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**Datasheet for the decision
of 20 January 2026**

Case Number: T 1221/23 - 3.4.01

Application Number: 18184512.4

Publication Number: 3597268

IPC: A61N5/06

Language of the proceedings: EN

Title of invention:

IRRADIATING DEVICE AND IRRADIATION METHOD

Patent Proprietor:

JK-Holding GmbH

Opponent:

KBL GmbH

Headword:

Application of actinic radiation / JK-Holding GmbH

Relevant legal provisions:

EPC Art. 56

RPBA 2020 Art. 13(2)

Keyword:

Inventive step - obvious solution
Amendment after notification of Art. 15(1) RPBA communication
- exceptional circumstances (no)

Decisions cited:

G 0001/24, T 2920/18, T 1598/18, T 0339/19, T 0732/21



Beschwerdekammern

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Case Number: T 1221/23 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 20 January 2026

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
3 May 2023 concerning maintenance of the
European Patent No. 3597268 in amended form.**

Composition of the Board:

Chairman

P. Scriven

Members:

P. Fontenay

D. Rogers

Summary of Facts and Submissions

- I. The opponent appealed the Opposition Division's decision to uphold the patent in amended form and requested that the impugned decision be set aside and the patent be revoked.

- II. The opposition relied on grounds under Articles 100(a) EPC in conjunction with Articles 53(c), exceptions to patentability, and 56 EPC, lack of inventive step; Article 100(b) EPC as to lack of a sufficient disclosure; and Article 100(c) EPC as to added subject-matter.

- III. Before the Opposition Division, the proprietor filed amended sets of claims as auxiliary requests A, B, and C and later replaced auxiliary requests A and C by auxiliary requests A1 and C1, respectively.

- IV. The Opposition Division held that the subject-matter of claim 1 of the patent extended beyond the content of the application as originally filed (Article 100(c) EPC). They further decided that auxiliary request A1, in which claim 1 had been amended to specify that the cooling means are comprised within the device (and not in the outer space), was allowable. Specifically, the objections regarding added subject-matter, lack of sufficient disclosure, lack of inventive step, and exclusion from patentability under Article 53(c) EPC were rejected.

V. In respect of inventive step, the Opposition Division held, *inter alia*, that the subject-matter of claim 1 of auxiliary request A1 was not rendered obvious by

D1: DE-U-87 01 889,

in combination with

D7: FR-A-2 937 795.

VI. On appeal, the opponent maintained their position that the method of independent claim 11 of auxiliary request A1, which the Opposition Division had deemed allowable, fell under the exclusion ground of Article 53(c) EPC, according to which European patents shall not be granted for methods for treatment of the human or animal body by therapy; that the subject-matter of claim 1 extended beyond the content of the patent as granted; and that the subject-matter of claim 1 was not inventive, in view of D1 combined to D7, in addition to some other combinations.

VII. With their reply to the appeal, the proprietor requested that the appeal be dismissed (main request). They also submitted a new set of claims for an auxiliary request C1, which differed from the main request in that method claims had been deleted.

VIII. The parties were summoned to oral proceedings, in accordance with their respective, conditional requests.

- IX. In a communication setting out its provisional opinion (Articles 15(1) and 17(2) RPBA), the Board indicated that:
- it had not been able to identify any extension of protection resulting from the amended wording of claim 1, in the form which the Opposition Division found could be maintained;
 - although claim 11 of the main request sought to define "a non-therapeutical method of operating a device applying a directed actinic radiation to a subject", its subject-matter was related inherently to a therapeutic method, contrary to Article 53(c) EPC;
 - in contrast with the Opposition Division view, the claimed device was not inventive over a combination of document D1, as closest prior art, with document D7, or other combinations of documents.
- X. In their reply to the Board's preliminary opinion, the proprietor contested the Board's view that the method claims defined a therapeutic method within the meaning of Article 53(c) EPC. They also addressed the Board's opinion regarding the lack of an inventive step starting from document D1 or some other documents cited by the opponent. In particular, they stressed that the claimed subject-matter differed from the teaching of D1 by more features than had been acknowledged by the Board.
- XI. With this reply, the proprietor filed new auxiliary requests B2, B3, B4, B5, C2, C3, C4, and C5. Claim 1 of auxiliary requests B2 to B5 contained additional limitations regarding the device. Auxiliary requests C2 to C5 differed from the corresponding requests B2 to B5 in that the method claims had been deleted.

- XII. Oral proceedings took place before the Board, in presence of both parties.
- XIII. The proprietor reiterated their position that the device according to claim 1, in the form which the Opposition Division found could be maintained, differed from the device of D1 in more ways than the Board had recognised. The Board had also failed to recognise that a key aspect of the invention lay in the specific arrangement of the additional radiation sources and associated cooling means in the narrow, further outer space, as was described in paragraph [0063] of the published application. Claim 1 had to be construed in light of this definition, in accordance with the principle of interpretation confirmed by the decision of the Enlarged Board of Appeal in G 1/24 *The description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity*, OJ EPO 2025, 60. The common solutions for cooling radiation sources known from the art could not be used under the circumstances, because they were too bulky for integration into confined spaces. The claimed solution allowed for heat dissipation at a distance away from the heat absorption area that was within the restricted area, thus enabling efficient use of the available narrow space.
- XIV. After the Board had decided on the merits of the main request, concluding that claim 1 did not involve an inventive step, and the chair had announced that the Board would not admit auxiliary requests B2 to B5 or C2 to C5 into the proceedings, the proprietor submitted an additional request, labelled "auxiliary request Ad-hoc", which was intended as new first auxiliary

request, before auxiliary requests B2 to B5 and C1 to C5.

XV. The proprietor's final requests were that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained on the basis of the claims according to one of "auxiliary request Ad hoc", auxiliary requests B2 to B5, and C1 to C5, in that order.

XVI. The opponent confirmed their request that the decision under appeal be set aside and the patent revoked.

XVII. Claim 1 of the main request (auxiliary request A1 before the Opposition Division) reads, with the labelling of features as introduced by the opponent in the statement of grounds:

1. A device (100) for an application of directed actinic radiation to a subject (200), said device (100) comprising:
1.1 an exposition tunnel (110) being capable of surrounding said subject (200) to be exposed to said actinic radiation, said exposition tunnel (110) being formed of one semi-cylinder barrel-shape first surface (120) made of a material substantially permeable to said actinic radiation to be applied to the subject (200),
1.1.1 and of at least one second surface (140) made of said material substantially permeable to said actinic radiation to be applied to the subject (200), said at least

one second surface (140) being capable of complementing the first surface (120) in forming said exposition tunnel (110);

1.2 the surfaces (120, 140) of said exposition tunnel (110) separating an inner space (130) where said subject (200) is exposed to said actinic radiation, from outer spaces (150, 160) where a plurality of radiation sources (170) capable of emitting actinic radiation through said surfaces (120, 140) are mounted;

1.3 said outer spaces (150, 160) being housed in at least first and second parts of a chassis (180, 190) of the device (100) and comprise

1.3.1 means for fixedly holding, and electrically and electronically operating, said plurality of radiation sources (170);

1.3.2 means (182, 192) providing said at least first and second parts of the chassis (180,190) with electric power;

1.3.3 means (183, 193) capable of ventilating, heating and/or cooling the device (100); and

1.3.4 means (184, 194) for the operation of the device (100), including a processing unit;

1.4 said first and second parts of the chassis (180, 190) of the device (100) being configured to complement each other in forming the outer shape of the device (100) by being configured to hingedly move away from, or towards, each other;

1.5 said device (100) further comprising at least one further outer space (300) separated from said inner space (130) and located at

*either one or both of the longitudinal ends (111, 112) of the exposition tunnel (110),
1.6 said at least one further outer space (300) housing a plurality of additional radiation sources (310A, 310B)
1.6.1 configured to emit radiation towards the subject (200) in a direction forming an acute angle with a longitudinal axis (A - A) of the device (100), and
1.7 said device (100) further comprising at least one cooling means for the plurality of additional radiation sources (310A, 310B), characterised in
1.8 that the additional radiation sources (310A, 310B) comprise LEDs (322), and
1.9 that said at least one cooling means for the plurality of additional radiation sources (310A, 310B) is at least one narrow space light appliance cooling system (500)
1.9.1 comprising heat pipes (520) for cooling the plurality of additional radiation sources (310A, 310B).*

XVIII. Claim 1 of "auxiliary request Ad hoc" differs from claim 1 of the main request in that feature 1.7 reads:

*...
said device (100) further comprising at least one cooling means for the plurality of additional radiation sources (310A, 310B) characterised in
that the additional radiation sources (310A, 310B) comprise LEDs (322), and
that said at least one cooling means for the plurality of additional radiation sources*

(310A, 310B) is at least one narrow space light appliance cooling system (500) comprising heat pipes (520) for cooling the plurality of additional radiation sources (310A, 310B),

and in that the following is added at the end of the claim:

and wherein the narrow space appliance cooling system (500) is splitted into a heat absorption component absorbing heat where it is generated and a heat dissipation component dissipating the heat at a distance away from the heat generation area, wherein the heat is transported by the heat pipes (520) from the heat generation area in the heat dissipation area.

XIX. Claim 1 of auxiliary request B2 specifies, regarding the "at least one narrow space light appliance cooling system", that it comprises

at least one thermal interface (510) configured to absorb heat from the LED array (320) and being a backing plate of a fixture for the LED array (320), and at least one heat exchanger (530) or heat sink (530), wherein the heat pipes are configured to transfer heat from the heat pipe's end (521) proximal to the thermal interface (510) to the heat pipe's end (522) distal from the thermal interface (510), and wherein the at least one heat exchanger (530) or heat sink (530) is configured to

dissipate the heat released by the heat pipe distal end (522).

XX. Claim 1 of auxiliary request B3 differs from claim 1 of auxiliary request B2 in that claim 1 specifies that the heat's pipe end proximal to the thermal interface is a *short distance heat pipe's end* and that the heat's pipe end distal from the thermal interface is a *long distance heat pipe's end*.

XXI. Claim 1 of auxiliary request B4 differs from claim 1 of auxiliary request B2 in that it specifies that

two heat pipes are configured to transfer heat from the short distance heat pipe's end (521) proximal to the thermal interface (510) to the long distance heat pipe's end (522) distal from the thermal interface (510)

XXII. Claim 1 of auxiliary request B5 differs from claim 1 of the main request in that it incorporates the additional features of claim 8. Specifically, claim 1 of auxiliary request B5 includes the following additional limitation, at the end of the claim:

said device further comprising at least one reflector (322) or a plurality of reflectors (322) forming a reflector array (330) for the plurality of additional radiation sources (310A, 310B) to collimate the radiation emitted by said plurality of additional radiation sources (310A, 310B).

XXIII. Auxiliary requests C1 to C5 differ from the main request and auxiliary requests B2 to B5, respectively, in that method claims have been deleted.

Reasons for the Decision

Main request - Inventive step

D1 combined with D7

1. Document D1 relates to a sun bank. It incorporates two different sets of radiation sources for tanning of the human body, one of which being movable to preferred locations within the irradiation tunnel to achieve optimal tanning of the skin (cf. page 4, first paragraph). D1 addresses a problem commonly encountered with known devices of shoulder areas not being optimally irradiated (cf. page 5, 2nd paragraph). D1 is hence a suitable starting point for assessing the inventive merits of the claimed invention.
2. Specifically, D1 discloses a device irradiating a subject with ultraviolet radiation used for tanning purposes. This corresponds to actinic radiation in the sense of the application, that is, radiation that has a photochemical effect on the irradiated body (paragraph [0022] of the published application). The device comprises an exposition tunnel formed of one semi-cylinder barrel-shape first surface and one second surface that surrounds the subject to be irradiated. The second surface complements the first surface in forming the tunnel (D1: page 8, lines 10-18; figures 1, 4) and is movable to move away from, or towards, the

first surface. Alternatively, the floodlight constituting the second surface in D1 can rotate (page 4, lines 4-6), thus implying the presence of a hinge of some kind connecting the two surfaces. It is implicit that the material constituting said surfaces is substantially permeable to the radiation applied to the subject.

3. The first and second surfaces of the exposition tunnel in D1 separate an inner space, where the subject is exposed to actinic radiation, from outer spaces, where a plurality of radiation sources are mounted and emit actinic radiation through said surfaces. The plurality of radiation sources is part of the device in D1 (page 8, lines 10-18). This implies that the outer spaces, which receive the radiation sources, are housed in the first and second parts of the chassis.
4. The Board further considers that the outer spaces, that include the radiation sources, in D1, also comprise means for the fixed holding, and electrical and electronic operating of the plurality of radiation sources; means for supplying electrical energy to the first and second parts of the chassis, as well as means for operating the device, including a processing unit.
5. This was contested by the proprietor, who stressed that D1 did not provide any specific indication regarding such means and their positions within the device.
6. The absence of such information in D1 does not affect the Board's finding. The features in question are essential for the operation of sun banks and are implicitly present in the outer spaces of D1, where the radiation sources are located. This follows from the

fact that the radiation sources must be installed in fixed locations within these spaces in order to radiate towards a subject inside. The operation of the radiation sources in D1 implies that they be connected to control means for regulating their operation (switch on/off, intensity, ...) and to some sort of electrical power source. This also applies to the entire device, which must be controlled and powered. This holds true regardless of whether the electrical power is obtained externally via cables or internally in the form of batteries: both alternatives implying the presence of corresponding means for providing electrical power to the device. Regardless of the fact that the exposition tunnel is primarily intended to receive a subject to be exposed to radiation, the restricted available inner space in the tunnel and the risks of electrical accidents preclude the installation of these various means within said space.

7. The Board concurs with the proprietor that feature 1.3.3 is missing in D1. Contrary to the opponent's view, the means capable of ventilating, disclosed in document D1, are not located in outer spaces in the first or second part of the chassis, but externally to the sun bank (page 10, lines 18-26).
8. To simplify the operation of the sunbed of D1 and, in particular, to avoid repeated repositioning of the ventilation means when the sun bed is used, the skilled person would have considered their integration into the sun bank. The incorporation of the ventilating means into the sun bank of D1 would thus have been a straightforward and obvious measure.
9. In a first embodiment, D1 discloses additional radiation means separated from said inner space and

located at a longitudinal end of the sun bank (D1: page 9, lines 28 and 29; Figure 2). This corresponds to recited features 1.5 and 1.6 in claim 1 of additional radiation means housed in a further outer space at a longitudinal end of the exposition tunnel.

10. The proprietor objected, in this regard, that feature 1.6 of at least one further outer space housing a plurality of additional radiation sources was missing in D1, as it required multiple sources in each further outer space. D1, in contrast, disclosed only two additional sources arranged in two different, separate spaces (Figure 2, Figure 3).
11. The Board holds, however, that the wording of feature 1.6 does not preclude a configuration of the kind disclosed in D1, with one additional radiation source on either side of the radiation tunnel. Feature 1.6 is therefore known from D1.
12. The additional radiation sources in D1 are configured to emit radiation towards the subject in a direction that forms an acute angle with the longitudinal axis of the device, as recited in feature 1.6.1 (page 8, line 25 - page 9, line 6; Figures 2-4).
13. The Board concurs with both parties that document D1 does not disclose features 1.7, 1.8, 1.9, and 1.9.1 of the claimed subject-matter.
14. It is a primary aim of the invention to optimise the irradiation of a subject present in the exposition tunnel. This is achieved by the targeted irradiation of body areas such as e.g. the scalp or shoulders, which are not, or not sufficiently, irradiated by the radiation sources present in the outer spaces.

Additional radiation sources are used for this purpose, which irradiate these areas. This ensures homogeneous irradiation of the subject. This applies regardless of whether the photochemical process triggered by the irradiation involves the production of melanin and its conversion into the dark pigment form for tanning purposes, or the production of collagen, elastin, keratin and hyaluronic acid (paragraphs [0034], [0052] - [0054] of the published application).

15. This is achieved according to the invention by additional LED sources and their associated cooling means located in at least one further outer space at either one of both longitudinal ends of the exposition tunnel. It is the Board's understanding of claim 1 that the light spectra produced by the (primary) radiation sources in the outer space surrounding the tunnel and by the additional LED radiation sources in the further outer space interact and produce corresponding radiation that contributes to the same effects in the subject. Reference is made to paragraph [0058] in the published application which discloses, more specifically, the use of the radiation device for tanning purposes, wherein the LEDs are selected to produce UV radiation like that produced by the radiation sources present in the outer space of the exposition tunnel.

16. This corresponds to the purpose of the additional radiation means provided in the sun bank of D1 (page 9, lines 20-32; page 10, lines 7-13). D1 does not contain any clear indication regarding the type of the additional radiation sources used for the invention disclosed therein. The only indication D1 contains refers to the prior art in which fluorescent lamps are used for the emission of UV radiation.

17. The LEDs provided in the device of the invention, with their associated narrow space light appliance cooling system, are less bulky than the additional sources of D1, which have to be arranged at a certain longitudinal distance from the exposition tunnel. This also applies to the embodiment of D1 in which these additional sources are integrated to the sun bank (Figure 2).
18. The objective problem solved by features 1.7, 1.8, 1.9, and 1.9.1, in combination, is thus to provide an alternative to the additional radiation means of D1, which enables their integration in a narrow space within the device ([0063] of the published application).
19. It would have been obvious for the skilled person, at the date of filing the application, in 2018, to replace UV sources used in solariums at the time D1 was published in 1987, with LEDs, which were known to be substantially less bulky and more efficient.
20. The fact that D7 does not elaborate in detail on the use of the device with its multiplicity of LEDs for phototherapy purposes, as pointed out by the proprietor, does not affect the finding that D7 explicitly addresses this use of the disclosed arrangement (page 8, lines 14-16). D7 would therefore have been considered by the person skilled in the art looking for radiation means producing high radiation power in restricted areas.
21. D7 refers to the use of multiple high-power LEDs. An essential aspect of the diode arrangement in D7 concerns the cooling means required due to the high-power output. The embodiment disclosed on page 15, line 27 to page 16, line 5, shows such a cooling system with

heat pipes in which a fluid circulates in a closed circuit to transfer heat from a heat absorption area close to the LEDs to a heat dissipation area where the fluid evaporates, before returning to the absorption area.

22. The incorporation of the LEDs and associated cooling system of D7 into the device of D1 leads in a straightforward manner to the claimed invention, which is therefore not inventive in the sense of Article 56 EPC.
23. The Board rejects the applicant's arguments that D7 does not explicitly address the problem resulting from narrow spaces in connection with the cooling means disclosed. It also rejects the view that the arrangement in D7 is not suitable for solving the objective problem of the invention, because it would not be able to dissipate the heat in a confined space.
24. In view of the objective problem defined above concerning the restricted available volume for receiving additional irradiation sources of D1, it suffices that the skilled person would have recognised that the LEDs described in D7 represent a suitable solution to this problem. It is, therefore, not necessary that the cooling means described in D7 explicitly address this issue, insofar as these cooling means do not counteract this effect.
25. The proprietor referred to paragraph [0063] of the published application. In their view, a consequence of the decision in G 1/24 was that the narrow space and the cooling means referred to in the claim had to be construed in the light of this paragraph. Specifically, that implied that the patentability requirements of

novelty and inventive step had to consider the features of this specific arrangement.

26. This did not persuade the Board.
27. Contrary to the proprietor's view, the Board is of the opinion that the claim does not incorporate the limitations mentioned in paragraph [0063] of the application. This applies both to the notion of narrow space and to the cooling means mentioned in claim 1. The decision in G 1/24 merely says that the description and drawings must always be consulted for interpreting the claims. It does not provide a basis for incorporating limitations that, although present in some embodiments of the invention, the appellant has not included in the claim language.
28. The proprietor's approach amounts to limiting the claim by imposing additional restrictions regarding the meaning of a narrow space and of cooling means it comprises, selected from among the preferred embodiments of the invention, without any objective basis for doing so.
29. The consultation required according to the decision in G 1/24 confirms that the cooling means and the narrow space light appliance cooling system contribute to cooling the additional radiation sources in that space, using some sort of heat pipes, thus giving the terms their usual understanding. This also applies to the relative adjective "narrow" which, while suggesting some kind of shape or size restriction, does not entail any further limitation.
30. The application as a whole merely requires that the further outer space be located at either one or both of

the longitudinal ends of the exposition tunnel. As observed by the opponent, neither paragraphs [0062] and [0063] nor the rest of the description provide any clear indication as to the shape and sizes of this further outer space going beyond the fact that it corresponds to (relatively) narrow, confined or limited spaces. Nor is there any indication in the patent specification that this further outer space must be closed.

31. The board thus finds that main request does not involve an inventive step.

Auxiliary request Ad hoc

32. Auxiliary request "Ad hoc" was filed during the oral proceedings before the Board. It constitutes an amendment to the proprietor's case, the consideration of which is a matter for the Board's discretion, under all relevant parts of Articles 12 and 13 RPBA.
33. Under Article 13(2) RPBA, any amendment, made at this late stage of the appeal 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.*
34. Auxiliary request "Ad hoc" was filed as a reaction to the Board's finding that auxiliary requests B2 to B5 and C2 to C5 were not admitted into the appeal proceedings. This followed the initial debate on the inventive merits of claim 1 of the main request over document D1 in combination with document D7.

35. In the proprietor's view, the Board's decision not to allow the main request was based on the Board's own interpretation of claim 1 and its refusal to construe the claim in the light of paragraph [0063] of the published application. The amendment to claim 1, in the new auxiliary request, consisted merely in incorporating the definitions contained in this paragraph. This did not constitute an arbitrary selection of a preferred embodiment of the invention but rather reflected the definition of a narrow space light appliance cooling system, in the context of the patent.
36. It was further argued that it was in the interest of the procedure to allow the inclusion of definitions in a claim. Such amendments did not, in fact, introduce any additional limitations because they simply spelled out what was already derivable from the claim language in view of the decision in G 1/24.
37. The proprietor's arguments did not persuade the Board.
38. Firstly, the Board agrees with the opponent that the additional features in claim 1 contain limitations of the claimed subject-matter. This follows from the preceding analysis, according to which the patentability of claim 1 of the main request was assessed on the basis of the claim language and did not incorporate any limitation of the embodiment disclosed in paragraph [0063]. The consultation of the description and drawings does not provide any basis suggesting otherwise.
39. Secondly, the finding that the subject-matter of claim 1 of the main request does not involve an inventive step, based on the combination of documents D1 and D7,

concerns an objection that had been raised at the beginning of opposition proceedings and was further elaborated in the Board's preliminary opinion. There is thus no objective element of surprise in the fact that the Board did not adopt a more specific interpretation of the claim in light of the embodiment mentioned in paragraph [0063] of the published application.

40. In addition to the fact that the amendments to claim 1 do not render the claimed subject-matter clearly allowable (Article 12(4) RPBA), the Board fails to identify exceptional circumstances that would have justified filing auxiliary request "Ad hoc" only at the oral proceedings before the Board, and after the proprietor had learnt about the Board's negative assessment of the main request and auxiliary request C1 and the non-admissibility of auxiliary requests B2 to B5 and C2 to C5.
41. As a result, "auxiliary request Ad hoc" was not admitted into the proceedings.

Auxiliary requests B2 to B5 and C2 to C5

42. Auxiliary requests B2 to B5 and C2 to C5 were filed as a reaction to the Board's preliminary opinion, that the subject-matter of claim 1 of the main request and of auxiliary request C1 lacked an inventive step. The amendments to claim 1 of these requests constitute amendments to the proprietor's case, the consideration of which is at the Board's discretion, under all relevant parts of Articles 12 and 13 RPBA, in particular Article 13(2).

43. It was the proprietor's view that the approach relied upon by the Board, in its preliminary opinion, regarding the lack of an inventive step over a combination of D1 and D7 differed from the opponent's argument. The proprietor could neither have foreseen this objection nor refuted it at an earlier stage of proceedings. This effectively amounted to a new attack. These circumstances were exceptional. Reference was made to the decisions in cases T 2920/18, T 1598/18 *Multispectral skin imaging / HID3*, T 339/19 *Film for stand-up-pouches/DOW* and T 732/21 *MRI-Safe Implantable Disk Magnet/MED-EL*, in which the respective boards had decided, under similar circumstances, to admit requests that had been filed after the preliminary opinion had been issued.
44. The proprietor additionally submitted that auxiliary requests B2 to B5 and C2 to C5 were intended to address the Board's concern regarding the lack of an inventive step and to serve procedural economy. The added features were also clear for a regular user of the English language and, therefore, did not give rise to new issues under Article 84 EPC.
45. The opponent argued that the objection of lack of an inventive step relied upon by the Board had not gone beyond what was to be expected. There were no exceptional circumstances in the fact that the Board did not stick to the specific argumentation relied upon by the opponent. Moreover, auxiliary requests B3 and C3 referred to short and remote distances, terms that raised new clarity issues.
46. The proprietor's arguments are not persuasive.

47. The objection relied upon by the Board, in its preliminary assessment, namely that the subject-matter of claim 1 of the main request and of auxiliary request C1 was not inventive, did not differ substantially from the opponent's objection. It relied on the same disclosure in D1 as the starting point combined with the same teaching from document D7. The Board rejected the formulation of the objective problem proposed by the opponent, as well as that relied upon by the Opposition division, and proposed, rather, an alternative which, in light of the debate during the oral proceedings, also proved insufficient. The main problem solved by the invention was eventually focused on the restricted space available for additional radiation sources.
48. The primary object of the appeal procedure is to review the appealed decision (cf. Article 12(2) RPBA). It belongs to the nature of such proceedings that a board might deviate from an opposition division's decision on certain points. This also applies to the parties' disputed or agreed arguments. Therefore, the parties must consider the possibility that a board might also deviate from the arguments presented. This applies to the definition of the objective technical problem, if the problem-solution approach is used.
49. The decisions cited by the proprietor do not contradict the approach followed by the Board.
50. In T 2920/18, the Board admitted late-filed requests which differed from the previous requests on file only in that certain claims had been deleted. The Board based its conclusion on the finding that the late-filed auxiliary request altered neither the factual nor the legal framework of the proceedings, and did not require

a reassessment of the subject of the proceedings (T 2920/18, point 3.15). These considerations do not apply under the present circumstances, since the added limitations do raise new issues under Article 56 EPC.

51. In T 1598/18, the Board concluded that the added definition in a claim did not add subject-matter, since the resulting subject-matter was present in the original disclosure (T 1598/18, point 18). The proprietor's request, which differed from initially filed auxiliary request 3 only by the amendments to the description, was admitted (points 22 - 26).
52. The conclusions that an added definition, in a claim, did not contradict the prohibition of added subject-matter is irrelevant to the present question, which is primarily whether an added definition further restricts the scope of a claim. Similarly, no conclusion can be drawn for the present case from the decision to admit the new request in T1598/18, as that decision relied on the pertinence of adapting the description.
53. In T 339/19, the Board took a relatively lenient approach regarding the meaning of "exceptional circumstances". This requirement was construed in light and in application of the principles underlying the rules of procedure. Reference was made, specifically, to the principles that had been developed by the Boards of Appeal in connection with the right to be heard (Article 113 EPC), the right to oral proceedings (Article 116 EPC) and the right to a fair hearing both under Article 6 ECHR (as per G 1/05 *Exclusion and objection/XXX* (OJ 2007, 362)). The Board admitted the request filed after it had issued its preliminary opinion, observing that the request did not raise new issues, could be dealt within the prevailing framework

of proceedings, and posed no additional difficulties or surprises for either the other party or the Board (T 339/19, point 1.4).

54. The Board notes that the added features in auxiliary requests B2 to B5 and C2 to C5 raise new issues regarding inventive step, which is, in particular, true considering that these requests (with the exception of auxiliary requests B2, B3 and C2, C3), are not convergent.
55. The Board exercised its discretion in T 732/21 in favour of the proprietor, noting that the amended request, which had been filed in the course of oral proceedings, overcame all the opponent's objections that the Board had endorsed in its preliminary opinion and others which had not even been considered persuasive. Specifically, the new request overcame the objections which had been raised under Article 100(c) EPC, as well as some of those that had been raised under Article 100(a) EPC (T 732/21, points 7 - 8). Noting that the added limitations were among those defined in claim 3 of the granted patent, against which objections under Article 100(a) EPC had already been raised in the notice of opposition, the Board held that the amendments were neither detrimental to procedural economy, nor imposed an undue additional burden on either the opponent or the board.
56. This differs from the present situation in which the amendments include new limitations based on the description of the invention (auxiliary requests B2 to B4 and C2 to C4). This also differs for auxiliary request B5 and C5, in which the amendment to claim 1 consists in a combination of claims 1 and 8 of the main request, which had been objected to in the notice of

opposition and in the statement of grounds of appeal. Contrary to the circumstances underlying T 732/21, the features added to claim 1 of auxiliary requests B5 and C5 do not appear *prima facie* to render the claim allowable in view of D1, which also incorporate an embodiment with reflectors.

57. In conclusion, there are no exceptional circumstances that would justify the late filing of auxiliary request B2 to B5 and C2 to C5, after that the proprietor became aware of the Board's negative preliminary assessment regarding the main request (Article 13(2) RPBA). For this reason alone, auxiliary requests B2 to B5 and C2 to C5 should not be considered.
58. As a result, auxiliary request B2 to B5 and C2 to C5 were not admitted into the proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Meyfarth

P. Scriven

Decision electronically authenticated