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**Datasheet for the decision
of 21 March 2025**

Case Number: T 0655/23 - 3.2.05

Application Number: 11702586.6

Publication Number: 2528732

IPC: B31B50/25, B31F1/08, B31F1/00,
B29C65/02, B29C65/40

Language of the proceedings: EN

Title of invention:

Process for the production of a container from a planar composite with a multiple inner layer by hot folding

Patent Proprietor:

SIG Services AG

Opponent:

Tetra Laval Holdings & Finance SA

Relevant legal provisions:

EPC Art. 54, 56, 100(a), 111(1), 113(1), 114(1)
EPC R. 103(1)(a)
RPBA 2020 Art. 11

Keyword:

Grounds for opposition - lack of novelty (no) - lack of inventive step

Inventive step - reformulation of the technical problem

Right to be heard - opportunity to comment (no)

Reimbursement of appeal fee - equitable by reason of a substantial procedural violation (yes)

Remittal - fundamental deficiency in first-instance proceedings (yes)



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0655/23 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 21 March 2025

Appellant: Tetra Laval Holdings & Finance SA
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 February
2023 rejecting the opposition filed against
European patent No. 2528732 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman P. Lanz
Members: M. Holz
B. Burm-Herregodts

Summary of Facts and Submissions

I. The opponent (appellant) filed an appeal against the opposition division's decision rejecting the opposition against European patent No. 2 528 732 (the patent). In the decision under appeal, the opposition division, *inter alia*, admitted document D36 into the proceedings and concluded that the subject-matter of claim 1 as granted was new in view of document D6 and involved an inventive step in view of a combination of document D36 and the common general knowledge or any of documents D6 and D9.

II. The patent proprietor (respondent) filed a reply to the appellant's statement of grounds of appeal including claim sets according to auxiliary requests 10 and 11 and documents D43 to D47 on English grammar.

By letter dated 9 February 2024, the appellant filed submissions in response to the respondent's reply.

III. The parties were summoned to oral proceedings before the board scheduled on 21 March 2025.

In a communication under Article 15(1) RPBA issued on 21 November 2024, the board provided its preliminary opinion.

IV. By letter dated 17 February 2025, the respondent filed further submissions.

V. Oral proceedings before the board were held on 21 March 2025.

VI. The final requests of the parties were the following.

The appellant requested that:

- the decision under appeal be set aside and European patent No. 2 528 732 be revoked
- the respondent's auxiliary requests 10 and 11 and documents D43 to D47 not be admitted in the appeal proceedings
- document D30 be disregarded in view of decision G 2/21 or, alternatively, the case be remitted for consideration of document D30 by the opposition division

The respondent requested that the appeal be dismissed (main request).

As an auxiliary measure, it was requested that the case be remitted to the opposition division for further prosecution in view of a substantial procedural violation by the opposition division or if the board, without considering document D30, intended not to dismiss the appeal or if document D30 were to be considered or if the auxiliary requests 1 to 15 were to be examined.

As a further auxiliary measure, it was requested that the decision under appeal be set aside and the patent be maintained as amended on the basis of the claim set of:

- one of auxiliary requests 1 to 5 filed with the respondent's letter dated 9 April 2021
- auxiliary request 6 or 7 filed with the respondent's letter dated 15 September 2022
- auxiliary request 8 or 9 filed with the respondent's letter dated 9 April 2021

- auxiliary request 10 filed with the respondent's reply to the appellant's statement of grounds of appeal
- auxiliary request 10 filed with the respondent's letter dated 9 April 2021 if the claim set of auxiliary request 10 filed with the respondent's reply to the appellant's statement of grounds of appeal is not admitted
- auxiliary request 11 filed with the respondent's reply to the appellant's statement of grounds of appeal
- auxiliary request 11 filed with the respondent's letter dated 9 April 2021 if the claim set of auxiliary request 11 filed with the respondent's reply to the appellant's statement of grounds of appeal is not admitted
- auxiliary request 12, 13 or 14 filed with the respondent's letter dated 9 April 2021
- auxiliary request 15 filed with the respondent's letter dated 15 September 2022

The respondent also requested that documents D18 to D20, D36, D36a, D37 and D37a not be admitted into the proceedings.

VII. The following documents submitted during the opposition proceedings were of particular relevance in the appeal proceedings.

- D6: WO 98/26994 A1
- D9: JP 11-300913 A
- D9a: English translation of document D9
- D30: Affidavit by Mr Stefan Pelzer, 23 March 2021
- D36: JP 10-329243 A
- D36a: English translation of document D36

VIII. Claim 1 as granted reads as follows (the feature numbering used by the board is included in square brackets).

"**[1.1]** A process for the production of a container (2) surrounding an interior (1), comprising the steps
[1.2] a. provision of a planar composite (3) comprising
[1.3] i. a carrier layer (4);
[1.4] ii. a barrier layer (5) of plastic joined to the carrier layer (4);
[1.5] iii. at least two layers (6, 7) of thermoplastic plastic K_{Sa} and K_{Sw} which are provided on the side of the barrier layer (5) of plastic facing away from the carrier layer (4), **[1.6]** at least one of the at least two layers (6, 7) of plastic K_{Sa} and K_{Sw} being a plastics mixture of at least two plastics;
[1.7] b. folding of the planar composite (3) to form a fold (8) with at least two fold surfaces (9, 10) adjacent to one another;
[1.8] c. joining respectively at least a part region (11) of the at least two fold surfaces (9, 10) to form a base or a top of the container (2);
[1.9] wherein at least one of the at least two layers (6, 7) of thermoplastic plastic K_{Sa} and K_{Sw} in step b. is heated above the melting temperature"

IX. The parties submitted the following.

(a) *Fundamental procedural deficiency*

(i) *Appellant*

The opposition proceedings suffered from a fundamental procedural deficiency. In the opposition proceedings, the parties had agreed that the differentiating features of claim 1 as granted in view of document D36

were features 1.5 and 1.6. In point 15.4.2 of the Reasons of the decision under appeal, the opposition division took the position that there were further differentiating features without having referred to this before the written decision was issued. Thus, the appellant had had no opportunity to comment on the opposition division's surprising assessment of distinguishing features or its further analysis which arose from that assessment. Despite the fundamental procedural deficiency, the board should not remit the case to the opposition division for further prosecution at this stage of the proceedings before examining the appeal on its merits.

(ii) *Respondent*

The opposition proceedings suffered from a fundamental procedural deficiency for the reasons set out by the appellant. Despite the fundamental procedural deficiency, the board should not remit the case to the opposition division for further prosecution at this stage of the proceedings before examining the appeal on its merits.

(b) *Ground for opposition under Article 100(a) EPC in conjunction with Article 54 EPC*

(i) *Appellant*

The subject-matter of claim 1 as granted was not new in view of the embodiment shown in Figure 3 of document D6. All features of the claim were disclosed in this embodiment. Feature 1.4 was disclosed in view of gas barrier layer 33 shown in Figure 3 and page 1, lines 33 to 36, page 9, lines 11 to 14, and Figure 5 of document D6. Feature 1.9 was disclosed in view of

page 2 of document D6. The transverse seal involved heating during folding. Since the sealing happened concurrently with step b., at least one of the layers was heated in step b.

(ii) *Respondent*

The subject-matter of claim 1 as granted was new in view of the embodiment shown in Figure 3 of document D6. Features 1.4, 1.7, 1.8 and 1.9 were not disclosed in this embodiment.

(c) *Ground for opposition under Article 100(a) EPC in conjunction with Article 56 EPC*

(i) *Appellant*

The subject-matter of claim 1 as granted did not involve an inventive step in view of document D36 (see also English translation D36a) in combination with the common general knowledge or one of documents D6 and D9 (see also English translation D9a). Document D36 did not disclose features 1.5 and 1.6. The objective technical problem was to provide a laminate with reduced scalping of flavour compounds, low sealing temperature and/or improved processability of the packaging material. The skilled person would have faced the technical problem of implementing the innermost layer of document D36. Document D30 should not be considered on appeal because it had not been considered in the opposition proceedings, was not reliable scientifically and did not support the technical effect alleged by the respondent. Document D30 had not been filed late but in appeal the respondent introduced a new case relating to a technical effect at low

temperatures based on document D30 which had not been submitted before.

(ii) *Respondent*

Documents D36 and D36a were not *prima facie* relevant to the case. A procedural abuse had been involved in filing documents D36 and D36a late. These documents should therefore not have been admitted into the proceedings before the opposition division.

Document D36 was not the closest prior art to the subject-matter of claim 1 as granted. The subject-matter of claim 1 as granted involved an inventive step in view of document D36 in combination with the common general knowledge or one of documents D6 and D9.

Document D36 did not disclose features 1.5 and 1.6. Feature 1.4 was mentioned as only one of three alternatives in the paragraph bridging pages 3 and 4 of document D36a. The skilled person would thus have had to select to produce a gable-top container, select to include a barrier layer in the laminate for the gable-top container and select a resin layer having gas barrier properties over an aluminium foil as the barrier layer. The objective technical problem was:

- to provide a process for producing a container from an alternative packaging laminate or, alternatively
- to provide a process which allowed for the production of containers of at least the same quality in terms of their leak tightness at increased production speed or, alternatively
- to provide a process for the production of a foodstuff container, which showed reduced scalping of flavour compounds in the foodstuff, from a planar composite, where the process applied a low sealing temperature and involved less problems in processing the planar composite

The second formulation was supported by document D30. If the decision under appeal could not be reviewed by the board without taking into account document D30, the case should be remitted to the opposition division.

Reasons for the Decision

1. Fundamental procedural deficiency

1.1 Both parties submit that the decision of the opposition division suffered from a fundamental procedural deficiency. According to point 15.4.2 of the Reasons of the decision under appeal, the opposition division based its conclusion on inventive step on the view that the process according to claim 1 differed from the content of document D36 in the entire planar composite used and processed, i.e. in features 1.3, 1.4, 1.5 and 1.6. Both parties agreed that features 1.3 and 1.4, taken into consideration for the assessment of inventive step in the decision under appeal, had not been discussed in the opposition proceedings as possible differentiating features in view of document D36 and that neither party had therefore had the opportunity to comment on this.

1.2 Document D36 was filed by the opponent in the opposition proceedings in response to the preliminary opinion of the opposition division as expressed in its communication dated 10 December 2021. The opposition division admitted document D36 for reasons of *prima facie* relevance for assessing inventive step (see point 15.1.2 of the Reasons of the decision under appeal). In its written decision, the opposition division referred to the parties' agreeing that document D36 disclosed a process for the production of

a container comprising all features of claim 1 except features 1.5 and 1.6 (see point 15.1.2 of the Reasons of the decision under appeal).

It is not apparent from the minutes of the oral proceedings before the opposition division or from the reasoning in its written decision that the opposition division heard the parties on whether feature 1.3 or 1.4 were disclosed in document D36. Furthermore, there are no written submissions from the parties referring to any of these features.

It can therefore not be ascertained that the parties or the opposition division had expressed the view during the written or oral proceedings that document D36 did not disclose feature 1.3 or 1.4.

Hence, it must be concluded that this point was instead raised for the first time in the reasoning of the decision under appeal. The decision under appeal is thus based on grounds on which the parties did not have an opportunity to present their comments, contrary to Article 113(1) EPC. The parties' right to be heard was therefore violated.

- 1.3 The violation of the right to be heard in the opposition proceedings constitutes a fundamental deficiency under Article 113 EPC since it potentially affected the outcome of the proceedings. Under Article 11 RPBA, such a violation can be considered to be a special reason justifying the remittal of the case to the opposition division in accordance with Article 111(1), second sentence EPC. However, the question of remittal is at the board's discretion. In the current case, both parties stated that they did not request direct remittal of the case, and neither party

requested a remittal of the case without the board examining the appeal on its merits. The above procedural deficiency furthermore substantially affected the examination of inventive step in view of document D36 as the closest prior art but, for example, not the objection of lack of novelty in view of document D6.

In this situation, the board exercised its discretion under Article 111(1), second sentence EPC and Article 11 RPBA and, in agreement with the parties' views, did not remit the case to the opposition proceedings for further prosecution at this stage of the proceedings before having examined, at least partially, the appeal on its merits.

2. Ground for opposition under Article 100(a) EPC in conjunction with Article 54 EPC

2.1 In point 14.4 of the Reasons of the decision under appeal, the opposition division concluded that document D6 did not disclose features 1.7, 1.8 and 1.9 such that the subject-matter of claim 1 as granted was new over that document. The respondent shares the opposition division's view and submits that document D6 also failed to disclose feature 1.4. The appellant submits that the subject-matter of claim 1 as granted was not new in view of the embodiment shown in Figure 3 of document D6.

2.2 *Feature 1.4*

Regarding feature 1.4, the opposition division set out that, according to the general description of the invention of document D6 on page 9, lines 11 to 14,

types of barrier material other than aluminium may be employed in a gas barrier layer, for example, polymer material such as "*polyvinyl alcohol (PVOH), ethyl vinyl alcohol (EVOH), polyester, such as polyethylene terephthalate (PET), or polyamide*", i.e. a barrier layer of plastic. Therefore, document D6 implicitly disclosed that the barrier layer 33 shown in Figure 3 may alternatively be made from plastic.

An alleged disclosure can only be considered implicit if it is immediately apparent to the skilled person that nothing other than the alleged implicit feature forms part of the subject-matter disclosed (see also "*Case Law of the Boards of Appeal of the European Patent Office*", 10th edn., July 2022 (Case Law), I.C. 4.3).

Document D6 does not implicitly disclose that the barrier layer 33 shown in Figure 3 may alternatively be made from plastic. According to page 11, lines 5 to 8 of document D6, layer 33 is a gas barrier layer of aluminium foil. Page 9, lines 11 to 14 of document D6 discloses that other types of barrier materials may also be employed in a gas barrier layer such as, for example, PVOH, EVOH, polyester, such as PET, or polyamide. However, the embodiment shown in Figure 3 of document D6 involves a gas barrier layer of aluminium foil. On the other hand, the disclosure of polymer material as the barrier material disclosed on page 9, lines 11 to 14 of document D6 does not unambiguously refer to the embodiment shown in Figure 3.

The appellant refers to page 1, lines 33 to 36 and Figure 5 of document D6. However, page 1, lines 29 to 36 of document D6 relates to the prior art ("*it is known in the art*") and does not unambiguously refer to

the embodiment shown in Figure 3. Moreover, Figure 5 relates to an embodiment that is different from the embodiment shown in Figure 3.

2.3 *Feature 1.9*

Regarding feature 1.9, the appellant refers to page 2 of document D6. In its view, the transverse seal involved heating during folding. Since the sealing happened concurrently with step b., at least one of the layers was heated in step b.

However, it is technically possible and not excluded in the process disclosed on page 2, lines 1 to 10 of document D6 that the heating only occurs after the tube is folded and the tube walls are brought into contact, i.e. after the folding is completed and the tube walls are held in the folded position. Such a course of action does not fall within the specification of feature 1.9 that at least one of the at least two layers of thermoplastic plastic K_{Sa} and K_{Sw} in step b. is heated above the melting temperature.

There is no reason to assume that the skilled person would consider a state in which the fold is fully formed and the planar composite is merely held in place with the two fold surfaces adjacent to one another to form part of step b. Such an interpretation does not follow from paragraph [0061] of the patent cited by the appellant. Nor does document D6 disclose that a sonotrode is used to exert a force on the tube to fold the tube, let alone that a sonotrode is used to heat the laminated packaging material while it is being folded, or, for that matter, that two layers of thermoplastic plastic are heated above the melting temperature while being folded.

2.4 *Summary on novelty*

In the embodiment shown in Figure 3 of document D6, at least features 1.4 and 1.9 are not disclosed, meaning that the subject-matter of claim 1 as granted is new over this document for this reason alone. The question whether features 1.7 and 1.8 are disclosed in this context may thus be left open.

No further objections of lack of novelty against the claims as granted have been raised in the appeal proceedings. The ground for opposition under Article 100(a) EPC in conjunction with Article 54 EPC therefore does not prejudice the maintenance of the patent as granted.

3. **Ground for opposition under Article 100(a) EPC in conjunction with Article 56 EPC**

3.1 The appellant submits that the subject-matter of claim 1 as granted did not involve an inventive step in view of document D36 (see also English translation D36a) in combination with the common general knowledge or one of documents D6 and D9 (see also English translation D9a).

3.2 The opposition division admitted document D36 in the opposition proceedings (see point 15.1.2 of the Reasons of the decision under appeal). According to page 4 of the Reasons of the decision under appeal, the opposition division also considered the English translation of document D36, i.e. document D36a, when deciding on the admittance of document D36.

The respondent submits that documents D36 and D36a were not *prima facie* relevant to the case and that there had been a procedural abuse involved in the late filing of documents D36 and D36a. These documents should therefore not have been admitted into the proceedings by the opposition division.

It is undisputed that documents D36 and D36a were filed after the opposition period, about six months prior to the oral proceedings before the opposition division, and that the opposition division correctly considered that it had discretion to decide on the admittance of these documents in the proceedings.

In accordance with Article 114(1) EPC, the opposition division must examine the facts of its own motion and is not restricted in this examination to the facts, evidence and arguments provided by the parties. The opposition division could therefore admit documents D36 and D36a into the opposition proceedings irrespective of whether or when these documents were filed by the appellant.

The board sees no legal basis in the EPC for excluding on appeal documents, requests or evidence correctly admitted by the department of first instance, particularly if the contested decision was based on them (see also Case Law, V.A.3.4.4). Moreover, on appeal against a decision of a department of first instance in exercise of its discretion, it is not for the board to review all the facts and circumstances of the case as if it were in that department's place and decide whether or not it would have exercised the discretion in the same way (see also Case Law, V.A.3.4.1b)). If the EPC requires that a department of first instance exercise discretion in certain

circumstances, that department should have a certain degree of freedom to do so without interference from the boards. A board should overrule the way in which the department of first instance exercised its discretion in reaching a decision in a case only if it concludes that the department of first instance did so in accordance with the wrong principles, without taking the right principles into account or in an arbitrary or unreasonable way, thus exceeding the proper limits of its discretion.

The respondent refers to the *prima facie* relevance and an alleged procedural abuse. These are the same criteria considered by the opposition division in point 15.1.2 of the Reasons of the decision. The respondent's estimation that documents D36 and D36a were less relevant than considered by the opposition division and that, contrary to the opposition division's view, their filing involved a procedural abuse does not imply an error in the opposition division's exercise of discretion.

The opposition division's discretionary decision was made in compliance with the right principles and was not based on the wrong principles, and the opposition division did not use its discretion in an arbitrary or unreasonable way.

The board therefore arrived at the conclusion that documents D36 and D36a cannot be excluded from the proceedings.

- 3.3 The respondent submits that document D36 was not the closest prior art to the subject-matter of claim 1 as granted.

The board, however, considers document D36 to be a suitable starting point for assessing inventive step. This document is in the technical field of the invention of packaging containers and discloses a process developed for the same purpose of producing such packaging containers.

- 3.4 The opposition division considered that document D36 did not disclose features 1.3, 1.4, 1.5 and 1.6.

The appellant submits that features 1.5 and 1.6 are the only differentiating features of claim 1 as granted in view of document D36.

The respondent submits that document D36 did not disclose features 1.5 and 1.6. Feature 1.4 was mentioned as only one of three alternatives in the paragraph bridging pages 3 and 4 of document D36a. The skilled person would thus have had to select to specifically produce a gable-top container, select to include a barrier layer in the laminate for the gable-top container and select a resin layer having gas barrier properties over an aluminium foil as the barrier layer.

The paragraph bridging pages 3 and 4 of document D36a explicitly discloses wrapping material in which a gas barrier layer is formed from a resin having gas barrier properties. The gas barrier layer is formed between a support member and an innermost layer. The wrapping material is used for manufacturing a gable-top type wrapping container. The support member is made of paperboard or the like and is a carrier layer as in features 1.3. Features 1.3 and 1.4 are therefore disclosed in document D36.

However, document D36 does not disclose features 1.5 and 1.6, as also submitted by both parties.

3.5 The opposition division considered the objective technical problem to be to provide a process for producing a container from the laminate according to features 1.3 to 1.6 (see point 15.4.2 of the Reasons of the decision under appeal). In this regard, the opposition division considered that features 1.3 to 1.6 were not features of the claimed process. However, no explanation for this view is given in the decision under appeal.

Features 1.3 to 1.6 are features that further define the claimed process. The process defined in claim 1 as granted is not merely suitable for processing the planar composite specified in features 1.3 to 1.6. Features 1.1 and 1.2 explicitly specify that the claimed process comprises the provision of such a planar composite.

The objective technical problem has to be formulated in such a way that it does not contain pointers to the solution or partially anticipate the solution (see also Case Law, I.D.4.2.1). The formulation used by the opposition division does not meet these requirements since it directly refers to features 1.3 to 1.6, which are features of the claimed solution. This formulation is therefore inappropriate.

3.6 In summary, the decision under appeal is based on an incorrect assessment of the differentiating features of claim 1 as granted in view of document D36 and an inappropriate formulation of the objective technical problem. The opposition division's reasoning therefore does not stand up to scrutiny.

3.7 In the next step of the problem-solution approach, the technical effect achieved by the claimed invention when compared with closest prior-art document D36 must be established in view of differentiating features 1.5 and 1.6. There is evidence for an alleged technical effect submitted in document D30 which was not considered by the opposition division. Document D30 was timely filed and is part of the proceedings. It can therefore not be disregarded as suggested by the appellant. Document D30 had not been considered by the opposition division since it concluded that the claimed subject-matter was inventive even without taking document D30 into account. For the reasons set out above, the opposition division's reasoning in this regard cannot be maintained.

The next step of the problem-solution approach thus involves issues which are not considered in the decision under appeal. In particular, examining document D30 would go beyond a mere judicial review of decision under appeal. In view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (see also Article 12(2) RPBA) and the fundamental procedural deficiency (see point 1. above), and since the parties did not disagree, the board exercised its discretion and decided to remit the case to the opposition division for further prosecution (see Article 111(1), second sentence EPC and Article 11 RPBA).

4. **Reimbursement of the appeal fee**

For the reasons set out above, the decision under appeal is to be set aside. The violation of the

parties' right to be heard in the opposition proceedings (see point 1. above) constitutes a substantial procedural violation under Rule 103(1) (a) EPC. A full reimbursement of the appeal fee is equitable by reason of this substantial procedural violation.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:



D. Hampe

P. Lanz

Decision electronically authenticated