

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 4 June 2024**

**Case Number:** T 2587/22 - 3.2.03

**Application Number:** 10737094.2

**Publication Number:** 2454416

**IPC:** E01C5/22, E01C9/08

**Language of the proceedings:** EN

**Title of invention:**  
SURFACES USING STRUCTURAL MODULES

**Patent Proprietor:**  
Permavoid Limited

**Opponent:**  
Hewitech GmbH & Co. KG

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54, 56, 84, 123(2), 123(3)  
EPC R. 80  
RPBA 2020 Art. 12(4), 13(2)

**Keyword:**

Novelty - main request (yes)

Claims - clarity - main request (yes)

Amendments - extension beyond the content of the application  
as filed (no) - broadening of claim (no)

Amendment occasioned by ground for opposition - (yes)

Amendment to case - amendment admitted (no)

Amendment after summons - exceptional circumstances (no) -  
taken into account (no) - cogent reasons (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 2587/22 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 4 June 2024**

**Appellant:**  
(Opponent)

Hewitech GmbH & Co. KG  
Am Langenhorster Bahnhof 16  
48607 Ochtrup (DE)

**Representative:**

Patentanwälte Olbricht Buchhold Keulertz  
Partnerschaft mbB  
Neue Mainzer Straße 75  
60311 Frankfurt am Main (DE)

**Respondent:**  
(Patent Proprietor)

Permavoid Limited  
Cinnamon House  
Crab Lane  
Fernhead, Warrington WA2 0XP (GB)

**Representative:**

Dehns  
St. Bride's House  
10 Salisbury Square  
London EC4Y 8JD (GB)

**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
30 September 2022 concerning maintenance of the  
European Patent No. 2454416 in amended form.**

**Composition of the Board:**

**Chairman** C. Herberhold  
**Members:** R. Baltanás y Jorge  
N. Obrovski

## **Summary of Facts and Submissions**

- I. European patent No. 2 454 416 B1 relates to "*Surfaces using structural modules*".
- II. An opposition was filed against the patent based on Article 100(a) EPC in conjunction with Articles 54 and 56 EPC.
- III. The current appeal is against the interlocutory decision of the opposition division in which the European patent was found to meet the requirements of the EPC in view of the amendments made in the main request filed during the oral proceedings.
- IV. This decision was appealed by the opponent (the appellant).
- V. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board indicated its preliminary opinion.
- VI. Requests

At the end of the oral proceedings, the following requests were maintained.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the case be remitted to the opposition division for consideration of auxiliary requests 1 to 15.

VII. Claim 1 as maintained (main request), including a numbering of its features based on that of the contested decision, reads as follows (amendments with respect to the originally filed claim **14** are marked in bold; amendments with respect to granted claim **1** are underlined):

- 1 ~~[An array of interconnected structural modules which forms an area]~~ A walkway surface suitable for walking on and/or a traffic surface for travelling directly over by a vehicle,
- 2 the surface comprising an array (405) of interconnected structural modules (10, 406)
- 3 and a flexible surface layer (407),
- 4 wherein each structural module comprises a flat top wall (11)
- 5 and a bottom wall (12) spaced therefrom by side walls (13) so as to define a volume between the top and bottom walls,
- 6 the top wall being provided with a plurality of apertures (17) to permit the flow of liquid into the volume
- 7 and the side walls and / or the bottom wall being provided with apertures (18, 19) to permit the flow of liquid out of the volume,
- 8 ~~[characterised in that a]~~ wherein [a] the flexible surface layer (407) on which a person is to walk or a vehicle is to travel is provided over the top walls of the modules
- 9 without an intervening rigid layer,
- 10 and wherein the size and shape of each aperture in the top wall is such that there is substantially no variation in the flatness of the flexible surface layer.

Independent claim 5 as maintained, including a numbering of its features based on that of the contested decision, reads as follows (amendments with respect to the originally filed claim **19** are marked in bold; amendments with respect to granted claim **8** are underlined):

- 5.1 A method of providing a walkway surface suitable for walking on and/or a traffic surface for travelling directly over by a vehicle
- 5.2 by interconnecting in an array **(405)** a plurality of structural modules **(10, 406)**,
- 5.3 wherein each structural module comprises a flat top wall **(11)**
- 5.4 and a bottom wall **(12)** spaced therefrom by side walls **(13)** so as to define a volume between the top and bottom walls,
- 5.5 the top wall being provided with a plurality of apertures **(17)** to permit the flow of liquid into the volume
- 5.6 and the side walls and / or the bottom wall being provided with apertures **(18, 19)** to permit the flow of liquid out of the volume,
- 5.7 ~~wherein characterised in that~~ a flexible surface layer **(407)** on which a person is to walk or a vehicle is to travel is provided over the top walls of the modules
- 5.8 without an intervening rigid layer,
- 5.9 and wherein the size and shape of each aperture in the top wall is such that there is substantially no variation in the flatness of the flexible surface layer.

VIII. Prior art

The following documents have been cited, both in the statements setting out the grounds of appeal and during the opposition proceedings, and are relevant to this decision:

- D4: "Atlas Design Manual, Section 2, Part 2, Atlantis Ecological Tank", "Copyright @ 2002"
- D6c: Video "30,000 gallon modular, underground rainwater harvesting system | Innovative Water Solutions", filed with a CD-ROM during opposition and also available at the website <https://www.youtube.com/watch?v=YdwKDVzh1cs>, the latter dated 15 May 2009
- D6: Screenshots from D6c

The appellant filed the following further documents of relevance to this decision for the first time with the statement setting out the grounds of appeal:

- D10: WO 2004/042148 A1
- D11: DE 42 39 004 A1

IX. The appellant's arguments on the main request can be summarised as follows.

(a) Admittance of the main request

The respondent filed the main request during the oral proceedings before the opposition division, although it had had the opportunity of doing so before, in particular in view of the negative opinion expressed in

the annex to the summons. Thus, the main request was late filed.

Furthermore, the main request was *prima facie* not allowable and raised a number of new issues related to clarity, added subject-matter and extension of the scope of protection.

(b) Amendments occasioned by a ground for opposition

There was no technical difference between the "*walkway surface suitable for walking on and/or a traffic surface for travelling directly over by a vehicle*" defined in amended claim 1 and the "*area suitable for walking on and/or for travelling directly over by a vehicle*" defined in the array of interconnected structural modules of granted claim 1. The amendment was just to bring clarity to the claim. Since clarity was not a ground for opposition, this amendment was not allowable under Rule 80 EPC.

(c) Added subject-matter

There was no literal basis for the expressions "walkway surface" and "traffic surface" in the originally filed application.

The originally filed application only contained a **generic** disclosure of capabilities like "suitable for walking on" or "for travelling directly over", as could be seen from claims 1 and 5 and paragraphs [0006] and [0015] of the "*patent specification (sic)*". This generic disclosure encompassed any objects suitable for the disclosed purpose. However, generic disclosure could not be a basis for **specific** subject-matter such as the "walking surface" and "traffic surface" which

were included in amended claim 1, thus Article 123(2) EPC was infringed.

Furthermore, the only disclosure of a "walkway" in the patent application did not comprise the flexible layer defined in claim 1 (see page 2, lines 32 to 34). There was no such thing as an "overall aim" of providing a walkway surface or a traffic surface in the patent which could allow some generalisation in this respect. Actually, the patent specification disclosed several different uses of the invention, such as producing a cushioning effect typical for sports surfaces (see paragraph [0031]) or installation of the structural modules above or below ground level (see paragraph [0069]).

(d) Extension of the protection conferred

First, granted claim 1 related to an array of modules forming an area and comprised the feature *"characterised in that a flexible surface layer [...] is provided over the top walls of the modules"*. The opposition division confirmed in its preliminary opinion that the "flexible surface layer" was not part of the subject-matter of the granted claim.

Since amended claim 1 related to a walkway surface and/or a traffic surface comprising the modules **and** the flexible surface layer, the claim no longer defined an arrangement of modules forming an area but instead defined a multilayered composition of elements, thus resulting in an *aliud*.

Second, granted claim 1 defined *"[a]n array of interconnected structural modules which forms an area suitable for walking on and/or for travelling directly*

over by a vehicle". Therefore, the structural modules alone were suitable for the defined function, and this property had a limiting effect.

This restriction had disappeared from amended claim 1 since it was the "walkway surface" and the "traffic surface" as a whole - i.e. including the "flexible surface layer" of feature 3 - which were now defined as being suitable for walking on and/or for travelling directly over by a vehicle.

Consequently, amended claim 1 encompassed embodiments where the structural modules *per se* did not have to be suitable for the use defined in granted claim 1.

This was confirmed by paragraph [0013] of the patent specification, which specified that the embodiments where the structural modules were used to provide a walkway "*without a flexible covering layer*" did not belong to the invention.

This second line of attack based on the properties of the structural modules in granted claim 1 and in amended claim 1 was not an amendment of the case within the meaning of Article 13(2) RPBA but a mere reformulation of the objection raised in the statement of grounds of appeal.

(e) Clarity

The amendments in claim 1 of the main request resulted in a lack of clarity since the object of the invention was now a surface, whereas the claim further defined elements (i.e. the array of interconnected structural modules) which were arranged below the defined surface.

Furthermore, the replacement of the feature "area" in granted claim 1 with "surface" in amended claim 1 was unclear for the skilled person since it was not specified whether they were synonyms, in particular in view of paragraph [0001] of the patent specification.

Moreover, amended claim 1 was not clear since the skilled person did not know whether the defined flexible surface layer was the same as the walkway/traffic surface.

The difference between a "walkway surface" and a "traffic surface" was also unclear for the skilled person, and the patent specification did not include any explanation about this. It was not clear to the skilled person how the embodiment consisting of a walking surface **and** a traffic surface was to be interpreted.

Finally, the fact that the claimed device could be used to produce surfaces providing a "cushioning effect" as for sports surfaces (see paragraph [0031]) raised the question of what was the difference between the defined walkway and a sports surface and whether the flexible surface layer of claim 1 could be covered with materials typically used for sports surfaces such as grass.

(f) Novelty

The terms used in feature 1 were so broad that they encompassed a very large scope of protection justifying the consideration of prior art relating to intermediate steps of construction such as in D4 or D6/D6c. This was also the case in view of the content of the patent specification, where it was repeatedly stated that the

invention was also intended for temporary purposes lasting for "any period of time" (see paragraphs [0025], [0063] and [0066]). This was exactly the kind of arrangements shown in D4 and D6/D6c, where some intermediate construction steps formed a temporary walkway/traffic surface. Since it was uncontested that each of D4 and D6/D6c anticipated all the other features of claim 1, the claimed subject-matter was not novel over each of these documents.

Legal security of third parties had to be considered since no definition of temporary surface and walkway/traffic surface was present in the patent, apart from the statements in the patent specification which made clear that the invention related to these aspects.

(g) Admittance of D10 and D11

The filing of D10 and D11 was a reaction to the fact that neither the patent proprietor nor the opposition division had argued until the oral proceedings before the opposition division that the subject-matter of claim 1 did not encompass intermediate steps of construction resulting in a surface suitable for walking or for the traffic of vehicles. This unexpected development excluded part of the prior art put forward by the then opponent.

Furthermore, the opposition division considered D4 and D6 novelty-destroying in its annex to the summons, so there had been no reason to file further evidence at that time. The appeal proceedings had thus been the first possible opportunity to file D10 and D11. In this context, the filing of D10 and D11 was not an amendment of the case but a refinement of the arguments already provided, namely that the claimed subject-matter was

known before the priority date even if it was interpreted as an intended and final "walkway surface" or "traffic surface".

Finally, both documents were *prima facie* relevant. The patent specification itself disclosed that more layers such as a geotextile or even artificial grass (see paragraph [0054]) could be provided, as was shown in D10 and D11.

D10 concerned golf courses (page 11, line 29) which represented "walkway surfaces" and also "traffic surfaces" since golf carts were driven over them.

According to the impugned patent "at least one side wall" or even a "peripheral wall" had to be provided, (paragraph [0073]). D10 showed a side with large openings (see Figure 3), which corresponded to such an embodiment. Therefore, feature 7 ("*the side walls and/or the bottom wall being provided with apertures to permit the flow of liquid out of the volume*") was shown in D10.

D11 related as well to a sports surface and consequently to a walkway surface. The modular construction defined in feature 2 was shown in column 3, line 41 to 44, where it was disclosed that D11 related to connected modules ("*Stegplatten*").

(h) Admittance of the inventive-step objection

The appellant had always considered the subject-matter of claim 1 not novel over D4 and D6.

The conclusion of the Board during the oral proceedings on novelty had therefore been surprising for the

appellant. Objecting to the main request on the basis of one of documents D4 or D6 and reasoning why the subject-matter of claim 1 did not involve an inventive step when considering the common general knowledge of the skilled person was thus an appropriate reaction to this development of the proceedings.

X. The respondent's arguments on the main request can be summarised as follows.

(a) Admittance of the main request

The only relevant question to be considered for the admittance of the main request was whether the opposition division exercised its discretion reasonably. Since the appellant could not show that this was not the case, there was no reason to revise the decision of the opposition division.

(b) Amendments occasioned by a ground for opposition

The fundamental legal question when considering Rule 80 EPC was whether the amendments carried out in claim 1 were occasioned by a ground for opposition, not whether they successfully addressed those grounds (which was, however, also the case). The amendments were triggered by the objections of an alleged lack of novelty announced by the chair of the opposition division at the beginning of the oral proceedings, and thus they were compliant with Rule 80 EPC.

(c) Added subject-matter

The test to be applied was to determine what the skilled person understood from the technical teaching of the application as originally filed. Then an

assessment had to be made on whether the amendments of claim 1 - apart from the purely linguistic aspects - actually related to a different technical teaching.

There was no doubt that the patent application disclosed surfaces upon which people could walk and on which vehicles could travel. The basis for claim 1 could be found in originally filed claims 14 and 19, lines 1 to 3 of page 1, and pages 2 and 3. The overall teaching was the provision of a surface at ground level on which to walk or drive. No new technical teaching could be seen by using the expressions "walkway surface" and "traffic surface" in amended claim 1.

(d) Extension of the protection conferred

There was no embodiment covered by amended claim 1 which was not covered by granted claim 1. The incorporation of the flexible surface layer (feature 3) was a limitation of the subject-matter since the device had to include this feature together with all those of granted claim 1. Paragraph [0013] of the patent specification merely confirmed that embodiments without a flexible surface layer do not belong to the invention.

The argument on the properties of the interconnected structural modules in granted claim 1 versus amended claim 1 had been presented for the first time during the oral proceedings and was not to be admitted under Article 13(2) RPBA.

(e) Clarity

Feature 8 clearly defined that the flexible surface layer had to be such that a person could walk on it or

a vehicle could travel over it. No unclarity could be seen.

Furthermore, the skilled person in the field of making roads or pavements knew what the surface of a road was and that a traffic surface could be walked upon as well.

(f) Novelty

The expressions "walkway surface" and "traffic surface" were terms of art for the skilled person. Even if temporary, a walkway/traffic surface had to be such to anticipate the subject-matter of claim 1.

The devices of D4 and D6 were simply not walkway/traffic surfaces but rather draining or water storage devices on which, at an intermediate point of construction, operators could walk on during their assembly.

(g) Admittance of D10 and D11

The issue of what kind of devices could be considered to anticipate the subject-matter of claim 1 was already under debate for the granted claims and could not come as a surprise for the appellant.

Furthermore, neither D10 nor D11 were *prima facie* relevant since they did not relate to a walkway/traffic surface, this being something different from a sports surface.

Moreover, none of the late-filed documents disclosed side walls and/or the bottom wall being provided with apertures to permit the flow of liquid out of the

volume (feature 7). Figure 3 of D10 merely disclosed an open side, i.e. there was no side wall at all. D11 did not even disclose a modular structure as defined in feature 2 comprising the walls defined in features 4 and 5.

(h) Admittance of the inventive-step objection

The statement of grounds of appeal contained a single sentence about inventive step in spite of the content of the contested decision, where this ground for opposition had been discussed in view of the distinguishing features.

Consequently, there were no reasons which could justify the admittance of such late-filed objections filed at the last possible moment of the appeal proceedings.

## **Reasons for the Decision**

1. Admittance of the main request - Article 114(2) EPC
  - 1.1 The appellant argued that the opposition division should not have admitted the new main request filed during the oral proceedings for being late filed and *prima facie* unallowable. Furthermore, the new main request could and should have been filed earlier, did not address the objections raised by the then opponent and gave rise to new ones.
  - 1.2 The appellant's argument about the alleged possibility for the respondent to have filed the main request at an earlier point of time in view of the negative

preliminary opinion of the opposition division is not convincing since it was only at the oral proceedings that the opposition division announced for the first time its preliminary opinion on the requests filed on 29 April 2022 within the time period in accordance with Rule 116(1) EPC. The opposition division's preliminary opinion in the annex to the summons had related to different requests.

1.3 The Board notes that the opposition division took into account the criterion of *prima facie* allowability when taking its discretionary decision on admitting the new main request. Even if the reasons for such *prima facie* allowability are not provided under point II.13.2 of the decision, the considerations on each of the raised objections in the remainder of the decision explain indirectly why the opposition division came to this *prima facie* evaluation. After the filing of the main request, the then opponent certainly raised a number of new issues to be discussed, but the opposition division did not find any of these *prima facie* persuasive, as it confirmed in the subsequent discussion of the request on the merits. Simply raising new objections does as such - i.e. independently of their *prima facie* merits - not speak against the admittance of an amended claim request.

1.4 Furthermore, the opposition division also took into account whether the then opponent could have been surprised by the late filing of the new main request and considered that, in view of the development of the proceedings, there was no surprise in the amendments made in the main request. The Board observes that no request for postponement is mentioned in the minutes.

- 1.5 The appellant did not contest that *prima facie* allowability is an **appropriate criterion** to be used when deciding on the admittance of late-filed requests in opposition proceedings. Whether or not the opposition division used the correct criteria for the exercise of discretion must be distinguished from whether it made a substantive error in judgement when applying these criteria. Thus, in accordance with well-established case law (see Case Law of the Boards of Appeal, 10th edn., V.A.3.4.1 b)), since the opposition division did not exercise its discretion in accordance with the wrong principles, without taking the right principles into account or in an arbitrary or unreasonable way, and thus did not exceed the proper limits of its discretion, there is no reason to revise the discretionary decision of the opposition division on the admittance of the main request.
  
2. Main request, amendments occasioned by a ground for opposition - Rule 80 EPC
  - 2.1 The appellant argued about an allegedly non-causal relationship between the amendments in the main request and the grounds for opposition.
  
  - 2.2 This objection is not convincing since the amendments in the main request were a direct reaction to the preliminary opinion expressed orally by the chair of the opposition division at the beginning of the oral proceedings (see point 2 of the minutes) in connection with the requests filed by the patent proprietor on 29 April 2022 (in reply to the position of the opposition division contained in the annex to the summons). The preliminary opinion explained orally by the chair about the interpretation of claim 1 implied that the subject-matter of the claims filed on

29 April 2022 might well not be patentable in view of the available prior art.

- 2.3 Consequently, the amendments were occasioned by a ground for opposition (namely, Article 100(a) EPC), irrespective of whether they were successful in delimiting the scope of the amended claims against the prior art concerned. This last question has no bearing on compliance with Rule 80 EPC, which only requires that the amendments are **occasioned** by a ground for opposition, irrespective of whether or not **these amendments** result in a clearer definition of the subject-matter.
3. Main request, added subject-matter - Article 123(2) EPC
  - 3.1 The appellant argued that the originally filed application only contained a **generic** disclosure of capabilities like "suitable for walking on" or "for travelling directly over" (see claims 1 and 5 and paragraphs [0006] and [0015] of the patent specification). This generic disclosure encompassed any objects suitable for the disclosed purpose. However, generic disclosure could not be a basis for **specific** subject-matter such as the "walking surface" and "traffic surface" which were included in amended claim 1, thus Article 123(2) EPC was infringed.
  - 3.2 This is not convincing for the reasons explained below.
  - 3.3 It is correct that the originally filed application does not contain a literal basis for the terms "walkway surface" and "traffic surface".

- 3.4 However, what is decisive for the assessment of added subject-matter is the technical teaching of the patent application as a whole.
- 3.5 The alternative "walking surface for walking on" is disclosed in originally filed page 2, lines 32 to 34, where it is described that the array of modules can be used to form "**a walkway in a muddy site**" (emphasis added). Immediately before this, it is disclosed that the apertures in the top wall of the modules have to be of a given size to prevent variations in the flatness of a **flexible layer** which "*can be laid on this surface without the need for an intervening rigid layer*" and also problems for persons wearing high heels (see page 2, lines 15 to 24). The use of a "flexible surface layer on which a person is to walk" is also disclosed in originally filed claim 14, which defines the invention in its broadest terms.
- 3.6 The skilled person understands from all this information disclosed in successive paragraphs that the array of modules of the invention - e.g. as defined in originally filed claim 14 - is generally also intended to be used for providing a walkway surface for walking on. It would be counter-intuitive to deduct that this aim is only pursued in the case of "muddy sites" where no covering flexible layer is used (see page 2, lines 32 to 34) but not in normal circumstances since no inextricable link can be seen which would limit the use as a walkway only for "muddy sites" and/or where no flexible layer is used. At most, this would be an allowable intermediate generalisation in view of the whole content of the patent application.
- 3.7 With respect to the alternative "traffic surface for travelling directly over by a vehicle", the originally

filed application discloses the use of an array of modules for providing a car parking area (see page 10, lines 12 to 21 and page 11, lines 20 to 24) to provide a surface "**trafficable** by vehicles" (emphasis added) (see page 11, lines 24 to 27).

3.8 The fact that the wording used to define the subject-matter has no exact literal basis in the patent application is not relevant since the wording of amended claim 1 corresponds to the technical teaching originally disclosed.

3.9 It is also of no relevance that the patent **specification** discloses embodiments in which "*the structural module may be allowed to deform slightly under a load and thereby provide a slight cushioning effect*" (paragraph [0031]) or excavation of an area before installation of the units is not necessary (paragraph [0069]). First, it is the technical teaching of the patent **application** that has to be taken into account when assessing whether the subject-matter of claim 1 has a basis in it. Second, neither a deformable structural module nor an installation as described in paragraph [0069] is incompatible *per se* with any aspect of claim 1, i.e. with the general technical teaching explained above. The Board cannot see how this content of the patent specification could deprive the subject-matter of claim 1 of a basis in the originally filed application as required by Article 123(2) EPC.

3.10 Since amended claim 5 basically corresponds to the use of the device of claim 1, the same reasons apply *mutatis mutandis*.

- 3.11 In view of the above, the subject-matter of the main request does not extend beyond the original disclosure in an unallowable manner (Article 123(2) EPC).
4. Main request, extension of the protection conferred - Article 123(3) EPC
- 4.1 Alleged *aliud*
- 4.1.1 The appellant did not bring any new argument during oral proceedings concerning the objection related to an alleged *aliud*. The Board thus remains of the same opinion as in its communication under Article 15(1) RPBA for the reasons below.
- 4.1.2 Granted claim 1 defines an "*array of interconnected structural modules which **forms an area suitable for walking and/or for travelling directly over by a vehicle***" (emphasis added).
- 4.1.3 Amended claim 1 relates to "[a] *walkway surface suitable for walking on and/or a traffic surface for travelling directly over by a vehicle, **the surface comprising an array of interconnected structural modules and a flexible surface layer***" (emphasis added).
- 4.1.4 The walkway/traffic surface of amended claim 1 includes an array of interconnected structural modules **comprising all the features** of granted claim 1. Thus, **any** array of interconnected structural modules as defined in amended claim 1 would fall under the scope of granted claim 1, and no extension of protection can be seen.
- 4.1.5 On the contrary, the scope of protection of amended claim 1 is limited compared to granted claim 1 since

the invention now only concerns a "walkway surface" and/or a "traffic surface" formed by the array of modules, whereas granted claim 1 related to an array of modules forming **any** kind of "area suitable for walking on and/or for travelling directly over by a vehicle".

4.1.6 Amended claim 1 also defines a flexible surface layer belonging to the claimed device "*on which a person is to walk or a vehicle is to travel*" and which "*is provided over the top walls of the modules*". This is a further limitation of the scope of protection compared to granted claim 1 since the claim now specifies what must be arranged on top of the array of interconnected structural modules of granted claim 1 and which function this further element must perform.

4.1.7 Therefore, the case is fundamentally different from those where the protection conferred by claim 1 as granted is extended to subject-matter which is **foreign** to that as granted (i.e. an *aliud*; see Case Law of the Boards of Appeal, 10th edn., II.E.2.4.12).

4.2 Properties of the structural modules

4.2.1 Even if this new line of attack was presented for the first time during the oral proceedings and could therefore not be admitted under Article 13(2) RPBA, the Board deems it more expedient to deal with it in substance.

4.2.2 There is no doubt that **granted** claim 1 defined an array of interconnected structural modules forming an area suitable for the functions defined, i.e. for walking and/or for travelling directly over by a vehicle. The skilled person understands, when reading granted claim 1, that the interconnected structural modules provide

the necessary strength to withstand such a use. This is in line with their common technical knowledge about structures and loads caused by a person or a vehicle.

4.2.3 Contrary to what was argued by the appellant, the restriction is still present in **amended** claim 1 since the skilled person - based on technical considerations - would not interpret that a **flexible** surface layer provided over the top walls of the modules (feature 8) without an intervening rigid layer (feature 9) and which could undergo variations in its flatness if the size and shape of each aperture in the top wall were not carefully chosen (see feature 10) could have any influence on the suitability of the ensemble of the defined walkway/traffic surface for allowing walking on it and/or travelling directly over by a vehicle. The skilled person reading amended claim 1 understands that this suitability - i.e. the load bearing capacity - **is indeed** provided by the array of interconnected structural modules (feature 2) over which the flexible surface layer is arranged.

4.2.4 Paragraph [0013] of the patent specification merely confirms that arrays of interconnected structural modules without a covering flexible layer do not belong to the invention defined in granted claim 1. This paragraph does not exclude a walking/traffic surface as defined in amended claim 1 such that the amendments might have resulted in the claim encompassing embodiments excluded by paragraph [0013]. Feature 8 (flexible surface layer) is instead in accordance with the fact that the embodiments mentioned in paragraph [0013] are excluded from the scope of protection of amended claim 1.

4.2.5 Since amended claim 5 basically corresponds to the use of the device of claim 1, the same reasons apply *mutatis mutandis*.

4.3 In view of the above, the protection conferred by amended claims 1 and 5 does not extend beyond the protection conferred by granted claim 1.

5. Main request, clarity - Article 84 EPC

5.1 The contested decision mentions only one objection having been raised in the context of Article 84 EPC, namely the one related to the feature "travelling directly over" (see point II.13.5.1). The objections raised by the appellant in its statement setting out the grounds of appeal and those raised for the first time during oral proceedings are therefore amendments within the meaning of Articles 12(4) and 13(2) RPBA. Nevertheless, the Board believes it is more efficient to deal with them in substance instead of addressing their admittance.

5.2 Elements arranged below the defined walkway/traffic surface

The skilled person reading claim 1 with a mind willing to understand - and within the context of the invention - understands that the essential elements for producing a walking/traffic surface are defined in the claim, including those meant to provide support for the persons or vehicles making use of the defined surface (see point 4.2.3 above). No lack of clarity related to how a surface may comprise elements arranged below it can be seen.

5.3 Surface vs area

- 5.3.1 Granted claim 1 defines "[a]n array of interconnected structural modules which forms an **area**" (emphasis added).
- 5.3.2 According to the appellant, the replacement of the word "area" with "surface" in feature 1 ("*[a] walkway **surface** suitable for walking on and/or a traffic **surface** for travelling directly over by a vehicle*"; emphasis added) resulted in claim 1 not being clear since it was not specified whether they were synonyms.
- 5.3.3 This is not persuasive since amended claim 1 does not include both terms simultaneously but the single term "surface". The skilled person reading amended claim 1 does **not** take granted claim 1 into consideration when interpreting amended claim 1, and this is exactly what must be done when assessing the clarity of a request. The appellant has not proved that the word "surface" is in itself an unclear term and has not explained why the skilled person reading amended claim 1 would find it difficult to ascertain its meaning.
- 5.3.4 Paragraph [0011] of the patent specification uses the word "surface" within the context of the surface on which the flexible layer is laid. The Board cannot see any contradiction or lack of clarity arising from the fact that the word "surface" - which has a clear technical meaning in itself - is used in conjunction with other terms to define different elements in a patent which correspond to what is generally understood as a surface - "***surface** for travelling directly over by a vehicle*" in claim 1 vs "*...an array of such modules will form a **surface**. A flexible layer such as a carpet is laid on this **surface**...*" in paragraph [0011].

5.4 Walkway/traffic surface vs flexible surface layer

Feature 8 defines that the flexible surface layer added in feature 3 is the one "*on which a person is to walk or a vehicle is to travel*". There is no unclarity in this feature, which actually defines the precise region of the walkway/traffic surface on which a person is to walk or a vehicle is to be driven.

5.5 Embodiment with a walkway surface **and** a traffic surface

5.5.1 The skilled person is aware of which surfaces fall under the category of walkway surfaces and which ones can withstand the load of vehicles such that they can be used as traffic surfaces. The implicit technical difference known to the skilled person is the different behaviour of structures under loads, and the skilled person has no difficulty in ascertaining this difference.

5.5.2 Moreover, the skilled person is aware that a traffic surface can be generally walked on, thus being suitable to form a walkway surface as well at the same time. Conversely, a walkway surface resistant enough to withstand the passage of vehicles would also be suitable to form a traffic surface. Both cases would correspond to an embodiment of a walkway surface and a traffic surface. There is thus no contradiction in defining a "walkway **and** traffic surface".

5.5.3 Consequently, the fact that no difference between walkway surface and traffic surface is explicitly defined in amended claim 1 or in the patent specification does not result in a lack of clarity. The skilled person is aware of this difference and has no difficulty in establishing the subject-matter

encompassed by amended claim 1, including embodiments comprising a walking surface and a traffic surface.

- 5.6 Alleged lack of clarity arising from paragraph [0031]
- 5.6.1 A walkway surface is something different from a sports surface according to the general understanding of the term "walkway surface". Even if it is true that persons can walk on a sports surface while practising sport, this does not make it a "walkway surface".
- 5.6.2 Paragraph [0031] of the patent specification discloses that "*in some cases the structural module may be allowed to deform slightly under a load and thereby provide a slight cushioning effect*". No reference to a sports surface is mentioned. The assumption that the disclosed property must be necessarily linked to the provision of a sports surface is a mere unsubstantiated assertion by the appellant.
- 5.6.3 As explained in point 5.4 above, feature 8 defines the region of the walkway/traffic surface on which a person is to walk or a vehicle is to be driven. Whether this flexible surface layer can correspond to a material typically used for producing sports surfaces - such as artificial grass - is an open question which does not affect the clarity of the claim since using such a material does not convert a walkway surface into a sports surface. The skilled person is able to determine whether the surface of a walkway/traffic surface on which a person is to walk or a vehicle is to be driven is actually formed by a flexible surface layer as defined in amended claim 1.

- 5.7 Since amended claim 5 basically corresponds to the use of the device of claim 1, the same reasons apply *mutatis mutandis*.
6. Main request, novelty - Article 54 EPC
- 6.1 D4
- 6.1.1 The appellant put forward that the patent specification repeatedly stated that the invention was also intended for temporary purposes lasting for "any period of time" (see paragraphs [0025], [0063] and [0066]). This was exactly the kind of arrangements shown in D4, where some intermediate construction steps formed a temporary walkway/traffic surface.
- 6.1.2 This is not persuasive since the terms "walkway surface" and "traffic surface" have a well-defined meaning for the skilled person, who would not consider an intermediate step of construction at a worksite where no public access is expected as falling under either of these two categories. The fact that a walkway/traffic surface can, as explained in the description of the patent specification, be temporary does not mean that **any** structure on which a person can walk or over which a vehicle can be driven is a walkway or traffic surface.
- 6.1.3 Consequently, even if D4 shows that it is possible to walk on the surface provided by the tanks covered with a flexible layer (see the image corresponding to "Step 3" of page 103), this is not within the context of a "walkway surface" since it only relates to an intermediate step of installation of a system which still has to be covered by other layers (including earth) to become final (see page 60). The ensemble of

the water tanks and the covering flexible layer of D4 is thus not a "walkway surface" according to the general technical meaning of this term but merely a component to be buried under a number of materials during construction. The fact that the operators can stand and walk on this ensemble at some point while doing their work does not make it a temporary "walkway surface" in the eyes of the skilled person. Indeed, such construction sites are usually secured from unauthorised access by warning signs or fences.

- 6.1.4 In view of the above, the subject-matter of claim 1 differs from D4 at least by virtue of feature 1 ("*A walkway surface suitable for walking on and/or a traffic surface for travelling directly over by a vehicle*").
- 6.1.5 Since claim 5 basically defines the use of the device of claim 1, the same reasons apply *mutatis mutandis* (distinguishing feature 5.1).
- 6.2 D6/D6c
  - 6.2.1 D6/D6c shows a similar system as the one of D4. The same considerations as explained in the preceding point about the interpretation of claims 1 and 5 apply here.
  - 6.2.2 As in the case of D4, the skilled person would not understand an intermediate stage of construction as anticipating a "walkway surface". The surface suitable for walking on is covered at a later stage by earth to reach the final condition (see minute 03:21 to 03:46 of D6c). Consequently, the subject-matter of claim 1 - alternative "walkway surface" - also differs from D6/D6c in feature 1. The same reasoning applies to the

subject-matter of claim 5, *mutatis mutandis* (distinguishing feature 5.1).

- 6.2.3 The appellant argued that D6c showed a vehicle on the flexible layer (minute 03:14), thus anticipating "a traffic surface for travelling directly over by a vehicle" within the meaning of claims 1 and 5. The movable working device of D6c was a "vehicle" within the meaning of these claims, and it was disclosed that the surface of D6c was suitable for vehicles to travel over it, including a wheelbarrow.
- 6.2.4 This is not convincing for the reasons below.
- 6.2.5 An intermediate stage of construction is not regarded as a "traffic surface" by the skilled person for the same reasons as explained above for the "walkway surface" feature. Even if the working device of D6c (see minute 03:14) were to be considered a "vehicle", this would not make the disclosure of D6c "a traffic surface" since it is an intermediate step of a construction site in the same manner as for the alternative "walkway surface".
- 6.3 Admittance of D10 and D11
- 6.3.1 The appellant brought forward that neither the patent proprietor nor the opposition division had argued before the oral proceedings that the subject-matter of claim 1 did not encompass intermediate steps of construction resulting in a surface suitable for walking on or for the traffic of vehicles. This unexpected development excluded part of the prior art put forward by the then opponent, which was then forced to file D10 and D11 and did so at the first possible

occasion, i.e. with the statement setting out the grounds of appeal.

6.3.2 This is not persuasive. The patent proprietor had already argued in point 5.2.3.1 to 5.2.3.7 of its reply to the notice of opposition that the suitability for walking or travelling on a surface at an intermediate step of construction was not enough to anticipate the subject-matter of claim 1, which defined a finished surface provided for the claimed purpose (see in particular point 5.2.3.5 of the reply).

6.3.3 Even if it is true that the preliminary opinion of the opposition division stated that the claimed subject-matter was merely limited to a suitability for the "walking" and "travelling directly over" functions (see point 6.2.1.3.1 of the annex to the summons), the opposition division was persuaded during the oral proceedings by the - already previously presented - arguments of the patent proprietor, and it accepted them (see point 14.1.4 of the contested decision). Consequently, the change of opinion of the opposition division was not an unforeseeable development of the proceedings but a possible event that the then opponent had to expect. This issue is unrelated to the amendments carried out in claims 1 and 5 of the main request, which were merely intended to clarify that the flexible surface layer is encompassed by the subject-matter of the claims.

6.3.4 Moreover, D10 and D11 are used to raise new objections and cannot be considered a mere "refinement" of the arguments already put forward in the opposition proceedings.

- 6.3.5 Consequently, they are an amendment to the appellant's case within the meaning of Article 12(4) RPBA, the admittance of which is subject to the Board's discretion.
- 6.3.6 Document D10 discloses interconnected structural modules ("adjacent box-channel units") comprising an impermeable bottom wall ("impermeable lower surface"; see page 8, lines 14 to 19) and side walls ("supporting webs 7"), where no apertures are disclosed in a direct and unambiguous manner. According to D10, the water flows through perforations in the upper plate towards the channels (9) "and laterally through the network" (see page 8, lines 30 to 32). This last wording has to be interpreted - in light of the description and the figures - as a drainage flow taking place along each channel until an exit with an absent side wall as shown in Figure 3. The absence of a side wall is different from a side wall being provided with apertures. Features 7 and 5.6 of claims 1 and 5 require a side wall and/or bottom wall being provided with apertures, not an absent wall. Paragraph [0073] of the contested patent does not disclose an absent peripheral wall either, but a peripheral wall with apertures (see corresponding Figures 1 and 2). Therefore, feature 7/5.6 is not shown in D10.
- 6.3.7 Furthermore, D10 relates to a surface to play sport on, i.e. a sports surface, which is not a "walkway surface" according to the usual meaning of this term (see point 5.6.1 above). Similarly, even if golf is one of the sports envisaged in D10, and even if golf carts are usually driven over golf courses, this does not make a golf course a "traffic surface" within the general meaning of this term for the skilled person. Features 1/5.1 are thus not disclosed in D10 either.

- 6.3.8 Consequently, D10 is not relevant for the outcome of the proceedings in view of the differences at first glance compared to the subject-matter of claims 1 and 5, or at least not more relevant than the prior art already available.
- 6.3.9 D11 shows a structure formed by an upper plate (4), a bottom plate (6) and side plates (8). There is no clear and unambiguous disclosure in D11 of apertures being provided in the side walls and/or the bottom wall (feature 7/5.6).
- 6.3.10 Like D10, this document relates to sports facilities ("Sportböden"), which do not correspond to a "walkway surface" according to the general meaning of this term (see points 5.6.1 and 6.3.7 above), let alone a "traffic surface". Feature 1/5.1 is thus not shown in D11 either.
- 6.3.11 Consequently, D11 is not relevant either for the outcome of the proceedings.
- 6.3.12 In view of the above, the Board does not admit D10 and D11 into the appeal proceedings (Article 12(4) RPBA).
7. Admittance of the inventive-step objection - Article 13(2) RPBA
- 7.1 The appellant argued that it had always considered the subject-matter of claim 1 to be not novel and that it had been surprising for it when the Board did not share this view at the oral proceedings. This surprising development justified a reaction in the form of an inventive-step objection starting from the prior art

relied upon for novelty, in particular in combination with the common general knowledge.

- 7.2 This is not persuasive for the reasons explained below.
- 7.3 The opposition division decided that the subject-matter of claim 1 of the main request was novel (see point II.14 of the contested decision).
- 7.4 The Board explained in its communication under Article 15(1) RPBA that it was of the preliminary opinion that none of the objections raised on novelty were persuasive (see point 8.4 of the communication), in line with the position taken by the respondent in its reply to the statement of grounds of appeal.
- 7.5 Consequently, the appellant was aware of the disputed features in the prior art and the fact that it was certainly possible - and, according to the preliminary opinion, even likely - that the Board would finally reach the conclusion that none of the objections on novelty were convincing. Accordingly, reaching this conclusion at the oral proceedings does not qualify as exceptional circumstances within the meaning of Article 13(2) RPBA.
- 7.6 Moreover, waiting until the last possible moment in the oral proceedings before the Board to raise a new objection based on a different ground for opposition and consisting of arguments which had not been presented before is in line neither with the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA) nor the parties' obligation to present their complete appeal case - to the benefit of the other party and the

board - in the statement of grounds of appeal and reply (Article 12(3) RPBA).

7.7 In view of the above, the Board does not admit the new objection related to an alleged lack of inventive step (Article 13(2) RPBA).

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

C. Herberhold

Decision electronically authenticated