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**Datasheet for the decision  
of 21 June 2017**

**Case Number:** T 1635/13 - 3.3.03

**Application Number:** 02805022.7

**Publication Number:** 1456259

**IPC:** C08F20/06, A61L15/00

**Language of the proceedings:** EN

**Title of invention:**

ACRYLIC ACID COMPOSITION AND ITS PRODUCTION PROCESS, AND  
PROCESS FOR PRODUCING WATER-ABSORBENT RESIN USING THIS ACRYLIC  
ACID COMPOSITION, AND WATER-ABSORBENT RESIN

**Patent Proprietor:**

NIPPON SHOKUBAI CO., LTD.

**Opponent:**

Evonik Degussa GmbH

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)

EPC R. 106

**Keyword:**

Amendments - allowable (no) (Main Request, Auxiliary Requests I-XI)

Late-filed auxiliary requests - admitted (no)

Objection pursuant to Rule 106 EPC- dismissed

**Decisions cited:**

R 0003/09, R 0012/09, R 0015/09, R 0016/09, R 0017/12,

R 0015/13

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1635/13 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 21 June 2017**

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**Representative:** Evonik Industries GmbH  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
24 May 2013 concerning maintenance of the  
European Patent No. 1456259 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** M. C. Gordon  
C. Brandt

## **Summary of Facts and Submissions**

I. The appeals of the patent proprietor (Appellant I) and of the opponent (Appellant II) lie from the interlocutory decision of the opposition division posted on 24 May 2013 according to which it was held that European patent number 1 456 259 could be maintained in amended form on the basis of the second auxiliary request, filed during the oral proceedings before the opposition division.

II. The application as filed had 17 claims whereby claims 1, 2 and 16 read as follows:

"1. A process for producing a water-absorbent resin, which is a process for producing a crosslinked water-absorbent resin by polymerizing a monomer component including acrylic acid and/or its salt in a major proportion of the monomer component wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene and/or propane, with the process being characterized by comprising the steps of preparing the monomer component from an acrylic acid composition that includes the unneutralized acrylic acid and a methoxyphenol and has a methoxyphenol content of 10 to 160 ppm by weight (based on the weight of the unneutralized acrylic acid); and then carrying out radical and/or ultraviolet polymerization of the resultant monomer component.

2. A process for producing a water-absorbent resin, which is a process for producing a crosslinked water-absorbent resin by polymerizing a monomer component including acrylic acid and/or its salt in a major proportion wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene

and/or propane,  
the process being characterized by comprising the steps of: preparing the monomer component from an acrylic acid composition that includes the unneutralized acrylic acid; and then carrying out radical and/or ultraviolet polymerization of the resultant monomer component in the presence of a methoxyphenol in an amount of 10 to 160 ppm by weight relative to the weight of acrylic acid and/or its salt (based on the weight in terms of the unneutralized acrylic acid) in the monomer component.

16. An acrylic acid composition, comprising unneutralized acrylic acid and being used in producing a crosslinked water-absorbent resin by polymerizing a monomer component including acrylic acid and/or its salt in a major proportion wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene and/or propane,  
with the acrylic acid composition being characterized by having a protoanemonin and/or furfural content of not more than 20 ppm by weight (relative to the unneutralized acrylic acid) and a methoxyphenol content of 10 to 160 ppm by weight relative to the unneutralized acrylic acid."

III. The patent was granted with a set of 16 claims, whereby claims 1 and 14 read as follows, differences compared to claims 1 and 16 as originally filed being indicated in **bold**, deletions in ~~striketrough~~:

"1. A process for producing a water-absorbent resin, which is a process for producing a crosslinked water-absorbent resin by polymerizing **and crosslinking** a monomer component including acrylic acid and/or its salt in a major proportion of the monomer component

~~wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene and/or propane,~~  
with the process being characterized by comprising the steps of: preparing the monomer component from an acrylic acid composition that includes the unneutralized acrylic acid and a methoxyphenol and has a methoxyphenol content of 10 to 160 ppm by weight **relative to the weight resulting from the conversion of the total weight of the acrylic acid and/or its salt into the unneutralized acrylic acid** ~~(based on the weight of the unneutralized acrylic acid)~~; and then carrying out radical and/or ultraviolet polymerization of the resultant monomer component.

14. An acrylic acid composition, comprising unneutralized acrylic acid and being used in producing a crosslinked water-absorbent resin by polymerizing **and crosslinking** a monomer component including acrylic acid and/or its salt in a major proportion ~~wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene and/or propane,~~ with the acrylic acid composition being characterized by having a ~~protoanemonin and/or furfural content of not more than 20 ppm by weight (relative to the unneutralized acrylic acid)~~ and a methoxyphenol content of 10 to 160 ppm by weight relative to the **weight resulting from the conversion of the total weight of the acrylic acid and/or its salt into the** unneutralized acrylic acid."

- IV. A notice of opposition was filed in which revocation of the patent in its entirety was requested.
- V. The decision of the opposition division was based on the claims of the patent as granted as the main request

and two sets of claims forming first and second auxiliary requests, submitted during the oral proceedings before the opposition division and corresponding to a renumbering of requests previously submitted in the written proceedings (see Facts and Submissions, section 9.3).

According to the decision, the main request (claims of the patent as granted) met the requirements of Article 123(2) and of sufficiency of disclosure but lacked novelty.

The first auxiliary request was held to meet the requirement of novelty but to lack an inventive step.

The second auxiliary request was held to meet the requirements of the EPC.

VI. Both parties appealed against the decision.

VII. Appellant I together with its statement of grounds of appeal filed auxiliary requests I-XI corresponding to requests already filed in opposition proceedings. The patent as granted was maintained as main request. In the reply to the statement of grounds of appeal of Appellant II and a further written submission, Appellant I took position on the objections with respect to the patent in the form as maintained by the opposition division. In particular it was argued that the requirements of Article 123(2) EPC were met by the claims of the patent as granted as well as in the form as approved by the opposition division.

In a written submission following issue of the summons to the oral proceedings Appellant I filed three amended sets of claims as auxiliary requests I-III, the

previously filed auxiliary requests I-III being redesignated auxiliary requests Ia-IIIa.

All requests included as claim 1 a process claim corresponding to granted claim 1 and including further limitations. In all requests the definition of the basis for the methoxyphenol content in the acrylic composition as set out in the claims of the patent as granted was retained.

- VIII. Appellant II in its statement of grounds of appeal took position on the set of claims as maintained by the opposition division, *inter alia* arguing that the requirements of Article 123(2) EPC were not satisfied in view of the expression "relative to the weight resulting from the conversion of the total weight of the acrylic acid and/or its salt into the unneutralized acrylic acid".

In its reply to the statement of grounds of appeal of Appellant I no further detailed arguments were presented, although the objection in respect of Article 123(2) EPC among others was indicated as being maintained for all sets of claims.

- IX. The Board issued a summons to attend oral proceedings and a communication setting out its preliminary view of the case. According to the communication, *inter alia* the Board was of the provisional opinion that the requirements of Article 123(2) EPC were satisfied by the main request.
- X. Appellant II filed a written submission taking issue *inter alia* with the preliminary view of the Board with respect to Article 123(2) EPC. It was further argued



that the newly filed auxiliary requests I-III should not be admitted to the procedure.

XI. Oral proceedings were held before the Board on 21 June 2017.

During the course of the oral proceedings following discussion of the requirements of Article 123(2) EPC for the main request two further requests numbered XII and XIII were submitted.

Claim 1 of the auxiliary request XII read as follows, differences compared to claim 1 as originally filed being indicated as above:

"A process for producing a water-absorbent resin, which is a process for producing a crosslinked water-absorbent resin by polymerizing **and crosslinking** a monomer component including acrylic acid and/or its salt in a major proportion of the monomer component ~~wherein the acrylic acid is a product obtained by catalytic gas phase oxidation of propylene and/or propane,~~

with the process being characterized **by the steps of:** ~~comprising the steps of~~ preparing the monomer component from an acrylic acid composition that includes the unneutralized acrylic acid and a methoxyphenol and has a methoxyphenol content of ~~10~~ **20** to 160 ppm by weight **relative to the weight resulting from the conversion of the total weight of the acrylic acid into the unneutralized acrylic acid** ~~(based on the weight of the unneutralized acrylic acid);~~ and then carrying out radical and/or ultraviolet polymerization of the resultant monomer component, **wherein in the step of preparing the monomer component, the acrylic acid composition has a protoanemonin content of not more**

