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Datasheet for the decision of 6 March 2026

Case Number: T 0498/24 - 3.3.09

Application Number: 18729746.0

Publication Number: 3538692

IPC: D01F2/00, D01F1/04, A41D27/00, D02G3/34, C08K9/10, C09K11/08

Language of the proceedings: EN

Title of invention:
PHOTON MARKER SYSTEM FOR FIBER MATERIAL

Patent Proprietor:
Fibretrace Technologies Limited

Opponents:
CHT Germany GmbH
Tailorlux GmbH

Headword:
Fibertrace/Microcapsules

Relevant legal provisions:
EPC Art. 123(2)
RPBA 2020 Art. 12(6), 13(2)

Keyword:
Amendments - extension beyond the content of the application as filed (yes)
Late-filed request - admitted in first-instance proceedings (no) - admitted (no)
Amendment after summons - exceptional circumstances (no) - taken into account (no)

Decisions cited:
G 0001/93, T 0860/00, T 1523/07, G 0002/10, T 1085/13, T 2461/17, T 1255/18, G 0001/24

Catchword:

Europäisches Patentamt
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Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: T 0498/24 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 March 2026

Appellant: (Patent Proprietor)	Fibretrace Technologies Limited The Stanley Building 7 Pancras Square London N1C 4AG (GB)
Representative:	Cohausz & Florack Patent- & Rechtsanwälte Partnerschaftsgesellschaft mbB Postfach 10 18 30 40009 Düsseldorf (DE)
Respondent: (Opponent 1)	CHT Germany GmbH Bismarckstraße 102 72072 Tübingen (DE)
Representative:	dompatent Partnerschaft von Patentanwälten und Rechtsanwälten mbB Deichmannhaus am Dom Bahnhofsvorplatz 1 50667 Köln (DE)
Respondent: (Opponent 2)	Tailorlux GmbH Fraunhoferstrasse 1 48161 Münster (DE)
Representative:	Kalkoff & Partner Patentanwälte mbB Martin-Schmeisser-Weg 3a-3b 44227 Dortmund (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 7 February 2024 revoking European patent No. 3538692 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chair	A. Jimenez
Members:	S. Arrojo
	F. Rinaldi

Summary of Facts and Submissions

I. The appeal of the proprietor is directed against the decision of the opposition division to revoke the patent for non-compliance with the requirements of Article 123(2) EPC.

II. The proprietor (appellant) requested that the decision be set aside and that the patent be maintained on the basis of the main request (patent as granted) or, in the alternative, that it be maintained on the basis of one of auxiliary requests 1 to 21 as filed with the statement of grounds of appeal. Furthermore, if the board concludes that one of these requests meets the requirements of Article 123(2) EPC, the appellant has asked that the case be remitted to the opposition division for further prosecution.

III. In their replies to the appeal, opponents 1 and 2 (respondents) requested that the appeal be dismissed and that the decision to revoke the patent be confirmed.

IV. In a communication under Article 15(1) RPBA, the board indicated that, in its preliminary opinion, none of the requests on file met the requirements of Article 123(2) EPC.

V. In a submission dated 19 February 2026, the appellant filed new auxiliary requests 1 to 5 in response to the preliminary opinion of the board and renumbered former auxiliary requests 1 to 21 as auxiliary requests 6 to 26.

VI. At the oral proceedings, which took place on 6 March 2026, the parties confirmed that the present decision should be based on the following requests.

- The appellant requests that the decision under appeal be set aside and that the patent be maintained on the basis of the claims as granted (main request) or, in the alternative, that it be maintained on the basis of one of auxiliary requests 1 to 5 as filed with the submission dated 19 February 2026, or that it be maintained on the basis of one of auxiliary requests 6 to 26, which had originally been filed with the statement of grounds of appeal as auxiliary requests 1 to 21. As a further auxiliary measure, if the board concludes that one of the requests on file meets the requirements of Article 123(2) EPC, the appellant requests that the case be remitted to the opposition division for further prosecution.

- The respondents request that the appeal be dismissed.

Reasons for the Decision

Main request

1. Article 123(2) EPC

1.1 Claim 1 as granted reads as follows (with the feature numbering proposed by the appellant and with the added features objected to under Article 123(2) EPC shown in bold):

"1. A method comprising:

1.1. providing a yarn or thread comprising ***a base fiber uniformly blended with trace fiber slivers,***

1.1.1 said trace fiber slivers comprising luminescent nano-particle photon marker ***microcapsules (16) evenly distributed within cellulose fibers,***

1.1.2 the luminescent nano-particle photon marker microcapsules (NPPMM 16) transmitting a reflected response signature RRS within a ***wavelength range of 380 nm and 100 µm*** *when examined under a spectrophotometer reader,*

1.1.3 the response signature being indicative of an aspect of the yarn, thread or any intermediate or final product manufactured therefrom, the method comprising:

1.2 providing the trace fiber slivers by ***processing trace fiber strands into the trace fiber slivers;***

1.3 forming the trace fiber strands by:

1.3.1 forming the luminescent nano-particle photon marker microcapsules (16) by encasing luminescent nano-particle photon markers (12) in shells (14), and

1.3.2 mixing the luminescent nano-particle photon marker microcapsules (16) within a diluted cellulose slurry to form a mixture;

1.3.3 extruding the mixture through a spinneret to form the trace fiber strands."

Feature 1.1.1: "microcapsules evenly distributed within cellulose fibers"

1.2 The appellant submitted that this feature finds support in the passage on page 10, lines 9 to 11, of the description as filed, as well as in Figure 3 and in the subject-matter of claim 1 as filed.

1.2.1 According to a first line of argument put forward by the appellant, feature 1.1.1 would at least be implicitly supported by the above-cited parts of the application as filed.

The passage on page 10, lines 9 to 11, of the description as filed explicitly discloses the following.

"The mixture of evenly distributed microcapsules and diluted cellulose is then pumped to a spinneret 24 and continuous trace fiber strands 26 are extruded [...]".

This step is also depicted in Figure 3 as filed. According to the appellant, it is well known in the art that the main purpose, and the necessary consequence, of providing evenly distributed microcapsules in the mixture to be extruded is to achieve a correspondingly even distribution of the microcapsules in the resulting extruded cellulose slivers. Since there is no indication on page 10 or in Figure 3 of the application as filed that the evenly distributed mixture should undergo any additional intermediate step before being extruded, there would be no basis to conclude that the homogeneous mixture would be disrupted before the formation of the slivers.

The method according to the invention as described in the application as filed would therefore inevitably lead to the microcapsules being evenly distributed within the cellulose fibres as defined in claim 1 at issue.

Consequently, in the appellant's view the application as filed provides an implicit basis for feature 1.1.1.

1.2.2 According to the appellant, the above conclusion is further reinforced by other parts of the application as filed.

Claim 1 as filed defines a finished yarn or thread comprising a base fibre with microcapsules "blended throughout". From this expression it follows that the microcapsules according to the invention must be uniformly distributed within the fibres.

This interpretation would be consistent with the main objects of the invention which, according to page 2 of the description as filed, include ensuring that the "authenticity, purity and provenance" of the yarns can be accurately ascertained. The skilled person would in particular recognise that determining the purity of the yarns requires a precise measurement of the amount of microcapsules, which would only be feasible if the microcapsules were evenly distributed within the cellulose fibres.

1.2.3 The appellant also submitted that document **D5** (US 2015/0329771 A1) — which was cited by the opponents in support of their argument that an evenly distributed mixture would not necessarily lead to a uniform distribution of the microcapsules in the fibres — in fact supported the conclusion that the feature in

question was the inevitable consequence of mixing and extruding an evenly distributed mixture as described on page 10 of the application as filed.

Document D5, which aimed to overcome the problems associated with an uneven distribution of pigments in fibres (see paragraph [0003] thereof), teaches that, by coating the pigments and by extruding an evenly distributed mixture, the fibres are homogeneously marked, i.e. the pigments are evenly distributed within the fibres (see paragraph [0008]).

According to the appellant, these teachings correspond exactly to those of the application as filed, and in particular to the indication on page 9, second paragraph, that the microcapsule shells serve to avoid deposition of the microcapsules prior to the extrusion of the evenly distributed mixture. The reference in paragraph [0010] of D5 to particle sizes merely serves to establish the minimum diameter required to avoid problems associated with the acid sensitivity of the particles.

In any event, the particles used in the invention are "microcapsules" (as is the case in D5), which implicitly limits their size to a few micrometres, or, more specifically, in the words of the description — pursuant to G 1/24 — to approximately 5 micrometres (see page 7 and also claim 3 as filed).

1.2.4 According to a second line of argument of the appellant, and in view of the conclusions reached in G 1/24, feature 1.1.1 should be interpreted in the light of the description.

When doing so, the skilled person would recognise that, since this feature forms part of a method claim, it should be interpreted accordingly as a method feature. From this perspective, the reference to evenly distributed microcapsules would be understood as a further characterisation of the mixing and extruding method steps, i.e. features 1.3.2 and 1.3.3, as defined in claim 1 at issue. This corresponds to what is described in the cited passage on page 10 of the application as filed, i.e. the step of extruding the evenly distributed microcapsules.

1.2.5 According to a third line of argument submitted by the appellant, if the board concludes that feature 1.1.1 defines product features (i.e. properties of the trace cellulose fibres produced) rather than further characterising the method steps of mixing and extruding, Article 123(2) EPC would nevertheless not be infringed, because according to G 1/93, a feature that does not provide any technical contribution and merely limits the scope of the claim does not infringe Article 123(2) EPC.

If the feature is regarded as characterising the product rather than the method, it would follow that it could not plausibly provide a technical contribution to the claimed method. Instead, such a feature would merely limit the scope of the claim by excluding from protection any method leading to a non-homogeneous distribution of the microcapsules in the fibres.

In the appellant's view, the criteria set out in G 1/93 is therefore fulfilled, and as a consequence feature 1.1.1 cannot be considered to infringe Article 123(2) EPC.

1.3 The board disagrees with the appellant.

First line of argument: alleged implicit disclosure

1.3.1 The board sees no basis for concluding that feature 1.1.1 is implicitly disclosed in the application as filed.

It is not disputed that extruding an evenly distributed mixture of microcapsules and cellulose would facilitate or promote a uniform distribution of the microcapsules within the extruded cellulose fibres. Therefore, provided that no intermediate step occurs between the mixing and the extrusion, obtaining cellulose fibres with evenly distributed microcapsules can be regarded as a likely result of the mixing and extrusion steps described on page 10 of the application as filed.

However, "likelihood" is not the criterion to be applied when assessing an alleged implicit disclosure. Instead, the "gold standard" according to G 2/10 requires that the feature in question be directly and unambiguously derivable from the application as filed. In a number of decisions (see T 860/00, Reasons 1.1; T 1523/07, Reasons 2.4; T 1085/13, Catchword), with which the present board agrees, this requirement - in the context of Articles 123(2) and 54 EPC - is equated with the strict criterion that the feature must necessarily or inevitably result from the explicit disclosure, such that no other outcome could reasonably be expected.

1.3.2 Even assuming that the uniformly distributed mixture of microcapsules is directly extruded through the spinneret, the only clear conclusion is that a consistent distribution of the microcapsules would be

promoted. However, a number of other factors can affect the homogeneity of the distribution of the microcapsules within the extruded fibres. The pumping and extrusion conditions, the intrinsic properties of the microcapsules and, in particular, the particle size distribution of the microcapsules (see paragraphs [0003] and [0010] of document D5), for example, may play a significant role in this respect.

1.3.3 Contrary to the appellant's position, the subject-matter of claim 1 as filed does not provide any indication as to how the microcapsules are distributed in the trace fibres. The feature "A yarn or thread comprising a base fiber with luminescent nano-particle photon marker microcapsules blended throughout [...]" in claim 1 of the application as filed does not concern the distribution of the microcapsules within the trace fibres, but rather their distribution within the base fibres. Since, according to claim 5 as filed, the microcapsules are dispersed in cellulose trace fibre slivers — a feature which is also defined in claim 1 at issue — the requirement that the microcapsules be "blended throughout" logically applies to the distribution of the trace fibre slivers containing the microcapsules within the base fibres (e.g. cotton fibres), not to the distribution of the microcapsules within the trace fibre slivers, let alone within the (extruded) cellulose fibres themselves.

1.3.4 There is also no basis for concluding that the trace fibres are identical to the base fibres. Not only are they presented as distinct components in both the claims and the description as filed, but the description also encompasses base fibres of animal and artificial origin (see the list on page 13 of the description as filed), which are not cellulose based.

In any event, even if the base fibres and trace fibres were both cellulose based or even identical in nature, they would still represent distinct components in the context of method claim 1 as filed, since they are provided separately and the microcapsules are only dispersed in the trace fibre slivers in the application as filed. This is confirmed by the following passage on page 11 of the description as filed (with emphasis added by the board), which clarifies that the base fibres and the trace fibres are distinct components that are blended together in order to achieve a homogeneous distribution of both fibres.

"The trace fiber slivers 28 are added to the cotton fibers [the base fibers] at a specific rate [...] The air flow duct 36 then blends all the fibers from each gin stand and feeds into a blow chamber before traveling to a baler [...]. This process allows for homogeneous distribution of trace fiber slivers 27 through each bale."

1.3.5 Document D5 likewise does not support the conclusion that extruding an evenly distributed mixture would necessarily or inevitably lead to the feature in question.

It is true that D5 aims to promote stable and homogeneous pigment distributions in order to avoid pigment losses and to provide a homogeneous marking of fibres. However, there are two decisive differences with respect to the application as filed. First, D5 proposes specific measures for achieving these objectives (see paragraphs [0008] and [0010]), such as operating within a particular particle size range (0.5 to 1.0 µm, preferably 0.6 to 0.9 µm) and using specific coatings and/or additives. Claim 1 does not define any

corresponding features. Although the description of the application as filed provides certain information regarding the shells of the microcapsules and the particle size thereof, these features differ significantly from those disclosed in D5 (e.g. a particle size of approximately 5 µm in the application as filed compared with 0.5 to 1 µm in D5). There is therefore no basis for extrapolating the effect described in D5 to the subject-matter of the present application. Secondly, whereas the features disclosed in D5 are explicitly said to achieve an even distribution of particles in the fibres, the application as filed merely indicates that the shells of the microcapsules are intended to prevent settlement of the particles (see page 9). While this may suggest that a uniform dispersion of the microcapsules within the fibres is likely, it does not establish that such an outcome would necessarily or inevitably result.

1.3.6 Moreover, the board is not persuaded by the appellant's argument that a homogeneous distribution of microcapsules within the cellulose fibres would be regarded, at least implicitly, as a mandatory requirement for achieving the intended purpose of analysing the purity of the fibres. Even assuming that the skilled person would understand this general purpose as being linked to the ability to measure precisely the concentration of luminescent microcapsules in the fibres, the solution proposed in the application as filed is to ensure that the trace fibres containing the microcapsules are uniformly blended with the base fibres (i.e. "blended throughout"). The conclusion that this requirement would extend to the distribution of the microcapsules within the cellulose (trace) fibres finds no basis in the application as filed.

1.3.7 The board has therefore concluded that the information in the application as filed would not necessarily or inevitably lead to a uniform distribution of the microcapsules within the cellulose trace fibres. Thus, feature 1.1.1 cannot be considered to be implicitly disclosed in the application as filed.

Second line of argument: claim interpretation pursuant to G 1/24

1.3.8 The board first of all notes that, irrespective of whether the conclusions of G 1/24 are applicable in the context of Article 123(2) EPC, the interpretation of a claim feature in the light of the description, as discussed in this decision, logically presupposes that the interpretation is based on disclosures or explanations relating - at least implicitly - to that feature in particular. In other words, the principles set out in G 1/24 do not support interpreting a feature in the light of disclosures or explanations that are not directly and unambiguously related to that feature. Such an approach would clearly be contrary to the well-established criteria of the "gold standard" as set out in G 2/10.

1.3.9 When comparing the passage on page 10, third paragraph, of the description as filed — which discloses a method for mixing and extruding a fluid mixture through a spinneret — with feature 1.1.1, which defines microcapsules evenly distributed within cellulose fibres, it is apparent that these are distinct features belonging to different categories (i.e. a method step versus a product feature). Moreover, as already explained above, these features cannot be regarded as

being implicitly linked such that one would necessarily result from the other.

1.3.10 Consequently, the board has concluded that the principles set out in G 1/24 do not justify interpreting a claim feature on the basis of information that is not necessarily associated - at least implicitly - with that feature in particular.

1.3.11 It also follows that there is no basis for concluding that product feature 1.1.1 — concerning the uniformity of the microcapsules within the cellulose fibres — should be reinterpreted as a further specification of the mixing and extruding steps defined in features 1.3.2 and 1.3.3, rather than being understood as a product feature obtained with the defined process.

Third line of argument: no technical contribution under G 1/93

1.3.12 Furthermore, the board is not persuaded by the appellant's third line of argument based on G 1/93. This argument fails from the outset, since it is not apparent how the requirement to obtain cellulose trace fibres with evenly distributed microcapsules could be regarded as not providing any technical contribution.

1.3.13 The appellant essentially argued that, if feature 1.1.1 were interpreted as a product feature, it could not provide any technical contribution to an invention directed to a method. This reasoning is not convincing, however. It is not only permissible but indeed common practice for method claims to be further defined by features relating to the product obtained, or to specific properties thereof. Such limitations generally provide a technical contribution, as the claimed method is restricted by the achievement of specific product

characteristics. Indeed, in such claim formulations, the properties of the resulting product are regarded as a technical effect of the method steps. This not only constitutes a technical contribution but may also represent a core aspect of the invention.

1.3.14 Moreover, as pointed out by the respondents, the appellant itself argued that achieving an even distribution of microcapsules in the cellulose fibres was essential for determining the purity of the fibres. Although this argument was not accepted as a basis for concluding that feature 1.1.1 is implicitly disclosed in the application as filed, the board considers that such a distribution would plausibly contribute to improving the ability to determine the purity of the fibres compared with the solution proposed in the application as filed (blending the trace fibres throughout the base fibres).

1.3.15 The board has therefore concluded that feature 1.1.1 provides a technical contribution. Consequently, the principles set out in G 1/93 cannot be applied in the present case in the assessment of Article 123(2) EPC.

1.4 In view of the above considerations, the board has concluded that the definition of "microcapsules evenly distributed within the cellulose fibres" extends beyond the content of the application as filed.

Thus, the requirements of Article 123(2) EPC are not met.

Auxiliary requests 1 to 5

2. Admittance under Article 13(2) RPBA

2.1 Auxiliary requests 1 to 5 were filed with the appellant's submission dated 19 February 2026. As this submission was made after notification of the board's communication under Article 15(1) RPBA, the admittance of these requests is governed by Article 13(2) RPBA. Pursuant to this provision, such late-filed amendments "shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned."

2.2 The appellant submitted that these auxiliary requests were filed in response to the preliminary opinion of the board. Although the Article 123(2) EPC objection against feature 1.1.1 had already been discussed during the opposition proceedings, the preliminary opinion contained arguments that had not been previously presented by the opposition division or the opponents.

For instance, the argument that the claims did not define the step of extruding a mixture of evenly distributed particles was new. Moreover, the criterion of "necessarily" or "inevitably" resulting from the original disclosure in relation to an alleged implicit disclosure had not been addressed earlier. The appellant argued that the preliminary opinion therefore represented the first guidance on how the objection could be overcome, and cited decisions T 2461/17 and T 1255/18 in support of this argument.

2.3 The appellant further argued that the non-admittance of an auxiliary request during the oral proceedings before the opposition division was surprising, particularly

since the opposition division had departed from its preliminary view that feature 1.1.1 had originally been disclosed. The appellant also contended that the existence of a so-called "inescapable trap" could amount to an exceptional circumstance. Finally, the appellant submitted that admitting the requests would not prejudice procedural economy or the rights of the other parties, as the amendments were of limited complexity and addressed subject-matter already discussed in the proceedings, and constituted a direct response to the outstanding objections.

2.4 The board disagrees.

2.4.1 It is first of all noted that the board did not raise any new objections in its preliminary opinion, unlike in the cited decisions T 2461/17 (Reasons 7 to 9) and T 1255/18 (Reasons 6.1). Rather, the board provided a more detailed and comprehensive explanation of the Article 123(2) EPC objection against feature 1.1.1 in the decision under appeal. This explanation did not change the subject of the proceedings, nor did it advance the proceedings in an unexpected direction; it merely intended to assist the parties in understanding the issues at stake.

2.4.2 Whether or not the decision under appeal provided guidance on how to overcome the objection is irrelevant. Beyond the requirement under Rule 111(2) EPC that decisions be reasoned — which is clearly met in the decision under appeal — there is no additional obligation of the opposition division, or the board, to advise on how to overcome objections. This responsibility rests entirely with the parties; any alleged shortcomings in this respect do not constitute

exceptional circumstances justifying late filing of requests.

2.4.3 The non-admittance of the auxiliary request at the oral proceedings does not constitute exceptional circumstances either. Even if the non-admittance of that request were considered unjustified, it could at most warrant the admission of the relevant auxiliary request filed at that stage (here, auxiliary request 18 filed as auxiliary request 13), but not other auxiliary requests (i.e. requests 1 to 5), and only for requests filed with the statement of grounds of appeal, not for submissions made after notification of the Article 15(1) RPBA communication.

2.4.4 The board is not persuaded that an "inescapable trap" constitutes exceptional circumstances, either. The fact that certain objections may be difficult to overcome does not render the situation exceptional, particularly since this was known to the appellant from the outset of the first-instance proceedings.

2.4.5 The board also notes that admitting the auxiliary requests would negatively affect both procedural economy and the rights of the respondents.

The objection in question involves a certain degree of procedural complexity. Given the late stage at which the requests were filed and the lack of justification given, the respondents could not have anticipated discussing them in substance, and therefore the admittance thereof would prejudice the respondents' procedural rights.

2.4.6 Finally, the auxiliary requests are not clearly allowable. The deletion of feature 1.1.1 could

introduce new issues under Article 123(3) EPC, and the inclusion of additional method features does not change the fact that the original application does not implicitly anticipate feature 1.1.1.

2.5 In view of the above considerations, the board has decided, having exercised its discretion under Article 13(2) RPBA, not to admit auxiliary requests 1 to 5.

Auxiliary requests 9a and 13

3. Article 123(2) EPC

3.1 As noted in the preliminary opinion, claim 1 according to these auxiliary requests defines the contested feature 1.1.1.

3.2 The appellant argued that claim 1 of auxiliary request 9a (originally filed as auxiliary request 4a) and of auxiliary request 13 (originally filed as auxiliary request 8) nonetheless overcame at least some of the objections raised by the board.

Claim 1 of auxiliary request 9a defines the steps of mixing and extruding cellulose fibres with evenly distributed microcapsules.

Claim 1 of auxiliary request 13 defines the particle size of the microcapsules.

3.3 The board notes that none of these amendments overcome all the objections raised against the main request. Consequently, the reasoning provided above with respect to the main request also applies to auxiliary requests 9a and 13. In particular, the method steps

disclosed on page 10 as filed (mixing and extruding evenly distributed microcapsules and diluted cellulose) do not necessarily imply that the microcapsules are evenly dispersed within the resulting cellulose fibres. The fact that this step is now defined in claim 1 at issue does not affect this conclusion. It follows that the objections raised against the main request also apply to claim 1 of auxiliary request 9a.

3.4 The same conclusion applies *mutatis mutandis* to claim 1 of auxiliary request 13: even if the microcapsules have a particle size of 5 µm, there is still no implicit disclosure of feature 1.1.1.

3.5 Accordingly, the subject-matter of claim 1 of auxiliary requests 9a and 13 does not overcome the outstanding objections, and the requirements of Article 123(2) EPC are not met.

Auxiliary requests 6 to 12, 13a, 14 to 17 and 19 to 26

4. Article 123(2) EPC

4.1 Claim 1 according to each of auxiliary requests 6 to 12, 13a, 14 to 17 and 19 to 26 defines the contested feature 1.1.1.

4.2 The objections raised against the main request therefore also apply *mutatis mutandis* to these requests. More specifically, as was the case for auxiliary requests 9a and 13, the inclusion of additional features in claim 1, based on the description and/or the claims as filed, does not overcome the argument that none of the disclosures in the application as filed — whether taken alone or in

combination — explicitly or implicitly disclose feature 1.1.1.

4.3 It follows that none of these requests meet the requirements of Article 123(2) EPC.

Auxiliary request 18

5. Admittance

5.1 Auxiliary request 18, which was filed as auxiliary request 13 with the statement of grounds of appeal and then renumbered after the filing of new auxiliary requests 1 to 5, was submitted for the first time during the oral proceedings before the opposition division (then as auxiliary request 1).

5.2 In point IV. of the decision under appeal, the opposition division held that this auxiliary request should not be admitted on the grounds of being late-filed under Rule 116 EPC and not being clearly allowable. The admittance of auxiliary request 18 is therefore at the discretion of the board under Article 12(6) RPBA, which states the following.

"The Board shall not admit requests, facts, objections or evidence which were not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance."

5.3 The appellant argued that the request was clearly allowable and that the circumstances of the case justified its admittance.

5.4 The board disagrees.

The opposition division exercised its discretion reasonably, applying the correct criteria (clear allowability), and therefore from this perspective there is no reason to overturn this exercise of discretion.

Furthermore, as discussed above, the board cannot find any teaching in the original application that would implicitly anticipate feature 1.1.1; the amendments to claim 1 therefore cannot be considered clearly allowable. Moreover, the board cannot identify any circumstances that would justify admitting the request.

5.5 In view of the above, the board has decided, having exercised its discretion under Articles 12(4) and 12(6) RPBA, not to admit auxiliary request 18 into the appeal proceedings.

6. Other procedural matters

6.1 The respondents requested that document D49, which was filed but not admitted during the first-instance proceedings, be admitted into the appeal proceedings. Furthermore, the respondents requested that the newly filed auxiliary requests 1 to 12 and auxiliary request 13 (which was not admitted during the first-instance proceedings) not be admitted into the appeal proceedings. However, since the board has concluded that the appeal should be dismissed, there is no need to address these requests.

6.2 Furthermore, since the board has concluded that none of the requests meet the requirements of Article 123(2) EPC, there is no need to address the appellant's

subsidiary request that the case be remitted to the opposition division for further prosecution.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Götz-Wein A. Jimenez

Decision electronically authenticated