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**Datasheet for the decision
of 16 November 2022**

Case Number: T 0837/18 - 3.4.01

Application Number: 12173921.3

Publication Number: 2528415

IPC: H05B6/80

Language of the proceedings: EN

Title of invention:

Method and system for heating with multi-frequency microwaves

Patent Proprietor:

Goji Limited

Opponents:

Fritsche, Rainer
Whirlpool EMEA S.p.A.

Headword:

Heating with multifrequency microwaves / Goji limited

Relevant legal provisions:

EPC Art. 76, 100(c), 123(2)

RPBA Art. 12(4)

RPBA 2020 Art. 11, 12(1), 12(2), 12(3), 13(1)

Keyword:

Divisional application

General principles - prohibition venire contra factum proprium
(request for remittal not admitted)

Decisions cited:

T 0379/96



Beschwerdekammern

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Case Number: T 0837/18 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 16 November 2022

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 25 January 2018
revoking European patent No. 2528415 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman T. Petelski
Members: P. Fontenay
 C. Almberg

Summary of Facts and Submissions

I. The appeal was filed by the patent proprietor (appellant) against the decision of the Opposition Division to revoke European patent 2 528 415. The corresponding European patent application 12 173 921 was filed as a divisional application of earlier European patent application 07 766 892.

II. Claim 1 of the patent as granted reads (with the added labelling of the features, as used by the Opposition Division in the decision):

- (a) A method for modifying a heating profile of a microwave oven (1400)*
- (b) using microwaves at a plurality of frequencies, the method comprising:*
- (c) defining a power of transmission to a cavity (10,98) of the microwave oven of microwaves at each of the plurality of frequencies;*
- (d) defining a duration for which said microwaves are transmitted at each of the plurality of frequencies;*
- (e) measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not output from the cavity; and*
- (f) using the measured proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both.*

The patent as granted further includes a corresponding independent claim directed to a system for modifying a heating profile.

- III. Two oppositions were filed against the patent. They both relied on the grounds of Articles 100(a), 100(b) and 100(c) EPC.
- IV. In its decision, the Opposition Division held that the ground for opposition raised under Article 100(c) EPC regarding added subject-matter prejudiced the maintenance of the patent as granted, and that auxiliary requests 1 to 13 extended beyond the content of the application as filed contrary to Article 123(2) EPC. Auxiliary request 0, which was filed during the oral proceedings before the Opposition Division, was considered to be prima facie unallowable for the same ground of added subject-matter and was thus not admitted into the opposition proceedings. The other grounds for opposition raised under Articles 100(a) EPC and 100(b) EPC were not addressed.

The Opposition Division considered that the subject-matter of granted claim 1 covered embodiments which were not disclosed in the application as filed or in the earlier application as filed. In the Opposition Division's view (and with its feature labelling), the claimed steps of

- c) defining a power of transmission to a cavity (10, 98) of the microwave oven of microwaves at each of the plurality of frequencies; and

d) defining a duration for which said microwaves are transmitted at each of the plurality of frequencies,

were disclosed only in the context of a sweeping step carried out during the calibration process. There was, however, no support for these two steps being carried out before measuring a proportion as recited in granted claim 1.

The same reasoning applied to the independent claims of auxiliary requests 1 to 13, all of which comprised the steps c) and d).

V. On appeal, the proprietor requested, as a main request, that the decision of the Opposition Division be set aside and that the patent be maintained as granted.

In the statement of grounds of appeal (page 2, third paragraph, third sentence), the proprietor further requested, as alternatives, that the patent be maintained on the basis of one of auxiliary requests 1 to 35, 0, 36 to 70, 0a, and 71 to 105, in this order.

The proprietor also conditionally requested remittal of the case to the Opposition Division for consideration of other grounds of opposition than Article 123(2) EPC (see points 35 to 41 below).

In response to opponent 1's reply to the appeal, the proprietor filed new requests 0b and 0c and modified the order of the auxiliary requests (see letter dated 9 July 2019, section 4.0). The proprietor requested then, as an alternative to the main request, that the patent be maintained on the basis of one of auxiliary

requests labelled 0b, 0c, 0, 0a, and 1 to 105, in this order. Additionally and conditionally, the proprietor requested "combinations of the amendments according to auxiliary requests 0b and 0c with each of the amendments of auxiliary requests 1 to 7 and combinations thereof" if the Board were to examine grounds of opposition which were not part of the appealed decision or added matter attacks which were unsuccessful in said decision. The latter claim sets were not provided, and the proprietor appreciated that many of them "will not be needed".

- VI. Opponent 1 (respondent) requested, in reply to the statement of grounds of appeal, as a main request, that the appeal be dismissed. He further requested that none of the auxiliary requests be admitted into the appeal proceedings. Further still, he conditionally requested remittal of the case to the Opposition Division for examination of the other grounds for opposition under Articles 100(a) and 100(b) EPC (see points 35 to 41 below).
- VII. Opponent 2 (respondent) did not submit any observations.
- VIII. In a communication issued under Article 15(1) RPBA 2020, the parties were informed of the Board's preliminary opinion. In sum, the Board found added subject-matter in features (c), (d), (e) and (f) of the main request, e.g. relating to the power and duration of microwaves at different frequencies, and observed that also auxiliary requests 1 to 13 comprised the steps (c) and (d). The Board was further minded not to

take account of auxiliary requests 0b, 0c, 0, 0a, and 14 to 105.

The proprietor was invited to confirm that the Board's understanding of the requests and their order reflected the intentions of the proprietor. With regard to the requests whose contents were not clearly identifiable, as such, the parties were informed that their admission would be assessed on the date of their filing in the light of the requirements defined in Article 13(2) RPBA 2020.

- IX. None of the parties commented on the substance of the preliminary opinion given by the Board. The proprietor and opponent 2 merely indicated that they did not intend to attend the oral proceedings. Opponent 1 reformulated his previously unconditional request for oral proceedings emphasising that the request only applied if the Board intended to set aside the decision of the Opposition Division revoking the patent.

- X. The Board did not identify any reason to depart from its preliminary opinion. There was also no need for oral proceedings, which were therefore cancelled.

- XI. Claim 1 of the proprietor's main request (patent as granted) corresponds to claim 1 of the main request underlying the impugned decision reproduced above.

Claim 1 of auxiliary request 0b differs from claim 1 of the patent as granted in that features (c) and (d) have been deleted.

Claim 1 according to auxiliary request 0b thus reads:

A method for modifying a heating profile of a microwave oven (1400) using microwaves at a plurality of frequencies, the method comprising: measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not output from the cavity; and using the measured proportions to modify a power of transmission at each frequency, a duration of transmission at each frequency, or both.

Claim 1 of auxiliary request 0c differs from claim 1 of the patent as granted in that features (c) and (d) have been deleted and feature (b) reformulated to incorporate a definition of the heating profile.

It reads:

A method for modifying a heating profile of a microwave oven (1400) using microwaves at a plurality of frequencies, wherein the heating profile defines a power and a duration of transmission to a cavity (10, 98) of microwaves at each of the plurality of frequencies, the method comprising measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not output from the cavity; and using the measured proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both.

Claim 1 of auxiliary request 0 reads as follows (with the added labelling of features as defined by the proprietor):

- (a) A method for modifying a heating profile of a microwave oven*
- (b) using microwaves at a plurality of frequencies, the method comprising:*
 - (b.1) sweeping the plurality of frequencies and measuring, for each of the plurality of frequencies, a first proportion of power input to a cavity of the microwave oven that is not output from the cavity;*
 - (c.1) defining a power of transmission to the cavity of the microwave oven of microwaves at each of the plurality of frequencies using the first measured proportions;*
 - (d.1) defining a duration for which said microwaves are transmitted at each of the plurality of frequencies using the first measured proportions;*
 - (d.2) sweeping the plurality of frequencies to transmit microwaves at the defined power for the defined duration at each frequency; and then*
 - (e.0) sweeping the plurality of frequencies and measuring, for each of the plurality of frequencies, a second proportion of power input to the cavity that is not output from the cavity; and*
 - (f.0) using the measured second proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both.*

Claim 1 of auxiliary request 0a reads as follows (with the added labelling of features as defined by the proprietor):

- (a) A method for modifying a heating profile of a microwave oven*

(b) using microwaves at a plurality of frequencies, the method comprising:

(b.0) receiving an object in a cavity of the microwave oven (1400);

(b.1) sweeping the plurality of frequencies and measuring, for each of the plurality of frequencies, a first proportion of power input to a cavity of the microwave oven that is not output from the cavity;

(c.1) defining a power of transmission to the cavity of the microwave oven of microwaves at each of the plurality of frequencies using the first measured proportions;

(d.1) defining a duration for which said microwaves are transmitted at each of the plurality of frequencies using the first measured proportions;

(d.2) sweeping the plurality of frequencies to transmit microwaves at the defined power for the defined duration at each frequency for heating the object; and then

(e.0) sweeping the plurality of frequencies and measuring, for each of the plurality of frequencies, a second proportion of power input to the cavity that is not output from the cavity; and

(f.0) using the measured second proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both.

The following table was submitted by the proprietor. It summarises the amendments that were made in the various auxiliary requests 1 to 105 compared to the root claim sets according to the main request and auxiliary requests 0 and 0a, respectively.

Issue	Corresponding Request(s)		
Root claim set: A123 EPC: Features c) and d)	MR	AR0	AR0a
A123 EPC: Feature e)	AR1 to AR3	AR36 to AR39	AR71 to AR73
A123 EPC: Feature f)	AR4 and AR5	AR39 and AR40	AR74 and AR75
A52 EPC	AR6 and AR7	AR41 and AR42	AR76 and AR77
Combinations of amendments to address A123 EPC feature e) and A52 EPC	AR8 to AR13	AR43 to AR48	AR78 to AR83
Combinations of amendments to address A123 EPC feature e), A52 EPC, with each of AR4 and AR5	AR14 to AR35	AR49 to AR70	AR84 to AR105

The amendments intended to address the issues identified above in the first column in relation to "A123 EPC: Feature e)" are, respectively, and with respect to the main request, the following:

Regarding claim 1 of auxiliary request 1, said amendments correspond to the features identified below in bold characters.

*A method for modifying a heating profile of a microwave oven (1400) using microwaves at a plurality of frequencies, **wherein the microwave oven includes one or more feeds for inputting power to a cavity (10, 98) of the microwave oven**, the method comprising defining a power of transmission to **the** cavity of the microwave oven of microwaves at each of the plurality of frequencies;*

defining a duration for which said microwaves are transmitted at each of the plurality of frequencies,
*measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not output **through the one or more feeds** from the cavity; and*
using the measured proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both.

With regard to claim 1 of auxiliary request 2, said amendments consist in that the additional step of:

feeding microwave energy via at least one feed (16, 18, 20) of a plurality of feeds (16, 18, 20) into the cavity;

was added before the measuring step, which was reformulated to read:

measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not output from the cavity, wherein the measuring comprises measuring a power coupled to other feeds of the plurality of feeds (S_{ij}) at each frequency and a return loss to the at least one feed of the plurality of feeds (S_{ii}) at each frequency.

With regard to claim 1 of auxiliary request 3, said amendments consist in that the additional step of:

feeding microwave energy via a feed (16, 18, 20) of a plurality of feeds (16, 18, 20) into the cavity;

was added before the measuring step, which was reformulated to read:

measuring, for each of the plurality of frequencies, a proportion of power input to the cavity that is not either a return loss to the feed (Sii) or coupled to other feeds of the plurality of feeds (Sij).

The amendments intended to address the issues identified above in the first column in relation to "A123 EPC: Feature f)" are, respectively, the following:

In claim 1 of auxiliary request 4, feature (e) has been reformulated to read:

using the measured proportions to modify the power of transmission at each frequency or the duration of transmission at each frequency.

In claim 1 of auxiliary request 5, feature (e) has been reformulated to read:

using the measured proportions to modify the power of transmission at each frequency.

The amendments intended to address the issues identified above in the first column in relation to "A52 EPC" are, respectively, the following:

In claim 1 of auxiliary request 6 feature (e) has been reformulated to read:

using the measured proportions to modify the power of transmission at each frequency and transmit at

the respective modified power at each frequency, modify the duration of transmission at each frequency and transmit for the respective modified duration at each frequency, or both.

In claim 1 of auxiliary request 7 feature (e) has been reformulated to read:

using the measured proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both, wherein the modified powers of transmission comprise at least two non-zero and distinct power levels.

Claims 1 of auxiliary requests 36 to 42 and 71 to 77 combine, in essence, the amendments made according to auxiliary requests 0 and 0a and those identified above to address the various issues under article 123(2) EPC and 52 EPC. Similarly, auxiliary requests 8 to 35; 43 to 70 and 78 to 105 combine the various amendments identified above as indicated in the table.

Each claim request further comprises an independent claim for a corresponding system for modifying a heating profile.

Reasons for the Decision

General observations

1. The present decision essentially relies on the observations made by the Board in the communication issued under Article 15(1) RPBA 2020 informing the parties of its preliminary opinion. In the absence of

any substantive reaction to said communication, the Board does not identify any reason to depart from this preliminary assessment. The following comments recapitulate, thus, the views developed in said communication.

2. The present divisional application 12 173 921 shares a common description and set of drawings with the earlier application 07 766 892 (see point 26.1 in EPO Form 1001E "request for grant of a European patent" with its explicit reference to the description and drawings of the previously filed application). It thus differs from the earlier application by the claims only. The two independent claims filed in the divisional application were directed, respectively, to:

- 1. A recording element comprising heating instructions for heating food in an RF heater, wherein the heating instructions include the amount of power that is to be absorbed in the food within a given period of time;*

and

- 12. A method for heating food in an RF heater, the method comprising:
reading heating instructions from a recording element, wherein the heating instructions include an amount of power that is to be absorbed in the food within a given period of time; and
determining a desired heating based on the heating instructions.*

3. The subject-matter for which a patent was granted, following examination of the divisional application, is related neither to any of the original 45 claims in

said earlier application nor to the original claims filed with the divisional application.

4. In the absence of any basis in the original claims of the earlier application and the divisional application, and in view of the fact that both applications share a common description and set of drawings, the various issues to be addressed under added subject-matter with regard to the earlier application as filed (Article 76(1) EPC) and the divisional application as filed (Article 123(2) EPC) are the same. These articles require identification, in the common original description and set of drawings, of a basis for the recited combinations of features according to the definitions in the proprietor's claim requests.

Main request - patent as granted - added subject-matter - Article 100(c) EPC

5. The proprietor submits that granted claim 1 finds a basis in a combination of the passages in the description on page 6, line 30, to page 7, line 9, and page 43, line 23, to page 45, line 15, in relation to the calibration routine. The passage on page 57, lines 25-33, provided a basis for combining the features pertaining to the calibration routine with those regarding the change of the heating pattern.
6. While it is acknowledged that the passage on page 57, lines 25-33, refers to the examples of a spectral image or a scan of the dissipation of RF energy at different frequencies as possible indicators of properties of the food, it does not contain any explicit reference to the calibration process of Figure 7. Moreover, the passage related to Figure 7 on page 43, line 23, to page 45,

line 15, which concerns more than one embodiment, does not disclose using microwaves, said use comprising defining a duration for which said microwaves are transmitted at each of the plurality of frequencies (feature d). Also the passage bridging pages 6 and 7 is insufficient in this respect. It first fails to establish any clear link to the calibration process. Second, the reference to the "time of delivering each frequency" on page 7, line 1, is too vague and does not permit to establish whether the term refers to a duration or to the repetition of the transmission process for said frequencies, as suggested by the following sentence.

7. The Board further concurs with the Opposition Division's interpretation of claim 1 that the claim's wording implies selecting frequencies and defining for each of said frequencies both a power level and a duration. The notion of duration is, however, not compatible with the notion of sweeping between frequencies referred to in the cited passages.
8. Opponent 1 submits that measurements regarding the net power efficiency and input efficiency should be distinguished from measurements of "a proportion of power input to the cavity that is not output from the cavity". In particular, the original applications did not disclose any measurement of the latter since the measurements actually envisaged did not consider the energy absorbed by the walls or leaking through the door seals.
9. The Board observes, however, that the measurements relating to the net power efficiency are directly related to the power input to the cavity that is not output from the cavity. In this respect, the estimation

made on the basis of the net power efficiency may also be considered to constitute a (indirect) measurement of the power input to the cavity that is not output from the cavity (see page 44, lines 25-30). It is, however, not clear from this passage whether such a measurement distinguishes between frequencies.

10. Furthermore, the Board fails to identify a basis for the step of using the measured proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both (feature (f)) in the original disclosure. This results primarily from the fact that the claim is silent as to the relationship between the modified powers and durations and the measured proportions. The modifications envisaged in the embodiment of Figures 6 and 7 serve a specific purpose, namely to contribute to a uniform heating, with specific frequencies being selected according to certain criteria. In its generality, the combination of features (e) and (f) as defined in claim 1 extends well beyond this specific aim, thereby extending the teaching of the application beyond its original content.
11. Moreover, the omission of the step of placing an object into the cavity is not justified by the description. The Opposition Division based its decision on the preliminary finding that said step was essential for the process disclosed in Figures 6 and 7. The Board concurs with the analysis of the Opposition Division in this respect.
12. On a general note, the Board observes the following. The original claims of neither the earlier application nor the divisional application provide sufficient basis for present claim 1. Hence, a possible basis could only

be provided by the generalised definitions in the description of what the application drafters considered to constitute an invention or, alternatively, by the description of specific embodiments, provided that there was a justification to generalize the specific embodiment along the line of the terms used in the claims.

13. Both possible options fail. The many general definitions to be found throughout the description reflect the content of the original claims or are not sufficiently complete, as such, to define any clear subject-matter. Regarding the multiplicity of optional features envisaged throughout the description, they appear to define, in the absence of any clear links to specific embodiments, a catalogue of possibilities to draw upon. In this respect, it is stressed that terms like "aspect of some embodiment of the invention", as it may be found in the description, are meaningless in the absence of any clear definition of what is actually the invention. Namely, they do not permit to identify any concrete combination of steps or means which could have constituted the basis for amendments to the claim definitions.
14. As a result, claim 1 of the main request does not comply with the requirements of Article 100(c) EPC.

Auxiliary requests 0b, 0c, 0, 0a and 1 to 105 - admission

15. Opponent 1 contested the admission of auxiliary requests 0 to 105 (in its reply to appeal preceding the filing of auxiliary requests 0b and 0c).

16. As a general note, for the understanding of the applicability of the revised version of the Rules of Procedure of the Boards of Appeal (OJ EPO 2019, A63, "RPBA 2020"), and of its predecessor ("RPBA 2007"), the Board refers to the transitional provisions of Article 25 RPBA 2020.
17. Auxiliary requests 0b and 0c were filed in response to opponent 1's reply to appeal. Admission of these requests is at the discretion of the Board under Article 13(1) RPBA 2020.
18. Both requests directly address the reasoning of the Opposition Division with regard to features (c) and (d), which have been deleted in the independent method claims of both requests. Claim 1 of auxiliary request 0c incorporates, instead, a definition of the "heating profile". Said requests should thus have been filed with the statement of grounds of appeal (cf. Article 12(3) RPBA 2020).
19. The Board also holds, contrary to the proprietor's view, that the deleted features have technical meaning and that their deletion leads to an extension of protection conferred by the claimed subject-matter contrary to Article 123(3) EPC.
20. Concretely, the step of defining the power, during the calibration process, is technical for the reasons set out in the description. The power is selected in order, for example, to avoid heating during calibration, while still allowing reliable detection. *E contrario*, a power level close to the operational heating level may be selected to reduce the dynamic range expected from some components (see description, page 43, lines 23-27 as to the technical effects associated with the power

intensity during calibration). The deletion of these features in claim 1 leads to the claimed subject-matter now encompassing processes where such steps would be performed beforehand.

21. Moreover, irrespective of the fact that the original disclosure does not appear to support the definition of a heating profile as introduced in claim 1 of auxiliary request 0c, said definition has no bearing on the extended scope of protection resulting from the deletion of steps (c) and (d), identified above.
22. In summary, belatedly filed auxiliary requests 0b and 0c give rise to new issues. The Board decides not to admit them into the appeal proceedings.
23. Auxiliary request 0 was filed during the opposition proceedings. The Opposition Division considered it to be *prima facie* unallowable and decided not to admit it. Admission of this request into the appeal proceedings is at the discretion of the Board under Article 12(4) RPBA 2007.
24. The Board concurs with the Opposition Division that the embodiment of Figure 6 does not constitute a sufficient basis for the method of claim 1. It is stressed, in this respect, that the embodiment of Figure 6 (in combination with Figure 7) discloses a calibration step intended to be repeated depending on the need (or lack of need) to pursue heating. It does not suggest a limitation of the heating process to three sweeping steps followed by a step of "using the measured second proportions to modify the power of transmission at each frequency, the duration of transmission at each frequency, or both". Moreover, as observed by the Opposition Division, the step of placing an object into

the cavity appears to be an essential aspect of the embodiment. Its omission is not justified (see above point 11).

25. The Board, hence, considers that the Opposition Division applied the right principles and applied them in a reasonable way when deciding on the admission of said auxiliary request. The Board, hence, decides not to overturn the decision of the Opposition Division to disregard auxiliary request 0. This request is thus not taken into account.
26. Auxiliary request 0a was filed for the first time with the statement of grounds of appeal. Its admission is at the discretion of the Board under Article 12(4) RPBA 2007.
27. The request constitutes an attempt to address the reasons of the Opposition Division for not admitting auxiliary request 0. However, the Board observes that the objection still applies, according to which the calibration routine of Figure 7 defines a process to be repeated in the course of the heating process, which cannot provide a basis for a heating process encompassing two phases for adapting the heating parameters only. Therefore, the Board considers that auxiliary request 0a is not sufficient to remedy the objections raised with regard to auxiliary request 0. It follows that auxiliary request 0a and, for the same reason, auxiliary requests 71 to 105, filed or, at best, outlined with the statement of grounds of appeal and subject to Article 12(4) RPBA 2007, should not be admitted into the appeal proceedings. An additional reason not to admit outlined auxiliary requests 76 to 105 is their lack of complete sets of claims, i.e.

their lack of express specification, contrary to Article 12(3) RPBA 2020.

28. Auxiliary requests 1 to 13 were admitted into the opposition proceedings but considered to be unallowable. Therefore, they constitute requests on which the impugned decision was based. Furthermore, the proprietor has directed its appeal case to them (cf. Article 12(1)(a) and (2) RPBA 2020). Auxiliary requests 1 to 13 are, therefore, admitted into the appeal proceedings.
29. Auxiliary requests 14 to 35 were, at best, outlined with the statement of grounds of appeal. The proprietor argues that these requests were further attempts to remedy the objections raised under Articles 76(1) and 123(2) EPC. They resulted from a combination of the amendments made to address objections raised against feature (f) with the amendments made in the preceding requests 1 to 3 and 6 to 13, respectively. However, the full sets of claims of auxiliary requests 14 to 35 were never submitted, contrary to the requirement of Article 12(3) RPBA 2020 that all requests should be expressly specified.
30. Furthermore, unlike auxiliary requests 1 to 13, the impugned decision was not based on auxiliary requests 14 to 35, although they were shortly mentioned in the proprietor's submission dated 29 September 2017 (page 11). Irrespective of whether or not the latter requests were withdrawn in the course of the oral proceedings, noting that the minutes of the oral proceedings before the Opposition Division do not appear to be conclusive in this respect (see sections 2 and 5.2 of those minutes), any review of these requests also would go

against the primary object of the appeal proceedings (Article 12(2) RPBA 2020).

For these reasons, the Board decides not to admit auxiliary requests 14 to 35.

31. Auxiliary requests 36 to 70, of which only 36 to 40 were actually filed as full sets of claims, appeared for the first time with the statement of grounds of appeal. Hence, their admission is at the discretion of the Board under Article 12(4) RPBA 2007, and partly also Article 12(3) RPBA 2020.
32. Each of auxiliary requests 36 to 70 was allegedly based on auxiliary request 0. They allegedly combine the amendments introduced in request 0 with the amendments made with regard to auxiliary requests 1 to 35, respectively. These amendments seemingly address issues unrelated to the reasons which led to auxiliary request 0 not being admitted, i.e. they are not serious attempts to overcome the issues raised by the Opposition Division. For these reasons, and for the reasons developed by the Opposition Division with regard to auxiliary request 0, which are endorsed by the Board, the Board decides not to admit these requests into the appeal proceedings. An additional reason not to admit auxiliary requests 41 to 70 is their lack of express specification, contrary to Article 12(3) RPBA 2020.

Auxiliary requests 1 to 13 - allowability

33. For the reasons developed above with regard to the main request and as noted by the Opposition Division under point 6 of the impugned decision: "All these requests

comprise features c and d. As explained for the main request, these features introduce subject-matter extending over the content of the application as filed".

34. Claim 1 according to each of auxiliary requests 1 to 13 contains added subject-matter contrary to both Article 123(2) EPC and Article 76 EPC. Auxiliary requests 1 to 13 are, hence, not allowable.

Request for remittal to the Opposition Division

35. In the statement of grounds of appeal, the proprietor formulated the following requests pertaining to remittal (page 12, point 6):

In conclusion, the reasons brought forward in the decision do not establish the alleged non-compliance of the claimed subject-matter with Article 123(2) EPC, for the reasons outlined above. We therefore request that the decision be set aside in its entirety and that this matter is remitted to the Opposition Division for consideration of the remaining grounds of opposition, unless the Board of Appeal intends to maintain the patent as granted. If the Board of Appeal maintains the decision against the Main Request, and subsequent requests AR1 to AR35, we request that the patent is maintained or remitted to the first instance according to Auxiliary Request 0. If the Board of Appeal maintains the decision against Auxiliary Request 0, and does not find any subsequent requests AR36 to AR70 allowable, we request that the patent is maintained or remitted to the first instance according to Auxiliary Request 0a, or a

subsequent request AR71 to AR105 as required to overcome the particular issue/combination of issues at hand.

36. The requests are not clear and require an interpretation.
37. As a first observation, the order of the claim requests disagrees with the one emphasised earlier in the statement of grounds (page 2, see point V. above). Moreover, two further claim requests, 0b and 0c, were filed and squeezed into the order of the claim requests after submission of the remittal requests without the latter being adjusted. Therefore, and due to the obscure language, the remittal requests are not specified in accordance with Article 12(3) RPBA 2020.
38. Regardless thereof, the Board understands the remittal requests such that the proprietor is effectively seeking a positive outcome in appeal on added subject-matter in combination with the Board's maintenance of the patent based on one of its claim requests - or otherwise remittal of the case to the Opposition Division for their consideration of the grounds for opposition under Articles 100(a) and (b) EPC.
39. Not only is this upside-down approach contrary to the primary object of the appeal proceedings to judicially review the appealed decision including the facts, objections etc. forming its basis (Article 12(2) RPBA 2020, as stressed in the Board's communication, page 4, point 1, but it also means that the proprietor only accepts a positive result as the substantive outcome of the appeal proceedings. It is inconsistent, under the same circumstances, to request remittal in the event of a negative assessment of the Board but not in the event

of a positive one, contrary to the prohibition of *venire contra factum proprium* (cf. T 379/96, point 2.3).

40. Therefore, despite the circumstance that the conditions for the remittal requests are most probably met, these requests are not admitted into the proceedings.

41. For the sake of argument, the requests for remittal would be unallowable anyway, even if admitted into the proceedings. The proprietor has not presented any arguments why the case should be remitted in the event the appeal looked set to be dismissed. The Board is convinced that the appeal should be dismissed for the reasons given above, and it can decide the case without undue burden. Special reasons for remittal do not present themselves (Article 11 RPBA 2020).

42. For these reasons, the Board decides not to remit the case to the Opposition Division.

Conclusion

43. Since no allowable claim request is on file and the case is not remitted, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



D. Meyfarth

T. Petelski

Decision electronically authenticated