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**Datasheet for the decision  
of 21 July 2020**

**Case Number:** T 2214/15 - 3.5.02

**Application Number:** 09729412.8

**Publication Number:** 2264680

**IPC:** G08B25/04, G01R11/00, G01R21/00

**Language of the proceedings:** EN

**Title of invention:**

Device State Detecting Device, Device State Detecting Method,  
Device State Detecting Server, Device State Detecting System,  
Liver Abnormality Detecting Device, Liver Abnormality Detecting  
System, Liver Abnormality Detecting Method, and Device State  
Database Maintaining Server

**Applicant:**

Mitsubishi Electric Corporation

**Relevant legal provisions:**

EPC Art. 84  
RPBA 2020 Art. 13(2)

**Keyword:**

Lack of support - main, first and second auxiliary request -  
(no)  
Admissibility of auxiliary requests - second auxiliary request  
(yes) - third auxiliary request (no)

**Catchword:**

If amendments intended to overcome objections of lack of support and lack of clarity raised in the summons give rise to further objections concerning clarity or added subject-matter, pointing out these further objections does not represent exceptional circumstances within the meaning of Article 13(2) RPBA 2020, but rather an ordinary development of the discussion which does not go beyond the framework of the initial objection. See reasons 5.3 and 5.4.



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Case Number: T 2214/15 - 3.5.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.02**  
**of 21 July 2020**

**Appellant:**  
(Applicant)

Mitsubishi Electric Corporation  
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**Representative:**

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**Decision under appeal:**

**Decision of the Examining Division of the  
European Patent Office posted on 14 July 2015  
refusing European patent application No.  
09729412.8 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** R. Lord  
**Members:** F. Giesen  
W. Ungler

## Summary of Facts and Submissions

I. The present appeal by the applicant (appellant) lies from the decision of the Examining Division posted on 14 July 2015 refusing European patent application No. 09729412.8 pursuant to Article 97(2) EPC, *inter alia* on the ground that none of the then pending requests met the requirements of Article 84 EPC.

II. Oral proceedings before the Board took place on 21 July 2020.

The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of the main request, or on the basis of auxiliary request 1, both filed with the statement of grounds of appeal, or on the basis of auxiliary request 2 filed with letter dated 19 June 2020, or on the basis of auxiliary request 3 filed during the oral proceedings of 21 July 2020.

III. Claim 1 of the **main request** reads as follows:

*"1. An apparatus state detector that detects states of at least one apparatus comprising:*

*measuring means (110) that is configured to measure a physical quantity of an environment in which the apparatus is placed, said physical quantity being any of a value of current supplied to the apparatus, a flow rate of water used by the apparatus, a flow rate of gas used by the apparatus, illuminance of the environment in which the apparatus is installed, a temperature of the environment in which the apparatus is installed, or*

*an amount of data transfer across a communication network of the environment in which the apparatus is installed;*

*feature quantity calculation means (120) that is configured to calculate a feature quantity of the measured value measured by said measuring means (110), wherein said feature-quantity calculation means (120) is configured to take a weighted average of said measured values with a predetermined window width to determine an average measurement value, and to define said average measurement value as said feature quantity;*

*storage means (140) that is configured to store, in advance, feature quantities of each apparatus and apparatus states associated with the feature quantities, respectively, as dictionary data; and*

*apparatus-state detection means (130) that is configured to search for a feature quantity stored in said dictionary data by using a feature quantity calculated by said feature-quantity calculation means (120) as a search key and detects an apparatus state based on the apparatus state associated with the retrieved feature quantity as a result of the search,*

*and said apparatus-state detection means (130) is also configured to detect an apparatus state based on stored historical data of said feature-quantity for each said apparatus, wherein said apparatus-state detection means (130) is configured, in a case of detecting the apparatus state based on said historical data, to obtain a difference between a first present feature quantity that is calculated*

*by said feature-quantity calculation means (120) based on a measured value by the measuring means (110) and a second past feature quantity that is calculated by said feature-quantity calculation means (120) based on a measured value by the measuring means (110) and to define the difference as a third feature quantity, and is configured to search for the feature quantity that is stored in said dictionary data with said third feature quantity being a search key to detect the apparatus state of an apparatus that has started an operation based on apparatus state matched with the retrieved feature quantity as a result of the search."*

IV. Claim 1 of **auxiliary request 1** reads as follows (here, and in the following, underlining and strike-through was added by the Board to identify features added and deleted with respect to the preceding request, respectively):

*"1. An apparatus state detector that detects states of at least one apparatus comprising:*

*measuring means (110) ~~that is~~ configured to measure a physical quantity of an environment in which the apparatus is placed, said physical quantity being any of a value of current supplied to the apparatus, a flow rate of water used by the apparatus, a flow rate of gas used by the apparatus, illuminance of the environment in which the apparatus is installed, a temperature of the environment in which the apparatus is installed, or an amount of data transfer across a communication network of the environment in which the apparatus is installed;*

feature quantity calculation means (120) ~~that is~~ configured to calculate a feature quantity of the measured value measured by said measuring means (110), ~~wherein~~ said feature-quantity calculation means (120) is being configured to take a weighted average of said measured values with a predetermined window width to determine an average measurement value, and to define said average measurement value as said feature quantity;

storage means (140) ~~that is~~ configured to store, in advance, feature quantities of each apparatus and apparatus states associated with the feature quantities, respectively, as dictionary data; and

apparatus-state detection means (130) ~~that is~~ configured to search for a feature quantity stored in said dictionary data by using a feature quantity calculated by said feature-quantity calculation means (120) as a search key and to ~~detects~~ an apparatus state based on the apparatus state associated with the retrieved feature quantity as a result of the search,

~~and~~ said apparatus-state detection means (130) is being also configured to detect an apparatus state based on stored historical data ~~of said feature quantity for each said apparatus~~, said historical data including a first present feature quantity calculated by said feature quantity calculation means (120) based on the measured value measured by said measuring means (110) when a plurality of apparatuses are operating simultaneously, and a second past feature quantity being unique to each apparatus state of each said apparatus and calculated by said feature quantity calculation

means (120) based on the measured value measured by said measuring means (110) when a single apparatus is operating,

wherein said apparatus-state detection means (130) is configured, in a case of detecting the apparatus state based on said historical data, to obtain a difference between ~~a~~ the first present feature quantity ~~that is calculated by said feature quantity calculation means (120) based on a measured value by the measuring means (110) and a~~ the second past feature quantity ~~that is calculated by said feature quantity calculation means (120) based on a measured value by the measuring means (110)~~ and to define the difference as a third feature quantity, and is configured to search for the feature quantity that is stored in said dictionary data with said third feature quantity being a search key to detect the apparatus state of an apparatus that has started an operation based on apparatus state matched with the retrieved feature quantity as a result of the search."

V. Claim 1 of **auxiliary request 2** reads as follows:

"1. An apparatus state detector ~~that~~ configured to detects states of ~~at least one~~ a first apparatus and a second apparatus, wherein the first apparatus has been operating since a point in the past and the second apparatus started operation at a point between the past and present, the apparatus state detector comprising:

measuring means (110) configured to continuously measure a physical quantity of an environment in which the first apparatus and the second apparatus



are-is placed, said physical quantity being any of a value of current supplied to the first apparatus and the second apparatus, a flow rate of water used by the first apparatus and the second apparatus, a flow rate of gas used by the first apparatus and the second apparatus, illuminance of the environment in which the first apparatus and the second apparatus are-is installed, a temperature of the environment in which the first apparatus and the second apparatus are-is installed, or an amount of data transfer across a communication network of the environment in which the first apparatus and the second apparatus are-is installed, and said measuring means (110) further being configured to measure a measured value, the measured value being a vector including physical quantities sampled for a predetermined period of time;

feature quantity calculation means (120) configured to calculate a feature quantity of the measured value measured by said measuring means (110), said feature-quantity calculation means (120) being configured to take a weighted average of the components of said measured values with a predetermined window width to determine an average measurement value, and to define said average measurement value as said feature quantity;

storage means (140), ~~configured to store, in advance,~~ in which feature quantities of each apparatus and apparatus states associated with the feature quantities, respectively, are prestored as dictionary data; and

apparatus-state detection means (130) configured to search for a feature quantity stored in said

dictionary data by using a feature quantity calculated by said feature-quantity calculation means (120) as a search key and to detect an apparatus state based on the apparatus state associated with the retrieved feature quantity as a result of the search, said apparatus-state detection means (130) being also configured to calculate a matching degree of the feature quantity calculated by said feature-quantity calculation means (120) and the feature quantity in said dictionary data to identify a search result based on the matching degree,

wherein said feature quantity for each said apparatus is stored as historical data,

~~said apparatus-state detection means (130) being also configured to detect an apparatus state based on the stored historical data, said historical data including a first present feature quantity calculated by said feature quantity calculation means (130) based on the measured value measured by said measuring means (110) when a plurality of apparatuses are operating simultaneously and a second past feature quantity being a feature quantity produced one or more periods earlier than the present time unique to each apparatus state of each said apparatus and calculated by said feature quantity calculation means (120) based on the measured value measured by said measuring means (110) when a single only the first apparatus is operating,~~

wherein said apparatus-state detection means (130) is configured, in a case of detecting the apparatus state based on said historical data, to obtain a

*difference between the first present feature quantity and the second past feature quantity and to define the difference as a third feature quantity, and to calculate a matching degree of said third feature quantity and the feature quantity in said dictionary data to identify a search result based on the matching degree, and is configured to search for the feature quantity that is stored in said dictionary data with said third feature quantity being a search key to detect the apparatus state of an apparatus that has started an operation based on apparatus state matched with the retrieved feature quantity as a result of the search."*

VI. Claim 1 of **auxiliary request 3** reads as follows:

*"1. An apparatus state detector configured to detect, in a system comprising a first apparatus and a second apparatus, states of a first apparatus and a the second apparatus, wherein the first apparatus has been operating since a point in the past and the second apparatus started operation at a point between the past and present, the apparatus state detector comprising:*

*measuring means (110) configured to continuously measure a physical quantity of an environment in which the first apparatus and the second apparatus are placed, said physical quantity being any of a value of [sic] current supplied to the first apparatus and the second apparatus, ~~a flow rate of water used by the first apparatus and the second apparatus, a flow rate of gas used by the first apparatus and the second apparatus, illuminance of the environment in which the first apparatus and~~*

~~the second apparatus are installed, a temperature of the environment in which the first apparatus and the second apparatus are installed, or an amount of data transfer across a communication network of the environment in which the first apparatus and the second apparatus are installed, and said measuring means (110) further being configured to measure~~  
determine a measured value, the measured value being a vector including physical quantities sampled with a constant sampling period for a predetermined period of time as components; wherein the predetermined period corresponds to a constant multiple of a period of a wave at 50 Hz to 60 Hz, which is a period of a voltage of the current supplied to the first apparatus and the second apparatus and the sampling period is a constant submultiple of the period of a wave at 50 Hz to 60 Hz;

feature quantity calculation means (120) configured to, when receiving a measured value from the measuring means (110), calculate a feature quantity of the measured value measured by said measuring means (110) and configured to sequentially output feature quantities as continuous values to an apparatus state detection means, said feature-quantity calculation means (120) being configured to take a weighted average of the components of said measured value with a predetermined window width to determine an average measurement value, and to define said average measurement value as said feature quantity;

storage means (140), in which configured to store, in advance, feature quantities of each apparatus and apparatus states associated with the feature

quantities, respectively, ~~are prestored as dictionary data wherein said feature quantity for each said apparatus is stored as historical data,~~ and

said apparatus-state detection means (130), configured to search for a feature quantity stored in said dictionary data by using a feature quantity calculated by said feature-quantity calculation means (120) as a search key and to detect an apparatus state based on the apparatus state associated with the retrieved feature quantity as a result of the search, said apparatus-state detection means (130) being also configured to calculate a matching degree of the feature quantity calculated by said feature-quantity calculation means (120) and the feature quantity in said dictionary data to identify a search result based on the matching degree,

~~wherein said feature quantity for each said apparatus is stored as historical data,~~

said apparatus-state detection means (130) being also configured to detect an apparatus state based on the stored historical data, said historical data including a first present feature quantity and a second past feature quantity being a feature quantity produced one ~~or more~~ periods earlier than the present time when only the first apparatus is operating,

wherein said apparatus-state detection means (130) is configured, in a case of detecting the apparatus state based on said historical data, to obtain a difference between the first present feature

*quantity and the second past feature quantity and to define the difference as a third feature quantity, and to calculate a matching degree of said third feature quantity and the feature quantity in said dictionary data to identify a search result based on the matching degree, and is configured to search for the feature quantity that is stored in said dictionary data with said third feature quantity being a search key to detect the apparatus state of an apparatus that has started an operation based on apparatus state matched with the retrieved feature quantity as a result of the search."*

VII. The appellant's arguments relevant to the present decision were essentially as follows:

Claim 1 of the main request was supported by the description. The Board's view expressed in the summons that the detection scheme based on the difference of feature quantities only worked with exactly two apparatus was incorrect. It worked also if a plurality of apparatus was running before a further apparatus was turned on. The Board's example, in which the time elapsed between determining the past and the present feature quantity amounted to days, was an extreme example, which a skilled person would rule out when construing the claim. One had to stick to the meaning of the wording of a claim, rather than to the wording. A claim could not rule out all extreme cases, as a matter of principle, and one could always construct such extreme examples. This did not render the claim unsupported. Furthermore, it was not possible to adequately define in the claim the time elapsed between the past and the present feature quantity. This time varied greatly, e.g. when a large office building or

only a small flat was supervised. Despite this open formulation the claim was supported, because given the teaching of the application, a skilled person was in a position to choose the time span correctly.

Claim 1 of the auxiliary request 1 was supported for the same reasons.

Auxiliary request 2 should be taken into account in the proceedings. The communication by the Board pursuant to Article 15(1) RPBA 2020 had raised a number of new issues not discussed before. Claim 1 of auxiliary request 2 defined that the past feature quantity was produced one or more periods earlier than the present feature quantity, thus expressing as clearly as possible the timing relationship between the past and the present feature quantity. The expression "period" was furthermore clear. Figure 9(a) showed an example of periods by the rectangular boxes in the graph. The term "continuously" referred to the time scale. What the claim meant is that the physical value was sampled continuously for a period of time and assembled into a vector. The expression "prestored" was not needed because claim 1 also defined "historical data". The objections of the Board could be easily addressed by an amended auxiliary request.

Auxiliary request 3 should be taken into account. The underlying procedural situation was a typical situation, in which the appellant made a good faith attempt to address new details and aspects of objections raised by the Board concerning the clarity of auxiliary request 2 for the first time during the oral proceedings. This represented exceptional circumstances which justified that auxiliary request 3 be taken into account by the Board.

## **Reasons for the Decision**

### 1. Admissibility of the Appeal

The appeal was filed in due time and form and is admissible.

### 2. Main Request - Article 84 EPC

#### 2.1 Claim 1 according to the main request does not meet the requirements of Article 84 EPC concerning support in the description for the following reasons.

The scheme of detection to which claim 1 is directed attempts to detect the state of a further apparatus when a plurality of other apparatus are already running based on a difference of feature quantities measured before and after the further apparatus changes its state. This scheme of detection works only under the condition that between the points in time when the second past feature quantity and the first present feature quantity are determined only one apparatus changes its state, e.g. is turned on or off. To give an example, consider the sequence where a washing machine, then a light and finally a TV set are turned on. It is possible to detect the state of the TV set by subtracting the compound feature quantity determined when the washing machine and the light are running, but not by subtracting a feature quantity measured when only the washing machine was running. The latter case would lead to a compound feature quantity after subtraction belonging to the washing machine and the light, thus not matching either apparatus correctly. In order to detect the state of an apparatus correctly,



the difference of the feature quantities before and after a change of state of this apparatus must be detected but the other apparatus must not change their state.

In contrast, claim 1 according to the main request is merely limited as to taking the difference of a first present and a second past feature quantity, without expressing the required additional restriction that the further apparatus must not change their state. Rather "past" is not limited to any particular point in the past. Since the subject-matter of claim 1 is not limited to this condition it lacks support in the description.

2.2 The appellant's arguments did not persuade the Board.

The appellant argued for the first time during the oral proceedings before the Board that the Board's view according to which the detection scheme of claim 1 worked only in the case of exactly two apparatus expressed in the summons was incorrect. While this is an amendment to the appellant's appeal case, the Board takes it into account, despite the fact that it should have been explained in the appellant's letter dated 19 June 2020 in response to the summons rather than in the oral proceedings. The appellant's argument appears to be correct but does not invalidate the general line of the Board's objections concerning the timing.

The appellant argued that a claim limited to a specific amount of time that has elapsed between the determination of the past feature quantity and the present feature quantity would be unduly restrictive. The time was situation dependent and could thus not be adequately specified in a claim. While the Board can

accept this, the Board's reasoning above shows, that the essential point is that only one apparatus changes its state between the determination of the past and the present feature quantity. The essential limitation therefore does not need to be expressed in terms of elapsed time, which the Board agrees cannot reasonably be defined. Nevertheless, in order for the claim to be supported, this essential limitation must be expressed in the claim.

Furthermore, the appellant argued that a skilled person would rule out "extreme interpretations" of a claim, such as determining the second past feature quantity on one day and the first present feature quantity on the next. According to the appellant, it was always possible to construct such extreme examples for any claim. Consequently, a claim did not have to exclude them to be supported.

According to Article 84 EPC, the claims define the subject-matter for which protection is sought. Consequently, the subject-matter actually claimed has to be the basis for examination. While the skilled person attempts to construe a claim reasonably and constructively, they do not mentally amend a claim to be more restrictive than it objectively is. The Board is not persuaded that their example represented an unreasonable "extreme case", which a skilled person would automatically rule out, just because it was chosen to illustrate their point clearly. Rather, the claim encompasses by its wording the exemplary situation. The Board is not convinced of the correctness of the appellant's sweeping statement that extreme examples could be constructed for any claim and would be mentally ruled out by a skilled person. In the Board's experience, where a claim is clear and

supported, it takes the will to misinterpret the claim in order to construct extreme examples. In addition, whether there might in principle exist exceptional circumstances in which claimed subject-matter could be viewed to be clear and supported despite covering some "extreme cases" is not decisive in the present case because in the present case it is clearly possible to correctly express the essential claim limitations in a concise and not unduly limiting way, thus excluding all the alleged "extreme examples". All the claim would have to specify is that only one apparatus changes its state between the determination of the past and the present feature quantity.

3. Auxiliary Request 1 - Article 84 EPC

The amendments introduced in auxiliary request 1 concern a more detailed definition of feature quantities stored as historical data. However, the expression "second past feature quantity" of claim 1 of auxiliary request 1 still does not express that the apparatus whose state is detected in the presence of other apparatus running must be the only one that has changed its state between the determination of the past and the present feature quantity. The appellant did not provide further comments in this respect.

Claim 1 of auxiliary request 1 therefore lacks support for the same reasons as claim 1 of the main request.

4. Auxiliary Request 2 - Article 84 EPC

4.1 The Board admitted the second auxiliary request into the proceedings.

The second auxiliary request is an amendment to the appellant's case within the meaning of Article 13(1) RPBA 2020 made after the notification of the summons to oral proceedings dated 20 March 2020, i.e. after entry into force of the revised Rules of Procedure of the Boards of Appeal. Pursuant to Article 13(2) RPBA 2020 such an amendment shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the appellant. The appellant argued that the Board had raised a number of new issues in the communication pursuant to Article 15(1) RPBA 2020 to which auxiliary request 2 represented a good faith reaction. The Board accepts that in the present case this represents exceptional circumstances within the meaning of Article 13(2) RPBA 2020.

4.2 Claim 1 of auxiliary request 2 does not meet the requirements of Article 84 EPC.

The introductory sentence of claim 1 reads "[a]pparatus state detector configured to detect states of a first apparatus and a second apparatus". In fact, the claimed apparatus only determines the state of the second apparatus by subtracting from a present feature quantity where, for example, the second apparatus is running a past feature quantity when second apparatus was not running.

Claim 1 defines that the second past feature quantity is produced "one or more periods earlier than the present time when only the first apparatus is running". In the context of claim 1, the expression "period" has no clear or recognised meaning. The physical quantity on which the calculation of the feature quantity is

based can be a current or water flow or temperature or illuminance or an amount of data transfer. While an AC-current typically has a period corresponding to its 50 or 60 Hz grid frequency, the other physical quantities are not normally periodic and hence it remains unclear what a period could be in their context.

Furthermore, the feature "measure a measured value" is unclear. The physical quantity is sampled and the measured instantaneous values are assembled into a vector termed "measured value" in the claim. What is measured are the instantaneous values of the physical quantity but not the measured value, i.e. the vector assembled from the measured values, itself.

The expression "components" introduced into claim 1 might have been intended to refer to components of the vector assembled from the measured physical quantities, but this was not expressed in claim 1, thus rendering the expression unclear.

The replacement of "stored in advance" by "prestored" does not overcome the problem identified in the summons that the point in time compared to which the data is "stored in advance" or "prestored" is not defined in the claim.

4.3 Claim 1 of auxiliary request 2 does not meet the requirements of Article 123(2) EPC.

According to claim 1 of auxiliary request 2, the measuring means are configured to "continuously" measure a physical quantity. In paragraph [0032] of the A1-publication of the present application, whose content is identical to the original application documents, the measuring means are disclosed, along

with additional details, to sample the physical quantity with a sampling frequency. The paragraph ends by stating that this measuring operation is performed continuously. The measuring operation itself cannot be considered "continuous" because it samples data points at discrete intervals. The claim however, defines that the data was continuously recorded. Paragraphs [0073] and [0074] use the expression "continuous" in the context of the feature quantity calculation means, not the measuring means. There is thus no direct and unambiguous disclosure of the claim amendment.

4.4 The appellant responded to these objections only by stating that these concerns could be easily addressed by a further amendment of the claim.

5. Auxiliary Request 3 - Admissibility

5.1 The third auxiliary request, filed during the oral proceedings before the Board, is an amendment to the appellant's appeal case. The Board did not admit this amendment into the proceedings because there were no exceptional circumstances in the present case, as required by Article 13(2) RPBA 2020.

5.2 The appellant argued that the present situation was a classical situation in which a further request should be admitted because the Board had raised new objections in connection with the second auxiliary request that the appellant could not have been expected to anticipate.

5.3 The Board is not persuaded by these arguments. The topics of discussion in view of auxiliary request 2 do not differ in substance from those identified in the

summons. This cannot be considered exceptional circumstances justifying the admittance of a further auxiliary request.

Concerning the central issue of lack of support, the Board had identified in detail in point 2.3 of the summons the timing of when the past and present feature quantities were determined as problematic. While it is true that the Board's statement that the difference scheme works for only two apparatus in point 2.2 of the summons is unprecise, this does not touch upon the correctness of the separate statement in point 2.3 about the timing. The amendment concerning the number of apparatus involved in auxiliary request 2 was an unsuccessful attempt at overcoming this previously identified problem because it introduced a further clarity problem. The objection by the Board during the oral proceedings thus does not go beyond the framework of the previous discussion, which is defined by the underlying claim deficiency.

The appellant correctly submits that the Board explained in the oral proceedings that the expression "one or more periods earlier" does not have a clear meaning in the context of claim 1. This amendment is also an attempt at overcoming the Board's central objection of lack of support (point 2.3 of the summons) by changing the definition of the elapsed time between the determination of the past and present feature quantity. As explained above, this central objection was already raised in the summons. The discussion of this feature is therefore still in essence a discussion concerning the central issue of lack of support. The Board merely pointed out that the amendment introduces further clarity problems, thereby not going beyond the

framework of the underlying discussion which is, again, defined by the underlying claim deficiency.

It is furthermore correct that the Board considered the feature "components" and the expression "measuring a measured value" to be unclear. The Board has also clearly stated in points 2.5 and 2.6 of the summons that the definition of the feature "measured value" lacked clarity in several respects. The attempt to overcome this clarity issue introduced two new clarity problems, which the Board pointed out during the oral proceedings. The discussion thus merely developed within the framework of a clarity deficiency of the claim raised in the summons, but it did not raise any new issues.

- 5.4 If the appellant's argument that identifying these newly introduced problems represented exceptional circumstances were correct, this would mean that the appellant would have to be given repeated opportunity to file amended claims until no new problems were introduced. Such a procedure could only be characterised as a continuation of the first-instance examination proceedings and would thus be at odds with the primary object of the appeal proceedings of a judicial review of the impugned decision, see Article 12(2) RPBA 2020.

Furthermore, the explanatory remarks accompanying Article 13(2) RPBA 2020 explain that

"if a party submits that the Board raised an objection for the first time in a communication, it must explain precisely why this objection is new and does not fall under objections previously raised by the Board or a party."



While the appellant argued that the Board had raised new details or aspects, the Board considers these details and aspects not to be new objections but to "fall under the objection" of lack of support concerning the timing and under the clarity objection concerning the definition of the "measured value".

It is also correct that the Board considered the amendment concerning the measuring means to be configured to "continuously" measure a physical quantity not to comply with Article 123(2) EPC. This amendment had been presented as being introduced to clarify the feature "measured value". The amendment was therefore occasioned by a claim deficiency which the Board had raised in the summons. It is self-evidently impossible for the Board to raise objections concerning added subject-matter before being presented with an amendment. However, given the strict third level of the convergent approach implemented by Article 13(2) RPBA 2020, identifying an amendment aimed at overcoming an objection raised in the summons as being non-compliant with Article 123(2) EPC can simply not be considered exceptional circumstances. An appellant has to be aware that every amendment will have to be examined for compliance with Article 123(2) EPC and that the earliest possible moment for this is during the oral proceedings if said amendment is filed in reaction to the summons. This is the ordinary development of the appeal proceedings rather than an exceptional course of events and it also does not go beyond the framework of the underlying claim deficiency.

In the present case, there were thus no exceptional circumstances justifying taking into account a further amended claim request. The identification of newly

introduced problems when attempting to solve issues discussed in the procedure up to that point is rather to be seen as the ordinary development of the discussion. Contrary to the appellant's submission, to the Board the present case is a typical case, where a central objection (that of lack of support) had been among the grounds for refusal, was identified and agreed with by the Board and was the central topic throughout the appeal proceedings, thus typically not warranting the opportunity to file a further auxiliary request.

6. Conclusion

Since the main, the first and the second auxiliary requests do not meet the requirements of Article 84 EPC, since the second auxiliary request does not meet the requirement of Article 123(2) EPC, and since the Board did not admit the third auxiliary request into the proceedings pursuant to Article 13(2) RPBA 2020, the Board cannot accede to any of the appellant's requests.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated