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**Datasheet for the decision  
of 22 June 2026**

**Case Number:** T 0682/24 - 3.3.09

**Application Number:** 12726541.1

**Publication Number:** 2713764

**IPC:** A23G3/00, A23G3/26

**Language of the proceedings:** EN

**Title of invention:**

SYSTEM AND METHOD FOR CONTINUOUSLY COATING CONFECTIONARY  
PRODUCT

**Patent Proprietor:**

Intercontinental Great Brands LLC

**Opponent:**

Mars, Incorporated

**Headword:**

SYSTEM AND METHOD FOR CONTINUOUSLY COATING CONFECTIONARY  
PRODUCT/INTERCONTINENTAL GREAT BRANDS LLC

**Relevant legal provisions:**

EPC Art. 54, 84, 123(2)  
RPBA 2020 Art. 12(4), 12(6)

**Keyword:**

Main request: novelty - (no)

Auxiliary requests: admitted in first instance proceedings  
(yes)

Auxiliary requests: novelty - (no), lack of clarity - (yes),  
amendments - allowable (no)

Auxiliary requests: late-filed requests - should have been  
filed in first-instance proceedings (yes)

**Decisions cited:**

T 0498/21

**Catchword:**



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

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Case Number: T 0682/24 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 22 June 2026**

**Appellant:** Intercontinental Great Brands LLC  
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**Representative:** Wilson Gunn  
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**Respondent:** Mars, Incorporated  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted/electronically  
transmitted on 21 March 2024 revoking European  
patent No. 2713764 pursuant to Article 101(3) (b)  
EPC.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** L. Basterreix  
M. Ansorge

## **Summary of Facts and Submissions**

- I. The appeal was filed by the patent proprietor against the decision of the opposition division that revoked the patent.
- II. An opposition had been filed against the European patent on the grounds that its subject-matter lacked novelty and inventive step, it was not sufficiently disclosed, and it contained subject-matter extending beyond the content of the application as filed.
- III. The decision was based on a main request, auxiliary requests I to VI filed on 30 November 2022 and a new auxiliary request II filed during the oral proceedings on 6 February 2024.
- IV. The opposition division decided that the main request complied with the requirements of sufficiency of disclosure, admitted document D35 into the proceedings, and decided that the main request was novel over documents D3 and D35 but was not novel over document D4. Auxiliary requests I to VI filed on 30 November 2022 were admitted into the proceedings. The opposition division decided that auxiliary request I was not novel over document D4, auxiliary request II did not comply with the requirements of Article 84 EPC, and auxiliary requests III to VI did not comply with the requirements of Articles 123(2) and 84 EPC. New auxiliary request II filed during the oral proceedings was not admitted into the proceedings.

## Parties and requests

- V. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or that the patent be maintained on the basis of one of auxiliary requests A to P filed with the grounds of appeal. They also filed conditional requests for the case to be remitted to the opposition division for further prosecution.
- VI. The respondent requested that the appeal be dismissed. The respondent also requested, should any of auxiliary requests B to E, G, H, K, L, N and P be admitted into the proceedings, an apportionment of costs in their favour.

## Reasons for the Decision

### 1. Main request

Claim 1 of the main request reads as follows (feature numbering as referred to by the parties):

*"a) A system for continuously coating individual pieces of confectionary product (12), the system comprising:  
b) a product feed device (14);  
c) at least one drum coating arrangement configured to receive the individual pieces of confectionary product from said product feed device,  
d) said drum coating arrangement including a first rotating drum (18) rotatable about a first drum axis and a second rotating drum (20) rotatable about a second drum axis;*

e) a first drum volume defined by said first rotating drum; and a second drum volume defined by said second rotating drum, said first drum volume being communicable with said second drum volume,

f) wherein said first rotating drum is configured to apply a liquid material to the individual pieces of confectionery product and said second rotating drum is configured to apply a dry powder material to the individual pieces of confectionery product;

g) wherein said drum coating arrangement is configured such that the confectionery product has a longer residence time in said second drum volume than said first drum volume;

h) and wherein said first drum and said second drum are independently inclinable."

#### 1.1 Novelty over document D4

1.1.1 The appellant argued that the main request was novel over document D4 because both features f) and g), which impart a structural limitation to the system, were not disclosed in this document. Regarding feature f), paragraph 39 of document D4 disclosed that to facilitate the application of dry powder, the drum members had to be set up differently, namely with a central pipe for delivering the dry powder instead of the nozzles of the embodiment shown in Figure 4. The embodiment of Figure 4 of document D4 providing two drum members that both applied a liquid spray to the cores was therefore not suitable for applying a powder in either drum. Regarding feature g), the first drum had to be at a steeper inclination than the second drum to achieve a longer residence time in the second drum. Document D4 disclosed that it was possible to speed up or slow down the coating process to change the thickness and/or quality of a coating and that

rotational speeds of the drums could be controlled. However, document D4 did not disclose a system in which the angle, speed and other parameters of the drums were set up to achieve a longer residence time in the second drum compared to the first drum. Lastly, feature h) was not disclosed either since document D4 disclosed that a computer might be used to control the tilting angle of the drums, but not that it was arranged to control the tilting angle of each drum separately.

1.1.2 The board finds these arguments not convincing. As concluded by the opposition division (see point 6.2.5 of the decision), feature f) only requires that the first and second drums be suitable for providing liquid and powder materials, respectively. Document D4 discloses, in paragraph 39, that spray nozzles 40 are positioned along one or more pipe or conduits 41 which extend along the inside of the rotating drum members. The sugar or other materials being coated on the cores can be applied as a liquid or dry powder. If a dry powder is used, it can be introduced into the rotating drum members from a central pipe, also preferably as a spray. Therefore, in document D4, the coating material can be applied in liquid or dry powder form inside the rotating drum members. There is no need to alter the system of Figure 4 of document D4 to apply a dry powder coating. Pipe 41 is a central pipe suitable for introducing the powder into the rotating drum members. No different set up is thus required depending on whether a liquid or a dry powder coating is to be applied. Feature f) is therefore disclosed in document D4.

1.1.3 The board also concurs with the opposition division's interpretation (point 6.2.6 of the decision) that feature g) only requires the possibility for the system

to control the operational parameters (such as speed and inclination of the two drums) that affect the residence time. Paragraph 40 of document D4 discloses that the drum members are preferably tilted or inclined with respect to a horizontal plane by a few degrees. An adjustable system can change the tilt or angle of tilt of the drum members, this affecting the speed at which the products pass through them. It appears from Figure 4 that each drum member (35 and 35') can be inclined by means of an adjustable mechanism (60 and 60'). Features g) and h) are therefore also disclosed in document D4.

1.1.4 The respondent objected to the admittance of the appellant's argument that document D4 does not disclose that the computer is arranged to control each drum member independently and argued that there were no legitimate reasons for filing this new argument based on new facts only in the statement of grounds of appeal. However, the board considers that this does not constitute a new argument but a mere development of the appellant's arguments regarding the non-disclosure of feature h) in document D4.

1.1.5 Nevertheless, the appellant's arguments are not persuasive. Although paragraph 48 of document D4 discloses that a computer can be used to control the tilting angle of drum members, it does not imply that drum members are necessarily tilted or inclined at the same angle. As stated above, Figure 4 shows that each drum member is adjustable by independent means, which, in the board's view, is the case whether they are controlled by an operator or a computer.

1.1.6 For these reasons, claim 1 of the main request lacks novelty over document D4.

2. Auxiliary requests A, F, I, J, M and O

2.1 Admission into the proceedings and substantial procedural violation

2.1.1 The respondent argued that auxiliary requests A, F, I, J, M and O, filed as auxiliary requests I to VI on 30 November 2022 and which were dealt with in the decision under appeal, should not have been admitted into the proceedings by the opposition division. These auxiliary requests were late filed, i.e. filed three years after the deadline under Rule 79(1) EPC and after the opposition division's first decision and the board's decision on appeal in case T 498/21 had been issued. The opposition division therefore had discretion not to admit them. Moreover, the opposition division's decision to admit these requests without applying its discretion, whereas it had previously exercised that discretion not to admit the documents filed by the opponent within the time limit specified in Rule 116(1) EPC, resulted in unfair treatment of the parties, which amounted to a substantial procedural violation.

2.1.2 In the decision under appeal, the opposition division stated that auxiliary requests I to VI had been filed within the deadline under Rule 116(1) EPC set during the opposition proceedings that followed the remittal from the board. The opposition division also considered that their filing did not constitute an abuse of procedure, that their number was not excessive and that, having been filed more than a year before the oral proceedings, a *prima facie* assessment was not justified (see points 7.2 and 7.3 of the decision). Even though it may be agreed with the respondent that the opposition division was not correct to consider that it did not have discretion not to admit these

requests into the proceedings (see point 7.4 of the decision), it is clear from the decision under appeal that the opposition division, when assessing whether these requests should be admitted, applied the correct principles and provided sufficient reasoning to explain why they had been admitted into the proceedings.

2.1.3 Regarding the documents filed by the respondent (then opponent), in the decision dated 23 February 2021, the opposition division considered that documents D21 to D34 could have been filed earlier. The opposition division considered that the amendments made by the patent proprietor when filing new auxiliary requests resulting from the combination of the subject-matter of granted claims were foreseeable and common practice and should not have caught the opponent unprepared. The opposition division did not agree that its preliminary opinion had changed the scope of proceedings. If, as submitted by the opponent, most of the late-filed documents were common general knowledge, the opposition division could not follow the argument provided by the opponent that these documents could not have been filed earlier. The opposition division could also not see why the pandemic situation would have hindered the opponent in filing these documents earlier as it did not appear that the opponent was not able to search for these documents online, document D30 being a printout of a web page. Lastly, the opposition division considered that none of documents D21 to D34 was more relevant than documents D1 to D20, which were already on file.

2.1.4 In its two decisions, the opposition division provided sufficient reasoning to justify the admission, or non-admission, of the parties' requests and documents into the proceedings. The fact that the opposition division reached contrary decisions is not sufficient to

establish unequal treatment amounting to a substantial procedural violation. The board further notes that if such a procedural violation were found to have occurred, the consequence would be remittal of the case to the opposition division (Article 11 RPBA) and not the exclusion on appeal of the auxiliary requests admitted during the opposition proceedings.

In view of the above, auxiliary requests I to VI, refiled as auxiliary requests A, F, I, J, M and O with the statement of grounds of appeal and on which the opposition division's decision is based, are part of the appeal proceedings.

## 2.2 Auxiliary request A

Claim 1 of auxiliary request A differs from claim 1 of the main request in that it relates to a *"system for continuously coating individual pieces of confectionary product (12) via agglomeration, the system comprising..."* (emphasis added by the board).

### 2.2.1 Novelty over document D4

2.2.2 The appellant argued that auxiliary request A further specified that the claimed system had to be set up to apply powder to the confectionery product such that it coats the product through a mechanism of clustering onto the product. This imparted additional structural limitations on the system as a whole and was enabled in the claimed invention by the application of a liquid to the product in the first drum, which acted as a binding solution. The liquid-coated product was then passed into the second drum where the powder was added and bound to the liquid material. The residence time in the first drum was relatively short to avoid absorption of

the liquid, and the residence time in the second drum was relatively long to give enough time for binding the powder to the liquid. The liquid material was therefore not dried before the powder was applied to the product.

2.2.3 However, as indicated in point 1.1.2 for the main request, the system disclosed in document D4 is suitable for the application of a liquid coating in the first drum and a powder in the second drum. The board sees no reason why such a system would, contrary to the claimed invention, not be suitable for the binding of particles or powder to a liquid. Accordingly, the feature "*via agglomeration*" does not impart additional structural limitations that would make the claimed system novel in view of document D4.

2.2.4 Claim 1 of auxiliary request A therefore lacks novelty over document D4.

2.3 Auxiliary request F

In claim 1 of auxiliary request F, feature g) "*wherein said drum coating arrangement is configured such that the confectionary product has a longer residence time in said second drum volume than said first drum volume*" has been replaced by the feature "*wherein said second drum volume is greater than said first volume, said larger second drum volume allowing the pieces of confectionary product to achieve said longer residence time in said second drum volume than said first drum volume*".

2.3.1 Clarity

2.3.2 According to the decision under appeal, the patent proprietor acknowledged the lack of clarity of

auxiliary request II (now auxiliary request F) due to the insertion of the subject-matter of granted claim 2 into claim 1. An antecedent-basis issue had been created by the term "*said longer residence*".

2.3.3 The appellant nevertheless contended in their grounds of appeal and letter dated 5 March 2025 that the opposition division erred in its decision because the term "*longer residence time*" appeared only once in the set of claims and did not contradict any other feature. The appellant further argued that a residence time for confectionery in each drum must be implicitly disclosed as otherwise the drums could not be configured to coat confectionery product as claimed.

2.3.4 These arguments are not convincing. Following the amendment of the main request, feature g), which claimed a longer residence time to be achieved in the second drum volume, was deleted and replaced with a new wording. The expression "*said residence time*" presupposes that a residence time has previously been mentioned in claim 1. This is, however, no longer the case as the only feature of claim 1 that provided an antecedent basis for residence time was deleted by the appellant. The term therefore lacks an antecedent basis. This defect cannot be remedied by what would be implicitly disclosed in the context of the system for continuously coating individual pieces of confectionery product of claim 1 in so far as it does not necessarily imply that a specific or distinct residence time must be defined for each drum to achieve the coating.

2.3.5 Claim 1 of auxiliary request F therefore does not comply with Article 84 EPC.

## 2.4 Auxiliary request I

Claim 1 of auxiliary request I differs from claim 1 of the main request by the addition of the term "*directly*" to feature e), namely: "*a first drum volume defined by said first rotating drum; and a second drum volume defined by said second rotating drum, said first drum volume being directly communicable with said second drum volume*" (emphasis added by the board).

### 2.4.1 Article 123(2) EPC

2.4.2 The opposition division concluded that auxiliary request I (then auxiliary request III) violated the requirements of Article 123(2) EPC. The opposition division considered that paragraph 26 was silent on any direct communication between the two drums. In paragraph 26, reference was made to Figures 1 to 6. While it was disclosed that the drums were fixed relative to each other, whether this means directly, in direct communication, using a specific locking mechanism, etc. was not clear. The opposition division also considered that the figures, which show that drums 18 and 20 are connected, are not conclusive as to whether this is a direct connection. Therefore, the skilled person was presented with a new teaching when specifying that the first drum volume is directly communicable with the second drum volume.

2.4.3 The appellant did not dispute this analysis but submitted that the feature "*directly communicable*" is disclosed in the application as filed, namely in paragraphs 27 (which refers to Figures 6 and 7), 32 and 34 and claims 4, 5, 28, 11 and 33.

2.4.4 The respondent objected that this was an amendment to the appellant's case which had not been justified or explained, requesting that it not be admitted under Article 12(4) and (6) RPBA.

2.4.5 It is apparent from the file that the patent proprietor, in their submissions of 30 November 2022 and 1 February 2024 and during the oral proceedings before the opposition division on 6 February 2024, consistently cited paragraph 26 of the application as filed and Figures 1 to 5 mentioned there, even though the basis for this amendment was contested by the opponent. The paragraphs and claims of the application as filed which are now referred to by the appellant are being invoked for the first time in appeal and thus constitute an amendment to the appellant's case, the admissibility of which is subject to the discretion of the board.

2.4.6 The objection under Article 123(2)EPC had been raised and discussed during the opposition proceedings, both in writing and during oral proceedings. The board considers that the appellant had ample opportunity before the opposition division to refer to other passages of the application as filed as a basis for the disputed amendment. Consequently, the board does not admit the new arguments submitted by the appellant in respect of this objection (Article 12(6) RPBA) and sees no reason to overturn the opposition division's decision that auxiliary request I does not comply with the requirements of Article 123(2) EPC.

2.5 Auxiliary request J

Claim 1 of auxiliary request J differs from claim 1 of the main request in the addition of the underlined

feature: "e) a first drum volume defined by said first rotating drum; and a second drum volume defined by said second rotating drum, said first drum volume being communicable with said second drum volume, via insertion of an end (41) of the first rotating drum (18) into a portion of the second rotating drum (20) that tapers down to an inlet opening (44) thereof, allowing the pieces to flow from the first drum (18) into the second drum (20)".

2.5.1 Article 123(2) EPC

2.5.2 The opposition division considered that the feature of the annulus 45 located between the drums, mentioned in paragraph 27 of the application as filed, had been omitted from the amendment made to feature e) and that this omission constituted an unallowable intermediate generalisation.

2.5.3 According to the appellant, this amendment was not an intermediate generalisation of paragraph 27 because the annulus did not have a functional relationship with the feature that the first and second drum volume were communicable via insertion of an end 41 of the first rotating drum 18 into a portion of the second rotating drum 20 that tapered down to an inlet opening 44, nor were the two features inextricably linked.

2.5.4 The respondent objected to the admission into the proceedings of the appellant's new arguments on the objection under Article 123(2) EPC. This objection was raised in their submissions of 1 December 2020 (in relation to the first auxiliary request filed on 13 December 2019 which contained the same amendment), and the appellant had put forward no arguments in writing to rebut this objection until their grounds of appeal,

some 3.5 years later. At the oral proceedings on 6 February 2024, the appellant merely relied on their written submissions, which simply referred to paragraph 27 as providing the basis for the amendment. The appellant has therefore not provided any justification for this amendment and cannot be allowed to remake their case at such a late stage. This would not only be contrary to procedural economy but also contrary to the fair and equal treatment of both parties.

2.5.5 The board considers that the appellant's arguments do not constitute an amendment to their case but a legitimate attempt to address point 12.5.1 of the contested decision, in which the opposition division held that numerous features had been omitted from the embodiment to which paragraph 27 and Figures 6 and 7 refer, such as the annulus 45 located between the drums, leading to an unallowable intermediate generalisation. Consequently, the board admits into the proceedings the arguments relating to the objection under Article 123(2) EPC submitted by the appellant in their statement of grounds of appeal.

2.5.6 The board is, however, not convinced by the appellant's arguments. Paragraph 27 of the application as filed refers to the exemplary embodiment of Figures 6 and 7, in which the drum volumes 40 and 42 communicate via insertion of an end 41 of the first drum 18 into a portion of the second drum 20 that tapers down to an inlet opening 44, allowing the pieces 12 to flow from the first drum 18 into the second drum 20. This insertion of the end 41 of the first drum 18 into the inlet opening 44 of the second drum 20 also forms an annulus 45 between the drums. It is clear from this paragraph that the formation of an annulus and the insertion of the end of the first drum into the inlet

opening of the second drum are inextricably linked. Turning to Figures 6 and 7, the tube 68 extends into the second drum volume via the annulus between the first and second drum. This tube, connected to a powder supply, feeds the powder material into the second drum volume and is positionally adjustable along an entire length of the second drum, allowing powder output to occur anywhere along an entire length of the second drum (see paragraph 33 of the application as filed). Therefore, in the embodiment of Figure 6 referred to in paragraph 27 of the application as filed, the annulus is necessary for applying the powder in the second drum and is not limited to the sampling of liquid-coated pieces as submitted by the appellant. By omitting this feature from the amendment made to feature (e), the appellant has also removed several other features of this embodiment that enable the coating of confectionery pieces, which constitutes an unallowable intermediate generalisation.

2.5.7 Claim 1 of auxiliary request J thus does not comply with the requirements of Article 123(2) EPC.

2.6 Auxiliary request M

In claim 1 of auxiliary request M, the following amendment has been made (emphasis added by the board):  
"e) a first drum volume defined by said first rotating drum, wherein said first rotating drum includes a release assist bar (58) inserted into said first drum volume from an opening at an output end of said first rotating drum, said release assist bar being disposed substantially parallel to said first drum axis in proximity to an inner surface of said first rotating drum, said release assist bar being configured to dislodge the pieces of confectionary product that

adhere to said inner surface of said rotating first rotating drum via said proximity to said inner surface;  
and a second drum volume defined by said second rotating drum, said first drum volume being communicable with said second drum volume".

Dependent claim 5 of auxiliary request M is identical to dependent claim 5 of the main request and reads as follows:

*"The system of claim 1, wherein at least one of an inner surface of said first rotating drum and an inner surface of said second rotating drum include ribs."*

2.6.1 Article 123(2) EPC

2.6.2 The appellant submitted that paragraph 31 of the application as filed described the release assist bar and, at the end of the paragraph, mentioned that inner surfaces of the drums 18 and 20 might also optionally include ribs 63 configured to facilitate coating the pieces 12. While Figure 9, to which paragraph 31 referred, does not show the release assist bar, this extract clearly disclosed that the drums might also comprise ribs, so that the application as filed disclosed combining both the ribs and release assist bar in the same drum. Additionally, claims 1 and 5 and Figures 7 and 8 covered undefined embodiments in which a portion of the drum had ribs and another portion of the drum was covered by the release assist bar, thus that the two features were compatible. Moreover, depending on the materials used to construct the ribs and release assist bar, the relative height of the ribs, and the proximity of the release assist bar to the inner surface of the drum, both might be able to occupy the same part of the drum either without coming

into contact or by deforming. Figure 8 showing the release assist bar and Figure 9 showing the ribs were both described as being in accordance with the exemplary embodiment of Figure 1 in paragraphs 10 to 19 of the application as filed. This explicitly disclosed the combination of the ribs and release assist bar in the same embodiment.

2.6.3 The respondent objected to the admission into the proceedings of the appellant's arguments based on new technical facts.

2.6.4 However, the board considers that the appellant's arguments do not constitute an amendment to their case but a legitimate attempt to address point 13.5.1 of the contested decision, in which the opposition division held that the requirements of Article 123(2) EPC were not met because it could not identify a direct and unambiguous disclosure of a combination of features in claim 1 with those in claim 5 of auxiliary request IV. Consequently, the board admits into the proceedings the arguments relating to the objection under Article 123(2) EPC submitted by the appellant in their statement of grounds of appeal.

2.6.5 The board, however, finds the appellant's arguments unconvincing. Paragraph 30 of the application as filed describes the release assist bar 58 which is positioned within the first drum volume 40 to be substantially parallel to the central first drum axis 52 and in proximity to the inner surface 56 (at a relatively upper portion of it in Figures 7 and 8). Paragraph 31 discloses a further feature of the embodiment of Figures 7 and 8, namely a weir plate. Ribs can also optionally be present on the inner surface of the drums, but reference is made in this case to the

embodiment of Figure 9 in which the ribs extend the full length of both drums. The presence of a scraper and ribs are thus disclosed as being part of different embodiments referred to in different figures. As submitted by the appellant, Figure 8 showing the release assist bar and Figure 9 showing the ribs are both described as being in accordance with the exemplary embodiment of Figure 1 (see paragraphs 10 to 19 of the application as filed). Nevertheless, there is no pointer in the application as filed that they can be combined with each other within the same rotating drum in the system described in Figure 1. The application as filed does not disclose an arrangement in which the scraper bar extends to only part of the drum, and only to a part in which ribs are not present. Nor does it disclose that, depending on the materials used to construct the ribs and release assist bar, the relative height of the ribs and proximity of the release assist bar to the inner surface of the drum, the two may occupy the same part of the drum either without coming into contact or by deforming, as alleged by the appellant.

2.6.6 Claim 1 of auxiliary request M therefore does not meet the requirements of Article 123(2) EPC.

2.7 Auxiliary request O

Auxiliary request O corresponds to a combination of auxiliary requests J and M. The board's conclusions on auxiliary requests J and M therefore apply equally to auxiliary request O.

This request thus does meet the requirements of Articles 123(2) EPC either.

3. Auxiliary requests B to E, G, H, K, L, N and P
  - 3.1.1 These requests were filed for the first time with the statement of grounds of appeal. They constitute an amendment to the appellant's case, and their admission into the proceedings, which is contested by the respondent, is subject to Article 12(4) to (6) RPBA.
  - 3.1.2 According to the appellant, auxiliary requests B to E, H and L were filed to address the opposition division's conclusion that the main request lacked novelty in view of document D4, and auxiliary requests G, K, N and P were filed to address the opposition division's conclusion that auxiliary requests II, IV, V and VI did not comply with the requirements of Articles 84 and 123(2) EPC, respectively. They submitted that the amendments were not complex, addressed the issues that led to the decision under appeal and enabled the board to dispose of the appeal with procedural efficiency.
  - 3.1.3 The board, however, agrees with the respondent that filing ten new auxiliary requests for the first time with the statement of grounds of appeal, when the appellant already had several opportunities to file such requests in two separate opposition proceedings, cannot contribute to procedural efficiency.
  - 3.1.4 Auxiliary requests B to E, H and L were filed to address the objection of lack of novelty over document D4 raised against the main request that had been filed during the oral proceedings before the current board, admitted into the proceedings and found in decision T 498/21 to meet the requirements of Article 123(2) EPC. After the case had been remitted to the opposition division for further prosecution, the appellant provided on 30 November 2022 further arguments on all

grounds for opposition and submitted auxiliary requests I to VI and, after the summons to oral proceedings had been issued, submitted on 1 February 2024 further arguments in support of maintenance of the patent. The appellant therefore had several opportunities to submit arguments relating to novelty of the main request over document D4 and auxiliary requests that could address the objection of lack of novelty. Additionally, auxiliary requests B to E, H and L all include new features from the description, none of which have been considered in the proceedings to date. Moreover, auxiliary requests D and E (method and use claims) relate to subject-matter that the opposition division found to lack clarity in its decision dated 23 February 2021. This part of the decision was not appealed by the patent proprietor. Instead, the patent proprietor filed during the first oral proceedings before the opposition division a new main request from which the method claims had been deleted and, during the appeal proceedings in case T 498/21, another main request (current main request) which did not contain method claims either. The reintroduction of method claims at this stage of the proceedings can only add complexity to the case.

- 3.1.5 With regard to auxiliary request G, the appellant was made aware of the lack of clarity of auxiliary request II at the oral proceedings dated 6 February 2024 and had the opportunity to address this issue by filing a new auxiliary request II which was not admitted into the proceedings. Auxiliary request G constitutes an additional attempt to address the same issue but with a different amendment, which the appellant had the opportunity to make during the opposition proceedings and should have made then. The same observation can be made for auxiliary request N, filed in appeal to

address the opposition division's conclusion that auxiliary request V did not comply with Articles 84 and 123(2) EPC.

- 3.1.6 As regards auxiliary request K, the board is of the opinion that the appellant cannot fill in the gaps in their argument by filing a new auxiliary request in appeal. As set out above for auxiliary request J, despite the objection under Article 123(2) EPC having been raised in the respondent's submissions of 1 December 2020 (in relation to the first auxiliary request filed on 13 December 2019), the patent proprietor put forward no arguments in writing or during the second oral proceedings before the opposition division to address this issue. The same observation can be made for auxiliary request P, which is a combination of auxiliary requests K and N.

In view of the above, the board considers that auxiliary requests B to E, G, H, K, L, N and P should have been submitted during the opposition proceedings before the opposition division and does not admit them into the proceedings.

#### 4. Conclusion

None of the requests on file is admissible or allowable. The appeal is therefore to be dismissed.

#### 5. Apportionment of costs

- 5.1 The respondent requested, should the board decide to admit any of new auxiliary requests B to E, G, H, K, L, N and/or P, an apportionment of costs in their favour.

5.2 In view of the board's decision on the non-admission of auxiliary requests B to E, G, H, K, L, N and P into the proceedings, there is no need to address the respondent's request.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated