

Internal distribution code:

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

**Datasheet for the decision
of 6 May 2022**

Case Number: T 1408/17 - 3.4.02

Application Number: 07782047.0

Publication Number: 2008146

IPC: G02B27/22, G03H1/30, H04N13/04,
G03B35/24, G03H1/26, G03B35/20,
G03H1/22

Language of the proceedings: EN

Title of invention:
SYSTEMS AND METHODS FOR ANGULAR SLICE TRUE 3-D DISPLAY

Patent Proprietor:
Third Dimension IP LLC

Opponent:
Holografika Kft

Relevant legal provisions:
EPC Art. 100(c), 111(1) sentence 2
EPC R. 103(1)(a), 111(2)
RPBA 2020 Art. 11, 13(2), 15(3), 15(6)

Keyword:

Oral proceedings - non-attendance of party
Decision under appeal sufficiently reasoned (yes, in respect
of at least one ground for opposition)
Added subject-matter (main request, yes)
Admission of auxiliary request (no)
Remittal to the department of first instance - (no)
Reimbursement of the appeal fee (no)

Decisions cited:

G 0002/10, R 0012/09, R 0019/10, R 0017/11



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 1408/17 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 6 May 2022

Appellant: Holografika Kft
(Opponent) 1192 Budapest
Ady Endre út 3a (HU)

Representative: Mak, Andras
S.B.G. & K. Patent and Law Offices
Andrassy ut 113.
1062 Budapest (HU)

Respondent: Third Dimension IP LLC
(Patent Proprietor) 3601 Bluff Point Drive
Knoxville TN 37920 (US)

Representative: Bryn-Jacobsen, Caelia
Kilburn & Strode LLP
Lacon London
84 Theobalds Road
London WC1X 8NL (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 13 April 2017
rejecting the opposition filed against European
patent No. 2008146 pursuant to
le 101(2) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition filed against European patent No. 2008146.

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

- II. In its decision, the opposition division held in respect of the patent as granted that
- the subject-matter of claim 1 did not extend beyond the content of the application as filed (Article 100(c) EPC),
 - the claimed invention was sufficiently disclosed (Article 100(b) EPC), and
 - the subject-matter of claim 1 was new and involved an inventive step in view of the documents considered during the opposition proceedings (Article 100(a) EPC).
- III. In its statement setting out the grounds of appeal, the appellant requested that
- the decision under appeal be set aside and the case be remitted to the opposition division in a different composition or, auxiliary, in the event that the case is not remitted, the patent be revoked,
 - the appeal fee be reimbursed in view of a substantial procedural violation, and

- apportionment of travel costs incurred by the appellant as a consequence of a postponement of the first-instance oral proceedings be ordered.

- IV. In a communication under Article 15(1) RPBA 2020 annexed to the summons to oral proceedings, the board presented a preliminary assessment of the case.
- V. By letter dated 16 November 2021, the respondent (patent proprietor) submitted claims according to a first auxiliary request.
- VI. By letter dated 4 April 2022, the appellant informed the board that it would not take part in the oral proceedings and, as regards the requests, the appellant submitted the following on page 1 of its letter:

"All requests on file are upheld.

- Our main request is to set aside the impugned decision and to revoke the patent, and the reimbursement of the appeal fee.

- Is [sic] this request cannot be granted, the [sic] we request to set aside the impugned decision and that the case be remitted to the Opposition Division and the reimbursement of the appeal fee.

- In case the Board is not minded to order reimbursement of the appeal fee, we request revocation of the patent by the Board.

- We request the non-admission of the auxiliary request under Art. 13 RPBA.

- We do not maintain our arguments with respect to novelty.

- We also withdraw our request for apportionment of costs.

- We do not maintain our request for a different composition of the Opposition Division."

VII. Oral proceedings were held before the board on 6 May 2022 in the absence of the duly summoned appellant.

The Chairman noted that the appellant (opponent) had submitted its requests in writing on page 1 of the letter dated 4 April 2022.

The respondent requested as main request that the appeal be dismissed, or, alternatively, that the decision under appeal be set aside and that the patent be maintained as amended on the basis of the claims of the first auxiliary request filed by letter dated 16 November 2021.

At the end of the oral proceedings, the Chairman announced the decision of the board.

VIII. Claim 1 of the patent as granted - with the feature labelling "A" to "K" used during the proceedings being inserted therein by the board - reads as follows:

"A 3-D display system comprising:

[A] one or more CPUs configured to generate multiple, individual 2-D images;

[B] a plurality of 2-D image projectors coupled to receive the multiple, individual 2-D images from the one or more CPUs; and

[C] a display screen (110) optically coupled to said 2-D image projectors;

[D] wherein the one or more CPUs are configured to, for each image projector, generate corresponding ones of the multiple, individual 2-D images by raytracing from a position of each one of the 2-D image projector,

through a 3-D dataset with respect to the display screen and performing inverted hidden line removal; and

[E] wherein the 2-D image projectors are configured to project the multiple, individual 2-D images substantially in focus on the display screen,

[F] wherein for each image projector, the corresponding individual 2-D image comprises multiple vertical stripes,

[G] wherein each stripe is associated with a corresponding angular slice on the display screen, each having a vertical extent which is substantially equal to a vertical field of view of the display screen and a horizontal extent which is substantially equal to a horizontal field of view of the display screen divided by the number of the 2-D image projectors; and

[H] wherein the display screen is configured to diffuse the light of each pixel from each of the 2-D images into a corresponding one of the angular slices which is associated with the vertical stripe containing the pixel,

[I] wherein the pixels of each vertical stripe are arranged to be viewable only in the corresponding angular slice,

[J] wherein each eye of a viewer can view only a single vertical stripe from each of the 2-D image projectors, and

[K] wherein each eye of the viewer observes a different set of the vertical stripes when the eyes are positioned to view within different angular slices."

Claim 1 of the first and sole auxiliary request differs from claim 1 of the patent as granted in that feature D reads as follows:

"wherein the one or more CPUs are configured to, for each image projector, generate corresponding ones

of the multiple, individual 2-D images by raytracing through a 3-D dataset from a position of each one of the 2-D image projector through the display screen to viewer positions and performing inverted hidden line removal;".

Reasons for the Decision

1. The appeal is admissible.
2. *Procedural matters*
 - 2.1 *Non-attendance of the appellant at the oral proceedings before the board*

In accordance with Rule 115(2) EPC, if a party duly summoned to oral proceedings before the EPO does not appear as summoned, the proceedings may continue without that party. Pursuant to Article 15(3) RPBA 2020 (which is applicable in accordance with Article 25(1) RPBA 2020), the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of a duly summoned party, which may then be treated as relying only on its written case.

In the case in hand, both parties requested oral proceedings. The appellant announced that it would not be attending the oral proceedings. By not attending these oral proceedings, the appellant effectively chose not to avail itself of the opportunity to present its observations and counter-arguments orally but instead to rely on its written submissions. The board was in a

position to announce a decision at the conclusion of the oral proceedings in accordance with Article 15(6) RPBA 2020, which applies in accordance with Article 25(1) RPBA 2020.

2.2 *Appellant's requests*

In its letter dated 4 April 2022, the appellant made the following requests:

As main request, the appellant requested that the decision under appeal be set aside and the patent be revoked and that the appeal fee be reimbursed.

As first auxiliary request, the appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division and that the appeal fee be reimbursed.

As second auxiliary request, the appellant requested that the decision under appeal be set aside and that the patent be revoked.

Furthermore the appellant requested that the respondent's first auxiliary request, filed by letter dated 16 November 2021, not be admitted into the appeal proceedings.

The board notes that the appellant withdrew its request for a different apportionment of the costs and its request that the board order a change in the composition of the opposition division in the event of a remittal.

3. *Examination of the allowability of the appellant's main request and first auxiliary request*

With its main request and first auxiliary request, the appellant requested that the decision under appeal be set aside and that the patent be revoked or that the case be remitted to the opposition division as well as that the appeal fee be reimbursed.

In view of the appellant's submissions, only Rule 103(1)(a) EPC (see OJ EPO 2020, A5) can be considered as a legal basis for reimbursement of the appeal fee. This rule provides that reimbursement of the appeal fee in full has to be ordered where the board of appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation. According to this provision, the first requirement is that the appeal is allowable. If this condition is not fulfilled, then a reimbursement of the appeal fee due to a substantial procedural violation cannot be considered.

For the case at hand, this means that it must first be examined whether the appeal is allowable, i.e. whether the decision under appeal must be set aside and either the patent must be revoked or the case must be remitted to the opposition division.

4. *Allegations of substantial procedural violations - Immediate remittal of the case to the opposition division under Article 111(1), second sentence, EPC 1973 and Article 11 RPBA 2020*

4.1 In the statement of grounds of appeal, the appellant submitted that the decision under appeal was not sufficiently reasoned in respect of the grounds for

opposition under Article 100(a), (b) and (c) EPC and did not take into account the appellant's arguments in this respect. In view of Article 113(1) EPC and Rule 111(2) EPC, the written decision under appeal was therefore tainted by several substantial procedural violations. The appellant submitted that, in formal terms, its evidence and arguments seemed to have been heard in the first-instance proceedings, but that in its written decision the opposition division simply repeated with some omissions the arguments submitted by the appellant, without however discussing their technical content and without explaining why the appellant's submissions were not convincing or why the respondent's submissions were convincing. As a result, the appellant was unable to argue on appeal why the contested decision was wrong, and could only repeat its previous arguments. More particularly, in respect of the specific reasoning of the contested decision relating to the ground for opposition under Article 100(c) EPC, the appellant submitted that features A, B and D of claim 1 as granted and the corresponding features of independent claim 15 as granted were not disclosed in or unambiguously derivable from the application as filed, either individually or in combination, that the same applied to the claimed "one or more CPUs" in connection with the 2-D images and the projectors, and that these objections were not considered in the written decision.

The respondent disagreed with the appellant and argued that there had been no substantial procedural violation in the first-instance proceedings.

- 4.2 In view of the substantial procedural violations alleged by the appellant, the board considers it appropriate to examine whether in the case at hand

immediate remittal of the case to the opposition division would be justified on account of a fundamental procedural deficiency within the meaning of the second sentence of Article 11 RPBA 2020, which applies under Article 25(1) RPBA 2020 in the case at hand. The board notes that the appellant's main request is no longer directed to a remittal of the case. However, there is no need for a party to request that a case be remitted. Remittal is at the board's discretion under Article 111(1), second sentence, EPC 1973, and can be ordered without any request.

- 4.3 According to Article 111(1), second sentence, EPC 1973, the board may either exercise any power within the competence of the department of first instance or remit the case to that department for further prosecution. When exercising this discretion, the board takes account of the provisions of Article 11 RPBA 2020. According to Article 11, first sentence, RPBA 2020, the board is not to remit a case for further prosecution to the department whose decision was appealed unless special reasons for doing so present themselves. As a rule, fundamental deficiencies which are apparent in the first-instance proceedings constitute such special reasons (Article 11, second sentence, RPBA 2020). This means that the rule is that a case is to be remitted if a fundamental procedural deficiency is established, but a board may exceptionally refrain from doing so if there are special reasons not to (see also "Case Law of the Boards of Appeal of the European Patent Office" (in the following "Case Law"), EPO, 9th edition 2019, V.A. 7.7.1 and V.A.7.7.2). When exercising its discretion under Article 111(1), second sentence, EPC, the board should take account of the particular circumstances of the case and the parties' wishes (see also Case Law,

V.A.7.2.1, V.A.7.3.4 and V.A.7.7.1).

- 4.4 According to Rule 111(2) EPC, decisions of the European Patent Office which are open to appeal must be reasoned.

It is a well-established principle that Article 113(1) EPC not only enshrines a party's right to be heard before a decision is issued against it, but also guarantees its right to have the relevant grounds fully taken into account in the written decision. However, this principle is not without limitation (see e.g. decisions R 19/10, Reasons, point 6.2, and R 12/09, Reasons, point 11). The opposition division is not required to address a party's each and every argument (see decisions R 19/10, Reasons, point 6.2, and R 17/11, Reasons, point 4), provided the party concerned can objectively understand whether or not the decision was justified.

In this respect, the decision under appeal should contain at least some motivation on crucial points of dispute, in order to give the party concerned a fair idea of why its submissions were not considered convincing and to enable it to base its grounds of appeal on relevant issues (see Case Law, III.B.2.4.2).

- 4.5 As regards the reasoning of the contested decision relating to the ground for opposition under Article 100(c) EPC 1973, the board notes that the decision under appeal contains a summary of the appellant's first-instance submissions relating to features A, B and D and to the combination of features F, I and D of claim 1 as granted (see first sentence of each of points 19.1 to 19.4 of the reasons of the decision), and also reasoning as to why the opposition

division did not consider each of these submissions to be convincing. In particular, the opposition division referred to page 6, last paragraph, and page 22, lines 11 to 21, and lines 16 and 17, and also to Figs. 15 and 19, of the application as originally filed and gave reasons why the claimed features A, B and D were based thereon (see second to last of the sentences of each of points 19.1 to 19.3 of the reasons). In addition, contrary to the appellant's submissions, the appellant's objections relating to features A, B and D were taken into account by the opposition division in its decision not only individually for each of the features, but also in respect of their combination, because features B and D refer explicitly to the "one or more CPUs" defined in feature A and the reasons given in the decision addressed the "one or more CPUs" in connection with the 2-D images mentioned in features B and D and also in connection with the projectors defined in feature B and subsequently mentioned in feature D (see points 19.1 to 19.3 of the reasons for the decision).

- 4.5.1 In view of these considerations, the board is of the opinion that the decision under appeal does contain arguments as to why the opposition division considered that none of the appellant's submissions regarding the ground for opposition under Article 100(c) EPC 1973 and relating to features A, B and D of claim 1 as granted and to their combination were convincing, and that these arguments constitute - irrespective of whether they are, in substance, persuasive or not - sufficient reasons within the meaning of Rule 111(2) EPC.

In addition, although the reasons for the decision did not explicitly mention independent claim 15 as granted, it is apparent that the same reasoning presented by the

opposition division in respect of claim 1 as granted also applied to independent method claim 15 as granted because, as acknowledged by the appellant, the same objections raised in respect of the features of the system defined in claim 1 as granted were raised in respect of the corresponding steps of the method defined in independent claim 15 as granted.

4.5.2 The board is therefore of the opinion that the contested decision, as far as it relates to the appellant's submissions concerning the ground for opposition under Article 100(c) EPC 1973 in respect of the patent as granted, is sufficiently reasoned within the meaning of Rule 111(2) EPC.

4.6 As a result, the opposition division's finding on the ground for opposition under Article 100(c) EPC 1973 could be dealt with by the parties on appeal and reviewed by the board. One of the issues which have already been the subject of the contested decision and the parties' appeal cases could thus finally be disposed of.

This also means that, even if the decision under appeal were not sufficiently reasoned with regard to the remaining grounds for opposition as submitted by the appellant, these other alleged substantial procedural violations in the first-instance proceedings could not have affected the entire decision-making process and the entire reasoning underlying the decision, and consequently no fundamental deficiency within the meaning of Article 11, second sentence, RPBA 2020 is apparent in the first-instance proceedings. There are thus no special reasons within the meaning of Article 11, first sentence, RPBA 2020 that would justify immediate remittal of the case to the department of

first instance. In these circumstances, there is no need to address the question of whether the contested decision was sufficiently reasoned in respect of the remaining grounds for opposition before the ground for opposition under Article 100(c) EPC 1973 is addressed in substance and decided upon by the board.

- 4.7 For the above reasons, the board saw no need to immediately remit the case at hand to the opposition division.
5. *Patent as granted - ground for opposition under Article 100(c) EPC 1973*
- 5.1 With its statement of grounds of appeal, the appellant submitted with respect to feature D of claim 1 as granted that, while the feature was based, as held by the opposition division in its decision, on the passage on page 6, lines 34 to 36, of the application as filed, specifically involving "ray-tracing [...] through the screen to the viewer positions", feature D only required "raytracing [...] with respect to the display screen", without consideration of the viewer positions. However, the viewer positions could not be omitted. In addition, ray-tracing "with respect to" the screen could cover arrangements where the rays are reflected by the screen, and it only required the ray-tracing to take the screen somehow into consideration without actually reaching it, for instance by using the screen as a reference for determining the position of the three-dimensional objects in the 3-D dataset.
- 5.1.1 The board notes that claim 1 as granted is directed to a 3-D display system in which a plurality of image projectors project a respective 2-D image on a display screen (features B, C, E), resulting in a 3-D image

being viewed by the viewer(s) positioned in front of the screen (features F to K). According to feature D, the 2-D images to be projected are generated by "raytracing" from a position of each of the projectors through a 3-D dataset "with respect to the display screen and performing inverted hidden line removal".

Ray-tracing image generation is disclosed in the paragraph bridging pages 6 and 7 of the application as originally filed according to which a projector image is rendered "by ray-tracing through the 3D dataset from the projector position through the screen to the viewer positions [...]. This algorithm requires inverted hidden line removal [...].". However, feature D of claim 1 as granted only requires carrying out the operation of ray-tracing "with respect to the display screen", and this operation can be carried out with respect to, for instance, the position of the screen, without necessarily involving ray-tracing "through the screen" as disclosed in the application as filed, and therefore without necessarily involving the generation of the 2-D images taking into account the technical features of the screen itself (see, for instance, the diffusing characteristics of the screen defined in feature H). In addition, the expression "to the viewer positions" has been omitted in feature D, such that the ray-tracing operation defined in the claim can be carried out with respect to an unspecified point or an unspecified set of points, and in particular with respect to a plurality of points located in front of the screen, but not necessarily corresponding to the position(s) of the viewer referred to in the claim (features J and K) or to the viewer positions mentioned in the description (see, for instance, page 6, lines 34 to 36) and represented in the figures (see, for instance, Fig. 19).

For these reasons, in the board's opinion feature D constitutes an intermediate generalisation of the ray-tracing image generation operation disclosed in the paragraph bridging pages 6 and 7 of the application as originally filed that cannot be directly and unambiguously derived from the content of the application as filed.

- 5.1.2 The respondent submitted that according to decision G 2/10 the correct assessment under Article 100(c) EPC was whether, given the technical information derivable by the skilled person using common general knowledge and including implicit features, the amendment added new technical information, that is, whether there had been a change in technical information compared to that which the skilled person could derive from the application as filed as a whole. The original technical content also included Fig. 19, which illustrated the ray-tracing from the projector positions. In addition, feature D of claim 1 as granted was to be understood in the context of the remaining claimed features, and in particular of feature E. Therefore, the skilled person would understand the expression "with respect to the display screen" to mean that no ray-tracing was done for rays which did not strike the screen and that ray-tracing had to be done for rays that did strike the screen, and thus through the screen and to the viewer positions. Thus, in view of the claimed subject-matter as a whole, and in particular of feature E together with features F to I, the features "through the screen" and "to the viewer positions" were already implicit in claim 1 as granted and the skilled person would interpret these features as being present in claim 1. The skilled person would therefore not be presented with new technical information.

However, the board does not find any of these arguments convincing. Fig. 19 is a representation of a system constituted by a plurality of projectors and a display screen, and of rays connecting the projectors and the viewer positions through the screen. Moreover, according to the description as originally filed (page 6, lines 30 and 31, and page 22, lines 18 and 19), the figure illustrates the ray-tracing algorithm from the projector's point of view disclosed on page 6, line 34, to page 7, line 5. Therefore, Fig. 19 also requires the ray-tracing operation referred to on page 6, line 34, to page 7, line 5, to be carried out through the screen and to the viewer positions, and it does not constitute a basis for omitting these features in feature D of claim 1 as granted. In addition, while the ray-tracing operation defined in feature D relates to how the 2-D images to be projected by the projectors are generated by the CPUs from a 3-D dataset, features E to I relate to the characteristics of the generated 2-D images projected by the projectors on the screen and to the projection characteristics of the screen, and these features do not imply that the generation of the 2-D images by the CPUs (feature D) would necessarily involve ray-tracing through the screen to the viewer positions as disclosed on page 6, line 34, to page 7, line 5. Therefore, contrary to the respondent's submissions, the claimed combination of features does not necessarily or implicitly imply that the ray-tracing operation defined in feature D is carried out through the screen and to the viewer positions.

As regards the respondent's submissions relating to the test to be applied in the assessment of whether an amendment extends beyond the content of the application as filed and the reference to decision G 2/10, the

board notes that according to this decision the test mentioned is whether the amendment "results in the skilled person being presented with technical information which he would not derive directly and unambiguously, using common general knowledge, from the application as filed" (point 4.5.1 of the reasons, second paragraph). Although the decision mentioned concerned the specific case of amending a claim by disclaiming subject-matter disclosed as part of the invention in the application as filed, the test mentioned is also applicable to any other amendment (point 4.5.1 of the reasons, second paragraph, first sentence). In the present case, the skilled person, when reading claim 1 as granted, is presented with new technical information, namely that the generation of the 2-D images by ray-tracing does not necessarily involve the ray-tracing operation being carried out through the screen to the viewer positions (see point 3.1.1 above, second paragraph). As already noted above (see the previous paragraph, together with point 3.1.1 above, second paragraph), this technical information is not directly and unambiguously derivable from the content of the application as filed. Therefore, the respondent's submissions in this respect are also not found persuasive by the board.

5.1.3 It follows that claim 1 as granted constitutes an unallowable intermediate generalisation of the content of the application as filed and that, therefore, the ground for opposition under Article 100(c) EPC 1973 prejudices the maintenance of the patent as granted.

6. *Respondent's first auxiliary request - admittance under Article 13(2) RPBA 2020*

- 6.1 The amended claims of the first auxiliary request were submitted by the respondent after notification of the summons to oral proceedings. Therefore, the first auxiliary request constitutes an amendment to the respondent's appeal case within the meaning of Article 13(2) RPBA 2020 (which applies in the present case in accordance with Article 25(1) and (3) RPBA 2020). In addition, according to Article 13(2) RPBA 2020 such an amendment to the respondent's case is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 6.1.1 In the present case, the feature corresponding to feature D of claim 1 as granted was amended in claim 1 of the first auxiliary request in response to the objection raised by the appellant in the statement of grounds of appeal (see point 4.1 above) in respect of feature D of claim 1 as granted and addressed in point 4.1 above. Therefore, the claims of the present first auxiliary request could already have been submitted in response to the statement of grounds of appeal.
- 6.1.2 The respondent argued in this respect that amended claim 1 of the first auxiliary request was in direct response to the comments expressed by the board in the communication annexed to the summons. The specific objection raised by the appellant in respect of feature D of claim 1 as granted and addressed in point 3 above was raised for the first time in the statement of grounds of appeal in an unclear way, in particular interrelated with other objections under Article 100(c) EPC and also with the allegations of a substantial procedural violation. The first auxiliary request was filed in response to the board highlighting the objection in its communication and isolating it from

the context in which it was presented by the appellant in the statement of grounds of appeal.

The board, however, cannot accept the respondent's arguments in this respect. As submitted by the appellant, feature D of claim 1 as granted was addressed in the statement of grounds of appeal in several respects, and in particular in respect of the alleged procedural violation (see point 3.1 above) and in respect of the submissions relating to the substantive conclusions of the decision under appeal in connection with objections raised in the context of the ground for opposition under Article 100(c) EPC with respect to feature D alone and to feature D in combination with the remaining claimed features. The specific objection addressed in point 3 above was raised in the statement of grounds of appeal:

- in a specific and clearly identifiable way on page 5/49, penultimate paragraph, under the heading "No basis for 'with respect to the display screen'", this paragraph pertaining to section "1.3" of the statement of grounds of appeal entitled "Statement of the Grounds of Appeal concerning the conclusions of the Decision", and

- subsequently addressed again in a clearly identifiable way and in more detail on page 17/49, fourth to eighth paragraphs, these paragraphs pertaining to section "3.1" of the statement of grounds of appeal entitled "Arguments in support of added subject-matter objection 100 (c) EPC", the last of these paragraphs reading "Opponent submits that the objections based on the 'with respect to' and 'viewer positions' feature (its omission) are highly relevant [...].".

In particular, the objection under consideration was raised in the two aforementioned passages of the statement of grounds of appeal as an objection distinct from the remaining submissions on Article 100(c) EPC and without connection with the appellant's submissions on the substantial procedural violation alleged in a different section of the statement of grounds of appeal, namely in section "1." on pages 2/49 to 4/49 entitled "Arguments concerning the substantial procedural violation".

In addition, in its communication under Article 15(1) RPBA 2020, the board only referred to the submissions made by the appellant in support of the objection under consideration and expressed the preliminary opinion that the ground for opposition under Article 100(c) EPC 1973 would prejudice the maintenance of the patent as granted (see point 2.1.1 of the communication), without however introducing any new element that would have justified filing, in response thereto, the claims of the first auxiliary request.

In these circumstances, and given that the claims of the present first auxiliary request could already have been submitted in response to the statement of grounds of appeal, the board - in agreement with the appellant - cannot identify in the respondent's submissions any exceptional circumstance justified by cogent reasons that would support the exercise of the board's discretion under Article 13(2) RPBA 2020 in favour of admitting the first auxiliary request into the appeal procedure.

- 6.1.3 In view of the above considerations, the board exercised its discretion under 13(2) RPBA 2020 and

decided not to take account of the first auxiliary request in the appeal proceedings.

7. In view of the above, the decision under appeal must be set aside and the contested patent must be revoked in accordance with Article 101(2), first sentence, EPC.
8. *Appellant's first auxiliary request for remittal of the case to the opposition division for further prosecution*

As already noted in point 4.7 above, immediate remittal of the case to the opposition division under Article 11 RPBA 2020 is not justified in the present case.

However, the decision under appeal must be set aside and the contested patent must be revoked (see point 7 above).

In these circumstances, irrespective of whether the appellant's allegations that the decision under appeal was not sufficiently reasoned in respect of the grounds for opposition under Article 100(a) and (b) EPC 1973 would have been found persuasive by the board and would have justified a remittal under Article 111(1) EPC 1973, the appellant's first auxiliary request for remittal of the case is devoid of purpose. Therefore, the appellant's first auxiliary request that the case be remitted to the opposition division is irrelevant.

9. *Request for reimbursement of the appeal fee under Rule 103(1) (a) EPC*

The appellant requested the reimbursement of the appeal fee in view of the allegation that the decision under appeal was not sufficiently reasoned and was therefore tainted by a substantial procedural violation (see point 4.1 above).

The board notes that the appeal is allowable (see point 7 above) and, therefore, the first requirement of Rule 103(1)(a) EPC is fulfilled. However, a refund of the appeal fee in this case is not equitable within the meaning of Rule 103(1)(a) EPC. Even in the event that the decision under appeal were tainted by a substantial procedural violation due to the decision not being sufficiently reasoned in respect of one of the grounds for opposition under Article 100(a) and (b) EPC as alleged by the appellant (see point 3.1 above), reimbursement of the appeal fee would not be equitable in the circumstances of this case because there is no causal link between the alleged substantial procedural violations and the need for filing an appeal (see in this respect "Case Law", section V.A.9.7.1). It is clear from the parties' submissions and the minutes of the oral proceedings before the opposition division that all objections regarding the grounds for opposition under Article 100(a), (b) and (c) EPC 1973 were discussed during the oral proceedings. However, these objections obviously did not convince the opposition division. Therefore, the appellant would in any case - in particular, if the whole decision had been sufficiently reasoned - have had to file an appeal if the appellant wanted the decision to be reversed by the board. Therefore, even though the decision may not have taken account of all the appellant's arguments in respect of the grounds for opposition under Article 100(a) and (b) EPC 1973, the alleged lack of reasoning ultimately would not have influenced the outcome of the proceedings.

In view of these considerations, the request for reimbursement of the appeal fee must be refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



H. Jenney

R. Bekkering

Decision electronically authenticated