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**Datasheet for the decision  
of 16 December 2025**

**Case Number:** T 1756/23 - 3.5.05

**Application Number:** 15707162.2

**Publication Number:** 3266221

**IPC:** H04R25/00

**Language of the proceedings:** EN

**Title of invention:**

Method of mounting at least one hearing device component  
inside a hearing device shell and hearing device

**Patent Proprietor:**

Sonova AG

**Opponent:**

GN Hearing A/S

**Headword:**

"While" vs. "hence"/SONOVA

**Relevant legal provisions:**

EPC Art. 123(2), 123(3)

RPBA 2020 Art. 13(2)

**Keywords:**

Added subject-matter - third, sixth to fourteenth, seventeenth to twenty-second auxiliary requests (yes)

Extension of scope of protection - fourth, fifth, fifteenth and sixteenth auxiliary requests (yes)

Admittance of claim requests filed after notification of Art. 15(1) RPBA communication - twenty-third to thirtieth auxiliary requests (no): no "exceptional circumstances"

**Decisions cited:**

G 0001/93



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Case Number: T 1756/23 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 16 December 2025**

**Respondent:**  
(Patent Proprietor)

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 August 2023 concerning maintenance of the  
European Patent No. 3266221 in amended form.**

**Composition of the Board:**

**Chair** K. Bengi-Akyürek  
**Members:** K. Peirs  
R. Romandini

## Summary of Facts and Submissions

I. The appeal of the opponent lies from the interlocutory decision of the opposition division to maintain the opposed patent in amended form in accordance with the proprietor's "third auxiliary request" referred to as "AR3" in point 9 of the section "Summary of Facts and Submissions" of the decision under appeal (Article 101(3)(a) EPC).

The higher-ranking claim requests were deemed not to comply with Articles 54, 84 and/or 123(2) EPC.

II. Oral proceedings before the board were held on 16 December 2025. The parties' final requests were as follows:

- The opponent requested that the decision under appeal be set aside and that the patent be revoked.
- The proprietor, having withdrawn its appeal during the oral proceedings before the board, requested that the opponent's appeal be dismissed, i.e. that the patent be maintained in amended form according to the "third auxiliary request" underlying the appealed decision. In the alternative, the proprietor requested that the patent be maintained in amended form based on the set of claims according to one of twenty-seven auxiliary requests (fourth to thirtieth auxiliary requests), where
  - the **fourth to fourteenth auxiliary requests**, all except for the third auxiliary request re-filed with the statement of grounds of appeal, are identical to the claim requests labelled

"AR4-AR14" in point 9 of the section "Summary of Facts and Submissions" of the appealed decision;

- the **fifteenth to twenty-second auxiliary requests** were filed for the first time with the proprietor's written reply to the opponent's statement of grounds of appeal

and

- the **twenty-third to thirtieth auxiliary requests** were filed after notification of the board's communication under Article 15(1) RPBA.

At the end of the oral proceedings, the board's decision was announced.

III. Claim 1 of the **third auxiliary request** (underlying the patent as maintained by the opposition division) reads as follows (board's feature labelling):

- (a) "A method of mounting at least one hearing device component (14) inside a hearing device shell (12),
- (b) said method comprising the steps of:
  - threading a fixture means (16) through a hole (18) formed in a side wall of the hearing device shell (12), the fixture means having a first end and a second end,
- (c) attaching the hearing device component (14) to the second end of the fixture means (16) protruding into an inside of the hearing device shell (12),
- (d) manipulating the first end of the fixture means (16) protruding through the hole (18) to an outside of the hearing device shell (12) such as to position the hearing device component (14) in a predetermined position,

- (e) fixing the positioned hearing device component (14) to an inner wall of the hearing device shell (12),
- (f) wherein said step of fixing comprises applying adhesive; and
- (g) after applying the adhesive, cutting off a portion of the fixture means (16) protruding through the hole (18) to the outside of the hearing device shell (12) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

IV. Claim 1 of the **fourth and fifteenth auxiliary requests** differs from claim 1 of the third auxiliary request in that, apart from deleting the expression "*through the hole (18)*" in feature (d), feature (g) is replaced by the following wording (board's feature labelling and mark-up, the latter reflecting amendments vis-à-vis feature (g)):

- (h) "after applying the adhesive, cutting off a portion of the fixture means (16) protruding ~~through the hole (18)~~ to the outside of the hearing device shell (12) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while and hence, a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

V. Claim 1 of the **fifth and sixteenth auxiliary requests** differs from claim 1 of the fourth auxiliary request in

that feature (h) is replaced by the following wording (board's feature labelling and underlining, the latter reflecting amendments vis-à-vis feature (h)):

- (i) "after applying the adhesive, cutting off a portion of the fixture means (16) protruding to the outside of the hearing device shell (12) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell and hence, a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18) in axial direction thereof."

VI. Claim 1 of the **sixth and seventeenth auxiliary requests** differs from claim 1 of the third auxiliary request in that, apart from deleting the expression "*through the hole (18)*" in feature (d), feature (g) is replaced by the following wording (board's feature labelling and mark-up, the latter reflecting amendments vis-à-vis feature (g)):

- (j) "after applying the adhesive, cutting off a portion of the fixture means (16) protruding ~~through the hole (18)~~ to the outside of the hearing device shell (12) from the remainder portion of the fixture means extending into the hole (18) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

VII. Claim 1 of the **seventh and eighteenth auxiliary requests** differs from claim 1 of the third auxiliary

request in that, apart from deleting the expression "*through the hole (18)*" in feature (d), feature (g) is replaced by the following wording (board's feature labelling and mark-up, the latter reflecting amendments vis-à-vis feature (g)):

(k) "after applying the adhesive and once the adhesive is cured, cutting off a portion of the fixture means (16) protruding ~~through the hole (18)~~ to the outside of the hearing device shell (12) from the remainder portion of the fixture means extending into the hole (18) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

VIII. Claim 1 of the **eighth, twelfth and nineteenth auxiliary requests** differs from claim 1 of the third auxiliary request in that, apart from deleting the expression "*through the hole (18)*" in features (d) and (g), it further comprises, at the end, the following feature (board's feature labelling):

(l) ", wherein a spacer (22) is used to provide a spaced apart positional relationship between the hearing device component (14) and the shell (12) or between the hearing device component (14) and a further hearing device component (24)".

IX. Claim 1 of the **ninth, thirteenth and twentieth auxiliary requests** differs from claim 1 of the third auxiliary request in that, apart from deleting the expression "*through the hole (18)*" in features (d) and

(g), it further comprises, at the end, the following feature (board's feature labelling):

(m) ", wherein the hearing device component comprises at least one of a coil, an antenna (14), a processor (36), and a sensor".

X. Claim 1 of the **tenth auxiliary request** reads as follows (board's feature labelling):

(n) "A hearing device (10) comprising a hearing device shell (12) accommodating at least one hearing device component (14), and a fixture means (16) for holding the at least one hearing device component (14), wherein the fixture means (14) [sic] comprises a first end that penetrates through at least a part of a hole (18) formed in a side wall of the hearing device shell (12) and a second end that is attached to the hearing device component (14),

(o) wherein the hearing device component (14) is fixed to an inner wall of the hearing device shell (12),

(p) wherein fixing is attained by means of an adhesive;

(q) and the first end of the fixture means is substantially flush with an outer wall of the hearing device shell."

XI. Claim 1 of the **eleventh and twenty-first auxiliary requests** differs from claim 1 of the ninth auxiliary request in that feature (b) is replaced by the following wording (board's feature labelling and underlining, the latter reflecting amendments vis-à-vis feature (b)):

(r) "said method comprising the steps of:  
threading a fixture means (16) through a hole (18)

formed in a side wall of the hearing device shell (12), wherein the hole (18) is positioned in a portion of the hearing device shell (12) which in use rests against a wall of an ear canal of a user, the fixture means having a first end and a second end,".

XII. Claim 1 of the **fourteenth and twenty-second auxiliary requests** differs from claim 1 of the thirteenth auxiliary request in that it additionally comprises feature (l) immediately preceding feature (m).

XIII. Claim 1 of the **twenty-third auxiliary request** differs from claim 1 of the third auxiliary request in that, apart from deleting the expression "*through the hole (18)*" in feature (d), feature (g) is replaced by the following wording (board's mark-up, reflecting amendments vis-à-vis feature (g)):

"after applying the adhesive and once the adhesive is cured, cutting off a portion of the fixture means (16) protruding ~~through the hole (18)~~ to the outside of the hearing device shell (12) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

XIV. Claim 1 of the **twenty-fourth to twenty-sixth auxiliary requests** differs from claim 1 of the third auxiliary request in that feature (g) is replaced by the following wording (board's underlining, reflecting amendments vis-à-vis feature (g)):

"after applying the adhesive and once the adhesive is

cured, cutting off a portion of the fixture means (16) protruding through the hole (18) to the outside of the hearing device shell (12) such that a cut-off plane of the remainder of the fixture means (16) is substantially flush with an outer wall of the hearing device shell while a distal end of the remainder of the fixture means (16) still penetrates through at least a part of the hole (18)."

XV. Claim 1 of the **twenty-seventh auxiliary request** differs from claim 1 of the twenty-third auxiliary request in that, immediately preceding feature (e), it comprises the following feature (board's feature labelling):

(s) "wherein the fixture means (16) comprises a filament and has a predetermined elasticity in order to allow for proper positioning of the attached hearing device component(14),".

XVI. Claim 1 of the **twenty-eighth to thirtieth auxiliary requests** differs from claim 1 of the twenty-fourth auxiliary request in that, immediately preceding feature (e), it comprises feature (s).

## **Reasons for the Decision**

### 1. *Technical background*

1.1 The opposed patent concerns an in-the-ear hearing device. It addresses in particular the typical difficulty of positioning and fixing components inside the custom-shaped shell of such a hearing device. In prior-art solutions, components are often mounted to the "faceplate" (i.e. the outer lid of the hearing device). This reportedly requires a larger faceplate,

which would contradict the goal of miniaturisation and leave valuable volume deep inside the shell unused. Additionally, the opposed patent considers that positioning components (like antennas) close to interferers (like receivers) causes performance issues.

1.2 The patent proposes a method to mount components directly to the inner wall of the hearing-device shell in a way that is independent of the faceplate. It mentions that this would allow for optimal use of the internal volume and flexible positioning to minimise interference (e.g. maximising the distance between an antenna and a receiver).

1.3 The most illustrative drawing in this regard is the opposed patent's Figure 1 (reproduced below).

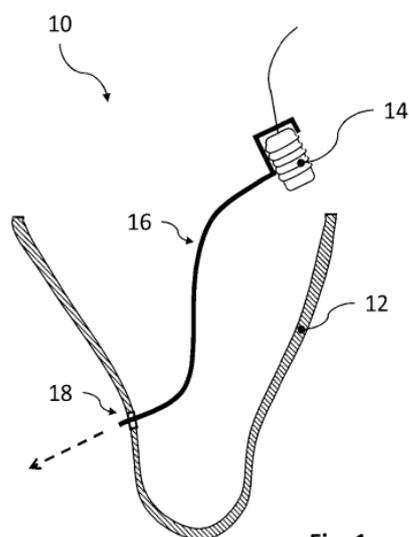


Fig. 1

It implies a step of threading where a fixture means (16) (e.g. a filament or thread) is passed through a small hole (18) drilled or modelled in the side wall of the hearing-device shell (12). The hearing-device component (14) (exemplified in Figure 1 as an antenna) is attached to the "second end" of the

fixture means (16) inside the shell. The "first end" of the fixture means (16), which protrudes to the outside, is manipulated (e.g. pulled, as indicated by the dashed arrow in Figure 1) to drag the component (14) into a predetermined position against the inner wall of the shell. Once in position, the component (14) is fixed to the inner wall using adhesive (20) (shown in Figure 2, not reproduced here). Finally, the portion of the fixture means (16) protruding outside is cut off so that the remainder is substantially flush with the outer shell wall.

2. *Third auxiliary request: claim 1 - added subject-matter*

Claim 1 of the **third auxiliary request** is based on original claims 1, 3 and 4. Contrary to the opposition division's positive assessment in Reasons 21.1 of the appealed decision, the amendments underlying feature (g), which were apparently proposed by the examining division in its communication under Rule 71(3) EPC, introduce subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).

2.1 In Reasons 21.1 of the appealed decision, the opposition division acknowledged that the terms "*hence*" and "*while*" have different meanings "in the general case". The board concurs with that insofar as the former term indicates a *consequence*, whereas the latter indicates *simultaneity*. In particular, the term "[*h*]ence" used at line 15 of page 7 as filed implies that the penetration of the distal end is a *result* of the way in which the "fixture means" is cut. This represents a "causal" relationship that is a *mandatory* result of the cutting operation. In contrast, the term "*while*" mentioned in feature (g) implies that the

penetration of the "distal end" occurs *at the same time* as the cutting of the "fixture means" with the cut-off plane being flush with the outer wall. This suggests a *parallel* or *concurrent* relationship.

2.2 Reasons 21.1 of the appealed decision also states that "*the opposition division cannot see which feature could have been removed by the deletion of the term 'hence'*".

2.3 The opponent, however, provided convincing arguments that replacing the term "hence" with the expression "*while*" does not meet the "gold standard" as to Article 123(2) EPC:

2.3.1 The board agrees with the opponent that the section starting at line 7 of page 7 as filed "*is to be read together with the foregoing section*". The skilled reader would indeed immediately understand this based on the phrase "*[s]ubsequently to the adhesive applying step*" used at line 10 of page 7 as filed. The board notes that this "adhesive applying step" is described in the "foregoing section", i.e. the paragraph bridging pages 6 and 7 as filed.

2.3.2 The opponent also rightly observes that this bridging paragraph (particularly its last sentence) states that the step of applying the adhesive comprises a sub-step of curing the adhesive/glue.

2.4 To further illustrate the violation of Article 123(2) EPC in view of feature (g) as amended, the board provides the following example, which hinges on the "curing" mentioned at line 4 of page 7 as filed being part of the step of "applying adhesive".

2.4.1 The description as filed expresses at lines 10 to 12 of page 7 that the operation of cutting off a portion of the "fixture means" protruding to the outside of the shell occurs "[s]ubsequent[ly] to the adhesive applying step". On account of the opponent's observation mentioned in point 2.3.2 above, this operation occurs *after* the adhesive has been cured. The curing of the adhesive ensures the fixation of the hearing-device component into the "predetermined position" that was reached following the steps described in the paragraph bridging pages 6 and 7 as filed. This fixation, in turn, immobilises the second end of the "fixture means" that is attached to the hearing-device component. In addition, the phrase "*the fixture means supports the component attached to the end of the portion of the fixture means*", appearing at lines 22 to 25 of page 6 as filed, implies two structural requirements. On the one hand, the "fixture means" must possess sufficient *rigidity* to support the component against its own weight. On the other hand, it must possess only a limited degree of *resilience* to prevent it from retracting out of the hole due to an elastic restoring force. Consequently, cutting off a protruding portion of the "fixture means" in the way as explained at lines 12 to 15 of page 7 as filed will *inevitably* result in the "distal end" of the (remaining) fixture means still penetrating through the hole in the side wall of the hearing-device shell. This specific condition, where the component is held in place by the cured adhesive without external aid, is hereinafter referred to as the "**autonomous state**".

2.4.2 In contrast, feature (g) allows the cutting to occur right "*after applying the adhesive*", i.e. *before* the "curing" of the adhesive takes place as part of the "adhesive applying step". This, however, means that the

hearing-device component can still move away from its "predetermined position" as mentioned in feature (d). In consequence, it would make technical sense for a skilled reader to impose a restriction on the hearing-device component's movement such that the protruding portion of the fixture means is cut off when, at the same time, the distal end of the remainder of the fixture means still penetrates the hole as specified in feature (g). This condition, where the position must be actively maintained (potentially by external tools or a component of the claimed "hearing device") during cutting because the bond resulting from the fixing in accordance with **feature (e)** is not yet secure, is hereinafter referred to as the "**assisted state**".

- 2.5 During the oral proceedings before the board, the proprietor presented three lines of argument:
  - 2.5.1 First, the proprietor argued that the terms "*while*" and "*still*" used in feature (g) were redundant because both terms expressed "simultaneity". Referring to the sequence of steps in claim 1, the proprietor further argued that the steps underlying features (b) to (g) had to be performed in the listed order. Therefore, by the time the "cutting" in step (g) takes place, the "fixing" in step (f) must logically be complete, rendering the state described in the "*while*" clause as per feature (g) an inevitable implication of the preceding steps.

This argument is unconvincing because it relies on a false equivalence between the act of "fixing" (i.e. applying adhesive) and the result of "being fixed" (i.e. that the component is stationary). Feature (f) defines the step of fixing as comprising

"*applying adhesive*". While applying adhesive is an action, establishing a secure bond (curing) is a process that takes some time. The application as filed explicitly defined a sequence of curing followed by cutting, ensuring the "autonomous state" (cf. point 2.4.1 above). Feature (g), however, permits a sequence where the adhesive is applied and the cutting is performed "after applying" but potentially before curing is complete. In this "assisted state" (cf. point 2.4.2 above), the "fixing" step (i.e. the application) has occurred, but the result (i.e. stability) has not. Therefore, the "*while*" clause mentioned in feature (g) is not implied by the steps underlying features (b) to (g); it actively introduces a specific condition that must be maintained to enable this undisclosed "assisted state". The opponent is therefore right that there is no direct and unambiguous disclosure in the application as filed for the use of the term "*while*" in feature (g).

2.5.2 Secondly, the proprietor argued that "*hence*" could also mean that a result is achieved that was not there before.

This is not convincing either, because it is contradicted by the word "*still*" used at line 16 of page 7 as filed, which implies that the (remaining) "fixture means" penetrating through at least a part of the hole in the axial direction thereof was present *before* the cutting action. Moreover, this argument does not address the fundamental deficiency: there is no direct and unambiguous disclosure in the application as filed for the use of the term "*while*" expressing "simultaneity" in feature (g).

2.5.3 Thirdly, the proprietor argued that the phrase introduced by "while" in feature (g) did not express a technical content and, in agreement with **G 1/93**, Headnote 2, should be ignored for assessing compliance with Article 123(2) EPC.

However, **G 1/93** concerns features that are not disclosed but are added merely to limit the protection conferred by the patent as granted without providing a technical contribution to the subject-matter of the claimed invention. The "while" clause mentioned in feature (g), however, fails this test right from the outset since it does provide a distinct technical contribution. By replacing the causal "hence" (implied by curing) with the temporal "while", the amendment changes the technical teaching of the claimed method. It thus allows the manufacturing process to be accelerated (i.e. *cutting* before *curing*) and permits the use of different tooling (e.g. external holding devices) associated with the "assisted state". Yet, these are indeed technical contributions to the claimed manufacturing method. The text "*while a distal end of the remainder of the fixture means still penetrates*" represents a "weaker" limitation replacing the "stronger" limitation as expressed by the phrase "*once the adhesive is cured*" which underlies the method disclosed on pages 6 and 7 as filed. By substituting the strict "autonomous state" with the looser temporal limitation of the "while" clause, the amendment generalises the teaching to cover the "assisted state". **G 1/93** does however not permit using an undisclosed feature to broaden the claimed subject-matter.

2.6 Hence, the third auxiliary request is not allowable under Article 123(2) EPC.

3. *Fourth, fifth, fifteenth and sixteenth auxiliary requests: claim 1 - extension of scope of protection*
- 3.1 Irrespective of any admittance issues regarding the **fourth, fifth, fifteenth and sixteenth auxiliary requests**, the board finds that **features (h) and (i)**, by replacing the term "*while*" with "*hence*", shift the definition of the claimed invention and therefore extend the protection conferred by the patent as granted.
- 3.2 During the oral proceedings before the board, the proprietor argued that the term "*hence*", indicating a *consequence*, had a more concrete and restricted meaning than the expression "*while*", the latter merely indicating the *simultaneous presence* of two features. The opponent acknowledged that "*while*" and "*hence*" might have some overlap but maintained that they possess essentially different meanings. To illustrate this, the opponent contrasted "*washing dishes while looking through a window*" (*simultaneity*) with "*washing dishes and hence having clean plates*" (*causality*).
- 3.3 The board agrees in this regard that the terms "*while*" and "*hence*" may appear to overlap in certain contexts due to inference. For example, in the colloquial phrase "*I am staying at home while it is raining*", the listener or reader *infers* that the rain is the *cause* of the stay, even though the sentence literally describes only two *simultaneous* events. However, in patent law, claims must be construed based on their *technical* meaning as understood by the skilled reader, rather than through a purely *linguistic* construction that relies on colloquial inference.

3.4 For the reasons set out in points 2.1, 2.4 and 2.5 above, the board finds that the terms "while" and "hence" define fundamentally different logical relationships for the skilled reader. By replacing the temporal "while" with the causal "hence" in features (h) and (i), the respondent has in fact shifted the definition of the claimed invention from a method characterised by a specific *simultaneous state* to one characterised by a specific *causal result*. This amendment, however, constitutes a shift in the technical definition of the claimed invention, i.e. it represents an *aliud*. Since the amended claim defines the invention by a technical relationship (causality) distinct from the one granted (simultaneity), the scope of protection is shifted to cover subject-matter that is not covered by the patent as granted, thereby violating Article 123(3) EPC.

3.5 In conclusion, the fourth, fifth, fifteenth and sixteenth auxiliary requests are not allowable under Article 123(3) EPC.

4. *Sixth to fourteenth and seventeenth to twenty-second auxiliary requests: claim 1 - added subject-matter*

Again, irrespective of the question of admittance regarding the sixth to fourteenth and seventeenth to twenty-second auxiliary requests, the board is not satisfied that the amendments underlying claim 1 of these claim requests comply with Article 123(2) EPC. The reasons for this are as follows:

4.1 Regarding the **seventh and eighteenth auxiliary requests**, the board notes that **feature (k)** specifies that the hearing-device component is fixed by the cured adhesive when performing the "cutting off" operation.

However, the term "*while*" remains present in claim 1. The addition of the phrase "*once the adhesive is cured*" does not inherently import the structural requirements disclosed in the passage at page 6, lines 22 to 25 as filed (discussed in point 2.4.1 above). Specifically, it does not ensure that the "fixture means" possesses a sufficient *rigidity* or limited *resilience* to prevent an autonomous disengagement from the hole.

To explain this in detail, and in addressing the proprietor's arguments set out in section I.4 of its submission of 15 October 2025, the board makes the following observations:

- 4.1.1 The method described in the passage at page 6, line 16 to page 7, line 20 of the application as filed relies on the "fixture means" having specific structural properties – namely sufficient *rigidity* and limited *resilience* – to ensure that the assembly is stable during the "autonomous state". Feature (k) adds a timing constraint (i.e. "*once the adhesive is cured*") but fails to incorporate these structural properties into the claim. Consequently, claim 1 of the seventh and eighteenth auxiliary requests constitutes an unallowable intermediate generalisation. By specifying the timing of the "cutting" step without defining the structural properties of the "fixture means", claim 1 encompasses embodiments which are not originally disclosed. For instance, the claim covers the use of a "fixture means" lacking the requisite rigidity (e.g. a limp thread) or having excessive elasticity. In such scenarios, even if the adhesive is cured, the "fixture means" would not be capable of maintaining the component's position autonomously upon cutting. The component would instead require external support or tension (i.e. corresponding to the "assisted state") to

prevent disengagement or displacement.

- 4.1.2 The proprietor interpreted the board's reasoning in this regard as an objection of insufficiency of disclosure (see section I.4 of the proprietor's written reply to the board's communication).

This is incorrect. The board's objection raised in point 7.4.2 of its communication is based on Article 123(2) EPC. The board identified there that the specific embodiment relied upon for the amendment (i.e. pages 6 and 7 as filed) inextricably links the step of "curing" with specific structural properties (i.e. sufficient rigidity/limited resilience) to support the "autonomous" nature of the claimed method. Extracting the timing limitation *without* the structural properties, however, extends the subject-matter to embodiments which are not disclosed in that specific context. This is a finding of added subject-matter, not a finding that the invention cannot be carried out.

- 4.1.3 The proprietor further argued that the expression "*predetermined position*" used in feature (d) implied a specific orientation for a proper function, which in turn implied that the "fixtured means" must be rigid and have a limited resilience.

This argument is also unconvincing. While the term "*predetermined position*" in a device claim might imply a final functional state, in a method claim, it can generally refer to *any* position that is related to performing the steps mentioned in this claim. In the context of present claim 1, this position can be, for instance, one that is convenient or necessary to perform the "fixing" step in accordance with feature (e). Crucially, a "*predetermined position*" can

be achieved and temporarily maintained by a non-rigid fixture means (e.g. a limp thread) through the application of external tension (corresponding to the "assisted state"). Therefore, the term "*predetermined position*" in the claimed method does not implicitly disclose the specific structural rigidity required for the "fixture means" to hold the hearing-device component autonomously without external tension (corresponding to the "autonomous state" as originally disclosed).

- 4.2 Regarding the **tenth auxiliary request** and **feature (n)**, the board acknowledges that this feature is based on claim 5 as filed. However, there is no direct and unambiguous disclosure in the application as filed for **features (o) to (q)**.

Particularly concerning **feature (q)**, the board agrees with Reasons 13 of the appealed decision that the term "flush" occurs only once in the application as filed (see page 7, line 14). This feature is disclosed in the context of the specific "fixture means" described at lines 7 to 20 of page 7 (i.e. of the type with sufficient *rigidity* and limited *resilience*). The "fixture means" recited in feature (q) of the tenth auxiliary request is not limited to this specific type and could possess, for instance, a different rigidity and resilience. Hence, generalising the "flush" cutting step to any "fixture means" constitutes an unallowable intermediate generalisation.

The proprietor's argument that "*there are actually more examples conveying the same meaning [as the term 'flush']*" is not convincing. The application as filed does not disclose such examples, at least not in a direct and unambiguous way. In Figure 2 as originally

filed, the "cut-off plane" of fixture means (16) is not necessarily "flush" with the outer wall of the shell (12). Furthermore, neither the passage at page 13, lines 10 to 15 as filed nor original claim 4 provides details on the relationship between the cut-off surface and the outer wall. Likewise, the board does not agree that this passage on page 13 indicates that the "cutting off" step is optional. Rather, this passage is understood to mean that once the adhesive (20) is cured, the fixture means is *ready* to be cut off as a subsequent and mandatory step in the manufacturing process.

4.3 Regarding claim 1 of the remaining claim requests, i.e. the **sixth, eighth, ninth, eleventh to fourteenth, seventeenth and nineteenth to twenty-second auxiliary requests**, it is immediately apparent that the same deficiency as identified in point 2 above for claim 1 of the third auxiliary request is still present.

4.4 Hence, the sixth to fourteenth and seventeenth to twenty-second auxiliary requests are not allowable under Article 123(2) EPC either.

5. *Twenty-third to thirtieth auxiliary requests:  
admittance*

5.1 Given that the **twenty-third to thirtieth auxiliary requests** were filed *after* the notification of the board's communication under Article 15(1) RPBA (cf. point II above), their admittance is subject to the provision of Article 13(2) RPBA. This provision stipulates that amendments to a party's appeal case shall, in principle, not be taken into account unless there are "exceptional circumstances", which have been

justified with cogent reasons by the party concerned.

- 5.2 The proprietor submitted that "exceptional circumstances" existed because these claim requests were a reaction to "new" objections raised in the board's preliminary opinion sent with its communication under Article 15(1) RPBA.

The board does not find this argument persuasive:

- 5.2.1 Regarding the **twenty-third to twenty-sixth auxiliary requests**, the proprietor stated that these were filed as a "*direct reaction to the statement of the Board of Appeal that the example described by feature (g) hinges on the 'curing'*".

However, the board's preliminary opinion indicated that the example provided in point 5.4 was derived from the opponent's arguments. Indeed, the opponent had explicitly raised the objection that the specific embodiment requires curing - and that omitting it constitutes an unallowable intermediate generalisation - in its statement of grounds of appeal (see pages 16 to 18). The board's preliminary opinion merely confirmed this existing objection.

Regarding the **twenty-seventh to thirtieth auxiliary requests**, the proprietor argued that these requests were a reaction to the board "*doubting that the method of claim 1 is enabled*".

The board disagrees with this argument for the following reasons.

- First, the board did not raise an objection of insufficiency of disclosure under Article 83 EPC.

The passage in question (point 5.4.1 of the preliminary opinion) analyses the description as filed to determine the structural requirements of the "fixture means" in the originally disclosed method for the purposes of assessing compliance with Article 123(2) EPC.

- Secondly, the reasoning set out in points 5.4.1 and 5.4.2 of the board's preliminary opinion explains why the omission of the "curing" step constitutes added subject-matter. The board illustrated that the method described in the passage at page 6, line 16 to page 7, line 20 of the application as filed relies on the fixture means having "sufficient rigidity" and "limited degree of resilience" to prevent it from moving out of the hole by itself.

Consequently, this was not a "new objection" but an analysis supporting the existing objection – raised by the opponent on pages 14 to 18 of its statement of grounds of appeal – that the specific sequence involving a "flush cut" requires specific conditions (i.e. curing/glue) which in turn imply specific structural properties. The proprietor's failure to address the structural implications of the "curing" objection at an earlier stage of the proceedings does not constitute an "exceptional circumstance" within the meaning of Article 13(2) RPBA.

- 5.3 Therefore, the board decided not to admit the twenty-third to thirtieth auxiliary requests into the appeal proceedings (Article 13(2) RPBA).

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated