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Datasheet for the decision of 30 June 2021

Case Number: T 1476/15 - 3.3.08

Application Number: 10004394.2

Publication Number: 2218776

IPC: C12N5/02, C12N7/02, C12N1/16, C12N1/20

Language of the proceedings: EN

Title of invention:
Animal protein-free media for cultivation of cells

Patent Proprietor:
Baxalta Incorporated
Baxalta GmbH

Opponent:
F.Hoffmann-La Roche AG

Headword:
Media for cell cultivation/BAXALTA

Relevant legal provisions:
EPC Art. 100(c)

Keyword:
Amendments - added subject-matter (yes)

Decisions cited:
T 0783/09, T 1253/07, T 0296/96, T 0823/96, T 0860/00, T 0068/99, T 1621/16, T 1511/07, G 0002/10, T 2273/10, T 0149/18, T 0347/17, T 1731/18

Catchword:

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Beschwerdekammern

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Case Number: T 1476/15 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 30 June 2021

Appellant: (Patent Proprietor 1)	Baxalta Incorporated 1200 Lakeside Drive Bannockburn, IL 60015 (US)
Appellant: (Patent Proprietor 2)	Baxalta GmbH Thurgauerstrasse 130 8152 Glattpark (Opfikon) (CH)
Representative:	Muncke, N. Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Respondent: (Opponent)	F.Hoffmann-La Roche AG 124 Grenzacherstrasse 4070 Basel (CH)
Representative:	Jaenichen, H.-R. Müller, S. Vossius & Partner Patentanwälte Rechtsanwälte mbB Siebertstrasse 3 81675 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 12 May 2015 revoking European patent No. 2218776 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	B. Stolz
Members:	D. Pilat
	D. Rogers

Summary of Facts and Submissions

I. European patent No. 2 218 776 based on European patent application No. 10004394.2 -a divisional application of the earlier European patent application No. 05798575.6 (EP 1 805 298) (hereinafter "the parent application" filed under the Patent Cooperation Treaty on 12 October 2005 and published as WO 2006/045438 on the 4 May 2006) - was opposed on the grounds of Articles 100(a), in conjunction with Articles 54 and 56 EPC, 100(b) and (c) EPC. An opposition division considered that the main request and 29 Auxiliary Requests (ARs) before it infringed Article 123(2) EPC. Auxiliary request AR I, submitted during oral proceedings, was not admitted.

II. The patentee (appellant) lodged an appeal against the decision of the opposition division to revoke the patent. With its statement of grounds of appeal, appellant submitted a main request and 29 auxiliary requests.

III. Opponent (respondent) replied to the statement of grounds of appeal and filed Exhibit A. In reply to the respondent's response, appellant filed further submissions.

IV. Oral proceedings took place on 30 June 2021. At the end of the proceedings, the appellant withdrew all auxiliary requests.

V. Claim 1 according to the main request read as follows:

"1. An animal protein-free cell culture medium, comprising at least one polyamine and at least one

protein hydrolysate derived from the group consisting of plants and yeast, wherein the polyamine is present in the culture medium in a concentration ranging from 2 to 8 mg/L and the protein hydrolysate is present in a concentration ranging from 0.05 % (w/v) to 0.5 % (w/v)."

Independent claims 6, 9 and 13 relate to a method for cultivating cells, a method for expressing a target protein and a method for producing a virus, respectively, in which the animal protein-free cell culture medium of claim 1 is used.

Claims 2 to 5 and 7, 8 and 10 to 12 and claims 14 to 16 were directed to preferred embodiments of claims 1, 6, 9 and 13, respectively.

VI. The submissions made by the **appellant**, insofar as relevant to the present decision, may be summarized as follows:

Main request (claims 1-16 as granted)
Articles 100(c) EPC

The parent application claim 1 and item 1 in [0078] of the patent application reads:

> "1. An animal protein-free cell culture medium, comprising at least one polyamine and at least one protein hydrolysate derived from the group consisting of plants and yeast."

Paragraphs [0031] and [0032] of the parent and of the patent application read:

"*In a preferred embodiment of the animal protein-free cell culture medium the concentration of the polyamine is present in a concentration ranging from about 0.5 mg/L to about 30 mg/L, more preferably from about 0.5 mg/L to about 20 mg/L, even more preferably from about 0.5 mg/L to about 10 mg/L, more preferably from about 2 mg/L to about 8 mg/L, most preferably from about 2 to about 5 mg/L in the medium.*"

and

"*In a preferred embodiment the total concentration of the plant- and/or yeast-derived protein hydrolysate in the animal protein-free cell culture medium is about 0.05 % to about 5 % (w/v), more preferably about 0.05 % to about 2 % (w/v), more preferably about 0.05 % to about 1 % (w/v), more preferably about 0.05 % to about 0.5 % (w/v), most preferably about 0.05 % to about 0.25 % (w/v).*"

Paragraph [0038] of both the parent and patent applications disclosed directly and unambiguously an animal protein-free cell culture medium in which the concentration range of polyamine given in granted claim 1 and the concentration range of protein hydrolysate given in granted claim 1 are both disclosed as "more preferred" embodiments:

"*In a further preferred embodiment of the animal protein-free cell culture medium the polyamine is present in a concentration ranging from about 0.5 to about 30 mg/L, more preferably from about 0.5 mg/L to about 20 mg/L, even more preferably from about 0.5 mg/L to about 10 mg/L, more preferably from about 2 mg/L to about 8 mg/L, most preferably*

from about 2 to about 5 mg/L in the medium, and the plant- and/or yeast-derived protein hydrolysate is present in the medium in a concentration ranging from about 0.05 % to about 5 % (w/v), more preferably about 0.05 % to about 2 % (w/v), more preferably about 0.05 % to about 1 % (w/v), more preferably about 0.05 % to about 0.5 % (w/v), most preferably about 0.05 % to about 0.25 % (w/v)."

The concentration ranges of both the polyamine and the protein hydrolysate defined in granted claim 1 as "from about 2 mg/L to about 8 mg/L" with regard to the polyamine and "from about 0.05 % to about 0.5 % (w/v)" with regard to the hydrolysate were connected parallel preferred ranges. Both features were described as "more preferred" at the same position in the corresponding lists of preferred embodiments.

The beneficial effect assigned to the selected concentration ranges for both the polyamine and the protein hydrolysate was disclosed in paragraphs [0071], [0016] and [0017] of the patent application.

Example 7 and Figure 5 showed an increased volumetric productivity of FVIII when compared to media without added putrescine. Figure 9 reported the absolute and relative effect on specific growth and cell specific productivity when particular polyamine over a particular range was added to the medium. Figures 3B and 4B showed how the volumetric productivity and the specific growth rate were modified when a cell expressing a recombinant protein was cultured in 5 different media each comprising a different commercial lot of soy hydrolysate at 0.25% (w/v) and being otherwise supplemented with putrescine.2HCl at 1 mg/L.

The concentrations in any of [0031], [0032] and [0038] became narrower and narrower. The first being named a preferred embodiment and the last being the most preferred embodiment, with intermediate ranges each referred to by "more preferably". This was not a random list of concentrations but was clearly a list of increasingly preferred concentration ranges. The person skilled in the art would have read the respective ranges together, so that the claimed combination of ranges was directly and unambiguously derivable.

In decision T 783/09 of 25 January 2011, especially items 5.5 to 5.7, the question of whether combinations of several elements from two lists of compounds could be considered as individually disclosed for the purpose of Article 123(2) EPC was addressed.
Decision T 783/09 essentially concluded that individual combinations taken from two groups of corresponding parallel preferred embodiments were to be considered as individually disclosed as long as the original application provided the average skilled person with the teaching as a whole that these corresponding, parallel preferred embodiments were to be read together. The skilled person would have directly and unambiguously combined the corresponding parallel values of a series of values of "more preferred" values within a range of a first and a most preferred value, which clearly indicated a hierarchy, insofar as each value is "more preferred" than the previous one, not more preferred than the first one. Decisions T 1253/07 of 15 December 2010, especially item 2.3, T 0296/96 of 12 January 2000, especially item 3.1, T 0823/96 of 28 January 1997, especially item 4.5, T 0860/00 of 28 September 2004, especially item 1.1 and T 0068/99 of 12 June 2003, especially items 3.2.1 and 3.2.2 supported this view.

The above recited decisions in their reasons and decision T 1621/16 of 14 October 2019 established that under certain circumstances highlighted elements from different lists of some length might be brought together without offending the requirements of Article 123(2) EPC.

The case underlying decision T 1621/16 concerned a dishwashing detergent composition defined in claim 1 of the main request by several elements each defined by % by weight of the total composition ranges. These amended ranges were reported to differ from original claim 1 in that they concerned one or only a subgroup of a larger group of elements and were in % by weight more limited. Thus, the amendments introduced in claim 1 were based on multiple selections from lists of converging alternatives (i.e. lists of options ranked from the least to the most preferred, wherein each of the more preferred alternatives is fully encompassed by all the less preferred and broader options in the list), and should not be treated like selections from lists of non-converging elements (i.e. mutually exclusive or partially overlapping alternatives) (see item 1.4 of the reasons). The multiple selections from lists of converging alternatives ought therefore to be analogous to the deletion of elements from lists.

If the amendments were based on multiple selections from lists of converging alternatives, it had to be assessed whether the specific combination resulting from the multiple selections was supported by the content of the application as filed to conclude that the requirements of Article 123(2) EPC were met. To this end two conditions had to be met:

- i) the combination should not be associated with an undisclosed technical contribution, that is, no unwarranted advantage should be derived from linking the specific combination of more and less preferred alternatives to an inventive selection which is not supported by the application as filed; and
- ii) the combination should be supported by a pointer in the application as filed. Such pointers can be provided by the example(s) (as in decisions T 27/16; Reasons, point 13.10 and T 615/95; Reasons, point 6, last paragraph) or by specific embodiment(s) of the application, as this/these generally represent(s) the most detailed and preferred form(s) of the invention.

The combination of features selected from lists of converging alternatives resulted in the subject-matter of claim 1.

Hence, the subject matter of claim 1 was directly and unambiguously disclosed in the patent application.

VII. The submissions made by the **respondent**, insofar as relevant to the present decision, may be summarized as follows:

Main request (claims 1-16 as granted)
Article 100(c) EPC

There was no basis neither in the parent nor in the patent application for an animal protein-free cell culture medium as defined in claim 1 comprising a specific concentration of both polyamine in a concentration ranging from 2 to 8 mg/L and protein hydrolysate in a concentration ranging from 0.05% (w/v)

to 0.5 (w/v). There was furthermore no "pointer" for selecting a concentration range, first of the polyamine and second of the protein hydrolysate, to arrive at the cell culture medium as defined in claim 1.

The combination of concentration ranges specified in claim 1 consisted of a selection of two ranges from two separate lists combining a polyamine and a protein hydrolysate concentration range that was for each of the lists not the most preferred embodiment mentioned. Since the decision T 783/09 points only to the combination of the most preferred ranges but not to the more preferred ranges, as in the present case of polyamine and hydrolysate, said decision was not applicable to the present case.

The patent application in paragraphs [0031], [0032] and [0038] presented no hierarchical order of increasingly preferred embodiments. The order of appearance of the concentration ranges started with more preferred, even more preferred, than more preferred again and finally most preferred. The prefixes "more", "even more" and then "more", or the three times "more", clarified that both the polyamine and the plant- and/or yeast-derived protein concentrations could not be seen in an increasing order of preference. More importantly, only the last quoted narrowest concentration of the polyamine and plant- and/or yeast-derived protein hydrolysate was characterized as the most preferred embodiment.

A combination of an individual element from a list with another element emerging from another list was not considered to be disclosed in the application as filed, unless there was a clear pointer to such a combination which was corroborated by decision T 783/09 and T

1253/07 (see decision T 1511/07 of 31 July 2009, points 2.1 and 2.2 of the reasons). Only the combination of the most preferred ranges, i.e. concentration range between 2 to 5 mg/L of the polyamine and 0.05% 0.25% (w/v) would at best satisfy the requirements of Article 123(2) EPC.

Example 1 of the patent application disclosed the preparation of a basal medium (BAV medium) in which varying concentrations of soy hydrolysate in the range of 0,0 to 1,0% and varying concentrations of polyamines (0-10 mg/L) were added (Figures 1-9). Examples 2, 4 to 9, and 12 referred to GD8/6 cells expressing Factor VIII (FVIII), whereas examples 10 and 11 referred to cells expressing hIgG (ARH77) and erythropoietin (EPO) respectively. None of these examples could act as pointer to the granted subject-matter of claim 1.

VIII. Appellant requested to set aside the decision under appeal and to maintain the patent as granted.

IX. The respondent requested that the appeal be dismissed.

Reasons for the Decision

Main request (claims 1-16 as granted)
Article 100(c) EPC

1. The granted patent is a divisional application of the earlier parent application EP 05798575 (EP 1805298). The claims of the parent application were included as "items" in the description of the divisional application (cf. paragraph [0078| of the patent application). It follows that if the subject-matter of the claims of the patent lacks a basis in the patent

application, it also lacks a basis in the parent application.

2. In accordance with established jurisprudence, the relevant question to be decided in assessing whether or not claim 1 encompasses subject-matter extending beyond the content of the application as filed, is whether the skilled person would derive the subject matter directly and unambiguously from the application as filed.

3. Claim 1 of the main request relates to an animal protein-free cell culture medium, comprising at least one polyamine and at least one protein hydrolysate derived from the group consisting of plants and yeast,

- wherein the polyamine is present in the culture medium in a concentration ranging from 2 to 8 mg/L and
- the protein hydrolysate is present in a concentration ranging from 0.05 % (w/v) to 0.5 % (w/v).

3.1 Claim 1 differs from item 1 of the patent application by the indicated concentration ranges.

3.2 It is undisputed that the patent application does not explicitly disclose the specific combination of concentration ranges of claim 1.

3.3 The concentration ranges for polyamine and the plant and yeast-derived protein hydrolysate are disclosed in separate convergent lists of concentration ranges in paragraphs [0031], [0032] and in separate lists of convergent concentration ranges in combination in paragraph [0038]. The concentration range from about 2 to about 8 mg/L for polyamine is explicitly disclosed

in paragraphs [0031] and [0038], whereas the concentration range from about 0.05 % (w/v) to about 0.5 % (w/v) for the plant- and/or yeast-derived protein hydrolysate is explicitly disclosed in paragraphs [0032] and [0038].

3.4 The appellant argued that the claimed subject-matter was based on a combination of concentration ranges of elements from converging lists of alternatives and that the criteria set out in decision T 1621/16 applied to the present case. The skilled person would have combined the corresponding parallel values of a series of values of "more preferred" values, as each value is "more preferred" than the previous one, within a range of a first and a most preferred value, in a hierarchical manner. The claimed concentration ranges for the polyamine and for the plant- and yeast-derived protein hydrolysate each appeared at the fourth position in their respective lists and were each disclosed as more preferred embodiments. The specific combination was not associated with an undisclosed technical contribution and the application as filed included a "pointer" to the combination of features resulting from the multiple selections.

3.5 The board is not convinced by the appellant's arguments.

3.5.1 The basic principle underlying Article 123(2) EPC and the ground of opposition under Article 100(c) EPC is that any amendment to a European patent relating to the disclosure (the description, claims and drawings) can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the application as filed. This

definition has become the "gold" standard for assessing any amendment for its compliance with Article 123(2) EPC (see decisions G 2/10 item 4.3 referring to G 3/89 and G 11/91, points 1, 1.3 and 3 of the Reasons).

3.6 Although a "pointer" to the claimed combination of features resulting from multiple selections by examples may help to determine the disclosure of an application as filed, it is vital to examine whether the claimed combination is directly and unambiguously derivable, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the patent application.

3.7 It is undisputed that the selected concentration ranges are taken from separate lists of converging alternatives disclosed in paragraphs [0031], [0032] and [0038].

4. As regards the presence of a "pointer" to the claimed combination in the patent application, the board cannot share the appellant's view for the following reasons:

4.1 First, there is no preference derivable from any of the convergent lists of concentrations ranges in the recited application sections which would identify the claimed combination as directly and unambiguously preferred over any of the remaining possible combinations, except for the combination of the most preferred and narrowest concentration ranges for these elements.

4.1.1 Even if one accepts that the two separate lists of increasingly preferred concentration ranges of elements, defined by the terms "preferred", "more preferably" or "even more preferably" and "most

preferably", consist of two lists of converging concentration ranges, there is neither an explicit nor an implicit yet direct and unambiguous disclosure in the patent application which indicates that the concentrations ranges of polyamines and plant- and yeast-derived protein hydrolysate must be read hierarchically and in parallel, where each parallel position in the sequence of five increasingly preferred embodiments of these two lists is combined. The identical number of concentrations ranges in both lists cannot by itself justify a parallel reading and establish a hierarchical and parallel link between these positions.

The structure of the lists themselves, starting with the broadest concentration ranges to the narrowest and most preferred concentration ranges, does not entail any indication that or why each of the second, third, and fourth concentration ranges of elements in both lists are to be combined in parallel, whereas the remaining combinations of concentration ranges combining any of the concentration ranges of the first list with any of the concentrations range of the second list in a non-parallel manner were not to be so combined.

Even taking into account example 7 of the patent application, describing the addition of putrescine at a concentration of 1 mg/L, which resulted in a medium having a total concentration of 2.07 mg/L with advantageous properties and the experimental results of Figure 9, the board cannot identify why the specific concentration ranges mentioned in the claim ought to be combined.

4.2 Second, appellant asserted that examples 5 to 9 and 12 of the patent application pointed to the claimed

combination of concentration ranges for polyamines and plant- and yeast-derived protein hydrolysate.

4.2.1 The board notes that examples 5 to 9 and 12, referred to by the appellant, relate to CHO cells stably expressing Factor VIII (GD8/6 cells) supplemented with a concentration of 0.15% to 1% (w/v) of soy hydrolysate (see example 6), 0.25% (w/v) or 0.4% (w/v) of soy hydrolysate (see examples 5, 7 to 9 and 12).
All the media comprising 0.4% (w/v) of soy hydrolysate were not supplemented with polyamine. They contained about 2.38 mg/L polyamine provided by the soy hydrolysate and the basal medium (2.3 mg/L + 0.08 mg/L), as derivable from Fig.6 and paragraph [0008] of the patent application.
All the media supplemented with polyamines had a concentration of 0.25% (w/v) of soy hydrolysate and were supplemented with 1 mg/L of putrescine.2HCl, corresponding to about 0.55 mg/L of putrescine. This amounted to a total concentration of putrescine of 2.07 mg/L.

Thus, the polyamine concentration present in the culture media used in examples 5 to 9 and 12 fall either within the most preferred concentration ranges of polyamines as disclosed in paragraphs [0031] and [0038] (i.e. the fifth concentration range) or alternatively within the third concentration range of polyamines according to paragraph [0077] first sentence (see also Figure 9), but does not specifically fall within the claimed fourth concentration ranging from 2 to 8 mg/L. Obviously, the polyamine concentration present in the culture media corresponding to the fifth concentration range falls also within the broader fourth to first concentration ranges, while the polyamine concentration corresponding to the third

concentration range falls also within the broader second and first polyamine concentration ranges.

Thus, examples 5 to 9 disclose a combination of either a more preferred or most preferred concentration of soy protein hydrolysate and a most preferred concentration of putrescine, while example 12 discloses media with 0.25% (w/v) of soy hydrolysate supplemented with a concentration of putrescine, ornithine, or spermine selected within 0 to 18 mg/L (equivalent to 0 to 10 mg/L of the polyamine without -.HCl) which falls within the most preferred fifth concentration range or the third preferred concentration range of polyamines as well as within all the other broader less preferred concentration ranges.

Even the media used in examples 10 and 11, not referred to by the appellant, comprising 0.25% (w/v) of soy hydrolysate supplemented with 1.8 mg/L putrescine.2HCl, contained a total amount of about 2.8 mg/L of putrescine.

4.3 Thus, the specific combination of concentration ranges defined in claim 1 is neither directly and unambiguously derivable from any example, nor derivable from any selected subgroup of examples. Therefore, the patent application provides no direct and unambiguous disclosure of the combination of ranges of claim 1, or, in the terms used in decision T 1621/16, no "pointer" to the selected combination of concentration ranges.

4.4 This conclusion is in line with the view expressed in decision T 1511/07 that the combination of an individual range from a list with another individual range emerging from a second list relating to a different feature is not disclosed in the application

as filed, unless there is a clear pointer to such a combination (point 2.1 of the reasons; see also Case Law of the Boards of Appeal of the European Patent Office, 9th Edition, II.E.1.6.2, and similarly decisions T 1731/18, points 1.4 and 1.5 of the reasons, T 2273/10 of 16 November 2012, point 2 of the reasons, T 149/18 of 24 February 2021, points 2.9 and 2.10, and T 347/17 of 2 February 2021, point 5.1).

5. Appellant referred to decisions T 783/09, T 1253/07, T 296/96, T 823/96, T 860/00 and T 68/99 to support its case.

These latter decisions highlighted that selections from lists are possible, if the application provides the average skilled person with the teaching as a whole that these embodiments are to be read together in parallel. By analogy, the skilled person would have understood that the three more preferred concentration ranges of the polyamine could be combined with the three more preferred concentration ranges of the hydrolysate.

5.1 Decision T 783/09 referred to a case where two DPP-IV inhibitors: "LAF237" and "DPP728" were combined with 22 individually listed antidiabetic compounds described as a very preferred embodiment of the invention. The board considered that the combination of a compound selected from either "LAF237" or "DPP728", which were considered as alternatives rather than a list of two possibilities, with any one of the twenty-two anti-diabetic compounds was equivalent to a disclosure of forty-four individual combinations from which three basic combinations, directly and unambiguously disclosed as "very preferred embodiments", were claimed. The group of claim 1 was the result of the

deletion of forty-one elements from a list of forty four qualitatively equal elements and not of a selection of three qualitatively equal elements from a list of forty-four qualitatively non-equal elements.

5.2 The present case differs from that underlying decision T 783/09 in that it does not relate to the combination of the very preferred, or most preferred, concentration ranges of polyamine and of protein hydrolysate. There is also no combination of one of two alternative concentration ranges of one element with a group of five different concentration ranges of another element all of them equally useful.

5.3 In the case underlying decision T 1253/07, the combination of a particular herbicide, designated 3-2, in combination with a specific subgroup of so-called safeners was claimed. The board considered this combination to be originally disclosed as herbicide 3-2 was one of the four most preferred herbicides, and it was exclusively used in the biological examples of the invention either alone or with safener II-9. Safener II-9 was a member of one of four most preferred safener groups, group II, mentioned in the claim (see reasons point 2.3). For this reason, the board considered that the skilled person would have directly and unambiguously assigned the especially preferred sub-group of safeners II to herbicide 3-2.

5.4 In the case at hand, there is no disclosure in the patent application of the specific concentration range of 0.05% (w/v) to 0.5% (w/v) of a plant- and/or yeast-derived protein hydrolysate in combination with 2 to 8 mg/L as a unique and particularly preferred concentration range of polyamine.

5.5 Decisions T 783/09 and T 1253/07 are distinguishable from the present case, as they are concerned with combinations of embodiments explicitly labelled, or immediately identifiable, as especially preferred embodiments, while the selected concentration ranges of polyamines and protein hydrolysate of present claim 1 are not directly and unambiguously identifiable as especially preferred.

5.6 Decisions T 823/96, item 4.5 and T 860/00, item 1.1 refer to the term "implicit disclosure" and how it has to be understood. The term "implicit disclosure" relates solely to matter which is not explicitly mentioned, but is a clear and unambiguous consequence of what is explicitly mentioned or that is necessarily implied in the patent application as a whole.

The board was not shown and cannot find any implicit disclosure, as specified above, of the combination of selected concentration ranges of claim 1 in the patent application.

5.7 Decision T 296/96, Reasons 3.1, stated that "when assessing whether a feature has been disclosed in a document, the relevant question is whether a skilled person would seriously contemplate combining the different features cited in that document." (emphasis added) .

Although the first part of decision T 296/96 paragraph 3.1 determines whether the person skilled in the art would seriously consider combining different features mentioned in this document, it finds that this is not the case when the combination does not follow directly and unambiguously from it, in accordance with the gold standard defined in decision G 2/10 of 30 August 2011.

5.8 In decision T 68/99, it was considered that the subject-matter of each dependent claim was also mentioned in the description as a "preferred" embodiment of the invention. The features in the description were not associated with other specific features, but were all simply mentioned as "preferred". For the skilled person this disclosure acted as a pointer because first, the use of preferred features in combination was more likely and second, it was obviously the best way to achieve the technical effects sought by the invention. This combination was thus directly and unambiguously derivable from the whole content of the application as filed.

5.9 While the board agrees that the combination of preferred features may be more likely than the combination of less preferred embodiments, in the case at hand, it finds no pointer to the claimed combination as the best way of achieving any technical effect.

6. Therefore, the board concurs with the reasoning in the decision under appeal that there is no basis for the specific combination of features of granted claim 1.

Accordingly, Article 100(c) EPC prejudices the maintenance of the patent according to the main request.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Malécot-Grob B. Stolz

Decision electronically authenticated