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**Datasheet for the decision
of 1 December 2023**

Case Number: T 0016/21 - 3.2.01

Application Number: 15730280.3

Publication Number: 3145354

IPC: A42B3/06

Language of the proceedings: EN

Title of invention:

HELMET

Patent Proprietor:

Leatt Corporation

Opponent:

O'Neal Europe GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 113(1), 123(2), 83, 84, 123(3), 111(1)

EPC R. 111(2), 80

RPBA 2020 Art. 13(2)

Keyword:

Amendments - main request, auxiliary request 4 - extension beyond the content of the application as filed (yes) - auxiliary requests 4, 7 - broadening of claim (no)
Sufficiency of disclosure - (yes)
Claims - clarity after amendment (yes)
Appealed decision - sufficiently reasoned (yes) - substantial procedural violation (no)
Right to be heard - violation (no)
Amendment occasioned by ground for opposition - (yes)
Amendment after summons - exceptional circumstances (yes) - cogent reasons (yes) - taken into account (yes)
Appeal decision - remittal to the department of first instance (yes)

Decisions cited:

T 2140/15

Catchword:



Beschwerdekammern

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Case Number: T 0016/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 1 December 2023

Appellant: O'Neal Europe GmbH & Co. KG
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 October 2020
rejecting the opposition filed against European
patent No. 3145354 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chair A. Jimenez
Members: A. Wagner
V. Vinci

Summary of Facts and Submissions

- I. The appeal of the opponent lies against the decision of the opposition division to reject the opposition filed against European patent No. 3 145 354 as granted.
- II. In its decision, the opposition division held that none of the grounds of opposition raised by the opponent
- under Article 100(a) EPC in combination with Articles 54 and 56 EPC,
 - under Article 100(b) in combination with Article 83 EPC and
 - under Article 100(c) EPC in combination with Article 123(2) EPC
- were prejudicial to the maintenance of the patent as granted.
- III. Oral proceedings were held before the Board on 1 December 2023.

The appellant (opponent) requested

- that the case be remitted to the opposition division due to substantial deficiencies in the opposition proceeding and that the appeal fee be reimbursed , or
- that the decision under appeal be set aside and the patent be revoked.

The respondent (patent proprietor) requested

- that the appeal be dismissed and hence that the patent be maintained as granted (main request) or, in the alternative,
- that the patent be maintained on the basis of one of the auxiliary requests 1 to 6 of the first instance proceedings filed again with the reply to the

statement of grounds of appeal of the appellant (opponent), or on the basis of one of the auxiliary requests 7 and 8 filed with letter of 23 June 2023. Additionally, the respondent requested apportionment of costs.

IV. Claim 1 of the main request reads as follows (feature numbering according to the impugned decision):

- 1.1 A helmet comprising:
- 1.2 an outer shell;
- 1.3 an impact absorbing liner (10) disposed inside the outer shell and connected in a load transferring manner to the outer shell to receive loads from the outer shell;
- 1.4 an inner liner (12) disposed inside the impact absorbing liner (10), said inner liner (12) being configured to slide relative to the impact absorbing liner (10);
characterised in that
- 1.5 said inner liner (12) defines at least one receiving formation (16); and
- 1.6 said helmet includes at least one deflector (14) comprising:
- 1.7 a hub (20) that is connectable to the impact absorbing liner (12);
- 1.8 a border (18) along at least part of the deflector's (14) periphery,
- 1.9 said border (18) being connectable to one of the receiving formations (16) of the inner liner (12); and
- 1.10 at least one flexible element (22) extending between the hub (20) and the border (18).

Auxiliary request 4 is based on the main request. In claim 1, the features 1.6, 1.7 and 1.8 are amended and

feature 1.11 is added as follows:

1.6* said helmet includes at least one disc-shaped deflector (14) comprising:

1.7* a central body in the form of a hub (20) that is connectable to the impact absorbing liner (12);

1.8' a border (18) along at least part of the deflector's (14) periphery extending around the hub,

1.11 said flexible element (22) being configured to be deflected by relative displacement of the border (18) relative to the hub (20) under a force (32) in a tangential direction.

Auxiliary request 7 is based on auxiliary request 4 with features 1.8' amended as follows:

1.8* a border (18) along at least part of the deflector's (14) periphery extending around the circumference of the deflector,

V. The appellant's (opponent's) arguments relevant to the present decision may be summarized as follows:

Procedural violation and reimbursement of the appeal fee

During examination, original claim 1 was substantially changed by replacing the term "body" by the term "hub" and by replacing the term "deformable" by the term "flexible". While the opposition division recited the opponent's essential arguments concerning these amendments, the division did not fully consider them in their reasoning, in particular with regard to Article

100(b) and (c) EPC (decision points 2.3.1, 2.3.3, 2.4.2). As therewith Rule 111(2) EPC and Article 113(1) EPC were infringed, the reimbursement of the appeal fee and remittal of the case to the opposition division was justified.

Sufficiency of disclosure

The subject-matter of claim 1 was not sufficiently disclosed over its full scope. Without defining the deflector being disc-shape and being made from a non-Newtonian material (paragraph [0019] of the patent in suit) and without the provision of a number of deformable curved spokes, the problem as posed in paragraph [0004] of the patent in suit could not be solved. In particular an embodiment with just one "flexible" element (instead of a "deformable" element) made of a Newtonian material did not always result in the slidable configuration as required in feature 1.4.

Main request - added subject-matter

The term "hub" was originally only disclosed in the context of a first embodiment. By omitting the further features of the first embodiment (e.g. disc-shaped deflector, curved spokes, non-Newtonian material, see page 5, lines 12 to 21 of the A1-publication WO 2015/177747 of the application as filed), the amendments resulted in an inadmissible intermediate generalisation.

Furthermore the replacement of the original term "deformable" with "flexible" introduced subject-matter which extended beyond the content of the application as filed because these terms were not synonymous but referred to distinct properties.

Objections to auxiliary request 4

The amendments did not overcome the objection under Articles 123(2) and 83 EPC raised with regard to the main request. Furthermore feature 1.7* was not allowable under Rule 80 EPC, under Article 123(3) EPC and Article 84 EPC. Feature 1.8' was to be objected under Articles 84 EPC and 123(2) EPC. Feature 1.11 contravened Articles 123(2), 83 and 84 EPC.

Admission of auxiliary request 7

Auxiliary request 7 was late filed and not admissible under Article 13(2) RPBA. The objection addressed in auxiliary request 7 was raised in appeal with letter dated 10 November 2021. There were two further letters from the respondent (patent proprietor) after receipt of the opponent's letter before summons to oral proceedings were issued. However the respondent (patent proprietor) decided to file auxiliary requests 7 and 8 only after receipt of the summons.

Furthermore, the amendments in feature 1.8* gave rise to new objections at a very late stage of the proceedings.

Objections to auxiliary request 7

The amendments made in feature 1.8* did not meet the requirements of Articles 84 and 123(2) EPC.

- VI. The respondent's (patent proprietor's) arguments relevant to the present decision may be summarised as follows:

Sufficiency of disclosure

The reasoning provided by the opposition division under point 2.4.2 of the impugned decision was correct. The problem posed was solved by the features of claim 1 defining that the border - connected to the inner liner - is able to move relative to the hub - connected to the impact absorbing liner - due to the flexible elements. All essential features were thus in the claim. All other features mentioned by the appellant (opponent) were preferred embodiments. Claim 1 provided sufficient information for a skilled person to implement the present invention.

Main request - added subject-matter

It was clear from page 5, lines 12 to 23 of WO 2015/177747 A1 that the hub was not functionally or structurally linked to any other feature of the first embodiment.

Furthermore from the wording "*differently configured deformable elements [...] which also extend flexibly between the body and the border.*" of the same passage, the skilled person unambiguously understood that the deformable elements were flexible. No technical information was added or omitted.

Objections to auxiliary request 4

The amendments made in claim 1 addressed the appellant's objections under Article 100(c) EPC. The requirements of Rule 80 EPC and Articles 83, 84, 123(2) and 123(3) EPC were met. The amendment made in feature 1.7* was literally disclosed on page 5, line 16 of the A1-publication of the application as originally filed. Feature 1.7* was also clear in the context of a disc shaped deflector as defined in amended feature 1.6*. The amendment in feature 1.8' addressed the objection

raised in the appellant's statement of grounds of appeal, page 13, first paragraph. Feature 1.11 was clear and directly derivable from page 7, lines 5 to 18 and figure 5.

Admission of auxiliary request 7

The objection with regard to feature 1.8' was raised for the first time in appeal with letter dated 10 November 2021, although auxiliary request 4 had already been submitted in opposition proceedings. In view of the numerous objections of the appellant (opponent) it was not foreseeable that this late filed objection might become of any relevance.

Objections to auxiliary request 7

Feature 1.8* reflected the technical disclosure as provided in the original application. No technical information were added. In the context of the claim wording, feature 1.8* was also clear. With regard to the objections raised in view to features 1.7* and 1.11 reference was made to the arguments about the allowability of auxiliary request 4.

Apportionment of costs

The oral proceedings took place in person upon request of the appellant (opponent). But the respondent (patent proprietor) requested oral proceedings by videoconference. As it turned out, video conferencing would have been suitable as well as more time and cost-effective. Therefore an apportionment of costs was justified.

Reasons for the Decision

1. Substantial procedural violation and reimbursement of the appeal fee

1.1 The appellant (opponent) is of the opinion that several cases of procedural violation occurred and that their right to be heard was infringed. In particular the impugned decision was not fully reasoned (Rule 111(2) EPC) and did not take full account of the opponent's arguments (Article 113(1) EPC).

1.2 The Board does not agree. The opposition division neither violated the right to be heard nor decided without giving a substantiated reasoning. The request for reimbursement of the appeal fee and for remittal to the first instance is thus not justified.

1.3 The appellant (opponent) pointed to the following alleged substantial deficiencies in the opposition proceedings.

1.3.1 One essential argument under Article 100(c) EPC was that the feature "hub" of granted claim 1 was inadmissibly isolated from a specific, first embodiment disclosed on page 5, lines 12 to 21 of the original application. While the argument itself was summarized under point 2.3.1 (second half) of the impugned decision, the opposition division disregarded this important argument and failed to give a reasoning why this argument was not convincing.

However, reasons why this argument was found not to be convincing are given on page 7 of the decision, line 9 to the end of paragraph. The discussion was directed to the question whether the feature "hub" was inextricably

linked to the deformable elements in the form of curved spokes. Under point 2.3.3 of the impugned decision, the opposition division held that from the wording of page 5, lines 21 to 23, of the application as originally filed, published as international application WO 2015/177747 A1, no such an inextricable link was derivable.

- 1.3.2 According to the appellant (opponent), the chairman allegedly confirmed during oral proceedings that a "hub" needed to be *"a central body which had one or more elements extending radially to the border wherein gaps are present between the elements"*. This was also reflected in the minutes, page 2, second paragraph (*"He [the chairman] explained the opposition division's understanding of the word "hub".*). This understanding, in particular concerning the gaps - was important with respect to inventive step, but was missing in the decision.

The Board refers to point 2.5.2.3 of the impugned decision, wherein it is explicitly stated that the term "hub", in a broad sense, is understood *"as a central body from which at least one element radiates"*. This corresponds to the alleged statement of the chairman and is thus included in the impugned decision. That allegedly gaps needed to be present is not relevant as the reasoning of the opposition division, in particular in view of novelty and inventive step, is not based on the necessity of gaps.

- 1.3.3 According to the appellant (opponent), the statement in point 2.5.2.3 of the decision reciting *"the opponent has also not presented any arguments as to why the word "hub" in claim 1 should be interpreted in deviation from this commonly accepted meaning"* was simply not

correct. Arguments were submitted e.g. in sections 1.7, 1.10 and 12 of the grounds of opposition. Disregarding the extensive argumentation was a violation of the opponent's right to be heard.

It is noted that in the mentioned sections of the grounds of opposition, the opponent argued that a "hub" was to be understood simply as a central part of the deflector. The opposition division obviously shared this understanding and stated - seen together with feature 1.10 - that "*In a broader sense, a hub can be seen as a central body from which at least one element radiates.*" (point 2.5.2.3 of the impugned decision). It is not apparent what exactly was disregarded by the opposition division.

- 1.3.4 In the appellant's (opponent's) opinion, the reasoning of the decision, point 2.4.2, did not take full account of the opponent's argument under Article 100(c) EPC. No reason was given why in the context of the disclosure the definition of flexible elements implied that these elements were also deformable. In the patent in suit, "flexible" was disclosed as an additional property distinct from "deformable" and not as synonymous.

However, the opposition division provided a detailed reasoning under point 2.3.3 of the decision: in their view, "deformable" covers permanent as well as temporary deformations. In the context of the original application (page 5, lines 16 to 23), the skilled person would derive that the elements are deformable in the sense of "flexible". Obviously the opposition division did not see the requirement of additionally defining the elements as being "deformable" for two reasons: The term "deformable is not restricted to a permanent change of shape" and there is no support that

"flexible elements cannot be considered deformable".

- 1.3.5 According to the appellant (opponent), the opposition division did not give any reason why the argument under Article 100(b) EPC that the specification only ever described non-Newtonian material as being appropriate to solve the problem posed was not followed and therewith infringing the opponent's right to be heard. In particular no indication was given to which other (Newtonian) material would have the required properties.

However, as stated by the respondent (patent proprietor), the opposition division has reasoned their decision under point 2.4.2. Therein it is stated that the skilled person would recognize from the original disclosure that the material choice is not restricted to non-Newtonian material but rather to materials that provide adequate deformability.

- 1.4 Consequently, no substantial procedural violation occurred neither in view of Article 113(1) EPC nor with regard to Rule 111(2) EPC.

2. Article 100(b) EPC and Article 83 EPC

- 2.1 The Board confirms the opposition division's view that the patent in suit meets the requirements of Article 100(b) EPC.

- 2.1.1 The core teaching of the patent in suit is to provide an inner liner configured to slide relative to an impact absorbing liner of the helmet (feature 1.4). The slidable configuration is achieved by a deflector comprising a hub connected to the impact absorbing liner (feature 1.7), a border received in the inner

liner (features 1.8, 1.9) and at least one flexible element between the hub and the border. Therefrom the skilled person understands that the problem posed in paragraph [0004] of the patent ("*protect a wearer's head against linear and rotational impacts, including improved protection against linear, low speed impacts*"), is solved by the slidable configuration achieved by the at least one flexible element between the hub and the border.

2.1.2 The flexible element allows relative movement between the border and the hub and therewith between the inner liner and the impact absorber liner. Thus the skilled person gets sufficient information from the claim itself how the invention works and how to put it in practice.

2.2 It is undisputed that the specification as a whole sufficiently discloses the invention. The objection of the appellant (opponent) is directed to the subject-matter of claim 1 allegedly not being sufficiently disclosed over its full scope. The objection is raised for all requests on file. The arguments are the following:

2.2.1 It is argued that without defining the deflector as being made from non-Newtonian material and/or without specifying the geometry of the at least one flexible element as a number of curved spokes, the problem posed in paragraph [0004] of the patent could not be solved. In particular paragraph [0027] mentioned the features "geometry" and "non-Newtonian material" as solution for the problem ("*The deflection of the spokes 22 and the relative displacement of the border 18 relative to the hub 20 results partly from the geometry of the deflector 14 (particularly the spokes) and partly from*

the resilient deformability of the non-Newtonian material of the deflector 14.2."). This was again emphasised in paragraph [0034] according to which "*the present invention also protects the wearer against moderate impacts, with impact absorption in the deflectors that varies with the severity of the impact, due to the non-Newtonian properties of the material from which the deflectors 14 are made.*"

According to the appellant (opponent), the patent in suit included no evidence for any Newtonian material having the properties required to solve the problem posed. Furthermore not every shape of a single flexible element could provide the claimed slidable configuration if not made from non-Newtonian material.

2.2.2 The appellant (opponent) argues additionally that no information leading to a reliable attachment of the inner liner to the impact absorbing liner via the deflector was included in claim 1, but only defined in claims 2, 8 and 9.

2.3 The Board is not convinced for the following reasons.

2.3.1 The structure of the deflector with a central hub, a border and at least one flexible element in between is not complex. The claimed helmet with the deflector can be put in practice with any flexible Newtonian material that allows the inner liner to slide relative to the impact absorbing liner. The skilled person is able to choose such a material with an appropriate (reversible or not) flexibility.

Therefore, contrary to the appellant's (opponent's) opinion a non-Newtonian material is not obligatory. That the non-Newtonian material is presented as providing a particularly advantageous embodiment

(paragraphs [0027] or [0034]) is not relevant for the assessment of the requirements of Article 100(b) EPC.

2.3.2 The same applies to the specific shape of curved spokes of the at least one flexible element. The skilled person - be it for a single or for more than one flexible element - is able to choose a geometry that allows the border to move relative to the hub and therewith allowing the inner liner to slide relative to the impact absorbing liner. The specific shape of curved spokes is not obligatory to enable the skilled person to put the claimed helmet into practice.

2.3.3 It is noted that with regard to the geometry and the flexible material, the skilled person would not consider any theoretically possible embodiment. Instead the skilled person takes into account all features of the claim, in particular feature 1.4 which requires the slidable configuration between the inner liner and the impact absorbing liner, and chooses appropriately.

2.3.4 With regard to the argument concerning the attachment of the deflector, it is noted that this objection concerns a clarity issue directed to the patent as granted. However, clarity is not a ground for opposition according to Article 100 EPC. The request of the respondent (patent proprietor) not to admit this objection under Article 12(6) RPBA 2020 as this objection was raised for the first time in appeal, can therefore be disregarded.

3. **Main request - extended subject-matter - Articles 100(c) and 123(2) EPC**

3.1 Compared to claim 1 of the original application the following amendments (indicated by underlines and strikethrough) are made in granted claim 1:

Feature 1.7: a hub ~~body~~ (20) that is connectable to the impact absorbing liner (12)

Feature 1.10: at least one flexible ~~deformable~~ element (22) extending between the hub ~~body~~ (20) and the border (18).

3.2 The original application was published as international application WO 2015/177747 A1 to which is referred to in the following.

3.3 The Board judges that the main request is not allowable because the term "hub" originally was disclosed only in combination with other features which are structural inextricably link to the use of a "hub".

3.4 Further objections under Article 100(c) EPC were raised by the appellant (opponent) with regard to the main request. Although these objections are not convincing, they are all dealt with under this point 3 of the decision as they respectively apply to the auxiliary requests.

3.5 "Body" replaced by "hub"

3.5.1 According to the respondent (patent proprietor) basis could be found on page 5, lines 12 to 23. However, this passage refers to a first embodiment as shown in figures 1 to 3.

3.5.2 The Board judges that in the application as originally filed a deflector with a hub is only presented with a

"disc shaped" deflector and a border "extending around its [the deflector's] circumference". These structural features, i.e. the hub in the central position and the border along at least part of the circumferential periphery of the disc shaped deflector, are inextricably linked to the required slidable configuration defined in feature 1.4.

3.5.3 Consequently, the main request does not meet the requirements of Article 100(c) EPC in combination with Article 123(2) EPC.

3.5.4 The respondent (patent proprietor) referred to page 2, lines 10 to 14 and claim 1 as originally filed and argued that therefrom it was apparent that only the described function was important. The overall teaching of the application as filed allowed the isolation of the feature "hub".

The Board is not convinced. When assessing the requirements of Article 123(2) EPC the question is whether the claimed subject-matter was directly and unambiguously derivable from the application as originally filed. As brought forward by the appellant (opponent), the specific embodiment of the body as a hub is not disclosed in a general manner but only in the context of the first embodiment. No basis for any other structure of a deflector comprising a hub is derivable from the original application that would allow proper functioning, in particular with regard to feature 1.4.

3.5.5 The appellant (opponent) argued that from the specific, first embodiment additional features were omitted. The patent application clearly disclosed two different forms of a deflector: one with a body and one with a

hub. The deflector with a hub was only disclosed as

- a) being made of non-Newtonian material,
- b) having deformable elements in the form of curved spokes and
- c) having more than one flexible elements.

All these features were inextricably linked to the hub to allow the slidable configuration and thus to solve the problem posted.

The Board notes that the hub is a specific embodiments of the body and not an alternative embodiment to the body. The arguments of the appellant (opponent) are not convincing for the following reasons:

- (a) The non-Newtonian is disclosed as an advantageous option for the deflector with a body in general (see WO-publication, page 2, lines 31, 32). There is no indication that because of the body now being a hub the non-Newtonian material should become obligatory. No structural or functional link to the material is apparent caused by specifying the body as a hub.
- (b) With regard to the deformable elements in the form of curved spokes, the Board shares the opposition division's view that from page 5, lines 21 to 23 (*"In other embodiments of the invention can include differently configured deformable elements instead or, or in addition to the spokes 22, which also extend flexibly between the body and the border."*), it is clear that the curved spokes are not functionally or structurally linked to the hub. The deformable elements can also be configured differently.

The appellant's argument that lines 21 to 23 of

page 5 referred to "other embodiments" with a body not being specified as a hub and therefore these lines did not refer to the first embodiment, is not convincing.

The skilled person understands that the wording "the body" in line 23 refers back to the before defined "*central body in the form of the hub*" (line 16). Lines 16 and 23 belong to the same paragraph and have to be read in the context of the first embodiment. The skilled person unambiguously understands that the curved spokes for the first embodiment are only exemplary.

- (c) The Board also disagrees with the appellant's opinion that the hub was inextricably linked to the provision of more than one flexible element. Original claim 1 provides a basis for deflectors with a body and just one deformable element - which has to meet the further requirement of allowing the slidable configuration according to feature 1.4. No inextricable link to the number of elements is derivable caused by specifying the body as a hub or by specifying the deformable elements as being flexible elements. About the difference between "deformable" and "flexible" elements, reference is made to the following point 3.6 of this decision.

3.6 **"deformable" replaced by "flexible"**

- 3.6.1 The Board agrees with the respondent (patent proprietor) that the replacement of the term "deformable" with "flexible" does not introduce subject-matter which extends beyond the content of the application as filed.

3.6.2 The skilled person knows that in general, the term "flexible" means "bending without breaking" and unambiguously understands that the term "flexible" is a specific form of the more general term "deformable". Consequently, in general, the terms "flexible" and "deformable" are not synonymous. This is also not disputed by the parties.

However, on page 5, lines 21 to 23, it is explicitly stated that the deformable elements "*extend flexibly between the body and the border.*" From this passage the skilled person only gets the information that "deformable" is used in the sense of "flexible". Also lines 20 and 31 of page 5 only disclose that the spokes can flex, and page 10, lines 1 to 4 recites: "*The deflection of the spokes is also reversible*". Thus the spokes can flex in one direction and then flex back. This can occur elastically or inelastically. Therefore, the technical information is limited to a specific form of deformable when using the term "flexible" in claim 1 instead of "deformable".

3.6.3 The appellant (opponent) argued that an element only being flexible would not cover the additional meaning of being also elastically and plastically deformable. However, the additional meaning was also required by the original application, e.g. on page 7, lines 15 to 18, wherein "*the resilient deformability of the non-Newtonian material*" was disclosed as allowing partly the deflection of the spokes. The elements had thus to be deformable and additionally flexible.

However, original claim 1 did not specify what kind of deformability was meant. The passages on page 5 (lines 21 to 23) and 10 (lines 1 to 4) can be understood as only referring to deformable in the sense of flexible

which may cover elastic deformable. Furthermore, an elastic deformability is only described in case of a non-Newtonian material - which is optional (see point 3.3.5 (a) above).

With regard to a plastic deformability it is noted that also for an flexible element, depending on the impact, the deformation can become permanent. Thus even by defining "flexible elements" which directly finds a basis in the original application, the elements implicitly are also plastically deformable as soon as the impact exceeds the limit of flexibility and/or elasticity.

4. Auxiliary request 4

4.1 In claim 1 of auxiliary request 4, inter alia feature 1.8 was amended to feature 1.8' and validly objected by the appellant under Article 123(2) EPC. Auxiliary request 4 is thus not allowable.

4.2 Feature 1.8' reads as follows (amendments indicated by underlines):

"a border (18) along at least part of the deflector's (14) periphery extending around the hub,"

4.3 According to the respondent (patent proprietor), basis could be found on page 5, lines 16 and 17. This passage recites: "*Each deflector 14 has a central body in the form of a hub 20 and a border 18 extending around its circumference.*"

4.4 The Board judges that feature 1.8' does not reflect the technical information given on the cited passage. As argued by the appellant (opponent), the passage on page 5 requires the border to extend around the

circumference of the deflector, not the hub. However, the wording of feature 1.8' allows embodiments wherein the border extends only partly around the periphery but also around the hub in a space between the periphery and the hub. Such an embodiment does not find any basis in the original application.

- 4.5 During oral proceedings, the respondent (patent proprietor) agreed that the penultimate word "its" in the cited passage refers to the deflector but argued that no technical information was added. The objected wording of features 1.8' allowed only one interpretation that corresponded to the original wording of page 5, lines 16, 17. The skilled person understood from feature 1.8' seen together with the amendments made in feature 1.6* and 1.7* - now specifying a disc-shape deflector with a hub being a central body - that a border extends at least partly along the circumferential periphery of the deflector.

However, such an interpretation is too narrow and does not reflect the broader feature wording.

5. Auxiliary request 7 - admittance

- 5.1 The Board admitted auxiliary request 7 into the appeal proceedings.
- 5.2 Auxiliary request 7 was filed after notification of the summons to oral proceedings. Its admission into appeal proceedings thus falls under the provision of Article 13(2) RPBA 2020. The submission of auxiliary request 7 constitutes an amendment to the patent proprietor's appeal case and can only be considered if there are exceptional circumstances justified with cogent reasons by the respondent (patent proprietor).

5.3 The Board considers the circumstances leading to the filing of auxiliary request 7 to be exceptional within the meaning of Article 13(2) RPBA 2020 for the following reasons:

5.3.1 During first instance proceedings and again with the statement of grounds of appeal, the appellant (opponent) raised numerous objections with regard to the main request as well as to auxiliary requests 1 to 6.

In their statement of grounds of appeal (point 5.16), the appellant (opponent) objected with regard to the main request that the hub was only disclosed with a "*border surrounding the circumference of the hub*". This objection was addressed by the respondent (patent proprietor) in auxiliary request 4, feature 1.8'.

5.3.2 The objection, that the border had to extend around the deflector's circumference and not around the hub's circumference was only filed in appeal with letter dated 10 November 2021.

However, the amendment "extending around the hub" was introduced during opposition proceedings and objected in detail by the opponent with letter dated 9 April 2020 (point 65) in preparation to first instance oral proceedings - but not with regard to the "circumference of the deflector".

5.3.3 The new objection was not specifically directed to auxiliary request 4 but only to the isolated wording of feature 1.8' (letter of 10 November 2021, point 44). However auxiliary request 4 includes further amendments, which seen together - from the respondent's point of view - clearly defined a border that extends around the circumference of the deflector.

5.3.4 Only from the Board's preliminary opinion it became clear that the change in the appellant's argumentation (points 5.3.2 and 5.3.3 above) becomes relevant for auxiliary request 4. Auxiliary request 7 is therefore considered as direct reaction to the Board's preliminary opinion.

5.3.5 The amendments made in auxiliary request 7 solve the issue under Article 123(2) EPC and do not give rise to new objections. Nor do they conflict with procedural economy.

5.4 The argument of the appellant, that auxiliary request 7 should have been filed directly in response to their letter dated 10 November 2021 and not only after notification of summons to oral proceedings does not outweigh the cogent reasons listed above.

6. Objections to auxiliary request 7

6.1 The amendments made in features 1.6* to 1.8* and 1.11 compared to claim 1 as granted specify that the deflector is disc shape with a central body in the form of a hub and a border that at least partly extends around the circumferential periphery of the deflector. Furthermore the sliding configuration as defined in feature 1.4 is further specified in that the flexible element can be deflected by relative displacement of the border relative to the hub under a force in a tangential direction.

6.2 Against auxiliary request 7, the appellant (opponent) raised objections under Rule 80 EPC and Articles 123(2), 123(3), 83 and 84 EPC. None of the objections convinced the Board. Auxiliary request 7 is thus

allowable.

6.3 **Feature 1.8***

6.3.1 In claim 1 of auxiliary request 7, feature 1.8 of the main request is amended to feature 1.8* (amendment indicated by underlines). Feature 1.8* reads as follows:

"a border (18) along at least part of the deflector's (14) periphery extending around the circumference of the deflector,"

6.3.2 The appellant (opponent) objected feature 1.8* under Article 84 EPC. It was not clear from the wording whether the border or the periphery extends around the circumference.

The Board does not agree. A skilled person understands that it is the border that extends around the circumference. The added wording rather defines the deflector's periphery - along which the border is at least partly provided - being a circumference, i.e. the periphery of the disc-shaped deflector as defined in amended feature 1.6* of auxiliary request 7 ("*said helmet includes at least one disc shaped deflector (14) comprising:*").

6.3.3 A further objection was raised under Article 123(2) EPC. The passage on page 5, lines 16, 17, on which the amendment was based on, required that the border of the first embodiment extended around the complete circumference, see also figure 1. This feature was necessary to allow snug fitting of the deflector in the aperture of the inner liner (page 6, line 20 with figure 4). However, the feature wording allowed the

border to extend only partly around the circumference.

The Board agrees that the wording still allows the border to extend only partly around the circumferential periphery. However, a border around at least part of the periphery was originally disclosed in claim 1 as granted. Specifying that the periphery is circumferential does not structural or functional link the deflector to a fully surrounding border. A snug fitting of the deflector does not require such a border.

6.4 **Feature 1.7***

6.4.1 Feature 1.7* was introduced with auxiliary request 4 and has been objected under Rule 80 EPC, under Article 123(3) EPC and Article 84 EPC. The objections likewise apply to auxiliary request 7.

6.4.2 Feature 1.7* reads as follows (amendments indicated by underlines):

"a central body in the form of a hub (20) that is connectable to the impact absorbing liner (12)"

6.4.3 According to the appellant (opponent) the amendment was not allowable under Rule 80 EPC (erroneously referred to as Article 82 EPC in the appellant's submission) because it included solely a clarification.

However, in the statement of grounds of appeal, points 5.15, 5.16, the appellant (opponent) raised an objection under Article 123(2) EPC that the term "hub" was disclosed only with respect to a particular form of a "central body". The amendment is thus allowable under

Rule 80 EPC.

- 6.4.4 With reference to T 2140/15, the appellant argued that the wording "*central body in the form of a hub*" was broader than the term "hub". The granted claim specifically required a hub. However, the amendment allowed any central body in the form of a hub, but not necessarily required a hub.

The Board does not agree. In the original sense, a hub is the central part of a wheel. Since the patent is not directed to a wheel, the term "hub" is to be understood in a figurative sense. In the granted claim the term "hub" never required a hub in the original sense but always a "central body in the form of a hub". Thus, in the present case, the skilled person does not get any information by the amendment that extends over the scope of the claim as granted. The requirements of Article 123(3) EPC are thus met.

- 6.4.5 Under Article 84 EPC it was argued that feature 1.7* was not clear as the use of a "central body" was vague and no precise explanation as to the scope of this term was given.

The Board disagrees because in the context of a disc shaped deflector (see feature 1.6*) with a central body in the form of a hub, the term "central body" is clear for a skilled person, in particular as the original sense of a hub is a central part of a wheel.

6.5 Feature 1.11

- 6.6 Feature 1.11 was introduced with auxiliary request 4 and has been objected under Articles 84, 83 and 123(2)

EPC. The objections also apply to auxiliary request 7.

6.7 Feature 1.11 reads as follows:

"said flexible element (22) being configured to be deflected by relative displacement of the border (18) relative to the hub (20) under a force (32) in a tangential direction."

6.7.1 The appellant (opponent) argued that as feature 1.11 referred to a hub, claim 1 was not clear in combination with feature 1.7*. According to feature 1.7* the hub was no longer claimed but only a central body in the form of a hub. Furthermore feature 1.11 defined a result to be achieved without defining the necessary technical features.

Following the reasoning under point 6.4.6 above, the skilled person has no difficulties to understand that the "hub" and the "central body in the form of a hub" refers to the same feature.

The Board holds that the functional feature 1.11 is allowable as the skilled person has no difficulty in providing flexible elements to perform the defined function. The claim actually includes all structural features of the deflector, i.e. the hub, the border and the flexible element in between. The skilled person is able to provide a flexible element such that the relative displacement is achieved.

6.7.2 According to the appellant (opponent), the amendment constituted an inadmissible intermediate generalisation. The alleged basis for feature 1.11 on page 7, lines 5 to 18, related to "deformable" elements, not to "flexible" elements. Furthermore, the

passage only referred to flexible elements in the form of spokes. As was evident from figure 5 of the patent in suit, the specific shape of the curved spokes was crucial to allow the claimed deflection. The same was disclosed on page 7, lines 15 to 18, additionally requiring the non-Newtonian material.

- 6.7.3 The Board does not agree. The skilled person has no doubt that the disclosure relating to deformable elements equally applies to flexible elements (see point 3.6 above).

The relative movement is achieved by the flexible elements which are indeed in the described embodiment in the form of spokes. However, the original application teaches on page 5, lines 21 to 23, that the spokes are only an example (see point 3.5.5(c) above). The skilled person understands that other configurations are possible as long as the elements are flexible and allow the relative movement (see point 3.5.5 above).

Concerning the non-Newtonian material reference is made to page 2, lines 31, 32 describing the material as being optional (see point 3.5.5(a) above). Even if in the embodiment described on page 7 a non-Newtonian material is used, it is clear from page 7, lines 15 to 18 that such material is not necessary to achieve the relative movement but that it merely supports this effect.

- 6.7.4 Further, the appellant (opponent) argued that the broad teaching of feature 1.11 was not sufficiently disclosed without defining the physical shape of the flexible elements (curved spokes).

However, the functional definition in feature 1.11 provides the skilled person with sufficient information on how the at least one flexible element is to be put into practice, namely flexible in such a way that the elements allow the relative movement as defined in features 1.4 and 1.11. The structure of the deflector is not complex such that the skilled person is able to find an appropriate flexible element.

7. Apportionment of costs

7.1 The respondent's request for apportionment of costs with regard to Article 16(1)(c) RPBA 2020 is refused.

7.2 The request was based on the argument that at the request of the appellant (opponent) oral proceedings were held in person while the respondent (patent proprietor) requested oral proceedings to be held as videoconference. In particular it was argued that the announced flip-chart presentation of the appellant was not at all decisive for the case. Consequently it would have been more time and cost efficient to hold the oral proceedings in the form of a video conference.

7.3 According to Article 104 EPC and Article 16 RPBA each party normally has to bear its own costs. It is of the party's right to request oral proceedings in person, independently of how and what they intend to present. Additionally it is under the Board's discretion to hold oral proceedings in presence.

7.4 Furthermore, it is noted that oral proceedings were planned to be hold in hybrid mode in order to fulfil the requests of both parties. However, it was the respondent's (patent proprietor's) decision to attend the hearing in person. The change from hybrid mode to

oral proceedings in person was thus initiated by the respondent (patent proprietor).

7.5 Consequently, no reason given by the respondent (patent proprietor) justifies a different apportionment of costs.

8. Description

8.1 The set of claims according to auxiliary request 7 form a suitable basis for maintaining the patent in amended form.

8.2 However, the amendments to the patent claims make it necessary to adapt the description. For this purpose, the Board considers it appropriate to remit the case to the Opposition Division for amendment of the description (Article 111(1) EPC). The parties agreed thereon.

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 with the claims according to auxiliary request 7 filed with letter of 23 June 2023 and a description to be adapted.
3. The requests for apportionment of costs and reimbursement of the appeal fee are refused.

The Registrar:

The Chair:



A. Voyé

A. Jimenez

Decision electronically authenticated