

**Internal distribution code:**

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

**Datasheet for the decision  
of 14 June 2016**

**Case Number:** T 0416/12 - 3.2.04

**Application Number:** 03425029.0

**Publication Number:** 1330961

**IPC:** A24C5/34, G01N22/02

**Language of the proceedings:** EN

**Title of invention:**

A method of detecting and eliminating foreign bodies in a flow of tobacco

**Patent Proprietor:**

G.D S.p.A.

**Opponent:**

Hauni Maschinenbau AG

**Headword:**

**Relevant legal provisions:**

EPC Art. 56  
RPBA Art. 13  
EPC R. 106

**Keyword:**

Inventive step - main request (no)

Late-filed auxiliary requests - admitted (no)

Obligation to raise objections - objection dismissed

**Decisions cited:**

T 0951/91, T 0087/05, G 0010/91, G 0009/92, G 0004/93

**Catchword:**

see Reasons 3 and 4



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 0416/12 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 14 June 2016**

**Appellant:** Hauni Maschinenbau AG  
(Opponent) Kurt-A.-Körber-Chaussee 8 - 32  
21033 Hamburg (DE)

**Respondent:** G.D S.p.A.  
(Patent Proprietor) Via Battindarno, 91  
40133 Bologna (IT)

**Representative:** Bianciardi, Ezio  
c/o BUGNION S.p.A.  
Via di Corticella, 87  
40128 Bologna (IT)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
19 January 2012 concerning maintenance of the  
European Patent No. 1330961 in amended form.

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** J. Wright  
C. Schmidt

## **Summary of Facts and Submissions**

I. The appellant (opponent) lodged an appeal, received 9 February 2012, against the interlocutory decision of the opposition division dated 19 January 2012 on the amended form in which European patent no. 1330961 could be maintained and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was filed on 25 May 2012.

II. The opposition was based inter alia on Article 100(a) EPC together with Articles 52(1) and 56 EPC for lack of inventive step.

The opposition division held that the patent as amended according to the first auxiliary request met all the requirements of the EPC, inter alia because the (inventive step) ground for opposition mentioned in Article 100(a) EPC did not prejudice maintenance of the patent as amended having regard to, amongst others, document  
D2: DE10037180 C1,  
in combination with the skilled person's general knowledge.

III. Oral proceedings before the Board were duly held on 14 June 2016.

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

The respondent (patent proprietor) requests that the decision under appeal be set aside and that the patent be maintained on the basis of the main request filed 16 May 2016 which is amended compared to that held

allowable by the opposition Division, or, alternatively, that the patent be maintained on the basis of auxiliary request 1 or 2 both also filed with letter dated 16 May 2016. Furthermore, that the case be remitted to the opposition division if any of documents D13 to D19 in relation to Article 100(a) EPC or any new combination of documents or attacks not discussed in the interlocutory decision of the opposition division be admitted into the proceedings.

V. The wording of claim 1 of the requests is as follows:

Main request

"A method of detecting and eliminating foreign bodies in a flow of tobacco, comprising the steps of advancing the flow (7) along a predetermined path (17) in a predetermined direction (16), passing from a feed station (6) to a preparation zone (18) in which the flow (7) is gathered into a continuous ribbon (19) of tobacco filler, thence through a forming station (20) at which the tobacco filler is incorporated into at least one continuous cigarette rod (21), and through a cutter device (29) by which the continuous cigarette rod (21) is divided into cigarette sticks (2), wherein it includes the steps of exposing the flow; (7) of tobacco to electromagnetic radiation of selected frequency, sensing an output signal (34) indicative of variations in moisture content along the flow (7) of tobacco, occasioned by the presence of foreign bodies within the selfsame flow, processing the output signal (34) in the form of a curve (37) reflecting the variations in percentage moisture content within the flow (7) of tobacco per unit of time (t) by a master controller (35) being relayed to a comparator (36), comparing the curve (37) moment by moment with an upper threshold signal (38a) and with a lower threshold

signal (38b), both of predetermined and constant amplitude, wherein the effect of raising or lowering the moisture content within the flow (7) from its correct level indicates that there are foreign bodies occupying a part of the flow (7) of the tobacco."

Claim 1 of the first auxiliary request reads as claim 1 of the main request except that the last clause of claim 1 of the main request "wherein the effect of raising or lowering...foreign bodies occupying a part of the flow (7) of the tobacco." is replaced by the wording:

", generating a cyclical output signal (40) by the controller (35) indicative of the timing with which the continuous rod (21) is cut by the cutter device (29) into the cigarette sticks (2) , and using the cyclical output signal (40) for sampling the curve (37) in order to obtain a succession of signals (C1, C2, C3, C4. . . Cn) of predetermined duration."

Claim 1 of the second auxiliary request reads as claim 1 of the first auxiliary request, except that it adds at the end of the claim the following wording:

", wherein the sampling step and the operation of the cutter device (29) are timed mutually in such a way that each signal (C1, C2, C3, C4... Cn) of predetermined duration can be associated with a portion of the flow (7) of tobacco destined to become the contents of one identifiable cigarette stick (2)."

VI. The appellant-opponent argued as follows:

Main request

The claimed method differs from that of D2 in that the % moisture content curve is compared to upper and lower thresholds, whereas in D2 the % moisture is combined with density then compared to a single threshold. D2 already teaches to generate the % moisture curve for the tobacco rod, and this is an indication of foreign bodies. It is an obvious alternative to use this available data to detect foreign bodies. The skilled person knows that normal tobacco varies between an upper and lower moisture content threshold, and that foreign bodies can have moisture contents above or below this range so the skilled person would inevitably choose an upper and lower threshold for comparison. Furthermore, analysing the figures of D2 reveals that comparing the % moisture curve to two thresholds would more accurately detect foreign bodies than the combined moisture/density parameter used in D2. Even if the skilled person were to understand from D2, paragraph [0019], that moisture content alone were less accurate in detecting foreign bodies than a combined moisture/density parameter, the skilled person would compromise on accuracy to have an alternative way of detecting foreign bodies.

Auxiliary requests, admissibility

The auxiliary requests are late filed. Furthermore, the respondent has not explained why they are allowable. Therefore they raise issues for which it has not been possible to prepare and it would not be fair to deal with these at the oral proceedings. The proceedings would therefore need to be adjourned for this purpose. Thus the requests should not be admitted into the proceedings.

VII. The respondent argued as follows:

Main request

No document has been cited that discloses detecting foreign bodies from moisture content of tobacco, therefore it cannot be obvious to do so. The skilled person would never arrive at the claimed invention starting from D2, since paragraph [0019] of that document teaches that it is impossible to detect foreign bodies using % moisture content alone. This paragraph is to be read as an absolute prohibition to do so and represents a technical prejudice, that stops the skilled person from applying this method. Rather in D2 the combination of moisture/density is used to detect foreign bodies. This needs only comparison with one threshold and is highly accurate. In any case, if the skilled person were to use the moisture threshold values D2 gives for normal tobacco, this would lead to inaccurate detection. The skilled person would never compromise on accuracy, since this would lead to unnecessarily wasting good tobacco. If anything it would be obvious to use only the density to detect foreign bodies, since this would only require comparison to a single threshold, so is simpler.

Auxiliary requests, admissibility

The auxiliary requests were filed in response to the Board's preliminary opinion, until then the main request appeared to be allowable. The appellant cannot be surprised by these requests, nor have they not already considered them, since the requests were in the opposition proceedings and the appellant already dealt with them in their grounds for appeal. Therefore they should be admitted.



## Reasons for the Decision

1. The appeal is admissible.
2. Main request, inventive step vis-à-vis D2 and the skilled person's general knowledge
  - 2.1 D2, cited in the patent at paragraph [0010], was considered by the division in its decision under appeal for inventive step and is addressed in the grounds of appeal (page 17). As this document also concerns the use of electro-magnetic (microwave) radiation to measure percentage moisture content in connection with the detection of foreign bodies in a tobacco rod of a cigarette making machine, it can be considered a suitable starting point for assessing inventive step. This is not disputed. D2 discloses a method, employed in a cigarette making machine, of detecting foreign bodies in a flow of tobacco (abstract and [0001]). Once detected these are also eliminated (see paragraph [0053]). Implicit in making cigarettes in such a machine are the steps of advancing the tobacco along a path from a feed station to a preparation zone, in which it is gathered into a ribbon, and passing it into a forming station at which the tobacco is formed into a cigarette rod (cf. paragraphs [0011] and [0014] "Tabakstrang", "Endlosstrang"). To make individual cigarettes, the rod must then be divided into individual cigarette sticks by a cutter device, paragraph [0014], line 43.
  - 2.2 D2 also discloses the step of exposing the flow of tobacco to electromagnetic radiation of selected frequency, namely microwave frequency (see paragraph [0014], "Mikrowellenstrahlung", cf. patent

specification, paragraph [0024]). The resulting signal is sensed to provide an output signal indicative of variations of moisture content along the flow of tobacco, and these variations will be occasioned by the presence of foreign bodies, since tobacco and foreign bodies such as wood and plastic, contain greater or lesser amounts of moisture compared to tobacco (paragraphs [0014], [0018], [0037] to [0042] and figures 1 to 7). Thus the effect of raising or lowering the moisture content within the flow from its correct level, in other words from the moisture level of tobacco, indicates that there are foreign bodies occupying a part of the tobacco flow.

- 2.3 In the Board's view it is also implicit that the resulting output signal will be processed by a microprocessor, in other words a master controller, in order to derive percentage moisture content within the tobacco flow per unit time (see paragraph [0018]), and this percentage moisture content curve is used in the foreign body detection method of D2 (see paragraphs [0043], "Datenverarbeitung" and [0044]).
- 2.4 In particular, D2 proposes generating a combined signal of the moisture content and density and comparing this to a single threshold to detect foreign bodies (paragraphs [0043], [0044] and [0053] and figures 9 to 14). Thus the Board sees the subject matter of claim 1 to differ from D2 by the steps of:
- relaying the percentage moisture content curve to a comparator
  - for comparing to an upper and a lower threshold signal, both of predetermined and constant amplitude, in other words to upper and lower

constant thresholds relating to the percentage moisture content curve.

In D2, the signal  $S_K$  combining the density and moisture derived absolute values (paragraph [0043]) is compared (in an inferred comparator) to a predetermined and constant threshold value (paragraph [0053]).

This assessment is also not disputed by the parties.

- 2.5 The patent is silent as to any particular effects these differences might achieve over and above the D2 method. Although it presents various prior art methods of detecting foreign bodies, stating their various drawbacks (see specification, paragraphs [0007] to [0009] mentioning accuracy and reliability) and formulates the object of the invention as being to overcome these drawbacks (paragraph [0011]), D2 is cited without mention of any drawback (paragraph [0011]). Nor are the specific features of comparing the % moisture curve to upper and lower thresholds attributed any particular advantages elsewhere in the description (cf. specification, paragraphs [0026] and [0027]). The Board also sees no reason to consider that these differences would necessarily make for a more reliable method of detecting foreign bodies, as the appellant has speculated. Indeed when reading D2, if anything, the skilled person understands rather the opposite (see paragraph [0019]), as it states that only an evaluation of density and moisture content signals in combination provide a highly sensitive and precise detection of foreign bodies.

Nor is the Board convinced that it is merely an alternative foreign body detection method. Since in D2 the curve used to identify foreign bodies requires data

processing to combine density and moisture content signals (see paragraph [0043] and [0043]), it is inherently computationally more complex than using the raw percentage moisture content signal directly.

Therefore the Board holds that, in the light of D2, the objective technical problem can be seen as how to provide a computationally simpler method for detecting foreign bodies in a flow of tobacco.

2.6 The Board must now consider whether, in solving the above problem, it would be obvious for the skilled person to arrive at the above differing features in the light of D2 and their general knowledge.

2.6.1 The respondent has argued, with reference to D2 paragraph [0019], that the skilled person would reject the idea of monitoring moisture content alone to detect foreign bodies as D2 teaches that this would not work (cf. impugned decision, reasons point 3.5.3). The Board disagrees.

2.6.2 The first sentence of paragraph [0019] states that a foreign body in a tobacco rod is characterised by its density as well as its moisture content differing from the remainder of the rod ("Ein im Tabakstrang vorliegender Fremdkörper zeichnet sich nun dadurch aus, dass er sowohl eine vom restlichen Tabakstrang abweichende Dichte als auch Materialfeuchte hat).

In the Board's view, this information alone indicates to the skilled person, a process engineer with experience in cigarette manufacture, that the moisture content on its own, that is independent of density, is a distinguishing parameter of a foreign body with respect to tobacco.

- 2.6.3 The next sentence explains that only by evaluation of density and moisture content in combination is it possible to detect foreign bodies with a high sensitivity and precision ... ("Erst durch die kombinierte Auswertung beider Signale Dichte und Feuchte ist man in der Lage, Fremdkörper mit hoher Empfindlichkeit und Präzision detektieren ... zu können."). The Board considers this to mean that it is only possible to achieve a highly sensitive and precise detection of foreign bodies by evaluating density and moisture in combination, rather than meaning that it is only possible to detect foreign bodies by evaluation of density and moisture in combination, as the respondent would have it. The latter interpretation ignores the sentence's syntax, which inextricably qualifies the detection as being of high sensitivity and precision, rather than speaking of detection in general. Furthermore, to read into the sentence that foreign body detection based on moisture content alone is impossible would fly in the face of the first sentence of paragraph [0019], with its information that moisture content of foreign bodies differs from that of tobacco.
- 2.6.4 The last sentence of paragraph [0019] explains that: If one were to evaluate ... only the moisture, it would lead to erroneous interpretations because the normal tobacco rod without foreign bodies is subject to certain random and irregular ... moisture fluctuations ("Würde man ... nur die Feuchte auswerten, käme man zu Fehlinterpretationen, da der normale Tabakstrang ohne Fremdkörper gewissen zufälligen und unregelmäßigen ... Feuchteschwankungen unterliegt"). Rather than the sentence denying the feasibility of detecting foreign bodies by evaluating moisture content alone, a conclusion that would again contradict the first

sentence of paragraph [0019], the skilled person reads the sentence as teaching that a detection scheme based on evaluating moisture content alone would come at the cost of possible detection errors.

- 2.6.5 From the above, the Board holds that the skilled person, reading paragraph [0019] in its entirety with a mind willing to understand, would understand that, along a tobacco rod, moisture content deviations alone can in principle be used as an indicator of foreign bodies, albeit if evaluating it to detect foreign bodies could lead to errors and a less accurate result.

This understanding is also in tune with the rest of the disclosure of D2: Figure 1 shows a graph of the progression of % moisture content along the length of cigarettes containing pure tobacco (figure 1, right hand axis, locus of circles and paragraph [0036]). Figures 2 to 6 show corresponding graphs along cigarettes containing tobacco and foreign bodies (see paragraphs [0037] to [0042]). Wherever foreign bodies are present, distinct peaks ("deutliche peaks"), be they positive or negative, can be seen and are described. For example in paragraph [0040] with figure 5 it is explained that, both the density and the humidity curve show distinct peaks in the range of 22-33 mm, which indicates the presence of this foreign body [glass]. ("Sowohl die Dichte- als auch die Feuchte-Kurve zeigen deutliche Peaks im Bereich von 22-33 mm, die auf das Vorhandensein dieses Fremdkörpers schließen lassen"). In other words it is apparent (to the skilled person) from these graphs that the moisture content curve (or density curve) alone indicates a foreign body.

2.7 Armed with the above understanding, the Board must now consider whether, in solving the above problem, it would be obvious for the skilled person to detect foreign bodies by evaluating tobacco rod moisture content by comparing it to two thresholds.

In the Board's view, the skilled person would immediately realise from D2 alone that evaluating the raw percentage moisture content to detect foreign bodies, rather than first processing it to generate a combined moisture/density parameter, offers a computationally simpler, though less accurate detection method. Where for example circumstances do not require such a high sensitivity or accuracy of detection they would as a matter of obviousness consider the use of percentage moisture content alone as an indicator of foreign bodies. In the light of the above problem (computational simplification) the Board considers that the skilled person would therefore, as a matter of obviousness, do just that.

Neither the promise of a highly sensitive and accurate detection based on a combinative evaluation (moisture/density), nor the possibility of errors when evaluating moisture alone to detect foreign bodies (see again paragraph [0019]) would dissuade the skilled person from considering moisture content alone. This is because the objective technical problem is not one of accuracy but of simplification. Focused on this, the skilled person would be willing to compromise on accuracy, i.e. he will as a matter of obviousness strike a balance between accuracy and simplification that best suits his requirements. Nor is the mention in a single document (see D2 paragraph [0019] again) of possible inaccuracy in a detection scheme based on moisture alone, a technical prejudice, in the sense of

a widely held but incorrect opinion of a technical fact, that might stop the skilled person from pursuing such a scheme (see Case Law of the Boards of Appeal, 7th edition, 2013 (CLBA), I.D.10.2, and the decisions cited therein).

- 2.8 The only remaining question is whether or not, in evaluating % moisture content curve to detect foreign bodies, the skilled person would compare the curve to upper and lower constant threshold signal values. The Board considers that they would do so as a direct and inevitable consequence of deciding to evaluate moisture content to detect foreign bodies.

D2 (see figure 1, right hand axis, circular dots and paragraph [0036]) discloses tobacco moisture content without foreign bodies to vary between upper and lower limits, namely 10.0 to 10.5 % according to paragraph [0036]. Whether or not these limit values for typical tobacco moisture content precisely correspond to threshold values the skilled person might choose for discriminating foreign bodies, the moisture content of foreign bodies either exceeds this range (cf. figure 2, foreign body: wood part ("Holzteil")) or in other cases is inferior to this range (cf. figures 3 to 7, foreign bodies of hard plastic, rubber, glass, metal and stone respectively ("Hartplastik", "Gummiteil", "Glas", "Metall" and "Stein")).

Indeed, as much is already suggested by the expression in paragraph [0043] which uses the modulus (ABS) of the difference between measured value (density or moisture content) and its mode to derive a signal for comparison to a threshold, paragraph [0053]. This approach allows for fluctuations either side of the mode. Using only moisture content this would easily be reduced to



determining the modulus of the difference between measured moisture content and the mode value and comparing it to an appropriate threshold, which as is clear from basic mathematics effectively sets a band or range of allowable moisture content values around the mode value. It requires no special insight to then use a lower and an upper threshold to define the band instead.

Thus, having, as a matter of obviousness, decided to evaluate % moisture content directly, the skilled person would as a matter of obviousness define an upper and lower threshold value for comparison in order to detect, and subsequently eliminate, all the foreign bodies disclosed in D2, such as wood, with its distinct positive peak as well as for example glass, with its distinct negative peak.

2.9 It might also be obvious to process the only other available raw material parameter (density), indicating foreign bodies, and this might be an even simpler method of detecting foreign bodies, with its positive peaks requiring comparison to a single threshold. However, this does not detract from the obviousness of processing only the moisture parameter. In both cases the skilled person would inevitably choose foreign body distinguishing threshold values appropriate to the curve chosen. Consequently, the skilled person would not dismiss the idea of using the % moisture curve merely because it would require an upper as well as a lower threshold value.

2.10 From the above, the Board holds that the skilled person would arrive at the subject matter of claim 1, without having made an inventive step starting from D2 in combination with the skilled person's general

knowledge. Therefore the subject matter of claim 1 does not meet the requirements of Article 52(1) in combination with Article 56 EPC.

3. Auxiliary requests - admissibility

- 3.1 According to Article 12 (2) of the Rules of Procedure of the Boards of Appeal (RPBA) "the statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on."

Thus, in accordance with the need for procedural economy and a fair proceedings, the underlying principle is one of early and complete presentation of the parties' case, as opposed to the piecemeal and tardy introduction of, amongst others, the arguments relied on, see Case Law of the Boards of Appeal, 7th edition 2013 (CLBA) IV.C.1.4.1 c), in particular T0951/91, reasons point 5.4.

- 3.2 In the present case, the first and second auxiliary requests were filed with letter of 16 March 2016. They were thus filed after filing the reply to the grounds of appeal and after oral proceedings had been arranged. Consequently, they constitute amendments to the respondent's case in the sense of Article 13 of the Rules of Procedure of the Boards of Appeal (RPBA). Under paragraph (1) of that article the Board has discretion in admitting such amendments. It shall exercise that discretion "in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for

procedural economy". Furthermore, under paragraph (3) of the article, "amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings".

- 3.3 An approach frequently adopted by the Boards when exercising their discretion in admitting amendments filed shortly before or in the course of oral proceedings can be summarized as follows: unless good reasons exist for filing amendments so far into the procedure - this may be the case when amendments are occasioned by developments during the proceedings -, they are only admitted at such a late stage if they are clearly or obviously allowable, see the Case Law of the Boards of Appeal, 7th edition, 2013, sections IV.C.1.4.1 and 1.4.2 and the decisions cited therein.

This means that it must be immediately apparent to the Board, with little or no investigative effort on its part, that amendments successfully address the issues raised without giving rise to new ones, see for example T 0087/05, reasons 2.

- 3.3.1 In the present case the Board does not consider that the amendments are in response to unforeseen developments during proceedings. The requests are said to be filed with a view to overcoming inventive step objections to claim 1 of the main request. However this objection was already raised by the appellant in their grounds of appeal, *inter alia vis-à-vis* D2 (see appellant's appeal grounds, pages 17 to 19), in response to the appealed decision's positive finding *vis-à-vis* D2 (reasons 3.5.2 and 3.5.3). It was addressed in the respondent's reply of 29 October 2012,

section F.3.2, and in the Board's communication in section 9.3 and again in the respondents final letter of 16 May 2016, section D.7.3. It can therefore hardly have come as a surprise, i.e. have been an unforeseen development, that inventive step starting from D2 was an issue.

- 3.3.2 Furthermore, whether or not the amendments give rise to new issues, it is not immediately apparent to the Board why the amendments should successfully address the issues raised. Whereas the letter accompanying the requests indicated the basis of amendments, the respondent provided no explanation as to why the subject matter of the independent claim of the auxiliary requests should, inter alia, involve an inventive step.

Nor are the amendments of such a nature that the Board could be expected to immediately realise, without investigative effort that they must overcome, amongst others, the inventive step objections made with respect to the main request. As the respondent explained (see their letter of 16 May 2016, page 2, point B3) claim 1 of the auxiliary requests essentially combines claim 1 of the main request with technical features taken from dependent claims. The amendments are therefore substantive in nature and would thus require proper investigation, inter alia in respect of inventive step vis-à-vis the prior art on file.

- 3.4 By waiting to present their arguments in respect of these issues until the very last moment, namely at the oral proceedings, barring their adjournment, the respondent denies the appellant the chance to properly consider and formulate counter arguments, and the Board the chance to prepare for the parties' arguments.

In the Board's view, admitting such requests with their associated supporting arguments revealed for the first time at the oral proceedings would neither be compatible with a fair procedure nor with the need for procedural economy. Rather, in accordance with the procedure codified by Article 13 (3) RPBA, the Board considers that the requests should not be admitted.

3.5 It is not in dispute that the appellant commented in their grounds of appeal (see their appeal grounds pages 23 and 24) on requests in the opposition proceedings worded almost the same as the respondent's late filed auxiliary requests. However, in the Board's view this does not relieve the respondent of the need for complete presentation of their case as early as possible. If this were not so it would place an unfair onus on the appellant as opponent to correctly predict what requests and associated arguments the respondent as proprietor might later introduce into the proceedings. Nor does the fact that similar requests were already on file in the opposition proceedings change the way in which the Board should exercise its discretion in admitting late filed requests and arguments in appeal proceedings. In accordance with established jurisprudence, the appeal procedure is not a continuation of the opposition procedure, but a distinct procedure in which any facts, evidence or arguments considered relevant must, if need be, be resubmitted. Were this not the case, Rule 12(2) RPBA would serve no purpose. For decisions highlighting the independent nature of appeal proceedings, see G 10/91, OJ 1993, 420; G 9/92 and G 4/93, both in OJ 1994, 875.

3.6 For all these reasons the Board decided not to admit the first and second auxiliary requests into the proceedings in accordance with Article 114(2) EPC.

4. Objection under Rule 106 EPC regarding violation of right to be heard

4.1 The respondent (patent proprietor) objected that the Board's finding violated their right to be heard for the following reasons:

- previous to the oral proceedings before the Board the inventive step of claim 1 of the main request had never been discussed vis-à-vis document D2 in combination with common general knowledge,
- the duration of the proceedings is not acceptable,
- no proof (document proving) common general knowledge had been provided.

4.2 It is evident from the preceding section that D2 was addressed as starting point in the decision under appeal, the appellant-opponent's grounds of appeal and the board's communication. The latter at section 9.3 refers to the appellant's arguments that relate to combinations involving D2. The appellant's grounds, page 17 under "A56" in points 87 to 105 discuss inventive step based on D2 alone, arguing obviousness of differences in their own right without any further documents. This issue, identified as decisive by the Board at the oral proceedings, was discussed there in detail and the respondent given ample opportunity to respond. In this point the Board is unable to see any violation of the right to be heard.

4.3 Nor did the discussion of inventive step hinge on any particular instance of common general knowledge, but

rather on the skilled person's understanding of the relevant passage of D2 (cf. section 2.6 above). The respondent's objection regarding lack of proof of common general knowledge is therefore beside the point. Apart from this, the objection was raised only after all requests had been discussed and decided.

- 4.4 Finally, the Board is unconvinced that the overall duration of the opposition proceedings (currently 10 years) would justify the late submission of requests by the respondent in appeal, and that not admitting them would therefore represent a violation of their right to be heard. To the contrary, as apparent from the preceding section, the respondent has had almost 4 years to submit these requests and supporting arguments but chose not to do so.
- 4.5 From the above the Board concludes that none of the points raised constitute a violation of the right to be heard. The Board therefore decided to dismiss the objection.
5. The question of admissibility of late filed documents need not be addressed. Furthermore, the Board's finding of lack of inventive step is based on D2 alone, as considered in the decision under appeal (and in the parties' submissions in appeal), see above. The Board need therefore not consider the conditional request for remittal.
6. As the patent according to the main request fails to meet the requirements of the EPC, and no other requests have been admitted, the Patent must be revoked pursuant to Article 101(3)(b) EPC.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Wolinski

A. de Vries

Decision electronically authenticated