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**Datasheet for the decision
of 9 January 2024**

Case Number: T 0246/22 - 3.5.03

Application Number: 16275165.5

Publication Number: 3173366

IPC: H04L29/08, B66B5/00, G06F8/65,
G05B19/042, B66B1/34

Language of the proceedings: EN

Title of invention:

Automated passenger conveying system manipulation via an automated remote activation and validation of controller software

Patent Proprietor:

Otis Elevator Company

Opponent:

KONE Corporation

Headword:

Software update for an elevator system/OTIS

Relevant legal provisions:

EPC Art. 56, 123(2)
EPC R. 139, second sentence
RPBA 2020 Art. 12(4)

Keywords:

Inventive step - main, 1st and 10th auxiliary requests (no):
juxtaposition of obvious features

Admittance of "carry-over requests" - 3rd to 8th auxiliary
requests (no): not demonstrated that "admissibly raised" and
not suitable to address the relevant issues; T 42/20 and
T 476/21 not followed

Admittance of claim requests filed on appeal - 2nd, 9th and
11th auxiliary requests (no): not suitable to address the
relevant issues and not convergent

Decisions cited:

R 0006/19, T 0042/20, T 0221/20, T 0364/20, T 1800/20,
T 0476/21

Headnotes:

- I. The onus to "demonstrate" that submissions were "admissibly raised and maintained" within the meaning of Article 12(4) RPBA lies, as a *general* rule, with the party.

- II. The minimum requirement under Article 12(4), first sentence, RPBA for demonstrating that claim requests were "admissibly raised" in the proceedings leading to the decision under appeal is twofold, namely that the party shows
 - (1) that the requests were filed *in due time*, typically before the expiry of the time limit set by the opposition division under Rule 116(1) and (2) EPC, and
 - (2) that it was made clear, explicitly or by way of unambiguous implication, *for what purpose* the requests were filed, i.e. which objections raised by the other party or the opposition division they try to overcome and how this is actually achieved.

See point 4 of the Reasons.



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0246/22 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 9 January 2024

Appellant I: Otis Elevator Company
(Patent Proprietor) One Carrier Place
Farmington CT 06032 (US)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Appellant II: KONE Corporation
(Opponent) Kartanontie 1
00330 Helsinki (FI)

Representative: K & H Bonapat
Patentanwälte Koch · von Behren & Partner mbB
Donnersbergerstraße 22A
80634 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
29 November 2021 concerning maintenance of the
European Patent No. 3173366 in amended form.**

Composition of the Board:

Chair K. Bengi-Akyürek
Members: P. Tabery
C. Almberg

Summary of Facts and Submissions

I. The appeals of the proprietor (appellant I) and the opponent (appellant II) lie from the decision of the opposition division to maintain the opposed patent in amended form according to an "auxiliary request 1". The opposition division found that the subject-matter of the claims as granted (main request) did not involve an inventive step (Articles 100(a) and 56 EPC).

II. The opposition division referred, *inter alia*, to the following prior-art document:

E1: JP 2006-264877 A.

III. Oral proceedings were held before the board on 9 January 2024. The final requests of the parties were as follows:

- The proprietor requested that the appealed decision be set aside and that the opposition be rejected (**main request**). Alternatively, it requested that the patent be maintained in amended form in accordance with one of **auxiliary requests 1 to 11** submitted with its statement of grounds of appeal (of which auxiliary requests 9 and 10 were later subjected to a request for correction submitted with letter of 7 September 2023).
- The opponent requested that the appealed decision be set aside and that the patent be revoked.

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

IV. Claim 1 of the **main request** (patent as granted) reads as follows:

"A method for automatic updating of a first controller application in a component (109) of an automated passenger conveying device (101), comprising:

downloading a second controller application in response to a software compatibility check (312);
characterised by:

scheduling a switchover (344) in response to the downloading of the second controller application

disabling the automated passenger conveying device (101) from providing service;

performing the switchover (344) from the first controller application to the second controller application;

performing a post-switchover inspection (352) of the second controller application that determines whether the automated passenger conveying device (101) works properly while the second controller application is active; and

enabling the automated passenger conveying device (101) to provide the service when the post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly."

V. Claim 1 of **auxiliary request 1** reads as follows
(amendments vis-à-vis claim 1 of the main request

indicated by the board):

"A method for automatic updating of a first controller application in a component (109) of an automated passenger conveying device (101), comprising: downloading a second controller application in response to a software compatibility check (312); characterised by: scheduling a switchover (344) in response to the downloading of the second controller application, comprising determining a time of day when the automated passenger conveying device (101) is least active and slotting the switchover for that time; disabling the automated passenger conveying device (101) from providing service; performing the switchover (344) from the first controller application to the second controller application; performing a post-switchover inspection (352) of the second controller application that determines whether the automated passenger conveying device (101) works properly while the second controller application is active; and enabling the automated passenger conveying device (101) to provide the service when the post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly."

VI. Claim 1 of **auxiliary request 2** reads as follows (amendments vis-à-vis claim 1 of auxiliary request 1 indicated by the board):

"A method for automatic updating of a first controller application in a component (109) of an automated passenger conveying device (101), said automated

passenger conveying device being one of a plurality of automated passenger conveying devices within an automated passenger conveying system, each of the plurality of automated passenger conveying devices comprising a corresponding component, the method comprising:

downloading a second controller application in response to a software compatibility check (312);

characterised by:

scheduling a switchover (344) in response to the downloading of the second controller application, comprising determining a time of day when the automated passenger conveying device system (101) is least active and slotting the switchover for that time;

disabling the automated passenger conveying device (101) from providing service;

performing the switchover (344) from the first controller application to the second controller application;

performing a post-switchover inspection (352) of the second controller application that determines whether the automated passenger conveying device (101) works properly while the second controller application is active; and

enabling the automated passenger conveying device (101) to provide the service when the post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly."

VII. Claim 1 of **auxiliary request 3** reads as follows (amendments vis-à-vis claim 1 of the main request indicated by the board):

"A method for automatic updating of a first controller application in a plurality of components (109) of a

corresponding plurality of automated passenger conveying devices (101) within an automated passenger conveying system, comprising:
downloading a second controller application to the plurality of components (109) in response to a plurality of corresponding software compatibility checks (312);
scheduling a switchovers (344) for each of the plurality of automated passenger conveying devices (101) in response to the downloading of the second controller application;
disabling the plurality of automated passenger conveying devices (101) from providing service;
performing the plurality of switchovers (344) from the first controller application to the second controller application;
performing a post-switchover inspections (352) of the second controller application that determines whether each of the plurality of automated passenger conveying devices (101) works properly while the second controller application is active; and
enabling each of the plurality of automated passenger conveying devices (101) to provide the service when the post-switchover inspections (352) of the second controller application determines that each of the automated passenger conveying devices (101) works properly
wherein the switchovers (344) are coordinated such that one of the plurality of automated passenger conveying devices (101) is taken out of service at a time."

VIII. Claim 1 of **auxiliary request 4** reads as follows (amendments vis-à-vis claim 1 of auxiliary request 3 indicated by the board):

"A method for automatic updating of a first controller

application in a plurality of components (109) of a corresponding plurality of automated passenger conveying devices (101) within an automated passenger conveying system, comprising:

- downloading a second controller application to the plurality of components (109) in response to a plurality of corresponding software compatibility checks (312);
- scheduling switchovers (344) for each of the plurality of automated passenger conveying devices (101) in response to the downloading of the second controller application;
- disabling the plurality of automated passenger conveying devices (101) from providing service;
- performing the plurality of switchovers (344) from the first controller application to the second controller application;
- performing post-switchover inspections (352) of the second controller application that determines whether each of the plurality of automated passenger conveying devices (101) works properly while the second controller application is active; ~~and~~
- enabling each of the plurality of automated passenger conveying devices (101) to provide the service when the post-switchover inspections (352) of the second controller application determines that each of the automated passenger conveying devices (101) works properly;
- sending to a network monitoring system (303) a message (354) indicating that a switchover (344) was completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly; and
- sending a notification to a user indicating that a switchover (344) was not completed when the

corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) does not work properly;

wherein the switchovers (344) are coordinated such that one of the plurality of automated passenger conveying devices (101) is taken out of service at a time."

IX. Claim 1 of **auxiliary request 5** reads as follows (amendments vis-à-vis claim 1 of auxiliary request 4 indicated by the board):

"A method for automatic updating of a first controller application in a ~~plurality of~~ components (109) of an ~~corresponding plurality of~~ automated passenger conveying devices (101) ~~within an automated passenger conveying system~~, comprising:

downloading a second controller application ~~to the plurality of components (109)~~ in response to a ~~plurality of corresponding~~ software compatibility checks (312);

scheduling a switchovers (344) ~~for each of the plurality of automated passenger conveying devices (101)~~ in response to the downloading of the second controller application;

disabling the ~~plurality of~~ automated passenger conveying devices (101) from providing service;

performing the ~~plurality of~~ switchovers (344) from the first controller application to the second controller application;

performing a post-switchover inspections (352) of the second controller application that determines whether ~~each of the plurality of~~ automated passenger conveying devices (101) works properly while the second controller application is active;

enabling ~~each of the plurality of~~ automated passenger

conveying devices (101) to provide the service when the post-switchover inspections (352) of the second controller application determines that ~~each of~~ the automated passenger conveying devices (101) works properly;

sending to a network monitoring system (303) a message (354) indicating that a switchover (344) was completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly; and

sending a notification to a user indicating that a switchover (344) was not completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) does not work properly;

~~wherein the switchovers (344) are coordinated such that one of the plurality of automated passenger conveying devices (101) is taken out of service at a time."~~

- X. Claim 1 of **auxiliary request 6** reads as follows (amendments vis-à-vis claim 1 of the auxiliary request 3 indicated by the board):

"A method for automatic updating of a first controller application in a plurality of components (109) of a corresponding plurality of automated passenger conveying devices (101) within an automated passenger conveying system, comprising:

downloading a second controller application to the plurality of components (109) in response to a plurality of corresponding software compatibility checks (312);

scheduling switchovers (344) for each of the plurality of automated passenger conveying devices (101) in

response to the downloading of the second controller application, comprising determining a time of day when each automated passenger conveying device (101) is least active and slotting the switchover for that time; disabling the plurality of automated passenger conveying devices (101) from providing service; performing the plurality of switchovers (344) from the first controller application to the second controller application; performing post-switchover inspections (352) of the second controller application that determine whether each of the plurality of automated passenger conveying devices (101) works properly while the second controller application is active; and enabling each of the plurality of automated passenger conveying devices (101) to provide the service when the post-switchover inspections (352) of the second controller application determine that each of the automated passenger conveying devices (101) works properly wherein the switchovers (344) are coordinated such that one of the plurality of automated passenger conveying devices (101) is taken out of service at a time."

- XI. Claim 1 of **auxiliary requests 7 and 8** differs from claim 1 of auxiliary requests 6 and 1, respectively, in that the following clause has been added:

"sending to a network monitoring system (303) a message (354) indicating that a switchover (344) was completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly; and sending a notification to a user indicating that a

switchover (344) was not completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) does not work properly;".

XII. Claim 1 of corrected **auxiliary requests 9** differs from claim 1 of auxiliary request 6 in that the "scheduling switchovers" step now includes the phrase:

"comprising determining a time of day when ~~each~~ the automated passenger conveying ~~device~~ system (101) is least active and slotting the switchover for that time".

XIII. Claim 1 of corrected **auxiliary requests 10** reads as follows:

"A method for automatic updating of a first controller application in a plurality of components (109) of a corresponding plurality of automated passenger conveying devices (101) within an automated passenger conveying system, comprising:
downloading a second controller application to the plurality of components (109) in response to a plurality of corresponding software compatibility checks (312);
scheduling switchovers (344) for each of the plurality of automated passenger conveying devices (101) in response to the downloading of the second controller application, comprising determining a time of day when ~~each~~ the automated passenger conveying system is least active and slotting the switchover for that time;
disabling the plurality of automated passenger conveying devices (101) from providing service;
performing the plurality of switchovers (344) from the

first controller application to the second controller application;
performing post-switchover inspections (352) of the second controller application that determine whether each of the plurality of automated passenger conveying devices (101) works properly while the second controller application is active;
enabling each of the plurality of automated passenger conveying devices (101) to provide the service when the post-switchover inspections (352) of the second controller application determine that each of the automated passenger conveying devices (101) works properly;
sending to a network monitoring system (303) a message (354) indicating that a switchover (344) was completed when the corresponding postswitchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly; and
sending a notification to a user indicating that a switchover (344) was not completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) does not work properly;
wherein the switchovers (344) are coordinated such that one of the plurality of automated passenger conveying devices (101) is taken out of service at a time."

XIV. Finally, claim 1 of **auxiliary request 11** differs from claim 1 of auxiliary request 2 in that the following clause has been added at the end:

"sending to a network monitoring system (303) a message (354) indicating that a switchover (344) was completed when the corresponding

post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) works properly; and
sending a notification to a user indicating that a switchover (344) was not completed when the corresponding post-switchover inspection (352) of the second controller application determines that the automated passenger conveying device (101) does not work properly."

Reasons for the Decision

1. Main request (patent as granted)
 - 1.1 Claim 1 of the main request includes the following limiting features (board's labelling):
 - F1 A method for automatic updating of a first controller application in a component of an automated passenger conveying device, comprising:
 - F2 downloading a second controller application in response to a software compatibility check;
 - F3 scheduling a switchover in response to the downloading of the second controller application;
 - F4 disabling the automated passenger conveying device from providing service;
 - F5 performing the switchover from the first controller application to the second controller application;

F6 performing a post-switchover inspection of the second controller application that determines whether the automated passenger conveying device works properly while the second controller application is active;

F7 enabling the automated passenger conveying device to provide the service when the post-switchover inspection of the second controller application determines that the automated passenger conveying device works properly.

1.2 Interpretation of features F2 and F3

1.2.1 As to the phrase "in response to a software compatibility check" according to **feature F2**, the proprietor argued that the claimed method related to "automatic updating". Hence, the "software compatibility check" had likewise to be performed automatically.

The board is not convinced by this argument, since claim 1 does not specify the "software compatibility check" as a distinct method step. Only the "downloading" is specified as a separate method step and is thus required to be performed automatically. Conversely, the "compatibility check" is merely mentioned as a preceding triggering event and could thus also have been performed by a device upon request or even manually by a person. It is even not derivable from the wording of claim 1 which unit is supposed to actually perform this software compatibility check (e.g. by an on-site or off-site device, etc.). In other words, as the "compatibility check" is not further specified, this term comprises even the most superficial ways of checking whether the software might be compatible (whatever "compatibility" may imply in

this context).

- 1.2.2 Having regard to **feature F3**, the board considers that "scheduling a switchover" may be interpreted simply as triggering a mechanism which ensures any type of time-based initiation of the respective "switchover".
- 1.3 Novelty (Article 54 EPC)
 - 1.3.1 With respect to **feature F2**, the board concurs with the proprietor that, in the system of document **E1**, the available memory size of the "remote maintenance device 11" does not correlate with the memory size of the "FE-ROM 5" and may thus not serve as an indication as to whether the control program being received may indeed be compatible with the "elevator control device". The respective considerations of the opponent and the opposition division are not convincing. However, as conceded by the proprietor itself, it is always implied that an update program is specifically selected for updating the control program. Thus, at least a rough or generic "software compatibility check" is always implied. Consequently, the board considers that only a sub-feature of feature F2, i.e. that the "downloading" step is being performed "in response to" this compatibility check, is not directly and unambiguously disclosed by document E1. For the sake of completeness, it is added that basic types of automatic software compatibility checks would have been notoriously known to the skilled person at the patent's priority date, like comparing file names and version numbers.
 - 1.3.2 As to **feature F3**, the proprietor argued that document E1 provided in paragraphs [0035] and [0048] two distinct embodiments. In the first of these

embodiments, the "quiet state" was determined, but no scheduling was performed. On the other hand, the second embodiment related to scheduling which was however not "in response to" downloading. Thus, no matter which paragraph was to be considered, at least a part of feature F3 constituted another difference over the disclosure of document E1.

The board concurs with the opponent that the "downloading" step of claim 1 is not limited to the downloading being *completed*. The phrase "in response to the downloading" thus also comprises the situation where the downloading is merely initiated but not yet completed. This is however already disclosed in paragraph [0047], last sentence, of document E1. Consequently, the board concurs with the opponent that feature F3 is anticipated by the embodiment described in paragraphs [0047] and [0048] of E1. On the other hand, since the wording of claim 1 allows for a broader interpretation than adopted by the proprietor, the proprietor's argument that document E1 failed to disclose the "in response to" aspect of feature F3 is not persuasive.

1.3.3 Lastly, with respect to **feature F5**, the board concurs with the opponent that the term "switchover" used in claim 1 allows for a broad interpretation, including replacing the *old* program with the *new* program. However, it has been accepted by the proprietor that the latter is already disclosed in document E1 (see statement of grounds of appeal, section 3.2.2). Thus, the board holds that feature F5 is also anticipated by document E1.

1.3.4 In view of the above, the subject-matter of claim 1 is novel and differs from the disclosure of document E1

merely in that the "downloading" is performed "in response to" a software compatibility check (i.e. **feature F2**).

1.4 Inventive step (Article 56 EPC)

1.4.1 The proprietor submitted, as regards the above distinguishing feature, that the "second controller application" being downloaded "in response to" the check ensured that the compatibility check was recent and thus likely to be accurate when the "downloading" happened, thereby improving reliability of the underlying system.

1.4.2 The board is not convinced by this argument, since it fails to perceive how a compatibility check for a particular piece of software may become outdated. Either the (same) piece of software is compatible with a (same) particular device or it is not. In addition, the phrase "in response to" does not imply any concrete time period, so that any "recent" compatibility check, let alone an "improved system reliability", remains pure speculation.

1.4.3 Rather, the board agrees with the opposition division that the distinguishing feature constitutes a trivial technical design option. The board holds that the skilled person would have indeed considered initiating the "automatic updating process" without undue delay once compatibility of the new software version with the device was established. Thereby, the skilled person would have arrived at the subject-matter of claim 1 without employing inventive skills.

1.5 In view of the above, the board endorses the opposition division's conclusion that the main request is not

allowable under Article 56 EPC.

2. Auxiliary request 1 - inventive step (Article 56 EPC)

2.1 Claim 1 of **auxiliary request 1** further specifies that (board's emphasis):

F3' the "scheduling" step comprises the step of determining a time of day when the automated passenger conveying device is least active and slotting the switchover for that time.

2.2 The board concurs with the opposition division that added **feature F3'** is not anticipated by the cited embodiment of document E1.

2.3 As to the technical effect of this distinguishing feature, the opposition division took the view that the "least active" determination performed during the "scheduling" step ensured that the latest information about the state of activity of the claimed conveying devices were taken into account and considered the associated objective technical problem to be "improving certainty of the update of the component of the passenger conveying device" (cf. Reasons 8.2.2).

The board disagrees. The question whether the "latest information" may indeed be retrieved at the time of scheduling mainly (or even exclusively) depends on the source of the relevant information from which the "least active" time slots for a switchover may actually be retrieved. Thus, the above technical effect and the formulated objective problem is based on mere speculation.

- 2.4 The board is also not convinced by the proprietor's argument that feature F3' contributed to the technical effect of "improving the reliability of the updating process". This was because elevator passengers could, for instance, disrupt the updating process. Notably, the "determining" of a time of day does not necessarily contribute to such an effect, since - in view of the lack of any temporal sequence between the "disabling" step (i.e. feature F4) and the remaining method steps of claim 1 - the elevator could well be "disabled" *before* the actual "update" is performed. Thus, the updating process would then be entirely unaffected by the presence of potential passengers in the claimed conveying devices.
- 2.5 In view of the above, feature F3' constitutes, at most, one of equally likely and feasible alternatives for scheduling the respective "switchover". Thus, it may not contribute to an inventive step.
- 2.6 At any rate, the board notes that paragraphs [0035] and [0036] of document E1 already disclose the use of the *date* and the *time* for determining whether an elevator is in a "quiet state", as argued by the opponent. The board also agrees with the opponent that the term "least active" of claim 1 is vague and certainly not limited to the building being closed (see paragraph [0048] of the opposed patent). Hence, the "quiet state" mentioned in paragraphs [0035] and [0036] of document E1 falls well within the broad term "least active" as claimed.
- 2.7 Hence, the subject-matter of claim 1 of auxiliary request 1 does not involve an inventive step over document E1 for the same reasons as set out for claim 1

of the main request in point 1.4 above.

2.8 Hence, auxiliary request 1 is not allowable under Article 56 EPC either.

3. Auxiliary request 2 - admittance

3.1 The claim set according to **auxiliary request 2** was filed for the first time with the proprietor's statement of grounds of appeal. Its admittance is therefore governed by all relevant parts of Article 12 RPBA.

3.2 The proprietor argued that the underlying amendments (cf. point VI above) had been introduced in response to the opponent's objection under Article 123(2) EPC, raised for the first time during the oral proceedings before the opposition division.

3.3 Regardless of this, the board considers that the respective amendments are evidently not apt to address the issue of inventive step (Article 56 EPC). Hence, this auxiliary request is not suitable to address all the issues which led to the decision under appeal within the meaning of Article 12(4), last sentence, RPBA. At the oral proceedings before the board, no further counter-arguments were provided in that regard.

3.4 In consequence, the board decided not to admit auxiliary request 2 into the appeal proceedings.

4. Auxiliary requests 3 to 8 - admittance

4.1 Claim 1 of auxiliary requests 3 to 8 further specifies that (board's emphasis):

- F8 the claimed method is applied to a plurality of automated passenger conveying devices within an automated passenger conveying system [**auxiliary requests 3, 4, 6 and 7**]
- F9 the switchovers are coordinated such that one of the plurality of automated passenger conveying devices is taken out of service at a time [**auxiliary requests 3, 4 and 6**]
- F10 a message is sent to a network monitoring system, indicating that a switchover was completed when the corresponding post-switchover inspection of the second controller application determines that the automated passenger conveying device works properly, and a notification is sent to a user indicating that a switchover was not completed when the corresponding post-switchover inspection of the second controller application determines that the automated passenger conveying device does not work properly [**auxiliary requests 4, 5, 7 and 8**].

4.2 Auxiliary requests 3 to 8 were filed for the first time during the opposition proceedings (then labelled as "auxiliary requests 2 to 7"). However, the opposition division did not decide upon them because a higher-ranking claim request had already been found allowable. Therefore, they represent "carry-over requests". Since the decision under appeal was thus not based on those requests, they would, on the face of it, constitute "amendments" of the proprietor's case within the meaning of Article 12(2) and (4) RPBA. However, pursuant to Article 12(4), first sentence, RPBA, such qualification as "amendments" applies only

"unless the party **demonstrates** that this part was **admissibly raised** and **maintained** in the proceedings leading to the decision under appeal" [board's emphasis].

- 4.3 To decide whether this exemption applies here, in which case auxiliary requests 3 to 8 would necessarily be part of the appeal proceedings, or whether they are indeed "amendments", in which case their forming part of these proceedings would be a discretionary matter for the board, requires in particular an interpretation and application of the terms "demonstrates", "admissibly raised" and "maintained".
- 4.4 Despite some leniency in this respect in the early jurisprudence (cf. **T 221/20**, **T 42/20** and **T 476/21**), the ordinary meaning of "demonstrates" must be that, as a general rule, the party making a submission that would, on the face of it, constitute an "amendment" bears the burden of showing that it was "admissibly raised and maintained" in the proceedings leading to the decision under appeal. The lawmakers' idea was obviously not to put *ex officio* responsibilities on the boards and/or expect them to assume an investigative role, learn every detail of the first-instance proceedings, identify and track claim requests to their source, and understand why they were filed. The onus is no doubt on the amending party.
- 4.5 In its statement of grounds of appeal, the proprietor merely submitted that auxiliary requests 3 to 8 corresponded to specific claim requests filed during the opposition proceedings, and referred to the comments made on those requests in the first-instance proceedings. Later, in its reply to the board's communication under Article 15(1) RPBA, in which the

board noted that the proprietor had not demonstrated that auxiliary requests 3 to 8 had been "admissibly raised and maintained", the proprietor argued that neither in Article 12(4) RPBA nor elsewhere in the RPBA was it laid down when it must be demonstrated that submissions not meeting the requirements of Article 12(2) RPBA were admissibly raised and maintained. This begs the question of whether there is any time requirement for the "demonstration" that a submission was "admissibly raised and maintained".

4.6 The board acknowledges that Article 12(4) RPBA itself does not provide a time by which it must be demonstrated that the respective submission was "admissibly raised and maintained". However, auxiliary requests 3 to 8 were submitted with a statement of grounds of appeal that lacked any indication that they were "admissibly raised and maintained" in the opposition proceedings. Since the statement did not contain the proprietor's complete appeal case within the meaning of Article 12(3) RPBA, the board has discretion not to admit such subsequent submissions (Article 12(5) RPBA). In addition, there are increasingly demanding criteria for admitting new submissions made *after* the filing of the statement of grounds of appeal and the written reply (cf. Article 13(1) and (2) RPBA). In this sense there are, at least in practice, temporal restraints on the "demonstration" required under Article 12(4), first sentence, RPBA.

4.7 The proprietor asserted, in its reply to the board's communication under Article 15(1) RPBA, *inter alia*, that its "**maintenance**" of auxiliary requests 3 to 8 was self-evident from the minutes of the oral proceedings

before the opposition division.

- 4.8 Those minutes in fact form part of the basis of these appeal proceedings, whether or not the proprietor invoked them (cf. Article 12(1)(a) RPBA). According to point 17 of these minutes, in the time between the announcement of the conclusion that a higher-ranking claim request was found allowable and the announcement of the decision, the proprietor expressly maintained auxiliary requests 3 to 8 (then labelled as "auxiliary requests 2 to 7"). In other words, those requests were manifestly maintained until the opposition division took its decision.
- 4.9 Irrespective of the admittance of the proprietor's late submissions to demonstrate maintenance of the auxiliary requests (cf. point 4.6 above), and as an exemption from the general rule that the onus lies with the party, the board cannot ask more of the proprietor in this respect than what is already obvious from said minutes - which a Board must always read. The circumstances of the present case do not warrant any statements as to possible further exemptions from said general rule.
- 4.10 The proprietor also argued, in its reply to the board's communication under Article 15(1) RPBA and relevant to the matter of *demonstrating* that auxiliary requests 3 to 8 were "admissibly raised" in the opposition proceedings, that the requests were "entirely validly filed" six weeks in advance of the final date for making submissions ahead of the oral proceedings under Rule 116 EPC. However, what the proprietor means by the unsubstantiated phrase "entirely validly filed" is obscure, and the rest of the arguments in that reply are rather relevant to the demonstration of *maintenance*

(i.e. a matter already resolved above).

- 4.11 In support of its view, the proprietor invoked two decisions of the Boards of Appeal. In the proprietor's view, decisions **T 42/20** (Reasons 4.2) and **T 476/21** (Reasons 7.1 to 7.3) confirmed that auxiliary requests which were "admissibly raised and maintained" in the first-instance proceedings but not considered in the first-instance decision were not "amendments", with no discussion over *how* or *when* this was demonstrated as required by Article 12(4), first sentence, RPBA.
- 4.12 Given the proprietor's view, and the silence in the RPBA and their explanatory remarks as to the meaning of "admissibly raised", the board finds it helpful, in the context of claim amendments, to establish what the actual requirements might be for a party's *demonstration* that submissions were indeed "admissibly raised".
- 4.13 In that regard, one viable approach could be that a Board decides whether the opposition division *should* have admitted the respective claim request into the opposition proceedings, had a decision on admittance been required (see e.g. **T 364/20**, Reasons 7). This would in turn mean that a Board - at least in part - should slip into the shoes of the opposition division. It would then have to infer, from the Board's perspective, how the opposition division should have exercised its discretion on the basis of the applicable procedural basis, e.g. in view of the current Guidelines for Examination, but also leniently applying the RPBA (see T 364/20, Reasons 7.2.10, last sentence). However, one of the possible consequences of that approach could arguably be that the boards would have to closely monitor the currently applicable Guidelines

to derive guidance as to how the respective opposition division should have exercised discretion generally conferred by Article 123(1) EPC in conjunction with Rule 81(3) EPC in *inter partes* proceedings (cf. **R 6/19**, Reasons 6 and 7). For the boards, the subject of such an approach could virtually correspond to a "moving target", possibly leading to similar cases being treated differently, depending on the amendments made to the Guidelines over the years. This approach also fails to convince this board since the Guidelines are not binding on the Boards and since the RPBA are approved and adopted specifically to govern the proceedings before the Boards.

4.14 This board, however, proposes another approach, namely that of defining minimum requirements for the demonstration of "admissibly raised" which could be more conducive to legal certainty and fairness in that regard, especially in opposition appeal proceedings. The board considers that claim requests which were already filed during the opposition proceedings and which did not belong to the basis of the decision under appeal in the above-mentioned sense (i.e. "carry-over requests") may indeed be regarded as "admissibly raised" under the minimum requirements that the party shows

- (1) that they were filed **in due time**, typically before expiry of the time limit set by the opposition division under Rule 116(1) and (2) EPC, and
- (2) that it was made clear, explicitly or by way of unambiguous implication, **for which purpose** they were filed, i.e. which objections raised by the other party or the opposition division they try to overcome and how this is actually achieved.

4.15 Consequently, the board does not endorse the conclusions drawn in decisions **T 42/20** and **T 476/21**, cited by the proprietor, where merely the timing aspect was considered by the competent boards (cf. T 42/20, Reasons 4.2 and T 476/21, Reasons 7.2 and 7.3).

4.16 On the other hand, the present board also does not subscribe to the test, with elaborate criteria, proposed by the competent board in case **T 1800/20**. According to that decision - besides the timing aspect - questions relating to (i) the suitability of the submission to overcome the objections raised against a higher-ranking claim requests, (ii) whether the submission gives rise to new objections and (iii) the suitability of the submission to be part of a convergent development of the first-instance proceedings should be considered in the assessment whether submissions were "admissibly raised" (see Reasons 3.4, items a) to d)). Taking such additional criteria into account when assessing the concept of "admissibly raised" and thus the question whether there is, at all, any discretion for a Board not to admit a party's submission into the appeal proceedings would compellingly lead to a significant overlap with the codified criteria to be used by the Boards once they indeed have such a discretion (see e.g. Article 13(1), last sentence, RPBA: "the suitability of the amendment to resolve the issues [...]", "whether the party has demonstrated that any such amendment, prima facie, overcomes the issues raised [...] and does not give rise to new objections"). Such an overlap could also lead to rather harsh and possibly unfair situations for the parties, without much gain for legal certainty - especially when considering that claim amendments made to address different objections raised (e.g. removing features to address added subject-matter and adding

features to address novelty or inventive step) could in some cases necessarily lead to diverging claim requests at the outset of appeal proceedings.

4.17 In the present case, regardless of whether the proprietor's submission made only in its reply to the board's communication under Article 15(1) RPBA that auxiliary requests 3 to 8 were in fact filed within the time limit of Rule 116(1) EPC can be considered to be substantiated on time (cf. point 4.6 above), the proprietor has failed to clearly indicate **for what purpose** they were filed, i.e. *how* the objections (for example added subject-matter, insufficiency of disclosure, lack of novelty and/or inventive step here) were concretely addressed and *why* they would be overcome. In particular, in the statement of grounds of appeal, the proprietor referred to the arguments provided in its letter dated 28 May 2021, accompanying the first submission of these auxiliary requests. Therein, it was notably not stated what respective technical problem was solved, or even what technical effect was caused, by the features added in claim 1 of each of the auxiliary requests. With these crucial elements for the assessment of inventive step missing, the onus to make factual submissions relevant to the application of the problem-solution approach in order to determine whether inventive step is to be acknowledged would lie entirely on the board, which is however not its role but the responsibility of the party. The proprietor's late sweeping statement that auxiliary requests 3 to 8 were "entirely validly filed" would obviously not suffice, even if they were to be admitted. In other words, the proprietor has not discharged its burden to demonstrate that these requests were "admissibly raised". Consequently, the exemption is not applicable, and auxiliary requests 3

to 8 indeed constitute "amendments" within the meaning of Article 12(4), first sentence, RPBA. Whether these amendments may be admitted into the appeal proceedings is thus a matter of the board's discretion (Article 12(4), second sentence, RPBA).

- 4.18 In line with the considerations set out in point 4.17 above, the board concurred with the opponent that the proprietor failed to sufficiently indicate why these auxiliary requests overcame the raised objections. The board thus concluded that the proprietor's pleadings did not comply with the requirement of Article 12(4), third and fourth sentences, RPBA ("The party shall [...] provide reasons for submitting [an amendment] in the appeal proceedings [...] and provide reasons why the amendment overcomes the objections raised.").

In addition, alternately adding and/or omitting features, i.e. features F3', F8, F9 and F10, throughout those auxiliary requests even more obfuscates the real purpose of their filing. This, at the same time, gives rise to "divergent" claim requests which may arguably increase the procedural and substantive complexity as regards the assessment of their compliance with the requirements of the EPC. Even more so when considering that at least features F3' and F9, i.e. performing the switchover on the basis of the "least active" time of day and taking one of the conveying devices out of service at a time, are evidently taken from the patent *description* rather than from the *claims* as granted, possibly also leading to a "fresh case".

- 4.19 Hence, none of auxiliary requests 3 to 8 was admitted into the appeal proceedings (Article 12(4) RPBA).

5. Auxiliary requests 9, 10 and 11 - admittance

5.1 With its reply to the board's communication under Article 15(1) RPBA, the proprietor filed for the first time present **auxiliary requests 9 and 10** and submitted that they were "corrected versions" of the former auxiliary requests 9 and 10 as filed with the statement of grounds of appeal. In those requests, the previous reference to "each automated passenger conveying system" in the independent claims was corrected to "the automated passenger conveying system". This correction was immediately apparent because there was only one "automated passenger conveying system" previously introduced into the claims.

5.2 Although no explicit request for correction under Rule 139 EPC was made, the board understands the above submission as a request for correction under Rule 139, second sentence, EPC. This was also confirmed by the proprietor at the hearing before the board. In that regard, the board concurs with the proprietor that the claims persistently make reference to a single "system", in line with the patent description. It is thus evident that nothing else could have been meant. Hence, the request for correction of auxiliary requests 9 and 10 under Rule 139, second sentence, EPC is to be granted. Due to the *ex tunc* effect of such a correction, the admittance of these requests is governed by Article 12 RPBA (rather than by Article 13 RPBA).

5.3 **Auxiliary request 11** was filed for the first time with the proprietor's statement of grounds of appeal. Its admittance is thus also regulated by Article 12 RPBA.

5.4 As to the admittance of auxiliary requests 9 and 11, the board considers that the proprietor failed to provide any reasoning as to how these requests were addressing all the relevant issues. Rather, the proprietor merely referred to the reasons brought forward with respect to auxiliary request 2, which were found not to be convincing (see point 3.3 above). Thus, auxiliary requests 9 and 11 were likewise not admitted into the appeal proceedings (Article 12(4) RPBA).

5.5 As to the admittance of auxiliary request 10, the board notes that this claim request comprises the amendments according to all higher-ranking requests. Hence, it is the most restricted claim request on file. Therefore, out of the auxiliary requests on file, it constitutes the claim request which is most suited to overcome the issues raised in the proceedings, in particular the issue of inventive step. Therefore, the board exercised its discretion to admit the (corrected) auxiliary request 10 into the appeal proceedings (Article 12(4) RPBA).

6. Auxiliary request 10 - inventive step (Article 56 EPC)

6.1 Claim 1 of auxiliary request 10 comprises features F1 to F10 and F3' (cf. points 1.1, 2.1 and 4.1 above).

6.2 The board considers that, besides features F2 and F3' (cf. points 1.3.4 and 2.2 above), also features F8, F9 and F10 are not directly and unambiguously disclosed in document E1.

6.3 As to **features F8 and F9**, i.e. the application of the claimed method to a plurality of automated passenger conveying devices and taking one of the plurality of those devices out of service at a time, these features

yield the technical effect that, during a software update, service disruptions of the elevator system made up of several conveying devices are kept as low as possible. The associated objective partial problem may thus be formulated as "how to adapt the method of document E1 to a multi-elevator system such that, during a software update, service disruptions are kept as low as possible".

- 6.4 With respect to **feature F10**, the board holds that the technical effect caused by this additional feature is the provision of feedback about the result of the software update. The objective partial problem lies therefore in "how to provide feedback about the result of the software update in the system of document E1".
- 6.5 Hence, features F8 and F9, on the one hand, and feature F10, on the other hand, are directed to different partial problems (i.e. avoiding disruptions; providing feedback) and thus do not cause a combined, synergistic technical effect. Instead, they constitute a juxtaposition of features. Therefore, the assessment of inventive step can be conducted separately for those distinguishing features.
- 6.6 As regards features F8 and F9, the skilled person would have been well aware, at the patent's priority date, that elevator systems comprising *several* elevators were widely known. In that context, the skilled person would also have recognised the need to reduce disruptions during a software update, especially for multiple elevators, and that this may be achieved by performing the respective updating steps in *sequence* (rather than in *parallel*). Hence, the mere adaptation of the method steps according to features F1 to F7 and F3' to a plurality of such devices (i.e. performing the software

update simply for *several* elevators and the scheduling for *all* of them, etc.) and the implementation measure as to taking out of service only one of the conveying devices at a certain point in time, would have been obvious to the skilled person when tasked with the underlying objective problem.

- 6.7 As regards feature F10, document E1 already discloses, in paragraphs [0053] and [0054], an automatic diagnosis operation and teaches that its result is transmitted to a "center terminal device". Since a terminal is typically operated by a user, transmitting the feedback to the terminal implies also providing it to a user. Thus, in view of the teaching of document E1, sending a message to such a "center terminal device" in the event that a switchover was successful, while sending a notification to a user (e.g. to the operator of an elevator system) in the event that a switchover was not successful falls within the routine practise and ordinary competences of the skilled person faced with the problem of providing some feedback on events such as software updates.
- 6.8 In view of the above, auxiliary request 10 is not allowable under Article 56 EPC either.
7. Consequently, none of the proprietor's pending claim requests is allowable. Thus, the opposed patent has to be revoked.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated