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**Datasheet for the decision
of 1 October 2024**

Case Number: T 0401/22 - 3.2.02

Application Number: 14162934.5

Publication Number: 2752216

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Language of the proceedings: EN

Title of invention:

Dispensing device

Patent Proprietor:

Pfizer Limited

Opponent:

Glaxo Group Limited

Relevant legal provisions:

EPC R. 115(2)

RPBA 2020 Art. 15(3)

EPC Art. 54(3), 56, 123(2)

Keyword:

Novelty - (no)

Amendments - added subject-matter (yes)

Inventive step - auxiliary request (no)



Beschwerdekammern

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Case Number: T 0401/22 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 1 October 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 December 2021 concerning maintenance of the
European Patent No. 2752216 in amended form.**

Composition of the Board:

Chair M. Alvazzi Delfrate
Members: A. Martinez Möller
C. Schmidt

Summary of Facts and Submissions

I. Appeals were filed by the patent proprietor and by the opponent against the interlocutory decision of the Opposition Division finding that auxiliary request 6 filed during the oral proceedings before the Opposition Division met the requirements of the EPC.

II. Oral proceedings before the Board took place on 1 October 2024.

In accordance with Rule 115(2) EPC and Article 15(3) RPBA, they took place in the absence of the proprietor, which had announced by letter dated 23 September 2024 that it would not be represented at the oral proceedings.

III. The appellant/proprietor ("proprietor") had requested in writing that the decision under appeal be set aside and that the patent be maintained as granted. As an auxiliary measure, it had requested that the patent be maintained on the basis of one of auxiliary requests 1 to 24 (including 6a) filed with the statement of grounds of appeal or one of auxiliary requests 2a to 2d and 3a to 3d filed by letter dated 30 August 2023.

The proprietor had further requested that the case be remitted to the Opposition Division if the priority claim was found to be invalid.

IV. The appellant/opponent ("opponent") requested that the decision under appeal be set aside and that the patent be revoked.

V. Claim 1 of the **main request** (patent as granted), with feature numbering in bold added by the Board, reads as follows:

1A "A device for dispensing individual doses of powder from respective pockets of a carrier, the device including:

1B an indexing mechanism for indexing the carrier (12) between respective pockets;

1C a first counter ring (130) having an indication of unit counts on a first display surface,

1D the first counter ring (130) being rotatable about a counter axis;

1E a second counter ring (131) having an indication of tens counts on a second display surface,

1F the second counter ring (131) being rotatable about the counter axis; and

1G an intermittent-motion mechanism for driving the second counter ring (131) from the first counter ring (130) and rotating the second counter ring (131) between consecutive tens counts when the first counter ring (130) rotates between two predetermined consecutive unit counts,

1H the first counter ring (130) being driven with the indexing mechanism,

1I the first (130) and second (131) counter rings being positioned one within the other, with the first and second display surfaces adjacent each other, characterised in that

1J the first and second display surfaces are generally planar and perpendicular to the counter axis."

VI. Compared with claim 1 of the main request, claim 1 of **auxiliary request 1** includes the feature "a carrier (12) provided in a housing;" before the feature "an indexing mechanism ...".

VII. Claim 1 of **auxiliary request 2** includes the following amendment with regard to claim 1 of auxiliary request 1:

"a carrier (12) provided in a housing and comprising a plurality of pockets with individual doses of powder;"

VIII. Claim 1 of **auxiliary request 2a** includes the following amendments with regard to claim 1 of auxiliary request 2:

"a plurality of pockets, each pocket holding a ~~with individual~~ doses of powder;"

IX. Claim 1 of **auxiliary request 2b** includes the following amendment with regard to claim 1 of auxiliary request 2:

"pockets with individual doses of powder, wherein each of the plurality of pockets is sealed by a lidding sheet;"

X. Claim 1 of **auxiliary request 2c** includes the following amendment with regard to claim 1 of auxiliary request 2b:

"sealed by a lidding sheet, wherein each respective dose of powder is exposed by a peeling of the lidding sheet;"

XI. Claim 1 of **auxiliary request 2d** includes the following amendment with regard to claim 1 of auxiliary request 2b:

"sealed by a lidding sheet, wherein the lidding sheet is ruptured as a consequence of moving a pocket from a respective storage position to a respective discharge position;"

XII. Claim 1 of **auxiliary request 3** includes the following amendments with regard to claim 1 of the main request:

"the device housing the carrier (12) comprising a plurality of pockets with individual doses of powder, the device including"

XIII. Claim 1 of each of **auxiliary requests 3a-3d** includes the amendments indicated above for auxiliary request 3 together with the amendments indicated for auxiliary requests 2a-2d, respectively.

XIV. Claim 1 of **auxiliary request 4** includes the following amendment with regard to claim 1 of auxiliary request 3:

"for indexing the carrier (12) between respective pockets, from an opened pocket to an unopened pocket;"

XV. Compared with claim 1 of the main request, claim 1 of **auxiliary request 5** further includes the following features, which have been added before the feature "and an intermittent-motion mechanism":

"a dispensing mechanism for releasing into an airstream the powder of a respective pocket of the carrier, wherein the indexing mechanism is configured to rotate the carrier relative to the dispensing mechanism so as to enable powder to be released from different pockets;"

XVI. Compared with claim 1 of auxiliary request 3, claim 1 of **auxiliary request 6** further includes the following features, which have been added to the end of the claim:

", wherein the carrier (12) comprises a first carrier and a second carrier, and the indexing mechanism is configured to index each of the first carrier and the second carrier between respective pockets."

XVII. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 6a** further includes the following feature, which has been added to the end of the claim:

", wherein the device further comprises a changeover component configured to cause the indexing mechanism to individually drive the first carrier and the second carrier."

XVIII. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 7** further includes the following feature, which has been added to the end of the claim:

", wherein when the device is indexed, one pocket from the first carrier and one pocket from the second carrier are opened together."

XIX. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 8** further includes the following feature, which has been added to the end of the claim:

", wherein the first carrier and the second carrier are indexed such that respective doses of powdered medicament are dispensed from each of the first and second carriers simultaneously."

XX. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 9** further includes the following feature, which has been added to the end of the claim:

" , wherein the first carrier and the second carrier are indexed such that respective doses of powdered medicament are dispensed from each of the first and second carriers sequentially, one at a time in an alternating fashion."

XXI. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 10** further includes the following feature, which has been added to the end of the claim:

" , wherein the pockets of the first carrier carry a different powdered medicament than the pockets of the second carrier."

XXII. Compared with claim 1 of the main request, claim 1 of **auxiliary request 11** further includes the following feature, which has been added before the feature "and an intermittent-motion mechanism":

"walls defining at least one flow path for deaggregating the powder medicament from an open pocket in a discharge position and at least a second flow path which bypasses the open pocket;"

XXIII. Claim 1 of **auxiliary request 12** includes the following amendment with regard to claim 1 of auxiliary request 11:

"bypasses the open pocket, wherein the walls defining the first flow path are configured to force the

airstream to change direction such that the dose of powder in the airstream is deaggregated"

XXIV. Claim 1 of **auxiliary request 13** includes the following amendment with regard to claim 1 of auxiliary request 12:

"is deaggregated, wherein the walls defining the first flow path have rounded corners configured to limit a pressure drop such that the pressure drop does not exceed 4 kPa at 60 l/min"

XXV. Compared with claim 1 of the main request, claim 1 of **auxiliary request 14** further includes the following feature, which has been added before the feature "and an intermittent-motion mechanism":

"a housing and a priming lever extending out of the housing, and the priming lever is configured to rotate about a central axis of the device;"

XXVI. Claim 1 of **auxiliary request 15** includes the following amendment with regard to claim 1 of auxiliary request 14:

"a central axis of the device, wherein the priming lever has a first position and a second position such that a movement from the first position to the second position is arranged to prime the device, and priming the device comprises exposing at least one dose of powdered medicament carried by the carrier"

XXVII. Claim 1 of **auxiliary request 16** includes the following amendments with regard to claim 1 of auxiliary request 15:

"a mouthpiece through which to inhale an airstream carrying a dose of powdered medicament from an opened pocket;

a housing and [...] powdered medicament carried by the carrier, wherein the priming lever is adjacent to the mouthpiece at the first position;

XXVIII. Claim 1 of **auxiliary request 17** includes the following amendments with regard to claim 1 of auxiliary request 14:

"a central axis of the device, wherein a movement of the priming lever operates the indexing mechanism to index the device such that at least one unused and unopened pocket of powdered medicament is moved into a position for dispensing and is opened"

XXIX. Claim 1 of **auxiliary request 18** includes the following amendments with regard to claim 1 of auxiliary request 17:

"a mouthpiece through which to inhale an airstream carrying a dose of powdered medicament from an opened pocket;

— a housing and a mouthpiece cover, and the mouthpiece cover is formed as a separate component from the housing, the mouthpiece cover being configured to be rotated relative to the housing to expose the mouthpiece;

a housing and a priming lever [...] is opened, wherein rotation of the mouthpiece cover from an open position to a closed position returns the priming lever to the first position and covers the mouthpiece; and"

XXX. Compared with claim 1 of auxiliary request 6, claim 1 of **auxiliary request 19** further includes the following features, which have been added to the end of the claim:

" , wherein the first and second carrier are arranged side by side; the device comprising a housing and a priming lever extending out of the housing; the priming lever is configured to rotate about a central axis of the device; and the priming lever extends from between the first and second carrier."

XXXI. Compared with claim 1 of the main request, claim 1 of **auxiliary request 20** further includes the following features, which have been added before the feature "and an intermittent-motion mechanism":

"first and second supports for first and second carriers;

a cam member having a first cam surface for engaging a first prodger member and a second cam surface for engaging a second prodger member such that a movement of the cam member moves the first prodger member so as to press on the supported first carrier and outwardly rupture a first lidding sheet of the first carrier and a movement of the cam member moves the second prodger member so as to press on the supported second carrier and outwardly rupture a first lidding sheet of the second carrier;"

XXXII. Compared with claim 1 of the main request, claim 1 of **auxiliary request 21** further includes the following feature, which has been added to the end of the claim:

", wherein the device comprises a housing comprising a pair of disc-shaped casing halves and enclosing the carrier (12)."

XXXIII. Compared with claim 1 of the main request, claim 1 of **auxiliary request 22** further includes the following feature, which has been added to the end of the claim:

", wherein the device comprises two casing halves enclosing the carrier, the first counter ring and the second counter ring."

XXXIV. Compared with claim 1 of the main request, claim 1 of **auxiliary request 23** further includes the following feature, which has been added to the end of the claim:

", wherein the intermittent-motion mechanism is a Geneva mechanism."

XXXV. Compared with claim 1 of auxiliary request 23, claim 1 of **auxiliary request 24** further includes the following features, which have been added to the end of the claim:

", and wherein: the second counter ring (131) is positioned within the first counter ring (130), the first counter ring (130) includes a pin for engaging a Geneva wheel (135) rotatable about an axis offset from the counter axis and the second counter ring (131) includes features engageable by the Geneva wheel (135)."

XXXVI. The following documents are relevant to the present decision:

D1 GB 0315509 (application number)

D2 EP 1 730 676 A0
D2a WO 2005/079727 A2
D3 US 6,076,521
D5 Bickford, John H., "Mechanisms for Intermittent Motion", Industrial Press Inc., 1972
D17 EP 0 069 715 A1

XXXVII. The opponent's arguments relevant to the present decision can be summarised as follows.

Validity of the priority

The priority document always and only disclosed a Geneva mechanism for driving the second counter ring from the first counter ring. The disclosure on page 16, lines 7 to 9 that a Geneva mechanism was a preferred implementation of an intermittent-motion mechanism only related to the indexing mechanism. Therefore the priority of claim 1 was invalid with regard to intermittent-motion mechanisms other than a Geneva mechanism for driving the second counter ring.

Main request - novelty over D2/D2a

D2 was prior art under Article 54(3) EPC for intermittent-motion mechanisms other than a Geneva mechanism, and disclosed all the features of claim 1 of the main request. The subject-matter of claim 1 was not novel over D2, published as D2a.

Auxiliary requests 1, 2, 2a-2d, 3, 3a-3d, 4

Claim 1 of each of auxiliary requests 1, 2, 2a-2d, 3, 3a-3d and 4 lacked novelty over D2/D2a.

Auxiliary request 5 - added subject-matter

The feature of the dispensing mechanism was only disclosed in conjunction with a pair of carriers, and not in isolation. Claim 1 thus comprised added subject-matter.

Auxiliary requests 6, 6a and 7 to 10 - added subject-matter

The features added to claim 1 of auxiliary request 6 had been extracted in isolation from further interrelated features such as the two supports and their arrangement. Claim 1 thus comprised added subject-matter. The same deficiency was present in auxiliary requests 6a and 7 to 10.

Auxiliary requests 11 to 13 - added subject-matter

The amendment in claim 1 of auxiliary request 11 contained elements extracted in isolation from interrelated features such as the arrangement for individually moving each pocket from a respective storage position to a respective discharge position. The same deficiency was present in claim 1 of auxiliary requests 12 and 13. Hence the requests contravened Article 123(2) EPC.

Auxiliary requests 14 to 18 - added subject-matter

The features of the priming lever added to claim 1 of auxiliary request 14 had been extracted in isolation from a specific embodiment comprising interrelated features such as the mouthpiece and its specific arrangement and the mouthpiece cover. The same deficiency was present in claim 1 of auxiliary requests

15 to 18. Hence the requests contravened Article 123(2) EPC.

Auxiliary request 19 - added subject-matter

Claim 1 of auxiliary request 19 contained all the features of claim 1 of auxiliary request 6 but did not contain further amendments that would remedy the issue of added subject-matter present in auxiliary request 6. Hence auxiliary request 19 contravened Article 123(2) EPC.

Auxiliary request 20 - added subject-matter

The amendment in claim 1 of auxiliary request 20 contained elements extracted in isolation from an embodiment with interrelated features such as the structure of the carriers and the arrangement of the prodger members. Hence auxiliary request 20 contravened Article 123(2) EPC.

Auxiliary request 21 - added subject-matter

Neither the description nor the figures of the application as filed disclosed disc-shaped casing halves. Hence auxiliary request 21 contravened Article 123(2) EPC.

Auxiliary requests 23 and 24 - inventive step starting from D3

D3 referred to D17 for the functionality of the Turbuhaler®: D17 was thus incorporated by reference. When D3 was construed in view of D17, it disclosed all the features of claim 1 of auxiliary request 23 except the feature that the intermittent-motion mechanism was

a Geneva mechanism. In particular, the features corresponding to features 1C to 1J were disclosed in D3, and features 1A and 1B were disclosed by the inhalator as described in D17. In the inhalator of D17, the perforations defined pockets within the meaning of claim 1 because they retained the active compound until the inhalator was activated by the air flow generated by the patient's inhalation.

The distinguishing feature that the intermittent-motion mechanism was a Geneva mechanism had no technical effect over the mechanism with the gear wheel used in D3. The problem to be solved was thus to provide an alternative. The Geneva mechanism was a well-known intermittent-motion mechanism, as shown by textbook D5, and the person skilled in the art would have used it in the device of D3. Hence claim 1 of auxiliary request 23 did not involve an inventive step.

When replacing the gear wheel of D3 with a Geneva mechanism, the person skilled in the art would have arrived at a device also comprising the features added to claim 1 of auxiliary request 24. Hence claim 1 of auxiliary request 24 did not involve an inventive step either.

XXXVIII. The proprietor's arguments relevant to the present decision can be summarised as follows.

Validity of the priority

The priority document, referring to the indexing mechanism, disclosed on page 16, lines 7 to 9 that a Geneva mechanism was a preferred implementation of an intermittent-motion mechanism. The priority document described the counter Geneva and the indexing Geneva as

both being "examples of a Geneva type mechanism providing intermittent rotation" (page 43, lines 7 to 11), thereby creating a bridge to the passage on page 16. Taking the content of the priority document as a whole, the teaching that intermittent-motion mechanisms other than a Geneva mechanism could be used not only applied to the indexing mechanism but also extended to the dose counter.

If the priority was found to be invalid, the case should be remitted to the Opposition Division.

Main request - novelty over D2/D2a

Since the subject-matter of claim 1 validly claimed the priority, D2/D2a did not form part of the prior art. In any case, the subject-matter of claim 1 was new over D2.

Auxiliary request 5 - added subject-matter

The basis for the amendments was found on page 8, lines 6 to 9 of the application as filed.

Auxiliary requests 6, 6a and 7 to 10 - added subject-matter

The basis for the amendments to claim 1 of each of these requests was found in the following passages of the application as filed:

Auxiliary request 6: page 11, line 15; page 16, lines 1 to 2, and page 18, lines 15 to 28.

Auxiliary request 6a: page 39, line 29 to page 40, line 2, and page 42, lines 13 to 16.

Auxiliary request 7: page 9, lines 10 to 11.

Auxiliary request 8: page 8, line 30 to page 9, line 5.

Auxiliary request 9: page 9, lines 13 to 24.

Auxiliary request 10: page 10, lines 5 to 9.

Auxiliary requests 11 to 13 - added subject-matter

The basis for the amendments to claim 1 of each of these requests was found in the following passages of the application as filed:

Auxiliary request 11: page 2, lines 26 to 29; page 3, lines 6 to 7; page 5, lines 5 to 7; page 28, lines 22 to 24, and page 30, lines 24 to 25.

Auxiliary request 12: page 28, lines 22 to 24.

Auxiliary request 13: page 3, lines 15 to 17, and page 28, lines 24 to 26.

Auxiliary requests 14 to 18 - added subject-matter

The basis for the amendments to claim 1 of each of these requests was found in the following passages of the application as filed:

Auxiliary request 14: page 23, lines 27 to 29.

Auxiliary request 15: page 23, line 27 to page 24, line 2.

Auxiliary request 16: page 2, lines 25 to 26; page 5, lines 3 to 4; page 8, lines 5 to 6, and page 23, line 27 to page 24, line 2.

Auxiliary request 17: page 24, lines 19 to 23.

Auxiliary request 18: page 2, lines 25 to 26; page 5, lines 3 to 4; page 8, lines 5 to 6; page 23, lines 18 to 25, and page 24, lines 19 to 23.

Auxiliary request 19 - added subject-matter

The basis for the amendments was found on page 26, lines 4 to 5; page 23, lines 27 to 29, and page 26, lines 13 to 15.

Auxiliary request 20 - added subject-matter

The basis for the amendments was found on page 10, line 27 to page 11, line 5, and page 11, lines 19 to 25.

Auxiliary request 21 - added subject-matter

The basis for the amendments was found on page 27, lines 27 to 28; page 32, lines 29 to 31, and page 33, lines 8 to 9.

Auxiliary requests 23 and 24 - inventive step starting from D3

D3 was directed to providing a dose indicating device and not a device for dispensing individual doses of powder. D3 did not disclose particulars about the inhalator. Hence it did not disclose features 1A and 1B. The dose indicating device of D3 was designed to be used with the Turbuhaler®, which was a reservoir-based inhaler.

The Opposition Division had not properly exercised its discretion in admitting D17.

The reference to D17 was in the section of D3 discussing the prior art, and D3 did not disclose the content of D17 to be incorporated by reference. Moreover, any incorporation from a secondary reference needed to be more specific than a mere reference to a whole document to establish what exactly was incorporated.

Even if D17 was considered, it was irrelevant. D17 did not disclose a carrier with pockets because as soon as

the perforations were in the air conduit, without plate 13 at the bottom of the membrane's perforations, the perforations were open to the air coming from underneath.

Moreover, the person skilled in the art had no motivation to replace the gear-type intermittent-motion mechanism of D3 with a Geneva mechanism. This modification would require modifications to other parts of the device.

As regards auxiliary request 24, it was not apparent where D3 disclosed that the first counter ring included a pin for engaging a Geneva wheel rotatable about an axis offset from the counter axis and that the second counter ring included features engageable by the Geneva wheel.

Reasons for the Decision

1. Patent
- 1.1 Inhalers can be used to administer pharmaceuticals for the treatment of conditions such as asthma or chronic obstructive pulmonary disease. Dry-powder inhalers are an alternative to pressurised inhalers using propellants.
- 1.2 The patent relates to a device for dispensing individual doses of powder from respective pockets of a carrier (e.g. blister packs). The device includes two counter rings, an indexing mechanism and an intermittent-motion mechanism. The first counter ring has an indication of unit counts and the second counter ring has an indication of tens counts. The counter

rings can be used for example to count the doses dispensed or the doses remaining.

2. Validity of the priority

2.1 Whether or not D2 is prior art under Article 54(3) EPC depends on whether or not the claim is entitled to the claimed priority of D1.

2.2 The Opposition Division found that claim 1 as granted was entitled to the claimed priority. The opponent contested this finding and argued that the priority document disclosed no "intermittent-motion mechanism" for driving the second counter ring from the first counter ring other than a Geneva mechanism.

2.3 It is common ground that the disclosure on page 16, lines 7 to 9 of the priority document relates to the indexing Geneva mechanism (see context provided by page 14, lines 1 to 7; page 15, lines 15 to 30, and page 16, lines 9 to 12). This passage on page 16 does not disclose that mechanisms other than a Geneva mechanism could be used to drive the counter rings. The passage on page 43, lines 7 to 11 describes that the indexing Geneva mechanism and the counter Geneva mechanism are examples of Geneva mechanisms providing intermittent rotation, but this passage does not disclose that mechanisms other than a Geneva mechanism could be used for the counter either, nor can this be derived from the whole priority document including both passages.

2.4 Therefore the priority of claim 1 as granted is only valid for the intermittent-motion mechanism of the counter being a Geneva mechanism, as disclosed for instance in independent claims 42 and 45 of the priority document. It follows that, to the extent that

claim 1 is directed to intermittent-motion mechanisms of the counter other than a Geneva mechanism, D2 is comprised in the state of the art under Article 54(3) EPC.

2.5 The proprietor requested that the case be remitted to the Opposition Division if the priority was found to be invalid. The Board sees no special reasons within the meaning of Article 11 RPBA to remit the case. The opponent had contested the validity of the priority and raised objections based on D2 from the outset of the opposition proceedings. Dealing with these objections on appeal does not result in an undue burden. There is thus no reason to further delay a decision dealing with these objections.

3. Main request - novelty over D2

3.1 The content of D2 was published as PCT publication D2a. D2a - and thus also D2 - anticipates the subject-matter of claim 1 at the following passages indicated in brackets hereinafter:

A device for dispensing individual doses of powder from respective pockets of a carrier (page 2, lines 18 to 19; page 6, lines 17 to 18; page 8, lines 15 to 27; page 9, lines 15 to 18), the device including:
an indexing mechanism for indexing the carrier between respective pockets (paragraph bridging pages 8 and 9; page 10, lines 10 to 11);
a first counter ring having an indication of unit counts on a first display surface (first count wheel 20 in Figures 1 to 6; see also page 2, lines 21 to 23), the first counter ring being rotatable about a counter axis (page 2, line 21);

a second counter ring having an indication of tens counts on a second display surface (second count wheel 30 in Figures 1 to 6; see also page 2, lines 25 to 26), the second counter ring being rotatable about the counter axis (page 2, line 25); and
an intermittent-motion mechanism for driving the second counter ring from the first counter ring and rotating the second counter ring between consecutive tens counts when the first counter ring rotates between two predetermined consecutive unit counts (kick wheel 40 in Figures 1 to 6; see also page 2, line 27 to page 3, line 7 as well as page 34, lines 10 to 25), the first counter ring being driven with the indexing mechanism (page 9, lines 5 to 7), the first and second counter rings being positioned one within the other, with the first and second display surfaces adjacent each other (see Figures 5 and 6 and page 4, lines 14 to 15), characterised in that the first and second display surfaces are generally planar and perpendicular to the counter axis (see Figures 5 and 6).

- 3.2 The proprietor asserted that D2 did not anticipate the subject-matter of claim 1, without however providing any arguments supporting this assertion.
- 3.3 It follows that the main request is not allowable for lack of novelty in view of D2.
- 4. Auxiliary requests 1, 2, 2a to 2d, 3, 3a to 3d, 4 - novelty over D2
 - 4.1 The additional features of claim 1 of each of auxiliary requests 1, 2, 2a-2d, 3, 3a-3d and 4 are disclosed in D2 (see page 8, lines 10 to 13; paragraph bridging pages 8 and 9; page 9, lines 15 to 22, and page 36,

lines 3 to 6). Therefore the subject-matter of claim 1 of each of these requests is not novel over D2. These requests are thus not allowable.

5. Auxiliary request 5 - added subject-matter

5.1 The proprietor identified page 8, lines 6 to 9 as the basis for the amendment. This passage relates to a device for dispensing individual doses of powder from respective pockets of a pair of carriers. The description explains that the dispensing mechanism and/or the indexing mechanism is/are adapted for use with the pair of carriers (see e.g. page 8, lines 12 to 15 and 20 to 22; page 9, lines 7 to 15, and page 10, lines 18 to 23). The pair of carriers is thus inextricably linked to the features added in claim 1 of auxiliary request 5. The proprietor argued that the dispensing mechanism was also disclosed in several other passages, but all the passages mentioned relate to devices for dispensing doses from two carriers.

5.2 It follows that claim 1 of auxiliary request 5 comprises added subject-matter (Article 123(2) EPC).

6. Auxiliary requests 6, 6a and 7 to 10 - added subject-matter

6.1 Claim 1 of each of these requests includes the following added feature:

"wherein the carrier (12) comprises a first carrier and a second carrier, and the indexing mechanism is configured to index each of the first carrier and the second carrier between respective pockets"

6.2 The proprietor addressed this feature when discussing auxiliary request 6 and identified three passages as the basis for this amendment: page 11, line 15; page 16, lines 1 to 2, and page 18, lines 15 to 28. All three passages refer to embodiments comprising, *inter alia*, first and second movable supports for supporting respective first and second carriers (for the device mentioned on page 11, line 15, the indexing mechanism is said to be "for moving the first and second supports" on page 11, line 31 to page 12, line 5). The two movable supports are in a close structural and functional relationship with the two carriers. The absence of the two movable supports from claim 1 of auxiliary request 6 thus results in added subject-matter.

6.3 Claim 1 of each of auxiliary requests 6a and 7 to 10 likewise comprises the feature recited above (two carriers), but not the closely-related feature of the two movable supports. Hence these requests comprise added subject-matter for at least the same reasons as set out for auxiliary request 6.

6.4 It follows that none of auxiliary requests 6, 6a and 7 to 10 are allowable.

7. Auxiliary requests 11 to 13 - added subject-matter

7.1 Claim 1 of each of these requests includes the following added feature:

"walls defining at least one flow path for deaggregating the powder medicament from an open pocket in a discharge position and at least a second flow path which bypasses the open pocket"

- 7.2 The passages on page 2, lines 22 to 33, and page 3, lines 6 and 7 (both identified by the proprietor as a basis for the amendment) disclose an embodiment that also comprises an arrangement for individually moving each pocket from a respective storage position to a respective discharge position, wherein each pocket, in the respective discharge position, forms an integral part of the individual respective first flow path. This feature - which is absent from claim 1 of each of auxiliary requests 11 to 13 - is inextricably linked to the added feature, by indicating how the discharge position is reached and defining that it is part of the first flow path. In addition, the two flow paths are disclosed in the embodiment as connecting with the mouthpiece, an aspect which is also absent from claim 1 of each of auxiliary requests 11 to 13 despite being inextricably linked to the presence of the two flow paths and contributing to the intended technical effect (see page 3, lines 9 to 14).
- 7.3 The proprietor also referred to page 5, lines 5 to 7 as a basis. This passage relates to a different embodiment and does not disclose that the pocket is in a discharge position. Moreover, that passage also discloses the two flow paths as being connected with the mouthpiece. The further passages cited by the proprietor (page 28, lines 22 to 24, and page 30, lines 24 to 25) describe the embodiment of Figure 9(b) and do not provide a basis for the added features in isolation. The passages referred to by the proprietor in connection with the additional features of claim 1 of auxiliary requests 12 and 13 do not change this finding.
- 7.4 It follows that claim 1 of each of auxiliary requests 11 to 13 comprises added subject-matter, so these requests are not allowable.

8. Auxiliary requests 14 to 18 - added subject-matter

8.1 Claim 1 of each of these requests includes the following added feature:

"a housing and a priming lever extending out of the housing, and the priming lever is configured to rotate about a central axis of the device"

8.2 The passages identified by the proprietor as a basis for the addition of the priming lever relate to the "preferred embodiment" of Figures 1(a) to (c) described on page 23, line 14 to page 24, line 32. In that embodiment, the priming lever is disclosed as extending out of the housing at a position adjacent the mouthpiece. The application as filed does not present this positioning as optional, but instead describes the associated advantages (page 24, lines 4 to 8).

8.3 Moreover, this preferred embodiment comprises two further features that are in a close functional relationship with the priming lever (page 24, lines 13 to 26), namely:

- an inner surface of the mouthpiece cover is provided with a return actuator to engage with the priming lever and move it back from its second position to its first position (i.e. from the position away from the mouthpiece illustrated in Figure 1(c) to the position adjacent the mouthpiece illustrated in Figure 1(b));
- and

- movement of the priming lever operates the indexing mechanism for moving a still unused and unopened pocket of powder into line with a dispensing mechanism such that, with subsequent priming of the device, the powder of that pocket is dispensed for inhalation.

- 8.4 None of claims 1 of each of auxiliary requests 14 to 18 includes these two features. In particular, only claim 1 of auxiliary request 16 specifies that the priming lever is adjacent to the mouthpiece at the first position, but said claim does not include the mouthpiece cover and the engagement with the priming lever.
- 8.5 Hence auxiliary requests 14 to 18 do not comply with Article 123(2) EPC.
- 9. Auxiliary request 19 - added subject-matter
 - 9.1 At least for the reasons set out in the above section 6. (missing movable supports for the two carriers), claim 1 of auxiliary request 19 comprises added subject-matter.
- 10. Auxiliary request 20 - added subject-matter
 - 10.1 As a basis for the amendment, the proprietor referred to passages of the embodiment described starting on page 10, line 25. In that embodiment, the supports are for carriers with a particular structure (see page 10, lines 27 to 29, and page 11, lines 15 to 18) and the prodger members are "movable towards and away from the second side surface of a supported first carrier between a retracted and an extended position" (page 10, lines 29 to 31, and page 11, lines 19 to 20). That is, the embodiment indicated as a basis only discloses the features added to claim 1 together with closely-related features of the supports and of the prodger members. Claim 1 of auxiliary request 20 does not comprise these features, and thus comprises added subject-matter.

11. Auxiliary request 21 - added subject-matter

11.1 The passages of the description cited by the proprietor do not provide a basis for a "pair of disc-shaped casing halves". The description only presents the carrier as disc-shaped (see page 25, lines 10 to 12). The casing halves shown in Figures 8 and 13 (see also Figures 1(a)-1(c)) are not disc-shaped. Hence auxiliary request 21 does not comply with Article 123(2) EPC.

12. Auxiliary request 22

12.1 The feature added to claim 1 of auxiliary request 22 as compared with claim 1 as granted is disclosed in D2 (see D2a, top cover 172 and bottom cover 174 on page 47, lines 11 to 14, and Fig. 10i). Hence the subject-matter of claim 1 is not novel over D2.

13. Auxiliary request 23 - inventive step starting from D3

13.1 D17 is mentioned in column 4, line 13 of D3. D17 was admitted into the proceedings by the Opposition Division, which considered that it was *prima facie* relevant for the reasons explained under point 42 of the appealed decision. Hence the Opposition Division exercised its discretion in accordance with the correct criteria and in a reasonable way. D17 is thus part of the appeal proceedings.

13.2 D3, in view of the citation of D17, anticipates the following features of claim 1 (see passages and explanations provided in square brackets):

A device for dispensing individual doses of powder from respective pockets of a carrier [column 3, lines 62 to 65 and column 4, lines 12 to 13 of D3 refer to

use of the dose indicating device of D3 in connection with the Turbuhaler® as described in D17; D17 discloses a device suitable for dispensing individual doses of powder from respective perforations of a perforated membrane 4 (page 1, lines 3 to 6, and page 8, lines 19 to 21 of D17; see also Figures 1 to 3); once one or more perforations are loaded with a dose of powder and inserted into the air conduit 6, the perforations retain the powder until the inhalator is activated by inhalation (see page 3, lines 7 to 9; page 5, lines 5 to 20, and page 7, lines 26 to 34 of D17); a perforation thus defines a pocket within the meaning of claim 1], the device including:

- an indexing mechanism for indexing the carrier between respective pockets [see page 5, lines 5 to 12, and page 8, line 33 to page 9, line 3 of D17, noting also that a single perforation may contain a dose to be dispensed according to page 8, lines 19 to 21; the indexing action is correspondingly disclosed in column 3, line 62 to column 4, line 43 of D3];
- a first counter ring having an indication of unit counts on a first display surface [outer digit disc 22 in Figures 6 and 7 of D3, see also column 6, lines 8 to 21],
- the first counter ring being rotatable about a counter axis [see Figures 6 and 7 of D3];
- a second counter ring having an indication of tens counts on a second display surface [inner digit disc 23 in Figures 6 and 7 of D3, see also column 6, lines 8 to 23],
- the second counter ring being rotatable about the counter axis [see Figures 6 and 7 of D3]; and
- an intermittent-motion mechanism for driving the second counter ring from the first counter ring and rotating the second counter ring between consecutive tens counts when the first counter ring rotates between two

predetermined consecutive unit counts [gear wheel 24 interacting with the inner tooth of digit disc 22 in Figures 6 and 7 of D3, causing an intermittent motion of digit disc 23; see also column 6, lines 15 to 21], the first counter ring being driven with the indexing mechanism [see column 4, lines 2 to 43 of D3, describing the coupling of the manoeuvring mechanism A with the first cylinder 1 and of the first cylinder 1 with the second cylinder 2, the second cylinder 2 thus being part of the indexing mechanism; see also Figure 7 and column 6, lines 62 to 65, describing how a driving arm 21 in the second cylinder 2 co-acts with the teeth 22a of the outer digit disc 22; the disc 22 is thereby driven with the indexing mechanism], the first and second counter rings being positioned one within the other [see column 6, lines 9 to 12], with the first and second display surfaces adjacent each other [see column 5, line 65 to column 6, line 2 in view of Figures 6 and 7], wherein the first and second display surfaces are generally planar and perpendicular to the counter axis [see Figures 6 and 7 and column 5, lines 65 to 67, the bottom surfaces of the digit discs being planar and perpendicular to the axis of rotation of the discs].

- 13.3 The proprietor submitted that the disclosure of D3 was limited to the specific inhaler shown in Figure 10 of D3, and that D3 referred to D17 in the section discussing the prior art (column 1, line 32 of D3). However, D17 is referred to again in the section of D3 entitled "Detailed description of the drawings". In particular, D3 discloses that the dose indicating device according to the invention is intended to be used in connection with the Turbuhaler® inhalator, and that the Turbuhaler® is described in D17 (see column 3, lines 62 to 65 and column 4, lines 12 to 13). This

represents a specific reference to D17, regardless of whether D3 states that the content is incorporated by reference or that the reference is to the whole document rather than to a specific section.

13.4 The proprietor argued that even if D3 were construed in view of D17, it did not disclose a carrier with pockets, since in the inhaler of D17 it was the plate 13 that prevented the active compound from passing through the perforations of the membrane as described on page 6, lines 34 to 38 of D17. However, this passage of D17 must be read in its context: the plate 13 prevents the active compound from passing through the membrane's perforations while the perforations are being loaded using scrapers 15 which press against the membrane (see page 5, lines 22 to 26, and page 6, lines 18 to 38 as well as Figures 2 and 3). Once the active compound is loaded, it also remains in the respective perforations when the membrane is rotated and the perforations are placed in the air conduit 6. It is only upon activation by the air flow generated by the patient's inhalation that the active compound is released from the perforations, entrained upon inhalation and carried through the nozzle 2 (see e.g. page 3, lines 7 to 9; page 5, lines 15 to 20, and page 7, lines 26 to 34 of D17). Hence the membrane with perforations anticipates a carrier with pockets within the meaning of claim 1, and D3 in view of the citation of D17 anticipates features 1A and 1B of claim 1 of auxiliary request 23.

13.5 It follows that the only feature distinguishing the subject-matter of claim 1 from the device disclosed by D3 in view of D17 is that the intermittent-motion mechanism is a Geneva mechanism. In D3, the intermittent motion is instead achieved using the gear

wheel 24, which is rotated by a tooth provided on the inside of the outer disc 22 (column 5, lines 55 to 65 and column 6, lines 3 to 6 and 15 to 21).

- 13.6 The proprietor did not submit any technical effect associated with this distinguishing feature. The contested patent states in paragraph [0111] that the Geneva mechanism provides "a particularly effective way of allowing the tens counter ring to be incremented as required", without providing further details. No advantage compared with the mechanism with the gear wheel 24 used in D3 is apparent. The problem to be solved when starting from D3 can thus be formulated as providing an alternative to the intermittent-motion mechanism used in D3 for driving the second counter ring from the first counter ring.
- 13.7 D5 is a textbook entitled "Mechanisms for Intermittent Motion", and its chapter 9 is completely dedicated to Geneva mechanisms, which are presented in the Introduction on page 127 as "one of the earliest of all intermittent motion mechanisms" and "probably still the most commonly used".
- 13.8 The person skilled in the art, faced with the above problem and using their common general knowledge as reflected in D5, would replace the gear wheel 24 of D3 by a Geneva wheel. This does not require any further modifications, since a Geneva wheel can also be driven by the inner tooth of the digit disc 22. Hence the person skilled in the art starting from D3 and using common general knowledge would arrive at a device anticipating the subject-matter of claim 1 without using inventive skill.
- 13.9 It follows that auxiliary request 23 is not allowable.

14. Auxiliary request 24 - inventive step starting from D3
- 14.1 D3 discloses that the digit disc 23 is positioned within the digit disc 22 (see Figure 6 and column 6, lines 9 to 10). The digit disc 22 has an inner tooth for engaging the gear wheel 24. Upon modification using common general knowledge as set out above in connection with auxiliary request 23, this inner tooth would instead engage a Geneva wheel. The inner tooth can be regarded as a pin as recited in claim 1 of auxiliary request 24.
- 14.2 Upon modification, the Geneva wheel would be at the same position as the gear wheel 24 in D3 and be rotatable about the same axis (see Figures 6 and 7 of D3). This axis of rotation is an axis "offset from the counter axis" as required by claim 1. The digit disc 23 comprises teeth which co-act with the gear wheel 24 / the Geneva wheel upon its modification (see column 5, lines 60 to 62 and Figure 7).
- 14.3 Therefore, when modifying D3 in order to provide an alternative to the intermittent-motion mechanism used in D3, the person skilled in the art would arrive at a device anticipating all the features of claim 1 of auxiliary request 24. It follows that the subject-matter of claim 1 of auxiliary request 24 is not inventive.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar:

The Chair:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated