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Datasheet for the decision of 28 November 2023

Case Number: T 3278/19 - 3.2.06

Application Number: 14182925.9

Publication Number: 2990516

IPC: D06F58/02, D06F58/20

Language of the proceedings: EN

Title of invention:
Laundry dryer

Patent Proprietor:
Electrolux Appliances Aktiebolag

Opponent:
Whirlpool EMEA S.p.A.

Headword:

Relevant legal provisions:
EPC Art. 100(a), 56, 84, 111(1)
RPBA 2020 Art. 13(2), 11

Keyword:

Grounds for opposition - inventive step (no)
Claims - auxiliary request - conciseness (no)
Amendment after summons - exceptional circumstances (yes)
Appeal decision - remittal to the department of first instance - special reasons for remittal (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 3278/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 28 November 2023

Appellant: (Opponent)	Whirlpool EMEA S.p.A. Via Carlo Pisacane 1 20016 Pero (MI) (IT)
Representative:	PGA S.p.A. Via Mascheroni, 31 20145 Milano (IT)
Respondent: (Patent Proprietor)	Electrolux Appliances Aktiebolag St Göransgatan 143 105 45 Stockholm (SE)
Representative:	Electrolux Group Patents AB Electrolux Group Patents S:t Göransgatan 143 105 45 Stockholm (SE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 12 November 2019 rejecting the opposition filed against European patent No. 2990516 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	M. Harrison
Members:	T. Rosenblatt
	J. Hoppe

Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 2 990 516 (hereinafter "the patent").

II. The opposition division considered that the opposition grounds under Article 100(a) and (b) EPC did not prejudice maintenance of the patent. The opposition division held *inter alia* that the subject-matter of claim 1 was novel over

E9 : WO 2011/080121 A1,

and involved an inventive step. For the assessment of inventive step the opposition division considered

E1 : EP 2 527 525 A1

to represent the closest prior art to the subject-matter of claim 1 whereas the appellant's objections based on E9 as an equally valid springboard for the assessment of inventive step were rejected for the reason that this document did not relate to the same subject-matter as claim 1 and addressed a different technical problem.

III. In its statement of grounds of appeal, the appellant maintained *inter alia* its novelty objection based on E9 as well as its objection of lack of inventive step based on either E1 or E9 as the closest prior art.

IV. The parties were summoned to oral proceedings. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020), the Board informed the parties of its preliminary opinion on the case. The Board stated *inter alia* that the

subject-matter of claim 1 appeared to be novel over E9 and indicated that inventive step could be discussed starting from either E1 or E9 as the closest prior art.

V. Oral proceedings before the Board were held on 28 November 2023, in the course of which the appellant withdrew its objection under the ground for opposition pursuant to Article 100(b) EPC and its novelty objection based on E9 (Articles 100(a) and 54 EPC).

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

The respondent (patent proprietor) requested that the appeal be dismissed (main request), or as an auxiliary measure that the patent be maintained in amended form according to one of auxiliary requests 2bis, 2ter, 1, 1bis, 1ter, 2, 3, 4, 4bis or 5-7, in the given order, where auxiliary request 2ter was filed in the oral proceedings, and the other auxiliary requests were filed with the reply to the grounds of appeal.

VII. Claim 1 of the patent (**main request**) has the following wording (bold feature numbering in square brackets added by the Board, which are also in accordance with point 14 of the impugned decision):

"[**a**] A laundry dryer (1) including:
[**b**] - a dryer casing (2) having a front wall (20), a rear wall (21), lateral walls (25), and a basement (24) defining a basement plane (X,Y);
[**c**] - a drum (3) rotatably accommodated within said casing (2) and accessible via a door connected to said front door (4);

[**d**] - a process air conduit (18) wherein drying process air is apt to flow, said process air conduit (18) being connected to said drum (3) so that said process air flows therethrough;
[**e**] - a process air generator (30), apt to generate drying process air, said process air generator (30) being located within said process air conduit (18);
[**f**] - said process air conduit (18) including a basement process air duct (28) formed in said basement (24), said basement process air duct (28) having walls (28w) and including a basement process air outlet (19) where process air exits said basement (24),
[**g**] - a motor (50) having a shaft (51) defining a motor axis (M), said motor axis passing through an aperture (26) provided in the basement process air duct (28) and substantially at or in proximity of a center of said basement process air outlet (19);
[**h**] - wherein a plane (PH) perpendicular to said basement plane (X, Y) and sectioning said basement (24) along said motor axis (M) divides said basement process air duct (28) in an outer (28outer) and in an inner portion (28inner), said outer portion (28outer) being the portion closer to a lateral wall (25) of the casing (2);
[**i**] - wherein a section by a plane (PZ) passing through said motor axis (M) and sectioning said basement process duct portion (28) and said basement outlet (19) in said outer portion (28outer) defines a curve (C), a starting point (Pin) of said curve (C) being located at said basement process air outlet (19) and an end point (Pend) of said curve (C) being located at said aperture (26);
characterised in that
[**j**] in said section by said plane (PZ) passing through the motor axis, the distance (D1,..., Di,....,DN) between a point of said curve (C) and said motor axis

(M) is a decreasing monotone function if the position of said point moves from said starting point (Pin) to said end point (Pend)."

Compared to claim 1 of the patent as granted, claim 1 of **auxiliary request 2bis** comprises the following amendments. The feature

> "a fan (12) apt to circulate said process air into said process air conduit (18), said fan (12) being located within said process air conduit (18) and including an impeller (12a) having an air inlet section (150in) which is the inlet for the process air to said impeller (12a);"

is inserted between features g and h. Furthermore the features

> "said basement (24) is realized in plastic material and said basement air duct (28) including said basement process air outlet (19) is realized integral to said basement (24),
> wherein a diameter (Dia1) of said basement process air outlet (19) is smaller or substantially equal to a diameter (Dia2) of said inlet (150in) for the process air to the impeller (12a), and that"

are inserted immediately after the expression "characterised in that".

In claim 1 of **auxiliary request 2ter** the expression "including said basement process air outlet (19)" introduced previously in auxiliary request 2bis in the claim's characterising portion is deleted.

The amendments to claim 1 of auxiliary requests 1, 1bis, 1ter, 2, 3, 4, 4bis and 5-7 are not relevant to the present decision.

VIII. The arguments of the appellant may be summarised as follows.

Main request

Claim 1 lacked an inventive step starting from the laundry dryer disclosed in Figure 9 of E9 as the closest prior art. The laundry dryer of claim 1 was distinguished over this known dryer only by feature j.

Feature i was disclosed. The opposite conclusion reached in the impugned decision was based on an interpretation of the wording of claim 1 (in the light of the description and drawings of the patent) which was too narrow. In particular there was no reason to exclude a mathematical meaning of the term "curve" in feature i and to limit its meaning so as to designate "a line continuously bending and gradually decreasing for its length" thereby excluding straight segments. Also, other parts of claim 1 defined features which required mathematical notions to be applied, such as feature j. Moreover, paragraph 10 of the patent referred to E1 as disclosing the features in the preamble of claim 1, and Figure 4 thereof disclosed straight sections in the outer portion of the basement process air duct. The skilled person, who was a mechanical engineer in the field of laundry appliances and who therefore necessarily had mathematical skills, would understand the term "curve" to encompass embodiments of the basement process air duct wherein the outer portion had a very small radius of curvature and particularly, also embodiments of the basement process air duct where the outer portion had a radius of curvature approaching zero. Feature i thus also encompassed embodiments wherein the outer portion of the basement process air duct comprised a couple of

consecutive rectilinear segments transverse to each other, as long as they defined a (simply) monotonically decreasing function, which as such could even include sharp corners and abrupt changes.

The only distinguishing feature j did not provide any technical effect over E9, and in particular did not achieve the effects mentioned in paragraph 6 of the patent. Claim 1, in particular the combined features i and j, did not exclude the presence of turbulence inducing features in the outer portion of the basement process air duct. The curve could include sharp corners. Since features i and j defined only a single plane and section, other sections could even comprise features which increased turbulence. Claim 1 also failed to exclude the air duct downstream of the outlet process air outlet having a reduced diameter section, for example in the form of a relatively smaller opening of a separate housing for a process air fan.

The objective technical problem could thus be seen to be the provision of an alternative to the embodiment of Figure 9 of E9. Depending on practical requirements, such as for example the need to provide accommodation of other devices, passage of cables or tubes into and through the process air duct's outer portion, or for fixing elements, it was then obvious for the skilled person to provide, for example, a cut-out in the flange constituting the process air outlet of the basement process air duct disclosed in Figure 9 of E9, depending on the circumstances. The necessary modification represented a mere design choice which fell within the normal practice of the skilled person.

Auxiliary request 2bis

This auxiliary request had not been substantiated in the reply to the appeal grounds and should therefore not be admitted into the appeal proceedings. In particular, no reason had been given for the amendment to claim 1 concerning the inserted expression "including said basement process air outlet (19)", which was not part of granted claim 11, upon which the remaining part of the feature added to the characterising portion was seemingly based. It therefore also did not comply with the requirement of Article 123(2) EPC. If however feature f was seen to constitute the basis for this added wording, no further limitation to the claim was introduced. This amendment then constituted a needless repetition and was contrary to the requirements of clarity and conciseness of Article 84 EPC.

Auxiliary request 2ter

Auxiliary request 2ter was filed extremely late and should not be admitted.

IX. The arguments of the respondent may be summarised as follows.

Main request

E9 did not represent a suitable starting point for the assessment of inventive step since it did not relate to heat pump laundry dryers, as correctly indicated in the contested decision. The objection was not considered in the impugned decision and should therefore not be admitted into the appeal proceedings.

Claim 1 was distinguished over the laundry dryer disclosed in E9 by combined features i and j. The interpretation of feature i by the appellant was based on the understanding of a mathematician, rather than on that of a skilled person being an engineer, considering the features of the duct of an actual physical object. The normal understanding of the term "curve" as "a line that continuously bends" which "has no straight lines" was also confirmed in dictionaries, such as the Oxford English Dictionary or the Cambridge Dictionary. The appellant's argument submitted for the first time in the oral proceedings and related to the citation of E1 in paragraph 10 of the patent should not be admitted. Moreover, the content of this paragraph was suggested by the examining division before the grant of the patent and should therefore be ignored. Furthermore, the figures of the patent did not allow any different conclusions, since even the portions at the starting point (Pin) of the curves C illustrated in Figures 6, 11 or 12 were in fact always at least slightly bending, not straight. This understanding was further corroborated by paragraphs 45 and 126 of the patent or the indications in paragraphs 34 and 35 to provide "smooth" channels avoiding causes of turbulence, thus clearly excluding the presence of sharp edges or corners in the curve. The skilled person also understood that the outer portion presented such a smooth shape not only in a single plane; any arbitrary, possible plane was meant to present such a shape. The combined features i and j thus excluded the presence of any flange and any feature creating turbulence in the outer portion of the process air duct between the process air outlet and the aperture for the motor shaft.

The outer portion of the basement process air duct

illustrated in Figure 9 of E9 comprised straight sections and did therefore not establish a curve within the meaning of feature i of claim 1. The basement process air duct's outlet, constituted by the central opening in the insulating panel 10, represented a flange, contrary to feature j of claim 1.

Compared to the substantially rectangular process air duct with an air outlet surrounded by a flange as known from E9, the curved shape of the outer portion of the duct according to combined features i and j gently and smoothly channelled the process air towards the basement process air outlet, thereby reducing the laundry dryer's energy consumption and increasing efficiency. The objective problem was thus to improve the air flow in the process air duct and to reduce the energy consumption of the laundry dryer.

Removing the flange which delimited the process air outlet of the basement process air duct in Figure 9 of E9 would lead to significantly reduced efficiency of the dryer since the process air would not be guided to the interior of the impeller arranged downstream from the process air outlet, and could thus not be conveyed as desired, leading to a non-working configuration of the dryer. The skilled person also did not receive any hint from E9 or the documents on file to modify the disclosed design and to provide a cut-out.

Auxiliary request 2bis

Auxiliary request 2bis had been substantiated with the reply to the appeal grounds by reference to the higher ranking requests; the objected feature had already been introduced in claim 1 of auxiliary request 1. It was based on feature f and essentially repeated part of its

content without introducing any change in the subject-matter claimed. The amendment could also be cancelled.

Reasons for the Decision

Main request

1. The subject-matter of claim 1 lacks an inventive step such that the opposition ground pursuant to Articles 100(a) and 56 EPC prejudices maintenance of the patent.

According to Article 56 EPC, an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. To assess whether the claimed subject-matter involves an inventive step, the Boards of Appeal commonly apply the problem-solution approach (see for example section I.D.2 of the Case Law of the Boards of Appeal, 10th Edition). The parties did not contest that this approach was appropriate for the present case and the Board cannot see any reason to deviate from it. In a first step thereof, some element of the prior art has to be identified which serves as both a starting point and a basis for the subsequent steps. The claimed subject-matter is then compared to this element of the prior art, differences are established, the technical effect(s) determined and an objective technical problem formulated. Whether the claimed feature combination solves the objective technical problem in an obvious manner in view of the remaining prior art and/or common general knowledge is decided in the final step. Apart from the state of the art constituted by documents within the meaning of

Article 54(3) EPC, specifically referred to in the second sentence of Article 56 EPC, any document belonging to the state of the art can in principle be used as a starting point for an objection of lack of inventive step. Although the starting point may often be an element of the prior art (e.g. some particular embodiment in a document) which has the most technical features in common with the claimed subject-matter and relates to a similar technical problem, the Board sees no reason to exclude other elements of the prior art as a starting point for the problem-solution approach which, for example, might even have less features in common with the claimed subject-matter or which may, themselves, be concerned with a different technical problem to the one mentioned in the patent in suit.

Therefore, and contrary to the view taken by the opposition division in point 2.4 of the impugned decision which was endorsed by the respondent in its reply to the appeal grounds, the laundry dryer disclosed in E9 is considered to represent an appropriate starting point from which the inventive step of claim 1 may be assessed, as also stated in the Board's communication pursuant to Article 15(1) RPBA 2020. It should additionally be noted that the appellant had also argued inventive step starting from E9 during the opposition proceedings and the opposition division's decision incorrectly rejected the attack simply on the basis that it considered E1 to be the "closest" prior art. During the oral proceedings before the Board, the respondent also did not further contest that inventive step be assessed based on the laundry dryer of E9 as a starting point.

2. It was common ground between the parties that features a to h of claim 1 are anticipated by the laundry dryer

disclosed in E9. It was furthermore accepted by the appellant during the oral proceedings before the Board that feature j was not disclosed in E9. The Board sees no reason to reach a different conclusion on these aspects.

The parties disagreed, however, on the question of disclosure of feature i of claim 1 in E9. The Board finds that feature i is disclosed in E9 for the following reasons.

2.1 The critical issue in this regard is the interpretation by the skilled person of the term "curve" used in feature i of claim 1.

Contrary to the respondent's view and the conclusion of the opposition division in point II.2.3.1 of the reasons for the impugned decision (see the last paragraph on page 10), the meaning of this term need not be limited to designate a line that continuously bends, thereby excluding the presence of straight segments and sharp edges or corners.

2.1.1 Even accepting that the meaning indicated in general dictionaries, such as the Oxford English Dictionary on which the respondent relied as an example, cannot be ignored, such definitions are not exclusive in view of common general knowledge of the skilled person in the present case. This skilled person has common general knowledge in the field of engineering of laundry dryers. This requires knowledge of advanced mathematics, including geometry and calculus. The Board concedes that the skilled person will not adopt a strict view of a mathematician when construing present claim 1. The skilled person nevertheless has knowledge of advanced mathematical concepts and terminology,

which is already evident from other features and terminology used in claim 1. For example, feature j further specifies the curve by reference to a "decreasing monotone function", which calls for an advanced appreciation and knowledge of mathematics. The skilled person would therefore not exclude interpretations of the term "curve" derived from their knowledge of the term "curve" in mathematics. It was not contested by the respondent that when taking this knowledge into account, the term "curve" indeed covers also straight lines, or indeed polygonal curves composed of a series of interconnected straight line segments, as also acknowledged by the opposition division (*ibid.*). Nor are sharp corners or edges joining line segments of such a curve excluded.

2.1.2 The respondent's references to the description of the patent in support of its more limited interpretation are unconvincing. Apart from the fact that such references cannot be understood to have a limiting effect on the subject-matter of claim 1, none of the cited passages (paragraphs 34, 35, 45, 126) anyway contradicts the broader interpretation given above. Paragraphs 34 and 35 of the patent indicate the process air duct as forming a "smooth" channel so as to avoid "'relevant' obstacles for the process air flow, such as flanges that abruptly reduce the diameter of the process air duct in the direction of the process air flow" (see notably paragraph 35). These paragraphs therefore do not provide any explanation of the term "curve". They deal with the avoidance of flanges representing sudden reductions in the diameter of the process air duct. This aspect is however related to the further properties of the curve defined by feature j, rather than stating that straight line segments of sharp corners or edges should be excluded. The content

of paragraph 45 of the patent again similarly refers to the exclusion of flanges in the process air duct (see in particular column 8, lines 14-18) and paragraph 126 does not contain anything allowing the conclusion to be reached that there is a mandatory absence of a straight line section in the curve. It is therefore also irrelevant whether or not the content of paragraph 10 of the patent (referring to E1 as disclosing the preamble of claim 1 of the patent and disclosing in Figure 4 thereof straight sections) is taken into account when interpreting the term "curve" of feature i in claim 1 as argued by the appellant. Even if this paragraph were ignored, as it should be according to the respondent, the conclusion of the Board would not be different.

2.2 Therefore, the terminology "defines a curve" appearing in feature i of claim 1 does not impose any particular structural or geometrical limitation on the shape of the features preceding it which are "a section by a plane passing through said motor axis and sectioning said basement process duct portion and said basement outlet in said outer portion" which would allow it to be distinguished from a corresponding section through the basement process air duct portion of the basement unit (7) of E9 (see Figure 9 thereof). It is undisputed that the starting and end points further specifying the curve are also identifiable in a corresponding section in Figure 9 of E9.

In this regard, the Board notes that the basement process air outlet referred to in claim 1 by feature f and by feature i, where the curve's starting point (Pin) is specified, may be considered to be embodied by the roughly oval or oblong opening in the rearward (upstream) lying vertical wall section of the blower

housing 8 connected to the base unit 7 shown in Figure 9 of E9 (see also paragraph 28 of E9).

Feature i of claim 1 of the patent in suit is thus disclosed in E9.

2.3 The only distinguishing feature of the subject-matter of claim 1 and the laundry dryer known from E9 is thus feature j. It cannot be excluded that the rearward (upstream) vertical wall section of the blower housing 8 in Figure 9 of E9 forms a continuous circumferential flange at the basement process air outlet which thus conforms to a non-monotone function comprising both decreasing and increasing curve segments, contrary to feature j, whichever "section by a plane (PZ)" according to feature i is considered.

3. There is, however, no particular technical effect achieved by feature j over the whole scope of claim 1. This is so because feature j does not provide for the intended effect of excluding any abrupt change in the diameter of the outer portion of the basement process air duct portion in other sections than the single section defined by preceding feature i (see for example paragraph 45 of the patent).

3.1 The Board notably disagrees with the respondent's interpretation of the expression "wherein a section by a plane (PZ)..." as referring to all such imaginable sections through the basement process duct portion and the basement outlet in the outer portion. The use of the indefinite article "a" covers also embodiments in which only a single section defines a curve according to feature i and comprising the further properties defined by feature j. This conclusion is supported *inter alia* by dependent claim 5 which further defines a

family of such sections (i.e. as an optional feature). The Board acknowledges that in a practical implementation there will be more than a single such section defining curves with the property according to feature j, resulting for example in a narrow angular interval of such sections (i.e. a notch or slit of limited width). Nevertheless the remaining parts of the outer portion may comprise, in the corresponding remaining sections, features which do not have to meet the requirement of feature j.

3.2 Furthermore, the combined features i and j do not exclude a constriction of the process air duct portion immediately downstream of the basement's process air outlet. For example, an impeller enclosed in a housing could be mounted downstream of the basement's process air outlet and present an air inlet section in the housing having a reduced diameter compared to the diameter of the basement's process air outlet. Such a possibility is not excluded by claim 1, as can also be seen from dependent claims 2 to 4 of the patent which only optionally exclude such configurations.

3.3 It is consequently not excluded that turbulence inducing structures could be present in other sections of the outer portion of the basement's process air duct or even downstream of the process outlet. The effects intended according to paragraphs 5 and 6 of the patent, i.e. reducing turbulence due to the presence of sudden changes in the air duct cross section so as to improve efficiency, energy consumption and noise of the laundry dryer, are therefore not necessarily achieved, or in other words are not achieved over the whole scope of the claim. The respondent did not indicate, and the Board cannot see evidence for, any other technical effect achieved over the whole scope of claim 1

compared to the known laundry dryer of E9.

4. An objective technical technical problem is therefore to provide a laundry dryer with an alternative configuration of the basement process air duct's outer portion known from Figure 9 of E9.

5. The Board finds that the skilled person would arrive without inventive skill at the solution of this problem as defined by the subject-matter of claim 1. The provision of a notch or slit in the rearward (upstream) vertical wall section of the blower housing 8 in Figure 9 of E9 for whatever practical reason, for example (as argued by the appellant) for admitting other components passing into and through the process air duct's outer portion, for passing screws, fitting or locking elements or for the purpose of saving material, falls within the customary practice of a skilled person.

The respondent's argument based on the absence of such alternative configurations in the prior art documents on file is unconvincing. Constructions comprising a notch or slit in an otherwise circumferential flange surrounding an outlet passage belong to the common general knowledge of the skilled person. The respondent also did not contest that notches or slits in such flange-like elements were known to the skilled person. The Board is also not convinced that such a feature, provided for whatever practical reason, would necessarily compromise the function of the embodiment disclosed in Figure 9 of E9 so that a skilled person would be dissuaded from such a modification. On the one hand the skilled person always has to weigh up advantages and disadvantages of a modification, while on the other hand the Board cannot see that a notch or slit of limited width in the flange-like wall section

of the blower housing 8 at the process air outlet in Figure 9 of E9 would be detrimental to the function of the process air duct. As indicated above (see point 3.1), feature j does not require that the whole "flange" constituted by the rearward (upstream) vertical wall section of the blower housing 8 in Figure 9 of E9 is removed (which was a further argument by the respondent).

6. Therefore, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC). Consequently, the respondent's main request for maintenance of the patent as granted cannot be allowed.

Auxiliary request 2bis

7. Maintenance of the patent in amended form according to auxiliary request 2bis cannot be allowed because amended claim 1 of this request does not meet the conciseness requirement of Article 84 EPC.

The first part of the features inserted in the characterising portion, "said basement (24) is realized in plastic material and said basement air duct (28) including said basement process air outlet (19) is realized integral to said basement (24)", is based on granted claim 11 (which states "wherein said basement (24) is realized in plastic material and said basement air duct (28) is realized integral to said basement (24)"). However, it has been complemented by a redundant definition of subject-matter (without there being a literal basis in granted claims 1 or 11) which is already specified in feature f, namely "said basement air duct (28) including said basement process air outlet (19)", as also acknowledged by the respondent. This repetition does not form a further

limitation to the subject-matter of claim 1. The addition of a redundant specification of subject-matter is contrary to the requirement of conciseness pursuant to Article 84 EPC. The respondent's argument pointing to similar amendments in previous higher ranking requests is irrelevant.

Auxiliary request 2ter

8. The Board exercised its discretion pursuant to Article 13(2) RPBA 2020 to take into account auxiliary request 2ter into the proceedings. This auxiliary request was submitted during the oral proceedings before the Board in reply to the conciseness objection raised under Article 84 EPC for the first time at the oral proceedings. This constitutes exceptional circumstances justifying the consideration of this request.

That a corresponding request was not submitted before the opposition division and was filed only at an extremely late state of the procedure is as such no reason to exclude it from consideration. The appellant had not raised the objection pursuant to Article 84 EPC in its rejoinder submitted more than two years after the submission of auxiliary request 2bis with the respondent's reply to the statement of grounds of appeal.

Amended claim 1 of auxiliary request 2ter is based on a combination of only granted claims 1, 2 and 11. The redundant wording added in claim 1 of auxiliary request 2bis has been deleted, such that the outstanding objection under Article 84 EPC was thus resolved.

9. According to Article 111(1) EPC, when deciding on an appeal, the Board may either exercise any power within

the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. Article 11 RPBA 2020 states that the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so.

The addition of the features from granted claims 2 and 11 changes the subject-matter of the proceedings and the impact of the added features on the question of inventive step has never been a matter of discussion so far. Also, the Board has overturned the opposition division's conclusion that E9 could not be used as the closest prior art for considering inventive step. This change of subject-matter thus constitutes special reasons justifying remittal of the case to the opposition division. The parties did not present any counter arguments against remittal concerning the aforesaid and did not object to remittal.

The Board therefore decided to remit the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

D. Grundner M. Harrison

Decision electronically authenticated