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Datasheet for the decision
of 7 December 2023

Case Number:	T 1502/20 - 3.5.03
Application Number:	09727342.9
Publication Number:	2274684
IPC:	H04L29/08, H04N7/173, H04N21/472, H04N21/258, H04N21/222, H04N21/231
Language of the proceedings:	EN

Title of invention:
Handling long-tail content in a content delivery network (CDN)

Applicant:
Level 3 Communications, LLC

Headword:
Popular CDN resources/LEVEL 3 COMMUNICATIONS

Relevant legal provisions:
EPC Art. 56
EPC R. 111(2)
RPBA 2020 Art. 12(4), 12(6), 11

Keyword:
Inventive step - main and 1st auxiliary requests (no):
arguments relating to "non-technical prejudice fallacy"
Admittance of requests filed on appeal - 2nd and 3rd auxiliary
requests (no): should have been filed earlier + "fresh case"
Remittal to the examining division (no): no substantial
procedural violation and no other "special reason"

Decisions cited:
T 1670/07

Case Number: **T 1502/20 - 3.5.03**

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 7 December 2023

Appellant: Level 3 Communications, LLC
(Applicant)   1025 Eldorado Boulevard
                        Broomfield, CO 80021 (US)

Representative: Marks & Clerk LLP
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                        London EC4A 1BW (GB)

Decision under appeal: Decision of the Examining Division of the
                        European Patent Office posted on 7 February 2020
                        refusing European patent application
                        No. 09727342.9 pursuant to Article 97(2) EPC.

Composition of the Board:

Chair   K. Bengi-Akyürek
Members: J. Eraso Helguera
                   C. Heath

Summary of Facts and Submissions

I.   The appellant lodged an appeal against the decision of
        the examining division to refuse the present European
        patent application for lack of inventive step
        (Article 56 EPC) with respect to a main request and a
        first auxiliary request.

II.   The appealed decision referred *inter alia* to the
        following prior-art document:

        D1:   US 2008/0071859 A1.

III.   Oral proceedings before the board were held on
        7 December 2023.

        The appellant requested that the decision under appeal
        be set aside and that a patent be granted on the basis
        of the claims of one of four requests:

        -   the **main request** and the **first auxiliary request** on
            which the appealed decision is based, both
            re-submitted with the statement of grounds of
            appeal and
        -   a **second** and a **third auxiliary request**, both filed
            for the first time with the statement of grounds of
            appeal.

        As an auxiliary measure, the appellant requested that
        the board remit the case to the examining division for
        further prosecution.

IV.   Claim 1 of the **main request** reads as follows:

"A method of content delivery in a content delivery
network comprising at least a first tier of servers,
the method comprising:

at a first server (108) in said first tier of
servers, obtaining a request from a client (106) for a
resource;

if said resource is available at said first
server (108) or at a peer of said first server (108),
serving (504) the resource to the client (106) from the
first server (108);

otherwise, if said resource is not available at
said first server (108) or at a peer of said first
server (108), determining (506) whether said resource
is to be served based on its popularity; and

when it is determined that said resource is not to
be served based on its popularity, obtaining the
resource at said first server (108) and serving (504)
the resource to the client (106) from the first
server (108); and

when it is determined that said resource is to be
served based on its popularity:

determining whether said resource is popular, and

if the resource is determined to be popular, then
said first server (108) obtaining (526) said resource
and said first server (108) serving (528) the resource
to the client (106), otherwise,

if the resource is determined not to be popular,
directing (522, 524) said client (106) to a second

server, said second server not in said first tier of
servers, and

said second server serving the resource to the
client (106)."

Claim 1 of the **first auxiliary request** reads as
follows:

"A method of content delivery in a content delivery
network comprising at least a first tier of edge
servers and a plurality of parent servers forming a
second tier of servers, said parent servers being
distinct from said edge servers, the method comprising:

at an edge server (108) in said first tier of
servers, obtaining a request from a client (106) for a
resource;

if said resource is available at said edge
server (108) or at a peer of said edge server (108),
serving (504) the resource to the client (106) from the
edge server (108);

otherwise, if said resource is not available at
said edge server (108) or at a peer of said edge
server (108), determining (506) whether said resource
is to be served based on its popularity; and

when it is determined that said resource is not to
be served based on its popularity, obtaining the
resource at said edge server (108) and serving (504)
the resource to the client (106) from the edge
server (108); and

when it is determined that said resource is to be served based on its popularity:

determining whether a current popularity value for said resource exceeds a first predetermined popularity threshold;

if the current popularity value does not exceed the first predetermined popularity threshold, directing (522) said client (106) to a content provider's origin server or a cache associated with said origin server, said origin server or the cache associated with said origin server serving the resource to the client (106);

if the current popularity value does exceed the first predetermined popularity threshold, determining whether said resource is popular by determining whether the current popularity value for said resource exceeds a second predetermined popularity threshold which is greater than the first predetermined popularity threshold; and

if the resource is determined to be popular based on the current popularity value exceeding the second predetermined popularity threshold, then said edge server (108) obtaining (526) said resource and said edge server (108) serving (528) the resource to the client (106), otherwise,

if the current popularity value exceeds the first predetermined popularity threshold but does not exceed the second predetermined popularity threshold, directing (524) said client (106) to a parent server of the plurality of parent servers, said parent server not in said first tier of edge servers, and

said parent server serving the resource to the
client (106)."

Claim 1 of the **second auxiliary request** reads as
follows:

"A method of content delivery in a content delivery
network comprising at least a first tier of edge
servers and a plurality of parent servers forming a
second tier of servers, said parent servers being
distinct from said edge servers, the method comprising:
    at an edge server (108) in said first tier of
servers, obtaining a request from a client (106) for a
resource;
    if said resource is available at said edge
server (108) or at a peer of said edge server (108),
serving (504) the resource to the client (106) from the
edge server (108);
    otherwise, if said resource is not available at
said edge server (108) or at a peer of said edge
server (108), determining (506) based, at least in
part, on a name used to request the resource, the name
corresponding to one or more servers, whether
popularity of said resource is to be used to determine
where the resource will be served from; and
    in response to determining that where said resource
is to be served from is not to be determined based on
its popularity, obtaining the resource at said edge
server (108) and serving (504) the resource to the
client (106) from the edge server (108);
    and
    in response to determining, based at least on the
name used to request the resource, that where said
resource is to be served from is to be determined based
on its popularity:

determining whether a current popularity value for said resource exceeds a first predetermined popularity threshold;

if the current popularity value does not exceed the first predetermined popularity threshold:

redirecting (514, 522), by the edge server (108), said client (106) to a content provider's origin server or a cache associated with said origin server, said origin server or the cache associated with said origin server serving the resource to the client (106);

if the current popularity value does exceed the first predetermined popularity threshold:

determining whether said resource is popular by determining whether the current popularity value for said resource exceeds a second predetermined popularity threshold which is greater than the first predetermined popularity threshold; and

if the resource is determined to be popular based on the current popularity value exceeding the second predetermined popularity threshold, then said edge server (108) obtains said resource from the origin server or a parent server, and caches (526) said resource, and said edge server (108) serves (528) the resource to the client (106),

otherwise, if the current popularity value exceeds the first predetermined popularity threshold but does not exceed the second predetermined popularity threshold:

redirecting (524), by the edge server, said client (106) to a parent server of the plurality of parent servers, said parent server in the second tier of servers, and

said parent server serving the resource to
the client (106)."

Claim 1 of the **third auxiliary request** reads as
follows:

"A method of content delivery in a content delivery
network comprising at least a first tier of edge
servers and a plurality of parent servers forming a
second tier of servers, said parent servers being
distinct from said edge servers, the method comprising:
    at an edge server (108) in said first tier of
servers, obtaining a request from a client (106) for a
resource;
    if said resource is available at said edge
server (108) or at a peer of said edge server (108),
serving (504) the resource to the client (106) from the
edge server (108);
    otherwise, if said resource is not available at
said edge server (108) or at a peer of said edge
server (108), determining (506) based, at least in
part, on a name used to request the resource, the name
corresponding to one or more servers, whether
popularity of said resource is to be used to determine
where the resource will be served from, wherein said
determining (506) comprises ascertaining whether the
resource has been designated to use the popularity
service; and
    in response to determining that said resource is
not designated and that where said resource is to be
served from is not to be determined based on its
popularity, obtaining the resource at said edge
server (108) and serving (504) the resource to the
client (106) from the edge server (108);
    and

in response to determining, based at least on the name used to request the resource, that said resource is designated and that where said resource is to be served from is to be determined based on its popularity:

determining whether a current popularity value for said resource exceeds a first predetermined popularity threshold;

if the current popularity value does not exceed the first predetermined popularity threshold:

redirecting (514, 522), by the edge server (108), said client (106) to a content provider's origin server or a cache associated with said origin server, wherein said origin server or associated cache is not comprised in either of the first or second tier of servers, said origin server or the cache associated with said origin server serving the resource to the client (106);

if the current popularity value does exceed the first predetermined popularity threshold:

determining whether said resource is popular by determining whether the current popularity value for said resource exceeds a second predetermined popularity threshold which is greater than the first predetermined popularity threshold; and

if the resource is determined to be popular based on the current popularity value exceeding the second predetermined popularity threshold, then said edge server (108) obtains said resource from the origin server or a parent server, and caches (526) said resource, and said edge server (108) serves (528) the resource to the client (106),

otherwise, if the current popularity value
exceeds the first predetermined popularity
threshold but does not exceed the second
predetermined popularity threshold:
redirecting (524), by the edge server,
said client (106) to a parent server of the
plurality of parent servers, said parent
server in the second tier of servers,
wherein said parent server recognises the
request as a redirect, cache fills the
resource from the origin server, and serves
the resource to the client (106)."

Reasons for the Decision

1.   MAIN REQUEST

This main request is identical to the one underlying
the appealed decision.

1.1   *Claim 1 – inventive step (Article 56 EPC)*

1.1.1   The board concurs with the appealed decision that
prior-art document **D1** could indeed be used as a
starting point for assessing inventive step. Using the
wording of claim 1, document D1 discloses the following
features (board's outline):

A method of content delivery in a content delivery
network (CDN) comprising at least a first tier of
servers ("edge servers"), the method comprising:

(a) at a first server ("selected best or optimal edge
    server") in said first tier of servers, obtaining a
    request from a client for a resource ("objects")

(Fig. 3(a), step 300; [0025]: "... a client, requesting one or more objects, to an edge server in the network ... the client is directed to an optimal edge server ...");

(b) if said resource is available at said first server or at a peer of said first server, serving the resource to the client from the first server (Fig. 3(a), step 310; [0026]: "... if so, serves (at 205, 310) the object to the requesting client 140 ...");

(c) ~~if said resource is not available at said first server or at a peer of said first server, determining whether said resource is to be served based on its popularity;~~

(d) ~~when it is determined that said resource is not to be served based on its popularity, obtaining the resource at said first server and serving the resource to the client from the first server;~~

(e) ~~when it is determined that said resource is to be served based on its popularity:~~

(f) determining whether said resource is popular (Fig. 3(a), step 315; [0027]: "... a check is initiated (at 315) for the edge server to determine whether the requested object is popular ..."),

(g) ~~if the resource is determined to be popular, then said first server obtaining said resource and said first server serving the resource to the client,~~

(h) if the resource is determined not to be popular, directing said client to a second server ("parent

(or origin) server"), said second server not in
said first tier of servers (Fig. 3(a), step 325;
[0029]: "... the selected edge server directs (at
210, 320) the requesting client 140 to a parent
server 120 ..."),

(i) said second server serving the resource to the
client (Fig. 3(a), step 345; [0029]: "... a parent
server that ... is able to serve (at 215, 345) the
requested object to the client ...").

1.1.2   The subject-matter of claim 1 thus differs from the
disclosure of D1 in **features (c) and (d)**
("difference 1" in Reasons 15.1 of the appealed
decision) and in **features (e) and (g)** ("difference 2"
in Reasons 15.1 of the appealed decision). This
corresponds in substance to the respective feature
analysis carried out by the examining division in
Reasons 15.1 of the appealed decision, on the one hand,
and by the appellant in section II of the statement of
grounds of appeal, on the other hand. For the avoidance
of doubt, the board expressly acknowledges that
features (f), (h) and (i) as disclosed by D1 do not
have features (c) and (e) as pre-conditions.

1.1.3   As to the technical effect associated with these
distinguishing features, the appellant submitted that
they improved the efficiency of the provided service.
Specifically, they led to a method in which the
resources were always served from the "first server",
with the sole exception of less popular resources for
which - in addition - "popularity" was to be
considered. The possibility to "override" the
popularity measures for specific resources further
provided higher control, fewer checks and quicker
deliveries with less delay. So, the appellant framed
the objective technical problem as "how to modify D1 to

improve the efficiency of the provided service in the CDN". Having the "first server" obtain and serve specific - yet "unpopular" - resources was in fact counter-intuitive. The skilled person starting from D1 could not have introduced these features without the use of hindsight.

1.1.4 These arguments fail to convince the board, since:

(a) Claim 1 does not indicate what kind of cache-filling policy - if any - the "first server" applies or how the "first server" is actually to be pre-populated - if at all - with resources. Although the first server "obtains" and "serves", according to claimed **features (d) and (g)**, a resource "which was not available at said first server or at a peer of said first server", it cannot be implied that such resource will necessarily be available at said first server for subsequent requests, i.e. "cached". Nor can it be assumed that the mere content delivery over the "first server" - without the ulterior benefits of caching - will necessarily be quicker and with less delay. On the contrary, for those resources associated with popularity measures, **features (c) and (e)** impose an additional processing burden when compared with a *mandatory* popularity evaluation as could be known from D1.

(b) The pre-condition defined by **feature (c)**, i.e. whether or not to override the popularity measures, can be motivated or triggered merely by administrative (i.e. non-technical) considerations rather than by technical ones. The present application itself corroborates this conclusion (see e.g. paragraph [0062]; board's emphasis: "...

A rule base may be used to augment and/or override the popularity measures for certain resources. The rules in the rule base may be static or dynamic and may be set by the CDN **administrator** and/or the **subscriber**. For example, a subscriber may **not want to pay** for certain content to be served from the edge, regardless of its popularity, and may set a rule accordingly ..."; paragraph [0067]: "... the **CDN operator** and/or the **subscriber** may specify ... content that is to be managed **based on its popularity**, rather than simply always being served from a cache.".

(c) The argument that it was counter-intuitive that the "first server" obtains and serves "unpopular" resources (which is, in the board's view, part of the *administrative* requirement) and that the skilled person would therefore not have introduced those features into the system of D1 without the use of hindsight is redolent of the so-called **"non-technical prejudice fallacy"** established in **T 1670/07**. In other words, the argument that non-technical aspects (such as mere administrative requirements) are a reason for not modifying the prior art cannot be accepted because the question is simply how the *implementation* of the distinguishing feature would be done rather than whether the skilled person would consider that aspect (cf. T 1670/07, Reasons 16). Hence, also here, there is no *technical* reason why the skilled person would not have considered modifying the various parts of the system of D1, at least to the extent claimed, to solve the objective problem posed (see point 1.1.5 below).

1.1.5   Overall, it follows from the above that the claimed use
        of a "first server" or an "edge server" on the basis of
        "popularity", as it appears in the independent claims,
        can only be considered as a mere *administrative*
        constraint. As such, it can e.g. be set by an operator
        on the basis of their subjective perceptions. Thus, the
        distinguishing features (c), (d), (e) and (g) are
        associated with administrative, i.e. non-technical,
        considerations or requirements. Hence, applying the
        well-established COMVIK approach, the underlying
        non-technical aim can legitimately be incorporated into
        the objective technical problem as a constraint that
        has to be met. As a consequence, in the present case,
        the objective technical problem may be framed as "how
        to modify or adapt the system of D1 so that a selected
        first server always serves requested resources
        irrespective of their popularity and that the rest of
        first servers always serve 'popular' resources".

1.1.6   The administrative requirements, once set, would have
        readily led the skilled person to the introduction of
        an additional check as to whether popularity is to be
        considered at a given first server (i.e. features (c),
        (d) and (e)) and to the configuration of said first
        server to obtain the resource at the server and serve
        it to the client from that server as per features (d)
        and (g) without the involvement of any inventive
        skills.

1.2   In view of the above, the main request is not allowable
        under Article 56 EPC.

2.   FIRST AUXILIARY REQUEST

        Claim 1 of the first auxiliary request differs from
        claim 1 of the main request in that

(j) the first server is an <u>edge server</u>;

(k) the second server is a <u>parent server</u>;

and in that features (f), (g) and (h) are replaced by the following features:

(l) determining whether a current popularity value for said resource exceeds a <u>first predetermined popularity threshold</u>;

(m) if the current popularity value does not exceed the first predetermined popularity threshold, directing said client to a content provider's <u>origin server</u> or a cache associated with said <u>origin server</u>, said origin server or the cache associated with said origin server serving the resource to the client;

(n) if the current popularity value does exceed the first predetermined popularity threshold, determining whether said resource is popular by determining whether the current popularity value for said resource exceeds a <u>second predetermined popularity threshold</u> which is greater than the first predetermined popularity threshold;

(o) if the resource is determined to be popular based on the current popularity value exceeding the <u>second predetermined popularity threshold</u>, then said edge server obtaining said resource and said edge server serving the resource to the client,

(p) if the current popularity value exceeds the first predetermined popularity threshold but does not exceed the second predetermined popularity threshold, directing said client to a <u>parent server</u>

of the plurality of parent servers, said parent
server not in said first tier of edge servers.

2.1   Claim 1 - inventive step (Article 56 EPC)

2.1.1   The appellant submitted that the introduction of
         numerical values associated with "popularity" made the
         claimed subject-matter even more technical. So, the
         claim now defined three categories of content - "rare",
         "medium", "very popular" - in relation to its
         popularity.

2.1.2   Yet the board considers that additional features (l) to
         (p) are still associated with mere administrative
         considerations. Notably, the added terms "current
         popularity value" and "first/second predetermined
         popularity threshold" do not necessarily correspond to
         (automatically) *measured* parameters. Administrative
         criteria are also quantified using numerical values and
         thresholds. At any rate, the objective technical
         problem as formulated in point 1.1.5 above and the
         observations on its solution indicated in point 1.1.6
         above still apply to claim 1 of the first auxiliary
         request.

2.2   The first auxiliary request is therefore not allowable
         under Article 56 EPC either.

3.   SECOND AND THIRD AUXILIARY REQUESTS

         Claim 1 of the **second auxiliary request** differs from
         claim 1 of the first auxiliary request in the following
         amended features:

         (c') if said resource is not available at said first

server or at a peer of said first server,
determining <u>based, at least in part, on a name used
to request the resource, the name corresponding to
one or more servers, whether popularity of said
said resource is to be used to determine where the
resource will be served from</u>;

(d') <u>in response to determining that where said resource
is to be served from is not be determined based on
its popularity</u>, obtaining the resource at said
first server and serving the resource to the client
from the first server;

(e') <u>in response to determining, based at least on the
name used to request the resource, that where said
resource is to be served from is to be determined
based on its popularity</u>:

(m') if the current popularity value does not exceed the
first predetermined popularity threshold:
<u>redirecting, by the edge server,</u> said client to a
content provider's origin server or a cache
associated with said origin server, said origin
server or the cache associated with said origin
server serving the resource to the client;

(o') if the resource is determined to be popular based
on the current popularity value exceeding the
second predetermined popularity threshold, then
said edge server obtains <u>said resource from the
origin server or a parent server, and caches</u> said
resource and said edge server serves the resource
to the client,

(p') if the current popularity value exceeds the first

predetermined popularity threshold but does not
exceed the second predetermined popularity
threshold:
<u>redirecting, by the edge server,</u> said client to a
parent server of the plurality of parent servers,
said parent server <u>in the second tier of servers,</u>

Claim 1 of the **third auxiliary request** comprises all
the limiting features of claim 1 of the second
auxiliary request, with the following amendments:

(c'') if said resource is not available at said first
server or at a peer of said first server,
determining based, at least in part, on a name used
to request the resource, the name corresponding to
one or more servers, whether popularity of said
said resource is to be used to determine where the
resource will be served from,<u> wherein said
determining comprises ascertaining whether the
resource has been designated to use the popularity
service</u>;

(d'') in response to determining that <u>said resource is
not designated and that</u> where said resource is to
be served from is not be determined based on its
popularity, obtaining the resource at said first
server and serving the resource to the client from
the first server;

(e'')in response to determining, based at least on the
name used to request the resource, <u>that said
resource is designated and</u> that where said resource
is to be served from is to be determined based on
its popularity:

(p'')if the current popularity value exceeds the first

predetermined popularity threshold but does not
exceed the second predetermined popularity
threshold:
redirecting, by the edge server, said client to a
parent server of the plurality of parent servers,
said parent server in the second tier of servers,
<u>wherein said parent server recognises the request</u>
<u>as a redirect, cache fills the resource from the</u>
<u>origin server</u>,

3.1   *Admittance into the appeal proceedings (Article 12(6)*
        RPBA, second sentence, 2020)

3.1.1   The appealed decision was based on different claim
        requests, the **second and third auxiliary requests**
        having been submitted with the statement of grounds of
        appeal. The appellant did not demonstrate that this
        part of the appeal case (i.e. the part relating to
        these auxiliary requests) was "admissibly raised and
        maintained" in the preceding examination proceedings,
        as required by Article 12(4) RPBA 2020. In consequence,
        it is an "amendment" which may be admitted only at the
        discretion of the board, which shall exercise its
        discretion in view of, *inter alia*, the complexity of
        the amendment, the suitability of the amendment to
        address the issues which led to the appealed decision,
        and the need for procedural economy.

3.1.2   The appellant's case presented in its statement of
        grounds of appeal with respect to the newly filed
        auxiliary requests was based on the presence of
        additional limitations which had been introduced during
        the examination proceedings into the claim request
        filed with the letter dated 6 October 2016. However,
        these limitations were not maintained in the claim
        requests subsequently filed on which the appealed

decision is based. In addition to this, the appellant
introduced *further features* allegedly extracted from
the description of the application as filed, i.e.
paragraphs [0043] and [0044] for the second and third
auxiliary requests and paragraphs [0040], [0034],
[0037], [0074] and [0047] for the third auxiliary
request, thereby generating a "fresh case".

3.1.3   The board considers that these requests *could* and
         should have already been filed before the examining
         division during the first-instance oral proceedings at
         the latest. In this regard, the board also notes that
         after having been summoned by the examining division,
         the appellant decided to withdraw the request for oral
         proceedings, thereby foregoing an opportunity to timely
         address further issues as regards inventive step during
         oral proceedings and potentially address them by filing
         new requests upon which the examining division could
         have ruled. The purpose of appeal proceedings is not to
         examine subject-matter which is substantially different
         from that considered by the department of first
         instance. Rather, the primary object of appeal
         proceedings is to review in a judicial manner the
         correctness of the appealed decision (cf. Article 12(2)
         RPBA 2020).

3.1.4   The appellant submitted that it could not have filed
         these claim requests earlier for several reasons.
         Firstly, the appellant had commercial priorities and
         budgets which prevailed over the rules of the EPO.
         Secondly, this was the first opportunity for the
         appellant to react to the examining division's
         erroneous argumentation in the appealed decision.

3.1.5   The board observes that the line of argumentation
         developed by the examining division in Reasons 15 and

16 of the appealed decision derives from the objection
raised in point 2 of the annex to the summons to the
first-instance hearing. In particular, the examining
division identified the same distinguishing features
and the same corresponding technical effects in claim 1
of the main request in view of D1. And the appellant
reacted indeed by filing the first auxiliary request
prior to the date scheduled for the oral proceedings
before the examining division. Already at this point in
time the appellant could indeed have filed the second
and third auxiliary requests.

3.2   In conclusion, the board did not admit the second and
third auxiliary requests into the appeal proceedings
(Article 12(6), second sentence, RPBA 2020).

4.   *Request for remittal of the case*

4.1   The appellant submitted that the board had identified
several flaws in the inventive-step reasoning appearing
in the appealed decision. For instance, the examining
division had not correctly identified the
distinguishing features in view of D1 and the technical
effect associated therewith. Thus, the appellant
neither obtained a properly reasoned decision nor was
fully heard on the reasons for refusal. The appellant
requested that the board remit the case to the
examining division to re-examine the case under the
"guidance" given by the board.

4.2   The board diverged indeed from the examining division's
reasoning, albeit not from its conclusions. In
particular, in Reasons 15.1 of the appealed decision,
the examining division had identified "partial
problems": features (c) and (d) ("difference 1) had "no
guaranteed technical effect" and feature (g)

("difference 2") constituted "a straightforward
alternative option". Differently, the board associates
all the distinguishing features (c), (d), (e) and (g)
with administrative, i.e. non-technical, considerations
or requirements (see point 1.1.5 above). But this does
not mean that the appealed decision was not reasoned
within the meaning of Rule 111(2) EPC. Rather, such
divergence is to be considered - at most - as an error
of judgement. The board finds no fundamental procedural
deficiency in the examination proceedings and can
decide the whole case. Particularly, the board cannot
see any "special reasons" for remitting the case to the
examining division (Article 11 RPBA 2020). It is in
fact not uncommon for a Board of Appeal to take a
different stance on issues of patentability than the
examining or opposition division. If this was
considered as an exceptional reason for a remittal,
most cases would have to be remitted. A different or
erroneous approach to the assessment of novelty or
inventive step is not a flaw of procedure that would
deprive a party of being properly heard and thus amount
to a *procedural* violation.

5.   Since there is no allowable claim request on file, the
        appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

B. Brückner K. Bengi-Akyürek

Decision electronically authenticated