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Datasheet for the decision of 17 July 2018

Case Number: T 0310/17 - 3.5.03

Application Number: 05108109.9

Publication Number: 1635234

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Language of the proceedings: EN

Title of invention:
Electronic control system for operating groups of a vehicle

Patent Proprietor:
PIAGGIO & C. S.p.A.

Opponent:
Peugeot Motocycles SA

Headword:
Electronic control system/PIAGGIO

Relevant legal provisions:
EPC Art. 54(3)
EPC R. 106
RPBA Art. 13(1)

Keyword:
Novelty (no)
Admissibility of late-filed requests - not clearly allowable, divergent, including unsearched subject-matter
Re Rule 106 - alleged violation of the right to be heard (no)

Decisions cited:
T 1634/09

Catchword:

Europäisches Patentamt
European Patent Office
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Beschwerdekammern

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Case Number: T 0310/17 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 17 July 2018

Appellant: (Patent Proprietor)	PIAGGIO & C. S.p.A. Viale Rinaldo Piaggio 25 56025 Pontedera (Pisa) (IT)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Appellant: (Opponent 1)	Peugeot Motocycles SA Rue du 17 Novembre 25350 Mandeure (FR)
Representative:	August Debouzy 6-8, avenue de Messine 75008 Paris (FR)

Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 20 December 2016 concerning maintenance of the European Patent No. 1635234 in amended form.**

Composition of the Board:

Chairman	F. van der Voort
Members:	T. Snell
	O. Loizou

Summary of Facts and Submissions

I. This case concerns appeals filed by both the proprietor and opponent 1 against the interlocutory decision of the opposition division. The opposition division held that the ground for opposition according to Article 100(c) EPC prejudiced the maintenance of the patent as granted, that the grounds for opposition according to Article 100(a) and (b) EPC did not prejudice the maintenance of the patent as granted, and that, account having been taken of the amendments made by the proprietor in accordance with a first auxiliary request, the patent and the invention to which it relates according to this request met the requirements of the EPC. Inter alia, the opposition division held that claim 1 of the first auxiliary request was not "unallowably broadened", and that its subject-matter was both new and involved an inventive step.

II. Oppositions had initially been filed by two opponents, opponent 1 (now Appellant 2), and opponent 2. In both notices of opposition, the grounds for opposition pursuant to Article 100(a), (b) and (c) were invoked. Opponent 2 has withdrawn its opposition in the course of the appeal proceedings and is therefore no longer a party to these appeal proceedings.

III. The only ground for opposition relevant to the board's decision is Article 100(a) EPC, in particular lack of novelty with respect to D1 (= EP 1 604 844 A1)(cf. Article 54(3) EPC). Only the parties' submissions relevant to the board's decision will be included in this summary of facts and submissions.

IV. For the sake of easier comprehension, the board will refer in the following to the parties respectively as "the proprietor" and "the opponent".

V. In the statement of grounds of appeal, the proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (i.e. rejection of the opposition) or, in the alternative, be maintained in amended form in accordance with one of five auxiliary requests, i.e. auxiliary requests 1 to 5, all as filed with the statement of grounds of appeal, whereby auxiliary request 3 corresponds to the auxiliary request 1 held by the opposition division to meet the requirements of the EPC.

The opponent in its statement of grounds of appeal requested that the decision under appeal be set aside and that the patent be revoked.

VI. In a communication dated 22 December 2017, accompanying a summons to oral proceedings, the board gave a preliminary opinion that D1 was to be taken into account as prior art within the meaning of Article 54(3) EPC 1973, and that the subject-matter of claim 1 of each request was not new with respect to D1. It also considered that claim 1 of each request did not comply with Article 123(2) EPC.

VII. In response to the board's communication, the proprietor, with a letter dated 6 April 2018, changed the order of auxiliary requests 2 to 4 into 4, 2 and 3 and renumbered these requests accordingly. Further, it submitted new auxiliary requests 6 to 8, 6' to 8' and 6'' to 8''.

Further, with a letter dated 17 May 2018, the

proprietor submitted new auxiliary requests 6''' to 8''' and 6^{iv} to 8^{iv}.

VIII. In a letter dated 15 June 2018, the opponent requested that none of the auxiliary requests 6 to 8, 6' to 8' and 6'' to 8'' be admitted pursuant to Articles 12(4) and 13(1) RPBA. In particular, with regard to auxiliary requests 6'' to 8'', it argued that claim 1 contained subject-matter taken from the description which had never been discussed in the procedure and which would necessitate a further search.

IX. Oral proceedings were held on 17 July 2018. During the oral proceedings, the proprietor filed a "new auxiliary request 4" to be ranked directly after auxiliary request 3 on file.

The proprietor raised an objection pursuant to Rule 106 EPC. The objection was subsequently discussed with the board and dismissed.

The final requests were established to be as follows:

The patent proprietor (Appellant 1) requested that the decision under appeal be set aside and that by way of a main request the opposition be rejected or, in the alternative, that the patent be maintained in amended form on the basis of the set of claims of one of, in this order, auxiliary requests 1 to 3 as filed with the letter dated 6 April 2018, a new auxiliary request 4 as filed during oral proceedings, auxiliary requests 4 to 8, auxiliary requests 6' to 8' and auxiliary requests 6'' to 8'', all as filed with the letter dated 6 April 2018, and auxiliary requests 6''' to 8''' and auxiliary requests 6^{iv} to 8^{iv} all as filed with the letter dated 17 May 2018.

The opponent (Appellant 2) requested that the decision under appeal be set aside and that the patent be revoked.

At the end of the oral proceedings, after due deliberation, the chairman announced the board's decision.

X. Claim 1 of the granted patent (main request) reads as follows:

"Electronic control system for a plurality of operating groups of a vehicle, comprising a parking group including an anti-roll system, a device for stopping the stroke of the suspension and a brake unit,

said system comprising an electronic controller (2) that allows the activation and deactivation of a selective actuation device for each operating group,

said controller (2) defining a first operating condition of the selective actuations defined as rest state, a second condition defined as block state and at least a third condition defined as transitional state, which is a passage step between the other two conditions, from which it is possible to pass into a further failure state or into at least an undetermined state,

wherein said block state is a state in which said parking group is actuated from said controller (2) by means of a generation of a command signal (11) for an electric motor (21) of the selective actuation device, and

said rest state is a state in which the parking group is not actuated."

XI. Claim 1 of auxiliary requests 1 and 2 is the same as claim 1 of the granted patent.

XII. Claim 1 of auxiliary request 3 is the same as claim 1 of the granted patent except that the wording

"from which it is possible to pass into a further failure state or into at least an undetermined state"

reads instead

"from which transitional state it is possible to pass into a further failure state, and from which transitional state it is also possible to pass into at least an undetermined state".

XIII. Claim 1 of "new auxiliary request 4" is the same as claim 1 as granted except that the following wording is added to claim 1:

"wherein said controller (2) determines a condition defined as limitation of revolutions in which the number of revolutions of the motor of the vehicle is predetermined,

wherein said transitional state comprises a first transitional state (T1) that refers to the passage from the rest state to the actuated block state and a second transitional state (T2) that refers to the passage from the actuated block state to the rest state, and

wherein said undetermined state comprises a first undetermined sub-state (I1) that is reached during an actuation from the rest state towards the block state and a second undetermined sub-state (I2) that is reached during an actuation from the block state towards the rest state".

XIV. Claim 1 of auxiliary requests 4 and 5 are the same as claim 1 of auxiliary request 3.

XV. Claim 1 of auxiliary requests 6 to 8 is the same as claim 1 of auxiliary request 3 except that the wording

"Electronic control system for a plurality of operating groups of a vehicle, comprising a parking group including an anti-roll system, a device for stopping the stroke of the suspension and a brake unit"

reads instead:

"Electronic control system for a plurality of operating groups of a vehicle, including an anti-roll system, a device for stopping the stroke of the suspension and a brake unit, which constitute a parking group".

XVI. Claim 1 of auxiliary requests 6' to 8' is the same as claim 1 of auxiliary request 6 except that the following wording is added to the claim:

", wherein said controller (2) determines a condition defined as limitation of revolutions in which the number of revolutions of the motor of the vehicle is predetermined".

XVII. Claim 1 of auxiliary requests 6'' to 8'' is the same as claim 1 of auxiliary request 6' except that the following wording is added to the claim:

", wherein the function of limiting the number of revolutions is active in the block state and the failure state, whereas the function of limiting the number of revolutions is inactive in the rest state".

XVIII. Claim 1 of auxiliary requests 6''' to 8''' is the same as claim 1 of auxiliary request 6'' except that the following wording is added to the claim:

", and wherein said undetermined state comprises a first undetermined sub-state (I1) that is reached during an actuation from the rest state towards the block state and a second undetermined sub-state (I2) that is reached during an actuation from the block state towards the rest state".

XIX. Claim 1 of auxiliary requests 6^{iv} to 8^{iv} is the same as claim 1 of auxiliary request 6''' except that the following wording is inserted in the claim following the feature: "wherein said controller (2) determines a condition ... the number of revolutions is inactive in the rest state,":

"wherein said transitional state comprises a first transitional state (T1) that refers to the passage from the rest state to the actuated block state and a second transitional state (T2) that refers to the passage from the actuated block state to the rest state,".

Reasons for the Decision

1. Granted patent - claim 1 - novelty with respect to D1 (Article 54(3) EPC 1973)

1.1 The board notes that it appeared that in the first instance proceedings the parties accepted that D1, a European patent application, was a potentially conflicting application within the meaning of Article 54(3) EPC, even though no formal reasons were given by the opposition division as to why this was the case. As

the board (for the reasons given below) considers that the subject-matter of claim 1 of several requests lacks novelty with respect to D1, it must first be established that D1 is comprised within the state of the art pursuant to Article 54(3) EPC.

1.2 The board notes firstly that Article 54(3) EPC 1973 is applicable under the transitional provisions regarding the introduction of EPC 2000.

1.3 The present patent has a priority date of 8 September 2004. The priority document appears to comprise the subject-matter of claim 1 of the granted patent. For the sake of argument (that is, leaving aside the question as to whether the application on which the present patent was granted was the first application within the meaning of Article 87(1) EPC), the priority claim is therefore assumed to be valid.

1.4 D1 has a date of publication (14 December 2005) which is after the priority date of the present application, but has an earlier priority date (10 June 2004). D1 constitutes a prior art document within the meaning of Article 54(3) EPC, assuming its priority is valid, the same states are designated, and the designation fees have been paid.

The board only has the Italian priority document of D1 at its disposal. In so far as the board can ascertain, the content of this document appears to be identical to that of D1. The priority claim of D1 is therefore deemed to be valid. Furthermore, with the exception of Latvia (LV), the same contracting states are designated in D1 as in the present application. Consequently, D1 is to be taken into account for examining novelty

pursuant to Article 54(3) EPC 1973. This was not contested by the proprietor.

1.5 With respect to novelty, it was common ground between the parties that D1 discloses all the features of claim 1 as granted except for the feature "a third condition defined as transitional state ... from which it is possible to pass into a further failure state or into at least an undetermined state".

1.6 The proprietor argued that claim 1 defined five states, namely a rest state, a block state, a transitional state, a failure state and an undetermined state. A proper reading of the claim was that the failure state and the undetermined state were alternative, mutually exclusive states into which the system passes from the transitional state according to operational circumstances, i.e. there are certain circumstances in which the system passes into the failure state, whereas under other circumstances it passes into the undetermined state. An interpretation of claim 1 as embracing only one of either a failure state or at least an undetermined state was improper.

1.7 The board finds no reason to give the claim the restrictive interpretation given by the proprietor. In the board's view, from a linguistic point of view, the wording " ... from which it is possible to pass into a further failure state or into at least an undetermined state" can be interpreted in several ways:

Interpretation (i): "... from which it is possible to pass into at least an undetermined state which may be a failure state" (in this respect, compare with the phrase "on an apple or on at least a piece of fruit").

Interpretation (ii): the claim defines two alternatives separated by "or": according to the first alternative, it is possible to pass "into a further failure state" and, according to the second alternative, it is possible to pass "into at least an undetermined state".

Interpretation (iii) (this being the proprietor's interpretation): "... from which transitional state it is possible to pass into a further failure state, and from which transitional state it is also possible to pass into at least an undetermined state" (cf. claim 1 of auxiliary request 3).

1.8 The board considers that each of these different interpretations is technically plausible and coherent. Consequently, there is no reason to disregard any of them out when determining the extent of protection conferred by claim 1.

1.9 Since it is not disputed that D1 discloses a failure state, D1 discloses the subject-matter of claim 1 when interpreted as "interpretation (ii)", first alternative.

Further, since the term "undetermined state" does not have a clearly defined meaning, the failure state in D1 can be regarded as an undetermined state. Consequently, D1 also anticipates the subject-matter of claim 1 when interpreted as "interpretation (i)".

1.10 The board concludes that the subject-matter of claim 1 lacks novelty with respect to D1 (Articles 52(1) and 54(1) and (3) EPC).

2. Auxiliary requests 1 and 2 - claim 1 - novelty

Claim 1 of these requests is the same as claim 1 as granted. Consequently, the subject-matter of these claims also lacks novelty with respect to D1 (Articles 52(1) and 54(1) and (3) EPC).

3. Auxiliary request 3 - claim 1 - novelty

3.1 The relevant feature of claim 1 now reads: "... from which transitional state it is possible to pass into a further failure state, and from which transitional state it is also possible to pass into at least an undetermined state" (cf. "interpretation (iii)" above).

3.2 In D1, in a transitory stage, the system can enter a fault condition when either a current overload has occurred (cf. paragraph [0032], point 2) or the maximum operating time in transition has been exceeded (idem, point 3). Fault signal pilot light 14 will switch on (cf. paragraph [0033]). After an established time has lapsed, the pilot light will switch off (cf. paragraph [0034]) and the system will remain stable awaiting a single command (cf. paragraph [0035]). From this state, a "double click" command will return it to the rest state. Paragraph [0035] states "However, if the double click is not performed within the established time lapse, the system will stall, and the initial central control unit condition must be reset".

3.3 The proprietor argued that there was only one failure state in D1, and therefore no disclosure of an undetermined state. In this respect, D1 disclosed a rest state, a block state, a transitional state and a single state which could be deemed a failure state which would be arrived at if either of the two conditions described in paragraph [0032], points 2 and 3, occurred. From this failure state, a "double click"

command signal would return the system to the rest state. If no double click was performed within the established time lapse, it was possible for the system to "stall", but this meant only that the system remained in the same failure state even if a double click was performed after the established time lapse. That notwithstanding, even if for the sake of argument the stalling of the system were regarded as a further state, the system of D1 could not transition to this state from the transitional state but only from the failure state.

3.4 The board however disagrees, as will be explained below, both that the "failure state" referred to by the proprietor has to be regarded as a single state, and that the "stalling" of the system has to be regarded as the system being maintained in the same failure state.

3.5 Firstly, the board notes that some of the system states in the present patent, which are defined by conditions, do not consist of a single state but may be regarded as being a collection of sub-states. This is clear from Fig. 4 of the patent which shows T1 and T2 as sub-states of the transitional state and several different occurrences, i.e. sub-states, of the transitional state T. The proprietor in fact agreed that states in general comprised sub-states, inter alia the rest state and the transitional state. Consequently, the board concludes that the term "state" has to be interpreted broadly, in particular with regard to the "failure state".

3.6 In accordance with D1, there are at least two fault conditions which cause the system to remain "in transitory state", namely: (i) a current overload has occurred; (ii) the maximum operating time has been exceeded. These events define separate faulty operating

conditions of the system, and the operating conditions define the corresponding states (cf. D1, claim 1 ("defined as ... state")). Consequently, in the board's view, both of these fault conditions can be regarded as different failure states. They can also be considered respectively as "undetermined states", since both the value of the current in the overload condition and the elapsed operating time are not properly defined in the failure condition, i.e. could each take an indeterminate value above the failure threshold.

Therefore, even disregarding the aspect of stalling in D1, the subject-matter of claim 1 lacks novelty with respect to D1.

3.7 That notwithstanding, for the sake of argument, the board further considers that the system is in a different state when stalling than when in one of the two aforementioned failure states, because the system behaviour when responding to a double click command attempting to return it to the rest state is different in the failure states than in the stalled state. Further, this stalled state can also be regarded as "undetermined", since only a reset can recover the system. The board also notes that claim 1 does not require the undetermined state to be arrived at directly from the transitional state and, hence, embraces an undetermined state arrived at from the transitional state via one of the failure states. Consequently, this feature of D1 also renders the subject-matter of claim 1 not new.

3.8 The board concludes that the subject-matter of claim 1 of auxiliary request 3 is not new with respect to D1 (Articles 52(1) and 54(1) and (3) EPC).

4. "New auxiliary request 4" - admissibility

This matter will be considered below, see point 9.

5. Auxiliary requests 4 and 5 - claim 1 - novelty

Claim 1 of these requests is the same as claim 1 of auxiliary request 3. Consequently, the subject-matter of claim 1 of these requests is not new either (Articles 52(1) and 54(1) and (3) EPC).

6. Auxiliary requests 6 to 8 - claim 1 - novelty

Claim 1 of auxiliary requests 6 to 8 respectively differs from claim 1 of auxiliary request 3 in amendments aimed at overcoming an objection pursuant to Article 123(2) EPC but which have no impact on the issue of novelty with respect to D1. This was not disputed by the proprietor. Consequently, the subject-matter of claim 1 of these requests is not new either (Articles 52(1) and 54(1) and (3) EPC).

7. Auxiliary requests 6' to 8' - claim 1 - novelty

Claim 1 of auxiliary requests 6' to 8' respectively differs from claim 1 of auxiliary request 6 in that the subject-matter of dependent claim 4 of the granted patent has been added. Since this subject-matter is also disclosed in claim 4 of D1, this amendment has no impact on the issue of novelty with respect to D1. This was not disputed by the proprietor. Consequently, the subject-matter of claim 1 of these requests is not new either (Articles 52(1) and 54(1) and (3) EPC).

8. Auxiliary requests 6'' to 8'', 6''' to 8''' and 6^{iv} to 8^{iv} - admissibility

8.1 Claim 1 of auxiliary request 6'' to 8'' respectively differs from claim 1 of auxiliary request 6' in that the following feature has been added from the description:

"wherein the function of limiting the number of revolutions is active in the block state and the failure state, whereas the function of limiting the number of revolutions is inactive in the rest state".

8.2 The opponent argued that this feature had never been discussed in the opposition or appeal procedure and would have necessitated an additional search (cf. the letter dated 15 June 2018, page 3, section entitled "Requêtes 6',7' et 8'" *[sic]*).

Furthermore, at the oral proceedings before the board, the opponent contended that this claim, prima facie, did not comply with Articles 84, 123(2) and 54(3) EPC. In this respect:

- there was a lack of clarity under Article 84 EPC due to the use of inconsistent terminology. In this respect, the limitation of the number of revolutions was at the same time a condition and a function;

- the amendment was based on an unallowable intermediate generalisation in that it comprised two limitation conditions extracted in isolation from five conditions described in the description. In this respect, the opponent referred to paragraphs [0036] and [0040] of the application as filed; and

- the added feature was disclosed in D1. In this respect the opponent referred to paragraphs [0023] and [0028] of D1.

8.3 The board notes that these new auxiliary requests were filed by the proprietor with its letter dated 6 April 2018 in response to the board's communication. They thus constitute amendments to the proprietor's case in the sense of Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA). According to this article "Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion". Further, it stipulates that this discretion "shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy".

8.4 In accordance with case law, an auxiliary request may be admitted pursuant to Article 13(1) RPBA at a late stage of appeal proceedings if sound reasons exist for filing the request so far into the proceedings, which may be the case when amendments are occasioned by developments during the proceedings, if the request does not extend the scope of discussion as determined by the grounds of appeal and the respondent's reply, it being noted that under Article 12(2) RPBA the grounds of appeal and the reply must contain a party's complete case, or if the request is clearly or obviously allowable, meaning that it must be immediately apparent to the board, with little investigative effort on its part, that the amendments made successfully address the issues raised without giving rise to new ones (cf. T 1634/09, point 3.2 of the reasons).

8.5 Bearing these criteria in mind, the board notes that in the present case, the request was not filed in response to a new objection (lack of novelty with respect to D1 having being already submitted in the notice of opposition and in the opponent's statement of grounds of appeal), neither was it necessary that the request be admitted in response to the new argument in the board's communication regarding the stall state, since this argument alone was not decisive for the decision with respect to lack of novelty, cf. points 3.4 to 3.6 above.

Further, as correctly pointed out by the opponent, the additional feature has never been discussed in the procedure and would necessitate an additional search. Consequently, if the board were to admit the request, it may be forced to remit the case for further prosecution, which would be entirely contrary to the principle of procedural efficiency.

Finally, the board, as a result of a prima facie assessment, considered that the amended claim was highly unlikely to be allowable for the reasons advanced by the opponent, especially those in respect of Articles 84 and 123(2) EPC.

8.6 The proprietor argued essentially, with regard to the opponent's clarity objection, that the terminology chosen was taken literally from the application as filed in claim 4 and paragraphs [0024], [0029] and [0036] of the description. Further, it argued that the claim was not unclear when read through the eyes of a skilled person. As regards the alleged intermediate generalisation, it argued that in the description, five conditions for limiting the revolutions were discussed separately.

However these arguments did not convince the board that, prima facie, the opponent's objections were without merit. At the very least, a prolonged discussion and deliberation of these issues would have been necessary.

8.7 In view of the above, the board used its discretion under Article 13(1) RPBA to not admit auxiliary requests 6'' to 8''.

8.8 *Auxiliary requests 6''' to 8''' and 6^{iv} to 8^{iv} - admissibility*

Claim 1 of auxiliary requests 6''' to 8''' and 6^{iv} to 8^{iv} respectively incorporates the same unsearched feature as discussed in connection with auxiliary request 6''. Consequently, the board decided to not admit these requests either for the same reasons (Article 13(1) RPBA).

9. New auxiliary request 4 - admissibility

9.1 The oral proceedings had reached a point where all requests on file had been discussed, including a large number of auxiliary requests filed after the board's communication. At this point, the proprietor requested an interruption to formulate a new auxiliary request. It indicated that the request would be based on claim 1 of auxiliary request 8'', but with the entire feature discussed above in relation to claim 1 of auxiliary request 6'' (cf. point 8.1 above) deleted.

9.2 In the event, the proprietor submitted a new claim 1 as indicated, however further amended to return to wording of the first three lines of the claim in accordance

with claim 1 of auxiliary request 3. The new claim thus used a formulation that the board in its preliminary opinion had indicated did not comply with Article 123(2) EPC (cf. point VI above).

9.3 New auxiliary requests filed in appeal proceedings are, in accordance with settled case law (cf. Case Law of the Boards of Appeal, 8th Edition 2016, page 1154, section IV.E.4, 4.4.4), expected to be convergent with the previous requests on file, i.e. to develop and increasingly limit the subject-matter of the independent claim in the same direction and/or in the direction of a single inventive idea. The set of claims of new auxiliary request 4 however diverges following auxiliary request 3, i.e. the first branch consists of new auxiliary request 4 and the second branch consists of the existing seventeen converging requests 4 to 8^{iv}.

9.4 Furthermore, if the board were to admit the request at such a late stage of the oral proceedings, the opponent and the board would be in the position to have to respond to an unexpected combination of granted claims 1, 2, 4 and 5. In the board's view, if the proprietor had wished to submit a request based on a combination of granted claims 1, 2, 4 and 5, it should have filed such a request at an earlier stage, particular as it was already aware of the opponent's objection to admitting auxiliary requests 6'' to 8'' set out in the letter dated 15 June 2018. It has also to be borne in mind that this was the fifth attempt to overcome the objection of lack of novelty discussed in the board's communication, following auxiliary requests 6' to 6^{iv} (cf. points XVI to XIX above).

9.5 Finally, claim 1 of this request prima facie does not comply with Article 123(2) EPC (cf. point 9.2 above).

9.6 The board therefore used its discretion under Article 13(1) RPBA to not admit the request.

10. The objection under Rule 106 EPC

10.1 The proprietor argued that the board had committed a substantial procedural violation of the right to be heard by not admitting auxiliary request 6'' and all lower ranking auxiliary requests. The proprietor objected that these requests had not been admitted by the board as allegedly late-filed only on the basis of a "summary assessment" with regard to allowability. The proprietor took the view that these requests were a response to a new argument raised by the board in its communication accompanying the summons to oral proceedings and were therefore entitled to be admitted, and could only rejected on the basis of an in-depth analysis.

10.2 The board however notes that the board's interpretation of D1 with respect to the stalling state, i.e. an objection first raised in its communication, was not in itself decisive to the reasons for rejecting auxiliary request 3, since the subject-matter of claim 1 in any case lacks novelty based on reasoning that was already known to the proprietor (cf. point 3 above). Furthermore, the board notes that in the letter accompanying the filing of auxiliary request 6'', the proprietor does not specifically mention that the request was being filed in response to the board's "stalling" novelty objection. In any case, the board did not refuse to admit auxiliary request 6'' and all lower ranking requests purely for reasons of being late-filed, see point 8 above.

10.3 As regards the right to be heard, the proprietor was heard on the issue of admissibility of these requests and on the reasons advanced by the opponent for not admitting the requests. Consequently, the board does not consider that there has been a violation of Article 113(1) EPC. The board therefore dismissed the objection.

11. Conclusion

As there is no allowable request, it follows that the patent must be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

3. The objection under Rule 106 EPC is dismissed.

The Registrar: The Chairman:

G. Rauh F. van der Voort

Decision electronically authenticated