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**Datasheet for the decision
of 11 March 2026**

Case Number: T 0930/24 - 3.5.04

Application Number: 18730872.1

Publication Number: 3629693

IPC: A01B69/04, A01D34/00, G05D1/02,
G06K9/00

Language of the proceedings: EN

Title of invention:

METHOD FOR CONTROLLING A SOIL WORKING MEANS BASED ON IMAGE
PROCESSING AND RELATED SYSTEM

Patent Proprietor:

Volta Robots S.r.l.

Opponents:

Husqvarna AB
Kilburn & Strode LLP

Headword:

Soil working means/VOLTA ROBOTS

Relevant legal provisions:

EPC Art. 56, 100(a), 104(1)
RPBA 2020 Art. 12(6), 16(1)
Decision of the President of the European Patent Office dated
13 November 2025 concerning inspection of files Art. 2

Keyword:

Granted patent and auxiliary requests 1 to 10 and 12 to 15 -
inventive step (no)
Auxiliary request 11 - should have been submitted in first-
instance proceedings (yes)
Auxiliary request 16 - error in use of discretion at first
instance (no)
Exclusion from file inspection (yes)
Non-disclosure of a letter to the parties (yes)
Apportionment of costs - non-attendance at oral proceedings
(yes)

Decisions cited:

T 0760/89, T 0909/90, T 0434/95, T 2324/14, T 1691/15,
T 2026/15, T 0161/18, T 2893/18, T 0847/20



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Case Number: T 0930/24 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 11 March 2026

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 May 2024
revoking European patent No. 3629693 pursuant to
Article 101(3)(b) EPC**

Composition of the Board:

Chair G. Decker
Members: F. Sanahuja
 A. Seeger

Summary of Facts and Submissions

- I. The appeal is against the opposition division's decision dated 7 May 2024 revoking European patent No. EP 3 629 693.
- II. In the opposition proceedings, the grounds for opposition under Article 100(a) EPC, together with Articles 54(1) and 56 EPC, and Article 100(b) and (c) EPC were raised.
- III. The opposition division revoked the European patent for the following reasons.
- The subject-matter of claim 1 of the main request was not new over the disclosure of documents D6, D25 and D45/D45a. The subject-matter of claim 18 of the main request was not new over the disclosure of document D25 (Article 100(a) EPC together with Article 54 EPC).
 - The subject-matter of claim 1 of auxiliary requests 1 to 9 and 12 to 14 was not new over the disclosure of any of documents D25 and D45/D45a (Article 54 EPC). The subject-matter of claim 1 of auxiliary requests 4, 5, 9, 13 and 14 was not new over the disclosure of document D6 (Article 54 EPC).
 - Claim 1 of auxiliary requests 10 and 15 lacked inventive step over the disclosure of document D37 combined with the common general knowledge of the person skilled in the art (Article 56 EPC).

- Auxiliary request 11 was not admitted into the proceedings under Article 123(1) and Rule 116(2) EPC.

IV. The patent proprietor (appellant) filed notice of appeal. With its statement of grounds of appeal, the appellant filed auxiliary requests 1 to 16 and submitted arguments as to why the opposition division had erred in its findings.

V. Opponents O1 and O2 (respondents O1 and O2) each filed replies to the statement of grounds of appeal.

VI. The board issued summons to oral proceedings and a communication under Article 15(1) RPBA. In this communication, the board gave the following preliminary opinion, *inter alia*.

- Claim 1 of the granted patent and auxiliary requests 1 to 10 and 12 to 15 was either not new over document D37 or did not involve an inventive step in view of the disclosure of document D37 and the common general knowledge of the person skilled in the art.
- The board was inclined to exercise its discretionary power under Article 12(6) RPBA by not admitting auxiliary requests 11 and 16 into the appeal proceedings.

VII. By letter dated 20 October 2025 and filed on 22 October 2025, respondent O2 requested that the oral proceedings be conducted by videoconference. In the subject line of that letter starting with "Proprietor:", respondent O2 did not state the actual

patent proprietor's name in the case in hand (i.e. "Volta Robots S.r.l."), but another name.

- VIII. On 23 October 2025, respondent O2 sent a corrected letter dated 22 October 2025 which was identical to the letter referred to in point VII. above, except for the subject line which contained the correct name of the patent proprietor. This letter is part of the public file and was forwarded to the other parties to the proceedings.
- IX. By letter dated 23 October 2025, respondent O2 requested that the letter filed on 22 October 2025 referred to in point VII. above be *"kept off the public file, excluded from file inspection and not forwarded to the parties"*. It additionally requested that the letter dated 23 October 2025 containing the above requests be kept off the public file.
- X. The appellant did not file a response to the board's communication under Article 15(1) RPBA, nor did it respond to the board's communication dated 16 January 2026 inviting the appellant to indicate whether it intended to attend the oral proceedings.
- XI. On 11 March 2026, the oral proceedings were held in the appellant's absence.
- XII. With the statement of grounds of appeal the appellant requested, as its main request, that the decision of the opposition division be set aside and that the patent be maintained as granted. Alternatively, the appellant requested that the patent be maintained in amended form on the basis of the claims according to one of auxiliary requests 1 to 16 filed with the statement of grounds of appeal. As an auxiliary

measure, it requested that oral proceedings be held if the main request could not be granted.

The final requests made by respondents O1 and O2 were that the appeal be dismissed and that the appellant bear the costs incurred by the respondents in preparing for and participating in the oral proceedings before the board.

XIII. The features of claim 1 of the granted patent are identified as follows:

- 1a) *"A method (100) for controlling a soil working means, based on an image processing,*
- 1b) *said soil working means comprising a locomotion member (201) and a working member (202), wherein the method comprises the steps of:*
- 1c) *- acquiring (101) at least one digital image of the soil by means of digital image acquisition means (203) installed on said working means; characterized by the steps of:*
- 1d) *- processing (102), by means of an electronic processing unit (204), the at least one digital image acquired by performing at least one convolution operation on the digital image by means of a trained convolutional neural network (300; 400; 500)*
- 1e) *wherein said neural network (300; 400; 500) comprises at least one convolutional layer and*
- 1f) *said at least one convolution operation is accomplished by means of a feed-forward of the neural network;*
- 1g) *- obtaining (103), by means of the electronic processing unit, at least one synthetic soil descriptor based on said processing;*

1h) *- generating (104), by means of the electronic processing unit, at least one control signal of said locomotion member or of said working member based on said synthetic soil descriptor."*

XIV. Claim 1 of auxiliary request 1 differs from claim 1 of the granted patent in that it further includes:

1i) *"- generating, based on the aforesaid synthetic soil descriptor, data and/or parameters describing the nature or structure of the soil"*

XV. Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that it further includes:

1j) *"wherein said describing parameters comprise a border or a discontinuity between two soil areas having different properties"*

XVI. Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 in that it further includes:

1k) *"wherein said border or discontinuity comprises a border between soil areas with grass and soil areas without grass"*

XVII. Claim 1 of auxiliary request 4 differs from claim 1 of the granted patent in that it further includes:

1i') *"wherein said synthetic soil descriptor is a soil classification and said step of generating (104) at least one control signal of said locomotion member or of said working member based on said soil classification, comprises the steps of:*

- 1j') - selecting (901) a predetermined sequence of motion instructions associated to the soil classification obtained on the basis of the processing performed with a trained neural network (300);
- 1k') - sending (902) said motion instructions sequence to the locomotion member (201) or to the working member (202) of the working means"

XVIII. Claim 1 of each of auxiliary requests 5 to 9 respectively differs from claim 1 of the granted patent and auxiliary requests 1 to 4 in that the underlined phrase has been added to the processing step:

"processing ... the at least one digital image acquired by means of said digital image acquisition means (203), ...".

XIX. Claim 1 of auxiliary request 10 differs from claim 1 of the granted patent in that it further includes:

- 1i") "wherein said synthetic soil descriptor is a soil semantic segmentation and said step of generating (104) at least one control signal of said locomotion member or of said working member based on said segmentation, comprises the steps of:
 - 1j") - selecting (921) at least one couple of semantic classes at the border thereof it is desirable for the working means to remain aligned;
 - 1k") - identifying (922) said at least one couple of semantic classes on the acquired image;
 - 1l") - if the classes of the couple are adjacent, calculating (923) the parameters that characterize a separation curve or border of said two classes by means of a regression method;

1m") - *determining (924) a motion or work instructions sequence based on said calculated parameters which characterize the separation curve;*

1n") - *sending (925) said motion instructions sequence to the locomotion member (201) or said working instructions sequence to the working member (202) of the working means"*

XX. Claim 1 of auxiliary request 11 differs from claim 1 of auxiliary request 10 in that it further specifies the group from which motion instructions are selected.

XXI. Claim 1 of auxiliary request 12 differs from claim 1 of the granted patent in that it further includes:

1i") "*- wherein the synthetic soil descriptor is a specific action to be taken by means of the working means based on the characteristics of the soil framed and said step of generating (104) at least one control signal comprises a step of sending (931) a specific action to be taken to the locomotion member (201) or to the working member (202) of the working means, obtained on the basis of the processing performed with the trained neural network (500) "*

XXII. The subject-matter of claim 1 of auxiliary requests 13 to 15 respectively corresponds to that of claim 1 of the granted patent and auxiliary requests 4 and 10.

XXIII. Claim 1 of auxiliary request 16 differs from claim 1 of auxiliary request 10 in that it further includes a sequence of steps for training the neural network.

Reasons for the Decision

1. *Granted patent and auxiliary requests 1 to 10 and 12 to 15 - inventive step over document D37 combined with the common general knowledge of the person skilled in the art (Article 100(a) EPC together with Article 56 EPC)*

1.1 Under Articles 100(a) and 101(2) EPC, the subject-matter of a European patent must be patentable under Articles 52 to 57 EPC.

An invention is to be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art (Article 56 EPC).

1.2 Both respondents argued that the subject-matter of claim 1 of the granted patent and the auxiliary requests lacked either novelty or inventive step over the disclosure of document D37.

1.3 Document D37 discloses an automatic steering control for an agricultural harvester (see page 1, lines 6 to 13). This system uses at least one video camera to acquire digital images (page 7, lines 12 to 14). A Video Processing Computer (VPC) processes these images to detect and track the crop line, detect the end of a row, detect obstacles in the path of the harvester and locate a crop line after the harvester has made a turn (see page 8, lines 29 to 33).

1.3.1 A crop line tracker (CLT), forming part of the VPC (see page 13, lines 8 to 18), analyses the digital images to determine the boundaries between cut and uncut crop,

i.e. a crop line, using a discriminator and a segmenter (see page 21, lines 12 to 21).

- 1.3.2 The discriminator outputs a signal having a magnitude related to the green colour intensity for each pixel position in a region of interest of the digital image (see page 21, lines 29 to 32). Since the discriminant using colour intensity is inadequate for Sudan grass, a texture discriminant (e.g. a Gabor elementary filter) must be convolved with the digital image to produce a filtered image. This image is then passed to the segmentation process (see page 30, lines 16 to 31).
- 1.3.3 From the colour-discriminated or texture-discriminated image, the segmenter finds the best segmentation by identifying the best position, for each scan line, that separates cut and uncut crop regions (see page 21, line 32 to page 22, line 9) and outputs a binary signal for each scan line indicating the position of the crop line in the scan line (see page 23, lines 2 to 11). Hence, the CLT segments the digital image (see page 28, lines 14 to 16).
- 1.3.4 The position of the crop line is used to vote on a steering direction and to subsequently develop steering commands (see page 23, lines 11 to 13 and page 23, line 33 to page 24, line 12).
- 1.3.5 To line the harvester up with the crop after a spin turn, a regression line is computed for each of four sections of the crop line (see page 1, lines 6 to 13 in combination with page 29, lines 8 to 16 and page 30, lines 1 to 15).
- 1.4 It is undisputed that document D37 discloses **features 1a) to 1c), 1g) and 1h)** of claim 1 of the

granted patent (see e.g. pages 71 and 72 of the appellant's statement of grounds of appeal).

- 1.5 With respect to **features 1d) to 1f)** of claim 1 of the granted patent, document D37 discloses applying a Gabor elementary filter to the image, which involves a convolution operation (see point 1.3.2 above). A Gabor filter is mathematically and structurally similar to a convolutional layer with a fixed kernel of a convolutional neural network (CNN); however, the parameters of the Gabor filter are fixed, whereas the weights of the CNN are learnt during training. Therefore, a Gabor filter is best described as a traditional image-processing filter rather than a trained CNN.

- 1.6 The board considers that document D37 also discloses **features 1i) to 1k), 1i') to 1k'), 1i") to 1n") and 1i"')** of claim 1 of auxiliary requests 1 to 10 and 12 to 15 for the following reasons.

- 1.7 With regard to **features 1i), 1j), and 1k)**, document D37 categorises pixels as either cut or uncut crop, including Sudan grass (see points 1.3.2 and 1.3.3 above). Therefore, this document discloses generating a soil descriptor describing a discontinuity structure between soil areas with different properties, including soil areas with grass and soil areas without grass.

- 1.8 With respect to **features 1i') and 1i"')**, the board notes the following.
 - 1.8.1 The appellant argued that the discriminant used to determine the crop line, based on the relative percentage of green in each of the digital image pixels, did not represent a semantic segmentation as

intended in the context of convolutional neural networks since the properties of cut and uncut crop were not recognised. Therefore, document D37 did not disclose a semantic soil segmentation (see pages 72 and 73 of the statement of grounds of appeal).

The admittance of this argument has been challenged by respondent O2, arguing that the argument was not raised and maintained by the appellant in first-instance opposition proceedings. Since the argument constituted an amendment to the appellant's case, respondent O2 requested that the board use its discretion not to admit the argument into the appeal proceedings (see section 9.3.2.1 of respondent's O2 reply to the statement of grounds of appeal).

However, the board considers that the appellant's submissions do not introduce a new line of argument that departs from its submissions during the first-instance oral proceedings according to which document D37 did not disclose semantic segmentation (see point 33.5 of the decision under appeal). As such, the appellant's submissions do not constitute amendments within the meaning of Article 12(2) and (4) RPBA. Therefore, the board has no discretion not to admit this argument under Article 12(4) RPBA.

- 1.8.2 Furthermore, the board is not convinced by the appellant's argument. By categorising pixels as either cut or uncut crop as part of the segmentation process (see point 1.3.3 above), the disclosure of document D37 effectively classifies or assigns a semantic label to different areas of the image. Therefore, the system in document D37 inherently performs a form of semantic segmentation, distinguishing between two soil areas having different properties.

The appellant's distinction based on the mechanism for arriving at the segmentation (individual pixel values vs. CNN) is not persuasive, because features 1i') and 1i") specify the outcome of the segmentation, i.e., a semantic soil classification/segmentation, which is technically the same as the pixel-based segmentation in document D37, rather than the process.

- 1.9 In the absence of specific arguments as to why **features 1j") and 1k")** are not disclosed in document D37, the board understands that the absence of semantic segmentation in this document, as alleged by the appellant, has the consequence that selecting and identifying semantic classes, as specified by these features, is not disclosed either.

However, document D37 discloses selecting and identifying cut and uncut crop areas in the digital image for determining a crop line (see point 1.3.1 above). The concepts of "cut crop" and "uncut crop" are regarded as semantic classes.

- 1.10 With regard to **feature 1l")**, the appellant argued that the regression of the separation curve between two classes was not carried out in document D37. Instead, a voting system with respect to the centre of the digital image was used (see page 73 of the statement of grounds of appeal).

The board does not share the appellant's view, as document D37 discloses calculating a regression line and error for each of four equal sections of the crop line, which separates the "cut crop" and "uncut crop"

semantic classes (see page 29, lines 14 to 16 of document D37 and point 1.9 above).

- 1.11 With regard to **features 1j'), 1k'), 1m") and 1n")**, the appellant did not provide an argument as to why it was of the opinion that document D37 did not disclose these features.

The board considers that document D37 discloses using the regression line to infer where the uncut crop begins in order to line up the harvester (see point 1.3.5 above). Therefore, document D37 discloses calculating a regression line for determining a motion instruction sequence based on the parameters of the separation curve and sending those instructions to a locomotion member, as specified in these features.

- 1.12 **Feature 1i"')** is broader than the combination of features 1i") to 1n") and, consequently, is also anticipated in document D37 for the reasons set out in points 1.8 to 1.11 above.

- 1.13 In view of the foregoing analysis, features 1d) to 1f) constitute the distinguishing features of claim 1 of the granted patent and auxiliary requests 1 to 10 and 12 to 15 with respect to the disclosure of document D37.

- 1.13.1 From the parties' submissions, it is undisputed that the distinguishing features achieve the technical effect of a more reliable and more stable soil classification, in particular for recognising border structures. The objective technical problem may thus accordingly be formulated as that of modifying or

adapting the known working means of document D37 (in the form of a harvester) to achieve this effect.

1.13.2 The board agrees with the opposition division's conclusion that the person skilled in the art, faced with this objective technical problem and being aware of state-of-the-art image segmentation methods using CNNs, would have readily considered replacing the segmentation method from document D37, which relies on the green colour intensity of the pixel to identify cut and uncut crop, with a CNN. Such a modification, leading to features 1d) to 1f), would have been obvious to the person skilled in the art. Using CNNs for image segmentation is recognised as a general trend in technology, as evidenced by documents D34, D39 and D43 (see point 33.4 of the decision under appeal).

1.13.3 With the statement of grounds of appeal (see page 73), the appellant submitted that the documents cited in point 33.4 of the decision under appeal exemplified the use of CNNs for image analysis; however, they did not disclose using CNNs for controlling a soil working means based on image analysis, as specified in claim 1 of auxiliary request 10.

Furthermore, it would not have been possible to apply a CNN to the control module from document D37, and as such an integration would necessitate an "additional arrangement (software and hardware)" for the control module from D37, which would have gone beyond the common general knowledge of the person skilled in the art.

1.13.4 The board is not convinced by these arguments. The person skilled in the art would have been aware that CNN-based segmentation and classification techniques

were likely to lead to better results than the segmentation disclosed in document D37. Whether such techniques had been applied for controlling a soil working means is not decisive, since the person skilled in the art is merely tasked with achieving a more reliable and more stable soil classification. The subsequent step of controlling the soil working means is independent of the segmentation method used.

While the implementation of a CNN for image processing in the system from document D37 might require additional hardware and software frameworks, such adaptation was part of the common general knowledge on the filing date of the application in hand.

Furthermore, the basic functionality of using segmented image data to generate control signals for a vehicle is already found in document D37. The substitution of an improved image segmentation technique does not introduce any unexpected technical difficulties which go beyond routine engineering tasks.

1.14 In view of the above conclusions, the subject-matter of claim 1 of the main request and auxiliary requests 1 to 10 and 12 to 15 does not involve an inventive step in view of document D37 and the common general knowledge of the person skilled in the art (Article 100(a) together with Article 56 EPC).

2. *Auxiliary request 11 - admittance (Article 12(6), second sentence, RPBA)*

2.1 Under Article 12(6), second sentence, RPBA, "[t]he Board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading

to the decision under appeal, unless the circumstances of the appeal case justify their admittance".

- 2.2 Auxiliary request 11 filed with the statement of grounds of appeal corresponds to auxiliary request 11 filed on 5 January 2024 (see section V.11 of the appellant's statement of grounds of appeal). During the oral proceedings before the opposition division, the appellant replaced auxiliary request 11 filed on 5 January 2024 with a new request (see point 13 of the decision under appeal and the last paragraph on page 8 of the minutes of the oral proceedings).
- 2.3 Respondents O1 and O2 submitted that, by replacing auxiliary request 11 in hand during the oral proceedings before the opposition division, the appellant had waived its right to further prosecute it. In addition, they argued that the circumstances of the appeal case did not justify the admittance of this request. Respondent O1 also argued that the appellant's behaviour effectively circumvented the opposition division's decision on auxiliary request 11 in hand (see sections VII.1 and 10.1 of respondent O1 and O2's replies to the statement of grounds of appeal).
- 2.4 The appellant did not justify the filing of auxiliary request 11 in hand at this stage of the proceedings.
- 2.5 The board considers that, if the appellant considered that the combination of features of the claims of auxiliary request 11 filed on 5 January 2024, and resubmitted with the statement of grounds of appeal, contributed to inventive step, it should have maintained these claims during the first-instance proceedings and should have sought a decision from the opposition division on those claims.

The appellant deliberately choosing not to pursue this request during the oral proceedings before the opposition division prevented the opposition division from issuing a decision on such a request. As a consequence, the board cannot exercise the primary object of appeal proceedings, that is to review the decision under appeal in a judicial manner (Article 12(2) RPBA).

- 2.6 In view of the above, the board exercises its discretionary power under Article 12(6), second sentence, RPBA by not admitting auxiliary request 11 into the appeal proceedings.
3. *Auxiliary request 16 - admittance (Article 12(6), first sentence, RPBA)*
- 3.1 Under Article 12(6), first sentence, RPBA, "*[t]he 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*".
- 3.2 Auxiliary request 16 corresponds to auxiliary request 11, which formed the basis for the decision under appeal. Auxiliary request 11 was filed during the oral proceedings before the opposition division.

The opposition division decided not to admit the then-pending auxiliary request 11 by exercising its discretion under Article 123(1) EPC together with Rule 116(2) EPC. In the opposition division's view, the request was filed late, after the time limit set

according to Rule 116(2) EPC, and was not clearly allowable, while the subject of the proceedings had not changed. Compared with claim 1 of auxiliary request 10, claim 1 specified additional training steps; however, these steps were considered to be conventional in nature, and thus did not, *prima facie*, overcome the objection of lack of inventive step over document D37 in combination with common general knowledge (see point 34 of the decision under appeal).

- 3.3 The board considers that the opposition division based its discretionary decision on the right principles and did not act in an unreasonable way.

The criterion for whether a late-filed amended set of claims is *prima facie* clearly allowable is a generally accepted principle that the opposition division should take into account when properly exercising its discretion under Rule 116(2) EPC (see Case Law of the Boards of Appeal of the European Patent Office, 11th edition, 2025, "Case Law", IV.C.5.1.7 and IV.C.5.1.7 b)).

- 3.4 The appellant argued that the opposition division had conducted a complete examination of the allowability of the then-pending auxiliary request 11 by detailing that the training steps were conventional and citing decision T 161/18 relating to the inclusion of details of the training dataset in patent applications. With reference to decisions T 847/20, T 2026/15 and T 2324/14, the appellant submitted that, by undertaking such a thorough examination, the opposition division implicitly admitted the request. Consequently, the opposition division wrongly exercised its discretion by then deciding not to admit the request, as no

discretion was remaining not to admit it (see section V.16 of the statement of grounds of appeal).

- 3.4.1 The board is not convinced that the opposition division carried out a full examination of the then-pending auxiliary request 11.
- 3.4.2 A *prima facie* assessment of inventive step necessarily involves a brief evaluation of the claimed subject-matter to determine if a late-filed request clearly overcomes prior objections. Identifying features as "conventional" is a common and efficient way to make a quick determination of obviousness without undertaking a full, detailed analysis. The opposition division's assessment does not provide an analysis of the technical effect or a formulation of the technical problem for the distinguishing features of claim 1, as submitted by respondent O1 (see section X.1 of its reply to the statement of grounds of appeal), nor does it present a detailed reasoning for individual features beyond the general statement of their conventional nature. Furthermore, the minutes of the oral proceedings confirm that a substantive debate on inventive step did not take place for this request.
- 3.4.3 The board agrees with respondent O1 that the case in hand is different from the appellant's cited decisions T 847/20, T 2026/15 and T 2324/14, in which a detailed examination was carried out for at least some of the objections raised against a request that was not admitted.
- 3.4.4 In light of the above, the opposition division's assessment was confined to a *prima facie* evaluation of allowability. Therefore, the then-pending auxiliary request 11 was not implicitly admitted and the

opposition division's discretion not to admit it was correctly exercised.

3.5 Furthermore, the board cannot identify any circumstance of the appeal case which would justify the admittance of auxiliary request 16.

3.6 As a result, it is not justified to overrule the way in which the opposition division exercised its discretion and to admit auxiliary request 16 into the appeal proceedings in the exercise of its own discretion under Article 12(6), first sentence, RPBA.

4. *Exclusion from file inspection and non-disclosure to the parties*

4.1 Respondent O2 requested that its letter filed on 22 October 2025 (see point VII. above) be excluded from file inspection and not be forwarded to the other parties. It argued that due to a clerical mistake, an incorrect item of reference information had been included in that letter. The incorrect reference information contained information internal to respondent O2. All the information relevant to the patent or these appeal proceedings was contained in the corrected letter sent on 23 October 2025 (see point VIII. above). Therefore, including the incorrect letter in addition to the corrected letter in the public file did not serve any purpose and in particular did not serve the purpose of informing the public or other parties about the patent and would be prejudicial to respondent O2's legitimate personal and economic interest to maintain the confidentiality of internal information.

4.2 The question of whether certain documents may be excluded from file inspection is governed by the "*Decision of the President of the European Patent Office dated 13 November 2025 concerning inspection of files*" (OJ EPO 2025, A65; hereinafter "the President's Decision") which entered into force on 1 January 2026. Article 2 of the President's Decision essentially corresponds to the previous provision in Article 1 of the "*Decision of the President of the European Patent Office dated 12 July 2007 concerning documents excluded from file inspection*" (Special edition No. 3, OJ EPO 2007, J.3). The latter decision was referred to in the board's communication dated 10 November 2025 dealing with the request for exclusion from file inspection.

4.3 The following provisions of the President's Decision are relevant to the case in hand.

- Under Article 2(2)(a), documents or parts thereof other than those referred to in paragraph 1 "*will be excluded from file inspection at the reasoned request of a party or their representative if their inspection would be prejudicial to the legitimate personal or economic interests of natural or legal persons*".
- Under Article 2(1)(d), requests for exclusion from inspection under paragraph 2(a) are to be excluded from file inspection by the EPO of its own motion.
- Under Article 2(3), documents covered by a request under paragraph 2(a) "*will be excluded from file inspection provisionally, pending a final decision on the request*".

- 4.4 The board understands respondent O2's request for exclusion to be a request under Article 2(2)(a) of the President's Decision. Accordingly, applying Article 2(1)(d) of the President's Decision, the board excluded from file inspection respondent O2's request for exclusion from file inspection (i.e. the letter dated 23 October 2025 referred to in point IX. above). Furthermore, applying Article 2(3) of the President's Decision, the board provisionally excluded the letter filed on 22 October 2025 referred to in point VII. above from file inspection.
- 4.5 The board further notes that the President's Decision does not explicitly address the question of whether other parties to the proceedings, i.e. the appellant and respondent O1 in the present case, may be prevented from gaining access to specific documents on file. The board holds that as a rule, this is not possible. Rule 144 EPC contains an exhaustive list of those parts of the file that can be excluded from inspection under Article 128(4) EPC. The above case is not listed. Instead, as is clear from Rule 144(d) EPC (this provision being implemented by the President's Decision), it is only the public that may be prevented from inspecting certain parts of the file. By contrast, due to the very nature of *inter partes* proceedings, as in the present case, all documents submitted in the course of opposition (appeal) proceedings and all exchanges between one party and the opposition division (or the board) as a rule have to be communicated to all parties (see T 1691/15, OJ EPO 2017, A15, points 3.3 and 3.5 of the Reasons; T 2893/18, points 2 and 6 of the Reasons).
- 4.6 However, the board is of the opinion that an exception to the above rule may be made for those documents (or

parts thereof) that have been filed by a party and have no substantive or procedural bearing on the proceedings. Neither the other parties to the proceedings nor the public have a legitimate interest in gaining access to these documents. Consequently, the legitimate interest of the party that filed the document in not having it forwarded to other parties prevails (for a similar case, see T 760/89, OJ EPO 1994, 797, point 4.3 of the Reasons).

4.7 Taking into account the above considerations, the board came to the following conclusion.

- From respondent O2's reasoning, the board has no reason to doubt that the name erroneously included in the subject line of the letter filed on 22 October 2025 has some relationship to respondent O2 and that its inspection would be prejudicial to respondent O2's legitimate personal or economic interests within the meaning of Article 2(2)(a) of the President's Decision. The board therefore excludes the letter filed on 22 October 2025 from file inspection.
- Since the board cannot discern any legitimate interest of the other parties to the proceedings or of the public in knowing the name erroneously included in the subject line, the letter filed on 22 October 2025 will not be forwarded to the other parties to the proceedings. Indeed, as argued by respondent O2, all the information relevant to the patent or these appeal proceedings is contained in the corrected letter.

5. *Apportionment of costs (Article 104(1) EPC and Article 16(1) RPBA)*

- 5.1 *Article 104(1) EPC stipulates that "[e]ach party to the opposition proceedings shall bear the costs it has incurred, unless the Opposition Division, for reasons of equity, orders, in accordance with the Implementing Regulations, a different apportionment of costs".*

Under Article 111(1) EPC, the Board of Appeal may exercise any power within the competence of the department which was responsible for the decision appealed.

Under Article 16(1) RPBA, the Board may on request order a party to pay some or all of another party's costs.

- 5.2 Each party is subject to an equitable procedural obligation to give notice if not attending oral proceedings to which it has been duly summoned. If it fails to do so, an apportionment of costs in favour of another party who has attended as summoned may be justified for reasons of equity (see Case Law, III.R.2.2.1 and III.R.2.2.1 a)).

- 5.3 Both respondents requested that the appellant bear the costs incurred by the respondents in preparing for and participating in the oral proceedings before the board.

The respondents argued that, had the appellant indicated that it would not attend the oral proceedings, the oral proceedings could have been cancelled and it would not have been necessary for the

respondents to either participate in or prepare for the oral proceedings.

- 5.4 In the present case, the appellant had requested oral proceedings as an auxiliary measure in case its main request could not be granted on the basis of the written submissions only. In its communication under Article 15(1) RPBA, the board gave the preliminary opinion that the appellant's main request could not be granted. The appellant did not reply to this communication, nor to the board's communication dated 16 January 2026, which invited the appellant to indicate, *inter alia*, whether it maintained its request for oral proceedings and whether it intended to attend. Furthermore, the appellant failed to appear at the oral proceedings without informing the board or the respondents. This conduct is not in accordance with the due diligence required in the exercise of rights.

As the board's communication under Article 15(1) RPBA clearly indicated the board's preliminary opinion to dismiss the appeal, and as the respondents had also only requested that oral proceedings be held as an auxiliary measure, the oral proceedings proved to be unnecessary and could have been cancelled. The appellant's conduct was thus the cause of the respondents' costs incurred in holding oral proceedings. It is therefore equitable, under Article 104(1) EPC and Article 16 RPBA, that the appellant bear the costs incurred by the respondents in preparing for and participating in the oral proceedings before the board (see e.g. T 909/90 point 4 of the Reasons; T 434/95, point 5.1 of the Reasons).

5.5 Under Article 113(1) EPC, a decision may only be based on grounds on which the parties concerned have had an opportunity to present their comments.

Although the appellant was not present at the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see Case Law, III.B.2.8.3).

Moreover, in the case in hand the appellant itself gave rise to the reason for the different apportionment of costs by failing to give timely notice of its voluntary absence from the oral proceedings. It therefore cannot rely on the provision of Article 113(1) EPC since it had to expect costs to be imposed in the event of such conduct (see T 434/95, point 5.2 of the Reasons).

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The appellant shall bear the costs incurred by the respondents in preparing for and participating in the oral proceedings before the board.

The Registrar:

The Chair:



U. Bultmann

G. Decker

Decision electronically authenticated