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**Datasheet for the decision
of 28 April 2022**

Case Number: T 2013/17 - 3.2.06

Application Number: 09787748.4

Publication Number: 2437627

IPC: A41D13/05, A41D13/018

Language of the proceedings: EN

Title of invention:

AIRBAG SYSTEM FOR MOTORCYCLE RIDERS

Patent Proprietor:

Alpinestars Research S.p.A.

Opponent:

Dainese S.p.A.

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54(2), 54(3)

RPBA Art. 12(2), 12(4)

RPBA 2020 Art. 12(3), 13(2)

Keyword:

Grounds for opposition

Novelty - (yes)

Statement of grounds of appeal - reasons set out clearly and concisely (no)

Late-filed evidence - submitted with the statement of grounds of appeal - admitted (no)

Amendment after summons - exceptional circumstances (no) - taken into account (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2013/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 28 April 2022

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 14 July 2017
rejecting the opposition filed against European
patent No. 2437627 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
W. Ungler

Summary of Facts and Submissions

I. The appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition against European patent No. 2 437 627 (hereinafter "the patent").

II. Claim 1 of the patent has the following wording (bold feature numbering in square brackets added by the Board, according to the impugned decision):

"[1] A garment (100) comprising:
- [2] at least one inflatable protective device (11) able to move from a rest condition, wherein it's in a deflated status, to a working condition, wherein it's in an inflated status; [3] in the working condition said at least one inflatable protective device (11) not emerging outside the garment (100), [4] but remaining inside a pocket (7) formed between a protection element (4), fixed to an external layer (14) of the garment (100), and the external layer (14) of the garment (100);
- [5] an inflation means (10) able to inflate said protective device (11), [6] said inflation means (10) containing more than one inflation charge [7] so that the inflation means (10) are able to inflate the inflatable protective device (11) more than once;
- [8] an electronic controller (9) able to activate the inflation means (10) if a risk and/or danger signal is detected by sensors [9] which are incorporated in the garment (100)
- [10] means (13) for the controlled escape of the inflating air from the inflatable protective device (11),
characterized in that

[11] the protection element (4) is fixed to the garment (100) by means of an elastic border (3) [12] which is able to be stretched for allowing the accommodation inside the garment (100) of the inflatable protective device (11) also when the inflatable protective device (11) is moved from the rest condition to the working condition, increasing its volume."

III. The following facts from the opposition proceedings are relevant to the present decision:

(a) the opposition was filed on 18 September 2014; maintenance of the patent was considered to be prejudiced by the opposition grounds pursuant to Articles 100(b) and 100(a) in combination with 54 and 56 EPC, referring *inter alia* to the following evidence :

D1 : <http://www.youtube.com/watch?v=fLCJLqKCOLw>

D4 : WO 2006/009970 A2

D5 : US 6 032 299 A

D6 : EP 1 315 427 B1

D7 : US 6 125 478 A

D8 : WO 2010/067289 A2

D11 : affidavit by motorcycle racer Mr. Valentino Rossi relating to a racing suit worn by him during pre-race tests on 1 and 2 May 2009 for the MotoGP World Championships at Jerez in Spain.

(b) in its reply to the notice of opposition, dated 12 May 2015, the respondent (patent proprietor) contested *inter alia* the public prior use supported by D11, that the racing suit mentioned therein was the one shown in D1, the respondent questioned specifically a number of statements in D11 concerning the circumstances of the alleged public availability of the suit and also the disclosure of

several features of claim 1 by the alleged prior use.

- (c) with its subsequent letter dated 15 June 2015, besides replying to the arguments of the respondent, the appellant raised further objections under Article 56 EPC, based on D4 to D7 in combination with the following further evidence submitted with that letter

D14: US 2006/0175810 A1

D15: DE 2626765 A1

D16: US 2006/0248632 A1

- (d) the parties were summoned to oral proceedings before the opposition division, arranged for 16 February 2017; in the annex to the summons, dated 16 August 2016, the opposition division set out its preliminary view according to which
- (i) Article 100(b) EPC did not prejudice maintenance of the patent (section 3 of the annex)
 - (ii) claim 1 was novel *inter alia* over D1 and D8 (sections 4.1 and 5.1 of the annex),
 - (iii) the appellant had not substantiated that D1 and D11 related to the same suit and had failed to demonstrate the disclosure of all features of claim 1 in D11 (section 5.2),
 - (iv) D11 did not provide sufficient evidence of a public prior disclosure and failed to disclose features 5 to 10 of claim 1 (section 6.1)
 - (v) the appellant had failed to provide any reasoned argument as to why it would have been obvious to combine the features of D11 (or D1) with D4 or with D5 to D7 (sections 6.1 and 6.2)

(vi) it was not apparent which garment of D4 the skilled person would have combined with the garment of D14, D15 or D16 in order to arrive at the garment of claim 1; D14, D15 and D16 failed to disclose an elastic border according to feature 11 of claim 1, and reasoned argumentation for the combinations of D14 to D16 with D5 to D7 was also not provided (section 6.3)

(e) without submitting any comments on the opposition division's preliminary opinion, the appellant informed the division of its non-attendance at the oral proceedings

(f) the oral proceedings were subsequently cancelled and the impugned decision was issued on 14 July 2017, repeating and confirming in essence the content of the opposition division's preliminary opinion.

IV. With the statement of appeal grounds, the appellant submitted the following evidence:

L1: <http://www.crash.net/motogp/news/147424/1/125-haojue-to-miss-mugello>

L2: <http://www.crash.net/motogp/news/145817/1/125-haojue-withdraws-from-japanese-grand-prix>

L3: <http://www.motogp.com/it/notizie/2009/03/27/progressi-per-hoyle-nei-test/149346>

V1, V2 : two videos documenting a motorcycle accident during the race at the Grand Prix on 3 May 2009 in Jerez of Mr. Michael Ranseder and the inspection of Mr. Ranseder's damaged racing suit

D17/Annex 1 : series of photographs of the racing suit worn by V. Rossi at MotoGP on 1 and 2 May 2009

D18/Annex 2 : series of photographs of the damaged racing suit of M. Ranseder and of its highside impact at MotoGP on 3 May 2009

D19/Annex 3 : series of photographs of V. Rossi taken by L. Soldano at MotoGP on 1 and 2 May 2009

D20: Affidavit of Mr. Silvano Celi

D21: Affidavit of Mr. Alessandro Bellati

D22: Affidavit of Mr. Luigi Soldano

D23: Activation data of Mr. Ranseder's airbag

The authors of affidavits D20 to D22 were offered to be heard as witnesses and the appellant stated that the racing suit specimens of Mr. Rossi and Mr. Ranseder worn in May 2009 in Jerez would also be available. The racing suit specimen were later submitted to the Board.

- V. The parties were summoned to oral proceedings before the Board. In a communication dated 23 April 2021 the Board informed the parties of its preliminary opinion on the case, according to which it appeared that the appeal should be dismissed. The Board noted in particular, by reference to Articles 12(3) of the Rules of Procedure of the Board of Appeal (RPBA 2020) and Articles 12(2) and (4) RPBA 2007, that the appeal grounds repeated certain objections literally copied from the notice of opposition without addressing the reasons given by the opposition division in the impugned decision and that in regard to certain new objections raised for the first time in the appeal grounds it had neither been justified why these could not have been raised before the opposition division nor had complete reasoning been submitted. The Board intended to hold those objections inadmissible (section 2 of the communication). Similarly, the Board

questioned the admittance of the evidence filed for the first time in the appeal procedure, without any justification why it could not have been submitted to the opposition division (section 3 of the communication). The Board further opined, in regard to the evidence admissibly filed in the opposition procedure (D1, D11, D4-D8, D14-D16), that the respective arguments of the appellant were unconvincing (section 4).

VI. Oral proceedings before the Board were held on 28 April 2022.

VII. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the appeal be dismissed.

VIII. The arguments of the appellant may be summarised as follows.

Art. 100(b) EPC - Substantiation of the objection

The appellant had implicitly replied to the reasons given in the impugned decision. There was no requirement in the EPC to discuss all arguments, nor was it specified anywhere how much detail was necessary in a reply. The opposition division's reasoning contained clear contradictions with regard to the double function of the elastic border so that it was immediately clear why the reasoning was wrong without any further detailed argument. This was also confirmed by several decisions of the Boards of Appeal, see for example T 140/88 and J 22/86, or chapter V.A.2.6.2 of the Case Law of the Boards of Appeal.

Article 100(a) in combination with 54(3) EPC - D8

The claim had to be given a broad interpretation, without relying on the description. The opposition division's interpretation of the expression "more than once" as implying a chronological order of inflations was unsubstantiated. The claim was not limited to such meaning and covered also embodiments in which, for example, several gas containers were connected to the inflatable protective device, which according to claim 5 of the patent could be composed of several inflatable chambers. Such a plurality of gas containers could thus inflate the individual chambers of the inflatable protective device more or less simultaneously. In such embodiments, the inflation occurred more than one time, hence more than once, though possibly in parallel. D8 disclosed the use of a plurality of gas generators, for example on page 25, line 12, employing the plural form. Moreover, since the garment disclosed in D8 was intended to allow the motorcycle rider to continue the race after inflation of the inflatable protective device and its subsequent deflation, as in the paragraph bridging pages 2 and 3, it was implicitly required that the inflatable protective device had to be inflatable again. The concept of inflation/deflation cycles was also disclosed in D8, for example on page 3, lines 10 to 18. The term "cycle" by definition meant that something occurred more than once.

Admittance of evidence submitted with the appeal grounds

The evidence submitted with the appeal grounds should be admitted into the proceedings since it was related to the public prior use disclosed in D1 and D11 which had been submitted already with the notice of

opposition. The appellant was totally taken by surprise by the opposition division's preliminary opinion, issued in August 2016, doubting the events reported by the famous motorcycle racer Valentino Rossi in its affidavit (D11). Compared to employees of the appellant present in May 2009 at the MotoGP event and which would not have been considered by the opposition division as being independent sources of the facts reported in D11, Mr. Rossi was in contrast an independent witness, not being employed by the appellant, not bound by any secrecy obligation and as such consequently a member of the public. The respondent's counter arguments in its reply to the opposition were limited to nothing more than simply refuting the evidence filed. Under these circumstances the opposition division's drastic preliminary opinion could thus not have been expected. The three month time available according to Rule 116 EPC after the annex to the summons to oral proceedings before the opposition division had been issued in August 2016 was too short to provide the necessary evidence to establish and complete the links between D1 and D11. A request for postponement would not have made sense. Although some evidence was indeed in the hands of the appellant, such as the racing suit specimens conserved at the appellant's museum, this evidence alone would not have been sufficient to complete all the links between D1 and D11. A further independent source witnessing and confirming the statements made in D11 needed to be found, which was difficult since the event had taken place eight years previously and too many pieces of evidence had to be searched for. The famous photographer Luigi Soldano was found only after some time and could be seen as an independent witness of the events reported in D11, since Mr. Soldano also worked for the respondent and was an official photographer of MotoGP.

All evidence was moreover filed at the earliest stage in the appeal procedure and could not have come as a surprise for the respondent. Moreover, the evidence was highly relevant not only for novelty but also for inventive step of the subject-matter of claim 1 of the patent.

Article 100(a) in combination with 54(2) EPC - D1, D11

Assuming the interpretation of the expression "more than once" encompassed also multiple inflations occurring more or less simultaneously when using a plurality of gas generators, at least D1 disclosed this feature, as was apparent from the use of the plural ending in the Italian term "*generatori*" by the technician explaining the function of the racing suit to V. Rossi in the video D1, at 1:49 minutes. The remaining features of claim 1 were disclosed in D1 together with D11 which both concerned the same racing suit.

Article 100(a) in combination with 56 EPC - any of D4 to D7 in combination with any of D15 to D17 - admittance into the proceedings

The appealed decision comprised only very short reasoning, as could be seen from item 7.3 thereof, which was not sufficiently substantiated. The appeal grounds in reply thereto set out the appellant's interpretation of claim 1 in its introductory portion, notably of the expression "protective element", which was important for the correct understanding of the function of the feature "elastic border". The feature analysis of claim 1 with respect to, for example, D4 in section 5.1 of the appeal grounds and the reasoning of

the appellant given in for example, section 5.4 set out the arguments for the combination of e.g. D4 and D15. These were sufficient to reply to the arguments used by the opposition division and to understand why the decision was wrong as required by Article 12(2) RPBA.

Moreover, the statement in the respective sections 5.3 to 5.5 of the appeal grounds according to which the same result could be derived when considering the jacket disclosed in, for example, D15 as the closest prior art in combination with D4 were not meant to constitute separate objections. Rather these statements were intended to clarify that the particular embodiment of D4 to be used as the closest prior art was not relevant.

Article 100(a) in combination with 56 EPC - D1 in combination with D4 - admittance into the proceedings

D1 had been provided as evidence of the public prior use of a racing suit. This subject-matter did not represent something new in the procedure and could be considered to constitute the closest prior art to the subject-matter of claim 1 of the patent. The garment according to claim 1 was distinguished over this racing suit by the feature "more than once" and the features 11 and 12 of claim 1. Faced with the problem of improving the safety of the rider, the skilled person would have found the solution to this problem obviously in D4. In particular, features 11 and 12 were disclosed in the passage bridging pages 25 and 26. The elastic elements therein corresponded in their function to those of the elastic border of claim 1. The skilled person would have notably understood that these elastic elements could form an elastic border between the protective element, which did not necessarily have to

be formed as a rigid structure, and an external layer, so as to satisfy the double function of the elastic border according to features 11 and 12.

The argument relating to the disclosure of feature 11 in D4 did not involve a change of the appellant's case. It rather constituted a development or completion of the arguments submitted in writing. It was based on the continuation of the reading of the previously cited passage from page 25, which related to feature 10 of claim 1, as clear from e.g. page 29 of the appeal grounds. Its admittance was anyway justified by the exceptional circumstances which emerged during the discussion at the oral proceedings of the double function of the elastic border according to feature 11 of claim 1.

IX. The arguments of the respondent may be summarised as follows.

Art. 100(b) EPC - Substantiation of the objection

The arguments contained in the statement of the grounds of appeal resulted from a simple copy and paste from the notice of opposition. This was not sufficient in view of the requirements of Rule 12(2) RPBA 2020 and of the purpose of the appeal procedure being a review of the impugned decision.

Article 100(a) in combination with 54(3) EPC - D8

The expression "more than once" clearly implied a time related concept, whereas the appellant's interpretation would simply correspond to the expression "more than one". The appellant's interpretation of the expression did not fit to the wording of features 6 and 7, when

taken in their entirety. D8 did not unambiguously disclose a plurality of containers; the Figures only illustrated a single gas canister. There was no mention of a possible re-inflation of the inflatable protective device after its deflation. The deflation mentioned in D8 only served the purpose of allowing the rider to continue their race without being hindered by the unfavourable aerodynamic profile of the inflated protective device.

Admittance of evidence submitted with the appeal grounds

The new evidence should not be admitted since the alleged public prior use had already been contested by the respondent in its response to the notice of opposition. After the opposition division had issued its preliminary opinion, the appellant had four months to reply. If this time period would have been too short, a reasoned request for postponement could have been submitted. The submitted evidence was entirely in the hands of the appellant. The technicians offered as witnesses only in the appeal were also employees of the appellant and nothing excluded them from being heard as witnesses. Moreover, as confirmed by the appellant, the author of D20, S. Celi, worked many years for the appellant in close cooperation with V. Rossi and could and should therefore have been offered as a witness when filing the opposition. Moreover, it was contested that V. Rossi could be considered as a member of the public.

Article 100(a) in combination with 56 EPC - any of D4 to D7 in combination with any of D15 to D17 - admittance into the proceedings

These objections should not be admitted into the procedure for the same reasons as the objections pursuant to Article 100(b) EPC could not be admitted. The appellant essentially repeated literally the corresponding written submissions in the opposition proceedings. The only difference was in the respective penultimate sentence of each paragraph 5.1 to 5.3 of the appeal grounds. However the resulting objections could not be considered to have been motivated by any issue raised in the decision and therefore constituted new lines of attack. These objections should and could have been filed in response to the opposition division's preliminary opinion.

Article 100(a) in combination with 56 EPC - D1 in combination with D4 - admittance into the proceedings

An objection based on only D1 as the closest prior art in combination with D4 had not been presented before in the appellant's written submissions. Rather D1 and D11 were always considered together. Simply continuing the reading from page 25 to page 26 in D4 was not sufficient to show that the argument was a further development of the original one.

Reasons for the Decision

Art. 100(b) EPC - Substantiation of the objection

1. The objection pursuant to Article 100(b) EPC presented by the appellant in section 1. of the appeal grounds is not taken into account (Article 12(4) RPBA 2007).

1.1 According to Article 12(2) RPBA 2020, which is applicable in the present case according to Article 25(1) RPBA 2020, the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, so that a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based.

Article 12(2) RPBA 2007 (which essentially corresponds to Article 12(3) RPBA 2020) requires *inter alia* that the appeal grounds and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on.

According to Article 12(4) RPBA 2007, which is applicable according to Article 25(2) RPBA 2020 to the present case, 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 Article 12(1) RPBA 2007 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 Article 12(2) RPBA 2007.

1.2 The appellant's objection pursuant to Article 100(b) EPC is uncontestedly literally copied from the notice of opposition. The arguments of the opposition division for rejecting these objections in section 4 of the impugned decision have not been refuted. The reasons given by the opposition division in the impugned decision have thus not been addressed. It has not been set out why the opposition division's decision on this opposition ground should be reversed (Article 12(3) RPBA 2020, Article 12(2) RPBA 2007).

1.3 The appellant's literal repetition of its arguments from the notice of opposition cannot be considered as an implicit reply to the reasons given in the impugned decision either. Such a form of reply may generally only serve the purpose of a complete re-examination of the appellant's case by the Board, which does not correspond to the purpose of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020).

Contrary to what was argued by the appellant in the oral proceedings, it is also not immediately apparent from the reasons given in the decision and the grounds of appeal submitted in regard to this opposition ground that contradictions exist between the reasons in sections 4 (sufficiency of disclosure) and 5 (novelty) of the impugned decision, particularly in regard to a double function of the "elastic border" feature. If such contradictions indeed were to exist in the impugned decision, it would have been up to the appellant to point these out in the appeal grounds and demonstrate that on the basis of any such deficiencies the reasons given in regard to the relevant ground of

opposition could not withstand scrutiny.

The case law referred to by the appellant in this regard is not relevant. First it is to be noted that the cited decisions T 140/88 and J 22/86 date from a period for which a requirement similar to those of Article 12(2) RPBA 2007 or Article 12(3) RPBA 2020 did not exist in the Rules of Procedure of the Boards of Appeal. Moreover, neither of these two decisions is based on similar factual circumstances to the present case. The crucial question of whether the literal repetition in the appeal grounds of an objection raised in the notice of opposition could be considered an appropriate response to the reasons given in the impugned decision was not addressed. The appellant's further general reference to section V.A.2.6.2 of the 9th Edition of the Case Law of the Boards of Appeal of the EPO summarises principles in respect of the form of the statement of grounds of appeal. It is however not apparent from this reference that the Board's conclusion based on the consideration of the Rules of Procedure of the Boards of Appeal in the present case would contradict those principles. The Board can accept that in exceptional cases it may be immediately apparent to the Board of Appeal upon reading the decision under appeal and the Statement of Grounds of Appeal that such decision cannot properly be supported (see J 22/86, point 2 of the Reasons). However, this is not the situation here, as set out above.

Article 100(a) in combination with 54(3) EPC - D8

2. The subject-matter of claim 1 is new in regard to the garment known from D8, which constitutes prior art within the meaning of Article 54(3) EPC.

- 2.1 Inflation means according to features 6 and 7 of claim 1 of the patent are not directly and unambiguously derivable from D8, in particular not in regard to the feature according to which the inflation means shall be able to inflate the inflatable protective device more than once.
- 2.2 There can be no doubt that "once" means "one time". "[M]ore than once" means consequently that some event happened at one time and at least one more time after that first occurrence of the event. Read in the complete context of features 6 and 7 the meaning of the underlined terminology can only mean that the inflation means is arranged to inflate one and the same inflatable protective device more than one time so as to provide (the possibility of) a chronological sequence of inflations.
- 2.3 The appellant's interpretation of the expression "more than once" as meaning "more than one" inflation, covering thereby the option of, for example, multiple inflations of several individual inflatable devices occurring more or less in parallel, neither corresponds to the normal meaning of the term "once" nor does the patent itself support such a deviating interpretation.
- 2.4 Despite the possibility of deflating the inflatable protective device in D8 (see for example, page 20, line 29 to page 21, line 3), a further re-inflation is not disclosed. The mention of gas generators_s (page 20, line 12), of an "inflation/deflation cycle" (page 3, lines 10-18) or of the fact that the garment was intended to allow the motorcycle rider to continue a race after a fall or accidental inflation (page 2, lines 1-2) do not mean that the inflation device must necessarily be arranged to allow inflation of the inflatable

protective device more than once. The plural form of the term "gas generators" appears to be no more than the grammatical requirement imposed by the following list of different usable generator types rather than indicating the presence of several generators in the garment. Moreover, even if it were assumed *arguendo* that the plural form indeed implied the presence of more than one generator in the garment, these could for example also inflate plural inflatable devices only once simultaneously (i.e. not "more than once" as defined in feature 7 of claim 1). Similarly, the term "cycle" does not necessarily mean that the inflatable device has to undergo several sequential cycles of inflation and deflation. A cycle can be completed by starting from the device in an un-inflated condition, inflating it, subsequently deflating it and thereby ending in an un-inflated condition. There is no indication in D8 that such a cycle is repeated or that it is intended to be. The appellant also failed to indicate any support for such an assumption. Also, the deflation of the inflatable protective device for allowing a motorcycle rider to continue a race appears to be motivated by aerodynamic considerations (see e.g. page 20, lines 36 to 38) rather than necessarily meaning that the device needs to be inflatable again.

- 2.5 The Board concludes that an inflation means arranged to inflate one and the same inflatable protective device more than once (i.e. more than one time so as to provide the possibility of a chronological sequence of inflations) is not directly and unambiguously derivable from D8.

Admittance of evidence submitted with the appeal grounds

3. The Board exercised its discretion according to Article 12(4) RPBA 2007 to hold inadmissible the entire body of evidence submitted by the appellant for the first time in the appeal proceedings, in particular L1 to L3, V1, V2 and D17 to D23, the offers to hear the authors of the affidavits D20, D21 and D22 as witnesses, which were all submitted with the statement of grounds of appeal, as well as the two racing suit specimens offered for submission when filing the grounds of appeal and ultimately submitted later during the appeal procedure, as well as all objections based on this evidence.
 - 3.1 The Board is not persuaded by the reasons given by the appellant that the above new evidence could not have been filed during the proceedings before the opposition division. Quite the contrary. From what follows, the Board concludes that this evidence could and should have been filed before the opposition division.
 - 3.1.1 It has not been argued and it is also not apparent to the Board that the appealed decision was based on considerations which would have come as a surprise for the appellant.

In fact, the opposite is the case, since the reasons given by the opposition division in section 5.1, in the first paragraph of page 7, and in section 5.2 of the impugned decision, were already known to the appellant, from for example sections 4.1 and 4.2 of the opposition division's annex to the summons to oral proceedings dated 16 August 2016 (e.g. that the opponent had failed to demonstrate that features 11 and 12 were known). Moreover, in the reply to the notice of opposition, the respondent already contested the alleged public prior use based on *inter alia* D1 and D11, which was then

taken up by the opposition division in the annex to the summons. A reaction to the doubts raised by the respondent in regard to the alleged public prior use could and should have occurred already before the opposition division, which did not happen. Instead the appellant chose not to submit any further comments and not to attend the oral proceedings before the opposition division, which as a consequence were ultimately cancelled.

- 3.1.2 The Board considers the evidence submitted in the appeal proceedings to relate to two distinct alleged public prior uses.

A first alleged prior use ("Rossi") concerns a racing suit worn by Mr. Rossi during the pre-race tests of the Moto Grand Prix of Jerez in Spain on 2 and 3 May 2009, according to the affidavit D11 in combination with *inter alia* the video D1 concerning allegedly the (same type of) racing suit, which documents were submitted already in the opposition procedure. With respect to this first prior use, on appeal the appellant submitted affidavits D20, D21, D22, the series of photographs of D17, D19 and the actual racing suit specimen in order to complete the evidence submitted during the first instance proceedings.

The Board considers a second alleged public prior use ("Ranseder") to relate to a racing suit allegedly identical to that disclosed in D1 and worn by Mr. Ranseder according to affidavits D20 and D21, photographs D18 and airbag activation data D23, videos V1 and V2, where D18, D23, V1 and V2 concern Mr. Ranseder's accident at the same Moto GP in Jerez in 2009, and the actual (damaged) racing suit specimen, as

well as internet content according to links L1, L2, L3.

3.1.3 Almost the entire evidence submitted with the appeal grounds lay exclusively within the sphere of the appellant. The authors of affidavits D20 and D21, who were offered to be heard as witnesses in regard to both alleged prior uses, have been or are employees of the appellant and thus readily accessible. Moreover, according to the appellant, the author of the affidavit D20, Mr. Celi, is the same person appearing in the video D1, explaining the features of a newly developed racing suit to Mr. Rossi, author of affidavit D11. Likewise, the two racing suit specimens worn by Mr. Rossi and Mr. Ranseder respectively, belong to the appellant. According to the appellant's statement made during the oral proceedings, these suits had been stored in the meantime in its own historical museum.

Since all this evidence was clearly in the hands of the appellant, or at least the knowledge of its existence, there is no apparent reason why it could not have been submitted at least in reply to the preliminary opinion issued by the opposition division.

3.1.4 The appellant's central argument focussed on the difficulty of finding, in a short time of only three months, an independent source having no business relationship to the appellant, to further confirm the facts initially alleged by means of *inter alia* D1 and D11. The Board does not find this convincing.

First, and as already mentioned above, the respondent had contested the alleged prior use already in its reply to the notice of opposition in May 2015. The opposition division issued its preliminary opinion in August 2016, in which it took up the criticism raised

by the respondent and consequently also questioned the alleged prior use. Oral proceedings were summoned for February 2017. This would have left more than twenty months for the appellant to react to the doubts expressed by the respondent and six months, rather than three, after the opposition division had transmitted its preliminary opinion based on these doubts. The Board cannot accept that this time would have been too short to search for further evidence, in particular since most of the evidence then submitted in the appeal proceedings came from the appellant itself (racing suit specimen, authors of affidavits D20 and D21). No explanation was given as to why it would have been difficult to retrieve the racing suit specimen from the appellant's museum nor why it was considered inappropriate to ask for a postponement of the oral proceedings to gather any further evidence, apart from the allegation that the appellant did not consider the opposition division would have granted such a postponement. No weight can however be attached to such an allegation since it is purely hypothetical. That the appellant was not able to immediately find the racing suit specimen kept in their own historical museum can not go to the detriment of the respondent. If the appellant had needed more time to find more evidence supporting the alleged public prior use, they should at least have communicated this to the opposition division after receipt of the division's preliminary opinion. Instead the appellant only stated that it would not attend the oral proceedings.

The Board is also not convinced that it would have been over-burdensome in the available time to find the so-called "independent source", i.e. Mr. Soldano (affidavit D22) who took the photographs, submitted as D19, of Mr. Rossi during the Grand Prix event in May

2009 in Jerez. As stated by the appellant, Mr. Soldano is a famous photographer (see appeal grounds, page 10, third full paragraph beneath the photographs), who took photographs *inter alia* at motorcycle races like the Grand Prix of Jerez 2009 and who more particularly took the photographs of a famous motorcycle racer, Mr. Rossi. According to the appellant's statement made during the oral proceedings, the appellant, in particular its master taylor Mr. Celi (affidavit D20), had a long standing working relationship with Mr. Rossi. Considering the apparent reputation of Mr. Soldano, considering that during such events like the Grand Prix in Jerez 2009 photographers generally have to register in order to perform their work on the race track and in the racer paddocks, considering that famous racers are certainly at least not unaware of who takes and sells photographs of them (appeal grounds, page 10, end of third full paragraph) and considering that Mr. Rossi was well known to the appellant, it is not credible that it would have taken more than three years after filing the notice of opposition and more than 2 years after the respondent had raised doubts in regard to the alleged public prior use, to find the famous photographer Mr. Soldano.

- 3.1.5 The Board can also not accept that it would have been a drastic position or totally surprising that the opposition division doubted a declaration of a famous personality (D11), despite it being additionally backed up by a video (D1). Whether or not an affidavit (such as D11) is signed by a famous person or not, does not have a decisive impact on its evidentiary value. The affidavit D11 does not refer to the video D1. The only link between D11 and D1 lies in the appearance of Mr. Rossi together with a technician (master taylor) of the appellant, Mr. Celi, author of the D20, as declared for

the first time in the appeal grounds. Furthermore, D1 and D11 both relate to some newly developed racing suit of the appellant, without it being clear from only D1 and D11 that these were necessarily identical racing suits. The opposition division's doubts regarding the circumstances of the alleged public prior use can therefore not be considered as surprising or drastic. And if it were surprising to the appellant, some form of reaction other than just informing the division that the appellant would not attend the oral proceedings would have been possible, for example offering Mr. Rossi and/or Mr. Celi to be heard as witnesses already before the opposition division. There are no provisions in the EPC which prejudice the evidentiary value of a testimonial by an employee of a party, let alone in comparison to the content of an affidavit of a famous personality.

- 3.1.6 No justification at all for the late submission of the second alleged public prior use (Ranseder) has been given. The fact that the Ranseder suit would allegedly have been the same as the one visible in D1 indicates that evidence regarding this suit could clearly have been submitted in the opposition proceedings.
- 3.1.7 Concerning the videos V1, V2 and the internet content referred to by links L1, L2, L3, these were only cited to further support the facts alleged in the affidavits. It was not argued that these means of evidence constituted a public prior use on their own.
- 3.2 Taking into account the overall circumstances accompanying the late submission of the evidence referred to above - notably the fact that most of it was within the sphere of and should have been known to the appellant already in the opposition proceedings

(author of D20 being an employee who appears in the video D1, racing suit specimen stored in their historical museum, the author of affidavit D22 being a famous photographer, etc.) - the potential relevance of the Rossi and Ranseder racing suit specimens cannot outweigh the failure to submit such evidence earlier.

Article 100(a) in combination with 54(2) EPC - D1, D11

4. The novelty objections based on only D1 and D11 do not prejudice maintenance of the patent (Article 100(a) in combination with 54(2) EPC).

During the oral proceedings the appellant stated in regard to these objections that it relied only on its written submissions.

- 4.1 D1 is a video published by the appellant. It was not contested that the video was made publicly available prior to the relevant date of the patent.

The subject-matter of claim 1 is however new over D1 (Article 54(2) EPC).

- 4.1.1 As opined in item 4.1.2 of the Board's communication dated 23 April 2021, a pocket formed according to the combination of features 4, 11 and 12 is not directly and unambiguously derivable from D1. The Board is in particular not convinced that the external layer of the garment could be equated, even within its broadest technically meaningful sense, with merely any layer of the garment, as seemingly suggested by the appellant in the two lines above the photograph on page 24 of its appeal grounds.

The appellant did not submit any further comments on this aspect, so that the Board has no reason to deviate from its preliminary opinion in this regard and hereby confirms it.

4.1.2 Moreover, for similar reasons to those set out in regard to the novelty objection based on D8 (see items 2.2 to 2.3 above), the Board also finds that an "inflation means ... able to inflate the inflatable protective device more than once" is not directly and unambiguously derivable from D1, not even from the plural "*generatori*" at 1:49 minutes of that video. The appellant did not submit any comment on this aspect, also contained in item 4.1.2 of the Board's April-2021 communication. In particular, the mere fact that a plurality of generators is mentioned does not mean that the inflation means can be activated more than once. Again, the Board thus has no reason to deviate from its preliminary conclusion and hereby confirms it.

4.2 Affidavit D11 signed by Valentino Rossi, relates to the alleged public prior use of a racing suit worn by Mr. Rossi during pre-race testing for the Grand Prix of Jerez in Spain on 2 and 3 May 2009.

A racing suit with the features mentioned in D11 cannot be considered to constitute prior art according to Article 54(2) EPC.

4.2.1 There is no evidence submitted during the opposition proceedings other than the affidavit D11 to establish that the racing suit was made available to the public by Mr. Rossi wearing it and that this suit comprised the features stated in D11.

4.2.2 As noted by the Board in item 4.1.1 of its preliminary opinion, the opposition division had questioned *inter alia* the public availability of the racing suit. For instance, in the third paragraph on page 9 of the impugned decision the opposition division stated:

"It has not been made clear who the technicians and journalists were, and in what way the presentation was considered public. Was the suit worn during the race the same one available to the public before and afterwards? In what way did Mr Rossi see that this suit was available to the public before and after the race? Was Mr Rossi present when the Dainese technicians explained the characteristics of the suit? The opposition division further notes that the opponent has not offered Mr Rossi as a witness."

4.2.3 In item 4.1.1 of its preliminary opinion, the Board also noted that these questions had already been raised by the opposition division in its preliminary opinion (see above item III.(d)(iv)) and agreed with the opposition division's questions needing an answer if a conclusion on the public availability of the racing suit within the meaning of Article 54(2) EPC were to be reached.

4.2.4 As also opined in the Board's preliminary opinion (*ibid.*), whether or not an affidavit (such as D11) submitted in the proceedings is signed by a famous person or not, does not have a decisive impact on its evidentiary value.

4.2.5 Besides having tried to introduce further evidence into the proceedings in order to reply to these questions, which evidence was held inadmissible for the reasons

given above, the appellant did not otherwise respond to these aspects of the Board's preliminary opinion. The Board thus has no reason to deviate therefrom and consequently confirms its opinion according to which the affidavit D11 is not sufficient to conclude that the racing suit mentioned was made publicly available (and that it comprised all the features of claim 1 of the opposed patent).

Article 100(a) EPC in conjunction with Article 56 EPC

5. The appellant raised the following objections under Article 56 EPC:
 - (a) based on the alleged public prior use of a racing suit worn by Mr. Rossi as evidenced by D11, D21, D22 and D23, D17/annex 1 and D19/annex 3 taken as the closest prior art in combination with any one of D4 to D7 (item 5.1 of the appeal grounds)
 - (b) based on the alleged Ranseder public prior use as the closest prior art in combination with any of D4 to D7 (item 5.2 of the appeal grounds)
 - (c) based on any of D4 to D7 as the closest prior art in combination with any of D14, D15 or D16 (items 5.3 to 5.5 of the appeal grounds)
 - (d) the inverse approaches to the objections under item c) here above, i.e. starting for example from D14 as the closest prior art and combining this with for example D4 (see the respective penultimate paragraphs of items 5.3 to 5.5 of the appeal grounds)
 - (e) based on D1 as the closest prior art in combination with D4 (as submitted during the oral proceedings)

6. In view of the Board's decision to exclude the evidence submitted in the appeal proceeding concerning the alleged public prior uses "Rossi" and "Ranseder" from

the procedure, the objections recited under item 5.(a) and (b) cannot be considered in the appeal proceedings (Article 12(4) RPBA 2007; see item 3. above).

7. For similar reasons to those set out in items 1.2 and 1.3 above, the objections mentioned under item 5.(c) above are not taken into account (Article 12(4) RPBA 2007).

Similar to the objection raised in regard to the ground of opposition pursuant to Article 100(b) EPC, also these objections are a copy-paste of the objections raised in the appellant's letter dated 7 September 2015 filed before the opposition division. These objections are considered in the impugned decision in section 7.3 (see in particular the lower half of page 11) and, again, no argument has been submitted by the appellant as to why the opposition division's considerations would be incorrect.

If the appellant had considered the reasoning in section 7.3 too short to be comprehensible and wanted to rely on erroneous considerations and/or a false interpretation of the terminology in the claim, as argued in the oral proceedings, this should have been indicated in the appeal grounds. The appellant's introductory remarks concerning the interpretation of granted claim 1 in section A of the appeal grounds do not show any relevance in regard to the conclusions of the opposition division, notably in regard to those in the final paragraphs of section 7.3 of the impugned decision. At least the appellant did not explain in this context that this was supposed to be understood so.

8. None of the inventive step objections recited under item 5.(d) was sufficiently substantiated in the appeal grounds and thus was also excluded from the proceedings (Article 12(4) RPBA 2007).

During the oral proceedings, the appellant stated that the corresponding remarks in the respective passages of items 5.3 to 5.5 in the appeal grounds were anyway not intended to constitute proper objections. Rather they should have been read as a confirmation of the appellant's considerations on inventive step in the previously mentioned respective "inverse approaches". As already noted in item 2.5 of the Board's preliminary opinion, the content of these very short paragraphs could, anyway, not have been considered as constituting complete reasoning which would have allowed the Board and the other party to immediately understand the objection, and if applying the problem-solution approach not least due to a missing formulation of a corresponding objective technical problem. For this reason it also not understandable how it could support the inverse inventive step approaches.

9. The Board also decided to not take into account the objection recited above under item 5.(e) (Article 13(2) RPBA 2020).

- 9.1 As also mentioned in the Board's preliminary opinion (item 2.4), the admittance of further submissions, in the sense that they might alter the appellant's appeal case in regard to the objections raised in the appeal grounds would be subject to the strict provisions of Article 13(2) RPBA 2020, the application of which was not contested by the appellant. Accordingly, any amendment to a party's appeal case made for example after notification of a summons to oral proceedings

shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 9.2 The objection presented by the appellant during the oral proceedings constituted such an amendment to its appeal case. Notwithstanding the question of whether the change of the closest prior art from the alleged public prior use "Rossi" as allegedly evidenced by D11, D21 etc. (item 5.1 of the appeal grounds) to only the disclosure of D1 by itself already constitutes a change of case, the argument that features 11 and 12 ("the protection element is fixed to the garment by means of an elastic border which is able to be stretched...") of claim 1 are disclosed in D4, in the passage bridging pages 25 and 26, constitutes such an amendment. It had never been argued before that the mentioned "elastic elements built into the internal or external structure of the cushion to return it to its pre-inflation size" should be considered as an elastic border according to features 11 and 12.

The Board does not accept that this argument constituted only a further development of the arguments previously submitted. To the contrary, the appeal grounds suggest that the appellant did not consider D4 as disclosing features 11 and 12. Similar to its feature analysis on the lower half of page 29 of the appeal grounds, at the beginning of the second full paragraph on page 32 of the appeal grounds, the appellant explicitly considers only feature 5 to 10 to be known from D4, whereas features 11 and 12 are considered to be known from the Rossi racing suit. Furthermore, the appellant did not contest the opinion of the respondent recited in the middle of page 33 of the appeal grounds and according to which (again) the

subject-matter of claim 1 was distinguished from D4 by *inter alia* feature 11.

Although it can be accepted that the passage of the bottom of page 25 of D4 had been relied upon by the appellant to substantiate the disclosure of features 6 and 7 of claim 1, simply turning the page and continuing the reading of the paragraph does not lead to the conclusion that some other argument concerning for example the possible disclosure of features 11 and 12 in D4 is being further developed; it is completely different. All the more so, since it had never been suggested that D4 could also disclose pertinent information in regard to the fixation of a protection element and an external layer (forming the pocket for the inflatable member) by an elastic border.

- 9.3 There are no exceptional circumstances justified with cogent reasons by the appellant for taking the amendments to its appeal case into account. An altered interpretation of the wording of claim 1 in regard to a double function of the elastic border defined in features 11 and 12, as perceived by the appellant, did not have any relevance in the written procedure nor in the oral proceedings for the conclusions reached by the Board. The Board's previous conclusions on novelty are not based on a particular novel interpretation of these features which would have emerged from the Board's preliminary opinion or in the oral proceedings.
10. The Board thus concludes that none of the grounds for opposition raised by the appellant prejudices maintenance of the patent. The appeal must therefore be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated