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Datasheet for the decision of 10 January 2025

Case Number: T 0111/24 - 3.2.05

Application Number: 14815452.9

Publication Number: 3055603

IPC: F16M7/00

Language of the proceedings: EN

Title of invention:
Cabinet Levelling Apparatus

Patent Proprietor:
Häfele SE & Co KG

Opponents:
Kunststoff Kommanditgesellschaft Nehl & Co
Adolf Würth GmbH & Co. KG

Relevant legal provisions:
EPC Art. 54(1), 56, 83, 84, 111(1), 123(2), 123(3)
EPC R. 80
RPBA 2020 Art. 11, 12(4), 12(6)

Keyword:
Compliance with Rule 80 EPC (yes: main request, auxiliary request 1)
Novelty (no: main request, auxiliary request 1; yes: auxiliary request 4)
Admittance of auxiliary requests (yes: 1; no: 2 and 3)
Admittance of document D20 (no)
Insufficiency of disclosure (no: auxiliary request 4)
Lack of clarity (no: auxiliary request 4)
Added subject-matter (no: auxiliary request 4)
Extension of protection (no: auxiliary request 4)
Inventive step (no: auxiliary request 4)
Remittal to the opposition division (yes)

Decisions cited:
G 0003/14, T 0352/04, T 1321/05, T 0206/22

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Case Number: T 0111/24 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 10 January 2025

Appellant I: (Patent Proprietor)	Häfele SE & Co KG Adolf-Häfele-Straße 1 72202 Nagold (DE)
Representative:	Grünecker Patent- und Rechtsanwälte PartG mbB Leopoldstraße 4 80802 München (DE)
Appellant II: (Opponent)	Kunststoff Kommanditgesellschaft Nehl & Co Stresemannstraße 30-.34 32257 Bünde-Hunnebrock (DE)
Representative:	Busse & Busse Patent- und Rechtsanwälte Partnerschaft mbB Postfach 1226 49002 Osnabrück (DE)
Appellant III: (Intervener)	Adolf Würth GmbH & Co. KG Reinhold-Würth-Straße 12-17 74653 Künzelsau (DE)
Representative:	Dilg, Haeusler, Schindelmann Patentanwaltsgesellschaft mbH Leonrodstraße 58 80636 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 14 December 2023 concerning maintenance of the European Patent No. 3055603 in amended form.**

Composition of the Board:

Chairman	P. Lanz
Members:	O. Randl
	M. Blasi

Summary of Facts and Submissions

I. The patent proprietor, the opponent and the intervener each filed an appeal against the opposition division's decision on the version in which European patent No. 3 055 603 ("the patent") can be maintained.

II. The opposition division was of the opinion that the subject-matters of the main request and auxiliary request 2 were not new over the state of the art. Auxiliary request 1B was not admitted. The opposition division found that auxiliary request 10 complied with the requirements of the EPC.

III. The following documents were taken into account by the opposition division and are also relevant to the appeal case:

D3 EP 0 292 921 A2
D6 JP H11-270515 A
D16 JP 2008-213058 A

IV. Together with its appeal, appellant III (the intervener) filed the following documents:

D20 DE 102 21 874 A1
D21 Brochure and presentation concerning Multi Star Vario system marketed by the Fennel company, and evidence of the date of Fennel's insolvency
D22 CN 2785454 Y

V. In its statement of grounds of appeal, appellant III requested that the appeal proceedings be accelerated because a patent infringement suit was pending before Landgericht Düsseldorf.

The board granted this request in application of Article 10(3) RPBA (see the board's communication issued on 26 February 2024).

VI. The oral proceedings before the board took place on 9 and 10 January 2025.

VII. Appellant I (the patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as amended based on one of the sets of claims

- of the main request or of auxiliary requests 1 to 6 as filed with its letter dated 23 August 2024, or
- of auxiliary request 7 or 7a as filed with its letter dated 7 January 2025, or
- of auxiliary request 7b or 7c as filed with its letter dated 23 August 2024, or
- of auxiliary requests 36 and 36a as filed with its letter dated 7 January 2025.

In the event the board admitted any of documents D20 to D22 into the appeal proceedings, appellant I requested that the patent be maintained as amended based on one of the sets of claims

- of auxiliary request H-D20 or 1-D20 to 6-D20 as filed with its letter dated 23 August 2024, or
- of auxiliary request 7-D20 or 7a-D20 as filed with its letter dated 7 January 2025, or
- of auxiliary request 7b-D20 or 7c-D20 as filed with its letter dated 23 August 2024.

Appellant I also requested that the case be remitted to the opposition division in the event the board admitted any of documents D20 to D22 into the appeal proceedings, or in the event the board considered any of auxiliary requests 5 to 7c.

Moreover, in the event the board considered any of auxiliary requests 1 to 7 as filed with the letter dated 23 August 2024 or 7 January 2025, respectively, not to be allowable under Rule 80 EPC, appellant I requested a referral to the Enlarged Board of Appeal or consideration of the auxiliary requests referred to in its notice of appeal.

Appellant II (the opponent) and appellant III requested that the decision under appeal be set aside and that the patent be revoked. They also requested remittal of the case to the opposition division for consideration of auxiliary request 5.

VIII. Claim 1 of the main request reads as follows (with the feature references used by the board indicated in square brackets):

"[**1**] An apparatus for adjusting a height adjustable leg having a longitudinal axis and for vertically supporting a cabinet, the apparatus comprising:
[**2**] a coupling (5, 10, 30) for forming part of said height adjustable leg, the coupling comprising
[**3**] a driven member (13) configured to rotate about the longitudinal axis of said height adjustable leg, and
[**4**] a tool (50) comprising a driving member (51) and a torque input (52, 61) for applying torque to the driving member (51),
[**5**] the tool (50) and the coupling (5, 10, 30) being complementarily adapted to releasably maintain engagement between the driving member (51) and the driven member (13) to allow the driving member (51) to drive the driven member (13) to rotate the coupling (5, 10, 30) about the longitudinal axis of the leg for height adjustment of the leg, and

wherein [**6**] the driving member (51) and the driven member (13) are gears that releasably mesh together when the tool is engaged with the coupling (5, 10, 30) from any lateral angular direction relative to the longitudinal axis of the leg,
wherein [**7**] the tool is able to remain in a stationary angular position relative *[sic]* the leg when the driving member (51) drives the driven member (13) for leg height adjustment,
wherein [**8**] the coupling (5, 10, 30) is a foot comprising the driven member (13) and a threaded socket for engaging a corresponding threaded shaft to form the height adjustable leg,
wherein [**9**] the driven member (13) remains at a fixed height relative to a floor surface on which the leg is to be positioned when vertically supporting the cabinet,
wherein [**10**] the tool (50) comprises a guide for setting the driving member (51) at a height relative to the floor surface so that the driving member (51) is positioned axially relative to the coupling (5, 10, 30) for engagement with the driven member (13), the height of the driven member (13) and height of the driving member (51) both being referenced from the floor surface."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the words "a coupling (5, 10, 30) for" in feature 2 have been replaced by "the height adjustable leg and a coupling (5, 10, 30)" (feature **2'**) and the words "for engaging" in feature 8 have been replaced by "in engagement with" (feature **8'**).

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 by the additional feature

"[**11**] wherein the foot is formed from a plastics material".

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 by the additional features "wherein [**12**] the tool (50) comprises an arm (53) and a handle (52), wherein [**13**] the arm (53) and the handle (52) extend along a longitudinal axis of the tool".

Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 3 by the additional features "wherein [**14**] the tool (50) comprises two lateral extensions (56) forming a jaw (63) for capturing a diameter of the coupling (5, 10, 30) to releasably retain the tool (50) to the coupling (5,10, 30) in a lateral direction to releasably maintain engagement between the driving member (51) and the driven member (13) when the driving member (51) drives the driven member (13) for height adjustment of the leg, wherein [**15**] the handle (52) is provided on a first end of the tool (50) and wherein the jaw (63) is provided on a second end of the tool (50), which second end is opposite to the first end in direction of the longitudinal axis."

IX. The parties' arguments can be summarised as follows:

(a) Main request: compliance with Rule 80 EPC

(i) Appellants II and III

Claim 1 as granted defined an "apparatus for adjusting a ... leg ... for vertically supporting a cabinet, appliance or structure ...". The references to an appliance or structure are no longer present in claim 1

of the main request. The word "cabinet" has a broad meaning and covers boxes and cases of all sizes. The amendment has not limited the claimed subject-matter. Consequently, the deletion of "appliance" and "structure" is not occasioned by a ground for opposition under Article 100 EPC and therefore the amendment violates Rule 80 EPC. As stated in decision G 1/84, point 9 of the Reasons, the opposition procedure must not be misused as an extension of examination procedure, see also decision T 2063/15, point 4.1.3 of the Reasons. The amendment must be genuine, appropriate and necessary to overcome a ground for opposition for it to comply with Rule 80 EPC.

(ii) Appellant I

The term "structure" encompasses much more than the word "cabinet". Its deletion from claim 1 has the consequence of limiting the claimed subject-matter. Consequently, the requirement of Rule 80 EPC is met.

(b) Main request: claim interpretation

(i) Appellant I

Feature 8 is derived from claim 6 as granted ("... wherein the coupling ... is a foot comprising the driven member ... and a threaded socket or a threaded shaft for engaging a corresponding threaded shaft or socket to form the height adjustable leg."). Feature 8 was obtained by deleting the second alternative. The embodiments of the patent all refer to the deleted alternative. The grammatical structure rules out the possibility that the threaded socket is part of the coupling but not of the foot: the drafter would have

added a comma before the words "and a threaded socket" if this were meant.

Regarding feature 10, the term "guide" has to be distinguished from the expression "axial bearing surface" as used in claim 10 as granted. While a bearing surface is static, a guide serves kinematics: it provides guidance for a vertical, tangential or radial movement. "Initial alignment" describes the ability to position the driven member in terms of height by placing the tool and guiding it, so that the movement over the guide inevitably leads to engagement. The relevant passages of the patent with regard to the tool are paragraphs [0114] (col. 18, lines 50 to 56), [0115], [0123] (col. 22, line 26 et seq.), [0124] and [0127] (col. 23), see also claims 95 and 96 and page 18, lines 10 to 16, of the PCT application on which the patent is based. The term "setting" expresses the intentional fixing of a determined height with respect to the floor, which is not disclosed in the prior art. The guide may co-operate with a ramp (see granted claim 11). A distinction needs to be made between the expressions "maintain engagement" (features 5, 14 and 17) and "for engagement". Regarding the ramp of claim 8, the disclosure of paragraph [0124] of the patent makes it clear that this only serves to accommodate any vertical misalignment. Feature 8 does not require the threaded shaft to be part of the claimed device, but it does not exclude it either.

(ii) Appellants II and III

The formulation of feature 8 is so broad that the foot may comprise the threaded socket, but it does not have to. The file history that has led to the present wording of feature 8 is not relevant for its inter-

pretation. Appellant I's argument based on English grammar is not convincing. Patent applications are often drafted by non-native speakers. Moreover, English grammar does not require a comma in this case (see feature 4). In any case, claim interpretation must be based on technical content and not on grammar. Feature 8 does not exclude the possibility that the foot comprises the threaded shaft.

Regarding feature 10, it is not correct that the axial position has to be provided by the guide; this can be deduced from the reference to a ramp in claim 8. An axial adaptation following the guiding movement is not excluded. "For engagement" in feature 10 encompasses both a situation where the height is being adjusted and a situation in which contact is established between the driving member and the driven member.

(c) Main request: novelty over document D6

(i) Appellant I

Document D6 does not disclose feature 1, 6, 8 or 10.

- Feature 1: The opposition division misconstrued what is meant by a height adjustable leg. In document D6, threaded shaft 18 moves along nut 23 in the axial direction, resulting in a height adjustment of the device. The height of the leg remains unchanged; it is defined by the upper end of threaded shaft 18, which is located in the device.
- Feature 6 was misinterpreted by the opposition division. In document D6, engagement is obtained by an axial displacement of the driving member. The tool and coupling are not brought into a driving connection by an exclusively lateral approach.

- Claim 6 as granted comprises two alternatives: either the socket or the shaft is the driven member. Feature 8 corresponds to the first alternative; the apparatus of document D6 corresponds to the second. The leg is formed by socket and shaft. Their axial overlap defines its possible change of length. The axial height of nut 23 cannot provide the necessary height adjustment, which is obtained only because the shaft can penetrate into the cabinet. The leg according to claim 6 as granted is arranged below the cabinet and does not extend into it.
- Feature 10: In document D6, the tool is ultimately fixed vertically when guide plate 15 rests on the top of gear wheel 3, at the end of the vertical lowering and after the teeth have been brought into engagement and the driving coupling is established. The axial referencing of the tool does not take place via the floor but via the driven member.

(ii) Appellants II and III

Document D6 discloses all of the features of claim 1.

- Feature 1: Appellant I's interpretation of the "height adjustable leg" is far-fetched. The skilled person would have understood that the adjustability in height is achieved by having a part of the leg determine the height of the cabinet.
- The driving member and the driven member do not have to be brought into contact in an exclusively lateral manner. Feature 6 allows for a certain axial movement. In this context, the teaching of the patent regarding ramp 60 should be considered.
- Feature 8: The threaded socket is not necessarily part of the foot. In document D6, the coupling is a foot with a driven member, namely setting wheel 3.

Threaded socket 23 can receive threaded shaft 18 to form the height adjustable leg.

- Feature 10: Guide plate 15 with its groove section 20 or the underside of body 5 forms a guide.

(d) Auxiliary request 1: admittance

(i) Appellants II and III

Auxiliary request 1 should not be admitted. The clarity objection against the previous version of auxiliary request 2 had been raised before the opposition division. Appellant I reacted for the first time in its reply to the statement of grounds of appeal. Moreover, the amendment does not expedite the proceedings.

(ii) Appellant I

Auxiliary request 1 should be admitted. Procedural economy is safeguarded since the amendment is minimalistic.

(e) Auxiliary request 1: compliance with Rule 80 EPC

(i) Appellants II and III

Compared with the version of previous auxiliary request 2 referred to in appellant I's statement of grounds of appeal, the present auxiliary request 1 is amended: "a height adjustable leg" has been replaced by "the height adjustable leg". This merely serves as a clarification, as confirmed by appellant I in its submission of 9 December 2024, page 4. However, clarity is not a ground for opposition. Rule 80 EPC does not specify to which request (the main or the preceding auxiliary

request) it refers, see G 3/14, point 56 of the Reasons: "The focus is ... how the amendments have changed the claimed subject matter vis-a-vis *the previous claims* ..."). Rule 80 EPC prohibits clarifying amendments.

(ii) Appellant I

The amendment is of a limiting nature and complies with Rule 80 EPC. It is a reaction to a clarity objection raised by appellant II. Decision G 3/14 must not be used to deprive a patent proprietor of its right to react to such an objection.

(f) Auxiliary request 1: novelty over document D6

(i) Appellants II and III

Document D6 discloses a height adjustable leg formed by adjuster 2, adjuster gear 3, threaded shaft 18 and threaded socket 23. Moreover, threaded socket 23 is in engagement with threaded shaft 18. Consequently, all of the features that distinguish claim 1 of auxiliary request 1 from claim 1 of the main request are disclosed by document D6, and therefore the subject-matter of claim 1 of auxiliary request 1 is not new over document D6.

(ii) Appellant I

Auxiliary request 1 requires the foot to be in threaded engagement with a threaded shaft in order to form the height adjustable leg. The support according to document D6 is not height adjustable. Rather, only nut 23 moves relative to threaded shaft 18. The length of the threaded shaft and thus the height of the support

remains unchanged; see Fig. 1 of D6. Nut 23 of document D6 does not have sufficient axial length to form a height adjustable leg with threaded shaft 18; cf. the axial length of threaded shaft 18 that extends into the device. Moreover, nut 23 is not part of the foot; it is connected to the device and is therefore part of the device. Document D6 does not disclose a threaded socket as part of the foot, which forms the height adjustable leg together with a threaded shaft. Thus, the subject-matter of claim 1 is new over document D6.

(g) Auxiliary requests 2 and 3: admittance

(i) Appellant I

In examining auxiliary request 4, the opposition division also considered the features of auxiliary requests 2 and 3. It can be seen from the reasons for the decision under appeal how the opposition division would have decided on these requests.

(ii) Appellants II and III

The subject-matter of auxiliary requests 2 and 3 is not the same as the subject-matter of the requests examined by the opposition division. Bringing forward the deferred auxiliary requests runs counter to the essential function of the appeal procedure.

(h) Admittance of document D20

(i) Appellants II and III

Document D20 should be admitted into the proceedings. It was found in a complementary search carried out

after the opposition division's surprising decision that the use of plastics material for the foot and in particular for its gear could justify an inventive step. Document D20 is relevant in this respect (cf. paragraphs [0040] and [0109] thereof). The document was filed as soon as possible in the appeal proceedings, as it was considered to be highly relevant for all of the requests on file. The document is only moderately complex. The admission of document D20 is expedient also in terms of procedural economy: it may prevent national nullity proceedings and further delays in pending infringement proceedings. It should be taken into account that the claimed subject-matter is difficult to search. Document D20 belongs to a different patent class from the patent. Considering that appellant I's auxiliary request 1 as filed on 23 August 2024 was admitted, it would be equitable to also admit document D20.

(ii) Appellant I

Document D20 should not be admitted. It was filed late without good reason. The fact that the document belongs to a different patent class from the patent does not justify its admission. Considering that the document is allegedly highly relevant for all of the requests on file, and also the patent as granted, it could and should have been identified earlier. Feature 11 had been introduced on 10 August 2023, i.e. one month before the final date set under Rule 116 EPC. The admittance of a completely new document cannot be compared to the admittance of an auxiliary request in which an indefinite article was replaced by a definite article in order to overcome a clarity objection.

(i) Auxiliary request 4: compliance with Article 83 EPC

(i) Appellants II and III

Feature 6 refers to gears that mesh together. Two such gears can mesh releasably with each other if at least one tooth of one of the gears engages in at least one recess between the teeth of the other gear. However, if teeth of one gear meet teeth of the other gear, the two gears cannot mesh with each other in a releasable manner. However, the latter case can occur if the tool is brought into engagement with the coupling from 'any' lateral angular direction with respect to the longitudinal axis of the leg. In such angular directions, the claimed releasable intermeshing is mechanically impossible. The patent fails to provide any practical technical teaching as to how the technical result of the feature in question can be achieved in angular positions in which the teeth abut against each other. However, such scenarios are covered by the subject-matter of the claim ("any lateral angular direction"). In particular, it is not disclosed how the driving member being brought up to the driven member at an oblique angle - which is also covered by the claim wording - can lead to meshing. Consequently, the subject-matter of claim 1 is not disclosed in a manner that allows it to be carried out over its entire scope.

(ii) Appellant I

The objection is based on an incorrect interpretation of claim 1. The possibility that the teeth may collide when they are engaged in a strictly radial manner in relation to the axis of rotation is inherent in the system. The patent accepts such a conceivable collision for a gearing with 'only' 40 teeth; cf. paragraph

[0144]. Regarding the "oblique approach", it should be noted that "lateral" primarily means the strictly radial direction, i.e. an approach in a plane extending at right angles to the longitudinal axis of the leg. The patent also presents solutions that allow for a certain angular position, i.e. a slight inclination relative to the strictly radial alignment (see paragraphs [0133] and [0146] of the patent).

(j) Auxiliary request 4: compliance with Article 84 EPC

(i) Appellants II and III

It is not clear whether the handle of features 12 and 13 is a torque input or whether a more general concept of handle is meant. Moreover, there is an intrinsic contradiction in claim 1 because the claimed apparatus for adjusting the leg itself comprises parts of the leg, such that the apparatus acts on itself.

(ii) Appellant I

Claim 1 is not self-contradictory. One part of an apparatus can act on another part of the same apparatus. The apparatus as a whole is still suitable for obtaining the claimed effect.

(k) Auxiliary request 4: added subject-matter

(i) Appellants II and III

- Feature 6: the words "coupling ... from any lateral angular direction" were based on page 3, lines 34 to 36, of the application as filed, which contains the wording "coupling laterally from any angular direction". There may be a difference when the tool

is introduced at an angle (cf. page 40, lines 30 to 32, of the application as filed).

- Feature 7: The alleged basis for the feature in the application as filed (page 14, lines 1 and 2) discloses that the tool is "adapted" - rather than "able" - to remain in a stationary angular position. "Adapted to" corresponds to a structural design, whereas "able" only refers to suitability. Thus, the requirements were relaxed, without any proper basis for this in the application as filed.
- Feature 12: The word "handle" is used in different ways in the application as filed. It can be a torque input (see page 34, lines 20 and 21, of the application as filed) but there are also other handles in the application as filed (see page 4, lines 26 to 29; page 13, lines 29 to 31; page 21, line 32, to page 22, line 8). There is no disclosure supporting an apparatus with both types. A similar objection applies to arm 53, which is a shroud around rod 65. In point 14.3.4 of its communication, the board stated that it is not decisive whether there is a rod in the arm or whether the arm can be rotated. In Fig. 25 there is a rod 65 but no arm 53. The absence of a rod in feature 12 violates Article 123(2) EPC.

(ii) Appellant I

The objections are unfounded:

- Feature 6: There is a good reason why the patent application as filed does not use the term "radial" (i.e. perpendicular to the axis of rotation) but "lateral". Small inclinations of the tool are possible.

- Feature 7: If the tool is able to remain in the angular position, it is adapted to do so. Here, the terms "able to" and "adapted for" are synonymous.
- Feature 12: According to Rule 43(7) EPC, reference signs must not be construed as limiting the claim. The board correctly construed this feature in its communication pursuant to Article 15(1) RPBA.

(l) Auxiliary request 4: extension of scope

(i) Appellants II and III

Article 123(3) EPC is violated by the addition of the entire leg to the claimed subject-matter. Claim 1 as granted only covered the combination of tool and coupling, whereas claim 1 of this auxiliary request covers the combination of tool and leg, which is different ("replacement by aliud"). The coupling as such is not operational; when an entire leg is used, the desired function is obtained. The leg parts that are not part of the coupling were previously completely irrelevant to the scope of protection, but they have become relevant as a consequence of the amendment. This has a consequence at the economic level. The economic value of the combination of tool and coupling is less than the value of the combination of tool and leg. Consequently, the outcome of infringement proceedings can greatly differ depending on which claim is found to be violated. In this respect, the present case is similar to those underlying decisions T 1321/05 (see point 9 of the Reasons) and T 352/04 (see point 2.9 of the Reasons), see also "Case Law of the Boards of Appeal", 10th edition, July 2022, section II.E.2.4.12).

(ii) Appellant I

Appellants II and III misrepresent what is claimed, namely the combination of tool and coupling and the remaining elements of the leg. This results in a genuine and exclusive narrowing of the scope of protection. Claim 1 as granted comprised the combination of tool and coupling; the remaining elements of the leg were optional and were within the scope of protection. The scope of protection of claim 1 of auxiliary request 4 is a genuine subset of the scope of protection of claim 1 as granted. Appellants II and III have not been able to name a single embodiment falling within the scope of protection of auxiliary request 4 that was not within the scope of protection of claim 1 as granted.

(m) Auxiliary request 4: inventive step starting from document D6

(i) Appellants II and III

Distinguishing features

Feature 11 is the only distinguishing feature. Regarding feature 13, the functional equivalent of the handle within the meaning of the patent is holder 13 rather than handle 12. As far as feature 14 is concerned, the lateral direction can be the direction normal to the direction of introduction (see also paragraph [0101] of the patent). In Fig. 3 of document D6, guide plate 15 with its groove 20 can be seen. The overall shape is very similar to what is shown in the patent. The extensions that surround threaded shaft 18 hold it laterally. There cannot be considerable clearance between the plate and the threaded shaft, because the pins have to be well

positioned with respect to the grooves in which they have to be inserted. The introduction of the tool is facilitated by chamfers anyway. The term "capture" does not necessarily mean that there has to be some clipping, as can be seen from paragraph [0105] of the patent ("... less than 180 degrees to capture the foot laterally ..."). In Fig. 3 of document D6, the angle is equal to 180°, and therefore the threaded shaft must be captured, even without pins 16. In principle, the pins can also be considered part of the jaw. Thus, feature 14 is disclosed in the figures and in paragraphs [0016] and [0017] of document D6.

Objective technical problem

Feature 11 has no particular technical effect, see also paragraph [0152] of the patent, which presents plastic as one suitable material among others. Thus, the objective technical problem can be formulated as the provision of a suitable or alternative material for the foot of a height adjustable leg.

Obviousness to the skilled person

Document D6 as such does not disclose the material of gear 3; it could be an injection-moulded part. Plastics would have been an obvious choice for the skilled person. There are numerous documents in the state of the art disclosing feet made from plastics, and therefore this can be considered part of the skilled person's common general knowledge. Moreover, when starting from document D6 and seeking a suitable material for gear 3, the skilled person would have consulted document D16. Fig. 6 thereof shows a tool that engages gear wheel 4, see also Fig. 7. Gear wheel 4 is part of a height adjustable leg shown in

Fig. 23, which is practically identical to that of document D6. Paragraph [0021] of document D16 discloses that gear 4 is made from metal or plastic. Thus, the choice of plastics materials would have been obvious to the skilled person. Other passages of document D16 corroborate this finding, such as paragraph [0001], which refers among other things to vending machines, as does paragraph [0004] of document D6. It is correct that the gear of document D16 interacts with ratchet lever 17, but this does not mean that the load is lower; it could even be higher. Moreover, it is important to note that such gears are only used once or twice during the lifetime of the leg, and therefore the argument based on load misses the point. Finally, document D3 discloses a system (see Fig. 6) whose foot 36 has a gear driven by means of a tool comprising another (classic) gear made from plastics, see col. 2, line 53, to col. 3, line 2.

(ii) Appellant I

Distinguishing features

Document D6 does not disclose feature 11, 13 or 14.

Feature 13: A handle is something that is to be clasped. Document D6 refers to handle 12. It is clear that the front part of the tool has to be lifted. To do so, the skilled person would support holder 13 on the floor and seize body 5. The skilled person would not seize holder 13. Therefore, this part cannot possibly be the handle of feature 13.

Feature 14: It is important to see that the action of capturing the coupling must lead to retaining it. In document D6, pins 16 retain the tool. These are needed

to achieve torque transmission. There is no need for guide plate 15 to provide this function, and it is not suitable for maintaining the engagement. It is not possible to derive functional properties from the drawings alone. Moreover, an angle of 180° cannot be derived from Fig. 3 of document D6. There might be considerable clearance between groove 20 and the coupling which it surrounds, in which case the plate cannot retain the coupling. That the guide plate is only used for positioning can also be seen from paragraph [0017] of document D6. Regarding angle values of less than 180°, paragraph [0105] of the patent discloses that the user "may push the tool against the foot" to maintain engagement. However, feature 14 requires the jaw itself to maintain engagement with respect to the radial forces.

Obviousness to the skilled person

Fig. 3 of document D6 is a drawing of a technical nature (tolerances, ...) and therefore the skilled person would have assumed that the foot is formed of a metallic material. Paragraph [0025] discloses the existence of a power transmission by which the torque is increased. Therefore, the skilled person would not have considered plastic to be a suitable material for the gear. The apparatus of document D16 differs from the invention in several ways. Contrary to what is shown in Fig. 7 of document D16, the gears of claim 1 mesh as they drive. Ratchet lever 17 of Fig. 7 lies relatively flat against the gear wheel, such that the load, and in particular the load per unit area, on the gear wheel is considerably lower, as in document D6. The ratchet lever can only swivel; it cannot turn. Therefore, there was no incentive for the skilled person to consider the material choices made in

document D16. Document D3 concerns furniture fittings; there is no unambiguous disclosure that the bevelled wheel should be made of plastics.

(n) Remittal to the opposition division

(i) Appellant I

The case should be remitted. The opposition division has not yet examined the remaining requests. The patent proprietor has the right to be heard by two instances. The remaining requests are narrower than the requests that have been decided upon by the board. A remittal is also necessary in light of the fact that the interpretation of the claim by the board is different from the interpretation by the opposition division.

(ii) Appellants II and III

The case should be remitted. Appellant II and III's earlier request that the case not be remitted was related to the admission of document D20. The opposition division has not yet examined the lower-ranking auxiliary requests. Doing so would be time-consuming. There are many objections against auxiliary request 6. It would be best to discuss them before the opposition division. It may be that two-day oral proceedings are necessary. It seems doubtful that it will be possible to discuss all of the requests during the oral proceedings before the board. Even though infringement proceedings are pending, a thorough discussion of the remaining auxiliary requests should have priority.

Reasons for the Decision

1. Main request

1.1 Compliance with Rule 80 EPC

Rule 80 EPC provides that claims may be amended, provided that the amendments are occasioned by a ground for opposition under Article 100 EPC.

Claim 1 as amended requires the apparatus to be suitable for adjusting the height of a leg that is suitable for supporting a cabinet. The leg of claim 1 as granted has to be suitable for supporting a cabinet, appliance or structure. The limitation to a cabinet limits the claimed subject-matter. Thus, the amendment is potentially suitable for overcoming a ground for opposition under Article 100 EPC. Consequently, the set of claims complies with Rule 80 EPC.

1.2 Claim interpretation

1.2.1 Feature 8

According to feature 8, the coupling is a foot comprising the driven member and a threaded socket for engaging a corresponding threaded shaft to form the height adjustable leg.

One issue that had to be decided by the board is whether the feature requires the threaded socket to be part of the foot ("a foot comprising the driven member and a threaded socket") or whether it could also be understood in such a way that the coupling is made up of a foot and a threaded socket.

Appellant I argued that the latter understanding was excluded in the absence of a comma ("the coupling is a foot comprising the driven member, and a threaded socket"). This argument did not persuade the board because no supporting evidence was filed and because comma rules are not always applied consistently even by native speakers of English (cf. the so-called "Oxford comma").

In view of the established rule that a claim should be interpreted in the broadest technically meaningful way, the board concluded that according to feature 8, the threaded socket can be, but does not have to be, part of the foot. A coupling comprising (i) a foot and (ii) a threaded socket that is not part of the foot would also fall under feature 8.

Moreover, the threaded shaft is not necessarily part of the claimed apparatus, but it can be.

Appellant I also pointed out that feature 8 corresponds to the first of the two alternatives of claim 6 of the patent as granted and should be interpreted accordingly. In the first alternative of claim 6 as granted, the socket is driven; in the second, the shaft. However, the interpretation of a claim feature that as such is clear cannot be based on the context from which it has been isolated. It has to be interpreted as it stands, regardless of how it came to be. Therefore, it is not warranted to read feature 8 in such a way that the socket has to be driven. In the context of claim 1, feature 8 does not require this narrow interpretation.

1.2.2 Feature 10

Feature 10 requires the tool to comprise a guide for setting the driving member at a height relative to the floor surface so that the driving member is positioned axially relative to the coupling for engagement with the driven member, the height of the driven member and height of the driving member both being referenced from the floor surface.

The guide according to feature 10 sets the driving member at a certain axial distance from the floor. Feature 10 does not require the guide to be such that the driving member moves *along a predetermined path*.

The crucial matter is whether "for engagement" is to be understood such that the guide brings the driving member to the axial position at which the engagement takes place or whether the indication is an indication of purpose to which the guide has to contribute but does not have to establish on its own. In the latter case, "for engagement" is understood as meaning "for the purpose of engagement".

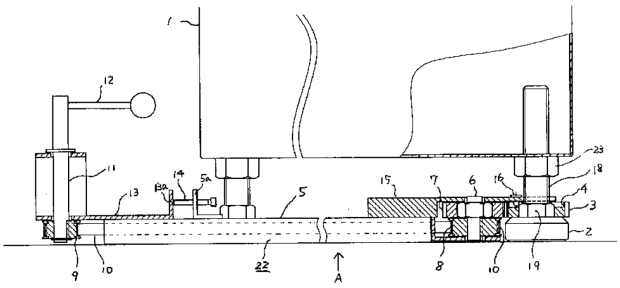
In this context, it is important to note that feature 5 also refers to "engagement". According to this feature, the tool and the coupling are complementarily adapted to releasably *maintain* engagement between the driving member and the driven member. It is clear from this feature that "engagement" refers to the final state in which the driving member and the driven member are connected, rather than to the process of bringing them together. In other words, "engagement" is not just about making contact; it designates the state in which the parts are engaged with each other.

Therefore, the board interprets "for engagement" in feature 10 within the meaning of an indication of the purpose of the driving member being in engagement with the driven member *when the height of the leg is being adjusted*. For feature 10 to be present, it is not required that the guide is such that the connection between the driving member and the driven member is established as soon as the guide has played its role. This conclusion is also in line with dependent claim 8, according to which the tool comprises a ramp surface that axially positions the tool to the coupling.

1.3 Novelty of the subject-matter of claim 1 over document D6

Document D6 concerns a device for adjusting the height of a device standing on legs. Fig. 1 shows tool 22 for rotating the rotating member 3 provided at the bottom of device 1:

【図1】



The opposition division reached the conclusion that document D6 disclosed all of the features of claim 1 of the main request (see point 2.6 of the Reasons for the decision under appeal). Appellant I contested the disclosure of features 1, 6, 8 and 10.

1.3.1 Feature 1

Feature 1 limits the claim to an apparatus for adjusting a height adjustable leg having a longitudinal axis and for vertically supporting a cabinet.

The opposition division identified features 2, 3, 18 and 23 of the device shown in Fig. 1 of document D6 as the height adjustable leg and device 1 as the cabinet according to feature 1.

Appellant I argued that threaded shaft 18 moved in an axial direction along nut 23, resulting in a height adjustment of device 1. The height of the leg itself remained unchanged because it is the upper end of shaft 18 located in the device that defines the constant, unchangeable height of the support.

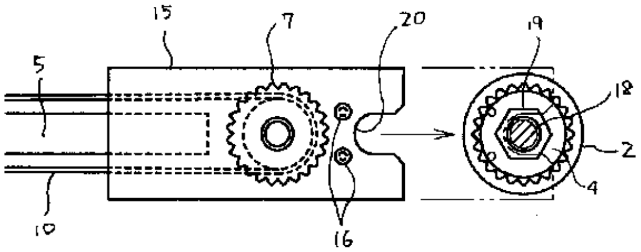
This interpretation of the expression "height adjustable leg" is unfounded. The skilled person would have understood that the height to be adjusted is the leg's effective height, i.e. the part of the leg responsible for the height adjustment of the cabinet. Therefore, feature 1 is disclosed in document D6.

1.3.2 Feature 6

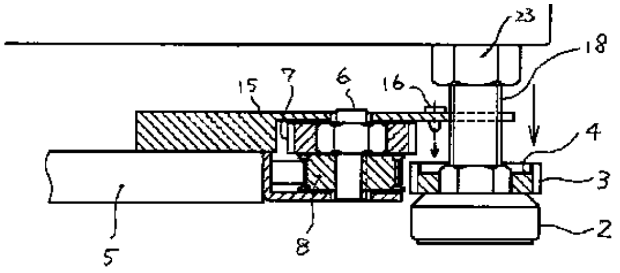
According to feature 6, the driving member and the driven member of the tool are "gears that releasably mesh together when the tool is engaged with the coupling [...] from any lateral angular direction relative to the longitudinal axis of the leg".

The opposition division identified gears 7 and 3 of the device of document D6 as the driving member and driven member, respectively. In the context of "any lateral

angular direction", the opposition division referred to the arrow in Fig. 3 of document D6:



According to the opposition division, feature 6 only requires "that the driving member and the driven member mesh together when the tool is engaged with the coupling". Thus, a combination of a lateral movement of the tool and an axial movement of guide plate 15 as shown in Fig. 4 of document D6 is not excluded.



Appellant I's main counter-argument is based on its interpretation of feature 6, according to which the feature requires an adaptation of the tool and coupling in such a way that they can be brought into a driving connection by an exclusively lateral approach.

In the board's view, it is unwarranted to read a limitation to an exclusively lateral approach into feature 6. The feature as it stands is open to a broader technically meaningful interpretation. Consequently, the board concludes that document D6 discloses feature 6.

1.3.3 Feature 8

According to feature 8, the coupling is a foot comprising the driven member and a threaded socket for engaging a corresponding threaded shaft to form the height adjustable leg.

The opposition division identified gear 3 of the device of document D6 as the driven member, and nut 23 as the threaded socket engaged with threaded shaft 18.

Appellant I's counter-arguments are based on an interpretation of feature 8 that the board does not endorse. In particular, feature 8 does not require the socket to be driven (see point 1.2.1 above). The foot of document D6 comprises a driven member (gear 3) and a threaded socket (nut 23) that engages threaded shaft 18 and the combination of these means forms a height adjustable leg of apparatus 1. The fact that the threaded shaft extends into device 1 is not relevant in this context. Thus, the board concludes that feature 8 is disclosed in document D6.

1.3.4 Feature 10

According to feature 10, the tool comprises a guide for setting the driving member at a height relative to the floor surface so that the driving member is positioned axially relative to the coupling for engagement with the driven member, the height of the driven member and height of the driving member both being referenced from the floor surface.

The opposition division identified both groove portion 20 as shown in Fig. 3 of document D6 and the

lower side of arm 5 (see Fig. 1) as guides according to feature 10.

Appellant I's counter-arguments rely on a unduly narrow interpretation of feature 10. Considering the interpretation adopted by the board (see point 1.2.2 above), the board concludes that feature 10 is disclosed in document D6 as well.

1.3.5 Conclusion regarding novelty

Document D6 discloses all of the features of claim 1 of the main request.

1.4 Fate of the main request

Since the subject-matter of claim 1 lacks novelty within the meaning of Article 52(1), Article 54 EPC, the main request is not allowable. Thus, this request must be rejected.

2. Auxiliary request 1

2.1 Admittance

The set of claims of auxiliary request 1 was filed for the first time with appellant I's reply to appellant II and III's statements of grounds of appeal in view of an objection of lack of clarity against a previous version of auxiliary request 2. Consequently, its admittance is governed by Article 12(4) RPBA, according to which it may be admitted at the discretion of the board.

The objection in question had been raised during the opposition proceedings but the opposition division found it not well-founded. It was raised again in the

statements of grounds of appeal of appellants II and III, which triggered the filing of auxiliary request 1 with appellant I's reply. This filing did not negatively affect procedural economy because appellant I responded to the objection during the first phase of the appeal proceedings. Moreover, the amendment consists in a change from an indefinite to a definite article which could not have surprised the other parties.

In view of the above considerations, auxiliary request 1 was admitted into the appeal proceedings.

2.2 Compliance with Rule 80 EPC

Rule 80 EPC provides that claims may be amended provided that the amendments are occasioned by a ground for opposition under Article 100 EPC.

Contrary to the view of appellant III, the board considers that the amendments referred to in Rule 80 EPC are amendments over the claims as granted. Therefore, when examining the compliance of a request with Rule 80 EPC, it is not appropriate to consider the amendments over other requests from which the request at issue may have been derived.

Claim 1 of auxiliary request 1 differs from claim 1 as granted in that

- the reference to an appliance or structure in feature 1 is absent,
- the height adjustable leg is part of the apparatus (feature 2'), and

- the threaded socket is "in engagement with" the threaded shaft rather than "for engaging" the shaft (feature 8').

The board is satisfied that each of these amendments limits the claimed subject-matter and is potentially suitable for overcoming a ground for opposition under Article 100 EPC. Consequently, the set of claims of auxiliary request 1 is found to comply with Rule 80 EPC.

Even if auxiliary request 1 were to be compared with former auxiliary request 2, which was amended for clarification, Rule 80 EPC would not constitute an obstacle to its admission. This is because the amendment sought to overcome a clarity objection raised by appellant III against a previous amendment of a granted claim. Article 101(3)(a) EPC requires the opposition division to examine whether the amendments made by the patent proprietor meet the requirements of the EPC, i.e. including those of Article 84 EPC (to the extent permitted by the Enlarged Board of Appeal's decision G 3/14). Rule 80 EPC cannot be used against amendments seeking to overcome an objection raised under such circumstances.

2.3 Novelty of the subject-matter of claim 1 over document D6

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the apparatus is required to comprise the height adjustable leg. Moreover, the wording "for engaging" in feature 8 has been replaced by "in engagement with".

The board agrees with appellant II that document D6 discloses a height adjustable leg formed by adjuster 2, adjuster gear 3, threaded shaft 18 and threaded socket 23. Appellant I's counter-arguments have not convinced the board. The skilled person would have understood that the support disclosed in document D6 is height adjustable even though the length of threaded shaft 18 is constant. The argument that threaded socket 23 is not part of the foot is based on an interpretation of feature 8 that the board does not endorse (see point 1.2.1 above).

The replacement of the expression "for engaging" with "in engagement with" cannot restore novelty over document D6 either because in this document threaded socket 23 is disclosed to be in engagement with threaded shaft 18.

Thus, the subject-matter of claim 1 lacks novelty within the meaning of Article 52(1), Article 54 EPC over document D6.

2.4 Conclusion regarding auxiliary request 1

Since the subject-matter of claim 1 is not new over document D6 (see point 2.3 above), auxiliary request 1 is not allowable. Consequently, this request must be rejected.

3. Auxiliary requests 2 and 3: admittance

Claim 1 of auxiliary requests 2 and 3 is identical to claim 1 of auxiliary requests 3 and 7 received by the EPO on 10 August 2023, except that feature 2' refers to "the height adjustable leg", whereas claim 1 of former auxiliary request 3 had "a height adjustable leg".

Auxiliary requests 3 and 7 received on 10 August 2023 were never examined by the opposition division. This is because when the opposition division informed the parties that the subject-matter of claim 1 of auxiliary request 2 was not new over document D6, appellant I "decide[d] to continue with auxiliary request 10" (see points 13.5 and 14 of the minutes).

Appellant I did not withdraw auxiliary requests 3 to 9. Its way of proceeding could be interpreted as renumbering its auxiliary requests or, in other words, a change of the order in which the auxiliary requests should be dealt with by the opposition division. Be that as it may, Appellant I's decision had the effect that the opposition division did not have to decide on auxiliary requests 3 to 9.

Given that the primary purpose of the appeal proceedings is a judicial review of the contested decision (see Article 12(2) RPBA), it is not appropriate to admit requests which appellant I deliberately chose not to have examined in the opposition proceedings (see also decision T 206/22, point 8 of the Reasons).

Appellant I's argument that it can be seen how the opposition division would have decided on auxiliary requests 2 and 3 on the basis of the reasons for the decision under appeal in respect of auxiliary request 4 cannot lead to a different conclusion. When appellant I decided to immediately proceed with auxiliary request 10, it could not have predicted that the opposition division would find a feature common to auxiliary requests 3, 7 and 10 to be the only distinguishing feature over the disclosure of document D6. This outcome cannot retroactively rescind appellant I's

decision to withhold auxiliary requests 3 and 7 for them to be decided upon by the opposition division.

Consequently, the board decided not to admit auxiliary requests 2 and 3 under Article 12(4) RPBA.

4. Auxiliary request 4

4.1 Admittance of document D20

Document D20 is a German patent application allegedly discovered by appellant II after the decision under appeal and filed with appellant III's statement of grounds of appeal less than one month after the opposition division had issued the reasons for its decision.

As can be seen from point 5.4 of the Reasons for the contested decision, feature 11, according to which the foot is formed from a plastics material, was decisive for the finding that the patent as amended in the form of what was then auxiliary request 10 complied with the requirements of the EPC. This finding triggered a new search, in which document D20 was found.

For the question of admittance of document D20, Article 12(4),(6) RPBA was relevant. In the board's view, document D20 could and should have been filed during the opposition proceedings. Moreover, it is not *prima facie* highly relevant for the question of whether the use of plastics material for the foot is inventive. Appellants II and III also overestimate the *prima facie* relevance of the document for the remaining requests on file; for instance, document D20 does not *prima facie* disclose a guide according to feature 10. Moreover, the combination of features 6, 8 and 11 was present in

auxiliary requests filed well before the oral proceedings before the opposition division, and therefore there was good reason to carry out the complementary search during the opposition proceedings. The argument that the admission of the document might make national nullity proceedings unnecessary is not decisive because this argument could always be used to justify the admission of late-filed documents.

Having considered all these aspects, the board decided not to admit document D20.

4.2 Compliance with Article 83 EPC

This objection concerns feature 6, according to which the driving member and the driven member are gears that releasably mesh together when the tool is engaged with the coupling from any lateral angular direction relative to the longitudinal axis of the leg.

The objection is based on situations where (i) the teeth of the driving gear meet the teeth of the driven gear such that they do not mesh together, or where (ii) the gears are brought together at an angle.

In the board's view, the objection is unfounded. The skilled person is aware that there are configurations that could hinder the gears from meshing, but this would not prevent the skilled person from carrying out the invention. In the unlikely case that the teeth of the gears meet exactly, it would be sufficient to slightly rotate the gear of the driving part for the meshing to be achieved. Moreover, there is no reason to believe that bringing together the gears at an angle makes meshing impossible. Furthermore, even if such cases did exist, a corresponding configuration would

not be covered by claim 1, which requires meshing when the tool is engaged with the coupling.

4.3 Compliance with Article 84 EPC

4.3.1 Intrinsic contradiction

Appellants II and III pointed out an intrinsic contradiction in claim 1 because the claimed apparatus for adjusting the leg itself comprises parts of the leg, such that the apparatus acts on itself.

In the board's view, this objection is unfounded. When the claim is considered as a whole, its admittedly unusual formulation does not raise doubts in the skilled person's mind as to what exactly is claimed, namely an apparatus whose technical purpose is achieved in that some of its parts act on others.

4.3.2 Handle (feature 12)

Feature 12 requires the tool to comprise an arm and a handle. According to appellants II and III, it is not clear whether the handle of feature 12 is a torque input or whether some other kind of handle is meant.

In the board's view, the term "handle" has to be given its broadest technically meaningful interpretation. It is not necessarily limited to a handle allowing for torque input. The term as such is broad, but does not make claim 1 unclear.

4.3.3 Conclusion

The objections under Article 84 EPC are unfounded.

4.4 Compliance with Article 123(2) EPC

4.4.1 Feature 6

According to feature 6, the driving member and the driven member are gears that releasably mesh together when the tool is engaged with the coupling from any lateral angular direction relative to the longitudinal axis of the leg.

The board is unable to see any technically meaningful difference between the expression "coupling ... from any lateral angular direction" as used in feature 6 and the expression "coupling laterally from any angular direction" as found on page 3, lines 34 to 36, of the application as filed. In the board's view, the term "lateral" does not exclude that the tool is introduced at an angle with respect to a plane perpendicular to the axial direction. The term "lateral" is not synonymous to "radial". Thus, the objection is unfounded.

4.4.2 Feature 7

Feature 7 requires the tool to be able to remain in a stationary angular position relative to the leg when the driving member drives the driven member for leg height adjustment.

The board understands the term "able" in feature 7 to be equivalent to "suitable". There is no discernible difference between a tool that is suitable to remain in a stationary angular position and a tool that is adapted to remain in this position. In the present context, the two expressions are synonymous. Consequently, the amendment does not violate Article 123(2) EPC.

4.4.3 Feature 12

According to feature 12, the tool comprises an arm and a handle.

Appellant II and III objected to the use of the word "handle", the precise meaning of which was ambiguous, and to the absence of any reference to a rod.

The board considers both objections unfounded.

The argument based on the use of "handle" is in reality a clarity objection (see point 4.3.2 above). The fact that the term is used in different ways in the application as filed does not mean that the introduction of a reference to a handle has the consequence that the claimed subject-matter extends beyond the content of the application as filed.

The argument that there are embodiments in which there is a rod but no arm is not persuasive because the skilled person would have understood that in such a case the rod is also an arm. All of the embodiments shown in the application as filed comprise an arm, regardless of whether or not it is referred to as such.

4.5 Compliance with Article 123(3) EPC

Appellants II and III argued that claim 1 was amended in such a way as to extend the protection conferred by the patent because claim 1 as amended covers an apparatus comprising a height adjustable leg, whereas claim 1 as granted covered an apparatus comprising a coupling. According to appellants II and III, this led to a "replacement by *aliud*", *aliud* being the Latin term for "another entity" or "something else". Several

decisions where the boards considered the amended claim to define such an *aliud* are summarised in "Case Law of the Boards of Appeal", 10th edition, July 2022, section II.E.2.4.12. Appellants II and III referred in particular to decisions T 1321/05 and T 352/04.

In the case underlying decision T 1321/05, claim 1 as granted was directed at a graphic-marking film. Claim 1 as amended was directed to a graphic-marking film bonded to a vehicle. In point 9 of the Reasons for the decision, the deciding board wrote:

> "*By the incorporation of the feature into Claim 1 of auxiliary request 3 that the film is bonded to a vehicle, its subject-matter is altered to relate to a film in association with a vehicle. In the Board's judgment, this combination of two physical entities - the film on the one hand and the vehicle on the other - constitutes a new physical entity different from the precursor-entities, ie different from the film constituting the subject-matter claimed by the granted patent. For the above reasons, claim 1 of auxiliary request 3 seeks protection for subject-matter not covered by the scope of the patent in suit, ie an aliud, contrary to Article 123(3) EPC*."

In case T 352/04, claim 1 as granted concerned a hair treatment composition. Claim 1 as amended comprised a feature according to which the composition is in the form of a non-aerosol hairspray with a mechanically-operated spray device.

In point 2.9.2 and 2.9.3 of the Reasons for the decision, the deciding board explained that a mechanically operated spray device containing a

cosmetic hair treatment composition could not be seen as a method of preparing the hair treatment product or as a (further) use of the product, and that it did not qualify as an admissible change of claim category either. Rather, the amendment of the claim shifted the scope of protection towards subject-matter that was not previously protected, in a way that was detrimental to legal certainty for third parties, i.e. precisely what Article 123(3) EPC sought to prevent.

In the understanding of the present board, a claim directed at a product covers all possible uses of this product, including uses in combination with other entities. Therefore, the board has doubts as to whether the decisions referred to above should be followed. Nonetheless, this question can remain unanswered because in the present case the amendment does not lead to an *aliud* within the meaning of the above-cited decisions. In claim 1 as granted, the apparatus comprises a tool and a coupling, which consists of several parts of the leg, the height of which is to be adjusted. Claim 1 of auxiliary request 4 is directed at an apparatus comprising a tool, a coupling and the parts of the leg that are not part of the coupling. This is not a change of object comparable to the change from a film to a vehicle or from a hair treatment composition to a spray device.

It may well be that in infringement proceedings before national courts the amendment can affect the damages for infringement allocated to the patent proprietor, but in the board's view this is not what is meant by Article 123(3) EPC when it refers to the "protection" conferred by the patent.

The board is unable to see a shift of the scope of protection of the claim such that there are embodiments that were not covered by claim 1 as granted that are now within the scope of protection. Appellants II and III did not provide specific examples in this respect. Claim 1 as granted does not exclude the threaded shaft from being part of the coupling, which means that the combination of tool + coupling covers the combination of tool + coupling including a leg, such that the latter is within the scope of protection of claim 1.

Consequently, the board concludes that the objection under Article 123(3) EPC is unfounded.

4.6 Inventive step of the subject-matter of claim 1, starting from document D6

4.6.1 Distinguishing features

It is undisputed that document D6 does not disclose feature 11. Appellant I argued that features 13 and 14 are not disclosed either.

(a) Feature 13

According to feature 13, the arm and the handle of the tool extend along its longitudinal axis.

Appellant III identified body 5 and holder (ホルダ) 13 of the apparatus of document D6 as the arm and handle of the tool. These elements extend along the longitudinal axis of the tool (see Fig. 2). Appellant I argued that handle (ハンドル) 12 rather than holder 13 constitutes the handle.

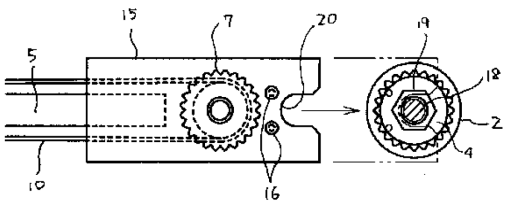
It is inevitable that the skilled person operating the tool of document D6 would hold holder 13 when positioning the tool. The existence of a handle does not mean that the user holds the tool exclusively by that handle. That the only element referred to as a handle in document D6 is element 12 is not decisive because holder 13 also qualifies as a handle according to the above definition.

Having considered all of the above, the board concludes that document D6 discloses feature 13.

(b) Feature 14

Feature 14 requires the tool to comprise two lateral extensions forming a jaw for capturing a diameter of the coupling to releasably retain the tool to the coupling in a lateral direction to releasably maintain engagement between the driving member and the driven member when the driving member drives the driven member for height adjustment of the leg.

Appellant III argued that groove portion 20 of tool 22 (see Fig. 3) constituted a jaw within the meaning of feature 14.



Appellant I pointed out that this jaw is used only for pre-positioning and that the engagement between the driving member and the driven member was maintained by pins 16 that engage in grooves 4.

A relevant question is whether the jaw of tool 22 captures a diameter of the coupling to releasably retain the tool to the coupling in a lateral direction.

The jaw can be said to accommodate a diameter of the coupling so as to radially position the tool with respect to the foot. The question that arises is whether it can also capture or retain the tool in a lateral direction or whether this effect is achieved by the pins' engagement in grooves 4.

As appellants II and III rightly pointed out, feature 14 is illustrated in paragraph [0105] of the patent. As stated in this paragraph, feature 14 is achieved by means of jaw 63 formed by lateral extensions 56 extending around the foot by 180° or less.

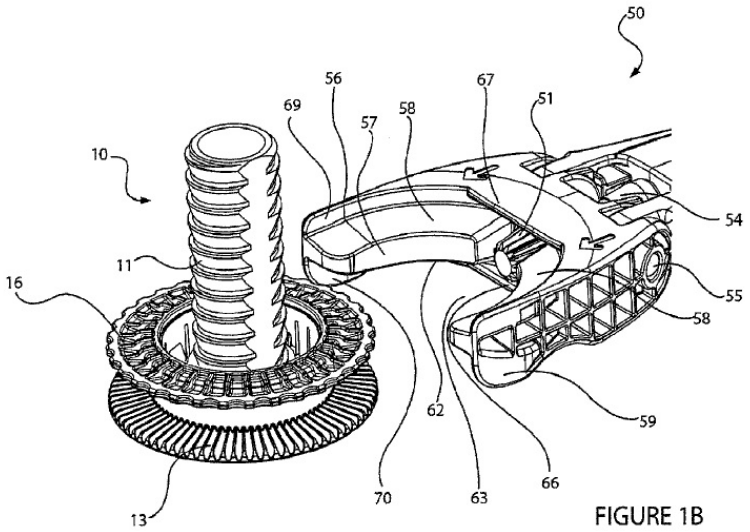


FIGURE 1B

Guide plate 15 of Fig. 3 of document D6 with its groove 20 has the form of a jaw with lateral extensions. When this jaw is brought into contact with the foot, it extends around the foot by about 180°. This information can be extracted from Fig. 3 without the need to measure an angle. Therefore, in accordance with the teaching of paragraph [0105] of the patent, the tool can be said to comprise two lateral extensions forming a jaw for capturing a diameter of the coupling to releasably retain the tool to the coupling in a lateral direction to releasably maintain engagement

between the driving member and the driven member, the lateral direction being the direction perpendicular to the direction of introduction of the tool in the plane of the drawing. There is no indication in document D6 that there is or should be significant clearance between the lateral extensions and threaded shaft 18. The existence of chamfers at the end of groove 20 and the fact that pins 16 have to be reliably guided into the corresponding grooves argues against significant clearance. The fact that document D6 does not explicitly mention the retention effect is unproblematic because the skilled person understands that the effect is necessarily achieved. That pins 16 also have a retaining effect does not alter this finding. The pins have the same effect as the user pushing the tool against the foot, which is mentioned at the end of paragraph [0105] of the patent.

In view of the above, the board concludes that document D6 also discloses feature 14.

(c) Conclusion

Document D6 discloses all of the features of claim 1 except feature 11.

4.6.2 Objective technical problem

Page 39, line 11, of the patent application as filed discloses that "the foot or coupling may be formed from a plastics material". No specific advantage of this choice is mentioned. Thus, the objective technical problem can be formulated as the provision of a suitable or alternative material for the foot of a height adjustable leg.

4.6.3 Obviousness to the skilled person

Document D6 does not disclose the material from which the leg is formed. In the board's view, appellant I's arguments according to which the skilled person would have assumed that gear 3 is metallic are not persuasive. Neither the tolerances of Fig. 3 nor the fact that there is a power transmission allow that conclusion to be drawn with certainty. It is well known, and beyond that also undisputed, that plastics materials have been used for legs of cabinets for decades. As a consequence, the skilled person would have considered the use of a plastics material (possibly of fibre-reinforced plastics if need be), also for the gear. Considering the increased weight and cost involved, the use of metallic gears would have been second choice. Therefore, using a plastics material for the foot of document D6 would have been an obvious choice for the skilled person trying to put into practice the teaching of document D6.

4.6.4 Conclusion

The subject-matter of claim 1 does not involve an inventive step within the meaning of Article 56 EPC starting from document D6.

4.7 Conclusion regarding auxiliary request 4

Since the subject-matter of claim 1 is not inventive (see point 4.6 above), auxiliary request 4 is not allowable. Consequently, auxiliary request 4 must be rejected and the decision under appeal must be set aside.

5. Remittal to the opposition division

As the decision under appeal was to be set aside, the board had discretion over whether or not to remit the case to the opposition division pursuant to Article 111(1) EPC. Under Article 11 RPBA, the board shall not remit an case unless special reasons present themselves for doing so.

All the parties, including the party that had requested acceleration, requested the remittal of the case to the opposition division for further prosecution.

A remittal is not detrimental to the interests of the public because there are several divisional applications belonging to the same patent family, the final scope of which is not yet known.

The board also took into account the fact that although there are pending infringement proceedings before Landgericht Düsseldorf, the request for acceleration was filed by one party to the proceedings and not by the court.

Having considered all of the above, the board has decided to grant the parties' unanimous request for a remittal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

D. Hampe P. Lanz

Decision electronically authenticated