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**Datasheet for the decision
of 24 June 2016**

Case Number: T 1647/15 - 3.2.01

Application Number: 05075660.0

Publication Number: 1577159

IPC: B60P3/06, B62D53/06

Language of the proceedings: EN

Title of invention:

Trailer having pivoted axles and a central recess

Patent Proprietor:

Nooteboom Group B.V.

Opponents:

FAYMONVILLE AG
MEUSBURGER Fahrzeugbau GmbH
Scheuerle Fahrzeugfabrik GmbH

Headword:

Relevant legal provisions:

EPC Art. 123(2)
EPC 1973 Art. 54, 56
RPBA Art. 11

Keyword:

Suspected partiality against at least one member of the
opposition division (yes)
Remittal to the first instance (no)
Added subject-matter- main request- auxiliary request 5 (yes)
Prior uses- violation of the right to be heard (yes)-
availability to the public (yes)
Novelty- auxiliary request 1- (no)
Auxiliary request 5A- admissibility (yes)- added-subject-
matter (no)- clarity (yes)- novelty and inventive step (yes)
Reimbursement of the appeal fees (yes)

Decisions cited:

G 0005/91, G 0008/91, G 0009/91, T 1028/96, T 0142/97,
T 0479/04, T 1982/09, T 1907/11, T 0803/12

Catchword:

see points 2.4, 2.5, 3



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Case Number: T 1647/15 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 24 June 2016

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 July 2015 concerning maintenance of the
European Patent No. 1577159 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: Y. Lemblé
 P. Guntz

Summary of Facts and Submissions

- I. All the parties to the first instance proceedings, the Patent Proprietor, Opponent I, Opponent II and Opponent III appealed against the decision of the Opposition Division dated 9 July 2015 to maintain the European patent No. 1 577 159 in amended form.
- II. In the decision under appeal, the Opposition Division held that the subject-matter of claim 1 according to the main request extended beyond the content of the application as originally filed EP-A-1 577 159 (D0) and that the subject-matter of the claims according to the first auxiliary request, filed on 10 April 2015, met the requirements for patentability.

In coming to this conclusion the Opposition Division took into consideration, *inter alia*, the alleged public prior uses of a trailer having the vehicle identification number 791431 "Scheuerle I" (documents E11a to E11p / OI), a trailer having the vehicle identification number 781131 "Scheuerle II" (Annexes 2-3 / OII), a trailer having the vehicle identification number 7161 "Scheuerle III" (annexes E1 to E18 / OIII), and the prior art documents E1-E3/OI, E16/OII and E32b/OII, all these documents being also cited by the Opponents in appeal.

- III. Oral proceedings before the Board were held on 23 and 24 June 2016.

The Appellant-Patent Proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or, in the alternative, that the patent be maintained in amended form on the basis of the Auxiliary Requests 1, 5, 5A,

2, 3, 4, 6 or 7 in this order (auxiliary request 5A as submitted during oral proceedings, all other auxiliary requests as submitted with the letter dated 10 April 2015).

Appellants-Opponents I and II requested that the Opposition Division's decision of 9 July 2015 be set aside for bias of at least one member of the Opposition Division and that the case be remitted for rehearing before an Opposition Division in a different composition or, in the alternative, that at least one of the questions of Opponents I or III be referred to the Enlarged Board of Appeal, or that the Opposition Division's decision of 9 July 2015 be set aside for violation of the right to be heard and that the case be remitted to the Opposition Division, or that the Opposition Division's decision of 9 July 2015 be set aside insofar as Opponents I and II are adversely affected and that patent EP 1 577 159 be revoked.

Appellant-Opponent III requested that the Opposition Division's decision of 9 July 2015 be set aside insofar as Opponent III is adversely affected and that patent EP 1 577 159 be revoked or, in the alternative, that the Opposition Division's decision of 9 July 2015 be set aside for bias of at least one member of the Opposition Division and that the case be remitted to an Opposition Division in different composition, or that at least one of the questions of Opponents I or III be referred to the Enlarged Board of Appeal, or that the Opposition Division's decision of 9 July 2015 be set aside for violation of the right to be heard and that the case be remitted to the Opposition Division.

All Appellants-Opponents further requested reimbursement of the appeal fee.

IV. Claim 1 as granted (main request) reads as follows
(delimitation of features as proposed by the Opposition
Division):

- (O1) Trailer (1), comprising a chassis (2) and an undercarriage (3) having one or more wheel lines (8),
- (O2) wherein each wheel line (8) comprises at least two sets (9) of wheels placed on either side of the trailer (1), and
- (O3) wherein at the position of the undercarriage (3) the chassis (2) has a central recess (11) running in longitudinal direction and open at the top for accommodating part of the load to be transported on the trailer, in particular an arm of an excavator,
- (O4) which recess (11) extends in both longitudinal and height direction at least partially between the mutually opposite sets (9) of wheels of one or more of the wheel lines (8),
- (O5) wherein each wheel set (9) has an axle body (18) on which are mounted two wheels (20),
- (O6) wherein at least some of the wheel sets (9) are steerable, and
- (O7) wherein at least some of the wheel sets (9) on either side of the trailer (1) are mechanically coupled to each other by means of a steering element (34) which extends in transverse direction of the trailer (1),

characterized in that:

- (K1) the wheel sets (9) have pivoted axles (10), each wheel set (9) has an axle body (18) on which are mounted two flat wheel hubs (19),

- (K2) a wheel (20) consisting of a rim (21) and a pneumatic tyre (22) being mounted on each wheel hub (19) such that the wheel hub (19) lies substantially in the plane of the wheel (20),
- (K3) each axle body (18) is pivotable about a pivoted axle (10) running substantially in longitudinal direction,
- (K4) said pivoted axle (10) being arranged between the wheels (20) below the axles (14) of the wheel set (9), so that the axle body (18) can execute a pivoting movement so that the wheels (20) of the wheel set (9) lie flat on a road surface (R) in all conditions,
- (K5) each wheel set (9) comprises at least one brake cylinder (32) placed between the wheels (20) thereof,
- (K6) the space between the wheels (20) is smaller than 1.5 times the width of each wheel (20), preferably even smaller than the width of each wheel (20) and substantially corresponds to the diameter of the at least one brake cylinder (32), and
- (K7) the steering element (34) extends in the vicinity of a bottom (12) of the recess (11).

In Claim 1 of the first Auxiliary Request, feature K1 of the main request has been completed to include "with associated brake drums" after "...on which are mounted two flat wheel hubs (19)".

Compared with claim 1 of the main request, Claim 1 of auxiliary request 5 has been modified to include the feature "the chassis (2) having a lowered middle part (5) for supporting a load, and an end part (6) raised relative thereto on which the undercarriage (3) is suspended, and in which the recess (11) is situated,"

between features O4 and O5 of the preamble of the claim and the feature that "the recess (11) lies at substantially the same level as the load-bearing chassis part" before feature K7 of the characterising part of the claim.

Claim 1 of auxiliary request 5A differs from claim 1 of auxiliary request 5 in that the claim is written in the one-part form, replacing "characterised in that" by "wherein" and in that the wording "with associated brake drums," has been included between "...on which are mounted two flat wheel hubs (19)" and "a wheel (20) consisting of...".

- V. The arguments of the Appellants/Opponents in support of their requests, as far as they are relevant for the present decision, can be summarised as follows:

Partiality

The decision of the Opposition Division should be set aside for partiality of at least one of the members of the Opposition Division and, in accordance with case law of the EPO (see G 5/91), the case should be remitted for rehearing before an Opposition Division in a different composition. As indicated in the minutes of the oral proceedings before the Opposition Division, the representative of Opponent III, on the second day thereof, was interrupted by the chairman saying: "Shut your mouth" and "Don't speak any more". The chairman, being asked whether he would confirm this wording, expressed that he would neither regret what he just said, nor "take anything back". This was a clear indication of a personal aversion of the chairman against the representative of Opponent III. It was also obvious that this personal animosity negatively

affected the ability of the chairman to hear Opponent III with an objective judicial mind. The Opposition Division made a fundamental procedural violation in deciding itself to reject the then raised objection of suspected partiality by Opponent III. The provisions of Article 24(3) EPC should have been applied to the members of the Opposition Division. The refusal of the Opposition Division to agree to the correction of the minutes of the oral proceedings requested by the Opponents was a further indication of partiality. The minutes were deliberately written so as to misinterpret what had happened and was said during the oral proceedings.

Right to be heard in connection with the prior use

The various technical drawings and sets of documents presented in opposition proceedings proved that the trailers Scheuerle I and Scheuerle III belonged to the prior art. In order to demonstrate that feature O4 was known from the trailer Scheuerle I or Scheuerle III, it was proposed by the Opponents to secure the evidence by inspection of the trailer in accordance with Article 117 (1) (f). However, this request was rejected by the Opposition Division with the argument that the Opponents had to provide the evidence and that it could not favour one of the parties over the other by helping a party gathering the required evidence. The Opposition Division had the duty to inspect the trailer and it was not justified to refuse the request of inspection on this issue (see decisions T 142/97, T 716/06, T 267/06). Because the Opposition Division did not follow the request of inspection on this issue, the right of the Opponents to be heard was violated.

Remittal to the first instance

Immediate remittal to the first instance because of fundamental procedural deficiencies was requested. This Board confirmed in the oral proceedings of 24 June 2016 that the Opposition Division made two substantial procedural violations (suspicion of partiality and right to be heard). The Board should therefore have remitted the case before an Opposition Division in a different composition (see G 5/91). In breach of the right of each party to be heard before two instances (Article 113(1) EPC), the present Board refused to remit the case to the Opposition Division on the ground that this would cause undue delays. However, the duration of the proceedings should not play any role. Accordingly, an objection under Rule 106 EPC against that decision of the Board was filed by Opponents I and II in the oral proceedings (see annex to the minutes of oral proceedings dated 24 June 2016: "Rüge gemäß Regel 106 EPÜ"). Opponent III joined this objection.

Added subject-matter (Article 100(c) EPC); Main Request and Auxiliary Request 5

Contrary to the opinion of the Patent Proprietor in its Main Request, the omission of "with associated brake drums" in feature K1 of claim 1 offended the requirements of Article 123(2) EPC.

Auxiliary request 1; Novelty

As was apparent from the technical drawings, photographs and sets of documents E11/OI respectively E1-E18/OIII presented in opposition proceedings, the subject-matter of claim 1 of this request was not novel over the prior use Scheuerle III or Scheuerle I.

Auxiliary Request 5A; admissibility

The Auxiliary Request 5A should not be admitted in the proceedings. This request was introduced for the first time in the oral proceedings before the Board and thus came as a surprise. As it was filed too late, it was not possible at this stage of the proceedings to prepare arguments against it. Its admission into the proceedings would deprive the Opponents of their right to be heard. The Board nevertheless admitted this request into the proceedings. Accordingly, an objection under Rule 106 EPC against that decision of the Board was filed in the oral proceedings (see annex to the minutes of oral proceedings dated 23 June 2016: "Rüge gemäß Regel 106 EPÜ") by Opponent II. Opponent III joined this objection.

Auxiliary Request 5A; added-subject-matter

The objections presented in opposition proceedings in respect of the patent as granted were maintained.

Paragraph [0013] of the application as originally filed EP-A-1 577 159 (D0) contained a definition for the feature "flat wheel hub". According to the first sentence of paragraph [0013] of the application a "flat wheel hub" was a wheel hub lying substantially in its plane. This was clear from the second sentence reading "By applying such flat wheel hubs instead of rounded protruding hubs that are generally used...". This definition was not depending on the rim and pneumatic tyre being used. In contrast, feature K2 of the claim was an assembling instruction. According to K2, the rim and the pneumatic tyre had to be mounted such that the wheel hub lay substantially in the plane of the wheel.

In consequence, Article 123(2) EPC was violated in two ways:

- firstly, the definition of the feature "flat wheel hub" had been abandoned.
- secondly, feature K2 of the claim contained an assembling instruction that had no basis in the application as originally filed.

Through the deletion of paragraph [0013], the original disclosure D0 had been generalised as the patent did no longer require that the wheel hub itself was flat irrespective of the rim and pneumatic tyre being used.

The introduction of feature K4, which was taken from the description of D0, into claim 1 led to an intermediate generalisation as this feature was inextricably linked to other features relative to the specific construction of the pivoting form of the wheel set. The requirement "so that the axle body can execute a pivoting movement so that the wheels of the wheel set lie flat on a road surface in all conditions" was derived from paragraph [0027]. However, this requirement, according to paragraph [0027], was only possible because of the particular structure of the longitudinal pivoted axle: "Through torsion of the tubular rubber body 24 the axle body 18 can execute a pivoting movement so that the wheels 20 of wheel sets 9 on either side of trailer 1 lie flat on the road surface R in all conditions". The omission of the details of the pivoted axle constituted a violation of Article 123(2) EPC because no other form of pivoted axle was disclosed in the application as a whole.

Auxiliary Request 5A; amendments of the description

Opponent III objected to the amendment of paragraph [0001] of the description as being contrary to the

requirements of Article 123(2) EPC.

Auxiliary Request 5A; clarity

The addition of the wording "with associated brake drums" rendered claim 1 unclear. This amendment had paved the way to two alternative interpretations of features K2 namely:

-the wheel hub including the brake drums lay substantially in the plane of the wheel;

-the wheel hub itself and thus excluding the brake drums lay substantially in the plane of the wheel.

These alternative interpretations had not been possible for granted claim 1 and thus resulted from the amendment performed by the proprietor. Furthermore, the proprietor could easily get rid of this lack of clarity by restricting the claim to one of these alternatives.

Auxiliary request 5A; novelty

The subject-matter of claim 1 of this request was not novel over the prior use Scheuerle III or Scheuerle I for the following reason: technical drawing E3/OIII of Scheuerle III showed at the rear part thereof an undercarriage with a load bearing chassis part. The recess which extended between the wheel sets of the three wheel lines of this load chassis part lay at substantially the same level as this load bearing chassis part, as far as the longitudinal direction thereof was considered.

Auxiliary request 5A; inventive step

The subject-matter of claim 1 of this request did not involve an inventive step over any of the prior uses Scheuerle I or III, merely obvious modifications being

necessary for a skilled person to arrive at the claimed subject-matter, or over any of the prior uses Scheuerle I and III in combination with E3/OI. Reference was made to paragraphs [0013], [0016], [0017], [0021] and paragraphs [0055] and [0057] in combination with figures 12 and 13 of E3, which disclosed a solution to the problem of deepening the central recess.

VI. The arguments of the Appellant-Patent Proprietor, as far as they are relevant for the present decision, can be summarised as follows:

Alleged partiality

The allegations of suspected partiality were unfounded and the request to set aside the decision of the opposition division for this reason should be rejected.

All three Opponents requested that the decision of the Opposition Division be set aside in view of the alleged partiality of the Opposition Division, in particular the Chairman of the Division. These requests were unfounded and appeared to have been caused by the decision of the Opposition Division on the merits of the case, rather than by the way the opposition proceedings were conducted. It could not be excluded that the the Appellants-Opponents raised the issue of alleged partiality in an orchestrated attempt to have an unfavourable decision be set aside on formal grounds.

Nothing in the way the Opposition Division and its Chairman conducted the proceedings could be interpreted by any objective standard as an indication of partiality. Contrary to the representative of Opponent III, the Opposition Division's conduct was

entirely professional throughout the proceedings. The truth of the matter was that the representative for Opponent III appeared to be disappointed by the way the oral proceedings were progressing. Due to his disappointment he was increasingly unable to maintain the detached and professional attitude that may be expected of a representative before the EPO. As indicated in the minutes of the oral proceedings, the representative for Opponent III repeatedly tried to speak at times when he was not allowed the floor. On the second day of the oral proceedings, Opponent III once again started to interrupt when the proprietor was responding to an inventive step attack by Opponent I. This interruption finally caused the Chairman, who until then had shown commendable restraint in view of Opponent III's increasingly inappropriate behaviour, to instruct Opponent III to refrain from interrupting the other parties. And whereas it was true that the language used by the Chairman at the time was fairly strong, it was no more than an attempt on the part of the Chairman to restore order at short notice. No objective observer would have qualified the Chairman's reprimand as an indication of any personal aversion, as the Opponents now submitted.

Regarding the issue of suspected partiality it should be noted that no provisions comparable to Article 24 EPC were in place for members of an Opposition Division. From the case law it followed that this had been a conscious choice of the legislator. Moreover, the case law was clear in that the deciding body of the EPO (whether first instance department or Board of Appeal) must decide on the admissibility of an objection for suspected partiality (T 1028/96), while an Opposition Division may decide on the allowability of such an objection (T 479/04 by reference to G5/91).

The partiality objection was based on a single reprimand for unprofessional conduct that was given when Opponent III started to interrupt the presentation by the proprietor, who had been given the floor and was speaking at that time. As acknowledged by Opponent I in his Statement of Grounds (at the bottom of page 5), such behaviour was not generally acceptable. And when one of the parties to oral proceedings, in particular in inter partes proceedings, behaved unacceptably, it was the task of the Chairman to intervene and restore order. To this end the Chairman ordered Opponent III to stop interrupting the proprietor. Under these circumstances the wording that was used by the Chairman was neither disproportionate nor offensive. Generally speaking, when a party was reprimanded for unprofessional or even unacceptable conduct during an oral proceedings, such a reprimand in itself could not be the basis for an objection of alleged partiality. If the "threshold" in the words of T 1028/96 were so low, this would open the door to abuse of proceedings. In that case any party fearing an unfavorable decision could simply provoke a reprimand and then ask for the decision to be nullified for alleged partiality.

The Opponents considered the Opposition Division's refusal to agree to the requested correction of the minutes of the oral proceedings as a further indication of partiality. The Opponents suggested that the minutes were deliberately written so as to misrepresent what happened and was said during the oral proceedings. However, the Opposition Division was correct in refusing to amend the minutes, which formed a fair representation of the oral proceedings.

Rule 124 EPC required the minutes to contain "the essentials of the oral proceedings ... and ... the relevant statements by the parties". The relevant case law stressed that the minutes need not reflect the full arguments of the parties (T 642/97) and that it was at the discretion of the minute writer what was "essential" or "relevant" (T 212/97). The minutes should record the requests of the parties and similarly important procedural statements. However, it was not the function of the minutes to record statements which a party considered to be possibly relevant (T 1798/08). In view of the above, the refusal of the opposition division to amend the minutes in the way requested by the Opponents was clearly in line with the established case law and could not be interpreted as an indication of suspected partiality.

Alleged violation of the right to be heard in connection with the prior use and remittal to the first instance

The Opponents' right to be heard was not violated by the Opposition Division's refusal to hear witnesses or inspect trailers on site so that the request to set aside the decision for this reason should be refused. According to case law, if a department of the EPO is of the opinion that an alleged prior use was in fact not a novelty destroying state of the art, there was no need to hear a witness to testify that this alleged prior use was made available to the public. In the present case, the Opposition Division specifically accepted the public prior use of the Scheuerle III trailer and analysed the Scheuerle I trailer on which Opponent I based its novelty objections and the Scheuerle II trailer on which Opponent II based its novelty objections as if these trailers had indeed been made

public, an approach which was suggested in T 324/03. Moreover, the Opposition Division in the present case found that all three Scheuerle trailers lacked at least the features O7, K2, K6 and K7 of the main claim. These findings were based on the documentary evidence that was filed by the Opponents. The Opposition Division further found that feature O4 was not disclosed in the Scheuerle trailers, at least not in combination with feature O6. Of all the missing features, this was the only one that the Opponents had offered to prove by way of witness testimony or inspection. Therefore, even if the opposition division had accepted the offer for witness testimony or inspection, and based on that testimony or inspection had come to a different conclusion regarding feature O4, the novelty attacks on the basis of the Scheuerle trailers still would not have been successful. Consequently, the Opposition Division's refusal to hear witnesses or inspect the trailers had no effect on the decision.

Added subject-matter (Article 100(c) EPC); Main Request and Auxiliary Request 5

The characteristic "associated brake drums" was not inextricably linked with the other characteristics defined in feature K1, so that the omission of these "associated brake drums" did not result in the subject matter of granted claim 1 extending beyond the content of the application as filed.

According to the established case law of the Boards of Appeal, situations might exist where characteristics taken from a working example might be combined with other features disclosed in a more general context without creating an objectionable intermediate generalisation. For such an intermediate generalisation to be admissible the skilled person should be able to

recognise without any doubt that those characteristics would not be closely related to the other characteristics of the working example and applied directly and unambiguously to the more general context. This was the situation in the patent in suit. The patent related to a trailer, in particular a low-loader, and sought to solve the problem of providing a trailer that was relatively compact, yet had a high payload in terms of both weight and volume. This problem was solved by the combination of features defined in claim 1, which cooperated to allow a trailer to have pivoted axles for optimum load distribution and a central recess that was sufficiently wide and deep to accommodate an excavator arm. As the skilled person would recognise, the presence of brake drums *per se* did not contribute to the claimed solution of the problem. Moreover, the skilled person would be well aware that drums were only one of several possible types of brakes. In fact, the skilled person would recognise that other types of brake elements, e.g. brake disks could be used in combination with the other characteristics of feature K1.

Auxiliary request 1; Novelty

Moreover, even if the Opponents would have proven that the trailers "Scheuerle I" and "Scheuerle III" as depicted in the photos and the drawings would indeed have been in public use before the priority date of the patent, they would still not take away the novelty of claim 1. In fact, none of the photos or drawings in set E11/OI or the series En/OIII actually disclosed a trailer having a central recess for accommodating part of the load, e.g. an excavator arm, which recess extended between the wheels in height direction (feature O4). Moreover, none of the photos or drawings

showed wheels having flat wheel hubs (feature K2), nor wheel sets in which the space between the wheels corresponded to the diameter of the brake cylinder (feature K6). And finally, none of the photos or drawings showed a steering element mechanically coupling the wheel sets on either side of the trailer and extending in the vicinity of the bottom of the recess (feature K7).

Regarding the central recess shown in the photos and drawings it should be noted that this appeared to be only 170 mm deep. Therefore, it was immediately clear that this recess was neither intended nor actually suitable for accommodating an excavator arm, which required a much deeper recess. In any event, the central recess of the Scheuerle trailers did not extend between wheels in height direction in the sense of claim 1 (feature O4). It was clear that this feature was only useful and would only contribute to solving the problem of providing a compact trailer having a high payload, both in terms of weight and volume, if it was actually present during normal use of the trailer. In the case of the Scheuerle trailers, however, the recess did not extend between the wheels during normal use. It was well known that a trailer needs about 100-150 mm of spring travel to be driven over normal roads. This meant that the bottom of the trailer must be kept at least 100-150 mm off the ground so as to prevent the trailer from hitting the ground when the springs reach their maximum compression during use. Since the rear view in E3/OIII or E11k/OI showed the bottom of the trailer to be 250 mm off the ground, it could only be lowered about 100-150 mm in order to maintain a ground clearance of 100-150 mm. Consequently, during use the bottom of the recess would be somewhere between 830-880 mm above the ground, i.e. approximately on level with the top of the wheels.

Therefore, the recess could not be said to extend between the wheels during normal use of the trailer. Photo E11b/OI showed that, when the Scheuerle trailer was fully lowered, the wheels protruded into the recess. In other words, in this situation the recess surrounded the wheels, rather than being between wheels as claimed. Nevertheless, it was clear that in this position the trailer could not be used. First of all its bottom would rest on the ground, so that it could not move, while moreover the wheels were no longer steerable. If the trailer were to be loaded in this position, the load would come into contact with the wheels, risking damage to the load and/or the wheels. Another difference between the Scheuerle trailers and the subject-matter of claim 1 was that the hubs which were shown in photos E11c/OI and E14/OIII were not flat (feature K2). Instead, the hubs were of conventional rounded, protruding design.

From the photos and drawings of the Scheuerle trailers it appeared that the space between the wheels was approximately 285 mm, since the measured distance between the centers of the wheels seemed to be 570 mm, while the width of each wheel was 285 mm. However, the diameter of a standard brake cylinder for this type of trailer was only 205 mm. Consequently, it could not be said that the space between the wheels in the Scheuerle trailers corresponded to the diameter of the brake cylinder as defined in claim 1 (feature K6). And finally, the steering system of the Scheuerle trailer differed substantially from that of the patented trailer (features O7 and K7). The Scheuerle trailer had centrally located rotating steering elements which were connected to steering cylinders. From these central steering elements track rods extended to the wheel sets at both sides of the

trailer. These track rods were arranged below the bottom of the recess. In fact, they appeared to be arranged almost halfway between the ground and the bottom of the recess, as shown in photo E11d/OI.

The subject-matter of claim 1 of auxiliary request 1 was therefore new with regard to the alleged prior uses Scheuerle I (document set E11/OI) and Scheuerle III (Annexes E1 to E18/OIII).

Auxiliary Request 5A; admissibility

The Auxiliary Request 5A was filed in reaction to the conclusions reached by the Board in oral proceedings. It combines the amendment made in the Auxiliary Request 5 to the characteristic "associated brake drums". The Auxiliary Request 5 was filed with the reply to the written statement setting out the grounds of appeal of Appellants-Opponents. These amendments did not change anything as regards the discussion on inventive step because claim 1 of Auxiliary Request 5 was on the table beforehand.

Auxiliary Request 5A; clarity and added-subject-matter

Regarding the interpretation of feature K1 the opponents stated that there would be two possibilities: either the feature only required the wheel hub per se to be flat or the feature defined the combination of wheel hub and brake drum as flat. This alleged ambiguity would introduce a lack of clarity. This was not the case. As already explained in point 2.4 of the reasons for decision T 1907/11 of the present Board, referring to paragraphs [0008] and [0031] of the patent, the term "flat wheel hub" should be understood as relating to a hub unit including the

brake. This interpretation, which was also adopted by the Opposition Division in the decision under appeal, made perfect sense in view of feature K2. In feature K2 the (flat) wheel hub 19 was defined as lying substantially in the plane of the wheel 20. This feature is illustrated in Fig. 10,11 of the patent and explained in col. 6, lines 2-3: "(...) wheel hubs 19 are accommodated as much as possible inside wheels 20". From these Figures it was clear that the reference numeral 19 actually denoted the combination of wheel hub and brake drum which the skilled person would recognize as such. This combination or "hub unit" lay substantially in the plane of the wheel, i.e. was accommodated as much as possible inside the wheel. Consequently, claim 1 met the requirements of Article 84 EPC.

Most of the arguments presented by the opponents in connection with the alleged extension of subject matter were presented in substantially the same wording in the original notices of opposition and the further filings during the first instance proceedings before the Opposition Division. These objections were treated in the decision of the Opposition Division (points 2.2.1-5 and 2.3.1-2 of the reasons for that decision) which confirmed that the alleged extensions of subject matter were not founded.

Auxiliary request 5A; novelty and inventive step

The prior use Scheuerle I or Scheuerle III failed to disclose a trailer where the recess lay at substantially the same level as the load-bearing middle chassis part, so that claim 1 of this request was novel.

The claimed trailer could not be derived in an obvious manner from the prior use Scheuerle I or Scheuerle III being taken alone or in combination with document E3. Any attempt to deepen the recess of the known trailer would collide with the centrally arranged steering system located just below the recess. To choose a suspension system according to document E3 for the wheel set situated on opposite sides of the recess would necessitate a total reconstruction of the trailer which would by no means be obvious.

VII. Opponent III requested that three question along the following lines should be referred to the Enlarged Board of Appeal under Article 112(1) (a) EPC:

Should the Board of Appeal consider that the contested decision, in spite of being flawed either by the partiality of a member who was objected under Article 24(3) EPC and participated to it or by a violation of the right to be heard, is not straight away to be set aside, the following legal issues should be referred to the Enlarged Board of Appeal in accordance with Article 112 (1) a) EPC:

Legal Question 1:

Is a decision of an Opposition Division to be set aside when it was taken with the participation of the member who was objected to under Article 24 (3) EPC ?

Legal question 2:

Is a decision of an Opposition Division to be set aside when it was obtained with the participation of the member who should have been excluded because of partiality ?

Legal question 3:

Is an Opposition Division bound to take evidence which is offered in support of invoked facts and which, in principle, is able to prove the indicated facts ?

VIII. Opponent I requested that a question along the following lines should be referred to the Enlarged Board of Appeal under Article 112(1) (a) EPC:

May a member of an Opposition Division who has been suspected of partiality be authorized to participate in a decision on his own partiality, or should his participation in this decision be denied by application of the general principles of procedural law of the Contracting States to the European Patent Convention in accordance with Article 125 EPC ?

Reasons for the Decision

1. The appeals are admissible.
2. Substantial procedural violations: Suspected partiality against at least one member of the Opposition Division, and right to be heard in connection with the prior uses
 - 2.1 All the Appellants-Opponents requested that the contested decision be set aside for partiality of at least one of the members of the Opposition Division and that the case be remitted for rehearing before an Opposition Division in a different composition. In its statement setting out its grounds of appeal and in accordance with its Legal Questions 1 and 2, Appellant-Opponent III has argued that Article 24(3) EPC was automatically applicable to opposition divisions. The Appellants-Opponents have in particular argued that the suspected members should not have participated to the decision on their own partiality. Instead, an

Opposition Division in a different composition should have taken a decision on the objection of partiality.

2.2 The Board does not share this view. Decision G 5/91 of the Enlarged Board of Appeal (OJ EPO 1992, 617) clearly states that, on account of differences of judicial nature between the two instances, the provisions of Article 24 EPC on exclusion and rejection for partiality only apply to members of the Boards of Appeal and the Enlarged Board of Appeal and not to employees of the first instance departments of the EPO, including the Opposition Divisions (Reasons, point 2). As explained in G 5/91, this has been a conscious choice of the legislator (point 2 of the reasons). There is therefore no legal basis for automatically applying Article 24 (3) and (4) EPC to an Opposition Division. Consequently, it is not appropriate to refer legal questions 1 and 2 of Opponent III to the Enlarged Board of Appeal.

2.3 In the same way, as to the Legal Question which was put forward by Opponent I for referral to the Enlarged Board of Appeal, the Board sees no reason to refer that question, because in the Board's view the answers to the question whether an Opposition Division could decide on the issue of its own partiality follows clearly from case law of the Boards of Appeal. Decision G 5/91, mentioned by Opponent I in its legal question, contains the following remark as *obiter dictum*: "In respect of the opposition proceedings, there may be arguments in favour of letting the Opposition Division itself consider and decide upon such matters [i.e. its impartiality] by way of an interlocutory decision allowing separate appeal. This would have the advantage of making it possible to have the procedural matter settled before a decision on substance is taken" (point

4 of the reasons). Accordingly, it can be deduced from this statement that it is not prohibited for an Opposition Division to decide on objections against its partiality. According to T 1028/96, it is the Board in its original composition, i.e. with the member objected to, which is competent to examine the admissibility of an objection of suspected partiality for the purpose of taking a decision on this matter. Applying this principle to the present case, it is clear that it was the task of the Opposition Division, including its chairman who was objected to, to examine the admissibility of the objection of suspected partiality. Further, decision T 479/04 states that there is no prohibition for the Opposition Division from deciding itself in the substance on an allegation of partiality made against it (see catchword of the decision). The Board is aware that it is a basic principle of procedural law in the Contracting States of the EPC (cf. Article 125 EPC) that all the member of a tribunal must be above any suspicion of bias (G 5/91, decision Headnote, item 1). However, because the proceedings before an Opposition Division are not judicial in nature (see G 5/91; Reasons, point 2) but have purely administrative character (see G 8/91: OJ EPO 1993, 346, reasons, point 7; G 9/91: OJ EPO 1993, 408, reasons point 18), there is no obligation for a member of an Opposition Division who has been objected to for suspicion of partiality to automatically step aside and be excluded from a decision on this matter.

- 2.4 As held by the Enlarged Board of Appeal in G 5/91 (Reasons point 6), the question whether or not an objection of suspected partiality raised in opposition proceedings was justified could only be considered in the particular circumstances of each individual case.

- 2.4.1 In the present case, the representative of the Appellant-Opponent III filed during the oral proceedings before the Opposition Division an objection of suspicion of partiality against the chairman, mentioning that he was interrupted by the chairman with: "Shut your mouth" and "Don't talk any more" and that the chairman emphasised he "would not withdraw anything".
- 2.4.2 From the content of the minutes it would appear that the chairman of the Opposition Division was repeatedly interrupted by Opponent III. Repeatedly talking out of turn is a disturbance which does not contribute to a fair and equal treatment of all parties and, in some extreme cases, may be considered as disrespectful towards the chairman and the members of the Opposition Division. Depending on the behaviour of a party and the course of the oral proceedings, it may well be that, in the excitement of the debate, the strong language used as in in the present case was a spontaneous outburst of a stressed chairman seeking to restore order and warrant a balanced conduct of the oral proceedings in a complex case like this one.
- 2.4.3 However, to the eyes of an objective observer, taking into account the strong language of the chairman's utterance which clearly went beyond the form of a mere reprimand and on account of the escalation following the incident and its ensuing emotional impact, the Board accepts that, subsequently to his outburst, the ability of the chairman to hear Opponent III with an objective judicial mind could be perceived as being affected. A further indication that a suspicion of partiality might arise in the eyes of an objective observer is the fact that the Opposition Division refused the requests of all the Opponents (see letters

of Opponent I dated 22 July and 4 August 2015, Opponent II dated 11 August 2015 and Opponent III dated 28 July and 3 August 2015) to correct the minutes of the oral proceedings in respect of the expression employed during this incident. As confirmed by all parties including the Appellant-Patent Proprietor present at the oral proceedings before this Board, it was not the expression mentioned in the minutes, "Please, shut your mouth", which was spoken out, but a more offensive "shut your mouth".

The Board judges therefore that, from the point of time following the outburst of the chairman, the objection of suspected partiality was justified, thus affecting the oral proceedings with a fundamental procedural deficiency. The contested decision, therefore, already for this reason is to be set aside.

It is to be noted that, since the decision of the Opposition Division is to be set aside, Legal Questions 1 and 2 of Opponent III as set out above are moot.

- 2.5 As regards the right to be heard in connection with the prior use, the Opposition Division in its decision interpreted feature O4 of claim 1 as referring to the trailer in its normal use, i.e. in travelling conditions, and was not persuaded that feature O4 was disclosed by the trailers "Scheuerle I" or "Scheuerle III", especially in view of the photograph E11b/OI presented by the Opponents: "Picture 11b does show that there is some lateral play for the wheel in the opening, but it is unclear, if there is any longitudinal play to enable steering of the wheels" (point 2.4.1, page 16 of the decision of the Opposition Division). In point 2.3.6 of the contested decision, the Opposition Division considered that, with respect to that feature, the Opponents had to provide the evidence and that it could not favour one of the

parties over the other by helping a party gathering the required evidence. These comments show that the division was not convinced that the rejected evidence was irrelevant on that issue.

According to the case law of the EPO and as mentioned in decision T 142/97 (see point 2 of the Reasons), a deciding body must ascertain the relevance of evidence submitted to them before deciding to admit or reject it. When relevant features of the prior art trailers as asserted by the Opponents are questionable and remain contested, a request from the Opponents to secure the evidence, e.g. by hearing witnesses proposed by the Opponents or by inspection of the trailer in accordance with Article 117 (1) (f), cannot be rejected without justification.

In the present case the Opposition Division rejected the evidence on the basis of mere suppositions, making no real attempt to definitely assess it or its relevance. Only if the Opposition Division knew enough about the evidence offered to ascertain that it was not relevant, would it have been justified in rejecting it. Because the Opposition Division did not follow the request of inspection on this issue, the right to be heard was violated. This refusal to consider evidence filed in due time infringed a party's fundamental rights to free choice of evidence and to be heard (Articles 117(1) and 113(1) EPC). Consequently, the contested decision involves a substantial procedural violation.

In view of the conclusion reached by the Board on the issue of taking evidence in the present circumstances, Legal Question 3 of Opponent III is moot.

3. Question of the Remittal to the first instance

3.1 Article 11 RPBA (Rules of Procedure of the Boards of Appeal) stipulates that a Board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise. Accordingly, the Board has a discretion to remit the case even in presence of such fundamental deficiencies if there are special reasons.

3.2 In the particular circumstances of the present case, the Board, taking into account the state of the proceedings, the special circumstances that led to the procedural violations and the interests of the parties and the public to reach a final decision on the one hand and the interest of the opponents to have the case thoroughly discussed in two instances on the other hand, decided that the case is not remitted to the Opposition Division for the following special reasons:

The Opposition Division refused to take evidence concerning the alleged prior use of the trailers Scheuerle I and III. A remittal to the department of first instance, though, would serve no purpose, since the Board, based only on the submissions of the parties and the documentation on file came to the conclusion that such prior use took place (cf. point 5.2, below). Thus, the opponents have already reached their goal of having both trailers considered as relevant state of the art.

Whereas under normal circumstances a potential suspicion of bias concerning a member of an Opposition Division might be a strong indication for a remittal, this is not the case here where this suspicion did not

affect the whole process of decision making but only arose out of an uncontrolled outburst at the end of exceptionally long and intense oral proceedings.

Notwithstanding the statement relative to the circumstances surrounding the mentioned incident, there is nothing in the minutes of the oral proceedings which indicates that the Opponents were not allowed to speak or to extensively present their cases. On the contrary, the oral proceedings lasted two full days until the final decision to maintain the patent in amended form was taken and the minutes indicate in extensive and complete way the essentials of the oral proceedings. On a high number of issues, the preliminary conclusions reached by the Opposition Division before the incident occurred were not tainted by a suspicion of partiality. In the same way, the contested decision deals in great details with these issues and is based on reasons which were extensively discussed in oral proceedings before said incident occurred.

In appeal proceedings before this Board, the behaviour of all Opponents in the oral proceedings, consisting in taking advantage of any opportunity for submitting new objections, submissions and requests, definitely gave the impression that the Opponents were using all possible means at their disposal to avoid a decision other than the revocation of the patent, preferring in this case to further delay the resolution of the proceedings. Without entering into specific details, it suffices here to refer to the fact that the requests of the Appellants-Opponents were modified various times during the oral proceedings and then submitted in writing to avoid any misunderstanding, and to the numerous procedural issues raised by the Appellants-Opponents at the oral proceedings. Though this conduct

is not objectionable per se, the Board doubts that a remittal of the case to the department of first instance, even in a different composition thereof, would serve the interest of justice in the sense that the remittal would likely result in the affair further growing in complexity and would cause an excessive delay in having the case finally decided, also taking into account the fact that these are the second appeal proceedings in the present case (in case T 1907/11 this Board had already remitted the case to the Opposition Division after having decided that the invention was sufficiently disclosed, Article 100(b) and 83 EPC). Under these circumstances, the Board, after two days of thorough oral proceedings, makes use of its power under Article 111(1) EPC together with Article 11 RPBA to deal itself with the case and not to remit it to the first instance as requested by the Appellants-Opponents (see also T 1982/09).

4. Added subject-matter (Article 100(c) EPC); Main Request and Auxiliary Request 5
- 4.1 The Board shares the view of the Opposition Division (see point 2.2.3 of its decision) that, contrary to the opinion of the Patent Proprietor, the omission of "with associated brake drums" in feature K1 results in subject-matter extending beyond the content of the application as filed (Articles 100(b) and 123(2) EPC).
- 4.2 Examining the various features O5 to O7, K1 to K7 which have been added to those (O1 to O4) of claim 1 as originally filed to form claim 1 as granted, the Board notes that paragraph [0027] of the description ("Wheel set 9 has an axle body 18 on which are mounted two wheel hubs 19 with associated brake drums") of the application as originally filed D0 (EP-A-1 577 159)

serves as a basis for features O5 and K1. The Board also notes that features K5 and K6 refer to the existence of a brake cylinder between the wheels mounted on their hubs. A person skilled in the art will recognize here that the provision of a brake cylinder with a hub alone (see K1 of granted claim 1) gives no functional brake and that it is only in association with a brake drum that the hub gives a functioning brake for the wheels of each wheel set. Thus, it is apparent that the features "brake cylinder" and "brake drum" are functionally closely related to each other and should both have been included in the claim. As this is not the case in claim 1 as granted, this claim does not fulfil the requirements of Article 123 (2) EPC.

4.3 Claim 1 of Auxiliary Request 5, which suffers the same defect as claim 1 of the Main Request, does also not meet the requirement of Article 123 (2) EPC.

5. Auxiliary request 1; Novelty (No)

5.1 Prior uses "Scheuerle I" and "Scheuerle III"; availability to the public

As mentioned in point 2.3.5 of the decision of the Opposition Division and in the last paragraph of page 7 of the minutes of the oral proceedings before the Opposition Division, the Patent Proprietor accepted that the trailer with the identification number 7161 which was delivered to the company Rolf Mumbach Transport GmbH in January 1988 ("Scheuerle III", see annexes E1 to E18/OIII) was on the road before the priority date of the contested patent. In oral proceedings before the Board, the Patent Proprietor

also conceded that the technical drawing E3 was prior art.

Documents set E11/OI relates to another similar trailer with the registration number M-T 1791, the "Scheuerle I" trailer and document E11j of Opponent I is an Affidavit of Mr. Balter, asserting that he made the photographs E11a to E11f of that trailer and explaining the link between the construction drawings E11g respectively E11k.

As regards the photos, the Patent Proprietor hinted to the possibility that the trailers might have been modified since the priority date of the patent. However, taking common wisdom into account and considering that the claimed subject-matter refers to the basic design of the trailer, it seems very unlikely that these very special vehicles had undergone significant design modifications impacting features of the claim. It would also be easy for a person skilled in the art to detect inconsistencies between the original technical drawings and the photographs presented by Opponents I and III. The Patent Proprietor also acknowledged in the oral proceedings that, as far as the claimed features are concerned, the design of the trailers "Scheuerle I" and "Scheuerle III" is very similar.

The Board, considering all the corroborating evidence and documents adduced by Opponents I and III and their explanation as to the links between the documents of the set E11 and noting that these concordant pieces of evidence correlate and combine together such as to confirm the high plausibility of the technical content disclosed by these documents, comes to the conclusion that the public prior use of the trailers "Scheuerle I"

and "Scheuerle III" as shown in the relevant documents and photos filed by Opponents I and III was established. This conclusion was also announced during oral proceedings before the Board and was not disputed any longer by the Patent Proprietor.

5.2 Novelty over the prior uses Scheuerle I and Scheuerle III

5.2.1 As regards the prior uses "Scheuerle I" or "Scheuerle III", the Patent Proprietor argued that, as mentioned by the Opposition Division, none of them disclosed feature 04 when combined with 06, nor features 07, K2, K6 and K7. The Board does not share this view.

5.2.2 Features 04 with 06

For the Board, there is no reason to restrict feature 04 as referring to the trailer when in travelling condition, which for the prior art trailers would mean that the bottom of the recess lies at $1150 \text{ mm} - 170 \text{ mm} = 980 \text{ mm}$ above the ground. The terms of feature 04 ("recess extends ... at least partially between the mutually opposite sets of wheels") are very general and this all the more since the patent does not give an unambiguous definition of the "sets of wheels" (see e.g. column 3, lines 39-45 and paragraph [0032] of the patent when read in combination with feature 07). The calculation made by the Opponent III on the basis of the technical drawing E3/OIII and taking the levelling possibility of $\pm 250 \text{ mm}$ into account demonstrates that the top of the tire of a wheel set (at least 856 mm above the ground) would be above the top of the recess when a remaining spring travel of 100 mm is considered. In this levelling position, the wheel sets would still be steerable since there is enough place in the cut-

outs for lowering the undercarriage another 100 mm. In the same way, photograph E11b/OI (Scheuerle I) shows that the recess extends in both longitudinal and height direction at least partially between the tires of the wheel sets. Thus, features O4 with O6 are to be considered as known from Scheuerle I and also from Scheuerle III.

5.2.3 Feature K2

In respect of feature K2, this Board wrote in its decision T 1907/11 referring to the first appeal in this case: "the term "flat wheel hub" must be interpreted, since a purely bidimensional "flat wheel hub" cannot exist in practice. The skilled person can derive from the content of the patent application (see paragraph [0013] of the patent application on which the patent is based as well as paragraphs [0008] and [0031] of the patent specification) that a "flat wheel hub" is a hub which is accommodated within the wheel and which has a greater extension in its radial direction than in its axial direction. Such hub units, including the brake, are well known in the art (see e.g. document E6 cited by Opponent III or document E32B cited by Opponent I)".

As shown in the photos E14/OIII or E15/OIII or in photos E11e/OI, the construction of the wheels of the wheel sets of the "Scheuerle I" or "Scheuerle III" trailers is such that the wheel hub including its associated brake drum is **substantially** accommodated inside the wheel, i.e. lies **substantially** in the plane of the wheel (bolt characters by the Board). Therefore, in agreement with the findings in its former decision T 1907/11, the Board judges that feature K2 is also disclosed in "Scheuerle I" or "Scheuerle III".

5.2.4 Feature K6

The "width of each wheel" is indirectly defined by feature K2 which stipulates that the wheel consists of a rim and a pneumatic tire. Contrary to the interpretation made by the Opposition Division in point 2.3.8 of its decision, the optional feature introduced by the word "preferably ..." ends with the next comma so that the wording "and substantially corresponds to the diameter ... one brake cylinder" is also optional. As is apparent from drawing E11k/OI of the "Scheuerle I" trailer, a track width of 570 mm for a wheel set equipped with 285/70 R19.5 tyres results in a space of 285 mm between the wheels, which is smaller than 1.5 times the width of each wheel (285 mm). This is also true for the space between the wheels of the "Scheuerle III" trailer, as shown in the photograph E14/OIII.

5.2.5 Feature K7 in combination with feature O7:

For the Board, features O7 and K7 can only be interpreted as having a very general meaning. They vaguely refer to the provision of "a steering element" without specifying in any way its construction, the only functionality that is required from it being defined in feature O7: coupling the wheel sets on either side. In the same way, the term "in vicinity of a bottom of the recess" in K7 can only be interpreted very broadly and covers a steering element which may be located in the vicinity of the bottom of the recess as well above the bottom or below the bottom. These features are undoubtedly shown in the photos E17-E18/OIII of the "Scheuerle III" trailer or photos E11c-E11d/OI of the "Scheuerle I" trailer.

5.2.6 The Board thus concludes that the subject-matter of claim 1 of the Auxiliary request 1 is not new over the prior art trailers "Scheuerle I" or "Scheuerle III".

6. Auxiliary request 5A

6.1 Auxiliary Request 5A; admissibility

Following the announcement during oral proceedings before the Board that the prior uses Scheuerle I and Scheuerle III belonged to the prior art and that each of the trailers destroyed the novelty of claim 1 in the form as maintained by the Opposition Division so that the decision under appeal was to be set aside, the Patent Proprietor proposed that the Auxiliary Request 5, submitted with the letter of 10 April 2015, be taken as a basis for further discussion in view of a maintenance of the patent in amended form. Moreover, in reaction of the announcement by the Board during the oral proceedings that the omission of the feature "with associated brake drums" contravened Article 123 (2) EPC, the Patent Proprietor added the omitted feature to feature K1 of claim 1 of Auxiliary Request 5, thus forming the Auxiliary Request 5A.

The Auxiliary Request 5 was admitted in the first instance proceedings (see point 2.3.1 of the decision of the Opposition Division) and was re-submitted in appeal proceedings (see last page, last paragraph) in the reply dated 6 April 2016 to the written statement setting out the grounds of appeal of Appellants-Opponents. In accordance with Rule 12(1)(b) RPBA, it is automatically taken into account by the Board since it belongs to the documents on which the appeal proceedings are based.

Auxiliary request 5A represents nothing more than a combination of Auxiliary Requests 1 and 5, in the sense that the amendment made to claim 1 of the first auxiliary request, namely completing feature K1 to include "with associated brake drums", has been made in analogous manner to claim 1 according to Auxiliary 5. Moreover, the added feature was, as announced by the Board, considered to be disclosed by the trailers Scheuerle I or Scheuerle III. The addition of this feature thus only served the purpose of overcoming the objection of added subject-matter, as did the corresponding amendment made to claim 1 of Auxiliary Request 1, and as such was fairly to be expected by the parties, and did not change anything in the discussion on novelty and inventive step. Under these circumstances, the Board exercised its discretion under Article 13(1) RPBA, to admit Auxiliary Request 5A into the proceedings.

6.2 Auxiliary Request 5A; added-subject-matter

6.2.1 Claim 1 of Auxiliary Request 5A combines the features of claim 1 as granted, whereby the feature "with associated brake drums" has been added to feature K1 for the reason mentioned above, with those of claim 4 as granted.

6.2.2 In respect of the Auxiliary Request 5A, the Opponents mainly repeated in appeal proceedings the objections already made in opposition proceedings under Article 100 c) EPC that the subject-matter of the patent extended beyond the content of the application as originally filed D0. Notwithstanding the missing feature "with associated brake drums", the Board, after a review of all these objections, came to the

conclusion that they are not justified and that the amendments made in examination proceedings comply with the requirements of Article 123(2) EPC for the reasons already explained in details by the Opposition Division in its decision.

6.2.3 Contrary to the assertion of the Opponents, the skilled person would not recognise in feature K2 an assembling instruction. From the content of paragraphs [0005], [0013], [0028], [0030] and [0031] of D0 it is obvious that this disclosure is aimed at proposing a structural design for a trailer which is very compact and nevertheless has a high payload. The original paragraphs [0027] and [0013] of D0, on which feature K2 is based, when read in combination, clearly indicate that the expression "mounted such that the wheel hub lies substantially in the plane of the wheel" can only be understood as referring to a constructional feature. In the field of mechanical engineering it is not unusual to use this type of formulations to define a structural arrangement. It is also with this meaning that the wording of the same paragraph [0027] "an axle body on which are mounted two wheel hubs" will be understood by the person skilled in the art. These passages do not refer to a way of assembling components but clearly to constructional features relating to the design of the trailer.

6.2.4 The Board does not share the view of Opponent I that the deletion of paragraph [0013] of the original disclosure D0 in the description resulted in a generalisation, as the patent does not longer require that the wheel hub itself was flat irrespective of the rim and pneumatic tyre being used. Feature K1 of claim 1 still specifies that the wheel hubs are flat and the last part of paragraph [0008] of

the patent specification repeats the deleted paragraph [0013]. The adjective "flat" expresses something which has a greater extension in the direction of flatness than in a direction perpendicular thereto. For a person skilled in the art, it is obvious that the required flatness "in the plane of the wheel" is a flatness in a radial direction of the wheel as explained in paragraph [0031] of D0 which is also paragraph [0031] of the patent specification. Since the space available between the wheels should be maximized, the required flatness obviously applies to the wheel as a whole, including the rim and pneumatic tyre.

6.2.5 The Board also does not share the view of Opponent II according to which the indication that the recess was for accommodation of an excavator arm was linked to other features mentioned in the context of paragraph [0023] of D0 (e.g. the dimensions of the recess). The indication of the use of the recess for accommodation of an excavator arm is optional in the claim ("in particular...") to give the skilled reader an idea of the form and purpose of the recess (see also paragraph [0004] of D0). It is sufficient in itself and there is no need to add additional features which, anyway, would also be optional.

6.2.6 The Opponents made objections relating to alleged intermediate generalisations in connection with feature K3 when combined with K4 or feature K4 when combined with feature K6.

Concerning features K3/K4, the Board does not recognise an intermediate generalisation in the omission of the feature relating to the provision of a torsional tubular rubber body 24 for executing a pivoting movement of the pivoted axle. As mentioned by the Opposition Division the only relevant functional

requirement which allows the wheels of each wheel set to lie flat on a road surface in all conditions is that the axle can execute a pivoting movement. The indication of the specific means for achieving the pivoting movement need not be included in the claim because they are well known in the art (see paragraph [0010] of the patent specification).

Regarding the features K4/K6, the objections of the Opponents rely more on an argument of sufficiency of disclosure than of added-matter. There is an explicit disclosure of K6 in claims 8 and 9 of D0. The question of sufficiency of disclosure has been dealt with in the first appeal T 1907/11.

6.2.7 Consequently, the Board comes to the conclusion that there is a direct and unambiguous basis in the original application D0 for the specific combination of features of claim 1 according to Auxiliary Request 5A. This conclusion also applies to the amendments made in the description.

6.3 Auxiliary Request 5A; Clarity

The Board does not share the view of Opponent I when it argues that the addition of "with associated brake drums" to feature K1 renders the claim unclear. Figures 10 to 12 of the patent specification show how a compact arrangement is obtained where the wheel hub 19 with its associated brake drum lies substantially in the plane of the wheel 20. As already explained above, the hub 19 with its associated brake drum has a flatness in a radial direction of the wheel, i.e. "in the plane of the wheel" (paragraph [0031] of the patent specification).

6.4 Auxiliary request 5A; Novelty

For the Opponents, the features coming from granted claim 4 to form claim 1 of this auxiliary request are also known from the prior use Scheuerle I or Scheuerle III.

The Board does not agree. This objection of lack of novelty relies on an erroneous interpretation of the terms "level" and "load bearing chassis part (5)" of the added features. The preamble of the claim clearly mentions that the chassis has "a lowered middle part (5) for supporting a load, and an end part (6) raised relative thereto on which the undercarriage (3) is suspended, and in which the recess (11) is situated". This definition is also in line with paragraph [0011] of the patent specification. Thus, the "load bearing chassis part (5)" cannot be the raised end part 6 on which the undercarriage is suspended. From the content of the patent specification it is also apparent that the term "level" refers to a horizontal position of a surface or platform and not to something positioned longitudinally along a component of the trailer. This is also confirmed by paragraph [0011] of the patent specification. The interpretation of the Opponents is inconsistent with the preamble of the claim and in total contradiction with the content of the patent specification.

The trailer according to Claim 1 of this request is therefore novel over both the prior uses Scheuerle I and Scheuerle III.

6.5 Auxiliary request 5A; Inventive step

6.5.1 The Opponents referred to the broad formulation used in the definition of the recess (feature 04: "at least partially between the mutually opposite sets of wheels") to argue that, if there was a need for a

deeper recess with its bottom lying on the level of the middle floor, it would be obvious to modify the form of the recess of the Scheuerle trailer along at least a longitudinal portion of the undercarriage such that the bottom would be at the same level as the load-bearing middle floor.

The Board does not follow this argumentation. As shown in the documents (E3/OIII, E11k/OI) presented by the Opponents, the recess which extends between steerable wheel sets is delimited by two inclined surfaces and its bottom is clearly above the level of the middle chassis part (difference of 355 mm in E3/OIII and 350 mm in E11k/OI). A man skilled in the art facing the Scheuerle I or the Scheuerle III trailer has *a priori* no incentive to precisely change the form and the deepness of the central recess of the undercarriage. But even if he would think about improving the form of the recess, he has to recognise that the design of these trailers has its limits. The arrangement of the steering linkage with its multiple oscillating levers, rods and connecting rods positioned longitudinally and centrally under the bottom of the recess and the fact that there must be sufficient ground clearance underneath the undercarriage for lowering the middle chassis part to load the cargo to be transported, leads to the conclusion that there is no room for deepening the recess in the claimed way. As a matter of fact, the Scheuerle I or the Scheuerle III trailer have already been optimized in this respect. Significantly increasing the deepness of the recess would necessitate a complete re-design of the trailer including its steering arrangement. In this respect, it can be noted that the patent proposes a solution to this problem (steering cylinder 33 with rotating dishes 29 and steering rod 34, see paragraphs [0028], [0032] and

[0033]). The argument that the recess needs to be deepened along only a longitudinal portion of the undercarriage relies on hindsight and ignores the fact that the claim implicitly specifies that the recess also extends between steerable wheel sets (see feature K7 in combination with features O4, O6 and O7). The claimed trailer is therefore not obvious to a person skilled in the art starting from the Scheuerle trailers alone.

6.5.2 The Opponents also contended that the claimed trailer would be obviously derivable from a combination of the Scheuerle trailer with the trailer of document E3/OI (EP-A-1 122 151).

The Board does not agree. Document E3 relates to an extensible low-bed vehicle, the front end and the rear end of which being connected by telescopic means (see introductory part of the description and preamble of claim 1 of E3). For this reason alone, it appears doubtful whether a person skilled in the art faced with the Scheuerle trailer would consult this document and/or consider that it may be of any interest. But even if a man skilled in the art would be inspired by this document in an attempt to improve the form of the recess of the Scheuerle trailer and recognise in the embodiment shown in Figures 12-13 a possibility to drastically increase the deepness of a recess in an undercarriage, he would then take over the design that is proposed here, i.e. choose a pivoted axle (Pendelachse 17) which is not below the axles of the wheels 4 so that it would not arrive at the claimed trailer. Moreover, it is not clear from the content of E3 how the steering would be achieved (feature O7) and how the skilled person could come to feature K7 on the basis of the design proposed by this document. Thus, it must be concluded that the claimed trailer is not

obviously derivable from a combined consideration of the Scheuerle trailer with document E3.

6.5.3 Dependent claims 2 to 11 relate to further developments of the inventive concept disclosed in claim 1 and contain all of the features of claim 1. The above conclusions regarding inventive step apply equally to these claims which likewise meet the requirements of the EPC.

6.6 The description has been brought into conformity with the amendments made in the claims. Page 2a was inserted in the description to mention the prior art known from the Scheuerle trailers.

The Board cannot see how the amendment made to paragraph [0001] of the description, consisting in modifying the text "The invention relates to a trailer as defined in the preamble of claim 1. Such a trailer is known from DE-U-296 17 052" to read "The invention relates to a trailer of the type that is known from DE-U-296 17 052", objected to by Opponent III, may introduce any added-subject-matter (Article 123(2) EPC), as no specific feature of the trailer according to DE-U-296 17 052 and which was not part of the invention is referred to. Accordingly, this objection fails.

7. Reimbursement of the appeal fees

On account of the fact that the decision of the Opposition Division was to be set aside and was vitiated by two procedural violations against the Opponents, the Board finds it equitable to reimburse the appeal fees paid by Opponents I, II and III.

8. Objections under Rule 106

The objections under Rule 106 (filed in writing during oral proceedings and annexed to the minutes of oral proceedings) rely on violations of the right to be heard by:

- i) admitting auxiliary request 5A and discussing it without giving sufficient time to the parties for presenting their observations, because it was not possible for the representative to contact the client at such short notice;
- ii) not remitting the case after having concluded that the Opposition Division was biased and that a procedural violation occurred, thus depriving the opponent of the possibility of a fair proceedings before the Opposition Division and of having an appealable decision.

The Board rejected the objections for the following reasons.

Firstly, the issue of admissibility of Auxiliary Request 5A was discussed with the parties and the Board exercised its discretion taking into account the observations of the parties. There is thus no issue of violation of the right to be heard in this respect. Rather, the Opponent's objection i) aims at criticizing the manner in which the Board has exercised its discretion by introducing the aspect of the necessity of contacting the client. However, this is irrelevant as concerns the right to be heard but rather concerns the ability of the professional representative to react appropriately to Auxiliary Request 5 without contacting the client. Certainly it can be assumed that a professional representative was able to react to Auxiliary request 5, and moreover no specific reasons

were given why this would not be the case. Further the Board notes that the oral proceedings were interrupted at various instances, and in particular for giving the Opponents time for considering in detail the Auxiliary Request 5A.

Secondly, as regards the issue of remittal, it was also sufficiently discussed with the parties before the Board announced its decision, so that also in this respect no violation of the right to be heard occurred. Rather, the Opponents' objections aim at a) establishing that in the particular circumstances of the case the Board has no discretion and b) criticizing the manner in which the Board has exercised its discretion. The discretion to remit is however enshrined in the general provision of Article 111(1) EPC, according to which "Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution". Article 11 of the Rules of Procedure of the Boards of Appeal specifically refers to the case of fundamental deficiencies being apparent in the first instance proceedings, and requires special reasons for the Board not to remit the case. As explained above, such special reasons exist, and were moreover discussed with the parties during oral proceedings. As regards the duration of the proceedings, the Opponents submitted that it should not play a role. The Board does not agree, as duration of the proceedings is definitely a factor to be taken into account in administering justice. Finally, the fact that by remitting the parties would have had recourse to two instances in particular as regards Auxiliary

Request 5A, does not take into account the fact that, according to the established case law, there is no absolute right to have an issue decided on by two instances (see also T 803/12, points 2 and 3 of the reasons), nor does it take into account the fact that in the present case there was already a proceedings before the Opposition Division which was not tainted by a procedural error (case T 1907/11, in which the Board exercised its discretion in the sense to remit the case but should not have necessarily done so).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of the following documents:
 - claims 1 to 11 according to auxiliary request 5A as submitted during oral proceedings,
 - description column 1 with insert page 2a and columns 2 to 6 as submitted during oral proceedings and
 - figures 1 to 12 according to the patent as granted.
3. The appeal fees paid by Opponents I to III are to be reimbursed.

The Registrar:

The Chairman:



N. Schneider

G. Pricolo

Decision electronically authenticated