

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 21 November 2024**

Case Number: T 1744/22 - 3.2.03

Application Number: 06818170.0

Publication Number: 1969190

IPC: E03C1/04

Language of the proceedings: EN

Title of invention:

CONNECTION ARRANGEMENT BETWEEN A FITTING UNIT AND A MEDIUM PIPE

Patent Proprietor:

BROEN-LAB A/S

Opponent:

NovaLab GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(c), 123(2), 104(1), 111(1)

EPC R. 103(1), 101(1)

RPBA 2020 Art. 12(6), 11, 16(1)(e)

Keyword:

Admissibility of appeal - (yes)

Amendments - added subject-matter (yes)

Amendment to case - amendment overcomes objection (no)

Reimbursement of appeal fee - (no)

Remittal - fundamental deficiency in first instance proceedings (no)

Oral proceedings - non-attendance of appellant/opponent

Apportionment of costs - abuse of procedure - (no)

Decisions cited:

T 2350/15

Catchword:



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

Case Number: T 1744/22 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 21 November 2024

Appellant: BROEN-LAB A/S
(Patent Proprietor) Drejervænget 2
5610 Assens (DK)

Representative: Patrade A/S
Ceresbyen 75
8000 Aarhus C (DK)

Respondent: NovaLab GmbH
(Opponent) Brunsbütteler Damm 446
13591 Berlin (DE)

Representative: Pfenning, Meinig & Partner mbB
Patent- und Rechtsanwälte
Joachimsthaler Straße 10-12
10719 Berlin (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 May 2022
revoking European patent No. 1969190 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman C. Herberhold
Members: B. Goers
F. Bostedt

Summary of Facts and Submissions

- I. European patent No. 1 969 190 relates to a connection arrangement comprising a fitting unit for a tap or an outlet.
- II. An opposition was filed against the patent based on the grounds of Articles 100(b) and (c) EPC and those of Article 100(a) EPC in conjunction with Articles 54 and 56 EPC. With the impugned decision the opposition division revoked the patent.
- III. This decision is appealed by the patent proprietor ("appellant").

The appellant requested

- that the decision under appeal be set aside and the patent be maintained as granted, or in the alternative,
- that a patent be maintained "based on any of the auxiliary request 19 or 20 also decided on in the decision", or
- that a patent be maintained based on auxiliary request 21 submitted for the first time with the statement setting out the grounds of appeal.

The appellant further requested that the case be remitted to the opposition division should there be special reasons for doing so.

In addition, the appellant noted a substantial procedural violation, *inter alia* due to an alleged violation of its right to be heard. The Board

interpreted this as an implicit request for reimbursement of the appeal fee.

The opponent ("respondent") requested that the appeal be dismissed, for being either not admissible or not allowable.

In addition, the respondent requested a different apportionment of the costs.

- IV. The Board issued a communication under Article 15(1) RPBA including the preliminary opinion that the appeal was admissible, that none of the main request and auxiliary requests 19, 20 and 21 were allowable and that the respondent's request for a different apportionment of costs was not persuasive.

In response to this communication the appellant announced by letter dated 30 October 2024 that it would not be attending the oral proceedings, while maintaining the requests and arguments presented in the statement setting out the grounds of appeal.

The respondent submitted by letter dated 13 November 2024 new arguments with respect to a different apportionment of the costs incurred in preparing and conducting the oral proceedings in appeal.

- V. Oral proceedings were held on 21 November 2024 in the absence of the appellant pursuant to Rule 115(2) EPC and Article 15(3) RPBA.
- VI. The only document referred to in this decision is the "A" publication of the patent's application documents as originally filed.

A1: WO 2007/076861 A1

VII. Claim wording relevant to this decision

(a) Independent claim 1 of the main request (patent as granted) reads (feature numbering added in "[]"):

"[M1] A connection arrangement
[M2] comprising a fitting unit for a tap (1) or an outlet (2) and
[M3] fittings (30,31,34) for connecting medium pipes (24,26) to the fitting unit,
[M4] said fitting unit forming a housing (13)
[M5] having a first bore (14) for mounting of the tap (1) or outlet (2) to the fitting unit,
[M6] the housing (13) comprising at least one second boring (17, 18) for connection of the respective medium pipe (24, 36) by means of the respective fitting (30,31,34),
[M7] at which second boring a first diameter (21) is provided with a thread (19)
[M8] receiving the respective threaded fitting (31,34) for establishing a medium tight connection of the medium pipe (24, 36) and the fitting unit, characterised in that
[M9] the thread (19) is provided at an outer end part of each second boring (14,17,18,37),
[M10] in that the threaded fitting (31,34) used is selectively one of the following:

- [M10a] a nut (31), interacting with the thread (19), and a cutting sleeve (30) for squeezing the separate cutting sleeve (30) around the medium pipe (24,36), or
- [M10b] a threaded soldering bushing (34), interacting with the thread (19), for mounting on

the medium pipe (24, 36) by soldering, and [M11] in that at least one further part (22) of each second boring (17,18) has a second diameter (23), which is less than the first diameter (21), [M12] and into which a medium pipe (24) is mountable by soldering."

- (b) Independent claim 1 of auxiliary request 19 has - compared with the main request - the following amendments to features [M2], [M5] and [M6] (feature numbering added in "[]", amendments marked in bold and strikethrough):

[M2.1] *comprising a fitting unit ~~for~~ **in the form of** a tap (1) ~~or an outlet (2)~~ and [sic]*

[M5.1] *having a first bore (14) for mounting of the tap (1) ~~or outlet (2)~~ to the fitting unit,*

[M6.1] *the housing (13) ~~comprising at least one~~ [sic] **two** second borings (17, 18) for connection of the respective medium pipe (24, 36) by means of the respective fitting (30,31,34),*

- (c) Independent claim 1 of auxiliary request 20 has - compared with the main request - the following amendments to features [M2] to [M8] (feature numbering added in "[]", amendments marked in bold and strikethrough):

[M2.2] *comprising a fitting ~~unit~~ **housing** for a ~~tap~~ **valve body** (1) ~~or an outlet (2)~~ and*

[M3.2] *fittings (30,31,34) for connecting medium pipes (24,26) to the fitting ~~unit~~ **housing**,*

[M4.2] *said fitting ~~unit~~ **housing** forming a housing (13)*

[M5.2] *having a first bore (14) for mounting of the ~~tap~~
valve body (1) ~~or outlet (2)~~ to the fitting unit
housing,*

[M6.2] *the housing (13) comprising ~~at least one~~ **two**
second**s** [sic] boring (17, 18) for connection of the
respective medium medium pipe [sic] (24, 36) by means
of the respective fitting (30,31,34),*

[M7.2] *at which second borings a first diameter (21) is
provided with a thread (19)*

[M8.2] *receiving the respective threaded fitting
(31,34) for establishing a medium tight connection of
the medium pipe (24, 36) and the fitting unit **housing,***

(d) Independent device claim 1 of auxiliary request 21
contains - compared with the main request - the
following amendments to features [M2] to [M7] and
the additional feature [M13] (feature numbering
added in "[]", amendments marked in bold and
strikethrough):

[M2.3] *comprising a fitting ~~unit~~ **housing** for a tap (1)
~~or an outlet (2)~~*

[M3.2] *fittings (30,31,34) for connecting medium pipes
(24,26) to the fitting ~~unit~~ **housing,***

[M4.2] *said fitting ~~unit~~ **housing** forming a housing (13)*

[M5.3] *having a first bore (14) for mounting of the tap
(1) ~~or outlet (2)~~ to the fitting ~~unit~~ **housing,***

[M6.3] *the housing (13) comprising ~~at least one~~ **two**
second borings (17, 18) for connection of the
respective medium medium pipe [sic] (24, 36) by means
of the respective fitting (30,31,34),*

[M7.3] *at which **two** second borings a first diameter
(21) is provided with a thread (19)*

[M8.2] *receiving the respective threaded fitting
(31,34) for establishing a medium tight connection of
the medium pipe (24, 36) and the fitting ~~unit~~ **housing,***

"[M13] [...] and wherein an inner third and innermost part (25) with a third diameter (26) is provided at each second boring (17), the third diameter being less than the second diameter (23), and that the third part (25) is intended for connecting gas and liquid to a valve in the fitting unit housing."

VIII. The appellant's arguments relevant to the present decision can be summarised as follows.

(a) Admissibility of the appeal

The appeal was substantiated and thus admissible.

(b) Main request - added subject-matter

The subject-matter of claim 1 did not extend beyond the content of the application as filed. Figure 2 of the original disclosure implicitly disclosed a housing with an outlet and a single second bore. The term "tap" was equivalent to the term "valve" and a restriction to a "bore for receiving a valve body" was not necessary to avoid an extension of subject-matter.

(c) Auxiliary request 19 - admittance

The opposition division's decision not to admit auxiliary request 1 was not correct in particular since the new objection of the missing "valve body" was unjust.

(d) Auxiliary request 20 - added subject-matter

The amendments resolved the issues of added subject-matter raised for the main request, in particular that of the omission of the feature "valve body".

(e) Auxiliary request 21 - admittance

Auxiliary request 21 should be admitted into the appeal proceedings since the appellant, in the oral proceedings before the opposition division, was surprised by new objections and did not have a proper opportunity to react at that time. The request also overcame the objection of added subject-matter previously raised.

(f) Alleged substantial procedural violation

Only in the oral proceedings before the opposition division were new facts and arguments under Article 123(2) EPC raised by the respondent for the first time, in particular regarding the omission of the "valve body". The opposition division accepted these facts and arguments and based its decision thereon, to the detriment of the appellant. Moreover, the opposition division gave no clear guidance to the appellant, in response to its decision that auxiliary requests 19 and 20 were not admitted or allowable, as to how further amendments could result in an allowable claim request.

IX. The respondent's arguments relevant to the present decision can be summarised as follows.

(a) Admissibility of the appeal

The appeal was not admissible under Article 108 EPC as it was insufficiently substantiated.

(b) Main request - added subject-matter

The subject-matter of claim 1 extended beyond the content of the application as filed. The combination of features was originally not disclosed for an "outlet" embodiment and further only for a first bore for receiving a valve body and for two second bores.

(c) Auxiliary request 19 - admittance

The opposition division's decision not to admit auxiliary request 19 was correct as this request did not resolve all the objections of added subject-matter against the main request and was thus *prima facie* not allowable.

(d) Auxiliary request 20 - admittance and added subject-matter

Auxiliary request 20 should not have been admitted into the opposition proceedings as it was late filed and *prima facie* not allowable. Thus the opposition division's exercise of discretion was erroneous. Also, the amendments did not resolve all the issues of added subject-matter raised for the main request.

(e) Auxiliary request 21 - admittance

Auxiliary request 21 should not be admitted into the appeal proceedings as it should have been filed earlier and was also *prima facie* not allowable at least under Article 123(2) EPC. Furthermore, the appellant had not substantiated how auxiliary request 21 would overcome the objections raised.

(f) Different apportionment of costs

The respondent's costs for the preparation and conduct of the oral proceedings in appeal had to be born by the appellant in full. The fact that the appellant had announced that it would not participate in the oral proceedings, while maintaining all its request, put the respondent in a situation where it was forced to prepare and participate in the oral proceedings despite the favourable preliminary opinion issued by the Board. Indeed, the oral proceedings served no purpose. Thus the appellant's behaviour was abusive.

Reasons for the Decision

1. Admissibility of the appeal

The appeal is admissible.

The respondent's argument that the appeal was not admissible since it was not substantiated is not persuasive for the following reasons.

- 1.1 According to Article 108, third sentence, EPC, a statement setting out the grounds of appeal must be filed in accordance with the Implementing Regulations. Rule 99(2) EPC requires that this statement of grounds of appeal indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.
- 1.2 In the case of a decision revoking the patent (such as in the case at hand), it is sufficient that the appeal be substantiated with respect to at least one claim request on which the appealed decision is based. It is, therefore, not necessary that all points of the decision be addressed, and the reasoning does not need to be persuasive either.
- 1.3 The appellant explained in the statement setting out the grounds of appeal the reasons why in its view the adverse conclusion under Articles 100(c) and 123(2) EPC - decisive for finding the main request not allowable in the appealed decision - was not correct. This is sufficient to meet the requirements of Article 108, third sentence, EPC in combination with Rule 99(2) EPC.

2. Main request - added subject-matter

The Board agrees with the appealed decision that the amendments made to claim 1 of the main request have created subject-matter which extends beyond that of the application as filed. The reasons are at least the following (already communicated to the appellant in point 7 of the preliminary opinion).

2.1 The combination of features of claim 1 is not originally disclosed for the "outlet" option encompassed by features [M2] and [M5].

The application as filed concerns connection arrangements of a fitting unit and a medium pipe. The "fitting unit" may have the form of a tap (4) or of an outlet (2) (see A1, e.g. first sentence). Moreover, according to page 2, lines 30 and 31, the "fitting unit will **consist** of the housing itself" (emphasis added), i.e. the terms "fitting unit" and "housing" are equivalents in the application as filed, in line with the wording of amended features [M3] and [M4].

The original claim 1 defines (emphasis added) "at least one boring (17, 18) **for mounting the medium pipe(s)** (24, 26)". The borings referred to by the wording "at least one boring" are exclusively borings receiving the fittings for mounting the medium pipes. This does not encompass a boring for a valve body or an outlet.

Feature [M5] of claim 1 of the main request defines in addition to claim 1 as originally filed (emphasis added) "a first bore (14) **for mounting a tap or an outlet**". This first bore defined in feature [M5] is

thus distinct from the second boring(s) for receiving the fittings for the medium pipes, see features [M6] to [M12], i.e. it is also an additional feature compared with claim 1 as originally filed.

It was undisputed that such a distinct first bore is originally explicitly disclosed for **receiving a valve body** in relation to the embodiment of a fitting unit in the form of a tap (see A1, page 7, lines 19 to 30 and the embodiments of Figures 3 to 5) while "a first bore for mounting ...the outlet to the fitting unit" (feature [M5]) was not originally explicitly disclosed.

The appellant's argument that such a first bore was implicitly disclosed in Figures 1 and 2 in combination with the further features of claim 1 is not convincing.

Contrary to the appellant's view, in the embodiments of Figures 1 and 2 it is neither shown nor implicitly derivable how the outlet is connected to the housing in detail. While there must be a bore in the housing which allows the water to flow through (i.e. for the fluid communication between the second boring and the first bore), the outlet may well be an integral part of the housing or may comprise a threaded bore into which an extension of the housing is inserted. The provision of a first bore in the housing is thus not indispensable for mounting of the outlet and Figures 1 and 2 do not implicitly disclose a bore for "mounting an outlet".

Therefore the option "or [for] an outlet" in features [M2] and [M5] in claim 1 and in claim 9 extends the subject-matter beyond that of the application as filed.

2.2 A first bore was also not originally disclosed for "mounting a tap" in general (feature [M5])

In addition to the conclusion in the preceding paragraph, the first bore (or "boring") 14 is not generally disclosed for "mounting the tap" in accordance with feature [M5], i.e. including any kind of mounting bores such as mere fixing holes. Instead, the first bore is specifically disclosed "for receiving the valve body" (of the tap). This is more restricted as it implies e.g. that respective fluid connections interacting with the valve body must be present in the housing.

The omission of the first bore's specifically disclosed functional feature "for receiving a valve body" thus extends the subject-matter beyond the content of the application as filed.

2.3 The omission of a second "second boring" is also an extension of the subject-matter, see features [M6] to [M8].

As explained above the subject-matter of claim 1 - due to the inclusion of feature [M5] - is originally only disclosed in relation to the tap embodiment as exemplified in Figures 3 to 5, i.e. in relation to a "fitting unit in the form of a tap". Therefore this fitting unit (13) is originally only disclosed with at least the following features (see also A1, e.g. page 7, lines 25 to 30):

- a fitting housing (13) with at least three bores, **one first bore** and **two second bores**
- a **valve body** received in the first bore

- two second borings, **each provided with a thread** receiving the respective threaded fitting

Accordingly, the following features are omitted in claim 1 of the main request thereby extending the subject-matter compared with the content of the application as filed:

- at least **two second borings** (feature [M6])
- **each** second boring provided with a thread (feature [M7])
- **each** second boring adapted to receive the respective threaded fittings (feature [M8])

2.4 The omission of the "third part" of the second borings also extends the subject-matter.

While the issue of the omitted "third part" of the second borings with a "third diameter" for "connecting gas and liquid to the valve" was only raised by the opposition division with respect to auxiliary request 20, this was relevant for the main request, too.

The tap embodiment (with a first bore and two second bores) is not only disclosed solely in combination with a valve body, but also with the respective connections of the second borings to the valve body (see features of claim 2), these connections being functionally required for connecting the gas and liquid to the valve body.

Therefore the omission of these features constitutes an unallowable intermediate generalisation of the connection arrangement claimed.

3. Auxiliary request 19

Under Article 12(6), first sentence, RPBA, auxiliary request 19 is not admitted into the appeal proceedings.

The opposition division exercised its discretion by not admitting auxiliary request 19 into the proceedings by applying the criterion of lack of *prima facie* allowability.

The Board does not see an error in the opposition division's exercise of discretion. It further agrees with the opposition divisions conclusion that auxiliary request 19 is *prima facie* not allowable.

The wording "fitting unit for a tap" of claim 1 as granted was amended to "fitting unit **in the form of** a tap" in claim 1 of auxiliary request 19 (emphasis added). As explained above, the term "fitting unit" is equivalent to the term "housing". Therefore a fitting unit in the form of a housing defines different subject-matter from a fitting unit suitable for a tap (i.e. forming a tap arrangement together with other parts). This at least creates issues under Article 84 EPC and Article 123(3) EPC.

4. Auxiliary request 20

4.1 Admittance

Auxiliary request 20 was admitted by the opposition division and addressed on the merits, and the appealed decision is thus based on it. It is also considered in the appeal proceedings.

- 4.1.1 The respondent's argument that auxiliary request 20 did not form part of the appeal proceedings because it had not been re-submitted with the statement setting out the grounds of appeal is not persuasive.

In accordance with Article 12(3)(a) RPBA, the requirement to attach requests as annexes applies only "insofar as they have not already been filed in the course of the [...] opposition [...] proceedings". The request is the subject of the decision under appeal and is thus also the subject of the appeal proceedings (Article 12(2) RPBA).

- 4.1.2 The Board also sees no error in the exercise of discretion by the opposition division when admitting this request.

The request was submitted in response to the discussion of added subject-matter of the main request during oral proceedings, as a consequence of which the lines of defence submitted in the form of auxiliary requests 1 to 18 were apparently not successful in overcoming the outstanding objections and were consequently withdrawn by the appellant and replaced *inter alia* by auxiliary request 20.

The fact that the opposition division nevertheless came to the final conclusion that auxiliary request 20 then admitted was not allowable bears no relevance in this context. The results of a *prima facie* evaluation and of an in-depth analysis may differ because of the very nature of a *prima facie* analysis.

4.2 Extension of subject-matter

4.2.1 Auxiliary request 20, although restricted to a fitting unit for a tap and to two "seconds boring [sic]", still does not address at least the following outstanding objections held against the main request:

- The first bore is defined as being "adapted for mounting of the valve body" and not for receiving the valve body which is still a more generic wording than originally filed (see also point 2.2 above).
- The connected "third parts" of the second borings are still not defined (see point 2.4 above).

Auxiliary request 20 is thus not allowable under Article 123(2) EPC.

5. Auxiliary request 21

Auxiliary request 21 is not admitted into the appeal proceedings for the following reasons.

5.1 Auxiliary request 21 was submitted for the first time with the statement setting out the grounds of appeal. It is thus an amendment under Article 12(4) RPBA and its admittance is at the discretion of the Board.

While it rectifies most of the issues of added subject-matter identified for the main request (see point 2. above), the following issues of added subject-matter are not resolved.

Feature [M5.3] is directed to a "first bore for mounting of the tap to the fitting housing" instead of

the originally disclosed wording "first bore for receiving a valve body" (see point 2.2 above).

Furthermore feature [M13] refers to "a valve" instead of "the valve body", i.e. a broader definition than originally disclosed for the "third parts".

Since this request is *prima facie* insufficient to overcome all the outstanding objections of added subject-matter raised against the main request, the Board decided to not admit it into the proceedings.

6. Request for reimbursement of the appeal fee

As the appeal is not deemed to be allowable, it is not possible to reimburse the appeal fee under Rule 103(1) (a) EPC. The question of whether the opposition division's decision was based on a substantial procedural violation can thus be left undecided.

7. Requests for remittal

In view of the fact that none of the appellant's claim requests is allowable, the requests for remittal of the case to the opposition division are moot.

8. No different apportionment of costs

The respondent requested a different apportionment of costs pursuant to Article 16(1) (e) RPBA. During the oral proceedings before the Board, the respondent clarified that this request was no longer related to the entire appeal proceedings (as stated in the written

reply to the appeal), but was limited to the costs of preparing and conducting the oral proceedings in appeal, which should be borne in full by the appellant.

The Board refuses this request for the following reasons.

8.1 The respondent referred to Article 16(1)(e) RPBA, which mentions costs incurred by any "abuse of procedure". It argued that the appellant should bear the respondent's costs for preparing and conducting the oral proceedings before the Board since the appellant had announced shortly before the oral proceedings that it would not participate, but had explicitly maintained all pending requests, including the request for oral proceedings. The respondent was therefore forced to prepare for and participate in the oral proceedings for the sole reason that the appellant had not withdrawn its requests (or even withdrawn its appeal). In this context, the respondent referred to case T 2350/15, in which - in a similar situation - the deciding board had found it equitable that the party not attending (while maintaining the oral proceeding request) bore the costs for preparation, travel and presence incurred by the other party. In this context, the appellant pointed out that its own request for oral proceedings had been limited to the event that the board did not dismiss the appeal on the merits, i.e. confirmed the revocation of the patent; its request for oral proceedings was therefore not directed to the request for a different apportionment of costs.

8.2 Article 104(1) EPC specifies that each party to the opposition proceedings bears the costs it has incurred. The same applies to appeal proceedings. However, the opposition division (or the board of appeal) may, for

reasons of equity, order a different apportionment of the costs.

- 8.3 In the present case, the Board considers that there are no reasons of equity that would justify a different apportionment of costs.

The respondent's argument is that the oral proceedings before the Board took place only because the appellant had announced that it would not participate in the oral proceedings, while at the same time maintaining in particular its request for oral proceedings.

The Board does not accept the above arguments for the following reasons.

While the Board did indeed decide not to cancel the oral proceedings, it did not do so only because the appellant maintained all its requests (including its request for oral proceedings). Instead, oral proceedings were considered expedient (see Article 116(1), first sentence, EPC) because the respondent had requested a different apportionment of costs in its reply to the statement of grounds of appeal, a negative preliminary opinion had been given on this point, and the respondent had provided further arguments in support of the request for apportionment in its last letter of 13 November 2024. In particular regarding these further arguments, there had not yet been an exchange of arguments and counter-arguments. The Board thus considered it necessary to give the respondent the opportunity to be heard at the oral proceedings on this request pursuant to Article 113(1) EPC. Therefore the need to prepare and conduct the oral proceedings did not arise solely from the appellant's announcement that it would not be attending while maintaining their

request for oral proceedings. Indeed, the discussion at the oral proceedings was mainly concerned with the respondent's request for a different apportionment of costs and the further arguments submitted.

- 8.4 It is for this reason alone that the decision referred to by the respondent is not relevant. In contrast to the present case, the board in T 2350/15 had considered that the oral proceedings (in the absence of the appellant/opponent) would have served no purpose and could have been cancelled, had it not been for the request of the appellant/opponent.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The opponent's request for a different apportionment of costs under Article 104(1) EPC is refused.
3. The appellant's request for reimbursement of the appeal fee is dismissed.

The Registrar:

The Chairman:



C. Spira

C. Herberhold

Decision electronically authenticated