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D E C I S I O N
of 21 December 2000

Case Number: T 0018/98 - 3.2.2

Application Number: 91310488.1

Publication Number: 0488552

IPC: A61G 7/005

Language of the proceedings: EN

Title of invention:

Beds

Patentee:

HUNTLEIGH TECHNOLOGY PLC

Opponent: Hill-Rom GmbH

Intervener I: Scandinavian Mobility EC-Høng A/S

Intervener II: Scandinavian Mobility UK Limited

Intervener III: LINAK A/S

Headword:

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Relevant legal provisions:

EPC Art. 54(1); 56; 100(b); 104(1); 105(1); 114(2)

Keyword:

"Three interventions under Article 105 EPC (two refused, one admissible)"

"Disclosure of invention (sufficient - general knowledge of a skilled person)"

"Apportionment of costs (refused)"

"Novelty (yes)"

"Inventive step (no)"

Decisions cited:

T 0296/93

Catchword:

-



Case Number: T 0018/98 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 21 December 2000

Appellant: Hill-Rom GmbH
(Opponent I) Postfach 10 01 41
D-47878 Kempen (DE)

Representative: Beyer, Rudi
Patentanwalt Dipl.-Ing. Rudi Beyer
Am Dickelsbach 8
D-40883 Ratingen (DE)

Appellant: Scandinavian Mobility UK Limited
(Intervener II) Unit C, Tyson Courtyard
(Opponent III) Weldon South Industrial Estate
Corby
Nothants NN18 8AZ (GB)

Representative: Nielsen, Henrik Sten
Budde, Schou & Ostenfeld A/S
Vester Søgade 10
DK-1601 Copenhagen V (DK)

Appellant: LINAK A/S, Nordborg
(Intervener III) c/o Patent Department
Kornblomstvej 45
P.O. Box 238
DK-9100 Aalborg (DK)

Representative: -

Other party: Scandinavian Mobility EC-Høng A/S
(Intervener I) Østergade 3
DK-4270 Høng (DK)

Representative: Nielsen, Henrik Sten
Budde, Schou & Ostenfeld A/S
Vester Søgade 10
DK-1601 Copenhagen V (DK)

Respondent: HUNTLEIGH TECHNOLOGY PLC
(Proprietor of the patent) 310-312 Dallow Road
Luton
Bedfordshire LU1 1SS (GB)

Representative: Jehan, Robert
Williams, Powell & Associates
4 St Paul's Churchyard
London EC4M 8AY (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 December 1997
rejecting the opposition filed against European
patent No. 0 488 552 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: W. D. Weiß
Members: M. G. Noël
C. Holtz

Summary of Facts and Submissions

- I. European patent No. 0 488 552 was granted on 10 August 1994 with seven claims. Claim 1 reads as follows:
- "A bed comprising a frame or platform (40) and means (44,48,54,62,42,46,56,60) for varying the height of the platform by the provision of separate power operated actuators, one (62) for the head end and one (60) for the foot end of the bed, characterised in that a level sensor (80) is connected to both actuators and arranged to maintain the angle of the platform relative to the sensor by adjusting power supply to the respective actuators."
- II. On 11 December 1997 the Opposition Division decided to reject the opposition filed by the opponent against the European patent on the reasons that the subject-matter of claim 1 was new and inventive over the state of the art represented in particular by document US-A-4 769 584 (E64) in combination with the prior use of a bed, the so-called "IDEO bed".
- III. The appellant (opponent) lodged an appeal against this decision on 20 December 1997 and filed a statement of grounds on 8 April 1998 along with new documents. The patentability of claim 1 was further contested on the basis of the prior use of the IDEO bed and the documents on file.
- IV. In a communication dated 25 November 1999 the Board informed the parties of the documents to be considered.
- V. On 7 April 2000 Scandinavian Mobility EC-Høng A/S (Intervener I) filed a notice of intervention under

Article 105(1) EPC followed by a written reasoned statement and supporting documents filed on 10, 11 and 13 April 2000, successively. The opposition and the appeal fees were paid on 10 April 2000.

- VI. (First) oral proceedings were held on 14 April 2000 in the course of which a second intervention was filed by Scandinavian Mobility UK Ltd (Intervenor II) taking up all the statement and documents presented with the first intervention, of which document GB-A-2 209 464 (E23) already considered in the opposition proceedings. The opposition and the appeal fees were paid on 14 April 2000.

At the close of the oral proceedings the Board announced its decision that the first intervention was deemed not to have been filed and that the second intervention was admitted. As a consequence the respondent (patent proprietor) was given a new time period to answer the admitted intervener's statement and a new oral proceedings was scheduled for 21 December 2000.

- VII. On 22 June 2000 Linak A/S (Intervener III) filed a notice of intervention under Article 105(1) EPC along with a reasoned statement and supporting pieces of evidence. The opposition fee was paid on the same day.

- VIII. In two communications of the Board dated 31 July and 29 September 2000, respectively, the parties were informed of the provisional opinion of the Board that Linak's intervention seemed to be inadmissible having regard to the provisions of Article 105(1) EPC.

- IX. On 13 November 2000, the appellant (opponent I) filed a

new line of arguments focused on document GB-A-2 209 464 (E23).

On 17 November 2000, Intervener II filed two affidavits by Mr Ze'ev Wexler and Prof. Hirshowitz, respectively, in relation to circumstances occurring at a time prior to the filing date of document E23.

The respondent's position on the relevance of document E23 was given in its reply dated 3 July 2000.

X. (Second) Oral proceedings were held on 21 December 2000. The discussion turned first about the admissibility of the Linak's (intervener III) intervention and a possible referral to the Enlarged Board of Appeal, at the Linak's request, then about formal aspects and substantive issues in relation to claim 1 vis-à-vis the state of the art represented principally by documents E23 and E64, and finally about apportionment of costs.

XI. The parties argued as follows:

(i) On the admissibility of the interventions

Scandinavian Mobility Høng A/S (intervener I) and Scandinavian Mobility UK Ltd (intervener II)

In a letter dated 25 January 1999, the respondent/patentee warned Scandinavian Mobility UK Ltd to stop infringing the patent in suit. On 7 April 2000, Scandinavian Mobility UK Ltd and Scandinavian Mobility EC-Høng A/S instituted proceedings against the respondent and Linak A/S at the High Court (Østre Landsret) in

Copenhagen, requesting *inter alia* that the patent in suit be declared invalid. On 10 April 2000, Scandinavian Mobility EC-Høng A/S filed a notice of intervention, based on Article 105 (1), second sentence, EPC, explaining that Scandinavian Mobility UK Ltd was the sales organisation of the main organisation Scandinavian Mobility, which owned a plurality of production plants, among others Scandinavian Mobility EC-Høng A/S. At the oral proceedings held on 14 April 2000, the Board expressed doubts as to the admissibility of the intervention, since the respondent patentee had only warned Scandinavian Mobility UK Ltd with regard to infringement in the UK. As a result of these objections, the representative for Scandinavian Mobility EC-Høng A/S in the same oral proceedings filed a notice of intervention on behalf of Scandinavian Mobility UK Ltd, stating that there had been a mistake as to who should have appeared as intervener. The opposition fee was paid for both interventions. However, a mistake had been made in naming the first company as the intervener, since only the latter had been warned in the letter from the patentee. The second intervention was filed immediately when the mistake was discovered in the oral proceedings on 14 April 2000. The second intervention was therefore admissible.

Linak A/S (intervener III)

The intervention by Linak A/S was filed under Article 105 (1), first sentence, EPC. At the High Court in Copenhagen, Linak A/S was a co-defendant together with the respondent/patentee. That

litigation was instituted under Article 105(1), second sentence, EPC. Linak A/S, referring to the first sentence of this paragraph, contended that as long as it had been sued, it did not matter who brought the suit, the patentee or, as in the present case, the alleged infringer. A peculiarity of Danish patent law allowed infringers to file claims against subcontractors in the same suit against the patentee seeking a ruling that the infringer did not infringe the patent, alternatively that the patent had to be declared invalid. Should Scandinavian Mobility UK Ltd have instituted proceedings against Linak A/S in a separate suit, the court would have consolidated the two proceedings. Request No. 4 in the Copenhagen suit sought an order that Linak A/S was jointly liable for any damages that Scandinavian Mobility UK Ltd might have to assume vis-à-vis the respondent/patentee. This meant that the court first had to decide whether Scandinavian Mobility UK Ltd infringed the patent. If it affirmed this, Linak A/S would also be infringing the patent. Since there was no limitation in Article 105 EPC, first sentence, EPC, as to the party bringing an infringement suit, the Copenhagen suit constituted proceedings for infringement of the patent, as far as it related to Linak A/S with respect to request No. 4. Therefore Linak A/S was entitled to intervene.

(ii) On the sufficiency of disclosure

- According to the opponents, the scope of claim 1 was so broad that a great number of

embodiments are covered. Since, however, the disclosure of the invention as a whole was neither clear nor complete, none of them could actually be carried out. In particular, the expression "a level sensor is connected to both actuators" was not true of the three possibilities of embodiments mentioned in the description (paragraphs bridging columns 4 and 5). Further, it could not be understood from the description the manner in which the different components placed between the level sensor and the actuators were connected each other or how the control system actually worked.

- According to the respondent claim 1 covered a general solution, which could be realised by any skilled person using generally known constructional elements. The plurality of alternatives and options of embodying the invention did not preclude the invention from being carried out by a person skilled in the art and did not permit to conclude to insufficiency of the disclosure.

(iii) On the patentability of claim 1

- According to the opponents, the subject-matter of claim 1, exemplified, in particular, by the third option (column 5 of the patent) of detecting the extension of the rods relative to the actuators, lacked novelty in view of document E23. Document E23 discloses drive mechanisms mounted in the bed posts and comprising each

a motor associated with a head screw. Further, computing means (Fig 11) are supplied with level signals sensed by potentiometers associated with the respective drive mechanisms and with setting signals from a control unit for activating the motors (actuators) appropriately, so as to continuously perform all desired functions, in particular that of maintaining the orientation (tilt angle) of the bed frame.

Before the filing date of the patent in suit a multi-position controlled bed similar to the one disclosed in document E23 had already been demonstrated in an Israeli hospital, as evidenced by the declarations of Mr Ze'ev Wexler (the inventor identified in E23) and Prof. Hirshowitz. The affidavits should therefore be considered as an evidence of a new prior use.

Should novelty of claim 1 be admitted on the basis of minor constructional details it was doubtful that a level sensor alone be able of simultaneously controlling two actuators. In any event such differences did not exceed the normal skill of a person of the art and the use of two actuators for controlling the orientation of the head and the foot ends of the bed was already known from document E64 taken as starting point in the patent itself.

- According to the respondent, the level

sensor actually comprised two potentiometers used as position sensors, each sensor being connected to a respective actuator. But in document E23 **three** sensors and **three** corresponding actuators were needed. Therefore, the subject-matter of claim 1 was novel.

The control means disclosed in document E23 served the purpose of avoiding unacceptable situations such as those described in connection with Figures 5d and 5e, and not the purpose of restoring a required angle of tilt after undesirable change due to the bed being unequally loaded. Besides, E23 was not concerned with the problem addressed in the patent since the bed was designed in E23 to remain stable and balanced. Since no other document suggested using two actuators for maintaining the angle of the platform relative to the sensor by adjusting power supply to the respective actuators, the subject-matter of claim 1 must also be regarded as inventive. Any other conclusion was the result of an ex-post reasoning.

The two declarations recently submitted by the opponents were inadmissible as late-filed and, in addition, insufficient in substance to prove prior use.

(iv) On the apportionment of costs

The appellant (opponent I) and the respondent (proprietor) both requested that the

intervener II pay for the costs incurred for the oral proceedings held on 14 April 2000. The respondent argued that the intervener could have instituted proceedings about 16 months earlier than it in fact did, so that these oral proceedings could have dealt with the substance of the opposition. The delay constituted abuse of proceedings, unnecessarily causing further oral proceedings.

The intervener responded that while it is true that the warning letter was dated 25 January 1999, negotiations were continuing between the parties until the beginning of the year 2000. Until March 2000, the intervener still had hopes to come to an agreement with the respondent. Only when it was clear that this would not happen, did the intervener have an obligation to act, which it did promptly, filing the suit with the High Court in Copenhagen on 7 April 2000.

- XII. The appellants (opponent I and intervener II) requested that the decision under appeal be set aside and that the European patent be revoked.

Opponent I further requested that intervener II pay the costs incurred for the oral proceedings held on 14 April 2000.

The respondent (patentee) requested that the appeal be dismissed and that intervener II pay the costs incurred for the oral proceedings held on 14 April 2000.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of the interventions and referral to the Enlarged Board of Appeal*
- 2.1 Scandinavian Mobility Høng A/S and Scandinavian Mobility UK Ltd

The notice of intervention filed in the name of Scandinavian Mobility EC-Høng A/S is inadmissible, since this company was never warned by the respondent, as required under the ground for intervention given in Article 105(1), second sentence, EPC. The fact that several companies were involved commercially with one another does not alter this conclusion. The notice of intervention filed by Scandinavian Mobility UK Ltd is admissible, since it complies with these conditions and the opposition fee was paid within the stipulated time limit.

Given the circumstances surrounding the interventions and the obvious mistake with regard to entitlement to intervene, the board finds it appropriate to consider the intervention filed by Scandinavian Mobility EC-Høng A/S in analogy with the case law of the boards of appeal allowing corrections of the identity of the party under Rule 65(2) EPC. In a case where the identity of an appellant is in doubt, the board may invite the appellant to remedy this deficiency, i.e. in fact to correct its identity. As a result, the party only has to pay one fee. Therefore, the board finds it appropriate to treat this intervention as not having been filed and to reimburse the opposition fee and the appeal fee paid on behalf of Scandinavian Mobility EC-Høng A/S.

2.2 Linak A/S

The board is not convinced by the arguments of Linak A/S, for the following reasons:

A European patent may be opposed by anyone within nine months from the date of publication of the grant of the patent. The possibility of intervening in centralized proceedings therefore represents an extraordinary opportunity to challenge the validity of the patent. A fair balance of the interests of the parties on both sides therefore requires clear limitations to this opportunity. These are laid down in Article 105 EPC. The underlying principle is that the patentee or any person having obtained rights in the patent has acted in such a way against an alleged infringer that the latter should have the possibility of presenting his case in the ongoing opposition proceedings before the EPO. In a sense, this does not differ from what is possible in most national proceedings; if a rights holder has started proceedings against an infringer, the latter can challenge the validity of the same patent in the same proceedings. The actions of a rights holder under Article 105(1) EPC are of two kinds: either he has instituted proceedings against the alleged infringer for infringement of the patent or he has warned the alleged infringer in a letter to stop infringing the patent. In the latter case, since there is a need for a clear demarcation line for the calculation of the time limit for intervention, the infringer is required to have taken court action against the rights holder to show that he does not agree that he is infringing.

Against this background, Article 105(1) EPC has to be

interpreted according to its wording as understood in their normal meaning. As said above, the court proceedings instituted by Scandinavian Mobility UK Ltd fall squarely under the second sentence of this paragraph. Under the case law of the boards of appeal, see T 296/93, OJ EPO 1995, 627, the two alternative means of intervention are mutually exclusive in the sense that once an intervention has been brought under one of these sentences, a new intervention cannot be brought out of time based on another action, using the other alternative as a basis. However, it should be noted that the party constellation in the Danish court case differs; in principle it can be seen as two independent litigations, one between Scandinavian Mobility UK Ltd and Linak A/S and the other between Scandinavian Mobility UK Ltd and the respondent/patentee.

According to Linak A/S, request No. 4, that it be declared jointly liable with Scandinavian Mobility UK Ltd, presupposes that the court finds that Linak A/S has infringed the patent. However, the board notes that the patentee has not sued Linak A/S for infringement, nor is a direct relationship to the patentee created by way of the plaintiff's request No. 4. Or, in other words, even if Scandinavian Mobility UK Ltd would be found by the court to have infringed the patent, the patentee has acquired no rights against Linak A/S, who is only answerable to Scandinavian Mobility UK Ltd. The reason for consolidating this type of accessory or corollary requests with the main patent litigation proceedings is one of efficiency only; the result for a subcontractor like Linak A/S is automatic, depending on the outcome of the main contentious issue it will be found jointly liable or not. It is therefore

procedurally expedient and economically advantageous to add such requests to the main proceedings. From this aspect, the Danish patent procedure appears similar to those of other European countries. The patentee further denies having given Scandinavian Mobility UK Ltd any right to appear on its behalf in infringement proceedings, or that the latter has acquired any rights in the patent. The request by Scandinavian Mobility UK Ltd against Linak A/S can therefore not be acknowledged as infringement proceedings falling under Article 105 (1), first sentence, EPC.

The board also takes note of the respondent's argument that, if "successive" interventions would be allowed, patentees or their rights holders would not be able to assess their procedural position and could possibly face very long drawn out proceedings before the EPO. The board finally observes that such interventions would also go against the underlying principle of interventions under the EPC that they must be caused by actions taken by the patentee or any other rights holder of the patent.

Since Article 105(1), second sentence, EPC, does not apply, the intervention of Linak A/S is inadmissible.

2.3 The request for referral of a question to the Enlarged Board of Appeal

Since the board arrived at a conclusion with regard to the conditions for intervention under Article 105(1) EPC without having to resort to any special mode of interpretation, whether narrow or broad, and there was no important point of law involved needing a decision by the Enlarged Board of Appeal as required by Article

112(1) EPC, the request for referral of a question has to be refused.

3. *Disclosure of the invention*

The invention is presented in its most general form, according to which controlling means are provided to maintain the orientation (pitch angle) of the bed frame. To this end, claim 1 is drafted with functional features in the form of the result to be achieved. The means as claimed are therefore restricted to a level sensor connected to two actuators. Other components of the controlling system are supposedly implicitly contained in the terms "connected to" and "arranged to" since, as a matter of fact, a sensor cannot be connected directly to actuators for performing a controlling action.

It is, however, not the function of a claim to contain all those features which are sufficient to carry out the invention, according to Article 100(b) EPC, this being required of the patent as a whole. In the present case, the skilled person on the basis of its common general knowledge is presented with sufficient information to carry out the invention in at least one embodiment taken from the various alternatives, in particular from column 3, line 48 to column 5, line 14. In return, the same level of general knowledge will be considered for interpreting the prior art documents when assessing the inventive step of the solution.

More specifically, it appears from the patent specification that the control system, also called control mechanism, comprises a microprocessor which receives signals from sensors arranged to provide

information representative of the angle of inclination of the bed frame with respect to a reference position and that these signals are compared with setting signals stored in the memory. All these signals are further processed in the microprocessor to generate, in a conventional manner, control signals for adjusting power supply to the respective actuators, in the sense which will bring about a restoration of the required angle of tilt in case of angle shifting.

The patent in suit is, therefore, not objectionable on the ground of Article 100(b) EPC.

4. *Novelty*

4.1 Document E23 discloses a multi-positional bed comprising a lower base frame 12 and an upper frame 25 upon which the patient rests, said upper frame being adjustable in height and in orientation, in particular about a transverse axis (pitch angle), by means of three drive mechanisms mounted in bed posts P1, P2, P3 and comprising each an electrical motor associated with a lead screw for travelling a nut. A potentiometer is coupled to the corresponding lead screw to provide an output voltage, which is indicative of nut height. Therefore, each potentiometer is a level sensor.

Height adjustment of the bed frame is achieved by simultaneously actuating all motors and at the same rate. Orientation adjustment is achieved by either actuating the one motor in post P2 at the foot end of the bed or by actuating simultaneously the two motors in posts P1 and P3 at the head end (cf. page 8, last paragraph and page 9, first paragraph). When the output voltages V_1 - V_3 are equal with respect to each other and

remain within a given tolerance value K, the frame lies in the horizontal position (cf. page 15, last paragraph). As a consequence, orientation of the frame may be controlled by the voltage at the output of the respective potentiometers.

As further disclosed in document E23 (page 15, last paragraph and pages 21 to 22 in connection with Figure 11) this and other functions can be preferably accomplished by means of a small computer or by a properly programmed microprocessor. Therefore, the computer is not only provided to prevent unacceptable situations from occurring such as those disclosed in connection with Figures 5d and 5e, but also to perform any desired functions and to program sequential operations such as varying the pitch angle or automatically restoring one or more bed conditions stored in the memory. The simplified diagram of Figure 11 illustrates conventional controlling means comprising a processor 180 for comparing sensed values from the potentiometers with set values from a control unit 185 attached to the bed (cf. pages 21, line 23) for providing actuating signals to the respective motors in order to correct the actuators in the sense as required.

Such control systems and the art of their programming have been well known to a person skilled in the art (cf. page 22, lines 19 to 23). Therefore, having in mind what has been said before (section 3) about common general knowledge of the skilled person, the last characterising feature of claim 1 according to which "(means) are arranged to maintain the angle of the platform relative to the sensor by adjusting power supply to the respective actuators" is disclosed by

document E23.

Further, as mentioned above, the foot end of the bed is moved by only one actuator in post P2 whereas the head end is moved by two actuators in posts P1 and P3. By contrast, in the present patent each end of the frame is connected to only one actuator 60, 62, respectively, through a plurality of hinged links and brackets so as to realize a deformable parallelogram. Moreover, in document E23 each potentiometer is coupled to a corresponding actuator whereas in the patent the level sensor in control box 80 is coupled to both actuators 60, 62.

4.2 Therefore, *stricto sensu*, the subject-matter of claim 1 is distinguished from the above prior art (E23) by the following features:

- in the preamble: "one (actuator) for the head end and one (actuator) for the foot end"
- in the characterising portion: "a level sensor is connected to both actuators".

Since none of cited documents discloses all the features of claim 1 in combination, its subject-matter is novel within the meaning of Article 54(1) EPC.

4.3 The affidavits submitted by the witnesses Mr Ze'ev, Wexler and Prof. Hirshowitz are disregarded under Article 114(2) not only because of their late-filing but also because these declarations fail to disclose anything beyond the teaching of document E23.

5. *Inventive step*

- 5.1 Document E64 represents the state of the art closest to the invention and discloses all the features forming the preamble of claim 1, as reported in column 1 of the patent in suit. In particular, document E64 discloses (cf. Figure 1 and column 4, lines 30 to 48) a bed comprising a patient support 16 mounted for pivotal movement about transverse axes, the pitch angle of the patient support being controlled by means of a pair of reversible motors 28 mounted to the frame 14 and respectively connected to the patient support through vertical drive mechanisms 30A, 30B at the head and foot ends of the patient support. However, the output of the pitch angle detector 42 is used only for monitoring purposes at display 40 on the control panel.
- 5.2 In agreement with the statement in column 1 of the patent, the problem to be solved in view of this state of the art (E64) is that if the bed is unequally loaded at the head or foot end, height adjustment may cause unwanted changes in tilt angle as the two motors move different loads. This problem might be solved by the characterising features of claim 1.
- 5.3 As reported before (section 4.1), computing means are proposed in document E23 to computerize the bed for allowing a great number of controlling functions, one of which is to maintain the angle of the bed frame by adjusting the power supplied to the actuators, like in the present patent (cf. column 3, lines 48 to 50) "the frame 40 may be...adjusted in tilt or maintained at a required angle by control means". The last characterising feature of claim 1, therefore, does not bring any inventive contribution to the subject-matter of claim 1.

At first sight, the characterising portion of claim 1 only differs from the disclosure of E23 (section 4.2, above) in that "a level sensor is connected to both actuators". At the oral proceedings, however, the respondent explained that the level sensor as claimed may actually consist of two potentiometers, each connected to its respective actuator, in accordance with the third possibility for positional control mentioned in column 5, lines 2 to 10 of the patent specification. In that case, the remaining feature at issue does not differ from document E23 in which the frame can be pitched by activating either one motor (connected to a level sensor) at the foot end or two motors (connected each to a level sensor) at the head end. Moreover, such constructional alternatives are regarded by the Board as not exceeding the normal skill of a person of the art.

5.4 The subject-matter of claim 1, therefore, does not involve an inventive step.

6. *Apportionment of costs*

Having considered the facts and arguments set forth by the parties (see section XI(iv) above), the Board does not find it equitable to order a different apportionment of the costs incurred by the oral proceedings held on 14 April 2000.

Order

For these reasons it is decided that:

1. The intervention filed in the name of Scandinavian Mobility EC-Høng A/S is deemed not to have been filed and, as a consequence, the opposition fee and the appeal fee paid for this intervention are reimbursed.
2. The intervention filed in the name of Scandinavian Mobility UK Ltd is admissible.
3. The intervention filed in the name of Linak A/S is rejected as inadmissible.
4. The request for referral of a question to the Enlarged Board of Appeal is refused.
5. The requests for different apportionment of costs are refused.
6. The decision under appeal is set aside.
7. European patent No. 488 552 is revoked.

The Registrar:

The Chairman:

V. Commare

W. D. Weiß