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**Datasheet for the decision
of 8 October 2024**

Case Number: T 1605/22 - 3.2.05

Application Number: 15804488.3

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Language of the proceedings: EN

Title of invention:
Process for preparing a polyolefin composition

Patent Proprietor:
Basell Polyolefine GmbH

Opponents:
The Dow Chemical Company
Chevron Phillips Chemical Company LP
TotalEnergies One Tech Belgium

Relevant legal provisions:
EPC Art. 56, 83
RPBA 2020 Art. 12(3), 12(5)

Keyword:

Sufficiency of disclosure (yes)

Inventive step (yes)

Admittance - unsubstantiated inventive step objections (no)



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

Case Number: T 1605/22 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 8 October 2024

Appellant: Chevron Phillips Chemical Company LP
(Opponent 2) 10001 Six Pines Drive
The Woodlands, Texas 77380 (US)

Representative: Abel & Imray LLP
Westpoint Building
James Street West
Bath BA1 2DA (GB)

Respondent: Basell Polyolefine GmbH
(Patent Proprietor) Brühler Strasse 60
50389 Wesseling (DE)

Representative: LyondellBasell
c/o Basell Polyolefine GmbH
Industriepark Hoechst, Bldg. E413
65926 Frankfurt am Main (DE)

Party as of right: The Dow Chemical Company
(Opponent 1) 2030 Dow Center
Midland, MI 48674 (US)

Representative: Boulton Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Party as of right: TotalEnergies One Tech Belgium
(Opponent 3) Zone Industrielle C
7181 Senefte (BE)

Representative: Raboin, Jean-Christophe
Total Research & Technology Feluy
Zone Industrielle C
7181 Senefte (BE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 April 2022 concerning maintenance of the
European Patent No. 3186051 in amended form.

Composition of the Board:

Chairman P. Lanz
Members: B. Spitzer
M. Blasi

Summary of Facts and Submissions

- I. Opponent 2's appeal lies against the opposition division's interlocutory decision finding that European patent No. 3 186 051 as amended according to the main request, comprising the set of claims which had been filed on 1 December 2021, meets the requirements of the EPC.
- II. The opposition had been filed against the patent as a whole on the basis of the grounds for opposition under Article 100(a) EPC together with Article 54(1) EPC (lack of novelty) and Article 56 EPC (lack of inventive step) and under Article 100(b) EPC.
- III. On 8 October 2024, oral proceedings before the board were held by videoconference.
- IV. The appellant (opponent 2) requested that the decision under appeal be set aside and that the European patent be revoked. It also requested that auxiliary request I not be admitted into the proceedings.

The respondent (patent proprietor) requested that the appeal be dismissed, or, alternatively, that the decision under appeal be set aside and that the patent be maintained as amended on the basis of the claims of one of auxiliary requests I to V filed with its reply to the statement of grounds of appeal. Furthermore, the appellant's objections of lack of inventive step relating to documents D4, D6, D9, D10, D11 and D12 should not be admitted into the appeal proceedings.

Opponents 1 and 3, which are party to the appeal proceedings as of right under Article 107, second

sentence, EPC, did not file any requests in the appeal proceedings.

V. The documents cited in this decision include the following:

- D3: Application Example: Feeding & Conveying in Polyolefin Production, from K-Tron Technologies Inc., 2010;
- D4: Application Example: Polyolefins / Bulk Polymer Compounding, from K-Tron Technologies Inc., 2001;
- D6: Success depends on the components, J. Gomez, K-Tron, 29 March 2011;
- D7: WO 2004/004996 A1;
- D9: US 2013/0099424 A1;
- D10: K-TRON Product Specification Smart Flow Meter, K-SFM-350, Doc# 0290016303, 11-2009;
- D11: US 8,543,242 B2;
- D12: US 2006/0063896 A1 and
- D13: US 2004/0020272 A1.

VI. Claim 1 of the main request reads as follows:

"A process for continuously preparing a polyolefin composition comprising bimodal or multimodal polyolefin and one or more additives in an extruder device equipped with at least one hopper preparing polyolefin pellets of the polyolefin composition in the extruder device, the process comprising

- (i) supplying a bimodal or multimodal polyolefin in form of a polyolefin powder at a flow rate to the hopper of the extruder device;
- (ii) measuring a flow rate of the polyolefin pellets prepared in the extruder device;
- (iii) supplying one or more additives to the same

hopper;

(iv) adjusting the flow rate of the polyolefin powder to the hopper in response to the measured flow rate of the polyolefin pellets and either keeping the flow rate(s) of the one or more additives supplied to the hopper constant or also adjusting the flow rate(s) of the one or more additives supplied to the hopper in response to the measured flow rate of the polyolefin pellets;

(v) transferring the polyolefin powder and the additives from the hopper into the extruder device;

(vi) melting and homogenizing the polyolefin powder and additives within the extruder device to form a molten polyolefin composition; and

(vii) pelletizing the molten polyolefin composition, thereby yielding the polyolefin pellets."

VII. The parties' arguments, where relevant to this decision, can be summarised as follows.

(a) Claim 1 of the main request - sufficiency of disclosure (Article 83 EPC)

(i) Appellant

The first objection under Article 83 EPC concerned how to control the extruder when the polyolefin powder feed rate into the hopper changed. If the feed rate increased while the screw speed of the extruder remained constant, the extruder risked becoming overloaded. Conversely, if the feed rate decreased without adjusting the screw speed, the extruder risked becoming too low in polymer melt. The patent failed to disclose how much the polyolefin powder feed rate could be increased. The respondent's argument that the person skilled in the art would have adjusted the feed rate

within "reasonable ratios" was unconvincing, as "reasonable ratios" were not defined, and without measuring the polyolefin powder flow rate upstream of the extruder, the skilled person did not know the ratio.

As a second objection under Article 83 EPC, it was not sufficiently disclosed where to measure the pellet flow rate. Feature (ii) in claim 1 of the main request, which specifies measuring "a flow rate of the polyolefin pellets prepared in the extruder device", imposed only two requirements: first, that a flow rate of polyolefin pellets was measured and, second, that the pellets were prepared in the extruder.

Paragraph [0040] of the patent suggested that the polyolefin pellet flow rate might be measured downstream of an underwater pelletizer and dryer, as described in document D7. Document D7 referred to a collection vessel 68 for the polyolefin pellets, with a mass flow sensor 70 positioned downstream of the collection vessel. The respondent argued that this measurement did not correspond to feature (ii) of claim 1 of the main request, as the pellet flow rate was "decoupled" from the extruder by the collection vessel 68, which could store large amounts of pellets without releasing them, but this interpretation was not correct. The collection vessel 68 served only as a small buffer, unlike the storage tank 75 in document D7. Therefore, the pellet flow rate measured by the sensor 70 was not decoupled from the extruder and did comply with feature (ii) of claim 1 of the main request.

The patent did not disclose in which specific region the mass flow of the polyolefin pellets had to be

measured and at what point the measured flow rate became decoupled from the extruder. As a result, it failed to provide sufficient guidance to the skilled person to avoid unworkable processes.

For these two reasons, the requirements of Article 83 EPC were not met.

(ii) Respondent

The requirements of Article 83 EPC were met.

First, the processing of polyolefin powder into polyolefin pellets in extruder devices was a widespread and well-known method. Claim 1 of the main request was directed to a continuous process, in which only minor adjustments to the polyolefin powder feeding, i.e., within "reasonable ratios", might be necessary. Adjusting the extruder screw rate was unnecessary to avoid a "backlog of polymer". For many commercially operated extruder devices, it was not even possible to adjust the screw rate, as they were one-speed or two-speed devices. The skilled person knew how to adjust the flow rate of polyolefin powder to the hopper in response to the measured flow rate of the extruded pellets, ensuring that the hopper did not overflow and the extruder did not run dry, either.

Concerning the appellant's second objection under Article 83 EPC, the person skilled in the art knew where to measure the flow rate of the polyolefin pellets according to feature (ii) of claim 1 of the main request, i.e., the flow rate of the polyolefin pellets prepared in the extruder device. It was correct that claim 1 of the main request did not specify the location of measurement; however, as long as a flow

rate of the polyolefin pellets prepared in the extruder device was measured, the specific location of measurement was not critical. Additionally, paragraph [0040] of the patent provided an example of where to measure this flow rate, namely: "*The flow rate of the polyolefin pellets to the hopper is preferably measured on dried polyolefin pellets, i.e. preferably downstream of the usually employed underwater pelletizer and centrifugal drier.*" The appellant did not present any evidence that non-working embodiments were covered.

(b) Inventive step of the subject-matter of claim 1 of the main request (Article 56 EPC)

(i) Appellant

The subject-matter of claim 1 of the main request was not inventive over document D3 alone, or combined with either document D7 and D13, or over document D7 combined with document D3.

Document D3, as the closest prior art, disclosed all the features of claim 1 of the main request except for features (ii) and (iv). Starting from document D3, only one step was needed to arrive at the claimed invention, i.e., to measure the polyolefin pellet flow rate instead of the polyolefin powder flow rate. The only technical effect of this embodiment related to the potential stickiness of the polyolefin powder, as described in paragraph [0040] of the patent. Claim 1 of the main request was not associated with sticky polymers but rather with bimodal and multimodal polyolefins, the vast majority of which, such as high density polyethylenes, were not sticky at all. Since no technical effect was related to these distinguishing

features, the objective technical problem to be solved was merely to provide an alternative process.

To adjust the ratio of polyolefin to additives, the polyolefin flow rate had to be measured. Since the flow of polymer was a closed stream (see arrows in the figures on pages 7 and 11 of document D3), the flow rate could be measured at various stages. Document D3 also measured the flow rate of the polyolefin pellets (see document D3, page 10, right-hand column, last paragraph). Once this value was measured, it was inevitably also used for the control system. In addition, document D3 disclosed processing data from various sensors by means of the digital control system and explicitly disclosed the control for the main polymer feed system and the additive supply system (see document D3, pages 11 and 12). The person skilled in the art would have used the pellet flow rate either as an alternative value or as an additional value. They not only could have done this, but also would have done this. No further motivation was needed as they knew that more sensor outputs were preferred to improve redundancy, to reduce noise, and to ensure safety in the event of deviations from the normal flow. Therefore, the subject-matter of claim 1 of the main request was obvious from document D3 alone.

If the person skilled in the art had needed further motivation, they would have found it in document D7. Document D7 also disclosed a process for producing polymer pellets and explicitly disclosed a sensor for measuring a flow rate of the polyolefin pellets prepared in the extruder device (see document D7, page 3, second paragraph and page 21, first paragraph). Although document D7 focused on the process downstream of the extruder, the skilled person starting from

document D3 would have considered document D7 because the teaching of documents D3 and D7 was not contradictory, but complementary. Document D7 used various inputs with different weightings of the values (see document D7, page 15, second paragraph). Therefore, the person skilled in the art would have applied this teaching to the control process in document D3.

Apart from that, the conservation of mass was a fundamental law known to the person skilled in the art, and document D13 also disclosed that mass throughput through an extruder remained constant, meaning that the input equalled the output. Therefore, it was obvious that the polyolefin flow rate could be measured anywhere. Document D3 already disclosed measuring the polyolefin pellet flow rate (see document D3, page 10, right-hand column, last paragraph and figure on page 11). For the same reasons as above, the subject-matter of claim 1 of the main request was obvious from documents D3 and D13.

Starting from document D7, the subject-matter of claim 1 of the main request differed on account of a polyolefin composition comprising bimodal and multimodal polyolefin and on account of feature (iv). The first differentiating feature had no technical effect but was a routine choice. Regarding the technical effect of the second distinguishing feature and the related objective technical problem, the same considerations applied as when starting from document D3. As such, the person skilled in the art had to look for an alternative process. Document D3, in the same way as document D7, taught a highly integrated control system and a large number of sensors. Document D7 failed to disclose the improvement in the dosing

accuracy. Therefore, the person skilled in the art would have integrated the control system from document D3 by using the pellet flow rate as an input to the control system from document D7. Therefore, starting from document D7, the person skilled in the art would also have arrived at the claimed solution and, hence, the claimed solution was obvious.

(ii) Respondent

Starting from document D3 as the closest prior art, the subject-matter of claim 1 of the main request differed on account of features (ii) and (iv).

According to paragraphs [0006] and [0040] of the patent, the objective technical problem was to provide a process that could be carried out economically, reliably, and with high dosing accuracy, even for bimodal and multimodal polyolefin polymers. Even if the objective technical problem was considered to be that of "providing an alternative process", the skilled person would have had no reason, without hindsight, to consider measuring the flow rate of the polyolefin pellets produced in the extruder and to use said value to adjust the flow rate of the polyolefin powder to the extruder.

Document D3 disclosed three different types of gravimetric feeders, which were also used to measure the polymer powder feed rate (see document D3, page 5, third column, paragraph with the heading "Primary Resin Feeding"). In the context of monitoring and controlling additive feed supply systems, document D3 also described a programmable logic controller (see document D3, page 12, first column, first paragraph). It only provided general information about process controls

(see document D3, pages 11 and 12) and did not explicitly disclose the details of monitoring and controlling the polymer powder supply system itself. The figure on page 11 of document D3 indeed showed that a smart flow meter for measuring the pellet flow rate was disclosed, but this metering device was linked to feeding the truck or railcar, not to the polyolefin powder feed rate. There was no motivation to measure the pellet flow rate downstream of the extruder and to use this value to adjust the polyolefin powder flow rate to the extruder.

Document D7 was not concerned with the control of the flow rate into the extruder, but with the downstream process, i.e., a uniform conveying capacity of the discharge conveyor system (see document D7, page 3, last two paragraphs). The pellet flow rate was not used to adjust the polymer powder flow rate but to control the load-out motor (see document D7, page 3, second paragraph and page 14, fourth paragraph).

Document D13 did not disclose a pelletizer, and thus did not provide any further motivation.

Since document D7 was not related to the control of the input to the extruder but the output of the pellets, document D7 was not considered the closest prior art. Even if the person skilled in the art had started from document D7, they would not have arrived at the claimed solution, and, hence the claimed solution was not obvious. Document D7 did not disclose a polyolefin composition comprising bimodal or multimodal polyolefins and feature (iv). Although in document D7 the flow rate of the polyolefin pellets prepared in the extruder device was measured, neither document D7 nor document D3 adjusted the flow rate of the polyolefin

powder to the hopper in response to the measured flow rate of the polyolefin pellets. Document D3 instead taught the measurement of the polymer powder flow rate. Therefore, even considering document D3, the skilled person would not have arrived at the claimed invention without hindsight.

Consequently, the subject-matter of claim 1 of the main request was inventive.

(c) Inventive-step objections relating to documents D4, D6, D9, D10, D11 and D12

(i) Appellant

Documents D4, D6, D9, D10, D11 and D12 had disclosures similar to that of document D3 and were also prejudicial to inventive step.

(ii) Respondent

The appellant's objections of lack of inventive step relating to documents D4, D6, D9, D10, D11 and D12 should not be admitted into the appeal proceedings.

Reasons for the Decision

1. Claim 1 of the main request - sufficiency of disclosure (Article 83 EPC)

1.1 Article 83 EPC stipulates that the application must disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The claimed subject-matter must be sufficiently disclosed in the patent document as a whole, including examples, and taking into account the

skilled person's common general knowledge. At least one way of enabling the person skilled in the art to carry out the claimed invention must be disclosed, but this is sufficient only if it allows the claimed invention to be performed without undue burden in the whole range claimed (see also Case Law of the Boards of Appeal of the European Patent Office, 10th edition, July 2022, "Case Law", II.C.1.). According to established case law of the Boards of Appeal, a successful objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts (see Case Law, II.C.9.).

- 1.2 Regarding the appellant's first objection under Article 83 EPC, which asserted that the application or the patent, respectively, lacked disclosure on how to control the extruder if the feed rate of the polyolefin going into the hopper changed, the board agrees with the respondent. Processing polyolefin powder into polyolefin pellets in extruder devices is a widespread and well-known method. Furthermore, claim 1 of the main request relates to a process for continuously preparing a polyolefin composition. In a continuous process, only minor modifications are required to adjust the flow rate of polyolefin powder to the hopper in response to the measured flow rate of the extruded pellets. Under these conditions, as the respondent argued, no major adjustments of the extruder screw rate are required to avoid a "backlog of polymer".

The appellant has not provided any verifiable facts that it would create an undue burden for the skilled person to adjust the flow rate of polyolefin powder to the hopper in response to the measured flow rate of the extruded pellets in such a way that the hopper does not

overflow and the extruder does not run dry.

- 1.3 As a second objection, the appellant contended that the requirements of Article 83 EPC were not fulfilled, as there was no disclosure of where to measure the pellet flow rate. Consequently, non-working embodiments were encompassed by the wording of claim 1 of the main request.

In accordance with the respondent's view, the board holds that the person skilled in the art knows where to measure the flow rate of the polyolefin pellets according to feature (ii) of claim 1 of the main request, i.e., the flow rate of the polyolefin pellets prepared in the extruder device. It is true that claim 1 of the main request does not specify the measurement location; however, as long as the flow rate of the polyolefin pellets prepared in the extruder device is measured, the specific location of measurement is not critical. Additionally, paragraph [0040] of the patent provides an example of where to measure this flow rate, namely: "*The flow rate of the polyolefin pellets to the hopper is preferably measured on dried polyolefin pellets, i.e. preferably downstream of the usually employed underwater pelletizer and centrifugal drier.*" The board does not share the appellant's view that there were non-working embodiments encompassed by claim 1 of the main request. Specifically, a pellet flow rate that is decoupled from the extruder, such as via an intermediate storage vessel, does not fall under the scope of feature (ii), as such a measurement would not accurately reflect the flow rate of the polyolefin pellets prepared in the extruder device.

- 1.4 In light of the foregoing, the board reaches the same conclusion as the opposition division (see decision under appeal, Reasons, point 4.1) and concludes that the claims of the main request meet the requirements of Article 83 EPC.

2. Inventive step of the subject-matter of claim 1 of the main request (Article 56 EPC)
 - 2.1 The appellant argued that the subject-matter of claim 1 of the main request did not involve an inventive step, either over document D3 alone, document D3 in combination with document D7, document D3 in combination with document D13, or document D7 in combination with document D3.

 - 2.2 Inventive step starting from document D3
 - 2.2.1 It is undisputed by the parties that document D3 could be taken to represent the closest prior art for the evaluation of inventive step and that the subject-matter of claim 1 of the main request differs from document D3 on account of features (ii) and (iv). Specifically, document D3 does not disclose measuring a flow rate of the polyolefin pellets prepared in the extruder device (feature (ii)) and adjusting the flow rate of the polyolefin powder to the hopper in response to the measured flow rate of the polyolefin pellets (feature (iv)).

 - 2.2.2 The parties have different views regarding the technical effect of these distinguishing features and the objective technical problem. The board, for deciding on inventive step of the subject-matter of claim 1, has taken the broader objective technical problem formulated by the appellant, namely, to provide

an alternative process.

2.2.3 Obviousness of the solution over document D3 alone

The K-Tron Smart Flow Meter disclosed in document D3 (see document D3, page 10, final paragraph) is used to meter the material from load-out area silos into the rail car or hopper trucks. As put forward by the appellant, this flow meter is suitable for measuring the flow rate of pellets at other places in the system, too. The board points out that, in the context of the problem-solution approach applied for assessing inventive step, it is not a question of whether the skilled person could have measured the flow rate of pellets at other locations, but whether they would have done so (see Case Law, I.D.5.). The board agrees with the respondent that the person skilled in the art would not have been motivated to place this flow meter in the position defined in step (ii) of claim 1 of the main request.

Even if they had placed this flow meter in a position to measure the pellet flow rate prepared in the extruder, they would not have been prompted to use this value for adjusting the flow rate of the polyolefin powder to the hopper, as claimed by feature (iv).

Document D3 discloses the control of the polyolefin powder flow rate and its adjustments to maintain the desired flow rate (see document D3, page 5, third column, last paragraph and fourth column, last paragraph). There is no indication that other sensor signals might be used for this adjustment.

Document D3 uses a plant-wide central distribution control system to monitor and control a variety of

operations and functions within the entire process and multiple sub-control modules. Document D3 also discloses extensive control for the main polymer feed systems and the additive supply system as well as for the process downstream of the extruder (see document D3, pages 11 and 12). Despite all this, document D3 does not mention any problems with measuring the polyolefin powder feed rate and does not give any indication of adjusting the flow rate of the polyolefin powder to the hopper in response to the measured flow rate of the polyolefin pellets. Therefore, without an *ex post facto* approach the person skilled in the art would not have had any incentive to deviate from the solution disclosed in document D3.

2.2.4 Obviousness of the solution over document D3 in combination with document D7

The board concurs with the appellant's argument that the person skilled in the art would have considered the teaching of document D7 since it also related to a process for continuously preparing polymer pellets; however, the board is not convinced that the person skilled in the art would have found the necessary motivation in document D7 to measure the flow rate of the polyolefin pellets and to use this value for adjusting the flow rate of the polyolefin powder to the hopper of the extruder. Although document D7 discloses measuring the pellet flow rate according to feature (ii) of claim 1 of the main request (see document D7, page 21, first paragraph), it is primarily concerned with improving the process downstream of the extruder, i.e., a uniform conveying capacity of the discharge conveyor system (see document D7, page 3, last two paragraphs). With regard to the control process, the teaching of document D7 does not go beyond that of

document D3. None of these documents discloses feature (iv). Consequently, for the same reasons as mentioned above, the person skilled in the art would not have arrived at the subject-matter of claim 1 of the main request.

2.2.5 Obviousness of the solution over document D3 in combination with document D13

Regarding the obviousness of the claimed solution over document D3 in combination with document D13, the appellant cited the law of conservation of mass and pointed to document D13, which disclosed that the mass throughput through an extruder typically remained constant during an extrusion process, i.e., the input equalled the output. Based on this knowledge, in the appellant's view it was equivalent for the person skilled in the art to either measure the polyolefin powder feed rate into the extruder or measure the flow rate of the polyolefin pellets prepared in the extruder. Although this was common general knowledge, the board again refers to established case law (see Case Law, I.D.5.), according to which it is not sufficient to determine whether the skilled person could have done so, but whether they would have done so. In the absence of any pointer, the board shares the respondent's view that feature (iv) is not rendered obvious without hindsight knowledge of the invention.

2.3 Inventive step over document D7 in combination with document D3

2.3.1 The respondent argued that document D7 was not the closest prior art, as document D3 was considered closer; however, whether document D3 is closer in terms of its purpose or common structural features is not

sufficient to disregard any objection of lack of inventive step starting from document D7, particularly since the objection starting from document D7 in combination with document D3 was considered in the decision under appeal.

Hence, the board disagrees with the respondent's view that any objection starting from document D7 should be disregarded simply because document D7 is not the "closest prior art". In this context, reference is made to the case law (see Case Law, I.D.3.4.1), according to which each objection of lack of inventive step has to be assessed on its own merits, and a prior art disclosure cannot be excluded as a starting point merely because some seemingly more promising item of prior art exists.

Document D7 relates to pellet production. The subject-matter of claim 1 of the main request differs from document D7 in that the polyolefin composition comprises bimodal or multimodal polyolefins and on account of feature (iv), which involves adjusting the flow rate of the polyolefin powder to the hopper in response to the measured flow rate of the polyolefin pellets. These distinguishing features are undisputed.

- 2.3.2 The technical effect and the resulting objective technical problem were in dispute amongst the parties. The board concurs with the appellant's view that the first differentiating feature had no technical effect but was a routine choice. As for document D3 taken as the closest prior art, the board considers the objective technical problem solved by feature (iv) to be that of providing an alternative process.

2.3.3 Both parties acknowledge that document D3, among other documents, is concerned with bimodal polyolefins but does not disclose feature (iv). Therefore, the question of whether the subject-matter of claim 1 of the main request starting from document D7 involves an inventive step hinges on the same issues as when starting from document D3. None of these documents discloses feature (iv). The board points out that, without an *ex post facto* analysis, the person skilled in the art would not have arrived at the subject-matter of claim 1 of the main request.

2.4 For the above reasons, the board concurs with the opposition division (see decision under appeal, Reasons, point 6.1) and concludes that the subject-matter of claim 1 of the main request involves an inventive step.

3. Inventive-step objections relating to documents D4, D6, D9, D10, D11 and D12

Documents D4, D6, D9, D10, D11 and D12 were cited by the appellant without being differentiated and without providing specific considerations, for example, following the problem-solution approach. As a result, the requirements of Article 12(3) RPBA, which stipulates that the statement of grounds of appeal 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 requests, facts, objections, arguments and evidence relied on, were not met. In line with Article 12(5) RPBA, the board had discretion not to admit any part of a submission by a party which does not meet the requirements of Article 12(3) RPBA. In the circumstances of the present case, the board saw no

reasons - and nothing was presented by the appellant in this respect - as to why these objections, despite not meeting the requirements of Article 12(3) RPBA, should be taken into consideration.

Consequently, these objections were not admitted by the board in accordance with Article 12(5) RPBA.

4. Conclusion

The appellant has not established that the patent as amended according to the main request, and the invention to which it relates, fail to meet the requirements of the EPC. The appeal therefore has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

P. Lanz

Decision electronically authenticated