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**Datasheet for the decision
of 7 July 2021**

Case Number: T 0590/17 - 3.4.02

Application Number: 10172026.6

Publication Number: 2241869

IPC: G01G23/01, G01G19/44, G01G21/22

Language of the proceedings: EN

Title of invention:
Weight measuring apparatus for use as an input device of a game apparatus

Patent Proprietors:
Nintendo Co., Ltd.
Hosiden Corporation

Opponent:
Bigben Interactive SA

Relevant legal provisions:
EPC Art. 76(1)
RPBA Art. 12(4)
RPBA 2020 Art. 13(1), 13(2)

Keyword:

Requests: Admission in first-instance proceedings and
consideration in appeal proceedings (main request: yes)
Extension beyond the content of the earlier application as
filed (main request: yes)
Admission of requests filed during the appeal proceedings
(first to fourth auxiliary requests: no)

Decisions cited:

T 0989/15, T 0954/17



Beschwerdekammern

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Case Number: T 0590/17 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 7 July 2021

Appellants I:

(Patent Proprietors)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
5 January 2017 concerning maintenance of the
European Patent No. 2241869 in amended form.**

Composition of the Board:

Chairman R. Bekkering
Members: F. J. Narganes-Quijano
 T. Karamanli

Summary of Facts and Submissions

I. The patent proprietors and the opponent lodged an appeal against the interlocutory decision of the opposition division, finding European patent No. 2241869 as amended according to Auxiliary Request 4B then on file to meet the requirements of the EPC. The patent was based on a divisional application to the earlier European patent application No. 08001659.5.

II. The opposition filed by the opponent against the patent as a whole was based on the grounds for opposition of added subject-matter in respect of the earlier application as filed (Article 100(c) EPC), and of lack of novelty and of inventive step (Article 100(a) together with Articles 52(1), 54 and 56 EPC).

In its decision the opposition division concluded, *inter alia*, as follows:

- Auxiliary Request 4B was admitted into the proceedings, and

- the patent as amended according to Auxiliary Request 4B met the requirements of the EPC, and in particular those set forth in Articles 76(1), 123(2), 84 and 56 EPC.

III. In a communication under Article 15(1) of the revised Rules of Procedure of the Boards of Appeal (RPBA 2020, OJ EPO 2019, A63) annexed to the summons to oral proceedings issued on 14 September 2020, the board presented a preliminary assessment of the case.

IV. With their letter dated 4 June 2021, the patent proprietors submitted amended claims according to auxiliary requests 1 to 7. As their main request, they requested that the opponent's appeal be dismissed and that the patent be maintained in amended form on the basis of Auxiliary Request 4B.

V. Oral proceedings were held before the board on 7 July 2021.

During the oral proceedings the patent proprietors submitted amended claims according to a new auxiliary request 4.

The patent proprietors requested as main request that the opponent's appeal be dismissed and, as an alternative, that the decision under appeal be set aside and that the European patent be maintained as amended according to auxiliary request 1 filed as auxiliary request 3 by letter dated 4 June 2021 or auxiliary request 2 filed as auxiliary request 5 by letter dated 4 June 2021 or auxiliary request 3 filed as auxiliary request 6 by letter dated 4 June 2021 or auxiliary request 4 filed at the oral proceedings dated 7 July 2021.

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

At the end of the oral proceedings the chairman announced the decision of the board.

VI. Claim 1 of Auxiliary Request 4B, on which the decision under appeal is based, reads as follows:

"A weight measuring apparatus (10) for use as an input device of a game apparatus, the weight measuring apparatus comprising:

a battery (35) for power supply;

a load platform (11) for receiving a pressure load;

a plurality of load sensors (12) provided on the bottom surface of the weight measuring apparatus as leg portions and supporting the load platform for detecting a pressure load, each load sensor generating a detected load signal and comprising a strain element (23);

an amplifier (34) for each load sensor (12), each amplifier being connected to an A/D converter (32)

a microcomputer (31) operationally connected to each of the load sensors (12) through the amplifier and A/D converter and configured to receive each digitized detected load signal at the same time;

connecting means (13) to operationally connect the microcomputer (31) to the game apparatus configured to transmit data indicating the detected load signals of the respective load sensors, each load signal comprising identification information for the respective load sensor (12) wherein calibration data (Fig. 9) for each of the load sensors is stored on the microcomputer (31), the calibration data for each of the load sensors being obtained from the respective load sensor at a time when a load having a predetermined weight is applied to the load sensor."

Claim 1 of auxiliary request 1 differs from claim 1 of Auxiliary Request 4B in that the final feature "obtained from the respective load sensor at a time when a load having a predetermined weight is applied to the load sensor" is replaced by the feature "obtained by the sequential application of loads having different weights to the corresponding load sensor".

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the feature "and comprising a strain element (23)" is replaced by the feature "and comprising a strain-gage type load cell comprising a strain element (23)".

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 1 in the insertion of the following feature at the end of the claim: "and wherein the weight measuring apparatus is configured to provide the calibration data (Fig. 9) to the game apparatus".

Claim 1 of auxiliary request 4 reads as follows:

"A weight measuring apparatus (10) for use as an input device of a game apparatus, the weight measuring apparatus comprising:

 a battery (35) for power supply;

 a load platform (11) for receiving a pressure load;

 a plurality of load sensors (12) provided on the bottom surface of the weight measuring apparatus as leg portions and supporting the load platform for detecting a pressure load, each load sensor generating a detected load signal and comprising a strain-gage type load cell comprising a strain element (23);

 an amplifier (34) for each load sensor (12), each amplifier being connected to an A/D converter (32)

 a microcomputer (31) operationally connected to each of the load sensors (12) through the amplifier and A/D converter and configured to receive each digitized detected load signal at the same time, wherein calibration data (Fig. 9) for each of the load sensors is stored on the microcomputer (31), the calibration data for each of the load sensors being obtained by the sequential application of loads having different weights to the corresponding sensor;

connecting means (13) to operationally connect the microcomputer (31) to the game apparatus configured to transmit data indicating the detected load signals of the respective load sensors and the calibration data (Fig. 9), each load signal comprising identification information for the respective load sensor (12)."

Reasons for the Decision

1. The appeal of the patent proprietors and the appeal of the opponent are admissible.

2. *Auxiliary Request 4B*

- 2.1 Admittance issues

- 2.1.1 Admission of Auxiliary Request 4B into the first-instance proceedings by the opposition division

In its statement of grounds of appeal, the opponent contested the opposition division's decision to admit into the proceedings the then Auxiliary Request 4B during the oral proceedings and requested that the admission of this request be reviewed by the board. The opponent submitted, in particular, that the opposition division held in the decision under appeal that the request was not "clearly not allowable", and that for this reason the opposition division, when exercising its discretion, applied the wrong criteria because a request submitted during oral proceedings could only be accepted if the request was clearly allowable, i.e. if it overcame *prima facie* all the raised objections.

The board notes, however, that the amended claims of Auxiliary Request 4B were submitted during the first-instance oral proceedings in reaction to new objections under Article 76(1) EPC raised for the first time during the oral proceedings. The opposition division subsequently examined the allowability of the amendments on a *prima facie* basis, and in particular - following, as noted by the patent proprietors, the criteria indicated in the Guidelines (2016), Part E-II, 8.6 - on the basis of the question of whether they were "clearly not allowable", and it concluded that Auxiliary Request 4B was not "clearly not allowable", so that this request could therefore be admitted into the proceedings.

In view of these considerations, the board sees no reason to conclude that the opposition division has exercised its discretion by applying wrong principles or the wrong criteria or in an unreasonable way, or for otherwise reviewing and overturning the opposition division's decision to admit Auxiliary Request 4B into the first-instance proceedings.

2.1.2 Consideration of Auxiliary Request 4B in appeal proceedings

With their statement of grounds of appeal, the patent proprietors requested that the decision under appeal be set aside and that the patent be maintained as granted or as amended according to a series of auxiliary requests. In reply to the statement of grounds of appeal of the opponent requesting the revocation of the patent, the patent proprietors disputed the arguments submitted by the opponent in respect of Auxiliary Request 4B underlying the decision under appeal. They

did not explicitly request, either in their reply or in their subsequent letter dated 5 February 2018, that the opponent's appeal be dismissed or that the patent be maintained in amended form on the basis of Auxiliary Request 4B. However, in their letter dated 4 June 2021 filed in preparation for the oral proceedings, the patent proprietors explicitly requested, as main request, that the opponent's appeal be dismissed, i.e., that the patent be maintained in amended form on the basis of the Auxiliary Request 4B, which the opposition division found to fulfil the requirements of the EPC.

The opponent submitted that the patent proprietors requested in their statement of grounds of appeal that the patent be maintained as granted or as amended according to different auxiliary requests, that in their reply to the opponent's appeal they did not modify these requests, and that they indicated for the first time during the appeal proceedings with the letter dated 4 June 2021 that the main request was the patent as amended according to Auxiliary Request 4B. The opponent further submitted that, in these circumstances, the present main request constituted an amendment to the patent proprietors' appeal case within the meaning of Article 13(1) RPBA 2020 and also within the meaning of Article 13(2) RPBA 2020, and that the admission of the present main request into the appeal proceedings should be refused in view of the substantive objections raised in respect of Auxiliary Request 4B and in view of the fact that no exceptional circumstance would justify the admission of the main request into the appeal proceedings.

However, as already noted by the board in its communication annexed to the summons to the oral proceedings, the fact that the patent proprietors, in

their letter of reply to the opponent's statement of grounds of appeal, contested the opponent's substantive submissions relating to Auxiliary Request 4B meant that this request was implicitly maintained by the patent proprietors. In addition, according to Article 12(4) RPBA 2007 (which applies in the present case according to Article 25(2) RPBA 2020) "everything presented by the parties" under Article 12(1) RPBA 2007 (which largely corresponds to the provisions of Article 12(1) RPBA 2020), and in particular the reply of a party to the statement of grounds of appeal filed by another party, "shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in (2) [i.e. Article 12(2) RPBA 2007]". In this context, the board notes that these requirements largely correspond to those of Article 12(3) RPBA 2020.

In view of these considerations, the board is of the opinion that Auxiliary Request 4B was further pursued by the patent proprietors in their reply to the opponent's statement of grounds of appeal, although not necessarily within the scope of a main request. Therefore, and in the absence of any other ground, the patent proprietors' request that the opponent's appeal be dismissed and thus the opposition division's decision that the patent as amended according to Auxiliary Request 4B met the requirements of the EPC be upheld, was to be taken into account by the board in accordance with Article 12(4) RPBA 2007. In addition, the mere fact of subsequently promoting the mentioned request as their main request did not constitute an amendment to the patent proprietors' appeal case within the meaning of Article 13(1) or (2) RPBA 2020.

For all these reasons, the opponent's request that the present main request of the patent proprietors not be admitted and thus Auxiliary Request 4B not be considered cannot be allowed.

2.2 Article 76(1) EPC

2.2.1 In its decision the opposition division held that the subject-matter of claim 1 of Auxiliary Request 4B, and in particular the feature relating to the calibration data for each of the load sensors "being obtained from the respective load sensor at a time when a load having a predetermined weight is applied to the load sensor", complied with the requirements of Article 76(1) EPC.

The opponent contested the opposition division's finding in this respect and submitted in particular that the mentioned feature relating to how the calibration data was obtained extended beyond the content of the earlier application as filed. More particularly, the calibration data referred to in claim 1 was disclosed in the earlier application as filed as being obtained by the sequential application of loads having different weights to the load sensors as explained in the description of the earlier application as filed, and the omission of this feature in present claim 1 constituted an unallowable intermediate generalisation of the content of the earlier application as filed.

2.2.2 The board first notes that the earlier application as filed (see paragraphs [0002] and [0007] of the publication (EP 2056080 A2) of the earlier application as filed) discloses a weight measuring apparatus for use with a game apparatus (see, for instance, Fig. 3A to 3H and Fig. 5), a weight applying unit for obtaining

calibration data used for performing calibration of the weight measuring apparatus (see, for instance, Fig. 8A, and claim 1 of the earlier application as filed), and a method of obtaining calibration data with the weight applying unit.

Claim 1 of Auxiliary Request 4B is directed to the weight measuring apparatus disclosed in the earlier application as filed, and the claims require that the apparatus comprises a microcomputer having calibration data stored therein. According to the earlier application as filed, the calibration data stored in the microcomputer of the claimed apparatus is obtained by a method involving

- the step of applying a load having a predetermined weight to each of the load sensor sections of the weight measuring apparatus using the weight applying unit and causing the microcomputer of the apparatus to store a value output from each of the load sensor sections, thereby performing a calibration (paragraph [0071], together with the subsequent detailed explanation in paragraphs [0072] to [0077]), followed by

- the repetition of the mentioned step with a load having a different weight (paragraph [0078]), whereby "the calibration [...] is finished" (paragraph [0078], last sentence) and the resulting data stored in the microcomputer contains a detection value output from each load cell each time a load having a different weight is applied (lines 11 to 19 of paragraph [0078]; see also Fig. 9, 15 and 16 and the corresponding description).

The further embodiment disclosed in paragraphs [0083] to [0088] of the earlier application as filed is - as

noted by the opponent - also based on the approach mentioned above.

The skilled person would therefore understand that the calibration data stored in the microcomputer of the weight measuring apparatus disclosed in the earlier application as filed specifically corresponds to the calibration data obtained by the sequential application of loads having different weights referred to above. Claim 1 of Auxiliary Request 4B, however, only requires that the calibration data stored in the microcomputer is "obtained from the respective load sensor at a time when a load having a predetermined weight is applied to the load sensor", and the data obtained in this manner is disclosed in the earlier application as filed not as the actual calibration data stored in the microcomputer for each of the load sensors, but only as part of it. For this reason, the claimed subject-matter constitutes an intermediate generalisation of the content of the earlier application as filed.

In addition, in the board's opinion, this intermediate generalisation is not directly and unambiguously derivable from the content of the earlier application as filed and is, therefore, unallowable.

- 2.2.3 The patent proprietors submitted that, as concluded by the opposition division in its decision, the use of several weights disclosed in the passage at lines 6 to 22 of paragraph [0078] of the earlier application as filed reading "For example, loads of 34kg, 68kg and 102kg are sequentially applied [...]" would directly and unambiguously be understood by the skilled person as a mere example.

The board agrees with the patent proprietors in so far as the mentioned passage discloses in its technical context an example relating to the use of specifically three loads each having a specific weight. Not, however, in the sense that the sequential application of different loads itself would only be an example of the method of obtaining the calibration data subsequently stored in the microcomputer of the weight measuring apparatus disclosed in the earlier application because the mentioned passage only discloses an example of the more general disclosure in paragraph [0078], first sentence, relating to the repetition with loads having different weights of the step of applying a load to each of the load sensors and causing the microcomputer to store the corresponding detection values.

- 2.2.4 The patent proprietors also submitted that the earlier application as filed was directed to the calibration of a weight measuring apparatus having load sensors on its bottom surface as leg portions thereof not by applying a weight on the load platform of the apparatus as in the prior art, but by turning the apparatus upside down and applying the weight on the load sensors (Fig. 1 and 2 and the corresponding description). In addition, the method involved the application of only "a weight" on the load sensors (paragraph [0053]), and not necessarily the application of different weights as also derivable from a comparison between claims 19 and 20, between paragraphs [0044] and [0045], and between paragraphs [0071] and [0078] of the earlier application as filed. The skilled person would therefore understand that the sequential application of loads having different weights was only optional.

The board, however, does not find these arguments convincing. The earlier application as filed refers indeed to the use of a weight or load (see, in particular, paragraphs [0053], [0044] and [0071], and claim 19), but only when describing the operation with the weight applying unit for the purpose of obtaining calibration data. In addition, claim 1 does not refer to calibration data obtained with the weight applying unit or with the corresponding method of obtention of calibration data with this apparatus, but to the calibration data specifically stored in the microcomputer of the weight measuring apparatus. Moreover, according to the earlier application as filed this specific calibration data is not only obtained by the step of applying a load to the load sensors, but - as already noted in point 2.2.2 above - by the repetition of this step with loads having different weights.

- 2.2.5 The patent proprietors also submitted that, even assuming that the claimed subject-matter constituted an intermediate generalisation, this generalisation would be allowable because the skilled person would understand that the earlier application as filed did not disclose two different methods of determination of calibration data, but only one, and thus the skilled person would not be presented with new information.

However, there is no disclosure in the earlier application as filed from which the skilled person could derive - even using its common general knowledge - that calibration data merely obtained by application of only one load to each of the load sensors would be sufficient to perform a calibration of the claimed weight measuring apparatus - let alone, as submitted by the opponent, to perform a proper calibration of the

same as required by the disclosure of the earlier application as filed relating to the claimed weight measuring apparatus.

2.2.6 The board concludes that the subject-matter of claim 1 of Auxiliary Request 4B extends beyond the content of the earlier application as filed (Article 76(1) EPC). Therefore, the patent proprietors' main request is not allowable.

3. *Auxiliary request 1 - Admittance under Article 13(2) RPBA 2020*

3.1 The patent proprietors filed the claims of auxiliary request 1 with their letter dated 4 June 2021.

In the present case, the summons to oral proceedings was notified after the date of entry into force of the revised version of RPBA 2020 which is 1 January 2020, see Article 24(1) RPBA 2020. Thus, pursuant to Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit auxiliary request 1, which was filed after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020. Article 13(2) RPBA 2020 implements the third level of the convergent approach applicable in appeal proceedings (see Supplementary publication 2, OJ EPO 2020, explanatory remarks on Article 13(2), first paragraph, first sentence).

According to Article 13(2) RPBA 2020, "[a]ny 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 were exceptional

circumstances, which had been justified with cogent reasons by the party concerned", i.e. in the present case by the patent proprietors.

- 3.2 Claim 1 of auxiliary request 1 differs from claim 1 of Auxiliary Request 4B in that the calibration data for each of the load sensors is said to be "obtained by the sequential application of loads having different weights to the corresponding load sensor".

The opponent submitted that claim 1 had been amended to overcome the objection under Article 76(1) EPC addressed in point 2.2 above, which had already been raised in the first-instance proceedings and also in the opponent's statement of grounds of appeal. In the opponent's view, the patent proprietors, instead of waiting for guidance from the board, could have filed this request at an earlier stage of the proceedings, and, for these reasons, there was no exceptional circumstance justifying the admission of this request into the proceedings under Article 13(2) RPBA 2020.

The patent proprietors submitted that since the opponent had raised a considerable number of independent and complex objections during the proceedings and in particular with the statement of grounds of appeal, a large number of auxiliary requests, each addressing one of the respective objections, and, in addition, combinations of these auxiliary requests would have had to be made in the form of further auxiliary requests, resulting in an excessively high number of auxiliary requests. They further argued that this approach would have been highly ineffective and contrary to procedural economy and that, in view of these exceptional circumstances, the submission of the claims of the present auxiliary

request 1 after the board had issued the communication annexed to the summons to oral proceedings was appropriate, and that therefore the request should be admitted into the proceedings. In addition, during the appeal proceedings the opponent did not point specifically to the omission in claim 1 of the sequential application of weights as constituting an objection under Article 76(1) EPC.

3.3 The board first notes that claim 1 of auxiliary request 1 represents an amendment to the patent proprietors' case in appeal within the meaning of Article 13(2) RPBA 2020, and that the amendment is directed to overcome the objection under Article 76(1) EPC addressed in point 2.2 above.

3.3.1 In addition, this objection was not raised for the first time in the board's communication annexed to the summons, but was already raised by the opponent in its statement of grounds of appeal. In particular, contrary to the patent proprietors' submissions, the opponent already submitted in its statement of grounds of appeal (page 8/15, second paragraph) that the sequential application of a plurality of different weights was disclosed as essential in the earlier application as filed and that its omission constituted an unallowable intermediate generalisation.

Therefore, the claims of auxiliary request 1 could have been filed at an earlier stage of the proceedings, and in particular with the patent proprietors' reply to the statement of grounds of appeal filed by the opponent.

3.3.2 As regards the patent proprietors' submissions that, in the circumstances of the case, filing auxiliary

requests would not have been procedurally appropriate, the board notes the following:

On the one hand, it might have been excessive and procedurally impractical to have filed amendments in reply to each one of the numerous and complex objections raised by the opponent (in particular, under Articles 76(1) and 123(2) EPC) in respect of the claims of Auxiliary Request 4B in their statement of grounds of appeal as all these amendments together with the possible alternative combinations thereof would have resulted in a high number of auxiliary requests.

On the other hand, however, these circumstances did not justify refraining - as the patent proprietors did - from filing any auxiliary request at all in due time and waiting for the board's preliminary assessment of the opponent's objections in order to react and file appropriate auxiliary requests overcoming specific objections addressed by the board. On the contrary, the patent proprietors could - and should - at least have attempted to overcome some of the opponent's objections, or partial aspects thereof, by filing an appropriate number of auxiliary requests.

In view of these considerations, and in particular given the fact that the patent proprietors did not attempt to file any auxiliary request in reply to the opponent's objections in due time, in particular to the opponent's objection mentioned in point 3.3.1 above, the board sees no exceptional circumstances which have been justified with cogent reasons by the patent proprietors in support of the admission of the amendments to claim 1 of auxiliary request 1 into the proceedings under Article 13(2) RPBA 2020.

3.4 In view of the above considerations, the board exercised its discretion under Article 13(2) RPBA 2020 and decided not to admit auxiliary request 1 into the proceedings.

4. *Auxiliary request 2 - Admittance under Article 13(2) RPBA 2020*

4.1 The claims of auxiliary request 2 were also filed with the letter dated 4 June 2021.

Thus, pursuant to Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit auxiliary request 2, which was filed after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

Claim 1 of this request differs from claim 1 of Auxiliary Request 4B, *inter alia*, in that the feature "comprising a strain element (23)" has been replaced by the feature "comprising a strain-gage type load cell comprising a strain element (23)".

The patent proprietors submitted that the mentioned amendment was a direct reaction to the objection raised by the board in its communication and according to which the parent application did not appear to generally disclose load sensors comprising a strain element, but only load sensors comprising a load cell of the strain-gage type operating with a strain element, so that claim 1 would appear to constitute an unallowable intermediate generalisation of the content of the earlier application as filed (Article 76(1) EPC). This objection was different from the objections

raised by the opponent during the proceedings, and therefore the objection was new and constituted exceptional circumstances justifying the admission of auxiliary request 2 into the appeal proceedings under Article 13(2) RPBA 2020.

The opponent submitted that the board's objection mentioned by the patent proprietors had already been raised during the first-instance proceedings (see, for instance, minutes of the first-instance proceedings, time 09:23, second sub-paragraph, together with time 11:20) and also in its statement of grounds of appeal, that for this reason the patent proprietors, instead of waiting for guidance from the board, could and should have filed this request at an earlier stage of the proceedings. Therefore, there was no reason that would justify the admission of the late filed request into the proceedings.

- 4.2 The board first notes that the opponent had already objected in its statement of grounds of appeal (section "caractéristique 1d" on pages 6/15 to 8/15, and in particular page 7/15, third paragraph) that claim 1 of Auxiliary Request 4B required that each load sensor comprised "a strain element (23)", that in the earlier application as filed (paragraph [0056] and Fig. 4A to 4D) this strain element was labelled "23a" and was disclosed as being inextricably linked with the plates 22 and 24 supporting the strain element, with the strain sensor or gage 23b attached to the strain element, and with the structure of the assembly, and that the omission of these features, and in particular the omission of the essential feature constituted by the strain sensor or "jauge de contrainte" 23b (statement of grounds of appeal, page 7/15, third paragraph, last sentence), constituted an unallowable

intermediate generalisation of the content of the earlier application as filed.

In addition, in the communication annexed to the summons to the oral proceedings (point 2.2.4 of the communication), the board presented a preliminary assessment of the mentioned opponent's objection and noted that, while there appeared to be no reason to conclude that the skilled person would have understood that the claimed load sensors each comprising a strain element would necessarily be structurally configured as disclosed in detail in paragraphs [0055] and [0056] of the earlier application as filed with reference to Fig. 4A to 4D (communication, point 2.2.4, second paragraph), the parent application did not appear to generally disclose load sensors comprising a strain element, but only load sensors comprising a load cell of the strain-gage type operating with a strain element, and that for this reason the claimed subject-matter appeared to constitute an unallowable intermediate generalisation of the content of the earlier application as filed.

It follows from the above considerations that the board, in its preliminary assessment of the opponent's objection, considered that, while some of the elements of the objection (omission in the claim of the plates 22 and 24 and of details of the structure of the assembly) did not appear persuasive, the element of the objection relating to the omission in the claim of the strain sensor or gage 23b attached to the strain element might be considered to be well founded in as much as the claim did not require that the load sensor comprised a load cell of the strain-gage type. Therefore, no new element was introduced in the objection expressed by the board in its preliminary

assessment of the opponent's objection, and the objection did not constitute - contrary to the patent proprietors' submissions - a new objection or a new issue that would have constituted an exceptional circumstance justified with cogent reasons within the meaning of Article 13(2) RPBA 2020.

It is also noted that the patent proprietors did not avail themselves of the possibility of filing in due time any auxiliary request in reply to the opponent's objection mentioned above, and that similar comments to those already made in point 3.3.2 also apply in respect of the filing of auxiliary request 2.

4.3 Since there were no exceptional circumstances which were justified with cogent reasons by the patent proprietors in support of the admission of the amendments to claim 1 of auxiliary request 2, the board exercised its discretion under Article 13(2) RPBA 2020 and decided not to admit auxiliary request 2 into the appeal proceedings.

5. *Auxiliary request 3 - Admittance under Article 13(2) RPBA 2020*

5.1 The claims of auxiliary request 3 were also filed with the letter dated 4 June 2021.

Thus, pursuant to Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit auxiliary request 3, which was filed after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

Claim 1 of this request differs from claim 1 of Auxiliary Request 4B, *inter alia*, in that the claim further requires that "the weight measuring apparatus is configured to provide the calibration data (Fig. 9) to the game apparatus".

The patent proprietors argued that the amendment was a reaction to the new objection raised by the board in the communication annexed to the summons, according to which it was not clear what the technical functional relationship was between the calibration data and the remaining features of the claimed apparatus (Article 84 EPC). For this reason, the amended claims were to be admitted into the proceedings under Article 13(2) RPBA 2020.

The opponent submitted that the amended feature gave rise to new objections under Article 76(1) EPC and also to new objections of lack of clarity and of lack of support in the description (Article 84 EPC), and that for this reason the amended claims should not be admitted into the proceedings pursuant to Article 13(1) RPBA 2020. In particular, claim 1 left open how the calibration data was transmitted to the game apparatus, and it was not clear whether the calibration data was transmitted to the game apparatus through the claimed connection means or by some other means (Article 84 EPC).

5.2 The board notes that, on the one hand, the amended feature of claim 1 under consideration was inserted in the claim in reply to the objection of lack of clarity of claim 1 of Auxiliary Request 4B raised for the first time by the board in its communication annexed to the summons, and that this can be seen as a cogent justification by the party why the circumstances are

exceptional. If such circumstances are shown to exist, the board of appeal may, in exercising its discretion, decide to admit an amendment made to the appeal case at this advanced stage of the proceedings (see Supplementary publication 2, OJ EPO 2020, explanatory remarks on Article 13(2), third paragraph, last sentence).

On the other hand, when exercising its discretion in accordance with Article 13(2) RPBA 2020 and deciding whether to admit an amendment made at the third level of the convergent approach, the board is free to use or not use the criteria applicable at the second level of the convergent approach, i.e. as set out in Article 13(1) RPBA 2020 (see Supplementary publication 2, OJ EPO 2020, explanatory remarks on Article 13(2), fourth paragraph; and for example decisions T 989/15, point 16.2 of the Reasons, and T 954/17, point 3.10 of the Reasons).

According to Article 13(1) RPBA 2020 and the explanatory remarks on Article 13(1) RPBA 2020 (see Supplementary publication 2, OJ EPO 2020), the onus is on the patent proprietors to demonstrate both why the amendment overcomes the issues raised by the board and why the amendment, *prima facie*, does not give rise to new objections.

As submitted by the opponent, the amended feature under consideration, *prima facie*, renders claim 1 unclear in respect of the way the claimed apparatus transmits the calibration data to the game apparatus, and in particular raises the question of whether the claimed apparatus is configured to transmit the calibration data to the game apparatus through the claimed

connecting means or by some other alternative means not specified in the claim (Article 84 EPC).

Therefore, the amendments introduced into claim 1, *prima facie*, give rise to new objections.

5.3 In view of these considerations, the board, in the exercise of its discretion under Article 13(2) RPBA2020, decided not to admit auxiliary request 3 into the appeal proceedings.

6. *Auxiliary request 4 - Admittance under Article 13(1) RPBA 2020*

6.1 The claims of auxiliary request 4 were submitted during the oral proceedings before the board.

Thus, pursuant to Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit auxiliary request 4, which was filed after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

Claim 1 of auxiliary request 4 has been amended, *inter alia*, by specifying that the calibration data for each of the load sensors is "obtained by the sequential application of loads having different weights to the corresponding sensor".

The opponent submitted that the amended claims should not be admitted into the proceedings pursuant to Article 13(1) RPBA 2020 because the amendments gave rise to new objections under Articles 76(1) and 84 EPC. In particular, the opponent submitted that the

"sequential application of loads having different weights to the corresponding sensor" specified in claim 1 was not clear and that the claim did not require that the calibration data was obtained by the application of the loads to each of the load sensors independently of each other, but included, in contrast to the corresponding disclosure in the description of the patent specification (Fig. 2 and the corresponding description), the possibility of a co-application of loads to the load sensors (Article 84 EPC).

The patent proprietors submitted that the amendments introduced into claim 1 overcame all the objections addressed by the board in the communication annexed to the summons, and that the claim was clear. In particular, it was clear in claim 1 that the loads were sequentially applied to the corresponding load sensor, i.e. for each of them and therefore independently of each other.

6.2 As set out above, one of the criteria applicable at the second level of the convergent approach, i.e. as set out in Article 13(1) RPBA 2020, is that the patent proprietors have demonstrated why the amendment, prima facie, does not give rise to new objections. The board adheres to the opponent's view that the claimed feature "sequential application of loads having different weights to the corresponding sensor", prima facie, is ambiguous and therefore not clear (Article 84 EPC) because it can be interpreted as the repeated application of loads disclosed in the description of the earlier application as filed and mentioned in point 2.2.2 above and also in the corresponding passages of the description of the patent specification, but also in the sense that a first load is applied to a first one of the load sensors, a second different load is

then applied to a second one of the load sensor, etc.. In addition, as a consequence of the formulation of the feature under consideration, doubts arise as to whether the claim is supported by the description within the meaning of Article 84 EPC because according to the description the calibration data is obtained for the different load sensors independently of each other (Fig. 2 together with the corresponding description, and paragraphs [0077] to [0084]) and the mentioned claimed feature does not exclude the co-application of different loads to the load cells as submitted by the opponent.

Therefore, the amendments introduced into claim 1, prima facie, give rise to new objections.

6.3 In view of these considerations, the board, in the exercise of its discretion under Article 13(2) RPBA 2020, decided not to admit auxiliary request 4 into the appeal proceedings.

7. The board concludes that none of the patent proprietors' requests is allowable. The patent must therefore 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:



L. Gabor

R. Bekkering

Decision electronically authenticated