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Datasheet for the decision
of 19 May 2020

Case Number:	T 0411/17 - 3.5.03
Application Number:	06120253.7
Publication Number:	1858292
IPC:	H04R25/00
Language of the proceedings:	EN

Title of invention:
Hearing device and method of operating a hearing device

Patent Proprietor:
Sonova AG

Opponent:
Siemens Medical Instruments Pte. Ltd.

Headword:
Automatic adaptation to acoustic environments in a hearing aid/
SONOVA

Relevant legal provisions:
EPC Art. 54(2), 54(3), 111(1)
EPC R. 103(1)(a)
RPBA Art. 12(4)
RPBA 2020 Art. 11, 12(2)

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Keyword:
Novelty - main and first auxiliary requests (no) - second
auxiliary request (yes)
Admission of second auxiliary request not admitted by the
opposition division - (yes): sufficient time for the opponent
to deal with the request
Remittal to opposition division - (yes): "special
reasons" (ruling on inventive step for the first time on
appeal would constitute an undue burden)
Reimbursement of appeal fee - (no)

Decisions cited:
G 0007/93

Case Number: **T 0411/17 - 3.5.03**

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 19 May 2020

Appellant:	Sonova AG
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 22 December 2016 revoking European patent No. 1858292 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chair	K. Bengi-Akyürek
Members:	K. Peirs
	J. Geschwind

Summary of Facts and Submissions

I.   This appeal of the patent proprietor is against the
        decision of the opposition division to revoke the
        opposed patent. The grounds for opposition invoked by
        the opponent were those pursuant to Articles 100(a) and
        100(b) EPC.

II.   The following prior-art documents were *inter alia* cited
        in the opposition proceedings:

        D1:   EP 1 404 152 A2;
        D3:   EP 1 841 286 A2;
        D9:   P. Nordqvist and A. Leijon: "Hearing-aid
                   automatic gain control adapting to two sound
                   sources in the environment, using three time
                   constants", J. Acoust. Soc. Am. 116 (5),
                   November 2004.

III.   In the impugned decision, the opposition division held
        that the independent claims of the patent as granted
        (main request) and the patent as amended (first
        auxiliary request) were sufficiently disclosed
        (Article 100(b) EPC) but that claim 1 of the main
        request was not novel over **D3** (Article 100(a) EPC in
        conjunction with Article 54(3) EPC) and that amended
        claim 1 of the first auxiliary request was not novel
        over **D9** (Articles 100(a) and 54(2) EPC). Furthermore,
        the set of claims of a second auxiliary request was not
        admitted into the proceedings under Rule 116(2) EPC.

IV.   Oral proceedings before the board were held on 19 May
        2020.

- The <u>appellant</u> requests that the decision under appeal be set aside and, as a **main request**, that the opposition be rejected, or, in the alternative, that the patent be maintained in amended form according to the claims of one of
  - a **first auxiliary request** filed with the statement of grounds of appeal (identical to the first auxiliary request underlying the decision under appeal)
  - a **second auxiliary request** filed as "sixth auxiliary request" with the statement of grounds of appeal (identical to the second auxiliary request underlying the decision under appeal)
  - a **third to sixth auxiliary request** filed as second to fifth auxiliary requests with the statement of grounds of appeal
  - a **seventh auxiliary request** filed with the statement of grounds of appeal.
- It further requests that the appeal fee be reimbursed in view of an alleged substantial procedural violation by the opposition division.

- The <u>respondent</u> requests that the appeal be dismissed or, in the alternative, that the case be remitted to the opposition division for further prosecution.

At the end of the oral proceedings, the board's decision was announced.

V.   Claim 1 of the **main request** (patent as granted) reads as follows:

"Method for operating a hearing device (1) having an adjustable transfer function (G) comprising M sub-functions (g1...gM), wherein M is an integer with

M ≥ 1, and wherein said transfer function (G) describes how input audio signals (S1) generated by an input transducer unit (2) of said hearing device (1) relate to output audio signals (S2) to be fed to an output transducer unit (5) of said hearing device (1), said method comprising the steps of

- deriving said input audio signals (S1) from a current acoustic environment; and
for each of said M sub-functions (g1,...,gM):
- deriving, on the basis of said input audio signals (S1) and for each class of N classes (C1,...,CN) each of which describes a predetermined acoustic environment, a class similarity factor (p1;...;pN) indicative of the similarity of said current acoustic environment with the predetermined acoustic environment described by the respective class, wherein N is an integer with N ≥ 2;
- deriving from N predetermined base parameter sets (B1/1,...,B1/N;...;BM/1,...,BM/N) assigned to the respective sub-function (g1;...;gM) and in dependence of said class similarity factors (p1,...,pN) an activity parameter set (a1;...;aM) for the respective sub-function (g1;...;gM), wherein each of said N base parameter sets (B1/1,...,B1/N;...;BM/1,...,BM/N) assigned to the respective sub-function (g1;...;gM) is assigned to a different class (C1;...;CN) of said N classes (C1,...,CN);
- adjusting the respective sub-function (g1;...;gM) by means of said activity parameter set (a1;...;aM); wherein, for at least one of said M sub-functions (g1,...,gM), a time-averaged activity parameter set (a1*;...;aM*) is used for adjusting the respective at least one of said M sub-functions (g1;...;gM)."

VI.   Claim 1 of the **first auxiliary request** comprises all
        the features of claim 1 of the main request and adds
        the following clause at the end of the third deriving
        step:

        "wherein the activity parameter set is obtained as a
        mixture of base parameter sets, the mixture depending
        on the class similarity factors of the base parameter
        sets".

VII.   Claim 1 of the **second auxiliary request** comprises all
        the features of claim 1 of the first auxiliary request
        and adds the following clause at the end:

        "the method further comprising the steps of
          - choosing an averaging time (τ) for said
        time-averaging in dependence of past changes in the
        respective activity parameter set (a1;...;aM);
          - decreasing said averaging time (τ) when said past
        changes in the respective activity parameter
        set (a1;...;aM) decrease; and
          - increasing said averaging time (τ) when said past
        changes in the respective activity parameter set
        (a1;...;aM) increase".

Reasons for the Decision

1.   *Patent in suit*

        The patent in suit aims at improving the automatic
        adaptation of a hearing aid to a changing acoustic
        environment. The hearing aid has an adjustable transfer
        function comprising one or more sub-functions to
        describe how audio signals received at the hearing
        aid's input relate to audio signals provided at the

hearing aid's output. These sub-functions correspond to
programs or algorithms that the hearing aid has at its
disposal to cope with different acoustic environments.
Each algorithm involves parameters to optimise its
performance in view of the specifics of the acoustic
environment prevailing at a particular time.

During the fitting of the hearing aid, a set of *typical*
listening situations, i.e. a set of predetermined
acoustic environments, may be considered and the
hearing aid may be programmed with "predetermined base
parameter sets" that define (the values of) the
parameters required for the hearing aid's algorithms to
cope best with each of those typical listening
situations. The hearing aid is able to discriminate
between listening situations by means of a classifier
that analyses the current acoustic environment and
determines how it relates to the predetermined acoustic
environments.

For this purpose, the classifier regards the
predetermined acoustic environments as "classes" and
calculates, for each of those classes, a degree of
similarity, i.e. a "class similarity factor", with the
current acoustic environment. The class similarity
factors are used to derive "activity parameter sets"
from the predetermined base parameter sets, e.g. by
weighting each base parameter set with a respective
class weight factor derived from the corresponding
class similarity factor. Such an activity parameter set
prescribes, for its associated algorithm, the proper
value of the parameters which the algorithm requires to
accommodate the current acoustic environment. As a
result, the hearing aid's transfer function can be
adjusted to adapt to the current acoustic environment

in an optimised way.

2.   *Main request: claim 1 as granted – novelty*
        (Article 54(3) EPC)

2.1   Using the terminology of present claim 1, document **D3**
        discloses
             a) a method for operating a hearing device
                (paragraph [0001]) having an adjustable transfer
                function *(paragraphs [0001] and [0030]:*
                "Signalverarbeitung"; paragraphs [0002] and
                [0029]: "Weiterverarbeitung") comprising
                M sub-functions *("Hörprogramm[en]")*, wherein M is
                an integer with M ≥ 1 *(paragraphs [0005], [0006]*
                and [0013]), and wherein said transfer function
                describes how input audio signals generated by an
                input transducer unit of said hearing device
                relate to output audio signals to be fed to an
                output transducer unit of said hearing device
                (paragraphs [0002], [0003], [0005], [0006] and
                [0013]),

                said method comprising the steps of

             b) deriving said input audio signals from a current
                acoustic environment *(paragraph [0002];*
                paragraph [0030]: "augenblicklichen
                Hörsituation");

             c) for each of said M sub-functions *(paragraph[0003],*
                [0013] to [0015] and [0030]: the scheme of D3 is
                to be applied to all occurring listening
                situations):

             d) deriving, on the basis of said input audio signals
                and for each class of N classes each of which

describes a predetermined acoustic environment
*(paragraph [0003]: "Analyse des akustischen
Eingangssignals zur Bestimmung der Hörsituation";
paragraph [0030]: "infolge einer Analyse der
augenblicklichen Hörsituation"; given that,
according to paragraph [0030], the parameters of
the signal processing, and therefore the
corresponding best fitting hearing-aid program,
are set automatically based on an analysis of the
momentary listening situation, each hearing-aid
program must be mapped to a particular listening
situation for which it performs best)*, a class
similarity factor indicative of the similarity of
said current acoustic environment with the
predetermined acoustic environment described by
the respective class *(implicitly disclosed,
otherwise an automatic setting of the hearing-aid
parameters for the current listening situation as
prescribed in paragraph [0030] would not be
possible)*, wherein N is an integer with N ≥ 2
*(paragraph [0003]: three common examples of
typical listening situations are given)*;

e) deriving from N predetermined base parameter sets
assigned to the respective sub-function
*(paragraph [0013]: each hearing-aid program is
characterised by certain values for a set or
subset of all possible parameters that may be
relevant for a particular typical listening
situation; by definition, the base parameter sets
of the claim can each be chosen to encompass all
those possible parameters)* and in dependence of
said class similarity factors *(paragraph [0030]:
"infolge einer Analyse der augenblicklichen
Hörsituation")* an activity parameter set
(paragraph [0030]: "Dabei können die

Signalverarbeitung betreffende Parameter auch
automatisch durch die Steuereinheit 7 **ermittelt**
und eingestellt werden, z.B. infolge einer Analyse
der augenblicklichen Hörsituation" [emphasis by
the board]: that the parameters can be **determined**
based on the current listening situation directly
and unambiguously means that they are derived,
e.g. by means of an interpolation between two or
more most relevant classes of typical hearing aid
situations, starting from relevant base parameter
sets corresponding to those classes that best fit
the current listening situation) for the
respective sub-function,
wherein each of said N base parameter sets
assigned to the respective sub-function is
assigned to a different class of said N classes
(implicitly disclosed: a class corresponding to a
typical listening situation will have attributed
to it a hearing-aid program with a parameter set
that best fits that class; a current listening
situation may then be mapped directly onto one of
those classes or to more than one via
interpolation);

f) adjusting the respective sub-function by means of
said activity parameter set *(paragraph [0030]:*
"ermittelt und **eingestellt**" *[emphasis by the*
board]); wherein for at least one of said M
sub-functions *(paragraphs [0031] to [0033]: the*
"at least one" of the claim can be any of those
hearing-aid programs which have the setting of the
amplification, i.e. volume control, as a mandatory
parameter), a time-averaged activity parameter set
(paragraph [0033]: "Mittelungsalgorithmus"; once
one parameter of the set is time-averaged, the
entire parameter set can be considered as a

time-averaged set) is used for adjusting the
respective at least one of said M sub-functions.

2.2   The appellant argued in view of Figure 2 of D3 that D3
did not anticipate feature f) of claim 1 because the
averaging algorithm "Mittelungsalgorithmus" according
to paragraph [0033] of D3 only applied to the starting
values "Startwerte" and not to the activity parameter
set. By contrast, the manual or automatic change of
parameters such as the volume control as mentioned in
paragraphs [0018] and [0030] was not time-averaged.

The board agrees with the appellant that the starting
values in D3 may indeed not be active immediately after
their determination and that they are stored in the
memory for use when their associated hearing program is
activated again. The board also accepts that the start
values may be subsequently changed during operation,
e.g. by the user manually adjusting the volume, as
apparent from paragraphs [0018] and [0030] of D3.

However, as pointed out by the respondent, the wording
of feature f) is broader than what is suggested by the
appellant: it does not specify *when* the time averaging
takes place and, in particular, it does not specify
that the time-averaged activity parameter set is used
instantaneously after its determination. As such, it
encompasses a dynamic change of starting values during
operation as well as a delayed use of updated starting
values as determined via a time-averaging procedure.
The claim allows, in particular, for a situation where
the listening situation changes immediately after the
time-averaging of the activity parameter set has been
determined for a specific listening situation and where
the result of the time-averaging is only used in the
next instance at which this specific listening

situation re-occurs. Moreover, as brought forward by
the respondent, whether a particular hearing program is
activated in D3 depends on the currently prevailing
listening situation and on the classifier assessing
that situation. Therefore, whenever the classifier in
D3 concludes that a particular listening situation
occurs, the corresponding hearing program is loaded
into the processor with the starting value as
determined via the time-averaging algorithm of
paragraph [0033] of D3. Given that time averaging
requires *by definition* a certain time span, the time
averaging of paragraph [0033] of D3 must take place
over a time period covering at least some of the
previous occurrences when that particular listening
situation prevailed. Consequently, the time-averaged
starting value of paragraph [0033] anticipates
feature f) of claim 1.

2.3   The appellant emphasised that D3 did not disclose a
        superposition ("Überlagerung") of at least two hearing
        programs in dependence of the current listening
        situation but, at most, taught an automatic selection
        of the best-fitting hearing program.

        The board holds that claim 1 does not require such a
        superposition either. It merely requires to *derive* an
        activity parameter set from the predetermined base
        parameter sets in dependence of a class similarity
        factor. Consequently, the wording of claim 1 is broad
        also in this respect and a mere (automatic) selection
        of the best-fitting hearing program and its parameter
        set from the list of predetermined base parameter sets
        is, in itself, encompassed by this wording. Moreover,
        paragraph [0030] of D3 teaches to determine the
        parameters ("die Signalverarbeitung betreffende
        Parameter") and not, as alleged by the appellant, a

selection of a *program*. Furthermore, in view of the
wording "ermittelt und eingestellt" of paragraph [0030]
of D3 as highlighted above, the disclosure of D3 goes
beyond a mere selection and rather derives the activity
parameter set from the predetermined base parameter set
based on arithmetic operations.

2.4   The appellant argued further that, in view of the fact
          that claim 1 requires at least <u>two</u> classes but only at
          least <u>one</u> sub-function, the hearing programs of D3
          constituted the N *classes* rather than the *sub-functions*
          of the claim.

          In that regard, the board notes that the skilled reader
          would, however, readily understand from the patent in
          suit, in particular from granted claim 1, that the
          number of classes and sub-functions in the claim is not
          indicative of any difference between them: one
          sub-function can correspond to multiple classes (in the
          sense of listening situations), namely by using
          different parameter sets. Moreover, as apparent from
          paragraphs [0026], [0030], [0050] and [0051] of the
          patent in suit, the classes of the claim clearly
          correspond to the "predetermined acoustic environments"
          and not to "hearing aid programs". Consequently, the
          hearing programs of D3 correspond to the "sub-
          functions" and the listening situations of D3
          correspond to the "classes" of the claim. Moreover,
          these classes must correspond to the listening
          situations as referred to by the term
          "Hörsituation[en]" in paragraph [0003] and the term
          "Hörumgebungen" of paragraphs [0011], [0015] and [0030]
          of D3.

          By contrast, paragraph [0035] of the patent in suit
          describes the sub-functions as "meaningfully combined

parts" of the hearing aid's transfer function through which many types of signal processing could be realised. This would mean, for a skilled reader, that the sub-functions are to be seen as algorithms that provide for a specific function within the signal processing scheme of the hearing aid. Furthermore, as set out in paragraphs [0035], [0037] and [0040] of the patent in suit, the sub-functions are controlled by the activity parameter sets which are dynamically adapted to the current acoustic environment. This is equivalent to the automatic adaptation by processor 7, induced by an analysis of the current acoustic environment, of the parameters relevant to the signal processing in processor 2 of paragraph [0030] and the hearing program of paragraph [0032] of D3. Therefore, the signal proces sing scheme according to paragraph [0030] of D3, as implemented via the hearing program of paragraph [0032] of D3, corresponds to the sub-functions of the claim and of the aforementioned paragraphs [0035], [0037] and [0040] of the patent in suit.

2.5   Hence, D3 discloses all the limiting features of claim 1 of the main request. Consequently, the subject-matter of present claim 1 is not new under Article 54(3) EPC.

3.   *First auxiliary request: claim 1 – novelty (Article 54(3) EPC)*

3.1   The **first auxiliary request** is identical to the first auxiliary request underlying the decision under appeal. Claim 1 of this request differs from the one of the main request essentially in that it further specifies that (board's underlining)

g) the activity parameter set is obtained as a
   <u>mixture</u> of base parameter sets, the mixture
   depending on the <u>class similarity factors</u> of the
   base parameter sets.

3.2   The board notes that the expression "augenblickliche[n]
        Hörsituation" in paragraph [0030] of D3 refers to the
        current listening situation, which may differ from the
        set of *typical* listening situations, i.e. the "classes"
        of claim 1, that are stored in the hearing aid and that
        are referred to in e.g. paragraph [0003] of D3. When
        such a difference occurs, the skilled person knows that
        control unit 7 of paragraph [0030] is configured to
        choose one of two options: either (i) it selects that
        particular typical listening situation that best fits
        the current listening situation, which directly
        determines the parameter set to be used, or (ii) it
        makes an interpolation of the best-fitting typical
        listening situations and, correspondingly, an
        interpolation of the parameter sets attributed to those
        typical listening situations. The former approach
        requires less calculations whereas the latter approach
        normally allows for a better reproduction quality.

        D3 does not explicitly state which approach is
        followed. However, given that there are only two
        approaches to choose from, there is a direct and
        unambiguous indication by the expressions
        "augenblicklichen Hörsituation" and "ermittelt" in
        paragraph [0030] to determine the currently active
        settings, i.e. the activity parameter set, as a mixture
        of base parameter sets. The board notes again the use
        of the words "ermittelt[en]" and "Ermittlung" in
        paragraphs [0014] to [0016] and [0032] of D3, which
        suggest that these terms are used in D3 within the
        context of calculations (see also the word "Berechnung"

in paragraph [0032]).

Given that only the latter of the two approaches
mentioned above requires a "calculation" of the
parameter set (the former one deriving the parameter
set directly from the selected typical listening
situation), D3 in fact implies an application of the
latter approach.

3.3   The appellant argued that paragraphs [0014] to [0016]
        and [0032] of D3 could not be used to interpret
        paragraph [0030], because the former determined the
        start value of the hearing aid's parameter whereas the
        latter concerned the change of the parameter value
        during the hearing aid's operation.

        However, the board's reference to paragraphs [0014] to
        [0016] and [0032] of D3 in point 3.2 above only aims at
        how the expressions "ermittelt[en]" and "Ermittlung"
        used in paragraph [0030] are to be construed. For this
        purpose, it is immaterial that paragraphs [0014] to
        [0016] and [0032] and paragraph [0030] concern a
        possibly different value of the parameters. In
        addition, the board's argumentation that the
        interpolation of the parameter sets constitutes a
        direct choice for the skilled person also holds without
        the reference to these paragraphs. It follows from the
        above that D3 likewise anticipates feature g) of
        present claim 1.

3.4   Hence, D3 discloses all the limiting features of
        claim 1 of the first auxiliary request. Consequently,
        the subject-matter of present claim 1 is not new either
        (Article 54(3) EPC).

4.   *Second auxiliary request*

4.1   Claim 1 of the **second auxiliary request** differs from
        that of the first auxiliary request in that it
        additionally includes the following methods steps
        (board's underlining):

        h) choosing an <u>averaging time</u> for said time-averaging
           in dependence of <u>past changes</u> in the respective
           activity parameter set;
        i) <u>decreasing</u> said averaging time when said past
           changes in the respective activity parameter set
           decrease;
        j) <u>increasing</u> said averaging time when said past
           changes in the respective activity parameter set
           increase.

4.2   Admission into the appeal proceedings (Article 12(4)
        RPBA 2007)

4.2.1   The second auxiliary request is identical to the second
        auxiliary request underlying the decision under appeal.
        The opposition division did not admit that request into
        the opposition proceedings on the grounds that it was
        late-filed (filed during the first-instance oral
        proceedings) and that claim 1 of the request was not
        based on the claims as granted.

4.2.2   Article 12(4) RPBA 2007 conveys the board the
        discretionary power to hold inadmissible facts,
        evidence or requests which were not admitted in the
        first-instance proceedings.

4.2.3   The respondent requested to confirm the opposition
        division's assessment and not to admit the second
        auxiliary request into the appeal proceedings. The

respondent emphasised that the patent proprietor could
have foreseen from the annex to the summons of the
opposition division that the opposition division would
raise an objection under Article 54(3) EPC against the
main request in view of D3 and an objection under
Article 54(2) EPC against the auxiliary request in view
of D9 as set out in the decision under appeal. In the
respondent's view, the patent proprietor deliberately
chose not to file the second auxiliary request before
expiry of the time limit pursuant to Rule 116(2) EPC.

4.2.4   The board holds that the opposition division had a
         discretion not to admit the second auxiliary request
         into the proceedings. Moreover, a board may overrule
         the way in which the department of first instance had
         exercised its discretion if it came to the conclusion
         either that it had not done so in accordance with the
         proper principles or had done so in an unreasonable
         way, and had thus exceeded the proper limits of its
         discretion. It is apparent from the file that the
         opposition division exercised its discretion not to
         admit the request into the proceedings on the grounds
         that, in view of feature g), claim 1 of the second
         auxiliary request did not find a correspondence in a
         dependent claim of the patent as granted. It considered
         the subject-matter of the amendments to be technically
         complex, such that the parties could not be expected to
         deal with it at oral proceedings (see appealed
         decision, Reasons, point 3).

4.2.5   The board agrees with the appellant that feature g) had
         been introduced into the independent claims with the
         first auxiliary request filed with a telefax of
         25 September 2015, i.e. more than a year ahead of the
         oral proceedings of 30 November 2016 before the
         opposition division. It is also apparent to the board

that the subject-matter of claim 1 of the second
auxiliary request corresponds to a combination of
claims 1, 8 and 9 of the then first auxiliary request.
The board therefore considers that there was sufficient
time for the opponent to prepare for the subject-matter
of the second auxiliary request, the more so since the
opponent could have foreseen that auxiliary requests
were to follow given the preliminary opinion of the
opposition division as set out in the annex to its
summons to oral proceedings. The board notes also that,
apart from feature g), claim 1 of the second auxiliary
request corresponds to a combination of claims 1, 8 and
9 as granted. At no point in time did the opponent
raise objections against the subject-matter of such a
combination, although this could have been done as
early as with the notice of opposition.

4.2.6   In view of the above, the board, exercising its own
        discretion under Article 12(4) RPBA 2007, decided to
        admit the second auxiliary request into the appeal
        proceedings.

4.3   Novelty (Article 54 EPC)

4.3.1   Claim 1 of the second auxiliary request is novel over
        D3 in view of the wording of feature g). D3 only shows
        a time averaging by the "Mittelungsalgorithmus"
        according to paragraph [0033], but the specifics of
        feature g) are not disclosed therein.

4.3.2   Present claim 1 is also novel over document **D9** and
        document **D1** in view of at least feature g).

4.3.3   Novelty of present claim 1 with respect to D3, D9 and
        D1 was not contested by the respondent at the oral

proceedings before the board.

4.3.4   In view of the above, novelty of claim 1 of the second
        auxiliary request is acknowledged (Article 54(2) and
        54(3) EPC).

4.4   In sum, the present second auxiliary request is
        admitted into the appeal proceedings and is held to be
        allowable under Article 54 EPC.

5.   *Remittal of the case to the opposition division*
        (Article 111(1) EPC; Article 11 RPBA 2020)

5.1   Pursuant to Article 11 RPBA 2020, the board shall not
        remit a case to the department whose decision was
        appealed for further prosecution, unless special
        reasons present themselves for doing so.

5.2   The opposition division had to decide only on the
        matters of sufficiency of disclosure (Article 83 EPC)
        and novelty (Article 54(2) and (3) EPC) as regards the
        present main request and first auxiliary request. As a
        consequence, an assessment of inventive step in view of
        the available prior-art documents was not necessary.

        Given that several lines of argument concerning lack of
        inventive step were submitted by the opponent in the
        notice of opposition, a ruling on those attacks by the
        board for the very first time in these appeal
        proceedings could not be given without an undue burden
        and would run contrary to the very purpose of a
        judicial review within the meaning of Article 12(2)
        RPBA 2020. Moreover, this course of action was
        explicitly consented to by both parties at the oral
        proceedings before the board. The board considers that
        the above observations represent "special reasons"

within the meaning of Article 11 RPBA 2020 for remittal
of the case.

5.3   Consequently, the board has decided to set the decision
        under appeal aside and to remit the case to the
        opposition division for further prosecution, in
        particular for the assessment of inventive step, on the
        basis of **claims 1 to 14 of the second auxiliary request**
        on file, i.e. of the previous "sixth auxiliary request"
        filed with the letter dated 27 April 2017.

6.   *Substantial procedural violation - request for*
        reimbursement of the appeal fee

6.1   According to Rule 103(1)(a) EPC, the appeal fee shall
        only be reimbursed in the event that the board deems
        the appeal to be allowable.

6.2   Since the decision under appeal is to be set aside, the
        appeal is indeed deemed to be allowable. The board,
        however, considers that no substantial procedural
        violation occurred in the opposition proceedings. The
        opposition division applied the proper principles to
        exercise its discretion not to admit the second
        auxiliary request into the proceedings on the basis of
        the correct facts (i.e. late-filed request; including
        features from the description) and in a reasonable way
        (i.e. by giving conclusive grounds for their
        discretionary decision). This does not constitute a
        procedural violation, let alone a substantial one,
        according to the established jurisprudence of the
        Boards of Appeal. The fact that the board used its
        discretion in a different way does not militate against
        the above conclusion (see e.g. G 7/93, Reasons,
        point 2.6).

6.3   Therefore, the board sees no reason to order a
        reimbursement of the appeal fee.

Order

For these reasons it is decided that:

1.   The decision under appeal is set aside.

2.   The case is remitted to the opposition division for
        further prosecution.

3.   The request for reimbursement of the appeal fee is
        refused.

The Registrar: The Chair:

D. Hampe   K. Bengi-Akyürek

Decision electronically authenticated