

Internal distribution code:

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

**Datasheet for the decision
of 24 February 2022**

Case Number: T 0392/17 - 3.2.06

Application Number: 08010296.5

Publication Number: 2000581

IPC: D06F58/28

Language of the proceedings: EN

Title of invention:

Dryer

Patent Proprietor:

LG Electronics Inc.

Opponent:

BSH Hausgeräte GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54

RPBA Art. 12(4)

RPBA 2020 Art. 13(1), 13(2)

Keyword:

Grounds for opposition

Novelty - (no)

Late-filed request - request could have been filed in first instance proceedings (yes)

Amendment after summons - exceptional circumstances (no) - taken into account (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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

Case Number: T 0392/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 24 February 2022

Appellant: LG Electronics Inc.
(Patent Proprietor) 20 Yeouido-dong
Yeongdeungpo-gu
Seoul 150-721 (KR)

Representative: Ter Meer Steinmeister & Partner
Patentanwälte mbB
Nymphenburger Straße 4
80335 München (DE)

Appellant: BSH Hausgeräte GmbH
(Opponent) Carl-Wery-Strasse 34
81739 München (DE)

Representative: BSH Hausgeräte GmbH
Zentralbereich Innovation -
Gewerblicher Rechtsschutz
Carl-Wery-Strasse 34
81739 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
12 December 2016 concerning maintenance of the
European Patent No. 2000581 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
J. Hoppe

Summary of Facts and Submissions

- I. The appellants (patent proprietor and opponent) filed respective appeals against the interlocutory decision of the opposition division in which the opposition division found that European patent No. 2 000 581 in an amended form met the requirements of the EPC.
- II. The following facts from the opposition proceedings are of relevance for the present decision:
- (a) the appellant-opponent raised *inter alia* the ground for opposition under Article 100(a) in combination with Article 54 EPC against claim 1 of the patent based only on D1 (WO-A-2006/019361);
 - (b) in the communication annexed to the summons to oral proceedings, the opposition division provisionally considered D1 to be prejudicial to the novelty of the subject-matter of granted claim 1;
 - (c) according to the minutes of the oral proceedings held on 26 October 2016 the following sequence of discussions took place:
 - (i) after the confirmation of the parties' requests, the grounds for opposition under Articles 100(a)/52(2) and 100(c) EPC were discussed and found not to prejudice maintenance of the patent;
 - (ii) novelty of the subject-matter of granted claim 1 was discussed based on D2: WO-A-2006/098571;
 - (iii) after a break from 9:49 to 10:02 the opposition division's chairman announced that claim 1 was considered to lack novelty over D2;

- (iv) the appellant-proprietor filed a new auxiliary request 1 which was then discussed in view of its admittance and subsequently in view of the requirement of Article 123(2) EPC;
- (v) after a further break from 11:01 to 11:21 the chairman announced that the amendments to claim 1 of new auxiliary request 1 were not allowable under Article 123(2) EPC;
- (vi) following a break from 11:22 to 11:30 the appellant-proprietor filed auxiliary request 1a, which was then discussed in view of the requirements of Articles 123(2) and 84 EPC (which were considered to be met) and subsequently in regard to the requirements of Articles 54 and 56 EPC, resulting in the announcement by the chairman of the opposition division, after the break from 12:43 to 12:49, that the subject-matter of claim 1 of auxiliary request 1a involved an inventive step;
- (vii) the remaining time of the oral proceedings, which closed at 14:06, was dedicated to the adaptation of the description.

III. With its statement setting out the grounds of appeal of 21 April 2017, the appellant-proprietor requested maintenance of the patent as granted, subsidiarily maintenance of the patent in amended form according to one of auxiliary requests 1 to 10 submitted therewith, among which auxiliary request 3 was stated as corresponding to auxiliary request 1a considered allowable by the opposition division.

In a subsequent letter dated 5 September 2017 the appellant-proprietor replied to the appellant-

opponent's grounds of appeal, reiterated its former requests and furthermore requested dismissal of the appellant-opponent's appeal.

IV. By a communication dated 23 September 2020, the parties were summoned to oral proceedings before the Board. In a subsequent communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), dated 1 December 2020, the Board set out its provisional opinion, noting *inter alia* the following points:

- (a) *"...the proprietor requests dismissal of the opponent's appeal (see letter of 5 September 2017, introductory section titled "Requests"), although it is not clear where this request comes in the order of requests filed by the proprietor. In particular, the Board notes that claim 1 of auxiliary request 3 submitted with the appeal grounds is, contrary to the proprietor's statements in paragraph 1.4 of its appeal grounds, not identical to claim 1 of "auxiliary request 1a" underlying the impugned decision." (see item 2 of the Board's communication);*
- (b) *contrary to the appellant-opponent's arguments, the appellant-proprietor's appeal appeared admissible (item 5);*
- (c) *"...that the combination of the features of claims 2 and 7 to 9 defines subject-matter which extends beyond the content of the application as filed. For this reason, the opposition ground of Article 100(c) EPC appears to prejudice maintenance of the patent" (item 6.3);*
- (d) *based on the provisional interpretation of certain expressions used in granted claim 1 of the patent in suit, "the Board considers that the subject-*

matter of claim 1 is new in view of D2." (items 8.1, 8.2, 8.2.1 and 8.2.2);

(e) in regard to auxiliary requests 1 to 10, *"... that the proprietor has not substantiated any of its auxiliary requests 1 to 10 in the sense that no indication has been given as to why the outstanding objections would be overcome by the respective amendments."* (item 11).

V. With its letter dated 19 February 2021, the appellant-proprietor replied to the Board's preliminary opinion and submitted new auxiliary requests 1 to 6, 5a, 6a. In regard to the auxiliary requests 1 to 10 submitted with the grounds of appeal, it was only stated:

"The auxiliary requests as filed on April 21, 2017 are kept. They should be handled if necessary after the newly filed requests are discussed. If the Board comes to the final conclusion that claim 2 as granted has no support in combination with granted claims 7-9, it is kindly requested to cancel claim 2 in the pending requests."

VI. Due to the COVID-19 pandemic the oral proceedings were rescheduled and finally held on 24 February 2022 by videoconference.

At the beginning of the oral proceedings the appellant-proprietor withdrew its request to dismiss the appellant-opponent's appeal (which corresponded to maintenance of the patent in amended form based on auxiliary request 1a underlying the impugned decision).

After a discussion of the main request, auxiliary request 1 and of the admittance of auxiliary requests 2 to 6, 5a, 6a of 19 February 2021, and of auxiliary requests 1 to 3 submitted with the appeal grounds, the

appellant-proprietor replaced auxiliary request 3 filed with its appeal grounds by a corrected version thereof ("corrected auxiliary request 3") and requested re-introduction of the previously withdrawn auxiliary request 1a. After discussion of the admittance of these two requests and after interruption for deliberation of the Board, the appellant-proprietor asked for another interruption of the oral proceedings for the preparation of a further auxiliary request, which interruption was refused by the Board. The appellant-proprietor also declared that it withdrew auxiliary requests 4 to 10 filed with the appeal grounds.

- VII. The appellant-proprietor's final requests were that the decision under appeal be set aside and the patent be maintained as granted (main request) or as an auxiliary measure that the patent be maintained in amended form according to one of the following requests in the given order:
- auxiliary requests 1 to 6, filed with letter dated 19 February 2021
 - auxiliary request 5a, filed with letter dated 19 February 2021
 - auxiliary request 6a, filed with letter dated 19 February 2021
 - auxiliary requests 1 to 2, filed with the grounds of appeal
 - "corrected auxiliary request 3", filed during the oral proceedings before the Board
 - auxiliary request 1a, filed in the oral proceedings before the opposition division
 - auxiliary requests 1 to 2 as filed with the grounds of appeal but without claim 2 (which have not been filed in writing)

- "corrected auxiliary request 3" as filed during the oral proceedings before the Board but without claim 2 (which had not been filed in writing)
- auxiliary request 1a as filed in the opposition proceedings but without claim 2 (which had not been filed in writing).

VIII. The appellant-opponent requested that the decision under appeal be set aside and the European patent be revoked.

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

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

- a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
- a steam course (613), in which the steam cycle is included, and
- a steam-off course (612), from which the steam cycle is excluded,

as operation courses, and an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course."

In **auxiliary request 1** of **19 February 2021** claim 1 is unchanged compared to claim 1 of the main request,

while dependent claim 2 has been deleted and the dependencies of the remaining claims adapted.

Claim 1 of **auxiliary request 2** of **19 February 2021** reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

- a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
- a steam course (613), in which the steam cycle is included, and
- a steam-off course (612), from which the steam cycle is excluded,

as operation courses for drying objects, and an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course, wherein the steam course (613) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and the steam cycle."

Claim 1 of **auxiliary request 3** of **19 February 2021** reads as follows:

"A dryer having a drying function comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller,

wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled, and including a drying cycle, a steam course (613), in which the steam cycle and a drying cycle is included, and a steam-off course (612) for drying objects, from which the steam cycle is excluded, as operation courses, and an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course."

Claim 1 of **auxiliary request 4** of **19 February 2021** reads as follows:

"A dryer having a drying function comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,

a steam course (613), in which the steam cycle is included, and

a steam-off course (612) for drying objects, from which the steam cycle is excluded,

as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course, wherein the steam-enable course (611) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and a cooling cycle for supplying cold air to the object container (20), to cool the object, wherein the steam course (613) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and the steam cycle."

Claim 1 of **auxiliary request 5** of **19 February 2021** reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

- a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
- a steam course (613), in which the steam cycle is included, and
- a steam-off course (612), from which the steam cycle is excluded,

as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course,

wherein the steam-enable course (611) is controlled to be executed under a condition in which an operation condition of the drying cycle is varied in accordance with a drying degree sensed during the drying cycle."

Claim 1 of **auxiliary request 6** of **19 February 2021** reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

- a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
- a steam course (613), in which the steam cycle is included, and
- a steam-off course (612), from which the steam cycle is excluded,

as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course, wherein the steam-enable course (611) is controlled to be executed under a condition in which an operation condition of the drying cycle is varied in accordance with a drying degree sensed during the drying cycle,

wherein an amount of the object is determined, based on the sensed drying degree,

wherein a point of time when a heater (240) operates to generate steam is varied in accordance with the determined object amount; or wherein an operation time of the heater (240) is varied in accordance with the determined object amount."

Claim 1 of **auxiliary request 5a** of **19 February 2021** reads as follows:

"A dryer having a drying function comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

- a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
- a steam course (613), in which the steam cycle is included, and
- a steam-off course (612) for drying objects, from which the steam cycle is excluded,

as operation courses, and an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses, wherein the controller controls an operation of the dryer to execute the selected operation course, wherein the steam-enable course (611) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and a cooling cycle for supplying cold air to the object container (20), to cool the object,

wherein the steam-enable course (611) is controlled to be executed under a condition in which an operation condition of the drying cycle is varied in accordance with a drying degree sensed during the drying cycle,
wherein the steam course (613) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and the steam cycle."

Claim 1 of **auxiliary request 6a** of **19 February 2021** reads as follows:

"A dryer having a drying function comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller,
wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of
a steam-enable course (611), in which a steam cycle for supplying steam to the object container (20) is enabled,
a steam course (613), in which the steam cycle is included, and
a steam-off course (612) for drying objects, from which the steam cycle is excluded,
as operation courses, and
an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses,
wherein the controller controls an operation of the dryer to execute the selected operation course,
wherein the steam-enable course (611) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and a cooling

cycle for supplying cold air to the object container (20), to cool the object, wherein the steam-enable course (611) is controlled to be executed under a condition in which an operation condition of the drying cycle is varied in accordance with a drying degree sensed during the drying cycle, wherein the steam course (613) includes a drying cycle for supplying hot air to the object container (20), to dry the object, and the steam cycle, wherein an amount of the object is determined, based on the sensed drying degree, wherein a point of time when a heater (240) operates to generate steam is varied in accordance with the determined object amount, or wherein an operation time of the heater (240) is varied in accordance with the determined object amount."

Claim 1 of **auxiliary request 1** submitted with the **grounds of appeal** reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

 a steam-enable course (611) including a drying cycle and a steam cycle, in which steam supply to the object container (20) is enabled,
 a steam course (613), in which the steam cycle is included, and
 a steam-off course (612), from which the steam cycle is excluded,
as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation course, wherein the controller controls an operation of the dryer to execute the selected operation course."

Claim 1 of **auxiliary request 2** submitted with the **grounds of appeal** reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller, wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

a steam-enable course (611) including a drying cycle and a steam cycle, in which steam supply to the object container (20) is enabled,
a steam course (613), in which a drying cycle and the steam cycle is included, and
a steam-off course (612), from which the steam cycle is excluded,

as operation courses, and
an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation course, wherein the controller controls an operation of the dryer to execute the selected operation course."

Claim 1 of **corrected auxiliary request 3** submitted during the oral proceedings reads as follows:

"A dryer comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller,

wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

a steam-enable course (611) including a drying cycle, in which a steam cycle for supply steam to the object container (20) is enabled,

a steam course (613), in which the steam cycle and a drying cycle is included, and

a steam-off course (612) for drying objects, from which the steam cycle is excluded,

as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation course,

wherein the controller controls an operation of the dryer to execute the selected operation course."

Claim 1 of **auxiliary request 1a** filed in the oral proceedings before the opposition division reads as follows:

"A dryer having a drying function comprising an object container (20) for containing an object, a control panel (19) provided to interface with a user, and a controller,

wherein the control panel (19) comprises a course selector (610) for enabling the user to select one of

a steam-enable course (611) including a drying cycle, in which a steam cycle for supply steam to the object container (20) is enabled,

a steam course (613), in which the steam cycle and a drying cycle is included, and

a steam-off course (612) for drying objects, from which the steam cycle is excluded,

as operation courses, and

an option selector (630) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation course, wherein the controller controls an operation of the dryer to execute the selected operation course."

- X. The appellant-opponent's arguments may be summarised as follows:

Inadmissibility of the appellant-proprietor's appeal

The proprietor's appeal was not substantiated within the meaning of Rule 99(2) EPC. Apart from incorrect comments on the interpretation of certain prior art, the proprietor had not shown why and in which aspect the opposition division's decision was defective in regard to its correct finding that the granted patent did not meet the requirements of the EPC.

Main request - Article 100(a), 54 EPC

Claim 1 was directed to a dryer, which should be understood broadly in the light of the description to cover any machine having a drying function, see for example paragraphs 2, 3, 10, 20, 27 and 37 of the patent in suit. The three operation courses defined in the claim were not in any way limited to drying courses or to courses necessarily including a drying cycle. The wash-dryer known from D2 anticipated all features of claim 1. In particular, the course select part 420 of the control panel shown in Figure 4 of D2 allowed the selection of one of the three courses defined by claim 1, any of which being operable with a drying cycle selectable by button 415. A steam-enable course was embodied for example by the standard course, a steam course by the freshen-up course and a steam-off course

by the sheet/pillow course. The option selector for enabling a steam course could be identified as being the steam select part 430.

Auxiliary requests 2 to 6, 5a, 6a submitted on 19 February 2021

The auxiliary requests submitted on 19 February 2021 could have been presented already with the appeal grounds. No exceptional circumstances justifying their admittance into the proceedings were present.

Corrected auxiliary request 3 and auxiliary request 1a (re-)submitted during the oral proceedings

New auxiliary request 3 was submitted far too late. The amendments were *prima facie* not compliant with Article 123(2) EPC, for example, in regard to the nesting of the steam cycle in the drying cycle added in the steam-enable course, due to the expression "in which".

Auxiliary request 1a had been withdrawn previously. There was no reason justifying its re-introduction at a late stage and it did not *prima facie* meet the requirement of Article 123(2) EPC.

XI. The appellant-proprietor's arguments may be summarised as follows:

Main request

Claim 1 related to a dryer only, i.e. a machine which had drying as its primary or general function, rather than washing. This was supported by the entire description of the patent, see for example paragraphs 2, 3, 6, 9, 10, 26, 37 or 66. Moreover, dryers had no

water supply as required in washing machines or wash-dryers. Wash-dryers such as those disclosed in D2 were therefore not claimed. As a consequence all courses selectable by the course selector necessarily related to drying courses and therefore required the inclusion of a drying cycle. The courses selectable by the course select part 420 of the wash-dryer known from D2 all related to washing operations, whereas a drying cycle was only optionally selectable via a separate button 415. Drying steam-enable, drying steam and drying steam-off courses were not disclosed in D2. In particular, a steam-course identified by the appellant-opponent with reference to the freshen-up course mentioned in D2 was not unambiguously derivable, since paragraphs 17 and 45 of D2 were inconsistent in regard to the use of steam in such a course.

*Auxiliary requests 2 to 6, 5a, 6a submitted on
19 February 2021*

The requests should be admitted into the proceedings in view of the following exceptional circumstances. The Board had signalled in its preliminary opinion that the subject-matter of claim 1 was considered novel over D2 in view of the apparently acknowledged interpretation of the term "[operation] courses" by the appellant-proprietor which had not been contested by the appellant-opponent. It was therefore not recognisable for the appellant-proprietor that this notion could be changed in the sense that it was not required that any of the courses selectable by the course select part was a drying course, as finally considered during the oral proceedings. This constituted a major change in the interpretation of the expression "[operation] course" compared to the reasoning given by the opposition division in the impugned decision. That reasoning was

however (also incorrectly) based only on the existence of a cooling cycle. For example, auxiliary request 2 clarified the nature of the courses as being drying courses and constituted a procedural simplification when seen in combination with the deletion of claim 2 and in reaction to the ground for opposition under Article 100(c) EPC.

Auxiliary requests 1 and 2 submitted with the grounds of appeal

The requests could only have been filed at the beginning of the appeal proceedings. During the oral proceedings before the opposition division, the opposition division had unexpectedly changed its preliminary opinion in regard to novelty of the subject-matter of granted claim 1. In order to overcome the objection based since then on D2, i.e. a different document than the one considered in the division's preliminary opinion, corresponding amendments could only be prepared during the oral proceedings, which resulted in a first amended version of claim 1 (i.e. "auxiliary request 1" underlying the decision). This auxiliary request 1 was not allowed for non-compliance with Article 123(2) EPC, and a further amendment (i.e. "auxiliary request 1a" underlying the impugned decision) considered finally allowable. However, in view of the limited possibilities generally available to submit amendments before the opposition division it was not possible to consider all consequences of the amendments so that the appellant-proprietor only became aware of unnecessary limitations introduced in claim 1 after having received the written decision. The respective amendments in auxiliary request 1a, i.e. the expressions "having a drying function" and "for drying objects", were then removed upon filing of *inter alia*

amended auxiliary requests 1 and 2 with the appeal grounds. The removal of these expressions was self-explanatory, considering in particular that claim 1 related to a dryer. Further substantiation was thus not required.

Corrected auxiliary request 3 and auxiliary request 1a (re-)submitted during the oral proceedings

The preceding discussions of auxiliary request 3 made the appellant-proprietor aware of the problems introduced by the amendments for the first time. In particular, it became clear that potential clarity problems with auxiliary request 1a underlying the impugned decision would seemingly not have constituted a problem for the Board.

Reasons for the Decision

Admissibility of the appellant-proprietor's appeal

1. As already stated in the Board's preliminary opinion, the appeal of the appellant-proprietor is admissible. Detailed reasoning on this aspect is however not required since the appeal is not allowable for the reasons set out in the following.

Main request - Articles 100(a) and 54 EPC

2. The subject-matter of claim 1 as granted lacks novelty in view of D2.
 - 2.1 As an explanatory preliminary remark it is noted that an operation course within the meaning of the patent is

understood by the skilled person to comprise one cycle or a series of different operational cycles. Without being limiting for the claim (see also 2.2.3 below), such cycles could be drying cycles using hot air, cooling cycles using cold air, or steam cycles, see for examples paragraphs 20-25 of the patent.

- 2.2 The claim is directed to "a dryer". The crucial question for the outcome of the examination on novelty is whether the subject-matter of granted claim 1 is limited to a machine which has the primary or main function as drying or, formulated differently, whether the claim excludes in particular wash-dryers or washing machines having an optional drying function, such as disclosed in D2. The Board answers these questions in the negative.
 - 2.2.1 Besides the denomination of the subject-matter as a "dryer", no further reference to a drying function is contained in the claim wording. The use of steam in some of the selectable operation courses clearly does not support a limited interpretation, since in general steam could be used during either (steam) wash courses or indeed in combination with drying courses.
 - 2.2.2 The appellant-proprietor considered the entire description of the patent to support a limited interpretation. Provided that the description could be used in order to give the claim a narrow interpretation, which the Board does not accept, the passages particularly referred to in this respect by the appellant-proprietor anyway do not mention that a dryer is a machine having the purpose of drying as its primary (or main) function. Paragraph 1 of the description sets out that the "present invention relates to a laundry machine, and more particularly to

a dryer using steam". According to paragraph 2 a laundry machine is an appliance for washing or drying an object such as laundry. Laundry machines include "a washing machine, a drying machine or a washing machine having a drying function". Despite some of the further passages cited by the appellant referring to a dryer which has a general drying function (e.g. paragraph 10), it cannot be derived from any of these passages that such a dryer may not simply be part of a washing machine where the washing machine is provided with such a general drying function in addition to its wash courses. Moreover, paragraphs 20 and 27 of the patent set out that the steam-enable course and steam course, respectively, "may include a drying cycle". Drying is thus not a function or cycle which must be performed in the selectable operation courses, as also argued by the appellant-opponent. This is confirmed also for example in paragraphs 30 or 111 relating to the steam fresh or refresh courses which constitute a steam course as defined in claim 1. These freshen-up courses constitute an odor, wrinkle or dust removing treatment of dry laundry in which a drying cycle may be dispensed with. Thus it cannot be concluded that drying is an operational cycle or course which is necessarily or primarily performed when specifying or using the "dryer" machine.

Since the "dryer" according to claim 1 does not necessarily have to perform a drying cycle, this leads the Board to the conclusion that the term "dryer" only designates a (laundry) machine which has a drying function. This is also seen to be a technically reasonable interpretation of claim 1.

2.2.3 For similar reasons, the operation courses selectable by the course selector defined in claim 1 are not

limited to courses necessarily relating to drying purposes. Nor do the operation courses selectable by the course selector necessarily have to include a dedicated drying course. The interpretation of the appellant-proprietor according to which all of the operation courses listed in claim 1 would be understood to be implicitly directed to (drying) steam-enabled, (drying) steam or (drying) steam-off courses is not supported by any feature in the claim.

2.2.4 That a dryer would not have any water supply other than the tank collecting condensed water, as argued by the appellant-proprietor, is contradicted by paragraph 66 of the patent in suit which clearly mentions the option of connecting the dryer to external water supply means, as in general washing machines. The argument that further differences allegedly existed between such a tap water connection as mentioned in paragraph 66 and that of a conventional washing machine is found unconvincing by the Board. The patent is silent in this respect and evidence supporting this allegation made during the oral proceedings before the Board has not been submitted.

2.3 D2 discloses a laundry machine which is a washing machine using steam (see for example paragraph 1). Figure 4 discloses a control panel of the washing machine. In a section (410) of that panel designated "option select part", a series of buttons (411-416) is contained which are labelled "wash", "rinse", "spin", "water temp", "dry" and "steam", see also paragraph 47 of D2. Above each of these buttons on the panel is displayed a vertically arranged list of operational options, which options relate to the designation of the button directly below. For example, above the "spin" button, different values of what constitute common

rotational spinning speeds are displayed ("1200(rpm), 1000, 800, 600, 400"). Similarly the list displayed above the dry-button comprises drying options, "dry time(min), very dry, normal dry, less dry (for ironing), damp dry (low temp)". Finally, in a section (460) of the panel, designated "steam wash displayer", a series of rectangular fields, all designated by different operational modes ("wash, rinse, spin" etc.) is illustrated, one of these fields being again labelled "dry". The skilled person understands therefore that the washing machine disclosed in D2 comprises also a drying function.

D2 therefore discloses a dryer within the meaning given to claim 1 as set out in item 2.2 and its sub-sections above.

2.4 D2 furthermore discloses in Figures 1 and 4 in combination with the relevant part of the description, an object container (Fig. 1, drum 30) for containing an object, a control panel (Fig. 4, 400) provided to interface with a user, and a controller (440, paragraph 42),

wherein the control panel comprises a course selector (420/421) for enabling the user to select one of

a steam-enable course (for example "standard"), in which a steam cycle for supplying steam to the object container is enabled (paragraph 51 and for example the second sentence of paragraph 61 or the first sentences of paragraphs 74 and 77), a steam course ("freshen up", "tub/drum wash"), in which the steam cycle is included (second and fourth sentences of paragraph 45), and

a steam-off course ("wool", "sheet/pillow"), from which the steam cycle is excluded (paragraph 51 and the last sentence in paragraph 74), as operation courses, and an option selector (450/430) for enabling the user to select an option course, in which the steam cycle is included, in addition to the operation courses (see for example paragraphs 49 and 51), wherein the controller controls an operation of the dryer to execute the selected operation course (for example paragraph 49 and following)."

All features of claim 1 are thus disclosed in D2, so that the subject-matter of claim 1 lacks novelty (Article 54(1) and (2) EPC).

2.5 The central counter-argument of the appellant-proprietor against this conclusion was based on a narrow interpretation of the term "dryer" and thus on the subsequent interpretation that the three operation courses defined in claim 1 implicitly related to drying courses. This narrow interpretation is, however, not justified for the reasons given above (item 2.2).

The Board also can not find any contradiction in paragraphs 14 and 45 of D2 which would throw a doubt on the disclosure of a selectable "steam course" according to claim 1. The second sentence of paragraph 14 is a general disclosure that the steam wash course includes at least one of the standard course, the tub/drum wash course and the freshen up course, in accordance with the illustration of Figure 4. Here, a freshen up course is considered in general terms amongst wash courses which use steam. Paragraph 45 then discloses in more detail all operation courses selectable by selector 420/421 in the preferred embodiment and discloses (in

regard to the freshen-up course) that it uses steam for removal of wrinkles. A contradiction does not arise.

- 2.6 It follows that the opposition ground under Article 100(a) in combination with 54 EPC prejudices maintenance of the patent as granted.

Auxiliary request 1 of 19 February 2021

3. Claim 1 of auxiliary request 1, submitted with the letter dated 19 February 2021, is the same as in the main request. Irrespective of the question of admittance, the requirement of Article 54 EPC is not met for the reasons set out above, so that the request for maintenance of the patent in this amended form is not allowable. The appellant-proprietor did not submit any comment in this regard.

Auxiliary requests 2 to 6, 5a, 6a submitted with the letter dated 19 February 2021

4. Auxiliary requests 2 to 6, 5a and 6a submitted with the letter dated 19 February 2021, are not taken into account (Article 13(2) RPBA 2020).

- 4.1 According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 4.2 Auxiliary requests 2 to 6, 5a and 6a of 19 February 2021 were filed after the Board had summoned the parties to oral proceedings.

4.3 In the letter accompanying their submission, an indication of the amendments made in the respective claims and the basis for the amendments in the granted claims and in the application as filed is given, as well as a brief indication of the potential relevance of the amendments for the requirements of novelty and inventive step. No reasons were given however justifying their late submission, let alone an indication of any possible exceptional circumstances (Article 13(2) RPBA 2020).

4.4 The arguments submitted by the appellant-proprietor during the oral proceedings, based on a change of the Board's conclusion during the oral proceedings in regard to the requirement of novelty of granted claim 1 compared to the corresponding statements on page 6 of the preliminary opinion, do not support the existence of exceptional circumstances. A deviation from a Board's preliminary opinion must always be expected - otherwise holding oral proceedings would be superfluous - and therefore cannot be considered as exceptional, at least as long as it is not based on considerations which occurred for the first time during the oral proceedings.

As regards this latter aspect, the Board had based its preliminary opinion on an assumption, which the Board had explicitly pointed out was the case in item 8.2 of the Board's preliminary opinion, that a certain limited interpretation of the expression "steam[-enable/off] course" might be followed, pointing however to a possibly different broader interpretation adopted by the opposition division in the impugned decision (the last two paragraphs of item 8.1 of the preliminary opinion). Concluding, after discussion during the oral proceedings before the Board, that a broader

interpretation applied, cannot be considered, under these circumstances, to have come as a surprise to the appellant-proprietor. The question of whether the operation courses defined in claim 1 referred necessarily to drying courses was dealt with in the impugned decision, in the last paragraph of item 2.3.1 on page 4. No reason is apparent why a corresponding amendment, for example by specifying a drying cycle such as proposed at the end of claim 1 of auxiliary request 2 submitted on 19 February 2021, could not have been filed with the appeal grounds, or at the latest in reply to the other party's appeal grounds.

That other outstanding issues, such as the objections raised under the opposition ground pursuant to Article 100(c) EPC against granted dependent claim 2, might be resolved in parallel and thereby would have facilitated the procedure in regard to these aspects is also irrelevant for the question of the existence of exceptional circumstances. In fact the opposite is the case; the relevant issue again is why these amendments could not have been submitted at the latest in reply to the appellant-opponent's appeal grounds in which these objections against dependent claim 2 had been maintained (see item 8 of the appellant-opponent's appeal grounds).

- 4.5 Thus, absent any exceptional circumstances justified with cogent reasons, auxiliary requests 2 to 6, 5a and 6a are not taken into account (Article 13(2) RPBA 2020).

Auxiliary requests 1 and 2, filed with the grounds of appeal

5. The Board exercised its discretion according to Article 12(4) RPBA 2007 to exclude auxiliary requests 1 and 2 submitted for the first time with the grounds of appeal.

5.1 According to Article 12(2) RPBA 2020, which is applicable in the present case according to Article 25(1) RPBA 2020, the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, so that a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based.

Article 12(3) RPBA 2020 (see also Article 12(2) RPBA 2007 previously applicable), which is also applicable according to Article 25(1) RPBA 2020, requires inter alia that the appeal grounds and the reply shall contain a party's complete appeal case. Accordingly, they shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the requests, facts, objections, arguments and evidence relied on.

A sanction in case these requirements are not met is set out in Article 12(4) RPBA 2007, which is applicable in the present case according to Article 25(2) 2020 RPBA. Although the wording of Article 12(4) RPBA 2007 relates to Article 12(2) RPBA 2007, the requirements for a party's complete appeal case are in essence the same as those of Article 12(2) RPBA 2007, so that the

sanction in Article 12(4) RPBA 2007 is applicable.

5.2 Compared to claim 1 as granted, claim 1 of auxiliary request 1 submitted with the appeal grounds comprises only the following amendment (emphasis by the Board) "a steam-enable course (611) including a drying cycle and a steam cycle, in which steam supply to the object container (20) is enabled,".

5.3 In the appeal grounds the appellant-proprietor stated that this amendment was "in line with the auxiliary request 1a" considered allowable by the opposition division and indicated support for the above amendment in the description of the published application.

Compared to the amendments of claim 1 of auxiliary request 1a (see above at the end of IX. of the Summary of Facts and Submissions), in addition to the above emphasised modification, several other amendments have been removed, i.e. the expression "having a drying function" after the designation of the subject-matter, the further specification of "a drying cycle" in the steam course, and the indication of the purpose "for drying objects" in regard to the steam-off course, cf. above Facts and Submissions IX., last section thereof.

5.4 No reason was given by the appellant-proprietor when submitting auxiliary request 1 with the grounds of appeal why this request could not have been filed in the proceedings before the opposition division. Nor was there any reason provided why the amendment would overcome the outstanding objections.

5.4.1 Although the Board can accept that the appellant-proprietor was perhaps in a difficult situation during the oral proceedings when faced with the change of the

opposition division's opinion on novelty of the subject-matter of claim 1 (see the above Summary of Facts and Submissions, II.(b) and (c)(iii)), in the present case this cannot justify that the submission of the present auxiliary request 1 was not possible.

As is apparent from the minutes of the oral proceedings before the opposition division (see above Summary of Facts and Submissions, II.(c)(iv)-(vii)) the appellant-proprietor was given a first opportunity to amend claim 1 ("new auxiliary request 1") and, after its rejection for lack of compliance with Article 123(2) EPC, a second opportunity to further amend the claim ("auxiliary request 1a"). It is particularly noteworthy that immediately after the announcement of the opposition division that the then pending "auxiliary request 1" did not comply with Article 123(2) EPC, preceded by an interruption of 20 minutes (see Summary of Facts and Submissions, II.(c)(v)), the appellant-proprietor requested a further break which lasted just eight minutes (see Summary of Facts and Submissions, II.(c)(vi)). It is not apparent from the minutes of the oral proceedings that this extremely short break for the preparation of further amendments was imposed by the opposition division and it has also not been alleged by the appellant-proprietor that this was the case. From the minutes it is also not apparent that the proprietor had requested more time or that the opposition division did not allow the filing of further requests. The statement made to the Board by the appellant-proprietor that opposition divisions in general are not very generous when it comes to requests for filing further amendments, besides being a mere allegation without any proof let alone that this would have applied in the present case, cannot justify that the appellant-proprietor did not even take or request

the time they considered necessary to react to the unexpected change of the opposition division's position on novelty.

Either the appellant-proprietor had considered that they had enough time to react to that change, then the change of the opposition division's view on novelty cannot justify a further opportunity to amend the claims in the appeal proceedings.

Or the appellant-proprietor did not have enough time, then this issue should have been raised before the division. The Board can thus only conclude that the appellant-proprietor had enough time before the opposition division to prepare amendments they considered appropriate.

- 5.4.2 It has not been alleged that the impugned decision comprises any considerations which were notified to the appellant-proprietor for the first time with the written reasons and the Board can also not see that this would have been the case.

- 5.4.3 Moreover, the Board is also not convinced by the appellant-proprietor's argument that the amendments were self-explanatory in view of their relevance for the requirements of novelty and inventive step. The amended claim 1 of auxiliary request 1a considered allowable by the opposition division comprised further amendments which have been deleted in claim 1 of auxiliary request 1 filed with the appeal grounds. No justification was provided why the features "having a drying function", the "drying cycle" specifying the steam course or the indication of the purpose "for drying objects" in regard to the steam-off course could simply be deleted, whereas they had been previously

considered apparently necessary by the appellant-proprietor to establish novelty and inventive step.

That some feature, such as the drying function, might retrospectively have been considered to be redundant by the appellant-proprietor and as such could be deleted without further explanation is not acceptable. It is not the role of the Board and the other party to imagine potential reasons for amended claims submitted for the first time with the appeal grounds, without any further substantiation as to the reasons behind these amendments and to the relevance of these amendments in regard to the outstanding objections.

5.5 Taking into account the entire circumstances underlying the submission of auxiliary request 1 with the grounds of appeal, as set out above, the Board exercised its discretion according to Article 12(4) RPBA 2007 to exclude auxiliary request 1 from the appeal proceedings.

5.6 For similar reasons the Board also decided to exclude auxiliary request 2 submitted with the grounds of appeal (Article 12(4) RPBA 2007) from the appeal proceedings as this request also could and should have been filed during the opposition proceedings.

"Corrected auxiliary request 3"

6. The Board decided not to take into account "corrected auxiliary request 3" filed during the oral proceedings before the Board (Article 13(2) RPBA 2020).

6.1 There are no exceptional circumstances justified with cogent reasons, accompanying the submission of this request. The preceding discussions of the admittance of

auxiliary request 3 submitted with the appeal grounds which was excluded - see the minutes of oral proceedings - and which was subsequently withdrawn, and the objections considered in this respect are in no way exceptional or surprising. In this regard it should be observed that the appellant-proprietor was made aware of problems with this request already in the Board's provisional opinion under item 11, noting that the appellant-proprietor had *inter alia* given no indication as to why outstanding objections might be overcome, and also the reasons above in relation to auxiliary requests 1 and 2 which gave rise to similar objections in auxiliary request 3 as filed with appeal grounds.

- 6.2 The appellant-proprietor may have underestimated the impact of its amendments in auxiliary request 3 filed with the grounds of appeal. This is however clearly not a reason justifying the submission of a further request, let alone a justification for postponing such filing until the very last moment in the oral proceedings.

Auxiliary request 1a

7. Auxiliary request 1a was not admitted into the proceedings. The Board exercised its discretion not to admit this request under Article 13(1) RPBA 2020 so that it need not be decided whether the even stricter requirements of Article 13(2) RPBA 2020 would have been fulfilled.

- 7.1 Article 13(1) RPBA 2020 provides *inter alia* that any amendment to a party's appeal case after it has filed its grounds of appeal or reply may be admitted only at the discretion of the Board. The party shall provide

reasons for submitting the amendment at this stage of the appeal proceedings. The Board shall exercise its discretion in view of, *inter alia*, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised by another party in the appeal proceedings or which were raised by the Board, whether the amendment is detrimental to procedural economy, and, in the case of an amendment to a patent application or patent, whether the party has demonstrated that any such amendment, *prima facie*, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections.

7.2 Irrespective of the questions of whether there could be any good reason at all justifying the re-introduction at a very late stage of the oral proceedings of a request which was previously withdrawn in the oral proceedings under Article 13(1) RPBA 2020, or whether exceptional circumstances could have existed within the meaning of Article 13(2) RPBA 2020, auxiliary request 1a was *prima facie* not allowable for at least the following reasons.

7.2.1 First, this auxiliary request includes dependent claims 2 and 7 to 9, on which the Board had expressed a negative opinion in its communication (see above Facts and Submissions, IV.(c)), so that these outstanding objections were not overcome and would have required further discussion.

7.2.2 Moreover, the amendment "for drying objects" introduced in regard to the feature defining "a steam-off course (612)" results at least *prima facie* in a further objection pursuant to Article 123(2) EPC. As also argued by the appellant-opponent, the application as

filed does not disclose a steam-off course "for drying objects" in general. Rather, the passages referred to also by the appellant-proprietor in this context, in particular paragraphs 17, 30 and 117 of the description of the (published) application appear to imply more specifically particular (low) temperature conditions for the steam-off courses to operate on clothes susceptible to heat damage.

- 7.3 Taking into account all circumstances of the (re-)submission of auxiliary request 1a, the Board therefore exercised its discretion not to admit this request into the proceedings.

Other auxiliary requests

8. The appellant-proprietor's further auxiliary requests to maintain the patent on the basis of any of the auxiliary requests 1 and 2 filed with the grounds of appeal, corrected auxiliary request 3 filed during the oral proceedings before the Board, or re-submitted auxiliary request 1a, in all of which additionally dependent claim 2 would be deleted, are not admitted either. The reasons for not admitting the corresponding auxiliary requests, as set out above, are not dependent only on the presence of the dependent claim 2 and could therefore not lead to a different conclusion.
9. Absent any set of claims complying with the requirements of the EPC, the patent has to be revoked (Article 101(3)(b) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated