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**Datasheet for the decision  
of 11 October 2021**

**Case Number:** T 2772/17 - 3.5.02

**Application Number:** 12196398.7

**Publication Number:** 2604924

**IPC:** F23N1/00

**Language of the proceedings:** EN

**Title of invention:**

Gas Valve with Communication Link

**Patent Proprietor:**

Honeywell International Inc.

**Opponent:**

Siemens Schweiz AG

**Relevant legal provisions:**

EPC Art. 100(c), 123(2), 100(a), 54, 56  
RPBA 2020 Art. 11

**Keyword:**

Grounds for opposition - added subject-matter (no) - lack of  
patentability (yes)  
Remittal - special reasons for remittal (yes)

**Decisions cited:**

G 0004/92, T 0482/18



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Case Number: T 2772/17 - 3.5.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.02**  
**of 11 October 2021**

**Appellant:** Honeywell International Inc.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 10 November  
2017 revoking European patent No. 2604924  
pursuant to Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** R. Lord  
**Members:** F. Giesen  
A. Bacchin

## **Summary of Facts and Submissions**

- I. The present appeal by the patent proprietor (appellant) lies from the decision of the Opposition Division posted on 10 November 2017 revoking European patent No. 2604924 pursuant to Article 101(3)(b) EPC.

The reasons for the decision were essentially that claim 1 in the version of the main request (patent as granted), and the first to third and seventh to tenth auxiliary requests contained added subject-matter going beyond the content of the application documents as originally filed, because of the the feature "communication interface with a communication bus protocol". Claim 1 of the fourth auxiliary request was held not to be clear, and the subject-matter of claim 1 of the fifth and sixth auxiliary requests was considered to lack novelty in view of document

D15: *EP 0 751 350 B1*.

- II. After notification of the summons to oral proceedings and a communication pursuant to Article 15 RPBA 2020, setting out the Board's preliminary opinion, the appellant withdrew their request for oral proceedings and informed the Board that no-one would attend the oral proceedings on behalf of the appellant.
- III. Oral proceedings before the Board took place on 11 October 2021. As announced, no-one attended on behalf of the appellant. In compliance with Rule 115(2)

EPC and Article 15(3) RPBA 2020, proceedings were continued without the appellant.

The final requests of the parties were as follows:

The appellant (patent proprietor) requests in writing that

the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained in amended form on the basis of one of the first to third auxiliary requests filed with letter dated 15 July 2016, or on the basis of one of the fourth to tenth auxiliary requests filed with letter dated 28 July 2017, or on the basis of one of the eleventh to fourteenth auxiliary requests filed with the statement setting out the grounds of appeal.

Additionally, for the case that the Board overturned the objection of added subject-matter, the appellant requested that the case be remitted to the Opposition Division for further prosecution.

The respondent (opponent) requests

that the appeal be dismissed.

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

*"A combustion appliance comprising:  
a combustion appliance controller (60);  
valve assembly comprising:  
a valve body (12), the valve body comprising:*

an inlet port (14) and an outlet port (16), with a fluid path (18) extending between the inlet port (14) and the outlet port (16);  
the first valve (20a, 22a, 30a) situated in the fluid path between the inlet port (14) and the outlet port (16);  
a first valve actuator (30a), secured relative to the valve body (12), for selectively moving the first valve (20a, 22a, 30a) between a closed position, which closes the fluid path (18) between the inlet port (14) and the outlet port (16), and an open position;  
one or more sensors (24, 48) in communication with the fluid path for sensing one or more parameters within the fluid path of the valve body (12);  
a valve controller (26) secured relative to the valve body (12) and in communication with the one or more sensors (24, 48), the valve controller (26) determining one or more valve conditions based on the one or more sensed parameters; and  
characterised in that  
the valve controller (26) having a communication interface (110) with a predetermined communication bus protocol, the communication interface communicates one or more of the valve conditions determined by the valve controller to the combustion appliance controller using the predetermined communication bus protocol."

Claim 13 of the **main request** reads as follows:

"A method for communicating information from a valve assembly (10) to a combustion appliance controller (60) that is located remotely from the valve assembly, wherein the combustion appliance controller is associated with a combustion

*appliance for which the valve assembly controls the flow of fuel, the method comprising:  
sensing one or more sensed parameters within the valve assembly (10);  
transferring the one or more sensed parameters to a controller of the valve assembly (26);  
using the controller of the valve assembly (26) to determine one or more valve conditions based on the one or more sensed parameters;  
sending information that is related to the one or more valve conditions from the controller (26) of the valve assembly (10) to the combustion appliance controller (60) across a communication bus that operates in accordance with a predetermined communication bus protocol."*

Claim 1 of the **fifth auxiliary request** is identical to independent method claim 13 of the main request (and to claim 1 of the fourth auxiliary request).

The sole claim of the **sixth auxiliary request** comprises the features of claim 13 of the main request and additionally the features:

*"the valve assembly (10) includes a valve actuator (30a) secured relative to the valve body (12), the valve actuator selectively moves a valve (20a, 22a, 30a) between a closed position, which closes the flow of fluid through the valve assembly, and an open position;  
one of the one or more valve conditions is a safety event condition; and  
upon reception of the safety event condition, the combustion appliance controller (60) opens a safety relay, which cuts power to a valve control signal that is coupled to the valve actuator (30a),*

*thereby closing the flow of fluid through the valve assembly."*

This decision does not rely on the wording of the first to fourth and seventh to fourteenth auxiliary requests, which are therefore not reproduced here.

V. The arguments of the appellant which are relevant for the present decision can be summarised as follows:

Claim 1 as granted and according to the first to third and seventh to tenth auxiliary request had not been amended in such a way that subject-matter going beyond the content of the application documents as originally filed was added.

A basis in the original application could be found in the second full paragraph on page 16 of the description. Contrary to what the respondent argued, there was no distinction between a communication interface having or using a communication bus protocol. A communication protocol was not a physical entity but a set of rules. There was no sense in which a communication interface could physically comprise a communication bus protocol. Claim 1 as granted specified a communication interface with a communication bus protocol and additionally that the communication interface used the communication bus protocol. It would thus be understood by a skilled person such that the communication interface was capable of using the predetermined communication bus protocol and indeed used the protocol to communicate the valve conditions. The respondent attempted to consider the feature "communication interface with a predetermined communication bus protocol" in isolation



from the feature according to which the communication interface used the communication bus interface.

The method according to claim 1 of the fifth auxiliary request was new in view of D15, because this document did not disclose using the controller of the valve assembly to determine one or more valve conditions based on the one or more sensed parameters. Paragraph [0054] of D15 merely concerned determinations made by basic controller 2, but not the valve controller. Consequently, D15 also did not disclose transmitting data relating to valve conditions.

Also the method according to claim 1 of the sixth auxiliary request was new. This claim required the valve to have a valve body, which D15 did not disclose. Furthermore, it did not disclose determining by controller 12 a safety condition based on the one or more sensed parameters, as already pointed out in the context of the fifth auxiliary request, and sending this information from controller 12 to basic module 2, upon receipt of which basic module 2 places the installation into a safety mode.

VI. The arguments of the respondent which are relevant for the present decision can be summarised as follows:

The amended feature "communication interface with a communication bus protocol" in claim 1 as granted and according to the first to third and seventh to tenth auxiliary requests constituted added subject-matter going beyond the content of the application as originally filed.

The only relevant original disclosure was to be found on page 16, lines 18 to 32. This passage contained only a disclosure of a communication interface with a communication protocol but not with a communication bus protocol. Furthermore, this passage contained a disclosure that the communication interface was compatible with a communication bus protocol but not that it comprised the communication bus protocol ("with"). Lastly, it contained a disclosure that the communication interface used a predetermined communication bus protocol but again no disclosure that it comprised the protocol.

Typically, communication protocols were implemented in software on a microprocessor which was separate from a communication interface. A given physical interface could be compatible with various communication protocols, but this did not mean that the communication protocol was implemented on the communication interface itself. This was, however, what the amended claim required. An example was a computer mouse and a laptop. The laptop merely sampled the output of the mouse. The mouse interface was only compatible with the laptop's communication bus protocol, but the protocol resided entirely on the laptop.

The appellant's argument according to which a skilled person would not understand a communication bus protocol to be a physical entity which could be physically comprised by a communication interface was without merit. First, claim 1 was not limited to a physical communication protocol. Second, a communication protocol is a set of rules implemented in software. However, the application as originally filed does not disclose that the communication interface

includes software implementing the communication bus protocol.

The appellant relied on the wording of claim 1 "communication interface with a communication bus protocol" and the "communication interface communicates [...] using the predetermined communication bus protocol" to construe claim 1 as meaning that the communication interface was "capable of" communicating using a predetermined communication bus protocol, which was in line with the application as filed. However, this argument was logically flawed. It only demonstrated that the amended claim provided a basis for the application as filed but not, as required for compliance with the requirements of Article 100(c) or 123(2) EPC, the other way around.

The method of claim 1 of the fifth auxiliary request lacked novelty in view of D15. According to D15 column 11, lines 9 to 12, controller 12 converted the electrical signals from components 22, 26, and 30 into corresponding digital values and transmitted them serially via bus 8. According to the opposed patent, comparison of sensor signals with threshold values was an example of determining a valve condition based on the sensed parameters. Comparison of sensed parameters with a threshold was exactly what the controller 12 according to D15 did. Digital input 188 converted an electrical signal to the value 0 or 1, representing either a gas leak or no gas leak.

The subject-matter of claim 1 of the sixth auxiliary request lacked novelty in view of D15, which disclosed solenoid valves in column 3, lines 47 to 52. All solenoid valves had valve bodies.

The eleventh to fourteenth auxiliary requests should not be admitted. They could have been presented in the first instance opposition proceedings, but were not.

## **Reasons for the Decision**

### 1. *Admissibility of the Appeal*

The appeal meets the requirements of Articles 106 and 108 as well as Rule 99 EPC. It is therefore admissible.

### 2. *Main Request - Amendments*

2.1 The ground for opposition pursuant to Article 100(c) EPC does not prejudice the maintenance of the opposed patent.

2.2 Claim 1 as originally filed had the feature

*"the controller having a communications interface that is compatible with a predetermined communication bus protocol, the communication interface for communicating one or more of the valve conditions determined by the controller to a device located remotely from the valve assembly using the predetermined communication bus protocol."*

This was amended essentially by deleting the words "that is compatible", so that the amended claim has the rather colloquial wording "interface with a protocol".

2.3 The expression "communication interface" in the context of data communication does not solely designate the

physical port over which a device is connected to a data bus alone. In order for two devices to communicate, there has to be a set of rules governing the communication, called the communication protocol, in addition to the physical connection, over which data is transmitted. The protocol, as the respondent correctly pointed out, needs to be stored in some memory and there has to be an appropriate electric circuit, such as a processor, using the set of rules to communicate. The expression "interface" covers, in addition to the physical port, the necessary processor and memory parts.

Claim 1 as originally filed states clearly that valve conditions were communicated to a remote device (later amended to the combustion appliance controller) using a predetermined communication bus protocol. It follows that there is an original disclosure of a communication interface which is configured to communicate via a communication bus using the required protocol.

The details of digital communication interfaces may differ greatly from one interface to another. The Board can not discern any teaching in the original claim wording which expressed any of the underlying technical details beyond the statement that the communication interface was configured to communicate using a communication bus protocol. This, however, means that the communication interface of the valve must be equipped with the required minimum features for the said communication over a bus.

Amended claim 1, reciting a "communication interface with a predetermined communication bus protocol" expresses nothing beyond the statement that the communication interface is configured to communicate

with a further interface using the communication bus protocol. The Board cannot discern that the choice of wording of the amended claim implied any further technical details, such as a particular distribution of the functions or layers of the communication bus protocol. In particular, it does not imply that the set of rules making up the protocol was stored in the physical port of the interface rather than some associated memory. As a consequence, the amended claim is not directed to a more specific embodiment falling under the more general teaching of original claim 1, but rather is directed at the same general and unspecific teaching, only slightly reworded.

2.4 The Board is not persuaded by the respondent's arguments in this context.

The respondent argues that typically, communication protocols were implemented in software on a microprocessor which was separate from a communication interface. The argument thus relies on the concept that the expression "communication interface" did not include an electronic circuit - such as the processor - and the stored protocol.

During the oral proceedings, the respondent adduced a further example having regard to a computer mouse device and a laptop computer in order to illustrate this point, arguing that there could be several communication protocols with which an interface could be compatible without having the protocols, and further arguing that the protocol for communication with a computer mouse resided entirely on the computer rather than on the mouse. The mouse therefore did not have an interface with a protocol but merely an interface compatible with a protocol.

The Board is not persuaded that communication interfaces exist, which communicate without accessing any electronic circuit and stored protocol, as the respondent argues. At the very minimum the data of a device would have to have the right format to participate in communication based on a predetermined communication bus protocol. Furthermore, any device participating would have to have some sort of address, for it to be able to be addressed by other devices. The Board therefore also is not persuaded that the communication between a mouse as a peripheral device and a laptop as a host device is correctly characterised by the respondent. In any case, the respondent has not presented any evidence for the correctness of their respective assertions. In the Board's understanding, even if the mouse were the sole peripheral device, it would have to respect data package formats, which can be considered to be part of a bus protocol.

Furthermore, claim 1 requires a bus protocol. A bus is a communication architecture allowing for the communication of a host with several further devices. This means the valve controller of claim 1 in the original version would be understood by a skilled person to respect, besides a data package format, some sort of address format. It could not merely continuously broadcast its data onto the bus - as the respondent argued was the case for a computer mouse -, but rather would have to respect some sort of command by the controller to "talk". Otherwise the host device would not be able to know from which peripheral device the portions of interfering data packages broadcast at the same time originated. Therefore, the valve controller as originally disclosed would not be

understood by a skilled person to comprise merely a physical port for an interface but also to have stored thereon some form of protocol. Contrary to the arguments of the respondent, the original application discloses a valve communication interface that is actually configured to communicate using a predetermined bus protocol, and therefore also a communication interface with a communication bus protocol.

The respondent argued further, that the appellant's argument was logically flawed, demonstrating only that the original disclosure was derivable from the amended claim, but not, as would be required to demonstrate compliance with Article 100(c) EPC, that the amended claim was derivable from the original disclosure. However, the Board has already explained that the amended claim wording was not a more specific embodiment of the general original teaching, but that both concerned the same subject-matter only expressed in slightly different words. The appellant's argument is therefore not logically flawed.

Moreover, the respondent argued that claim 1 was not limited to a "physical" protocol, so that the appellant's respective argument was without merit. The appellant argued that protocols can never be physical entities in order to rebut the respondent's arguments that an interface with a protocol meant that the interface comprised the protocol, and in order to demonstrate that an interface with a protocol was synonymous to an interface using the protocol. Therefore, the respondent's argument in this respect is beside the point.



2.5 In conclusion, the patent does not contain subject-matter going beyond the content of the application as originally filed.

3. *Fourth Auxiliary Request - Clarity*

3.1 The Opposition Division decided that claim 1 of the fourth auxiliary request did not meet the requirements of Article 84 EPC.

3.2 The appellant maintained the fourth auxiliary request without, however, providing any argument as to why the impugned decision should be overturned in respect of this request. The appeal is therefore not substantiated as far as the fourth auxiliary request is concerned, which means that that part of the decision has not been appealed. Thus the corresponding conclusion of the impugned decision has become final in this respect.

4. *Main Request and Fifth Auxiliary Request - Novelty*

4.1 The ground for opposition pursuant to Article 100(a) EPC in combination with Article 54 EPC does not prejudice the maintenance of the opposed patent because the subject-matter of claim 13 of the main request is new over D15.

4.2 The Board was in a position to examine the subject-matter of claim 13 of the main request.

The Opposition Division had decided that the subject-matter of claim 1 of the fifth auxiliary request lacked novelty. The respondent also raised an objection of lack of novelty in view of D15 against the subject-

matter of claim 1 of the fifth auxiliary request. This subject-matter is identical to that of claim 13 of the main request (patent as granted). The respondent's objection against the fifth auxiliary request and the impugned decision therefore also apply directly to claim 13 of the main request.

4.3 It was contentious between the parties whether D15 disclosed the features

- *using the controller of the valve assembly (26) to determine one or more valve conditions based on the one or more sensed parameters;*
- *sending information that is related to the one or more valve conditions*

of claim 13 as granted or claim 1 of the fifth auxiliary request.

4.4 Document D15 does not disclose that the valve controller is used to determine one or more valve conditions.

D15 discloses a gas module 6 having a controller 12, valves 24 and 28, a gas leakage detector 26 ("Gas-Dichteprüfeinrichtung 26") and low and high pressure detectors 22 and 30, for supervising whether the pressure is in the allowable range ("Gasdruckwächter minimal 22" and "Gasdruckwächter maximal 30").

According to paragraph [0080] of D15, the controller 12 has digital inputs 188 to which the outputs of the gas leak detector and the low and high pressure detectors are connected. The expression "digital inputs" implies that the controller receives digital data, which is consistent with the fact that D15 also discloses analog

inputs in column 19, lines 49 to 53. Figure 5 depicts these controllers as switches. This implies the valve conditions "low pressure", "high pressure" and "leak" are communicated as binary values to the controller 12, as the respondent argued and as appears to be consistent with the existence of digital inputs.

It would follow from these observations that the valve conditions are already determined at the respective low pressure, high pressure and leak detectors before being communicated to the controller.

However, D15 contains a further passage in column 10, line 53 to column 11, line 12, according to which the high and low pressure detectors 22 and 30 and the leak detector 26 are connected to the controller via a single core line and transmit electrical signals, which appears to be in contradiction to the implication of the former passage. According to column 11, lines 9 to 12, the controller 12 converts the electrical signals from the detectors 22, 26 and 30 to digital data in order to transmit them over the bus 8. Even if one understood the digital inputs to be inputs with an analog to digital converter, there is no direct and especially unambiguous disclosure as to whether the controller also performs a comparison with a threshold, or whether it merely converts an analog electrical signal reading into a digital value.

The respondent argued that it followed from figure 5 that the controller 12 determined the valve condition of "leak" or "no leak" as a function of a sensed parameter, the sensed parameter being whether a contact 26 was closed or open due to gas pressure. The Board is not convinced that the disclosure of D15 is detailed enough for it to be derivable how exactly a valve

condition is determined. Figure 5 is clearly schematic to some extent, attempting mainly to represent graphically the device's functionality. It remains ambiguous from the passages adduced by the respondent whether the leak detector is in reality a simple switch, and the logic to infer a leak from the switch position resides in the controller 12, whether the controller does not have any logic to infer a valve condition but merely converts readings from the detectors to digital values, or whether the gas leak detector transmits a binary signal which already represents the valve condition.

The respondent argued further that the controller had to compare the digital input signals with a threshold to distinguish a logical 0 from a logical 1. According to the opposed patent, column 14, lines 28 to 37, comparison of the sensed parameters with corresponding threshold values was an example of determining valve conditions from the sensed parameters. The controller therefore also determined a valve conditions from the sensed parameters simply by using TTL logic in order to determine whether it received a logical 0 or 1. However, according to the respondent's interpretation of the disclosure of D15, the controller does not compare a sensed parameter to a threshold value but merely a digital input signal, which already contains the information concerning a valve condition. According to the respondent's reading, the actual determination of the valve condition is performed at the respective detectors themselves, as becomes apparent from the fact that they output binary values, rather than the actual sensed pressure readings.

Document D15 therefore does not contain a direct and unambiguous disclosure as to whether the valve

controller 12 compares the sensed parameters to a threshold and thus whether it, rather than the detectors or the combustion appliance controller or some other instance, determines a valve condition based on the sensed parameters.

The Board is therefore persuaded by the appellant's argument that D15 does not disclose the feature "using the controller" to determine a valve condition based on the one or more sensed parameters.

However, as far as the second alleged distinguishing feature is concerned, the valve controller according to D15 can pass the information concerning a high or low pressure condition or a gas leak on to the main combustion appliance controller via bus 8, that is, it sends information related to one or more valve conditions over the bus. The expression "information related to a valve condition" is so broad that it even covers sending the original data from the sensor over the bus.

4.5 It follows from these considerations that the subject-matter of claim 13 as granted and of claim 1 of the fifth auxiliary request is new in view of D15.

5. *Main Request and Fifth Auxiliary Request - Inventive Step*

5.1 The ground for opposition pursuant to Article 100(a) EPC in combination with Article 56 EPC prejudices the maintenance of the opposed patent. The subject-matter of claim 13 of the main request, and additionally that of claim 1 of the fifth auxiliary request, does not involve an inventive step in view of D15.

- 5.2 The Board had informed the parties of their preliminary opinion in this respect in the communication pursuant to Article 15 RPBA 2020, dated 21 January 2021 (see point 4, particularly point 4.3 of the communication). No substantive reply by the appellant to this preliminary opinion was received. The Board has therefore no reason to deviate from it.
- 5.3 Neither the opposed patent nor the appellant's submissions contain any explanation as to what technical effect results from the distinguishing feature as defined in the previous section, namely using the controller of the valve assembly to determine one or more valve conditions based on the one or more sensed parameters. The Board also can not see a technical effect brought about by the distinguishing feature compared to the solution of D15. The technical problem is therefore to provide an alternative method to transfer information from a valve assembly to a combustion appliance controller.
- 5.4 The solution to this technical problem is obvious in view of D15 alone. The Board considers that determining a valve condition locally in the controller and sending information related to the valve condition to a remote controller does not allow for any other functionality than when determining the valve condition remotely or at the detectors themselves. The claimed variant is merely one out of a very limited number of possible alternatives, which are equivalent as far as the functionality is concerned.
- 5.5 The Board therefore concludes that the subject-matter of claim 1 of the main request does not involve an inventive step in view of D15.

5.6 The same conclusion as for the main request applies to the identical subject-matter of claim 1 of the fifth auxiliary request.

6. *Main Request and Sixth Auxiliary Request - Inventive Step*

6.1 The subject-matter of claim 1 of the main request does not involve an inventive step.

6.2 On the basis of the parties' submissions, the Board was in a position to examine claim 1 of the main request for novelty and inventive step.

The impugned decision had come to the conclusion that claim 1 of the sixth auxiliary request lacked novelty.

The appellant argued that this conclusion was wrong, because D15 did not disclose a valve body and because the valve conditions were not determined at the valve controller 12 according to D15. The respondent replied that all valves had valve bodies with an inlet and an outlet port and a fluid path extending between them. Therefore, while the respondent's appeal case does not contain any explicit substantiated objection of lack of novelty or inventive step against claim 1 of the main request, the respondent's line of argument in respect of the method claims of fifth and sixth auxiliary requests, together with the reasons of the impugned decision, also cover all features of the device claim 1 of the main request.

The appellant had been informed accordingly in the Board's communication pursuant to Article 15 RPBA 2020

(see point 5 of the communication) but has not presented any comments in reply.

- 6.3 The Board agrees with the assertion of the respondent that all valves have valve bodies with an inlet and an outlet port and a fluid path extending between them. It is the very purpose of a valve to close or open a fluid passageway, and therefore a valve must also comprise a valve actuator for achieving this purpose. These features are therefore implicitly disclosed in D15.

In the discussion of the fifth auxiliary request the Board came to the conclusion that D15 did not contain an unambiguous disclosure that valve conditions were determined in valve controller 12 but that this modification did not involve an inventive step.

The appellant has not argued that there were any further distinguishing features.

- 6.4 Therefore, the Board concludes that the only distinguishing feature of claim 1 of the main request is the same as that of claim 1 of the fifth auxiliary request. The same conclusions therefore apply to claim 1 of the main request.

Consequently, the ground for opposition pursuant to Article 100(a) EPC in combination with Article 56 EPC prejudices the maintenance of the opposed patent because the subject-matter of claim 1 of the main request does not involve an inventive step in view of D15.

- 6.5 The respondent also argued that a gas leak detector implies that upon detection of a gas leak a combustion appliance would cut off fuel flow. The appellant has



not provided any counter-arguments in this respect. The Board finds the respondent's assertion persuasive, which leads the Board to the conclusion that also the subject-matter of claim 1 of the sixth auxiliary request does not involve an inventive step within the meaning of Article 56 EPC.

7. *Remittal*

7.1 Pursuant to Article 11 RPBA 2020, a Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

7.2 In the present case, special reasons exist, which prevent the Board from fully deciding the case. The Board therefore did not accede to the respondent's request to at least discuss patentability of the first and second auxiliary requests.

7.3 The reasons for the impugned decision were *inter alia* that the main request and the first to third and seventh to tenth auxiliary requests contained added subject-matter going beyond the content of the original application. Consequently, the question of novelty and inventive step was not examined in respect of these auxiliary requests. The statement of grounds of appeal and the reply, as well as the respondent's supplementary observations, also did not contain any argument whatsoever dealing with the question of novelty and inventive step. Furthermore, neither party

had replied in substance to the preliminary opinion of the Board annexed to the summons.

7.4 According to Article 12(2) RPBA 2020, the primary object of appeal proceedings is the judicial review of the decision under appeal. While this in itself does not preclude that for reasons of procedural efficiency, duration of cases and the ensuing legal uncertainty a Board makes every effort to decide as much as it can under the circumstances, the Board also considers that the principle of party disposition is a well recognised legal principle in the case law of the Board of Appeal. This means that the parties' requests determine the scope of the appeal proceedings, which cover only that part of the impugned decision indicated in the statement of grounds as actually being challenged. Moreover, the Board agrees with the statement of decision T 0482/18, reasons 1.2.5, lit e) that the judicial character of the appeal proceedings before a Board of Appeal presupposes that each party must present its own appeal case, clearly presenting the facts upon which their case rests and laying out the arguments supporting the party's requests.

7.5 In the present case, the respondent asks the Board to examine questions for which neither party has presented any facts and arguments whatsoever to the Board and for which not even the decision under appeal contains any reasons. Therefore, examining such question would imply that the Board would have to issue a ruling for the first time on this subject-matter and would thus be in contradiction to the nature of the appeal proceedings.

Furthermore, the appellant has decided not to attend the oral proceedings. Any discussion of new facts and evidence in their absence poses a risk of violating the

appellant's right to be heard (see the principles developed in decision G 0004/92 and Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, III.B.2.7).

- 7.6 The respondent argued that the present case already had a considerable duration, the priority year being 2011. While the Board would agree that it would be desirable to finish cases faster, in the present case the age of the file is not yet excessive and the duration of a case cannot lead to a change in the nature of the appeal proceedings. It is, after all, also the parties' behaviour which, by deciding not to present any arguments in respect of novelty and inventive step, leads to the remittal of the case.

The respondent further argued that at least the examination of novelty and inventive step of some of the auxiliary requests on file was straightforward and could therefore have been expected by the absent appellant. While the discussion of some of the requests may have been straightforward, the Board is of the opinion that not all of the requests could have been discussed without any contribution by the parties. Consequently, the Board would have had to remit for further prosecution at some point of the discussion anyway, so that the duration of the case could not be shortened by discussing only some of the auxiliary requests.

The respondent also argued that, given the large number of requests, they had to focus the reply to the statement of grounds of appeal on topics that had formed the basis for the discussion under appeal. It was simply not possible to present arguments at the outset of the proceedings for such a large number of

possible ways the discussion might have taken. The Board acknowledges that the choice of what should be in the reply to an appeal can be difficult. However, when a party is of the opinion that an objection is likely to be successful and straightforward, as the respondent was in their own words, there is no reason not to include it.

Furthermore, the Board had clearly expressed in their preliminary opinion what would have to be discussed at the oral proceedings and that the request for remittal would have to be considered. In this context the Board noted the lack of comments by the respondent and further provided a preliminary opinion on the question of remittal. However, still no substantive reply to this preliminary opinion was received. While the respondent is correct in pointing out that Article 13(2) RPBA 2020 requires special circumstances for amendments to an appeal case after summons to oral proceedings to be admitted, this observation cannot lead to the conclusion that submissions made for the first time at the oral proceedings are more likely to be admitted than a written reply to the Board's preliminary oral proceedings well before oral proceedings. While there can be no guarantee that amendments to a party's appeal case are admitted, the earlier they are submitted the more likely their admittance becomes.

7.7 Concluding, the absence up until the oral proceedings of any argument from either party and from the decision under appeal concerning novelty and inventive step of the first to third and seventh to tenth auxiliary requests, and the absence of the appellant from the oral proceedings, represent special circumstances in the present case that justify a remittal to the

Opposition Division for further prosecution within the meaning of Article 111(1) EPC and Article 11 RPBA.

- 7.8 Given that the Board remits the case for further prosecution, there was no need to decide on the admissibility of the eleventh to fourteenth auxiliary requests.

## 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.

The Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated