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Datasheet for the decision of 15 December 2017

Case Number: T 0335/13 - 3.3.08

Application Number: 02794065.9

Publication Number: 1448799

IPC: C12Q1/68, C12N15/10

Language of the proceedings: EN

Title of invention:
Methods of selective nucleic acid isolation

Patent Proprietor:
Life Technologies Corporation

Opponent:
König Szynka Tilmann von Renesse

Headword:
Nucleic acid isolation/LIFE TECHNOLOGIES

Relevant legal provisions:
EPC Art. 58, 83, 99(1), 100(b), 113(1), 114(2), 133(3), 134
EPC R. 41(2)(c), 76(2)(a), 139
RPBA Art. 12(4)

Keyword:
Main request - sufficiency of disclosure - (no)
Admissibility of auxiliary requests I to IV filed with appellant's statement setting out the grounds of appeal - (no)

Decisions cited:
G 0009/93, G 0003/97, G 0004/97, G 0001/12, J 0025/86, T 0870/92, T 0792/00, T 0063/06, T 0898/07, T 0361/08, T 0679/09

Catchword:

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Beschwerdekammern

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Case Number: T 0335/13 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 15 December 2017

Appellant: (Patent Proprietor)	Life Technologies Corporation 5823 Newton Drive Carlsbad, CA 92008 (US)
Representative:	Grund, Martin Grund Intellectual Property Group Patentanwalt und Solicitor PartG mbB Postfach 44 05 16 80754 München (DE)
Respondent: (Opponent)	König Szynka Tilmann von Renesse Patentanwälte Partnerschaft mbB Mönchenwerther Strasse 11 40545 Düsseldorf (DE)
Representative:	Roth, Carla König-Szynka-Tilmann-von Renesse Patentanwälte Partnerschaft mbB Postfach 11 09 46 40509 Düsseldorf (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 26 November 2012 concerning maintenance of the European Patent No. 1448799 in amended form.**

Composition of the Board:

Chairman B. Stolz
Members: P. Julià
D. Rogers

Summary of Facts and Submissions

I. The appeal of the patent proprietor (appellant) lies from an interlocutory decision of an opposition division maintaining European patent No. 1 448 799 in amended form. The opposition division considered that the opposition was admissible and that the main request (claims as granted) did not meet the requirements of Article 100(b) EPC (Article 83 EPC). The patent proprietor was considered not to be entitled to claim priority rights and auxiliary request 1 not to be inventive (Article 56 EPC). The patent was maintained on the basis of an auxiliary request 2. Both, auxiliary requests 1 and 2, were filed at the oral proceedings before the opposition division.

II. With the statement setting out the grounds of appeal, the appellant maintained its main request as before the opposition division (claims as granted) and filed auxiliary requests I to IV and new evidence.

III. In reply thereto, the opponent (respondent) filed new evidence and resubmitted Annex I originally filed on 4 May 2012. With reference to the decision T 679/09 of 13 November 2012, the respondent objected to the introduction of auxiliary requests I to IV into the proceedings, and requested to dismiss the appeal.

IV. The appellant submitted comments on the respondent's reply to the statement of grounds of appeal.

V. As an auxiliary measure, both parties requested oral proceedings.

VI. With the summons to oral proceedings, the board sent a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) informing the parties of its provisional, non-binding opinion on substantive matters. In the board's view, the opposition was admissible and the granted claims did not comply with Article 100(b) EPC (Article 83 EPC). The board was inclined not to admit auxiliary requests I to IV into the proceedings (Article 12(4) RPBA). Accordingly, the appeal was likely to be dismissed.

VII. Without submitting substantive arguments, the appellant informed the board that it did not intend to attend the scheduled oral proceedings and, accordingly, withdrew the request for oral proceedings.

VIII. The respondent informed the board of its intention to attend the scheduled oral proceedings but did not submit any further substantive argument.

IX. Oral proceedings took place on 15 December 2017 in the presence of the respondent.

X. Claims 1 and 6 as granted read as follows:

"1. A method of isolating genomic DNA from a biological sample comprising:

selectively binding genomic DNA to a solid phase by contacting the biological sample with the solid phase under conditions which selectively bind genomic DNA; separating the solid phase with the bound genomic DNA from an unbound portion of the biological sample; and isolating the genomic DNA from the solid phase, wherein the conditions which selectively bind genomic DNA comprise using a binding buffer comprising:

a alkaline pH; and
a large anion, wherein the large anion is at least as large as a bromide ion, wherein the alkaline pH is equal to or above 10.0, and wherein the solid phase is a siliceous material.

6. A method for isolating genomic DNA and RNA from a biological sample comprising:

selectively binding genomic DNA to a first solid phase by contacting the biological sample with the first solid phase under conditions which selectively bind genomic DNA; wherein the conditions which selectively bind DNA comprise using a binding buffer comprising:

an alkaline pH; and
a large anion, wherein the large anion is at least as large as a bromide ion and wherein the alkaline pH is equal to or above 10.0;
separating the first solid phase with the bound genomic DNA from a first unbound portion of the biological sample;
isolating the genomic DNA from the first solid phase; and isolating RNA from the first unbound portion of the biological sample, wherein the first solid phase is a siliceous material."

Claims 2 to 5 and claims 7 to 14 were directed to preferred embodiments of claims 1 and 6, respectively. Claims 15 and 17 were directed to a method of identifying genomic DNA in a biological sample (claim 15) and a method for identifying genomic DNA and RNA in a biological sample (claim 17) comprising essentially the steps of claims 1 and 6, respectively, with the additional steps reading:

"... identifying the genomic DNA bound to the solid phase, wherein the solid phase is a siliceous material." (claim 15);

"... identifying the genomic DNA bound to the solid phase; and
identifying the RNA from the first unbound portion of the biological sample, wherein the first solid phase is a siliceous material." (claim 17)

Claims 16 and 18 were directed to preferred embodiments of claims 15 and 17, respectively.

XI. The following documents are cited in this decision:

(3): EP-A1-0 969 090 (publication date: 5 January 2000);

(10a): Copy of official partnership company register (Partnerschaftsregister des Amtsgerichts Essen, Germany);

(10b): Excerpts from Partnerschaftgessellschaftgesetz (PartGG) and Handelsgesetzbuch (HGB);

(12): Experimental report,
Universitätsklinikum Münster,
Prof. Dr. rer. nat. S. Ludwig and
Dr. rer. nat. R. Seyer,
Münster, 4 May 2012, pages 1 to 9;

(14): Declaration by Ph.D. R.C. Conrad,
signed on 10 August 2012;

(18): Invention disclosure No. 4648, pages 1 to 53, signed 6 June 2000.

XII. The submissions of the appellant, insofar as they are relevant to the present decision, may be summarized as follows:

Admission of the opposition

The appellant has put forward two arguments against the admissibility of the opposition. These arguments may be summarised as follows:

The opponent could not be identified

The first argument was that the opponent could not be identified as required by Rule 76(2)(a) EPC and Rule 41(2)(c) EPC.

The opponent was a German partnership. The identity of the partners could change over time; hence there was a lack of certainty as to the identity of the people who, at any moment in time, actually constituted the partnership. Further, in box III of EPO Form 2300 (Notice of Opposition), the opponent had simply written its name and not, in addition, its "official designation", as required by Rule 76(2)(a) EPC and Rule 41(2)(c) EPC. The appellant's point here was that the opponent should have added after its name the words "Patentanwälte Partnerschaft". Thus, the Notice of Opposition was incomplete and further contributed to uncertainty as to the opponent's true identity.

A partnership acting as a straw man could not validly file an opposition

The second argument was that the opponent was acting as a "straw man", (the opposition had been filed on behalf of an undisclosed third party) and that this was one of the cases where this could lead to a circumvention of the law by abuse of process, and hence should not be permitted.

The decisions G 3/97 and G 4/97 (OJ EPO 1999, pages 245 and 270, respectively) made it clear that only natural persons could file oppositions in their own name as a straw man. These cases did not provide for a partnership to file straw man oppositions. If a partnership was able to file a straw man opposition then this could lead to a circumvention of the representation provisions of the EPC in that the partnership could be represented by a non-qualified employee in accordance with Article 133(3) EPC and this could be used to provide cover for non-qualified persons acting as *de facto* professional representatives.

Main request (Claims as granted)
Article 100(b) EPC

Although the elution buffer employed in document (12) (pH = 8.0, TE-buffer) was capable of eluting genomic DNA in binding experiments carried out at pH 8.0 - 11.0, this buffer did not necessarily perform in the same way in binding experiments carried out at higher pH values of 12.0, 13.0 and 14.0. The absence of eluted genomic DNA at higher pH values in document (12) was not conclusive because: i) at higher binding values of pH, less total genomic DNA was bound, and thus the method of document (12) did not produce sufficient yield and fell below the detection threshold; and ii) the elution conditions disclosed in the patent (pH 9.0,

Tris-buffer at 56°C and constant mixing for 5 min, and a subsequent elution step with 0.1 M NaOH) were not reproduced in the method of document (12). In this context, reference was made to the declaration of a technical expert in document (14) in which it was argued that the experiments of document (12) were performed under sub-optimal conditions.

XIII. The submissions of the respondent, insofar as they are relevant to the present decision, may be summarized as follows:

Admission of the opposition

Box III of Form 2300 of the notice of opposition established the legal entity "König Szynka Tilmann von Renesse" as a single opponent, and not multiple opponents (the Box in this form for multiple opponents was not checked). The only omission was the identification of the legal entity as a "Patentanwälte Partnerschaft" on said form. However, this was identifiable from the letter accompanying Form 2300. Thus, the requirements of Rules 76(2) and 41(2)(c) EPC were fulfilled (decision J 25/86, OJ EPO 1987, page 475, was cited in this context). According to the established case law, the correction of mistakes in the name of the opponent was allowed (*inter alia*, decisions T 870/92 of 8 August 1997 and T 898/07 of 30 April 2009). The facts underlying the decision G 1/12 (OJ EPO 2014, page 114) were not pertinent to those underlying the present case.

Moreover, according to Article 99 EPC in conjunction with Article 58 EPC, any person, or any body equivalent to a legal person under the law governing it, could give notice of opposition without specifying any

particular interest. The opponent/respondent was a German Partnerschaftsgesellchaft equivalent to a legal person under German law and thus, entitled to give notice of opposition. This was also explicitly confirmed in decision G 3/97 (*supra*) which stated that the only exception was where involvement of the opponent was to be regarded as a circumvention of the law by abuse of process. This was not the present case and no evidence had been provided to demonstrate the contrary.

Main request (Claims as granted)
Article 100(b) EPC

There was no general guidance in the patent how genomic DNA could be isolated at high pH values; there was no disclosure of binding conditions for high pH values in the patent nor any evidence on file showing that at high pH values these binding conditions were common general knowledge. On page 6, lines 30 and 31 of the patent, reference was made to pH = 12.0 as highest pH, but not higher values. However, this reference was not directly to genomic DNA but to DNA in general (since the patent application contemplated the isolation of the much more stable plasmid DNA). In document (18) (same inventors as the opposed patent), pH = 10.0 was disclosed as the highest possible pH value. The experimental results shown in document (12) supported the conclusion that it was not possible to isolate genomic DNA at pH values of 12.0, 13.0 or 14.0.

As regards the declaration in document (14) arguing on the use of sub-optimal conditions in the experiments of document (12), the results in Example 4 of the patent at pH = 10.0 (Figure 5e) were obtained under conditions that closely resembled those used at pH = 10.0 and 11.0

in the experimental set-up of document (12). This comparison showed that the conditions used in document (12) were, by far, better than those used in the patent (increased amount of recovered genomic DNA). There were several possible reasons that could explain such improvement (siliceous membrane *vs.* particles, optimized elution process for spin column, etc.). There was thus no reason for questioning the results obtained in document (12) for higher pH values of 12.0 to 14.0, namely no recovery of genomic DNA. These results were further supported by document (3) showing that, using siliceous particles and (binding and elution) conditions falling within the scope of the claims, no genomic DNA could be isolated at a pH above 12.0 (*inter alia*, column 6, paragraphs [0035] and [0036], column 13, Example 2). Reference was also made to the fact that at very high pH values of e.g. 12.0 or above, RNA was known to be rapidly degraded and accordingly could no longer be isolated.

Admission of auxiliary requests I to IV

Auxiliary requests I to IV corresponded to auxiliary requests I, III, V and VI, respectively, filed by the patent proprietor/appellant on 24 August 2012. During the opposition procedure, these requests were replaced by auxiliary requests 1 and 2 underlying the decision under appeal. The opposition division did not decide on these requests. Their reintroduction in appeal proceedings was not in line with the reasoning given in decision T 679/09 (*supra*).

XIV. The appellant (patent proprietor) requested in writing that the decision under appeal be set aside, that the opposition be found inadmissible, that the patent be maintained as granted, or alternatively that the patent

be maintained in the form of one of auxiliary requests I to IV, all filed under cover of a letter dated 8 April 2013.

XV. The respondent-opponent requested that the appeal be dismissed and that auxiliary requests I to IV not be admitted into the proceedings.

Reasons for the Decision

Article 113(1) EPC

1. In the communication pursuant to Article 15(1) RPBA attached to the summons to oral proceedings, the board informed the appellant that, for the reasons given, it considered the opposition to be admissible and that it had serious doubts whether the subject-matter of the main request (granted claims) was sufficiently disclosed (Article 100(b) EPC). The board also gave reasons why it was of the provisional opinion that auxiliary requests I to IV could not be admitted into the appeal proceedings and that, therefore, the appeal was likely to be dismissed (cf. point VI *supra*).

2. By its decision not to attend the scheduled oral proceedings and not to submit substantive arguments in reply to the board's communication, the appellant has chosen not to avail itself of the opportunity to comment or present its observations on the board's provisional opinion (Article 113(1) EPC).

3. The respondent did not submit any further substantive argument in reply to the board's communication (cf. point VIII *supra*) nor did it do so at the oral proceedings before the board.

4. Thus, the present decision is based on the same grounds and evidence on which the provisional, non-binding opinion of the board was based.

Admission of the opposition
The opponent cannot be identified

5. The opponent is a German partnership. Under German law such a partnership is considered to have its own legal personality. This does not now appear to be disputed and has been proved by document (10b) filed by the respondent-opponent. That the opponent has its own legal personality deals with the appellant's argument that a changing body of partners makes it difficult to identify the opponent.

6. The appellant further argues that by not including the words "Patentanwälte Partnerschaft" in box III of Form 2300 the opponent did not fulfil the requirements of Rule 76(2)(a) EPC and Rule 41(2)(c) EPC, and that this defect cannot be corrected at a later stage.

7. The appellant's own awareness that the words "Patentanwälte Partnerschaft" should go into box III of Form 2300 shows that this error has not prevented the identification of the opponent. Thus, there is an incorrect designation of the opponent which nevertheless suffices to indicate the opponent's identity. An error in a designation can be corrected at any moment (see "Case Law of the Boards of Appeal of the EPO", 8th edition 2016, IV.D.2.2.4, page 1015; Rule 139 EPC, decision T 870/92, *supra*, point 1.2, fifth paragraph of the Reasons, and decision T 898/07, *supra*, point 1.2 of the Reasons). In this case, as the opponent has in fact been identified, no purpose would

have been served by requiring, at a late stage of the proceedings, a purely formal correction of the Notice of Opposition.

A partnership cannot be a straw man

8. The appellant suggests that decision G 3/97 (*supra*) provides an exhaustive list of the types of parties that can be straw men and that a partnership is not found therein. The board finds no such claim to exhaustiveness in G 3/97, the language used throughout the decision being rather general, see the Order, point 1(a), "An opposition is not inadmissible purely because the person named as opponent ... is acting on behalf of a third party".

9. The appellant also objects that a partnership as a straw man opponent would have a tendency to introduce into proceedings those circumventions of the law by abuse of process that were found in decision G 3/97 (*supra*) as being a basis for not allowing a party to be an opponent on a straw man basis.

10. The circumvention identified by the appellant is that such a partnership could utilise the provisions of Article 133(3) EPC to use an employee of the partnership as the partnership's representative (and *de facto* as the representative of the true opponent), this employee having neither a legal qualification, nor being a professional representative within the meaning of Article 134 EPC.

11. The fact that the opponent is acting on behalf of a third party (a straw man arrangement) does not render the opposition inadmissible. It is however inadmissible if the opponent's involvement is to be regarded as

circumventing the law by abuse of process. Such circumvention of the law arises, in particular, if:

- the opponent is acting on behalf of the patent proprietor. According to decision G 9/93 (OJ 1994, page 891), a proprietor cannot oppose his own patent; opposition is an *inter partes* procedure, so the patentee and opponent must be different persons.

- if the opponent is acting on behalf of a client in the context of activities which, taken as a whole, are typically associated with professional representatives, without possessing the necessary qualifications. This would be the case if a person not entitled to act as a professional representative were acting on a client's behalf and carrying out all the activities typically carried out by professional representatives, while himself assuming the role of a party in order to circumvent the prohibition on his acting as a professional representative.

12. It is the second of these abuses that the appellant is suggesting arises, or may arise in this case. The boards must, of course be vigilant to guard against such an abuse. In this case the board is satisfied that, throughout these proceedings, the opponent-respondent has been represented by a professional representative, as provided for by Article 134 EPC. The board is therefore unable to identify any circumvention of the law by abuse of process in this case. Such circumvention must be found actually to exist at the time of assessing the admissibility of the opposition (see G 3/97, *supra*, Order, point 2, last sentence). A potential for such circumvention to come into existence in the future is not a basis for finding an opposition inadmissible.

13. Hence the board is of the view that the opposition is admissible.

Main request (claims as granted)
Article 100(b) EPC

14. It is not contested that the disclosure of the patent is sufficient for carrying out the claimed methods at pH = 10.0 (Examples of the patent), and there is also evidence on file showing that the patent teaches how to carry out these methods at pH = 11.0 as well (document (12)). It is, however, contested whether "the opposed patent provides sufficient disclosure to enable the claimed invention over the full scope of the claims", as stated on page 10, point 3.3 of the decision under appeal, with reference to the decisions T 63/06 of 24 June 2008 and T 792/00 of 2 July 2002. Indeed, the opposition division considered the claims as granted to contravene Article 83 EPC because, with reference to the results shown in document (12), there were serious doubts substantiated by verifiable facts that the claimed methods could be carried out at pH = 12.0, 13.0 and 14.0 (cf. pages 9 to 12, point 3, in particular page 12, point 3.4 of the decision under appeal).

15. The board notes that the methods of the independent claims 1, 6, 15 and 17 are not limited to the use of any particular siliceous material as the solid phase nor to any particular elution or binding conditions for selectively isolating genomic DNA, except for a binding buffer comprising an alkaline pH "equal to or above 10.0" and a large anion as defined in these claims (cf. point X *supra*). Thus, according to the established case law which requires the indication of all essential features of the invention in the claims (cf. "Case

Law", *supra*, II.A.3.2, page 272), neither a particular siliceous material (membrane, particle, bead, etc.) nor the binding and/or elution conditions are essential features of the invention.

16. The board further notes that there is no indication in the patent that a skilled person should differentiate between alkaline pH values of 10.0 or 11.0 and alkaline pH values of 12.0 or above. It is noted, however, that the patent refers to an alkaline pH range between 8.0 and 12.0, without specifying any particular elution conditions (cf. page 6, lines 28 to 32; page 7, lines 9 and 10). The results reported in the patent show an (expected) significant decrease in the binding of genomic DNA to silica at a pH value of 10.0. The effect of the salt composition (advantageous presence of large anions) on the pH sensitivity of this binding is understood to be at the core of the present invention (cf. page 10, Example 4, in particular paragraph [0085] and Figures 5a to 5k). Figure 7 of Example 6 of the patent is the sole figure to provide a result for the highest pH value (pH = 11.0) exemplified in the patent, even though this value is only extrapolated.

17. From the submissions of the parties and after reviewing the evidence on file, the board considers that the results reported in document (12) are the sole experimental evidence on file showing that the claimed methods can be successfully carried out at a pH value of pH = 11.0. These results, however, do not support that these methods can be carried out at higher pH values, in particular at pH = 12.0, 13.0 or 14.0. The conditions under which these experiments were carried out at pH below 12.0 have not been contested by the appellant, and the board sees no reason to do so either.

18. The appellant disputes the results of the experiments of document (12) carried out at high pH values (cf. point XII *supra*). However, in view of the comparison of the results obtained at low pH values between the conditions disclosed in the patent and those used in document (12) (far better), the board considers that there is no reason to expect a different result at higher pH values. Appellant's arguments based on document (14), namely a decreased binding of genomic DNA at high pH values (which was already known in the art; cf. paragraph [0085] of the patent, document (3)) and the alleged deficient elution conditions in the experiments of document (12), are not convincing and the board cannot follow them. The less so, since none of the steps/conditions suggested in document (14) for overcoming the alleged deficiencies of the experiments described in document (12) are features of the claimed methods, nor are they disclosed as necessary (essential) steps/conditions in the patent itself. In fact, there is no evidence on file to show that the steps/conditions referred to in document (14) may actually result in a recovery of genomic DNA at pH values of 12.0 or above. Thus, the board agrees with the respondent that, in the light of all the evidence on file, the burden of proof has shifted to the appellant (cf. page 30, fourth paragraph of respondent's reply to the statement of grounds of appeal). This proof or evidence thereof has not been put forward by the appellant in appeal proceedings nor is it present on file.

19. In the communication pursuant to Article 15(1) RPBA, the board noted that the findings of the opposition division as regards the binding buffer (0.1 M L-arginine) used in the experiments of document (12)

(cf. points 3.3.5, 3.3.5.2 and 3.3.5.3 of the decision under appeal) had not been contested by the appellant in its statement of grounds of appeal. The board noted a further objection raised under Article 83 EPC by the opponent/respondent in opposition proceedings, namely that RNA is degraded at high pH values (pH = 12.0 or above, in particular pH = 14.0), because it is not stable under alkaline conditions, and thus, that some of the claimed methods aiming at the isolation and/or identification of RNA do not work at such high pH (cf. page 9, point 3 of the decision under appeal, and page 30, first paragraph of respondent's reply to the statement of grounds of appeal). The board also noted that this objection had not been specifically addressed by the opposition division in the decision under appeal. Since none of the parties have submitted further substantive arguments in reply to the board's communication (cf. points VII and VIII *supra*), there is no need for the board to discuss these issues in further detail.

20. In view of all the above considerations, the board considers that the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC).

Admission of auxiliary requests I to IV

21. According to the case law of the Boards of Appeal (cf. "Case Law", *supra*, IV.E.4, page 1127), the function of an appeal is to give a judicial decision upon the correctness of a separate earlier decision taken by a department of first instance. Appeal proceedings are not an opportunity to re-run the proceedings before the first instance. Article 12(4) RPBA empowers the board

not to admit facts, evidence or requests which could have been presented in the first instance proceedings. This applies all the more to requests that were filed and subsequently withdrawn in the first instance proceedings (cf. *inter alia*, T 361/08 of 3 December 2009, point 13 of the Reasons, and T 679/09, *supra*, point 12 of the Reasons; both decisions from this board in different compositions).

22. Auxiliary requests I to IV are identical to auxiliary requests I, III, V and VI, respectively, which were filed by the patent proprietor/appellant during the opposition proceedings but not prosecuted at the oral proceedings before the opposition division. According to the "Minutes of the oral proceedings before the opposition division" issued on 6 November 2012 (hereinafter "the Minutes"), when the opposition division considered the main request (granted claims) to contravene Article 83 EPC, the patent proprietor/ appellant put forward a new auxiliary request 1 (cf. page 4, fifth paragraph of the Minutes). Likewise, when the opposition division considered this auxiliary request 1 not to be inventive, the patent proprietor/ appellant filed a new auxiliary request 2 (cf. page 8, last paragraph of the Minutes). Thereby, the patent proprietor/appellant prevented the opposition division from taking a decision on the previously filed auxiliary requests I, III, V and VI. The re-filing of these (non-examined) auxiliary requests in appeal proceedings is thus not in line with the established case law referred to above.

23. In its communication pursuant to Article 15(1) RPBA, the board noted that the appellant had provided no reasons in the statement of grounds of appeal to justify and/or explain the reintroduction of these

auxiliary requests at this late stage of the proceedings. Nor have any reasons been put forward by the appellant in reply to point 20 of the board's communication indicating that the board intended to hear the appellant in this respect (cf. points VI and VII *supra*).

24. Under these circumstances, the board considers it appropriate to exercise its discretion under Article 114(2) EPC governed by the principles laid down in Article 12(4) RPBA and not to admit auxiliary requests I to IV into the appeal proceedings.

Conclusion

25. In the communication pursuant to Article 15(1) RPBA, the board noted that the auxiliary request 1 underlying the decision under appeal had not been filed by the appellant with the statement setting out its grounds of appeal. This auxiliary request was thus not part of the appeal proceedings. Accordingly, the appellant was informed that, if the board decided against the appellant on the main request and auxiliary requests I to IV were not admitted into the appeal proceedings, in line with the provisional, non-binding opinion given therein, the appeal would have to be dismissed and the patent would be maintained as amended by the opposition division (cf. "Case Law", *supra*, IV.E.3.1.5, page 1114).

26. As stated above, the appellant has not replied in substance to the board's communication and, since the board sees no reason to deviate from its provisional, non-binding opinion and as none of the appellant's requests succeeds, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Malécot-Grob B. Stolz

Decision electronically authenticated