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**Datasheet for the decision
of 7 September 2023**

Case Number: T 0597/21 - 3.2.01

Application Number: 15164122.2

Publication Number: 2933201

IPC: B65D1/02

Language of the proceedings: EN

Title of invention:
LIGHTWEIGHT PLASTIC CONTAINER

Patent Proprietor:
Plastipak Packaging, Inc.

Opponents:
MHT Mold & Hotrunner Technology AG
ALPLA Werke Alwin Lehner GmbH & Co. KG
Krones AG

Headword:

Relevant legal provisions:
EPC Art. 69, 76(1), 100(c), 123(3)
EPC R. 103(1)(a), 115(2)
RPBA 2020 Art. 12(3), 12(5), 13(2), 15(1), 15(3)

Keyword:

Divisional application - added subject-matter (yes)
Amendments - protection extended (yes)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no)
Amendment after summons - taken into account (no)
Reimbursement of the appeal fee (no)

Decisions cited:

T 0108/91, T 1172/08, T 0131/15

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0597/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 7 September 2023

Appellant: Plastipak Packaging, Inc.
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Respondent: MHT Mold & Hotrunner Technology AG
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Representative: WSL Patentanwälte Partnerschaft mbB
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Respondent: ALPLA Werke Alwin Lehner GmbH & Co. KG
(Opponent 2) Mockenstrasse 34
6971 Hard (AT)

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9471 Buchs (CH)

Respondent: Krones AG
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Representative: Grünecker Patent- und Rechtsanwälte
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 April 2021
revoking European patent No. 2933201 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairwoman S. Watson

Members: A. Pieracci

 R. Cramer

Summary of Facts and Submissions

- I. An appeal was filed by the patent proprietor in the prescribed form and within the prescribed time limit against the decision of the opposition division revoking the European patent No. 2 933 201.
- II. In preparation for oral proceedings, the Board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA, in which it indicated that the appeal was likely to be dismissed.
- III. With letter dated 7 July 2023 the patent proprietor contested the preliminary opinion of the Board.
- IV. Oral proceedings before the Board took place on 7 September 2023. At the end of the oral proceedings the decision was announced. For further details of the proceedings reference is made to the minutes thereof.
- V. The final requests of the patent proprietor are:
 - that the appealed decision be set aside
 - and
 - that the patent be maintained as granted (main request),
 - or, in the alternative,
 - that the patent be maintained in amended form according to one of the first to twelfth auxiliary requests, all filed with the statement setting out the grounds of appeal.The patent proprietor further requests reimbursement of the appeal fee and conditionally a referral to the Enlarged Board of Appeal.

VI. The final requests of opponents 2 and 3 are

that the appeal be dismissed.

Opponent 2 requests that the fourth to sixth auxiliary requests not be admitted into the proceedings.

Opponents 2 and 3 request that document A1, filed by the patent proprietor with the statement setting out the grounds of appeal, not be admitted into the appeal proceedings.

VII. Opponent 1 made no requests or submissions during the appeal proceedings.

VIII. The following documents are mentioned in the present decision:

D15: Cover and page 143 of document A1;

D25: DE 26 38 351 A1;

D26: US 4 156 490;

D27: EP 0 049 876 A1;

D28: US 5 450 972;

A1: "Bottles, preforms, closures - a design guide for PET packaging", Brandau, O. (Ed.), Vol. 4, Heidelberg: PETplanet Publisher GmbH, 2005.

IX. The arguments of the parties are dealt with in detail in the reasons for the decision.

X. Claim 1 of the patent as granted (main request) reads as follows:

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending

upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the first auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface and an upper surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X) from the top of the

dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the second auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and the neck portion further including threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the third auxiliary request reads as follows (additions with

respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and the neck portion further including threads (26); a tamper-evident formation (28) having a lower surface and an upper surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the fourth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising: a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18)

having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface and an upper surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm, wherein the threads (26) are positioned between the upper surface of the tamper-evident formation (28) and the top of the dispensing opening (24); characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the fifth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26) for receiving a closure; a tamper-evident formation (28) having a lower surface and an upper surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X)

from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the sixth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and the neck portion further including threads (26) for receiving a closure; a tamper-evident formation (28) having a lower surface and an upper surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the seventh auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the weight of the neck portion is 3.0 grams or less, the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the eighth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising:
a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion

(16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the weight of the neck portion is 3.0 grams or less, the total weight of the container is 11 grams or less, the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the ninth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board and deletions being struck through):

"A plastic blow molded container, comprising: a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22

mm; characterised in that the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less, ~~and wherein~~ the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less and wherein the vertical distance from a furthest outwardly radially-extending portion of the lower surface of the tamper-evident formation (28) to the lower surface (22) of the support flange (18) at the same outward radial distance is 5,08 mm (0.200 inches) or less."

Claim 1 of the patent as amended according to the tenth auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising: a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the volume of the container is at least 500 ml, the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732

mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the eleventh auxiliary request reads as follows (additions with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising: a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the volume of the container is at least 500 ml, the weight of the neck portion is 3.0 grams or less, the total weight of the container is 11 grams or less, the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Claim 1 of the patent as amended according to the twelfth auxiliary request reads as follows (additions

with respect to claim 1 of the patent as granted being underlined by the Board):

"A plastic blow molded container, comprising: a hollow body portion including a lower supporting base portion (12); a sidewall portion (14) extending upwardly from the base portion (12); and a neck portion (16) extending upwardly from the sidewall portion (14), the neck portion (16) including a support flange (18) having an upper (20) and lower (22) surface and threads (26); a tamper-evident formation (28) having a lower surface; and a dispensing opening (24) at the top of the neck portion (16), the dispensing opening (24) having a top and an inner diameter that is at least 22 mm; characterised in that the weight of the neck portion is 2.3 grams or less, the total weight of the container is 11 grams or less, the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the support flange (18), including the threads (26) and the tamper-evident formation (28), is 14,732 mm (0.580 inches) or less and wherein the vertical distance (D) from the lower surface of the tamper-evident formation (28) to the top of the dispensing opening (24) is 7,62 mm (0.30 inch) or less."

Reasons for the Decision

1. Admittance of document A1
- 1.1 Opponents 2 and 3 requested that document A1 not be admitted into the proceedings. Document A1 was filed by the patent proprietor with the statement setting out the grounds of appeal. Document D15 submitted by the patent proprietor before the opposition division is a page from A1.

1.2 The patent proprietor argued that the filing of document A1 was a reaction to the decision of the opposition division taking into account late-filed evidence of the opponents, allegedly showing threads on a container flange, and leading the division to deviate from its preliminary opinion. Furthermore, since document A1 represented common general knowledge, it should be admitted into the proceedings since the filing of common general knowledge was always to be allowed.

1.3 Document A1, consisting of almost 200 pages, has been filed with the statement setting out the grounds of appeal but was not used therein in support of any argument against the decision of the opposition division beyond what was already contained in D15, and thus it cannot be seen as a reaction to the change of opinion of the opposition division. Furthermore, since the document was not used or addressed by the patent proprietor in its statement setting out the grounds of appeal beyond what was contained in D15, its submission is unsubstantiated in the sense of Article 12(3) RPBA. That the document might represent common general knowledge is irrelevant in this respect, since it has not been indicated which common general knowledge was supposedly represented and for what purpose. The Board thus considered it appropriate to make use of its discretion according to Article 12(5) RPBA and did not admit document A1 into the proceedings. As a consequence any reference to document A1 made in the course of the proceedings after the filing of the statement setting out the grounds of appeal is also not taken into account. The Board's decision does not affect the fact that D15 is in the proceedings, and

that references to that document can be taken into account.

2. Admittance of the request to show samples at the oral proceedings.

The patent proprietor requested to show bottles and preforms at the oral proceedings as indicated with letter dated 7 July 2023, in order to support its argumentation.

Opponents 2 and 3 objected to the request of the patent proprietor to present samples of bottles and preforms at the oral proceedings.

As the presentation of the bottles and the preforms was intended to take place for the first time at the oral proceedings and was announced only after the summons to the oral proceedings had been issued, the request is subject to the requirements of Article 13(2) RPBA. As exceptional circumstances justified with cogent reasons had not been submitted by the patent proprietor for presenting the above samples and the corresponding arguments at that point in time in the proceedings, the Board decided not to grant the above request according to Article 13(2) RPBA.

3. Added subject-matter of claim 1 of the patent as granted (Article 100(c) EPC)

- 3.1 The Board concurs with the opposition division (although this issue was decided for the then first auxiliary request, see point 28 of the decision under appeal), that the following feature of claim 1:

"the neck portion (16) including a support flange (18) having an upper (20) and a lower (22) surface and threads (26) "

is not directly and unambiguously derivable from the parent application contrary to the requirements of Article 76(1) EPC.

- 3.2 The Board agrees with the findings of the opposition division that the above feature, due to its formulation and grammatical structure, is unequivocally understood by the person skilled in the art as meaning that it is the support flange which has both the upper and lower surface and also the threads, which is not disclosed in the parent application. It is not disputed by the patent proprietor that the parent application does not show a support flange having threads.
- 3.3 The patent proprietor however argued that two interpretations were possible for the contested feature, i.e. that the threads were either on the neck or on the flange, and that the person skilled in the art, making use of their common general knowledge, would only consider the alternative that made technical sense, i.e. that the threads were on the neck.
- 3.4 The argument of the patent proprietor, that the repetition of the word "and" implies that the contested expression has to be interpreted as indicating two lists of elements and therefore it is the neck portion which includes the threads, cannot be followed as it has not been convincingly shown why the person skilled in the art would understand the expression in that way.
- 3.5 Also, the further arguments of the patent proprietor that of the two possible interpretations only the one

where the threads are on the neck would be considered by the person skilled in the art, are not convincing as discussed in the following.

- 3.6 The Board cannot follow the argument of the patent proprietor that the characterizing feature of claim 1 reciting that:

"the vertical distance (X) from the top of the dispensing opening (24) to the lower surface (22) of the upper flange (18), including the threads (26) and the tamper-evident formation (28) is 14,732 mm (0.580 inches) or less"

implies that the tamper-evident formation and the threads are provided at distinct locations between the top of the dispensing opening and the lower surface of the support flange so that the threads can only be provided on the neck and not on the support flange.

- 3.7 The above features do not exclude the flange having threads, and the Board sees no contradiction with the preamble of the claim or any ambiguity.

- 3.8 The Board also cannot follow the argument of the patent proprietor that threads on the support flange do not make technical sense.

The fact that in document D15 the threads are not shown on the flange and that in this document the height of the thread is significantly larger than that of the flange so that it would not be possible to put threads on the flange, has no implication for the understanding of claim 1 of the patent in suit.

The disclosure of D15 does not exclude the possibility of realizing a container with a neck portion including

a support flange having an upper and a lower surface with threads being provided on the support flange.

The fact that the person skilled in the art having always in mind the general aim of reducing the weight of the container would not be inclined to make a thicker flange, as argued by the patent proprietor, would not impede the person skilled in the art to do so, if this would be considered useful for fulfilling other aims.

That this is not the case in D15, which is meant to represent the common general knowledge, is not conclusive. Patent claims are supposed to define inventions which are novel, i.e. different, from what is generally known in the art.

Also the argument that it might be inappropriate to have threads in the flange due to deformation which might occur during heating of the preform is not conclusive, as it has not been shown that this is unfeasible.

The same applies to the argument that in view of the thickness of the flange, which can be derived from the distances given in claim 1 in combination with those of claim 6 and 14, it is not feasible to provide threads on the flange. The patent proprietor has not convincingly demonstrated why the dimensions given in the claims of the patent in suit are such that the flange necessarily cannot have threads, this remains a mere assertion.

- 3.9 The argument of the patent proprietor, that any inconsistency, such as the threads being on the flange in a claim although this feature is not shown in the

description and the drawings, would be corrected by the skilled reader when reading the claim, cannot be followed. This approach has no legal basis and would imply that the requirements of the EPC on added subject-matter could be circumvented, to the detriment of legal certainty.

- 3.10 The arguments of the patent proprietor referring to the location and the radial extension of the tamper-evident formation and to the fact that this retains a ring at the open end of the closure, are not convincing since no properties of the tamper-evident formation are included in the claim. Furthermore, as argued by opponents 2 and 3, in paragraph [0008] of the patent specification it is indicated that other ways, such as a foil covering, for indicating tampering might be used according to the invention instead of those shown in the drawings of the patent specification. Any reference to the specific realization of the tamper-evident formation in the drawings is thus not convincing.
- 3.11 The argument of the patent proprietor, that threads in the support flange for engaging the closure would lead to an instable fit between the closure and the container, which may cause leakage of liquid, is also not convincing.
A closure is not part of the claimed subject-matter and even if it were, there could be other elements preventing leakage. The claimed features are not exhaustive, not all the elements of the container when in use are listed.
- 3.12 The Board notes that reference signs cannot be construed as limiting the claim (Rule 43(7) EPC) and that therefore the presence of reference signs in claim 1 cannot change the assessment of whether subject-

matter has been added with respect to the previous application, contrary to the arguments of the patent proprietor.

3.13 The Board considers that, since it is the patent proprietor which carries the burden of proof for the assertion that threads cannot be provided on a container support flange, it is not necessary to address the issue of whether documents D25 to D28, filed by opponent 2 in opposition proceedings, do show a support flange with threads.

3.14 The Board concludes that claim 1 of the patent as granted unambiguously foresees that the support flange is provided with threads and that, since the parent application does not disclose this combination of features, subject-matter has been added extending beyond the content of that application contrary to Article 76(1) EPC, so that Article 100(c) EPC prejudices the maintenance of the patent as granted.

4. Added subject-matter of claim 1 of the first auxiliary request (Article 76(1) EPC)

As the features objected to above for claim 1 of the main request are also comprised in claim 1 of the first auxiliary request, this request is also not allowable as the requirements of Article 76(1) EPC are not fulfilled.

5. Extent of protection of claim 1 of the second auxiliary request (Article 123(3) EPC)

5.1 In the second auxiliary request the contested combination of features has been amended by addition of the underlined features as set out below:

"...the neck portion (16) including a support flange (18) having an upper (20) and a lower (22) surface and the neck portion further including threads (26)..."

The opposition division found, in relation to the then third auxiliary request, that this amendment contravened the requirements of Article 123(3) EPC.

- 5.2 The patent proprietor argued that claim 1 as granted allowed the threads to be anywhere on the neck portion and not necessarily on the support flange and that in case of ambiguity the description should be used for interpreting the claim. By applying Article 69 EPC and its protocol of interpretation, it would be clear to the skilled reader that the granted protection has not been extended by the amendment to the claim. Furthermore, Article 69 EPC and its protocol of interpretation have to be used even if there is no ambiguity in the meaning of the claims, as outlined in decision T 1172/08.
- The patent proprietor also cited decisions T 131/15 and T 108/91, arguing that the claims cannot be read in isolation from the description and that the reading of the claims cannot be such as to exclude all the embodiments of the invention.
- 5.3 The Board concurs with the opposition division and with opponents 2 and 3 that claim 1 of the patent as granted protects a container with a support flange having threads, whereas claim 1 according to the second auxiliary request also provides protection for a container with a support flange having no threads, so that a different scope of protection would be granted contrary to Article 123(3) EPC.

5.4 The Board does not share the view of the patent proprietor that the above assessment is not correct in view of Article 69 EPC and its protocol of interpretation.

5.4.1 The Board agrees with the patent proprietor, referring to decision T 1172/08, that according to Article 69 EPC and its protocol of interpretation the description and the drawings should be used when interpreting the claims for establishing the extent of the protection conferred, even if there is no ambiguity in the meaning of the claims and that a fair interpretation of the claim has to be made in light of the description as indicated in T 108/91.

However, the Board, in analogy to the findings of the Board in T 1172/08, point 14 of the reasons, considers that reading in claim 1 as granted that the threads are on the neck rather than on the flange is not correct as it would require the skilled reader to completely ignore the wording of granted claim 1, which per se is not technically meaningless, with the consequence that the wording of claim 1 would merely serve as an empty shell.

5.4.2 The patent proprietor also referred to T 131/15, point 5.5 of the reasons, arguing that the interpretation of the feature of the threads given by the Board would exclude all the embodiments illustrated in the patent in suit and that therefore, according to T 131/15, the terms of the claim should be understood according to the definition "threads on the neck and not on the support flange".

The Board cannot follow the above argument at least for the reason that from nowhere in the patent in suit can such an explicit definition be directly and

unambiguously derived, nor has this been shown by the patent proprietor.

Furthermore, as argued by the opponents, in the case at hand, the line of argument submitted by the patent proprietor would lead to the replacement of a feature, "threads on the flange", with a different feature, namely "threads on the neck", rather than introducing a definition into the claim.

6. Third to twelfth auxiliary requests

6.1 The Board indicated in its communication pursuant to Article 15(1) RPBA, that the further auxiliary requests were not allowable for the following reasons:

- the third and the sixth auxiliary requests, analogously to the second auxiliary request, extended the protection conferred by the patent as granted;
- the fourth, the fifth and the seventh to the twelfth auxiliary requests, analogously to the main request, contained subject-matter extending beyond the content of the earlier application as filed.

6.2 As the parties did not react to these points of the Board's communication, the Board, after having reconsidered all the factual and legal aspects of the case, confirms its preliminary finding that the third to twelfth auxiliary requests are not allowable for the reasons set out for the previous requests.

6.3 Claim 1 of the third and of the sixth auxiliary requests do not comprise the feature of claim 1 of the patent as granted of "the support flange...having

threads", so that protection would be conferred also for a support flange not having threads, contrary to the requirements of Article 123(3) EPC analogously to the second auxiliary request.

6.4 Claim 1 of the fourth, the fifth and the seventh to the twelfth auxiliary requests comprise the feature

"the neck portion (16) including a support flange (18) having an upper (20) and a lower (22) surface and threads (26) "

which the Board found not to be directly and unambiguously derivable from the parent application contrary to the requirements of Article 76(1) EPC (see points 3.1 and 3.2 above).

The fact that other features have been added to the claim, for example that

"the threads (26) are positioned between the upper surface of the tamper-evident formation (28) and the top of the dispensing opening (24)", as in the fourth auxiliary request,

or that the threads are "for receiving a closure" as in the fifth auxiliary request,

does not change the fact that a support flange having threads, as required by the sole valid interpretation of claim 1, is not directly and unambiguously derivable from the parent application.

6.5 The request of opponent 2 not to admit the fourth to sixth auxiliary requests thus does not need to be considered.

7. Alleged substantial procedural violation and reimbursement of the appeal fee

The patent proprietor argued in the statement setting out the grounds of appeal that a plurality of substantial procedural violations were committed by the opposition division justifying that a reimbursement of the appeal fee be ordered.

The Board notes that according to Rule 103(1) (a) EPC a prerequisite for the reimbursement of the appeal fee is that the appeal is deemed to be allowable. Since this is not the case here, the patent proprietor's request for reimbursement of the appeal fee must be refused.

8. Conditional request for referring a question to the Enlarged Board of Appeal

The patent proprietor requests to refer the following question to the Enlarged Board of Appeal should the Board consider the mandatory character of the application of Article 69 EPC for assessment of compliance with Article 123(3) EPC to be either non-existent or not applicable, namely:

"Is it mandatory to use the description and drawings for interpreting the claims of the patent, in accordance with Article 69, before and after amendment of the claims when assessing compliance of the amendment with the requirements of Article 123(3)?"

Since, as outlined in point 5.4.1 above, the Board concurs with the patent proprietor that Article 69 EPC and its protocol of interpretation have to be applied when assessing the extent of protection conferred

according to Article 123(3) EPC, the auxiliary request for referral does not become active.

Order

For these reasons it is decided that:

1. **The appeal is dismissed.**
2. **The request for reimbursement of the appeal fee is refused.**

The Registrar:

The Chairwoman:



A. Voyé

S. Watson

Decision electronically authenticated