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**Datasheet for the decision
of 16 October 2024**

Case Number: T 1953/22 - 3.5.07

Application Number: 15783836.8

Publication Number: 3134195

IPC: B01D35/00, G08C17/00,
G05B23/00, H04Q9/00

Language of the proceedings: EN

Title of invention:

System and method for maintenance and monitoring of filtration systems

Patent Proprietor:

Solvantum Intellectual Properties Company

Opponents:

BRITA SE
Aquis Wasser-Luft-Systeme GmbH, Lindau,
Zweigniederlassung Rebstein

Headword:

Filtration system monitoring/SOLVENTUM

Relevant legal provisions:

EPC Art. 100(c), 123(2)
EPC R. 103(1)(a), 111(2)
RPBA 2020 Art. 12(3), 12(4), 12(5), 13(2)

Keyword:

Added subject-matter - main request and auxiliary requests 1, 2, 3 and 3a (yes)

Amendment after notification of Art. 15(1) RPBA communication - auxiliary requests 0, 3AA, 3A-1 to 3A-6 and 4 (not admitted)

Discretion not to admit submission - auxiliary requests 5, 5a, 5b, 6, 6a, 6b (not substantiated)

Reimbursement of appeal fee - equitable by reason of a substantial procedural violation (no)

Decisions cited:

T 0752/16, T 0172/17, T 2563/17, T 0277/19



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Case Number: T 1953/22 - 3.5.07

D E C I S I O N
of Technical Board of Appeal 3.5.07
of 16 October 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 June 2022 concerning maintenance of the
European Patent No. 3134195 in amended form**

Composition of the Board:

Chair	P. San-Bento Furtado
Members:	R. de Man
	O. Loizou

Summary of Facts and Submissions

- I. The patent proprietor (appellant I) and opponent 1 (appellant II) appealed against the decision of the opposition division concerning maintenance of European patent No. 3 134 195 in amended form on the basis of an auxiliary request 3a.
- II. Oppositions had been filed by opponent 1 and opponent 2 on the grounds of lack of novelty, lack of inventive step, insufficiency of disclosure and added subject-matter (Article 100(a), (b) and (c) EPC).
- III. The opposition division decided, *inter alia*, that the subject-matter of claim 1 of the main request (patent as granted) and of auxiliary requests 1 and 2 was not new, that claim 1 of auxiliary request 3 was not clear, and that auxiliary request 3a complied with the requirements of the EPC.
- IV. In its statement of grounds of appeal, appellant I maintained the main request (patent as granted), auxiliary requests 1, 2 and 3 submitted with the letter of 2 December 2021, auxiliary request 3a submitted during the oral proceedings before the opposition division, and auxiliary requests 4, 5a, 5b, 6, 6a and 6b submitted with the letter of 2 December 2021.
- V. In its communication under Article 15(1) RPBA, the board expressed, *inter alia*, the preliminary opinion that the subject-matter of the main request and auxiliary requests 1, 2, 3 and 3a extended beyond the content of the application as filed. It further indicated that it was not inclined to admit auxiliary

requests 4, 5, 5a, 5b, 6, 6a and 6b into the appeal proceedings.

- VI. With a letter dated 16 September 2024 submitted in response to the board's communication, appellant I filed auxiliary requests 0, 3AA, 3A-1 to 3A-6 and 4.
- VII. Oral proceedings were held on 16 October 2024 in the presence of appellants I and II, opponent 2 having previously informed the board of its non-participation. At the end of the oral proceedings, the Chair announced the board's decision.
- VIII. Appellant I's final requests were that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, in the alternative, that the patent be maintained in amended form on the basis of one of:
- auxiliary request 0 submitted with the letter of 16 September 2024;
 - auxiliary requests 1 to 3 submitted with the letter of 2 December 2021;
 - auxiliary request 3AA submitted with the letter of 16 September 2024;
 - auxiliary request 3a submitted during the oral proceedings before the opposition division;
 - auxiliary requests 3A-1 to 3A-6 and 4 submitted with the letter of 16 September 2024; and
 - auxiliary requests 5, 5a, 5b, 6, 6a and 6b submitted with the letter of 2 December 2021.

Appellant II's final requests were that the decision under appeal be set aside and that the patent be revoked. Furthermore, it requested that the appeal fee be reimbursed due to a substantial procedural violation and that appellant I's appeal be dismissed.

No submissions were received from opponent 2 (respondent and party as of right).

IX. Claim 1 of each of the main request (patent as granted) and auxiliary requests 1 and 2 reads as follows:

"A fluid-filter monitor apparatus (104) for operating at a fluid-maintenance site, the fluid-filter monitor apparatus (104) comprising:

a fluid filter, a sensor configured and arranged to provide parameters that characterize fluid flowing through the fluid filter, and a wireless interface circuit (103, 203);

the wireless interface circuit (103, 203) configured and arranged to

operate in a set-up mode by communicating authentication data with a mobile data-processing device (110, 210) while the mobile data-processing device (110, 210) is proximate to the fluid-maintenance site, the authentication data being defined by an authentication protocol and including connection-authorization information for connecting to a local WiFi network for transmitting the parameters to a remotely-situated server (108, 208); and

operate in a normal-operation mode by sending the parameters wirelessly, according to the authentication protocol, to the remotely-situated server (108, 208) via a wireless communication medium and a broadband connection."

X. Claim 1 of auxiliary request 3 reads as follows:

"A system comprising a fluid-filter monitor apparatus (104) for operating at a fluid-maintenance site and a

mobile data-processing device, the fluid-filter monitor apparatus (104) comprising:

a fluid filter, a sensor configured and arranged to provide parameters that characterize fluid flowing through the fluid filter, and a wireless interface circuit (103, 203);

the wireless interface circuit (103, 203) configured and arranged to

operate in a set-up mode by communicating authentication data with the mobile data-processing device (110, 210) while the mobile data-processing device (110, 210) is proximate to the fluid-maintenance site, the authentication data being defined by an authentication protocol and including connection-authorization information for connecting to a local WiFi network for transmitting the parameters to a remotely-situated server (108, 208); and

operate in a normal-operation mode by sending the parameters wirelessly, according to the authentication protocol, to the remotely-situated server (108, 208) via a wireless communication medium and a broadband connection,

wherein the mobile data-processing device (110, 210) is configured to access information stored in the remotely-situated server (108), wherein the information is data processed by either the fluid-filter monitor apparatus (104), the remotely-situated server (108) or both."

- XI. Claim 1 of auxiliary request 3a differs from claim 1 of the auxiliary request 3 in that the following text has been added at the end of the claim:

"the system further including the remotely-situated server (108, 208), wherein the remotely-situated server (108, 208) includes a database with entries correlating

filter-identification information of the fluid filter with operator-identification information corresponding to the mobile data-processing device (110, 210)."

XII. Claim 1 of auxiliary requests 0, 3AA and 3A-1 differs from claim 1 of the main request and auxiliary requests 3 and 3a in that the text "operate in a set-up mode by communicating authentication data with" has been replaced with "operate in a set-up mode by receiving, over a short-distance wireless communication medium, authentication data from".

XIII. Claim 1 of auxiliary request 3A-2 differs from claim 1 of auxiliary request 3A-1 in that the text "and includes the parameters provided by the sensor" has been added after "the remotely-situated server (108) or both".

XIV. Claim 1 of auxiliary request 3A-3 has been obtained by moving the penultimate paragraph of claim 1 of auxiliary request 3A-2 to the end of the claim and inserting the text ", which is identified by the entries in the database," after "wherein the mobile data-processing device (110, 210)".

XV. Claim 1 of auxiliary request 3A-4 reads as follows:

"An apparatus comprising:

a first fluid-filter monitor for operating at a first fluid-maintenance site and a second fluid-filter monitor for operating at a second fluid-maintenance site, each of the first and second fluid-filter monitors including a fluid filter, a sensor configured and arranged to provide parameters that characterize fluid flowing through the fluid filter, and a wireless interface circuit (103, 203),

a remotely-situated server (108, 208) includes a database with entries correlating identification information corresponding to and indicative of the parameters of the respective fluid filters at the first and second fluid-maintenance sites,

wherein the wireless interface circuit (103, 203) of the first fluid-filter monitor is configured and arranged to

operate in a set-up mode by receiving, over a short-distance wireless communication medium, authentication data from at least one mobile data-processing device (110, 210) while said at least one mobile data-processing device (110, 210) is proximate to the fluid-maintenance site, the authentication data being defined by an authentication protocol and including connection-authorization information for connecting to local WiFi network for transmitting the parameters to the remotely-situated server (108, 208) remotely; and

operate in a normal-operation mode by sending the parameters wirelessly, according to the authentication protocol, to the remotely-situated server (108, 208) via a wireless communication medium and a broadband connection; and

wherein the wireless interface circuit (103, 203) of the second fluid-filter monitor is configured and arranged to

operate in a set-up mode by communicating authentication data over at least one wireless communication medium with said at least one mobile data-processing device (110, 210) while said at least one mobile data-processing device (110, 210) is proximate to the fluid-maintenance site, the authentication data being defined by an authentication protocol; and

operate in a normal-operation mode by sending the parameters wirelessly, according to the authentication protocol, to the remotely-situated server (108, 208) via a wireless communication medium and a broadband connection, and wherein the remotely-situated server (108, 208) is configured and arranged to maintain status information based on the parameters, and to communicate notifications indicative of the status of each of the first fluid-filter monitor and the second fluid-filter monitor,

further including the at least one mobile data-processing device (110, 210), wherein the at least one mobile data-processing device (110, 210) is configured to access information stored in the remotely-situated server (108), wherein the information is data processed by either the first fluid-filter monitor, the remotely-situated server (108) or both and includes the parameters provided by the sensor."

XVI. Claim 1 of auxiliary request 3A-5 differs from claim 1 of auxiliary request 3A-4 in that the following text has been added at the end of the claim:

"wherein the database entries further correlate the identification information with said at least one mobile data-processing device (110, 210) authorized to access information on the database regarding at least one of the respective fluid filters at the first and second fluid-maintenance sites."

XVII. Claim 1 of auxiliary request 3A-6 differs from claim 1 of auxiliary request 3A-5 in that the text "regarding at least one of the respective fluid filters at the first and second fluid-maintenance sites" at the end of the claim has been replaced with "regarding the

respective fluid filters at the first and second fluid-maintenance sites".

- XVIII. Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 3AA in that the text "(110, 210)" has been inserted after "for operating at a fluid-maintenance site and a mobile data-processing device" and in that the final paragraph has been replaced with the following text:

"further including the remotely-situated server (108, 208), wherein the remotely-situated server (108, 208) includes a database with entries correlating the parameters with filter-identification information corresponding to the fluid filter and correlating the identification information of the fluid filter with operator-identification information corresponding to the mobile data-processing device (110, 210), and wherein the mobile data-processing device (110, 210) is configured and arranged with a program to operate in the set-up mode by sending the authentication data to the wireless interface circuit (103, 203) according to the authentication protocol, and wherein the system includes a set of mobile data-processing devices (110, 210) including the mobile data-processing device (110, 210) which are identified by the entries in the database and are configured and arranged to communicate with the remotely-situated server (108, 208) for accessing information corresponding to operational or maintenance information for the fluid filter."

- XIX. The text of auxiliary requests 5, 5a, 5b, 6, 6a and 6b need not be reproduced here.

Reasons for the Decision

1. The patent relates to monitoring fluid-treatment systems.

Main request (patent as granted)

2. The board adopts the itemisation of claim 1 as granted which was used in the first-instance proceedings and is reproduced here:

- 1.1 A fluid-filter monitor apparatus for operating at a fluid-maintenance site, the fluid-filter monitor apparatus comprising:
 - 1.2 a fluid filter,
 - 1.3 a sensor configured and arranged to provide parameters that characterize fluid flowing through the fluid filter, and
 - 1.4 a wireless interface circuit; the wireless interface circuit configured and arranged to
 - 1.4.1 operate in a set-up mode by communicating authentication data
 - 1.4.1.1 with a mobile data-processing device while the mobile data-processing device is proximate to the fluid-maintenance site,
 - 1.4.1.2 the authentication data being defined by an authentication protocol and
 - 1.4.1.3 including connection-authorization information for connecting to a local WiFi network for transmitting the parameters to a remotely-situated server; and
 - 1.4.2 operate in a normal-operation mode by sending the parameters wirelessly, according to the

authentication protocol, to the remotely-situated server

1.4.2.1 via a wireless communication medium and a broadband connection.

3. *Added subject-matter - Article 100(c) EPC*

3.1 Claim 1 as granted was obtained from claim 1 as originally filed by the addition of feature 1.4.1.3, which was taken from the passage on page 10, line 34, to page 11, line 4, of the application as filed.

3.2 Appellant II argued that the application as filed did not disclose the combination of features 1.4.1, 1.4.1.1 and 1.4.1.3.

According to features 1.4.1 and 1.4.1.1, in a "set-up mode", the wireless-interface circuit communicated authentication data including connection-authorisation information "with" a mobile data-processing device. The term "with" left open the possibility that the wireless interface circuit transmitted connection-authorisation information that it already possessed to the mobile data-processing device. The description, however, only disclosed that the connection-authorisation information was transmitted from the mobile data-processing device to the fluid-filter monitor apparatus.

3.3 In its reply to appellant II's statement of grounds of appeal, appellant I argued that features 1.4.1 and 1.4.1.1 were present in original claim 1, and that the application explicitly referred to the disclosure on page 10, lines 29 to 34, which appellant II had interpreted as meaning that the connection-authorisation information was transmitted to the wireless interface circuit, as an "exemplary fluid-

specific flow diagram". It was therefore clear that the features disclosed in this passage were merely optional, and that the addition of feature 1.4.1.3 to original claim 1 did not violate Article 123(2) EPC.

In a letter filed in response to appellant II's reply, appellant I further argued that merely specifying the type of data included in the authentication data, namely that the authentication data included connection-authorisation information, did not require the "exemplary direction of data transmission" described in the passage on page 10, line 29, to page 11, line 4, to be specified in claim 1, in particular in view of the direct and unambiguous disclosure of the language that the authentication data was communicated "with" the mobile data-processing device throughout the application documents.

In the letter dated 16 September 2024 filed in response to the board's communication, appellant I maintained that the language "communicating authentication data with a mobile data-processing device" was applicable to the configuration described on page 10, line 29, to page 11, line 3, of the description.

- 3.4 It is undisputed that the language "communicating authentication data with a mobile data-processing device" in features 1.4.1 and 1.4.1.1 covers both communicating authentication data from the fluid-monitor apparatus to the mobile data-processing device and communicating authentication data from the mobile data-processing device to the fluid-monitor apparatus.
- 3.5 The passage on page 10, line 29, to page 11, line 4, of the description reads as follows:

"Turning now to the exemplary fluid-specific data flow diagram of FIG. 3, a filter-monitor communications circuit, awaits authentication (step 0) from a mobile-communication device (e.g., personal digital assistant or 'PDA'). A service provider arrives at a customer site to set-up the fluid-filter monitoring system. As shown via Step 1 in FIG. 3, the service provider transmits authentication data, via the mobile-communication device, over a short-distance wireless communication medium (Bluetooth, ZigBee, WiFi, etc.). The authentication data can include connection-authorization information for connecting to a local WiFi network for transmitting fluid-flow characterizing parameters to a remotely-situated server, as well as information that associates the fluid-filter monitoring system to a service provider and/or customer."

The board notes that it is the fluid-filter monitoring apparatus which collects the fluid-flow characterising parameters and transmits them to a remotely-situated server. Hence, the connection-authorization information is information, such as a Wi-Fi password, for connecting the fluid-filter monitoring apparatus to a local Wi-Fi network to allow the parameters to be transmitted. Since the connection-authorization information is transmitted by a service provider via the mobile communication device over a short-distance wireless communication medium, it is communicated from the mobile communication device to the fluid-filter monitoring apparatus.

- 3.6 Appellant I's argument that feature 1.4.3 can be claimed without the specific direction of transmission of the connection-authorization information disclosed

in the passage on page 10, line 29, to page 11, line 4, because that passage describes an "exemplary" fluid-specific flow diagram is not convincing. While the embodiment described in this passage is indeed disclosed as optional, it is the embodiment from which feature 1.4.3 was taken.

- 3.7 Appellant I's further argument that the transmission direction of the connection-authorisation information is disclosed as being "exemplary" is not convincing, either. In the embodiment described on page 10, line 29, to page 11, line 4, the transmission direction of the connection-authorisation information is not disclosed as optional. Rather, the skilled reader of the passage understands that the connection-authorisation information is transmitted, over a short-distance wireless communication medium, to the fluid-monitor apparatus to allow the apparatus to connect to a local Wi-Fi network. Separating the connection-authorisation information from the disclosed transmission direction therefore results in a teaching which the passage does not disclose.
- 3.8 At the oral proceedings before the board, appellant I no longer argued that the application disclosed transmitting the connection-authorisation information in both directions. Instead, it now argued that, although features 1.4.1 and 1.4.1.1 covered the transmission of authentication data in both directions, the skilled person would understand that the connection-authorisation information of feature 1.4.3 was transmitted only from the mobile-communication device to the fluid-filter monitoring apparatus. There could be other pieces of authentication data which were transmitted from the fluid-filter monitoring apparatus to the mobile-communication device (appellant I

referred to page 5, line 33, to page 6, line 4, of the description of the application). According to appellant I, any other reading of claim 1 would be utterly wrong and illogical and would contradict the board's own conclusion that the connection-
authorisation information necessarily had to be transmitted from the mobile data-processing device to the fluid-filter monitor apparatus.

3.9 The board does not agree with appellant I's new reading of claim 1, which it presented for the first time at the oral proceedings before the board and which is at odds with its earlier arguments (see point 3.3 above).

3.9.1 According to features 1.4.1 and 1.4.1.1, the wireless interface circuit of the fluid-filter monitor apparatus communicates authentication data "with" the mobile data-processing device. It is common ground that the term "communicating with" as used in the description and the claims does not impose a limitation on the direction of data transmission.

According to feature 1.4.1.3, the authentication data includes connection-authorisation information.

Hence, the claim covers transmission of connection-authorisation information both from the mobile data-processing device to the fluid-filter monitor apparatus and from the fluid-filter monitor apparatus to the mobile data-processing device.

3.9.2 Appellant I's argument that the board's reading of claim 1 logically contradicts the board's reading of the passage on page 10, line 29, to page 11, line 4, is mistaken.

The passage on page 10, line 29, to page 11, line 4, discloses that the connection-authorisation information is transmitted from the mobile data-processing device to the fluid-filter monitor apparatus (see point 3.5 above). The board's argument (see point 3.7 above) is that the disclosure of the communication of connection-authorisation information cannot be separated from this disclosed direction of transmission without changing the teaching of this passage, i.e. without adding subject-matter.

Claim 1, on the other hand, does *not* include the direction of transmission of the connection-authorisation information (from the mobile data-processing device to the fluid-filter monitor apparatus). In claim 1, the connection-authorisation information has been separated from its originally disclosed direction of transmission.

- 3.9.3 In so far as appellant I takes the view that including the direction of transmission of the connection-authorisation information in claim 1 would have been "unduly limiting" because there may be situations, possibly even disclosed in the application as filed, in which other types of authentication data are transmitted from the fluid-filter monitor apparatus to the mobile data-processing device, the board notes the following. A claim normally defines "the matter for which protection is sought" in terms of positive features. If a claim states that information of type X is communicated from device A to device B, this does not rule out that information of type Y, or even of the same type X, is *also* communicated from device B to device A.

- 3.10 In summary, the board's position is that the claimed combination of features 1.4.1, 1.4.1.1 and 1.4.1.3 in granted claim 1 results in a teaching that is not originally disclosed. The subject-matter of the patent as granted therefore extends beyond the content of the application as filed (Article 100(c) EPC).

Auxiliary request 0

4. Claim 1 of auxiliary request 0 is based on claim 1 of the patent as granted and has been amended to specify that the wireless-interface circuit receives authentication data from the mobile data-processing device over a short-distance wireless communication medium.
5. *Admission into the appeal proceedings*
- 5.1 Auxiliary request 0 was filed after notification of the board's communication under Article 15(1) RPBA. Appellant II objected to its admission into the proceedings under Article 13(2) RPBA, which provides that such a request is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons.
- 5.2 In its letter filed in response to the board's communication, appellant I submitted that auxiliary request 0 should be admitted because it addressed objections raised in the board's communication which had not been previously raised by the opposition division.

The board notes that the amendment made in auxiliary request 0 is intended to address the objection of added

subject-matter raised in point 3. above against the patent as granted. This objection was not raised for the first time in the board's communication, as it had been treated (but not found convincing) by the opposition division in point 24 of the reasons for the contested decision, and as it had been maintained by appellant II in section F.I.1 of its statement of grounds of appeal. The fact that the board's preliminary opinion deviated from the findings of the opposition division might have subjectively surprised appellant I, but it does not objectively qualify as an exceptional circumstance (see, for example, decisions T 752/16, Reasons 3.4; T 172/17, Reasons 4.2; T 2563/17, Reasons 1.5; and T 277/19, Reasons 3.4; see also Case Law of the Boards of Appeal, 10th edition, 2022, V.A.4.5.6, under h)).

- 5.3 At the oral proceedings, appellant I did not contest that the objection had already been on file. It now argued that the board's reasoning as presented in its communication had been entirely different from that presented by appellant II and constituted a new line of reasoning. In particular, the board's communication had suggested for the first time that the "connection-authorisation information" was a Wi-Fi password.

The board considers that its reasoning of the objection of added subject-matter as presented in its communication and in point 3. above is not based on a new and potentially surprising evaluation of the facts. The objection was and is that feature 1.4.3 was originally disclosed in combination with a transmission direction, which direction, however, is not present in claim 1 as granted. The board may have refined the reasoning originally presented by appellant II, in particular to take into account the counterarguments

put forward by appellant I, but this does not represent an exceptional circumstance (see decision T 2563/17, Reasons 1.4).

As for the connection-authorisation being a Wi-Fi password, in its communication the board merely stated that it understood "connection-authorization information for connecting to a local WiFi network" to be "information such as a Wi-Fi password that allows the monitoring system to connect to the local Wi-Fi network". The board fails to see how the example of a Wi-Fi password could have surprised appellant I, and appellant I did not argue that the board's characterisation of the connection-authorisation information was inaccurate. Moreover, this characterisation of the connection-authorisation information, including the example of "a password for the WiFi network", had already been given by appellant II in section C.II.5 of its statement of grounds of appeal.

- 5.4 Hence, the board concludes that no exceptional circumstances are present and therefore does not admit auxiliary request 0 into the appeal proceedings (Article 13(2) RPBA).

Auxiliary requests 1, 2, 3, 3AA, 3a, 3A-1 to 3A-6 and 4

6. *Added subject-matter - Article 123(2) EPC*

- 6.1 Claim 1 of each of auxiliary requests 1, 2, 3 and 3a includes the combination of features 1.4.1, 1.4.1.1 and 1.4.1.3 without specifying that the connection-authorisation information is transmitted from the mobile data-processing device to the fluid-filter monitor apparatus. The objection of added subject-

matter raised in point 3. above therefore also applies to these requests. Appellant I had no further arguments.

6.2 Hence, auxiliary requests 1, 2, 3 and 3a do not comply with Article 123(2) EPC.

7. *Admission into the appeal proceedings*

7.1 Auxiliary requests 3AA, 3A-1 to 3A-6 and 4 were filed after notification of the board's communication under Article 15(1) RPBA. Claim 1 of each request includes the same amendment as made in claim 1 of auxiliary request 0. The reasons for not admitting auxiliary request 0 given in point 5. above therefore also apply to these requests, which appellant I did not dispute.

7.2 The board therefore does not admit auxiliary requests 3AA, 3A-1 to 3A-6 and 4 into the appeal proceedings (Article 13(2) RPBA).

Auxiliary requests 5, 5a, 5b, 6, 6a and 6b

8. *Admission into the appeal proceedings*

Since none of auxiliary requests 5, 5a, 5b, 6, 6a and 6b have been substantiated in these appeal proceedings (nor in the first-instance proceedings), which appellant I did not dispute, the board does not admit these requests into the appeal proceedings (Article 12(3), (4) and (5) RPBA).

9. Since none of the requests admitted into the appeal proceedings is allowable, the decision under appeal is to be set aside and the patent is to be revoked.

10. *Request for reimbursement of the appeal fee*

10.1 Appellant II requested the reimbursement of the appeal fee under Rule 103(1)(a) EPC. It had raised objections under Articles 84 and 123(3) EPC to auxiliary request 3, which also applied to auxiliary request 3a. The opposition division had not sufficiently reasoned the rejection of those attacks in its decision. This lack of reasoning was contrary to Rule 111(2) EPC and constituted a substantial procedural violation. Reimbursement of the appeal fee was equitable because the objections, if successful, would have led to a different outcome, and because the lack of reasoning had not allowed appellant II to assess its chances of success on appeal.

10.2 Under Rule 103(1)(a) EPC, the appeal fee is to be reimbursed if the appeal is allowed and such reimbursement is equitable by reason of a substantial procedural violation. In the present case, appellant II's appeal is to be allowed and it is at least arguable that the contested decision does not sufficiently reason the rejection of one or more of the objections raised under Article 84 EPC to auxiliary request 3, including objections which also applied to auxiliary request 3a, i.e. to the request which was found allowable.

10.3 However, the board need not decide whether the contested decision was indeed insufficiently reasoned, since reimbursement of the appeal fee would in any event not be equitable.

10.3.1 For a reimbursement of the appeal fee to be equitable, the case law of the boards of appeal as a rule requires the presence of a causal link between the alleged

substantial procedural violation and the filing of the appeal (see the decisions cited in Case Law of the Boards of Appeal, 10th edition, 2022, V.A.11.7). Although exceptions to this rule exist, for example if the substantial procedural violation is the reason for a remittal of the appeal without any substantial progress having been made, the board sees no reason to deviate from the rule in the circumstances of the present case, where the board reaches a final decision on the case.

10.3.2 In this respect, the board disagrees with appellant II's argument that reimbursement is equitable because the alleged lack of reasoning prevented it from assessing its chances of success on appeal. It is true that the requirement laid down in Rule 111(2) EPC that decisions of the EPO which are open to appeal should be reasoned serves the purpose of allowing the parties and the board of appeal to examine whether the decision was justified or not. But this does not mean that a violation of this provision automatically renders reimbursement of the appeal fee equitable even if the violation was not causal for the filing of the appeal.

10.3.3 In the present case, it is undisputed that the contested decision contains sufficient reasoning at least in respect of the objections of added subject-matter, novelty and inventive step which had been raised against auxiliary request 3a. Since these objections were among the objections maintained in appellant II's statement of grounds of appeal, it follows that appellant II would have appealed even if the contested decision had contained reasons for rejecting the objections under Articles 84 and 123(3) EPC which had persuaded appellant II to drop those specific objections. Hence, the alleged absence of

sufficient reasoning was not itself causal for the filing of the appeal.

10.3.4 Appellant II is correct in stating that, if one of the objections under Articles 84 EPC and 123(3) EPC raised against auxiliary request 3a had been successful, i.e. if the opposition division had decided at the oral proceedings that one of them was valid, the outcome of the first-instance proceedings would have been different in that at least auxiliary request 3a would have been refused. In that case appellant II might not have needed to appeal. However, the board sees no compelling reason to assume that the alleged insufficient reasoning in the written decision means that the opposition division did not properly consider the objections under Articles 84 and 123(3) EPC during its deliberation at the oral proceedings. Moreover, appellant II did not argue that the opposition division had violated its right to be heard in respect of these objections.

10.4 Since the board does not consider reimbursement of the appeal fee to be equitable, appellant II's request for reimbursement of the appeal fee is to be refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chair:



S. Lichtenvort

P. San-Bento Furtado

Decision electronically authenticated