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**Datasheet for the decision
of 29 February 2024**

Case Number: T 0566/20 - 3.5.04

Application Number: 12155814.2

Publication Number: 2490438

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Language of the proceedings: EN

Title of invention:
Vision measuring device

Patent Proprietor:
Mitutoyo Corporation

Opponent:
Carl Zeiss Industrielle Messtechnik GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)
RPBA 2020 Art. 12(6), 13(2)

Keyword:

Granted patent - added subject-matter (yes)
Auxiliary requests 1, 3a, 3b, 4a and 4b - should have been
submitted in first-instance proceedings (yes)
Auxiliary requests 5 and 6 - added subject-matter (yes)
Auxiliary request 7 - amendment after summons - exceptional
circumstances (no)

Decisions cited:

T 0169/20, T 1127/16

Catchword:



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Case Number: T 0566/20 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 29 February 2024

Appellant: Carl Zeiss Industrielle Messtechnik GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 December 2019
rejecting the opposition filed against European
patent No. 2490438 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chair B. Willems
Members: F. Sanahuja
B. Müller

Summary of Facts and Submissions

- I. The appeal is against the decision of the opposition division dated 6 December 2019 rejecting the opposition filed against European patent No. 2490438.
- II. During the opposition proceedings, grounds for opposition according to Article 100(a) EPC, together with Articles 54(1) and 56 EPC, and Article 100(c) EPC were raised.
- III. The opposition division rejected the opposition to the European Patent, *inter alia* because there was no extension of subject-matter in the independent claim of the opposed patent (Article 100(c) EPC).
- IV. The opponent ("appellant") filed notice of appeal. With the statement of grounds of appeal, it contested, *inter alia*, the opposition division's conclusion identified in point III. above.
- V. The patent proprietor ("respondent") filed a reply to the appeal with arguments in support of the opposition division's conclusion, point III. above. It further submitted auxiliary requests 1, 2a, 2b, 3a, 3b, 4a, 4b, 5 and 6.
- VI. The board issued summons to oral proceedings and a communication under Article 15(1) RPBA. In this communication, the board gave, *inter alia*, the following preliminary opinion.

- (a) The subject-matter of claim 1 of the granted patent extended beyond the content of the application as filed (Article 100(c) EPC).
- (b) During the oral proceedings, the parties should be prepared to discuss whether auxiliary requests 1, 2a, 2b, 3a, 3b, 4a and 4b should be admitted to the appeal proceedings under Article 12(4) and Article 12(6), second sentence, RPBA.
- (c) The subject-matter of claim 1 of auxiliary requests 5 and 6 extended beyond the content of the application as filed (Article 123(2) EPC).

- VII. In its letter of reply dated 5 February 2024, the respondent argued that auxiliary requests 1 to 4b should be admitted to the appeal proceedings under Articles 12(4) and 12(6) RPBA. It also submitted reasons to support its opinion that the subject-matter of claim 1 of the granted patent did not extend beyond the disclosure of the application as filed.
- VIII. During the oral proceedings before the board, the respondent withdrew auxiliary requests 2a and 2b and filed auxiliary request 7.
- IX. The appellant's final requests were that the opposition division's decision be set aside and that the patent be revoked in its entirety.

The respondent's final requests were that the appeal be dismissed and that the patent be maintained as granted or, alternatively, on the basis of the claims of one of auxiliary requests 1, 3a, 3b, 4a, 4b, 5 and 6 filed with its reply to the appeal, or the claims of

auxiliary request 7 filed during the oral proceedings before the board.

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

XI. Claim 1 of the **granted patent** reads as follows.

"A vision measuring device (1), comprising:

an imaging device (141) which images a measurement target (3) and transfers image information representing an image of the measurement target (3);

a position control device (151) which controls an in-focus position of the imaging device (141) and outputs the in-focus position as position information representing a position in an in-focus axis direction; and

a vision measuring system (2) which performs vision measurement on the measurement target (3) based on the image information and the position information,

characterized in that:

the imaging device adds serial number information;

the position control device (151) acquires the position information in response to a trigger signal which is output from one of the imaging device (141) and the position control device (151) to the other of them at a certain timing of an imaging period during which the imaging device (141) images the measurement target (3) and retains the position information in association with the serial number information; and

the vision measuring system (2) calculates position information representing a position of the image information in the in-focus axis direction based on the image information with the serial number information transferred from the imaging device (141) and the position information in association with the serial number information output from the position control device (151), and performs auto-focusing control by using the calculated position information."

- XII. Claim 1 of **auxiliary request 1** differs from claim 1 of the main request in that the specification of the vision measuring system in the last paragraph of the claim has been amended as follows (additions underlined).

"the vision measuring system (2) calculates position information representing a position of the image information in the in-focus axis direction based on the image information with the serial number information transferred from the imaging device (141) and the position information in association with the serial number information, wherein the position information in association with the serial number information is output from the position control device (151), and performs auto-focusing control by using the calculated position information."

- XIII. Claim 1 of **auxiliary request 3a** reads as follows.

"A vision measuring device (1), comprising:

an imaging device (141) which images a measurement target (3) and transfers image information representing an image of the measurement target (3);

a position control device (151) which controls an in-focus position of the imaging device (141) and outputs the in-focus position as position information representing a position in an in-focus axis direction corresponding to a Z-axis direction; and

a vision measuring system (2) which performs vision measurement on the measurement target (3) based on the image information and the position information,

wherein the position control device (151) is configured to control an imaging device driving mechanism (144) for driving the imaging device (141) in the Z-axis direction,

characterized in that:

the imaging device adds serial number information to the image information at the same time as an output of a trigger signal, wherein serial number information is a running number counted from when imaging is started,

the trigger signal being output from one of the imaging device (141) and the position control device (151) to the other of them at a certain timing of an imaging period during which the imaging device (141) images the measurement target (3);

the position control device (151) acquires the position information in response to the trigger signal and retains the position information in association with the serial number information;

the position control device (151) includes a latch counter (152) which counts the number of times Z-values

are output, and a latch buffer (153) which retains obtained Z-values associated with serial number information in the form of array data,

the Z-values are position information;

the latch counter is reset by an instruction to the position control device (151) from the imaging device (141) when image output is stopped and/or after the imaging device (141) is moved to an auto-focus search start position, and/or from the vision measuring system (2) when imaging settings of the imaging device (141) have been changed; and

the vision measuring system (2) calculates position information representing a position of the image information in the in-focus axis direction based on the image information with the serial number information transferred from the imaging device (141) and the position information in association with the serial number information output from the position control device (151), and performs auto-focusing control by using the calculated position information."

XIV. Claim 1 of **auxiliary request 3b** differs from claim 1 of auxiliary request 3a in that the specification of the vision measuring system in the last paragraph of the claim has been amended in the same manner as in claim 1 of auxiliary request 1.

XV. Claim 1 of **auxiliary request 4a** differs from claim 1 of auxiliary request 3a in that the following phrase has been amended as follows (additions underlined and deletions ~~struck through~~):

"the Z-values ~~are~~being position information;"

and in that the following text has been inserted after the paragraph starting with "the latch counter is reset":

"the trigger signal being one of a vertical synchronization signal, a strobe signal, an imaging start instruction signal;

when the trigger signal is a vertical synchronization signal, the position control device (151) acquires and retains the position information in response to the vertical synchronization signal which is output from the imaging device (141) at an end point of the imaging period;

when the trigger signal is a strobe signal, the position control device (151) acquires and retains the position information in response to the strobe signal which is output from the imaging device (141) at a middle point of the imaging period;

when the trigger signal is an imaging start instruction signal, the position control device (151) acquires and retains the position information at the same time as outputting the imaging start instruction signal at a start point of the imaging period;"

XVI. Claim 1 of **auxiliary request 4b** differs from claim 1 of auxiliary request 4a in that the specification of the vision measuring system in the last paragraph of the claim has been amended in the same manner as in claim 1 of auxiliary request 1.

XVII. Claim 1 of **auxiliary request 5** differs from claim 1 of the main request in that the specification of the

position control device in the penultimate paragraph of the claim has been amended as follows (additions underlined).

"the position control device (151) acquires the position information in response to a trigger signal which is output from one of the imaging device (141) and the position control device (151) directly to the other of them at a certain timing of an imaging period during which the imaging device (141) images the measurement target (3) and retains the position information in association with the serial number information;"

XVIII. Claim 1 of **auxiliary request 6** differs from claim 1 of auxiliary request 5 in that the specification of the position control device in the penultimate paragraph of the claim has been amended as follows (additions underlined).

"the position control device (151) acquires the position information in response to a trigger signal which is output from one of the imaging device (141) and the position control device (151) directly to the other of them at a certain timing of an imaging period during which the imaging device (141) images the measurement target (3) and retains the position information in association with the serial number information wherein the imaging device (141) is connected to the position control device (151) through a dedicated digital communication wire;"

XIX. Claim 1 of **auxiliary request 7** differs from claim 1 of the main request in that the specification of the vision measuring system in the last paragraph of the

claim has been amended as follows (additions underlined and deletions ~~struck through~~).

"the vision measuring system (2) calculates position information representing a position of the image information in the in-focus axis direction corresponding to the serial number information based on the image information with the serial number information transferred from the imaging device (141) and the position information in association with the serial number information output from the position control device (151), and performs auto-focusing control by using the calculated position information."

Reasons for the Decision

1. The appeal is admissible.
2. *Granted patent - added subject-matter (Article 100(c) EPC)*
- 2.1 The ground for opposition under Article 100(c) EPC would prejudice maintenance of the patent as granted if its content went beyond that of the application as originally filed.

An amendment to a patent application or patent can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole disclosure of the description, claims and drawings of the application as filed (see Case Law of the Boards of Appeal of the European Patent Office, 10th edition, 2022, "Case Law", II.E.1.1).

According to case law of the boards of appeal, if one of a plurality of technically reasonable interpretations of an ambiguous claim contains subject-matter that extends beyond the content of the application as originally filed, it has to be concluded that there is added subject-matter (see Case Law, II.E.1.3.9 e)).

There is no need to automatically consult the description and drawings of a patent when a claim contains an ambiguous feature which can be interpreted in more than one technically reasonable way (see Case Law, II.E.1.3.9 d)). Rather, the claim should essentially be read and interpreted on its own merits (see Case Law, II.A.6.1).

2.2 Granted claim 1 specifies the following.

"the vision measuring system calculates position information representing a position of the image information in the in-focus axis direction based on the image information with the serial number information transferred from the imaging device and the position information in association with the serial number information output from the position control device" (emphasis added by the board)

2.3 The opposition division concluded that the appellant's (then opponent's) interpretation of the underlined expression, that the position control device could output the serial number information, was not technically logical when the claim was considered as a whole (see point 2.2.3 of the impugned decision).

It was apparent from the claim that the output from the position control device concerned the position information in association with the serial number information. Moreover, this interpretation was in accordance with the disclosure of the application as filed.

- 2.4 In the statement of grounds of appeal (see for example points 5.2 and 5.5), the appellant submitted that the position control device could output the serial number information, possibly with the position information. This interpretation was grammatically correct, made technical sense and was not disclosed in the application as originally filed.
- 2.5 In its reply to the appeal (see section III, point 1.1), the respondent concurred with the opposition division's findings.
- 2.6 During the oral proceedings before the board, the respondent stated that claim 1 of the granted patent specified that the position control device retained the position information in association with the serial number information. The expression "in association with" did not imply that the serial number information was stored together with the position information, in particular because the position control device did not receive the serial number information. Similarly, the expression "in association with" in the contested feature did not necessarily mean that the position information and the serial number information were output at the same time.

Claim 1 of the granted patent should be interpreted as an interaction between the imaging device, the position control device and the vision measuring system, wherein

the imaging device and the position control device provided information to the vision measuring device to calculate the claimed position information. The claimed subject-matter, and in particular the contested feature, left open how the serial number information was provided to the vision measuring system.

Furthermore, grammar could not be decisive in determining the claimed subject-matter. Rather, the claim should be interpreted by a person skilled in the art. The respondent noted that, in English, participle clauses do not always unambiguously determine what they refer to; however, this ambiguity did not necessarily lead to added subject-matter in a claim. In the present case, the position information in the contested feature should be interpreted as the position information which had previously been associated with the serial number information.

- 2.6.1 The board agrees with the appellant that outputting both the position information and the associated serial number information from the position control device is technically sensible, i.e. it is meaningful and plausible to the person skilled in the art from a technical point of view. It further agrees with the appellant that the fact that the claim does not include a step of receiving serial number information does not necessarily mean that the position control device does not receive this information. Outputting both the position information and the serial number information allows the vision measuring system to match position information with image information by unambiguously correlating serial number information associated with, or included in, each of them (see point 5.3 of the statement of grounds of appeal).

Moreover, the appellant's interpretation does not appear to give rise to incompatibilities with the remaining features of the claim.

- 2.6.2 This board endorses the view that a patent proprietor would be awarded an unwarranted advantage if it were allowed to restrict the claimed subject-matter by discarding at will technically reasonable interpretations in view of the description (see T 1127/16, point 2.6.1 of the Reasons and T 169/20, point 1.3.3 of the Reasons).

Therefore, the fact that the description and drawings support one interpretation of an ambiguous feature is not sufficient for other interpretations of the ambiguous feature that are technically reasonable in the context of the claim to be discarded.

- 2.7 The respondent further submitted that outputting both position information and serial number information from the position control device had a basis in the passage extending from page 22, line 14 to page 23, line 28 of the originally filed description. More specifically, the position information - in the form of a Z-coordinate - was stored together with the serial number information in the form of a time stamp (see *"When a time stamp described above is output, it may be retained together with the Z-coordinate"* on page 23, lines 1 and 2). Further, the disclosure *"the Z-value array data (Z-coordinates, etc.) in the Z-value latch buffer 153 is sent from the position control unit 151 to the PC 2"* on page 23, lines 26 to 28 provided a basis for outputting position information and serial number information from the position control device,

since the term "etc." could only correspond to the serial number information.

2.7.1 The appellant countered, *inter alia*, that the general reference to "etc." in the quoted phrase could not be a direct and unambiguous basis for outputting serial number information. It also argued that the claim amounted to an unallowable intermediate generalisation of the specific embodiment described in the cited passages.

2.7.2 The board is of the view that it is not directly and unambiguously derivable from the cited passages of the description that "etc." in the phrase "the Z-value array data (Z-coordinates, etc.)" refers to the time stamp retained with the respective Z-coordinate, and hence that the serial number information is output from the position control device together with the Z-coordinates.

2.8 In view of the above, claim 1 of the granted patent extends beyond the content of the application as filed. Therefore, the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted.

3. *Auxiliary request 1 - admittance (Article 12(6) RPBA)*

3.1 Under Article 12(6), second sentence, RPBA, "[t]he Board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance".

- 3.2 The amended claims of auxiliary request 1 were filed for the first time with the respondent's reply to the statement of grounds of appeal.
- 3.2.1 The respondent justified the filing of auxiliary request 1 at that stage of the proceedings as follows.
- (a) There was no need to respond to the appellant's objections during opposition proceedings, since the respondent was convinced that the objections were unfounded. This was also borne out by the opposition division's statements in its communication and decision.
 - (b) Auxiliary request 1 addressed the objection of added subject-matter in the statement of grounds of appeal, which was based, at least in part, on new arguments referring to document D2 in support of the appellant's technical reasoning. Auxiliary request 1 was therefore submitted as a legitimate response at the first opportunity.
- 3.2.2 Moreover, the respondent submitted that the amendment was not complex and was suitable for overcoming the objection under Article 100(c) EPC.
- 3.3 The appellant argued that auxiliary request 1 should not be admitted to the appeal proceedings. Although the respondent had amended the claims to address some objections raised during the first-instance proceedings, it had not addressed the objection under Article 100(c) EPC. Further, the amendment gave rise to issues under Articles 84 and 123(2) EPC.

- 3.4 In the board's view, auxiliary request 1 should have been submitted in the proceedings leading to the decision under appeal.
- 3.5 The respondent's argument that it saw no reason to file auxiliary request 1 during the first-instance proceedings did not convince the board. The patent proprietor is solely responsible for the requests it presents and the timing of their filing. A patent proprietor cannot permissibly postpone the filing of requests that should have been filed at first instance simply because it considered the opponent's objections to be unfounded. A patent proprietor should be aware that a board of appeal may agree with the objections raised by an opponent. The patent proprietor takes a risk in refraining from filing claim requests during the first-instance proceedings in the belief that the objections raised are unfounded, only to file those requests during the appeal proceedings.
- 3.6 If the respondent considered that the amendments to the claims of auxiliary request 1 provided a fallback position in case the opposition division did not maintain the patent as granted, it should have filed an auxiliary request with such claims during the first-instance proceedings.
- 3.7 Furthermore, the circumstances of the appeal case do not justify the admittance of auxiliary request 1.
- 3.7.1 The appellant's arguments against maintenance of the granted patent in the statement of grounds of appeal are essentially the same as those put forward in the opposition proceedings. The appellant's reference to a prior-art document does not substantially change the objection under Article 100(c) EPC raised in the notice

of appeal. Therefore, the circumstances of the case have not changed and cannot justify the filing of auxiliary request 1 for the first time during the appeal proceedings.

3.7.2 In respect of claim 1 of the granted patent, the board concluded that the position control device outputting both the position information and the associated serial number information was a technically sensible interpretation of granted claim 1 which was not originally disclosed (see point 2.6.1 above). Since it is not apparent from the wording of the amended claim that the serial number information is not output, the respondent could not convince the board that the amendment was suitable for overcoming the objection of added subject-matter.

3.8 In view of the above, the board is of the view that auxiliary request 1 should have been filed during the first-instance proceedings, and that the circumstances of the present appeal case do not justify its admittance. Thus, the board, exercising its discretion under Article 12(6), second sentence, RPBA, decided not to admit auxiliary request 1 to the appeal proceedings.

4. *Auxiliary requests 3a, 3b, 4a and 4b - admittance (Article 12(6) RPBA)*

4.1 Reference is made to the legal provision in point 3.1 above.

4.2 The amended claims of auxiliary requests 3a, 3b, 4a and 4b were filed for the first time with the respondent's reply to the statement of grounds of appeal.

- 4.2.1 The respondent justified the filing of these requests at this stage of the proceedings as follows.
- (a) There was no need to respond to the appellant's objections during opposition proceedings, since the respondent was convinced that the objections were unfounded. This was also borne out by the opposition division's statements in its communication and decision.
- (b) Auxiliary requests 3a, 3b, 4a, and 4b were a legitimate response to the issue of intermediate generalisation raised with respect to granted claim 1.
- 4.2.2 Furthermore, the respondent submitted that the amendments were not complex and were suitable for overcoming the objection under Article 100(c) EPC.
- 4.3 The appellant considered that auxiliary requests 3a, 3b, 4a and 4b should not be admitted to the appeal proceedings. It submitted that the amendments, which were taken from different passages of the specification, should have been filed at first instance and were complex. The requests were not clearly allowable, and admitting them would run counter to the principle of procedural economy.
- 4.4 In the board's view, these auxiliary requests should have been submitted during the proceedings leading to the decision under appeal.
- 4.5 The respondent's argument that it saw no reason to file these requests during the first-instance proceedings did not convince the board, for the same reasons as

those given in relation to auxiliary request 1 (see point 3.5 above).

4.6 If the respondent considered that the amendments to the claims of these auxiliary requests provided a fallback position in case the opposition division did not maintain the patent as granted, it should have filed auxiliary requests with such claims during the first-instance proceedings.

4.7 In addition, the circumstances of the appeal case do not justify the admittance these requests either, since the amendments are not directed at overcoming the objection under Article 100(c) EPC raised against granted claim 1, and give rise to further issues under Article 123(2) EPC.

4.7.1 The board concluded that the position control device outputting both the position information and the associated serial number information in granted claim 1 was not directly and unambiguously derivable from the application as filed (see point 2.7.2 above). The board's conclusion in respect of claim 1 of the granted patent was not based on an alleged intermediate generalisation. Hence, contrary to the respondent's submissions, the amendments to the claims of auxiliary requests 3a, 3b, 4a and 4b cannot be directed at overcoming the objections raised against granted claim 1.

4.7.2 Moreover, the passages of the description cited by the respondent as the basis for the amendments relate to an embodiment in which the imaging device issues a trigger to the position control device. However, the subject-matter of claim 1 of auxiliary requests 3a, 3b, 4a and 4b is not limited to this configuration. It

includes the position control device issuing a trigger signal to the imaging device, which is not described in the cited passages. Thus, the amendments give rise to complex issues under Article 123(2) EPC.

- 4.8 In view of the above, the board is of the view that these requests should have been filed during the first-instance proceedings, and that the circumstances of the present appeal case do not justify their admittance. Therefore, the board, exercising its discretion under Article 12(6), second sentence, RPBA, decided not to admit any of auxiliary requests 3a, 3b, 4a and 4b to the appeal proceedings.
5. *Auxiliary requests 5 and 6 - added subject-matter (Article 123(2) EPC)*
- 5.1 The European patent application or European patent may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).
- 5.2 Claim 1 of both requests specifies the feature of granted claim 1 which had been objected to under Article 100(c) EPC (see points 2.6 and 2.7 above).
- 5.3 Neither the appellant nor the respondent submitted comments going beyond the discussion for granted claim 1.
- 5.4 The board is of the view that claim 1 of both requests contains subject-matter which extends beyond the content of the application as filed, for the same reasons as those given in relation to claim 1 of the granted patent. Therefore, claim 1 of auxiliary

requests 5 and 6 does not meet the requirements of Article 123(2) EPC.

6. *Auxiliary request 7 - admittance (Article 13(2) RPBA)*

6.1 The claims of auxiliary request 7 were filed during the oral proceedings before the board, i.e. after the communication under Article 15(1) RPBA, and are therefore amendments within the meaning of Article 13(2) RPBA which entered into force on 1 January 2024 (see OJ EPO 2023, A103).

6.2 Under Article 13(2) RPBA, any amendment to a party's appeal case after notification of a communication under Article 15(1) RPBA is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

In applying Article 13(2) RPBA, the board may also rely on the criteria set out in Article 13(1) RPBA (see Supplementary publication 2 of the OJ EPO 2020, explanatory notes to Article 13(2), page 60, fourth paragraph).

Under Article 13(1) RPBA, the board must exercise its discretion in deciding whether or not to admit amendments to a party's appeal case in view of, *inter alia*, whether the party has demonstrated that any such amendment, *prima facie*, overcomes the issues raised by another party in appeal proceedings or by the board and does not give rise to new objections.

6.3 Claim 1 of auxiliary request 7 was amended, *inter alia*, by deleting the expression "in association with the serial number information", with the result that only

the position information is output from the position control device.

- 6.4 The respondent submitted that the exact nature of the objection under Article 100(c) EPC only became clear during the oral proceedings before the board, and that the amendment overcame the objection. Furthermore, it did not give rise to new objections, in particular under Article 123(3) EPC, since the deleted feature was redundant.
- 6.5 The appellant argued that auxiliary request 7 was filed late. In addition, the scope of the claim was likely to have been broadened because of the deleted feature. Thus, it gave rise to new objections.
- 6.6 The board cannot identify any exceptional circumstances within the meaning of Article 13(2) RPBA that would justify the admittance of auxiliary request 7.

In the notice of opposition (see point IV.3), the appellant (then opponent) expressed the view that the application as filed did not disclose outputting the position information with the serial number information from the position control information. Since the objection was clearly stated from the outset of the opposition proceedings, the board cannot accept as exceptional circumstances that the appellant became aware of the exact nature of the objection for the first time during the oral proceedings before the board.

- 6.7 Furthermore, the board concurs with the appellant that auxiliary request 7 gives rise to new objections. While granted claim 1 could be interpreted as outputting both the position information and the serial number

information, claim 1 of auxiliary request 7 specifies outputting only the position information. Therefore, claim 1 of auxiliary request 7 was *prima facie* amended in such a way that the protection it confers is extended (Article 123(3) EPC).

6.8 In view of the above, the board, exercising its discretion under Article 13(2) RPBA, decided not to admit auxiliary request 7 to the appeal proceedings.

7. *Conclusion*

7.1 Since the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted, none of auxiliary requests 1, 3a, 3b, 4a, 4b and 7 are admitted to the appeal proceedings and claim 1 of auxiliary requests 5 and 6 does not meet the requirements of Article 123(2) EPC, the decision under appeal is to be set aside and the patent revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



K. Boelicke

B. Willems

Decision electronically authenticated