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**Datasheet for the decision  
of 20 April 2023**

**Case Number:** T 1473/20 - 3.2.01

**Application Number:** 15183145.0

**Publication Number:** 2993078

**IPC:** B60N2/70, B60N2/28

**Language of the proceedings:** EN

**Title of invention:**

SIDE IMPACT PROTECTION FOR CHILD SAFETY SEATS

**Patent Proprietor:**

HTS Hans Torgersen & Sønn AS

**Opponents:**

Wonderland Nurserygoods Company Ltd.  
Britax Römer Kindersicherheit GmbH  
ALLISON BABY UK LIMITED

**Headword:**

**Relevant legal provisions:**

EPC Art. 52(1), 54, 83, 84, 111(1)  
RPBA 2020 Art. 11, 13(2)

**Keyword:**

Novelty - main request (no)

Claims - clarity - auxiliary request (yes)

Sufficiency of disclosure - auxiliary request (yes)

Appeal decision - remittal to the department of first instance  
(yes)

Amended auxiliary request after summons - taken into account  
(yes)

Amended auxiliary request after summons - exceptional  
circumstances (yes)

Amended auxiliary request after summons - cogent reasons (yes)

New submission after summons - taken into account (no)

New submissions after summons - exceptional circumstances (no)

New submissions after summons - cogent reasons (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1473/20 - 3.2.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 20 April 2023**

**Appellant:** HTS Hans Torgersen & Sønn AS  
(Patent Proprietor) 3535 Krøderen (NO)

**Representative:** Bird & Bird LLP  
Am Sandtorkai 50  
20457 Hamburg (DE)

**Respondent:** Wonderland Nurserygoods Company Ltd.  
(Opponent 1) Units 1405 -1406 Dominion Centre  
43 - 59 Queen's Road East  
WanChai, Hong Kong (HK)

**Representative:** Pfenning, Meinig & Partner mbB  
Patent- und Rechtsanwälte  
Joachimsthaler Straße 10-12  
10719 Berlin (DE)

**Respondent:** Britax Römer Kindersicherheit GmbH  
(Opponent 2) Theodor-Heuss-Straße 9  
89340 Leiphelm (DE)

**Representative:** Richardt Patentanwälte PartG mbB  
Wilhelmstraße 7  
65185 Wiesbaden (DE)

**Respondent:** ALLISON BABY UK LIMITED  
(Opponent 3) Venture Point  
Towers Business Park  
Rugeley  
Staffordshire WS15 1UZ (GB)

**Representative:** Pfenning, Meinig & Partner mbB  
Patent- und Rechtsanwälte  
Joachimsthaler Straße 10-12  
10719 Berlin (DE)



## Summary of Facts and Submissions

I. The appeal filed by the appellant (patent proprietor) is directed against the decision of the opposition division to revoke the European patent No. 2 993 078.

II. In its decision, the opposition division held that the ground for opposition pursuant to Article 100(a) in combination with Article 54 EPC was prejudicial to the maintenance of the patent as granted, that the auxiliary requests 1 to 10 and 2a did not meet the requirements of Article 84 EPC, that the auxiliary requests 3a and 4a did not meet the requirements of Article 54 EPC, and that the auxiliary request 6a did not meet the requirements of Article 56 EPC. Novelty and inventive step were assessed in view of document

D1: WO-A 1-2010/001230.

During the appeal proceedings the respondent 2 (opponent 2) filed the following non-patent literature:

R1: *"Regulation N. 44 of the Economic Commission for Europe of the United Nations (UN/ECE)- Uniform provisions concerning the approval of restraining devices for child occupants of power driven vehicles"*

III. With a communication pursuant to Article 15(1) RPBA dated 11 May 2021, the Board informed the parties of its preliminary, non-binding assessment of the appeal.

Oral proceedings pursuant to Article 116 EPC were held before the Board on 20 April 2023 in mixed-mode format.

The appellant requested that the decision under appeal

be set aside and the patent maintained as granted (main request) or, as an auxiliary measure, in amended form according to anyone of the adapted auxiliary requests 1, 3, 5, 7, 8 and 10 to 14 filed with letter dated 23 May 2022 or of the auxiliary requests 2, 4, 6, 9 and 15 filed with the statement of the grounds of appeal, the auxiliary requests to be dealt with in their numerical order.

The respondents (opponents 1 to 3) requested that the appeal be dismissed.

Independent claim 1 as granted reads as follows (labelling of the features added by the Board):

1.1 *"Child safety seat (1), where the child safety seat (1) comprises a seat shell (2)*

1.2 *being divided into a sitting portion (3), a backrest portion (4) and a headrest portion (5),*

1.3 *one or more of the said portions (3, 4, 5) being provided with protective side walls,*

1.4 *a stiff foam material (C) being arranged at least on an inside of the seat shell (2) and supported thereby,*

*characterised in that*

1.5 *the stiff foam material (C) at least over a part of each of the protective side walls is provided with at least one through-going opening (O),*

1.6 *in which at least one through-going opening (O) a softer foam material (D) is arranged,*

1.7 *the softer foam material (D) being a compressible resilient foam material."*

Independent claim 1 according to the auxiliary request 1 reads as follows (labelling of the features added by the Board):

1.1 *"Child safety seat (1), where the child safety seat (1) comprises a seat shell (2)*

1.2 *being divided into a sitting portion (3), a backrest portion (4) and a headrest portion (5),*

1.3 *one or more of the said portions (3, 4, 5) being provided with protective side walls,*

1.4 *a stiff foam material (C) being arranged at least on an inside of the seat shell (2) and supported thereby,*

*characterised in that*

1.5 *the stiff foam material (C) at least over a part of each of the protective side walls is provided with at least one through-going opening (O),*

1.6 *in which at least one through-going opening (O) a softer foam material (D) is arranged,*

1.7 *the softer foam material (D) being a compressible resilient foam material,*

1.8 *wherein each of the through-going openings (O) is of such a size that it will cover an area corresponding to the head, neck and at least a part of a child's or*

*infant's upper body, or an area corresponding to the whole upper body of a child or infant."*



## Reasons for the Decision

### MAIN REQUEST: Patent as granted

#### Novelty: Articles 52(1) and 54 EPC

1. The subject-matter of independent claim 1 as granted is not novel over the prior art within the meaning of Articles 52(1) and 54 EPC as correctly stated by the opposition division in the decision under appeal.

1.1 It its decision the opposition division held that document D1 was prejudicial to the novelty of the subject-matter of claim 1 as granted. With its appeal, the appellant contested this assessment of the first-instance department and in particular the conclusion that features 1.4 and 1.5 of claim 1 were directly and unambiguously disclosed in D1.

1.2 Regarding feature 1.4, the appellant observed that claim 1 did not only require that the stiff foam material was arranged on an inside of the seat shell, but also that it was supported thereby. It was put forward that the stiff foam material of the child safety seat disclosed in D1 and visible in Figures 9 and 10 is not supported, but simply located/positioned thereon without being necessarily be attached to and hence supported by the inside of the seat shell.

1.3 The Board is not convinced:

As observed by the opposition division and the respondents, paragraph [0070], lines 14-15 of D1 teaches that the *"baby capsule or child safety seat (CSS) may incorporate segmented compressible liners according the location of the torso and head of the*

*baby*" (emphasis added). Furthermore, the passage on lines 22 to 23 in the same paragraph indicates that *"a compressible liner may be added to the existing side panels [of the seat shell]"* (emphasis added). The terms *"incorporate"* and *"added"* clearly imply for the person skilled in the art that the compressible liner of the child safety seat which includes a stiff foam material is not only located on an inside of the seat shell, but that it is also somehow fixed thereto to be kept in position, and hence supported thereby. This interpretation of the technical content of document D1 is confirmed by paragraphs [0071] and [0073] in combination with figures 9 and 10 of D1 referred to by the respondents which clearly show that compressible liners labelled (910) and (1010) respectively are located inside the seat shell and supported thereby at least in a direction substantially perpendicular to their extension, i.e. transversal to the seat shell.

- 1.4 Regarding feature 1.5, the appellant put forward that the term *"contiguous"* and the statement reading *"For this embodiment the spaced region 526 thickness would effectively be 0 mm"* in the passage of paragraph [0051] of D1 describing an alternative embodiment of the compressible liner shown in Figure 5, had been erroneously interpreted by the opposition division when assessing novelty of claim 1 over D1. The appellant pointed out that according to the common understanding two elements were considered to be *"contiguous"* when they touch each other. It was asserted that when applying this meaning to the term *"contiguous"* in the above cited passage of D1, the person skilled in the art derived that the apex ends (136) of the protuberances (130) of the softer foam material (124) merely reach the outer surface (118) of the stiff foam material (128) without extending

therethrough. As a consequence in the appellant's view the whole outer surface (118) of the compressible liner remained formed by a continuous/uninterrupted layer of stiff foam material (128) also in this alternative embodiment, i.e. no through-going openings were formed in the stiff foam material (128) as instead required by claim 1 as granted. The appellant further argued that the word "effectively" in the expression "*For this embodiment the spaced region 526 thickness would effectively be 0 mm*" had the effect to rule out the possibility that the remaining thickness of the spaced region (526) was exactly zero as instead alleged by the opposition division, whereby the outer surface (118) of the stiff foam material (128) remained closed and continuous also in this second alternative embodiment. The appellant also pointed out that the fact that the cavity (132) in which the softer foam material (124) was located did not form through-going openings was also supported by the terminology adopted in D1 which consistently indicates this cavity as "*recess 132*", i.e. a blind cavity, rather than as "*hole 132*" or the like. Finally the appellant alleged that the performance achieved by the liner (510) of document D1 as described in paragraphs [0078] to [080], namely an advantageous gradual and continuous increasing of the resistance to the impact, was specifically determined by the particular structure represented in Figure 5, and that this technical effect could not be achieved by an arrangement of the softer foam material (124) in openings going through the stiff foam material (128), whereby a structure according to feature 1.5 of claim 1 could not be read in D1.

- 1.5 The arguments submitted by the appellant are not convincing for the following reasons:  
As correctly pointed out by the opposition division and

the respondents, there is no reason to assume that the presence of the word "effectively" in the expression "For this embodiment the spaced region 526 thickness would effectively be 0 mm" implies that in the alternative embodiment presented in the second passage of paragraph [0051] of D1 the residual thickness of the spaced region (526) shown in Figure 5 is not reduced to 0. In fact, in the Board's view, the term "effectively" means nothing more than "in practice" or "actually", thereby indicating that according to this alternative embodiment the thickness of the spaced region is indeed reduced to 0. This conclusion is supported by the fact that according to the first embodiment the residual thickness can be consistently reduced to 1 mm (see second sentence of paragraph [0051]). The person skilled in the art understands that starting from the first embodiment with an already significantly reduced thickness of the spaced region (526) to 1 mm, the only logical further implementation of an alternative embodiment would foresee to completely suppress the spaced region (526), rather than further reducing its thickness to an order of magnitude of few tenths of a millimeter what does not make any technical sense. Furthermore, as pointed out by the opposition division and the respondents, paragraph [0052] of D1 teaches that the apex ends (136) of the protuberance (130) of the softer foam material (124) referred to in previous paragraph [0051] of D1 may be truncated. It follows that in case of a residual thickness of the stiff foam material (128) equal to 0 the top surface of the truncated cone-shaped cavity (132) will lay on the same plane (contiguous to) of outer surface (118) of the stiff foam material (128), thereby determining through-going openings within the meaning of feature 1.5 of claim 1. Moreover, the term "recess 132" adopted in the description of the compressible liner according to

Figure 5 of D1 is consistent with the structure of this first embodiment. However, as this terminology refers to the embodiment shown in Figure 5 only, it is not necessarily in contradiction with the possibility that according to the alternative embodiment presented in paragraph [0051] through-going openings instead of recesses are provided. Finally the Board in agreement with the opposition division and the respondents cannot see why the presence of discrete number of through-going openings on the outer surface (118) of the stiff foam material (128) of the compressible liner of D1 should be incompatible with the technical effect claimed in paragraph [0080] onwards of the description. In fact, as correctly observed by the respondents, also in presence of trough-going openings, there will be still a predominant extended area of the outer surface (118) of the compressible liner of D1 where a layer of stiff foam material fully covers the underlying softer foam material. There is thus no reasons to believe that the presence of through-going openings can have a substantial impact on the shock-absorbing behaviour of the compressible liner of D1.

- 1.6 For all the reasons above the negative assessment of novelty of the opposition division is confirmed.

**AUXILIARY REQUEST 1**

2. The adapted auxiliary request 1 at stake corresponds to the auxiliary request 1 underlying the decision under appeal. This adapted auxiliary request was submitted together with adapted auxiliary requests 3, 5, 7, 8, and 10 to 14 to correct the lack of correspondence with the first instance auxiliary requests 1 to 10 objected by the Board with its communication under Article 15(1) RPBA.

**Admissibility**

3. The auxiliary request 1 is admitted in the appeal proceedings.
4. The respondents requested not to admit the auxiliary request 1 (together with all the other auxiliary requests) essentially for the reason that it was late filed.
  - 4.1 The appellant argued that the submission of all the adapted auxiliary requests was a response to the request for clarification expressed by the Board in its preliminary opinion regarding the circumstance that the auxiliary requests 1, 3, 5, 7, 8 and 10 to 14 submitted with the statement of grounds of appeal did not correspond to the auxiliary requests 1 to 10 underlying the contested decision as instead expressly indicated in the statement of grounds of appeal. Furthermore, it was argued that the adaptations introduced in claim 1 of the auxiliary request 1 were of mere formal nature and did not have any substantial effect on the actual extension of the protection afforded by the independent claim. The appellant concluded that the adaptations under discussion were mere corrections of an obvious clerical error remedying the inconsistency between the statement of grounds of appeal and the claim sets filed therewith objected by the Board in its preliminary opinion.
  - 4.2 The respondents replied that the circumstance that the adapted auxiliary requests had been submitted more than 2 years after the statement of the grounds of appeal and one year after the preliminary opinion of the Board indicated that the content of the auxiliary requests

originally filed with the statement of grounds of appeal was not the result of a clerical error, but rather reflected the true intention of the appellant at that time. Furthermore, it was alleged that the amendment in independent claim 1 of the auxiliary request 1 consisting in the reintroduction of the term "*at least*" changed the extension of the protection afforded.

4.3 As the adapted auxiliary request 1 was filed after notification of the summons to oral proceedings, its admissibility is subjected to the provisions of Article 13(2) RPBA.

4.4 The Board agrees with the appellant that the submission of the adapted auxiliary requests represents a reaction to the request for clarification expressed in the preliminarily opinion. Furthermore, as correctly pointed out by the appellant, the wording of the second paragraph on page 2 as well as of points 1. to 14. of the statement of grounds unambiguously indicated that, with the only exception of the new auxiliary request 15, all the attached auxiliary requests 1 to 14 were meant, in the intention of the appellant, to correspond to the respective 14 auxiliary requests filed in the first instance proceedings. Therefore, the Board is convinced that the inconsistency between the text of the statement of grounds of appeal introducing the auxiliary requests filed therewith and the content of the auxiliary requests actually submitted amounted to a clerical error and that the true intention of the appellant was indeed to file 14 auxiliary requests corresponding to those underlying the appealed decision. Furthermore in the Board's view, although it would have been advisable to submit the adapted auxiliary requests at an earlier stage of the

proceedings, the late filing cannot put in question that the original true intention of the appellants was to file with the grounds of appeal auxiliary requests corresponding to those underlying the contested decision. The Board further considers that restoring the auxiliary request 1 underlying the decision under appeal does not negatively impact neither on procedural economy nor on the position of the respondents in the appeal proceedings taking into account that the auxiliary request 1 had been submitted one year before the date scheduled for the oral proceedings and has been decided by the first-instance department. Finally, contrary to the view of the respondents 1 and 3 (opponents 1 and 3), the auxiliary request 1 at stake is clearly convergent with the main request.

- 4.5 The Board is convinced that all the considerations above amount to exceptional circumstances justified with cogent reasons within the meaning of Article 13(2) RPBA 2020 and thus the auxiliary request 1 is admitted to the appeal proceedings.

**Article 84 EPC**

5. Contrary to the assessment of the opposition division the subject-matter of claim 1 according to the auxiliary request 1 is clear within the meaning of Article 84 EPC.
- 5.1 In the contested decision the opposition division expressed the view that the amendment introduced in claim 1 of the auxiliary request 1, namely the last group of features reading:

*"wherein each of the through-going openings (O) is of such a size that it will cover an area corresponding to*



*the head, neck and at least a part of a child's or infant's upper body, or an area corresponding to the whole upper body of a child or infant."*

resulted in an attempt to define part of the claimed subject-matter, namely the size of the through-going openings, by reference to an external and non-standardized entity, i.e. the size of the child body part to be protected, this reference contravening Article 84 EPC.

- 5.2 With its appeal the appellant contested the negative clarity assessment of the opposition division and argued that the definition in terms of a result to be achieved adopted in claim 1 was justified and hence allowable since any attempt to define the size of the through-going openings in precise numerical terms or by a range of values, as required by the respondents, would have resulted in an undue limitation of the protection afforded by claim 1. The appellant observed that child safety seats fulfilling certain safety standards were available on the market in different sizes commonly expressed in terms of age and/or weight of the child for whom the seat was intended. In particular, according to the *"UNECE-R 44 Standard for child restraint systems"* (R1) submitted by the respondent 2 (opponent 2), child safety seats were classified by *"mass groups"*. Given a required safety standard, a certain mass group could be put in relation with the size of the dummy or dummies used when conducting the required crash tests assessing whether or not a child safety seat of that specific mass group fulfilled the applicable safety requirements. The appellant explained that for any specific mass group the person skilled in the art was certainly able to derive the average size of the body parts of a future

occupant to be covered according to claim 1 by the respective trough-going opening from the corresponding body part size of the standard dummy/dummies used in the crash tests whereby, contrary to the conclusion of the opposition division, the size recited in claim 1 could be considered a standardized parameter. The appellant concluded that the person skilled in the art understood the wording of claim 1 as meaning that the size and the position of each of the trough-going openings had to be selected in order to at least sufficiently protect at least a major portion (but not necessarily the entirety) of the corresponding body part of the child for whom the safety seat was intended, this size being easily derivable from the corresponding body part size of the standard dummy/dummies used to conduct the crash tests required by the applicable safety standards.

- 5.3 The respondents replied that according to established case law of the boards of appeal the functional definition adopted in claim 1 could only be allowed if the invention either could only be defined in such terms or could not otherwise be defined more precisely without unduly restricting the scope of the claims, and if the result was one which could be directly and positively verified by tests or procedures adequately specified in the description or known to the person skilled in the art, i.e. without requiring undue experimentations. The respondents alleged that none of these conditions were fulfilled. It was asserted that, on the contrary, it would had been possible to clearly define the size of the trough-going openings by introducing the average actual dimensions of the correspondent body parts to be protected for a child belonging to a specific mass group. The respondents explained that these dimensions were known from the

applicable safety standards or could be directly derived from the standardized dimensions of the dummy/dummies used in the crash tests carried out for the applicable mass group. In support of these allegations reference was made to the above mentioned "*UNECE-R 44 Standard for child restraint systems*" (R1), in particular to sections L330/56, L330/80 and to Tables 1 and 2 under sections L330/119 to L330/21 providing standardized weights and dimensions of children body parts by age group. The respondents further objected that the wording of claim 1 was unclear and ambiguous regarding the meaning of the expression "*corresponding area*". It was pointed out that the interpretation proposed by the appellant, namely that this expression meant the projection of the child body part onto to the seat shell, was inconsistent with the representations of Figures 2A and 2B of the contested patent clearly showing that the projection of the head extended well beyond the area of the trough-going openings filled with the softer foam material (D). It was concluded that due to these severe clarity issues the person skilled in the art was unable to determine the actual extension of the protection afforded by the subject-matter of claim 1 which did not thus comply with the requirements of Article 84 EPC.

5.4 The Board is not convinced by the arguments put forward by the opposition division in the contested decision and by the respondents for the following reasons:

It is well known that the dimensions and the weight of children body parts vary in the practice from child to child even if in the same age/weight group. These anthropological parameters can thus only be assessed and treated statistically on the basis of anthropometric considerations (see cited "*UNECE-R 44*

*Standard"*, section L330/118, point 1.1) . Furthermore, not only the dimensions and the weight of the children head (or any other body part), but also its shape/profile vary from child to child within the same age/weight group. Therefore, the Board agrees with the appellant that under these circumstances a precise definition of the dimensions and of the position of the trough-going openings in claim 1 it is not appropriate because it might result in an area of softer foam material not providing sufficient protection for any typology of head or body part. The Board thus shares the view of the appellant that the broader formulation adopted in claim 1 is an appropriate and justified manner to express the extension area of the through-going openings in such a way that to offer effective protection in almost all the cases without unduly limiting the protection afforded. This wording must be construed as meaning that each trough-going opening must extend and be positioned in such a way to provide sufficient protection for any body part typology (i.e. dimensions, weight, shape) in the same age/weight group. In the practice the "*corresponding area*" within the meaning of claim 1 can be determined for any specific seat size by considering the upper and lower limit of the size of the corresponding body part of the dummy/dummies used in the crash test, thereby also taking into account the anthropological deviations which statistically occur among children of the same age/weight group. As regards the interpretation of the term "*area*", the Board takes the view that in the present context, in which the protection of the body plays a fundamental role, it can only be understood as referring to the projection of the child body part onto the seat shell (and not for instance the effective area of the curved surface of said body part), whereby what counts is that the size corresponds to the area, not

that the through-going opening has also exactly the same profile of said projection. In view of all above the Board concludes that the person skilled in the art, reading the wording of claim 1 in the technical context of the contested patent, is able to clearly and unambiguously identify the limitation imposed by the expression "*corresponding area*". A limitation expressed in terms of a numerical range or by reference to the applicable safety standard as invoked by the respondents is neither required nor justified in the present case as it would impose an undue restriction to the protection afforded by the claim.

In other words, even if the claim does not define a specific numeric limitation, it is still clear in the sense of Article 84 as the skilled person is able to establish when a through-going opening is of such a size that it will cover an area corresponding to the head, neck and at least a part of a child's or infant's upper body, or an area corresponding to the whole upper body of a child or infant and to exclude when it is not of such a size. Clearly a small through-going opening, of a size of e.g. few square centimeters would not correspond to the head, nor would a through-going opening of a size definitely greater than the area of a child's head. Insofar a through-going opening is of a size that can be related to the area of a child's head (within a same age/weight group), taking into account statistical deviations, then it is a through-going opening covering an area corresponding to a child's head.

**Article 83 EPC**

6. The auxiliary request 1 meets the requirements of Article 83 EPC as correctly assessed by the opposition

division.

- 6.1 The respondents maintained the objection raised in respect to claim 1 as granted and argued that the patent did not provide the person skilled in the art with sufficient information to determine without undue burden what kind of stiff and softer foam material should be selected when carrying out the claimed invention.
- 6.2 The Board does not agree and concurs with the opposition division and the appellant that paragraph [0059] of the contested patent provides concrete examples of materials suitable for implementing the stiff and a softer foam materials recited in claim 1 of the contested patent. In this respect the Board also considers that the relative terms "*stiff*" and "*softer*" are interpreted by the person skilled in the art as meaning that the foam material (D) arranged in the through-going openings must be softer compared to the foam material (C) in which the opening are formed. In conclusion, the Board cannot see why the person skilled in the art should experience any difficulty in selecting an appropriate combination of foam materials according to claim 1 of the contested patent. Finally and contrary to the allegation of the respondents, the Board has no doubt that the person skilled in the art, who is an expert in foam material production, would be perfectly able to manufacture the well known materials indicated in paragraph [0059] of the contested patent which fulfill the requirements of claim 1.

**Admissibility of the further issues raised under Article 83 EPC at the oral proceedings**

- 6.3 At the oral proceedings the respondents 1 and 3 (opponent 1 and 3) raised further objections under Article 83 EPC which were also supported by the respondent 2 (opponent 2). It was essentially alleged that the patent did not provide sufficient information regarding the positioning of the trough-going openings and how the "*corresponding area*" recited in claim 1 should be determined and/or measured.
- 6.4 The appellant correctly objected that these new objections under Article 83 EPC had been raised for the first time at the oral proceedings and requested to dismissed them as late filed.
- 6.5 The respondents explained that as the opposition division had come to the conclusion that claim 1 of the auxiliary request 1 did not meet the requirements of Article 84 EPC, there was no need at the first instance proceedings to further expand the original objection under Article 83 EPC. Furthermore, the respondents alleged that the major lack of clarity allegedly affecting claim 1 of the auxiliary request 1 did not permit to meaningfully develop at an earlier stage the new issues under Article 83 EPC which were now presented in response to the surprising positive assessment of clarity announced by the Board at the oral proceedings.
- 6.6 The Board observes that the auxiliary request 1 was already on file since an early stage of the opposition proceedings. The respondents were thus in the position to present in due time any additional objections under Article 83 EPC if they wished to do so. However, they

consciously decided to rely on the original issue raised against claim 1 as granted under Article 83 without presenting any new attack during the first instance proceedings. Furthermore the appeal of the appellant was directed, among others, against the decision of the opposition division to consider the subject-matter of claim 1 of the auxiliary request 1 unclear within the meaning of Article 84 EPC. This opened to the possibility that the Board decided not to follow the assessment of the opposition division in particular regarding the clarity issue at stake. With their replies to the appeal of the appellant the respondents had the opportunity to further develop the original objection under Article 83 EPC, if they wished to do so, in order to strengthen their position in the appeal proceedings in particular for the case, which could not be excluded, that the Board for example maintained the positive assessment of Article 83 EPC of the opposition division, but reversed the negative assessment of clarity. Finally, notwithstanding the fact that the Board with its preliminary opinion timely informed the parties that it was not inclined to follow the assessment of the opposition division in respect of the objection under Article 84 EPC, the respondents decided to postpone the submission of the new issues under Article 83 EPC to the last possible moment, i.e. to the oral proceedings.

6.7 As in view of the considerations above no exceptional circumstances of the appeal proceedings justified by cogent reasons could be identified, the Board decided to disregard the new submissions regarding Article 83 EPC under Article 13(2) RPBA.



**Remittal of the case**

7. The Board, in the exercise of its discretion provided by Article 111(1) EPC, considers appropriate to remit the case to the first instance department, "*special reasons*" within the meaning of Article 11 RPBA 2020 being that the opposition division assessed novelty only in respect of the broader claim 1 as granted and of the auxiliary requests 3a and 4a, and inventive step only in respect of the auxiliary request 6a, all these auxiliary requests containing different subject-matter compared with that presented in claim 1 of the auxiliary request 1. The parties did not object to the remittal of the case to the opposition division for assessing novelty and inventive step.
  
8. At the oral proceedings the question arose whether the Board, before remitting the case to the first instance department, should also decide on compliance with Article 123(2) EPC which was also not dealt with by the opposition division in respect of the auxiliary request 1. At the oral proceedings the proprietor and the respondents 1 and 3 (opponents 1 and 3) requested to have a ruling of the department of first instance also on this issue. This was not objected by the respondent 2 (opponent 2). Thus, the Board did not see any reason not to remit the case to the opposition division also for the assessment of compliance of the auxiliary request 1 with the requirements of Article 123(2) EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated