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Datasheet for the decision of 13 December 2013

Case Number: T 1869/12 - 3.2.07

06784349.0 Application Number:

Publication Number: 1910212

IPC: B67D1/07, B08B9/02

Language of the proceedings: ΕN

Title of invention:

ADAPTIVE SANITATION SYSTEM

Applicant:

The Coca-Cola Company

Headword:

Relevant legal provisions:

EPC Art. 21(3)(a), 97(1), 113(1), 113(2) EPC R. 71(3), 71(4), 71(5), 111(2), 140

Keyword:

Correction of the published European patent specification refused

Decisions cited:

G 0001/10, T 0055/00, T 0850/95, T 1093/05, T 1257/08

Catchword:

In case of procedural violations in the granting procedure, rectification is only possible via appeal against the decision to grant (point 4.5).

A correction of the published European patent specification or of the decision to grant cannot be allowed when this specification corresponds to the true intention of the Examining Division when granting the patent (points 4.1-4.4)



Beschwerdekammern Boards of Appeal Chambres de recours

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Case Number: T 1869/12 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 December 2013

Appellant: The Coca-Cola Company

(Patent Proprietor) Patent Department,

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Representative: Jackson, Robert Patrick

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Decision under appeal: Decision of the Examining Division of the

European Patent Office posted 24 January 2012 refusing to modify the published European patent

specification EP-B-1 910 212

Composition of the Board:

Chairman: H. Meinders Members: G. Patton

I. Beckedorf

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Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal against the decision of the Examining Division posted 24 January 2012 refusing to correct the published European patent specification EP-B-1 910 212.

The Examining Division held that the reversal of the amendments introduced by the Examining Division on its own motion in the claims annexed to its communication according to Rule 71(3) EPC dated 1 March 2011 cannot be accepted.

The Board provided its preliminary non-binding opinion II. annexed to the summons for oral proceedings scheduled for 13 December 2013. It considered that the decision under appeal could be set aside and the appeal fee reimbursed in view of the substantial procedural violations committed by the Examining Division in dealing with the request for correction. In the Board's opinion the reasoning in the decision was insufficient (Rule 111(2) EPC) and the right to be heard was not observed (Article 113(1) EPC). However, the published European patent specification could not be corrected as requested since it is in conformity with the true intention of the Examining Division when it decided to grant the patent. The decision to grant had in the meantime become final since no appeal had been lodged against it by the applicant.

As announced with its letter dated 10 December 2013, the appellant did not attend the oral proceedings which took place on 13 December 2013 in its absence in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

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During the oral proceedings the Board carefully considered all appellant's arguments, including those provided with its letters dated 20 November 2013 and 10 December 2013 filed as a reaction to the preliminary opinion of the Board.

The decision was announced at the end of the oral proceedings.

- III. The appellant requests that the decision under appeal be set aside and that the published European patent specification be corrected in accordance with pages 2 and 4 filed with letter of 5 December 2011 (main request), or, alternatively, that the case be remitted to the department of first instance for further prosecution (auxiliary request), and that the appeal fee be reimbursed for reason of procedural violation.
- IV. The appellant's arguments are essentially as follows:

The reasoning of the decision under appeal does not relate to the appellant's request for correction of the published European patent specification, contrary to Article 113(1) EPC.

The decision to grant is correct and was in conformity with the appellant's request of 8 July 2011 so that the published European patent specification should be corrected accordingly.

The decision to grant refers only to the official communication pursuant to Rule 71(3) EPC dated 1 March 2011, but mentions that the appellant's subsequent request for amendments dated 8 July 2011 has been "taken into account". Therefore, these documents

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form together the decision to grant, in line with the appellant's wishes.

The expression "taken into account" in the decision to grant is the standard formulation invariably used in other cases in EPO form 2006A to indicate that the appellant's requested amendments are included in the granted patent. This would also be the normal understanding for someone familiar with EPO practice.

If the requested amendments of 8 July 2011 would not have been taken into account in the decision to grant a date of 00.00.00 would have appeared, instead of the present "08.07.11".

The annex to the official communication dated 29 August 2011 could neither have been the basis for granting the patent by the Examining Division since otherwise the corresponding date "29.08.11" would have appeared in the decision to grant.

Extraneous documents, such as the communications of 29 August 2011 and 5 October 2011, do not form part of the decision to grant and should not be used for modifying its clear meaning. This would be contrary to the principle of good faith as an applicant would have to guess what the intention of the Examining Division is instead of relying on the clear statements in the decision to grant.

The communication dated 29 August 2011 states that the requested amendments were allowed. The omission of the full set of amendments as annexed to this communication is therefore a clerical error. In case of doubt, it is reasonable to assume that an EPO employee would have acted properly so that, interpreting the decision to

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grant different from being in compliance with the appellant's requests, requires the applicant to assume that the Examining Division consciously and deliberately acted in violation of the EPC by granting claims which were not approved by the appellant.

With respect to the communication dated 5 October 2011, no conclusion can be drawn from it since it appears "to be rather confused about EPO practice" and furthermore of a later date than the decision to grant.

Third parties cannot be affected by the requested correction of the published European patent specification since only the decision to grant has a legal effect. The published European patent specification is merely for information purposes so that it can be corrected according to Rule 140 EPC.

Reasons for the Decision

1. Summary of essential facts

The application was pending at 13 December 2007, the date of entry into force of EPC 2000. According to Article 7(2) of the Revision Act of 29 November 2000 (OJ EPO 2001, Special Edition No. 4, 50), Article 1.1, first sentence, of the decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the said Revision Act (OJ EPO 2007, Special Edition No. 1 of OJ EPO 2007, 197) and Article 2 of the decision of the Administrative Council of 7 December 2006 amending the Implementing Regulations to the EPC 2000 (OJ EPO 2007, Special Edition No. 1, 89), the revised Articles 94 and 97 are, however, applicable to this application. The same applies to the

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Implementing Regulations of these Articles, i.e. Rule 71 EPC. The applicable Rule 71 for the present application is thus the one which entered into force on 21 October 2008 (OJ EPO 2008, 513).

- 1.1 With its letter of 8 July 2011, the appellant reacted in time to the communication of 1 March 2011 according to Rule 71(3) EPC with which the Examining Division expressed its intention to grant a patent. The applicant expressed an explicit and clear disagreement with the text proposed for grant: it requested that the substantive amendments introduced by the Examining Division be deleted and that only the claims be renumbered. The appellant fulfilled all the requirements according to Rule 71(3) EPC and filed the translations in French and German of the claims in the form it wanted, in accordance with Rule 71(4) EPC.
- With the communication of 29 August 2011, the appellant was informed that its request for amendment or correction of the text intended for grant "has been allowed" and that a copy of the requested amendments or corrections made "is attached here to" (cover page). The claims annexed to the communication, however, did not comprise all the requested amendments, but only the re-numbering of the claims. This communication was therefore inconsistent in itself. In addition, there did not follow the communication required according to Rule 71(5) EPC, setting a time limit for the appellant to submit its observations on the issue of the amendments which were (apparently) not accepted by the Examining Division.
- 1.3 Instead, on 8 September 2011, i.e. only 10 days after the above mentioned communication, the decision to grant was issued, with the publication of the mention

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of the grant foreseen for 5 October 2011. On the cover page it was stated that "the request for amendments received at the EPO on 08.07.11 and any subsequent modifications agreed with the applicant have been taken into account".

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- 1.4 With letter of 16 September 2011 the appellant drew attention to the inconsistency in the communication of 29 August 2011 making clear its proposed amendment: reversal of the substantive amendments made by the Examining Division with its proposal for grant of 1 March 2011.
- 1.5 With communication of 5 October 2011 the Examining Division dealt with this as a "request for the correction of errors under Rule 140 EPC in the decision of 08.09.2011", which was the decision to grant. It stated that it could not be accepted. The reasons referred to the communication dated 28 April 2008 of the examination proceedings.
- 1.6 With letter of 5 December 2011 the appellant insisted on its interpretation of the standard texts of the communication of 29 August 2011 and of the decision to grant of 8 September 2011 that these texts correctly reflected the situation and that **only** the text of the claims annexed to the communication of 29 August 2011 was not correct.

Since the B-Specification had been received in the meantime, of which the claims clearly reflected the incorrect text, it requested a correction of that specification to reflect what in its opinion was the correct text.

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In addition, it requested further amendments to the text of the description, which had **not** formed part of its reaction dated 8 July 2011 to the communication under Rule 71(3) EPC.

- 1.7 With decision dated 24 January 2012 the Examining Division, still dealing with the request as one for correction of the decision to grant under Rule 140 EPC, refused this request, dealing only with the part related to the reversal of the Division's amendments to the claims, not the additional amendments to the description.
- 1.8 It is against this decision that the appellant has filed its appeal.
- 2. Competence and composition of the Board
- 2.1 The impugned decision does not deal with the request to correct the published European patent specification (hereafter called the B-publication) but converts it into a request to correct the decision to grant, which it then refused. The appellant is therefore clearly negatively affected. Since the other requirements of Article 106(1), first sentence, and Article 108 EPC as well as Rule 99 EPC are fulfilled, the appeal is admissible.
- 2.2 The Board considers itself competent in its present composition of two technical members and one legal member, for the same reasons as held in T 55/00 (not published in OJ EPO, point 2 of the reasons). Indeed, the main issue of the present case is related to the substantive content of the claims of the granted patent. As the impugned decision was taken by an Examining Division with three members, an appeal

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against this decision has to be dealt with by a Technical Board of Appeal in a composition according to Article 21(3)(a) EPC.

- 3. Main request
- 3.1 Appellant's request to set aside the decision under appeal
- 3.1.1 As underlined in the statement of grounds of appeal, points 5 and 6, the reasoning of the impugned decision does not deal at all with the case the appellant makes, namely that the decision to grant is in fact correct with its standard text, but that the annexed claim texts were incorrect and have led to an incorrect text of the B-publication. This amounted to only a request for correction of the B-publication, which was clearly stated in the appellant's letters of 8 July 2011, 16 September 2011 and 5 December 2011.

More in particular, it does not deal with the issue at stake of an inconsistency between the standard text of the communication dated 29 August 2011 ("your request ... has been allowed") and the annexed insufficiently re-amended pages of the text intended for grant, nor does it deal with the issue of the decision to grant dated 8 September 2011 ("request for amendments received ... on 08.07.11 ... have been taken into account").

In view of the above, the reasoning is not sufficient, contrary to Rule 111(2) EPC and the decision has been arrived at without observing the right to be heard (Article 113(1) EPC).

3.1.2 The way in which the procedure up to the decision was dealt with by the Examining Division is also characterised by a procedural violation and by errors of judgement on how the situation could have been best resolved.

When the appellant requested reversal of the substantive amendments to the claims, the Examining Division (in fact only the primary examiner) set on 12 August 2011 the wrong procedure in motion by crossing the wrong box: "consent is given to the amendments/corrections requested" in Form 2092A (which is available in the public file). As amendments the only partly accepted ones were appended.

As a consequence, the standard Form 2098A ("Your request of 08.07.11 for amendment or correction ... has been allowed") was sent to the appellant on 29 August 2011, instead of the required reasoned communication under Rule 71(5) EPC to explain why (part of) the amendments were not accepted.

The fact that the wrong procedure was followed, has to be seen as a further procedural violation.

3.1.3 Instead of solving this problem, which was easily recognisable by 16 September 2011 on receipt of the appellant's letter pointing out the inconsistency in the letter of 29 August 2011, the Examining Division insisted on its course of treating the appellant's writings as a request for correction of the decision to grant under Rule 140 EPC. Indeed, the problem could easily have been solved by suggesting the applicant to file an appeal against the decision to grant, to which interlocutory revision with reimbursement of the appeal

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fee would have been given. After this the correct procedure under Rule 71(5) EPC could have been pursued.

- 3.1.4 As a result of these substantial procedural violations, the decision under appeal is immediately to be set aside.
- 3.1.5 However, on remittal the situation, apart from providing the proper reasoning on the dismissal of the appellant's requests, appears difficult to redress for the following reasons that the Board wishes to add by way of an *obiter dictum* to the aforementioned rationale for the decision.
- 3.2 Appellant's request to correct the published European patent specification
- 3.2.1 The impugned decision deals solely with the request as one relating to the correction of the decision to grant. In that respect it explains why the Examining Division believes that the patent could not be granted in the form as requested by the appellant.

The appellant holds the view that the decision to grant is correct and is in conformity with its request of 8 July 2011 (the claims were filed again with the letter dated 5 December 2011) so that only the B-publication needs to be corrected accordingly and put in line with the clear wording of the communication of 29 August 2011 and of the decision of 8 September 2011. In its statement of grounds it states that it has never requested the correction of any error in the decision to grant, since the communication and the decision correctly (in its opinion) state that the requested amendments have been allowed.

The Board cannot share the appellant's view.

3.2.2 A correction of the B-publication as requested can only be allowed, if in the process of converting the version as intended for grant into the B-publication printing errors or errors of transcription occur. That is not the case here since the text of the claims as annexed to the communication of 29 August 2011 is identical to the text of the claims in the B-publication. The fact that it is the text intended for grant by the Examining Division, is confirmed by its communication of 5 October 2011.

That it was the actual intention of the Examining Division to grant a patent according to the annex of the communication dated 29 August 2011 could also have been derived from this communication itself, which clearly states that "a copy of the requested amendments or corrections made is attached hereto". This also concurs with the corrected documents as submitted to the printers, available from 12 August 2011 onwards as Form 2092A and Form 2035.3 in the public file, the latter referring only to the renumbering of the claims, i.e. to only part of the requests of 8 July 2011.

3.2.3 The appellant argues in favour of correcting the B-publication that the decision to grant does not encompass "the entire file" but only the patent text to which it makes explicit reference (G 1/10, OJ EPO 2013, 194, point 3 of the reasons referring to T 850/95, OJ EPO 1996, 455, point 3.2 of the reasons). In the present case, the decision to grant contains only a cross-reference to the communication pursuant to Rule 71(3) EPC dated 1 March 2011 and to the appellant's subsequent request for amendments dated 8 July 2011. Therefore, only these documents would form the entire

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decision to grant, which is thus in line with the appellant's wishes.

With respect to the decision to grant which stipulates that:

"The request for amendments received at the EPO on 08.07.11 and any subsequent modifications agreed with the applicant have been taken into account" (hereafter referred as to the "statement")

the appellant holds the view that, since there were no further modifications agreed with the applicant, only the set of claims as indicated by reference to its request of 8 July 2011, in its entirety, forms part of the granted patent.

The Board can, however, not follow the appellant's view. To "take into account" is for the Board identical to "to consider". In this respect, this consideration was to be seen as limited to what was communicated with the earlier communication and what was contained in the attachment of the communication dated 29 August 2011, the latter referring to the "requested amendments or corrections made". In a situation of a requested correction of the B-publication, all documents shedding light on the text intended for grant by the Examining Division, need to be taken into account.

3.2.4 The appellant further considers that the expression "taken into account" in the statement of the decision to grant is the standard formulation invariably used in EPO Form 2006A, when all the applicant's requested amendments are included in the granted patent. This would be the normal understanding for someone engaged in legal dealings with the EPO and familiar with its

usual practice who would not interpret it otherwise, such as for instance "considered but rejected" (T 1093/05, OJ EPO 2008, 430, point 4 of the reasons). The appellant cites the files EP 1 390 503, EP 1 475 195, EP 1 787 069, EP 1 824 594, EP 1 825 839 and EP 183 557 in which this standard formulation is used for accepting all the amendments requested by the applicant.

The Board is however of a different opinion. Someone engaged in legal dealings with the EPO and familiar with its usual practice would have realised that the attachment of the communication dated 29 August 2011 was the set of claims foreseen by the Examining Division for the grant, or at least should have realised this on receipt of the communication dated 5 October 2011 and the certificate of the EP patent on 7 October 2011.

3.2.5 The appellant further argues that **the date 00.00.00** instead of 08.07.11 would have been included in the statement in order to indicate that the requested amendments of 8 July 2011 would not have been taken into account (T 1093/05, *supra*). Since 00.00.00 does not appear but 08.07.11 instead, the corresponding requested amendments are thus included in the decision to grant.

In addition, should the amendments according to the annex of the communication dated 29 August 2011 have been regarded by the Examining Division as the valid documents of the grant, the date 29.08.11 should then have appeared instead of 08.07.11.

The Board can, however, not share the appellant's view since the date 00.00.00 only appears in the cases when

no amendment was filed or taken into account (T 1093/05, supra, point 2 of the reasons). However, the request of 8 July 2011 has actually been filed and has been considered as is also clear from the communication dated 29 August 2011. In particular, the re-numbering of the claims 16-19 to 14-17, i.e. a part of the appellant's request, is shown in the attachment.

Further, the date 29.08.11 cannot be included in the decision to grant as it can only refer to a "request for amendments received at the EPO". Consequently, the decision to grant always bears a date of a request filed by the applicant, not when a modification is introduced by the Examining Division.

3.2.6 The appellant further argues that extraneous documents such as the communications dated 29 August 2011 and 5 October 2011 do not form part of the decision to grant. As they are not referred to in this decision, they should not be used for modifying its clear meaning. Any other interpretation of the decision to grant using extraneous documents would be contrary to the principle of good faith as, otherwise, an applicant would have to guess the intention of the Examining Division instead of relying on the clear statements of the decision.

The appellant further considers that, even if extraneous documents were to be taken into consideration, they should not be used for changing the meaning of a decision. Objective intentions of the writer have to be considered when construing a document in good faith while subjective intentions, i.e. what the writer meant to say but did not, are to be disregarded (T 1093/05, supra). The appellant cites T 1257/08 (not published in OJ EPO) in which the Board

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decided that a second decision issued by the Opposition Division to correct a first decision is not legally valid, even though it is in line with the Opposition Division's (subjective) intentions. Therefore, in the present case, the fact that the Examining Division had a subjective intention which could have been different from the clear decision to grant in accordance with the wishes of the appellant does not play a role.

With respect to the communication dated 29 August 2011 the appellant considers that the requested amendments have "been allowed". The omission of the full set of amendments as annexed to the communication is therefore a clerical error that the appellant requested to correct with its letter of 16 September 2011.

For the appellant, in case of doubt, it is reasonable to assume that an EPO employee would have acted properly. Therefore, interpreting the decision to grant otherwise than being in compliance with the appellant's request involves assuming that the Examining Division consciously and deliberately acted in violation of the EPC by granting claims which were not approved by the appellant. This is why it is proper to assume that only a clerical error occurred in the attachments of the communication dated 29 August 2011.

With respect to the communication dated 5 October 2011, the appellant holds the view that no conclusion can be drawn from it since it appears "to be rather confused about EPO practice". Furthermore, it is post-dated with respect to the decision to grant so that it cannot modify or have any influence on its meaning (T 1257/08, supra).

The Board can, however, not share the appellant's view since the communication dated 5 October 2011 is not considered to form part of the decision to grant, nor to change its meaning. It is only referred to as a further indication of what the text intended for grant was.

The communication dated 29 August 2011 is part of the file, can therefore be used by the Board when determining what was the text intended by the Examining Division for grant. The attachment to the communication cannot be regarded as a clerical error, especially when the box "A copy (...) is attached hereto" is ticked on its cover page.

There is no doubt, however, that the Examining Division committed a procedural violation by acting as it did, which became evident with its communication of 5 October 2011 and with the transmission of the certificate of the patent on 7 October 2011. The secure way to redress this would have been to lodge an appeal against it, not by only continuing to argue in good faith on a different content of the decision to grant.

3.2.7 Finally, the appellant argues that third parties could not be affected by the correction of the B-publication since only the decision to grant has legal effect.

Since the published B-publication is not the authentic text and is merely for information purposes, the correction of the published B-publication has no actual retroactive effect and can be easily performed.

Consequently, such an outcome has no adverse effect on third parties of which the legal position vis-à-vis the patent has at all times been determined by the (unchanged) authentic text of the patent.

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However, as discussed above, the Board considers that the decision to grant corresponding to the true intention of the Examining Division, is the one granting the patent with the set of claims of the attachment of the communication dated 29 August 2011. As the B-publication is in line with it, it cannot be corrected since no errors have occurred. Hence, the discussion of affecting third parties is irrelevant.

3.2.8 In view of the above, it appears that a correction of the B-publication so as to revert to the text of the claims as requested by the appellant, is not possible.

This applies a fortiori for the further "corrections" to the decision, page 2, as also requested in the letter of 5 December 2011. These never formed part of the text intended to grant by the Examining Division, so cannot be seen as a typographical error, nor as an error of transcription.

- 4. Request of the appellant to correct the decision to grant (Rule 140 EPC)
- 4.1 In its later submission of 20 November 2013 the appellant states as its "maintained" main request that the decision under appeal be set aside and the Rule 140 EPC request be allowed. Such a request is one to correct the decision to grant.

The appellant tries to achieve, via correction of the decision to grant, the patent to be comprising the set of claims proposed by the Examining Division with the communication under Rule 71(3) EPC dated 1 March 2011, however, with the substantive amendments as proposed by the appellant with letter of 8 July 2011.

4.2 Decision G 1/10 (supra) of 23 July 2012 has dealt with the question of requests to correct a granted patent via a correction under Rule 140 EPC of the decision to grant with the following answer (point 1 of the headnote): "Since Rule 140 EPC is not available to correct the text of a patent, a patent proprietor's request for such a correction is inadmissible whenever made, including after the initiation of opposition proceedings." The decision does not set a date of entry into force, nor any transitional provisions.

The case law up to this decision took a more lenient view on such requests, starting from the premise that the decision to grant included the documents as intended for grant. On this premise, a correction of the patent could be achieved via a request to correct the decision to grant, if the Examining Division agreed with the applicant that this was indeed the version it had intended to grant.

4.3 Even supposing that the present case is to be dealt with according to the more favourable case law "ante-G 1/10", the result cannot be as requested by the appellant.

From the annex to the communication dated 29 August 2011, the communication dated 5 October 2011 and the decision dated 24 January 2012 it is abundantly clear that the Examining Division intended - and maintained that intention - to grant the patent with its own proposed claims, **not** with the claims as requested by the appellant with its letter of 8 July 2011.

In such a situation there can be no question that the text of the patent as granted was the result of a

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"linguistic error, an error of transcription or an obvious mistake."

- 4.4 The means chosen by the appellant, i.e. defining only one possible interpretation of the communication dated 29 August 2011 and of the decision to grant dated 8 September 2011 and insisting on the correction of the B-publication and/or the correction of the decision to grant therefore cannot lead to the result aimed at.
- 4.5 When receiving the communication dated 5 October 2011 clarifying the Examining Division position on the text of the patent as granted, the appellant should have realised that to safeguard its interests it should have taken appropriate action in the form of filing also an appeal against the decision to grant the patent in that form.

For this, there was ample time since the two-month time limit for filing the appeal against this decision sent on 8 September 2011 extended until 18 November 2011.

It was clear that the procedure up to grant was defective in that the communication under Rule 71(5) EPC had not been sent. It was clear that the decision to grant was defective in that the patent would be in a form not agreed to by the applicant (Article 113(2) EPC). Both are substantial procedural violations.

In such a case the applicant must consider carefully the nature of the defect and how it is most securely rectified. If procedural violations are involved in (arriving at) a decision, rectification is only possible on appeal against that decision (T 1093/05, supra, point 12 of the reasons).

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- 4.6 Since such an appeal has not been filed **the decision to grant has become final** (Article 97(1) EPC).
- 5. Auxiliary request of remittal to the department of first instance

As the decision under appeal is set aside, the Board follows the appellant's auxiliary request to remit the case to the department of first instance for further prosecution, i.e. for proper consideration of the requests, followed by adequate reasoning.

A new, properly argued decision can, however, not alter the fact that the decision to grant, and with it the version **not** agreed to by the appellant, is **final**.

Nor can it alter the assessment that a correction of the B-publication is not possible, or that a correction of the decision is impossible.

6. Request for reimbursement of appeal fee

Since the decision under appeal is to be set aside for reason of the substantial procedural violations as discussed in points 3.1.1 and 3.1.2 above the appeal fee is to be reimbursed.

Order

For these reasons it is decided that:

- 1. The decision under appeal is set aside.
- 2. The case is remitted to the department of first instance for further prosecution.
- 3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated