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**Datasheet for the decision  
of 4 March 2021**

**Case Number:** T 0013/19 - 3.5.03

**Application Number:** 07793860.3

**Publication Number:** 2050307

**IPC:** H04R25/00

**Language of the proceedings:** EN

**Title of invention:**

Hearing aid, expansion unit and method for manufacturing a hearing aid

**Applicant:**

Exsilent Research B.V.

**Headword:**

Oral proceedings *in absentia*/JILDERDA

**Relevant legal provisions:**

EPC Art. 123(2)  
EPC R. 103(1)(a), 115(2)  
RPBA 2020 Art. 15(3)

**Keyword:**

Oral proceedings - non-attendance of appellant  
Added subject-matter - main and auxiliary requests (yes)  
Reimbursement of the appeal fee - (no): appeal not allowable  
and no procedural violation

**Decisions cited:**

T 0930/92, T 0954/93

**Catchword:**

It is no more than the usual degree of courtesy owed to a Board of Appeal as a court of final appellate jurisdiction that a party's intention not to attend the oral proceedings or any impediment to attendance is communicated as early as possible (see point 1.3 of the Reasons).



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Case Number: T 0013/19 - 3.5.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.03**  
**of 4 March 2021**

**Appellant:** Exsilent Research B.V.  
(Applicant) Waldeck Pymontlaan 20-3  
1075 BX Amsterdam  
NETHERLANDS

**Former Representative:** Ayolt A. Jilderda  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 23 July 2018  
refusing European patent application  
No. 07793860.3 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chair** K. Bengi-Akyürek  
**Members:** K. Peirs  
J. Geschwind

## Summary of Facts and Submissions

I. The appeal is against the decision of the examining division refusing the present European patent application for lack of inventive step (Article 56 EPC) and lack of clarity (Article 84 EPC).

II. The appellant requests that

- the decision under appeal be set aside;
- a patent be granted according to a set of claims as per a **main request**;
- in the alternative, a patent be granted according to a set of claims as per a **first** or a **second auxiliary request**.

Each of the claim requests is identical to the respective requests underlying the decision under appeal.

Moreover, the appellant requests that the appeal fee be reimbursed in view of a substantial procedural violation on the part of the examining division.

Lastly, oral proceedings were requested in the event that the board would dismiss the appeal.

III. In response to the board's communication under Article 15(1) RPBA 2020 (including a negative preliminary opinion), the appellant did not respond in substance.

One week before the date of the oral proceedings, the registrar of the board had contacted the appellant's then representative, enquiring whether the appellant

intended to attend the arranged in-person oral proceedings. The representative indicated orally that he would not be attending the oral proceedings before the board.

IV. Following repeated enquiry by the registrar, a written confirmation was filed by the then representative, on the evening of the second day before the scheduled oral proceedings, stating that he would not attend those oral proceedings because he had resigned from representing the appellant. With that written confirmation, the European Patent Office was also made aware of an alleged "new address of applicant". A new representative was not appointed.

V. Oral proceedings before the board were held on 4 March 2021 *in absentia*. At the end, the board's decision was announced.

VI. Claim 1 of the **main request** reads as follows (the board highlighted some of the changes with respect to original claim 1 by bold-face combined with italics):

"A hearing aid, comprising: a behind-the-ear (BTE) component, comprising a device housing (10) which is adapted to be worn behind an ear of a user and comprises an electric power supply (12); an in-the-ear (ITE) component (20), comprising a sound-emitting opening (22), a microphone (21) and a loudspeaker (23); and a processing device (13) for a purpose of reproducing sound received via the microphone and delivering reproduced sound via the loudspeaker and the sound-emitting opening to an auditory organ of the user, wherein the in-the-ear component is physically separated from the behind-the-ear component, and wherein said in-the-ear

component and said behind-the-ear component are mutually connected via an electrical cord connection (30) which, at least during operation, establishes an electronic connection between the behind-the-ear component and the in-the-ear component, characterized in that said in-the-ear component (20) is configured and adapted to be received **completely recessed** in the ear canal of the user allowing the loudspeaker (23) as well as the microphone (21) **to be accommodated recessed** in the ear canal of the user, in that said electrical cable connection (30) has a length which allows the in-the-ear component and the microphone to reside **completely recessed** in the ear canal of the user; and in that said processing device is a programmable digital sound processor (13) which reproduces said sound in at least partly processed manner."

VII. Claim 1 of the **first auxiliary request** reads as follows (the board adopted the same highlights by bold-face combined with italics as for claim 1 of the main request; amendments vis-à-vis claim 1 of the main request are indicated by the board using underlining for added text and bold-face combined with strike-through for deleted text):

"A hearing aid, comprising: a behind-the-ear (BTE) component, comprising a device housing (10) which is adapted to be worn behind an ear of a user and comprises an electric power supply (12); an in-the-ear (ITE) component (20), comprising a sound-emitting opening (22), a microphone (21) and a loudspeaker (23); and a processing device (13) for a purpose of reproducing sound received via the microphone and delivering reproduced sound via the loudspeaker and the sound-emitting opening to an auditory organ of the

user, wherein the in-the-ear component is physically separated from the behind-the-ear component, and wherein said in-the-ear component and said behind-the-ear component are mutually connected via an electrical cord connection (30) which, at least during operation, establishes an electronic connection between the behind-the-ear component and the in-the-ear component, characterized in that said in-the-ear component (20) is configured and adapted to be received **completely recessed** in the ear canal of the user allowing the loudspeaker (23) as well as the microphone (21) **to be accommodated recessed** in the ear canal of the user, in that said electrical cable connection (30) has a length which allows the in-the-ear component and the microphone to reside **completely recessed** in the ear canal of the user; **and** in that said processing device is a programmable digital sound processor (13) which reproduces said sound in at least partly processed manner; in that said in-the-ear component (20) is releasably fitted in a separate outer casing (25,26), and in that said outer casing (25,26) is manufactured from a relatively soft, bio-compatible plastic which is able to adjust itself to the natural anatomy of the ear under the influence of the body temperature of the wearer for lying resiliently against the wall of the auditory canal while at least practically sealing acoustically all around".

VIII. Claim 1 of the **second auxiliary request** reads as follows (the board adopted the same highlights by bold-face combined with italics as for claim 1 of the main request; amendments vis-à-vis claim 1 of the main request are indicated by the board using underlining for added text and bold-face combined with strike-through for deleted text):

"A hearing aid, comprising: a behind-the-ear (BTE) component, comprising a device housing (10) which is adapted to be worn behind an ear of a user and comprises an electric power supply (12); an in-the-ear (ITE) component (20), comprising a sound-emitting opening (22), a microphone (21) and a loudspeaker (23); and a processing device (13) for a purpose of reproducing sound received via the microphone and delivering reproduced sound via the loudspeaker and the sound-emitting opening to an auditory organ of the user, wherein the in-the-ear component is physically separated from the behind-the-ear component, and wherein said in-the-ear component and said behind-the-ear component are mutually connected via an electrical cord connection (30) which, at least during operation, establishes an electronic connection between the behind-the-ear component and the in-the-ear component, characterized in that said in-the-ear component (20) is configured and adapted to be received **completely recessed** in the ear canal of the user allowing the loudspeaker (23) as well as the microphone (21) **to be accommodated recessed** in the ear canal of the user, in that said electrical cable connection (30) has a length which allows the in-the-ear component and the microphone to reside **completely recessed** in the ear canal of the user; **and** in that said processing device is a programmable digital sound processor (13) which reproduces said sound in at least partly processed manner; in that said in-the-ear component (20) is releasably fitted in a separate outer casing (25,26), and in that said outer casing comprises at least one flexible fin for lying resiliently against the wall of the auditory canal."



## Reasons for the Decision

### 1. *Procedural matters*

1.1 The appellant having been duly summoned, the oral proceedings were held *in absentia* pursuant to Rule 115(2) EPC and Article 15(3) RPBA 2020.

1.2 As stated in point III above, the appellant's then representative informed the board at a very late stage that he would not be attending the arranged oral proceedings because he had resigned from representing the appellant. While it is not uncommon for a party not to appear at oral proceedings, the registry of the competent board is usually given notice well in advance of the oral proceedings.

It may have happened that the former representative became aware of the termination of his representation for the current case only *in extremis*. However, this seems to be unlikely, given that, from the file, it is apparent that the automatic debit order referring to the deposit account held by the representative's law firm was already revoked on 27 July 2020, upon the representative's request.

1.3 In any case, it is no more than the usual degree of courtesy owed to a Board of Appeal as a court of final appellate jurisdiction that a party's intention not to attend the oral proceedings or any impediment to attendance is communicated as early as possible.

If a representative is able to do so only when oral proceedings are already imminent, the courtesy requirement enshrined in Article 6 of the Code of Conduct of the Institute of Professional

Representatives before the European Patent Office ("epi Code of Conduct"; cf. OJ EPO 2020, Supplementary publication 1) should have provided the representative with ample motivation to inform the registry promptly. Instead, the representative merely contented himself with remaining silent until he was contacted by the registrar and even then only filed a corresponding written confirmation after repeated enquiry.

The written confirmation being filed at an unreasonably late stage, the board became aware of an alleged change of the applicant's status *de facto* only one day before the oral proceedings, which prevented the registry from establishing whether or not that alleged new applicant - or a new representative - would be attending the oral proceedings instead. This necessitated the board to prepare for the oral proceedings and to wait courteously on the day of the oral proceedings in the event that someone would appear on behalf of the appellant - despite the well-known risks associated with the current Covid 19 pandemic.

1.4 It is lamentable that the present board is hence compelled to refer to the statement of T 954/93 (cf. Reasons, point 2) and to recall that such conduct is reprehensible (see also T 930/92, Headnote I).

2. *Main request: claim 1 - added subject-matter (Article 123(2) EPC)*

2.1 Claim 1 of the **main request** seems to be based in part on original claim 1 together with page 14, line 26 to page 15, line 30 and Figures 1, 4 and 5 of the application as filed, i.e. the international application as published. However, it suffers from severe deficiencies regarding added subject-matter for

the following reasons.

- 2.2 There is no direct and unambiguous basis in the application as filed for the phrases "completely recessed" and "to be accommodated recessed" as highlighted with bold-face and italics in the text of claim 1 reproduced in point V above.

While the first paragraph of page 4 of the application as filed comprises the expressions "deep microphone" and "placed relatively deeply in the ear", this does not mean that the ITE unit can be completely recessed in the ear canal: the word "deep" is an unspecific term which does not convey the same meaning as the phrase "completely recessed". The latter of the two expressions renders this particularly apparent, in view of the qualifier "relatively" and the reference to the "ear" rather than to the "ear canal".

The original drawings are schematic and on no account provide a direct and unambiguous basis for an ITE unit that is completely recessed in the ear canal.

- 2.3 Consequently, claim 1 of the main request does not comply with Article 123(2) EPC.

3. *First and second auxiliary requests: claim 1 - added subject-matter*

- 3.1 The phrases mentioned above in point 2.2 for claim 1 of the main request are also comprised in claim 1 of the **first and second auxiliary requests** (cf. the board's emphasis with bold-face combined with italics in points VI and VII above).

- 3.2 Hence, the same reasoning as in point 2 above applies and claim 1 of the first and second auxiliary requests does not comply with Article 123(2) EPC either.
4. *Substantial procedural violation - reimbursement of the appeal fee*
- 4.1 The appellant requested in writing the reimbursement of the appeal fee given the long duration of the first-instance proceedings and in view of the fact that the examining division repeatedly introduced relevant prior art during the examination phase.
- 4.2 According to Rule 103(1)(a) EPC, the appeal fee shall only be reimbursed in the event that the board deems the appeal to be allowable, which is not the case here.
- 4.3 Nonetheless, the board considers that no substantial procedural violation occurred in the first-instance proceedings. The board notes that the examining division is at liberty to introduce prior art when it deems this to be expedient (cf. Article 114(1) EPC), in particular when a new set of claims is submitted.
- 4.4 Moreover, as to the long duration of the examination proceedings, a period of nine years may indeed appear excessive, but the board notes that the applicant bears part of the responsibility in this respect: it took the applicant six years to request an acceleration of the examination proceedings, after which the examining division issued communications at a reasonable pace. Instead of replying promptly, the applicant repeatedly requested an extension of the time limit to reply to these communications, thereby causing the greater part of the delay involved in dealing with the file.

4.5 Hence, while the piecemeal way in which the examining division introduced documents and the long duration of the proceedings before it are, indeed, regrettable, the board cannot see how this would result in any procedural violation, let alone a substantial one.

4.6 It follows from the above that the request for reimbursement of the appeal fee must be refused.

## Order

### For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated