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Datasheet for the decision of 7 August 2024

Case Number: T 2089/22 - 3.2.01

Application Number: 12001954.2

Publication Number: 2607153

IPC: B60N2/28

Language of the proceedings: EN

Title of invention:
Height adjustment device

Patent Proprietor:
Britax Römer Kindersicherheit GmbH

Opponent:
Helbig, Christian, Dr.

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)
RPBA 2020 Art. 13(2)

Keyword:
Amendments - extension beyond the content of the application as filed (yes)
Amendment after summons - exceptional circumstances (no)

Decisions cited:
G 0002/10

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 2089/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 7 August 2024

Appellant: (Opponent)	Helbig, Christian, Dr. Chemin de la Croisette 42 1260 Nyon (CH)
Respondent: (Patent Proprietor)	Britax Römer Kindersicherheit GmbH Theodor-Heuss-Straße 9 89340 Leipheim (DE)
Representative:	Fechner, Benjamin K&L Gates LLP Karlstraße 12 80333 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 27 July 2022 concerning maintenance of the European Patent No. 2607153 in amended form.**

Composition of the Board:

Chairman	G. Pricolo
Members:	J. J. de Acha González
	M. Millet

Summary of Facts and Submissions

I. The appeal of the opponent lies against the interlocutory decision of the Opposition Division, which found that the contested patent, as amended in accordance with the auxiliary request 1, complied with the requirements of the EPC.

II. The Opposition Division found among others that the subject-matter of claims 1 and 2 did not extend beyond the content of the application as originally filed.

III. Oral proceedings before the Board were held on 7 August 2024 as a videoconference.

The appellant (opponent) requested that the decision of the Opposition Division be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal of the opponent be dismissed (main request), or, in the alternative, that the patent be maintained in amended form on the basis of one of the auxiliary requests 1 to 3 filed with the reply to the opponent's statement of grounds of appeal or on the basis of one of the auxiliary requests 4 to 8 filed with letter of 26 July 2024.

IV. Claim 1 of the main request read as follows (feature numbering of claim 1 according to the contested decision and differences of claim 1 with respect to originally filed claim 1 underlined by the Board):

M1.1 *A device for height adjustment of a headrest of a child safety seat consisting of*

M1.2 *a carrier element (5) carrying the head rest of the child safety seat,*

M1.3 *a locking element (1) designed and arranged to prohibit height adjustability in a first position and to permit height adjustability in a second position,*

M1.4 *wherein in the first position the locking element (1) engages with positive locking in a toothed strip (8), ~~and~~*

M1.5 *an adjusting element (2), and*

M1.7a *dimensionally instable pulling means,*

M1.6 *wherein the locking element (1) is connected with the adjusting element (2) via a motion link (30) ~~and~~*

M1.7 *the adjusting element (2) is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30) from the first position to the second position*

M1.8 *to release the engagement of the locking element (1) with the toothed strip (8).*

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the feature M1.7 reads as follows (differences underlined by the Board):

M1.7 *the adjusting element (2) has a ramp shape (20) and is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30) and the ramp shape (20) from the first position to the second position*

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the features M1.4 and M1.7 read as follows (differences underlined by the Board):

M1.4 *wherein in the first position the locking element (1) engages with positive locking in a toothed strip (8) arranged at a rear side of a seat shell of the child safety seat,*

M1.7 *the adjusting element (2) is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30) from the first position to the second position by moving the locking element (1) away from the seat shell of the child safety seat*

Claim 1 of auxiliary request 3 reads as follows (differences with respect to claim 1 of the main request underlined by the Board):

M1.1 *A device for height adjustment of a headrest of a child safety seat consisting of*

M1.2 *a carrier element (5) carrying the head rest of the child safety seat,*

M1.3 *a locking element (1) designed and arranged to prohibit height adjustability in a first position and to permit height adjustability in a second position,*

M1.4 *wherein in the first position the locking element (1) engages with positive locking in a toothed strip (8) arranged at a rear side of a seat shell of the child safety seat,*

M1.5 *an adjusting element (2),*

M1.9a *a spring (3), and*

M1.7a *dimensionally instable pulling means,*

M1.6 *wherein the locking element (1) is connected with the adjusting element (2) via a motion link (30) and*

M1.7 *the adjusting element (2) has a ramp shape (20) and is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting*

element (2) transfer the locking element (1) along the motion link (30) and the ramp (20) from the first position to the second position

M1.8 *to release the engagement of the locking element (1) with the toothed strip (8),*

M1.9 *wherein after the height has been adjusted and the tension in the dimensionally instable pulling means has become weaker, the adjusting element (2) is pressed downward due to the force of a spring (3), so that the locking element (1) is moved along the motion link and towards the seat shell of the child safety seat and is again taken into engagement with the toothed strip (8).*

Claim 1 of auxiliary request 4 differs from claim 1 of the main request in that the feature M1.7 reads as follows (differences underlined by the Board):

M1.7 *the adjusting element (2) has a ramp shape (20) and is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30), wherein the locking element (1) is urged to move substantially horizontally along the ramp shape (20) from the first position to the second position*

Claim 1 of auxiliary request 5 differs from claim 1 of the main request in that features M1.4, M1.6 and M1.7 read as follows (differences underlined by the Board):

M1.4 *wherein in the first position the locking element (1) engages with positive locking in a toothed strip (8) arranged at a rear side of a seat shell of the child safety seat,*

M1.6 *wherein the locking element (1) is connected with*

the adjusting element (2) via a motion link (30) that urges the locking element (1) to be transferred to the second position,

M1.7 *the adjusting element (2) has a ramp shape (20) and is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30) from the first position to the second position*
by moving the locking element (1) substantially horizontally along the ramp shape (20) away from the seat shell of the child safety seat

Claim 1 of auxiliary request 6 is identical to claim 1 of auxiliary request 4.

Claim 1 of auxiliary request 7 is identical to claim 1 of auxiliary request 5.

Claim 1 of auxiliary request 8 reads as follows (differences with respect to claim 1 of the main request underlined by the Board):

M1.1 *A device for height adjustment of a headrest of a child safety seat consisting of*

M1.2 *a carrier element (5) carrying the head rest of the child safety seat,*

M1.3 *a locking element (1) designed and arranged to prohibit height adjustability in a first position and to permit height adjustability in a second position,*

M1.4 *wherein in the first position the locking element (1) engages with positive locking in a toothed strip (8) arranged at a rear side of a seat shell of the child safety seat,*

M1.5 *an adjusting element (2),*

M1.9a *a spring (3), and*

M1.7a *dimensionally instable pulling means,*

M1.6 *wherein the locking element (1) is connected with the adjusting element (2) via a motion link (30) and*

M1.7 *the adjusting element (2) has a ramp shape (20) and is configured to be pulled upward by the dimensionally instable pulling means so as to have the adjusting element (2) transfer the locking element (1) along the motion link (30) and the ramp (20) from the first position to the second position*

M1.8 *to release the engagement of the locking element (1) with the toothed strip (8),*

M1.8a *wherein the carrier element (5) is configured to be raised along guide rails to adjust the height of the head rest on the child safety seat;*

M1.9 *wherein after the height has been adjusted and the tension in the dimensionally instable pulling means has become weaker, the adjusting element (2) is pressed downward due to the force of a spring (3) and the carrier element (5) is raised along the guide rails, so that the locking element (1) is moved along the motion link (30) substantially horizontally along the ramp shape (20) towards the seat shell of the child safety seat and is again taken into engagement with the toothed strip (8).*

Reasons for the Decision

1. *Main request - inadmissible extension*

1.1 The subject-matter of claim 1 extends beyond the content of the application as originally filed (Articles 100(c) and 123(2) EPC).

1.2 The basis given by the respondent for the subject-matter of claim 1 of the main request is originally filed claims 1, 2, 3, 4 and 6 and paragraphs [0012] and [0017] of the application as originally filed (see A-publication).

1.3 The Opposition Division considered among others that the omitted features from paragraph [0017] and figures 3 and 4 of the application as originally filed (see A-publication) regarding the movement directions of arrows A and B were represented in claim 1 by the wording "*pulling upwards*" (arrow B) and the "*transfer of the locking element along the motion link*" (arrow A). Also the omitted features from paragraphs [0012], [0013] and [0015], such as the ramp shape, were not linked to the unlocking functionality and further these paragraphs were not required as basis for the amendment to claim 1 (see point 17.4 of the contested decision).

The respondent argued that feature M1.7 could be derived from paragraphs [0012] and [0017] of the application as originally filed. In particular, the former paragraph disclosed that the motion link, which connected the adjusting element with the locking element, urged the locking element into the second position when the adjusting element was raised. The latter paragraph further specified that the locking element moved along the motion link and released the positive-locking connection when the adjusting element was raised. Since the latter paragraph taught one example on how the motion link urged the locking element, the other elements mentioned in this paragraph were not relevant and therefore not linked to or closely related to the motion link.

In addition, with respect to feature M1.7, the respondent argued that the terms "*via*" and "*along*" the motion link were synonymous, so that there was no additional subject-matter with respect to claim 1 as originally filed.

1.4 According to the established case law, the criterion for assessing whether the patent incurs in an inadmissible extension of subject-matter is the "*gold standard*", namely whether the claimed subject-matter is derivable directly and unambiguously for the skilled person from the application as originally filed (see e.g. point 4.3 in the Decision of the Enlarged Board of Appeal G 2/10, OJ EPO 2012, 376).

1.5 In the case at hand, the amendments introduced to feature M1.7 in claim 1, in particular, the relationship between the adjusting element, the motion link and the locking element in order to provide the unlocking motion from the first position and the second position of the locking element along the motion link is not disclosed in the application as originally filed as generally as claimed in claim 1 under consideration.

In that sense, as the appellant argued in the statement of grounds of appeal, "*via*" and "*along*" are not synonymous for the transfer of the locking element from the first position to the second position by the adjusting element through the motion link. Via is more general than along. The former includes, for example, a motion link which is an axis and the locking element which rotates around the motion link, whereas the latter excludes such a structure.

The basis for the amendment is therefore paragraph [0012] or paragraph [0017], the latter disclosing a preferred embodiment of the invention.

Both paragraphs disclose that the motion link has a ramp along which the locking element is urged to move from the first position to the second position and that during this movement, which is substantially horizontal, i.e. substantially perpendicular to the upward direction of the adjusting element, the engagement of the locking element in the toothed strip is released (see in this regard also paragraph [0013]). In this respect, it is noted that paragraph [0017], which also specifies the direction of movement of the adjusting element and locking element, is disclosed in combination with paragraph [0016], which illustrates the ramp shape along which the adjusting element transfers the locking element from the first to the second position, and figures 1 to 4, showing the relationship of the movements of the locking and adjusting element, all passages pertaining to the preferred embodiment. The ramp shape of the adjusting element alone does not in itself imply a horizontal movement of the locking element, i.e. a movement perpendicular to that of the adjusting element, since the movement of the locking element depends on the shape of the ramp. The movement of the locking element could well be at 45° with respect to that of the adjusting element, or, as the appellant pointed out, also a rotation.
These features have been therefore omitted and they are in structural and functional relationship with the other features added to claim 1 as originally filed.

Consequently, the amendments to claim 1 result in subject-matter that extends beyond the content of the application as originally filed.

2. *Auxiliary requests 1 to 3 - inadmissible extension*

2.1 Since none of the auxiliary requests 1 to 3 can solve the above-mentioned problem under Articles 100(c) and 123(2) EPC, in particular due to the omission of the features on the moving direction of the locking element, these requests are also not allowable. This was not contested by the respondent.

3. *Auxiliary requests 4 to 8 - admissibility*

3.1 The respondent filed the auxiliary requests 4 to 8 by letter of 26 July 2024, after having received the communication of the Board under Article 15(1) RPBA dated 27 May 2024.

3.2 The respondent argued that these requests were filed in order to address the Board's preliminary objections in its communication regarding Article 123(2) EPC. In particular, the objection relating to the omission of the substantially horizontal movement of the locking element was raised for the first time by the Board in its communication.
In addition, the requests were filed under exceptional circumstances, since the attorney's firm had only two representatives and one of them had been unable to work since June 2024 due to the loss of a close family member, followed by weeks of care, so that the other available representative had an excessive workload, which delayed the preparation of the auxiliary requests 4 to 8.

3.3 Under Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

3.4 The Board judges that the reasons put forward by the respondent do not justify the existence of exceptional circumstances in the present case.

In particular, the auxiliary requests 4 to 8 should have been filed at the latest with the reply to the statement of grounds of appeal, since the Board's opinion on Article 123(2) EPC for the subject-matter of claim 1 of the main request is based on the arguments put forward by the appellant not only in the opposition proceedings but also in their statement of grounds of appeal, and also considered by the Opposition Division in its decision. In particular, it can be inferred from the grounds of appeal (see page 12, third paragraph) and from the contested decision (see paragraph 17.4) that the appellant raised the objection of added subject-matter based on the movement of the locking element which was not defined as being substantially horizontal in relation to the upward movement of the adjusting element, by referring to the horizontal and upward movements as indicated by arrows A and B.
Thus, in its communication under Article 15(1) RPBA, the Board did not raise any new issues concerning Article 123(2) EPC for the main request. Accordingly, the respondent should have filed these requests as fallback positions at the latest with their reply of 11 April 2023.
From this it follows that the fact that the respondent's representative changed about one year

after the reply was filed does not justify not having submitted the requests with the reply. It also follows from the above that the difficulties of the newly appointed representative for replying to the communication of the Board, such as excessive workload, are completely irrelevant in this context. As pointed out, the respondent should have filed the auxiliary requests 4 to 8 already in April 2023. Thus the difficulties of the respondent's representative in June 2024 cannot be considered as exceptional circumstances, since they occurred more than one year later.

Consequently, the auxiliary requests 4 to 8 were not taken into account.

4. It follows that the appeal of the opponent is well founded and allowable.

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:

C. Vodz G. Pricolo

Decision electronically authenticated