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**Datasheet for the decision
of 29 September 2023**

Case Number: T 0100/22 - 3.2.04

Application Number: 17708571.9

Publication Number: 3264956

IPC: A47J43/07, A47J43/046

Language of the proceedings: EN

Title of invention:

A BOWL ASSEMBLY

Patent Proprietor:

Kenwood Limited

Opponent:

SEB S.A.

Headword:

Relevant legal provisions:

EPC Art. 54, 56

RPBA 2020 Art. 13(2)

Keyword:

Novelty - main request (no)

Inventive step - auxiliary request (no)

Amendment after summons - exceptional circumstances (no)

Decisions cited:

T 0410/99, T 0230/01, T 0412/91

Catchword:



Beschwerdekammern

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Case Number: T 0100/22 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 29 September 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
5 November 2021 concerning maintenance of the
European Patent No. 3264956 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The appeals were filed by the appellant (proprietor) and appellant (opponent) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 1, the patent in suit met the requirements of the EPC.
- II. The opposition division decided that the subject-matter of the main request was not novel but that the subject-matter of auxiliary request 1 was novel and involved an inventive step.
- III. On 26 May 2023 the Board issued a communication in preparation for oral proceedings which were duly held on 29 September 2023.
- IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted, or in the alternative that the patent be maintained as amended on the basis of one of auxiliary request 1 (as upheld) or auxiliary request 2, filed with letter of 21 September 2023.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

- V. The independent claim 1 of the main request reads as follows:

"A bowl assembly (110) for an appliance (1) arranged to process contents of the bowl assembly, comprising:
a bowl (112) having an aperture (115) in its base;

a tool mount (200) for a processing tool (230), the tool mount (200) being arranged to fit within the aperture (115) in a first configuration; and a blanking plug (300) arranged to fit within the aperture (115) in a second configuration; wherein the tool mount (200) and the blanking plug (300) are interchangeable with one another, and the bowl assembly (110) is configured to be mounted to the appliance (1) for processing in both the first and second configurations".

Claim 1 of auxiliary request 1 reads as for the main request except that after the wording "a bowl (112) having an aperture (115) in its base", the following wording is inserted:

"the aperture having a non-circular shape"

and at the end of the claim, the following wording is added:

"; and wherein the cross-sectional shapes of both the tool mount and the blanking plug are arranged to correspond with said non-circular shape of the aperture such that they can fit within and fill the aperture, so as to prevent rotation of the tool mount and blanking plug when fitted therein."

Claim 1 of auxiliary request 2 reads essentially as for auxiliary request 1 except that after the wording "so as to prevent rotation of the tool mount and blanking plug when fitted therein", the following wording is added:

"; and wherein further: the tool mount (200) comprises a body portion and a cap portion (204), the cap portion

(204) comprising a lip portion arranged to abut an edge of the aperture (115) when the tool mount (200) is fitted within the aperture (115), the lip portion extending around substantially the entire perimeter of an upper surface of the cap portion (204); the blanking plug (300) comprises a body portion and a cap portion (304), the cap portion (304) comprising a lip portion arranged to abut an edge of the aperture (115) when the blanking plug is fitted within the aperture (115), the lip portion extending around substantially the entire perimeter of an upper surface of the cap portion (304); the tool mount (200) is drivable for driving the processing tool (230), and further comprises a shaft (220) arranged to extend longitudinally through the body portion such that it passes through the cap portion (204); and said upper surface of the blanking plug (300) is flat and featureless."

VI. In the present decision, reference is made to the following documents:

D3: DE202013010484U1

D4: Thermomix TM31 Guide d'utilisation, Vorwerk
France, Nantes, Version 20120816/230

VII. The appellant-proprietor's arguments can be summarised as follows: D3 is a non-enabling disclosure which should not be considered as prior art. Even if it were considered, it would not take away novelty of claim 1 of the main request. Regarding auxiliary request 1, starting from D3 as closest prior art the problem to be solved is ease of assembly of the mixing bowl. The skilled person would not look to the TM31 instruction manual D4 for a solution to this problem because the skilled person would understand D3's numerous references to TM31 relate to a device that has no

cylindrical plug and which would therefore be irrelevant. Even if the skilled person were to combine D3 with D4 they would not arrive at the subject matter claimed as a matter of obviousness. Regarding auxiliary request 2 filed on 21 September 2023, there are exceptional circumstances justifying its admittance into the proceedings.

VIII. The appellant-opponent's arguments can be summarised as follows: D3 is enabled and is thus prior art. D3 takes away novelty of claim 1 of the main request. The combination of D3 with D4 takes away inventive step of auxiliary request 1. Auxiliary request 2 should not be admitted into the proceedings because there are no exceptional circumstances which would justify this.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The patent (see published patent specification, paragraphs [0001] and [0002]) relates to a mixing bowl assembly, for an appliance such as a kitchen appliance. The assembly is arranged to process contents such as food. Such appliances can typically be fitted with a rotating tool [such as a knife] and may also be arranged to heat the bowl's contents.

According to the patent (see paragraph [0003]), certain cooking operations, such as slow cooking, do not require a rotating tool which, by obstructing movement of the ingredients and reducing bowl space, may be detrimental to cooking performance. To resolve this

difficulty (see paragraph [0004] and all versions of claim 1) as well as the bowl assembly of the invention having a first configuration in which an aperture in the base of the bowl receives a processing tool mount, it also has a second configuration in which a blanking plug is fitted in the aperture. In both configurations, the bowl assembly is mountable with an appliance for processing, for example by cooking.

3. Main request, claim 1, novelty with respect to D3

3.1 D3 (see title and abstract) relates to a cleaning plug for a kitchen appliance. The plug is installed in the appliance's mixing bowl by pushing it into an aperture at the bottom of the bowl.

3.2 Status of D3 as prior art

It is not in dispute that D3 was published before the priority date of the patent. However, the appellant-proprietor has argued that it suffers a fundamental deficiency which renders its teaching non-reproducible and thus non-enabled, so it should not be taken into account as valid prior art. In particular, it argued that the skilled person is familiar with the *Thermomix TM31* from the company *Vorwerk* which they know to have a bowl aperture of hexagonal shape. Therefore, D3's references to a blanking plug *for a TM31* apparatus (see for example paragraphs [0001], [0002] and [0007]) are contradicted by D3's disclosure in the same paragraphs that the TM31's mixing bowl has a *circular* aperture ("ein kreisrundes Loch") which D3's blanking plug precisely fits ("passgenau") to seal the aperture, which can but imply a cylindrical plug. Moreover, the contradiction is compounded by D3's explicit disclosure (see for example paragraph [0010] and the figures) that

the blanking plug is cylindrical. According to the appellant-proprietor this contradiction is unresolvable so the skilled person could derive no teaching from D3, which should therefore not be taken into account as prior art.

3.3 In accordance with established jurisprudence (see for example Case Law of the Boards of Appeal, 10th edition, 2022 (CLBA) I.C.4.1 and for example T410/99, reasons, 3.2.1), the technical disclosure in a prior art document must be considered as a whole and is novelty-destroying if it directly and unambiguously discloses the subject-matter in question, account also being taken of a skilled person's common general knowledge at its publication date.

3.4 In the present case, the Board sees no contradiction or ambiguity in D3's teaching when considered as a whole. The Board agrees with the appellant-proprietor that the skilled person will derive from D3, paragraphs [0001] and [0002] that, amongst other things, it concerns a plug that should precisely fit the aperture in a Thermomix TM31 mixing bowl. Whilst it is true that the shape of an aperture may have implications for the shape of a plug designed to fit it, the skilled person, reading D3, has no need to speculate or investigate what aperture-shape might lie behind the name Thermomix TM31 because D3's paragraph [0002] tells them explicitly that the TM31 has a *circular aperture (ein kreisrundes Loch)*. Furnished with this knowledge, the skilled person is faced with no ambiguity or apparent contradiction when they read further into the document (see paragraphs [0010] to [0013]) that D3's precisely fitting plug is cylindrical. This idea is moreover confirmed by D3's figures, briefly described in paragraphs [0020] to [0022], which show a plug of

uniform width (figures 1 and 2) and of circular profile (figure 3), in other words a cylinder. Thus, D3 directly and unambiguously discloses an embodiment of a mixing bowl having a circular aperture and a cylindrical plug to fit the aperture.

3.5 Nor is any contradiction or ambiguity to be found in D3's claim. It defines, amongst other things, a plug for sealing the aperture of a kitchen apparatus bowl. There, no particular shapes for the plug or aperture are mentioned, nor is there any reference to a TM31 kitchen apparatus. Therefore, this part of D3 directly and unambiguously discloses a more general teaching than a circular shaped aperture and a cylindrically shaped plug, or a plug designed for a particularly named kitchen appliance. This interpretation is not a new concept synthesised by *smearing together* different ideas found elsewhere in D3 and other prior art relating to the TM31 to create a new and more general undisclosed concept, as argued by the appellant-proprietor. Rather, as in any patent document, the claim defines the boundaries of D3's invention and this, in a nut shell, includes the idea of a plug to seal an aperture in a mixing bowl without limitation as to the profile of either.

3.6 From the above, the Board holds that D3, when read alone, presents the skilled person with no contradictions or ambiguities.

3.7 The only remaining question, would be whether the skilled person's reading of D3 is contradictory when taking their common general knowledge into account. In the Board's view it is not.

3.7.1 Such a contradiction would be predicated on the skilled person having in mind a non-circular shaped aperture on reading D3's references to TM31. In this regard, the Board notes that these references are purely to the name *TM31* and not to a particular document (such as D4). In accordance with established jurisprudence, common general knowledge is to be found in basic textbooks and the like. In the Board's view, knowledge of the shape of the aperture in a bowl of an apparatus traded under the name TM31 would not fall under this category. This is all the more true since *TM31* may refer to different versions of a product having different technical specifications, as indeed has been pointed out by the appellant-proprietor (see its letter of 21 July 2022, point 7.21).

3.8 From the above, the Board concludes that D3 directly and unambiguously discloses a cylindrical plug for the circular aperture of a mixing bowl (see the description and drawings) and in its most general expression (see claim 1) a plug for an aperture in a mixing bowl.

In the Board's view, this conclusion would not be seen by the skilled person as implausible, erroneous or based on speculation and thus not conforming to the gold standard of considering, just as for examining added subject matter, what is directly and unambiguously derivable from D3. Rather, the Board has demonstrated that it is firmly anchored in D3's explicit wording, whilst taking into account the skilled person's common general knowledge. Moreover, the concept of fitting a plug into an aperture, be it circular or not, is not implausible.

- 3.9 Nor, in the Board's view, would the skilled person have any particular difficulty in realising a kitchen apparatus with a bowl and plug as D3 describes. In particular, by applying their general knowledge, the skilled person can provide a mixing bowl with a circular aperture and a cylindrical plug of matching diameter as described in the example and shown in the drawings. Moreover, the skilled person would likewise have no difficulty in providing differently shaped apertures and corresponding plugs (cf. its claim 1), and thus they would be enabled to implement the teaching of D3 across the whole breadth of its disclosure.
- 3.10 Thus, D3 is not a deficient document that does not reflect technical reality, let alone has the appellant-proprietor unequivocally proven that it is non enabling (cf. T0230/01, reasons 5.2 and T412/91, reasons 4.6). Therefore, the appellant-proprietor's contention that D3 is not to be considered as prior art is moot and the Board must consider it in its examination of novelty and inventive step.
- 3.11 Turning now to consider how D3's disclosure reads onto the features of claim 1, D3 (see the abstract, first sentence) explains that it concerns a bowl assembly for an apparatus having a mixing bowl, thus it is arranged for processing the bowl contents. The bowl has an aperture in its base (see paragraph [0002]: *ein kreisrundes Loch*). In the same paragraph D3 discloses a processing tool in the form of a knife. Since the knife cannot operate by directly scraping the base of the bowl where it would not cut anything it must be mounted somewhere above it. Therefore, D3 implicitly discloses

some kind of a [knife] tool mount, whether formed as one piece with the knife or as a separate piece.

Furthermore, D3 (see paragraph [0002]) discloses that disassembling the knife does not reveal some kind of protruding tool engagement/drive mechanism, but rather exposes the aperture in the mixing bowl. This can but mean that the [knife] tool mount is engaged/driven from below the aperture, so the tool mount must be arranged to fit within the aperture in this configuration, rather than merely sitting loosely on top as the appellant-proprietor has speculated. Therefore, D3 discloses a first configuration as claimed.

According to the same paragraph and the abstract, after removing the knife to reveal the aperture, a cleaning [blanking] plug (Reinigungsverschluss) can be pushed into the aperture to seal it. Thus the tool mount and blanking plug are interchangeable and D3 discloses a second configuration as claimed.

In this second configuration (blanking plug fitted), the mixing bowl can be completely assembled on the kitchen apparatus. As explained in the last two lines of paragraph [0002] and in greater detail in paragraph [0005] (mode b), in this mode, the cooking function is enabled. In other words the bowl's contents can be processed by cooking. Needless to say, when the knife is fitted to the bowl (first configuration), the contents of the bowl can also be processed by cutting and/or cooking. Therefore, D3 discloses processing in both first and second configurations as claimed.

3.12 For these reasons, the Board confirms the opposition division's finding (see impugned decision, point 2.3.3) that D3 takes away novelty of the subject matter of

claim 1, Article 54(1) EPC. Therefore, the main request (as granted) and with it the appeal of the proprietor must fail.

4. Auxiliary request 1, claim 1, inventive step starting from D3 with D4

4.1 Following on from the discussion of novelty for the main request, the subject matter of claim 1 differs from D3 by the following features:

- That the aperture in the base of the bowl has a non-circular shape; and that
- the cross-sectional shapes of both the tool mount and the blanking plug are arranged to correspond with said non-circular shape of the aperture such that they can fit within and fill the aperture, so as to prevent rotation of the tool mount and blanking plug when fitted therein.

As has been explained, the only specific shape D3 discloses for the plug and aperture in the mixing bowl are a cylinder and a circular aperture respectively. By implication, the tool mount for such an aperture would also have a cylindrical shape. Needless to say, this shape combination would allow rotation, contrary to what the claim requires.

4.2 According to the appellant-proprietor, preventing the blanking plug and the tool mount from rotating in the aperture has the technical effect of making the assembly and disassembly of the mixing bowl easier. In this regard, the Board notes that it would be easier to push a cylindrical plug/tool mount into a circular aperture than to do the same with non-circular

aperture/plug because the latter would require the user to first adopt a certain rotational orientation. Thus any ease of assembly/disassembly of the bowl resulting from non-circularity as claimed concerns operations carried out after insertion of the latter and made easier by the relative rotation of the bowl and plug/tool-mount being prevented, such as when locking into the apparatus. This seems to be confirmed in the published patent specification (see paragraph [0007]), and in particular the sentence bridging columns 1 and 2: *preferably wherein the locking arrangement is configured to inhibit movement of the tool mount or blanking plug relative to the bowl.*

Indeed, this is how the appellant-proprietor framed its explanation of the technical effect of this aspect of the invention in its letter of 5 September 2023, section 10.12, in particular with respect to locking and unlocking the bowl when assembling and disassembling it.

- 4.3 With this in mind, the Board agrees with the appellant-proprietor that the objective technical problem can be formulated as how to modify D3 to improve the ease of assembly and disassembly of the mixing bowl.
- 4.4 The appellant-proprietor has argued that D3 points away from the claimed solution by providing a different solution to the problem, namely it teaches to provide a *finger grip* on at least the blanking-plug (see for example D3, paragraph [0004] and [0012] and claims 2 and 5) to improve ease of assembly of the mixing bowl. Therefore, so the argument goes, faced with the objective technical problem (improving assembly and disassembly of the bowl) the skilled person would only consider improvements to the finger grip.

D3 discloses that the finger grip makes it easy to insert/remove the plug (see paragraph [0012]). However, D3 goes on to explain that in a subsequent bowl assembly stage (see paragraph [0022] with figure 3) the cleaning plug has two locking lugs for engaging a pivotable bowl lock, without mentioning the finger grip. Thus, the skilled person would not limit their investigations to making improvements to the finger grip but would also consider improving this latter stage of assembling/disassembling the bowl. Therefore, the argument that the skilled person would only consider improving D3's finger grip is moot.

4.5 The appellant-proprietor has also argued that, faced with the objective technical problem, the skilled person would not look to a solution in D4 (an instruction manual for the Thermomix TM31) because, D3 would *prejudice* the skilled person against looking at anything concerned with a Thermomix TM31 device. In a nutshell, the argument is that D3 teaches to only use a cylindrical plug/tool-mount fitting a circular aperture and, because the skilled person knows this not to be the case with the Thermomix TM31, they would be prejudiced in the sense that they would reject out of hand any prior art concerned with such a device.

4.5.1 The argument is predicated, firstly on the idea that the skilled person knows of the TM31 and in particular the shape of its tool-mount from their general knowledge and secondly on the idea that the skilled person would consider that keeping the cylindrical shape of the tool-mount/plug would be necessary for easily assembling/disassembling the bowl. In the Board's view, neither are true. Firstly, as already explained, the skilled person would not be aware of the

technical details of the TM31 from their general knowledge. Secondly, D3 discloses a broader teaching than a cylindrically shaped tool-mount/plug (see its claim 1). Moreover, D3 does not mention any role the cylindrical shape of the blanking plug might play in assembling/disassembling the bowl. Therefore, faced with the objective technical problem (ease of assembly/disassembly) the skilled person would not reject out of hand all prior art concerned with a TM31 apparatus.

4.5.2 On the contrary, in the Board's view, D3's numerous references to the TM31 name, including the statement in paragraph [0001] that that invention relates to a cleaning plug that is [suitable] for a Thermomix TM31 appliance, would indicate to the skilled person that prior art concerning an appliance of this name could be particularly pertinent when attempting to solve an objective technical problem starting from D3.

4.6 With this mindset, the skilled person would certainly look at D4, an instruction manual for a Thermomix TM31 (see title), which, as can be inferred from its version number (20120816/230) on page 9, as available to the public well before the priority date of the patent (25.02.2016) . Moreover, it discloses information about how to insert and remove the knife when assembling and disassembling the bowl of a TM31 (see pages 14 and 13 respectively), so the skilled person would particularly look at this when seeking a solution to the problem.

4.6.1 To assemble the bowl (page 14), the knife is first pushed through the aperture (figures 1 and 2). Figure 2 shows the aperture to have a rounded hexagonal shape with two diametrically opposed rectangular slots. At the oral proceedings before the Board, it was no longer disputed that figure 2 also shows the upper part of the

knife tool mount to have a corresponding hexagonal shape with diametrically opposed lugs so that it fits within and fills the aperture. Therefore, the doubts raised by the opposition division in this regard (see its decision, reasons point 2.6.3, top of page 15) are moot.

- 4.6.2 In the Board's view, the skilled person, a mechanical engineer experienced in devices such as kitchen appliances, will immediately see (figure 2) that the lugs can only fit through the slots on inserting the tool mount, such that they adopt a predetermined orientation relative to the bowl. Moreover, the skilled person will realise that, even after passing below the aperture, the lugs will maintain this orientation due to the corresponding hexagonal shapes of the aperture and tool mount. The mixing bowl is then fitted to its base by holding the [finger grip] of the knife with one hand and turning the base with the other hand to lock it to the bowl. Starting as they do from D3 (cf. abstract, last sentence), the skilled person will know that the lugs form part of a key which locks the bowl.
- 4.6.3 The Board holds that the skilled person will realise that the fixed orientation of the tool mount achieved by the matching hexagonal shapes makes this locking easier because the user does not need to prevent the [knife] tool mount from rotating when locking the base of the bowl, they only need to ensure it stays pressed against the base of the bowl. When disassembling the bowl, the unlocking of the base (see D4, page 13, figure 5) is even easier since the user can do so with their hands only contacting the bowl and its base (which needs simply to be rotated), without their needing to exercise the caution that an approach to the sharp knife would necessitate. The Board notes that the

description on page 13 explains this explicitly so it behoves no interpretation of the figure. The user need only touch the [finger grip of] the knife when removing it from the bowl in a subsequent operation (figure 6).

- 4.6.4 As they look to make bowl assembly/disassembly easier, the skilled person would thus be motivated to replace D3's circular aperture and cylindrically profiled plug/tool mount with a rounded-hexagon shaped aperture and a corresponding rounded-hexagon shaped profile for the plug/tool mount as disclosed in D4, as a matter of obviousness, thus arriving at a non-circular shaped tool mount and plug which were prevented from rotating in the non-circular aperture as claimed.

- 4.7 The only remaining question is whether they *would* do so or whether, as the opposition division found, they would not do so, because this would require a non-obvious adaptation of the shape of the sealing ring (*Dichtring*) of D3's plug (see impugned decision, point 2.6.3, page 15). In the Board's view they would do so.
 - 4.7.1 D3's plug can seal the bowl when it is being cleaned independently of the base of the kitchen apparatus (see paragraph [0005], mode a). The Board agrees with the appellant-proprietor that, however the skilled person might modify D3's plug they would keep this cleaning functionality (cf. D3 title). It is common ground that in this mode, the purpose of the sealing ring (see figure 2 and paragraphs [0010] to [0013], [0021]) is to hold the plug perfectly in the aperture by providing a counter-force that squeezes the plug's sealing collar against the upper rim of the aperture.

- 4.7.2 It is implicit that D3's sealing ring is already elastic, heat resistant, food-safe and under an appropriate tension for it to stay on D3's cylindrical plug and provide an appropriate counter-force. Moreover, it must be sufficiently durable to withstand being pushed into the circular aperture in D3's bowl multiple times during the lifetime of the plug. Thus, these requirements would not present the skilled person with a complex set of insurmountable problems to solve when adopting a hexagonally shaped plug, but are rather ones which D3's sealing ring already solves.
- 4.7.3 Thus the only question is whether the skilled person would be able to adapt D3's circular sealing ring to a hexagonal shape. In the Board's view, such an elastic sealing ring would automatically conform to the shape of such a hexagonal plug without any or with only minimal modifications requiring no more than the skilled person's routine skills, such as choosing a ring diameter suitable for keeping the ring under sufficient tension on the plug. Nor is the Board convinced that it would be problematic for an elastic circular sealing ring to fit snugly around the corners of the hexagonally shaped plug and to withstand the stresses induced by conforming to such a shape, with its flat surfaces interspersed by corners. This is because, as can best be seen in D4, page 14, figure 2, D4's hexagonally shaped tool-mount has *smooth rounded* corners, so it is without the abrupt changes in shape that the appellant-proprietor envisages might cause problematic stresses and misalignments.

- 4.8 For all these reasons, the Board considers that the subject matter of claim 1 of auxiliary request 1 (as maintained) lacks inventive step starting from D3 in combination with D4.
5. Auxiliary request 2 of 21 September 2023, admissibility
- 5.1 According to Article 12(3) RPBA) 2020, the statement of grounds of appeal and the reply must set out the parties' complete case. In particular, it must be set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld. Any amendment to a party's appeal case after this is only admitted at the Board's discretion. Where, as in the present case, amendments are made after the Board has issued its communication, the strict requirements of Article 13(2) RPBA 2020 apply, according to which such amendments shall, in principle not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 5.2 In the present case, the appellant-proprietor has argued that exceptional circumstances arise because, in its communication in preparation for the oral proceedings (cf. section 9 and 10), when discussing inventive step, the Board had failed to discuss the role played by D3's sealing ring and the opposition division's finding that its presence in D3 rendered the combination of the teachings of D3 and D4 non-obvious (see impugned decision, page 15, lines 8 to 12).
- 5.3 Long before the Board issued its communication, this aspect of the impugned decision was challenged by the appellant-opponent (see its grounds of appeal, points 13 and 14 on page 15 and its letter of 21 July 2021,

paragraph bridging pages 2 and 3). This means that, from the start of the appeal proceedings, the appellant-proprietor should have been aware that it could not necessarily rely on the opposition division's finding in favour of the proprietor regarding this issue. Thus, it should have timely filed all auxiliary requests it considered appropriate to meet this challenge as part of its complete case, prior to the Board issuing its communication.

Therefore, however regrettable it is that the Board did not give an opinion on this issue in its communication, this does not retrospectively release the appellant-proprietor from its obligation to file its complete case at the start of the appeal proceedings, nor constitute exceptional circumstance justifying the filing of a new auxiliary request in the very last week prior to the oral proceedings.

- 5.4 Contrary to how the appellant-proprietor has argued (letter of 21 September 2023, page 7), the Board also does not consider that the late filing of an auxiliary request itself creates exceptional circumstances justifying its admittance. If this were so, then Article 13(2) RPBA 2020 would serve no purpose. Whilst in withdrawing some requests and filing a new one, the appellant-proprietor's action reduced the number of auxiliary requests on file at the oral proceedings before the Board, this cannot mask the fact that the other party and the Board had a further request to consider shortly before the oral proceedings. Therefore, its filing does not contribute to procedural efficiency leading to an exceptional circumstance which would justify its admittance. Rather, the Board sees it to be merely an attempt by the appellant-proprietor to *have another go*.

5.5 The Board is also not convinced that exceptional circumstances exist because of the appellant-opponent's request, made in its letter of 9 August 2023, that the Board should deal with previous auxiliary requests 2 to 16 itself rather than remitting the case to the opposition division. Amongst other things, this is because, when filing the present auxiliary request 2 of 21 September 2023, the appellant-proprietor unconditionally withdrew previous auxiliary requests 2 to 16. Therefore, through its own procedural action the appellant-proprietor rendered moot the appellant-opponent's request that these be dealt with by the Board. In view of this, any hypothetical consequences that might have arisen from the Board deciding on this request in one way or the other are irrelevant for these appeal proceedings, let alone do they constitute exceptional circumstances justifying the late filing of a new request.

5.6 For these reasons, the Board decided not to admit auxiliary request 2 of 21 September 2023 into the proceedings.

6. From the above it follows that the division was right to find lack of novelty for claim 1 as granted (main request) but wrong to find inventive step for claim 1 in the form upheld (auxiliary request 1). The decision must therefore be set aside. As the remaining auxiliary request 2 has not been admitted into the proceedings, the Board must revoke the patent, pursuant to Art 101(3)(b) EPC.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated