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**Datasheet for the decision
of 31 March 2022**

Case Number: T 1407/18 - 3.3.02

Application Number: 11832047.2

Publication Number: 2627719

IPC: C09D5/03, C09D127/12,
C09D167/02, C08G18/62,
C08G18/79, C08G18/80, C08L67/02

Language of the proceedings: EN

Title of invention:
HYBRID POLYESTER FLUOROCARBON POWDER COATING COMPOSITION AND
PROCESS FOR MANUFACTURE THEREOF

Patent Proprietor:
Akzo Nobel Coatings International B.V.

Opponent:
Jotun A/S

Relevant legal provisions:
EPC Art. 100(b), 54, 56
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - insufficiency of disclosure

Novelty - public prior use - burden of proof

Inventive step

Amendment after summons - exceptional circumstances

Decisions cited:

G 0001/03



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1407/18 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 31 March 2022

Appellant: Akzo Nobel Coatings International B.V.
(Patent Proprietor) Christian Neefestraat 2
1077 WW Amsterdam (NL)

Representative: Rupp, Christian
Mitscherlich PartmbB
Patent- und Rechtsanwälte
Sonnenstraße 33
80331 München (DE)

Respondent: Jotun A/S
(Opponent) P.O. Box 2021
3202 Sandefjord (NO)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 April 2018
revoking European patent No. 2627719 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: A. Lenzen
P. de Heij

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor (appellant) against the opposition division's decision (decision under appeal) to revoke European patent No. 2 627 719 (patent).

II. The following documents, filed before the opposition division, are relevant for the present decision:

- D1a Product Data Sheet of Corro-Coat Durasol
- D1b Safety Data Sheet of Corro-Coat Durasol
- D1c Jotun Powder Coatings, Corro-Coat Durasol, Shades of Timeless Protection
- D2 Formulation Guideline Corro-Coat Durasol
- D2b Recommended Process and Application Control Requirements for Corro-Coat Durasol
- D6a Jotun, Recipe for Work Order No. WO/49176 of 26 March 2008, Product 1002443
- D6b Jotun, Recipe for Work Order No. WO/49174 of 26 March 2008, Product 1002443X
- D6c Jotun, Recipe for Work Order No. WO/49175 of 26 March 2008, Product 1002443Y
- D6d Screenshot showing quality control data for Work Order No. WO/49176 of 26 March 2008
- D7a Recipe of Part No. 1002443
- D7b Recipe of Part No. 1002443X
- D7c Recipe of Part No. 1002443Y
- D8a Order from AL Jaber Aluminium Extrusion to Jotun Powder Coatings U.A.E. LLC dated 3 April 2008
- D8b Invoice from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 23 April 2008
- D8c Delivery Order from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 23 April 2008

- D9a Order from AL Jaber Aluminium Extrusion to Jotun Powder Coatings U.A.E. LLC dated 9 April 2008
- D9b Invoice from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 23 April 2008
- D9c Delivery Order from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 23 April 2008
- D10a Order from AL Jaber Aluminium Extrusion to Jotun Powder Coatings U.A.E. LLC dated 13 May 2008
- D10b Invoice from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 14 May 2008
- D10c Delivery Order from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion dated 14 May 2008
- D11 Declaration of Mr Valbuena of 15 June 2016
- D11b Declaration of Mr Valbuena of 6 December 2017
- D12 Declaration of Mr Karlsen of 16 June 2016
- D12b Declaration of Mr Karlsen of 6 December 2017
- D13 WO 99/60066 A1
- D15 US 4,916,188

III. With its reply to the statement of grounds of appeal, the opponent (respondent) filed:

- D16 Experimental report (1 page)

IV. In preparation for the oral proceedings, scheduled at the parties' request, the board issued a communication pursuant to Article 15(1) RPBA 2020.

V. Oral proceedings before the board were held by videoconference on 31 March 2022 in the presence of both parties. During the oral proceedings, the board decided:

- to maintain the opposition division's decision to admit D2b, D11b and D12b into the proceedings
- to not admit the respondent's inventive-step objections based on D13 and D15 as the closest prior art

At the end of the oral proceedings, the chair announced the order of this decision.

VI. The parties' final requests relevant for this decision were as follows.

The appellant requested that:

- the decision under appeal be set aside and that the patent be maintained as granted (main request)
- the opposition division's decision to admit D2b, D11b and D12b into the proceedings be set aside and that these documents be ignored on appeal

The respondent requested that the appeal be dismissed, implying that the decision under appeal be confirmed and that the patent remain revoked.

VII. The appellant's appeal case relevant for the present decision can be summarised as follows.

Sufficiency

- The board's preliminary opinion in its communication pursuant to Article 15(1) RPBA 2020, according to which the respondent's sufficiency objection was not convincing, was correct.

Novelty: public prior use

- There was a discrepancy with regard to the gloss specification in the sales documents D8a-c, D9a-c and D10a-c on the one hand and the documents submitted as evidence for the composition of the product sold (D6a-d and D2) on the other. Because only the respondent had access to these documents, a high standard of proof had to be applied. The public prior use submitted by the respondent did not satisfy the high standard of proof precisely because of this discrepancy. The declarations D11, D11b, D12 and D12b had no probative value. Furthermore, it could not simply be assumed that the gloss specification on the sales documents was wrong. The subject-matter of the granted claims was novel over the alleged public prior use.

Novelty: D13 and D15

- It was clear from the disclosure of D15 that the particles of example 3 were not a mixture of the particles of examples 2 and 8. Granted claim 6 could not be construed as meaning that its subject-matter comprised a group of particles such as those of D13 and D15, all having the same composition. The subject-matter of granted claim 6, therefore, was novel over D13 and D15.

Inventive step

- The respondent did not prove the alleged public prior use. Consequently, the inventive-step objection starting from it as the closest prior art was not convincing.

- The respondent's inventive-step objections starting from D13 and D15 as the closest prior art were submitted only at the oral proceedings before the board. However, the respondent had not provided convincing arguments why these objections were raised so late. These objections should not be admitted.

VIII. The respondent's appeal case relevant for the present decision can be summarised as follows.

Sufficiency

- Claim 6 of the main request was not enabled across the whole scope claimed. It was not plausible that the claimed advantages of improved gloss could be achieved for all of the claimed components and in just any amount of those components.

Novelty: public prior use

- The documents submitted by the respondent related to the same public prior use. D8a, D8b and D8c (analogously: D9a-c and D10a-c) were evidence of the sale of a product from Jotun Powder Coatings U.A.E. LLC to AL Jaber Aluminium Extrusion.

D8a-c did not designate the sold product with the exact same name. However, the different names shared the same product code "4002F47316". This was the respondent's internal code for the powder coating composition "4002 Dover Sole Smooth" the composition of which was derivable from D6a-d and D7a-c.

The names of D8a-c also shared the words "Dover Sole". As was evident from D1c, these words related to a colour in the respondent's "Corro-Coat Durasol" product range. D2 was a formulation guideline for this product range and, therefore, also showed the composition of the product sold at least with regard to the ingredients mentioned in the granted claims. The product range was publicly available in 2005. This was clear from D1a, D1b and D1c.

Declarations D11 and D12 confirmed that the product "4002 Dover Sole Smooth" had been sold.

There was a discrepancy with regard to the gloss specification on the sales documents D8a-c on the one hand and D6a/D2 on the other hand. However, apart from the sales documents, the other documents submitted by the respondent which contained a gloss specification were consistent, and the specification was confirmed in the respondent's repeat of D6a-c in D16. Thus, the figure on the sales documents was merely a typographical error by the accounts department.

The public availability of the "Corro-Coat Durasol" product range and the public availability and sale of the "4002 Dover Sole Smooth" product within this range therefore anticipated the subject-matter of claims 1, 2 and 4 to 7 as granted.

Novelty: D13 and D15

The wording of claim 6 of the main request was so broad that it encompassed the option that the claimed particle populations were the same.

Example 2 of D13 and example 3 of D15 therefore anticipated the claimed subject-matter.

In addition, the powder coating composition of D15 (example 3) was a mixture of the particles of examples 2 and 8, i.e. two groups of discrete particles with different compositions. Thus, this example anticipated the subject-matter of granted claim 6, irrespective of how claim 6 was construed.

Inventive step

- The granted claims did not involve an inventive step over the public prior use as the closest prior art.

- In the alternative, D13 or D15 could be considered closest prior-art documents. The subject-matter of granted claim 6 differed from each of these documents in that the hybrid polyester-fluorocarbon powder coating composition comprised a second type of particle in addition to the first type of particle, each type of particle having a different composition. In view of the arguments put forward by the respondent in its reply to the statement of grounds of appeal concerning the excessive breadth of the granted claims (points 114 to 137 and 154 to 158), an inventive step could not be acknowledged.

While D13 and D15 had been identified as possible closest prior art for the subject-matter of the granted claims only at the oral proceedings before the board, the corresponding inventive-step objections were to be admitted. More specifically, novelty objections to granted claim 6 based on D13 and D15 had been put forward in the respondent's

reply to the statement of grounds of appeal. The board had concluded only at the oral proceedings that D13 and D15 did not anticipate the novelty of claim 6. The respondent had been unable to formulate an inventive-step objection based on these documents earlier as it had not been clear what the distinguishing features were supposed to be. Furthermore, D13 and D15 had been referred to in the discussion of inventive step of the auxiliary requests.

Reasons for the Decision

Main request - The claimed subject-matter

1. The appellant's main request was that the decision under appeal be set aside and that the patent be maintained as granted. The independent claims of the patent as granted read as follows.

1.1 Claim 1

"Process for the manufacture of a hybrid polyester-fluorocarbon powder coating composition, comprising the steps of:

- *Preparation of a polyester powder coating composition A, comprising a polyester resin and a curing agent for said polyester resin;*
- *Preparation of a fluorocarbon powder coating composition B, comprising a fluorocarbon resin and a curing agent for said fluorocarbon resin;*
and
- *Dry blending said polyester powder coating composition A and fluorocarbon powder coating composition B,*

wherein the weight ratio of polyester powder coating composition A to fluorocarbon powder coating composition B is in the range of 70:30 to 30:70."

1.2 Claim 6

"Hybrid polyester-fluorocarbon powder coating composition, comprising:

- 30 - 70 wt.% based on the total weight of the powder coating composition of discrete particles comprising a polyester resin and a curing agent for said polyester resin; and*
- 70 - 30 wt.% based on the total weight of the powder coating composition of discrete particles comprising a fluorocarbon resin and a curing agent for said fluorocarbon resin"*

1.3 Claim 7

"Use of the hybrid polyester-fluorocarbon powder coating composition of claim 6 for the coating of panels for architectural use."

Main request - Sufficiency

2. The respondent argued that the invention as stipulated in granted claim 6 was not sufficiently disclosed. Claim 6 was so broad that it covered embodiments in which the particles contained only small amounts of the respective resins and/or curing agents. However, powder coating compositions containing such particles could not solve the problem of the patent, i.e. achieve an

improvement of gloss retention of the corresponding coating.

3. This is not convincing. A technical effect, let alone an improvement of gloss retention, is not a feature of claim 6 as granted. Consequently, the question of whether this effect is achieved over its whole breadth is to be assessed under Article 56 EPC and not Article 100(b) EPC (G 1/03 (OJ 2004, 413), point 2.5.2 of the Reasons). In this respect, the board agrees with the decision under appeal (point 4 on page 6).

Main request - Novelty: public prior use

4. Before the opposition division, the respondent had filed D2b, D11b and D12b in support of its public prior use objection. The opposition division decided to admit these documents into the proceedings. On appeal, the appellant requested that this decision be set aside and that these documents be ignored on appeal.

At the oral proceedings, the board decided to maintain the opposition division's decision to admit D2b, D11b and D12b into the proceedings. It is unnecessary to give reasons for this decision in view of the outcome of the appeal which is to grant the appellant's main request.

5. The respondent raised an objection of public prior use against granted claims 1, 2 and 4 to 7. It was based on the sale of a product, sales documents D8a-c, D9a-c and D10-a-c submitted as proof of the sale.
6. D8a is an order confirmation. It shows that AL Jaber Aluminium Extrusion (in this decision also abbreviated as "AL Jaber") ordered, *inter alia*, the following

product from Jotun Powder Coatings U.A.E. LLC, which is an affiliate company of the respondent:

"DOVER SOLE 4002 F 47316 JOTUN"

D8b is an invoice for the sale of the following product:

*"4002F47316 HYPER DURABLE DOVER SOLE
HYPER DURABLE MATT 30%+-5"*

It was undisputed between the parties that the figure "30%+-5" is the gloss specification of the product sold (note: in the following, this gloss specification - to match the format of the specifications in the other documents - is abbreviated simply as "30±5").

D8c is a delivery order showing that a product was sent to and received by AL Jaber. This product has exactly the same designation with exactly the same gloss specification as in D8b.

7. The essentially identical reference number on the sales documents D8a-c (D8a: "AL/OP/8000580"; D8b,c: "8000580") show that they refer to the same sales transaction.

The names of the product(s) mentioned in D8a-c all contain:

- (a) the figure "4002 F 47316"/"4002F47316"
- (b) the words "Dover Sole"

On this basis, the respondent took the view that D8a-c referred to the sale of the same product. In its favour, it is accepted that this is correct.

8. Granted claims 1, 2 and 4 to 7 feature, *inter alia*, a powder coating composition comprising a polyester resin, a curing agent for this polyester resin, a fluorocarbon resin and a curing agent for this fluorocarbon resin (see above). However, D8a-c contain no information about the chemical composition of the product sold. Based on D8a-c alone, therefore, it cannot be concluded that the product sold was as required by granted claim 6, that it had been manufactured according to granted claims 1, 2, 4 and 5 or that it was intended to be used according to granted claim 7.

9. As regards the chemical composition of the sold product, the respondent pointed to D6a-d and D2.
 - 9.1 D6a-d concern a work order for the product "(4002F47316) 4002 Dover Sole Smooth". According to D6a, this product is a mixture of two components. D6b and D6c give the composition of each of these two components. D6d is a printout from the quality control in the production of this product. The gloss specifications for the above product are 20 ± 5 in D6a and 12 ± 5 in D6d.

D2 is a formulation guideline for the "Corro-Coat Durasol" range of powder coating compositions and discloses their general chemical composition. D2 gives a gloss specification of 20 ± 5 , which is consistent with that of D1a, i.e. another document relating to the same range of products, and that of D6a (see above).
 - 9.2 With regard to the links between D8a-c and D6a-d/D2, the respondent essentially argued as follows.

- The name of the product in D6a-d, i.e. "(4002F47316) 4002 Dover Sole Smooth", comprised the same reference number ("4002F47316") as that of the product sold in D8a-c. Hence, D6a-d had to be considered to relate to the product sold and describe its composition.
- As was evident from D1c, the "Corro-Coat Durasol" product range comprised the powder coating composition of the colour "Dover Sole". Because these words were also contained in each of the product names in D8a-c, D2 could also be considered to describe the composition of the product sold.

10. However, the links between D8a-c and D6a-d/D2 alleged by the respondent are contradicted by the fact that the gloss specifications in the documents cited as evidence of the chemical composition of the product sold (D6a, D2: 20 ± 5 ; D6d: 12 ± 5) differ considerably from the gloss specification noted in the sales documents (D8a-c: 30 ± 5). As is evident from the reasoning below, the board reaches a different conclusion from that of the opposition division on the basis of this discrepancy, which was not addressed in the decision under appeal.

11. The following points are decisive for the question of how to evaluate the above discrepancy.

- The gloss value is an important parameter of a coating. The same applies to the gloss specification of a coating composition, i.e. the gloss value that can be expected for the coating resulting from the application of the coating composition. This is evident from the fact that the sales documents explicitly mention the gloss specification but not, for example, other parameters of the coating composition or the

coating resulting from it. Given this, it cannot simply be asserted, as the respondent did, that the figure 30 ± 5 on the sales documents was merely a typographical error by the accounts department.

- As regards the alleged error on the sales documents, the respondent also referred to D16. D16 reports on the respondent's experiment repeating the composition of D6a-c and gives a gloss of 21 ± 1 gloss units for coated panels. According to the respondent, the fact that the gloss observed was according to the specification in D2/D6a showed that the sales documents contained an error. However, this is not convincing. D16 can at most prove that the gloss indication in D2/D6a may be correct. It cannot eliminate the discrepancy between the gloss specifications mentioned above or show that the gloss specification in the sales documents D8a-c was erroneous. Thus, it does not exclude that the product sold according to the sales documents was different from the one specified in D2/D6a.
- The crucial documents submitted as evidence for the composition of the product sold (D6a-d and D2) are internal documents to which only the respondent had access and the existence and content of which could not be confirmed by any external source. This was acknowledged by the respondent. It is established case law of the boards that a high standard of proof (up to the hilt, beyond any reasonable doubt) has to be applied in such circumstances (Case Law of the Boards of Appeal of the European Patent Office, ninth edition, 2019, III.G.4.3.2b)). The mere existence of such a clear discrepancy between the different gloss specifications in D8a-c on the one hand and D2/D6a on the other hand shows that

the standard of proof to be applied in this case has not been met by the respondent.

- Although both declarations D11 (point 5) and D12 (point 5) expressly confirm that D8a-c prove the sale of "4002 Dover Sole Smooth", i.e. the product to which D6a-d relate, they do not change the above conclusion because both declarations are completely silent on the discrepancy pointed out above. In addition, the board shares the appellant's doubts about the reliability of the statements in D11, D11b, D12 and D12b that could not be examined by the board since the declarants were not heard as witnesses.

12. The sets of documents D9a-c and D10a-c have different reference numbers and therefore relate to different sales transactions. However, the respondent acknowledged that D9a-c and D10a-c were similar evidence to D8a-c of further sales of the same product. Therefore, the reasoning above applies *mutatis mutandis* also to D9a-c and D10a-c.
13. In summary, the board arrives at the conclusion that it cannot be concluded which product was sold in D8a-c, D9a-c and D10a-c and that, consequently, the public prior use as put forward by the respondent has not been proven beyond reasonable doubt. As concerns the public availability of the "Corro-Coat Durasol" product range, the board is not convinced beyond any reasonable doubt that this range included the product (4002F47316) 4002 Dover Sole Smooth. The only evidence that this was the case (D11, D11b, D12 and D12b) is not convincing up to the required standard of proof for the reasons set out above. The subject-matter of claims 1, 2 and 4 to 7 as granted, therefore, is novel over the alleged public prior use.

Main request - Novelty: D13 and D15

14. The respondent also put forward novelty objections against claim 6 as granted based on D13 (example 2) and D15 (examples, in particular example 3).
 - 14.1 In D13 (example 2), *inter alia*, a polyester resin, a fluorocarbon resin and a curing agent for the polyester and the fluorocarbon resins were dry-blended and then melt-blended in an extruder, ground and sieved to give a finely divided powder coating composition. It was common ground between the parties that this process provides a hybrid polyester-fluorocarbon powder coating composition comprising only one type of discrete particles, all particles having the same composition.
 - 14.2 In D15 (example 3), *inter alia*, a hydroxyl polyester resin, a hydroxyl fluorocarbon resin and a curing agent for the polyester and the fluorocarbon resins were dry-blended and then melt-blended in an extruder, and ground and sieved to give a powder coating composition. In view of the clear description of the process in D15 (column 6, lines 51 to 68), which applies not only to example 3 but also to the examples 2 and 4 to 8, it cannot be concluded, as the respondent did, that the particles of example 3 had to be a mixture of the particles of examples 2 and 8. Rather, similar to D13, each of the examples of D15 also provides a hybrid polyester-fluorocarbon powder coating composition comprising only one type of discrete particles, all particles having the same composition.
15. The respondent construed granted claim 6 such that it covered embodiments in which all particles have the same composition. It argued that, firstly, because of

the use of open language ("comprising") in granted claim 6, both groups of "discrete particles" could be identical and, secondly, that a group of identical particles, such as those disclosed in D13 or D15, could be divided mentally into two parts in terms of quantity, so that the amount of one part fell within the range of "30 - 70 wt.%" and that of the other part fell within the range of "70 - 30 wt.%", as required by granted claim 6. Consequently, D13 and D15 were novelty-destroying for granted claim 6. The opposition division accepted this line of argument in its decision.

This construction of the claim is, in the board's view, entirely artificial and not convincing. The claim clearly requires two distinct types of particles. This is clear by use of the word "discrete" and the division into two particle fractions. As explained above, both D13 and D15 disclose hybrid polyester-fluorocarbon powder coating compositions comprising only one type of discrete particles, all particles having the same composition. Consequently, these powder coating compositions consist of identical particles, they comprise 100 wt.% of them. Thus, the powder coating compositions of D13 and D15 do not contain a type of particles whose amount is less than 100 wt.%. They cannot therefore be subsumed under the wording of granted claim 6, the subject-matter of which is consequently novel over D13 and D15.

Main request - Inventive step

16. In the written proceedings on inventive step, the respondent only cited the prior public use assessed above as the closest prior art. As it was concluded

that this public prior use has not been proven, this objection cannot succeed.

17. At the oral proceedings before the board, the respondent, for the very first time in the appeal proceedings, put forward inventive-step objections against the granted claims on the basis of D13 and D15 as the closest prior art. The appellant requested that these objections not be admitted (Article 13(2) RPBA 2020).
- 17.1 These entirely new inventive-step objections constitute an amendment of the respondent's appeal case. Pursuant to Article 13(2) RPBA 2020, such an amendment must not be taken into account unless there are exceptional circumstances justified with cogent reasons. In the case at hand, there are no such exceptional circumstances for the following reasons.
- 17.2 The board acknowledges that the respondent had raised novelty objections to granted claim 6 based on D13 and D15 in its reply to the statement of grounds of appeal. These objections have been assessed above. However, this did not relieve the respondent of its duty to put forward inventive-step objections starting from these documents as the closest prior art if it had wished to do so. The respondent's argument that a feature which could distinguish the subject-matter of granted claim 6 from D13/D15 was not discernible is not convincing. As is evident from the assessment above, the respondent's novelty objections are based on a particular construction of claim 6. In its statement of grounds of appeal, the appellant challenged this construction (accepted by the opposition division and underlying its decision), considering the presence of two different types of particles to be the distinguishing feature

over each of D13 and D15. Therefore, the respondent should have addressed this issue in its reply and provided arguments for the absence of an inventive step on the basis of this distinguishing feature. It could not simply assume that the board would accept the respondent's reasoning on this contentious issue and as a result acknowledge that there was no distinguishing feature over D13 and D15.

The board also acknowledges that the respondent had put forward arguments concerning the breadth of the claims and had referred to D13/D15 as the closest prior art in its reply to the statement of grounds of appeal. However, while the arguments on the breadth of the claims were aimed at the granted claims, the discussion starting from D13/D15 as the closest prior art was only aimed at the claims of the auxiliary requests for features not present in the independent claims of the main request. Hence, for the new inventive-step objections, D13/D15 would have to be selected as the closest prior art for the main request, and the problem/solution approach would have to be applied starting from these documents using, as regards the effects obtained, the arguments on the breadth of the claims. The new inventive-step objections, therefore, combine bits from different parts of the reply to the statement of grounds of appeal, bits which had been presented in an entirely different context. Admitting these objections would amount to allowing the respondent to regard its reply as a reservoir from which it could pick at will to formulate new inventive-step objections.

17.3 At the oral proceedings, therefore, the board decided to not admit the respondent's inventive-step objections

starting from D13 and D15 as the closest prior art (Article 13(2) RPBA 2020).

18. In the absence of further inventive-step objections, it is to be concluded that the subject-matter of the granted patent involves an inventive step. The main request, therefore, is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated