

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 18 March 2019**

Case Number: T 0180/14 - 3.5.02

Application Number: 08161440.6

Publication Number: 2081163

IPC: G08B21/00

Language of the proceedings: EN

Title of invention:

Multithreat safety and security system and specification
method thereof

Patent Proprietor:

THALES NEDERLAND B.V.

Opponent:

Diehl BGT Defence GmbH & Co. KG

Relevant legal provisions:

RPBA Art. 13(1)
EPC R. 103(1)(a), 139

Keyword:

Late-filed request - submitted shortly before oral proceedings

Late-filed auxiliary requests - amendments after arrangement
of oral proceedings

Reimbursement of appeal fee - violation of the right to be
heard (no)

Correction of error - (no)



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0180/14 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 18 March 2019

Appellant: THALES NEDERLAND B.V.
(Patent Proprietor) Zuidelijke Havenweg 40
P.O. Box 42
7550 GD Hengelo (NL)

Representative: Bell, Mark
Marks & Clerk France
Immeuble «Visium»
22, avenue Aristide Briand
94117 Arcueil Cedex (FR)

Respondent: Diehl BGT Defence GmbH & Co. KG
(Opponent) Alte Nussdorfer Strasse 13
88662 Überlingen (DE)

Representative: Diehl Patentabteilung
c/o Diehl Stiftung & Co. KG
Stephanstrasse 49
90478 Nürnberg (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 November
2013 revoking European patent No. 2081163
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman R. Lord
Members: C. Vassoille
J. Hoppe

Summary of Facts and Submissions

- I. The patent proprietor (appellant) filed an appeal against the decision of the opposition division to revoke European patent no. 2 081 163.
- II. In the decision under appeal, the opposition division came to the conclusion that:
- the subject-matter of claim 1 of the main request, the first auxiliary request as well as the fourth auxiliary request did not meet the requirements of Article 123(2) EPC;
 - the subject-matter of claim 1 of the second auxiliary request did not meet the requirements of Article 54 EPC; and
 - the third auxiliary request was not to be admitted into the opposition proceedings.
- III. With the statement of grounds of appeal the appellant filed a new main request. On page 1, third paragraph of the statement of grounds, it was stated that "we file a new Main request which includes claims 1-22 of our 2nd auxiliary request filed during the oral proceedings before the Opposition division. [...] The redrafted request is appended". Claim 1 of the annexed main request did not however correspond to claim 1 according to the second auxiliary request filed during the oral proceedings before the opposition division. Rather, the term "3D position" had been replaced by the wording "vector position", which was present in claim 1 of the granted patent. Furthermore, the wording "and the selective distribution" had been replaced by "for selective distribution".

On page 7 of the statement of grounds of appeal it was further stated that the third and fourth auxiliary requests were based on the second and third auxiliary requests filed before the opposition division.

In the letter of reply to the statement of grounds of appeal, filed by the opponent (respondent) on 22 July 2014, the discrepancy between what was said in the statement of grounds and in the submitted main request, which was annexed to the statement of grounds, was identified in detail (see points I.1 and I.2 of the before-mentioned letter). The appellant did not at that stage react to the respondent's reference to this identified discrepancy between the written statement and the content of the annexed main request.

In a communication under Article 15(1) RPBA the board drew the appellant's attention to the corresponding discrepancy already identified by the respondent. It was *inter alia* noted by the board that the subject-matter of claim 1 of the main request and the first, third and fourth auxiliary requests was provisionally considered to not fulfil the requirements of Article 123(2) EPC.

With letter of 15 February 2019, i.e. approximately one month prior to the oral proceedings scheduled before the board, the appellant, in response to the board's communication, filed a new main request as well as new first to fifth auxiliary requests. Claim 1 of the new main request is identical to claim 1 of the second auxiliary request as filed during the oral proceedings before the opposition division.

IV. Oral proceedings before the board took place on 18 March 2019 in the presence of the appellant only, the respondent having informed the board with letter dated 17 December 2018 that they would not attend the oral proceedings.

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request or one of the first to fifth auxiliary requests, in that order, all filed with letter dated 15 February 2019, and that the appeal fee be reimbursed.

The respondent (opponent) requested in writing that the appeal be dismissed.

V. Claim 1 of the appellant's main request reads as follows:

"A safety and security system for a definite area comprising sensors (110, 120, 130, 140, 150, 160, 170, 180) fit for capturing a first set of instant-track data (300) on a first set of objects (200) located in said area or in the vicinity thereof, said first set of instant-track data comprising at least real-time 3D position and speed data from at least one sensor on at least one of the objects of said first set of objects, information sources (400) fit for capturing a second set of non instant-track data (500) on a second set of objects (600), said second set of non-instant track data comprising at least an information piece on one of identification, position/behaviour history of at least one of the objects of said second set of objects, said system being **characterised in that** it further comprises:

- a set of computer processes (900, 100A, 200A) fit for correlating members of the first set of objects (200) with members of the second set of objects (600) and for computing threat levels of the members of the first set of objects from said first and second sets of data assigned to said correlated members, and;
- computer processes, databases and networks, fit for managing the collection of said instant-track and non instant-track data on said first and second sets of objects from said sensors and information sources and the selective distribution of said data to users of the system."

VI. Claim 1 of the appellant's first auxiliary request differs from the main request in that the final feature has been amended as follows:

"...and the ~~selective~~ distribution of said data to selected users of the system." (deletion and addition indicated by strike-through and underlining)

VII. Claim 1 of the appellant's second auxiliary request differs from the main request in that the final feature has been amended as follows:

"... the ~~selective~~ distribution of said data to selected users of the system, said selection of users being based on one of an area of interest and an operator role." (deletion and additions indicated by strike-through and underlining)

VIII. Claim 1 of the appellant's third auxiliary request differs from the main request in that the final feature has been amended as follows:

"...the selective distribution of said data to selected users of the system, wherein the second set of data comprises expected kinematics patterns for classes of objects and the threat levels of members of the first set of objects which belong to said classes are computed at least partly from the values of at least one variable defining deviation from said kinematics." (deletion and addition indicated by strike-through and underlining)

IX. Claim 1 of the appellant's fourth auxiliary request differs from the main request in that:

- in the first paragraph "3D position" has been replaced by "vector position";

and in that the final paragraph (from "computer processes ...") has been deleted and replaced by:

"wherein the second set of data comprises expected kinematics patterns for classes of objects and the threat levels of members of the first set of objects which belong to said classes are computed at least partly from the values of at least one variable defining deviation from said kinematics."

X. Claim 1 of the appellant's fifth auxiliary request differs from the main request by the addition of the following at the end of the claim:

"based both on geographic criteria which define areas of responsibility and areas of interest and on attributes of the data itself."

XI. The arguments of the appellant as far as they are relevant for the present decision are as follows:

The main request filed with letter of 15 February 2019 should be admitted into the appeal proceedings because the statement of grounds of appeal made the appellant's intention clear that the main request should correspond to the second auxiliary request filed during the oral proceedings before the opposition division. It should therefore have become apparent that the discrepancy between what was stated in the statement of grounds of appeal and the annexed main request was unintended. The former representative, who was then in charge of the case, had retired and the new representative had detected the error only after receipt of the board's communication under Article 15(1) RPBA and in preparation for the oral proceedings before the board. The handwritten amendments made during the oral proceedings before the opposition division had been difficult to decipher and the content of the corresponding amended requests was therefore difficult to determine. This might have been the cause for the erroneous requests that had been filed with the statement of grounds of appeal. The main request filed with the letter of 15 February 2019 was intended to correct the mistake and should therefore be admitted into the appeal proceedings.

The board's assessment that claim 1 of each of the first to third auxiliary requests, filed with letter of 15 February 2019, contained the amended wording "distribution ... to selected users" instead of the wording "selective distribution" used in the granted claim 2 was accepted.

As regards the fourth auxiliary request, it was entirely clear from the appellant's statement on page 7, first paragraph of the letter of 15 February 2019

("...bring the claim language into compliance [...] in the manner already agreed during the oral proceedings") that the term "vector" had been unintentionally left uncorrected in claim 1. It was the written statement made in this last submission which was relevant, and not the version of the fourth auxiliary request that was annexed to this submission.

The fifth auxiliary request was a new request, which should be admitted into the appeal proceedings at the discretion of the board in accordance with Article 13 RPBA. The fifth auxiliary request was an attempt to address the objections raised by the opposition division with respect to allegedly new subject-matter in the second, third and fourth auxiliary requests submitted during the opposition proceedings, and which the board had not set aside in the communication under Article 15(1) RPBA. Since the wording was drawn verbatim from paragraph [0055] of the application as filed, and established the novelty of the present invention with respect to features already generally discussed with respect to the main, second and third auxiliary requests, the fifth auxiliary request introduced no issues which could not reasonably be addressed during the oral proceedings before the board.

The appellant had been deprived by the opposition division of the right to be heard (Article 113(1) EPC), *inter alia* because they were not given sufficient time to file their observations on the prior art cited by the opposition division. This amounted to a substantial procedural violation so that the reimbursement of the appeal fee according to Rule 103 EPC was justified.

XII. No further arguments regarding any of the new requests filed with the appellant's letter of 15 February 2019 have been submitted by the respondent.

Reasons for the Decision

1. The appeal is admissible.

2. *Correction under Rule 139 EPC*

2.1 In the letter of 15 February 2019, the appellant requested that the amended main request as well as the amended first to fourth auxiliary requests, filed with the same letter, should be considered as obvious corrections under Rule 139 EPC.

2.2 Rule 139 EPC allows the correction of "linguistic errors, errors of transcription and mistakes in any document filed with the European Patent Office". Rule 139 EPC is thus a generally applicable provision, which also applies to appeal proceedings (see G 1/12, points 34 and 35 of the reasons). Principles that have been established by the case law of the Boards of Appeal in this regard are *inter alia* that the requester bears the burden of proof, if the original intention is not immediately apparent, and that the request for correction must be filed without delay (see G1/12, point 37 of the reasons). Neither the first nor the second condition is met in the present case.

2.3 Contrary to what was argued by the appellant, their intention was not clear from the statement of grounds of appeal alone, i.e. that the main request should correspond to the second auxiliary request filed during

the oral proceedings before the opposition division. To the contrary, there was a clear discrepancy between the written statement and the content of the annexed main request and there is nothing in the statement of grounds that would have justified the assumption that the written statement should have taken precedence over the annexed requests. This is all the more true in view of the fact that also the first to fourth auxiliary requests filed with the statement of grounds of appeal contained similar wording of claim 1, namely "vector position" (which appeared in the main and first to fourth auxiliary requests filed with the grounds) and "for selective distribution" or "distribution ... to selected users" (the former of which appeared in the main request and the latter in the first to third auxiliary requests) instead of "3D position" and "and the selective distribution", respectively, in the request filed before the opposition division. In view of the clear discrepancy between the written statement and the content of the annexed main request, the original intention of the appellant is not immediately apparent. This conclusion thus applies not only to the main request, but also to the first to fourth auxiliary requests filed with the statement of grounds of appeal. Moreover, the appellant did not argue that the auxiliary requests were identical to any of the previous requests filed before the opposition division, merely that they were "based on" previous requests filed during the proceedings before the opposition division.

2.4 Furthermore, the appellant became aware of the alleged error at the latest at the date of receipt by them of the letter of reply filed by the respondent, that is on 8 August 2014. In this letter, the discrepancy between what was said in the statement of grounds of appeal and

the main request, which was annexed to the statement of grounds, was identified precisely and discussed exhaustively (see points I.1 and I.2 of the above-mentioned letter). The respondent further identified the presence of the term "vector" in claim 1 of each of the first to fourth auxiliary requests, which was found by the opposition division to not fulfil the requirements of Article 123(2) EPC. At that time the appellant neither reacted to the respondent's identification of the discrepancy between the written statement and the content of the annexed main request nor to the identification of the term "vector" in claim 1 of each of the first to fourth auxiliary requests. This conduct suggests the presumption that the appellant saw no need for action. This in turn suggests that the main request and first to fourth auxiliary requests were filed intentionally, contrary to what is now argued by the appellant.

2.5 However, even if the original intention had been proven by the appellant, corrected requests could and should have been filed immediately after the appellant had become aware of the alleged error, i.e. after receipt of the respondent's reply at the latest. A corrected version of the requests was however not submitted until four and a half years later, after the appellant had been made aware of the error for the second time, this time by the board.

2.6 In this context it has to be noted that a change of the representative cannot be accepted as a justification for tardiness, because the new representative has to continue the proceedings from the point they reached before the change (see case law of the Boards of Appeal, 8th edition 2016, IV.C.1.3.18).

- 2.7 A correction under Rule 139 EPC is therefore not possible at this late stage of the appeal proceedings.
3. *Non-admittance of the main request under Article 13(1) RPBA*
- 3.1 Since correction under Rule 139 EPC is not possible (see the board's remarks under point 2 above), admittance of the amended requests filed with the letter of 15 February 2019 under Article 13(1) RPBA had to be assessed. Under Article 13(1) RPBA, the board has a discretion to admit and consider any amendment to a party's case after it has filed its statement of grounds of appeal or reply.
- 3.2 The appellant's main argument to justify the late filing of the new main request was that the new representative had only taken over the case recently and had become aware of the erroneously filed main request when preparing for oral proceedings before the board. The board notes that the new main request comprises claims 1 to 22 of the second auxiliary request filed before the opposition division, and thus, substantially corresponds to a request that was already on file in the first instance proceedings (former second auxiliary request). Nevertheless, the board does not consider a change in representative to be an acceptable justification for filing the new main request at this very late stage of the appeal proceedings, namely one month prior to the oral proceedings before the board. As stated above, it is established case law of the boards of appeal that a change in representative cannot be accepted as a justification for the late filing of submissions (see case law of the Boards of Appeal, 8th edition 2016, IV.C.1.3.18).

- 3.3 Moreover, the board does not find the appellant's additional argument convincing that the handwritten amendments made during the oral proceedings before the opposition division had been difficult to decipher and the content of the corresponding amended requests was therefore difficult to determine. First, the board finds that the handwritten amendments can be deciphered without any difficulties and second, the corresponding amendments are recited in the decision under appeal. Thus, even if there had been difficulties in deciphering the handwritten amendments, doubts in this respect could have been dispelled by looking at the reasons for the decision under appeal.
- 3.4 The new main request also has not been filed in response to new objections raised for the first time by the board in the communication under Article 15(1) RPBA. Rather, the objections raised by the board were either already present in the decision under appeal and/or had been brought forward by the respondent in the letter of reply to the grounds of appeal (see the board's remarks under point 2.4 above). As far as the respondent's objections to the new main request raised for the first time in that letter of reply are concerned, the board considers that the appellant had the obligation to submit a substantive reaction to the points raised by the respondent at that stage of the procedure. The appellant however waited without a valid justification for the board's communication before a substantive reaction was submitted.
- 3.5 The subject-matter of claim 1 of the amended main request is also not such that it is clearly allowable or such that it could be considered as a promising attempt to counter all of the points raised by the

board in the preliminary opinion. As has been indicated in the board's preliminary opinion provided in the communication under Article 15(1) RPBA (see points 9 and 10 of this communication), novelty in the sense of Article 54 EPC of the subject-matter of claim 1 of the main request has been put into question in view of document E1 (WO 2006/137072 A2). In response to the board's preliminary opinion, however, the appellant did not refer to the board's opinion, nor did claim 1 of the new main request contain any amendment of a limiting nature that could be interpreted as an attempt to establish novelty of the subject-matter of claim 1 over E1. Since the new main request has only been filed shortly before the oral proceedings before the board and since it does not address all of the points raised by the board in the preliminary opinion, it would not be expedient to admit it into the proceedings.

3.6 Consequently, since the new main request was submitted only one month prior to the oral proceedings before the board without any valid reason and since admitting it into the proceedings would be contrary to the need for procedural economy referred to in Article 13(1) RPBA, the board exercised its discretion under that Article not to admit the main request filed with the letter of 15 February 2019 into the appeal proceedings.

4. *Non-admittance of the first to third auxiliary requests under Article 13(1) RPBA*

4.1 The board's findings under point 3 of the present decision generally also apply to the first to third auxiliary requests.

4.2 In addition to what has been established with regard to the main request, the board observes that claim 1 of

each of the first to third auxiliary requests contains the amended wording "distribution ... to selected users" instead of "selective distribution" used in claim 1 of the main request. A corresponding feature was not present in claim 1 of any of the requests that were filed in the proceedings before the opposition division. The submission of the first to third auxiliary requests therefore constitutes an amendment of the appellant's case, the admittance of which has to be assessed under Article 13(1) RPBA.

4.3 As has been observed by the board in points 12 and 13 of the communication under Article 15(1) RPBA, the amended wording of claim 1 needs further extensive consideration as to whether it fulfils the requirements of Article 123(2) EPC. In the communication under Article 15(1) EPC, the board raised doubts as to whether the amendment is directly and unambiguously derivable from the original application. The first to third auxiliary requests therefore raise new issues instead of addressing all points raised by the board, and therefore, their admittance would be contrary to the need for procedural economy.

4.4 The board therefore exercised its discretion under Article 13(1) RPBA not to admit the first to third requests filed with the letter of 15 February 2019 into the appeal proceedings.

5. *Non-admittance of the fourth auxiliary request under Article 13(1) RPBA*

5.1 The board's findings under point 3 of this decision generally also apply to the fourth auxiliary request.

5.2 With letter of 15 February 2019, the appellant attempted for the second time to file a correct version of the fourth auxiliary request. Claim 1 of this new version of the fourth auxiliary request still contains the wording "vector position", which was found by the opposition division in the decision under appeal to not meet the requirements of Article 123(2) EPC (see point 9.4 of the reasons for the decision under appeal). The board in its preliminary opinion confirmed this finding of the opposition division (see point 8 of the communication under Article 15(1) RPBA). The fourth auxiliary request therefore cannot be considered as a promising attempt to counter all of the points raised by the board in the preliminary opinion. To the contrary, it is *prima facie* not allowable.

5.3 The appellant referred to the letter of 15 February 2019 on page 7, first paragraph, where it was stated: "The issues under A123(2) presented in paragraph 8 of the summons to Oral proceedings A123(2) are addressed herewith". The appellant argued that from this passage it was clear that the original intention was that the term "vector" in claim 1 of the fourth auxiliary request should read "3D". Furthermore, the written submission should prevail over the annexed copy of the request.

5.4 The board however observes that the first paragraph on page 1 of the above-mentioned letter only mentions corrected copies of the main request and the first to third auxiliary requests. No mention of a corrected copy of the fourth auxiliary request can be found in this paragraph. Instead the appellant stated on page 7 that "... the Fourth Auxiliary Request is identical to claims on file before the present appeal proceedings, ..." and that "...claim 1 of the Fourth

Auxiliary Request is a simple combination of claims 1 and 9 as originally filed ...", which is in contradiction with the insertion of the term "vector", which was neither mentioned in claim 1 nor in claim 9 as originally filed. Contrary to what was argued by the appellant, the original intention is therefore not immediately apparent.

- 5.5 The board therefore exercised its discretion under Article 13(1) RPBA not to admit the fourth auxiliary request filed with the letter of 15 February 2019 into the appeal proceedings.

- 6. *Non-admittance of the fifth auxiliary request under Article 13(1) RPBA*

- 6.1 Claim 1 of the fifth auxiliary request filed by the appellant with letter of 15 February 2019 comprises additional features from the description, which were not present in claim 1 of any of the requests that have been filed in the proceedings before the opposition division. The fifth auxiliary request therefore constitutes an amendment of the appellant's case, the admittance of which has to be assessed under Article 13(1) RPBA.

- 6.2 The appellant has argued that the fifth auxiliary request is an attempt to address the objections raised by the opposition division with regard to the second, third and fourth auxiliary requests filed during the oral proceedings before the opposition division, and that since these objections had not been reversed by the board in the communication under Article 15(1) RPBA, the late filing of the fifth auxiliary request, only one month prior to the oral proceedings before the board, was justified.

- 6.3 It is to be noted that no new points were raised by the board in the communication under Article 15(1) RPBA that would justify the submission of a request, which constitutes an amendment of the appellant's case. Rather, as has been confirmed by the appellant themselves, the amendment results from objections already raised by the opposition division, and therefore, the fifth auxiliary request could and should have been filed already with the statement of grounds of appeal. The appellant's argument that the board in the preliminary opinion did not reverse the opposition division's opinion, is not a valid reason to amend the appellant's case at this very late stage of the proceedings.
- 6.4 The amendment of claim 1 of the fifth auxiliary request raises new complex issues as regards the question of whether the amendments meet the requirements of Article 123(2) EPC. It is particularly noted that the additional features have only been disclosed in the description in combination with other features and it is questionable, whether the isolated extraction of these features is directly and unambiguously derivable from the original application. Admitting the fifth auxiliary request into the appeal proceedings at this very late stage would therefore contradict the principles established by the Rules of Procedure of the Boards of Appeal of efficient proceedings and of equal treatment of the parties.
- 6.5 The board therefore exercised its discretion under Article 13(1) RPBA not to admit the fifth auxiliary request filed with the letter of 15 February 2019 into the appeal proceedings.

7. *Request for reimbursement of the appeal fee*

7.1 The appellant has requested reimbursement of the appeal fee on the ground that the opposition division had committed a substantial procedural violation. According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed where the board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation. Neither of these two conditions is met in the present case.

7.2 According to the minutes of the oral proceedings before the opposition division, the appellant (patent proprietor) had been given sufficient opportunity to present their arguments on the substantive issues. The appellant was also given sufficient time by the opposition division to comment on the admissibility of the third auxiliary request and the board therefore cannot recognise a violation of the right to be heard (Article 113(1) EPC). Furthermore, a procedural violation is an objective deficiency in the procedure in the sense that the procedural rules have not been applied. Therefore, a mere error in the judgment on substantive issues committed by the opposition division would not constitute a "procedural" violation. The alleged error as regards the application of the opposition division's discretion not to admit new requests would involve the consideration of substantive issues and thus would not represent a procedural violation.

7.3 Since the appeal is neither allowable nor has the opposition division committed a substantial procedural violation, the request for reimbursement of the appeal fee according to Rule 103 EPC has to be refused.

8. *Conclusion*

Since none of the requests of the appellant has been admitted into the proceedings, the board had to accede to the request of the respondent to dismiss the appeal.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



A. Vottner

R. Lord

Decision electronically authenticated