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**Datasheet for the decision
of 22 February 2024**

Case Number: T 1773/22 - 3.2.03

Application Number: 12759448.9

Publication Number: 2756241

IPC: F25D23/02, F25D23/06

Language of the proceedings: EN

Title of invention:

A COOLING DEVICE COMPRISING AN INSULATION MATERIAL THAT IS PROVIDED TO BE DISTRIBUTED HOMOGENEOUSLY IN THE INSULATION VOLUME

Patent Proprietor:

Arçelik Anonim Sirketi

Opponent:

Liebherr-Hausgeräte Ochsenhausen GmbH

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 84
RPBA 2020 Art. 13(2)

Keyword:

Novelty - main request, auxiliary requests (no)
Late-filed substantiation of inventive step objection -
admitted (yes)
Inventive step - auxiliary requests (no)
Claims - clarity - auxiliary requests (no)
Late-filed request - submitted during oral proceedings -
admitted (no)

Decisions cited:

G 0003/14, R 0006/20, T 0596/07, T 0172/17, T 0574/17,
T 0882/17, T 1259/17, T 1042/18, T 1776/18, T 2866/18,
T 0339/19, T 2295/19, T 0487/20, T 0557/21, T 0732/21,
T 1686/21, T 1800/21, T 1575/22, T 1662/22

Catchword:



Beschwerdekammern

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Case Number: T 1773/22 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 22 February 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 May 2022 concerning maintenance of the
European Patent No. 2756241 in amended form.**

Composition of the Board:

Chairman C. Herberhold
Members: B. Goers
N. Obrovski

Summary of Facts and Submissions

- I. European patent No. 2 756 241 relates to a cooling device with an insulation volume filled with an insulation material and in which at least one perforated regulating member having a plurality of holes is placed into the insulation volume.
- II. In the impugned decision, the opposition division concluded that the patent as amended on the basis of auxiliary request 10 then on file complied with the requirements of the EPC.
- III. The patent proprietor ("appellant") appealed against this decision.
- IV. In the oral proceedings before the Board the final requests were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the patent be maintained as amended on the basis of one of auxiliary requests 1 to 10 filed with the statement of grounds of appeal or auxiliary request 11 filed during the oral proceedings before the Board.

The opponent ("respondent") requested that the appeal be dismissed.

- V. The following document is relevant to this decision.

D1: DE 199 23 382 A1
- VI. Wording of the claims relevant for this decision.

(a) Independent product claim 1 of the main request (patent as granted) reads (feature numbering added in "[]"):

"[1.1] A cooling device (1) comprising a body (2) having an inner wall (3), an outer wall (4), an insulation volume (5) between the inner wall (3) and the outer wall (4), an insulation material (6) filled into the insulation volume (5),
[1.2] and characterised by at least one perforated regulating member (7)
[1.3] that is placed into the insulation volume (5) for preventing the formation of gaps by regulating the flow of the insulation material (6) during it being filled into the insulation volume (5),
[1.4.1] wherein said regulating member (7) has a plurality of holes and
[1.4.2] is configured and is placed into the insulation volume (5) in such a manner that insulation material (6) during it being filled into the insulation volume (5) splits into smaller pieces by passing through said holes of the regulating member (7)."

(b) Claim 1 of **auxiliary request 1** corresponds to claim 1 of the main request with the following additional feature:

"... and the regulating member (7) is fastened onto the inner wall (3) from its edges."

(c) Claim 1 of **auxiliary request 2** corresponds to claim 1 of the auxiliary request 1 with the following additional features marked in bold:

"... wherein the regulating member (7) is placed on the face of the inner wall (3) facing the insulation volume (5), and the regulating member (7) is fastened onto the inner wall (3) from its edges, and the insulation material (6) is filled into the insulation volume (5) through an opening (O)."

(d) Claim 1 of **auxiliary request 3** corresponds to claim 1 of the main request with the following additional features:

"... and characterized by the regulating member placed into the insulation volume so as to be almost parallel to the inner wall and the outer wall."

(e) Claim 1 of **auxiliary request 4** corresponds to claim 1 of the main request with the following additional features:

"... characterized by the regulating member (7) placed at the ceiling (T) section of the inner wall (3), throughout the ceiling (T)."

(f) Claim 1 of **auxiliary request 5** corresponds to claim 1 of the main request with the following additional features:

"... and characterized by the body (2) having at least one intermediary wall (8) that provides the body (2) to be divided into compartments and the regulating member (7) placed into the intermediary wall (8)."

(g) Claim 1 of **auxiliary request 6** (which is identical to claim 1 of the patent as maintained according to the decision under appeal) corresponds to claim 1

of the main request with the following additional features:

"... and characterised in that two regulating members (7) are placed at intervals between the inner wall (3) and the outer wall (4) so as to be parallel to each other, that one of the regulating members (7) is closer to the inner wall (3), and the other to the outer wall (4), and that the holes on the regulating member (7) that is closer to the inner wall (3) are smaller than the holes on the regulating member (7) that is closer to the outer wall (4)."

(h) Claims 3, 4, 6, 7 and 9 of auxiliary request 6 read:

"3. A cooling device (1) as in Claim 1 or 2, characterized by the regulating member (7) placed into the insulation volume (5) so as to be almost parallel to the inner wall (3) and the outer wall (4)."

"4. A cooling device (1) as in anyone of the above Claims, characterized by the regulating member (7) being net-shaped."

"6. A cooling device (1) as in anyone of the above claims, characterized by the body (2) having at least one intermediary wall (8) that provides the body (2) to be divided into compartments and the regulating member (7) placed into the intermediary wall (8)."

"7. A cooling device (1) as in Claim 6, characterized by two regulating members (7), each placed at each one of the faces of the intermediary wall (8) facing both compartments."

"9. A cooling device (1) as in anyone of the above claims, characterized by two regulating members (7) placed so as to be spaced apart from each other."

(i) Auxiliary requests 7 to 11 include independent claim 1 of auxiliary request 6 and the following dependent claims of auxiliary request 6:

- Auxiliary request 7: claims 2 to 6 and 8 (as claims 2 to 7)
- Auxiliary request 8: claims 3 to 5 and 8 (as claims 2 to 5)
- Auxiliary request 9: claims 3 to 5 (as claims 2 to 4)
- Auxiliary request 10: claims 3 and 5 (as claims 2 and 3)
- Auxiliary request 11: claims 2 and 4 to 8 (as claims 2 to 7)

VII. The appellant's arguments relevant to the present decision can be summarised as follows.

(a) Main request - novelty

The subject-matter of claim 1 was novel over D1. D1 did not disclose a regulating member having the functional features [1.3] and [1.4.2] of claim 1.

(b) Auxiliary requests 1 and 2 - admittance of inventive-step objections

The inventive-step objections against auxiliary requests 1 and 2 should not be admitted into the appeal proceedings as they had not been part of the opposition proceedings and had been substantiated only during the oral proceedings before the Board.

(c) Auxiliary requests 1 to 5 - novelty and inventive step

The subject-matter of claim 1 of any of these requests was novel over D1 and involved an inventive step starting from D1 in combination with common general knowledge.

(d) Auxiliary requests 6 to 10 - clarity

The claims were sufficiently clear for a skilled person. Due to the wording "at least one regulating member" in feature [1.2] of claim 1, no inconsistency arose from the definition of several members in dependent claim 7 or 9. The features of the dependent claims had not been amended compared to the claims as granted. From the description and the figures, the skilled person could understand the claims.

(e) Auxiliary request 11 - admittance

The request should be admitted as a reaction to the objections under Article 84 EPC against dependent claims 3 and 9 of auxiliary request 6.

VIII. The respondent's arguments relevant to the present decision can be summarised as follows.

(a) Main request - novelty

The subject-matter of claim 1 was not novel over at least the sieve and grid embodiments disclosed in D1.

(b) Auxiliary requests 1 and 2 - admittance of inventive-step objections

The objections should be admitted into the proceedings. It was only possible to formulate an inventive-step attack once the distinguishing features were established. Not admitting the attacks violated the respondent's right to be heard and its legitimate expectations as also apparent from T 596/07.

(c) Auxiliary requests 1 to 5 - novelty and inventive step

The subject-matter of claim 1 of all these requests was not novel over D1. In addition, claim 1 of auxiliary requests 1, 2 and 5 did not involve an inventive step starting from D1 in combination with common general knowledge.

(d) Auxiliary requests 6 to 10 - clarity

At least claims 3, 4, 7 and 9 of auxiliary request 6 and the corresponding claims of auxiliary requests 7 to 10 were not in line with the requirements of Article 84 EPC. The use of the definite article and the singular ("the regulating member") in claims 3 and 4 was in contradiction to the definition of two members in claim 1. Furthermore, the two members in claim 1 had different properties and it was not clear which member was addressed in the dependent claims. In addition, a lack of clarity arose from the "almost parallel" definition in claim 3 and by the further definition of two regulating members in claims 7 and 9.

(e) Auxiliary request 11 - admittance

The request should not be admitted for being late filed without special circumstances present and being *prima facie* not allowable.

Reasons for the Decision

1. Main request - novelty

The Board agrees with the appealed decision that the subject-matter of claim 1 of the main request is not novel over the disclosure of D1.

- 1.1 D1 discloses (see Figures 1 and 2) a cooling device with a body comprising inner and outer walls and an insulation volume formed in between. The volume is filled with a foamed and cured insulation material, a process step supported by regulating members ("Mittel [means] 25") also being specified for during filling of the insulation volume.

The only features of claim 1 in dispute related to the regulating member defined in features [1.2], [1.3], [1.4.1] and [1.4.2] of claim 1. These features encompass both structural and functional definitions.

These definitions are anticipated by the disclosure of D1, as is explained in the following paragraphs.

1.2 Structural features of the regulating member

The only structural features of the regulating member defined in claim 1 are that the member is "perforated" and that it "has a plurality of holes" (features [1.2] and [1.4.1]).

- 1.2.1 Whether these "holes" have to correspond to the perforations implied by the term "perforated regulating member" in feature [1.2] is not defined in claim 1. The

impugned patent does not disclose a single example of how a regulating member is manufactured and how perforations or holes are formed. It is merely stated that the member can be "web-shaped" or "net-shaped" (paragraphs [0007] and [0010]; see also Figure 2). As to the interpretation of the term "perforated", it is common ground that the term encompasses "having a plurality of holes" (as shown by the appellant by reference to the Merriam-Webster dictionary). Contrary to the appellant's argument, the term "perforated" does not require a homogeneous distribution of the perforations.

To conclude, the Board considers the feature "perforated member having a plurality of holes" equivalent to "member having a plurality of holes".

1.2.2 D1 discloses the following embodiments of a regulating member:

- a non-woven material ("Vliesmaterial")
- an open-cell polymeric foam material
- a grid or sieve producible by injection moulding (column 3, lines 6 to 15)

At least the grid and the sieve embodiments of D1 fall within the definition "perforated member having a plurality of holes", thus anticipating features [1.2] and [1.4.2] under novelty.

1.3 Functional features of the regulating member

The regulating member is further defined in claim 1 by the following functional features:

- feature [1.3]: preventing the formation of gaps by regulating the flow of the insulation material during it being filled into the insulation volume
- feature [1.4.2]: placed into the insulation volume in such a manner that insulation material during it being filled into the insulation volume splits into smaller pieces by passing through said holes of the regulating member

1.3.1 It is apparent that these functions depend on the interaction of the holes/perforations of a particular size and distribution with the properties of the insulation material (*inter alia*, viscosity and expansion speed). Even if described in D1 with a different wording and with a focus on other partial effects (see, for example, column 2, lines 1 to 4 where it states that the material is able to penetrate and wet the inner wall), the Board has no doubt that the functional features [1.3] and [1.4.2] are also disclosed in D1, in particular for the grid or sieve embodiments of the regulating members. The foam material in D1 is a foam material typically used for insulation in the technical field which flows during expansion, i.e. in its uncured state, through the holes and reaches the walls (see the passage cited above). The final product of D1 is therefore not distinguishable from that defined in claim 1.

1.3.2 The appellant argues that penetration of insulation material into [the holes in] the regulating member 25 in D1 did not imply that the insulation material was split into smaller pieces or would also pass through the holes, but this is not convincing. D1 (column 1, lines 45 to 60) describes that the retardation of the foam expansion allows for better distribution and degassing before the insulation material finally

reaches the wall. The term "Benetzung" (wetting) applies, contrary to the appellant's understanding, not only to liquids but also to foam prior to curing. The regulating member thus only retards the foam distribution with its defined flow resistance (see column 3, lines 6 to 10) and does not prevent foam from exiting the holes and wetting the wall on the other side. This is even the case if the regulating member is placed directly adjacent the wall. Inevitably, smaller pieces of the insulation material result from the foam passing through the holes/perforations of the regulating member.

2. Auxiliary request 1 to 5 - novelty

The respondent raised objections of lack of novelty over the disclosure of D1 against the subject-matter of claim 1 of all auxiliary requests 1 to 5.

For the following reasons, the Board comes to the conclusion that the subject-matter of claim 1 of auxiliary requests 1, 2 and 5 is novel whereas the subject-matter of claim 1 of auxiliary requests 3 and 4 is not novel.

2.1 Auxiliary requests 1 and 2

The only feature in question for novelty of claim 1 of both auxiliary requests 1 and 2 is that "the regulating member is fastened onto the inner wall from its edges".

The further features added to claim 1 of auxiliary request 2 are undisputedly disclosed either explicitly ("member placed on the face of the inner wall") or

implicitly ("opening" for filling the insulation material into the volume) in D1.

- 2.1.1 The respondents argued that the feature "fastened onto the inner wall from its edges" was anticipated by the cured insulation material in which the regulating member is finally embedded. They concluded that the insulation material thus connects, *inter alia*, the edges with the inner wall.

This is not persuasive.

- 2.1.2 If considering only the wording, the feature "fastened onto the inner wall from its edges" implies that a fastening means is present having a fastening function **at the edges** of the regulating member. Therefore, the skilled person understands that distinct technical means must be interacting with the edges of the regulating members. However, the continuous cured mass of the insulation material surrounding the member is not a distinct technical means. Instead, this cured mass fastens the member at any point.

- 2.1.3 This understanding of a distinct fastening means is further in line with the embodiments described in the description, in which the fastening of the regulating member to the inner wall is done **before** the insulation material is filled into the volume (see patent, paragraphs [0021] and [0024]). The fastening of the members to the walls before the filling step is also inherently necessary to accomplish the functional features [1.3] and [1.4.2] during the filling step.

Thus, the feature "is fastened onto the inner wall from its edges" is to be construed such that the member is (mechanically) fastened to the inner wall before being

filled, i.e. independent of the presence of the insulation material in the volume. The insulation material in D1 thus cannot be the means for fastening.

- 2.1.4 D1 discloses spacers formed integrally with the grids or sieves as the means to fasten the members to the inner wall (column 3, lines 15 to 22). It is not explicitly disclosed in D1 that these spacers be arranged at the edges of the regulating members. In fact, no details about the location of the spacers relative to the members are disclosed in D1.

The conclusion in the decision under appeal that the spacers are "**necessarily** placed at the edges of the regulating member" (emphasis added) and that they are thus implicitly disclosed in D1 is not convincing. For these embodiments described in D1 there is no technical limitation as to where, relative to the surface area of the grid or sieve, the disclosed spacers are to be arranged. While their placement at the edge is one option, the spacers could as well also be arranged only in the proximity of the edges or even in a more central portion of the grid or sieve. Therefore, while D1 discloses that the regulating member is "fastened onto the inner wall", the feature "fastened **from its edges**" is not clearly and unambiguously disclosed in D1.

Consequently, the subject-matter of claim 1 of auxiliary requests 1 and 2 is novel.

Whether the subject-matter of claim 1 of these requests involves an inventive step is discussed in point 3 below.

- 2.2 Auxiliary request 3

Claim 1 of auxiliary request 3 encompasses the further restriction that the regulating member is "almost parallel" to the inner and outer wall.

According to D1 (column 3, lines 6 to 22) the regulating member in the form of a sieve or grid is fastened to the inner wall via spacers at a **defined** distance to the inner wall. This defined distance corresponds to a parallel arrangement of the regulating member relative to the inner (or outer) wall (see also Figure 2).

Contrary to the appellant's argument, it is not persuasive that an inclination at a defined angle between the inner wall and the regulating member is also encompassed in D1 by the term "defined distance". According to the common technical understanding of the skilled person a "defined distance" refers to a particular (constant) value. If an embodiment with varying distance were intended to be encompassed in D1 this would have required supporting information such as an indication of a mean distance, the distance at different edges or an inclination angle. No such information is provided in D1. Also, in the embodiments of Figures 2 and 3, only parallel arrangements of the walls (17 and 22) and the regulating members (25) are shown.

Claim 1 of auxiliary request 3 is thus not novel.

2.3 Auxiliary request 4

The only further feature added to the subject-matter of claim 1 of auxiliary request 4 compared to the main request ("the regulating member be placed at the ceiling section of the inner wall, throughout the

ceiling") does not establish a further distinction over D1.

D1 discloses in column 5, lines 2 to 8 and in claim 3 that the regulating means can be on the complete surface of the inner and/or outer walls. The term inner and outer walls in D1 includes the bottom and ceiling walls (see column 3, lines 56 to 65).

Claim 1 of auxiliary request 4 is thus likewise not novel.

2.4 Auxiliary request 5

The subject-matter of claim 1 of auxiliary request 5 further encompasses the feature: "at least one intermediary wall that provides the body to be divided into compartments and the regulating member placed into the intermediary wall". The "intermediary wall" also forms an insulation volume which subdivides an inner space formed by the body of the cooling device into different compartments (see patent, Figure 3, part 8). This wall can be used, for example, to separate the fridge and freezer compartments of a cooling combination device.

D1 does not disclose such an intermediary wall. While D1 makes reference to refrigeration devices, such as refrigerators and freezers ("Kältegeräte, wie Kühl- und Gefriergeräte", see D1, column 1, lines 8 to 15), this statement is not a clear and unambiguous disclosure of a fridge-freezer combination, contrary to what was argued by the appellant, and just lists devices encompassed by the term "cooling device".

The subject-matter of claim 1 of auxiliary request 5 is thus novel.

3. Admittance of the inventive-step objections against auxiliary requests 1 and 2
 - 3.1 During the oral proceedings before the Board, after announcement of the Board's conclusion that the subject-matter of claim 1 of auxiliary requests 1 and 2 was novel, the respondent substantiated for the first time inventive-step objections against auxiliary requests 1 and 2. The respondent relied on D1 as the starting point, which it had used for its novelty objections against auxiliary requests 1 and 2. The respondent considered that the now established distinguishing feature (fastened **from the edges**, see point 2.1 above) was obvious in view of common general knowledge as a mere routine design choice without any additional technical effect.
 - 3.2 The respondent submitted that it had only been established in the oral proceedings before the Board that the subject-matter of claim 1 of auxiliary requests 1 and 2 was novel over D1. Referring to T 597/07, it argued that if an inventive-step objection was raised on the basis of a document also used for a novelty objection, it was not possible to substantiate the inventive-step objection before the novelty objection had been decided. The respondent further alleged that this inventive-step objection not being admitted violated its right to be heard. According to the respondent, the inventive-step objections were also *prima facie* convincing, and their admittance was not detrimental to procedural economy.

- 3.3 The appellant requested that these inventive-step objections not be admitted into the appeal proceedings as there were no exceptional circumstances within the meaning of Article 13(2) RPBA. The respondent should have been aware of more recent case law which had established that the reasoning underlying T 597/07 could not be generalised and applied to questions of admittance under the Rules of Procedure of the Boards of Appeal.
- 3.4 The Board considers that T 597/07, invoked by the respondent, concerns whether a fresh ground for opposition has been raised. This question must indeed be distinguished from whether there has been an amendment to a party's appeal case under the RPBA (see T 1042/18, Reasons 4.8). Whether the documents taken as starting points for new inventive-step objections were previously used for objections of lack of novelty has no bearing for determining whether these inventive-step objections constitute an amendment to an opponent's appeal case under Article 13(2) RPBA (see T 2866/18, Reasons 4.7, with multiple further references; see also T 557/21, Reasons 6.3.4, fifth paragraph). In the current case, it was not disputed that the inventive-step objections starting from document D1 had not been substantiated before the oral proceedings before the Board. Substantiating them for the first time in the oral proceedings before the Board thus constitutes an amendment of the respondent's appeal case, the admittance of which is subject to the Board's discretion under Article 13(2) RPBA.
- 3.5 The respondent also errs in saying that its right to be heard requires that its late substantiation of the inventive-step objections starting from document D1 be admitted. The right to be heard requires, in the

context of admittance, that the party concerned have the opportunity to express itself sufficiently on the criteria for the admittance of the late-filed submission and, possibly, that the decision on admittance be not arbitrary or manifestly illegal (see R 6/20, Reasons 3.1.2). It does not encompass any right to have an amendment admitted. The latter would also not be compatible with the boards' discretionary power to decide on the admittance of amendments under the RPBA, which is a reflection of their discretionary power under Article 114(2) EPC (see T 1776/18, Reasons 4.6.3).

- 3.6 Having said this, the Board decided to admit the inventive-step objections starting from document D1 into the appeal proceedings for the following reasons.
- 3.6.1 At the third level of the convergent approach, the boards may also rely on criteria applicable at the second level of the convergent approach, i.e. as set out in Article 13(1) RPBA (T 172/17, Reasons 5.4, third paragraph, with reference to the explanatory remarks in CA/3/19, points 59 and 60; T 732/21, Reasons 6). This, in turn, provides the possibility of relying - when applying Article 13(2) RPBA - on the criteria in Article 12(4) to (6) RPBA, which are referred to in Article 13(1) RPBA (T 487/20, Reasons 2.2). The latter concerns, for example, the complexity of the amendment, which is explicitly referred to as an admittance criterion in the non-exhaustive list of criteria under Article 12(4) RPBA and is not mentioned in Article 13(1) RPBA.
- 3.6.2 The Board considers that the assessment of whether there are exceptional circumstances is not separate from the exercise of discretion whether to admit an

amendment under Article 13(2) RPBA. Without prejudice to the differences between these legal provisions, the Board considers the mechanism under Article 13(2) RPBA in that regard similar to the mechanism under Article 12(6) RPBA, which contains the phrases "shall not admit" and "unless the circumstances of the appeal case justify their admittance", the word "admittance" indicating the exercise of discretion. Also under Article 13(2) RPBA, the reference to "unless there are exceptional circumstances" should be understood as "unless there are exceptional circumstances [...] *which justify its admittance*" (see, for example, T 1686/21, Reasons 1.6; T 574/17, Reasons 2.3.10 and T 1662/22, Reasons 3.3, all referring to exceptional circumstances justifying the admittance of the amendment). Not separating the assessment of whether there are exceptional circumstances from the exercise of discretion whether to admit an amendment under Article 13(2) RPBA is consistent with the view that exceptional circumstances can be of a legal nature (with regard to the latter, see T 2295/19, Reasons 3.4.12 to 3.4.14; T 339/19, Reasons 1.3.4; T 1800/21, Reasons 3.4.2 and 3.4.3).

- 3.6.3 The Board further notes that the reasons presented by the party for the late filing of the amendment to its appeal case are an admittance criterion under Article 13(1) RPBA (expressed by the reference to "the party's justification for its amendment"). For assessing whether there are exceptional circumstances under Article 13(2) RPBA, it would be systematically incoherent to use this admittance criterion for anything else than as a criterion for the exercise of discretion. In the Board's view, the term "exceptional circumstances" thus expresses nothing other than how the Board must exercise its discretion when deciding

whether to admit an amendment to a party's appeal case at the third level of the convergent approach in application of criteria under Article 13(1) RPBA in conjunction with Article 12(4) to (6) RPBA, namely that the admittance of amendments must be exceptional at this late stage of the appeal proceedings and in any case more exceptional than under Article 13(1) RPBA.

3.6.4 However, a board is not obliged to use all the criteria referred to in Article 13(1) RPBA when exercising its discretion under Article 13(2) RPBA (see, for example, T 574/17, Reasons 2.3.3). It may limit itself to the admittance criterion concerning the reasons presented by the party for the late filing of the amendment. Whether it is appropriate to do this depends on the circumstances of the case.

3.6.5 As set out in point 3.4 above, in the case at hand, the reasons presented by the respondent for the late filing of the substantiation of its inventive-step objections starting from document D1 do, as such, not justify their admittance. Nevertheless, although parties must plan for the eventuality that their arguments are not considered persuasive, it can be taken into account in favour of the respondent that the Board deviated, on novelty in view of document D1, in the oral proceedings for the first time both from the reasoning in the decision under appeal and its preliminary opinion under Article 15(1) RPBA.

3.6.6 More importantly, the amendment of the respondent's appeal case was not complex. The novelty objection had been based on an alleged implicit disclosure, taking account of common general knowledge, of the additional features in auxiliary requests 1 and 2 in document D1, whereas the inventive-step objection starting from

document D1 was based on the implementation of these features being obvious in view of the same common general knowledge. Hence, the respondent did not rely on any additional evidence for its inventive-step objections. Moreover, the discussion on novelty of whether the spacers are at least implicitly disclosed in D1 as being located such that they fasten the member from the edge is, from a technical perspective, very similar to the discussion on inventive step as to where a skilled person would consider them to be located. Under such circumstances, admitting the inventive-step objections is neither detrimental to procedural economy nor unfair to the appellant.

3.6.7 Furthermore, the Board considered the objections *prima facie* highly relevant to the high degree required under Article 13(2) RPBA (see, on amended claim requests, T 1800/21, Reasons 3.4.7). The Board *prima facie* considered the implementation of the additional features in auxiliary requests 1 and 2 to merely be an obvious choice reflecting the customary practice in the art.

3.6.8 Applying all the above admittance criteria in an overall assessment (see T 1575/22, Reasons 1.3: "Gesamtschau"), the Board considered that there were exceptional circumstances justifying the admittance of the inventive-step objections starting from document D1 into the appeal proceedings under Article 13(2) RPBA.

4. Auxiliary requests 1, 2 and 5 - inventive step

The subject-matter of claim 1 of auxiliary requests 1, 2 and 5 does not involve an inventive step for the following reasons.

4.1 Auxiliary requests 1 and 2

4.1.1 As explained above, the sole distinguishing feature of the subject-matter of claim 1 of auxiliary requests 1 and 2 over D1 is that the spacers are not disclosed as being suitable for fastening the member from its edges. In fact, no information is disclosed in D1 as to where at the regulating members the spacers are located.

4.1.2 The objective technical problem linked to this distinguishing feature is to suitably arrange the spacers for connection with the inner wall at the regulating members.

The appellant argued that due to the flexibility of the grid or sieve and its tendency to bend under the force of the expanding foam, the selection "at the edges" had an advantage to be considered in the technical problem. However, this is not supported by any feature of the claim. Instead, the claimed subject-matter encompasses any kind of flexible and rigid members. Moreover, bending can occur not only near the edges but also at the central part of the members.

The appellant's argument that spacers located at the edge avoided rendering parts of the central perforated part of the regulating member inactive in terms of the functions defined in features [1.3] and [1.4.2] is not persuasive either since it refers to the dimension and distribution of perforations in the members not defined in claim 1. Furthermore, such detrimental effects can occur also when placing the spacers at the edges.

4.1.3 Placing the spacers in D1 at the edges of the regulating member to fasten it from the edges to the

inner wall is thus just of other known alternatives the skilled person selects in a routine design exercise in line with the customary practice in the art and does not involve an inventive step.

4.2 Auxiliary request 5

The provision of an intermediary wall in a cooling device is a common feature in the technical field, e.g. for the combination of a fridge and a freezer in one single body. It is also apparent for a skilled person that such an intermediary wall requires an insulation volume between the compartments as fridges and freezers are operate at different temperatures.

For the partial insulation volume of the intermediary wall as a part of the whole insulation volume of the body, the same problem of achieving a homogenous filling applies (see patent paragraph [0005]).

D1 already points to the provision of a regulating member at all inner surfaces of the volume (column 5, lines 2 to 5: "vollflächig [full-surface area]"). For this reason, the provision of the member also in such an intermediary wall is obvious for a skilled person.

5. Auxiliary requests 6 to 10

5.1 Independent claim 1

Claim 1 of auxiliary requests 6 to 10 is identical to claim 1 of the patent as maintained.

The respondent raised objections under Articles 54, 56, 84 and 123(2) EPC against claim 1 of auxiliary requests 6 to 10.

As the patent proprietor is the sole appellant, the subject-matter of claim 1 of auxiliary requests 6 to 10 (which is identical to claim 1 of the patent as maintained according to the decision under appeal) is subject to the prohibition of *reformatio in peius* (see Case Law of the Boards of Appeal, 10th edition 2022, V.A.3.1.4). The principle of the prohibition of *reformatio in peius* must be taken into account *ex officio* at all stages of the appeal proceedings (T 882/17, Reasons 3.20). Therefore, the objections against claim 1 of auxiliary requests 6 to 10 are not considered by the Board.

5.2 Dependent claims

The patent as maintained according to the decision under appeal has no dependent claims. For this reason, the dependent claims of auxiliary requests 6 to 10 are not subject to the principle of prohibition of *reformatio in peius*.

The respondent raised, *inter alia*, objections of lack of clarity against auxiliary requests 6 to 10. At least dependent claims 3, 4, 7 and 9 of auxiliary request 6 and the corresponding claims of auxiliary requests 7 to 10 (where still present) give rise to issues of lack of clarity and conciseness as outlined in the next paragraphs.

These issues result from the amendments made to claim 1 relative to the version as granted by including a new feature group from the description (see A-Publication,

page 3, paragraph [0013]). They are thus objectionable under Article 84 EPC (see G 3/14, catchword).

As none of auxiliary requests 6 to 10 is, for the reasons given below, allowable under Article 84 EPC, the respondent's request that auxiliary requests 7 to 10 not be admitted into the appeal proceedings does not need to be addressed.

- 5.2.1 Dependent claim 3 of auxiliary request 6 (a claim of equivalent subject-matter is present in auxiliary requests 7 to 10)

Claim 1 was amended compared to the version as granted by the additional feature "two regulating members are placed at intervals between the inner wall and the outer wall so as to be parallel to each other". Claim 3 defines that the regulating members are "almost parallel" to the inner and outer wall. Therefore, not only is the definition of claim 3 redundant to that of claim 1 as amended (lack of conciseness), the relative definition "almost parallel" in claim 3 is also in conflict with the definition "parallel" in claim 1. This conflict is introduced by the amendment in claim 1.

- 5.2.2 Dependent claim 4 of auxiliary request 6 (a claim of equivalent subject-matter is present in auxiliary requests 7 to 9)

Claim 1 defines **two** regulating bodies. The two regulating members are defined with different properties in claim 1 with the regulating member closer to the inner wall having smaller holes. Contrary to this, in dependent claims 4 the additional feature

"net-shaped" is defined for "**the** regulating member", i.e. using the definite article and the singular.

It is thus not clear which of the two regulating members of claim 1 the features in the dependent claims 4 refer to, or whether even both members are addressed, contrary to the requirements of Article 84 EPC.

5.2.3 Dependent claims 7 and 9 of auxiliary request 6 (auxiliary request 6 only)

In dependent claims 7 and 9 "two regulating members" are defined without back-reference to the two members of claim 1. As concluded in the appealed decision, it is ambiguous whether these features address the same members of claim 1 or additional members, and the requirements of Article 84 EPC are not complied with.

5.3 As each of auxiliary requests 6 to 10 comprises at least one dependent claim which does not fulfil the requirements of Article 84 EPC as a consequence of the amendment made to independent claim 1, none of these auxiliary requests is allowable.

6. Auxiliary request 11 - admittance

Auxiliary request 11 corresponds essentially to auxiliary request 6 with dependent claims 3 and 9 being deleted. It was submitted by the appellant during the oral proceedings before the Board after the announcement of the Board's conclusion that auxiliary requests 6 to 10 did not comply with the requirements of Article 84 EPC.

The deletion of dependent claims is an amendment of the

appeal case (see T 1259/17, Reasons 2.1 to 2.3.3). The reasons presented by the party for the late filing of this amendment, i.e. that the filing of auxiliary request 11 constituted a legitimate reaction to the objections against dependent claims 3 and 9 of auxiliary request 6, do not speak in favour of admittance. Clarity objections against dependent claims had already been raised in the opposition proceedings and were explicitly set out for all requests concerned in the Board's communication under Article 15(1) RPBA. Moreover, auxiliary request 11 does not address - and hence cannot overcome - the clarity objections against claims 4 and 7 of auxiliary request 6 (see points 5.2.2 and 5.2.3 above), which apply equally to claims 3 and 6 of auxiliary request 11.

For these reasons, the Board concludes that there are no exceptional circumstances justifying the admittance of the amendment under Article 13(2) RPBA.

7. To conclude, the appellant's claim requests are either not allowable or not admitted into the appeal proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

C. Herberhold

Decision electronically authenticated