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**Datasheet for the decision
of 3 September 2024**

Case Number: T 2011/21 - 3.2.01

Application Number: 13003568.6

Publication Number: 2826662

IPC: B60N2/28

Language of the proceedings: EN

Title of invention:

Child safety seat

Patent Proprietor:

BRITAX RÖMER Kindersicherheit GmbH

Opponent:

CYBEX GmbH

Headword:

Relevant legal provisions:

EPC Art. 52(1), 54, 56, 83, 84, 111, 112, 113, 123(2), 117
RPBA 2020 Art. 12(2), 12(3), 12(4)
EPC R. 103(1)(a)

Keyword:

Evidence - public prior use - review of the evaluation of evidence by the first instance
Novelty - main request (no) - auxiliary request (yes)
Inventive step - auxiliary request (yes)
Sufficiency of disclosure - (yes)
Amendments - allowable (yes)
Claims - clarity in opposition appeal proceedings
Amendment to case - amendment within meaning of Art. 12(4) RPBA 2020 (yes) - admitted (yes)
Reply to statement of grounds of appeal - new request substantiated (yes)
Substantial procedural violation - (no)
Appeal decision - remittal to the department of first instance (no)
Reimbursement of appeal fee - (no)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

G 0003/14, G 0001/21

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 2011/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 3 September 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
10 September 2021 concerning maintenance of the
European Patent No. 2826662 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
A. Jimenez
A. Wagner
O. Loizou

Summary of Facts and Submissions

- I. The appeal filed by the appellant (opponent) is directed against the interlocutory decision of the opposition division maintaining the European patent No. 2 826 662 in amended form.

In its decision the opposition division held that the ground for opposition pursuant to Article 100(a) in association with Article 54 EPC was prejudicial to the maintenance of the patent as granted and decided to maintain the patent in amended form according to the auxiliary request 1, filed as auxiliary request 2, on 12 November 2019. In particular, the opposition division found that this auxiliary request met the requirements of Article 83, 84 and 123(2) EPC and that the subject-matter of independent claim 1 was novel and involved an inventive step in view, among others, of the public prior use represented by the child safety seat commercialized with the name "*Sirona*" (bundle of evidence M11). During the oral proceedings which was held by videoconference the "*Sirona*" child safety seat was inspected remotely by the opposition division. The inspection was transmitted by videoconference to all parties with every party having been given the chance to direct the camera used for inspection to specific details of interest. Screenshots showing several relevant views and constructional details of the child safety seat "*Sirona*" were taken and attached to the protocol of inspection.

- II. With a first communication according to Article 15(1) RPBA dated 29 June 2023 the Board informed the parties of its preliminary assessment regarding only the issue of the alleged substantial procedural violation

objected by the appellant (opponent).

First oral proceedings pursuant to Article 116 EPC were held before the Board on 20 November 2023 to discuss the request for remittal of the case to the opposition division in view of alleged substantial procedural violations.

With a second communication according to Article 15(1) RPBA dated 18 December 2023 the Board informed the parties of its preliminary assessment of the remaining issues under discussion.

Second oral proceedings pursuant to Article 116 EPC were held before the Board on 3 September 2024.

III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked or, in the alternative, that the case be remitted to the opposition division in view of a substantial procedural violation, and that the appeal fee be reimbursed. The appellant (opponent) also requested that the questions as mentioned in the minutes of the oral proceedings of 20 November 2023 be referred to the Enlarged Board of Appeal.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to one of the auxiliary requests 1 to 8 filed with the reply to the statement of grounds of appeal of the appellant (opponent).

IV. Independent claim 1 of the patent as maintained reads as follows (labelling according to the decision under appeal):

A child safety seat (1) for a vehicle comprising an outer shell (2) enclosing a seating area (3) for a child (4) and

a protective element (5),

the protective element (5) comprising a housing component (7) and

an impact component (8),

wherein the housing component (7) is embedded into the outer shell (2), wherein the outer shell (2) comprises a side wing (13) and the housing component (7) is embedded into the side wing (13), and

the impact component (8) is mounted to the housing component (7),

is configured to be enclosed at least partially by the housing component (7),

and is configured to protrude laterally from the outer shell (2) in a direction facing away from the seating area (3),

the impact component of the protective element being configured to be transferred from a rest position to a functioning position,

and the impact component of the protective element being configured to protrude further from the outer shell when disposed in the functioning position than when disposed in the rest position,

the housing component (7) or the impact component (8) comprising a deformable region (9) adapted to cushion forces impacting on the impact component (8),

wherein the housing component (7) is supported by a fixed bearing (12), the fixed bearing allowing the impact forces to be guided into a structurally stable part of the child safety seat,

the impact component (8) comprising a top portion (8a) and a bottom portion (8b), the top portion being mounted on top of the bottom portion and the top portion being wider in diameter than the bottom portion, the outer edge of the top portion resting on the outer shell (2), when the impact component is retracted completely into the housing component (7).

Independent claim 1 according to the auxiliary request 1 is identical to independent claim 1 of the patent as maintained.

Compared to independent claim 1 of the patent as maintained, independent claim 1 according to the auxiliary request 2 contains the further limitation that that bottom portion of the impact element is "*cylindrical*".

Compared to independent claim 1 of the patent as maintained, independent claim 1 according to the auxiliary request 3 contains the further limitation that:

"the impact component comprises a rigid body molded from a thermoplastic material, wherein the rigid body

comprises a screw thread (8c)".

V. The questions to be referred to the Enlarged Board of Appeal as submitted by the appellant (opponent) are the following:

1. *"Is the decision G 1/21 applicable for first instance proceedings."*

2. *"If the answer to question 1 is no, is the decision G 1/21 applicable for the procedure of taking evidence by inspection."*

Reasons for the Decision

MAIN REQUEST (patent as maintained) AND AUXILIARY REQUESTS 1 AND 2

Articles 52(1) and 54 EPC: Novelty

1. Regarding the objection of lack of novelty raised by the appellant (opponent) against the subject-matter of independent claim 1 according to the patent as maintained and to the auxiliary requests 1 and 2, the parties at the second oral proceedings referred to the arguments provided in writing and did not make any further submissions. The Board has thus no reason to deviate from its preliminary assessment of novelty of these requests as set out in the second communication according to Article 15(1) RPBA dated 18 December 2023 which is herewith confirmed and reads as follow:

Main Request

2. Contrary to the conclusion of the opposition division, the subject-matter of independent claim 1 of the patent as maintained lacks novelty within the meaning of Articles 52(1) and 54 EPC in view of the child safety seat "Sirona" which was remotely inspected by the opposition division in the course of the taking of evidence.

2.1 The public availability of the prior use of the "Sirona" child safety seat is not contested by the respondent (patent proprietor). Based on the taking of evidence, the opposition division concluded that the subject-matter of claim 1 according to the auxiliary request 1 underlying the decision under appeal was novel over this public prior use. The opposition division held that the inspected "Sirona" child safety seat did not comprise the feature introduced in claim 1 of the auxiliary request 1 that:

"the outer shell (2) comprises a side wing (13) and the housing component (7) is embedded into the side wing (13)".

The remaining features of independent claim 1 were considered to be directly and unambiguously disclosed in combination by this public prior use.

2.1.1 The conclusion of the opposition division regarding the alleged distinguishing feature above was based on an interpretation of the term "side wing" (see point 15.2.1 of the decision) which was considered too narrow by the appellant (opponent). In this respect, the opposition division followed the arguments of the respondent (patent proprietor) that the term "side

wing" had a commonly recognised meaning in the technical field of child safety seats. According to this meaning, the person skilled in the art did not understand the term "*side wing*" of a child safety seat as meaning its entire side wall, but rather only the forward portion of it, i.e only the portion of the side wall lying beyond the back rest of the seat on which the child's back was supposed to lay. The transitional region bridging the side of the seat with its back was thus not covered by the term "*side wing*".

- 2.1.2 However - as pointed out by the appellant (opponent) - no evidence was provided either by the opposition division nor by the respondent (patent proprietor) in support of this narrower interpretation. Reference was merely made to the functional definition of the term "*side wing*" given in paragraph [0030] of the contested patent, lines 40-41, according to which "*The side wings are configured to enclose the child's torso on both sides.*". The opposition division inferred from this passage that the portion of the side surface of a child safety seat lying behind the back rest (and hence behind the child's back) did not belong - at least in the context of the patent - to the "*side wing*". Under this assumption and by referring in particular to the screenshot N°21 attached to the protocol of the inspection, the opposition division concluded that the housings of the telescopic assemblies carrying the impact component of the "*Sirona*" child safety seat entered the seat shell behind the back of the child and, therefore, that it was not "*embedded in the side wing*" but, at the most, in the curved transition portions of the outer shell interposed between the sidewall and the back rest. According to the opposition division's interpretation, these transition portions did not belong to the side wings, whereby the feature

of claim 1 that the housing component was embedded into the side wings could not be read in the public prior use.

2.2 The interpretation of the term "*side wing*" adopted in the contested decision and the consequential positive assessment of novelty of the subject-matter of claim 1 provided by the opposition division were contested by the appellant (opponent) with their appeal. They maintained that the alleged distinguishing feature could be read in the public prior use when the term "*side wing*" was interpreted correctly, i.e. broadly as to mean the entire sidewall of the seat.

2.2.1 The Board concurs with the appellant (opponent) that the term "*side wing*" - in absence of any convincing evidence that in the relevant technical field the person skilled in the art would understand it in the way suggested by the opposition division - should be interpreted broadly to merely indicate:

the entire sidewall/side surface of the child seat.

In view of the above broader definition the "*side wing*" is understood by the skilled reader as to include the curved transitional portions of the side walls merging into the back portion of the outer shell, and not only - as alleged by the respondent (patent proprietor), the forward portion of the side walls located beyond the back rest of the seat. Furthermore, as convincingly pointed out by the appellant (opponent), the cited text in paragraph [0030] of the contested patent cannot provide or prove a commonly recognized definition of the term "*side wing*" in the broader sense adopted by the opposition division. In fact, this passage only says that "*the side wings are configured to enclose the*

child's torso on both sides". This functional requirement does not however exclude, that the side wings of the child safety seat may also extend further behind the portion of the seat occupied by the torso of the child.

2.2.2 Turning to the screenshots taken during the inspection of the "SIRONA" child safety seat and in particular to the images N°19 to 21, it is clear that the housings of the telescopic assemblies shown therein, which functionally equate with the *"impact components"* recited in claim 1, are embedded in the left and right curved portions of the side walls merging into the back portion of the outer shell, wherein - according to the definition adopted by the Board - said curved portions also belong to the side wings of the child safety seat. Therefore - contrary to the view of the opposition division - the disputed feature that *"the outer shell (2) comprises a side wing (13) and the housing component (7) is embedded into the side wing (13)"* when construed according to the correct definition of the term *"side wing"* is directly and unambiguously derivable from the public prior use *"Sirona"*.

2.3 With their reply to the statement of grounds of appeal of the appellant (opponent), the respondent (patent proprietor) maintained the view that - contrary to the conclusion of the opposition division - the feature of claim 1 of the patent as maintained that the housing components (7) or the impact components (8) comprise *"a deformable region adapted to cushion forces impacting on the impacting components"* was not directly and unambiguously derivable from the public prior use. In this respect, it was argued that the deformability provided by the mushroom-shaped head of the telescopic assembly which could be inferred from the screenshot

N°14 of the "*SIRONA*" child safety seat was not a deformability within the meaning of claim 1. The respondent (patent proprietor) pointed out that the skilled reader understood that the deformability required by the rigid body of the impact element of claim 1 was not just the inherent deformability of a material, i.e. the inherent deformability/flexibility of the mushroom-shaped head of the telescopic assembly of the "*Sirona*" child safety seat, but rather a deformability capable to provide a considerable damping effect in case of impact. In their opinion, this was not the case of the deformation undergone by the mushroom-shaped head of the impact element of the prior use child safety seat shown in screenshot N°14 caused by a force applied by a finger. In this respect, the respondent (patent proprietor) reiterated the argument that the side of the deformation of the mushroom-shaped head visible in screenshot N°14 was not relevant and advantageous in case of crash because the impact forces, due to the orientation of the mushroom-shaped head within the vehicle when the seat was correctly positioned and secured, acted on the other side that was relatively stiff and could only break without damping any impact force. Further, the position of the elastic side of the mushroom-shaped head of the impact component of the "*Sirona*" child safety seat did not correspond to the relevant direction of the linear forces which were usually transferred to the seat shell in case of impact.

2.3.1 These arguments are not convincing:

As correctly observed by the opposition division and the appellant (opponent), the formulation of this contested feature is very broad in the sense that it does not specify any direction of the forces acting on

the impact component in case of a crash and that have to be cushioned. The Board concurs with the opposition division that in view of the large number of possible dynamic scenarios in case of a crash, forces may impact on the shell of the seat in principle from any direction such that the elastic part of the mushroom-shaped head of the impact component of the "*Sirona*" child safety seat shown in screenshot N°14 can provide, at least under certain impact conditions, for a cushioning effect as required by claim 1 of the patent as maintained. Therefore, the Board confirms the view of the opposition division that this feature can be directly and unambiguously read in the prior use's child safety seat.

- 2.3.2 In view of all the above and contrary to the findings of the opposition division, the subject-matter of claim 1 of the patent as maintained lacks novelty over the public prior use "*Sirona*". An assessment of the further novelty attacks raised by the appellant (opponent) is thus not required.

Auxiliary Requests 1 and 2

- 2.4 These auxiliary requests correspond to the auxiliary requests 7 and 8 filed at the end of the first instance oral proceedings. The appellant (opponent) objected to their admissibility under Article 12(2) RPBA. It was argued that they had not been discussed and decided upon by the opposition division and hence they did not form part of the contested decision. As independent claim 1 of each of these auxiliary requests lacks novelty within the meaning of Articles 52(1) and 54 EPC in view of the public prior use "*Sirona*" the admissibility issue needs not to be dealt with.

- 2.4.1 The objection of lack of novelty raised against independent claim 1 of the patent as maintained analogously applies for the same reasons to the identical independent claim 1 of the auxiliary request 1.
- 2.4.2 Independent claim 1 of the auxiliary request 2 is amended to specify that the bottom portion of the impact component (8) is "*cylindrical*". However, the Board agrees with the appellant (opponent) that also the bottom portion of the impact component of the "*Sirona*" child safety seat is cylindrically shaped (see for example screenshot N°16) at least in the meaning that the term "*cylindrical*" has in the context of the contested patent (see Figures 3 and 4a to 4d).
- 2.4.3 In conclusion and irrespective of the admissibility issue raised by appellant (opponent), independent claim 1 of auxiliary requests 1 and 2 respectively also lacks novelty over the public prior use "*Sirona*", whereby these requests are not allowable.

AUXILIARY REQUEST 3

3. The auxiliary request 3 was filed as auxiliary request 10 at the end of the first instance oral proceedings. Compared to independent claim 1 of the version of the patent allowed by the opposition division, independent claim 1 contains the additional features literally introduced from claims 9 and 10 as granted (claims 15 and 16 as filed), namely that:

"the impact component (8) comprises a rigid body moulded from a thermoplastic material wherein the rigid body comprises a screw thread (8c)".

Admissibility

- 3.1 The auxiliary request 3 is admitted into the appeal proceedings.

- 3.2 As for the higher-ranking auxiliary requests 1 and 2, the admissibility of the auxiliary request 3 was contested by the appellant (opponent) for the same reasons (see point 2.4 above). Furthermore, it was objected that this request did not comply with the requirements of Rule 80 EPC and, as reiterated at the oral proceedings, that it was not duly substantiated by the respondent (patent proprietor) as required by Article 12(3) RPBA.
 - 3.2.1 The appellant (opponent) argued that the admissibility of this late filed request was not discussed and decided upon at the oral proceedings in view of the conclusion of the opposition division that the contested patent could be maintained on the basis of the higher-ranking auxiliary request 1. As a consequence this auxiliary request did not underlie the decision under appeal and therefore was not part of the appeal proceedings pursuant to Article 12(2) RPBA as instead asserted by the respondent (patent proprietor), but represented an unallowable amendment of the respondent's (patent proprietor's) appeal case pursuant to Article 12(4) RPBA.

 - 3.2.2 The Board acknowledges that the auxiliary request 3 was indeed filed as auxiliary request 10 after the announcement by the opposition division that the auxiliary request 1 was considered allowable, and that the appellant (opponent) promptly objected to its admittance before the end of the oral proceedings (see minutes, point 24). In the Board's view, the question

to be in principle answered is whether the auxiliary request 3 was admissibly filed (as auxiliary request 10) before the opposition division. That being the case, the auxiliary request 3 would not represent an amendment of the respondent's (patent proprietor's) appeal case. However, this question may remain unanswered for the following reasons:

Even considering auxiliary request 3 to be an amendment to the respondent's (patent proprietor's) appeal case, the Board exercised its discretionary power provided by Article 12(4) RPBA such to admit the auxiliary request 3 into the appeal proceedings. When exercising its discretion, the Board considered that:

a) the amendments in independent claim 1, as it will be explained below, appeared to be "*prima facie*" suitable to address the issues raised in respect of the main request, namely lack of novelty,

b) these amendments were not complex as they consisted in the integral introduction of features recited in dependent claims as granted (and as filed), and

c) the amendments introduced in claim 1 did not negatively impact on procedural economy and/or on the position of the appellant (opponent) in the appeal proceedings taking into account that they were filed at an early stage of the appeal proceedings, i.e. with the reply to the statement of grounds of appeal. Furthermore, the appellant (opponent) was aware of the content of this potential auxiliary request from the end of the first instance oral proceedings and could thus reasonably expect that this request was re-submitted in reaction to the appeal.

- 3.3 Regarding the objection raised by the appellant (opponent) under Rule 80 EPC, the Board observes that the added features clearly limit the scope of the protection afforded by independent claim 1 in an attempt to further distinguish the claimed child safety seat from the cited prior art, thereby addressing the ground for opposition under Article 100(a) EPC. Therefore, contrary to the allegation of the appellant (opponent), the Board - in agreement with the opposition division - cannot see any lack of compliance with Rule 80 EPC affecting the auxiliary request 3.
- 3.4 Finally the Board - contrary to the allegation of the appellant (opponent) - finds that the respondent (patent proprietor) has sufficiently substantiated the auxiliary request 3 as required by Article 12(3) RPBA.
- 3.4.1 The Board observes that under point 7.3 of their reply dated 24 May 2022, the respondent (patent proprietor) clearly indicated the limitations introduced and the basis thereof in the application as originally filed. Furthermore, besides generally stating that the amendments introduced rendered the subject-matter of independent claim 1 novel and non-obvious with respect to the cited prior art, the technical effects achieved are extensively discussed. More detailed arguments as to why the subject-matter of independent claim 1 was novel and non-obvious in view of the evidence cited in the appeal proceedings - as pretended by the appellant (opponent) - were not required and could not be expected to be filed with the reply dated 24 May 2022 because no submissions were made in respect of this auxiliary request in the statement of grounds of appeal of the opponent. Finally, the Board observes that in reaction to the comments filed by the appellant (opponent) with their submissions dated 2 August 2022

addressing for the first time the auxiliary request 3, the respondent (patent proprietor) provided with their letter dated 27 October 2022 further comments to the extent that the very general submissions of the appellant (opponent) required. These submissions do not indeed indicate either a closest prior art document nor a clear line of argument based on the problem-solution approach and based on a specific combination of pieces of prior art. Therefore, the Board takes the view that the objection of lack of substantiation raised by the appellant (opponent) is not justified.

Articles 83, 84 and 123(2) EPC

4. Regarding the objections raised under Articles 83, 84 and 123(2) EPC against the main request and maintained by the appellant (opponent) in respect to the auxiliary request 3 to the extent that they are still applicable, the parties at the oral proceedings referred to the arguments provided in writing and did not make any further submission. The Board has thus no reason to deviate from its preliminary assessment of these issues as set out in the communication according to Article 15(1) RPBA dated 18 December 2023 which is herewith confirmed and reads as follow:

Article 83 EPC: Sufficiency of Disclosure

- 4.1 Contrary to the view of the opposition division, the appellant (opponent) maintained that the skilled person was not able to figure out how the impact component could be retracted completely into the housing component while, at the same time, the outer edge of the top portion was resting on the outer shell of the child safety seat as required by the last feature of

independent claim 1.

- 4.1.1 However, the Board shares the view of the opposition division and the respondent (patent proprietor) that according to established case law of the Boards of Appeal, a claim shall be construed with a mind willing to understand, thereby adopting an interpretation which is technically sensible and which takes the whole disclosure of the patent into account, and ruling out any illogical reading which does not make technically sense. That said, the Board concurs with the opposition division (see reasoning and conclusion regarding the patent as maintained in the contested decision) and the respondent (patent proprietor) that by correctly construing the claim in accordance with the above mentioned approach, the person skilled in the art readily realizes that the recited complete retraction of the impact component is to be understood as a configuration where only the bottom portion of the impact component is actually completely retracted into the housing, thereby allowing that the top portion of the impact component rests on the outer shell of the seat. How this functionality can be put in practice can be immediately derived by the person skilled in the art without any burden from all the embodiments presented in the contested patent (see Figures 3 and 5 to 7 with corresponding description).

Article 84 EPC: Clarity

- 4.2 The alleged lack of clarity raised by the appellant (opponent) against dependent claims 7 and 12 of the patent as maintained also applies to the corresponding dependent claims of the auxiliary request 3. In this respect, the appellant (opponent) argued that the inconsistency resulting from the teachings of dependent

claims 7 and 12 (claims 8 and 13 as granted) with the invention as now defined in independent claim 1 according to which the housing component was embedded into the side wings (features of granted claim 7) was of different "quality" compared to the inconsistency between dependent claims 7, 8 and 13 as granted. Therefore, even if claim 1 of auxiliary request 3 (inter alia) was a combination of granted claims 1 and 7, the principles of the G3/14 did not apply and, contrary to the view of the opposition division, these dependent claims of the auxiliary request 3 could be objected under Article 84 EPC.

- 4.2.1 The Board does not agree and follows the view of the opposition division and the respondent (patent proprietor) that the inconsistency in auxiliary request 3 between claim 1 and the dependent claims 7 and 12 regarding the location of the housings of the protective elements is of the same nature and extent as the inconsistency between dependent claims 7, 8 and 13 as granted. Claims 7 and 12 are thus not open to objections under Article 84 EPC as correctly stated by the opposition division in application of the principles of the G3/14.

Article 123(2) EPC: Basis for the amendment

- 4.3 In view of the introduction in claim 1 of the feature that the rigid body of the impact component comprises a screw thread, the only objection raised under Article 123(2) EPC by the appellant (opponent) against claim 1 as maintained still affecting independent claim 1 of the auxiliary request 3 is the alleged unallowable intermediate generalisation resulting from the omission of the feature that the bottom portion of the impact component is "essentially cylindrical". This feature

was presented in the context of the specific embodiment disclosed in paragraphs [0034] and [0035] of the description as filed supporting the additional features of the impact component introduced in claim 1.

- 4.3.1 However, the Board follows the arguments of the opposition division and the respondent (patent proprietor) that an "*essentially cylindrical*" shape is not inextricably and functionally linked to the remaining features of the rigid body of the impact component introduced in claim 1 from the description and this because the person skilled in the art recognizes that the same functionality could be also achieved by cross-sections other than (essentially) circular provided that they allow for the axial transfer/movement of the impact component between the functioning position and the rest position.

In any case, the fact that a screw thread is provided on the rigid body of the impact component as now specified in claim 1 inherently implies that the bottom portion of the impact component of the child safety seat must be essentially cylindrical, i.e with a circular cross section allowing for rotation of the rigid body. Therefore, no unallowable intermediate generalisation of the specific embodiments described in paragraphs [0034] and [0035] of the A1-publication occurs.

Article 52(1) and 54 EPC: Novelty

5. Lack of novelty was not objected by the appellant (opponent) against the subject-matter of claim 1 of the auxiliary request 3 and the Board does not see any reason for raising such an objection.

Articles 52(1) and 56 EPC: Inventive Step

6. The subject-matter of claim 1 of the auxiliary request 3 is not rendered obvious by the cited prior art (Articles 52(1) and 56 EPC).

6.1 At the oral proceedings the appellant (opponent) maintained the arguments put forward with their written submission dated 2 August 2022 where it was essentially argued that the feature "*the impact component (8) comprises a rigid body moulded from a thermoplastic material ...*" was at least rendered obvious in view of common general knowledge. However, no submissions were made as to why the provision of a thread on the rigid body should be considered obvious in view of the available prior art. In particular no closest prior art document or starting point for the invention was identified by the appellant (opponent) nor did they substantiate why it would be obvious to provide a generally known child safety seat as, for example the Sirona child safety seat, with an impact component made of a thermoplastic material having a rigid body comprising a screw thread. Under these circumstances, the Board is satisfied with the arguments provided by the respondent (patent proprietor) in their reply to the statement of grounds of appeal of the (appellant) opponent in support of inventiveness of the subject-matter of independent claim 1 where the distinguishing features with respect to the public prior use "*Sirona*", that indeed represents a possible closest prior art, and the technical effect thereby achieved are extensively discussed.

Alleged Substantial Procedural Violation

7. The Board takes the view that no substantial procedural violation took place during the proceedings before the department of first instance and that the right to be heard pursuant to Article 113 EPC was properly granted to the appellant (opponent).

- 7.1 The appellant (opponent) contested the correctness of the decision of the opposition division to hold oral proceedings and to carry out the inspection of the child safety seat "*Sirona*" per videoconference hence in the physical absence of the opposition division and of the parties although it had been requested to hold them in person. The appellant (opponent) essentially pointed out that in view of the complexity of the structure and design of the outer shell, in particular of the rear part of the "*Sirona*" child safety seat, it was not possible by a mere video-inspection to correctly identify the effective location/extension of the portions of the seat functionally corresponding to the "*side wings*" recited in claim 1. Consequently, it was not possible to correctly assess whether the "*housing component*" of the "*protective element*" of this known child safety seat was embedded in the "*side wings*" as required by the new feature introduced in claim 1 of the patent as maintained. It was alleged that the inspection per video was detrimental to the position of the appellant (opponent) in the opposition proceedings in the sense that it prevented them to present their arguments in the most convincingly and effective way. Furthermore, it was asserted that also the capacity of the opposition division to correctly assess the issues under discussion, namely the location and the respective functionality of the different portions of the outer shell, was negatively affected. In view of

all the above, the appellant (opponent) concluded that the decision to carry out the inspection by videoconference unduly limited their right to be heard to an extent that this circumstance amounted to a substantial procedural violation justifying the remittal of the case to the department of first instance and the reimbursement of the appeal fee.

- 7.1.1 The Board considers that the opposition division erred in not granting the opponent's request to take evidence by inspection be made in-presence. The opponent's request was namely substantiated and in the Board's view well-founded, in particular because the object to be inspected was a complex three-dimensional item, and it could not a priori be ruled out that the images on the screen would allow the participants to appreciate the full extent of the disclosure.

This error, however, does not constitute a substantial procedural violation, because the decision of the opposition division to consider the subject-matter of independent claim 1 of the patent as maintained novel in view of the prior use "*Sirona*", was actually neither determined nor influenced to the detriment of the appellant (opponent) by the fact that the inspection took place by videoconference and not in presence.

This approach of the opposition division constitutes rather a different - and in view of the Board erroneous - interpretation by the opposition division of the term "*side wings*".

In fact, the inspection made by video conference revealed that the prior used object had all the features as alleged by the appellant (opponent). The

issue was not one of the opposition division not appreciating the whole extent of the disclosure but one of claim construction. The Board has thus no reason to consider that the opposition would have arrived at a different result if the inspection had taken place in-presence.

7.2 The appellant (opponent) saw a further substantial procedural violation in the circumstance that the opposition division in paragraph 15.2.1 of the contested decision stated that the term "*side wings*" of claim 1 had a generally recognized meaning in the technical field of child safety seat. The appellant (opponent) alleged that they were not given the opportunity during the oral proceedings to comment on this allegedly new and surprising statement of the opposition division that was decisive for the novelty assessment over the public prior use "*Sirona*" to the detriment of the appellant (opponent). The appellant (opponent) concluded that also this circumstance of the first instance proceedings amounted to a violation of their right to be heard pursuant to Article 113(1) EPC and hence to a substantial procedural violation justifying the remittal of the case to the opposition division and the reimbursement of the appeal fee.

7.2.1 The Board is not convinced:

As pointed out by the respondent (patent proprietor,) it can be inferred from the minutes (see last sentence of point 12. and point 24.) and the decision itself (points 15.2.1 and 15.2.2) that the interpretation issue regarding the term "*side wings*" was extensively discussed with the parties and that the appellant (opponent) was aware of the narrower definition of the term "*side wings*" which convinced the opposition

division. Thus, the erroneous interpretation of the opposition division of this term constitutes in view of the above an error of judgment, which, however, was not made in violation of the opponent's right to be heard.

7.3 Finally the appellant (opponent) saw a further violation of their right to be heard in the reasoning of the opposition division under points 16.2.3 and 16.2 of the decision regarding inventive step attacks starting from EP-A-2 275 303 (labelled M5 in the decision) and from the public prior use "*Sirona*" respectively. Also in this case it was alleged that the appellant (opponent) did not have the opportunity to comment on an alleged fact on which the reasoning of the decision was based.

7.3.1 The Board is not convinced:

As correctly pointed out by the respondent (patent proprietor), the reasoning of the opposition division under point 16.2.3 objected by the appellant (opponent) relates to an alternative/secondary line of arguments based on the same evidence as the primary line of arguments of the opposition division presented in the same paragraph. The primary line of arguments is not contested under Article 113 EPC. Regarding the objection against the reasoning under point 16.2 relating to a further inventive step attack starting from the public prior use "*Sirona*", the Board follows the view of the respondent (patent proprietor) that from the wording of this section there is no reason to assume that the technical content of the public prior use and of the further documents cited in this section of the decision has not been duly discussed with the parties during the opposition proceedings.

- 7.4 In conclusion no substantial procedural violation occurred during the proceedings before the department of first instance justifying the remittal of the case to the opposition division and the reimbursement of the appeal fee.

Request to refer questions to the Enlarged Board of Appeal

8. According to established case law, a prerequisite for a referral is that the questions are relevant for deciding the case in question (see e.g. Case Law of the Boards of Appeal of the European Patent Office, 10th edition, V.B.2.3.3).

- 8.1 The questions proposed by the appellant (opponent) for referral to the Enlarged Board of Appeal were triggered by the decision of the opposition division to hold the oral proceedings and the inspection of the child safety seat "*Sirona*" by videoconference without the consent of the appellant (opponent). However, for the reasons presented above, the decisive issue leading to the contested positive assessment of novelty of the subject-matter of claim 1 as maintained over the public prior use was the erroneous interpretation of the term "*side wings*" adopted by the opposition division. This is irrespective of the format adopted for the oral proceedings and the inspection. Accordingly, the questions submitted by the appellant (opponent) are not relevant for deciding the case in question.

9. In view of all the above, the claims according to the auxiliary request 3 form a suitable basis for the maintenance of the patent in amended form. Since this was explicitly requested by the respondent (patent proprietor) at the oral proceedings and was not opposed

to by the appellant (opponent), the Board considered it as appropriate to order that the adaptation of the description be made before the department of first instance following the remittal of the case.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent with the claims of the auxiliary request 3 filed with the reply to the statement of grounds of appeal, and a description to be adapted thereto.
3. The requests for reimbursement of the appeal fee and for referral to the Enlarged Board of Appeal are refused.

The Registrar:

The Chairman:



H. Jenney

G. Pricolo

Decision electronically authenticated