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**Datasheet for the decision  
of 16 March 2017**

**Case Number:** T 1727/13 - 3.4.02

**Application Number:** 02019681.2

**Publication Number:** 1293755

**IPC:** G01C15/00

**Language of the proceedings:** EN

**Title of invention:**  
Operator guiding system

**Patent Proprietor:**  
Kabushiki Kaisha TOPCON

**Opponent:**  
Leica Geosystems AG

**Headword:**

**Relevant legal provisions:**  
EPC Art. 123(2)  
RPBA Art. 12(2), 13(1)

**Keyword:**  
Amendments - added subject-matter (yes)

**Decisions cited:**

R 0001/13

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1727/13 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 16 March 2017**

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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**29 May 2013 concerning maintenance of the**  
**European Patent No. 1293755 in amended form.**

**Composition of the Board:**

**Chairman** R. Bekkering  
**Members:** A. Hornung  
B. Müller

## **Summary of Facts and Submissions**

- I. The opponent appealed against the interlocutory decision of the opposition division maintaining European patent No. 1293755 in amended form.

Opposition had been filed against the patent as a whole and based on the grounds of Article 100(a) EPC, together with Articles 54(1) and 56 EPC, on Article 100(b) EPC and on Article 100(c) EPC.

The opposition division had found that the patent as amended according to a first auxiliary request then on file and the invention to which it related met the requirements of the EPC.

- II. Oral proceedings before the board were held on 16 March 2017.

The opponent-appellant requested that the decision of the opposition division be set aside and that the patent be revoked. The opponent also requested that none of the requests filed

- with the reply of 24 February 2014 (main request and "1st to 5th" auxiliary requests) and

- with the letter of 14 February 2017 (auxiliary requests "1a, 1b and 1c")

be admitted into the proceedings.

The patent proprietor-respondent requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of

- claims 1 to 15 according to the main request filed with the reply of 24 February 2014, as main request,

- claims 1 to 13 according to "auxiliary request 1a" filed with the letter dated 14 February 2017, as first auxiliary request,
- claims 1 to 13 according to "auxiliary request 1b" filed with the letter dated 14 February 2017, as second auxiliary request,
- claims 1 to 12 according to "auxiliary request 1c" filed with the letter dated 14 February 2017, as third auxiliary request,
- claims 1 to 14 according to the "2nd auxiliary request" filed with the letter dated 24 February 2014, as fourth auxiliary request,
- claims 1 to 14 according to the "3rd auxiliary request" filed with the letter dated 24 February 2014, as fifth auxiliary request,
- claims 1 to 13 according to the 4th auxiliary request filed with the letter dated 24 February 2014, as sixth auxiliary request, and
- claims 1 to 13 according to the 5th auxiliary request filed with the letter dated 24 February 2014, as seventh auxiliary request.

### III. Claims of the requests

#### (a) Main request

Independent claim 1 according to the main request reads as follows:

"An operator guiding system for guiding an operator when the operator moves with a mobile station (12) around a base station (10) installed, the system comprising

a base station (10) provided with imaging means, distance measurement means for measuring a distance between the base station and a mobile station, and angle measurement means

for detecting a photographing direction of the imaging means, in such a way that the base station serves as a positional coordinate measurement unit,

a mobile station (12) provided with display means, for displaying a landscape seen from the base station (10), wherein the landscape displayed by the display means of the mobile station (12) is based on landscape data obtained by the imaging means of the base station (10) and the angle measurement means of the base station as well as positional coordinate data of the mobile station, which are obtained by the positional coordinate measurement unit,

wherein the display means of the mobile station (12) is arranged to display a direction and a distance from a current position of the mobile station (12) to a next target point (13) within a landscape image displayed on the display means of the mobile station, on the basis of construction plan data stored in the mobile station (12), and the landscape data obtained by the imaging means of the base station (10) and the angle measurement means of the base station (10) and the positional coordinate data of the mobile station (12), which is obtained by the positional coordinate measurement unit."

(b) First to third auxiliary requests

Claims 1 according to the first, second and third auxiliary request differ from claim 1 of the main request inter alia in that the operator guiding system comprises "a mobile station (12) provided with display means, for displaying a landscape that the operator sees from a predetermined position with the base station behind him/her, the landscape seen from the base station (10)" (the difference with respect to claim 1 of the main request has been underlined).

(c) Fourth auxiliary request

Claim 1 of the fourth auxiliary request differs from claim 1 of the main request in that the following feature has been added at the end of the claim:

"wherein the display means of the mobile station (12) displays a landscape seen from the base station (12) in a horizontal angle direction where the mobile station (12) is detected, wherein the position of the mobile station (12) has been measured by the angle measurement means and the distance measurement means in the base station (10), and

wherein a target line (21) is displayed at a horizontal angle position corresponding to a direction where the mobile station is collimated, on the landscape data, and wherein a collimation line (20) is displayed at the current position of the mobile station".

(d) Fifth auxiliary request

Claim 1 of the fifth auxiliary request differs from claim 1 of the fourth auxiliary request in that the following feature has been added at the end of the claim:

"wherein an arrow is displayed in a direction from the collimation line (20) to the target line (21)".

(e) Sixth auxiliary request

Claim 1 of the sixth auxiliary request differs from claim 1 of the fifth auxiliary request in that the following feature has been added at the end of the claim:

"wherein the display means provided for the mobile station (12) displays three kinds of target points that are: the next target point (13); a target point before processing;

and a target point where processing has been finished, on basis of the current position of the mobile station (12) measured by the base station (10) and the construction plan data stored in the mobile station (12)".

(f) Seventh auxiliary request

Claim 1 of the seventh auxiliary request differs from claim 1 of the sixth auxiliary request in that the following feature has been added to the claim:

"wherein the direction is displayed by an arrow from the mobile station to the next target point and the distance is displayed by a numeral"

and in that the feature "wherein the display means of the mobile station (12) is arranged to display a direction and a distance from a current position of the mobile station (12) to a next target point (13) in a superposed manner within a landscape image displayed on the display means of the mobile station" has been modified by adding the underlined wording.

## **Reasons for the Decision**

1. Main request

1.1 Admissibility

The set of claims according to the main request is admitted into the proceedings.

The set of claims according to the main request was filed by the patentee within four months of notification of the opponent's grounds of appeal.



Nevertheless, the opponent requested not to admit the present main request into the proceedings under Article 12(4) RPBA. The board, however, sees no reason not to admit the present main request whose set of claims is based on the auxiliary request filed, and admitted, during the first instance opposition proceedings. In particular, claim 1 of the present main request is identical to claim 1 on the basis of which the opposition division proposed to maintain a patent and present dependent claim 2 has been amended in order to overcome objections raised by the opponent in its statement of grounds of appeal.

The opponent further requested not to admit the present main request into the proceedings in view of Article 12(2) RPBA. In view of the patentee's submissions filed with a letter of 24 February 2014, pages 1 to 15, the board, however, is satisfied that the patentee thereby provided sufficient reasons why the decision of the opposition division should be upheld.

Therefore, the main request is admitted into the proceedings (Article 12(2) and (4) RPBA).

## 1.2 Amendments

Claim 1 contains subject-matter which extends beyond the content of the application as filed, contrary to the requirement of Article 123(2) EPC.

- 1.2.1 The board can accept the patentee's argument that part of present claim 1 is based on claim 2 as originally filed. Present claim 1 has been amended inter alia by specifying that the mobile station is provided with display means "for displaying a landscape seen from the base station". The application as filed, however, contains neither the explicit

wording nor an implicit disclosure of "a mobile station provided with display means, for displaying a landscape **seen from the base station**".

This feature added to present claim 1 means that the display means is for displaying a landscape image at the mobile station as if it were seen from the position of the base station. The application as filed, however, merely discloses that "the display screen of the display means provided for the mobile station displays a landscape **seen from a predetermined position**" (see e.g. claims 1 and 2 as originally filed). The application as filed explicitly mentions examples of "predetermined positions" which correspond to the position of the "next target point" (see claim 3 as filed) and to the "current position of the mobile station" (see claim 5 as filed), but it does not disclose that the "predetermined position" could also be the position of the base station.

It is true that the expression "from a predetermined position" as such could theoretically refer to any position, including the position of the base station. However, in view of the definition given in the independent claims 1 and 2 as filed of the direction in which the image is seen, i.e. "from a predetermined position in a direction of the base station" or "from a predetermined position in a direction making 180° with the direction of the base station", the board agrees with the opponent that it is logically excluded that the "predetermined position" could mean the position of the base station.

Since the skilled person cannot derive from the application as filed directly and unambiguously that the image displayed on the mobile station is a landscape seen from the base station, the amended claim 1 contravenes the requirements of Article 123(2) EPC.

1.2.2 The patentee provided the following arguments in favour of compliance of the amendment with the requirements of Article 123(2) EPC.

- (a) According to the patentee, a literal basis of the wording of claim 1 "displaying a landscape seen from the base station" could be found in the description as filed, page 11, lines 3 to 5, which reads "[d]escribing the Background mode display in detail, the display means **displays the landscape** when the direction of the mobile station at the current position is **seen from the base station**".

The board is not convinced that the recited passage constitutes a basis for the amended feature. Indeed, as explained by the opponent during oral proceedings, this sentence merely defines the direction in, but not the position from, which the landscape is seen: this sentence merely defines the Background mode display, as opposed to the Foreground mode. The amended feature, however, defines the position from which the landscape is seen.

- (b) The patentee argued that it was clear from the application as filed that landscape images are taken from the base station by the imaging means belonging to the base station. After having processed the landscape images taken by the imaging means, a certain extract of these images is displayed on the display screen of the mobile station. In this sense, the displayed images were landscape images seen from the base station. In support of its argument, the patentee referred to figure 3, representing the Background mode display and showing the mobile station (12) at the center of the display and a next target point (13) which lay between the base

station and the mobile station. Figure 5 showed a similar situation. It was clear from these figures that the landscape images were not seen from the mobile station but from the base station. Contrary to the opponent's assertion, for the patentee, figures 3 and 5 are not congruent with claim 5 as filed.

The board cannot agree with this viewpoint. According to the application as filed, page 7, lines 11 to 17, and claim 5 as filed, it is clear that the basic concept of the invention is to display, in the Background mode, an image as seen from the "current position of the operator (mobile station)" with the base station being positioned behind the operator. The board agrees with the opponent's explanation that the displayed images shown in figures 3 and 5 correspond to images seen from a position just behind, which however remains close to the mobile station. Indeed, it would make little sense to display to the operator an image seen from a position of the base station which potentially may be located far away from the operator's current position, because such an image would not help the operator at its current position to orient itself in the landscape. Furthermore, figures 3 and 5 are explicitly described on page 22, lines 25 to 27 of the application as filed as displaying "the image of the landscape that the operator (mobile station 12) sees with the base station 10 behind him/her (that is, background direction)".

- (c) The patentee stated that present claim 1 was based on claim 2 as originally filed, in combination with the paragraph on page 11, lines 3 to 14 of the application as filed. The expression added to present claim 1 "for displaying a landscape seen from the base station" did actually not define a **position** from which the landscape was seen but merely a **direction** in which the landscape

was seen. Since claim 2 as originally filed left open the exact position from which the image was seen (the "predetermined position" defined in claim 2 as filed could be any position), the added feature in present claim 1, defining merely a direction, was supported by claim 2 as originally filed. Since the description basically only defined two viewing directions, the Foreward (foreground) mode and the Back (background) mode, it was clear that the claim referred to one of these directions, namely the Back (background) mode.

The board is not convinced by these arguments. First of all, for the reason given in the third paragraph of point 1.2.1 above, the "predetermined position" mentioned in claim 2 as originally filed does not cover all possible positions. Secondly, as argued by the opponent, present claim 1 does not define a specific direction in which an image is seen. Indeed, a direction is defined by at least two points, whereas the feature "a landscape seen from the base station" defines only one point from which any direction could originate. The patentee's referral to the description as filed, basically defining only two viewing directions, i.e. Foreground and Background modes, does not restrict the actual scope of present claim 1 to one of these two directions.

1.2.3 In conclusion, claim 1 according to the main request contains subject-matter which extends beyond the content of the application as filed, contrary to the requirements of Article 100(c) EPC.

2. First to third auxiliary requests

2.1 Following the opponent's request not to admit the first, second and third auxiliary requests into the proceedings and

taking into account the arguments of both parties, the board exercises its discretion in not admitting these requests into the proceedings under Article 12(2) and 13(1) RPBA for the following reasons (see also "Case Law of the Boards of Appeal", 8th edition 2016, chapter IV.E.4.4):

2.1.1 As a rule of principle, according to Article 12(2) RPBA, the parties must present their complete case, including clear and concise reasons why the decision under appeal should be reversed, amended or upheld at the beginning of the appeal proceedings. Present first to third auxiliary requests, however, were filed only after oral proceedings had been arranged and are therefore late filed. Moreover, these requests were filed without any explanation why they would overcome the existing objections of added subject-matter, contrary to the requirements of Article 12(2) RPBA. Furthermore, it is to be noted that no substantial change of the facts of the case occurred since the opponent's filing of its statement of grounds of appeal, which possibly could have justified the filing of the first to third auxiliary requests only one month before the oral proceedings before the board.

2.1.2 According to well-established case law, one of the criteria for assessing the admittance of new requests with amended claims during appeal proceedings is whether the amendments are *prima facie* clearly allowable or whether the amended claims are at least likely to overcome the objections in response to which the request has been filed (see "Case Law of the Boards of Appeal", 8th edition 2016, chapter IV.E.4.4.2; see, for instance, decision of the Enlarged Board of Appeal in case R 1/13, point 16.2 of the reasons). The present amendments do not fulfil this criterion since claims 1 of the first to third auxiliary requests *prima facie* infringe the requirements of at least Article 123(2) EPC. Indeed, even though it has been added in claim 1 that the

operator sees the landscape "from a predetermined position with the base station behind him/her", thereby prima facie overcoming the objection raised in the first paragraph of point 7.2.2(c) of the annex to the summons to oral proceedings, the feature "the landscape seen from the base station" is still present in claim 1. This second feature, however, objected to in the second paragraph of point 7.2.2(c) of the annex to the summons to oral proceedings, comprises added subject-matter as explained in point 1.2 above.

## 2.2 Counter-arguments from the patentee

2.2.1 The patentee counter-argued that the new auxiliary requests were filed in reaction to the objection raised in point 7.2.2(c) of the annex to the summons to oral proceedings. There was no abuse of procedure. The current representative took over the case only a few months before the oral proceedings and tried to avoid a large amount of new requests by replacing the previous first auxiliary request by the current first to third auxiliary requests.

The board acknowledges that no objection of abuse of procedure is raised and that claims 1 of the new requests seem to overcome part of the objections under Article 123(2). However, the feature "landscape seen from the base station", which has no basis in the application as originally filed, has remained in claim 1. This means that the new requests are prima facie not allowable.

2.2.2 The patentee was of the opinion that the parties were summoned to oral proceedings for presenting their arguments to the board. Therefore, it was unnecessary to present detailed arguments in writing.

The board acknowledges that parties may present arguments orally to the board during oral proceedings. Nevertheless it is essential that parties present "clearly and concisely the reasons why it is requested that the decision under appeal be reversed" (Article 12(2) RPBA), all the more when the new claim requests are filed after the parties have been summoned to oral proceedings. For instance, in the present case, the patentee, when filing the new requests, did not explain why amended claim 1 would be suitable to overcome the objection under Article 123(2) EPC raised in the second paragraph of point 7.2.2(c) of the annex to the summons to oral proceedings.

### 3. Fourth to seventh auxiliary requests

#### 3.1 Admissibility

The opponent requested not to admit the fourth to seventh auxiliary requests because claim 1 of these requests contained exactly the same feature as claim 1 of the main request. This feature, i.e. "for displaying a landscape seen from the base station", was considered by the board as having no basis in the application as originally filed.

The patentee argued that all four requests were filed with the reply to the opponent's statement of grounds of appeal, i.e. at the earliest possible point in time in the appeal proceedings. Moreover, extensive reasons were given in that letter of reply why the amendments overcame the opponent's objections under Article 123(2) EPC.

Following the patentee's arguments the board sees no reason not to admit the fourth to seventh auxiliary requests into the proceedings.

#### 3.2 Amendments



3.2.1 Claims 1 according to the fourth to seventh auxiliary requests, while comprising additional features with respect to claim 1 of the main request, still comprise a mobile station defined by the same wording as claim 1 of the main request, i.e. "a mobile station (12) provided with display means, for displaying a landscape seen from the base station (10)".

Therefore, claim 1 of the fourth to seventh auxiliary requests contains subject-matter which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC for the same reasons as those given in point 1.2 above.

3.2.2 The patentee explained the meaning of the amendments of claim 1 of the fourth to seventh auxiliary requests but did not argue that these amendments were such that they invalidated the board's reasons given in relation to claim 1 of the main request whose feature "a mobile station (12) provided with display means, for displaying a landscape seen from the base station (10)" was found to contravene the requirements of Article 123(2) EPC.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Kiehl

R. Bekkering

Decision electronically authenticated