

Internal distribution code:

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

**Datasheet for the decision
of 28 June 2016**

Case Number: T 1902/14 - 3.2.01

Application Number: 11159575.7

Publication Number: 2383132

IPC: B60J7/00

Language of the proceedings: EN

Title of invention:
Shade apparatus for vehicle

Patent Proprietor:
AISIN SEIKI KABUSHIKI KAISHA

Opponent:
Webasto SE

Headword:

Relevant legal provisions:
RPBA Art. 13(1)
EPC Art. 54(1), 123(2), 83, 56

Keyword:

Late-filed document - admitted (yes)

Novelty - main request (no)

Late-filed auxiliary requests - admitted (yes)

Amendments - added subject-matter (yes) auxiliary request 1 -

added subject-matter (no) auxiliary request 2

Sufficiency of disclosure - (yes)

Inventive step - auxiliary request 2 (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent
Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89
2399-4465

Case Number: T 1902/14 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 28 June 2016

Appellant: Webasto SE
(Opponent) Kraillinger Str. 5
82131 Stockdorf (DE)

Representative: Epping - Hermann - Fischer
Patentanwalts-gesellschaft mbH
Postfach 20 07 34
80007 München (DE)

Respondent: AISIN SEIKI KABUSHIKI KAISHA
(Patent Proprietor) 1, Asahi-machi 2-chome
Kariya-shi, Aichi-ken 448-8650 (JP)

Representative: Winter, Brandl, Fürniss, Hübner,
Röss, Kaiser, Polte - Partnerschaft mbB
Patent- und Rechtsanwaltskanzlei
Alois-Steinecker-Strasse 22
85354 Freising (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 July 2014 concerning maintenance of the
European Patent No. 2383132 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: H. Geuss
O. Loizou

Summary of Facts and Submissions

I. The appeal of the opponent is directed against the interlocutory decision of the Opposition Division of the European Patent Office posted on 17 July 2014 concerning maintenance of the European Patent No. 2383132 in amended form.

II. The opposition division held that the subject-matter of claim 1 as maintained in amended form according to the interlocutory decision is novel and inventive in view of documents

DE 10 2005 024 657 (E2),
DE 10 2005 038 373 (E3).

Further, the opposition division decided not to admit into the proceedings, pursuant to Rule 116 EPC, document

WO 2007/137338A1 (E10).

III. With the statement of grounds of appeal, the appellant referred to sunroof shade apparatuses C207 and C451, manufactured by the appellant itself, that were delivered to car manufacturing companies before the priority date of the patent in suit and thus were part of the state of the art.

Further during the appeal proceedings the appellant filed the following documents:

with letter of 28 August 2015
EP 1582386 A2 (E11);

with letter of 21 December 2015
DE 10 2007 002 857 A1 (E12).

IV. Oral Proceedings were held on 28 June 2016.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request), or in the alternative, the patent be maintained on the basis of the set of claims of the auxiliary request 1, filed with letter dated 30 May 2016, or auxiliary request 2 filed during oral proceedings, or one of auxiliary requests 3 and 4, filed with letter dated 30 May 2016.

V. Claim 1 of the main request (according to the interlocutory decision) reads as follows:

A shade apparatus (10, 20) configured so as to be assembled at a sunroof (14) of a vehicle (12), comprising:
a first rail (16) including a guide groove (26) extending in a longitudinal direction of the first rail (16);
a second rail (16) including a guide groove (26) extending in a longitudinal direction of the second rail (16) and arranged so as to keep a first distance (A) from the first rail (16) in a direction orthogonal to the longitudinal direction;
a roller shaft (18) provided at one end portions of the respective first and second rails (16) in the longitudinal direction and arranged so as to extend in the direction orthogonal to the longitudinal direction;
a shade member (22) configured so as to be reeled on the

roller shaft (18) and reeled out from the roller shaft (18) when the shade member (22) is operated;
a first sliding member (24) provided at the shade member (22), arranged so as to extend in a reel out direction of the shade member (22), and being provided within the corresponding guide groove (26) to be slidable within the corresponding guide groove (26) of the first rail (16); and

a second sliding member (24) provided at the shade member (22), arranged so as to extend in the reel out direction of the shade member (22) while keeping a second distance (B) from the first sliding member (24) in an axial direction of the roller shaft (18), and being provided within the corresponding guide groove (26) to be being slidable within the corresponding guide grooves (26) of the second rail (16),

characterized in that

the first distance (A) between the first and second rails (16) is set to be relatively greater at a portion of the first and second rails (16) in the longitudinal direction than the second distance (B) between the first and second sliding members (24) being in a natural state by a width (C) such that in case where the sliding members (24) are engaged with the corresponding guide grooves (26) of the respective rails (16) the shade member (22) is stretched by the width (C) in the vehicle width direction.

VI. Claim 1 of the first auxiliary request reads as follows:

A shade apparatus (10,20) configured so as to be assembled at a sunroof (12) of a vehicle (12), comprising:

a first rail (16) including a guide groove (26) extending in a longitudinal direction of the first rail (16);

a second rail (16) including a guide groove (26) extending in a longitudinal direction of the second rail (16) and arranged so as to keep a first distance (A) from the first rail (16) in a direction orthogonal to the longitudinal direction;

a roller shaft (18) provided at one end portions of the respective first and second rails (16) in the longitudinal direction and arranged so as to extend in the direction orthogonal to the longitudinal direction;

a shade member (22) configured so as to be reeled on the roller shaft (18) and reeled out from the roller shaft (18) when the shade member (22) is operated;

a first sliding member (24) provided at the shade member (22), arranged so as to extend in a reel out direction of the shade member (22), and being provided within the corresponding guide groove (26) to be slidable within the corresponding guide groove (26) of the first rail (16); and,

a second sliding member (24) provided at the shade member (22), arranged so as to extend in the reel out direction of the shade member (22) while keeping a second distance (B) from the first sliding member (24) in an axial direction of the roller shaft (18), and being provided within the corresponding guide groove (26) to be slidable within the corresponding guide groove (26) of the second rail (16),

characterized in that

the first distance (A) between the first and second rails (16) is set to be relatively greater at a portion of the first and second rails (16) in the longitudinal direction than the second distance (B) between the first

and second sliding members (24) being in a natural state by a width (C) such that in case where sliding members (24) are engaged with the corresponding guide grooves (26) of the respective rails (16) the shade member (22) is stretched by the width (C) in the vehicle width direction, and the first distance (A) is set to be constant and the second distance (B) differs depending on positions of the first and second sliding members (24) in the reel out direction of the shade member (22).

VII. Claim 1 of the second auxiliary request reads as follows:

A shade apparatus (10, 20) configured so as to be assembled at a sunroof (12) of a vehicle (12), comprising:
a first rail (16) including a guide groove (26) extending in a longitudinal direction of the first rail (16);
a second rail (16) including a guide groove (26) extending in a longitudinal direction of the second rail (16) and arranged so as to keep a first distance (A) from the first rail (16) in a direction orthogonal to the longitudinal direction;
a roller shaft (18) provided at one end portions of the respective first and second rails (16) in the longitudinal direction and arranged so as to extend in the direction orthogonal to the longitudinal direction;
a shade member (22) configured so as to be reeled on the roller shaft (18) and reeled out from the roller shaft (18) when the shade member (22) is operated;
a first sliding member (24) provided at the shade member (22), arranged so as to extend in a reel out direction of the shade member (22), and being provided within the corresponding guide groove (26) to be slidable within

the corresponding guide groove (26) of the first rail (16); and
a second sliding member (24) provided at the shade member (22), arranged so as to extend in the reel out direction of the shade member (22) while keeping a second distance (B) from the first sliding member (24) in an axial direction of the roller shaft (18), and being provided within the corresponding guide groove (26) to be slidable within the corresponding guide groove (26) of the second rail (16), wherein the first distance (A) between the first and second rails (16) is set to be relatively greater at a portion of the first and second rails (16) in the longitudinal direction than the second distance (B) between the first and second sliding members (24) being in a natural state by a width (C) such that in case where sliding members (24) are engaged with the corresponding guide grooves (26) of the respective rails (16) the shade member (22) is stretched by the width (C) in the vehicle width direction,

characterized in that

the first distance (A) between the first and second rails (16) is set to be constant and
the second distance (B) between the first and second sliding members (24) in the natural state is set to gradually change depending on positions of the first and second sliding members (24) in the reel out direction of the shade member (22).

VIII. The appellant's submissions as relevant to the present decision may be summarized as follows:

Documents E11 and E12 should be admitted into the proceedings. Their content is highly relevant for the

evaluation of novelty of claim 1 according to the main request and constitutes the closest prior art document for the respective claim 1 of auxiliary request 1 or 2.

E11, in particular, shows a shade roller with a stretchable cloth (cf. paragraph [0033]) providing a crease-free presentation in the reel out state. The cloth is fixed by a metallic guide element (*bandförmiges Führungselement* 41, cf. paragraph [0046] and figure 3) which slides in a guiding rail (*Führungsabschnitt* 43). The only element in E11 which is reported to be elastic is the cloth (*Rollobahn* 21 in paragraph [0033]); there is no disclosure of any further elastic or flexible elements which may contribute to the stretching of the cloth.

The first and second auxiliary requests are late filed (they were filed on 30 May 2016, less than four weeks before the date of oral proceedings) and should not be admitted into the proceedings. These requests deal with issues which had already been raised in the statement of grounds of appeal.

The additional feature of claim 1 of the first auxiliary request infringes Article 123(2) EPC. That feature defines that the first distance (A) is set to be constant and the second distance (B) differs depending on positions of the first and second sliding members (24) in the reel out direction of the shade member. Despite the fact that this feature is literally taken from the description (cf. paragraph [0050], line 50 et seq.), it is taken out of context since the sentence before that passage reads "*On the other hand, the second distance B between the sliding members 24 in the natural state is set to gradually change in the reel out direction of the shade member 22 (i.e. in the front-rear*

direction of the vehicle)" and includes therefore the feature that the second distance (B) is set to gradually change depending on the reel out position of the shade member. The sentence on which the respondent relies starts with the wording „in other words" and as such merely paraphrases the previous sentence.

Also the subject-matter of claim 1 according to the second auxiliary request has been amended in such a way that it contains subject-matter which was not originally disclosed. The amendment in question concerns the introduction of the feature concerning the width C. Claim 1 as granted only defines distances A and B but not the width C. Since according to the definition of claim 1, distance A "is set to be relatively greater" than distance B only "at a portion", it is within the scope of the claim 1 that in some areas distance B is as great as distance A or even greater than distance A. That means - according to the definition which is now in claim 1 - that in these areas the width C is at least zero and the shade member is not stretched. However, an embodiment with a value of zero or less for the width C is not disclosed in the application documents as originally filed.

In any case, this definition in claim 1 leads to a lack of disclosure according to Article 83 EPC. The skilled person would not know how to proceed if distance B is greater than distance A. In this case the cloth is not stretched and the beneficial effect of the invention does not occur.

Finally, the subject-matter of claim 1 according to auxiliary request 2 does not involve an inventive step. Document E12 discloses all features of that claim beside the feature that the second distance (B) between the

first and second sliding members (24) in the natural state is set to gradually change depending on positions of the first and second sliding member (24) in the reel out direction of the shade member (22).

This feature solves the problem of reducing the sliding resistance between the shade member and the guiding rails thereby improving the presentation of the shading member. However, a roll up screen with a gradually changing shape is known from E10. E10 discloses that simply increasing the tension in the screen material in order to avoid sagging has disadvantages for larger screens and that these disadvantages are overcome if the screen material is formed with a curve. By including the teaching of E10 in the disclosure of E12 the skilled person would arrive at the contested invention without an inventive step.

The prior use C207 has only been filed with respect to claim 1 according to the interlocutory decision. But the prior use C451 challenges inventive step of the subject-matter of claim 1. It is acknowledged that C451 does not show first and second sliding members slidable in grooves of first and second rails, but straps (cf. figure, statement of grounds of appeal, page 29) sliding on guiding rods. However, it is clear that the lateral extension of the roller cloth gradually changes depending on the position of the straps with respect to the guiding rods (cf. statement of grounds of appeal, page 28, figure at the bottom). It is within the general knowledge of a skilled person to adapt the design of C451 and to replace the straps and guiding rods by guiding rails and sliding members according to the present invention. This corresponds to an obvious kinematic inversion.

Finally, also applying the teaching of E10 to any of E2, E11, or E3 would lead in an obvious manner to the claimed subject-matter, for the same reasons as when starting from E12. E12 or E11 and common general knowledge would also render obvious the claimed subject-matter.

IX. The respondent's (patent proprietor) rebuttal was essentially the following:

Document E11 and E12 should not be admitted into the proceedings since they were filed late and their subject-matter is not relevant for the invention in suit.

In particular, document E11 does not disclose the feature of claim 1 according to which the first distance between the first and second rails is set to be relatively greater at a portion of the first and second rails in the longitudinal direction than the second distance between the first and second sliding members being in a natural state by a width such that in case where sliding members are engaged with the corresponding guide grooves of the respective rails the shade member is stretched by the width in the vehicle width direction.

This feature implies that the elasticity which is the basis for a proper presentation of the shade cloth is only present in the shade member, and not in the rails or in further clamping elements. However, it is not directly and unambiguously clear from E11 whether the rails or further clamping elements provide some elasticity. The fact that E11 does not mention any further elastic elements but the cloth in paragraph [0033] does not mean that there are none.

The auxiliary requests 1 and 2 filed with letter of 30 May 2016 should be admitted into the proceedings. These requests are a reaction to the appellant's objections against the auxiliary request filed with the reply. These objections were raised for the first time with letter of 29 April 2016. Accordingly, these requests are not late filed, they are presented in good time before the oral proceedings, and the amendments made are clear and traceable.

The feature which has been added to claim 1 of the first auxiliary request is literally disclosed in the description, cf. paragraph [0050], lines 45 et seq. Therefore, claim 1 is not amended inadmissibly.

The same applies for claim 1 of auxiliary request 2. The distances A, B and C as well as the fact that distance C is the result of a calculation based on A and B are mentioned in the description as originally filed. Adding distance C as a new feature to claim 1 does not result in undisclosed subject-matter, irrespective of a hypothetical case in which B is greater than A and consequently C is negative.

Further, this situation does not result in insufficient disclosure according to Article 83 EPC. It is clear for the skilled person that the invention is based on the elasticity of the shade member. It is immediately understood by a skilled person that the beneficial effect of the invention takes place in those areas of the shade apparatus in which A is greater than B. Even if there would be other regions in which B is greater than A (and consequently no stretching effect of the shade member), the positive effect of the invention remains for those areas in which A is greater than B.

The differing feature that the second distance B between

the first and second sliding members in the natural state is set to gradually change depending on positions of the first and second sliding member in the reel out direction of the shade member involves an inventive step.

This feature is not disclosed in E12 and solves the problem of reducing the sliding resistance between the shade member and the guiding rails thereby improving the presentation of the shading member in a stretched state. This problem is mentioned in the patent description, cf. paragraph [0005].

Document E10 does not disclose a shade member for a vehicle but a screen assembly for windows and doors in buildings. Firstly, the skilled person would not take into account this document; the situation in a building is completely different to the situation in a vehicle. But even if he would, he would not arrive at the invention. The shape of the screen according to E10 is very different from the shape of the shade member according to the invention. Claim 1 defines that the curved shape of the shade member is on the sides thereof, i.e. facing the rails, whereas E10 discloses that the curved shape is at at least one of the edges that is moved in reel out direction.

The design situation for the alleged prior use C451 is completely different as compared to the contested invention. C451 does not disclose rails and sliding elements but guiding rods and straps, so it is unclear between which points the distance B has to be measured. Accordingly, the prior use C451 is not an appropriate starting point for the assessment of inventive step. Nor would a mere kinematic inversion lead to the claimed subject-matter. Furthermore, the figure at the bottom of

page 28 of the statement of grounds of appeal does not show a shape according to the last feature of claim 1. The different numbers 829,2 mm, 829,9 mm and 828,6 mm do not imply a varying width of the shade member; the variations are only representative of measurement and/or constructive tolerances.

Since all further documents are less relevant than E11 or E12, they are not able to challenge inventive step of the invention.

Reasons for the Decision

1. The appeal is admissible.
2. Document E11, filed with letter of 28 August 2015 is admitted into the proceedings.
 - 2.1 The respondent objected to the admission of E11 for it being not relevant.

The admissibility of E11 is subjected to the discretion of the Board according to Article 13 (1) RPBA, as this document has been filed on 28 August 2015 during the appeal proceedings, after filing the statement of grounds of appeal. According to Article 13 (1) RPBA, any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject matter submitted, the current state of the proceedings and the need for procedural economy.

- 2.2 Considering that document E11 has been filed well in advance of oral proceedings, that its technical subject-matter is not complex and readily understandable, and

that this has not been challenged by the respondent, none of the above criteria speaks against the admissibility of E11. Accordingly the Board exercised its discretion to admit E11 into the proceedings.

3. The invention as defined in claim 1 of the main request is not novel over document E11, Article 54 (1) EPC.

3.1 The respondent contested that document E11 did not disclose a shade apparatus configured so as to be assembled at a sunroof and, more particularly, that it did not disclose the feature of claim 1 according to which

the first distance (A) between the first and second rails (16) is set to be relatively greater at a portion of the first and second rails (16) in the longitudinal direction than the second distance (B) between the first and second sliding members (24) being in a natural state by a width (C) such that in case where the sliding members (24) are engaged with the corresponding guide grooves (26) of the respective rails (16) the shade member (22) is stretched by the width (C) in the vehicle width direction.

3.2 The Board does not follow these arguments. E11 explicitly mentions a sunroof (see dependent claim 19, *Dachfenster*). Moreover, E11 explicitly mentions the stretch-property of the roller cloth 21, cf. paragraph [0033]. The cloth is fixed via a metallic guide element (*bandförmiges Führungselement* 41, cf. paragraph [0046] and figure 3) in a guiding rail (*Führungsabschnitt* 43). Thus, it is clear from the description and the figures that there are no further elastic elements, which are

constructively foreseen in this design. Although it is accepted that the guide elements and the rails have some inherent elasticity (as all metallic elements), it is clear for the skilled person that they can be regarded as essentially rigid elements as compared to the cloth, whereby stretching of the cloth in E11 is practically only due to the elasticity of the cloth itself. Accordingly, the width of the cloth in a natural state is smaller than the distance between the rails, the cloth is stretched when reeled out, and thus the above mentioned feature is known from E11.

- 3.3 Since all other features of claim 1 are disclosed in D11, as not disputed by the parties, claim 1 lacks novelty over D11.

- 4. The auxiliary requests 1 and 2, submitted with letter of 30 May 2016, are admitted into the proceedings, Article 13 (1) RPBA.

 - 4.1 The admission of the respondent's auxiliary requests 1 and 2 is subjected to the discretion of the Board according to Article 13(1) RPBA, cf. point 2.2, above.
 - 4.2 The Board agrees with the respondent's argument that amended auxiliary requests 1 and 2 have been filed in reaction to the objections of the appellant that were raised for the first time with letter of 29 April 2016. These objections relate to the deletion of the feature concerning the "width C" in claim 1 of the auxiliary requests filed with the letter of reply to the statement of grounds of appeal.

The auxiliary requests filed with letter of 30 May 2016 restore the deleted feature.

Otherwise, the subject-matter of the auxiliary requests corresponds to that of the auxiliary requests filed with the reply to the statement of grounds of appeal.

Finally, the Board notes that the objections concerning the admissibility of auxiliary request 2 only concerned auxiliary request 2 as filed with letter of 30 May 2016. The amendments made to claim 1 of auxiliary request 2 during oral proceedings before the Board (i.e. the auxiliary request 2 on which the present decision is based), consisting in shifting the term "characterized in that", did not give rise to any objections.

The Board thus saw no valid reason not to admit the auxiliary requests 1 and 2.

5. The subject-matter of claim 1 of the first auxiliary request has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed, Article 123(2) EPC.

In particular, claim 1 of the first auxiliary request differs from claim 1 according to the interlocutory decision by the feature

- the first distance (A) is set to be constant and the second distance (B) differs depending on positions of the first and second sliding members (24) in the reel out direction of the shade member.

- 5.1 This additional feature is literally disclosed in the description paragraph [0050], lines 45 et seq. (reference is made to the patent application as published). The respondent states that consequently the subject-matter of claim 1 has not been amended inadmissibly.

5.2 The Board is of the opinion that the feature under consideration is isolated from the context in which it is disclosed.

5.2.1 Paragraph [0050] of the description is directed to the second embodiment of the invention.

This paragraph discloses *"On the other hand, the second distance B between the sliding members 24 in the natural state is set to gradually change in the reel out direction of the shade member 22 (i.e. in the front-rear direction of the vehicle)"* and includes therefore the feature that the second distance (B) is set to gradually change depending on the reel out position of the shade member. The following sentence of this paragraph (from which the contested feature has been taken) reads *"In other words, the second distance B between the sliding members 24 in the natural state differs depending on positions thereof in the reel out direction of the shade member 22."*

5.2.2 The wording of this passage leaves no doubt that it was intended to express by the second sentence ("In other words...") the same as what was described previously. Accordingly this sentence cannot be seen as a disclosure that the second distance may change in any possible way. What is disclosed is only a gradual change of the second distance. Since such gradual change is not recited in claim 1, its subject-matter extends beyond the content of the application as filed.

6. The subject-matter of claim 1 of the second auxiliary request has not been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed, Article 123(2) EPC.

6.1 Claim 1 of the second auxiliary request consists of claim 1 as maintained by the opposition division with some minor clarifications and the features of dependent claim 4 as granted.

6.2 The appellant submits that the feature

by a width (C) such that in case where the sliding members (24) are engaged with the corresponding guide grooves (26) of the respective rails (16) the shade member (22) is stretched by the width (C) in the vehicle width direction

which has been added to claim 1 as granted during opposition proceedings is not originally disclosed in combination with the features of dependent claim 4 as granted.

6.3 The addition of this feature to claim 1 as granted defines in the Board's view firstly the width C (i.e. $A=B=C$) and secondly the fact that the width C is substantially achieved by stretching of the shade member. Even if the width C is not explicitly mentioned, this technical information is however already implicitly present in claim 1 as granted (and of claim 1 as originally filed), which defines a first distance A greater than the second distance B at a portion of the first and second rails in the longitudinal direction. In fact, this information represents the general principle of the invention, cf. paragraph [0041] of the patent.

The fact that distance A might be relatively greater than distance B only at a portion and consequently distance B might be greater than distance A at another portion does not constitute added subject-matter (the definition of distances A, B and C being present in the

original filed documents), but simply a possibility that is not explicitly mentioned yet is encompassed both by the wording used in the application as filed and the wording of claim 1 according to auxiliary request 2.

7. Claim 1 according to the second auxiliary request defines the invention in a manner which is sufficiently clear and complete for it to be carried out by a person skilled in the art, cf. Article 83 EPC.

7.1 In the view of the Board, the fact that is not excluded by the wording of the claim that in some regions the distance B may be greater than the distance A (e.g. the shade member extends over the rails, cf. point 6, above) and thus the width C is negative, does not result in a lack of disclosure according to Article 83 EPC.

The fact that a shade member having (necessarily, as this is a requirement of claim 1) areas in which $A > B$ (i.e. areas in accordance with then invention), and also (additionally) areas in which $B > A$, falls under the scope of claim 1, does not imply that the invention is insufficiently disclosed in the sense of Article 83 EPC. In fact, for the reproducibility of the invention it is irrelevant in the present case whether some features of the invention are not present in some parts of the claimed apparatus. What counts, is that they can be realized at least on certain parts, and this is undisputed.

8. The subject-matter of claim 1 according to the auxiliary request 2 is considered as involving an inventive step according to Article 56 EPC.

8.1 The subject-matter of claim 1 of the second auxiliary request undisputedly differs from the shade apparatus according to E12 by the following feature:

the second distance (B) between the first and second sliding members (24) in the natural state is set to gradually change depending on positions of the first and second sliding member (24) in the reel out direction of the shade member (22).

8.2 This distinguishing feature solves the objective problem of reducing sliding resistance between the shade member and the guiding rails thus improving presentation of the shade member in stretched state, cf. paragraph [0005] of the patent. This is also not disputed by the parties.

8.3 The appellant argues that E10 would suggest the claimed solution to this problem. The Board does not agree.

Firstly, document E10 deals with a screen assembly for large windows and door openings (see in particular page 1, second paragraph) and its technical field is different from the vehicle technology area, with which E12 is exclusively concerned (see E12, paragraph [0002]). Having regard to the specific constraints for sun shades for vehicles, it is at least doubtful that the skilled person would turn to this document when facing the above-mentioned problem starting from E12.

Secondly, the shape of the screen according to E10 differs substantially from the shape of the shade member according to the invention. In accordance with the definition of claim 1, the shade member has a gradually varying width in the natural state, i.e. in the natural (untensioned) state, it is curved at the sides facing the rails (thereby providing a varying tensile force

depending on the positions of the shade member in the reel out direction, see in particular paragraph [0051] of the patent), whereas E10 discloses that the screen member is curved at the sides perpendicular to the rails, i.e. the sides that are moved in reel out direction (see e.g. Figs 12-16 and page 18, line 10 to page 19, line 27). Therefore, even if the skilled person would take into consideration document E10, it would not arrive at an apparatus having all the features of claim 1.

9. The lines of argumentation taking E2, E3 or E11 as starting point and combining them with E10 are not convincing either. As is the case with E12, these documents do not disclose a shade member with a gradually varying width in the natural state, nor does E10 or common general knowledge suggest this feature. In respect of common general knowledge, no specific evidence was submitted by the appellant.
10. Since the arguments of the appellant/opponent based on documents E10 and E12 fail, there is no need to decide whether or not these documents should have been admitted into the proceedings.
11. Regardless of the admissibility of the allegation of prior use in respect of the shade apparatus C451, filed with the statement of grounds of appeal, and the question whether the allegation is sufficiently substantiated, the Board considers that, even if the prior use had taken place as alleged, it is not prejudicial to the inventiveness of the claimed subject-matter.
 - 11.1 The appellant submits that the subject-matter of claim 1 differs from the shade apparatus according to C451 in

that the shade member, instead of having sliding members that slide in guide grooves of rails, has side straps that slide in guide rods fixed to the roof of the vehicle. However the skilled person would immediately identify that rails and sliding members would be an obvious alternative to the straps and rods, this alternative merely representing a kinematic inversion.

11.2 The absence of the rails and sliding members affects further features of the claim: in particular the definition of distances A and B are based on the rails and sliding elements, that means that distances A and B as defined in the claim do not exist in C451.

11.3 In any case, the design of the C451 apparatus is fundamentally different from the shade apparatus according to the contested patent. The suggested modification of the C451 apparatus cannot be regarded as a mere kinematic inversion, which would be obtained e.g. by providing the rods on the shade members and the straps on the roof of the vehicle, but involves the replacement of mechanical elements, namely sliding members instead of straps and grooves in rails instead of rods. It is neither apparent why the skilled person would consider such replacement, nor is there an suggestion that these mechanical elements are obviously interchangeable.

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 with the order to maintain the patent in amended form on the basis of the following:

Description:

pages 1-3 and

columns 3-11, as filed during oral proceedings.

Claims:

No 1 and 2 of the auxiliary request 2,
as filed during oral proceedings.

Drawings:

Fig. 1 to 6 as filed during oral proceedings.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated