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**Datasheet for the decision  
of 7 December 2020**

**Case Number:** T 1604/16 - 3.2.02

**Application Number:** 09775807.2

**Publication Number:** 2293755

**IPC:** A61G3/06, B60P1/43, B60R3/02

**Language of the proceedings:** EN

**Title of invention:**  
FOLDABLE RAMP ALLOWING AN INVALID WHEELCHAIR PASSENGER ENTER  
INTO A VEHICLE

**Patent Proprietor:**  
API CZ S.R.O.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54(1), 54(2), 56, 100(a), 100(b)  
EPC R. 103(1)(a), 116, 124(2)  
ECHR Art. 6

**Keyword:**

Sufficiency of disclosure (yes)  
Review of a finding of fact of the department of first  
instance - (yes)  
Novelty - (yes)  
Inventive step - (yes)  
Reimbursement of appeal fee - (no)

**Decisions cited:**

G 0007/93, G 0003/97, T 0474/04, T 1553/07, T 0918/11,  
T 2565/11, T 1107/12, T 0621/14, T 1418/17

**Catchword:**

The boards have competence to review appealed decisions in full, including points of law and fact. This applies also to findings of fact of the department of first instance which are based, at least in part, on the evaluation of witness evidence obtained in the course of hearing a witness (reasons, point 3.1 and sub-points).



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Case Number: T 1604/16 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 7 December 2020**

**Appellant:** API CZ S.R.O.  
(Patent Proprietor) Slapy 106  
391 76 Slapy (CZ)

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
1 March 2016 concerning the maintenance of  
European Patent No. 2293755 in amended form**

**Composition of the Board:**

**Chairman** M. Alvazzi Delfrate  
**Members:** D. Ceccarelli  
Y. Podbielski  
A. Martinez Möller  
L. Bühler

## Summary of Facts and Submissions

I. The patent proprietor has appealed against the Opposition Division's decision, posted on 1 March 2016, that, account being taken of the amendments according to auxiliary request 5 then on file, European patent No. 2 293 755 and the invention to which it related met the requirements of the EPC.

II. The patent was opposed on the grounds of lack of novelty, lack of inventive step, insufficient disclosure and added subject-matter.

By letter dated 13 August 2012 the opponent dropped the objection based on the ground of added subject-matter.

III. The Opposition Division held that the ground for opposition of insufficient disclosure did not prejudice the maintenance of the patent as granted.

The Opposition Division found that the subject-matter of claim 1 of the patent as granted lacked novelty over a public prior use based on the witness evidence of Ms Silvia Merz taken before the Opposition Division and the following documents:

E1: Invoice No. 2730463 from the company MobiTEC Sonderfahrzeugtechnik to Ms Silvia Merz, dated 4 July 2007

E1/1: Photo documentation of a VW Caddy, delivered to Ms Silvia Merz

It was not convinced by the opponent's novelty objections in view of an alleged prior use based on the display of a car as shown in the photographs in E1/1 at

a trade fair, and in view of a further alleged prior use based on E1/1 and the following document:

E2: Invoice No. 2730582 from the company MobiTEC Sonderfahrzeugtechnik to Mr Lutz Schubert, dated 30 August 2007

The Opposition Division found a novelty objection based on the following document

E3: "VW Caddy mit Taxi-Rampe", trade brochure from the company MobiTEC Sonderfahrzeugtechnik

to be unsubstantiated and did not admit into the proceedings

It did not examine the opponent's novelty objections against the patent as granted based on the following documents:

E4: US-A-2007/0241153

E5: US-B-6,179,545

The Opposition Division found the opponent's objections of lack of inventive step unconvincing.

- IV. By letter dated 28 April 2016, the opponent withdrew the opposition.
- V. In the statement setting out the grounds of appeal, dated 30 June 2016, the appellant requested that the decision under appeal be set aside and the patent be maintained as granted or, as an auxiliary measure, on the basis of one of auxiliary requests 1 to 5, filed with that statement. The appellant also requested reimbursement of the appeal fee.

Oral proceedings were requested in the event that the main request could not be granted. The request for oral proceedings was not made conditional on the outcome of the request for reimbursement of the appeal fee.

VI. **Claim 1 of the patent as granted** reads as follows:

"Foldable ramp allowing the entry of a passenger bound to a wheelchair into a vehicle designed for vehicles (4) with a lowered floor well (5) for transportation of a wheelchair (2) consisting of a ramp (6, 6', 6") which unfolds in the entry position out off [sic] the vehicle, in the transport position it is locked vertically in the vehicle (4) on the edge of the floor well (5) and in the passive position it extends horizontally over the floorwell (5) **characterized in that** the ramp (6, 6', 6") is provided by carriers (7) on its sides, the carriers (7) being movably connected to tiltable side parts (8) being pivotally attached to the lower edge of the floor well (5) and the movable connection of the carriers (7) to the tiltable side parts (8) is created with the possibility of change of position of the ramp (6, 6', 6") in respect of the tiltable side parts (8) when changing from the transport position of the ramp (6') into the passive position of the ramp (6") applying a rotationally translational movement such that in the passive position the tiltable side parts (8) are extended vertically and the ramp (6") lies horizontally on the level of the upper edges of the floor well (5) as well as on the level of the tiltable side parts (8)."

Claims 2 to 9 are dependent claims.

VII. The proprietor's arguments, where relevant to the present decision, may be summarised as follows:

The opponent had failed to prove beyond reasonable doubt that the car shown in the photographs in E1/1 was the same car as sold to Ms Merz according to E1. Ms Merz's car had had a rear-impact crash and had been completely repaired after the filing date of the patent. The photographs shown in E1/1 had been taken after these repairs. It was unclear what type of ramp was included in the car sold in 2007. Although Ms Merz had stated that the car had not changed after the repairs, she was neither technically trained nor interested in mechanics. It was doubtful whether she would have noticed any difference in the mechanism of the foldable ramp and whether she would correctly remember the technical details of the repairs. It followed that the alleged prior use based on E1 and E1/1 did not form part of the prior art.

The objective problem to be solved by the invention was to improve the handling of a foldable ramp to be used with a vehicle having a lowered floor well, when moving the ramp from a vertical transport position into the horizontal passive position within the vehicle.

The Opposition Division had committed substantial procedural violations of the appellant's right to be heard by holding auxiliary request 1 inadmissible and refusing auxiliary request 4. Reimbursement of the appeal fee was therefore justified.

### Reasons for the Decision

1. The invention

The invention relates to a foldable ramp for loading a wheelchair into a vehicle. A ramp of this type and its position in the vehicle are illustrated in Figure 1 reproduced below.

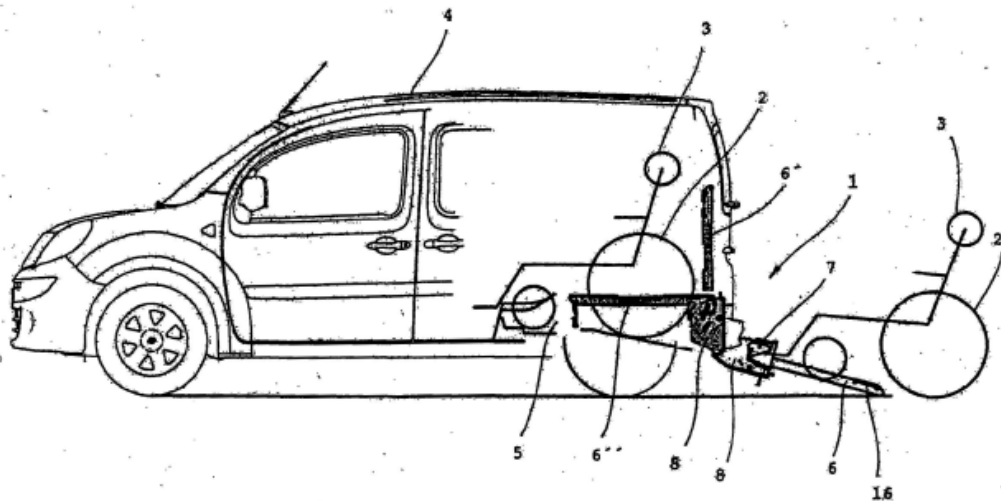


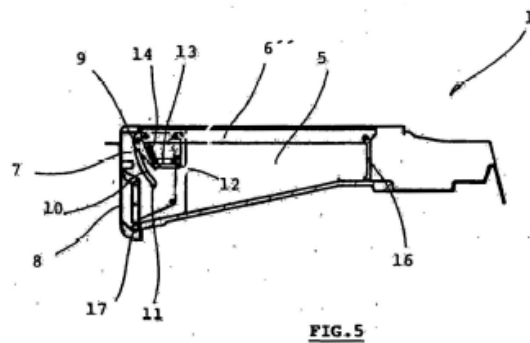
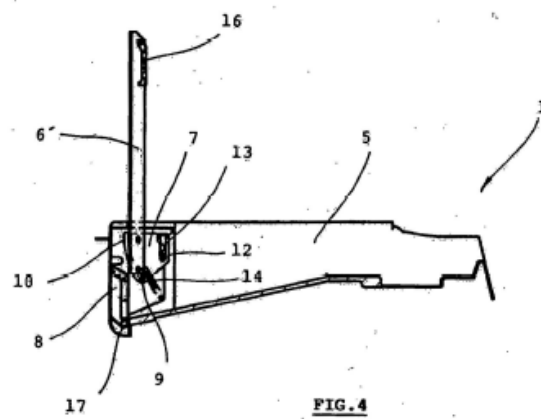
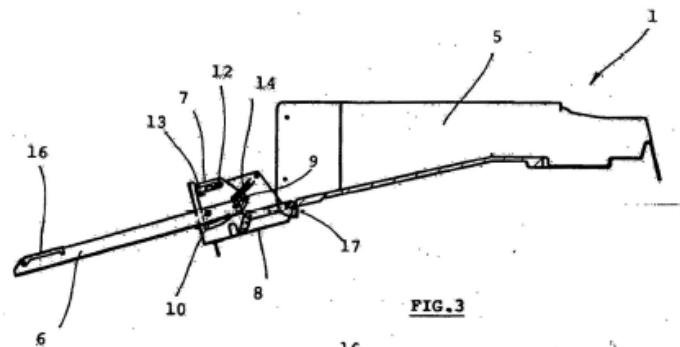
FIG. 1

When not in use (passive position) the ramp extends horizontally over the floor of the vehicle. From that position it can unfold off the vehicle (entry position) so as to allow the wheelchair to be loaded. When the wheelchair is loaded the ramp can be locked vertically in the vehicle (transport position) for transportation.

Figures 3 to 5, reproduced below, depict the entry



position, the transport position and the passive position, respectively.



The mechanism for the movement between those positions includes carriers (7) on the sides of the ramp. The carriers are movably connected to tiltable side parts (8) (by means of pins 9 and 12 cooperating with grooves 10 and 13, respectively; column 5, lines 9 to 17).

The tiltable side parts are pivotally attached to the floor (by means of hinge 17).

The mechanism permits a "rotationally translational" movement from the transport position of the ramp to its passive position.

According to the patent, the foldable ramp can be easily operated by one person as the centre of gravity of the ramp can be lowered and shifted during the movement between the passive position and the transport position (paragraph [0011]).

2. Sufficiency of disclosure

In the impugned decision (point 21), the Opposition Division concluded that the subject-matter of claim 1 of the patent as granted was sufficiently disclosed. The Board has no reason to question this finding, in particular in the absence of any arguments disputing it in the appeal proceedings.

It follows that the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

3. Novelty

3.1 In the impugned decision (point 19.1), the Opposition Division concluded that the prior use based on E1 and E1/1 formed part of the prior art.

More specifically, it concluded that on the day the (former) opponent delivered Ms Merz a car with a ramp as depicted in the photographs in E1/1, which took place as indicated in E1, a ramp of this type was made available to the public. The appellant contested this finding.

- 3.1.1 E1 is an invoice showing that a car with a taxi ramp was sold and delivered to Ms Merz by the (former) opponent before the priority date of the patent.

However, it is common ground that the photographs in E1/1, showing Ms Merz's car, were taken by the (former) opponent after the filing date of the patent; they were taken after the car had had an accident and been repaired.

A crucial point to be assessed is therefore whether the ramp shown in the photographs in E1/1 is the same as the one originally delivered to Ms Merz when she bought the car. As evidence, the (former) opponent offered the witness Ms Merz, who was heard by the Opposition Division on 26 November 2015.

- 3.1.2 The Opposition Division based its assessment of the prior use on documents E1 and E1/1 and the evidence given before it by the witness Ms Silvia M. Merz. The appellant challenges this finding.

The competent board in T 1418/17 held that a board should only overrule a finding of fact made by the department of first instance if that department's evaluation of the evidence had one of the following shortcomings: essential points had not been considered, irrelevant matters had been taken into consideration or illogical conclusions had been drawn (reasons 1.3). The Board in the case in hand deems it necessary to consider whether, when reviewing the Opposition Division's finding of fact, it should limit itself to identifying whether or not one of the criteria set out in T 1418/17 has been met, or should overrule the Opposition Division's finding if it considers it to be

wrong but not to fulfil one of these criteria.

3.1.3 Article 117 EPC gives a non-exhaustive list of "means and taking of evidence" in proceedings before the European Patent Office. These include the production of documents and the hearing of witnesses. It is established case law that evidence is assessed in accordance with the principle of the free evaluation of evidence. This means that there are no firm rules of evidence defining which types of evidence are, or are not, convincing. There are thus no firm rules concerning the probative value of a particular piece of evidence based on what type of evidence it is. Instead, the question of whether a fact can be regarded as proven has to be assessed on the basis of all the relevant evidence (G 3/97, reasons 5).

3.1.4 The evidence adduced before the Board in the case in hand includes documents E1, E1/1 and, in addition, the minutes of the hearing of the witness Ms Silvia M. Merz (hereinafter "the minutes"). The minutes are a verbatim transcript of the recording of the testimony given by the witness in the hearing before the Opposition Division pursuant to Rule 124(2) EPC. They are thus a true reflection of what the witness testified at the hearing. The minutes are a written document akin to a written witness statement. However, the minutes differ in that they reflect that the witness answered questions posed by the Opposition Division and the parties, whereas a written witness statement simply sets out the witness's remarks that the party filing the statement considers relevant.

Since the Board did not hear the witness and only has the minutes as evidence, the question arises as to whether there are restrictions on the Board's

competence to review and set aside the Opposition Division's finding of fact.

- 3.1.5 When hearing a witness, the competent body (here the Opposition Division) has a number of ways of scrutinising the reliability of the witness testimony (a summary is given in T 474/04, reasons 8). Issues such as whether the testimony of the witness is based on their own observations or on information from others, or whether the witness was able to observe what they claim to have observed can be addressed in the form of questions answered by the witness. The questions and answers are then reflected in the minutes. There are also issues concerning the credibility of the witness themselves, that is whether the witness is telling the truth. This depends not only on what the witness says, but also on their body language, facial expressions etc. during the hearing. The direct impression that the witness may give is a matter which can only be assessed by the competent body hearing the witness. In the case before the Board, neither the Opposition Division nor the appellant has questioned the witness's credibility at all, let alone in view of the impression given during the testimony.
- 3.1.6 Having satisfied itself that there are no issues in terms of the witness's credibility and that the questions and answers reflected in the minutes do not leave any gaps or raise any questions which the Board needs the witness to clarify, the Board considers itself to be in a position to review and, if necessary, set aside the Opposition Division's decision on the public prior use, including its finding of fact based principally on the witness evidence of Ms Merz, on the basis of documents E1, E1/1 and the minutes (see for instance T 918/11, reasons 3).

3.1.7 With respect to the criteria set out in T 1418/17, the Board notes that the principle of the free evaluation of evidence applies to all types of evidence adduced, including documentary evidence, expert opinions and statements made by the parties. It is the Board's view that this principle has no direct bearing on the extent of the boards' competence for reviewing decisions in general, and particularly findings of fact made by a department of first instance. If the criteria set out in T 1418/17 were applied so broadly, this would amount to a considerable restriction of a board's competence. This kind of restriction may well be found in some national jurisdictions where the last judicial instance only reviews questions of law and the review of findings of fact is very limited. If there are several instances of judicial review, legislators might limit the second or further instance's power of review. However, there is no basis in the EPC or established case law for such a broad restriction of the boards' competence. On the contrary, the boards have competence to review appealed decisions in full, including points of law and fact (see e.g. explanatory remarks to new paragraph 2 of Article 12 of the Rules of Procedure of the Boards of Appeal, OJ Suppl. 2/2020). This is in accordance with Article 6 of the European Convention on Human Rights, which stipulates that there must be at least one judicial instance that can review a case in full, i.e. the law and the facts, given that the boards of appeal are the only judicial body to review decisions by the departments of first instance of the European Patent Office (regarding Article 6 ECHR, see e.g. Guide on Article 6 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights 2013, paragraph 84).

3.1.8 The Board is well aware that there is case law on a restriction of the boards' competence when reviewing discretionary decisions taken by the departments of first instance in certain circumstances (G 7/93, reasons 2.6, and case law based on this decision). However, the Board does not consider the evaluation of evidence to be a discretionary decision.

3.1.9 Given the factual context of decision T 1418/17, the Board considers that the criteria set out in that decision were meant to concern only findings of fact made by the department of first instance which are based, at least in part, on the evaluation of witness evidence obtained in the course of hearing a witness.

Although in this context T 1418/17 refers to several decisions of the boards, there are certain aspects of these which, in the Board's view, warrant further consideration.

In T 621/14 the competent board refused to admit additional witness evidence that was put forward at a late stage in the appeal proceedings and was aimed at challenging the opposition division's finding on a public prior use. The board's principal reason for the refusal was that the appellant had not objected to the hearing of the witnesses before the opposition division or to the opposition division's evaluation of that witness evidence. There was thus no reason to evaluate the evidence newly submitted on appeal (reasons 1). The Board in the case in hand notes that the aforementioned decision does not concern the question of a board's competence in a case where the appellant is arguing that the impugned decision should be set aside because the opposition division allegedly failed to correctly evaluate the witness evidence obtained by hearing the

witness. On the contrary, decision T 621/14 deals with a party's failure to present its full case in due time.

In decision T 2565/11 the competent board overruled the opposition division's evaluation of the witness evidence on the basis that irrelevant matters had been taken into consideration and illogical conclusions had been drawn (reasons 1.2.1). However, the board did not - and in fact did not need to - give any reasons as to why its competence in reviewing and overruling the opposition division's finding of fact should be limited.

Similar considerations apply to T 1553/07 in which the lack of reasoning in the opposition division's decision meant that the competent board was unable to establish how the opposition division had evaluated the evidence and why it arrived at its conclusion concerning the public prior use (reasons 20).

Lastly, the main issue raised by the parties in the appeal proceedings in T 1107/12 concerned the issue of the standard of proof, so the competent board's evaluation of the first-instance decision focused on this point (reasons 1.2.1 and 1.2.2). What the Board takes from T 1107/12 is that the competent board considered it unnecessary to carry out its own evaluation of the evidence unless it had reason to do so, e.g. because the reasoning could not be followed. There is, however, no explanation as to why a board should only overrule an opposition division's finding in certain well-defined circumstances.

- 3.1.10 In view of the above the Board in this case does not see any reason why it should limit its review of the Opposition Division's findings of fact made in the



context of the public prior use by applying the criteria set out in decision T 1418/17.

- 3.1.11 In the case in hand, the evidence lies entirely within the sphere of the (former) opponent, who sold the car and took the photographs produced as E1/1. The Board needs to take this into account when assessing whether it is convinced that the public prior use occurred.
- 3.1.12 Turning to Ms Merz's witness statement, the appellant pointed to a few passages of the transcript which cast doubt on whether the repairs to Ms Merz's car after the accident might have involved the modification of the taxi ramp previously installed and originally sold with the car.

First of all, the witness statement makes it clear that specifically the ramp was damaged and needed repairing (pages 14, 19 and 20).

Following a question from the appellant as to whether, after the repairs, the ramp was technically the same as before the accident, Ms Merz replied that she could not note any difference (page 20). However, she also repeatedly explained that she had no technical skills (page 8, last statement; page 9, last statement; page 11, last but one statement; page 14, first statement). She went on to explain that an example difference she would have noticed was if the repairs had meant the colour of the ramp carpet was changed (page 21, last statement).

In this context it is possible that Ms Merz overlooked a visually small but technically substantial difference in the mechanism for folding the ramp, which is, by design, mostly hidden from view. Although she confirmed

that the handling and the movement of the ramp had not changed after the repairs to the car (as explained by the Opposition Division), doubts remain as to whether the same movement was made possible by a different mechanical arrangement or whether she could even notice a relatively minor difference of movement.

The Opposition Division correctly observed that Ms Merz was not capable of describing the mechanism or the movement of the ramp in technical terms.

It is of little relevance that taxi ramps were available for sale in 2007, as observed by the Opposition Division with reference to further witness statements provided by Ms Schachtner and Mr Lutz, since the question is not whether a taxi ramp was delivered to Ms Merz on the day indicated in E1, but rather which taxi ramp was delivered.

- 3.1.13 Another point which casts substantial doubts on whether the repairs to the ramp involved technical modifications is that all the photographs produced had been taken after the repairs.

The repairs were carried out by the (former) opponent. Ms Merz stated that the photographs in E1/1 were taken by the (former) opponent for the insurance company of the other car involved in the accident (minutes of witness's hearing, page 12, last three statements). They were needed to show that something could not be fully repaired after the accident, resulting in the car having lost some value (page 12, last statement but one). When asked, Ms Merz stated that from the photographs she could not discern any residual damage after the repairs (page 14, first statement).

However, the Board doubts that it was objectively possible even for a technically competent person to note any such residual damage without a comparison with the status before the accident, or at least with the condition before the repairs.

It is highly likely that the insurance company of the other car involved in the accident needed some photographs of Ms Merz's car at least just after the accident. After all, taking photographs after an accident and before repairs is common whenever a reimbursement from an insurance company is to be requested. It is highly plausible that such photographs would have been taken in the garage where the repairs took place, i.e. at the (former) opponent's premises.

However, there are no such photographs on file.

In view of this, the doubts raised by the appellant (page 10 of the statement of grounds, first sentence) as to whether such photographs before the repairs might show a foldable ramp different from that shown in E1/1 are legitimate.

- 3.1.14 Another point to consider is that these doubts cannot be resolved since the opposition has been withdrawn.
- 3.1.15 Under these circumstances, the evidence produced is not enough to convince the Board that the ramp depicted in the photographs in E1/1 was made available to the public before the filing date of the patent, in particular on the day Ms Merz's car was delivered according to E1.

Hence, the Opposition Division erred in concluding that the ramp shown in E1/1 formed part of the prior art.

As a consequence, the novelty objection based on E1 and E1/1 does not prejudice the maintenance of the patent as granted. There is no need for the Board to consider the substance of the disclosure of E1/1.

3.2 In the impugned decision (points 19.2 and 19.3), the Opposition Division concluded that the opponent's objections in view of an alleged prior use based on the display of a car according to the photographs in E1/1 at a trade fair and in view of a further alleged prior use based on E1/1 and E2 did not prejudice the maintenance of the patent as granted. The Board has no reason to question this finding, in particular in the absence of any arguments disputing it in the appeal proceedings.

3.3 E3 is a brochure of a vehicle with a foldable ramp of the kind in the invention in this case. The brochure shows pictures of the ramp and its position within the vehicle. However, no details of the mechanism for moving the ramp between a folded and an extended position are discernible. Hence, E3 does not disclose carriers being movably connected to tiltable side parts so as to permit the rotationally translational movement as defined in claim 1 of the patent as granted. It follows that the subject-matter of claim 1 is clearly novel over E3.

Under these circumstances the novelty objection based on E3 does not prejudice the maintenance of the patent as granted. There is no need for the Board to consider whether the brochure was made available to the public before the priority date of the patent or whether it should have been admitted into the proceedings.

3.4 E4 and E5, which were not considered by the Opposition Division in the impugned decision, concern foldable ramps of the kind in the invention in this case. However, neither E4 nor E5 discloses carriers being movably connected to tiltable side parts so as to permit the rotationally translational movement as defined in claim 1 of the patent as granted. It follows that the claimed subject-matter is novel over each of E4 and E5.

3.5 In conclusion, the ground for opposition of lack of novelty (Article 54(1) and (2) EPC) under Article 100(a) EPC does not prejudice the maintenance of the patent as granted.

#### 4. Inventive step

The Opposition Division was not convinced by the (former) opponent's objections concerning a lack of inventive step, in particular because the features "'tiltable side parts being pivotally attached to the lower edge of the floor well' together with a 'change of position of the ramp in respect of the tiltable side parts'" (point 28.2 of the reasons) in claim 1 of the patent as granted were not disclosed by any of the prior art relied on. The Board has no reason to question this finding, in particular in the absence of any arguments disputing it in the appeal proceedings.

The Board also notes that none of the prior art relied on by the (former) opponent in relation to novelty discloses carriers being movably connected to tiltable side parts so as to permit the rotationally translational movement as defined in claim 1 of the patent as granted.

Because of this feature, the centre of gravity of the ramp can be lowered and shifted during the movement between the passive position and the transport position (paragraph [0011] of the patent). This solves the objective technical problem of improving the handling of the foldable ramp between the two positions.

Since there is no teaching in the available prior art to provide the distinguishing feature in order to solve the objective technical problem, the subject-matter of claim 1 of the patent as granted also involves an inventive step.

It follows that the ground for opposition of lack of inventive step (Article 56 EPC) under Article 100(a) EPC does not prejudice the maintenance of the patent as granted.

5. Hence, the patent is to be maintained as granted.
6. Request for reimbursement of the appeal fee

The appellant argued that the Opposition Division had committed substantial procedural violations in not admitting auxiliary request 1 and refusing auxiliary request 4. Hence, the appeal fee should be reimbursed.

Under Rule 103(1)(a) EPC, the appeal fee is to be reimbursed in full if the Board deems the appeal to be allowable and if such reimbursement is equitable by reason of a substantial procedural violation.

As regards auxiliary request 1, which was first filed at the oral proceedings before the Opposition Division, the Board notes that the Opposition Division justified its decision not to admit the request in that the

subject-matter of claim 1 was "clearly not novel" (paragraph spanning pages 15 and 16 of the impugned decision). A discretionary decision made by the Opposition Division under Rule 116 EPC about the admittance of a late-filed request can be based on this kind of *prima facie* assessment of the request, irrespective of whether the proprietor might have had good reason for filing a further request during the oral proceedings. For a request filed at this stage to be admitted, it should *prima facie* overcome all the outstanding objections. Auxiliary request 5, which was also filed during the oral proceedings, was held admissible for this reason. It follows that not admitting auxiliary request 1 was not a procedural violation.

As regards the refusal of auxiliary request 4, the appellant argued that the Opposition Division did not apply the regulations of the EPC correctly and that the refusal was based upon "a wrong interpretation of the European Patent Convention, in disregard of clear case law from the Boards of Appeal as well as the Enlarged Board of Appeal and as listed in the Guidelines". At most, however, this would be a matter of substance, i.e. at most an error of judgement, but not a procedural violation.

In conclusion, the Opposition Division did not commit any substantial procedural violation that would justify reimbursement of the appeal fee.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated