled person would perform this in a routine manner without any surprising effect.

VII. The respondent argued essentially as follows:

Admission of D8 into the proceedings

D8 had been filed for the first time together with the statement setting out the grounds of appeal. It should not be admitted into the proceedings since it was *prima facie* not relevant. It did not disclose more than documents D2 to D7, which were already on file.

Clarity

The container and the frame were two distinct parts. The first of the two alternatives of claim 1 clearly specified that the engagement member was integral with the container.

Novelty

D1 did not disclose the feature of claim 1 that

- the locking means comprised an engagement member operating between the **container** and the lid.

Hence, with respect to the two alternatives of claim 1:

- D1 did not disclose that the engagement member consisted of a shaped portion presented by the front corner edge **of the container, integral with the**

container, extending toward the lid, and insertable in a recess afforded by the lid (first claimed alternative); and

- D1 did not disclose that the engagement member consisted of a shaped portion presented **by the front corner edge of the lid, integral with the lid, extending toward the container, and insertable in a recess afforded respectively by the container** (second claimed alternative).

Therefore, the subject-matter of claim 1 was novel over D1.

Inventive step - starting from D1

In view of the technical effects given in the contested patent in relation to the distinguishing features, the problem to be solved could be seen in increasing the stability of a packet known from D1 when it was in closed position after it had been opened and reclosed multiple times.

The locking means of D1 were integral with the frame; so the skilled person would not find therein a hint towards the solution according to claim 1.

Further, none of documents D2 to D7 disclosed or even suggested arranging the locking means on the corners of the container. The skilled person would therefore not consider these documents when seeking to solve the above-mentioned technical problem. At most he would arrange the locking means on the side walls of the container of D1, as taught for example in D2.

D8 did not disclose the claimed solution since the locking means in D8, i.e. the first post-defining portion 54 of the container and the recess 55 of the lid, were not positioned on the corner edges of the packet but rather on the side walls. In claim 1 the engagement member was positioned on the front corner edge, as derivable from the expression "presented by the front corner edge". Further, the engagement member according to claim 1 was a "shaped portion", which was not the case for the flat post 54 of D8.

Therefore, even if the skilled person were to combine the teaching of D1 with the teaching of D8, this would not lead to the subject-matter of claim 1.

The skilled person would refrain from shifting the tab 69 of the frame 22 according to D1 to the container 10, since this would have the effect that in closed condition the lip would overlap the container and that the edges of the lid and container would no longer be flush with each other when the packet was closed. This would go against the disclosure of D1, as could be seen for instance in figures 1 to 4, where the edges of the lid and container were flush with each other.

Further, the recess 55 of D8 which would then have to be present on the side wall of the lid 12 of D1 would necessarily require the presence of an internal guide wall. This guide wall would inevitably collide with the frame 22 of D1.

Inventive step - starting from D8

The skilled person would not select D8 as closest prior art because it concerned a packet with a different cross-section than that of claim 1. Modifying a diecut

blank from a packet with a rectangular cross-section to a packet with a triangular cross-section was an undue burden for the skilled person.

Reasons for the Decision

1. *Admission of D8 into the proceedings*
- 1.1 Document D8 was filed for the first time in the opposition-appeal proceedings with the statement setting out the grounds of appeal.
- 1.2 Article 12(4) RPBA, regulating this situation, reads as follows: "*Without prejudice to the power of the Board to hold inadmissible facts, evidence or requests which **could have been presented** or were not admitted in the first instance proceedings, everything presented by the parties under (1) shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in (2)*" (emphasis added by the board).
- 1.3 Therefore, the *prima facie* relevance of document D8 is not a criterion explicitly specified in Article 12(4) RPBA for its admission.
- 1.4 Considering the "could have been presented" criterion, the present board takes the more lenient approach of "should have been presented", i.e. whether there was a sound reason for presenting D8 for the first time at the appeal stage.
- 1.5 The set of claims of the patent as upheld by the opposition division was filed during the oral proceedings (see minutes, page 1, last line). Claim 1

as amended during the oral proceedings no longer covers the original embodiments of the invention illustrated in figures 3, 3a, 4, 4a, 5, 8, 8a and 9 (and claims 4 to 9 of the patent as granted), where the engagement member operates between the frame and the lid. Such an amended claim 1 could not have been expected by the appellant in view of the sets of claims originally envisaged for discussion at the oral proceedings (claims of the patent as granted and auxiliary request filed with letter dated 26 October 2012). The board considers that the filing of D8 together with the statement setting out the grounds of appeal was the appellant's reaction to the late filing of amended claim 1 and therefore that D8 was submitted "in due time" pursuant to Article 114(2) EPC.

The above holds true regardless of the fact that the appellant did not attend the oral proceedings before the opposition division.

1.6 This corresponds to the board's preliminary opinion given in the annex to the summons to oral proceedings, which has not been contested by the respondent in its subsequent written or oral submissions.

1.7 For the above-mentioned reasons, D8 is admitted into the proceedings.

2. *Amendments*

2.1 With respect to claim 1 of the patent as granted, the amendments (see point IV above) are based on page 4, line 14, to page 5, line 1, in combination with figures 1, 1a, 2 and 2a of the application as originally filed (cf. paragraphs 24 to 29 of the contested patent and

figures 1, 1a, 2 and 2a). Hence, the requirements of Article 123(2) EPC are fulfilled.

The replacements of "comprises" by "consists of" and of "associated with" by "integral with" relate to further limitations, such that the requirements of Article 123(3) EPC are also fulfilled.

The above has not been contested by the appellant.

2.2 The amendments do not introduce non-compliance with Article 84 EPC. Indeed, contrary to the appellant's view (see statement setting out the grounds of appeal, page 2, point 1), the board considers that a person skilled in the art knows that the frame is a part distinct from the container. Since in claim 1 the engagement member is stated to be **integral with the container** (or the lid), the skilled person will readily understand that it does not relate to the frame. This is also described and supported by the contested patent (see point 3.6 below).

2.3 This corresponds to the board's preliminary opinion given in the annex to the summons to oral proceedings, which has not been contested by the appellant in its subsequent written submissions.

2.4 The requirements of Article 84 EPC are therefore met.

3. *Novelty*

3.1 Although not a ground for opposition raised by the opponent in its notice of opposition, novelty was introduced by the opposition division pursuant to Article 114(1) EPC (see minutes, page 1). Hence this

ground is part of the legal framework of the appeal proceedings.

- 3.2 The appellant has argued that the subject-matter of claim 1 lacks novelty over D1, on the assumption that in a cigarette packet the frame is usually regarded as being a part of the container (see statement setting out the grounds of appeal, page 2, point 1).
- 3.3 D1 (page 6, line 23, to page 8, line 10; page 14, lines 2-6; figure 15) discloses a rigid packet 1 with a hinged lid, comprising a container 10, also a lid 12 attached pivotably to the container 10 along a hinge 19 and pivotable thus between a position in which the container is open and a position in which the container is closed, the closed packet appearing prismatic in shape and substantially triangular in section, said packet also comprising locking means ("retaining means" 66, "tab" 69), positioned on **a** front corner edge ("at the vertex of the Vee") to coincide with an area, remote from the hinge 19, along which two side faces of the prism are joined, by which the lid 12 is retained in the closed position; said locking means 66, 69 comprising an engagement member ("tab" 69) operating between **the frame (22)** and the lid (12).
- 3.4 In the packet 1 of D1, the engagement member 69 consists of a shaped portion presented by the front corner edge 26 of the frame 22, **integral with the frame 22**, extending toward the lid 12, and insertable in a recess ("slot" 70) afforded by the lid 12.
- 3.5 Hence, D1 does not disclose the feature of claim 1 (see also statement setting out the grounds of appeal, page 2, first complete paragraph) that

- the locking means comprises an engagement member operating between the **container** and the lid.

Hence, with respect to the two alternatives of claim 1:

- D1 does not disclose that the engagement member consists of a shaped portion presented by the front corner edge **of the container, integral with the container**, extending toward the lid, and insertable in a recess afforded by the lid (first claimed alternative); and

- D1 does not disclose that the engagement member consists of a shaped portion presented **by the front corner edge of the lid, integral with the lid, extending toward the container, and insertable in a recess afforded respectively by the container** (second claimed alternative).

3.6 Claim 1 explicitly states, for the first alternative, that the engagement member is integral with the container.

The board follows the respondent's view that a person skilled in the art will readily understand, also using his common general knowledge, that the engagement member in claim 1 is not integral with the frame, contrary to the appellant's view, since said frame is an additional part of the packet, distinct from the container (see contested patent, paragraphs 15 and 19). This is clear from the fact that the two parts - container and frame - are obtained from two distinct initial blanks as shown in figures 6 and 7 for the container 10 and in figure 6a for the frame 22. That the container 10 and the frame 22 are secured together via flaps 43 of the diecut blank 32 (for the container

10) and appendages 51 of the flat leaf 45 (for the frame 22) does not change this fact (see paragraphs 54 and 67).

3.7 This corresponds to the board's preliminary opinion given in the annex to the summons to oral proceedings, which has not been contested by the appellant in its subsequent written submissions.

3.8 Since in D1 the engagement member 69 is integral with the frame 22 (see point 3.4 above), the subject-matter of claim 1 is novel vis-à-vis D1 (Article 54(1) EPC).

4. *Inventive step*

4.1 The appellant has contested the inventive step of the subject-matter of claim 1:

- starting from the embodiment shown in figure 15 of D1 as closest prior art in combination with either the skilled person's common general knowledge or any of the teachings of documents D2 to D7; or

- in view of the disclosure of D8 alone, or starting from the disclosure of D8 as closest prior art in combination with either the skilled person's common general knowledge or the teaching of document D1.

4.2 *Starting from D1*

4.2.1 The board shares the parties' view that D1 can plausibly be seen as closest prior art since it concerns a rigid packet which is prismatic in shape and substantially triangular in section, like the one claimed in claim 1.

- 4.2.2 The effect of the distinguishing feature that "the locking means comprises an engagement member operating between the **container** and the lid (for the two claimed alternatives; see point 3.5 above)" enables the lid to reassume its correct closed position in contact with the edges of the container after the packet has been opened and reclosed multiple times (see contested patent, paragraphs 5 to 9, where the effect is discussed with respect to the disclosure of D1; respondent's reply, page 2, eighth complete paragraph).
- 4.2.3 Therefore, in view of this effect, the problem to be solved cannot be seen as merely to provide an alternative position of the engagement members in the packet of figure 15 of D1 as argued by the appellant but rather, as maintained by the respondent, to securely close the packet after it has been opened and reclosed multiple times.
- 4.2.4 The skilled person will not find any hint towards the solution according to claim 1 in D1 itself, since in D1 the locking means is always positioned on the frame and not on the container.
- 4.2.5 Further, as set out in the impugned decision (see point 2.4), the skilled person would refrain from shifting the tab 69 of the frame 22 according to D1 to the container 10, since this would have the effect that in closed condition the lip would overlap the container and that the edges of the lid and container would no longer be flush with each other when the packet is closed, thereby possibly also generating bumps. This would go against the disclosure of D1, as could be seen for instance in figures 1 to 4, where the edges of the lid and container were flush with each other. The container and/or the lid would have then to be modified

in an unknown manner in order to maintain the overall shape of the packet of D1.

- 4.2.6 In the board's view, the appellant has failed to convincingly show why and how the skilled person would have modified the disclosure of D1, in view of D1 alone, so as to arrive at the subject-matter of claim 1.
- 4.2.7 The board concurs with the appellant that the skilled person considering the prior-art documents D2 to D7, which lie in the same technical field of cigarette packets, as does D1, will realise that locking means according to which the engagement member operates between the container and lid are usual and well known in that technical field.
- 4.2.8 These locking means, however, are shown in documents D2 to D7 as being positioned on the side walls of the packet. In fact none of these documents discloses locking means positioned at a corner edge, and so the skilled person would not find in them any incentive to go in this direction. Hence, should the skilled person consider applying the teaching of one of said documents to the packet of D1, he would position the locking means on the side walls of the triangular cross-section of the container and/or of the lid (see D2, column 2, lines 38-49, figure 1; D3, page 5, first complete paragraph, figures 1, 2, 5, 8 and 12; D4, column 1, lines 21-24, figure 6; D5, figures 1 and 2; D6, paragraph 5, figures 1 and 2; D7, page 1, line 31, to page 2, line 6, figures 3, 5 and 8).
- 4.2.9 The appellant has thus failed to convincingly show why and how the skilled person using his common general knowledge and/or the disclosure of D2 to D7 would have

modified the disclosure of D1 so as to arrive at the subject-matter of claim 1.

- 4.2.10 Consequently, the board cannot find fault in the impugned decision, see point 2.3, in this respect.
- 4.2.11 Regarding document D8, the board considers that it discloses (column 1, lines 4-21; column 2, line 61, to column 3, line 25; figures 1, 6 to 10) a rigid packet with a hinged lid, comprising a container 80, also a lid 90 attached pivotably to the container 80 along a hinge 17 and pivotable thus between a position in which the container is open and a position in which the container is closed, the closed packet appearing prismatic in shape, said packet also comprising locking means (posts each comprising a first post-defining portion 54 and a second post-defining portion 58), positioned on a front corner edge to coincide with an area, remote from the hinge 17, along which two side faces ("front wall" 12, "wall side panel" 50) of the container 80 are joined, by which the lid 90 is retained in the closed position; said locking means 54, 58 comprising an engagement member ("first post-defining portion" 54) operating between the container 80 and the lid 90; the engagement member 54 consisting of a shaped portion presented by the front corner edge of the container 80, integral with the container 80, extending toward the lid 90, and insertable in a recess ("gap" 55) afforded by the lid 90.
- 4.2.12 Consequently, taking the wording used in claim 1 into account, the board is of the opinion that D8 discloses the distinguishing features of the first claimed alternative over D1, see point 3.5 above.

4.2.13 In fact, contrary to the respondent's view, the board considers that the posts 54, 58 in the packet of D8 represent the locking means of claim 1, i.e. not only the first post-defining portion 54, and are positioned on each front corner edge of the container 80. Claim 1 merely requires that the locking means (the posts 54, 58 in D8) are positioned on a front corner edge, but not necessarily that the engagement member (first post-defining portion 54 in D8) of said locking means has also to be positioned at the front edge corner. The expression "presented by the front corner edge" used in claim 1 for the engagement member does not equate to "positioned on" the front edge corner used for the locking means. Further, the engagement member 54 of the locking means 54, 58 of the packet of D8 is also considered to be a "shaped portion" as in claim 1, the expression "shaped portion" not being further specified.

4.2.14 The board shares the respondent's view put forward at the oral proceedings that the skilled person would refrain from applying the teaching of D8 to the packet of D1 since he would arrive at edges of the lid and container that were no longer flush with each other, which would go against the disclosure of D1, see point 4.2.5 above. In fact the front corner edge of the lid would then have to come around over the frame 22 and cover the engagement member of the container.

4.2.15 Further, the recess 55 of D8 which would then have to be present on the side wall of the lid 12 of D1 would necessarily require the presence of an internal guide wall. This guide wall would inevitably collide with the frame 22 of D1. The skilled person would then have to modify the container of D1 in an unknown manner to bring about the closure of the packet. For this reason

too the skilled person would be discouraged from applying the solution of D8 to the packet of D1.

4.2.16 Therefore, starting from D1 the skilled person would not arrive at the claimed subject-matter in an obvious manner.

4.3 *Starting from D8*

4.3.1 The appellant argued further that the subject-matter of claim 1 lacked inventive step starting from D8 as closest prior art.

4.3.2 The board, however, cannot find any argument in the appellant's submissions as to why the skilled person would select D8 as plausible closest prior art. It shares the respondent's view that the skilled person would not consider starting from a container having a rectangular cross-section to develop a container with a triangular cross-section. The initial diecut blank would indeed have to be completely redesigned, which, contrary to the appellant's allegation, goes beyond a skilled person's routine work. Therefore, for this reason alone, inventive step objections based on D8 as closest prior art are not convincing.

4.3.3 In addition, as mentioned in D1, page 3, lines 15 to 25, the shape of the cross-section of the container has an influence on the freedom of movement of the cigarettes left inside the packet after the progressive removal of the cigarettes. Packets with rectangular cross-sections as in D8 provide the cigarettes left inside with a high degree of freedom in at least one direction, so that they break when knocking against one another. The shape of the cross-section of the packet also has an influence on the stackability of the

packet. This has already been acknowledged in T 1174/03, not published in OJ EPO, reasons 2.1 to 2.9, concerning the grant procedure for the very same document D1 of the present decision. Consequently, the triangular cross-section of the packet of claim 1 is a technical distinguishing feature over D8 which has a technical effect, contrary to the appellant's view.

- 4.3.4 The appellant has failed to show convincingly how the skilled person would have solved the technical problem associated with the said technical effects so as to arrive at the subject-matter of claim 1 in an obvious manner.
- 4.3.5 Further, the board cannot share the appellant's view that the skilled person would immediately realise that the technical disclosure of D8 can be applied to other types of cross-section, depending on the need, and that in applying it to a triangular cross-section he will necessarily arrange the locking means at the front corner edge, in a routine manner.
- 4.3.6 This amounts to a mere allegation. As put forward by the respondent at the oral proceedings, applying the teaching of document D8 concerning a packet with a rectangular section to a packet with a triangular cross-section would pose an undue burden on the skilled person, meaning that he would refrain from starting from D8, as already discussed under point 4.3.2 above. In fact, doing so would require a complete redesign of the diecut blank of the packet, leading to unforeseeable difficulties and problems.
- 4.3.7 Therefore, the skilled person would not consider the packet known from D8 as representing the closest prior art. Furthermore, the appellant has failed to

convincingly show how the skilled person, even if he had considered starting from a packet known from D8, would have arrived at the subject-matter of claim 1 of the patent as maintained in an obvious manner.

4.4 In view of the above, inventive step has to be acknowledged for the subject-matter of claim 1 of the patent as maintained by the opposition division.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated