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**Datasheet for the decision
of 10 February 2026**

Case Number: T 0676/24 - 3.4.02

Application Number: 16169727.1

Publication Number: 3093611

IPC: G01B11/245, G01B11/27

Language of the proceedings: EN

Title of invention:

Measuring Method and Device to Measure the Straightness Error
of Bars and Pipes

Patent Proprietor:

Q-TECH S.r.l.

Opponents:

RDE Company S.r.l.
MSG Maschinenbau GmbH

Headword:

Reduced appeal fee and substantial procedural violation/Q-TECH

Relevant legal provisions:

EPC Art. 108, 111(1), 113(2)
EPC R. 6(4), 6(5), 103(1)(a)

Keyword:

Appeal filed - appeal fee paid in the correct amount (yes)

Substantial procedural violation - decision upon text submitted
or agreed by patent proprietor (no)

Decisions cited:

T 1678/21, T 0553/25



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Case Number: T 0676/24 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 10 February 2026

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 22 March 2024
revoking European patent No. 3093611 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: F. Giesen
 B. Müller

Summary of Facts and Submissions

- I. The appeal by the patent proprietor is directed against the decision of the opposition division revoking European patent No. 3 093 611.

According to the minutes of the oral proceedings before the opposition division dated 22 March 2024, the patent proprietor filed "a new main request at 5:32 pm" and confirmed that "this request is the new main request" (see points 25 and 27). The minutes refer to this request as "NMR" and state that it "corresponds to the claims as granted" (see point 29).

Annexed to the minutes was, inter alia, a claim request entitled "MODIFIED MAIN REQUEST (marked-up)". Claim 1 of this request essentially combines the features of claims 1 and 5 as granted.

The decision under appeal is based, inter alia, on a request labelled "New Main Request (NMR, corresponding to the claims as granted)" comprising claims 1 to 12 "of the patent specification" (see point 15 on page 4). Moreover, the decision under appeal reproduces claim 1 of this request, which is identical to claim 1 as granted, in the form of a feature table with features M1.1 to M1.7 (see point 29). The decision under appeal does not deal with the "Modified Main Request".

- II. On 13 May 2024, the patent proprietor filed a notice of appeal and indicated on EPO Form 1038 (filed together with the notice of appeal) that the EPO was authorised to deduct the appeal fee from the representatives' deposit account for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC in

the amount of € 2,015. On 13 May 2024, the EPO debited this amount accordingly.

In this context, it should be noted that the patent proprietor, then applicant, had filed a "declaration for SMEs, natural persons, non-profit organisations, universities and public research organisations for the purpose of fee reductions under Rule 6 EPC" (EPO Form 1011, hereinafter referred to as "Declaration for SMEs") on 13 May 2016. In this declaration the box according to which the signatory was a small or medium-sized enterprise was ticked. The declaration contained a hand-written signature at the left-hand side of its bottom and the company stamp of "Q-Tech Srl" at its right-hand side. Neither the name under the signature nor the signatory's position within the company were printed as requested at the bottom of the form.

The EPO had never questioned this declaration.

III. With its communication of 17 June 2024, the board invited the patent proprietor to submit evidence that it was an entity referred to under Rule 6(4) and (5) EPC as mentioned in the above EPO Form 1038. Reference was made to point 4 of the decision of 14 February 2023 in case T 1678/21.

IV. With the letter dated 13 August 2024, the patent proprietor submitted the following evidence (labelled F1 to F3 in accordance with the proprietor's letter dated 9 January 2026):

- F1 Q-TECH SRL: "Bilancio di esercizio al 31 dicembre 2023"
- F2 "ATTESTAZIONE DELLA DENUNCIA CONTRIBUTIVA RELATIVA AL PERIODO: Giugno 2024"

F3 Declaration for SMEs filed with the application on 13 May 2016 (dated 10 May 2016).

This evidence was intended to show that the patent proprietor was an SME under Rule 6(4) and (5) EPC eligible for the reduced appeal fee.

More precisely, document F1 was a summary balance sheet on which it was reported (see page 5) that in year 2023 the total production value was equal to € 1,718,730.

In addition, document F2 showed (see line 3) that Q-TECH S.r.l. had 6 employees.

Based on these disclosures, the patent proprietor argued that Q-TECH S.r.l. was an enterprise which employed fewer than 50 persons and which had an annual turnover not exceeding EUR 50 million. Therefore, Q-TECH S.r.l. was an SME entitled to the reduction of fees.

In its reply to the appeal dated 2 December 2024, opponent 2 argued that documents F1 and F2 were not sufficient to justify the appellant's entitlement to pay a reduced appeal fee since the origin and content of the Italian-language documents F1 and F2 were completely unclear.

In addition, opponent 2 referred to the patent proprietor's website, which stated that Q-TECH had grown since 2010, employed 30 engineers alone and was a larger group. This contradicted the patent proprietor's statements based on documents F1 and F2.

Furthermore, with respect to document F3, it was not possible to verify who had signed the declaration and in what capacity, nor was there any direct connection with the patent proprietor's current financial situation. The patent proprietor now operated under a different address and, according to its website, was part of a larger group but not an SME.

Opponent 2 concluded that, as a consequence, the appeal fee was not paid in full, meaning that the appeal was not filed (Article 108, second sentence, EPC).

V. In its communication pursuant to Article 15(1) RPBA, annexed to the summons to oral proceedings dated 29 October 2025, the board invited the patent proprietor to answer the objections of opponent 2 to documents F1 to F3.

VI. With a letter dated 9 January 2026 dealing mainly with the topic of the SME status, the patent proprietor filed

- a signed statement that it was an SME (F13) indicating also that it had been an SME at the point in time of filing the appeal;

- English translations of documents F1 and F2 already on file. These translations were provided by a sworn translator in Italy. The patent proprietor refiled them with seal with a letter dated 16 January 2026.

The proprietor set out verbatim (the following quotation from the letter of 9 January 2026, like other quotations in this decision, is narrow-spaced):

3.3.1 A reduced appeal fee is valid for SMEs according to the recommendation of the EU commission. This means

that the entity shall not have more than 250 employees in total.

With document F2 the appellant has already filed evidence that six people are employed (see English translation F2.a).

This document has been signed by Francesco Cimino. As can be seen from the header of the document, this document has been issued by the national authority of Italy, namely INPS. The document has been signed by the director of the head quarters of INPS of Brescia.

Therefore, document F2 serves as an independent document being evidence that six people are employed with the appellant.

3.3.2 On the website of Q-Tech, figures are presented under the heading "guaranteed efficiency, reliability and precision". Within this "figure section", it says "30 highly specialized engineers".

Indeed, Q-Tech has a network of more than 30 highly qualified engineers. However, these are freelance engineers which are booked on a per-project basis. There is no hint in the "figure section" that the "highly specialized engineers" are employed. Freelancers do not count into the number of employers (see art. 5 of the enclosure of 2003/361/EG [sic] of the European Commission).

Even if those engineers would be counted into the number of employees according to the SME-understanding, this would be less than 250 employees which is the threshold of the SME-status.

3.3.3 It is clear that if six people are employed according to F2, there is no point in the relevant time where 250 employees had been employed by Q-Tech. This would be against the normal understanding of each person.

3.3.4 For confirmation purposes, we file Social Security Contribution Certificates from December 2022 (F4) and December 2023 (F5) of Q-Tech. These are in the same format as evidence F2. Translations into English are filed as F4.a and F5.a respectively.

From the third line of the table right under the header of F4.a and F5.a it becomes evident that the number of employees has been seven in 2022 and seven in 2023.

3.4 Opponent 2 is of the opinion that Q-Tech is part of a "group".

As can be read from the first page of F1/F1.a, Q-Tech is not part of a "group" (see third page, last line).

3.4.1 We file as F6 a further extract of the public register concerning Q-Tech - which is called "Visura" in Italian - giving an overview of the company. We also enclose a machine translation (F6.a) from the Italian document into English for the whole document and again a certified translation (F6.b) of the relevant passages.

From pdf-page 2 and 3 of the certified translation F6.b it can be seen that Q-Tech is owned by the natural persons Luca Fumagalli, Gianfranco Chiapparini, Paolo Tomassini.

3.4.2 Further, Q-Tech is shareholder of two further companies, namely "Q-Service" and "Coim Tech".

We enclose also for these companies "Visuras" (group F9 and F12). From pdf-page 2 and 3 respectively of the certified translation (F9.b for Q-Service and F12.b for Coim Tech) it becomes evident that Q-Service is owned by Q-Tech with a share of 90 %, and Coim Tech is owned by Q-Tech with a share of 3 %.

3.4.3 Q-Services is a small company with a yearly turnover of EUR 162.201 in 2022 (see F7 as the original balance sheet, F7.a as a machine translation of the full document and F7.b as a certified translation of the relevant passages; see pdf-page 4, last line of F7.b) and EUR 167.925 in 2023 (see F8 as the original balance sheet, F8.a as a machine translation of the full document and F8.b as a certified translation of the relevant passages; see pdf-page 4, last line of F8.b). T

The number of employees may also be extracted from the balance sheets under "Employment data". This has been two in 2022 (see pdf-page 5 of F7.b) and two in 2023 (see pdf-page 5 of F8.b). We enclose a machine translation for the whole document and a certified translation of the relevant passages.

3.4.4 Already from the amount of the shares (3%) it becomes clear that Q-Tech is not involved directly or indirectly in the management of Coim Tech (without prejudice to their rights as stakeholders).

According to art. 3 of the enclosure of 2003/361/EG [sic] of the European Commission, this would be

considered not being part of the entity in question. Even if one would count Coim Tech as to 100 percent to Q-Tech, the yearly turnover and the number of employees is smaller than the threshold of the SME-recommendation. We enclose balance sheets of Coim Tech for 2022 (F10, F10.a, F10.b) and 2023 (F11, F11.a, F11.b), machine translations of the full documents (FX.a) and certified translations (FX.b) of the relevant passages. From the certified translations it is clear that the turnover in 2022 has been EUR 1.655.394 and in 2023 EUR 1.625.562 (see pdf-page 4 of F10.b and F11.b); the number of employees has been eleven in 2022 and twelve 2023 (see pdf-pages 5 of F10.b and F11.b).

3.4.5 Q-Tech is not a shareholder of any other company.

3.4.6 Therefore, even the sum of the turnover and the employees of Q-Tech, Q-Services and Coim Tech are below the given SME-threshold.

3.5 According to T225/19, the enclosed evidence is to be reviewed by the Board also if these documents are filed later than the appeal, because the requirements for the effective filing and admissibility of the appeal is to be examined at every stage of the proceedings. Therefore, statements and supporting documents must also be accepted after the appeal period has expired.

The following is a list of the documents filed together with the letter dated 9 January 2026:

- F1.a English translation of F1 (Financial Statement)
- F2.a English translation of F2 (Employee Statement)
- F4 Employee statement Q-Tech 2022
- F4.a Partial certified translation into English of of F4
- F5 Employee statement Q-Tech 2023
- F5.a Partial certified translation into English of F5
- F6 Complete "Visura" of Q-Tech
- F6.a Complete machine translation into English of F6
- F6.b English certified translation of pages of F6
- F7 Complete balance sheet of Q-Services 2022

- F7.a Complete machine translation into English of F7
- F7.b Partial certified translation into English of F7
- F8 Complete balance sheet of Q-Services 2023
- F8.a Complete machine translation into English of F8
- F8.b Partial certified translation into English of F8
- F9 Full "Visura" of Q-Services
- F9.a Complete machine translation into English of F9
- F9.b Partial certified translation into English of F9
- F10 Complete balance sheet of COIMTECH 2022
- F10.a Complete machine translation into English of F10
- F10.b Partial certified translation into English of F10
- F11 Complete balance sheet of COIMTECH 2023
- F11.a Complete machine translation into English of F11
- F11.b English certified translation of pages of F11
- F12 Complete "Visura" of COIMTECH
- F12.a Complete machine translation into English of F12
- F12.b English certified translation of pages of F12
- F13 SME-declaration

The SME-declaration F13 for the company Q-TECH S.r.l. made on EPO Form 1011bis contains a handwritten signature, accompanied by the printed name "LUCA FUMAGALLI" and the position "Q-TECH CEO" of the signatory within the company.

VII. Oral proceedings before the board took place on 10 February 2026. The parties' final requests were as follows:

The patent proprietor requested that

- the appeal be declared admissible,

- the decision under appeal be set aside,
- the case be remitted to the department of first instance and
- the appeal fee be reimbursed.

In the alternative, the patent proprietor requested that the patent be maintained in amended form on the basis of the claims of one of the main request and auxiliary request 1 and 2, all filed with the statement of grounds of appeal dated 22 July 2024.

Opponent 1 requested that

- the appeal be dismissed,
- if any of the amended sets of claims were admitted and not considered to violate Article 83 EPC, the case be remitted to the opposition division for further prosecution.

Opponent 2 requested that

- the appeal be deemed not to have been filed for failure to pay the appeal fee in full, or
- in case the appeal was considered having been filed, that it be dismissed, and that
- none of the requests be admitted as they were all filed late.

Reasons for the Decision

1. Whether the appeal is not deemed to have been filed

Opponent 2 contests that the appeal was validly filed because the proprietor paid the reduced appeal fee without being entitled to it.

Editorial note: the emphases added in the following in bold typeface are those of the board.

1.1 The legal framework

Pursuant to **Article 108**, first and second sentences, EPC

[n]otice of appeal shall be filed... within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the **fee for appeal** has been paid. ...

Article 2 of the Rules relating to Fees (RFees), in item 11, sets out two different amounts of the fee for appeal:

11. Fee for appeal	
(Article 108) for an appeal filed	
- by any person referred to in Rule 7a, paragraph 2 (a) to (d)	2 015 [euros]
- by any other person	2 925 [euros]

Rule 7a(2) (a) to (d) EPC reads:

(2) The reduction of fees referred to in paragraph 1 shall be available for:

- (a) microenterprises;
- (b) small and medium-sized enterprises;
- (c) natural persons;
- (d) non-profit organisations, universities or public research organisations

Rule 7a EPC was inserted by the Decision of the Administrative Council of 14 December 2023 amending the Implementing Regulations to the European Patent Convention and the Rules relating to Fees, and adjusting the amount of the reduction in the fee for the supplementary European search where the international or supplementary international search report was drawn up by one of the European International Searching Authorities (CA/D 16/23) (hereinafter: "the Decision"), see OJ EPO 2024, A3.

Pursuant to its Article 5, the Decision entered into force on 1 April 2024.

Rule 7a (b) to (d) EPC correspond to former Rule 6(4) (a) to (c) applicable until 31 March 2024; Rule 7a(a) was added by the above Decision.

On 13 May 2024 when the appeal was filed new Rule 7a EPC had already been in force. Therefore, the mention of former Rule 6(4) EPC in Form 1038 filed together with the notice of appeal and the board's reference to that latter rule in its communication of 17 June 2024 are to be understood as a reference to Rule 7a EPC.

There is no provision corresponding to former Rule 6(5) EPC concerning the definition of micro, small and medium-sized enterprises in the Implementing Regulations amended by the Decision. However, section II.7 of the "Notice from the European Patent Office dated 25 January 2024 concerning fee-related support measures for small entities" (Official Journal EPO, 2024, A8) corresponds to former Rule 6(5) EPC. This section reads:

For the language- and micro-entity-related fee reduction scheme (Rule 7a(2) and (3) EPC), the definitions of SMEs and microenterprises in Article 2 of **Commission Recommendation 2003/361/EC of 6 May 2003** as published in the European Union's Official Journal

(L 124 of 20 May 2003, p. 36) in Annex 2 to this notice apply [hereinafter referred to as "the Recommendation"].

The conditions set out in the Recommendation defining the category of micro, small and medium-sized enterprises are correctly summarised in section 6 of the "**Notice** from the EPO dated 18 December 2017 concerning the **reduced fee for appeal** (Article 108 EPC) for an appeal filed by a natural person or an entity referred to in Rule 6(4) EPC" (OJ EPO 2018, A5; hereinafter referred to as "the Notice"). It reads in pertinent part:

The category of micro, small and medium-sized enterprises is made up of enterprises

- which employ fewer than 250 persons,
- which have an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million and
- for which no more than 25% of the capital is held directly or indirectly by another company that is not an SME.

As to a **declaration** to be filed in connection with the payment of reduced fees, **Rule 7b EPC** was introduced by the Decision. The rule reads in pertinent part:

Rule 7b

Declaration of eligibility for a reduction of fees

(1) Applicants wishing to benefit from a reduction of fees under Rule 7a, paragraph 1 or 3, shall declare themselves to be a person within the meaning of Rule 7a, paragraph 2 or 3, at the latest when the first reduced payment is made.

The **Notice** also has a section entitled "**Declaration** of entitlement" setting out the details in points 3 to 5.

1.2 Application of the legal framework

1.2.1 The patent proprietor's status of an SME

In the following the board assesses the three conditions set out in the Notice as reproduced in the previous section.

(a) Number of employees

The board is satisfied that the patent proprietor's submissions in this regard are supported by the evidence on file. They cover the relevant periods 2022 and 2023 (see point (b) below). For the board it has thus been established that the patent proprietor, even including both companies in which it is a shareholder (Q-Services and Coim Tech) employs far fewer than 250 employees. For the details, the board refers to points 3.3.1 to 3.3.4 of the patent proprietor's letter of 9 January 2026.

(b) Annual turnover

The board is also satisfied that the documents on file establish an annual turnover of all three companies combined in years 2022 and 2023 that is far below the threshold of € 50 million.

In the oral proceedings before the board, opponent 2 objected that no evidence was produced for year 2024 the appeal having been filed on 13 May 2024.

In this respect, the patent proprietor correctly referred to Article 4(1) and (2) of the Recommendation according to which the latest two approved accounting periods and calculated on an annual basis were to be

taken into account. These annual periods were 2022 and 2023.

(c) Capital held by another company that is not an SME

The proprietor has also established that no more than 25% of the capital of the three companies is held directly or indirectly by another company that is not an SME. The reason being that Q-TECH S.r.l. is owned by three natural persons. See above, point 3.4.1 of the letter dated 9 January 2026:

From pdf-page 2 and 3 of the certified translation F6.b it can be seen that Q-Tech is owned by the natural persons Luca Fumagalli, Gianfranco Chiapparini, Paolo Tomassini.

(d) In conclusion, the patent proprietor has established that, at the point in time when it filed the appeal, i.e. on 13 May 2024, it was an SME within the meaning of the Recommendation.

1.2.2 Declaration of eligibility for a reduction of the appeal fee

(a) Assertions by opponent 2

In its reply to the appeal of 2 December 2024 (see above, point V), opponent 2 asserted that, with respect to document F3, i.e. the Declaration for SMEs filed with the application on 13 May 2016, it was not possible to verify who signed this declaration in what capacity, nor was there any direct connection with the appellant's current financial situation, which now operated under a different address (and, according to its website, was part of a larger group but not an SME;

this objection has been discussed and dismissed above, in section 1.2.1).

In the oral proceedings before the board, opponent 2 objected that at the time of filing it could not be evaluated whether the patent proprietor was entitled to the reduced appeal fee. No evidence to this effect had been submitted during the appeal period. If it was considered that evidence had been filed, that evidence was not sufficient.

(b) No declaration required by Rule 7b EPC

Pertinent Rule 7b(1) EPC reproduced above requires a declaration, inter alia, to be an SME, from "[a]pplicants wishing to benefit from a reduction of fees under Rule 7a, paragraph 1 or 3".

Paragraph 1 refers to the filing or examination fee, paragraph 3 to five different fees, none of them being the appeal fee.

As a consequence, Rule 7b(1) EPC requires no declaration of eligibility for a reduction of the appeal fee. Nor is there any such requirement in the item 11 of Article 2 RFees specifying the reduced fee. Nor has the board detected any other legal basis. Cf. the analogous conclusion for former Rule 6(6) EPC in T 1678/21, point C.3.1 and the conclusion in T 553/25 for Rules 7a and 7b EPC.

Evidence of eligibility for a reduction of the appeal fee need not be produced within the appeal period or on the date of payment of the appeal fee (cf. Rules 7a(6) and 7b(1) EPC). Rather, it can be produced upon request by the board (cf. Rule 7(3) RFees). This is what

happened in this case: the board requested evidence in its communications of 17 June 2024 and 29 October 2025. The patent proprietor heeded these requests with its letters dated 13 August 2024 and 9 and 16 January 2026.

(c) Declaration required by the Notice

It follows from the previous section (b) that the requirement of a declaration in the section entitled "Declaration of entitlement" of the Notice (points 3 to 5) has no legal basis. The question of whether the Notice referring to repealed Rule 6(4) EPC applies at all can remain open. In T 553/25 it was said (in point 1 of the Reasons) that the "... provisions on fee reduction were transferred into new Rules 7a and 7b EPC". Furthermore, items 3 to 5 and 11 of the Notice were applied (in points 2 and 3 of the Reasons). The indications at the bottom of EPO Forms 1038 and 1038 bis to print the name and mention the function in a company likewise have no legal basis.

Applying the declaration requirement of the Notice nevertheless *arguendo*, the patent proprietor has complied with it. This is because the EPO had never contested the validity of the declaration filed on 13 May 2016. The change of address mentioned by opponent 2 does not weigh against its validity as such changes take place over time. The patent proprietor was therefore entitled to rely on the EPO's tacit acceptance of the declaration. Consequently, the patent proprietor was not required to file a new declaration within the time limit for filing the appeal and at the latest (cf. by analogy Rules 7a(6) and 7b(1) EPC) when paying the reduced appeal fee.

The patent proprietor nevertheless did file a new Declaration for SMEs on EPO Form 1038bis, together with its letter dated 9 January 2026.

1.3 Conclusion

The patent proprietor's appeal is deemed to have been filed on 13 May 2024 when the reduced fee for an appeal of € 2,015 was received. The proprietor was entitled to this fee pursuant to Rule 7a(2)(b) EPC, because it has shown that it was an SME at that point in time.

2. Substantial procedural violation

2.1 The board considers that a substantial procedural violation occurred because the opposition division did not decide upon the European patent in the text submitted to it, or agreed, by the proprietor of the patent as required by Article 113(2) EPC.

2.2 Oral proceedings before the opposition division

Oral proceedings before the opposition division took place on 23 January 2024. During these oral proceedings, the patent proprietor filed several requests.

The filing and discussion of these requests are reflected in two versions of the minutes:

2.2.1 Minutes dated 22 March 2024

The minutes dated 22 March 2024 indicate, inter alia, that the patent proprietor filed "a new main request at 5:32 pm" and confirmed that "this request is the new

main request" (see points 25 and 27). The minutes refer to this request as "NMR". However, the minutes state that this request "corresponds to the claims as granted" (see point 29).

The minutes further record that opponent 1 stated that "NMR is [...] completely new" (see point 31.2), that opponent 2 referred to "the comma" at the end of the claim (see point 31.3), and that the chairman of the opposition division "pointed out that the amendments of NMR are completely based on granted claims" (see point 32.1).

In addition, the last page of the minutes mentions three enclosures, inter alia a "further new main request, i.e. NMR, filed at 17:29". The annex to the minutes comprises a marked-up copy entitled "MODIFIED MAIN REQUEST (marked-up)" containing 11 claims, in which amended independent claim 1 essentially combines the features of claims 1 and 5 as granted.

2.2.2 Request for correction of minutes

With a letter dated 26 April 2024, opponent 2 requested a correction of the minutes, stating that the request mentioned in point 29 of the minutes "differed from the claims as granted".

2.2.3 Minutes dated 8 May 2024

On 8 May 2024 the opposition division issued a second, amended version of the minutes. These minutes are identical to the previously issued minutes with the following exceptions:

In point 29, the statement that NMR "corresponds to the claims as granted" has been deleted. The enclosures mentioned on the last page of the minutes were not sent again.

2.2.4 The board concludes from the above that the patent proprietor requested that the patent be maintained on the basis of the claims according to the request entitled "MODIFIED MAIN REQUEST (marked-up)" (labelled "NMR" by the opposition division), filed at 17:29 hrs during the oral proceedings, and that independent claim 1 of this request essentially combines the features of claims 1 and 5 as granted.

2.3 Decision under appeal

2.3.1 The decision under appeal is based, inter alia, on a request labelled "New Main Request (NMR, corresponding to the claims as granted)" comprising claims 1 to 12 "of the patent specification" (see point 15 on page 4).

2.3.2 The decision under appeal reproduces claim 1 of this request in the form of a feature table with features M1.1 to M1.7 (see point 29), discusses "Art. 100(b) and 83 EPC", and concludes that "the NMR does not comply with the requirements of Art. 83 EPC" (see point 30).

2.3.3 The board concludes from the above that the decision under appeal is based, inter alia, on a request relating to the patent as granted rather than on the request filed by the patent proprietor during the oral proceedings before the opposition division.

2.4 Substantial procedural violation

Basing a decision on the wrong request constitutes a substantial procedural violation because the freedom of disposition under Article 113(2) EPC is fundamental and disregarding it adversely affects the entire proceedings.

3. Remittal

3.1 The board remits the case to the opposition division for further prosecution within the meaning of Article 111(1) EPC and Article 11 RPBA.

3.2 According to Article 11 RPBA, the board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

The substantial procedural violation which occurred in the present case constitutes such a special reason.

3.3 During the oral proceedings before the board, opponents 1 and 2 argued that, in the event of remittal, the scope of further examination should be limited to the re-examination of the correct request. Opponent 2 submitted that there was no doubt that the opposition division had considered the correct claims during the oral proceedings and had merely made an error in the written decision. Opponent 1 agreed that the error was insignificant.

The patent proprietor argued that the first version of the minutes, which stated that the new main request concerned the claims as granted, raised doubts as to whether each member of the opposition division had been fully aware of the claims discussed during the oral proceedings.

- 3.4 The board is persuaded by the patent proprietor's argument. The reference in the first version of the minutes indeed creates doubt as to whether each member of the opposition division was fully aware of the correct claims under discussion. This is corroborated by the fact that the decision under appeal addresses the claims as granted. A mere correction of the minutes is unable to dispel this doubt. This justifies remittal so that the correct request can be examined and the parties can be heard on it.

The board has the power to set aside the decision under appeal. However, it sees no legal basis for limiting the opposition division's competence after remittal. The opposition division will have to exercise its own judgment as to the subject of the further examination in view of the reasons for remittal.

4. Reimbursement of the appeal fee
- 4.1 The board orders reimbursement of the appeal fee, since the appeal is allowable and such reimbursement is equitable by reason of the above-mentioned substantial procedural violation within the meaning of Rule 103(1) (a) EPC.
- 4.2 Opponent 1 argued that, in the present case, the board, and not the patent proprietor, raised the issue of a

substantial procedural violation. In these circumstances, reimbursement of the appeal fee was not equitable.

Opponent 2 argued that whether reimbursement of the appeal fee was equitable depended on the limits imposed by the board on the further prosecution and on the patent proprietor's conduct therein. Opening a new case would render reimbursement not equitable.

- 4.3 The patent proprietor argued that Rule 103 EPC did not provide that reimbursement of the appeal fee was equitable only if the issue is raised by the party adversely affected. Whether reimbursement was equitable was an objective criterion. In its view, in the present case, the mere fact that the opposition division committed a substantial procedural violation made reimbursement equitable.
- 4.4 The board is persuaded by the arguments of the patent proprietor. The boards of appeal may examine the facts of a case of their own motion pursuant to Article 114(1) EPC and verify whether Article 113 EPC has been complied with by the departments of first instance (see Case Law of the Boards of Appeal, 11th edition, July 2025, III.B.2.1).
- 4.5 Moreover, Rule 103(1)(a) EPC provides that reimbursement of the appeal fee shall be ordered where the appeal is allowable and such reimbursement is equitable by reason of a substantial procedural violation. It does not require that the violation be raised or that reimbursement be requested by the party concerned.

Rule 103(1)(a) EPC also does not provide that the future conduct of the appealing party may be taken into account. This would not be factually possible anyway.

Reimbursement of the appeal fee is ordered where an appeal was necessary in order to rectify a procedural violation committed by a department of the European Patent Office. The party concerned should not suffer a financial disadvantage in the form of the appeal fee for seeking correction of such a violation.

In the present case, the board sets aside the decision under appeal. The appeal is therefore allowable.

In these circumstances, reimbursement is equitable by reason of the opposition division's substantial procedural violation.

4.6 The conditions laid down in Rule 103(1)(a) EPC are therefore fulfilled.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated