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**Datasheet for the decision
of the Enlarged Board of Appeal
of 23 July 2012**

Case Number: G 0001/10
Application Number: 99115002.0
Publication Number: 0961184
IPC: G05B 19/418
Language of the proceedings: EN

Title of invention:
System for use in a field device management

Patentee:
Fisher-Rosemount Systems, Inc.

Opponent:
Endress+Hauser (Deutschland) AG+Co. KG

Headword:
Request to correct patent/FISHER-ROSEMOUNT

Relevant legal provisions:
EPC Art. 2(2), 19(1), 70(1)(3), 97(1), 100, 109(1), 112(1)(a),
113(2), 123(2)(3), 138
EPC R. 71, 91, 95, 103(1)(a), 139, 140

Relevant legal provisions (EPC 1973):
EPC R. 89

Keyword:
"Request under Rule 140 EPC to correct patent inadmissible"

Decisions cited:
G 0001/07, T 0850/95, T 0777/97

Headnote:

The questions referred to the Enlarged Board of Appeal are answered as follows:

1. Since Rule 140 EPC is not available to correct the text of a patent, a patent proprietor's request for such a correction is inadmissible whenever made, including after the initiation of opposition proceedings.

2. In view of the answer to the first referred question, the second referred question requires no answer.



Case Number: G 0001/10

D E C I S I O N
of the Enlarged Board of Appeal
of 23 July 2012

Appellant: Endress+Hauser (Deutschland) AG+Co. KG
(Opponent) Colmarer Strasse 6
D-79576 Weil am Rhein (DE)

Representative: -

Respondent: Fisher-Rosemount Systems, Inc.
(Patent Proprietor) 8301 Cameron Road
Austin, Texas 78754 (US)

Representative: Bohnenberger, Johannes
Meissner, Bolte & Partner GbR
Widenmayerstrasse 48
D-80538 München (DE)

Referring Decision: Interlocutory decision of the Technical Board
of Appeal 3.5.03 dated 17 June 2010.

Composition of the Board:

Chairman: W. Van der Eijk
Members: C. Rennie-Smith
B. Günzel
A. G. Klein
R. Menapace
U. Oswald
G. Weiss

Summary of Facts and Submissions

I. By its interlocutory decision of 17 June 2010 in appeal T 1145/09, Technical Board of Appeal 3.5.03 referred the following questions to the Enlarged Board of Appeal:

1. Is a patent proprietor's request for correction of the grant decision under Rule 140 EPC which was filed after the initiation of opposition proceedings admissible? In particular, should the absence of a time limit in Rule 140 EPC be interpreted such that a correction under Rule 140 EPC of errors in decisions can be made at any time?

2. If such a request is considered to be admissible, does the examining division have to decide on this request in *ex parte* proceedings in a binding manner so that the opposition division is precluded from examining whether the correction decision amounts to an unallowable amendment of the granted patent?

II. The opposition filed on 10 September 2004 was based on the sole ground of added subject-matter (Article 100(c) EPC), the only argument being that in claim 1 of the patent the feature

"means for initiating (56) a command related to a position of the device data"

was not disclosed in the application as filed. The proprietor's reply of 27 April 2005 argued that this resulted from a typographical error made when amending claim 1 during the pre-grant procedure and that the feature should read

"means for initiating (56) a command related to a portion of the device data".

The word "position" should thus read "portion". The proprietor requested in a letter of 27 December 2005 that the opposition proceedings be stayed and that the case be remanded to the examination division for re-issuance of the granted patent after correction under Rule 89 EPC 1973. On 2 November 2006 a formalities officer acting for the opposition division issued a communication stating that the case was referred to the examining division and that examination of the opposition was adjourned pending the final decision of the examining division.

III. The opponent filed an appeal which was rejected as inadmissible by Board 3.5.03 in its decision T 165/07 of 23 November 2007. The Board considered that the formalities officer's communication did not constitute a decision within the meaning of Article 106(1) EPC 1973 and that the opposition division had not yet taken a decision on the proprietor's request to stay the opposition proceedings and to remit the case to the examination division for a decision on the request for correction under Rule 89 EPC 1973.

IV. On 12 March 2009 the opposition division took the interlocutory decision to stay opposition proceedings, to remit the case to the examining division for a decision on the request for correction under Rule 140 EPC (which corresponds to Rule 89 EPC 1973), and to allow a separate appeal against this decision. The opponent appealed against that decision. In order to

expedite the appeal proceedings, Board 3.5.03 issued an early communication expressing its preliminary view that an important point of law might justify a referral to the Enlarged Board of Appeal. The parties agreed that, after submission of the proprietor's reply to the grounds of appeal, an interlocutory decision to refer questions of law to the Enlarged Board could be taken without prior oral proceedings.

V. By way of explaining why it considered that both a fundamental point of law and the need for uniform application of the law arose in the present case, the referring board made *inter alia* the following observations in its interlocutory decision.

1. A stay of opposition proceedings to allow the examining division to decide on the proprietor's request for correction under Rule 140 EPC may lead to considerable delay. Such a stay could only be justified if the respondent's request for correction under Rule 140 EPC, which was filed after the initiation of opposition proceedings, constitutes an admissible remedy on which only the examining division has the power to take a binding decision and if the outcome of the opposition proceedings decisively depends on that decision.

2. Rule 140 EPC is silent as to any time limit to request corrections of decisions. If it is accepted that requests for corrections under Rule 140 EPC submitted only after the initiation of opposition proceedings are admissible at all and are to be dealt with by the examining division, certain issues are bound to arise due to the existence of "parallel"

proceedings relating to the same patent, as demonstrated by the present case where the requested correction concerns the very feature on which the opposition is based. (The parties agreed that, if the examining division allowed the correction, the opposition would be deprived of its basis and probably rejected as unfounded or - in view of the retroactive effect of the correction decision - inadmissible.)

3. Decision G 1/97 (OJ EPO 2000, 322, point 3(c) of the Reasons) observed that the *travaux préparatoires* for Rule 89 EPC 1973 show that the legislator was particularly concerned that the correction of procedural errors should not adversely affect third parties. Thus, since correction will not change a granted patent in substance, it may be argued that it does not matter whether the original or the corrected version of the patent forms the basis of opposition proceedings.

4. The case law of the boards of appeal does not reveal a unanimous view on the question whether or not the opposition division was bound by the examining division's correction decision. On the one hand, in decision T 268/02 of 31 January 2003 Board 3.3.02 concluded, without further explanation, that the opposition division - and the board of appeal in opposition appeal proceedings - had the inherent power to verify whether the examining division had correctly applied the provisions of Rule 89 EPC 1973. On the other hand, Board 3.2.01 in its decision T 79/07 of 24 June 2008 reached the opposite result.

5. The procedural issue in the present case, namely whether the opposition division should stay its proceedings in view of the respondent's request for correction under Rule 140 EPC, decisively depends on the question of whether such a request filed after the initiation of opposition proceedings is an admissible remedy on which only the examining division has the power to take a binding decision.

6. The appellant (opponent) argued that remittal to the examining division and a consequent stay of the opposition proceedings would be procedurally unfair, violate the principle of equal treatment of parties, and leave it with no legal remedy against the correction decision whereas the proprietor could appeal the examining division's decision if its request for correction was not allowed.

7. The referring board doubted whether the EPC should be interpreted as meaning that a request under Rule 140 EPC only submitted after the initiation of opposition proceedings can be admissible. Such a request, if admitted, might *de facto* allow the patent proprietor to transform what started out as an *inter partes* procedure into an *ex parte* procedure on the very point which gave rise to the opposition. The board was particularly concerned that the opponent could be left without legal remedy in a situation where the examining division exceeds the inherent limits of Rule 140 EPC and amends the patent grant decision in substance by its "correction" decision.

VI. The Enlarged Board issued communications dated 27 July 2010 to both parties to the appeal proceedings inviting

them to file observations on the referred questions by the end of November 2010. The appellant (opponent) did not reply. In a letter dated 29 November 2010 the respondent (patent proprietor) filed observations which can be summarised as follows.

1. Unlike most provisions of the EPC which include a specific time limit or time frame (for example, for requesting examination, or for filing a divisional application, a priority claim, an opposition or an appeal) which must be observed, Rule 140 EPC mentions no time limit and thus should be interpreted to allow the filing of a request at any time, including during opposition proceedings.

2. Since a correction under Rule 140 EPC must be obvious, it cannot come as a surprise. The making of a correction should only be limited by the acceptability of the request and not related to when the mistake was noticed and the request made. A time limit would be tantamount to stating that after a certain time the obvious error is suddenly no longer present and that the uncorrected decision reflects the intention of the deciding body.

3. The opposition division should not have an opportunity to consider the allowability of a corrected decision which merely puts the decision into the form the skilled person would understand to be correct on reading the decision. It is not an amendment and so it is not possible for the opposition division to consider whether it infringes Article 123(3) EPC.

4. Since Rule 140 EPC requires that both the mistake and the correction have to be evident to the skilled person, third parties are neither adversely affected by the correction itself nor by the possibility of correction at any time during the lifetime of a patent.

5. The potential loss of the opposition without the possibility of an appeal by the opponent is the result of the opponent's own choice to rely on only one ground of opposition under Article 100(c) EPC and the EPO should not then have to maintain the opposition proceedings for the opponent's benefit. Further, correction of a mistake in the decision to grant in no way affects the opponent's right to bring national revocation proceedings.

VII. In response to an invitation from the Enlarged Board pursuant to Article 9 RPEBA, the President of the European Patent Office filed comments, those pertinent to the present decision being summarised below.

1. Rule 140 EPC only allows correction of linguistic errors and errors of transcription (which are in general unproblematic) and obvious mistakes which, according to the case law, means the text of a decision does not correspond to the real intention of the deciding instance (see T 450/97, OJ EPO 1999, 67, point 5.2 of the Reasons). The limitation to obvious errors is justified in the interest of legal certainty and to prevent adverse effects for third parties. The *travaux préparatoires* show that the protection of third parties was a particular concern of the legislator. If the requested correction results in changes to the

scope of the claims, this can have very serious consequences for third parties.

2. Due to the words "in proceedings before the EPO" in Article 123(1) EPC, requests under Rule 139 EPC to correct errors in documents filed in examination proceedings may only be considered as long as such proceedings are pending. Thereafter, only a correction under Rule 140 EPC can be considered and applicants often turn to Rule 140 EPC which has no express time limit to request the correction of obvious errors when this is no longer possible under Rule 139 EPC.

3. Under current first instance practice, a request under Rule 140 EPC need not be filed during pending proceedings, may be filed after the grant of a patent and may be allowed at any time, including after the initiation and even termination of opposition proceedings. If the examining division exceeded the limits of Rule 140 EPC, the non-existence of a time limit might cause considerable problems, not only if a request for correction is filed during opposition proceedings but also if filed after expiry of the opposition period. In such a case, there would be no means of verifying that the correction fell within the inherent limits of Rule 140 EPC; third parties would be left, in certain circumstances, without an appropriate legal remedy and, in other cases, they would have to resort to national revocation proceedings which could be cumbersome. A time limit would thus provide legal certainty and the protection of third parties, while the interests of patent proprietors would not be prejudiced in view of their right, and duty, to agree the text of patents to be granted under Rule 71(3) EPC.

4. Under current practice (following T 79/07 of 24 June 2008), if a request for correction under Rule 140 EPC is filed when opposition proceedings are pending, these are suspended while the case is remitted to the examining division and only resumed after a final decision of the examining division. Since the retroactive effect means a corrected grant decision keeps its original date, the public is informed of the correction by a note in the European Patent Bulletin and the publication of a corrigendum, the number and date of the Bulletin being indicated in the European Patent Register. No new decision to grant is issued, no mention of (a new) grant is published in the Bulletin, no new period for opposition begins and pending opposition proceedings resume and continue on the basis of the corrected grant decision. Five concerns arise from this current practice.

First, opposition proceedings could be considerably delayed, particularly if the patent proprietor files an appeal against a refusal of the request for correction.

Second, an erroneous decision of the examining division which exceeded the limits of Rule 140 EPC and violated Article 123(3) EPC would not be subject to appeal by an opponent, although the patentee could appeal a decision adverse to him.

Third, there could be an adverse effect on third parties. If a third party, relying on a patent as granted, started use of the invention it might later infringe the patent as corrected; or if, again relying on the granted claims, it decided not to file an

opposition it might, after correction, be deprived of this legal remedy. There is no provision protecting third parties, unlike other situations where the EPC balances the interests of the public and of the patent proprietor (see Articles 70(4)(b), 112a(6) and 122(5) EPC).

Fourth, opponents have no chance to plead their case before the examining division nor to appeal against the correction decision. Since no further opposition period starts after that decision, they also have no further means of attacking the patent, which is particularly untenable if the pending opposition is rejected as a result of the correction. If an opponent then appeals, he cannot challenge the correction itself, which however was the real reason for rejecting his opposition; nor is there any provision for the refund or reimbursement of the opposition fee.

Fifth, the principle of equal treatment of parties in opposition proceedings is questioned since a patent owner has the possibility to turn *inter partes* proceedings into *ex parte* proceedings which decide an issue - the content of the patent - which is decisive for the opposition proceedings.

VIII. In response to an invitation (see OJ EPO 2010, 402) to third parties to file statements in accordance with Article 10(2) RPEBA, the Enlarged Board received two *amicus curiae* briefs. The first was filed by the Institute of Professional Representatives before the EPO ("epi"). In its opinion the questions referred to the Enlarged Board of Appeal should be answered in the affirmative - a request under Rule 140 EPC should be

admissible at any time, including after the commencement of opposition proceedings; and only the examining division should be competent to decide such requests and the opposition division should be precluded from reviewing that decision. The reasons for those responses were as follows.

1. Rule 140 EPC is intended for correcting errors in decisions of the EPO and not errors in documents filed by a patent applicant or proprietor and the conditions to be applied should be strict. It is right that Rule 140 EPC contains no time limit in view of the character of the possible corrections.

2. The opposition division must be precluded from reviewing the decision of the examining division since otherwise the starting point for an analysis under Article 123(3) EPC would be rendered uncertain.

3. As regards the argument of the opponent in the referred case that it would have no legal remedy against the correction decision since it was not party to the examining division proceedings, this may seem harsh but is the logical consequence of the retrospective effect of a correction of the decision to grant.

4. Regarding the possibility that the examining division might exceed the limits of the remedy under Rule 140 EPC, the opposition division is entitled to review issues under Article 123(2) EPC at any time, and this can include the corrected version of the patent.

IX. The second *amicus curiae* brief was filed by a firm of European patent attorneys representing the opponent in proceedings concerning European patent No. 1800984 which resulted from a divisional application claiming only one of the two priorities of its parent application. After grant and the commencement of opposition proceedings, the proprietor filed a request under Rule 139 EPC to correct the priority claim. The opposition division remitted the case to the examining division "for correction of the priority information" and the examining division issued a decision under Rule 140 EPC to correct the decision to grant to show the second priority. The *amicus* observed that the ground of opposition based on the alleged novelty-destroying content of the omitted priority document was thereby defeated without the opponent being able to participate in the correction proceedings and without the oral proceedings it had requested being held.

Reasons for the Decision

1. The Enlarged Board of Appeal agrees with the referring board's decision (see point 17 of the Reasons) that the referred questions relate to a decisive issue in the case before it concerning the interpretation of Rule 140 EPC, the delimitation of the respective competences of the examining and opposition divisions, and the possible intercalation of *ex parte* and *inter partes* proceedings. The procedural provisions of the EPC are silent on these issues and the case law of the boards of appeal is at least partly divergent (see section V.4 above). Thus the present referral is admissible as it serves both the purposes mentioned in

Article 112(1) (a) EPC, namely ensuring uniform application of the law and addressing points of law of fundamental importance.

2. Rule 140 EPC reads:

"In decisions of the European Patent Office, only linguistic errors, errors of transcription and obvious mistakes may be corrected."

This is exactly the same wording as the previous Rule 89 EPC 1973. Accordingly, while both are referred to herein, no distinction is made between the present and previous rules or between the case law relating to one or other of them.

3. The referred questions use the expression "request for correction of the grant decision under Rule 140 EPC" and therefore this decision is not concerned with corrections of any other decisions. Further, even in the context of corrections of grant decisions, it is clear that the referring decision is concerned only with the text of patents which are treated as an integral part of grant decisions by reason of being referred to in communications under Rule 71(3) EPC (see T 850/95, OJ EPO 1996, 455, point 2 of the Reasons). Accordingly this decision is further confined to corrections of patents themselves - to the description, claims and drawings (often called the "patent documents"). Such patent documents have the particular characteristics that they are not only supplied by a patent applicant but also that they may only be the subject of a decision to grant if approved by the applicant (see Article 113(2) and Rule 71 EPC and point

10 below). The Enlarged Board's decision is therefore limited to corrections within grant decisions of the description, claims and drawings and references in these reasons to "patent corrections" or "correcting patents" are also so limited.

4. It also follows from this limitation of the present reasons to such patent corrections that, among other possible corrections to grant decisions, the Enlarged Board is not here concerned with corrections to bibliographic data and need not therefore comment on situations such as that described in the submissions of the second amicus curiae (see section IX above). Rule 71(3) EPC has been amended with effect from 1 April 2012 (OJ EPO 2010, 637) so as to extend its scope to bibliographic data which is also to be sent to the applicant (thereby codifying the EPO's previous practice). Since both the text in which the examining division intends to grant the patent and the related bibliographic data are mentioned in the amended Rule 71(3) EPC as separate entities, it is clear that under the amended Rule bibliographic data still do not form part of the text of the patent. (Subsequent references to Rule 71 EPC are to the Rule prior to that amendment).

5. As the Enlarged Board observed in decision G 1/97 (OJ EPO 2000, 322, see point 3(c) of the Reasons) by reference to the *travaux préparatoires*, legal certainty and the prevention of adverse effects on third parties are the reasons for the narrow ambit of allowable corrections under Rule 140 EPC (then Rule 89 EPC 1973):

"The *travaux préparatoires* concerning Rule 89 EPC also show that the legislator was particularly concerned with the protection of third parties. This is evident from the history of Rule 89, which emerged from a draft version of Article 159(a) (see BR/49 d/70, page 9) incorporated in the draft Implementing Regulations of April 1972 under Article 91(1) (see BR/185 d/72) which deals with the correction of procedural errors as long as this does not adversely affect the interests of, *inter alia*, third parties. Finally, it was decided that Rule 89 EPC should be limited to its present, narrow wording, which rules out any possibility of such adverse effect."

In the Enlarged Board's judgment Rule 140 EPC is not available to correct patents. This is consistent with the wish to rule out any possibility of adverse effects as expressed in its earlier opinion cited above. There are several reasons, all of which reflect the need for legal certainty and the protection of third parties, why this should be so (see points 6 to 8 below) while patent proprietors none the less have adequate remedies available, both before and after grant, to ensure that the text of their patents is correct (see points 9 to 13 below). The non-availability of Rule 140 EPC to correct patents means that the Enlarged Board, while agreeing with the statement in decision T 850/95 (see point 3 above) that patent documents referred to in a grant decision become an integral part of the decision, does not agree with the subsequent conclusion that errors in those documents may subsequently be corrected under Rule 140 EPC (or Rule 89 EPC 1973 which was in effect at the time of decision T 850/95 - see OJ EPO 1996, 455, point 2 of the Reasons, final sentence).

6. Legal certainty is served by the grant decision establishing a definitive text of a patent for the purposes of any subsequent proceedings, whether at national or EPO level. As from its grant, a European patent ceases to be within the jurisdiction of the EPO and becomes, subject only to the possibility of later EPO proceedings by way of opposition or limitation, a bundle of national patents each of which falls within the exclusive jurisdiction of a designated Contracting State (see Article 2(2) EPC). One necessary corollary of the decision to grant is that the EPO is no longer competent to deal with any further matters relating to the text of the patent (see decision T 777/97 of 16 March 1998, point 3 of the Reasons). A further corollary of the grant decision is that, according to Article 70(1) EPC and subject to Article 70(3) EPC, the courts and other authorities of each designated Contracting State are entitled, indeed required, to take the text of the granted patent as the basis of any national proceedings. Since, apart from any later opposition or limitation proceedings, the patent is then subject to the exclusive jurisdiction of those Contracting States, there is no reason why any subsequent decision of the EPO (other than in opposition or limitation proceedings) to change the text of the granted patent should be recognised in those jurisdictions. Since, territorial scope apart, the powers of national courts and the opposition division correspond to each other (see Articles 100 and 138 EPC), it would follow that the text of an opposed patent should also be in the form as granted.

7. As regards third parties, including potential opponents, none of the concerns with the present practice expressed in the President's comments and, to a lesser extent, in the referring decision can arise if there is no possibility of recourse to Rule 140 EPC to correct patents (see sections V.1, V.7 and VII.4 above). Thus there will be no delay in opposition proceedings caused by requests under Rule 140 EPC and no decisions on corrections not subject to appeal by an opponent. There will be no adverse effects on third parties who, relying on a patent as granted, undertake activities which later infringe a patent as corrected. There will be no would-be opponents who, relying on the granted claims, decide not to file an opposition only to find that, after correction, they are threatened by the patent but deprived of the possibility of opposition. And there will be no question of denying the principle of equal treatment of parties through the possibility for a patentee to turn *inter partes* proceedings into *ex parte* proceedings on an issue - the content of the patent - which is decisive for an opposition.
8. Further, the Enlarged Board considers that the absence of a possibility to request patent corrections under Rule 140 EPC should not prejudice patent proprietors. If on the one hand a correction would be obvious (as it should be to satisfy Rule 140 EPC) then, as the respondent proprietor submitted (see section VI.2 above), there can be no surprise and no adverse effect on opponents or others, because all concerned should read the patent as if corrected and an actual correction should not be necessary. If on the other hand a correction would be less than immediately obvious, then it should not in any event be allowed

under Rule 140 EPC which is confined to correction of "obvious mistakes".

9. In the Enlarged Board's judgment a patent applicant (or, subsequently, a patent proprietor) has adequate means at his disposal to ensure his patent as granted is in the exact form he wants it to be without any need to invoke Rule 140 EPC. Should an applicant, at any stage up to and including the final approval by him of the text of his patent, make a mistake (or overlook a mistake he has previously made) in a document he has filed - for example, he mis-spells a word or uses an incorrect word in an amended claim which he files in the course of examination proceedings - then before grant that mistake can be corrected under Rule 139 EPC on request.

10. Further, a patent applicant is obliged to approve the text in which his patent is to be granted (see Article 97(1) and Rule 71(3) (4) and (5) EPC). He must be informed of the text in which the examining division intends to grant a patent and is deemed to approve that text if he proceeds to pay the requisite fees and file translated claims within a period of four months (see Rule 71(3) EPC). Otherwise he must within that four month period request amendments or corrections (see Rule 71(4) EPC, which specifically mentions "correction of errors under Rule 139"); and there is also a procedure for further amendment and approval in the event those first amendments or corrections are not consented to by the examining division (see Rule 71(5) EPC).

11. If, given the opportunity to check the patent text before approving it, an applicant does not draw any errors to the attention of the examining division and thus ensure his approval is limited to the correct text, then the responsibility for any errors remaining in that text after grant should be his alone, whether the error was made (or introduced) by him or by the examining division. Thus, for example, the responsibility for a mis-spelt or incorrect word in an amended claim in the approved text is from this point in time entirely that of the patent applicant and it would be illogical thereafter to impute that mistake to the examining division - by suggesting the examining division did not intend to make a decision which in fact included the very text approved by the applicant himself - in order to bring the applicant's own error within the ambit of Rule 140 EPC. The President's comments (see section VII.2 above) referred to the practice of some applicants who turn to Rule 140 EPC to request the correction of obvious errors when this is no longer possible under Rule 139 EPC. That practice suggests some patent applicants seek to rely on Rule 140 EPC to "tidy up" their own errors by the fiction of ascribing them to the examining division. As *epi* correctly observed (see section VIII.1 above), Rule 140 EPC is intended for correcting errors in decisions of the EPO and not errors in documents filed by a patent applicant or proprietor. It would follow from the non-availability of Rule 140 EPC to correct patents that this practice should cease.
12. If however the examining division proceeds to make a decision to grant which contains an error subsequently made by it, so that the granted text is not that

approved by the proprietor, then the proprietor is adversely affected by that decision and is entitled to appeal. If, for example, the text of the patent which is the subject of the decision to grant includes an amended claim which has after approval been erroneously changed by the examining division, then the patent proprietor can demonstrate that the examining division did not grant his patent with the text approved by him. It must then follow that the examining division failed to observe Article 113(2) EPC and the appeal should succeed by allowing interlocutory revision and reimbursement of the appeal fee as being equitable in view of the examining division's mistake (see respectively Article 109(1) and Rule 103(1) (a) EPC).

13. The referring decision relates to opposition proceedings. The Enlarged Board considers Rule 140 EPC is not available for correcting patents, including during opposition or limitation proceedings. However, it is always open to a patent proprietor to seek to amend his patent during opposition or limitation proceedings and such an amendment could remove a perceived error. Such an amendment would have to satisfy all the legal requirements for amendments including those of Article 123 EPC. Being a request for an amendment under Article 123 EPC and not a request for a correction under Rule 140 EPC, and thus a normal incident of the opposition or limitation proceedings, no question arises as to which body is competent to deal with the request. In the case of opposition proceedings, the amendment will be considered and decided by the opposition division (see Articles 19(1) and 100 EPC), in the case of limitation

proceedings by the examining division (Rules 91 and 95(2)(3)(4) EPC).

14. The first referred question asked whether a patent proprietor's request for correction of the grant decision under Rule 140 EPC which was filed after the initiation of opposition proceedings is admissible. Since the Enlarged Board considers that Rule 140 EPC is not available to correct granted patents, it follows that a request for such a correction under Rule 140 EPC filed is inadmissible.

15. The subsidiary part of the first referred question asked whether, in particular, the absence of a time limit in Rule 140 EPC should be interpreted such that a correction under Rule 140 EPC of errors in decisions can be made at any time. It follows from the Enlarged Board's opinion that, as regards corrections of patents, Rule 140 EPC is not available at all.

16. It was a condition precedent of the second referred question that a request for correction of a grant decision under Rule 140 EPC filed after the initiation of opposition proceedings should be considered admissible. Since, as stated above, the Enlarged Board does not consider such a request admissible at all, no answer to the second referred question is required.

Order

For these reasons, it is decided to answer the questions of law which were referred to the Enlarged Board of Appeal as follows:

1. Since Rule 140 EPC is not available to correct the text of a patent, a patent proprietor's request for such a correction is inadmissible whenever made, including after the initiation of opposition proceedings.
2. In view of the answer to the first referred question, the second referred question requires no answer.

The Registrar:

The Chairman:

W. Crasborn

W. Van der Eijk