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Datasheet for the decision of 20 September 2006

Case Number: T 0676/04 - 3.2.03

Application Number: 93916792.0

Publication Number: 0649486

IPC: E04B 1/00, E04B 1/82, E04B 1/84

Language of the proceedings: EN

Title of invention:
Anechoic structural elements and chamber

Patentee:
INDUSTRIAL ACOUSTICS COMPANY, INC.

Opponent:
G+H Schallschutz GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 107, 100(c), 123(3), 84, 54

Keyword:
"Parties to appeal - entitlement to appeal - adversely affected (no)"
"No reformatio in peius"
"Extended subject-matter (no)"
"Amendments - opposition proceedings"
"Claims - interpretation"
"Novelty (yes)"
"Inventive step (yes)"

Decisions cited:
G 0009/92, G 0004/93, G 0001/99

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0676/04 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 20 September 2006

Appellant: (Opponent)
G+H Schallschutz GmbH
Bürgermeister-Grünzweig-Str.1
D-67059 Ludwigshafen (DE)

Representative:
Schuster, Thomas
Grünecker, Kinkeldey, Stockmaier & Schwanhäusser
Anwaltssozietät
Maximilianstrasse 58
D-80538 München (DE)

Respondent: (Patent Proprietor)
INDUSTRIAL ACCOUSTICS COMPANY, INC.
1160 Commerce Avenue
Bronx, NY 10462 (US)

Representative:
Read, Matthew Charles
Venner Shipley LLP
20 Little Britain
London EC1A 7DH (GB)

Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 6 May 2004 concerning maintenance of the European patent No. 0649486 in amended form.

Composition of the Board:

Chairman: U. Krause
Members: G. Ashley
K. Garnett

Summary of Facts and Submissions

I. The grant of European patent 0 649 486, which concerns sound absorbing units for an anechoic chamber, was opposed on the basis of lack of novelty and inventive step (Article 100(a) EPC), and for an unallowable extension of subject-matter (Article 100(c) EPC). According to the reasons given in the decision posted on 6 May 2004, the opposition division decided that the patent be maintained in amended form.

II. The patent proprietor filed notice of appeal and paid the appeal fee on 26 May 2004; a statement containing the grounds of appeal was filed on 23 July 2004. The opponent also filed a notice of appeal on 26 May 2004, paying the appeal fee on the same day; the grounds of appeal were submitted on 26 July 2004.

In accordance with Article 11(1) Rules of Procedure of the Boards of Appeal, a preliminary opinion was issued together with a summons to attend oral proceedings; these were duly held on 20 September 2006.

III. Requests

The appellant (patent proprietor) requests that the decision under appeal be set aside and that the patent be maintained on the basis of the claims filed with the grounds of appeal as the main request, alternatively, as the first, second or third auxiliary requests, or on the basis of the claims filed as the fourth auxiliary request with the letter of 14 February 2005.

The appellant (opponent) requests that the decision under appeal be set aside and that the contested patent be revoked.

IV. Claims

(a) Main Request

Claims 1 and 2 of the main request read as follows:

"1. A substantially enclosed sound absorbing unit for an anechoic chamber, comprising:

a substantially flat panel member (25,55,65,75,85) having a layer of sound absorptive material; and

an anechoic member (21,51,61,71,81) disposed adjacent to said flat panel member said anechoic member having a base (29,59,69,79,89) and a sound transparent wall member (26,56,66,76,86), said wall member including a layer of sound absorptive material (27,48,54,64,74,84), said wall member further including a protective covering (20,50,60,70,80) thereover

characterised in that the anechoic member is hollow and the protective covering comprises a substantially solid, protective cover sheet (20,50,60,70,80) made of sound reflective material having perforations formed therein, said perforations forming a free-space and in which said free-space of said perforated cover sheet is at least 7% of the total area of the cover sheet.

2. A sound absorbing unit according to claim 1 wherein said anechoic member (21,51,61,71,81) is spaced from said panel member."

Dependent claims 3 to 21 concern further preferred embodiments of the sound absorbing unit of claim 1.

(b) First Auxiliary Request

Compared with claim 1 of the main request, claim 1 of the first auxiliary request in addition requires that the sound absorbing unit is configured so that a plurality of units can be provided within an anechoic chamber to give an acoustic response with a maximum deviation from the inverse square law of about 3 dB.

(c) Second Auxiliary Request

Claim 1 of the second auxiliary request is directed to an anechoic chamber with an acoustic response that provides a maximum deviation from the inverse square law of about 3 dB; the chamber is defined to include a sound absorbing unit as defined in claim 1 of the main request.

(d) Third Auxiliary Request

The preamble of claim 1 of the third auxiliary request reads as for the main request, and the characterising portion is as follows:

"… characterised in that the anechoic member is hollow and the protective covering comprises a substantially solid, protective cover sheet(20,50,60,70,80) made of sound reflective material having perforations formed therein, said perforations forming a free-space and in which said free-space of said perforated cover sheet is at least 7% of the total area of the cover sheet and

wherein said anechoic member (21,51,61,71,81) is spaced from the panel member."

V. State of the Art

The following documents, cited amongst others during the opposition proceedings, are relevant for this decision:

E1: US-A-2706530
E10: FR-A-0875333
E12: G. Kurtze, "Physik und Technik der Lärmbekämpfung", Verlag G.Braun, Karlsruhe 1964, pages 157 and 158.
E13: K. Biehn et al. "Lärmbekämpfung", Verlag Tribüne Berlin, 1989, chapter 6.4.

The following document was cited with the opponent's grounds of appeal:

E17: I. Slawin, "Industrielärm und seine Bekämpfung", Verlag Technik Berlin, 1960, pages 266 to 267.

VI. Submissions of the Parties

Admissibility of the Patent Proprietor's Appeal, Main Request and First and Second Auxiliary Requests

Both the opponent, and the Board in its provisional opinion, questioned the admissibility of the proprietor's appeal, given that the opposition division had maintained the patent on the basis of a set of claims which appeared to have been put forward during the oral proceedings as the patent proprietor's main request. If the appeal was not admissible, the main

request and the first and second auxiliary requests, which do not contain the feature of granted claim 2 that was included in claim 1 as maintained by the opposition division, could not be allowed in view of the principle of prohibition of reformatio in peius.

Although the attorney for the proprietor accepted that an independent claim combining the subject-matter of granted claims 1 and 2 was presented as the main request during the oral proceedings, he submits that the circumstances surrounding the filing of the request were such that the patent proprietor was adversely affected in the sense of Article 107 EPC. He alleges that during the oral proceedings, the opposition division gave an indication that claim 1 of the then main request did not define any features that would provide an inventive step; he explained that, confronted with a possible rejection, he felt obliged to submit an amended set of claims as the main request. Since this request was not made willingly, the proprietor has been adversely affected.

Third Auxiliary Request

(a) Article 100(c) EPC

The opponent submits that the feature that "the anechoic member is hollow" was disclosed in the application as originally filed (international patent application number PCT/US93/06114) only in combination with a layer of sound absorbing material (28) on the base, as shown in the embodiments in Figures 5A to 5D, and as described at page 10, lines 23 to 25, and page 11, lines 4 to 5, 17 to 19 and 32 to 34, of the

application. Since claim 1 defines a hollow anechoic member, without requiring the presence of a sound absorbing layer, subject-matter has been added.

The proprietor referred to the description of the example shown in Figure 2A given at page 8, lines 7 to 10 of the application, as providing support for the amendment. Here it is stated that, "anechoic wedge element 21 is generally hollow having a free space 30. However,… a layer of sound absorptive material 28 may be disposed on base member 29"; use of the word "may" indicates that the sound absorptive layer 28 is an optional feature. In addition, it is clear to the skilled person that the invention relates to the protective covering and that the sound absorptive layer 28 is of less significance and hence optional.

Concerning the description of the embodiment shown in Figure 2A, the opponent argued that in the context of the description the word "may" does not indicate an optional feature, since "may" is also used in connection with essential features. For example, the perforated cover sheet is clearly essential to the invention, but at page 8, lines 1 to 2 it is said that the cover sheet "may be formed from a perforated, sound reflective material such as metal", implying that it could also be formed from other non-perforated materials.

The opponent argued further that, given the requirement for an anechoic element to absorb sound to a very high degree, the strip of sound-absorbing material (28) is essential in order to compensate for the general absence of material in the hollow element. Page 5,

lines 1 to 4 of the description indicates that an object of the invention is to reduce the amount of sound absorptive materials in an element, but there is no indication that it is possible to eliminate the strip completely.

(b) Article 123(3) EPC

Claim 1 of the patent, as granted, defines a protective covering comprising a "substantially solid, sound reflective, protective cover sheet (20,50,60,70,80) having perforations therein". This feature is amended in claim 1 of the third auxiliary request to read: "substantially solid, protective cover sheet (20,50,60,70,80) made of sound reflective material having perforations therein".

The opponent argues in essence that granted claim 1 requires a protective cover that, although perforated, is capable of reflecting sound. This implies an upper limit for the area of perforations, because if the area of perforations exceeds about 50%, the cover ceases to be capable of sound reflection. Claim 1 of the third auxiliary request does not require the cover to reflect any sound and, in effect, removes the upper limit for amount of perforations.

Covers that have a high amount of perforations and are not sound-reflecting would have been outside of the scope of granted claim 1, but now fall within the scope of claim 1 of the third auxiliary request. The amendment thus leads to a extension of protection contrary to Article 123(3) EPC.

The proprietor is of the view that the expressions used in claim 1 of both the granted patent and of the third auxiliary request are synonymous. The intention of the invention is to have a cover sheet with holes in it, whose function is to enable the unit to absorb sound. There is no difference in either meaning or scope conferred by the expressions used in the granted and amended claims.

(c) Article 84 EPC

The opponent is also of the view that the above amendment leads to a lack of clarity in the claim, contrary to Article 84 EPC, since the skilled person is uncertain of the meaning of the expressions.

(d) Novelty

The opponent argues that the subject-matter of claim 1 lacks novelty with respect to E1. In particular, the walls of the anechoic elements of E1 (indicated by reference numeral 10 in the Figures) can be considered as flat panel elements having a layer of sound absorptive material. Since the anechoic elements are shown in Figure 6 of E1 as being spaced apart from each other, it follows that the requirement in claim 1 that an anechoic member is spaced from a panel member is also disclosed.

The proprietor contends that the sound-absorbing unit of E1 is not suitable for use in an anechoic chamber. An anechoic chamber is conventionally defined as one that does not have a less than 0.99 normal incidence sound absorption coefficient throughout the frequency

range of interest. E1 discloses sound absorbing units of the diffraction panel type, which cannot achieve the high level of sound absorption required.

(e) Inventive Step

The opponent contests inventive step on the basis of the combination of either E3 or E10 together with either E12 or E13.

Documents E3 and E10 concern sound absorbing elements for use in anechoic chambers. The opponent argues that the solution of providing a perforated cover, for example of metal, for such elements is obvious in light of either E12 or E13, both of which teach that sound absorbing material can be protected, and the sound absorbing property maintained, by covering with a perforated plate of hard material having at least 15% holes.

The proprietor disputes the view held by the opponent and the opposition division that the requirement "for an anechoic chamber" in the introductory part of the claim does not import any technical feature into the claim. He explained that the purpose of the claimed sound absorbing unit is to provide a chamber with anechoic properties, i.e. absorption of 99% of the sound, in accordance with, for example, the international standard ISO 3745.

The proprietor submits that neither E12 nor E13 relates to anechoic chambers; E12 discloses a relatively thin layer (about 4 cm) of sound absorbing material, which only has 50% absorption (see second and third

paragraphs on page 157), and E13 shows that the maximum degree of absorption is less than 0.90 (Figure 6/15). Since the sound absorbing units of E12 and E13 are not suitable for use in an anechoic chamber, the skilled person would not contemplate applying their teachings to the units of E3 or E10.

Reasons for the Decision

1. Admissibility of the Patent Proprietor's Appeal

It is clear from the minutes that the opposition division had carefully monitored requests submitted during the oral proceedings, and in particular, requests were confirmed by the parties before the decision was announced (see the minutes page 8, paragraph 7.15). Consequently, the set of claims which forms the basis of the contested decision was indeed the main request of the patentee. This has also been admitted by the attorney of the patent proprietor, but he maintains that the circumstances surrounding the filing of the request led to the proprietor being adversely affected in the sense of Article 107 EPC.

As far as the Board is concerned, there is no hint of anything untoward occurring during the oral proceedings. The opposition division expressed its opinion that claim 1 of a particular request lacked inventive step, but such an indication is normal judicial practice and is often given during hearings; it cannot be considered as subjecting the attorney to improper pressure to withdraw the request. The Board does not accept the argument of the proprietor's attorney that he was

wrongly pressurised by the opposition division into withdrawing the request; it is assumed that attorneys practising before the EPO have a knowledge of the procedure for filing and withdrawing requests.

Since the proprietor is not adversely affected in the sense of Article 107 EPC, the appeal is deemed to be inadmissible. The proprietor is nevertheless a party to the appeal proceedings as of right.

2. Reformatio in Peius - Main Request and First and Second Auxiliary Requests

Since the proprietor's appeal is deemed to be inadmissible, the opponent becomes the sole appellant. Under the doctrine of no reformatio in peius, as expounded in decisions G 9/92 and G 4/93 (see OJ 1994, 875), if the opponent is the sole appellant, the proprietor is primarily restricted in appeal proceedings to defending the patent as maintained by the opposition division. The exception referred to in G 1/99 (OJ 2001, 381), allowing amendments to meet an objection put forward by the opponent/appellant or the Board during the appeal proceedings, does not apply here.

Claim 1 according to the main request and the first and second auxiliary requests does not contain the feature of granted dependant claim 2, this being a part of claim 1 as maintained by the opposition division, and is thus broader in scope than that maintained by the opposition division. Consequently, these requests fall foul of the doctrine and are not admitted into the proceedings.

3. Third Auxiliary Request

3.1 Article 100(c) EPC

As compared with claim 1 of the application as originally filed, claims 1 of the granted patent and of the third auxiliary request have been amended to define the anechoic member as being hollow. The opponent maintains that a hollow anechoic member is only disclosed in the patent application in combination with a strip of sound absorptive material on its base. Failure to define such a strip in claim 1 leads to an extension of subject-matter beyond the application as filed.

At page 8, lines 8 to 10 of the patent application it is stated that "However, as further shown in Fig. 2A, a layer of sound absorptive material 28 *may* be disposed on base member 29." (emphasis added). Normally the use of the word "may" is a clear indication that a feature is optional. However, as the opponent has indicated, the application is liberally sprinkled with "mays", also in connection with essential features (see for example page 8, lines 1 to 2), such that the usual linguistic meaning cannot be ascribed to this word. It is therefore necessary to determine which features the skilled person reading the application as a whole would understand as essential and which as optional.

It is clear that the patent application is directed to a protective covering for anechoic elements that provides a high degree of sound absorption (see page 3, line 23 to page 4, line 24). Claim 1 of the application

as originally filed did not require that the anechoic wedge element be hollow, indeed according to one embodiment of the invention (see page 5, lines 32 to 34) it is foreseen that the entire interior space of the wedge can be filled with sound absorbing material. Thus according to the patent application, the feature of the wedge being hollow is an optional one. The question is whether the skilled person would understand that the embodiment relating to a hollow anechoic element must inevitably also include a layer of sound absorptive material on its base.

The role of the sound absorptive layer in hollow elements is to provide some additional absorbing capability, and to enable the anechoic element to be tuned to particular frequencies of sound (see page 8, lines 16 to 19 of the application). There will be situations where the sound absorbing capacity of the walls of the element is sufficient, and situations where tuning is not required; thus a hollow element is not inextricably linked to the necessity to have a sound absorbing strip. In addition, the functions of the sound absorbing strip have nothing to do with the main thrust of the invention, which is to provide a protective covering for anechoic elements.

A skilled person reading the application would therefore be of the view that the invention is directed to a covering, and whether or not the anechoic element is hollow or contains an extra strip of sound absorbing material is merely an option depending on the particular use the anechoic element is put to. Consequently, the amendment does not add subject-matter contrary to Article 123(2) EPC.

3.2 Articles 123(3) and 84 EPC

Given the arguments presented by the parties, it is convenient to consider the objections raised by the opponent under these two articles together.

Claim 1 of the granted patent defines a protective covering comprising a "substantially solid, sound reflective, protective cover sheet (20,50,60,70,80) having perforations therein". Claim 1 of the third auxiliary request refers to a "substantially solid, protective cover sheet (20,50,60,70,80) made of sound reflective material having perforations therein".

The opponent holds the view that claim 1 of the granted patent requires the cover sheet to be able to reflect at least some sound. This implies an upper limit to the area of perforations, since above about 50%, the cover would be incapable of reflecting any sound. By removing this limitation in claim 1 of the third auxiliary request, the opponent alleges that the scope of the claim has been extended, contrary to Article 123(3) EPC, to include covers that are fully sound absorbing.

The opponent is also of the view that in addition to Article 123(3) EPC, the above amendment is contrary to Article 84 EPC. In particular, the expression "sound reflective material" lacks clarity. Whether or not an object is "sound reflective" depends not only on the material, but also on the form it takes, so for example, a highly perforated metal sheet ceases to be sound reflective; hence, there is a lack of clarity as to what is meant by "sound reflective material".

In response to these grounds of objections, the proprietor argued that the two expressions, in granted claim 1 and amended claim 1, are synonymous, and thus there is no broadening in scope of the claim. The intention of the patent is to make the cover from a sheet of material provided with holes in order to enable it to absorb sound; this is readily apparent to the skilled person reading claim 1 in light of the specification.

The Board can find no indication in the description that the sound absorbing unit should be capable of reflecting sound at all; on the contrary, the invention is directed to a sound absorbing unit for an anechoic chamber, i.e. having an absorption coefficient of 0.99, and which thus should be capable of absorbing as much sound as possible. Paragraphs [0030], [0039] and claims 11 to 13 of the specification describe the types of material for the cover and the amount of perforations required for it to have a sound absorption coefficient suitable for anechoic conditions. The conclusion is that the skilled person would not read into either the granted or amended claim any requirement for sound to be reflected. Consequently, there is no infringement of either Article 123(3) or Article 84 EPC.

3.3 Novelty (Article 54 EPC)

In assessing novelty of the subject-matter of claim 1 with respect to E1, the opponent has interpreted a wall of the unit of E1 (feature 10 in Figure 6) as being the flat panel member of claim 1, and argues that Figure 6 shows walls 10 that are spaced apart from neighbouring

units. This does not seem to be a reasonable interpretation, as a wall of a unit of E1 cannot be equated to the flat panel member of claim 1. Figure 6 of E1 shows an embodiment in which a plurality of sound absorbing units are suspended in an array, whereas Figure 1 shows an individual unit. It can be seen that there is no separate panel positioned at a distance from the unit in the sense of the disputed patent (see Figures 2A, 2B, 5A-5D); it is clear to the skilled person reading the patent specification that the anechoic element and the flat panel member are separate items. Alternatively, the base of the unit shown in Figure 1 of E1 equates to the flat panel of claim 1, in which case it is not spaced apart from the anechoic unit.

It is therefore concluded that the subject-matter of claim 1 differs from E1, at least in that the anechoic element is not spaced from the flat panel member, and hence the claimed subject matter is novel over E1.

3.4 Inventive Step (Article 56 EPC)

The opponent contests inventive step on the basis of the combination of either E3 or E10 together with either E12 or E13.

The invention set out in the contested patent relates to the provision of protective covers for sound absorbing units used in anechoic chambers.

E10 discloses sound absorbing elements for use on walls, ceilings etc., and in particular for use in an anechoic chamber (see page 1, lines 1 to 5 "laboratoires

d'expériences acoustiques"). A row (1) of sound absorbing elements is positioned at a distance from base plate (3) (see Figures 1 and 3), and the elements have a protective cover of silk (see page 4, lines 19 to 21). E10 therefore forms an appropriate starting point for the invention, with subject-matter of claim 1 differing from that disclosed in E10 in that the elements have a perforated cover made of sound reflective material, rather than the silk covers of E10.

Starting from E10, the objective problem to be solved is seen as how to provide improved protection for the sound absorbing elements.

The opponent argues that the solution of providing a perforated cover, for example of metal, is obvious in light of either E12 or E13, both of which teach that sound absorbing material can be protected, whilst maintaining the sound absorbing property, by covering it with a perforated plate of hard material. In particular, E12 explains that, because sound absorbing materials tend to be mechanically soft, a protective cover is necessary (page 157, penultimate paragraph). Covers made from metal, board or plaster are completely transparent to sound if they are provided with at least 15% perforations (see paragraph bridging pages 157 and 158). E13 also discloses perforated covers for protecting sound absorbing units (see section 6.4.1), and teaches that sound waves can pass unhindered through the cover if the area proportion of holes is at least 30%. In the view of the opponent, it would be therefore be obvious to replace the silk covers of E10 by hard ones as described in E12 or E13, and given that E12 and E13 are extracts from text books, such a

measure is merely within the general knowledge of the skilled person.

The proprietor argues that the purpose of the claimed sound absorbing unit is to provide a chamber with anechoic properties, i.e. absorption of 99% of the sound. Such sound absorbing units are to be distinguished from sound diffraction units, which operate under less strict requirements.

Regarding E12, the proprietor submits that the document does not relate to anechoic chambers, as evidenced by the relatively thin layer (about 4 cm) of sound absorbing material and the fact that it only has 50% absorption (see second and third paragraphs on page 157). Although the proprietor agrees that E12 discloses the use of a protective cover, and the cover is said to be completely permeable to sound, this is only in the context of the sound absorbing structure described in E12. The skilled person would have considered that such a cover would nevertheless have some detrimental effect when used in an anechoic chamber, where the standards are significantly higher, and consequently would not have entertained the idea.

Concerning E13, the proprietor refers to Figure 6/15, which shows that the maximum degree of absorption is less than 0.90, indicating that the material of E13 is not suitable for use in an anechoic chamber.

The proprietor also drew attention to E17, a document submitted by the opponent. Figure 140 concerns a sound absorbing panel having an absorption coefficient of 0.5 to 0.7 and shows a construction with a protective cover

of perforated material. Figure 141, on the other hand, concerns a sound absorber with a coefficient of 0.98, and no protective cover is indicated. The proprietor argues that, especially as Figures 140 and 141 are side by side in the book, this is an indication that it is counter intuitive to provide high efficiency sound absorbers with a protective cover.

The Board is persuaded by the arguments of the proprietor that the sound absorbing capability of units for anechoic chambers is more demanding than for other applications. Whereas documents E12, E13 and E17 all show perforated covers for units having a sound absorbing coefficient up to 0.8, and this may be seen as general knowledge as suggested by the opponent, there is no indication that such a cover would be suitable for applications requiring a coefficient in the region of 0.99. Consequently, the skilled person would not immediately consider using a cover such as described in E12 or E13 for the sound absorbing elements of E10.

Even if it were considered that it is generally known that sound absorbing units made from delicate materials can be protected with a perforated cover of hard material, and the skilled person would be tempted to try such a cover for the elements of E10, it is doubtful that he would derive the subject-matter of claim 1. E12 discloses a sheet of perforated material as a cover, but which should not be placed in direct contact with the sound absorbing elements (see page 158, "Abdeckungen mit gelochten Platten sollten möglichst nicht unmittelbar vor der Schluckstoffschicht angeordnet werden"). Applying this teaching to E10, the

obvious place for such a sheet in the structure of E10 would be as a flat plate above the metallic grid (5) shown in Figures 1 and 3; this would comply with the teaching of E12 and would provide a flat surface that is easy to maintain. However, claim 1 requires the walls of the anechoic members themselves to be covered with the perforated material, as shown in the Figures. Given that this is a more complex solution than simply providing a flat sheet over all of the elements, it is not be an obvious measure for the skilled person.

Similarly with E13, firstly, the document does not disclose material that the skilled person would seriously contemplate for use in an anechoic chamber, and secondly, even if it were to be used to protect the sound absorbing elements, the skilled person would not consider covering the wall of each individual element.

The subject-matter of claim 1 of the third auxiliary request therefore has an inventive step in light of E10 combined with either E12 or E13.

E3 describes sound absorbing elements for use in an anechoic chambers. The elements have as a protective covering a bag, made from, for example, nylon. The subject-matter of claim 1 differs from that of E3 at least in terms of the material and the form of the protective covering, and therefore is inventive for the same reasons as given above starting from E10.

Order

For these reasons it is decided that:

1. The appeal of the patent proprietor is inadmissible.

2. The appeal of the opponent is dismissed.

The Registrar: The Chairman:

A. Counillon U. Krause