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**Datasheet for the decision
of 1 December 2011**

Case Number: T 0960/08 - 3.4.01
Application Number: 00305969.8
Publication Number: 1172656
IPC: G01P 13/04, G01P 3/44
Language of the proceedings: EN

Title of invention:
Rotational direction detecting

Patentee:
Infineon Technologies AG

Opponent:
SIEMENS AG

Appellant:
VDO Automotive AG, subsidiarily SIEMENS AG

Headword:
Transfer of opposition/VDO Automotive AG

Relevant legal provisions:
EPC Art. 107, 112(1)
EPC R. 22, 99(1)(a), 101(1)(2), 139, 103(1)(a)

Keyword:
"Admissibility of the appeal, transfer of opposition"

Decisions cited:
G 0004/88, G 0002/04, T 0670/95, T 0019/97, T 0006/05,
T 0956/03, T 1137/97, T 1421/05, T 0870/92, T 0478/99,
T 0413/02, T 0340/92, T 0001/97, T 0097/98, T 0457/08,
T 0428/08

Catchword:
-



Case Number: T 0960/08 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 1 December 2011

Appellant: VDO Automotive AG, subsidiarily SIEMENS AG
(Opponent: SIEMENS AG) Postfach 22 16 39
D-80506 München (DE)

Respondent: Infineon Technologies AG
(Patent Proprietor) Am Campeon 1-12
D-85579 Neubiberg (DE)

Representative: Zimmermann, Tankred Klaus
Schoppe, Zimmermann
Stöckeler & Zinkler & Partner
Patentanwälte
Postfach 246
D-82043 Pullach bei München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 17 March 2008
rejecting the opposition filed against European
patent No. 1172656 pursuant to Article 101(2),
2nd sentence EPC.

Composition of the Board:

Chairman: H. Wolfrum
Members: P. Fontenay
A. Pignatelli

Summary of Facts and Submissions

I. On 14 May 2008, an appeal was filed against the decision of the opposition division, posted on 17 March 2008, by which the opposition filed by Siemens AG against European patent No. 1172656 was rejected.

II. The notice of appeal and the statement of grounds of appeal were filed in one document and the appeal fee paid on the same day. The appeal was filed in the name of VDO Automotive AG and, as an auxiliary request, in the name of Siemens AG.

III. The statement of grounds of appeal set out the reasons why the European patent should be revoked. Despite the indication that copies of newly cited documents D4 and D5 were enclosed to the statement of grounds, such copies were actually missing. The appellant stressed that the introduction of document D4 in the proceedings constituted a direct reaction to the finding of the opposition division with regard to the absence of evidence for the common knowledge which was thus considered speculative. No indication that other documents were enclosed was contained.

It was requested that the decision under appeal be set aside and the patent revoked. Furthermore, reimbursement of the appeal fee was requested.

IV. With a letter received on 26 June 2008, after expiry of the period for filing the notice of appeal, the representative filed copies of documents D4 and D5, a declaration of Siemens AG and a declaration made by the European patent representative on behalf of VDO

Automotive AG, both dated 22 April 2008, stating that the opponent status had been transferred as well as an extract from the commercial register of the Amtsgericht Regensburg.

- V. In its reply to the statement of grounds of appeal, received on 5 September 2008, the respondent/patent proprietor questioned VDO Automotive AG's entitlement to appeal and the admissibility of the auxiliary request indicating Siemens AG as an appellant. The issues of patentability were also dealt with on an auxiliary basis.
- VI. By a communication posted on 10 August 2011, subsequent to summons to oral proceedings posted on 12 July 2011, the board addressed the issue of VDO Automotive AG's entitlement to appeal and the admissibility of the auxiliary request indicating Siemens AG as an appellant and informed the parties that this would have to be discussed at oral proceedings. Furthermore, questions of patentability were addressed. It was also indicated that the request for reimbursement of the appeal fee did not seem to be allowable.
- VII. By letter received on 31 October 2011, the respondent again addressed the issue of VDO Automotive AG's entitlement to appeal and the admissibility of the auxiliary request indicating Siemens AG as an appellant. The issue of patentability was also discussed.
- VIII. By letter received on 25 November 2011, the appellant, represented by a new representative, addressed for the first time the admissibility of the auxiliary request naming Siemens AG as an appellant. It further addressed

the issue of patentability. The issue of VDO Automotive AG's entitlement to appeal was not dealt with.

IX. Oral proceedings were held on 1 December 2011.

At the oral proceedings, an authorisation issued to Dr. Bonn by Siemens AG, a sub-authorisation signed by Dr. Bonn and empowering the new representative to act on behalf of Siemens AG and a power of attorney issued to the new representative by Continental Automotive GmbH were filed. Furthermore, an undated internal screen shot from Unycom and a copy of the notice of appeal dated 22 February 2008 against the decision of the opposition division of 27 December 2007 to maintain European patent No. EP0871230 in amended form were filed (case T 457/08).

X. The appellant requests that the decision under appeal be set aside and the patent revoked.

As far as the admissibility of the appeal is concerned, it requests that the auxiliary request indicating Siemens AG as appellant be admitted first and, as an auxiliary measure, that the appeal filed in the name of VDO Automotive AG be admitted.

As a further auxiliary request, it requests that the notice of appeal be corrected under Rule 139 EPC so that the order of the names of the appellants is reversed.

It further requests that the proceedings be interrupted and the following questions be referred to the Enlarged Board of Appeal:

1. (a) Does the applicability of the principles established in G 4/88 depend solely on whether the subsidiary to which the opposition is to be transferred already had legal personality when the parent company filed the notice of opposition?
- (b) Can the right to transfer the opposition be forfeited where the original opponent's dealings with the EPO ostensibly demonstrate its wish to pursue the opposition despite having lost its substantive opponent status?
2. (a) What formal requirements must be met before the transfer of opponent status can be accepted? In particular, is it necessary to submit full documentary evidence proving the alleged facts?
- (b) Is an appeal filed by an alleged new opponent inadmissible if the above formal requirements are not met before expiry of the time limit for filing the notice of appeal?
- (c) Which pieces of documentary evidence must be produced within the above time limit and which may be submitted after it has expired? Is it absolutely essential that documents accessible to the public, such as extracts from a commercial register, be submitted within the time limit?
3. (a) Does the EPC provide for a substantive opponent status?

(b) If so, what finding must be reached where an opponent informs the EPO that, despite having transferred its substantive opponent status, it wishes to pursue the opposition proceedings before the EPO?

4. In G 2/04, the right to file an appeal in the original opponent's name as an auxiliary request is made subject to a justifiable legal uncertainty, for example a situation in which a transfer of the opposition has been requested but not yet registered.

(a) What finding must be reached in the case of a planned request for transfer of the opposition which fails for factual (but not legal) reasons?

(b) When must such legal uncertainty pertain: when the appeal is signed, when the EPO receives the appeal, or is a retrospective view also permissible, in the knowledge that the request for transfer of the opposition failed for factual reasons?

The appellant also requests reimbursement of the appeal fee.

XI. The respondent requests that the appeal be rejected as inadmissible or, as an auxiliary measure, that the appeal be dismissed. It further requests that documents D4 and D5 and the two declarations submitted on 22 June 2008 be disregarded as they were filed too late.

XII. The arguments of the appellant can be summarised as follows.

(a) Admissibility of the auxiliary request indicating that the appeal is filed in the name of Siemens AG

(aa) Siemens AG is the party to the proceedings and is entitled to appeal.

The opposition was received by the EPO on 19 January 2007. At that time the company Siemens VDO Automotive AG did not exist. The opposition was filed in the name of Siemens AG and Siemens AG was the party to the proceedings at the time the appeal was filed.

Siemens VDO Automotive AG was founded on 6 March 2007 and registered on 19 April 2007. By contract ("*Einbringungsvertrag*") dated 23 May 2007, the business assets of Siemens AG named "Siemens VDO Automotive" were transferred with effect from 1 June 2007 to the new company "Siemens VDO Automotive AG", which on 10 December 2007 changed its name to "VDO Automotive AG". On 21 January 2008, with its submissions filed in view of the oral proceedings to be held before the opposition division, Siemens AG would have had the possibility to transfer the position of opponent to "VDO Automotive AG". However, Siemens AG decided to maintain its opponent status.

Siemens AG was the registered party to the opposition proceedings and is therefore the right party to the appeal proceedings. A transfer of the opponent status

has not been requested; nor has it been decided by the EPO.

Even though the appeal was filed by VDO Automotive AG, this is irrelevant because VDO Automotive AG was entitled to act on behalf of Siemens AG.

(bb) The auxiliary request is admissible according to G 2/04 because the legal situation at the time the appeal was filed was unclear for three reasons.

First, there was a factual uncertainty.

The representative who filed the appeal knew that the transfer of the business assets "Siemens VDO Automotive" had taken place. However, the contract by which the business assets had been transferred was not available to him. He therefore did not know what had been transferred. He had received contradictory statements and legal opinions about the transfer of the opponent status from different departments of Siemens AG and VDO Automotive AG.

Although not explicitly stated in the notice of opposition, the business assets "Siemens VDO Automotive" were the assets in the interests of which the opposition had been filed because the invention was only applicable to this particular field in which the direction of rotation of wheels had indeed to be determined and this was part of the business assets "Siemens VDO Automotive".

The opposition proceedings were therefore no longer in the interests of Siemens AG.

However, a transfer of the opponent status had been neither requested nor decided.

Since the situation was unclear, the appeal was filed in the name of VDO Automotive AG and, as an auxiliary request, in the name of Siemens AG.

It was the duty of the EPO to decide which party is the correct one.

Second, there was uncertainty as to the necessary means of proof.

In fact, decision G 2/04 did not answer question 2a and, therefore, at the time of the filing of the notice of appeal, the representative had no way of knowing for sure which documents were needed to transfer the opponent status. In particular, he could not know under which conditions the transfer of opponent status by a contract has an effect in the proceedings before the EPO.

In any case, the "*Einbringungsvertrag*" was a secret agreement and could not be submitted. It was not the intention of the party to make this contract public. The party did not want to prove the transfer at the time of the filing of the appeal. Also for this reason, the representative could not know which other documents he could provide to prove the transfer.

When the appeal was filed, the representative was of the opinion that the pieces of evidence actually filed on 26 June 2008 had already been filed with the EPO on

22 April 2008. It was not possible, however, to prove that these letters were sent out on 22 April 2008. The screen shot in which "Übertragungserklärung Siemens" and "Übertragungserklärung Conti" are indicated under 14 May 2008 shows that these letters were elaborated on that date. The post is normally brought to the EPO in person. No evidence at all for the date of despatch could be given.

Third, legal uncertainty derived from the fact that G 4/88 and G 2/04 are contradictory. In fact, in G 4/88 the Enlarged Board of Appeal stated that opponent status can be freely transferred, whereas in G 2/04 the opposite was decided.

In the present case, both decisions were applicable. Therefore, it was not clear to the representative whether the transfer was allowable or not.

From the above it could be concluded that at the point in time the appeal was filed, the situation was uncertain from both a legal and a factual point of view. As there was a legal uncertainty, the situation arose which was considered in G 2/04 to be one in which it was possible to file an auxiliary request indicating another appellant as an alternative to the main request. Therefore only one appeal was filed. It was not possible to file two appeals for financial reasons.

(b) Entitlement to appeal of VDO Automotive AG

As to VDO Automotive AG's entitlement to appeal, the appellant filed two declarations, both dated 22 April 2008, as evidence that the opponent status had been

transferred by Siemens AG to VDO Automotive AG on 23 May 2007 by the "*Einbringungsvertrag*" concerning the business assets "Siemens VDO Automotive".

The first declaration was made by the then representative of VDO Automotive AG and Siemens AG on headed notepaper of Continental "VDO Automotive AG". It was stated therein that the opponent status had been transferred from Siemens AG to VDO Automotive AG. It was also announced that a fusion with Continental Automotive GmbH would probably take place before the oral proceedings. The declaration further stated that the opposition had been filed in the interests of the business assets "Siemens VDO Automotive" (SV) and that these assets had been transferred to Siemens VDO Automotive AG on 23 May 2007 under an "*Einbringungsvertrag*". On 10 December 2007 the name of the company was changed to VDO Automotive AG.

The second declaration was made by two employees of Siemens AG on headed notepaper of Siemens AG. This declaration confirmed that on 23 May 2007 the business assets "Siemens VDO Automotive" had been transferred, together with the opponent status, to Siemens VDO Automotive AG under an "*Einbringungsvertrag*".

The declarations were filed late because the representative was unaware that they had not been filed before he sent the notice of appeal. He found out later that the declarations had not been filed at the EPO. It was not requested to register the transfer of the opponent status and no arguments in favour of the transfer were submitted.

(c) Request for correction of an error in the notice of appeal

The declaration in the notice of appeal that the appeal was filed in the name of VDO Automotive AG and, as an auxiliary request, in the name of Siemens AG was an error and should be corrected under Rule 139 EPC.

The correct declaration was that the appeal was filed in the name of Siemens AG and, as an auxiliary request, in the name of VDO Automotive AG. To prove that this was the real intention of the party, a copy of the notice of appeal in proceedings T 457/08, in which the names of the appellants were in the right order, was filed.

The fact that the same order was chosen in case T 428/08 as in the present case was due to the fact that the party had tried different schemes in order to provoke a referral of questions of law to the Enlarged Board of Appeal.

(d) Request for reimbursement of the appeal fee

As far as the request for reimbursement of the appeal fee is concerned, the appellant submitted that the opposition division had violated the procedural rights of the party in that it had erred in its assessment of the state of the art.

(e) Request for referral of questions to the Enlarged Board of Appeal

The questions of law should be submitted to the Enlarged Board of Appeal because they were relevant for the decision on the present case.

(f) The appellant also presented submissions against the patentability of the claimed subject matter.

XIII. The arguments of the respondent can be summarised as follows.

The appellant had not submitted and proved within the time limit for filing the notice of appeal that the opponent status was transferred to VDO Automotive AG. Since VDO Automotive AG was not party to the opposition proceedings, it was not entitled to appeal and was not a party to the appeal proceedings.

The registration of the transfer of the opponent status was not requested and the pieces of evidence for the transfer were filed after the time limit for filing the appeal had elapsed. It was not proved that they were sent before the expiry of the time limit for filing the appeal. Siemens AG continued to act as an opponent after the date of the transfer. The transfer of the opponent status did not take place or, if so, it took place after the filing of the appeal. The filed declarations could have been made after the filing of the appeal. It was not proved that they were made at the date of the transfer of the business assets. The procedural conduct of Siemens AG showed that a transfer of the opponent status was not intended.

Even if it was proved that the business assets "Siemens VDO Automotive" had been transferred to VDO Automotive

AG, the opponent status could not be transferred because there was no conclusive evidence that the opposition was filed in the interests of the business assets which were transferred. In fact, the invention was applicable in many other technical fields in which Siemens AG operated like, for example, turbine and rail. According to the jurisprudence of the EPO, the opponent status could not be transferred in such cases.

The appeal in the name of VDO Automotive AG was therefore inadmissible.

The appeal filed in the name of Siemens AG as an auxiliary request was inadmissible because procedural declarations could not be filed conditionally.

The exception foreseen in G 2/04 was not applicable to the present case because the legal uncertainty was due to the procedural conduct of the party and was dependent on an uncertain event outside the proceedings. A subjective legal uncertainty was not sufficient to admit the exception foreseen in G 2/04. An objective one was necessary.

The name of the appellant could not be corrected, because there was no indication that it was an error to file the appeal as it was filed. Furthermore, it was not evident what the true intention was. In case T 428/08 the name of the appellant was indicated as in the present case. It could not be said that Siemens AG always wanted to act as appellant.

The questions of law to be referred to the Enlarged Board of Appeal had either been decided already or were irrelevant for the decision on the present case.

The request for reimbursement of the appeal fee was not justified, because an erroneous evaluation of the state of the art did not constitute a procedural violation.

The respondent also presented submissions in favour of the patentability of the claimed subject matter.

Reasons for the decision

1. At the end of the oral proceedings, the representative of the appellant requested that the board first decide on the auxiliary request.

This request requires a reversal of the order in which the requests were filed.

The admissibility of the appeal can be examined only on the basis of the legal facts as they stand at the time the period for filing the notice of appeal expired. The order of requests concerning the person of the appellant is also a legal fact. Therefore, the requests have to be considered in the order they were filed when the time limit for filing the notice of appeal expired.

The request is therefore refused.

2. Entitlement to appeal of VDO Automotive AG

2.1 VDO Automotive AG is not entitled to appeal under Article 107, first sentence, EPC.

According to Article 107, first sentence, EPC, only a party to proceedings adversely affected by a decision may appeal. In deciding which party is affected by a decision, the legal situation at the time the impugned decision was issued has to be considered.

The party adversely affected by the decision under appeal is Siemens AG, since its opposition was rejected by the impugned decision.

Siemens AG filed the opposition and remained the party to the opposition proceedings until the end of the procedure, i.e. it was the party to the opposition proceedings at the time the decision under appeal was issued. There was no indication in the notice of opposition that the opposition had been filed in the interests of the business assets "Siemens VDO Automotive" or any other special business assets.

These facts are evident from the file and have been confirmed by the appellant.

It follows that Siemens AG was formally the party to the opposition proceedings.

VDO Automotive AG was never a party to the proceedings before the department of first instance in the present case. Therefore, the conditions laid down in

Article 107, first sentence, EPC concerning entitlement to appeal are not fulfilled.

- 2.2 VDO Automotive AG is not entitled to appeal due to the transfer to it of the business assets "Siemens VDO Automotive".

Where opposition proceedings are pending before the EPO, the opponent's status may be transferred to a third party by universal succession or as part of the opponent's business assets, together with the assets in the interests of which the opposition was filed (see G 4/88 and Case Law of the Boards of Appeal, 6th Edition 2010, VII.C.5.1.2).

However, there is a clear distinction between a substantive transfer of opponent status with the business assets and its procedural validity in proceedings before the EPO (cf., among others, T 19/97).

The boards of appeal have consistently held that formal requirements have to be fulfilled for the opponent status to be considered transferred. This finding is based on an application, by analogy, of the general procedural principle laid down in Rule 22(3) EPC (cf. Case Law of the Boards of Appeal, 6th Edition 2010, VII.C.5.1.2).

It follows from this procedural principle that the procedural validity of a transfer of opponent status is dependent on the submission of a duly substantiated request and on production of documents providing evidence of legal succession within the proceedings

(cf., among others, T 6/05, T 19/97). A mere declaration by the transferee that he has acquired the party status is not sufficient (cf. T 670/95). A transfer can only be acknowledged from the date when adequate evidence to prove the transfer was filed, i.e. *ex nunc* (cf., among others, T 956/03, T 1137/97, T 1421/05). There is no retroactive effect of the submission of evidence. Until evidence of the transfer has been provided, the original party to the proceedings continues to have the relevant rights and obligations (cf. e.g. T 870/92, T 19/97, T 478/99, T 413/02, T 6/05). This is especially justified in cases where the opponent status is transferred together with the assignment of business assets, because the original party continues to exist and may continue the opposition proceedings (cf. T 6/05 point 1.6.4 of the reasons). In particular, if the transfer takes place before the period for filing the notice of appeal expires, then the entitlement of the transferee to replace the opponent has to be established by filing the necessary evidence before the period for filing the notice of appeal expires (T 956/03). The present board does not see any reason to depart from this jurisprudence.

In the present case, it was even never explicitly requested during the proceedings that the transfer of the party status as opponent be acknowledged. In fact, there was no substantiated submission on this issue at any time in the proceedings. On the contrary, the appellant submitted that Siemens AG continued to be party to the proceedings.

The declarations annexed to the letter of 26 June 2008, i.e. after expiration of the period for filing the appeal, that the opponent status had been transferred are not a request that the transfer be acknowledged in the proceedings and cannot be considered an implicit request either because this is in contrast to the procedural behaviour of the appellant and its submissions.

Moreover, the appellant admitted that it could not be proved that the declarations as well as the extract from the commercial register of the Amtsgericht Regensburg were filed at the EPO before the expiry of the period for filing the notice of appeal.

As it was not requested that the transfer of the party status be acknowledged and as the declarations and extract from the commercial register of the Amtsgericht Regensburg filed as evidence were submitted after expiry of the period for filing the notice of appeal although the alleged transfer had taken place earlier, it is unnecessary to examine whether the evidence would be convincing.

Since the required conditions are not fulfilled, the procedural validity of the transfer of the opponent status cannot be acknowledged in the present case.

It follows from the above that VDO Automotive AG is not entitled to file the appeal under Article 107 EPC.

3. Admissibility of the auxiliary request indicating that the appeal is filed in the name of Siemens AG

3.1 In principle, a conditional appeal is not admissible.

However, in decision G 2/04 the Enlarged Board of Appeal held that an appeal filed by one representative containing an auxiliary request concerning the person of the appellant is admissible under the following three conditions:

- i. there are no doubts whether a review of the contested decision shall take place;
- ii. the professional representative is entitled to act in the name of both persons;
- iii. there is a legal uncertainty about the party status.

According to G 2/04, a legal uncertainty about party status exists when the uncertainty is caused by a legal situation which, from an objective point of view, may be considered unclear (cf. G 2/04, point 3.2.4(c) of the reasons), thus corresponding to situations where the party status has to be decided by the competent body of the EPO on the basis of the file as it stands and depends only on the judgment of this body (cf. G 2/04, point 3.2.4(c) of the reasons) and the party in question cannot be held responsible for the legal uncertainty as to which one of the entities may seriously be considered to be the correct party (cf. G 2/04, point 3.2.5(b) of the reasons).

An uncertainty dependent on an uncertain event outside the proceedings, or caused by the procedural conduct of the party, does not justify filing an appeal in the name of a person indicated alternatively as an auxiliary request (see G 2/04, point 3.2.4(c)).

3.2 In the present case, there are no doubts that it was intended that a review of the contested decision shall take place and that the representative who filed the appeal was entitled to represent both parties.

However, the legal situation was clear from an objective point of view. In fact, although the alleged transfer of the party status took place before the expiry of the period for filing the notice of appeal, no request for transfer of the party status had been filed before expiry of the period for filing the notice of appeal or at any time later. Therefore, according to the established jurisprudence of the boards of appeal (see above point 2.2 of the reasons), the transfer has no procedural validity before the EPO, irrespective of whether or not there was an agreement between the parties on this point.

The alleged legal uncertainty about the party status resides in the fact that the appellant and the representative were uncertain about the content of the contract concerning the transfer and about the conditions under which a transfer is procedurally valid. This is a state of mind of the representative and thus an event outside the proceedings which does not justify the filing of an auxiliary request in the name of the person indicated alternatively.

(a) The "*Einbringungsvertrag*" is a contract between the two parties in whose name the appeal was filed. The parties are legal persons. The fact that individuals working for them in different departments did not know the content of the contract, or had different opinions

about its content, or evaluated its legal effects differently, or had different opinions on what pertained to the transferred business assets, is an event outside the proceedings.

The argument of the appellant that it is the duty of the EPO to decide who is the right party to proceedings in this case cannot be accepted as it is an improper attempt to shift responsibilities insofar as it seems to imply that the EPO, instead of the parties, should decide on the content of the contract.

(b) As far as the uncertainty as to the necessary means of proof and the time of their filing is concerned, the jurisprudence clearly establishes that, if the appeal is filed by the transferee, the transfer has to be requested and proved within the time period for filing the notice of appeal and that, in the case of a transfer of business assets, the request that the transfer be acknowledged has no retroactive effects.

The necessity of requesting and proving the transfer before expiry of the period for filing the notice of appeal was therefore clearly recognisable.

It is true that in decision G 2/04, point 3.2.3(c) of the reasons, the Enlarged Board of Appeal cites as an example of legal uncertainty the situation where a request for transfer of the opposition has been submitted but the transfer has not yet been registered and it is doubtful whether or not the evidence submitted by the requester for establishing the transfer actually satisfies the EPO that a transfer has duly taken place.

In the present case, however, no request to register a transfer has been filed, so that this example is irrelevant.

(c) As far as decisions G 4/88 and G 2/04 are concerned, it is clear that both decisions are complementary and applicable to the present case insofar as G 4/88 establishes the principle that the opposition pending before the European Patent Office may be transferred to a third party as part of the opponent's business assets together with the assets in the interest of which the opposition was filed and as G 2/04, contrary to the view developed by the appellant, does not contradict this finding and does also not permit a free transfer of the status as opponent.

The factual situations underlying these two decisions are very clear and very different from each other. In the situation underlying G 4/88 it was for legal reasons not from the outset possible to attribute the procedural status of opponent to the business assets in the interests of which the opposition was filed, whereas G 2/04 is concerned with a situation in which the holding company did not want to attribute the procedural status of opponent to the entity in whose interest the opposition was filed and which already existed at that time. In G 2/04 it was decided that there is no reason to extend the application of the rationale of G 4/88 to the case where a subsidiary company was sold in whose interest the opposition had been filed by the parent company.

The legal situation that follows from these decisions is clear: only if the business assets in the interests of which the opposition was filed are sold to another company is a transfer possible. In that case, if all further conditions established by the jurisprudence are fulfilled, then the transfer also has procedural validity before the EPO.

In the present case, it was submitted that a transfer of business assets had taken place and that the transferee did not exist at the time the opposition was filed. There was accordingly no reason to think that G 4/88 was not applicable. Moreover, the situation underlying G 2/04, namely two legal entities existing at the time the opposition was filed, was not given.

There could also not be any uncertainty on the way the two decisions should be applied.

The uncertainty was a personal uncertainty on the part of the representative, and this is an event outside the proceedings.

Thus, the conditions established by decision G 2/04 for the admissibility of an auxiliary request concerning the identity of the appellant are not fulfilled.

Since the appellant is not entitled to appeal and its auxiliary request is not admissible, the appeal is inadmissible under Article 107 and Rule 101(1) EPC.

4. The appellant requested that the notice of appeal be corrected under Rule 139 EPC.

A correction under Rule 139 EPC is only possible if there is an error in a document.

For the notice of appeal, Rule 101(2) EPC and Rule 99(1)(a) EPC are to be applied as *lex specialis* (cf. e.g. T 340/92, T 1/97, T 97/98).

The principles for correction of a notice of appeal under these Rules were set out in T 97/98. Even though that decision was taken under the EPC 1973, the same principles apply under the EPC now in force, since the text of Rules 99(1)(a) EPC and 101(2) EPC is identical to that of Rules 64(a) and 65(2) EPC 1973.

In case T 97/98, the board held that (point 1.3 of the Reasons): "What is required (for a correction) under Rules 64(a) and 65(2) EPC is that there was indeed a deficiency, i.e. that the indication was wrong, so that its correction does not reflect a later change of mind as to whom the appellant should be, but on the contrary only expresses what was intended when filing the appeal. It must be shown that it was the true intention to file the appeal in the name of the person, who is, according to the request, to be substituted."

The board added that, for the purposes of Rules 64(a) and 65(2) EPC 1973, it must be possible on the expiry of the time limit for appeal to determine whether or not the appeal was filed by a person entitled to appeal in accordance with Article 107 EPC. For this, it is sufficient if:

"... it is possible to derive from the information in the appeal with a sufficient degree of probability, where necessary with the help of other information on file, e.g. as they appear in the impugned decision, by whom

the appeal should be considered to have been filed ...". (Point 1.3 of the Reasons).

The board also indicated that the identity of the true appellant should be derivable within the appeal period by a person not knowing all the details later presented to the board (Point 1.6 of the Reasons).

The present board agrees with these principles and applies them to the present case.

The appellant submitted the request for correction as an auxiliary request.

This implies that it considered the original declaration to be the main request.

This implies in turn that this declaration was not an error and that the change is just a change of mind. A correction is therefore not possible, because the notice of appeal did not contain a deficiency under Rule 99(1)(a) EPC.

The notice of appeal in case T 457/08 was filed as evidence that the true intention was to file the appeal for Siemens AG, as the main request, and for VDO Automotive AG as an auxiliary request, because that was the order of the requests in that case. However, that notice of appeal cannot prove the true intention in the present case. Furthermore, the notice of appeal in another appeal is not information on file, i.e. as it appears in the impugned decision, as required in T 97/98.

The respondent submitted decision T 428/08, in which the same order of requests as in the present case was chosen and maintained.

Therefore, it cannot be assumed that the appellant usually files its appeals in the reverse order and only in the present case was the order erroneously changed. The appellant itself submitted that it has tried different combinations in order to provoke a referral to the Enlarged Board of Appeal.

The board therefore holds that the original declaration was not an error and cannot be corrected under Rule 101(2) EPC.

5. The appellant requested that questions of law be referred to the Enlarged Board of Appeal.

Under Article 112(1) EPC it is within the discretion of the boards of appeal to refer a case to the Enlarged Board of Appeal if this appears necessary for ensuring uniform application of the law or if a point of law of fundamental importance arises. Referrals are normally refused where there is no contradictory case law and the deciding board can see no reason for departing from earlier decisions. A purely theoretical interest in clarifying points of law is no justification for referral nor should hypothetical points be referred (cf. Case Law of the Boards of Appeal of the EPO 6th edition, VII.E.14).

Questions 1 to 3 are not relevant for the decision on the present appeal since a transfer of the opponent status has not been requested. Question 4 is not

relevant because no legal uncertainty exists in the present case. Therefore, a referral would be of purely theoretical interest.

Furthermore, questions 1(a) and (b), 2(a), (b) and (c), first point, and 3(a) and (b) can be clearly answered if the established and consistent jurisprudence of the boards of appeal is applied. The present board has no reason to depart from this jurisprudence (see point 2.2 above).

The answer to question 2(c) second point depends on the circumstances of the individual case.

The request that questions 1 to 4 be referred to the Enlarged Board of Appeal is therefore refused.

6. Since the appeal is inadmissible, the request for reimbursement of the appeal fee is refused under Rule 103(1)(a) EPC.

Order

For these reasons it is decided that:

1. The request that the proceedings be interrupted and the questions of law filed during the oral proceedings be referred to the Enlarged Board of Appeal is refused.
2. The appeal filed in the name of VDO Automotive AG or subsidiarily in the name of Siemens AG is rejected as inadmissible.
3. The request for reimbursement of the appeal fee is rejected.

The Registrar:

The Chairman:

R. Schumacher

H. Wolfrum