

**Internal distribution code:**

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

**Datasheet for the decision  
of 26 November 2020**

**Case Number:** R 0004/19

**Appeal Number:** T 0333/18 - 3.5.03

**Application Number:** 08837606.6

**Publication Number:** 2212535

**IPC:** G05B13/02, F02D29/02,  
B60W10/00, H02P9/04

**Language of the proceedings:** EN

**Title of invention:**  
OPTIMAL LOAD CONTROLLER METHOD AND DEVICE

**Applicant:**  
Verschuur, John Alexander

**Headword:**  
Petition for review

**Relevant legal provisions:**  
EPC Art. 112a(2)(c), 113(1)  
EPC R. 106

**Keyword:**  
Petition for review - obligation to raise objection -  
fundamental violation of Article 113 EPC (no) - clearly  
unallowable

**Decisions cited:**

**Catchword:**



**Große Beschwerdekammer**  
**Enlarged Board of Appeal**  
**Grande Chambre de recours**

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

Case Number: R 0004/19

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 26 November 2020**

**Petitioner:** Verschuur, John Alexander  
(Applicant) 8501 Devonshire Blvd.  
Denver, CO 80229 (US)

**Representative:** Grünecker Patent- und Rechtsanwälte  
PartG mbB  
Leopoldstraße 4  
80802 München (DE)

**Decision under review:** **Decision of the Technical Board of Appeal 3.5.03  
of the European Patent Office of 24 January  
2019.**

**Composition of the Board:**

**Chairman** C. Josefsson  
**Members:** W. Sekretaruk  
E. Bendl

## **Summary of Facts and Submissions**

I. The applicant's petition for review of 4 June 2019 is directed against the decision of Board of Appeal 3.5.03 in case T 333/18 dismissing the applicant's appeal against the refusal of European patent application No. 08837606.6. The Board's written decision in the underlying appeal was posted to the applicant's representative on 27 March 2019. The petition for review relies on Article 112a(2)(c) EPC and Article 112a(2)(d) EPC.

The petitioner has divided its "Reasoned Statement" in seven sections:

1. Summary: Optimal Load Controller Appeal Process (pages 2-6)
2. Optimal Load Controller - comments on the decision (pages 7-58)
3. Comments on the Statement of Grounds of Appeal (referred to as "L3") (pages 58-65)
4. Comments on the arguments in L3 relating to the objective technical problem (pages 66-73)
5. Oral Proceedings at the instance of the EPO (pages 74-75)
6. Arguments regarding viewing the claimed invention as a whole (pages 76-81)
7. Advantages of the optimal load controller and device (OLCMD) pages 82-83).

In its statement, the petitioner asserts that the following three fundamental violations of its right to be heard occurred in the appeal proceedings. Firstly, that the Board ignored the petitioner's comments in the grounds of appeal challenging the decision of the examining division on inventive step (page 4, first bullet point). Consequently, the applicant's right to be heard was infringed. Secondly, that there was no attempt in written communications to address any of the information

submitted by the appellant prior to the decision. This had the effect of delaying the oral proceedings and infringing on the appellant's right to be heard. Thirdly, that the Board assumed that the applicant's right to be heard on the change in the formulation of the technical problem was forfeited because it did not attend the first instance oral proceedings.

First alleged violation: appellant's comments on inventive step in the grounds of appeal

II. In the grounds of appeal, the appellant (petitioner) argued that the examining division's assessment of inventive step was flawed. According to the petitioner, there were four differences between the claimed invention and the closest prior art, yet the Board considered there were only two. Additionally, it was argued in the grounds of appeal that the differentiating features of the claimed invention created a synergistic and dynamic optimisation effect. The petitioner argues that the Board made only a piecemeal comparison and ignored this argument. In addition, the petitioner claims that the Board's decision neither considers the appellant's view that the examining division's formulation of the objective technical problem was based on hindsight, nor addresses the appellant's arguments in the grounds of appeal dealing with the could-would analysis of the problem-solution approach.

Second alleged violation: no communication before oral proceedings

III. The petitioner argues that conducting appeal proceedings without issuing a communication before holding oral proceedings had the effect of delaying the oral proceedings and infringed on the appellant's right to be heard.

Third alleged violation: the change in the objective technical problem in first instance oral proceedings

IV. The decision was allegedly based on facts on which the applicant was not able to comment, as the change in the formulation of the objective technical problem was introduced into the first instance proceedings only during the oral proceedings, which the applicant chose not to attend. According to the petitioner, the Board of Appeal failed to recognise an infringement of the applicant's right to be heard and therefore infringed the appellant's right once again.

V. In his reply of 23 November 2020, the petitioner addressed these issues.

First alleged violation: appellant's comments on inventive step in the grounds of appeal

VI. The petitioner explained in more detail that the Board took into account only some of the arguments, and, in addition, assessed them incorrectly. The Board allegedly ignored differences between the claimed invention and the prior art concerning the plurality of load controllers, the feedback-loop and the need for an additional sensor (and lack thereof in the invention). The petitioner alleged the following errors in the obviousness assessment: the ignored synergy, the formulation of an incoherent objective technical problem, the ignored non-combinability of D6 by D7 and hindsight argumentation. This resulted in a piecemeal assessment that was not in line with a correct legal analysis of the presence of an inventive step. The petitioner acknowledged that a Board does not need to address each argument but contended that this was not true for the inventive step assessment, which was central to the Board's decision.

Second alleged violation: no communication before oral proceedings

VII. According to the petitioner, the violation of the right to be heard resulted not only from the Board's failure to provide its opinion on the additionally filed auxiliary requests and arguments before the oral proceedings. It also came as a surprise that the Board had not admitted the auxiliary requests due to a minor, newly raised clarity objection, to which the applicant had had no opportunity to respond.

Third alleged violation: the change in the objective problem in first instance oral proceedings

VIII. The petitioner argues that the first instance decision was based on facts on which the applicant was not able to comment, because the change in the formulation of the objective problem to be solved was included in the first instance proceedings only during the oral proceedings, which the applicant chose not to attend. The Board's dismissal of the claim that a violation of the right to be heard had occurred was not merely a substantive issue, but rather a severe procedural defect.

IX. During the oral proceedings before the Enlarged Board of Appeal on 26 November 2020, the petitioner further elaborated on the alleged infringement of its right to be heard. A party to EPO proceedings had a right to a real consideration of its arguments. The petitioner argued that besides the fact that the Board had allegedly not afforded the appellant an opportunity to comment on the lack-of-clarity issues, an inventive step assessment following the generally applied problem-solution approach was missing entirely. A feature-by-feature assessment was, the petitioner claimed, no response to the appellant's arguments, which relied on effects of the invention as a whole. A clear indication that the Board had disregarded the appellant's submissions was allegedly apparent in point 1.5 of the Board's decision. The appellant explained that it had not agreed that the problem to be solved could be formulated as

"how to simplify the system of D6 with regard to the optimisation of a plurality of parameters". The applicant had requested a decision on the state of the file, which the examining division did not grant. Instead of deciding on the state of the file, the examining division introduced a different problem to be solved without giving the applicant the possibility to respond. According to the petitioner, such a clear infringement of the applicant's right to be heard would have required a remittal of the case to the department of first instance.

X. The petitioner requests that the decision under appeal be set aside and the case be reopened before the Board of Appeal.

### **Reasons for the Decision**

1. The petition meets the requirements with respect to the time limit and payment of the petition fee.

2. Concerning the first alleged violation, the petition complies with Rule 106 EPC. An objection in respect of the alleged procedural defects had not been possible before the Board, as the alleged deficiencies only became apparent from the reasons of the decision. However, concerning the second and third alleged procedural defects, an objection could quite conceivably have been raised during the appeal proceedings.

First alleged violation (see point II. above)

3. In this part of the petition the petitioner claims that its arguments as submitted in the grounds of appeal on the inventive-step analysis by the examining division were not taken into account by the Board when deciding on the appeal.

The law and general principles



### 3.1 Article 113(1) EPC reads:

The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

This implies that those involved be given an opportunity not only to present comments (on the facts and considerations pertinent to the decision) but also to have those comments considered, that is reviewed, with respect to their relevance for the decision on the matter.

On the other hand, the right to be heard does not go so far as to impose a legal obligation on a board to address each and every argument of the parties in detail in a decision.

### 3.2 The inventive-step discussion in the decision of the Board

The Enlarged Board of Appeal refers to point 1 of the impugned decision: Main request - claim 1 - inventive step (pages 5-13). The issues listed by the petitioner were dealt with in this part of the decision, as follows:

- (1) Four differences: points 1.9 - 1.10
- (2) Synergistic and dynamic optimisation effect and combined consideration of features: points 1.13-1.14.
- (3) Formulation of the objective technical problem based on hindsight: point 1.5
- (4) The could-would analysis: points 1.7.2 -1.7.3

In summary, all the issues put forward by the appellant in its grounds of appeal were dealt with. The petitioner argued that there was no agreement between the appellant and the Board on what to view as the closest prior art. This argument must fail because there is no proof that the minutes are incorrect in this respect. In fact, the petitioner has not even filed a request for correction. The mere fact that the Board's

assessment of the facts differs from the petitioner's does not mean that there was an infringement of the right to be heard.

Second alleged violation (see point III. above)

4. Rule 106 EPC reads:

A petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.

The lack of a communication could have been raised during the oral proceedings before the Board. Comments on clarity were possible during the discussion on the admissibility of the auxiliary requests which the appellant eventually chose to maintain.

5. Third alleged violation (see point IV. above)

The objection that the Board failed to recognise an infringement of the applicant's right to be heard in first instance proceedings could have been raised during the oral proceedings before the Board.

6. In the light of the foregoing, the Enlarged Board of Appeal finds no fundamental violation of the petitioner's right to be heard or any other fundamental procedural defect defined within the meaning of Rule 104 EPC.

## **Order**

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

The petition for review is unanimously rejected as being clearly unallowable.

The Registrar:

The Chairman:



N. Michaleczek

C. Josefsson

Decision electronically authenticated