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**Datasheet for the decision
of 28 January 2020**

Case Number: T 1020/16 - 3.3.01

Application Number: 10152287.8

Publication Number: 2179666

IPC: A24B15/28, A24B13/00, A24B3/04

Language of the proceedings: EN

Title of invention:
Smokeless Tobacco Compositions And Methods For Treating
Tobacco For Use Therein

Patent Proprietor:
R.J. Reynolds Tobacco Company

Opponents:
Japan Tobacco Inc.
Swedish Match North Europe AB

Headword:
Smokeless Tobacco/REYNOLDS

Relevant legal provisions:
EPC Art. 56, 76(1)
RPBA Art. 13

Keyword:

Main request: Inventive step - (no)

Auxiliary requests 1, 2 to 4 - subject-matter extends beyond
content of earlier application (yes)

Late-filed auxiliary request 1a - admitted (no)



Beschwerdekammern

Boards of Appeal

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Case Number: T 1020/16 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 28 January 2020

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 February 2016 concerning maintenance of the
European Patent No. 2179666 in amended form.**

Composition of the Board:

Chairman A. Lindner
Members: M. Pregetter
 L. Bühler
 J. Molina de Alba
 P. de Heij

Summary of Facts and Submissions

I. European patent No. 2179666 is based on European patent application No. 10152287.8. It is a divisional application of the parent application No. 08796428.4, filed as an international application published as WO2009/015142.

II. The following documents, cited during the opposition and appeal proceedings, are referred to below:

(2) R.F. Denier, "pH effects during ammonia processing/550", Brown & Williamson tobacco corporation research, development & engineering file note, 1985, 4 pages

(10) B. Sändh, "SNUS", Nya ScanBook, Falun 1992, pages 106 and 107

(10a) English translation of page 107 of document (10)

(10b) English translation of page 105 of document (10)

(13) US 4,848,373

(14) US 4,660,577

(15) Experimental report, "Reproduction of disclosure in D10", submitted on 3 November 2016, 1 page

III. The patent in suit was opposed under Article 100(a), (b) and (c) EPC on the grounds that the claimed subject-matter lacked novelty and an inventive step, was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, and extended beyond the content of the

application as filed and the content of the parent application.

The opposition division found that the subject-matter of the claims of the main request (set of claims as granted) did have a basis in the application as filed and in the parent application, and that it was sufficiently disclosed and novel, but lacked an inventive step. Auxiliary request 1 was found to meet the requirements of the EPC.

The patent proprietor and both opponents appealed this decision.

- IV. In the statement setting out its grounds of appeal the patent proprietor (appellant 1) requested that the patent be maintained as granted or alternatively that the patent be maintained based on any of the auxiliary requests 1 to 4. Sets of claims for auxiliary requests 1 and 2 had been submitted with a letter dated 15 January 2014, auxiliary requests 3 and 4 with a letter dated 11 September 2015.
- V. Together with the statement setting out its grounds of appeal, opponent 2 (appellant 3) submitted documents (13) and (14). With a letter dated 3 November 2016 it submitted document (15).
- VI. The board issued a communication according to Article 15(1) RPBA 2007.
- VII. With a letter dated 16 January 2020, appellant 1 submitted an amended main request and amended auxiliary requests 1 to 4.

Independent claim 1 of the main request reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:
providing a mixture of water and a tobacco material in the form of a slurry;
heating the mixture at a temperature and for a time sufficient to pasteurize the mixture;
adding an amount of a base to the slurry sufficient to raise the pH of the slurry to an alkaline pH, thereby forming a pH-adjusted mixture;
continuing to heat the pH-adjusted mixture at a temperature and for a time sufficient for the pH of the pH-adjusted mixture to drop at least about 0.5 pH unit following said adding step to form a treated tobacco material; and
incorporating the treated tobacco material into a smokeless tobacco product."

Claim 1 of auxiliary request 1 reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:
providing a mixture of water and a tobacco material in the form of a slurry;
heating the mixture at a temperature and for a time sufficient to pasteurize the mixture;
adding an amount of a base to the slurry sufficient to raise the pH of the slurry to an alkaline pH, thereby forming a pH-adjusted mixture;
continuing to heat the pH-adjusted mixture at a temperature and for a time sufficient for the pH of the pH-adjusted mixture to drop at least about 0.5 pH unit

following said adding step to form a treated tobacco material;
drying the slurry to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material; and
incorporating the treated tobacco material into a smokeless tobacco product."

Claim 1 of auxiliary request 2 reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:
providing a mixture of water and a tobacco material in the form of a slurry;
heating the mixture at a temperature and for a time sufficient to pasteurize the mixture;
adding an amount of a base to the slurry sufficient to raise the pH of the slurry to an alkaline pH, thereby forming a pH-adjusted mixture;
continuing to heat the pH-adjusted mixture at a temperature and for a time sufficient for the pH of the pH-adjusted mixture to drop at least about 0.5 pH unit following said adding step to form a treated tobacco material;
drying the slurry to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material;
adding one or more flavorants and additional moisture to the dried tobacco material in an amount sufficient to raise the moisture content of the tobacco material to at least about 25% by weight; and
incorporating the treated tobacco material into a smokeless tobacco product."

Claim 1 of auxiliary request 3 reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:
providing a mixture of water and a tobacco material in the form of a slurry;
heating the mixture at a temperature and for a time sufficient to pasteurize the mixture;
adding an amount of a base to the slurry sufficient to raise the pH of the slurry to an alkaline pH, thereby forming a pH-adjusted mixture;
continuing to heat the pH-adjusted mixture at a temperature and for a time sufficient for the pH of the pH-adjusted mixture to drop at least about 0.5 pH unit following said adding step to form a treated tobacco material;
cooling the slurry having a final pH in the range of about 8.0 to about 8.5 to ambient temperature;
drying the slurry to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material;
adding one or more flavorants and additional moisture to the dried tobacco material in an amount sufficient to raise the moisture content of the tobacco material to at least about 25% by weight; and
incorporating the treated tobacco material into a smokeless tobacco product."

Claim 1 of auxiliary request 4 reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:
providing a mixture of water and a tobacco material in the form of a slurry;

heating the mixture at a temperature and for a time sufficient to pasteurize the mixture;
adding an amount of a base to the slurry sufficient to raise the pH of the slurry to an alkaline pH, thereby forming a pH-adjusted mixture;
continuing to heat the pH-adjusted mixture at a temperature and for a time sufficient for the pH of the pH-adjusted mixture to drop at least about 0.5 pH unit following said adding step to form a treated tobacco material;
cooling the pH-adjusted mixture to about ambient temperature, the pH-adjusted mixture having a pH of at least about 8 at the time the cooling step begins;
drying the slurry to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material;
adding one or more flavorants and additional moisture to the dried tobacco material in an amount sufficient to raise the moisture content of the tobacco material to at least about 25% by weight; and
incorporating the treated tobacco material into a smokeless tobacco product."

VIII. Oral proceedings before the board took place on 28 January 2020 in the absence of appellant 3 as announced by letter of 14 January 2020.

During the oral proceedings an amended set of claims was filed as auxiliary request 1 and subsequently renamed as auxiliary request 1a.

IX. Claim 1 of auxiliary request 1a reads as follows.

"1. A process for preparing a tobacco composition suitable for use as a smokeless tobacco composition, comprising:

providing a mixture of water and a tobacco material in the form of a slurry, the slurry comprising at least about 75% by weight water based on the total weight of the slurry:

heating the slurry to a temperature of at least about 60°C for a time sufficient to pasteurize the tobacco material:

adding an amount of a base to the slurry sufficient to raise the pH of the slurry to at least about 8.5, thereby forming a pH-adjusted slurry; and

continuing to heat the pH-adjusted slurry to a temperature of at least about 60°C for a time sufficient for the pH of the slurry to drop at least about 0.5 pH unit following said adding step:

drying the slurry to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material;

and

incorporating the treated tobacco material into a smokeless tobacco product."

- X. The appellant-proprietor's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

Inventive step - main request

Starting from document (10) as the closest prior art, there were several differences. Firstly, document (10) did not disclose a pasteurisation step. A skilled person could not deduce that the time disclosed in document (10) was sufficient to pasteurise the tobacco mixture. It was common general knowledge that pasteurisation required a temperature of above 60°C. Sweating and pasteurisation were two distinct processes. Secondly, document (10) did not disclose

that the addition of potassium carbonate led to an alkaline pH. Document (15) provided no proof of achieving an alkaline pH, since it related to measurements performed after the priority date of the patent in suit and followed a different process from document (10). Finally, document (10) did not disclose a drop in pH. It was not plausible that a drop in pH occurred in the process of document (10). The drop in pH was due to complex reactions taking place after the addition of a base and during heat treatment. In summary, document (10) did not disclose the sequence of pasteurising, adding a base and monitoring the pH while continuing the heat treatment until the complex reactions had been completed as shown by the required drop in pH. The problem to be solved was that of providing a process for preparing a smokeless tobacco product with improved storage properties. This problem was solved by the process features of claim 1, since it was clear from the teaching of the patent as a whole that the combination of the decrease in the number of microorganisms by the pasteurisation and the composition resulting from the complex reactions led to these improved storage properties (see paragraph [0087]). The skilled person would not have arrived at the subject-matter of claim 1 of the main request without using hindsight.

Extension of subject-matter - auxiliary requests 1 and 2 to 4

The step of drying the slurry to a moisture content of no more than about 15% by weight was disclosed on pages 7 and 8 of the parent application. The term "thereafter" (page 7, line 25) could refer only to the mandatory steps described in the preceding passages which corresponded to the other steps defined in claim 1 of auxiliary request 1. Additional support could be

found on pages 35 and 36. There, a process was described which comprised some mandatory and some optional steps. On page 36, line 12, it was clearly stated that the tobacco material "is" then dried, thereby clarifying that the step of drying was mandatory. The upper limit for the moisture content of 15% by weight was unambiguously disclosed in claim 27. The same line of argument applied to auxiliary requests 2 to 4.

Admission of auxiliary request 1a

The subject-matter of claim 1 of auxiliary request 1a resulted from a combination of granted claims. No new subject-matter had been added. Auxiliary request 1a had been filed as a reaction to the board's finding that the subject-matter of auxiliary request 1 did not fulfil the requirements of Article 76(1) EPC. This finding had come as a surprise since the board had not indicated in its communication that the requirements of Article 76(1) EPC had not been met.

- XI. The appellant-opponents' arguments, insofar as they are relevant to the present decision, may be summarised as follows. Appellant-opponent 2's arguments are summarised as presented in writing.

Inventive step - main request

Document (10) represented the closest prior art. It disclosed the same process as claim 1 of the main request. The only difference was that the magnitude of the drop in pH had not been specified. There was no data on file that any technical effect resulted from a drop in pH with a magnitude of 0.5 units when compared to the inherent drop in pH in document (10). The

definition of a drop of 0.5 units was thus arbitrary. In line with established case law, a modification not linked to a particular functionality could not per se constitute the basis for acknowledging an inventive step.

Extension of subject-matter - auxiliary requests 1 and 2 to 4

Claim 22 of the parent application as filed could not be combined with any features of claims 27 or 28 since these claims were dependent on claim 23. The passage on page 7, lines 23 to 28 of the parent application as filed disclosed a combination of several process steps, due to the use of the term "thereafter". However, the process steps of lines 23 and 24, i.e. the cooling step and the step of adding a humectant, had not been included in claim 1 of auxiliary request 1. The same sequence of cooling, adding a humectant and drying could be found on pages 8 and 36. A process comprising a step of drying the slurry to a moisture content of no more than about 15% by weight in the absence of further restrictions could not be found in the parent application as filed. Consequently, the subject-matter of claim 1 of auxiliary request 1 extended beyond the content of the parent application as filed. The same line of argument applied to auxiliary requests 2 to 4.

Admission of auxiliary request 1a

Auxiliary request 1a should not be admitted. It had been submitted at a very late stage of the proceedings and contained a number of technical features which had never been discussed.

XII. The final requests were as follows.

Appellant 1 (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained according to the claims of the main request, or, alternatively, according to one of the following sets of claims:

- auxiliary request 1 filed by letter dated 16 January 2020;
- auxiliary request 1a filed as auxiliary request 1 during the oral proceedings on 28 January 2020;
- auxiliary requests 2 to 4 filed by letter dated 16 January 2020.

Appellant 2 (opponent 1) requested that the decision under appeal be set aside and that the European patent No. 2179666 be revoked.

Appellant 3 (opponent 2) requested in writing that the decision under appeal be set aside and that the European patent No. 2179666 be revoked.

Reasons for the Decision

1. The appeals are admissible.
2. The oral proceedings before the board took place in the absence of appellant-opponent 2, who had been duly summoned but had chosen not to attend. In accordance with Rule 115(2) EPC and Article 15(3) RPBA 2020, the board was not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of a party duly summoned who was treated as relying only on its written case. Hence, the board was in a position to announce a decision at the conclusion of the oral proceedings, as provided for by Article 15(6) RPBA 2020.

3. The admission of the claim requests submitted by letter of 16 January 2020 was not objected to. The board also raised no objections.

4. *Main request - inventive step (Article 56 EPC)*

4.1 The object of the patent in suit is the provision of methods for processing tobacco for use in smokeless tobacco compositions (paragraph [0001]). Heat treatment of the tobacco and adjustment of the pH of the tobacco are to be carried out in a manner adapted for improving the storage stability of the sensory characteristics of the smokeless tobacco product (paragraphs [0074] and [0087]).

4.2 It was common ground that document (10) represents the closest prior art. In the following, reference is made to the English translation of page 107 provided as document (10a). The amount of tobacco powder is disclosed in document (10b).

Document (10a) describes a process for preparing snus. 1 kg tobacco powder is mixed with 11 decilitres water and 1/2 hectogram salt. The mixture is heat-treated at a temperature of 45-50°C for 5 days (covered by plastic foil). Then 90 g potash (potassium carbonate) is mixed in with it and the snus is put to "sweat" for another day.

4.3 The difference between claim 1 of the main request and the disclosure of document (10a) needs to be determined.

The mixing of water, salt and tobacco powder in document (10a) leads to a slurry. This has not been contested.

Document (10a) goes on to describe a sweating step, involving heating to 45-50°C for 5 days. The question needs to be answered whether this heat treatment can be seen as a pasteurisation step. The term "pasteurize" defines a process of partial sterilisation, with a focus on eliminating pathogenic microorganisms to render a product safe for consumption. Most microorganisms, and especially pathogenic microorganisms, are not viable at elevated temperatures, one reason being the denaturation of most proteinaceous matter at temperatures above 42°C. Consequently, heating an aqueous slurry to 45-50°C for 5 days will result in the degradation, destruction and/or denaturation of at least a portion of the microorganisms within the tobacco composition. The sweating step of document (10a) thus involves pasteurisation. This finding is in line with the definition of the necessary heat treatment in paragraph [0006] of the patent in suit which is "viewed as a type of pasteurisation".

The next step in document (10a) is the addition of 90 g potassium carbonate. It can be clearly seen from document (15) that the pH resulting from this addition is in the alkaline range. The process used in document (15) does not differ in any crucial steps from the process of document (10a). The board concludes that it is irrelevant in the context of a pH change whether the slurry is covered by plastic or aluminium foil. In document (15), the magnetic stirrer is used only when determining the pH and not in the process leading to the alkaline slurry.

After raising the pH, document (10a) teaches sweating the slurry for another day. No further information is

provided. It was common ground that tobacco has acidic groups which will react, in possibly complex reactions, with the added base. The board considers it to be inevitable that a reaction between acidic groups and a base leads to a drop in pH. Whether such a reaction is a straightforward neutralisation or involves a series of complex intermediate reactions has not been established. Therefore, the magnitude of such a drop in pH under the conditions of document (10a) is not known.

The board cannot accept the patent proprietor's line of argument that the wording of claim 1 requires that the heating must not be interrupted until a drop in pH of 0.5 is achieved, thus implying continuous monitoring of the pH. The wording of claim 1 merely defines that heating is continued, with or without interruptions, until a certain drop in pH, to be determined in any possible way, has taken place.

Consequently, claim 1 of the main request differs from the disclosure of document (10a) in that it defines a drop in pH of at least about 0.5 units.

- 4.4 The drop in pH of at least about 0.5 units has not been shown to be linked to a surprising effect. Paragraph [0087] of the patent in suit describes that the heat treatment coupled with the interaction between the base and the acidic species of the tobacco leads to greater storage stability of the sensory characteristics of the smokeless tobacco products and in particular to greater pH storage stability of the final product. However, there is no data on file that links storage stability to a drop in pH of specifically 0.5 units or more. The claimed subject-matter provides no more than an alternative process.

4.5 Therefore, the technical problem to be solved is the provision of an alternative process for preparing a stable smokeless tobacco product, e.g. in the form of snus.

This problem is solved by the process according to claim 1 of the main request.

4.6 However, the definition of the magnitude of the drop in pH by the value of (at least) 0.5 cannot lead to the acknowledgement of an inventive step.

The skilled person would have been aware that, when heating a mixture of base and tobacco, a drop in pH occurs (see table 1 of document (2) and point 4.3 above relating to the reaction of a base and acidic groups). Claim 1, by limiting this generally known drop in pH to a drop of at least about 0.5 units, introduces a requirement for the process that is not linked to a technical effect and is thus arbitrary. Limiting the process by a value for which no technical effect or functionality has been established cannot be seen as a contribution to the art and consequently cannot form the basis for acknowledging an inventive step.

4.7 The subject-matter of claim 1 of the main request does not involve an inventive step.

5. Auxiliary request 1 - extension of subject-matter (Article 76(1) EPC)

5.1 Claim 22 of the parent application as filed (all cited passages relate to the publication WO2009/015142) corresponds to claim 1 of auxiliary request 1, which, however, additionally defines a step of "drying the slurry to a moisture content of no more than about 15%

by weight, based on the total weight of the dried tobacco material". In the context of the present decision it is not necessary to discuss the further step of "incorporating the treated tobacco material into a smokeless tobacco product".

In the following it will be determined whether the introduction of the step of drying the slurry to a moisture content of no more than about 15% is disclosed in the parent application as filed in combination with the other features of claim 1.

5.2 Claim 27 of the parent application defines a drying step resulting in the required moisture content. However, claim 27 is dependent on claim 23, which defines further features that do not form part of claim 1 of auxiliary request 1, such as an initial moisture level of the slurry, a certain pH and temperatures for the heat treatment. Thus, the drying step of claim 27 is not disclosed in combination with the more general process steps of claim 22.

5.3 In the description of the parent application as filed various processes are disclosed.

5.3.1 One such process is described on page 7, lines 5 to 30. The mandatory process steps of this embodiment include the provision of a mixture comprising water and a tobacco material having a high moisture content. This mixture is subjected to a heat-treatment step for a time and at a temperature adapted to pasteurise the material. Thereafter, a base is added to the mixture in an amount sufficient to raise the pH of the mixture to the alkaline pH range. All other steps described for this embodiment are qualified either as "preferable" (for example heating the pH-adjusted

mixture for a time sufficient for the pH of the mixture to drop by at least about 0.5 pH units), or as optional ("can") or as being only included "if desired".

Lines 23 to 28 are particularly relevant. There, it is stated that following the step of adding a base the mixture can be cooled. A humectant can be added during or following the cooling step. From the expression "during or following" it is clear that the step of adding the humectant cannot be separated from the step of cooling. The passage goes on to indicate that "[t]hereafter, if desired, the pH of the mixture can be readjusted with additional base (e.g. to a pH of about 8.0 or less), and the mixture can be dried (e.g., to a moisture content of no more than about 15% by weight, based on the total weight of the dried tobacco material)". It is not clear which process steps the term "thereafter" refers to. Consequently, it is not directly and unambiguously derivable from the embodiment on page 7 that the step of drying to a moisture content of no more than about 15% by weight is disclosed in combination with the other specific steps defined in claim 1 (such as the step of forming a slurry and the step of heating the pH-adjusted mixture for a time sufficient for the pH of the mixture to drop by at least about 0.5 pH units following the step of adding a base), but in the absence of a step of cooling and a step of adding a humectant.

- 5.3.2 The subject-matter of claim 1 also extends beyond the disclosure of page 7, line 31 to page 8, line 10 of the parent application as filed. Drying the pH-adjusted slurry to a moisture content of less than about 15% by weight is disclosed in this passage only in combination with a slurry comprising at least about 80% by weight water, heating the slurry to a temperature of at least

about 70°C for at least about 30 minutes, raising the pH to at least about 9.0, continuing to heat the slurry to at least about 60°C for at least 1.5 hours, cooling to about ambient temperature, and adding a humectant.

- 5.3.3 Additionally the process described on page 35, line 8 to page 36, line 21 needs to be examined. There the same steps are disclosed as mandatory as in claim 1 of auxiliary request 1. However, in this embodiment the moisture content to be achieved by the drying step is described as a range including a lower limit, i.e. as being "typically about 5 to about 15% by weight, often about 10 to about 12% by weight" (page 8, lines 17 to 19). Claim 1 does not define such a lower limit. Thus, this passage cannot provide support for claim 1 of auxiliary request 1.
- 5.3.4 Appellant 1 argued too that the open range of no more than about 15% by weight for the moisture content of the dried slurry is disclosed as such, e.g. in claim 27 of the parent application as filed, and can be combined with other parts of the parent application, such as the process of page 36. The board cannot accept this argument. The parent application as filed describes various processes. Some processes are limited by the moisture content before heating and the addition of a base. Others describe in detail the temperatures to be reached when heating or cooling. Further processes stress the pH values to be reached at certain points in time during the process. Taking an optional step disclosed in combination with certain process conditions and/or certain further process steps out of such a specific combination of conditions and steps and rendering it mandatory for another process not having these restrictions on certain conditions and further process steps leads to subject-matter that extends

beyond the parent application as filed.

5.4 Consequently, the subject-matter of claim 1 of auxiliary request 1 extends beyond the parent application as filed (Article 76(1) EPC).

6. Auxiliary request 1a - admission (Article 13 RPBA 2007)

Auxiliary request 1a was filed at an advanced stage of the appeal proceedings, namely at the oral proceedings before the board, after the discussion on the extension of the subject-matter of auxiliary request 1 had been completed. No new aspects were raised during the oral proceedings before the board beyond those already addressed during the written phase of the appeal proceedings, including the communication pursuant to Article 15(1) RPBA 2007. Therefore, the filing of auxiliary request 1a cannot be seen as a timely or appropriate reaction to new developments during the oral proceedings. Claim 1 of auxiliary request 1a has been considerably limited by including specific water contents and temperatures. These limitations had neither been addressed in the decision under appeal nor discussed in the written phase of the appeal proceedings. Therefore, the board was faced with a fresh case which, if admitted, would require the remittal of the case to the department of first instance for further prosecution in view of the necessity to restart the whole opposition proceedings on the basis of the claims of this request. This would not only cause considerable delay to the proceedings but would also prevent the board from taking a final decision at the end of the oral proceedings.

However, where oral proceedings take place, a board must endeavour to ensure that a case is ready for

decision at their conclusion, unless there are special reasons to the contrary (cf. Article 15(6) RPBA 2020), which is clearly not the case here as follows from the above considerations.

For the above reasons, the board, exercising its discretion, decided not to admit auxiliary request 1a into the proceedings (Article 13(1) and (3) RPBA 2020).

7. Auxiliary requests 2 to 4 - extension of subject-matter (Article 76(1) EPC)

The reasons provided for the subject-matter of claim 1 of auxiliary request 1 under point 5 above apply *mutatis mutandis* to the subject-matter of claim 1 of auxiliary requests 2 to 4.

To put it briefly, the subject-matter of claim 23 has not been included in claim 1 in any of these requests. Consequently, the subject-matter of claim 1 cannot be derived from the claims of the parent application.

Furthermore, neither the addition of a humectant (see page 7, line 24) nor the restrictions concerning the water content of the slurry or the temperature to be reached during the heating steps of the embodiment disclosed on page 7, lines 31 to page 8, line 10, have been included in claim 1 of any of auxiliary requests 2 to 4.

Lastly, claim 1 of each of these requests defines an open range of no more than about 15% by weight for the moisture content of the dried slurry and thus does not correspond to the disclosure to be found on page 36.

Consequently, the subject-matter of claim 1 of

auxiliary requests 2 to 4 extends beyond the parent application as filed (Article 76(1) EPC).

8. For the reasons given in points 4 to 7 above none of the claim requests on file is allowable.

Given this conclusion it is not necessary to discuss the further objections raised by the appellant-opponents.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated