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**Datasheet for the decision
of 24 March 2025**

Case Number: T 1250/23 - 3.2.01

Application Number: 18211522.0

Publication Number: 3533670

IPC: B60R19/02, B60R19/18, E04C3/04

Language of the proceedings: EN

Title of invention:
MULTI-STRIP BEAM

Patent Proprietor:
Shape Corp.

Opponent:
Kirchhoff Automotive Deutschland GmbH

Headword:

Relevant legal provisions:
EPC Art. 87(1), 89, 54, 56, 112(1)(a)
RPBA 2020 Art. 12(4), 12(6)

Keyword:

Priority - validity of priority date of P1 (no)
Novelty - main request (no) - auxiliary requests I, II (no)
Inventive step - auxiliary request 1d_2 (yes) - non-obvious
combination of known features
Amendment to case - amendment within meaning of Art. 12(4) RPBA
2020
Late-filed requests III, IV - should have been submitted in
first-instance proceedings (yes)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

T 0981/17, T 2201/19, T 1800/21

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1250/23 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 24 March 2025

Appellant: Shape Corp.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 May 2023 concerning maintenance of the
European Patent No. 3533670 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: A. Wagner
M. Millet

Summary of Facts and Submissions

- I. The appeals by the patent proprietor and the opponent are directed against the decision of the opposition division to maintain the European Patent No. 3533670 in amended form on the basis of auxiliary request 1d_2 filed during the oral proceedings.
- II. The impugned decision refers, *inter alia*, to the following documents, which are also cited in this decision:

P1: US 2014/61985029
D3: US 2014/0151140
D5: JP 2010-019414
D5a: Engl. machine translation of D5
D6: US 6,349,521
D7: WO 2006/000074
D11: DE 11 2006 003 017 T5

In its decision, the Opposition Division held among others that the earliest priority P1 of the patent in suit was valid such that D3 was not prior art under Article 54 EPC.

The main request (patent as granted) and auxiliary request 1 were found to contravene the requirements of Article 100(c) and 123(2) EPC (claim 1, claim 7).

Claim 1 of auxiliary request 1a was held not new over JP 2010-106463 (D1) and DE 28 53 658 (D4).

Claim 1 of auxiliary request 1b and independent claim 2 of auxiliary request 1c were held not inventive over D5 with D6.

Claim 1 of auxiliary request 1d_2 was held inventive over D5 with common general knowledge, D6, D7 or D11.

- III. Oral proceedings by videoconference were held before the Board on 24 March 2025.
- IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted. As an auxiliary measure, it was requested that the patent be maintained according to one of the auxiliary requests I to IV filed with the statement of grounds of appeal. It was further requested that the opponent's appeal be rejected or, as an auxiliary measure, that the patent be maintained according to one of the auxiliary requests I or II filed with the reply to the opponent's statement of grounds of appeal.

Furthermore, it was requested that the following questions be referred to the Enlarged Board of Appeal:

1. Ist die Stellung eines Antrags im Rahmen der Beschwerdebegründung eine Änderung im Sinne des Artikel 12(4) VOBK, wenn in diesem Antrag im Vergleich zu einem gleichlautenden Antrag, welcher bereits Gegenstand des Verfahrens der ersten Instanz war, lediglich ein unabhängiger Anspruch gestrichen wurde?
2. Sofern die Frage 1 mit "Ja" beantwortet wird, ist diese Änderung eine Änderung, welche das Kriterium der "außergewöhnlichen Umständen" nach Artikel 13(2) VOBK erfüllt?

Translation by the Board:

1. Does a claim request filed with a party's statement of grounds of appeal constitute an amendment within the meaning of Article 12(4) RPBA, when, in comparison to an identical request which was already subject of the

first instance proceedings, only one of the independent claims has been deleted?

2. If the answer to 1. is "yes", is this amendment an amendment that fulfils the criterion of "exceptional circumstances" pursuant to Article 13(2) RPBA?

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

V. Claim 1 of the **main request** (patent as granted) reads as follows (feature numbering according to the impugned decision):

M1 Beam article

M2 including elongated metal sheets,

M2.1 each having an elongated body and opposing edges,

M3 the bodies arranged and secured together to form an elongated at least partly closed tubular beam,

M3.1 having a length with non-constant transverse cross sections along the length,

M3.2 with some of the edges butting adjacent ones of the bodies to form non-radiused corners.

M3.3 the body of at least one of the sheets being planar.

In claim 1 of **auxiliary request I**, feature M3 is amended by deleting "at least partly":

M3' the bodies arranged and secured together to form an elongated closed tubular beam,

Auxiliary request II is based on auxiliary request 1 wherein the features of granted claim 3 are added to claim 1:

M4 wherein the beam article is a bumper reinforcement beam.

Claim 1 of **auxiliary requests III and IV** is identical. Based on claim 1 of auxiliary request II, the features of granted claim 5 are added as follows:

M5 wherein the beam article has channel ribs (114A, 114B, 114H) in its front wall (101A, 101B, 101H),

M5.1 wherein one channel rib (114A, 114B, 114H) is centred over each tubular section of the beam (100A, 1B, 100H),

Claim 1 of the patent as maintained (**auxiliary request Id_2**) is based in claim 1 of auxiliary request III and adds the features of granted claim 6 as follows:

M6 wherein up flanges (110A, 110B, 110H) and down flanges (111A, 111B, 111H) on the front and rear walls (101A, 101B, 101C and 102A, 102B, 102H) extend above and below the top and bottom shear walls (103a, 103B, 103H and 105A, 105B, 105H) respectively.

VI. The appellant's (patent proprietor's) arguments relevant to the present decision may be summarized as follows:

Validity of the earliest priority of 28 April 2014 (P1)

The opposition division correctly held the earliest priority valid. Paragraph [0026] of P1 corresponded to a direct and unambiguously disclosure of feature M3.1, i.e. non-constant transverse cross sections along the length.

Novelty over D3: main request, auxiliary requests I and II

As the earliest priority was valid, D3 was not prior art according to Articles 54(2) and (3) EPC for claim 1 as granted. Even if D3 was to be considered as prior art, D3 did not disclose a closed tubular beam as required by feature M3, M3' respectively.

Admittance of auxiliary requests III, IV

The only amendment in auxiliary request III compared to auxiliary request 1c underlying the impugned decision was to delete one of the two independent products claims. According to T 0981/17, such a deletion was not an amendment within the meaning of Article 12(4) RPBA.

Even if such a deletion of an independent claim was seen as an amendment within the meaning of Article 12(4) RPBA, T 1800/21 concluded with regard to the more restrictive Article 13(2) RPBA that the mere deletion of one of the independent claims even overcame the hurdle of exceptional circumstances. Auxiliary requests III and IV should thus be admitted under the less restrictive Article 12(4) RPBA.

Referral to the Enlarged Board of Appeal

Should the Board not admit auxiliary request III and IV into the appeal proceedings, it was requested to refer two questions - as submitted by email during oral proceedings before the Board - to the Enlarged Board of appeal as diverging case law existed in view of the evaluation of what was considered as an amendment within the meaning of Article 12(4) RPBA. The answers to the questions were decisive to the present case as they had an impact on the admittance of auxiliary requests III and IV.

Patent as maintained: Inventive step

The conclusion of the opposition division that the subject-matter of claim 1 as granted involved an inventive step starting from D5 was correct. The appellant's (opponent's) line of argumentation was based on hindsight.

- VII. The appellant's (opponent's) arguments relevant to the present decision may be summarised as follows:

Validity of the earliest priority of 28 April 2014 (P1)

Contrary to the opposition division opinion, P1, paragraph [0026] ("*the strips 32A could be non-parallel*") with figure 4 did not unambiguously disclose non-constant transverse cross sections along the length of the beam. Thus, feature M3.1 was not directly derivable from the earliest priority document P1.

Novelty over D3: main request, auxiliary requests I and II

As the priority of P1 was not valid, D3 was prior art according to Article 54(2) EPC. The bumper reinforcement beam disclosed in D3, paragraph [0018] with figures 3 and 4, took away the novelty of the subject-matter of claim 1 of the main request as well as of auxiliary requests I and II.

Admittance of auxiliary requests III, IV

Auxiliary requests III and IV were not to be admitted. These requests should have been presented in the first instance proceedings.

Auxiliary requests III and IV allegedly were based on auxiliary request 1c underlying the impugned decision. The amendments made to the set of claims of auxiliary request 1c were undoubtedly amendments within the meaning of Article 12(4) RPBA as the subject-matter of claim 1 of auxiliary request III was never discussed before the opposition division and not subject of the impugned decision. The same applied to claim 1 of auxiliary request IV which was identical to claim 1 of auxiliary request III.

The patent proprietor had sufficient opportunities for filing new requests before the opposition division. There was no reason why auxiliary requests III and IV were not already filed during opposition proceedings.

Referral to the Enlarged Board of Appeal

The request for a referral was filed at a very late stage during oral proceedings before the Board and should not be admitted.

Furthermore, the proposed questions for the referral

were not decisive for the present case. In the present case, it was out of question

- that the amendments made in auxiliary requests III and VI were amendments within the meaning of Article 12(4) RPBA,

- that the admittance of auxiliary requests III and IV was thus subject to the discretion of the chamber and

- that the discretion had to be exercised case by case depending on the specific circumstances.

Patent as maintained: Inventive step

The opposition division was wrong in concluding that claim 1 involved an inventive step in view of D5 combined with common general knowledge, D6, D7 or D11. Claim 1 differed in features M3.1 (non-constant cross section), M5 and M5.1 (centred channel ribs).

The distinguishing features were well known from the prior art and the skilled person was aware of their technical effects. To solve the problem posed, it was thus obvious from the common general knowledge, to modify the bumper of D5 as defined in claim 1.

D6 in particular addressed the problem linked to the distinguishing features (column 1, lines 16, 17, 29 to 31) and proposed to provide several channel ribs to achieve different flexural properties along the length of the beam. When applying this teaching to D5, the cross-section was automatically non-constant along the length. Each channel rib defined a "tubular section" in longitudinal direction of the beam. The claim wording kept open in which direction a "tubular section" was to be defined.

But even if, in view of D5, the tubular sections had to be seen in vertical direction, with the teaching of D6,

the skilled person would obviously provide channel ribs centred over each tubular section in vertical direction of the beam.

The same applied to the combination of D5 with D7 or D11.

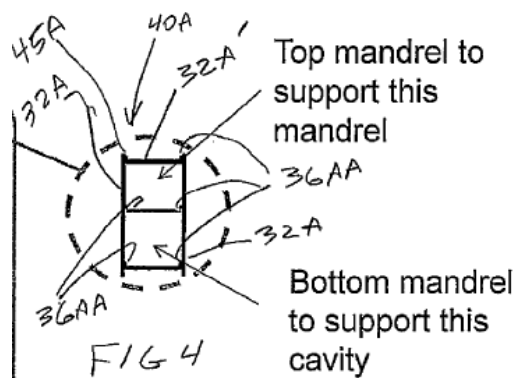
Reasons for the Decision

1. Validity of the earliest priority of 28 April 2014 (P1)

1.1 The priority of document P1 is not validly claimed for the subject-matter of granted claim 1 (Article 87(1) EPC) because the non-constant cross section defined in feature M3.1 of claim 1 as granted does not find a direct disclosure in P1.

1.2 As a consequence, the resulting earliest possible effective date for the subject-matter of granted claim 1 under Article 89 EPC is that of the next earliest priority document, which is 15 July 2014.

1.3 Contrary to the patent proprietor's and the opposition division's opinion (decision, point 13.2), P1, paragraph [0026] with figure 4 (reproduced below), does not unambiguously disclose non-constant transverse cross sections (feature M3.1) along the length of the beam.



1.4 Paragraph [0026] recites: "*The three strips 32A' end up parallel and in a second orientation so that they form shear walls in the final beam segment 40A. The illustrated strips 32A' end up extending perpendicular to the front and rear walls/strips 32A, but it is contemplated that the strips 32A could be non-parallel (i.e. angled).*"

1.5 From this wording, it cannot directly be concluded that the wording "*the strips 32A could be non-parallel* " refers to the longitudinal direction of the beam. With regard to figure 4 and the mentioned context that the shear walls 32A' extend perpendicular to the front and rear walls 32A but that the latter walls 32A could be non-parallel, the wording can likewise be understood as referring to the vertical direction, such that e.g. the front and rear wall may form an open V-shape in the cross-section. The cross-sections along the length would then still be constant.

1.6 Consequently, the disclosure in paragraph [0026] is ambiguous which contradicts the requirement of a direct and unambiguous disclosure of feature M3.1 for the priority of P1 to be valid.

1.7 At the oral proceedings the appellant (patent proprietor) submitted that the skilled person would exclude the possibility that the front and rear walls 32A formed an open V-shape in cross-section, as this would not be possible with the kind of roll forming device shown in figures 2 and 3 of P1.

This argument is not convincing because a non-parallelism of the walls 32A would in any case require modifications of the roll forming device shown in

figures 2 and 3, in which each sheet is either parallel or perpendicular to any of the other sheets.

Nor is it convincing that such modification would not lie within the skilled person's normal abilities, or else one would have to conclude that a non-parallelism is not disclosed in P1 at all, and, as a consequence, also a non-constant transverse cross section would not be disclosed at all.

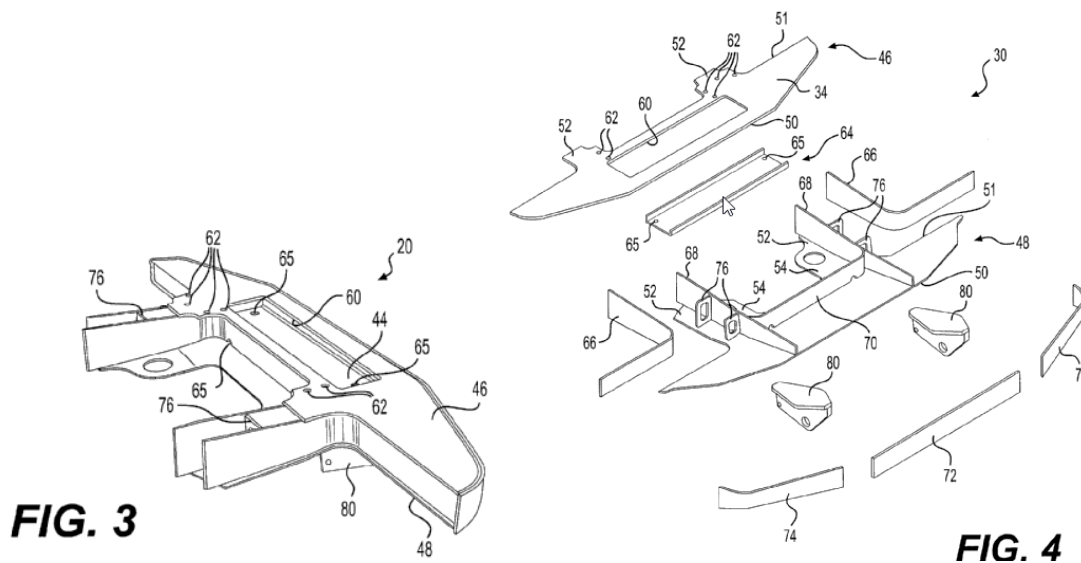
2. Novelty over D3: main request, auxiliary requests I and II

2.1 With 15 July 2014 being the earliest priority, D3 - which is published on 5 June 2014 - is state of the art according to Article 54(2) EPC.

2.2 D3 anticipates the subject-matter of claim 1 of the main request, of auxiliary request I and auxiliary request II as submitted by the appellant (opponent).

2.3 The main request corresponds to the patent as granted. Auxiliary request I corresponds to auxiliary request 1a underlying the impugned decision. Auxiliary request II corresponds to auxiliary request 1b underlying the impugned decision.

2.4 D3 discloses in figures 3 and 4 (reproduced below) with paragraph [0018] a bumper reinforcement beam having a length with non-constant transverse cross sections. The beam is formed by elongated metal sheets as claimed.



The appellant (patent proprietor) disputed that the beam of D3 disclosed feature M3, M3' respectively, concerning the closed form of the beam.

2.5 However, as argued by the appellant (opponent), with the lateral sheets 66, 74, 72, 70 and the top and bottom plates 46, 48 a closed tubular beam is shown - and therewith also "an at least partly" closed beam as required by the main request.

2.6 It is true that the bumper beam of D3 has a hole in the support web 76 at the back of the bumper, however, these kind of openings are not excluded by the claim wording, understood as requiring a "substantially" closed tubular beam.

It is noted that this understanding of the claim wording is in line with the description of the patent in suit, paragraph [0019], disclosing the closed bumper beam with attachment holes 107A, access holes 108A and accessory mounting holes 109A (see e.g. in figure 6).

2.7 The main request, auxiliary request I and auxiliary request II are thus not allowable under Article 54 EPC.

2.8 As a consequence, there was no need to discuss the further findings of the opposition division contested by the appellant (patent proprietor) with regard to the main request and the auxiliary requests 1a and 1b (points 14, 15.6, 16.3 and 17.3.2 of the impugned decision).

3. Admittance of auxiliary requests III and IV

3.1 Auxiliary request III and IV were submitted for the first time with the patent proprietor's statement of grounds of appeal. Claim 1 is identical for both auxiliary requests.

3.2 The Board did not admit auxiliary requests III and IV into the appeal proceedings pursuant to Articles 12(4), (6) RPBA.

The amendments made in these requests are amendments within the meaning of Article 12(4) first sentence RPBA. The admittance of these auxiliary requests is thus subject to the discretion of the Board. In view of the numerous opportunities for filing auxiliary requests available to the patent proprietor in the first instance proceedings and in view of the preliminary conclusion of the opposition division during oral proceedings, auxiliary requests III and IV should have been submitted in first instance proceedings.

3.3 Amendment within the meaning of Article 12(4) RPBA

3.3.1 The appellant (patent proprietor) acknowledged that auxiliary requests III and IV are new in appeal but was of the opinion that, because the amendments only concerned the deletion of claims in the set of claims

of auxiliary request 1c underlying the impugned decision, the deletion was not to be considered as an amendment in the sense of Article 12(4) RBPA - in accordance with T 0981/17 and T 2201/19. As a consequence, the admittance of auxiliary requests III and IV was not subject to the Board's discretion.

3.3.2 In view of the case-specific circumstances of the present case, the Board does not agree.

(a) Auxiliary request 1c underlying the impugned decision was filed on 14 February 2023 with two independent device claims. Both claims are based on claim 1 of auxiliary request 1b (II in appeal). Claim 1 adds the features of granted claim 5. Claim 2 adds the features of granted claim 6 instead.

The opposition division held (decision, point 17.4.2) that claim 2 was not allowable under Article 56 EPC. Claim 1 of auxiliary request 1c was not addressed by the opposition division and no decision was taken thereon.

(b) In appeal, claim 1 of previous auxiliary request 1c is now the sole independent device claim 1 of auxiliary request III and of auxiliary request IV, respectively. The impugned decision does not comprise any conclusions on the subject-matter of this claim that may be reviewed by the Board (Article 12(2) RBPA).

(c) In fact, in the present case, the patent proprietor submitted auxiliary request 1c (underlying the impugned decision) including two independent claims in the same category relating to two alternatives. This implies that the appellant considered both

alternatives to be patentable at that time. It cannot be denied that, if one of the alternatives were not patentable, then auxiliary request 1c would fall irrespective of the patentability of the other alternative. This is what happened in the opposition proceedings as the alternative of claim 2 was held to be not in conformity with the requirements of Article 56 EPC.

- (d) In opposition proceedings, the appellant did not submit a request directed only to the other alternative of claim 1, which would have required a decision of the opposition division specifically for that alternative. Accordingly, with auxiliary requests III and IV the Board and the other party to the proceedings are presented with a new situation which might have been dealt with, but did not have to, and in fact was not dealt with, in opposition proceedings. It is thus, from an objective point of view, a new situation in appeal.

3.3.3 Even if - as argued by the appellant (patent proprietor) - claim 1 of auxiliary requests III and IV as such was submitted during first instance proceedings and the features of granted claim 5 were discussed before the opposition division with regard to auxiliary request 1d underlying the impugned decision (decision, point 17.5.2), auxiliary requests III and IV still constitute an amendment within the meaning of Article 12(4) RBPA.

The reason is that the features of granted claim 5 were only discussed in the more limited context of claim 1 of auxiliary request 1d wherein the features of granted claim 5 are combined with those of granted claim 6. Claim 1 of auxiliary request III (and IV), however,

presents the features of claim 5 in a broader context, i.e. without the additional features of claim 6 as granted. This might have e.g. an impact on the discussion of inventive step in view of the document that can be considered as closest prior art.

Thus, the mere fact that the features of granted claim 5 were discussed before the opposition division, does not necessarily result in the same discussion for auxiliary request III in appeal as for auxiliary request 1d in opposition. In other words, claim 1 of new auxiliary requests III and IV introduces new aspects on which the assessment and the reasoning in the appealed decision were not focused.

3.3.4 The appellant (opponent) referred to the decisions T 981/17 and T 2201/19.

In T 981/17 the board admitted an auxiliary request because the method claims were the same as those of the main request and all device claims had been deleted. Therewith the objection against the device claims of the main request became moot. No new facts or emphasis were introduced into the proceedings. Therefore the board did not see this deletion of claims as an amendment in the sense of Article 13(2) RPBA.

In T 2201/19, in the auxiliary request all claims except one method claim had been deleted. This claim had already been discussed during first instance proceedings and was underlying the appealed decision. The board consequently did not see a change of the factual or legal framework and admitted the auxiliary request.

3.3.5 In these cases - and contrary to the present case - the opposition division also decided on the independent claim of the category that was maintained in appeal. These decisions thus not apply to the present case.

3.3.6 Hence, the amendments made to auxiliary request 1c underlying the impugned decision and presented in auxiliary requests III and IV in appeal constitute an amendment within the meaning of Article 12(4) RPBA. Here new features and aspects regarding inventive step would have to be discussed when admitting these auxiliary requests.

As a consequence the admittance of auxiliary requests III and IV is subject to the discretion of the Board.

3.4 Qualification for "exceptional circumstances" in view of T1800/21

3.4.1 The appellant (patent proprietor) was of the opinion that even if auxiliary request III and IV represented amendments within the meaning of Article 12(4) RPBA, they met all the requirements of exceptional circumstances pursuant to Article 13(2) RPBA as established in T 1800/21. If the amendments overcame the strict hurdle of Article 13(2) RPBA, they must also overcome the less strict hurdle of Article 12(4) RPBA.

3.4.2 The Board does not agree.

The decision T 1800/21 dealt with an auxiliary request filed after the board's communication according to Article 15(1) RPBA. Here all method claims had been deleted and only the device claims of the main request as maintained by the opposition division were upheld. The board saw an amendment of the case because a

decision on the admissibility and the allowability of a request could only be taken with respect to the request as a whole. However, even if the deletion of a claim category was considered to be an amendment, the fact that the same device claims were already exhaustively discussed between the parties and, that the deletion significantly enhanced procedural economy by clearly overcoming existing objections without giving rise to any new issues, could be seen as justifying exceptional circumstances in the sense of Article 13(2) RPBA 2020.

3.4.3 These circumstances that were considered in T 1800/21 for concluding that there were "exceptional circumstances" are not given in the present case. Therefore the reasoning of T 1800/21 is not applicable here.

(a) In T 1800/21, the department of first instance took a decision on the upheld independent claim which is not the case here.

(b) The amendments in auxiliary request III (and IV) change the factual framework as the claimed subject-matter in claim 1 broadens the discussion under Article 56 EPC as explained under point 3.3.3 above and therewith contradicts the principle of procedural economy - contrary to the amendments concerned in T 1800/21.

3.5 **The Board's discretion pursuant to Article 12(4), (6) RPBA**

3.5.1 The appellant (patent proprietor) was of the opinion that the following reasons justified the admittance of auxiliary requests III and IV:

- Claim 1 of auxiliary request III or IV was already

present in the first instant proceedings.

- The objections of the opposition division with regard to auxiliary request 1c were overcome by deleting independent claim 2.
- With regard to auxiliary request 1d, the opposition division held that the features of granted claim 5 implemented in claim 1 overcame the novelty and inventive step objections of the opponent.
- The procedural economy was not negatively effected.

3.5.2 The Board does not agree. In exercising its discretion, the Board judges that auxiliary requests III or IV could and should have been submitted at the latest together with auxiliary request 1c filed on 14 February 2023 during opposition proceedings (Article 12(6) RPBA) and are therefore not admitted into appeal proceedings.

3.5.3 For further explanation, the history of the patent proprietor's filings in opposition proceedings is briefly summarised as follows:
In response to the summons to the first day of oral proceedings 35 auxiliary requests were filed. The oral proceedings before the opposition division lasted two days. It started on a first day and continued on a second day more than 4 months later. During the first day of oral proceedings the patent proprietor filed new auxiliary requests 1a to 1e. In between the two days of oral proceedings, a new auxiliary request 1c replacing the previous one was filed on 14 February 2023.
During the second day of oral proceedings, a new auxiliary request 1d_2 was filed.

3.5.4 At the end of the first day of oral proceedings, the opposition division came to the conclusion that

auxiliary request 1b (II in appeal) was not inventive over D5+D6 (minutes of 1 December 2022, point 114). In view of the disclosure of D5, figure 1, it could not have been surprising for the patent proprietor that the additional features of claim 2 (up flanges and down flanges) of new auxiliary request 1c were seen as also being disclosed by the combination of D5 with D6. The patent proprietor should have filed - at the latest in reaction to the conclusions after the first oral proceedings - an auxiliary request in accordance with auxiliary request III and IV.

- 3.5.5 Furthermore, the arguments of the appellant (patent proprietor) listed above (point 3.5.1) could not convince the Board for the reasons given in points 3.3.2 and 3.3.3 above.

4. Referral to the Enlarged Board of Appeal

- 4.1 Based on Article 112(1)(a) EPC, the appellant (patent proprietor) requested to refer the following questions - filed in German and translated by the Board - to the Enlarged Board of Appeal.

1. Does a claim request filed with a party's statement of grounds of appeal constitute an amendment within the meaning of Article 12(4) RPBA, when, in comparison to an identical request which was already subject of the first instance proceedings, only one of the independent claims has been deleted?

2. If the answer to 1. is "yes", is this amendment an amendment that fulfils the criterion of "exceptional circumstances" pursuant to Article 13(2) RPBA?

4.2 From the appellant's (patent proprietor's) point of view, the referral was justified as diverging case law existed in view of the evaluation of whether the mere deletion of an independent claim in an request underlying the impugned decision was considered in appeal as an amendment in the sense of Article 12(4) RPBA (T 1800/21) or not (T 981/17).

The second question was directed to T 1800/21 wherein such kind of amendment was seen as an amendment but held to meet the criterion of "exceptional circumstances" pursuant to Article 13(2) RPBA compared to the contradictory findings of the Board in the present case.

4.3 In T 1800/21 the opponent requested to refer questions to the Enlarged Board of Appeal:

"1) In appeal proceedings, is a new auxiliary request, filed by a patent proprietor after the grounds of appeal or reply, to be considered an amendment to the appeal case subject to Art. 13 RPBA, when the new auxiliary request differs from a request on file solely in the deletion of one or more claims?

[...]

3) If the answer to 1) or 2) is positive, does a prima facie allowability of the new request constitute a relevant factor in deciding the admissibility of said request, and particularly is a prima facie allowability of the request an "exceptional circumstance" under Art. 13(2) RPBA?"

The board saw no need for a referral. The question whether "exceptional circumstances" were given, could be solved by the board itself.

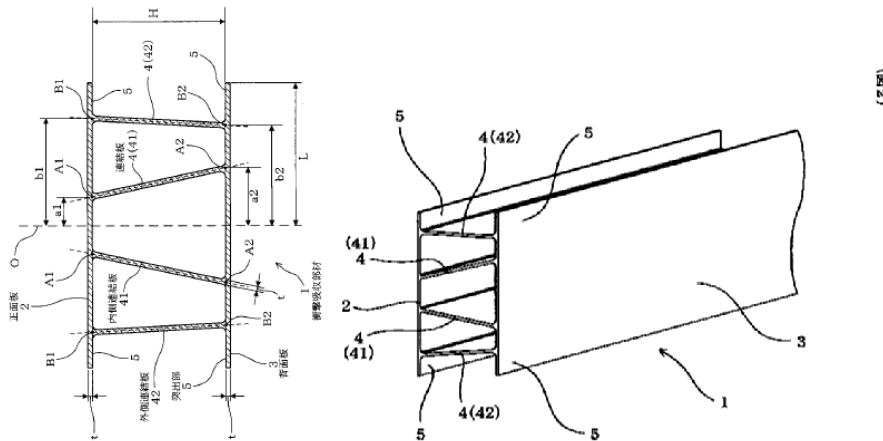
- 4.4 It is noted that the questions raised by the appellant (patent proprietor) are very similar to those of T 1800/21. In the present case, a referral was considered to be inappropriate because the Board is of the opinion that a generalised answer to the proposed questions is not possible.
- 4.4.1 As acknowledged by the appellant (patent proprietor) the evaluation of an amendment is to be seen in the context. Likewise, even under the assumption that there might be cases in which the deletion of an independent claim would not represent an amendment of a case in appeal, still the question of whether such deletion is to be considered as an amendment or not always involves a case-by-case decision.
- 4.4.2 As elaborated above (point 3.3), in the present case, auxiliary requests III and IV represent amendments of the case within the meaning of Article 12(4) RPBA.
- 4.4.3 Likewise, the criterion of "exceptional circumstances" has to be evaluated on a case-by-case basis. In particular on this point, the present case cannot be compared with the cited case law (T 1800/21), see point 3.4 above: contrary to the cited case law, in the present case there is a change of the factual framework, new aspects detrimental to procedural economy are introduced and no decision of the department of first instance was taken.
- 4.4.4 As the Board decided to not refer the proposed questions to the Enlarged Board of Appeal, the appellant's (opponent's) request to not admit the request for a referral became moot.

5. Patent as maintained: Inventive step

5.1 The Board confirms the opposition division's findings (impugned decision, point 17.5.2) that the subject-matter of claim 1 as maintained is inventive over D5 combined with common knowledge, D6, D7 or D11.

5.2 Claim 1 of the patent as maintained by the opposition division (auxiliary request 1d_2) combines essentially the features of granted claims 1, 3, 5 and 6.

5.3 D5, figures 1 and 2 (reproduced below), was considered the closest prior art disclosing a bumper reinforcement beam with up and down flanges on the front and rear wall.



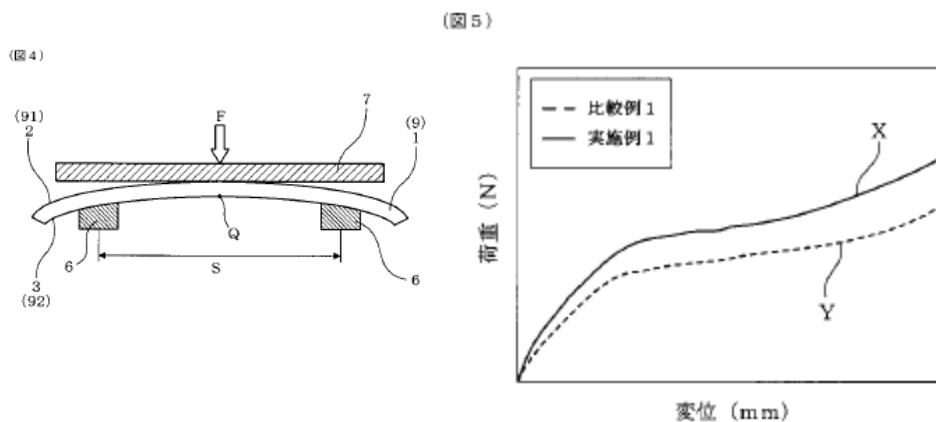
5.4 It is undisputed that D5 at least does not disclose feature M3.1 (non-constant cross section) and the features of granted claim 5 (M5 and M5.1: channel ribs in the front wall centred over each tubular section).

5.5 The problem to be solved - as formulated by the appellant (opponent) and considered by this opposition division in the impugned decision - was to improve the bending properties of the beam along its length to improve the crash behaviour.

5.6 Starting from D5 and confronted with the problem posed, the common general knowledge does not give a hint to modify the disclosed bumper beam according to claim 1.

5.6.1 According to D5a, paragraph [0001], the bumper beam disclosed therein has an improved bending behaviour as become apparent from figures 4 and 5 (reproduced below). Therein, the shock absorbing property of the beam as shown in figures 1 and 2 (line X in figure 5) compared to the shock absorbing property of a comparative beam as shown in figure 3 having parallel shear walls 93 perpendicular to the front and rear wall (line Y in figure 5) is shown.

D5 teaches that the inclined arrangement of the shear walls 4 already results in an improved crash behaviour (paragraphs [0030], [0033], [0035]).

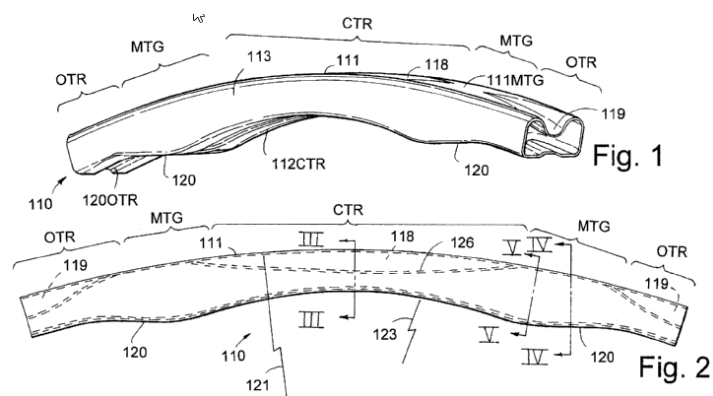


5.6.2 Thus, even if it can be agreed with the appellant (opponent) that the skilled person is aware of bumper beams having ribs and/or non-constant cross sections, D5 describes explicitly a beam without these features. There is no motivation to modify this bumper beam only because the skilled person knows about different types of bumper beams.

5.7 Also the combination of D5 with D6 is not convincing.

5.7.1 As pointed out by the appellant (opponent), D6 addresses a similar problem as the one posed (column 1, lines 15 to 23: "it is desirable to provide beams having different flexural properties along their length.").

D6 proposes in column 1, lines 29 to 31 that "a bumper construction for vehicles includes a tubular beam having a length and a longitudinal cross section that varies along the length.". This is achieved by forming several recesses 118, 119 on the front wall as shown in figures 1 and 2 of D6 (reproduced below).



5.7.2 From the appellant's (opponent's) point of view, when starting from D5, in order to solve the problem posed, the skilled person would form recesses 118, 119 as shown in D6 in the beam article of D5, thereby creating a non-constant transverse cross section. With regard to feature M5.1, it was noted that the claim wording kept open in which direction the "tubular sections" were directed. The channel ribs in D6 defined several tubular section in the longitudinal direction of the beam with a channel rib centred over each of these sections.

5.7.3 While, with regard to feature M5.1, the opponent's understanding of "the tubular sections" in view to D6 is an appropriate interpretation of the claim wording, the Board does not agree with the submitted line of argumentation as it does not reflect the actual teaching of D5 and D6.

- (a) D6 teaches to provide a non-constant transverse cross sections along the length. Means for that purpose are recesses 118, 119 applied by hydroforming (D6, column 1, lines 49 to 63, column 4, lines 50 to 54). The main teaching of D6 is thus not to provide channel ribs, but to provide a tubular beam having a longitudinal cross section that varies along the length.
- (b) Should the skilled person try to implement this teaching directly to D5, they would notice that the means disclosed in D6 to achieve the main teaching is not obviously combinable with D5.

In D6 the beam is rollformed and then reshaped by hydroforming (column 4, lines 50 to 56). Even if - as pointed out by the appellant (opponent) - the beam in D6 can also be extruded or formed other than by rollforming (column 5, lines 57 to 59), the hydroforming process is not obviously applicable to the cross section of D5 when the structure is welded as mentioned in D5a, paragraph [0015], to form abutting edges with non-radiused corners as required by feature M3.2.

According to D6, column 4, lines 53 to 67, for re-shaping the roll formed beam a bladder is positioned inside of the tubular beam and then expanded while the beam is placed in an outer die. Such a re-shaping does not appear obvious for the

multi-segmented cross section of D5 as it would apply high tensions to the weld seams - as argued by the appellant (patent proprietor).

- (c) The means proposed in D6 are thus not directly applicable to the beam of D5. Should the skilled person nevertheless consider the teaching of D6, which is to provide non-constant transverse cross sections along the length, the skilled person might, when starting from D5, consider other means than channel ribs to provide a tubular beam with a longitudinal cross section that varies along the length.

- (d) Even putting aside the actual teaching of D6 and the technical hindrances, the skilled person would still be confronted with the question of which process should be used to provide channel ribs in D5. Assuming that the skilled person would go so far, the Board agrees with the opposition division's findings on page 20, point 17.5.3 ii) of the impugned decision. The only possibility to identify "tubular sections" in D5 - which is the starting point - is in the vertical direction. However, D6 teaches to provide one rib over the height, but several along the length. Thus, it is still not obvious to provide one channel rib in each vertical tubular section of the bumper beam of D5 - contrary to the appellant's (opponent's) opinion.

5.7.4 Furthermore, the appellant (opponent) argued that the skilled person would obviously apply the general teaching of D6 to D5 such that several channel ribs were pre-formed on the front wall 4 over each tubular section, therewith also automatically achieving non-

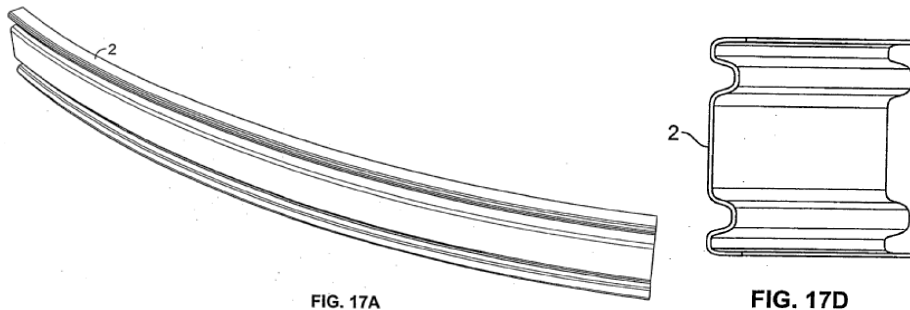
constant cross-section along the length.

5.7.5 However, this argumentation is based on hindsight. Nothing in D6 teaches or hints the skilled person to provide channel ribs already before forming the beam. Furthermore, D6 does not include any teaching about the distribution of channel ribs in case of more than one tubular section in vertical direction.

5.8 The further combinations of D5 with D7 or D11 - which were only submitted in writing - are not sufficiently substantiated (opponent's statement of grounds of appeal page 9, point 3.3) as submitted by the patent proprietor. The Board therefore does not see any reason for deviating - with regard to these attacks - from the opposition division's finding in the impugned decision, point 17.5.2.

5.8.1 It is noted that D7 - similar to D6 - refers to the hydroforming process for providing ribs to a rollformed beam. The skilled person would be confronted with similar problems as for D5 combined with D6.

5.8.2 With regard to D11, the impugned decision refers to figures 17A to 17D with paragraph [0046] (figures 17A and 17D reproduced below).



Even if the skilled person would consider to provide channel ribs according to D11, figure 17D, on the front

wall of the beam shown in figure 1 of D5, the cross sections would still be constant. Furthermore, it is not obvious to provide a channel rib in each of the three vertically arranged tubular sections of the bumper beam of D5.

5.9 Hence, auxiliary request 2d_1 meets the requirement of Article 56 EPC.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



K. Boelicke

G. Pricolo

Decision electronically authenticated