

Internal distribution code:

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

**Datasheet for the decision
of 19 April 2018**

Case Number: T 1668/14 - 3.4.03

Application Number: 04008754.6

Publication Number: 1469428

IPC: G07C9/00, B60R25/04

Language of the proceedings: EN

Title of invention:

Switch device, especially ignition switch, interrogating a transponder by radio waves

Patent Proprietor:

KABUSHIKI KAISHA TOKAI RIKI DENKI SEISAKUSHO

Opponent:

Huf Hülsbeck & Fürst GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 101(3)(a), 108, 123(2)

EPC R. 99(2)

RPBA Art. 12(2), 13(1), 15(1)

Keyword:

Admissibility of appeal - appeal sufficiently substantiated
(yes)

Late-filed request - justification for late filing (no) -
request clearly allowable (no)

Amendments - added subject-matter (yes)

Decisions cited:

G 0004/95

Catchword:



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 1668/14 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 19 April 2018

Appellant: KABUSHIKI KAISHA TOKAI RIKA DENKI SEISAKUSHO
(Patent Proprietor) 260, Toyota 3-chome,
Ohguchi-cho,
Niwa-gun,
Aichi 480-0195 (JP)

Representative: Isarpatent
Patent- und Rechtsanwälte Behnisch Barth Charles
Hassa Peckmann & Partner mbB
Postfach 44 01 51
80750 München (DE)

Respondent: Huf Hülsbeck & Fürst GmbH & Co. KG
(Opponent) Steeger Strasse 17
42551 Velbert (DE)

Representative: Bals, Rüdiger
Bals & Vogel
Universitätsstrasse 142
44799 Bochum (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 June 2014 concerning maintenance of the
European Patent No. 1469428 in amended form.**

Composition of the Board:

Chairman G. Eliasson
Members: S. Ward
T. Bokor

Summary of Facts and Submissions

- I. This is an appeal by the patent proprietor and sole appellant against the interlocutory decision of the Opposition Division in the case of European patent No. 1 469 428. The Opposition Division decided that:
- the subject-matter of claim 1 of the main request (patent as granted) was not new (Articles 100(a), 52(1) and 54 EPC);
 - the claimed subject-matter of auxiliary requests I and II failed to meet the requirements of Article 123(2) EPC;
 - auxiliary request III was not admitted into the proceedings pursuant to Rule 116 EPC; and
 - account being taken of the amendments made by the proprietor during the opposition proceedings (according to auxiliary request IV filed in oral proceedings), European patent No. 1 469 428 and the invention to which it related met the requirements of the EPC.
- II. The opposition was filed against the patent in its entirety. Grounds cited for the opposition were lack of inventive step (Articles 100(a), 52(1) and 56 EPC) and unallowable extension of subject-matter (Article 100(c) EPC). During the oral proceedings the Opposition Division also admitted into the proceedings the ground of lack of novelty (Articles 100(a), 52(1) and 54 EPC), which had been subsequently invoked by the opponent.
- III. The following document is referred to in this decision:
- D2: EP 0 846 820 A1

IV. At the end of the oral proceedings held before the Board the requests of the parties were as follows:

The appellant-proprietor (hereinafter, the proprietor) requested that the decision under appeal be set aside and that the patent be maintained in an amended form on the basis of one of its requests, ranked in the following order:

Main Request as filed with letter dated 10 March 2018;
Main Request as filed in the oral proceedings before the Board;

Auxiliary Requests I to XI as filed with letter dated 10 March 2018.

The respondent-opponent (hereinafter, the opponent) requested that the appeal be rejected as inadmissible, or that it be dismissed.

V. Claim 1 of the main request (as filed with letter dated 10 March 2018) reads as follows:

"A switch device (35, 55) for use by an operator and connection to an actuator (18), for enabling the actuator (18) to be driven when an ID code transmitted from a transponder (25) of a portable device (20) matches a predetermined ID code of a vehicle controller (10), wherein the switch device (35, 55) transmits a transponder-driving radio wave that causes the transponder (25) to generate electromotive force for transmitting the ID code, the switch device (35, 55) comprising:

*an operation switch (30) for driving the actuator (18);
a coil antenna (17) used for transmitting the transponder-driving radio wave,*

a push button (36) arranged to be pressed by a finger of the operator so as to operate the operation switch (30);
a switch holder (34) holding the operation switch (30);
the switch device (35, 55) being characterized in that the switch holder (34) has an annular ring (40);
the coil antenna (17) is annular and is arranged inside the ring (40);
the coil antenna (17) is arranged along the outer rim of the push button (36) of the operating switch (30)."

Claim 1 of the main request filed at oral proceedings before the Board is identical to the claim cited above, except that the following wording of claim 1 as granted is restored: *"a push button (36) pressed by the operator for operating the operation switch (30)"*, and the following final feature is added:

"wherein the switch device (35, 55) is suited to be arranged in an instrument panel (3) such that the push button (36) is exposed from the instrument panel (3)."

All of the independent claims of auxiliary requests I-IX filed with letter dated 10 March 2018 comprise the following feature:

"a push button (36) arranged to be pressed by a finger of the operator so as to operate the operation switch (30)".

Auxiliary request X comprises independent claims 1 and 2 which are identical to claims 1 and 2 of auxiliary request IV filed in oral proceedings before the Opposition Division, and found by the Opposition Division to meet the requirements of the EPC.

Independent claim 3 has been added, and reads as follows:

"A security system (1) for use by an operator and for controlling driving of an actuator (18), the security system (1) comprising:
a portable device (20) including a transponder (25);
and
a switch device (35, 55) for use by an operator and connection to the actuator (18), for enabling the actuator (18) to be driven when a first ID code transmitted from the transponder (25) of the portable device (20) matches a predetermined second ID code of a vehicle controller (10), wherein the switch device (35, 55) transmits a transponder-driving radio wave that causes the transponder (25) to generate electromotive force for transmitting the first ID code, the switch device (35, 55) comprising:
an operation switch (30) for driving the actuator (18);
a coil antenna (17) used for transmitting the transponder-driving radio wave, a push button (36) pressed by the operator for operating the operation switch (30);
a substantially cylindrical bezel (33) in which the operation switch (30) is arranged,
the bezel having an outwardly bent portion (33a) surrounding the push button movably arranged in the operation switch (30);
wherein the coil antenna (17) is arranged along the outer rim of the push-button (36) of the operating switch (30); and
a coil antenna housing is provided in the peripheral portion (33a) of the bezel (33) and the coil antenna (17) is arranged in the coil antenna housing,
a request signal output unit (12) for transmitting a request signal;

the portable device (20) including the transponder (25) for transmitting a transponder signal including the first ID code, the security system enabling the actuator to be driven when the first ID code transmitted from the transponder matches the predetermined second ID code, wherein the switch device transmits the transponder-driving radio wave that causes the transponder to generate electromotive force for transmitting the first ID code, the portable device transmitting an ID code signal including a third ID code in response to the request signal transmitted from the request signal output unit;
a first determination unit (12) for determining whether the third ID code included in the ID code signal transmitted from the portable device matches a preset fourth ID code;
a first control unit (12) for enabling the actuator to be driven when the first determination unit determines that the third ID code and the fourth ID code match;
a second determination unit (12) for determining whether the first ID code included in the transponder signal transmitted from the transponder of the portable device matches the second ID code; and
a second control unit (12) for enabling the actuator to be driven when the second determination unit determines that the first ID code and the second ID code match."

The independent claims of Auxiliary request XI are identical to those of Auxiliary request X, except that claim 3 comprises the following additional feature (in bold): I

*"the bezel having an outwardly bent portion (33a) surrounding the push button movably arranged in the operation switch (30) **and movably arranged in the bezel (33)**".*

VI. With the summons to oral proceedings, the Board sent the parties a communication under Article 15(1) RPBA, which included *inter alia* the following provisional opinions:

The appeal appeared to be admissible. At least in the case of the main request, the proprietor had explained why the requirements of the EPC were considered to be met. If such an explanation was provided for a single request, the appeal as a whole may not be found inadmissible on grounds of insufficient reasoning.

Claim 3 of the main request comprised the feature "the push button movably arranged in the operation switch", which was found by the Opposition Division to contravene the requirements of Article 123(2) EPC. The Board also doubted whether the claimed formulation had a basis in the application as filed.

Claim 1 of auxiliary request II did not appear to be novel over document D2. In particular, the term "push-button" could not be considered to be limited only to one which is suited to be directly hand or finger-manipulated. The embodiment of Fig. 4 of the application disclosed the push-button being pushed by the portable device.

VII. The proprietor's arguments, in so far as they are relevant to the present decision, were essentially as follows:

(a) Mr Goebel, who was accompanying the opponent's representative, should only be allowed to speak on technical matters, as indicated in the letter of

19 March 2018, and not on legal issues such as the admissibility of the appeal.

(b) The appeal was admissible, essentially for the reasons set out in the provisional opinion of the Board.

(c) All requests should be admitted into the proceedings.

Concerning the main request filed with the letter dated 10 March 2018, the independent claims comprised the amended feature that the push button was "arranged to be pressed by a finger of the operator so as to operate the operation switch", which had a basis on page 19, lines 9-14 of the description as filed. This amendment was made in response to comments made in the Board's communication under Article 15(1) RPBA concerning the interpretation of the term "push button", and established "a clear and precise delimitation against prior art document D2".

Concerning the main request filed in oral proceedings before the Board, the independent claims were based on those of the the main request filed with the letter dated 10 March 2018, but had been amended, firstly by reverting to the definition of the push button according to the granted claims, and secondly by defining that the push button "is exposed from the instrument panel", which had a basis on page 13, lines 4-7 of the description as filed. These amendments were filed in response to the Board's finding at oral proceedings that the main request filed with the letter dated 10 March 2018 was inadmissible, and differentiated the claimed subject-matter from the arrangement of D2 by ensuring that the exposed push

button was free to be pressed by the finger of the operator.

The remaining requests were also admissible.

(d) Claim 3 of auxiliary request X comprised the feature "a push button movably arranged in the operation switch", which, contrary to the view of the Opposition Division, did not extend beyond the content of the application as filed. Although the wording of this feature was not disclosed "as such", it found a clear basis in the passage on page 12, lines 21-26.

(e) Claim 1 of auxiliary request XI further included the feature that the push button is "movably arranged in the bezel", which had a clear basis in the application as filed (page 12, lines 32-33).

VIII. The opponent's arguments, in so far as they are relevant to the present decision, were essentially as follows:

(a) The appeal was inadmissible. All requests filed with the statement of grounds comprised amendments, and the proprietor was thereby creating a new case. This was unfair on the opponent and incompatible with the main point of the appeal procedure, which was to review the decision of the department of first instance.

(b) All requests on file should be found inadmissible, as they were late filed and incorporated features from the description which shifted the subject-matter of the claimed invention and would require an additional search.

(c) The independent claims of auxiliary requests X and XI did not meet the requirements of Article 123(2) EPC, at least in respect of the following feature of claim 3: "a push button movably arranged in the operation switch".

Reasons for the Decision

1. *Procedural matters*

1.1 A letter dated 19 March 2018 contained the following request from the opponent:

"Hiermit beantragt die Einsprechende, dass neben dem Unterzeichner dieses Schreibens und Herrn Norbert Heller, tätig in der Patentabteilung der Einsprechenden, Herr Sebastian Goebel (deutscher Patentanwalt), tätig in der Kanzlei Bals & Vogel, als technischer Berater des Unterzeichners während der mündlichen Verhandlung vortragen darf. Herr Goebel ist aufgrund seiner Qualifikation als studierter Elektrotechniker mit dem Fall vertraut und hat bereits inhaltlich bei der Ausarbeitung des Einspruchsschriftsatzes mitgearbeitet."

During the oral proceedings the proprietor objected to Mr Goebel speaking on the issue of the admissibility of the appeal, as this was essentially a legal matter, and the above passage was considered to indicate that Mr Goebel would be speaking on technical matters only.

1.2 According to G 4/95, during oral proceedings:

"a person accompanying the professional representative of a party may be allowed to make oral submissions on specific legal or technical issues on behalf of that party, otherwise than under Article 117 EPC, in addition to the complete presentation of the party's case by the professional representative" (G 4/95, Headnote I).

Such oral submissions can only be made "with the permission of and under the discretion of the EPO" (G 4/95, Headnote II(a)). One of the "main criteria" which should be considered by the EPO when exercising this discretion is that the "professional representative should...specify the subject-matter of the proposed oral submissions (G 4/95, Headnote II(b) (i)).

1.3 In the present case, the opponent's letter introduced Mr Goebel as both a qualified electrical engineer and a German patent attorney, which the Board would regard as implicitly conveying the intention that he might be called upon to make submissions on either technical or legal matters.

1.4 Even if *arguendo* one were to concede that the request was only for Mr Goebel to speak on technical matters, the proprietor did not dispute that the criteria set out in G 4/95 were fulfilled in this respect, and there was no objection to Mr Goebel speaking *per se*.

G 4/95 does not deal explicitly with the question whether an accompanying person may ever be allowed to speak on matters other than those previously notified. However, the fact that the EPO has a discretion to decide that a proposed accompanying person may not be heard at all (Headnote II(a)) suggests that such

discretion extends also to the nature of the submissions to be permitted. The Board therefore judges that it falls within the discretion of the EPO to decide whether an accompanying person may be allowed to speak on matters other than those previously notified, and that this discretion is to be exercised taking into account the facts of the particular case and the principles set out in G 4/95. Permission should only be granted where it is clear that it would not unexpectedly disadvantage the opposing party, bearing in mind that:

"it is important to ensure that during oral proceedings, one party does not present oral submissions which take an opposing party by surprise and for which such opposing party is not prepared"
(Reasons, point 10, second paragraph).

- 1.5 In the present case, the admissibility of the appeal had already been questioned in the written procedure. The fact that this issue arose during the oral proceedings was not, therefore, a surprising turn of events, and both parties were presumably prepared to discuss it.
- 1.6 Moreover, the proprietor's representative, being a professional European patent attorney, was fully competent to deal with the question of the admissibility of the appeal. Under these circumstances, the Board cannot see in what sense the proprietor could possibly be disadvantaged by an accompanying person, rather than the opponent's representative, presenting the opponent's case on admissibility.
- 1.7 The Board therefore decided to allow Mr Goebel to present the case on the admissibility of the appeal.

2. *Admissibility of the appeal*

2.1 For the appeal to be admissible, a statement of grounds of appeal shall be filed (Article 108 EPC, third sentence) in which:

"the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based" (Rule 99(2) EPC).

2.2 The Boards have developed a consistent body of jurisprudence on the conditions under which an appeal may be rejected as inadmissible for lack of adequate substantiation. This includes the following principles:

(a) If the admissibility requirements are fulfilled in respect of at least one request, the appeal as a whole is admissible, even if this request is subsequently withdrawn (*Case Law of the Boards of Appeal, 8th Edition 2016, IV.E.2.6.3, second paragraph*).

(b) It is not an absolute requirement for admissibility that the appellant should attack the opposition division's decision as flawed. Where amended claims have been filed, an appeal may also be admissible if sufficient reasons are given in the statement of grounds why the amendments are considered apt to remedy the deficiencies identified by the opposition division (*Case Law of the Boards of Appeal, 8th Edition 2016, IV.E.2.6.5(b)*).

(c) Whether the appellant's arguments are convincing or likely to be successful is irrelevant for the

purposes of determining the admissibility of the appeal (*Case Law of the Boards of Appeal, 8th Edition 2016, IV.E.2.6.2, first paragraph, final sentence and 2.6.6*).

2.3 Hence, contrary to the position of the opponent in the response to the statement of grounds, an appeal is not necessarily rendered inadmissible by an appellant-proprietor filing amended claims, and defending the claims as amended in the grounds of appeal.

2.4 In the present case, claim 1 of the main request filed with the statement of grounds of appeal is identical to claim 1 of the main request on which the contested decision was based, the subject-matter of which was found to lack novelty over D2. In the statement of grounds of appeal (section 9), arguments are provided why this finding is considered to be incorrect.

The subject-matter of claim 2 of the main request on which the contested decision was based was found not to comply with the requirements of Article 123(2) EPC (see Reasons for the Decision, point 4.2, claim 2 of the main request and claim 2 of auxiliary request I being identical). The reasoning given was that an "essential feature is missing in its wording" (said feature being that "the coil antenna is arranged along the outer rim of the push button"). The proprietor pointed out in the statement of grounds of appeal that the disputed feature had now been added to claim 2 (and claim 3) of the main request "in order to overcome the Article 123(2) EPC objection of the appealed decision".

The subject-matter of claim 3 of the main request on which the contested decision was based was found not to comply with the requirements of Article 123(2) EPC (see

Reasons for the Decision, point 5.2, claim 3 of the main request and claim 3 of auxiliary request II being identical). The reasoning given was that the feature "a push button movably arranged in the operation switch" was not originally disclosed. In the statement of grounds of appeal (point 1), a passage of the description is cited, which, it is argued, provides the necessary basis.

2.5 Thus, at least for the main request filed with the statement of grounds of appeal, the proprietor provided explanations why the requirements of the EPC were considered to be met. In view of the principles set out above under point 2.2, the appeal is admissible.

3. *Whether the requests of the proprietor are to be admitted into the proceedings*

3.1 *Main request filed with the letter dated 10 March 2018*

3.1.1 The main request filed with the letter dated 10 March 2018 (approximately three and a half years after the filing of statement of grounds of appeal) comprises the following feature:

"a push button (36) arranged to be pressed by a finger of the operator so as to operate the operation switch (30)".

The corresponding feature common to claim 1 as granted, claim 1 of the main request on which the contested decision was based and claim 1 filed with the statement of grounds of appeal was:

"a push button (36) pressed by the operator for operating the operation switch (30)".

- 3.1.2 According to Article 12(2) RPBA, the statement of grounds of appeal shall contain an appellant's complete case. In the oral proceedings, the proprietor argued that this request should nevertheless be admitted, as the above amendment was made in response to comments made in the Board's communication under Article 15(1) RPBA concerning the interpretation of the term "push button".

Where objections are raised for the first time in a communication of the Board, amendments filed as a direct response are generally admitted into the proceedings and not regarded as late-filed. On the other hand, where such objections were already part of the decision under appeal, and the Board merely re-states or endorses them, any amendments filed in response are, in principle, late-filed (*Case Law of the Boards of Appeal, 8th Edition 2016, IV.E.4.4.3 and 4.4.12*).

- 3.1.3 In the present case, the question of how to interpret the term "push button" was already examined in the contested decision. For the main request, the chief point of discussion in the assessment of novelty was whether this term should be considered to restrict the claimed subject-matter only to switches which could be activated by the operator's finger, as argued by the proprietor. The Opposition Division judged that, contrary to the view of the proprietor, the term "push button" should be interpreted broadly, and hence that D2 anticipated the claimed subject-matter (Reasons for the Decision, point 3.3).

It was therefore to be expected that the proprietor should file its complete case in respect of this

objection with the statement of grounds of appeal, whether by means of argument, amendment or both.

In fact, in the statement of grounds of appeal, the proprietor confined itself to arguing for a narrow interpretation of the existing text, citing document D14 (an extract from Wikipedia) in support. No attempt was made to establish a more limited definition of "push button" by way of amendment.

- 3.1.4 The fact that the Board subsequently expressed doubts about the proprietor's argument in this respect (communication under Article 15(1) RPBA, point 8.2) does not constitute raising a new issue during the appeal proceedings, but simply sets out a provisional opinion on an issue which was part of the impugned decision. The Board does not therefore accept that the filing of a new main request with an amended definition of "push button" can be justified as a response to issues which arose for the first time during the appeal proceedings.
- 3.1.5 The main request filed with the letter dated 10 March 2018 is therefore late-filed, and may only be admitted and considered at the Board's discretion (Article 13(1) RPBA).
- 3.1.6 In exercising this discretion, the boards generally refuse to consider late-filed requests unless they are directed to subject-matter which is *prima facie* allowable. In other words, it should be immediately apparent that the amendments made successfully address the issue raised, without giving rise to new ones (Case *Law of the Boards of Appeal, 8th Edition 2016, IV.E. 4.4.2(a)*).

In the present case, the basis for the amendment was given as paragraph [0048] of the published application (page 19, lines 9-14 of the description as filed), which reads:

"In the preferred embodiment, the owner of the vehicle 2 places the portable device 20 against the push button 36 of the ignition switch 30 and presses the push button 36 with the portable device 20. Alternatively, the owner may press the push button 36 with his or her finger while holding the portable device 20 in the vicinity of the push button 36."

3.1.7 Thus, what is disclosed is a push button which allows the switch to be operated by pressing it with a finger, *provided the portable device is in the vicinity of the push button*. The claim, however, comprises embodiments in which the switch may be operated by pressing it with a finger, irrespective of the location of the push button. The Board does not believe that such embodiments are disclosed in the application as filed, and the subject-matter of the proposed amendment is therefore not *prima facie* allowable, as it raises a new issue in relation to the requirements of Article 123(2) EPC.

3.1.8 The main request filed with the letter dated 10 March 2018 is found to be late-filed and not *prima facie* allowable, and is consequently not admitted into the proceedings (Article 13(1) RPBA).

3.2 *Main request filed at oral proceedings before the Board*

3.2.1 Claim 1 of the main request filed at oral proceedings before the Board reverts to the wording of claim 1 as

granted in relation to the push button, and the following feature is added:

"wherein the switch device (35, 55) is suited to be arranged in an instrument panel (3) such that the push button (36) is exposed from the instrument panel (3)."

- 3.2.2 According to the proprietor, this amendment ensures that the push button, by being exposed from the instrument panel, may be pressed by the finger of the operator, thus establishing a difference over D2.

This amendment represents a further attempt to define the claimed "push button" more precisely, and hence, for the reasons mentioned above in connection with the previous request, it is not a response to issues which arose for the first time during the appeal proceedings. The main request filed at oral proceedings before the Board is therefore late-filed, and may only be admitted and considered at the Board's discretion (Article 13(1) RPBA).

- 3.2.3 The basis for this feature was given as the last sentence of paragraph [0034] the published application (page 13, lines 4-7 of the description as filed), which reads:

"The switch device 35 is installed in a manner that the peripheral portion 33a of the bezel 33 and the push button 36 of the ignition switch 30 are exposed from the instrument panel 3."

- 3.2.4 It is far from clear that this amendment successfully overcomes the objection raised, since the Board does not see *prima facie* why describing the push button as

being exposed from the instrument panel would necessarily establish a difference over D2.

3.2.5 Moreover, since the passage providing the purported basis for this amendment discloses that the push button of the ignition switch *and the peripheral portion of the bezel* are exposed from the instrument panel, this amendment introduces *prima facie* the new issue of a possible intermediate generalisation, contrary to the requirements of Article 123(2) EPC.

3.2.6 In the light of the above, the main request filed at oral proceedings before the Board is found to be late-filed and not *prima facie* allowable, and is consequently not admitted into the proceedings (Article 13(1) RPBA).

3.3 *Auxiliary requests I-IX*

The independent claims of auxiliary requests I-IX filed with the letter dated 10 March 2018 all comprise the feature cited above under point 3.1.1 which resulted in the main request filed with said letter not being admitted into the proceedings. Auxiliary requests I-IX are therefore also not admitted for the same reasons *mutatis mutandis*.

3.4 *Auxiliary requests X and XI*

3.4.1 Independent claims 1 and 2 of auxiliary request X are identical to claims 1 and 2 of auxiliary request IV filed in oral proceedings before the Opposition Division, and found by the Opposition Division to meet the requirements of the EPC.

Independent claim 3 has been added in an attempt to obtain coverage for a third embodiment in which the coil antenna is mounted in a coil antenna housing provided in the peripheral portion of the bezel.

This embodiment was the subject of independent claim 3 of the granted patent, which was rejected by the Opposition Division on the grounds that one of the claimed features ("a push button movably arranged in the operation switch") extended beyond the content of the application as filed, contrary to Article 123(2) EPC.

- 3.4.2 While the contested decision indicates that the proprietor accepted that this feature is not disclosed explicitly ("as such") in the application as filed (see Reasons for the Decision, point 5.2), it has been consistently argued by the proprietor during the appeal procedure that it has an implicit basis (see grounds of appeal, section 1; and letter dated 10 March 2018, section 1). The Board therefore sees no reason why the proprietor should not be entitled to continue to defend this position in oral proceedings.

Moreover, the further amendments to claim 3 compared to the granted version essentially correspond to the limitations which were incorporated into claims 1 and 2 of auxiliary request IV filed in oral proceedings before the Opposition Division, to which the opponent did not raise any formal objections (Reasons for the Decision, point 7.1).

Auxiliary request XI differs from Auxiliary request X in that claim 3 comprises the feature that the push button is "movably arranged in the bezel". This feature was discussed in the contested decision (Reasons for

the Decision, point 5.2) and was present in claim 3 of auxiliary requests I and IV filed with the statement of grounds of appeal.

3.4.3 In the light of the above considerations, the Board decides to admit auxiliary requests X and XI into the proceedings.

4. *Auxiliary request X: Article 123(2) EPC*

4.1 As noted above, claim 3 of auxiliary request X comprises the feature "a push button movably arranged in the operation switch". It is not disputed that there is no literal basis for this amendment, nor is it suggested that the disclosure that the push button "is movably arranged in the bezel" (page 12, lines 32-33) provides the required basis (the proprietor regarded this as a separate feature).

The proprietor argues that a basis for the claimed feature can be found in the following passage on page 12, lines 21-26:

"The ignition switch 30 includes the push button 36, an extension member 37, and a switch (not shown). The extension member 37 is arranged between the push button 36 and the switch. When the push button 36 is pressed, the extension member 37 moves together with the push button 36, to actuate the switch."

According to the proprietor, this amounts to a disclosure that "the push button is movably arranged in (the arrangement) of the operation switch". The Board does not agree. The push button is certainly movable, and is defined as being a component part of the ignition switch. However, the push button being

"movably arranged in the operation switch" implies that the motion of the push button takes place within, or in the interior of, the operation switch, which is not disclosed.

4.2 The Board accepts that the difference between the claimed feature and what is disclosed in the application as filed might be considered relatively minor. Nevertheless, there is a difference. Claim 3 of auxiliary request X therefore contains subject-matter which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

5. *Auxiliary request XI: Article 123(2) EPC*

5.1 Auxiliary request XI differs from auxiliary request X in that claim 3 comprises the additional feature that the push button is "movably arranged in the bezel". The Board accepts that this feature *per se* has a basis in the application as filed (page 12, lines 32-33).

5.2 However, claim 3 also comprises the feature that the push button is "movably arranged in the operation switch", which, in the above analysis of auxiliary request X, has been found not to meet the requirements of Article 123(2) EPC.

6. *Summary*

The main request filed with the letter dated 10 March 2018, the main request filed at oral proceedings before the Board and auxiliary requests I-IX are not admitted into the proceedings (Article 13(1) RPBA). Auxiliary requests X and XI are admitted into the proceedings, but comprise subject-matter which

extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC. Hence the patent cannot be maintained pursuant to Article 101(3) (a) EPC according to either of auxiliary requests X or XI.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated