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**Datasheet for the decision
of 27 August 2021**

Case Number: T 1892/17 - 3.5.02

Application Number: 12715903.6

Publication Number: 2695270

IPC: H02J1/14, H02J3/28, H02J13/00

Language of the proceedings: EN

Title of invention:
Optimized load management

Patent Proprietor:
SMA Solar Technology AG

Opponent:
Fronius International GmbH

Relevant legal provisions:
EPC Art. 100(a), 56
RPBA 2020 Art. 13(2)

Keyword:
Main request - Inventive step - (yes)
Amendment of appeal case after summons - exceptional
circumstances (no)

Decisions cited:

G 0001/19, T 0641/00



Beschwerdekammern

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Case Number: T 1892/17 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 27 August 2021

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 June 2017
revoking European patent No. 2695270 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman R. Lord
Members: C.D. Vassoille
A. Bacchin

Summary of Facts and Submissions

- I. This is an appeal of the patent proprietor against the decision of the opposition division to revoke European patent no. 2 695 270.
- II. In the decision under appeal, the opposition division came to the conclusion *inter alia* that the subject-matter of claim 1 of the patent as granted did not involve an inventive step (Articles 100(a) and 56 EPC).
- III. The following documents are relevant for the present decision:
- D1: DE 10 2008 037 575 A1
O1: US 2006/0276938 A1
O3: EP 0 161 447 A1
- IV. The parties were summoned to oral proceedings. In a communication under Article 15(1) RPBA 2020 annexed to the summons, the board set out their preliminary observations on the appeal, concluding *inter alia* that the subject-matter of claim 1 of the main request seemed to involve an inventive step in view of document D1.
- V. Oral proceedings before the board took place on 27 August 2021 in the presence of both parties.

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or, if this was not possible, that the patent be maintained in amended form according to one of auxiliary requests I

to IX, all filed with the statement setting out the grounds of appeal.

The respondent (opponent) requested that the appeal be dismissed.

VI. Claim 1 of the patent as granted reads as follows (feature numbering added in squared brackets):

"[1] A method of optimizing a chronological developing of consumption of electric power
[1.1] by a group of different consumers (2 to 7) with regard to a supply of electric power
[1.2] including electric power from at least one wind or solar power generator (8),
[1.3.1] - wherein a consumption of electric power by the individual consumer (2 to 7) is measured
[1.3.2] to determine characteristic time curves of the consumption of electric power by the individual consumers (2 to 7);
[1.4] - wherein a prognosis of a chronological developing of the supply of electric power from the at least one power generator (8) is made for a future period of time;
[1.5.1] - wherein a plan for apportioning electric power to the individual consumers (2 to 7) within the future period of time is
[1.5.2] made based on the characteristic time curves of the consumption of electric power by the individual consumers (2 to 7) and
[1.5.3] adapted to the prognosis; and
[1.6] - wherein electric power is apportioned to the individual consumers (2 to 7) according to the plan within the future period of time,
characterized in

[1.7] - **that** the consumption of electric power by the individual consumers (2 to 7) is measured at a sample rate of at least 0.1 Hz; and

[1.8] - **that** the electric power is apportioned according to the plan within the future period of time at a temporal resolution equal to at least 0.1 Hz."

Claims 2 to 7 are dependent on claim 1.

VII. Independent apparatus claim 8 of the patent as granted reads as follows:

"An apparatus for optimizing the chronological developing of consumption of electric power by a group of different consumers (2 to 7) with regard to a supply of electric power including electric power from at least one wind or solar power generator (8), the apparatus comprising:

- measurement devices for determining time curves of a consumption of electric power by the individual consumers (2 to 7); and
- a central controller (11) for apportioning electric power to the individual consumers, the central controller (11) being configured to
 - determine characteristic time curves of the consumption of electric power by the individual consumers,
 - make a prognosis of a chronological developing of the supply of electric power from the at least one power generator (8) for a future period of time,
 - make a plan for apportioning electric power to the individual consumers (2 to 7) within the future period of time based on the characteristic time curves of the consumption of electric power by the individual consumers (2 to 7) and adapted to the prognosis, and

- apportion electric power to the individual consumers (2 to 7) according to the plan within the future period of time,

characterized in

- **that** the measurement devices are configured to measure the consumption of electric power by the individual consumers (2 to 7) at a sample rate of at least 0.1 Hz, and
- **that** the central controller is configured to apportion electric power to the individual consumers (2 to 7) according to the plan at a temporal resolution equal to at least 0.1 Hz within the future period of time."

Claims 9 to 16 are dependent on claim 8.

In view of the board's decision on the main request, it is not necessary to reproduce the wording of the auxiliary requests at this point.

VIII. The arguments of the appellant as far as they are relevant for the present decision are as follows:

Each of features 1.3.2, 1.4 and 1.5.1 to 1.5.3 contributed to the technical character of the invention and were therefore to be taken into account in the assessment of inventive step.

Features 1.3.2 and 1.5.2 of claim 1 of the patent as granted were not disclosed by document D1. In particular, "characteristic time curves" could not be derived from paragraph [0008] of D1. More specifically, the formulation in this paragraph: "Energienutzung und/oder Energieverbrauch im System zu den Zeitpunkten T_1 - T_C ($C \in \mathbb{N}$; $C \geq 1$)" (emphasis added, English translation: "Energy use and/or energy consumption in

the system at times T_1-T_c ($C \in \mathbb{IN}; C \geq 1$)") did not imply that the energy consumption measured at a limited number of C points in time was apportioned to individual consumers. It also did not mean that the energy consumption at the C points in time was evaluated to determine one characteristic time curve of the consumption of electric power for each of the individual consumers. Rather, D1 disclosed the determination of the overall energy consumption in the system ("Gesamtenergieverbrauch"). Accordingly, feature 1.5.2 was not disclosed by D1 according to which a plan is made based on the characteristic time curves of the consumption of electric power by the individual consumers. This also applied in view of the disclosure in paragraphs [0027] and [0059] of D1.

The subject-matter of claim 1 of the patent as granted further differed from document D1 in features 1.7 and 1.8. Features 1.3.2, 1.5.2, 1.7 and 1.8 further provided a synergistic effect, which lay in a more accurate control of the individual consumers. Document D1 did not disclose a link between, on the one hand, smoothing the load curve of the local system due to the energy consumption in the local system, and on the other hand, any sample rate or temporal resolution of measuring the consumption of electric power by and apportioning electric power to individual consumers. Rather, document D1 was concerned with the optimisation of the energy consumption and smoothing of load curves in a local system. Nothing in D1 pointed towards the use of a higher sample rate or temporal resolution of 0.1 Hz for measuring and apportioning of electric power. To the contrary, D1 in figures 4 to 8 disclosed energy packages on a time scale having a length of 40 minutes and therefore significantly differed from the present invention.

The skilled person had no motivation to entirely change this teaching of D1. Furthermore, the skilled person who had consulted document O1 as highly pertinent prior art document relating to the control of energy consumption devices, would not have reduced the time increments according to figures 4 to 8 of D1 beyond 5 minutes (see paragraph [0113] of document O1).

The respondent's objection based on O1 as the closest prior art document was submitted too late in the appeal proceedings and should not be taken into account.

IX. The arguments of the respondent as far as they are relevant for the present decision are as follows:

None of features 1.3.2, 1.4 and 1.5.1 to 1.5.3 had a technical character, but instead constituted mere mental acts that were not to be taken into account in the assessment of inventive step. In particular, measurements in a 10 second interval could easily be recorded manually by a user and entered in a suitable table. The same applied to features 1.5.1 to 1.5.3. Moreover, feature 1.3.2, according to which a measurement of the consumption of electric power by the individual consumers was done to determine a characteristic time curve, left it open as to whether the characteristic time curve had in fact to be established or not, as it merely contained a desired way of how to process the measurements. Similarly, it was to be noted that feature 1.6 left it open as to whether an energy flow followed the apportionment of the energy or not. Features 1.3.2, 1.4 and 1.5.1 to 1.5.3 related to a mere simulation within the meaning of the decision G 1/19 of the Enlarged Board of Appeal

and thus were not to be taken into account in the assessment of inventive step.

Since the appellant had agreed to the preamble of claim 1 being delimited against document D1 during the examination proceedings, it was clear that features 1.1 to 1.6 were disclosed by document D1.

Features 1.3.1 and 1.3.2 as well as feature 1.5.2 were disclosed by document D1, see in particular paragraph [0007], third indent, paragraph [0010], first indent, paragraph [0008], point b), paragraph [0012], paragraph [0027], third indent and paragraph [0059] of D1. It was particularly clear from paragraph [0027], fifth indent that the switching on and off of the consumers required a measurement of the consumption of electric power of the individual consumers. D1 thus disclosed more than just a consideration of the total energy consumption in the system.

The only distinguishing features between the subject-matter of claim 1 and document D1 were thus features 1.7 and 1.8, referring to a sampling frequency of 0.1 Hz and corresponding temporal resolution equal to at least 0.1 Hz, respectively. These features were however obvious to the person skilled in the art, in particular in view of document O3.

Even if features 1.3.2 and 1.5.2 were considered not to be disclosed by D1, it was at least obvious to the skilled person to measure the power consumption of the individual consumers and to provide the planning for a future apportionment of electric power in a suitable time scale.

In order to increase the stability of an electrical power system and at least to reduce possible oscillation processes in the system, the skilled person would obviously envisage an increased accuracy of the power consumption measurements as well as a more accurate planning of power apportionment. Especially in view of the fact that a characteristic power consumption and planning could be realised by a user purely mentally and without any further technical means, a high accuracy and corresponding fine-grained time scale was an obvious technical implementation in order to achieve this objective.

Reference was made in particular to document O3 in figure 2 and page 6, lines 21 to 24, which disclosed sample rates of at least 0.1 Hz in the sense of features 1.7 and 1.8.

As regards a lack of inventive step in view of document O1 as the closest prior art document, this objection should be taken into account in the appeal procedure. It was the appellant who had introduced the objection based on document O1 into the proceedings themselves, and the respondent was therefore entitled to adopt this objection in the appeal procedure.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - Inventive step (Articles 100(a) and 56 EPC)*
 - 2.1 *Technicality*
 - 2.1.1 All features of claim 1 of the patent as granted are to be taken into account in the assessment of inventive step.
 - 2.1.2 The method of optimising a chronological developing of consumption of electric power according to claim 1 *inter alia* comprises measuring the consumption of electric power of the individual consumers (feature 1.3.1) as well as apportioning of the electric power to the individual consumers (feature 1.6). These features thus imply the use of corresponding technical means in a physical entity, making the claimed method eligible to be patented under Article 52(2) EPC.
 - 2.1.3 However, the respondent argued that features 1.3.2, 1.4 and 1.5.1 to 1.5.3 do not have a technical character, but rather relate to mere mental acts and therefore are not to be taken into account in the assessment of inventive step.
 - 2.1.4 The board recognises that method steps 1.3.2, 1.4 and 1.5.1 to 1.5.3 of claim 1, relating to determining characteristic time curves, making a prognosis for a future time period, making a plan for apportioning of electric power based on the characteristic time curves

and adapting it to the prognosis, when considered in isolation, only involve data processing and simulation aspects. However it is a general principle that the question whether a feature contributes to the technical character of the claimed subject-matter is to be assessed in view of the whole scope of the claim.

The claimed invention does not refer to a simulation as such. The data processing or simulation is rather defined in claim 1 as being based on (real) measurements of consumed electric power in a technical system, resulting in a plan and a prognosis, which does not produce a purely virtual effect. Rather, the plan made on the basis of the characteristic time curves and thus, on the basis of the measured consumed electric power, is in fact defined in claim 1 as being used for a (real) apportionment of the electric power according to this plan within the future period of time at a temporal resolution equal to at least 0.1 Hz (feature 1.8). Consequently, claim 1 is clearly limited to a technical teaching, involving the specific technical use of the calculated characteristic time curves, plan and prognosis. Features 1.3.2, 1.4 and 1.5.1 to 1.5.3 in particular define a way of processing the measured consumed electric power such as to achieve an appropriate apportionment of electric power to individual consumers, and thus contribute to a specific technical effect. Thus, irrespective of whether features 1.3.2, 1.4 and 1.5.1 to 1.5.3 are *per se* considered to be technical or non-technical in nature, in the overall context of claim 1, they in any case provide a technical contribution to the invention, having technical character as a whole, over the prior art, and are consequently to be taken into account in the assessment of inventive step (see also the findings in T 0641/00 (COMVIK), Headnote I.).

2.1.5 For the sake of completeness, the board observes that it does not understand the decision G 1/19, cited by the respondent, to mean that any feature in a claim related to a simulation, if considered in isolation, is in principle not to be taken into account in the assessment of inventive step, and the respondent has not submitted anything further in this respect.

2.1.6 The board has therefore come to the conclusion that features 1.3.2, 1.4 and 1.5.1 to 1.5.3 are to be taken into account in the assessment of inventive step.

2.2 *Closest prior art document D1*

2.2.1 The appellant did not contest that document D1 could be considered as the closest prior art document in the assessment of inventive step of the subject-matter of claim 1 of the patent as granted.

2.3 *Distinguishing features over the closest prior art document D1*

2.3.1 Furthermore, it was not in dispute that the subject-matter of claim 1 of the patent as granted differs from document D1 in that it did not disclose the sample rate and temporal resolution according to features 1.7 and 1.8 of claim 1.

2.3.2 The board agrees with the appellant that, in addition, document D1 does not disclose the determination of characteristic time curves of the consumption of electric power by the individual consumers (feature 1.3.2) and making a plan for apportioning electric power on the basis of these characteristic time curves

of the consumption of electric power by the individual consumers (feature 1.5.2).

2.3.3 The respondent referred to several passages in the description of document D1, in particular paragraphs [0007], [0009], [0010], [0012], [0027], [0028], [0059] and [0060], while substantially arguing that the person skilled in the art would understand from these passages that characteristic time curves of the consumption of electric power by the individual consumers must necessarily be determined in order to regulate the energy flow to the individual consumers (see in particular paragraph [0027], fifth indent).

2.3.4 The board notes that paragraph [0059] as well as other passages in D1 may indeed refer to the use of a history of consumed power. It is also true that D1 in paragraph [0027], fifth indent, discloses switching on or off of individual power consumers, and that paragraph [0012] discloses recognising energy use habits and a prognosis for future energy usage. However, none of these passages, either explicitly or implicitly, discloses directly and unambiguously the determination of characteristic time curves of the consumption of energy of individual consumers and making a plan for apportioning of electric power based on these curves.

To the contrary, the board agrees with the appellant that document D1 is primarily concerned with the determination and smoothing of the overall power consumption (see for example paragraph [0010], first indent: "Gesamtenergieverbrauch", paragraph [0009]: "...Lastkurven beim Energieverbrauch optimal zu glätten..."). The board is thus convinced that the skilled person would understand the respective passages on the determination of the consumption of electric

power of the individual consumers in the context of the determination and smoothing of the overall power consumption. This is also supported by the fact that, as the appellant has correctly submitted, the teaching of document D1 centres on the use of mobile energy sources to smooth the overall load curve. For this purpose, the determination of characteristic time curves of the consumption of electric power of individual consumers and the provision of a plan for apportioning electric power to the individual consumers based on characteristic time curves is neither provided for nor required in the overall teaching of document D1. The skilled person would therefore not read these features into document D1.

- 2.3.5 Furthermore, the board cannot accept the respondent's argument that the switching on and off of individual consumers, as disclosed in paragraph [0027], fifth indent, necessarily requires the determination of characteristic time curves of individual consumers as defined in feature 1.3.2. As the appellant has correctly pointed out, the passage in question generally refers to a regulation of an energy flow, in particular by switching on and off individual consumers and it does not provide any detail on either the type of control structure or on the controlled variable such as the overall energy flow or the energy flow to the individual consumers. Therefore, it cannot be derived directly and unambiguously from this paragraph that characteristic time curves of the consumption of electric power of individual consumers are determined and a plan for the apportioning of electric power to the individual consumers is provided on the basis of these characteristic time curves.

2.3.6 Furthermore, the board is not convinced by the respondent's argument, according to which feature 1.3.2 represents a non-restrictive statement of purpose and had thus to be considered as an optional feature in the context of claim 1. The board rather considers feature 1.3.2 to limit claim 1 in the sense that the measured electrical power consumed by the individual consumers (feature 1.3.1) is not only suitable to be used for determining characteristic time curves according to feature 1.3.2. In the overall context of claim 1, feature 1.3.2 is clearly to be understood as actually determining characteristic time curves, because these form the basis for establishing the plan according to features 1.5.1 and 1.5.2 as well as the apportionment of electric power according to feature 1.6. Concerning the latter feature 1.6, the skilled person, in the overall context of claim 1, would not understand this feature to be optional in the sense that an apportionment of power could or could not involve a flow of energy to the individual consumers. Rather, it is evident that an apportionment of power in the sense of feature 1.6, especially in conjunction with feature 1.8, implies an actual flow of power to the individual consumers.

2.3.7 Finally, also the respondent's argument that the preamble of claim 1 had been accepted by the appellant to be delimited with respect to document D1, does not convince the board. The patent under appeal in paragraph [0009] may acknowledge document D1 to disclose a known method and an apparatus for optimising a chronological developing of consumption of electric power by a group of different consumers. However, this passage does not give rise in anyway to the assumption that document D1 discloses all features of the preamble of claim 1. To the contrary, the passage in question

provides an appropriate summary of D1, which particularly refers to the overall power consumption and stationary power sources that are considered in D1 for the purpose of an optimised utilisation of energy. Moreover, even if this were the case, in the appeal proceedings the appellant explicitly did not acknowledge features 1.3.2 and 1.5.2 as being disclosed in D1, and the respondent's argument is therefore irrelevant.

- 2.3.8 The board has therefore come to the conclusion that document D1, in addition to features 1.7 and 1.8, does not disclose features 1.3.2 and 1.5.2., according to which characteristic time curves of the consumption of electric power by the individual consumers are determined and a plan for apportioning electric power to the individual consumers is made based on the characteristic time curves of the consumption of electric power by the individual consumers.

2.4 *Objective technical problem*

The respondent has considered the objective technical problem starting from D1 and in view of the distinguishing features 1.3.2 and 1.5.2 to be that of how to provide a more accurate control of the power consumption of individual consumers. The board finds the objective technical problem to be appropriate and the appellant has not objected to it. It therefore forms the basis for the further assessment of inventive step.

2.5 *Obviousness*

- 2.5.1 The subject-matter of claim 1 is not rendered obvious in view of the closest prior art document D1.

- 2.5.2 The board agrees with the appellant that the person skilled in the art, when starting from document D1 and in view of the objective technical problem, would not have modified the method of D1 such as to arrive at the claimed invention.

Document D1 concentrates on the overall power consumption and smoothing of load peaks, in particular by means of mobile energy sources (see for example paragraph [0009]). A plan is particularly disclosed as forming the basis for discharging the mobile energy sources in order to achieve an optimised energy usage in the system (see in particular paragraph [0010]). Thus, document D1 strongly concentrates on taking into account the total energy use and also uses measurements of the consumption of individual consumers exclusively for this purpose. The determination of characteristic time curves of the electric power consumption by individual consumers, in particular in connection with a high measurement sample rate (feature 1.7) and a resulting high temporal resolution of the apportionment of power (feature 1.8), is therefore in contrast to the teaching of D1. Accordingly, figures 4 to 8 disclose time blocks having a length of 40 minutes, being in contrast to the present invention, which focuses on apportioning of electric power according to a plan, which is based on characteristic time curves of the individual consumers, and which has a temporal resolution equal to at least 0.1 Hz.

- 2.5.3 Since the measurement of a consumption of electric power by the individual consumers is carried out with a comparatively higher sample rate as defined in feature 1.7, the determined characteristic time curves and the plan based on them also have a higher resolution

(features 1.3.2 and 1.5.2), and consequently, the apportionment of the electric power to the individual consumers can be carried out with a higher temporal resolution (feature 1.8). The objective technical problem is thus solved in an advantageous manner by the specific combination of features 1.3.2, 1.5.2, 1.7 and 1.8. The board therefore recognises a synergistic effect of features 1.3.2, 1.5.2, 1.7 and 1.8.

- 2.5.4 The solution to the objective technical problem according to the aforementioned combination of distinguishing features is neither described in the prior art nor is it suggested by any of the prior art documents.
- 2.5.5 In particular, the person skilled in the art does not receive a hint towards the solution from paragraph [0014] of document D1, which discloses a permanent monitoring of data structures ("...durch diese Datenstrukturen ständig überwacht und überprüft werden..."). The board does not recognise any interrelation between the solution according to the distinguishing features and this paragraph.
- 2.5.6 Furthermore, document O3 on page 6, third paragraph may disclose a sampling rate according to feature 1.7. However, the board does not see any hint here either to the combination of features 1.3.2, 1.5.2, 1.7 and 1.8, defining the solution to the objective technical problem underlying the invention.
- 2.5.7 Moreover, under point 2.3.4 above, the board has already set out that the person skilled in the art would derive from the overall disclosure of document D1 a teaching which does not use the measured power consumption of the individual consumers to determine

characteristic time curves and to establish a plan for apportioning of electric power to individual consumers based on these characteristic time curves. Document D1 rather teaches to consider the total energy consumption of the system as well as smoothing of load peaks substantially by switching mobile energy sources and/or individual consumers on and off. The fact that the consumption of electric power by the individual consumers is measured in this context is not equivalent to the determination of characteristic time curves and the establishment of a plan for apportionment of electric power based on these time curves. Thus, D1 does not provide any hint to the person skilled in the art to modify the method disclosed in it in such a way that the solution according to the invention is implemented in a manner departing from the consideration of the total energy consumption.

2.5.8 The subject-matter of claim 1 therefore is not rendered obvious by document D1 either in combination with the common general knowledge of the skilled person or in combination with document O3. The same applies to the independent apparatus claim 8, which comprises device features corresponding to the method features of claim 1.

2.6 *Inventive step in view of document O1 - Admissibility (Article 13(2) RPBA 2020)*

2.6.1 During the oral proceedings before the board, the respondent for the first time has raised an objection under Articles 100(a) and 56 EPC against the main request based on document O1 as the closest prior art document.

2.6.2 The respondent's reply to the proprietor's appeal did not include an objection against the main request under Articles 100(a) and 56 EPC based on document O1 as the closest prior art document. Nor was this an objection on which the decision under appeal was based.

2.6.3 The appellant in the statement setting out the grounds of appeal under point F on page 11 had stated the following:

"In fact, O1 discloses no less features of the present invention than D1, compare Point 5 of the Summons to the oral proceedings, in which the Opposition Division assumes that (in addition to features 1, 1.1., 1.2 and 1.6) features 1.3 and 1.5 are also be given in O1. Thus, O1 might be considered closest prior art at least equally well as D1."

2.6.4 In a communication annexed to the summons to oral proceedings, the board under point 12 had noted that the appellant seemed to have referred to document O1 as an alternative starting point in the assessment of inventive step, which might therefore become a point for discussion at the oral proceedings.

2.6.5 With letter of 26 February 2021, the respondent replied to the board's preliminary opinion set out in the communication annexed to the summons to oral proceedings. Despite the board's remark under point 12, document O1 was not addressed in this letter, particularly no objection of lack of inventive step starting from this document was raised and substantiated.

2.6.6 According to Article 13(2) RPBA 2020, which in the present case is applicable under Article 25(1) RPBA

2020, any amendment to a party's appeal case made after notification of the summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances.

2.6.7 The reference to document O1 in the statement setting out the grounds of appeal concerns the appellant's appeal and is limited to referring to this document as a possible closest prior art. The respondent could have adopted and developed the appellant's statement with regard to document O1 as the closest prior art in their own appeal case when filing the reply to the proprietor's appeal. However, the respondent failed to do so. It was not until the oral proceedings that the respondent referred to document O1 for the first time in the appeal proceedings and presented a substantiated objection under Articles 100(a) and 56 EPC based on document O1, which went far beyond what the appellant had submitted in their statement setting out the grounds of appeal. This therefore constitutes an amendment of the respondent's appeal case, filed at the last stage of the appeal, in the sense of Article 13(2) RPBA 2020.

2.6.8 As set out above, in the present case, the appellant in the statement setting out the grounds of appeal referred to document O1 as a possible closest prior art document, which was however not referred to as a starting point in the assessment of inventive step in the decision under appeal. Contrary to the respondent's view, these circumstances may be unusual, but they are not exceptional within the meaning of Article 13(2) RPBA 2020 such that they could justify a new objection under Articles 100(a) and 56 EPC on the basis of O1, to be raised in substance for the first time at the oral proceedings before the board.

2.6.9 The respondent substantially argued that the appellant had introduced the objection based on document O1 into the proceedings themselves and that they were therefore entitled to adopt this objection. The board is not convinced by this argument for the reasons set out above. In particular, given that the gist of the appellant's argument in the statement of grounds of appeal was that the subject-matter of the patent did involve an inventive step over O1, the respondent's objection based on that document could and should have already been raised and substantiated with the reply to the appeal. This is particularly valid since this objection would have involved a completely new discussion, due to the fact that it had not formed part of the appealed decision. The respondent at least would have had reason to provide a substantiated objection based on document O1 in the letter of 26 February 2021. No exceptional circumstances are therefore apparent that would justify the new objection raised for the first time during the oral proceedings before the board.

2.6.10 In light of the above, the board has exercised their discretion under Article 13(2) RPBA 2020 not to take into account the respondent's objection under Articles 100(a) and 56 EPC based on document O1 as the closest prior art document in the appeal procedure.

2.7 *Conclusion*

Consequently, the board has come to the overall conclusion that the ground for opposition under Article 100(a) in combination with Article 56 EPC does not prejudice the maintenance of the patent as granted.

3. *Result*

Given that the ground for opposition under Article 100(a) in combination with Article 56 EPC does not prejudice the maintenance of the patent as granted and further considering that the respondent did not raise any further objections against the main request, the board had to accede to the appellant's main request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated