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

**Case Number:** T 2752/18 - 3.2.07

**Application Number:** 12182685.3

**Publication Number:** 2565126

**IPC:** B65C9/00, B67C3/22

**Language of the proceedings:** EN

**Title of invention:**

Operating machine

**Applicant:**

PROMECC S.R.L.

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)

RPBA Art. 12(4)

**Keyword:**

Late-filed requests - requests could have been filed in  
examination proceedings (yes)

**Decisions cited:**

**Catchword:**



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Case Number: T 2752/18 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 6 May 2022**

**Appellant:** PROMEC S.R.L.  
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**Representative:** Karaghiosoff, Giorgio Alessandro  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 8 May 2018  
refusing European patent application No.  
12182685.3 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Beckman  
A. Cano Palmero

## **Summary of Facts and Submissions**

- I. An appeal was filed by the applicant (appellant) in the prescribed form and within the prescribed period against the decision of the examining division refusing European patent application No. 12 182 685.3.
- II. In its decision the examining division found that the then main and sole request did not meet the requirements of Article 123(2) EPC (unallowable amendments).
- III. The appellant requested  
  
that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims submitted with the statement setting out the grounds of appeal as main request and as auxiliary requests I and II.
- IV. The Board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020 that the main request as well as auxiliary requests I and II were likely not to be admitted into the proceedings to which the appellant did not respond in substance.
- V. Oral proceedings before the Board were held on 6 May 2022 at the end of which the decision was announced. For further details of the oral proceedings reference is made to the minutes thereof.
- VI. In view of the decision taken by the Board there is no need to reproduce the independent claim of the main request or of auxiliary requests I and II.

## **Reasons for the Decision**

### *1. Transitional provisions*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) RPBA 2020, instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

### *2. Admittance of the main request and auxiliary requests I and II into the proceedings*

2.1 As acknowledged by the appellant during the oral proceedings before the Board, the main request and auxiliary requests I and II have not been subject of the appealed decision, so their admittance into the proceedings depends on the Board's discretion under Article 12(4) RPBA 2007.

By virtue of Article 12(4) RPBA 2007, a Board has discretion to not admit requests which could and should have been presented already in the proceedings leading to the decision under appeal. For the Board decisive in this respect is the issue whether justifying reasons exist for the filing of such a request only with the statement setting out the grounds of appeal.

2.2 The appellant did not submit any arguments in writing as to why the new main request and the auxiliary requests had not been filed earlier to allow a decision on their allowability by the examining division.

The Board cannot identify any surprising change in the examination proceedings that could have prevented the appellant from filing the main request and the auxiliary requests already in examination proceedings. On the contrary, the examining division had contact with the appellant via telephone consultation and e-mail to address its objections under Article 123(2) EPC already on 13 April 2018 after the then sole request, on which the appealed decision is based, was filed with letter dated 22 March 2018 (see decision under appeal, point XIII.; minutes of result of telephone consultation dated 26 April 2018, in particular attached e-mail dated 13 April 2018).

Thus, the appellant was aware of the objections under Article 123(2) EPC that led to the refusal of the application in due time after filing the sole request on which the decision under appeal is based. Hence, the appellant could and should have presented additional requests already in examination proceedings in order to overcome these objections with respect to Article 123(2) EPC.

However, instead of filing additional requests to address the objections raised by the examining division with respect to Article 123(2) EPC, the appellant informed the examining division with letter dated 20 April 2018, only four days before the date of the oral proceedings already planned in examination proceedings, that it would not attend the scheduled oral proceedings, withdrew its request for oral proceedings and requested a decision according to the state of the file. Thus, the appellant had deliberately chosen to not defend any other request in examination proceedings, even though it was aware that the

examining division could find its then sole request unallowable.

- 2.3 During the oral proceedings before the Board, the appellant's representative argued that the appellant gave clear instructions in examination proceedings not to file any new requests before the examining division in order to address the known objections raised under Article 123(2) EPC.

The Board cannot accept the appellant's argumentation since it merely confirms that the appellant was clearly aware of the objections under Article 123(2) EPC already in examination proceedings, but let intentionally pass the opportunity in examination proceedings to react thereto by submitting additional requests.

- 2.4 For these reasons, submitting the main request and auxiliary requests I and II for the first time in appeal proceedings is not justified and the Board exercises its discretion to not admit them into the appeal proceedings pursuant to Article 12(4) RPBA 2007.
3. As a consequence, since there is no admissible request relied upon by the appellant, there is no valid set of claims on the basis of which a patent could be granted.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated