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**Datasheet for the decision  
of 16 March 2023**

**Case Number:** T 1522/21 - 3.2.07

**Application Number:** 13815489.3

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**IPC:** B65D30/20, B65D30/10,  
B65D77/06, B65D75/00,  
B65B51/10, B65D25/16, B65B1/04

**Language of the proceedings:** EN

**Title of invention:**  
FLEXIBLE POUCH WITH A LARGER OPENING

**Patent Proprietor:**  
Société des Produits Nestlé S.A.

**Opponent:**  
N.V. Nutricia

**Headword:**

**Relevant legal provisions:**  
EPC Art. 83, 54, 56, 99(1), 100(b), 116(1)  
EPC R. 99(2)  
RPBA 2020 Art. 11, 12(6)

**Keyword:**

Late-filed evidence - admitted (no) - should have been  
submitted in first-instance proceedings (yes) - error in use  
of discretion at first instance (no)

Remittal - (no)

Sufficiency of disclosure - main request (yes)

Novelty - (yes)

Inventive step - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1522/21 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 16 March 2023**

**Appellant:** N.V. Nutricia  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
6 July 2021 concerning maintenance of the  
European Patent No. 2935032 in amended form.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** V. Bevilacqua  
A. Cano Palmero

## Summary of Facts and Submissions

I. An appeal was filed by the opponent against the decision of the opposition division to maintain European patent No. 2 935 032 in amended form according to the then auxiliary request 13.

II. The following documents, mentioned in the appealed decision, are referred to in the present decision:

D11: US 5,772,332 A;  
O4: US 4,261,253 A;  
O6: US 3,380,646 A;  
O8: EP 0 994 039 A1.

The following documents, both cited in the description of the patent in suit, were referred to in the statement setting out the grounds for appeal and are also mentioned in the present decision:

D1: EP 1 947 023 A2  
O9: EP 0 334 242 A1.

III. The opposition division found:

- that the ground for opposition according to Article 100(b) EPC held against claim 11 of the patent as granted;
- that then auxiliary requests 1 to 12 were "not allowed" into the proceedings because the amendments made to claim 11 thereof, *prima facie*, failed to overcome the ground for opposition under Article 100 (b) EPC;
- that then auxiliary request 13, based on the claims as granted, the only amendment being the deletion of claim 11, was admitted into the proceedings;

- that the subject-matter of claim 1 of then auxiliary request 13 was novel, in particular over the disclosure of document O8;
- that late filed document D11 was admitted into the proceedings;
- that the subject-matter of claim 1 of then auxiliary request 13 involved an inventive step, in particular over the combination of the teachings of documents O4 and O6, and over document D11 taken alone.

IV. In preparation for oral proceedings the Board communicated its preliminary assessment of the case to the parties in a communication pursuant to Article 15(1) RPBA 2020 of 18 November 2022.

V. Oral proceedings before the Board took place on 16 March 2023. At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.

VI. The final requests of the parties are as follows:

for the opponent (appellant)

- that the decision under appeal be set aside, and
- that the patent be revoked.

for the patent proprietor (respondent)

- that that the appeal of the opponent be dismissed; *i.e.* that the patent be maintained in the form held by the opposition division to meet the requirements of the EPC (main request);
- alternatively, when setting aside the decision under appeal, that the patent be maintained in amended form on the basis of one of the sets of

claims of auxiliary requests 1 to 15 filed with the reply to the statement of grounds of appeal;

- that the case be remitted to the opposition division if D1 or D11 is admitted into appeal proceedings.

VII. Claim 1 in the version held by the opposition division to meet the requirements of the EPC (main request) corresponds to claim 1 as granted and reads as follows:

"A flexible pouch (1) comprising an opening (2) with a perimeter of the opening (a), a bottom (3) with a perimeter of the bottom (b), at least two side walls (4), at least two lateral folding lines (5), at least one of these lateral folding lines (5) comprising a welding line (6) of a width (w), said perimeter of the opening (a) is greater than said perimeter of the bottom (b), characterized in that a part or all of the lateral welding lines (6) of the flexible pouch (1) have a width (w) which is not constant along its length, wherein the pouch (1) is a stand-up pouch; and wherein at least one lateral welding line (6) has a width (w1) near the bottom (3) which is larger than the width (w2) near the opening (2)."

The text of claim 1 of auxiliary requests 1 to 15 is not repeated here because the present decision is only based on the main request.

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

## Reasons for the Decision

1. Admittance into the proceedings of documents O9, D1 and D11

1.1 D1 and O9

1.1.1 The opponent asserts that documents D1 and O9 are an integral part of the appeal proceedings because they are referenced to in the patent in suit.

Additionally, the opponent argues that D1 became *prima facie* relevant in relation to a novel argument of the patent proprietor upon which the appealed decision is based which was first submitted during oral proceedings (statement of grounds, point 17).

This was because, so the opponent, only at the oral proceedings before the opposition division the claim feature "at least one of these lateral folding lines comprising a welding line of a width" was construed taking into account the disclosure at paragraph [0066] of the patent in suit.

1.1.2 The patent proprietor argues against the admittance of documents D1 and O9 into the appeal proceedings, as indicated in its response to the statement of grounds of appeal. On page 5, the last three paragraphs address O9, while point 2.1 pertains to D1.

The patent proprietor contests the notion that having cited these documents in the patent automatically incorporates them into appeal proceedings.

Furthermore, the patent proprietor puts forward that the appealed decision is not based upon any new claim

interpretation, but rather on the plain reading thereof.

- 1.1.3 The Board follows the arguments of the patent proprietor. Contrary to what has been argued by the opponent, O9 and D1 are not already part of the present appeal proceedings.

As correctly indicated by the patent proprietor, it is established case law (see Case Law of the Boards of Appeal [CLB], 10th edition 2022, IV.C.4.4) that a document is not automatically scrutinised in opposition or opposition appeal proceedings simply because it was quoted and acknowledged in the patent in suit.

The opponent has not referred to these documents during opposition proceedings, but, for the first time, with its statement setting out the grounds of appeal.

According to Article 12(6), second sentence, RPBA 2020, a Board shall not admit evidence which should have been submitted in the proceedings under appeal, irrespective of the *prima facie* relevance thereof (which is not mentioned in Article 12(6) RPBA 2020) unless the circumstances of the case justify their admittance.

As in the present case claim 1 under consideration corresponds to claim 1 of the patent as granted, the Board cannot see any circumstances justifying admitting new, late filed evidence against this claim.

The Board is also not convinced that the alleged new argumentation of the patent proprietor to which the opponent refers, changed the framework of the opposition such that the filing of new evidence, against a claim as granted, would be justified.



This is because, as noted by the patent proprietor during oral proceedings before the Board, the requirement that at least one of the lateral folding lines comprises a welding is an explicitly formulated feature of granted claim 1 and not the outcome of a particular claim interpretation based on paragraph [0066] of the patent in suit.

The opponent's allegation that during oral proceedings before the opposition division there was an unexpected change in the stance taken by the opposition division is not convincing because no such change of stance has been identified on the basis of a comparison between the grounds of the appealed decision and the preliminary opinion of the opposition division issued with notification dated 26 March 2020 or on the basis of an analysis of the minutes of the oral proceedings before the opposition division.

1.1.4 In the absence of circumstances justifying the filing of O9 and D1 for the first time with the statement setting out the grounds of appeal, the Board decides not to take these documents, together with the arguments and objections based thereupon, into consideration (Article 12(6) RPBA 2020).

1.2 Admittance of D11

1.2.1 The opposition division admitted document D11 into the opposition proceedings finding it *prima facie* relevant (see reasons for the decision under appeal, section 5.1.1).

1.2.2 The patent proprietor argues that the opposition division did not exercise its discretion in a

reasonable way because D11 was not filed in reaction to any amendment to the claims, and could not have been considered as being *prima facie* relevant (point 3.1 of the reply to the grounds of appeal) because the content thereof was not detrimental to the maintenance of the patent.

- 1.2.3 The opponent filed document D11 after the nine-month period under Article 99(1) EPC but before the final date for making written submissions according to Rule 116(1) EPC.

It is established case law that evidence submitted after the nine-month period is generally to be regarded as late-filed, unless special circumstances apply, for example the subject of the proceedings has changed (CLB, *supra*, IV.C.4.3, final two paragraphs).

It is however also established case law that, if a discretionary decision of an opposition division is challenged in appeal, it is not for the Board to review all the facts and circumstances as if it were the opposition division.

A Board should only overrule the way in which an opposition division has exercised its discretion if it comes to the conclusion that the opposition division used the wrong principles, or did not take into account the right principles or exercised its discretion in an unreasonable or arbitrary manner (CLB, *supra*, IV.C.4.5.2 and V.A.3.5.1 b), first paragraph).

- 1.2.4 In the Board's view the opposition division exercised its discretion reasonably and according to the right criteria.

During the oral proceedings before the opposition division, both parties presented their arguments on the content and admissibility of D11. The minutes of the proceedings, specifically page 5, points 26.1 to 31, contain these discussions. The opposition division based its ruling on the principle of *prima facie* relevance, which is a decisive principle in such decisions, as acknowledged in CLB, supra, IV.C.4.5.3. Consequently, there is no justification to overturn the opposition division's discretionary decision and to exclude D11 from the proceedings.

1.3 Remittal of the case to the opposition division for further examination

1.4 The patent proprietor requested that the case be remitted to the opposition division if D11 is admitted into appeal proceedings.

However, pursuant to Article 11 RPBA 2020, the Board shall only remit the case if there are special reasons for doing so.

In the present it is not apparent to the Board which purpose would be served by such a remittal, because the appealed decision is already based on D11 and, thus, also in this regard, subject to the review by the Board in accordance with Article 12(2) RPBA 2020.

Based on the above, the Board decides not to remit the case to the opposition division.

2. Sufficiency of disclosure of the subject-matter of claim 1 of the main request (Articles 83 and 100(b) EPC)
- 2.1 According to the opposition division (section 2.2.1 of the grounds of the appealed decision) the skilled person's knowledge allowed carrying out a pouch having the features of claim 1 according to the patent as granted and according to the main request.
- 2.2 The opponent contests the above findings, and explains that the claimed pouch inevitably comprises a seal positioned in the bottom thereof (statement of grounds, section 11) and argues that the skilled person is not in a position to reduce this particular seal into practice. This is particularly evident in those cases in which there are more than two side walls, where at least three surfaces meet at a single point without a seal (called "miraculous joint", see section 12 of the statement setting out the grounds of appeal) being present on the bottom side.

The patent proprietor argued during opposition proceedings that VFFS technology could be used for the manufacturing, resulting in a pouch with the lateral welds (and folds) at the sides which is filled from above (see letter of 30th January 2019 at IV.7).

In that case however, the top and the bottom are inevitably sealed with a welding line, and this is in contradiction with point 4.1 of the decision (statement of grounds, points 9 and 10)

In the letter dated 31 May 2022, the opponent further argued that the patent proprietor did not provide any evidence that stand up pouches having the claimed

structure ("defined construction") were known before the filing date.

In the present case, so the opponent, in the absence of any specific example of how the invention could be reduced to practice, there should be a presumption of insufficiency of disclosure, and the burden of proof in that respect should be shifted to the patent proprietor.

- 2.3 The opponent's arguments are not convincing because they appear to rely on the assumption that claim 1 includes implicit features, such as the "miraculous joint" mentioned in point 12 of the statement of grounds of appeal.

However, the Board sees no reason to follow the opponent on reading into claim 1 features which are not mentioned therein.

This is because claim 1 conveys as such a clear and plausible technical teaching to the skilled reader (see reasons for the decision under appeal, sections 2.2.1).

The reference to arguments submitted by the patent proprietor dealing with VFFS technology is also not suitable to cast doubts on the validity of the conclusions of the opposition division because VFFS is neither mentioned in granted claim 1, nor in section 2.2.1 of the reasons for the appealed decision dealing with sufficiency of description thereof.

It is established case law of the Boards of Appeal that a lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts. In order to establish insufficiency of

disclosure in *inter partes* proceedings, the burden of proof is on the opponent(s) to show, on the balance of probabilities, that the skilled person is unable to carry out the invention (see CLB, *supra*, II.C.9.).

The allegation of the opponent that in the present case, in the absence of any concrete examples, there should be a presumption of insufficiency of disclosure, with the result that the burden of proof should be shifted to the patent proprietor is not convincing.

This is because sufficiency of disclosure has been established in the appealed decision and under Rule 99(2) EPC it is upon the appellant to indicate the reasons for setting aside the impugned decision.

Also the allegation of the opponent that there are no concrete examples of the invention is not followed by the Board, because, as noted by the patent proprietor, the opponent has not convincingly shown why it is not possible to successfully reproduce the embodiment depicted in figure 9 the patent specification.

As a consequence of the above, the Board concludes that the appellant failed to convincingly demonstrate that the findings at section 2.2.1 of the appealed decision are not correct.

### 3. Novelty over 08

3.1 The opposition division (appealed decision, section 4) acknowledged the novelty of the subject-matter of claim 1 of the main request and identified the following distinguishing features:

i) "said perimeter of the opening is greater than said perimeter of the bottom",

ii) "wherein the pouch is a stand-up pouch",

iii) "wherein at least one lateral welding line (24) has a width near the bottom which is larger than the width near the opening".

3.2 The opponent contests section 4 of the appealed decision with the following arguments.

The opposition division was wrong in identifying the first distinguishing feature i), because it did not apply the criteria set in the Case Law for deriving dimensions from figures correctly, as it failed to consider what the skilled person would have objectively derived from the disclosure of O8.

There is no disclosure in figure 4 of O8 of any exact dimensions.

The opposition division was wrong also in identifying the second distinguishing feature ii), because the assessment was based on an excessively restrictive definition of "stand-up pouch".

This second feature is disclosed in O8 because this pouch has, in an inverted state, a stand-up bottom that does not have any seams or seals.

O8 also discloses the third feature iii), because the seal line 24 in Figure 3, clearly shows a width near the bottom that has double the width of the remainder of the seal, because (as explained at paragraph [0065] of the patent in suit) welding includes gluing.

During oral proceedings before the Board the opponent added that although the object disclosed in O8 has not been qualified as a stand-up pouch in this document, still is a stand-up pouch in the broadest sense of this term, as it is a flexible packaging provided with a standing surface.

- 3.3 The Board disagrees with the opponent.  
O8 is not novelty destroying, already because it fails to disclose the second distinguishing feature ii).

This is because the Board considers the assessment of the opposition division, according to which a skilled person would never consider the wrapping disclosed in O8 as a stand-up pouch (see point ii at page 10 of the decision and also points 56 to 58 of the reply of the patent proprietor), as correct.

The argument of the opponent that the appealed decision is based on an excessively restrictive claim construction, and that the wrapper disclosed in O8 is to be regarded as a stand-up pouch, because the term "stand-up pouch" is to be interpreted broadly as any flexible packaging having a a standing surface, is not convincing.

This is because, according to the established jurisprudence (CLB, *supra*, II.A.6.1) the claims are directed to a reader skilled in the field of the patent in suit, who is aware of the respective terminology, and the opponent failed to provide any evidence to substantiate its allegation that the broadest technically sensible meaning given by a skilled reader to the expression "stand-up pouch" would extend to any flexible packaging having a a standing surface.



4. Inventive step over the combination of the teachings of documents O4 and O6

4.1 The opposition division acknowledged inventive step of the subject-matter of claim 1 of the main request over the combination of the teachings of documents O4 and O6 (section 6.1.1, page 13, first paragraph of the grounds) on the basis of a lack of compatibility of the technical solutions respectively disclosed in these two documents.

Starting from the embodiments of figures 2 (appealed decision, section 6.1.1, page 13, last three paragraphs) and 8 of O4 (page 14, first paragraph) the opposition division concluded that at least the features that the pouch comprises two folding lines, and that the perimeter of the opening is greater than the perimeter of the bottom would be missing in a combination with the teaching of O6.

4.2 The opponent disagrees (statement of grounds, points 45-55) as follows.

The compatibility problems identified by the opposition division and by the patent proprietor (see point 144 of the reply to the statement setting out the grounds of appeal) when trying to produce the pouch depicted in figures 2 and 8 of O4 with one of the machines depicted in O6 would not prevent a skilled person from recognizing the core teaching of document O6, namely that a pouch constituted by two faces and a bottom part folded so as to form with said faces a W- section is able to stand upright (column 1, lines 20-25) and from understanding that this teaching is independent from the machines used to achieve this pouch structure.

O4 discloses a pouch intended to be used as a cup (figures 2 and 8, column 1, line 29).

Starting from this embodiment a first difference would be the claimed structure and perimeter of the bottom.

The opponent formulates the problem to be solved as how to modify the product depicted in figures 2 or 8 of O4 to make it more similar to a cup (statement of grounds, point 50).

The skilled person would have considered document O6, and be motivated to provide a bottom in the pouch of O4 similar to the bottom disclosed in O6 to make this known pouch able to stand upright like a cup.

Since the claim in question is directed to a product, the skilled person is not restricted to the production methods disclosed in O6 and to the structural details of the machines depicted in the figures of this document and would have no practical difficulties in applying the structural features of the resulting pouch to the flexible pouch disclosed in O4.

In this way the skilled person would arrive at the claimed flexible stand-up without having to exercise any inventive skill.

The technical difficulties mentioned in the appealed decision in respect of the lack of compatibility of the machines disclosed in O6 with the pouch structure shown in the figures 2 and 8 of O4 do not represent a real obstacle to the skilled person in this respect, because these difficulties would only arise if a skilled person would attempt to manufacture the bag using these machines (statement of grounds, points 52-54).

The second distinguishing feature, which is the presence of a lateral folding line comprising a welding line, does not contribute to inventive step, so the opponent, because no particular effect is mentioned in relation thereto(statement of grounds, point 55).

4.3 The arguments of the opponent are not persuasive, for the following reasons.

The argument that a skilled person would have separated the "core teaching" of document O6 indication the structure of a pouch able to stand upright, from allegedly secondary aspects of the content of this document, involving the machines and methods used to achieve this very pouch structure, is not convincing.

This is because when investigating inventive step it should be borne in mind that the technical disclosure in a prior art document should be considered in its entirety, as it would be done by a person skilled in the art (CLB, *supra*, I.D.9.5) and that it is not justified to arbitrarily isolate parts of such document from their context in order to derive from them technical information which would be distinct from the integral teaching of the document.

As noted by the opposition division in the appealed decision (section 6.1.1 of the reasons) and by the patent proprietor (reply to appeal, points 144 and 145) O6 teaches ways to make a pouch capable to stand upright which cannot be applied to the pouches depicted in figures 2 and 8 of O4.

This is because it is not apparent (also because it has not been convincingly explained by the opponent) how

these methods (and machines) used to add a bottom part folded so as to form a W-section with the faces of the pouch could be used in combination with the pouches depicted in O4.

The opponent also failed to convincingly explain how the addition of a bottom gusset to create a flat bottom in the pouch of any of figures 2 and 8 of O4 would have resulted in the claimed feature that the perimeter of this added bottom is inevitably smaller than the perimeter of the opening of the pouch (see the appealed decision, section 6.1.1, page 13, third paragraph).

Based on the above, the Board concludes that the opponent failed to convincingly show that there is a mistake in section 6.1.1 of the opposition division's decision.

5. Inventive step starting from D11
- 5.1 The opposition division acknowledged inventive step starting from the pouch disclosed in figure 16 of D11 and taking the teaching of figure 12 of the same document into account (section 6.2 of the reasons of the appealed decision).
- 5.2 The opponent contests the above reasoning, as follows.
  - 5.2.1 Starting from figure 16, the distinguishing feature is that the perimeter of the opening is greater than the perimeter of the bottom.  
The problem to be solved is how to improve this known pouch such that it is easier to access the content therein.

The opponent argues that a skilled person would have found a teaching to enhance the accessibility thereto by referring to figure 12 of the same document.

This is because a skilled person would immediately understand that by making, in the pouch of figure 16, the opening perimeter greater than the bottom perimeter, as taught in figure 12, the above problem could be straightforwardly solved.

5.2.2 In a second line of argumentation, whose admissibility has been contested by the patent proprietor, the opponent starts from the pouch depicted in figure 12 of D11.

The passage from column 5, line 58, to column 6, line 16 of D11 explains that this embodiment is produced through heating and stretching the pouch material to obtain a larger opening perimeter.

The opponent argues that the skilled person, starting from figure 12, would take insight from the disclosure related to figure 16 (see also column 6, lines 53 to 58) to obtain a pouch having a larger opening which could be more easily produced.

This is because the skilled person would have realised that it is possible to produce a pouch shaped as in figure 12 by using lateral welding lines with varying width, as shown in figure 16.

According to the opponent, the skilled person would have understood the advantages of this teaching, because the process of stretching applied in the embodiment of figure 12 is only possible with certain materials, while and using the welding technique of figure 16, the more accessible shape of figure 12 could

be produced in a manner that did not require stretching (statement of grounds, point 36).

By doing so, the skilled person would have arrived to a pouch according the subject-matter of claim 1 of the main request.

6. The Board does not find either line of attack convincing.

6.1 D11, figure 16, does not disclose an opening perimeter greater than the bottom perimeter.

According to the first line of attack, a skilled person starting from figure 16 of D11, and aimed at realising a pouch providing easy access to the contents thereof would find in the embodiment of figure 12, having the distinguishing feature, a teaching on how to solve this problem and by following it, would come to the claimed pouch.

However the description of figure 12 teaches only one way in which the distinguishing feature is achieved.

As explained from column 5, line 58 to column 6, line 16 of D11, the enlarged opening is achieved by heating and stretching the material of the pouch.

Therefore, as also established in the appealed decision (section 6.2.1), there is no reason for a skilled person, starting from figure 16 of D11, to modify the width of the lateral welding lines in order to arrive at an opening perimeter greater than the bottom perimeter.

6.2 The arguments submitted in relation to the second line of attack, starting from figure 12 of D11, are also not persuasive, for the following reasons.

The embodiment of figure 12 of D11, taken as the starting point, has the claimed feature that the perimeter of the opening is greater than the perimeter of the bottom.

The allegation of the opponent that the skilled person would learn, from the disclosure related to figure 16 of D11, a way to simplify manufacturing of the embodiment of figure 12 is not based on the content of the disclosure of this document.

This is because the opponent failed to indicate any passage showing that there is a relationship between the "narrowing portions" of figure 16 (column 6, lines 53-58) and the stretching and expansion of the perimeter of the opening done to achieve the inverted truncated pyramid shape of figure 12 (see from column 5 line 58 to column 6 line 4).

D11 does not teach how varying the width of the welding line can be used to enlarge the perimeter of the opening of a pouch, as it is done with the embodiment of figure 12 (reply to appeal, points 94 to 96).

6.3 As the appellant's objection starting from figure 12 of D11 is not convincing, and can be already dismissed on that basis, there is no need to discuss the admissibility objection raised by the patent proprietor against this second line of attack.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated