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**Datasheet for the decision  
of 2 December 2021**

**Case Number:** T 0441/18 - 3.2.08

**Application Number:** 09796208.8

**Publication Number:** 2358309

**IPC:** A61F2/30

**Language of the proceedings:** EN

**Title of invention:**

TRUSS IMPLANT

**Patent Proprietor:**

4-web, Inc.

**Opponent:**

Aesculap AG

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)

RPBA 2020 Art. 13(2)

**Keyword:**

Main request - added subject-matter (yes)

Auxiliary requests 1, 3, 5, 7, 9, 11 and 13 - amendment after summons - taken into account (no)

Auxiliary requests 2, 4, 6, 8, 10 and 12 - added subject-matter (yes)

**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 0441/18 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 2 December 2021**

**Appellant:** 4-web, Inc.  
(Patent Proprietor) 6629 Whispering Woods Court  
Plano, Texas 75024 (US)

**Representative:** Bardehle Pagenberg Partnerschaft mbB  
Patentanwälte Rechtsanwälte  
Prinzregentenplatz 7  
81675 München (DE)

**Respondent:** Aesculap AG  
(Opponent) Am Aesculap-Platz  
78532 Tuttlingen/Donau (DE)

**Representative:** Winter, Brandl - Partnerschaft mbB  
Alois-Steinecker-Straße 22  
85354 Freising (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 15 December  
2017 revoking European patent No. 2358309  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairwoman** P. Acton  
**Members:** M. Olapinski  
C. Schmidt

## Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietor against the opposition division's decision of 15 December 2017 to revoke the patent in suit.
- II. Oral proceedings by videoconference took place before the Board on 2 December 2021.
- III. The appellant requested that the decision under appeal be set aside and that the patent be maintained either on the basis of the main request or one of auxiliary requests 1 to 13, all re-filed with the letter dated 29 November 2021.
- IV. The respondent (opponent) requested that the appeal be dismissed.
- V. Claim 1 of the main request reads (with feature denominations by the Board):

"[A] An implant (100,1800) for interfacing with a bone structure,

*characterised in that*

[B] the implant comprises: a web structure (101) comprising:

[C] an internal truss structure (104) that is enclosed by an external truss structure (105), wherein

[D] the internal truss structure (104) comprises a space truss defined by a plurality of planar truss units (106) having a plurality of struts joined at nodes, and wherein the planar truss units of the internal truss structure are coupled at an angle with respect to one another such that each of the truss units is not coplanar with each adjacent truss unit,

[E] wherein the web structure extends through a central portion of the implant,

[F] wherein the external truss structure (105) is formed by a plurality of planar truss units being arranged in a series with an angle relative to one another to form an enclosure having vertical walls defined by the planar truss units of the external truss structure arranged in a vertical direction from a bottom surface of the implant toward a top surface of the implant;

[G] wherein the web structure is configured to interface with the bone structure."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request by the following marked-up amendments to Feature F:

"[F-1] wherein the external truss structure (105) is formed by a plurality of planar trusses~~es~~ ~~units~~ being arranged in a series with an angle relative to one another to form an generally circular or polygon shaped enclosure having substantially vertical walls defined by the planar trusses and planar truss units of the external truss structure arranged in a vertical direction from a bottom surface of the implant toward a top surface of the implant;"

Claim 1 of auxiliary request 2 differs from claim 1 of the main request by the replacement of Feature F with the following feature:

"[F-2] wherein the external truss structure (105) comprises one or more planar truss units, the one or more planar truss units of the external truss structure comprising two or more adjacent planar truss units that lie in substantially the same plane, and".

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 by the following marked-up amendments to Feature F-2:

"**[F-3]** wherein the external truss structure (105) comprises one or more planar trusses~~es~~ units, the one or more planar trusses~~es~~ units of the external truss structure comprising two or more adjacent planar truss units that lie in substantially the same plane, and".

Claim 1 of auxiliary request 4 differs from claim 1 of the main request by the replacement of Feature F with the following feature:

"**[F-4]** wherein the external truss structure (105) is formed by a plurality of planar truss units, and wherein the external truss structure (105) includes a top portion (111), a bottom portion (112) and a side portion (113), wherein the side portion (113) is formed by a plurality of planar truss units arranged vertically to form a circular or polygon ring-like structure that surrounds the perimeter of the internal truss structure;"

Claim 1 of auxiliary request 5 differs from that of auxiliary request 4 by the following marked-up amendments to Feature F-4:

"**[F-5]** wherein the external truss structure (105) is formed by a plurality of planar trusses~~es~~ units, and wherein the external truss structure (105) includes a top portion (111), a bottom portion (112) and a side portion (113), wherein the side portion (113) is formed by a plurality of planar trusses~~es~~ units arranged vertically to form a circular or polygon ring-like

structure that surrounds the perimeter of the internal truss structure;"

Claim 1 of auxiliary requests 6 differs from claim 1 of the main request by the following marked-up amendments to Feature F:

"**[F-6]** wherein the external truss structure (105) is formed by a plurality of planar truss units, and wherein the external truss structure (105) includes a top portion (111), a bottom portion (112) and a side portion (113), wherein the side portion (113) is formed by a plurality of planar truss units being arranged in a series with an angle relative to one another to form an enclosure having vertical walls defined by the planar truss units of the external truss structure arranged in a vertical direction from a bottom surface of the implant toward a top surface of the implant;"

Claim 1 of auxiliary request 7 differs from that of auxiliary request 6 by the following marked-up amendments to Feature F-6:

"**[F-7]** wherein the external truss structure (105) is formed by a plurality of planar trusses ~~units~~, and wherein the external truss structure (105) includes a top portion (111), a bottom portion (112) and a side portion (113), wherein the side portion (113) is formed by a plurality of planar trusses ~~units~~ being arranged in a series with an angle relative to one another to form ~~an~~ a generally circular or polygon shaped enclosure having substantially vertical walls defined by the planar trusses and planar truss units of the external truss structure arranged in a vertical direction from a bottom surface of the implant toward a top surface of the implant;"

Claim 1 of auxiliary requests 8 differs from claim 1 of auxiliary request 6 by the following additional feature inserted at the end of Feature F-6:

"**F-6a**] wherein the external truss structure encompasses the sides, top and bottom of the internal truss structure".

Claim 1 of auxiliary request 9 differs from claim 1 of auxiliary request 8 by the replacement of Feature F-6 with Feature **F-7**.

Claim 1 of auxiliary requests 10 differs from claim 1 of auxiliary request 6 by the following additional feature inserted after Feature F-6:

"**F-6b**] wherein top portion (111) of external truss structure (105) includes a plurality of truss units coupled to one another to form a planar truss that spans entirely the region between top edges of the side portion 113 of external truss structure 105;"

Claim 1 of auxiliary request 11 differs from claim 1 of auxiliary request 10 by the replacement of Feature F-6 with Feature **F-7**.

Claim 1 of auxiliary requests 12 differs from claim 1 of auxiliary request 10 by the following additional feature inserted after Feature [F-6b]:

"**F-6c**] wherein bottom portion (112) of external truss structure (105) includes a plurality of truss units coupled to one another to form a planar truss that spans entirely the region between bottom edges of the side portion 113 of external truss structure 105;"



Claim 1 of auxiliary request 13 differs from claim 1 of auxiliary request 10 by the replacement of Feature F-6 with Feature **F-7**.

VI. The appellant's (patent proprietor's) arguments can be summarised as follows.

*Main request*

Feature F of claim 1 was derived from page 9, lines 1 to 4 of the application as filed, in which the term "planar trusses" was replaced with "planar truss units". The application as filed contained very broad generic definitions of the terms "truss", "truss unit", "planar truss" and "planar truss unit" (page 6, lines 15 to 26), according to which there was no difference in content between a truss and a truss unit. The planar trusses 107a,b of Figure 1A thus also represented "planar truss units". Hence, the above-mentioned replacement was merely a change in name, not in content.

*Auxiliary requests 1, 3, 5, 7, 9, 11 and 13*

The new auxiliary requests were filed as a reaction to the Board's communication. They contained straightforward amendments that resolved the issues raised in the communication without leading to new issues or affecting procedural efficiency. They merely clarified the understanding of the claims, *inter alia*, by returning to the wording of the claims underlying the appealed decision. Hence, they did not create a fresh case.

Moreover, the respondent had raised a lot of objections under Articles 84, 123(2) and 123(3) EPC. It would not be equitable and would be detrimental to the procedural efficiency if the appellant had to react by filing requests with all the permutations of amendments to address these issues at once. Taken together with the simple, unobtrusive nature of the amendments, the new auxiliary requests thus had to be admitted.

*Auxiliary request 2*

Claim 1 was based on claim 1 as originally filed with additional features taken from the description. Feature D defined details of the internal truss structure taken from page 8, lines 8 to 12 describing the embodiment of Figure 1A. Feature F-2 specified the external truss structure based on page 2, lines 10-12, where the term "planar trusses" had been replaced with "planar truss units". The details of the internal and external truss structures were independent and thus not inextricably linked with each other. Therefore, the combination of Feature D from the detailed description of the embodiment of Figure 1A with Feature F-2 from the general part of the description did not extend beyond the content of the application as filed.

*Auxiliary request 4*

Feature F-4 was derived from page 9, lines 5 to 11 in which "planar trusses" had been replaced with "planar truss units". Since Feature F-4 did not specify an angled arrangement but a vertical orientation of the side walls of the external truss structure, claim 1 overcame the objections against the preceding requests.

The embodiment of page 9, lines 5 to 11 did not require a subdivision of the planar trusses of the side region of the external truss structure. In addition, the subdivision of the planar trusses 107a,b shown in Figure 1A and described on page 8, lines 15 to 23 was only an implementation detail not inextricably linked with the arrangement of vertical side walls according to Feature F-4. According to page 7, lines 29 to 33, the function of the external truss structure was to "provide support against tensile and compressive forces acting vertically", whereas tensile, compressive and shear forces acting in other directions were taken up by the internal web structure. Thus, the only essential feature of the side portion of the external truss structure was that it had vertical struts. Moreover, Figure 1A disclosed at least two planar trusses of the external truss structure without any substructure (above reference sign 103a and below reference sign 403 in Figure 1A). Hence, the omission of the subdivision of the vertical walls of the side portion in claim 1 did not infringe Article 123(2) EPC.

*Auxiliary requests 6, 8, 10 and 12*

The same arguments as for the preceding requests applied.

VII. The respondent (opponent) argued essentially as follows.

*Main request*

There was no basis in the application as filed for replacing the term "planar trusses" on page 9, lines 1 to 4 with "planar truss units". This passage related to the embodiment of Figure 1A, in which the terms had a

more specific meaning than according to their generic definition on page 6.

In the embodiment of Figure 1A, each planar truss 107a,b of the external truss structure included a plurality of planar truss units 108 that lay substantially in the same plane (page 8, lines 17 to 18). In contrast, Feature F specified that all planar truss units were angled relative to one another. This extended beyond the content of the application as filed.

*Auxiliary requests 1, 3, 5, 7, 9, 11 and 13*

The new auxiliary requests represented an amendment to the appellant's appeal case made after the summons and should not be admitted under Article 13(2) RPBA 2020.

*Auxiliary request 2*

There was no basis in the application as filed for replacing "planar trusses" with "planar truss units" in the disclosure of page 2, lines 10 to 12. Hence, Feature F-2 extended beyond the content of the application as filed. Furthermore, Feature D was taken from the embodiment of Figure 1A. This embodiment also disclosed a more specific external truss structure forming an enclosure of vertical walls around the internal truss structure (page 8, line 29 to page 9, line 11). At least the omission of the vertical orientation of the planar truss units of the external truss structure in claim 1 thus represented an unallowable intermediate generalisation of the content of the application as filed.

*Auxiliary request 4*

Feature F-4 was based on a different passage than Feature F of the main request, but both passages related to the same embodiment of Figure 1A. Feature F-4 did not require an angled arrangement of the side walls of the external truss structure but still did not define a plurality of planar truss units lying in the same plane as disclosed on page 8, lines 17 to 18. More specifically, claim 1 omitted the essential feature that the vertical walls of the external truss structure of the embodiment of Figure 1A were subdivided into a plurality of triangular planar truss units (page 8, lines 15 to 23). Claim 1 of auxiliary request 4 thus did not meet the requirements of Article 123(2) EPC.

*Auxiliary requests 6, 8, 10 and 12*

Claim 1 of auxiliary requests 6, 8, 10 and 12 specified a side portion of the external truss structure with the same wording as Feature F taken from page 9, lines 1 to 4. The further additional features of claim 1 of these requests did not change the fact that Feature F contained added subject-matter. Hence, auxiliary requests 6, 8, 10 and 12 were also not allowable for the same reasons as argued for the main request.

## **Reasons for the Decision**

### **1. Main request**

- 1.1 According to the appellant, Feature F of claim 1 is derived from page 9, lines 1 to 4 of the WO publication of the application as filed. The only difference was that the term "planar trusses" had been replaced with "planar truss units", with the reference to "the planar

trusses and the planar truss units" being replaced with a reference to only "the planar truss units".

- 1.2 The appellant argued that these replacements were allowable because the application as filed contained very broad generic definitions both for a "truss" (as "a structure having one or more elongate struts connected at joints referred to as nodes", page 6, lines 15 to 16) and a "truss unit" (as a unit of a truss, where each truss "may include one or more truss units", page 6, lines 18 to 22). Accordingly, a "planar truss" could be represented by a "planar truss unit" and vice versa. As there was no difference in content between these terms, the structures 107a,b in Figure 1A described as "planar trusses" also fell within the generic definition of "planar truss units" according to the application as filed.
- 1.3 As submitted by the appellant, Feature F was taken from page 9, lines 1 to 4. This passage is part of the detailed description of the embodiment of Figures 1A and 1B which starts on page 7, line 26 and ends on page 9, line 20. Page 8, lines 17 to 18 specifies that in this embodiment "each planar truss 107a,b includes a plurality of planar truss units 108 that are coupled to one another and lie substantially in the same plane" (emphasis added). Accordingly, this passage discloses a more specific relationship between the "planar trusses" *of the external truss structure* and their "planar truss units" than according to the generic definition of terminology on page 6.
- 1.4 In this context, the reference to "the" planar trusses and "the" planar truss units on page 9, lines 1 to 4 implies that each planar truss is subdivided into a plurality of "planar truss units".

In contrast, Feature F requires that the external truss structure is formed by a plurality of planar truss units that are (all) "arranged in series with an angle relative to one another". It thus excludes planar truss units lying in the same plane.

1.5 As Feature F is inconsistent with the passage from which it allegedly derives, the subject-matter of claim 1 extends beyond the content of the application as filed. Hence, the main request does not comply with the requirements of Article 123(2) EPC.

**2. Auxiliary requests 1, 3, 5, 7, 9, 11 and 13**

2.1 New auxiliary requests 1, 3, 5, 7, 9, 11 and 13 were filed for the first time on 19 November 2021, after notification of a summons to oral proceedings.

2.2 In accordance with 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".

2.3 The appellant submitted that the new auxiliary requests merely clarified the understanding of the claims, *inter alia*, by returning to the wording of the claims underlying the appealed decision. Hence, they did not create a fresh case.

However, when initially setting out its complete appeal case in the statement of grounds of appeal in accordance with Article 12(3) RPBA 2020, the appellant relied on requests which were amended with respect to

those underlying the appealed decision. Compared to these requests, the new auxiliary requests contain substantive amendments intended to remove added subject-matter. Consequently, the new auxiliary requests represent an amendment to the appellant's appeal case, even if they return to the wording of previous claims.

- 2.4 The appellant submitted that the amendments were a reaction to the Board's communication under Article 15(1) RPBA 2020. However, the objections under Article 123(2) EPC, in particular those due to the replacement of "planar trusses" with "planar truss units", had been raised by the respondent in its reply to the statement of grounds of appeal (pages 12 to 13). The filing of the new auxiliary requests is thus not justified by exceptional circumstances arising from the Board's communication.
- 2.5 The appellant further argued that the amendments were straightforward, solved the issues raised in the Board's communication and did not lead to new issues nor affect procedural efficiency. However, these do not represent "exceptional circumstances", either.
- 2.6 The appellant submitted that the respondent had raised a lot of objections under Articles 84, 123(2) and 123(3) EPC. It argued that it would be inequitable, and detrimental to procedural efficiency, if the patent proprietor had to file requests covering all permutations of potential issues at once. Taken together with the simple, unobtrusive nature of the amendments, the new auxiliary requests thus had to be admitted.



However, it is the responsibility of the patent proprietor to decide on its line of defence by weighing the importance of the attacks of the opponent. The fact that in the case at hand a complete defence might have required a large number of requests is not per se an exceptional circumstance within the meaning of Article 13(2) RPBA 2020. This applies irrespective of whether the nature of the amendments is particularly simple and unobtrusive.

2.7 As no exceptional circumstances were established, the new auxiliary requests 1, 3, 5, 7, 9, 11 and 13 are not taken into account pursuant to Article 13(2) RPBA 2020.

### **3. Auxiliary request 2**

3.1 Claim 1 of auxiliary request 2 is based on claim 1 as filed with additional features taken from the description. Feature D, which defines the details of the internal truss structure, is derived from the detailed description on page 8, lines 8 to 12 on the "illustrated embodiment" in Figure 1A. Feature F-2 defining the composition of the external truss structure is derived from the general description of the invention on page 2, lines 10 to 12 with the difference that the term "planar trusses" has been replaced with "planar truss units".

3.2 Claim 1 no longer specifies that the planar truss units of the external truss structure are *arranged with an angle* relative to one another. It now specifies that one or more of them comprise a plurality of adjacent planar truss units that lie in substantially the same plane. Hence, the issue of added subject-matter for the reasons set out for the main request does not apply to auxiliary request 2.

3.3 However, Figure 1A (on which Feature D is based) displays a more specific external truss structure forming an enclosure of vertical walls around the internal truss structure as described in the passage from page 8, line 29 to page 9, line 11. The omission of the vertical orientation of the planar trusses and planar truss units of the external truss structure in claim 1 represents an unallowable intermediate generalisation of the content of the application as filed.

3.4 The appellant argues that the details of the internal and external truss structures were independent and thus not inextricably linked with each other. Therefore, the combination of Feature D from the detailed description of the embodiment of Figure 1A with Feature F-2 from the general part of the description did not extend beyond the content of the application as originally filed.

However, page 7, lines 26 to 33 explains that the idea behind defining an internal truss structure enclosed by the external truss structure of Figures 1A-1B is to distribute different load conditions between differently specialised structures. The provision of an internal truss structure with non-coplanar adjacent planar truss units (Feature D) is designed to "provide support against tensile, compressive and shear forces along the various planes containing the respective trusses", whereas the external truss structure is specialised to "provide support against tensile and compressive forces acting vertically through the implant". The latter is particularly important in spinal implants as depicted in Figures 1A-2A and 5A-6D (page 6, lines 6 to 11), where large vertical forces

occur. Hence, Feature D is functionally linked with the vertical orientation of the planar trusses forming the enclosure.

As Feature F-2 does not include this limitation, it is not originally disclosed in combination with Feature D but contains an unallowable intermediate generalisation of the embodiment of Figure 1A described on page 7, line 24 to page 9, line 20.

3.5 Consequently, the subject-matter of claim 1 of auxiliary request 2 extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

#### **4. Auxiliary request 4**

4.1 Feature F-4, which replaces Feature F from claim 1 of the main request, specifies that the external truss structure includes a top portion, a bottom portion and a side portion. It further specifies the structure of the side portion. According to the appellant, Feature F-4 is based on page 9, lines 5 to 11, the only difference being that the term "planar trusses" is replaced with "planar truss units".

4.2 The above-cited passage belongs to the description of the embodiment according to Figure 1A.

4.3 Claim 1 of auxiliary request 4 no longer specifies that the planar truss units of the external truss structure are *arranged with an angle* relative to one another, this having led to the objection against the main request reasoned above. It furthermore includes the *vertical orientation* of the planar truss units of the side region of the external truss structure, the

omission of which was considered to infringe Article 123(2) EPC in auxiliary request 2.

4.4 However, claim 1 does not define a subdivision of the planar truss structures of the side portion of the external truss structure with triangular planar truss units as described on page 8, lines 15 to 23.

4.5 The appellant submitted that such a subdivision was not required in view of page 7, lines 29 to 33. According to this passage, the function of the external truss structure was to "provide support against tensile and compressive forces acting vertically", whereas tensile, compressive and shear forces acting in other directions were taken up by the internal web structure. Hence, the only essential feature of the side portion of the external truss structure was that it had vertical struts.

It is true that page 7, lines 29 to 33 conveys the idea of different internal and external truss structures specialised for the functions submitted by the appellant. However, this does not mean that the vertical arrangement of the planar trusses alone was sufficient for providing support against tensile and compressive forces acting vertically through the implant. Stability against vertical forces also requires that the planar trusses are stable against shear. It is well known from the statics of trusses which - as in this case - have pin joints that stability against *in-plane* shear can only be provided by *in-plane* reinforcing structures with oblique struts. Hence, in addition to vertical struts, a subdivision of the planar trusses into a plurality of triangular planar truss units is essential for the function of the

external truss structure according to page 7, lines 29 to 33.

- 4.6 The appellant countered that the embodiment of Figure 1A displayed at least two planar trusses of the external truss structure without such a substructure (one above reference sign 103a, and another on the opposite side across the web structure, below reference sign 403).

Indeed, omitting the substructure in intermediary planar trusses here and there, such as in two out of the ten trusses in Figure 1A, may be tolerable in terms of the stability of the overall side portion against vertical forces. However, this does not mean that the oblique reinforcing struts can be omitted in all planar trusses forming the side portion. It is for this reason that the fourfold subdivision of planar trusses 107a,b with "X"-shaped struts is explicitly disclosed in detail on page 8, lines 17 to 23, shown in all other planar trusses in Figure 1A and displayed in all the figures showing an internal truss structure enclosed by an external truss structure as claimed.

Even the most general disclosure of the invention describes that the planar trusses *of the external truss structure* comprise at least a subdivision into "two or more planar truss units" (page 2, lines 10 to 12; page 2, lines 21 to 23 and claim 5 as filed).

Accordingly, the external truss structure of the embodiment of Figure 1A is only disclosed in combination with a subdivision of its planar trusses into a plurality of triangular planar truss units.

4.7 Such a subdivision is not defined in Feature F-4. Hence, the subject-matter of claim 1 of auxiliary request 4 contains an unallowable intermediate generalisation of the original disclosure and extends beyond the content of the application as filed contrary to the requirements of Article 123(2) EPC.

**5. Auxiliary request 6**

Feature F-6 of auxiliary request 6 defines that the external truss structure includes a top portion, a bottom portion and a side portion, where the side portion is "formed by a plurality of planar truss units being arranged in series with an angle relative to one another [...]".

The definition of additional top and bottom portions does not change or influence the angled arrangement of the truss units of the side portion of the external truss structure.

Hence, Feature F-6 of claim 1 of auxiliary request 6 contains the same inconsistency as the main request between the claimed planar truss units "arranged in series with an angle relative to one another" and the plurality of planar truss units lying "substantially in the same plane" according to page 8, lines 17 to 18.

Accordingly, the subject-matter of claim 1 of auxiliary request 6 does not fulfil the requirements of Article 123(2) EPC, either.

**6. Auxiliary requests 8, 10 and 12**

Claim 1 of auxiliary requests 8, 10 and 12 also contains Feature F-6 and only differs from claim 1 of

auxiliary request 6 by further features specifying the structure of the top and/or bottom portions of the external truss structure (Features F-6b and F-6c), or by specifying that "the external truss structure encompasses the sides, top and bottom of the internal truss structure" (Feature F-6a).

These additional features have no impact on the definition of the angled arrangement of the truss units of the side portion of the external truss structure according to Feature F-6, which was found to extend beyond the content of the application as filed.

Hence, the subject-matter of claim 1 of auxiliary requests 8, 10 and 12 does not fulfil the requirements of Article 123(2) EPC, either.

## **Order**

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated