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**Datasheet for the decision
of 25 June 2014**

Case Number: T 0832/13 - 3.2.01

Application Number: 08709870.3

Publication Number: 2139721

IPC: B60P3/025

Language of the proceedings: EN

Title of invention:

VENDING VAN WITH DEVICE FOR MOVING AND/OR UNLOADING COUNTERS
AND RELATED HANDLING PROCEDURE

Patent Proprietor:

Sperotto S.P.A. Carrozzerie Industriali

Opponents:

Vianello, Alberto
B.B.M. Bolpagni S.P.A

Headword:

Relevant legal provisions:

EPC Art. 54(1), 54(2), 56
EPC R. 80

Keyword:

Evidence - public prior use - not proven
Novelty - main request (yes)
Inventive step - main request (no)
Amendment occasioned by ground for opposition - (yes)
Novelty - auxiliary request (yes)
Inventive step - auxiliary request (yes)
Taking of evidence - hearing witness - (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0832/13 - 3.2.01

**D E C I S I O N
of Technical Board of Appeal 3.2.01
of 25 June 2014**

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 March 2013 concerning maintenance of the
European Patent No. 2139721 in amended form.

Composition of the Board:

Chairman	G. Pricolo
Members:	H. Geuss
	D. T. Keeling

Summary of Facts and Submissions

- I. The appeal is directed against the interlocutory decision of the Opposition Division of the European Patent Office posted on 15 March 2013 concerning maintenance of the European Patent No. 2139721 in amended form.
- II. In its decision the Opposition Division held that the subject matter of independent claim 1 of the auxiliary request 3A filed during the oral proceedings of 19 February 2013 met the requirements of novelty and inventive step.

As regards other requests considered in the impugned decision and relevant to these appeal proceedings:

The Opposition Division found that the subject matter of claim 1 of the patent as granted did not fulfil the requirements of novelty in view of the following prior art:

WO 2005/070721 **(E1)** and
JP 2006151153 **(E25)**

with its corresponding automatic translation into English **(E25a)**.

The Opposition Division further decided that auxiliary request 5 containing independent claims 1 and 2 did not meet the requirements of Rule 80 EPC and thus was not admitted into the opposition proceedings.

- III. All the parties to the first instance proceedings, namely the patent proprietor and opponents I and II, appealed against the decision of the Opposition

Division.

IV. The following prior art cited during the opposition procedure was cited also during appeal proceedings:

DE 34 46 490 (E2);
FR 2 742 975 (E18);
Prior use of a vending van (B1)
(with supporting evidence B1.1 to B1.8));
Prior use evidence of another vending van (B2.5);
JP 2004231046 (E20);
GB 1182981 (E21); and
US 6745588 (E22).

Together with its statement setting out the grounds of appeal the appellant/opponent I referred for the first time to an alleged public prior use supported by the following documents:

Technical expertise on oath (certified by court of Turin) made by Dott. Ing. Mauro Marchitelli on a vending van (E28);

Copy of the vehicle registration certificate of the vending van of E28 (E28a);

Copy of the approval certificate from the Italian Ministry of Transport of the van of E28 (E28b);

Council directive 1999/37/EC of 29 April 1999 on the registration documents for vehicles (E28c);
and

cited the following document:

AU 20111100012 (E29) .

Appellant/opponent II filed with its statement of grounds of appeal the following documents in support of an alleged public prior use that was already mentioned during the opposition procedure (identified as B3 in the decision under appeal), though at a late stage:

Original official certificate of approval by the Italian Ministry of Transport and related technical drawing relative to a vending van with chassis number WMAL881279Y046593 (B3) ;

Copy of the selling invoice of the van according to B3 (B4) .

Appellant/opponent II also filed with its statement of grounds of appeal the following document in support of the prior use according to B1:

Original official certificate of approval by the Italian Ministry of Transport and related technical drawing relative to the van of B1 (B1.9) ; .

V. Oral proceedings took place on 25 June 2014.

The appellant/opponent II, although duly summoned, did not attend the oral proceedings.

The appellant/patent proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted or in accordance with Auxiliary Request 3 filed during the oral proceedings. The remaining auxiliary requests on file, and the

request to reject the appeal of opponent II as inadmissible, were withdrawn.

The appellants (opponent 01 and, in writing opponent 02) requested that the decision under appeal be set aside and that the European Patent be revoked.

VI. Claim 1 as granted according to the main request reads as follows:

A vending van (500, 501, 502, 503) comprising a motorized vehicle with a chassis (2) placed on wheels (3) and supporting a vehicle floor (4), and one or more counters (6, 7) to be moved, said vending van comprising a handling device (1, 100, 200, 300) for moving one of said one or more counters, said handling device (1, 100, 200, 300) comprising one or more longitudinally extending supporting elements (10), each movable in relation to its longitudinal axis, said one or more supporting elements (10) being arranged so as to support said counter (7) to be moved, and lying underneath or alongside said counter to be moved (7), **characterized in that** said one or more supporting elements (10) are located underneath said vehicle floor (4).

VII. Independent claims 1 and 2 of the auxiliary request 3 read as follows (amendments with respect to claim 1 as granted underlined by the Board):

1. A vending van (500, 501, 502, 503) comprising a motorized vehicle with a chassis (2) placed on wheels (3) and supporting a vehicle floor (4), and one or more counters (6,7) to be moved, said vending van comprising a handling device (1, 100, 200, 300) for moving one of said one or more counters, said handling

device (1, 100, 200, 300) comprising one or more longitudinally extending supporting elements (10), each movable in relation to its longitudinal axis, said one or more supporting elements (10) being arranged so as to support said counter (7) to be moved, and lying underneath or alongside said counter to be moved (7)

characterized in that

said one or more supporting elements (10) are located underneath said vehicle floor (4)

and in that

when placed inside the loading compartment, said counter rests on said supporting elements (10) and on wheels (26) provided at the rear of said counter and suitable for being placed in contact with said vehicle floor (4) so as to enable the displacement of the counter (7) inside the loading compartment of the van.

2. A vending van (500, 501, 502, 503) comprising a motorized vehicle with a chassis (2) placed on wheels (3) and supporting a vehicle floor (4), and one or more counters (6,7) to be moved, said vending van comprising a handling device (1, 100, 200, 300) for moving one of said one or more counters, said handling device (1, 100, 200, 300) comprising one or more longitudinally extending supporting elements (10), each movable in relation to its longitudinal axis, said one or more supporting elements (10) being arranged so as to support said counter (7) to be moved, and lying underneath or alongside said counter to be moved (7)

characterized in that

said one or more supporting elements (10) are located underneath said vehicle floor (4)

and in that

when placed inside the loading compartment, said counter rests on said supporting elements (10), said supporting elements (10) comprising a pair of shaped

heads, one at the front and one at the rear, that engage in corresponding seats integral with the counter (7), said vehicle floor (4) having openings for enabling the passage of the parts of the supporting elements (10) on which the counter (7) rests so as to enable the displacement of the counter (7) inside the loading compartment of the van.

VIII. The arguments of the appellants/opponents, insofar as they are relevant to this decision, can be summarised as follows (as appellant/opponent II did not attend the oral proceedings, of the arguments that were filed in writing, only those still relevant to the present decision are summarized):

Prior use

The alleged public prior use supported by documents **E28, E28a, E28b and E28c** filed with its statement of grounds of appeal by Opponent I should be admitted into the proceedings as being highly relevant. Both the approval certificate (E28b) and the registration certificate (E28a) were issued before the priority date of the contested invention. Further the statement according to E28 proved that no modification had been undertaken for the vehicle approved and registered according to E28a and E28b since the date of the first registration. According to Italian legislation for vehicles, the approval certificate (E28b) and the registration certificate (E28a) for this type of vehicles, i.e. vending vans, was issued for the combination of the truck (driving unit) and the specific container. Any modification carried out to any one of the truck or container after the issuance of these certificates needed a renewed issuance of the certificates in order to be allowed to circulate with

the vehicle (truck and container). Further the date (I) of 28 June 2010 to which the registration certificate E28a referred corresponded to a renewed issuance of the certificate due to new regulations. Relevant for the state of the art was the date (B) of 6 July 2005 referring to the first registration of the vehicle and the absence of any substantial annotations on page 3 of the registration certificate (E28a) from 2005 till now. It was also apparent from the statement of Mr. Peraldo on page 2 of the technical expertise on oath of Mr. Marchitelli that no modification to the specific container shown in E28 had been performed since the date of the first registration of the vehicle (i.e. 6 July 2015).

The public availability of the alleged public prior use supported by evidence **B3 and B4** filed with the statement of grounds of appeal of opponent II was sufficiently proven.

B4 was a copy of the last invoice of a series of invoices for the selling of the vehicle of B3. B4 dated 8 March 2006 was thus a clear proof that the vehicle of B3 was made available to the public before the priority date of the patent because the buyer, which constituted a member of the public, had seen beyond any doubt, at the time of the invoice, the specification of the vehicle according to B3. B4 incontestably proved that the vehicle of B3 was sold and thus made available to the public according to T482/89.

The main request- Novelty

The subject matter of claim 1 as granted was not new over documents E1, E25, E2.

With respect to the interpretation of claim 1 as granted, the term "underneath" from the characterising portion of claim 1 could not be constructed as just defining a position of the movable supporting elements completely located under the vehicle floor when seen from a top view. The term also included a position in which these elements were partly situated underneath the floor or in a position lower than the vehicle floor but not necessarily covered by it. Support for this interpretation was to be found in the embodiment of figure 6 of the patent as granted. According to this embodiment the vehicle floor 4 had to include a groove or a free space that allowed the travel of the head 20 and its connecting element to the longitudinal member 15. This groove or space defined a location in which part of the member 15 was not located in a position lower than, and covered by, the vehicle floor.

According to this interpretation of "underneath", the embodiment of **figure 6 and 7 of E1** disclosed all the features of claim 1. It was also apparent from figure 7 that the support arms 30 were partly covered by the vehicle floor 26 from a top view and as a consequence also the support arms 42 in their retracted position when inserted in the support arms according to the configuration of figure 6.

Figure 1(C) of E25 clearly showed that the movable supporting elements 32 were located underneath the vehicle floor F.

Document E2 referred to a vending van as claimed in claim 1 as granted. E2 disclosed a vending trailer attachable to a motorized vehicle and thus when the trailer was attached to a motorized vehicle, it formed together with the vehicle a vending van as defined in

the claim 1 as granted. The floor of the mobile vending trailer could be identified as the vehicle floor of claim 1. The movable supporting elements 15 of figures 9 and 11 were thus located underneath the vehicle floor.

Inventive step

The subject matter of claim 1 did not involve an inventive step in view of E1 and common general knowledge of the skilled person. It was obvious for the skilled person to extend the support members 30 underneath the floor 26 of figure 7 to provide a more stable support for the movable support arms 42. By doing so the moment created by the secondary frame 40 comprising the counters through the arms 42 into the members 30 would be better supported and the complete movable arrangement would be more stable.

The auxiliary request 3

The objection according to Rule 80 EPC raised by appellant/opponent I concerning the admissibility of multiple independent claims in auxiliary request 3 was withdrawn during the oral proceedings.

Independent claim 1

Starting from the disclosure of E1 an inventive step objection was raised on the basis of a combination with E18 or B1.9 (or B1.5). E1 did not disclose that the counter, when placed inside the loading compartment of the van, rested on wheels provided at the rear of said counter and suitable for being placed in contact with the vehicle floor so as to enable the displacement of the counter inside the loading compartment of the van.

The technical problem to be solved could thus be formulated as how to facilitate the movement of the counter on the floor of the loading compartment by providing a better support with less friction. The arrangement of the movable counters (45) of E1 mounted on the frame 4 had two disadvantages; first, the high friction in the support points for the secondary frame (40) located on the upper part of the side chassis rails (21), and second, the unbalance of the weight of the counter (45) with respect to both the support points on the side chassis rails and on the support arms (42) which worsened the sliding of the counter. This unbalance was caused by the cantilevered position towards the interior of the van of the center of gravity of the counter (45) with respect to the side chassis rails (21).

The skilled person, who was aware of the existence of wheels as a friction reducing means, when trying to solve the posed problem would, when looking into E18, figure 2, add a support arm with a wheel to the rear part of the counter in order to reduce friction for the sliding of the counter by the rolling of the wheel and to achieve an even distribution of the weight of the counter by providing two more separated support points. The side chassis rails 21 could thus be eliminated.

The skilled person would get exactly the same hint when looking at B1.9 or B1.5, which disclosed a counter resting on front and rear wheels slidably movable on the vehicle floor and on the supporting elements 63. It was further considered that B1.9 (with reference to the figure showing the counter exposed outside the loading compartment) clearly suggested the skilled person to keep the counter resting on the supporting elements and

on the wheels when placed inside the loading compartment.

Further, the subject matter of claim 1 did not involve an inventive step over the combination of document E1 with B2.5, or documents E20, E29, E21 or E22. These documents generally disclosed counters mounted on front and rear wheels for facilitating their displacement. The skilled person would have modified the structure of E1 simply by adding wheels in contact with the vehicle floor at the rear of the counter so as to enable the displacement of the counter inside the loading compartment of the van; the modification of the structure of E1 would be very simple, and would not require any particular modification.

Further, the subject matter of claim 1 did not involve an inventive step over the combination of document E2 with B1.9 for these same reasons.

Independent claim 2

The subject matter of claim 2 was not novel in view of E25; reference was made to the opposition proceedings. No objections on inventive step were raised.

IX. The arguments of the Appellant/Patent Proprietor, as far as they are relevant for the present decision, may be summarised as follows:

Prior Use

The alleged public prior use supported by **E28** should not be admitted into the proceedings as being late filed and *prima facie* not relevant. Its public

availability had not been proven beyond any doubt so that this prior use did not form part of the prior art.

New evidence **B3** and **B4** filed by appellant/opponent II in support for the alleged public prior use were inadmissible. These documents represented irrelevant late-filed evidence which could have been provided earlier at any stage of the opposition proceedings. Further, the alleged prior use was not to be considered public because it was not proven beyond any doubt that the vehicle according to B3 was made available to the public before the priority date of the patent in suit.

B4 was a copy of a last invoice of the purchase of the vehicle according to B3 but evidence was lacking that proved that the selling transaction had been indeed completed.

The main request

The subject matter of claim 1 as granted was new.

The skilled person when reading the patent specification would interpret the word "underneath" in claim 1 as meaning that the movable supporting elements are located beneath the vehicle floor and do not laterally protrude therefrom (reference was made to the figures of the patent), i.e. from a top view of the vehicle the supporting elements are covered by the surface of the vehicle floor and situated below the vehicle floor.

According to **figures 6 and 7** and description page 6 second paragraph of **E1** the supporting elements 30 and 42 laterally protruded from the vehicle floor 26. The structure, extension and connection of the vehicle

floor 26, side chassis rail 21 and supporting elements 30 and 42 were not explicitly shown in figures 6 and 7. The attachment points for the supporting elements 30 and 42 to the vehicle main frame 20 were just below the side chassis rails 21 and thus located aside the vehicle floor 26 so that the supporting elements did not extend underneath the vehicle floor 26.

The vending van of **document E25** did not include supporting elements that were located underneath the vehicle floor. Figure 1(C) showed that the guide rails 30 and the movable elements 32 were integrated to the floor F and located flush on the same level as the floor. Clearly from figures 1(A) and (C) the guide rails 30 and the movable elements 32 were not covered by the vehicle floor from a top view of the van.

The novelty argumentation based on **E2** and presented for the first time during the oral proceedings should not be admitted into the proceedings. The disclosure in E2 was farther away from the subject matter of claim 1 as the content of E1 or E25. Further, it was evident from the whole disclosure of E2 that a vending van in the sense of the patent was not disclosed but just a vending trailer.

Inventive step

When starting from E1 the skilled person would never arrive at the subject matter of claim 1 as granted. The differentiating feature of the subject matter of claim 1 with respect to the disclosure of E1 was the characterising portion of the claim. The skilled person had no motivation to extend the supporting members under the floor 26 of the vehicle. The weight of the counters of part 40 in E1 was supported by the support

points in the side chassis rails 21 and by the support members 30 mounted to main frame 20. Therefore members 30 and arms 42 were already dimensioned to stably support the corresponding part of the weight of the counter 40. Extending the members 30, and as a consequence arms 42, beneath the floor meant larger and heavier structural components for the whole structure which, in fact, were unnecessary.

The auxiliary request 3

The amendments according to auxiliary request 3 were occasioned by a ground of opposition that did not allow the maintenance of independent claim 1 as granted, which offered the broadest form of protection. The patent proprietor was entitled to obtain protection for embodiments that were covered by a broad independent claim of a given category, and that were explicitly described in the patent, by introducing several independent claims directed to these different embodiments.

Independent claim 1

The subject matter of claim 1 was not rendered obvious by the available prior art.

It was clear that wheels are known as a means for moving objects or counters on a surface but what was relevant for the present case was if the skilled person would have been incited by the prior art to modify the system of E1 to arrive to the claimed subject matter.

This was not the case because the system in E1 differed substantially from the ones of E18 and B1.9 (also B1.5) and none of these prior arts hinted to modify the

system of E1 in order to add wheels at the rear of the counter. Rather adding the wheels at the rear of the counter would reduce the length of travel of the secondary frame 40 of E1, and thus of the counters 45, because the wheels would hit against the side chassis rails 21 and thereby limit the movement of the counter. These rails 21 could not be removed because they belonged to the main frame of the vehicle. Instead, the skilled person would have acted on the contact surface between the side chassis rails 21 and the secondary frame 40 in order to facilitate the displacement of the counter.

Further, according to E1 there was no imbalance of the weight of the secondary frame containing the counters because even in the retracted position the center of gravity of the secondary frame with all its components lied between the support arms 42 and the contact point of the side chassis rails 21 with the secondary frame 40.

It was further requested that documents E20, E21, E22, B1.9 and E29 were not admitted because they had been late filed and were *prima facie* not relevant.

Independent claim 2

The patent proprietor considered that subject matter of claim 2 involved an inventive step because none of the available prior art rendered obvious the provision of supporting elements having a pair of shape heads as claimed.

Reasons for the Decision

1. The appeal is admissible.

Prior use based on evidence E28, E28a, E28b and E28c

2. The prior use supported by E28, E28a, E28b and E28c does not form part of the prior art according to Article 54(2) EPC because - irrespective of the admissibility of E28, E28a, E28b and E28c into the proceedings - the public availability of the alleged public prior use based on these documents is not proven.

- 2.1 **E28** is an expertise on oath of Mr Marchitelli concerning the vending van of the company "Peraldo di Peraldo Vilmo & C. Snc", dated 28 June 2013, stating that the vending van according to the alleged prior use has not been modified since the date of registration and further that the vending van according to the alleged prior use discloses all features of contested claim 1.

E28a is a registration certificate of the vehicle of E28 (date of first registration of the vehicle 6 July 2005).

E28b is an approval certificate of the Italian Ministry of Transport of the vehicle of E28 (dated 27 June 2005).

- 2.2 Appellant/opponent I submitted that according to the technical expertise on oath (see point 3 of E28) of Mr Marchitelli, it is proved that the vending van, which

shows all features of the contested claim 1, has not been modified since the date of its first registration (cf. E28a). Since the date of the first registration (cf. E28a) and the date of approval by the Italian Authority is before the priority date of the contested invention, the prior use according to E28 et seq. is a state of the art according to Article 54 EPC.

2.2.1 However, the statement under point 3 of E28 that the vending van has not been modified since the date of first registration is not made on the basis of the personal knowledge of the drafter of E28, but merely reports a statement made by the owner (Mr Peraldo) of the company (Peraldo di Peraldo Vilmo & C. Snc) which owns the van, to the drafter of E28 (Mr Marchitelli). Mr Peraldo's statement can only be regarded as an information given to Mr Marchitelli without any guarantee of its exactness. Certainly, the information does not have the quality of a statement on oath.

2.2.2 Secondly, the statement of Mr Peraldo that no changes have been made to the vehicle since the date of the first registration is very general in nature.

It is unlikely that within a period of eight years no replacement of parts has taken place in the framework of vehicle maintenance. Due to the general nature of this statement, the Board has serious doubts that it takes into account all aspects, including those relevant to the contested claim. Especially, it is not unlikely that changes could have taken place which were considered to be too marginal and thus not worth mentioning.

2.2.3 Thirdly, the statement of the company's owner (Mr Peraldo) is silent about which person was using and

supervising the vehicle.

Because there is no particular information about the structure of Mr Peraldo's company, the Board cannot ascertain, whether the owner himself was involved in the maintenance of the vehicle.

2.2.4 Therefore the statement of Mr Peraldo, as reported in the expertise of Mr Marchitelli, does not convince the Board that a prior use as documented by E28 effectively was made available to the public before the priority date of the contested patent.

2.3 The appellant/opponent I submitted further that the vending van according to E28 could not have been modified since the time of registration for legal reasons. According to Italian law, the registration certificate (E28a) and the approval certificate (E28b) are issued for the combination of the driving unit and the specific container, and any modification to either of them would require issuance of new certificates.

Nevertheless, no evidence is provided which backs up this allegation. Further, it is also not clear to what extent any modification to the container would require the issuance of new certificates or any kind of annotations in it.

Consequently, the Board holds that there is no proof that modifications to the arrangement for sliding the counters within the container can be performed without requiring new certificates.

2.4 It cannot thus be ascertained beyond reasonable doubt that the arrangement of the counters in the container as illustrated in the technical expertise on oath (E28)

is indeed the one that corresponds to the container as at the date of the first registration of the vehicle.

Prior use based on evidence B3 and B4

3. The alleged prior use supported by B3 and B4 does not form part of the prior art according to Article 54(2) EPC because, irrespective of the admissibility of the evidence B3 and B4 into the proceedings, the public availability of the alleged public prior use based on these documents is not proven.
 - 3.1 **B3** comprises the original official certificate of approval by the Italian Ministry of Transport and the original related technical drawing of a vending van with chassis number WMAL881279Y046593.
B4, dated 8 March 2006, is a copy of the last selling invoice of the van from B3 from a series of invoices.
 - 3.2 The appellants/opponents submitted that B4 is a clear proof that the vehicle of B3 was made available to the public before the priority date of the patent because the buyer, which constituted a member of the public according to T482/89, has seen beyond any doubt, at the time of the invoice, the specification of the vehicle according to B3. B4 incontestably proves that the vehicle of B3 was sold and thus it has been made available to the public. In particular, it is not probable that a sum of an order of 90,000 € was paid over less than one year as documented by B4 and that no technical drawing or no result in the form of a prototype was presented to the customer.
 - 3.3 In the Board's view there is no doubt that the vehicle (driving unit and container) with chassis number WMAL881279Y046593 from the technical drawing of B3

dated 27 July 2005 corresponds to the vehicle of the approval certificate of B3 from 28 February 2006.

- 3.3.1 Both documents bear the same stamp of the Italian Ministry of Transport. Nevertheless, the Board follows the Opposition Division's opinion that these documents do not prove the public availability of the vehicle before the priority date of the contested patent.
- 3.3.2 The technical drawing of B3 is an internal document of the company B.B.M. Bolpagni S.P.A. and the inspection for the approval certificate must be regarded as an internal - not public - act between this company and the Italian authority.
- 3.3.3 Thus, these documents are not able to prove that a vehicle according to the alleged specifications has been placed on the market. In particular, an approval certificate is no proof that the vehicle according to B3 has been sold and delivered to a customer.
- 3.4 The selling invoice of B4 does not prove the delivery of a vehicle according to technical drawing of B3 to a customer.
 - 3.4.1 Document B4 is an invoice on which different payments between 6 June 2005 and 30 January 2006 of a customer, HICA S.N.C. DI DI LEO MICHELE & C., to B.B.M. Bolpagni S.P.A. are listed. The invoice further indicates a resulting amount which remained open.
 - 3.4.2 However, further information on the invoice is missing to confirm that B4 proves that the vehicle was sold or delivered. In particular, a delivery date or any other statement proving that the vending van according to B3 has been delivered is missing. Furthermore, it is not

clear whether the remaining amount has been paid by the customer; no further document which proves the payment of the remaining amount has been provided.

3.4.3 It follows that it is not proven that the sale between the customer and the manufactory has been concluded, or that the vehicle has been delivered.

3.5 The Board agrees that the buyer of the vehicle had with certainty seen at some point in time falling within the period of issue of the different invoices some kind of specification of the vending van.

3.5.1 Nevertheless, there is no proof that the customer saw the drawing of B3 or the vehicle according to B3, and this without being bound by any sort of confidentiality agreement.

Thus the Board is not convinced that the final version of the vehicle as shown in B3 was presented to the customer of B4 before the priority date of the contested patent and in such a way that the customer of B4 could freely dispose of this information.

3.6 The decision T 482/89 referred to by appellant/opponent II does not contradict the present case because this decision relates to a use in which a sale of a prior used object was proven, whilst in the present case not a single sale of the van is proven.

Main request - Novelty

4. The subject matter of claim 1 as granted is new because it does not form part of the state of the art in view of E1, E25 or E2 (Article 54(1) EPC).

4.1 With respect to the interpretation of the wording of claim 1, the appellant/opponent I considers that the wording "said one or more supporting elements are located underneath said vehicle floor" includes a position for the supporting elements which is lower than the vehicle floor and not necessarily covered by it from a top view.

The Board disagrees. This term defines a position below the vehicle floor and covered by said vehicle floor when seen from a top view of the van. However, the wording of the claim is so broadly formulated that a position of the movable supporting members *partly* underneath the vehicle floor falls within the scope of the claim.

4.2 Document E1 discloses the preamble of claim 1 as granted.
This is not disputed by the parties.

4.2.1 The feature "said one or more supporting elements (10) are located underneath said vehicle floor (4)." is not disclosed in E1.

4.2.2 The appellant/opponent I submitted that it was apparent from figure 7 of E1 that the support arms 30 were partly covered by the vehicle floor 26 from a top view and as a consequence also the movable support arms 42 in their retracted position when inserted in the support arms 30 according to the configuration of figure 6.

4.2.3 The Board holds that it is not derivable from the disclosure of E1 that the movable elements 42 extend underneath the vehicle floor. In all figures of E1 the support arms 42 are only partially shown.

In particular, the perspective view in figures 6 and 7 does not reveal where exactly the support arms are located: they could be located underneath the floor, or possibly not. This depends on the exact longitudinal position of the support members (30) and cannot be deduced exactly from the three-dimensional drawing. Consequently, the contested feature cannot be unambiguously and directly derived from E1.

4.3 Document E25 discloses the preamble of claim 1 as granted.

This is not disputed by the parties.

The feature "said one or more supporting elements (10) are located underneath said vehicle floor (4)" is not disclosed in E25.

4.3.1 Appellant/opponent I argued that figure 1(C) of E25 clearly showed that the movable supporting elements 32 were located underneath the vehicle floor (F).

4.3.2 The Board considers that the movable supporting elements 32 of E25 do not extend underneath the vehicle floor. It is clear from figure 1(C) that the elements 32 which slide within the guide rails 30 are not located underneath the vehicle floor F because, as is illustrated in figures 1(A) and 1(C), they are not covered by the floor from a top view due to the groove of the floor F.

4.4 The subject matter of claim 1 is new with respect to the disclosure of E2.

The feature "A vending van" is not disclosed in E2.

4.4.1 The appellant/opponent I considers that a motorized vehicle attached to the vending trailer of E2 falls

under the definition of a vending van according to claim 1.

- 4.4.2 The Board disagrees. E2 does not disclose a vending van in the sense of claim 1 even considering the combination of the vending trailer of E2 attached to a motorized vehicle. According to the wording of claim 1 the vending van comprises a motorized vehicle with a chassis supporting a vehicle floor. The floor of the vending trailer of E2 is not supported by the chassis of the motorized vehicle but by the chassis of the trailer and thus cannot be considered to be the vehicle floor of claim 1. The attachment means (e.g. a tow ball type arrangement) of the trailer to the vehicle do not define supporting means but pulling or driving means for the trailer.

Main request - Inventive Step

5. The subject matter of claim 1 as granted does not involve an inventive step because, having regard to the disclosure of E1 and common general knowledge of the skilled person, it is obvious to a person skilled in the art (Article 56 EPC).
- 5.1 The subject matter of claim 1 as granted differs from the vending van according to E1 in that the one or more supporting elements are located underneath said vehicle floor (see point 4.2.1 above).
- 5.2 The appellant/patent proprietor formulates the objective technical problem as providing a vending van with a simple and efficient arrangement for the displacement of the counters that does not obstruct the loading compartment of the van and maximises the width of the loading compartment of the van without

influencing the overall lateral width of the vehicle.

Starting from E1 the skilled person would never, according to the appellant/patent proprietor, arrive at the subject matter of claim 1 as granted when trying to solve the posed technical problem. The skilled person would not find any reason in the prior art to extend the supporting members of E1 under the floor 26 of the vehicle. The weight of the counters of part 40 in E1 is supported by the support points in the side chassis rails 21 and by the support members 30 mounted to main frame 20. Therefore members 30 and arms 42 already have the dimensions required to stably support the corresponding part of the weight of the counter 40.

- 5.3 However, the Board holds that the problem to be solved is to provide a practical solution for the design as shown in E1.

The formulation of the problem as made by the appellant/patent proprietor is not correct because it rests on the assumption that the supporting members do not extend under the floor 26. However, as stated above, it is not derivable from E1 directly and unambiguously (cf. 4.2.3, second paragraph) whether the movable support arms (42) "extend underneath the floor" or not (cf. in particular figures 6 and 7).

Therefore, when reading E1 and trying to put in practice its teaching, the skilled person would be confronted with the problem of where to locate exactly the support arms, i.e. of finding a practical implementation of the design shown in E1.

The Board judges that providing the support members 30 and the movable support arms 42 at least partly underneath the vehicle floor when implementing the

design of E1 represents an obvious solution to the above-mentioned problem, having regard to the common general knowledge of the skilled person. As a matter of fact, the skilled person would recognize that this solution allows the reaction shear force and moment due to the weight supported by the support members 30 to be distributed on a substantial portion of each support member, namely the portion underneath the vehicle floor. Indeed each support member 30 can be seen as a beam carrying a load and cantilevered to a supporting frame. It is generally known that in this case better stability and better distribution of the reaction forces at the connection between the beam and the supporting frame are achieved if the beam is fixed to the supporting frame over a substantial portion thereof rather than fixed flush to the frame. The latter situation would result in the reaction shear force and reaction moment to be disadvantageously concentrated on a very small portion of the beam and of the supporting frame. In this context, it is noted that the cantilevered support members 30 carry a substantial load when the movable arms (42) are in their retracted position as shown in Fig. 6, due to the fact that in this position the weight of the counters (as well as any forces that arise on the counters during movement of the van) is (are), at least in part, supported by the cantilevered support members 30.

Auxiliary request 3

6. Auxiliary request 3 includes two independent claims (claims 1 and 2) in the same category.
- 6.1 Claim 1 corresponds to claim 1 of auxiliary request 3A which is identical to claim 1 of auxiliary request 5 underlying the contested decision. It has been further

delimited with respect to claim 1 as granted by the feature that

- when placed inside the loading compartment, said counter rests on said supporting elements (10) and on wheels (26) provided at the rear of said counter and suitable for being placed in contact with said vehicle floor (4) so as to enable the displacement of the counter (7) inside the loading compartment of the van.

6.2 Claim 2 corresponds to claim 2 of auxiliary request 5 of the contested decision (claim 2 also corresponds to claim 2 of auxiliary request 3 filed with the statement of grounds of appeal of appellant/patent proprietor). It has been further delimited with respect to claim 1 as granted by the feature that

- when placed inside the loading compartment, said counter rests on said supporting elements (10), said supporting elements (10) comprising a pair of shaped heads, one at the front and one at the rear, that engage in corresponding seats integral with the counter (7), said vehicle floor (4) having openings for enabling the passage of the parts of the supporting elements (10) on which the counter (7) rests so as to enable the displacement of the counter (7) inside the loading compartment of the van.

7. Auxiliary request 3 meets the requirements of Rule 80 EPC. In particular, the amendments made resulting in the two independent claims 1 and 2 in the same category are occasioned by a ground for opposition under Article 100 EPC.

- 7.1 The Opposition Division held in its decision that auxiliary request 5 (which i.a. consists of the present independent claims 1 and 2) was not admissible because the amendments made, which resulted in two independent claims 1 and 2 in the same category, did not meet the requirements of Rule 80 EPC.
- 7.2 According to established case law of the Boards of Appeal, the replacement of one independent claim as granted by several independent claims each directed to a respective specific embodiment covered by the independent claim as granted is admissible if the replacement was occasioned by grounds for opposition specified in Article 100 EPC (see Case Law of the Boards of Appeal of the European Patent Office, IV.D. 4.4.2, 7th edition 2013).
- 7.3 The proposed amended independent claims 1 and 2 in the same category of auxiliary request 3 (corresponding to auxiliary request 5 in opposition proceedings) is a legitimate response designed to limit the scope of the patent, in order to overcome the grounds for opposition of lack of novelty and inventive step, without abandoning alternatives presented in different specific embodiments (see paragraph [0081] of the patent) which were covered by the independent claim as granted and which can no longer be covered by a single claim.
- 7.4 No objections with respect to the requirements of Article 123(2) EPC were raised by either of the appellants/opponents.

Auxiliary request 3 - Independent claim 1

8. The subject matter of claim 1 involves an inventive step because, having regard to the state of the art, it

is not obvious to a person skilled in the art (Article 56 EPC).

8.1 Document E1 is considered the closest state of the art to the subject matter of claim 1 because it discloses all the features of claim 1 except that:

- (i) the one or more supporting elements are located underneath said vehicle floor, and
- (ii) the counter, when placed inside the loading compartment, rests on wheels provided at the rear of said counter and suitable for being placed in contact with said vehicle floor so as to enable the displacement of the counter inside the loading compartment of the van.

The patent proprietor and opponents I and II did not contest that feature (ii) is not disclosed in E1.

8.2 The posed technical problem is how to facilitate the movement of the counter by reducing friction inside the loading compartment of the vending van.

In this context, the Board holds - contrary to the argumentation of opponent/appellant I - that the support of the counter in a balanced way due to the absence of an inwardly directed cantilevered weight of the counter in its transport configuration does not play a role. Since the disclosure of E1 is silent about the center of gravity of the counter in relation to the support point on the chassis rails 21 (cf. figures 6 and 7), there is no basis in E1 to consider the balance of the counter in the transport configuration as being a technical problem in connection with the vending van according to E1.

8.3 The integration of feature (ii) in the vending van according to E1 is not rendered obvious by the state of the art on file even considering documents E20, E21, E22, B1.9 and E29, the admissibility of which was contested by the appellant/patent proprietor.

8.3.1 The Board agrees with the appellants/opponents that wheels are generally known to the skilled person as a friction reducing means for displacement of counters on surfaces. For example E18, B1.9, B1.5, E20, E21, E22, E29 or B2.5 disclose such counters which are supported on both front and rear wheels.

Nevertheless, the systems in these documents are completely different to the arrangement of E1, with the result that the skilled person would not be induced to combine their teaching with the vending van according to E1, and, in particular, to mount wheels in the rear part of the counter (40, 41). The teaching of these documents, to add front and rear wheels to both the rear and front part of the counter would require restructuring the main frame (20) of the vehicle with its side chassis rails (21), the support arms (42) and support members (30) of the system of E1 in order to allow the counter to be displaced on the vehicle floor and rest on the movable supporting elements when the counter is placed inside the loading compartment. Neither would the skilled person be induced by this state of the art to add wheels only to the rear part of the counter (40, 45) of E1. The side chassis rails 21 of E1 are part of the main frame 20 of the vehicle which cannot simply be modified or eliminated because they belong to the vehicle frame-structure that supports all the components of the vehicle including the counters. Further, the surface of the floor 26 of

E1 would have to be adapted to support the weight of the counters through wheels. As a result, it is not clear from the appellant/opponent I's argument why the skilled person would adopt such steps.

Therefore, the Board does not follow the arguments of appellant/opponent I, stating that the integration of feature (ii) in E1 would be very simple and would not require any particular modification of the remaining structure.

- 8.3.2 The appellant/opponent II, in its written case, follows the same argumentation when combining E1 with B1.9.

Summarizing, the skilled person cannot find any hint in the prior art available to modify the vehicle according to E1 to arrive in an obvious manner at the subject matter of claim 1 of auxiliary request 3.

- 8.3.3 The inventive step objection from appellant/opponent II based on E2 in combination with B1.9 (cf. statement of grounds of appeal, page 11 et seq.) does not render the subject matter of claim 1 obvious. Document E2 is a worse starting point for an inventive step evaluation than E1, since E2 does not even disclose a vending van, (cf. 4.4 above).

Auxiliary request 3 - Independent claim 2

9. The subject matter of independent claim 2 of auxiliary request 3 is new because it does not form part of the state of the art (Article 54 EPC).

Lack of novelty for the subject matter of claim 2 with respect to document E25 was objected by appellant/opponent I by making reference to the submissions made

during the opposition proceedings, which were related at that time to claim 2 of auxiliary request 5 of the opposition proceedings.

As stated above, E25 does not disclose movable supporting elements located underneath the vehicle floor (see point 4.3 above).

10. The appellants/opponents I and II have raised no objections with respect to inventive step for the subject matter of claim 2 (Article 56 EPC).
The Board sees no reason to raise any objection on this matter *ex officio*.

11. Dependent claims 3 to 29 relate to further developments of the vending van according to claim 1 or 2 to which they refer. The above conclusions regarding novelty and inventive step apply equally to these claims, which likewise meet the requirements of the EPC.

Request of appellant/opponent II for hearing a witness

12. Finally the Board does not see any reason to hear the witness as requested by appellant/opponent II.
 - 12.1 In the last paragraph of its statements of grounds of appeal, appellant/opponent II submitted that "Anyway, by way of precaution, in the event that the Board of Appeal is of the opinion of uphold the decision of the Opposition Division, even in amended form, oral proceedings are hereby requested under Article 116 EPC, even with the summons of witness".

 - 12.2 However, according to established case law of the Boards of Appeal, it is necessary that a party who wishes to adduce evidence by means of a witness

indicates what factual details it wishes to prove by this means (cf. Case Law of the Boards of Appeal of the European Patent Office, 7th edition, 2013, III.G.2.2).

Since no factual details of the testimony are mentioned at all, the request is moot.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent in amended form on the basis of the following documents:
 - Claims 1 to 29 of Auxiliary Request 3, filed at the oral proceedings.
 - Description, columns 1 to 13 as filed at the oral proceedings,
 - Figures 1 to 38 as granted.

The Registrar:

The Chairman:



B. ter Heijden

G. Pricolo

Decision electronically authenticated