Internal distribution code:

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

Datasheet for the decision of 18 September 2025

Case Number: T 1528/23 - 3.3.09

Application Number: 12723757.6

Publication Number: 2846648

IPC: A23L33/00, C13K5/00, A23L33/10

Language of the proceedings: EN

Title of invention:
INFANT FORMULAE AND THEIR PREPARATIONS

Patent Proprietor:
N.V. Nutricia

Opponent:
Société des Produits Nestlé S.A.

Headword:
Infant Formula/NESTLÉ

Relevant legal provisions:
EPC Art. 54(2), 56
RPBA 2020 Art. 12(4), 13(2)

Keyword:
Main request: novelty and inventive step - (yes)
Admission of new documents and new novelty and inventive step attacks - (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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

Case Number: T 1528/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 18 September 2025

Appellant: (Opponent)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Plougmann Vingtoft a/s Strandvejen 70 2900 Hellerup (DK)
Respondent: (Patent Proprietor)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 21 June 2023 concerning maintenance of the European Patent No. 2846648 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	A. Veronese
	R. Romandini

Summary of Facts and Submissions

I. The appeal was filed by the opponent (appellant) against the decision of the opposition division of 27 April 2023, finding that the European patent as amended according to the main request filed electronically on 23 February 2023 meets the requirements of the EPC.

II. Claims 1 and 11 of the main request reads:

"*1. An infant formula powder composition comprising micronized lactose or lactose microcrystals (i) of which at least 80 % has a size less than 10 micrometer, and/or (ii) having a median particle size D50 below 10 micrometer.*"

"*11. A method for manufacturing an infant formula powder composition, comprising (a) providing a spray-dried powder comprising proteins, lipids and carbohydrates, vitamins and micronutrients, (b) blending said powder with micronized lactose or lactose microcrystals (i) of which at least 80 % has a size less than 10 micrometer, and/or (ii) having a median particle size D50 below 10 micrometer.*"

III. Claims 13 and 14 relate to the use of the formula of claim 1 for providing nutrition to an infant and to a method for providing nutrition to an infant using that formula, respectively.

IV. With its notice of opposition, the opponent had requested revocation of the patent in its entirety on, *inter alia*, the grounds under Article 100(a) (lack of novelty and lack of inventive step).

V. The documents submitted during the opposition proceedings included:

D1: GB 987,934

D5: WO 2006/069918

D6: Synlait Starter Formula product information sheet, November 2011

D11: B. Koletzko, J. Ped. Gastroenterol. Nutrit. 41(5), 2005, 584-99

D13: European Commission, "Report of the Scientific Committee on the Revision of Essential Requirements of Infant Formulae and Follow-on Formulae", adopted on 4 April 2003

D14: Commission Directive 2006/141/EC

D16: Compendium of Breast Milk Substitutes, 2002

D17: Product data sheet for Lactopure lactose

D18: Laser diffraction particle size analysis of lactose product from Alpavit

D21: R. C. Rowe, "Handbook of pharmaceutical excipients", 2009

D24: M. Louey et al., International Journal of Pharmaceutics 252, 2003, 87-98

D32: G. V. Barbosa-Canovas et al., "Food Powders, Physical Properties, Processing and Functionality", 2005, 79

D33: J. J. Fitzpatrick, "Food Powder Flowability", Encapsulated and Powdered Foods, ed. C. Onwulata, 2005, Chapter 10

D35: EP 1 799 052 B1

VI. In its decision, the opposition division found, *inter alia*, the following.

- The subject-matter claimed in the main request was novel over D16, which did not disclose an infant formula comprising lactose particles having a particle size of less than 10 micrometres.

- The claimed subject-matter involved an inventive step over D11, the closest prior art, in combination with any of D1 to D4.

VII. With its statement setting out the grounds of appeal, the appellant filed:

D36: The EFSA Journal, 113, 2004, 1-35

VIII. With a letter dated 28 August 2025, the appellant filed:

D38: WO 2011/034988 A1
D39: Pilamec, Mesh-to-micron conversion table

The **appellant's arguments** can be summarised as follows.

- The terms "lactose microcrystals" and "micronized lactose" were ambiguous. Furthermore, it was impossible to distinguish micronised lactose added to an infant formula from micronised lactose inevitably present in commercial lactose powders used to prepare infant formulas.

- The claimed infant formula was not novel over the infant formulas of D16 or those of D6, D11, D13 and D14. Documents D17, D18, D21 and D24 provided evidence that any commercial infant formula obtained by dry mixing and including lactose powder contained micronised lactose with a particle size of less than 10 micrometres. D35 and D36 showed

that infant formulas could be produced by any of dry-mix, wet-mix, and combined dry- and wet-mix processes.

- The claimed infant formula was not novel over D38. Although D38 was filed late, shortly before the oral proceedings before the board, there were exceptional circumstances for its admission.

- The claimed infant formula did not involve an inventive step over D11, which disclosed standard infant formulas and represented the closest prior art. The claimed infant formula differed from those of D11 in that it contained particles of the claimed size. The problem of increasing the flowability of the infant formula was not solved across the claimed scope. Thus, the objective technical problem was to provide an alternative formula. The proposed solution was obvious in view of a combination of D11 with D1 or D21.

- The claimed formula also did not involve an inventive step over D21, D32 and D33, which represented common general knowledge and showed that small particles, e.g. of lactose, increased flowability and reduced the caking of powders.

The **respondent's arguments** may be summarised as follows.

- D38 and D39 were late filed and should not be admitted. The inventive-step attacks based on D21, D32 and D33 should not be admitted either.

- Claim 1 was clear. It related to a formula comprising micronised lactose particles blended

with a spray-dried mixture containing the ingredients of an infant formula.

- D17 and D18 were not prior art and could not be used in the assessment of novelty. D16, D21 and D24 did not disclose formulas containing micronised lactose with particles having a size below 10 micrometres. Infant formulas were usually prepared by spray drying the entire mixture of ingredients making up those formulas. During this process, any micronised lactose melted with the other ingredients. Thus, no micronised particles could be found in the product.

- D11 was the closest prior art for assessing inventive step. The difference was the presence of lactose particles of the claimed size. As shown in the tests described in the patent, the claimed lactose particles improved the flowing properties of the powder, reducing caking and lumping. Neither D11 nor the other cited documents, e.g. D1 and D21, gave any incentive to provide the claimed infant formula.

The requests

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

X. The patent proprietor (respondent) requested that the appeal be dismissed (main request) or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 5 or one of auxiliary requests AR1A, AR2A and AR5A. All requests were filed during the opposition proceedings by letter of 23 February 2023.

Reasons for the Decision

Main request

1. *Novelty*

1.1 Preliminary note: claim 1 refers to "micronized lactose" and to "lactose microcrystals" having a particle size in the micrometre range. In the following, these are collectively referred to as lactose micro-particles.

1.2 The opposition division found that the claimed subject-matter was novel over the teaching of D16 on the ground that this document did not disclose an infant formula comprising lactose micro-particles having a size of less than 10 micrometres.

1.3 The appellant disputed the opposition division's finding, stating that the "Opposition Division had erred in its novelty analysis". The definitions of "micronized lactose" and "lactose microcrystals" given in claim 1 were unclear. This claim required, at most, that some lactose particles having a size of less than 10 micrometres were present in the powdered infant formula. Although D16 did not explicitly mention them, lactose micro-particles of the claimed size were present in the disclosed commercial infant formulas. These micro-particles were always present in the commercial lactose powders used for their preparation. When infant formulas were prepared by dry mixing these lactose powders with the other powdered ingredients, lactose micro-particles of the claimed size were inevitably incorporated into the final product.

1.4 In its statement setting out the grounds of appeal, the appellant argued that the post-published documents D17 and D18, as well as D21 and D24, provided evidence that, irrespective of whether they contained fine, medium or coarse lactose, commercially available lactose powders contained lactose micro-particles of less than 10 micrometres. D35 and D36 showed that infant formulas could be prepared by wet-mixing, dry-mixing, a combination of wet- and dry-mixing, and by dry mixing lactose into a spray-dried mixture of protein and lipids. Hence, it was "more likely than not" that lactose-containing infant formulas of D16 prepared by dry-mixing included lactose micro-particles of the claimed size (see paragraphs 4.2.3 and 4.3.1 of that statement). During the oral proceedings before the board, the appellant added that the presence of lactose micro-particles in infant formulas produced before the filing date by dry mixing was actually inevitable.

1.5 The board does not agree with these conclusions. It is uncontested that claim 1 requires the presence of lactose micro-particles having a size of less than 10 micrometres in the powdered infant formula. At any rate, this is clear from the wording of the claim, in which features (i) and (ii) each refer to both the lactose microcrystals and the micronised lactose. These micro-particles must remain in discrete form, distinguished from the other ingredients present in the infant formula at the end of the manufacturing process.

1.6 D16, the Compendium of Breast Milk Substitutes, describes the composition and the properties of some commercially available infant formulas. However, as noted by the respondent, the described formulas are not necessarily in powder form. In fact, on page 1, D16 states that infant formulas can be "available as

powders, concentrates and ready to feed formats". The disclosed infant formulas do not necessarily comprise lactose either, because, as shown on page 1 of D16, "lactose-free" infant formulas are also commercialised to prevent lactose intolerance.

1.7 Moreover, as far as powder formulas are concerned, D16 does not provide any information on how the described commercial infant formulas were prepared.

1.8 As noted by the respondent, and acknowledged by the appellant, infant formulas are commonly prepared by mixing all ingredients in wet form and spray drying the mixture. When this occurs, an agglomerate of proteins, lipids and lactose is formed in which "the lactose would not be identifiable as discrete lactose" (see the third paragraph from the bottom of page 3 of the appellant's statement setting out the grounds of appeal). It is logical to assume that this occurs in any process involving intermediate steps in which lactose and other ingredients enter in contact with a solvent. In this regard, the appellant acknowledged that the preparation of infant formulas by wet-mix steps was also part of the common general knowledge (see the last paragraph of page 12 of its statement setting out the grounds of appeal).

1.9 Since D16 is silent on how the described commercial infant formulas were prepared, this document does not directly and unambiguously disclose infant formulas in powder form comprising the lactose micro-particles defined in claim 1. The same applies to the method for manufacturing the formula defined in claim 11, to the use of the formula defined in claim 13 and to the method of using it defined in claim 14.

1.10 The appellant argued that D16 was cited merely as an example showing that lactose-containing infant formulas in powder form were commercially available before the filing date. Although neither D16 nor any of the other cited documents disclosed an example of an infant formula prepared simply by dry mixing a lactose powder with other ingredients, there were no doubts that such formulas existed and were publicly available before the relevant date. It was inevitable that such lactose-containing infant formulas contained lactose micro-particles of the claimed size.

1.11 These arguments are not convincing. In the first place, the fact that something is more likely than not to occur is not sufficient to establish direct and unambiguous disclosure. Furthermore, in the absence of any information on the origin and the properties of the lactose used to prepare the commercial formulas described D16 or the method for their manufacture, the teaching of D17, D18, D21 and D24 does not allow drawing conclusions on the characteristics of the lactose in the described formulas. The same applies to infant formulas which, according to the appellant, were available on the market before the relevant date but were not identified during the appeal proceedings. The mere allegation that it is very likely that these formulas contained lactose micro-particles of the claimed size does not amount to direct and unambiguous disclosure of the claimed subject-matter.

1.12 For these reasons, it is concluded that the claimed subject-matter is novel over the teaching of D16. The appellant mentioned in passing D6, D11, D13 and D14 as further documents disclosing lactose-containing infant formula in powder form. However, the appellant did not indicate whether and why the teaching of these

documents went beyond that of D16. Thus, there are no reasons to believe that these documents disclose the claimed infant formulas.

1.13 Consequently, the claimed infant formula is novel over the cited prior art. The same conclusions apply to the method of producing the formula in claim 11 and to the use and the method of using the formula in claims 13 and 14 (Article 54(2) EPC).

2. *Admission of documents D38 and D39*

2.1 In accordance with Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a summons to oral proceedings must, as a rule, not be taken into account unless there are exceptional circumstances justified with cogent reasons by the party concerned.

2.2 In the case at hand, after notification of the summons and just a few weeks before the oral proceedings held before the board, the appellant filed D38 and D39. In its opinion, D38 disclosed an infant formula containing lactose micro-particles of the claimed size. Thus, D38 was highly relevant for novelty and had to be admitted into the appeal proceedings. D39, which confirmed that the lactose particles of D38 had the claimed size, had also to be admitted for the same reasons.

2.3 The appellant added that there were good reasons for filing D38 and D39 late. Claim 1 defined the size of the lactose particles by an unusual parameter, and different views were expressed during the proceedings as to the scope of claim 1. This rendered difficult the identification of relevant documents. D38 was brought to light only shortly before the oral proceedings as a

result of a targeted search assisted by artificial intelligence. Its late filing was not due to a lack of diligence.

2.4 The appellant argued that the board's ultimate obligation was to prevent the maintenance of invalid patents. Its discretion to admit new documents could not be limited to a purely formalistic assessment of procedural economy. Thus, in the case at hand, the board had to examine whether the opposed patent complied with the EPC requirements, in this case novelty, taking into account D38 and D39.

2.5 The board is not persuaded by these arguments.

2.6 The size of the lactose micro-particles given in claim 1 was set out as a preferred embodiment in claim 1 as granted. The argument that there were difficulties in determining this size had been presented by the appellant in its notice of opposition and in a letter filed in 2018, during the opposition proceedings. The same arguments were reiterated in the statement setting out the grounds of the current appeal.

2.7 This means that the alleged difficulty to determine the claimed scope had been brought up at the outset of the opposition proceedings. It was not triggered by amendments in the respondent's case or by new facts or arguments set out in the communication issued by the board in preparation for the oral proceedings.

2.8 The fact that a claim might contain an unusual parameter giving rise to different claim interpretations is not justification for conducting further searches or for filing new evidence at a very

late stage of the appeal proceedings. If a claim is unclear, it is on the opponent to take into account all possible interpretations and to present its case together with any relevant supporting evidence at the earliest possible stage of the opposition proceedings.

2.9 For these reasons, the board does not consider that there are exceptional circumstances justified with cogent reasons to amend the appellant's case and to admit D38 and D39 into the appeal proceedings.

2.10 Hence, D38 and D39 are not admitted into the appeal proceedings (Article 13(2) RPBA).

3. *Inventive step*

3.1 The invention relates to an infant formula in powder form having good flowing properties which does not suffer from caking or lumping issues and which can be easily handled and measured without using a scoop or spoon. To provide the required flowing properties, the invention envisages the inclusion of micronised lactose or lactose microcrystals having the particle size specified in claim 1 in the powdered formula (see paragraphs [0002] to [0008] of the opposed patent).

D11 as the closest prior art

3.2 The opposition division found that D11 was the closest prior art. D11 illustrates the nutritional requirements for infant formulas set out in the Codex Alimentarius, a set of standards developed by the Food and Agriculture Organization and the World Health Organization. D11 specifies the compositional requirements of infant formulas (Table 1). It further refers to lactose as a dominant carbohydrate in human

milk, describing its beneficial effects and suggesting its inclusion in infant formulas (page 591, left-hand column, and 593, right-hand column).

3.3 The parties did not object to the opposition division's selection of D11 as the closest prior art. However, the appellant stated that although during the proceedings before the opposition division the focus had been on D11, any other document disclosing lactose-containing infant formulas, e.g. D5, D6 and D16, could also be used as an alternative starting point. Yet, the appellant did not explain why the teaching of any of these documents went beyond that of D11. Thus, the board does not see reasons to diverge from the choice of D11 as the closest prior art.

Distinguishing features

3.4 D11 focuses on the compositional requirements for infant formulas and on the ingredients which must be present to satisfy the infant's nutritional needs. However, D11 does not describe the formulation of any such formula. A powder is mentioned only once, in passing, when discussing the labelling requirements of infant formulas. Thus, from D11 it can only be assumed that some infant formulas in powder form were known before the relevant date.

3.5 As decided by the opposition division, since the population of "micronized lactose or lactose microcrystals" is not further characterised in claim 1, the claimed subject-matter differs from the teaching of D11 in that the infant formula comprises micro-particles, namely micronised lactose or lactose microcrystals having a size below 10 micrometres.

Technical effect

3.6 The tests in the opposed patent show that the inclusion of lactose microcrystals having a size of less than 10 micrometres (Lactochem® microfine) in a commercially available infant formula powder (Nutrilon Standard 2™) increases its flowability (Figure 1).

3.7 It is credible that, being commercially available, this formula contains the ingredients, namely proteins, fats and carbohydrates, which according to D11 must be included in infant formulas to satisfy the infant's nutritional requirements.

3.8 The appellant argued that claim 1 encompassed formulas including just trace amounts and very high amounts of lactose micro-particles. These formulas could not provide the alleged effect. It also noted that after reaching a peak in flowability, at about 4 wt.% of microcrystalline lactose (reflected by the smallest ring size in Figure 1), the flowability of the powder decreased. In its opinion, this pattern was in line with the teaching of D33, which taught that the flow properties of a powder could be worsened when a high fraction of fines was included. Thus, there was evidence that an increase in flowability could not be achieved across the entire scope claimed.

3.9 These arguments are not convincing.

3.10 In the first place, the relevant feature characterising the claims is that the infant formula contains lactose micro-particles having a size below 10 micrometres. From this fact, the skilled person would understand that the micro-particles are included in the claimed formulas for a purpose and cannot be present just in

trace amounts. Since the claimed formula is meant for feeding an infant and must include substantial amounts of other ingredients, such as proteins and fats, it cannot contain extremely high amounts of lactose either. Furthermore, as noted by the opposition division, there is no evidence that if the amount of lactose is increased beyond that shown in Figure 1 of the patent (around 15%), the flowability of the infant formula will become worse than that observed if no lactose is present at all.

3.11 The appellant argued that an improvement in flowing properties was only observed by adding lactose micro-particles to wet-mixed powdered infant formulas. There was no evidence that such an effect could be observed with infant formulas obtained by adding lactose micro-particles to a dry-mixed infant formula. Furthermore, no effect would have been observed over infant formulas which, such as those mentioned in D18, could contain lactose micro-particles of the claimed size.

3.12 These arguments are not persuasive. First of all, it was on the appellant to provide evidence that the effects observed in the tests described in the patent do not occur with infant formulas prepared by simple dry-mixing. Moreover, since it is uncontested that D11 is the closest prior art, the argument that no effect is observed over the compositions of D18 is irrelevant.

3.13 For these reasons, the board considers that the test in the patent makes it credible that the inclusion of lactose micro-particles having a size of below 10 micrometres in a nutritional formula increases its flowing properties, preventing caking and lumping issues and allowing it to be dispensed without the use of spoons or scoops.

Underlying technical problem

3.14 Taking into account the observed technical effect, starting from D11, the underlying objective technical problem is the provision of an infant formula powder having improved flowing properties which is less subject to caking and lumping and which can be dispensed without using a spoon or a scoop.

Non-obviousness of the claimed solution

3.15 As mentioned above, D11 focuses on the ingredients which must be included to satisfy the infant's nutritional needs but does not describe any specific infant formula in powder form. It does not address any problem occurring when formulating infant formulas in powder form either. It does not address the problem of scarce flowability, lumping or caking of these formulas. Hence, D11 does not contain any pointer to the claimed solution.

3.16 According to the appellant, D1 suggested the inclusion of lactose micro-particles having the claimed size to increase flowability.

3.17 The board does not consider this argument persuasive either.

3.18 D1 focuses on the preparations of a dry free-flowing powder containing lactulose, a compound promoting the growth of *bifidus* flora in infants (page 1, lines 12 to 26, and page 2, lines 47 to 64). D1 teaches that the preparation of lactulose powders is difficult. To enable the formation of a free-flowing powder, rather than a sticky product, it suggests forming a liquid

containing lactulose, lactose and possibly other carbohydrates and spray drying it at a high temperature (page 1, lines 47 to 61; examples and claims). This results in particles having a size of 2 to 50 micrometres (page 3, lines 3 to 9).

3.19 However, as noted by the respondent, this process produces a powder which is, as such, free flowing and not a powder used to improve the flowability of an infant formula powder. The powder of D1 cannot be considered, as such, an infant formula because it does not contain the ingredients which, according to D11, have to be contained in infant formulas.

3.20 Even assuming that the skilled person would have considered adding the spray-dried particles of D1 to an infant formula powder, by doing this they would not have obtained the claimed infant formula. As mentioned above when discussing novelty over D16, claim 1 requires the presence of discrete lactose micro-particles having the claimed size. The skilled person would not consider the spray-dried particles obtained according to the process of D1, which contain a mixture of lactose and lactulose, to be micronised lactose or lactose microcrystals, i.e. lactose micro-particles as defined in the claims.

3.21 For these reasons, the subject-matter of claim 1 involves an inventive step over the teaching of D11, alone or combined with that of D1. The same conclusions apply to the method of producing the formula in claim 11 and to the use and the method of using the formula in claims 13 and 14 (Article 56 EPC).

4. *Non-admittance of inventive-step objection based on a combination of D11 with D21*

4.1 The appellant has also considered that starting from D11 and confronted with the underlying problem, the skilled person would have found in D21 a prompt toward the claimed solution.

4.2 The combination of D11 with D21 is a new attack presented for the first time in appeal. D21 was not used in any inventive-step attack during the opposition proceedings. No reason for raising a new attack based on a combination of D11 with D21 only in appeal was provided, nor can any be seen by the board. It appears that the only reason for raising this new attack was simply to try an alternative approach once it became likely that the attack based on the combination of D11 with D1 would fail.

4.3 Even if the attack based on the combination of D11 with D21 were admitted, it would not be successful. D21 describes the properties of lactose in anhydrous and monohydrate form. The only mention of its use as a flow aid concerns dry powders used for inhalation. No mention is made of its use to improve the flow of infant formula, which, as noted by the respondent, typically contains significant amounts of fat and proteins. No mention of lactose particles of the claimed size for improving the flowing properties of powder compositions is made either. Thus, when confronted with the underlying problem, the skilled person would not have had a reasonable expectation that lactose particles, let alone of the claimed size, could improve the flowability of infant formula in powder form. Consequently, the skilled person would not have found in D21 any prompt toward the claimed solution.

5. *Non-admittance of inventive-step objections starting from D21, D32 and D33 as the closest prior art*

5.1 In section 5.1 of its statement of grounds of appeal, the appellant argued that "before discussing the opposition division's reasons for considering claim 1 inventive over the prior art, the appellant has found expedient to initially touch upon the skilled person common general knowledge".

5.2 In the following sections of its statement of grounds of appeal, it referred to D21, D32 and D33 as documents representing common general knowledge which discussed the issue of flowability of powdered composition and the use of fine powders to improve their flowing properties. After a lengthy discussion on the teaching of these documents, the appellant expressed the opinion that the claimed subject-matter "is not inventive in view of the skilled person's common general knowledge" because it "does not represent anything above or beyond the mere application of the skilled person's common general knowledge (as represented by e.g. D21, D32 and D33)".

5.3 These are *de facto* new inventive-step attacks, starting from D21, D32 and D33 as the closest prior art, which were not set out during proceedings before the opposition division.

5.4 The board notes that D32 was cited late, in a letter filed by the appellant before the oral proceedings before the opposition division, as a secondary document to complement an inventive-step attack starting from D11 as the closest prior art (see the letter dated 27 April 2003). D33 was filed by the proprietor (as

D31a) in a letter dated 20 April 2023 to rebut that new attack. D21 was not used for an inventive-step attack during the opposition proceedings, let alone as a starting point for an inventive-step attack. It was actually filed by the proprietor to discuss sufficiency of disclosure.

5.5 The board also notes that in its statement setting out the grounds of appeal, the appellant did not even use the problem-solution approach when formulating its new attacks starting from D21, D32 and D33. This means that the appellant left to the board the task of formulating a complete inventive-step objection. The appellant did not give any reason for formulating new attacks based on D21, D32 and D33 in appeal either.

5.6 For these reasons, the board considers that these new attacks should not be admitted into the appeal proceedings (Article 12(4) RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

K. Götz-Wein A. Haderlein

Decision electronically authenticated