**than 20 ppm by weight (relative to the monomers)."**

Claim 1 of auxiliary request XIII differed from claim 1 of auxiliary request XII in that the end of the claim did not include the amendment relating to the protoanemonin content and read as follows:

**"[polymerization of the resultant monomer component];  
within 1 hour after the polymerization, starting to dry  
the resultant polymer;  
and then forming a powder having a weight-average  
particle diameter in the range of 300 to 500  $\mu\text{m}$  wherein  
the quantity of particles having particle diameters in  
the range 850 to 150  $\mu\text{m}$  is not less than 95 wt %."**

XII. The arguments of Appellant II as far as relevant to the present decision can be summarised as follows:

(a) Main request - Article 123(2) EPC

Claims 1 and 2 of the application as originally filed related to two distinct processes. Operative claim 1 combined aspects of both of these, in particular it included the step of preparing the monomer component from an acrylic acid composition with a specific methoxyphenol content as in original claim 1, but defined the basis for the calculation of the methoxyphenol content as specified in original claim 2 i.e. for the content of methoxyphenol in the presence of which polymerisation was carried out. There was however no basis for this combination in the application as originally filed. The description at pages 8-10 reflected and confirmed the distinction between the two processes as was shown by the explicit citation of part of the wording of claim 2 in quotation

marks in the passage on page 10, lines 7-15.

This objection applied to all the requests on file at the beginning of the oral proceedings.

(b) Admittance of the auxiliary requests XII and XIII

The newly filed requests, apart from being very late, presented new combinations of features arising from additions of some features and deletions of alternatives. Such combinations had hitherto not been present in the procedure. The amendments made in any case did not overcome the defects identified with respect to Article 123(2) EPC and gave rise to a clarity issue relating to the interpretation of the amended basis for the methoxyphenol content. The claims also encompassed new possibilities depending on how the amount of acrylic acid was calculated meaning that there was a deficiency with respect to Article 123(3) EPC. Furthermore auxiliary request XII was based on a request - auxiliary request III - which itself was late filed, the admissibility of which had been challenged in written proceedings.

XIII. The arguments of Appellant I as far as relevant to the present decision can be summarised as follows:

(a) Main request - Article 123(2) EPC

(b)

The literal basis for the wording relating to the basis for calculation of the amount of methoxyphenol including the conversion of acrylic acid salt to unneutralized acrylic acid, was provided by page 10, lines 7-15 of the application

as originally filed, which passage was of a general nature and not restricted to the subject-matter of either of claims 1 or 2. The preceding pages 8-10 discussed each of the processes according to claim 1 or 2 separately. However, the specific discussion of the process of claim 2 ceased at page 10, line 6 and the following passages were of a general nature. The distinction created by the opponent between the processes of claims 1 and 2 was artificial - both claims related to the same process, only the order of the steps differed. Thus according to claim 1 as originally filed the methoxyphenol content of the acrylic acid was adjusted, the monomer component was prepared from this composition by adding the crosslinker and other components including the neutraliser for the acrylic acid. Claim 2 as originally filed related to a process in which the acrylic acid was converted into the monomer component by adding an alkaline agent (for neutralisation), comonomer if necessary, the crosslinker and the methoxyphenol content adjusted. In both claim 1 and claim 2 of the application the same methoxyphenol content was required and the amount thereof was based on unneutralised acrylic acid. In both cases unneutralised acrylic acid was contained in the acrylic acid composition, but the presence of salt was not excluded. The application as filed and the definitions in claims 1 and 2 covered both neutralised and unneutralised acrylic acid as components for the polymerisation. From the presence of two forms of the acrylic acid component it was inherent that the content of methoxyphenol had to be calculated on the total amount of acrylic acid treated as free acid in both processes regardless of the form in which it was actually

present (salt or free acid).

(c) Admittance of auxiliary requests XII and XIII

Auxiliary request XII corresponded to auxiliary request III as filed in the submission made in preparation for the oral proceedings, in response to the communication of the board. However, auxiliary request XII now specified that the total weight of acrylic acid was calculated on the basis of conversion into unneutralised acrylic acid. The specified amount of methoxyphenol had already been present in auxiliary request IV. Furthermore one of the impurities of which the maximum amount was defined had been deleted.

Auxiliary request XIII essentially corresponded to auxiliary request VIII as filed with the statement of grounds of appeal with the same amendment with respect to the basis for calculation of the amount of acrylic acid as for auxiliary request XII.

Since the new requests essentially corresponded to claim sets which had already been submitted during the appeal procedure they should be admitted to the procedure. The amendments made were directed to addressing the concerns of the opponent with respect to the basis for calculation of the content of methoxyphenol in terms of the amount of acrylic acid and to this end clarified that the basis was unneutralised acrylic acid.

(d) In view of the positive tenor of the preliminary opinion of the board there had been no reason to file such requests earlier in the procedure. The amendments made constituted a restriction of the

claims since of the three possibilities defined in the original claims by the wording "acrylic acid and/or its salt" only one remained, namely acrylic acid.

- (e) The change of mind of the Board was essentially based on the most recent submissions of the opponent made around a week prior to the oral proceedings and during the oral proceedings. Under these circumstances a fair hearing, according the patent proprietor the right to be heard, required that the claims be admitted.

XIV. Appellant I requested that the decision under appeal be set aside and the opposition be rejected, i.e. the patent be maintained as granted, alternatively, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of any of auxiliary requests I, Ia, II, IIa, III, IIIa, IV to XIII in that order, whereby auxiliary requests designated I, Ia, II, IIa, III, IIIa were filed with letter dated 31 May 2017, auxiliary requests IV to XI were filed with the statement setting out the grounds of appeal and auxiliary requests XII and XIII were filed during the oral proceedings on 21 June 2017.

Appellant II requested that the decision under appeal be set aside and that the European patent No. 1 456 259 be revoked. It was further requested that auxiliary requests I to III and XII and XIII not be admitted into the proceedings.

## Reasons for the Decision

1. Main request - Article 123(2) EPC
  - 1.1 Claim 1 of the main request is directed to a process for preparing a water-absorbent resin wherein the monomer component is prepared from an acrylic acid composition that includes unneutralised acrylic acid and a methoxyphenol in an amount of 10-160 ppm whereby the content of the methoxyphenol is calculated on the basis of the weight resulting from the conversion of the total weight of the acrylic acid and/or its salt into the unneutralised acrylic acid, which means that any salt of acrylic acid present is treated as acrylic acid, i.e. only the weight of acrylic acid is taken into account, discounting the weight of the counterion.
  - 1.2 The application as originally filed contained three independent claims directed to processes for producing a water absorbent resin whereby claims 1 and 2 are relevant for the present decision.
    - 1.2.1 Claim 1 was directed to a process for producing a water-absorbent resin by polymerising a monomer component containing acrylic acid and/or its salt, and was characterised *inter alia* by the step of preparing the monomer component from an acrylic acid composition that included unneutralised acrylic acid and a methoxyphenol, whereby the content of the methoxyphenol was based on the weight of the unneutralised acrylic acid.

Thus in original claim 1 although the monomer composition could contain both unneutralised acrylic acid and its salt by virtue of the word "includes", the amount of methoxyphenol in the composition was based

only on the weight of unneutralised acrylic acid. In the wording of claim 1 as originally filed and in contrast to operative claim 1 the amount of salt present was not taken into account in any manner in the calculation of the amount of methoxyphenol. The same disclosure is to be found in the description of the application as originally filed at page 8, line 20-27 where it is further clarified that solid content of acrylic acid is meant. There is no indication in this part of the description that salts of acrylic acid are to be taken into account in the calculation of the amount of methoxyphenol. The first two paragraphs on page 9 providing more information about the amount of methoxyphenol and the consequence of varying it do not provide any further information about the basis for the calculation of the amount thereof.

- 1.2.2 Claim 2 of the application as originally filed was also directed to a process for producing a water-absorbent resin involving polymerising acrylic acid and/or its salt. The process is characterised by preparing the monomer from an acrylic acid composition that includes unneutralised acrylic acid and carrying out polymerisation of the resulting monomer **in the presence** (Board's emphasis) of a methoxyphenol in an amount of 10-160 ppm relative to the weight of acrylic acid and/or its salt (based on the weight in terms of unneutralised acrylic acid).
- 1.2.3 Thus compared to claim 1 of the application as filed two differences can be identified with respect to the definition of the amount of methoxyphenol in claim 2.

Firstly, in claim 2 the amount of methoxyphenol specified is that present during the polymerisation whereas in claim 1 the amount specified is that in the



starting acrylic acid composition, no restriction being placed of the amount present during the polymerisation.

Furthermore, according to claim 2 in calculating the amount of methoxyphenol both unneutralised acrylic acid and any salt present is to be taken into account, whereby the amount of the salt is calculated based on the weight in terms of the unneutralised acrylic acid.

- 1.2.4 The same information is to be found at page 9, line 25- page 10, line 2 of the application as filed. The following paragraph (page 10, lines 3-6) discusses the consequences of employing amounts of methoxyphenol lying outside the claimed range and states that this is the same as in the situation discussed with respect to the subject-matter of claim 1.

The following section of page 10, lines 7-15, explicitly referred to by Appellant I (see section XIII, above), explains that the weight of acrylic acid to be taken into account in calculating the amount of methoxyphenol is the weight resulting from conversion of the total weight of acrylic acid and its salt into the unneutralised acrylic acid. This is then elucidated further with respect to sodium acrylate.

- 1.2.5 The question arose as to whether, as argued by Appellant I, this passage of the description was general, i.e. applied to the process of both claims 1 and 2 of the application as originally filed or only to claim 2.

Considering that at page 10, line 8 of the application as originally filed the wording "methoxyphenol of an amount of 10 to 160 ppm by weight relative to the acrylic acid and/or its salt" is enclosed in quotation

marks and that this is *verbatim* the wording of claim 2 and considering further that claim 1 of the application as originally filed contains no reference to salts of acrylic acid in the definition of the amount of methoxyphenol, it has to be concluded that the passage at page 10, line 7-15 relates solely and exclusively to the subject-matter of claim 2 and is not of a general nature.

- 1.3 The above analysis of original claims 1 and 2 and the corresponding parts of the description shows firstly that each of these claims relates to separate processes with different and distinct definitions in particular in terms of the basis for the amount of methoxyphenol. The analysis further establishes that operative claim 1 contains a combination of features which are taken from both claim 1 and claim 2 of the application as originally filed.

This can in particular be seen from the presentation of the differences between claim 1 of the patent as granted (present main request) and claim 1 of the application as originally filed in section III, above. The wording in the final part of the claim **"resulting from the conversion of the total weight of the acrylic acid and/or its salt into the unneutralized acrylic acid"** is derived from the aforementioned passage on page 10 of the application as originally filed elucidating the process of claim 2 as originally filed.

Thus the feature of operative claim 1 relating to the amount of methoxyphenol being based on acrylic acid and acrylic acid salt (calculated as free acrylic acid) was originally disclosed only in combination with a process in which the polymerisation was required to be carried

out in the presence of a defined amount of methoxyphenol, which amount was based on the amount of acrylic acid and salt thereof calculated as acrylic acid. This definition of the amount of methoxyphenol was however not disclosed in connection with a process which was characterised - as in original claim 1 - by preparing a monomer component from an acrylic acid composition that contained acrylic acid and an amount of methoxyphenol based on the weight of the unneutralised acrylic acid only, whereby - in contrast to claim 2 - the amount of methoxyphenol present during the polymerisation was not defined.

Consequently the features of operative claim 1 are derived from two distinct and alternative embodiments of the application as filed for the combination of which in a single process there is no basis in the claims or description of the application as originally filed.

Claim 1 of the main request therefore does not meet the requirements of Article 123(2) EPC.

The same objection arises with respect to claim 14 of the main request directed to the acrylic acid composition wherein the amount of methoxyphenol is defined in the same terms as in claim 1.

- 1.4 In the light of this conclusion it is not necessary to provide detailed reasons concerning the allowability of the further amendments to claim 1 compared to claim 1 of the application as originally filed (deletion of the definition of the manner in which the acrylic acid was obtained and the introduction of the step of crosslinking), although for the sake of completeness it is noted that the board was satisfied that these

amendments were allowable pursuant to Article 123(2) EPC.

2. Auxiliary requests I, Ia, II, IIa, III, IIIa and IV-XI

Since claim 1 of all these requests corresponds to granted claim 1 with further limitations and employs the same definition of the content of methoxyphenol, i.e. based on conversion of the total weight of acrylic acid and/or its salt into unneutralised acrylic acid, the above conclusion applies to all these requests with the consequence that the requirements of Article 123(2) EPC are not satisfied.

In view of this conclusion, the board found it superfluous to decide on the admittance of auxiliary requests I, II and III.

3. Auxiliary requests XII and XIII - admittance

3.1 In claim 1 according to auxiliary requests XII and XIII the amendment was made *inter alia* with respect to granted claim 1 that the weight used as basis for the methoxyphenol content was defined as resulting "from the conversion of the total weight of the acrylic acid into the unneutralized acrylic acid" thereby deleting the words "and/or its salt".

3.2 These requests were filed at the oral proceedings after discussion of the allowability of the main request in view of the objections under Article 123(2) EPC, after deliberation of the board on the issue and before announcement of the conclusion reached by the board, i.e. at the latest possible point in time during the proceedings. No reason was given for the late filing other than the fact that the preliminary opinion of the

Board had been in favour of Appellant I and the change of mind was due to the most recent submissions of Appellant II.

3.3 The Board considers that the amendment does not *prima facie* solve the critical issue under Article 123(2) EPC (the amended wording only makes sense if the acrylic acid to be converted still includes the salt and not only the unneutralised acid, for which no conversion is necessary) and potentially raises other issues under Article 84 EPC (what does the amendment change with respect to the granted wording?) and Article 123(3) EPC (if the basis for calculation is now different, was it included in the previous wording of granted claim 1?) with which the opposing party and the Board were confronted for the first time at the oral proceedings.

3.4 Moreover, the Board does not see any justification for the late filing of the requests, since they are intended to overcome an objection which had already been present in opposition proceedings as well as in the statement of grounds of Appellant II (see pages 7 and 8). The fact that following the preliminary opinion of the Board Appellant II expressed its reasons why it maintained the objection is a normal course of action, which did not change the objection, which, under evaluation of the submissions of Appellant II, remained exactly the same as set out in the statement of grounds.

3.5 In respect of the point in time in which the requests were filed it does not make any difference whether the preliminary opinion of the Board on the issue was positive or negative.

3.6 As clearly set out and emphasised in the Board's communication (annex to the summons), such a communication expresses the "preliminary and non-binding" opinion of the Board to streamline and prepare the oral proceedings. Therefore it is self-evident that the Board can come to a different evaluation of the facts and submissions during the subsequent proceedings, in particular during the oral proceedings, for whatever reasons and that such a different evaluation is in itself not a sufficient reason for admitting subsequently filed requests, in particular when it simply results in following a position previously expressed by one of the parties. Moreover, the Enlarged Board of Appeal (EBA) has expressly stated that discrepancies between the Board's provisional opinion expressed in a communication preparing oral proceedings and its analysis in its final decision is in itself not a fundamental procedural defect (R 3/09, paragraph 5.1 of the reasons).

3.7 The EBA also held that parties are obliged to participate actively in the appeal proceedings (R 15/09, paragraph 4.2 of the reasons; R 12/09 of 15 January 2010, paragraph 11 of the reasons) and that it is for them and their representatives to submit the necessary arguments and requests to support their case on their own initiative and at the appropriate time (R 17/12, paragraph 2.11 of the reasons, R 15/13, paragraph 18 of the reasons). Late submissions may therefore not be excused by waiting for a communication expressing the Board's preliminary opinion and taking this opinion as cause for undertaking or omitting further procedural steps, even more since under the current legal situation the issuance of an interlocutory communication is not compulsory for the Boards of appeal and not issuing a communication does

not constitute a violation of the right to be heard (R 16/09, paragraph 2.2.17 of the reasons).

3.8 In view of these reasons the Board finds it appropriate to exercise its discretion according to Article 13(1) RPBA by not admitting auxiliary requests XII and XIII into the proceedings.

3.9 After the Chairman had announced the decision not to admit auxiliary requests XII and XIII, into the proceedings, Appellant I raised an objection according to Rule 106 EPC with respect to that decision. The objection was dismissed by the Board as it considered that the decision not to admit auxiliary requests XII and XIII was a proper exercise of its discretion in view of the clear reasons given above and could therefore not constitute a violation of the right to be heard.

**Order**

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

1. The decision under appeal is set aside.
2. European patent No. 1456259 is revoked.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated