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**Datasheet for the decision  
of 12 July 2022**

**Case Number:** T 0361/19 - 3.3.10

**Application Number:** 09705362.3

**Publication Number:** 2240212

**IPC:** A61L27/04, A61L27/06,  
A61L27/30, A61L27/54,  
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**Language of the proceedings:** EN

**Title of invention:**

COATED ARTICLES

**Patent Proprietor:**

Wallwork Cambridge Limited

**Opponent:**

Oerlikon Surface Solutions AG, Pfäffikon

**Headword:**

COATED ARTICLES / Wallwork

**Relevant legal provisions:**

EPC Art. 56

RPBA 2020 Art. 13(1), 13(2)

**Keyword:**

Late filed documents admitted - (no)  
Amendment to appeal case - justification by party (no)  
Admission of late filed objection - (no)  
Amendment after summons - exceptional circumstances (no)  
Inventive step - main request (no) - auxiliary request (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0361/19 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 12 July 2022**

**Appellant:** Oerlikon Surface Solutions AG, Pfäffikon  
(Opponent) Churerstrasse 120  
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**Representative:** Misselhorn, Hein-Martin  
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**Respondent:** Wallwork Cambridge Limited  
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**Representative:** Willett, Christopher David  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 23 November  
2018 rejecting the opposition filed against  
European patent No. 2240212 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** P. Gryczka  
**Members:** M. Kollmannsberger  
T. Bokor

## Summary of Facts and Submissions

- I. The opponent's appeal lies from the decision of the Opposition Division to reject its opposition against European Patent Nr 2 240 212.
- II. The patent had been opposed under Articles 100(a), 100(b) and 100(c) EPC for lack of novelty (Article 54 EPC) and inventive step (Article 56 EPC), insufficient disclosure (Article 83 EPC) and unallowable amendments (Article 123(2) EPC).
- III. The following documents are referred to in this decision:
- D1: Kutscheij K. et al.: "High Temperature Tribological Behavior of CrN-Ag Self-Lubricating Coatings", ADVANCED ENGINEERING MATERIALS, 2006, 8, No. 11, 1125-1129
- D2: Zhao, J. et al.: "Bactericidal and corrosive properties of silver implanted TiN thin films coated on AISI317 stainless steel", SCIENCE DIRECT, Surface & Coatings Technology, 201 (2007), 5676-567
- D3: de los Arcos T. et al.: "Preparation and characterization of TiN-Agnanocomposite films", VACUUM, 67 (2002), 463-470
- PF1: CN 1304627 C
- PF2: CN 1570196 A
- BM1-BM5: Convolute of documents concerning the retrieval history of PF1 and PF2
- IV. In its decision the Opposition Division came to the conclusion that the amendments made during examination

proceedings were allowable and that the claimed invention was sufficiently disclosed. The novelty objections were dismissed. Inventive step was acknowledged. In particular, D2 was seen as document representing the closest state of the art and the independent claims were considered to define a non-obvious solution to the problem of finding alternative coated metallic biomedical articles and processes for their production.

- V. With its grounds of appeal the appellant requested the impugned decision to be set aside and the patent to be revoked.

The appellant submitted arguments why in its view the assessment of the Opposition Division was flawed. These arguments center around the technical effect achieved by the claimed devices and processes over the prior art and concern thus inventive step, Article 56 EPC.

The Opposition Division's findings with respect to amendments, sufficiency and novelty over the documents cited during the opposition procedure were not disputed.

- VI. With its reply to the grounds of appeal the patentee as respondent requested to dismiss the appeal. As an auxiliary request, it requested to maintain the patent in amended form on the basis of a claim set filed together with this submission.

The respondent argued essentially that the Opposition Division's decision was correct insofar as an inventive step was acknowledged even in case the claims only defined an alternative to the devices and processes known from the prior art.

VII. Independent claim 1 of the granted patent reads as follows:

*"A metallic biomedical article for use in contact with internal human or animal body tissue, having a first silver-containing metal-nitride coating thereon, and a second silver-containing metal nitride coating on the outer surface of the component and containing a greater amount of silver than the first silver-containing metal nitride coating."*

Independent claim 14 of the granted patent reads as follows:

*"A method of coating a metallic biomedical article for use in contact with internal human or animal body tissue, by depositing a silver-containing metal nitride coating on its surface, and a second silver containing metal nitride coating on its surface, containing a greater amount of silver than the first silver-containing metal nitride coating."*

Independent claim 1 of the auxiliary request reads:

*"A metallic biomedical article for use in contact with internal human or animal body tissue, having a first silver-containing metal-nitride coating thereon, and a second silver-containing metal nitride coating on the outer surface of the component and containing a greater amount of silver than the first silver-containing metal nitride coating underneath."*

Independent claim 14 of the auxiliary request reads as follows:

*"A method of coating a metallic biomedical article for use in contact with internal human or animal body tissue, by depositing a silver-containing metal nitride coating on its surface, and an outermost second silver containing metal nitride coating on its surface, containing a greater amount of silver than the first silver-containing metal nitride coating underneath."*

VIII. With letter of 5 July 2021 the appellant introduced new documents PF1, PF2 and BM1-5. PF1 and PF2 were said to be novelty destroying for the claims of the granted patent.

IX. With letter of 30 September 2021 the respondent requested PF1, PF2 and BM1-5 not to be admitted into the appeal procedure. Additionally, it filed further auxiliary requests 2-5 for maintenance of the patent in amended form.

X. With notification of 1 October 2021 the parties were summoned for oral proceedings to take place on 22 July 2022.

The Board issued an accompanying communication under Article 15(1) RPBA 2020 stating the issues to be discussed at oral proceedings and giving a preliminary opinion on some of them. The parties were given a final date for reply of four months before the date of the oral proceedings.

XI. Oral proceedings were held on 12 July 2022 in the form of a videoconference.

XII. Regarding the disputed points the appellant submitted essentially the following arguments:

PF1 and PF2 should be admitted into the proceedings. They were prima facie relevant. They could not have been submitted earlier since the advances in online prior art searching allowed their retrieval only in 2020.

The claims of the granted patent lacked an inventive step. Neither claim 1 nor claim 14 defined an order of the silver containing metal nitride layers specified in the claims. The claimed objects thus did not show any improvement over a one-layer arrangement as known from D2. Arbitrarily placing a second layer on the biomedical article was an alternative obvious to the skilled person. The claims of auxiliary request 1 did define an order of the layers, the layer having the higher concentration of silver ions being on the outer side. However, antibacterial as well as mechanical properties of articles coated with metal nitride layers having different concentrations of silver ions were known from D1-D3. A skilled person would thus have deduced that a better trade-off between these properties could be obtained by splitting the layer disclosed in D2 into two distinct layers having different concentrations of silver ions.

Claims 1 and 14 of auxiliary request 1 contained unallowable amendments. Although raised only during oral proceedings in appeal this objection should be admitted. It was straightforward and easy to understand.

XIII. Regarding the disputed points the respondent submitted essentially the following arguments:

PF1 and PF2 should not be admitted into the appeals proceedings under Article 13(1) RPBA 2020. There was no



justification for their late filing. Furthermore, these documents were not prima facie relevant.

The articles and processes defined in the claims of the granted patent were based on an inventive step. When read by a skilled person, claims 1 and 14 did define an order of the two layers on the article. In any case, even if one assumed that no order was defined such claims were still inventive as none of D1-D3 referred to multilayer arrangements. This held even more for the claims of auxiliary request 1. The improved properties obtained by the claimed arrangement of layers was not rendered obvious by any of the cited documents.

The objection raised under Article 123(2) EPC against the claims of auxiliary request 1 was late filed and should not be admitted under Article 13(2) RPBA 2020. The objection was also unfounded in substance.

XIV. The final requests of the parties were as follows:

The appellant requested the impugned decision to be set aside and the patent to be revoked.

The respondent requested the appeal to be dismissed. As an auxiliary measure, it requested the maintenance of the patent on the basis of one of auxiliary request 1, as filed with the reply to the grounds of appeal, or auxiliary requests 2-5, filed with letter of 30 September 2021. Furthermore, it requested the documents PF1, PF2 and BM1-5 not to be admitted into the appeal proceedings.

XV. The decision was announced at the end of the oral proceedings.

## **Reasons for the Decision**

1. The appeal is admissible.
2. Admission of documents PF1, PF2 and BM1-5
  - 2.1 PF1 and PF2 are two almost identical Chinese patent documents. The appellant submitted them in July 2021, over two years after filing the grounds of appeal. They were, evidently, not part of the opposition procedure.
  - 2.2 Their admission to the proceedings is governed by Article 13(1) RPBA 2020 and is thus subject to the discretion of the Board. Article 13(1) RPBA 2020 states that the party shall provide reasons for submitting such documents at this stage of the proceedings. The Board shall exercise its discretion, *inter alia*, in view of the current state of the proceedings or the suitability of the submission to resolve issues raised by any other party or by the Board.

Furthermore, Article 13(1) RPBA 2020 refers to Article 12(6) RPBA 2020 according to which evidence that should have been submitted during opposition proceedings shall not be admitted, unless the circumstances justify its admittance.
  - 2.3 The appellant has submitted that although an extensive search for novelty destroying documents had previously been carried out in 2018 and 2019, these documents were found by chance by the opponent in autumn 2020. PF1-PF5 showed the different attempts to search the prior art carried out by various commercial providers. It was argued that the possibilities to search Chinese prior art had significantly improved in the last years, thus making the retrieval of such documents only possible at

this late stage of the proceedings. Translation and preparation of the submission caused a further delay until they could be finally filed in July 2021.

2.4 Generally, appeal proceedings are meant to provide for a judicial review of the appealed decision, not to open a further possibility for attacking a patent with different means should the opposition have been rejected, see Article 12(2) RPBA 2020. Furthermore, in the present case the filing of the documents is not a reaction to any procedural step from the Board or the respondent.

2.5 The decision to grant the disputed patent was published in April 2016, the opposition was filed in January 2017 and the decision of the Opposition Division was notified in November 2018. The Board sees no valid justification why PF1 and PF2 were filed only in July 2021, more than two years after filing the grounds of appeal and more than four years after the expiry of the opposition period. A search for documents relevant to the novelty of a granted patent claims should, in principle, be carried out until the expiry of the nine month opposition period, and not during the appeal stage. The argument that these patents were practically irretrievable until 2020 has not been substantiated; the mere fact that they were not found by commercial providers of prior art searches is, in the view of the Board, not sufficient.

Thus, the Board does not see any good reason why these documents should not have been filed already in opposition proceedings. The Board decides not to admit them into the proceedings, Article 13(1) RPBA 2020 in combination with Article 12(6) RPBA 2020.

2.6 The appellant has stressed the *prima facie* relevance of these documents and requested their admittance for this reason alone, since they would clearly lead to a revocation of the disputed patent due to lack of novelty. They disclosed the same invention.

The Board notes that *prima facie* relevance is not one of the criteria mentioned in Article 13 RPBA 2020. There, the term *prima facie* is only used regarding amendments of the patent which overcome issues raised by another party or the Board.

However, the Board acknowledges that there may be situations where a clearly novelty destroying document has been overlooked by everyone and, out of the blue, appears only at an advanced stage of appeal proceedings.

The Board recognises that it may appear absurd to knowingly render a judgment entirely detached from the underlying factual situation of the case. The Board considers that admission of a late filed, but *prima facie* novelty-destroying document is, in principle, covered by Article 114 EPC and also by Article 13(1) RPBA 2020, which applies here. These provisions leave sufficient discretion to a Board to admit such documents.

However, the present case is not such a situation. On the one hand, in fact PF1 describes an object made of stainless steel being coated with at least two silver containing titanium nitride layers, the outer layer having a higher silver content than the inner one (see e. g. embodiment 1 on page 6). Also a preparation process by sputtering the different layers is disclosed. On the other hand, independent claims 1 and

14 of the disputed patent require a "*biomedical article*", a feature which is neither disclosed in the "summary of the invention" part, nor in the "detailed description of the invention" part of PF1 containing the embodiments. The appellant has referred to page 5, second paragraph of PF1 where "medical instruments" are mentioned, however, this paragraph relates to the description of the prior art rather than to the description of the invention. The same holds for PF2.

Thus, neither PF1 nor PF2 are *prima facie* relevant for novelty of the granted claims.

- 2.7 Finally, the appellant argued during oral proceedings that, since the patent cannot be maintained as granted (see below), the discussion on the respondent's auxiliary request created a fresh case allowing the appellant to file PF1 and PF2 as new evidence.

The Board cannot agree. The filing of the respondent's auxiliary request with its reply to the grounds of appeal and the filing of PF1 and PF2 are manifestly unrelated. The requirements for admitting PF1 and PF2 into the appeal procedure do not change depending on whether the granted patent or the respondent's auxiliary request 1 are at stake.

3. Inventive step, Article 56 EPC

*Main request*

- 3.1 Closest state of the art

- 3.1.1 The independent claims of the patent are directed to biomedical articles and a process for their preparation. In particular, the patent deals with the

surfaces of medical implants which need to fulfil specific requirements with respect to hardness, toughness, surface friction and should have antibacterial properties, see e. g. paragraph [0005].

- 3.1.2 In the impugned decision D2 was chosen as the closest state of the art. The Board agrees, for the following reasons:

In general, the document representing the closest state of the art should disclose subject-matter conceived for the same purpose or aiming at the same objective as the claimed invention and having the most relevant technical features in common (see Case Law, I.D.3.1).

In the present case, the invention dealing with biomedical articles, in particular implants, a skilled person would start from a document disclosing such objects. From the documents cited by the appellant in the inventive step discussion the only one dealing with biomedical objects is D2.

- 3.1.3 The appellant argued that also D1 and D3 were relevant as a starting point for the inventive step discussion.

However, D1 is a study of the tribological behaviour of chromium nitride / silver coatings, i. e. it studies self-lubrication and friction of such surfaces at high temperatures. D1 does not mention any specific application. D3 is a study of the tribological behaviour of titanium nitride / silver films as coatings on silicon substrates. D3 mentions tools and machine parts as application (see introduction). These documents may play a role as secondary documents, but a skilled person would not start from these documents if their aim is to prepare a biomedical article.

3.1.4 D2 deals with metallic biomaterials such as dental or cardiovascular implants, see introduction. D2 states that titanium nitride coatings on stainless steel or titanium have proven useful for their mechanical properties, but do not exhibit any antibacterial effect. For this reason it has been decided to add silver ions to the coating. Different concentrations of silver in the titanium nitride have been tested for antibacterial efficacy and for the influence of the silver atoms on the corrosion properties of the coating, see point 3 of the study. As a result it has been found that the antibacterial efficacy increases with increasing silver content up to a plateau. Also the corrosion instability increases, so that a compromise has to be found (see point 4 of the study).

3.2 Differences of the claims with respect to the closest prior art

3.2.1 It is undisputed that independent claim 1 of the patent differs from D2 in requiring a second silver containing metal nitride coating on the outer surface containing a greater amount of silver than the first coating.

Independent process claim 14 requires at least the presence of a second silver containing metal nitride coating containing a greater amount of silver than the first coating; it does not specify its location.

3.2.2 It was disputed whether the claims require the second coating to be on top of the first coating or not.

The respondent argued that in a skilled person's reading this was a requirement of the claim. In

particular claim 1 required the second coating to be at the outer surface, implying that the first coating was underneath the second one.

The appellant argued that the order of layers was not defined in claim 1 and even less in claim 14.

3.2.3 The Board agrees with the appellant's point of view. Claim 1 does not require the second coating to be on top of the first one, it only requires it to be at the outer surface of the article. The different layers could be present e. g. on different locations on the surface of the biomedical article. The same holds for claim 14, the location of the two layers is undefined. The mere numbering of the layers as "first" and "second" does not imply a specific spatial arrangement.

3.2.4 Thus, the difference of the claimed subject-matter with respect to the disclosure of D1 is the presence of a second layer on the surface of the claimed article, the second layer having a higher silver concentration than the first one.

3.3 Objective technical problem and solution

3.3.1 The Opposition Division held that, since the presence of the second layer did not lead to any improvements the problem to be solved starting from D2 was the provision of an alternative biomedical article.

The respondent argued that the claimed two-layer arrangement leads to improvements vs. a one-layer arrangement. However, these arguments were based on the assumption that the second layer is located on top of the first layer. Since the claim does not require such



an arrangement these arguments cannot be taken into account.

During the oral proceedings the respondent accepted the technical problem to be formulated as an alternative in case the claims were interpreted as not requiring a specific spatial arrangement of the layers.

Thus, starting from D2 the problem to be solved was the provision of an alternative biomedical article having antibacterial as well as suitable mechanical properties, as already stated by the Opposition Division.

- 3.3.2 This problem has been solved by the claimed articles which are characterized by having two silver containing metal nitride coatings, the second one having a higher silver content than the first one.

It was undisputed that this problem has in fact been solved.

#### 3.4 Obviousness of the solution

- 3.4.1 In the impugned decision it was held that, since none of the cited documents disclosed a plurality of silver containing metal nitride coatings, a skilled person could neither derive the claimed articles nor the claimed manufacturing process in an obvious way from the prior art.

- 3.4.2 D2 discloses different coatings with a different level of silver content, albeit not on the same substrate (see e. g. table 1). Thus, a skilled person knows that different concentrations of silver ions in the outer coating of a biomedical article are possible, and it

knows the trade-off between having a higher silver concentration and thus better antibacterial properties, and the resulting decrease in hardness of the coating, see point 3.1.4 above.

Applying two different coatings with different silver concentrations at different positions of the surface of the same article does not need inventive skills. In fact, this corresponds to nothing more than a variation of the silver concentration on the surface. Since a skilled person knows that concentration variations are possible, the skilled person, when looking for a mere alternative, would have arrived at such an arrangement in an obvious manner.

The respondent stressed that the silver in D2 is applied using  $\text{Ag}^+$  implantation into a metal nitride layer and argued that this was, strictly speaking, not a silver coating. The Board disagrees. The claims require a "*silver containing metal nitride coating*" which is clearly fulfilled by silver ions implanted into a metal nitride surface.

3.5 Thus, the claimed objective technical problem being the provision of an alternative biomedical article having antibacterial as well as suitable mechanical properties has been solved in an obvious way.

3.6 Thus the Board holds that the subject-matter of the claims of the granted patent lack an inventive step.

#### *Auxiliary Request 1*

3.7 Differences of the claims with respect to the closest prior art

3.7.1 The independent claims of auxiliary request 1 differ from the claims of the granted patent in that they define an arrangement of the two layers. It is required that the second layer, having the higher silver concentration, is placed above the first layer.

3.7.2 As known from D2 (see point 3.1.4 above), a higher silver concentration leads to higher antibacterial activity, but also to faster corrosion. The claimed arrangement of layers leads to a higher antibacterial effect of the coating at the beginning after implantation of the article, whereas once the outer layer has corroded the inner layer provides mechanical stability while still maintaining some antibacterial effect.

In other words, the two apparently inseparable effects of higher silver concentration discussed in D2, do not need to be combined in one layer but each of the layers can be optimized separately.

This idea is mentioned in paragraph [0023] of the description and during oral proceedings the parties agreed that this is in fact true.

3.8 Objective technical problem and its solution

3.8.1 Thus, the objective technical problem to be solved was the provision of a coated biomedical article having a better trade-off between antibacterial properties and stability against corrosion.

3.8.2 This problem has been solved by splitting the layer disclosed in D2 into two layers, the layer with the higher concentration of silver ions being located above the one with the lower concentration.

3.8.3 In the appellant's view, the problem was not solved, at least not for the whole of claim 1. It argued that no concentrations of silver ions were defined in the claim. In case the concentration difference was too small, no effect would be achieved. Furthermore, it argued, referring to paragraph [0014] of the patent, that the antimicrobial effect was caused by silver nanoparticles, a feature likewise not defined in the claims.

However, the Board sees no need to define concentrations in the claim. The effect is achieved by splitting the layer disclosed in D2 into two distinct layers, the outer layer having a higher silver ion concentration. The magnitude of the effect will of course depend on the silver concentrations in the layer, however, the presence of the effect as such will not.

Nor does the presence of silver nanoparticles need to be defined in the claims. That the antibacterial activity of the silver doped coating is due to silver nanoparticles is merely a mechanistic explanation of the effect. The layer as such will have antibacterial activity; this is already known from D2.

3.9 Obviousness of the claimed solution

3.9.1 D2 teaches the trade-off between antibacterial activity and corrosion stability depending on the silver concentrations. D2 does not hint a skilled person to use a two-layer arrangement as claimed.

3.9.2 D1 explains the concept of silver-induced self-lubrication properties of metal nitride layers which

additionally contain silver. D1 mainly discusses high temperature behaviour, see the title or the first sentence of the conclusions part at the end of the document. Temperatures of 600°C are not relevant for the use as biomedical article, so a skilled person would not have paid much attention to this document in the first place. D1 does disclose some results of tribological properties carried out at room temperature, see "*tribological properties*", page 1127. However, this passage only states that the coating becomes softer with increasing silver content. This does not add anything to the teaching of D2. A two-layer arrangement is not disclosed in D1.

3.9.3 The same concept is discussed in D3 (see introduction).

The appellant referred to page 466, left column, where in its view the use of two distinct layers was suggested. However, this passage only explains that silver tends to progressively diffuse to the surface of the growing film with increasing deposition time. It does not disclose two distinct layers, and, more importantly, it does not explain why the use of two layers may be beneficial in order to improve the trade-off between antibacterial activity and corrosion stability.

The appellant furthermore referred to the multi-layered structures mentioned in the introductory part of D3. However, firstly it is not clear whether this disclosure relates to silver-containing structures at all. Secondly, it does not provide the skilled person with any information why the use of two distinct layers as claimed would solve the technical problem stated above.

- 3.9.4 The idea of using two consecutive layers with a higher silver content in the outer layer in order to improve the trade-off between antibacterial activity and corrosion resistance is thus not obvious for a skilled person starting from D2 and considering D1 and D3.
- 3.10 The article defined in claim 1 of auxiliary request 1 is based on an inventive step. Since claim 14 recites the inventive features of claim 1 also the process defined in claim 14 is based on an inventive step.
4. Amendments, Article 123(2) EPC.
- 4.1 During oral proceedings the appellant raised an objection against the amendments carried out in claims 1 and 14 of auxiliary request 1. They argued that the limitation of the second silver containing layer being on the "outer" surface of the component had no basis in the original disclosure, since the respective passage in the description on page 5 referred to the "outermost" layer.
- 4.2 This objection, having been made for the first time at the oral proceedings before the Board, is an amendment of the appellant's appeal case, the admission of which is subject to Article 13(2) RPBA 2020.

The claims of auxiliary request 1 were submitted with the respondent's reply to appeal in August 2019. At the date of the oral proceedings, they had been on file for almost three years. Furthermore, the Board's communication under Article 15(1) RPBA 2020 issued in October 2021 gave a final date for reply of four months before the date of the oral proceedings, i. e. in March 2022. This communication mentioned the amendments made with respect to the claims of the granted patent and

stated that this request may have to be discussed during oral proceedings if the claims of the granted patent lacked novelty or inventive step.

Thus, the appellant had ample possibilities to file objections under Article 123(2) EPC against the claims of auxiliary request 1.

Article 13(2) RPBA requires exceptional circumstances justified by cogent reasons for amendments to a party's case which exceptionally are to be admitted at such a late stage of the proceedings.

No such circumstances have been advanced by the appellant. The appellant's argument that the issue is simple and easy to understand, whether true or not, cannot in itself justify its late submission. Furthermore, the Board also does not find the objection to be prima facie convincing and well-founded. Neither the disputed wording (outer vs. outermost), nor the comparison of the overall technical content of the application with the apparent scope of the claims highlights any subject-matter that would appear, prima facie, to lack basis in the application as filed.

5. In summary, the patent in the form of the respondent's first auxiliary request complies with the requirements of the EPC as stipulated in Article 101(3)(a) EPC and can be maintained on this basis. The respondent's further auxiliary requests need not to be addressed.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in the following version:  
Description: Columns 1-8 of the patent specification,  
Claims: Nr. 1 to 15 of the auxiliary request filed with letter dated 12 August 2019,  
Drawings: Figs. 1-3 of the patent specification.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated