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**Datasheet for the decision
of 15 December 2022**

Case Number: T 1683/18 - 3.2.05

Application Number: 07759824.1

Publication Number: 2077949

IPC: B41N1/08

Language of the proceedings: EN

Title of invention:

Manufacturing process to produce litho sheet

Patent Proprietor:

ACR II Aluminium Group Cooperatief U.A.

Opponent:

Hydro Aluminium Rolled Products GmbH

Relevant legal provisions:

EPC Art. 54(1), 83, 123(2)

RPBA Art. 12(4)

Keyword:

Valid filing of the appeal (yes)
Admittance of improved translation (yes)
Added matter (no)
Sufficiency of disclosure (yes)
Novelty (no)
Admittance of auxiliary requests 2 and 3 (no)

Decisions cited:

G 0009/92, G 0003/14, T 0279/89, T 0019/90, T 1811/13



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Case Number: T 1683/18 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 15 December 2022

Respondent: ACR II Aluminium Group Cooperatief U.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
13 April 2018 concerning maintenance of the
European Patent No. 2077949 in amended form.**

Composition of the Board:

Chairman P. Lanz
Members: O. Randl
A. Bacchin

Summary of Facts and Submissions

- I. The patent proprietor and the opponent filed an appeal against the decision of the opposition division that European patent No. 2 077 949 ("the patent") can be maintained in amended form.
- II. In a letter dated 15 February 2022, the patent proprietor withdrew its appeal.
- III. Among the documents cited in the decision under appeal, only document D4 (JP S61-274993 A) is relevant for the appeal proceedings. The appellant filed the following documents with its statement of grounds of appeal:
- D4* Human translation of document D4
D15 T. Furu et al., "Trace Elements In Aluminium Alloys", Proceedings of the 12th International Conference on Aluminium Alloys, Yokohama, Japan, September 5-9, 2010, pages 282 to 289
- IV. In a communication pursuant to Article 15(1) RPBA 2020, issued on 21 March 2022, the board *inter alia* explained that, in view of the withdrawal of the patent proprietor's appeal, the opponent was the sole appellant, and the patent proprietor was the respondent to the opponent's appeal. Consequently, the principle of prohibition of *reformatio in peius* applied. The board further explained that, against this background, it understood that the respondent (patent proprietor) requested that the appeal be dismissed or that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of auxiliary request 2 or 3, each filed on 4 January 2019.

- V. As both parties declared that they would not attend the oral proceedings scheduled for 23 May 2022, the oral proceedings were cancelled.
- VI. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.
- VII. According to the board's understanding of the respondent's requests given in the communication pursuant to Article 15(1) RPBA 2020, which was not contested, the respondent (patent proprietor) requested that the appeal be dismissed or that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of auxiliary request 2 or 3, each filed on 4 January 2019.
- VIII. Claims 1 and 9 of the auxiliary request filed during the oral proceedings before the opposition division, which the opposition found to meet the requirements of the EPC (main request), read (feature references used by the board are given in square brackets):

"1. [**S0**] A lithographic sheet comprising an aluminum alloy, wherein the aluminum alloy consists of:
[**S1**] 0.05 wt % to 0.25 wt % Si;
[**S2**] 0.25 wt % to 0.4 wt % Fe;
[**S3**] less than or equal to 0.007 wt % Cu;
[**S4**] 0.01 wt % to 0.25 wt % Mn;
[**S5**] 0.31 wt % to 0.40 wt % Mg;
[**S6**] less than or equal to 0.03 wt % Zn; and
[**S7**] less than or equal to 0.03 wt % Ti;
[**S8**] the balance aluminum and incidental impurities, the incidental impurities no greater than 0.05 wt % each and 0.15 wt % in combination."

"9. A method for producing a lithographic sheet comprising the steps of:
providing an aluminum sheet made from the aluminum alloy according to claim 1;
degreasing the aluminum sheet by an electrolytic pre-etching step, wherein
the electrolytic pre-etching step comprises:
contacting the aluminum sheet with an electrolyte bath; and
applying a current having a non-sinusoidal wave form to the electrolyte bath at a constant peak voltage; and
roughening the aluminum sheet by electrograining after degreasing the aluminum sheet."

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the upper limit for the weight percentage of Cu is 0.04 instead of 0.007 (feature **S3'**) and the upper limit for the weight percentage of Ti is 0.014 instead of 0.03 (feature **S7'**).

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that feature S3 was replaced by feature S3' and in that there is a lower limit of 0.01 for the weight percentage of Zn (feature **S6'**).

IX. The parties' relevant submissions may be summarised as follows.

(a) Appeal deemed to be filed

(i) Respondent (patent proprietor)

The opponent incorrectly paid the reduced appeal fee due for a natural person or an entity referred to in Rule 6(4) and (5) EPC. Although the board issued a

communication stating that no declaration pursuant to Rule 6(6) EPC had been filed, no declaration pursuant to Rule 6(6) EPC was filed within the established time limit (25 June 2018), nor was the shortfall in fees paid within the two-month time limit for filing the notice of appeal. Consequently, the opponent's appeal must be deemed not filed or considered inadmissible. Article 8 of the Rules relating to Fees (RFees) is not intended as a remedy for a party that deliberately paid a reduced fee without being entitled to it. Additionally, the shortfall in this case (about 17% of the full amount) is too high to be considered a small amount pursuant to Article 8 RFees. Therefore, the opponent's appeal must be deemed not filed. Moreover, the opponent's request for re-establishment must be rejected. In accordance with the established jurisprudence, an opponent is not entitled to request re-establishment of rights in respect of the two-month time limit for filing an appeal.

(b) Admittance of documents D4* and D15

(i) Respondent (patent proprietor)

Documents D4* and D15, which were submitted for the first time along with the opponent's statement of grounds of appeal, could have been presented during the opposition proceedings and should not be admitted into the appeal proceedings (Article 12(4) RPBA 2007). Document D4* replaces a machine translation of a Japanese patent application. The opponent was aware that some passages of that translation were unclear. Moreover, the new translation is not certified. The authors of document D15 are from companies having a connection with the opponent, and the document could have been presented in the opposition proceedings. It should be

held inadmissible (Article 12(4) RPBA 2007). Moreover, this document cannot be considered evidence of the common general knowledge of the skilled person.

(ii) Appellant (opponent)

Documents D4* and D15 should be admitted. Document D4 was part of the first-instance proceedings. The filing of an improved translation does not create new facts. The objection based on an alleged ambiguity in the machine translation was only raised during the oral proceedings. Document D15 is introduced in support of the argument that the Cu contents according to maintained claim 1 are customary in the art. Its filing in the appeal proceedings was triggered by the admission of a new auxiliary request during the oral proceedings in which the Cu content was limited. The document substantiates that the Cu content according to claim 1 of the auxiliary request is customary in the art.

(c) Main request: compliance with Article 123(2) EPC

(i) Appellant (opponent)

The subject-matter of granted claim 10 (corresponding to claim 9 of the patent as maintained) has no basis in the originally filed application. The process features added in the claim referred to a pre-etching step of a sheet and were at most disclosed for a strip in the original application. The opposition division assumed that it was clear from the original application that the terms "sheet" and "strip" were interchangeable in the context of the application and that, according to the understanding of the skilled person, the disclosed process steps also extended to the treatment of a sheet (section 1.2 of the decision under appeal). However,

this assumption is incorrect since the patent nowhere indicates an interchangeability of these terms. On the contrary, the wording of the patent and also the technical knowledge contradict this assumption. Thus, the opposition division's decision must be set aside. Paragraphs [0058] to [0065] of the original application do not provide a basis for the amendments. The first line of paragraph [0060] does not speak of treating a plate with the pre-etching step. Rather, the pre-etching step explicitly referred to the strip, while the sheet is only referred to in terms of the subsequent properties of the product. A direct reference to the effect of the pre-etching step on the sheet is not found in the original application. Rather, it is clear from paragraph [0060] that a strip is used to produce the sheet and that the strip is subjected to the pre-etching step. The original disclosure does not give any indication that "sheet" and "strip" are synonymous or interchangeable. It is clear from the wording chosen in the original application that "strip" refers to the semi-finished product processed in the process - including the pre-etching step - while "sheet" refers to the product of the process. Paragraphs [0002] and [0035] of the original application also describe that lithographic plates are made from strips. This clearly distinguishes the plate as the product from the strip as the semi-finished product. This distinction also directly corresponds to the understanding of the person skilled in the art. The difference between a strip and a plate is also by no means trivial in terms of carrying out the process steps. Finally, claim 9 as maintained relates to a working method on an aluminium plate, in which a plate provided according to the feature "providing an aluminum sheet made from the aluminum alloy according to claim 1" is acted upon via the pre-etching step

according to the feature "degreasing the aluminum sheet by an electrolytic pre-etching step". Whether a working step acts on a plate or a strip is clearly distinguishable. Thus, claim 9 as maintained does not comply with the requirements of Article 123(2) EPC.

(ii) Respondent (patent proprietor)

Claim 10 as granted complies with the requirements of Article 123(2) EPC since the additional feature "made from the aluminum alloy according to claim 1; degreasing the aluminum sheet by an electrolytic pre-etching step" is disclosed in paragraph [0060], whereas the additional feature "roughening the aluminum sheet by electrograining after degreasing the aluminum sheet" is disclosed in paragraph [0065]. The terms "sheet" and "strip" are interchangeable in the context of the patent application (in particular, from paragraphs [0058] and [0060]) and, consequently, the skilled person would have understood from the overall disclosure of the patent application as originally filed that the method steps of paragraphs [0060] and [0065] not only apply to a "strip" but also to a "sheet". The application uses these terms interchangeably, so that the use of the term "sheet" in amended method claim 10 as granted complies with requirements of Article 123(2) EPC. It is not relevant that the skilled person knows that sheets and strips have different dimensions and that different devices may be required to treat them chemically since the application as originally filed refers to both "aluminum sheet" and "aluminum strip". Thus, granted claim 10 does not present the skilled person with new technical information. This reasoning also applies to corresponding claim 9 of the patent as maintained by the opposition division.

(d) Main request: insufficiency of disclosure

(i) Appellant (opponent)

The subject-matter of the patent is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. For the skilled person to put into practice the teaching of the patent, it is not sufficient that a plate with any composition of the alloy according to claim 1 can be obtained. Otherwise, the teaching of the patent would merely be a trivial, unpatentable extension of the prior art. The production of aluminium alloy plates is complex. The actual properties of the final product depend on a variety of parameters during manufacture. While not all parameters need to be reproduced in detail, the disclosure of the invention in the patent is insufficient if those skilled in the art can no longer determine whether they are working within the scope of the invention or not. In the current case, there is no information available to the skilled person about mechanical or surface properties towards which the skilled person could work by means of experiments. Finally, the patent does not indicate a single way of carrying out the alleged invention. The "ALLOY" referred to in paragraph [0040] of the patent does not constitute an example of an embodiment according to the features of the maintained claim. Consequently, the patent does not fulfil the requirement of a sufficient disclosure.

(ii) Respondent (patent proprietor)

The subject-matter of the patent is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. Even though

the "ALLOY" described in paragraph [0040] of the patent is outside the range of claim 1, the method of making the lithographic sheet provided by the patent application as originally filed can be easily adapted to perform the invention. Thus, the patent provides enough information for the skilled person to make the lithographic sheet of claim 1 as granted and, additionally, to apply the method of claim 10 as granted and claim 9 of the patent as maintained. Claim 1 as granted relates to a lithographic sheet having a specified composition. It would not be an undue burden for the opponent to attempt to reproduce the teaching to support its argument of insufficiency of disclosure. In the absence of such experimental evidence, the opponent's allegation had to be considered unfounded and unsubstantiated.

(e) Novelty of the subject-matter of claim 1 over the disclosure of document D4

(i) Appellant (opponent)

The subject-matter of maintained claim 1 is not new over document D4. It is clear from translation D4* that the Cu content according to document D4 is preferably 0.004-0.020 wt.% (see page 8, first paragraph). Feature S3 is thus clearly anticipated by document D4. The selection of a sub-range of numerical values from a larger range is only novel if all the following criteria are met:

- The selected sub-range is narrow. This criterion is not fulfilled because the range for the Mg content extends over a substantial part of the prior-art range (see D4*: page 6, "Summary of the invention" and the additional minimum requirement for the Mg

content in view of the Si and Mn content). The claimed range for the Zn content (feature S6) of 0-0.03 wt% covers more than half the previously known range of 0-0.05 wt% (see page 8, first paragraph).

- The selected sub-range is sufficiently far removed from the known range illustrated by means of examples. Alloy "A" from Table 1 of document D4 has a composition containing 0.28 wt.% Fe (feature S2), 0.07 wt.% Si (feature S1), 0.01 wt.% Mn (feature S4), 0.31 wt.% Mg (feature S5) and 0.02 wt.% Ti (feature S7). Zn is not mentioned (feature S6), but the range for impurities is 0-0.05 wt.% (see page 8, first paragraph) (feature S8). Only the explicit indication of the Cu content of 0.016 wt.% of alloy "A" is above the claimed range maximum of 0.007 wt.% (feature S3). However, the skilled person is already informed that the exact Cu content is not decisive for the assessment of alloy "A" by the indication that Cu is only present as an impurity - and not as an alloying addition - and is preferably contained in the range of 0.004-0.020 wt.% (see page 8, first paragraph). Rather, the person skilled in the art would have tried to keep the amount of impurities small. On the basis of alloy "A", it is thus clear that the examples of document D4 readily convey an alloy according to maintained claim 1.
- The selected area does not provide an arbitrary specimen from the prior art. This criterion is not fulfilled because no technical effect is apparent for the Cu content seen as a distinguishing feature. The selection of the alloy ranges - as far as they do not directly result from document D4 - is thus an arbitrary selection.

(ii) Respondent (patent proprietor)

The opposition division's finding that claim 1 as granted is not novel over document D4 (see item 5.2.3 of the Grounds for the decision under appeal) is incorrect. The skilled person in the art would have been aware of the upper limit of the impurity range (0.05 wt%) and would have been prompted to work below this limit, but there is no information in document D4 that would have motivated them to work specifically below the limit of 0.03 wt%. Prior to the disclosure of patent, the skilled person would not have made additional efforts to maintain the limit of impurities not higher than 0.03 wt% because there was no reason to do so. The inventors had found, however, that a content of Zn lower than or equal to 0.03 wt % (in the aluminium alloy composition of claim 1 as granted) is advantageous for electrograining in nitric acid, and it can function as the initiator for pit formation during electrograining (see paragraph [0019] of the patent). According to Table 1 of document D4, alloy A consists of 0.28 wt% Fe, 0.07 wt% Si, 0.01 wt% Mn, 0.31 wt% Mg, 0.016 wt% Cu, 0.02 wt% Ti, 0.04 wt% Zr, the remainder being aluminium. Thus, although the general description of the aluminium alloy provided by D4 states that it can comprise not more than 0.05 wt% of impurities, the specific definition of alloy "A" does not mention the presence of any unspecified impurity. Consequently, document D4 does not teach an aluminium alloy having feature S6 in combination with the rest of elements specified in claim 1 as granted. According to translation D4*, a technical effect is associated with a copper content from 0.004 to 0.020 wt% since this range is preferable for resistance to ink staining (see page 8, first paragraph). Thus, the skilled person would have understood that copper is not a mere

impurity that does not have any effect on properties of the aluminium alloy. Taking into account that the amount of Cu present in alloy "A" is 0.016 wt% (see Table 1 of document D4), the skilled person in the art would have been motivated to work in the upper part of the above-mentioned preferred range, i.e. outside the range specified in claim 1 of auxiliary request 1 (less than or equal to 0.007 wt%). When looking at the examples contained in document D4 (see Table 1), it would be clear that the main focus of this prior-art document is on compositions clearly outside the claimed scope of the current invention. Moreover, a Cu amount of less than or equal to 0.007 wt%, in combination with the other alloying elements in the aluminium alloy comprised in the lithographic sheet of the invention, allows a uniform pitting response. Consequently, this range cannot be considered an arbitrary selection. Thus, document D4 does not clearly and unambiguously disclose feature S3 in combination with the other alloying elements in the aluminium alloy and, therefore, claim 1 is new over document D4. Furthermore, the skilled person would have been aware of the upper limit of the impurity range disclosed in document D4 (i.e. 0.05 wt%) and, therefore, would have been prompted to work below this limit, but there is no information in this prior-art document that would have motivated them to work specifically with an amount of Zn below the limit of 0.03 wt%. Thus, the skilled person would not have been motivated to work specifically below the limit of 0.03 wt% Zn.

(f) Auxiliary requests 2 and 3: admittance

(i) Appellant (opponent)

Auxiliary requests 2 and 3 should not be admitted in

application of Article 12(4) RPBA 2007. The patent proprietor did not explain why auxiliary requests 2 and 3 were not submitted at first instance. The content of document D4 was known from the opposition proceedings. Moreover, auxiliary requests 2 and 3 do not meet the criterion of convergence. Taking into account auxiliary requests 2 and 3, the patent proprietor has filed a total of three auxiliary requests differentiated from each other by the inclusion of different features. The subject-matter of the main request is further limited by the following (seemingly indiscriminate) inclusion of various parameters: restriction of the Cu content (auxiliary request 1); limitation of the Ti content (auxiliary request 2) and limitation of the Zn content (auxiliary request 3). Thus, different further developments are pursued by the inclusion of different features.

(ii) Respondent (patent proprietor)

Auxiliary requests 2 and 3 should be admitted. Claim 1 of auxiliary request 2 specifies that the amount of Ti is less than or equal to 0.014 wt%. Claim 1 of auxiliary request 3 requires the amount of Zn to lie within the range of 0.01-0.03 wt%.

Reasons for the Decision

1. Decision in written proceedings

As both parties announced that they would not attend the oral proceedings, the board decided to cancel the oral proceedings and to issue a decision in writing (Article 12(8) RPBA 2020). The present decision is based solely on grounds and evidence, which were notified to the parties and were considered by the board in the communication under Article 15(1) RPBA 2020. Thus the parties have had an opportunity to present their comments in this regard (Article 113 EPC).

2. Appeal deemed to be filed

The respondent had objected that the appeal should be deemed not to have been filed, in accordance with Article 108, second sentence, EPC, because the appeal fee had not been paid in the correct amount.

As explained in the board's communication dated 28 March 2019, the opponent paid the appeal fee in due time (on 22 June 2018). However, the amount was insufficient because the opponent paid the amount due before 1 April 2018, whereas the appeal fee had been increased as of 1 April 2018 (see Decision of the Administrative Council of 13 December 2017 amending Articles 2 and 14 of the Rules relating to Fees (CA/D 17/17; OJ EPO 2018, A4). Since a period for payment is only deemed to have been observed if the full amount of the fee had been paid in due time, in application of the transitional provision provided by the above-mentioned Decision CA/D 17/7, the board stated that the appeal fee would be deemed to have been

validly paid if the deficit was made good within two months of receipt of the board's communication (see Article 3(5) of decision CA/D 17/17). The opponent reacted accordingly and paid the shortfall on time, on 29 May 2019. Therefore, the appeal fee is deemed to have been validly paid, and the appeal is validly filed. As a consequence, the request for *restitutio in integrum* under Article 122 EPC, filed by the appellant on 6 July 2018, did not need to be considered.

3. Admittance of documents D4* and D15

Documents D4* and D15 were filed by the appellant with the statement setting out the grounds of appeal.

The board cannot see any good reason not to admit document D4*, which is a human translation of document D4 replacing a machine translation on file. Document D4 had been submitted already during the opposition period and there is no reason to assume that its human translation in document D4* is incorrect. In view of this, the board took document D4* into account in the appeal proceedings in accordance with Article 12(4) RPBA 2007, which applies in view of the transitional provisions set out in Article 25(2) RPBA 2020.

Document D15 was filed as evidence of the skilled person's common general knowledge. As there is no need to consider document D15, the question of its admittance may be left unanswered.

4. Main request

4.1 Interpretation of the claims: "sheet" vs "strip"

The patent does not contain definitions of the terms

"sheet" and "strip". Among the definitions for the term "sheet" given in the Oxford English Dictionary, the following appears to be most appropriate here: "A relatively thin piece of considerable breadth of a malleable, ductile, or pliable substance". The same dictionary defines a "strip" as "a narrow piece of board, metal plate, etc.". Thus, the terms are not synonymous in common English. The term "strip" seems to convey the idea of relative narrowness; this cannot be said of the term "sheet".

The term "strip" is absent from the granted claims. It is rarely used in the patent description (12 times compared to 53 occurrences of the term "sheet"). One relevant passage is found in paragraph [0002]:

"Lithographic sheet manufacturing places high requirements on purity and uniformity of litho strip surfaces." (Underlining by the board.)

The term is mostly used in the description of the claimed method (see paragraphs [0028] to [0035]). According to this part of the description, the strip is the outcome of a hot-rolling process step (paragraph [0028]). This strip may then be cold-rolled once or twice (paragraph [0029]). Subsequently, it is electrolytically pre-etched or degreased (paragraph [0030]). A current of no-sinusoidal wave form is applied to the electrolyte bath. Its charge density may depend on the strip width (paragraph [0033]). The strip may also pass through an acid bath and be anodised in this bath (paragraph [0031]). It may also be roughened by electrograining (paragraph [0035]).

Although the terms "sheet" and "strip" as such are not synonymous, they are used in the patent as if they

were. They designate the same object. The term "sheet" is mostly used when the method is described in abstract terms (what is claimed is a "method of producing a lithographic sheet"), but "strip" is used when a particular piece is being considered, in particular during the execution of the method.

The appellant's counter-arguments are unpersuasive. The fact that the patent does not indicate that the terms are interchangeable is not decisive. The first sentence of paragraph [0030] (corresponding to paragraph [0060] of the original application) refers to a "strip" (rather than a "sheet") being pre-etched, but the second part of this sentence shows that "sheet" and "strip" are used synonymously in this context. The assertion that "strip" refers to the semi-finished product and "sheet" to the finished product is unwarranted. When the next step is referred to (paragraph [0035] of the patent, corresponding to paragraph [0065] of the application as originally filed), the term "strip" is again used. The appellant attempts to establish a distinction between the terms "sheet" and "strip" that has no objective basis in the patent or the original application on which it is based.

4.2 Compliance with the requirements of Article 123(2) EPC

This objection against the subject-matter of claim 9 of the set of claims which the opposition division found to comply with the requirements of the EPC is built essentially on the distinction between the terms "sheet" and "strip". This distinction is unwarranted in the current context (see section 4.1 above).

Consequently, this objection is unfounded. Claim 9 complies with the requirements of Article 123(2) EPC.

4.3 Sufficiency of disclosure

Whether the subject-matter of granted claim 1 was sufficiently disclosed was examined in section 2 of the Grounds for the decision under appeal. In section 2.2, the opposition division made the following statement:

"According to the opposition division, even when assuming that the range of "ALLOY" is outside of the current claimed range of claim 1, it has a composition that is very close to the composition of the claimed lithographic [sic] sheet and it is within the skill of the skilled person to perform the invention and make the lithographic sheet of claim 1 and apply the method of claim 10, as the method of making the sheet can be easily adapted by the skilled person to arrive at desired alloy composition of the claims. The reversal of the burden of proof does not apply here, as it is credible from the patent that the effect is achieved and the opponent has not provided evidence of the contrary. Therefore the requirements of Article 83 EPC are met."

The board shares this view. A successful objection of lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts (see T 19/90, section 3.3 of the Reasons). In order to establish insufficiency of disclosure in *inter partes* proceedings, the burden of proof is upon an opponent to establish, on the balance of probabilities, that a skilled person reading the patent, using his common general knowledge, would be unable to carry out the invention. It is not apparent to the board why the skilled person would have been unable to carry out the invention to obtain a lithographic sheet according to

claim 1 of the set of claims which the opposition division found to comply with the requirements of the EPC and perform the method according to claim 9 of this set of claims. As the claims do not require the plate to have specific properties (other than the ranges for the various components and impurities), the question of whether the plates obtained have those properties is not relevant for the examination of sufficiency of disclosure. Whether those skilled in the art know whether they are working within the scope of the invention is a question of clarity and not sufficiency of disclosure (see e.g. decision T 1811/13, section 5.1 of the Reasons). Since the alleged lack of clarity does not arise from a post-grant amendment of the patent, it is outside the board's scrutiny (see decision G 3/14). Finally, the fact that the description does not contain a specific embodiment appears to be unproblematic in view of what is claimed.

Consequently, the objection based on Article 83 EPC is unfounded.

4.4 Novelty of the subject-matter of claim 1 over the disclosure of document D4

The opposition division concluded that the subject-matter of claim 1 of the patent as granted was anticipated by document D4. In section 5.2.3 of the Grounds for the decision under appeal, it justified this conclusion as follows:

"According to the opposition division claim 1 is not novel in view of the alloy "A" of D4. D4 is directed to a sheet for offset printing which is a field closely related to lithographic sheets and the sheet of D4 is therefore suitable as

lithographic sheet. Further Alloy "A" has a composition falling within the ranges of claim 1 as the Zr content of Alloy "A" falls within the range allowed for incidental impurities of claim 1. It is noted that for the other metals (Zn, Ti and Cu) an upper limit lower than 0.05 wt.% is given in claim 1. This confirms that for other metals a presence in an amount near the upper limit of 0.05 wt. % is within the scope of claim 1.

Further, as to the Zn content, this is not given for alloy "A" in tabel [sic] 1 of D4. On page 4, lines 18-20 of the translation of D4 it is mentioned that the level of Mn, Cu and Zn is preferably below 0.05 wt.%. As the levels of the other two metals Mn and Cu are given in table 1, it is implicit that Zn is indeed not present. Even if one would assume that Zn is present, the claimed range of 0-0.03 wt.% of claim 1 is not narrow compared to the preferred impurity level of Zn of 0-0.05 wt.%, and there is no effect associated with the claimed range. Therefore the requirements of novelty of ranges would not be in view of D4 (cf. GL VI 8 (ii)), and the subject-matter of claim 1 would still not be novel in view of D4."

However, the opposition division was of the opinion that the subject-matter of auxiliary request 1 (which constitutes the respondent's main request in the appeal proceedings) was new for the reasons set out in section 5.4.3 of the Grounds for the decision under appeal:

"According to the opposition division the range of D4 in paragraph 22 of 0.004-0.020 is not clear from the translation. It is not clear what the "t" is in the formula "t-0.004 -0.020" and also not what is

*meant with the wording "ink contamination proof".
Therefore D4 does not clearly and unambiguously
disclose a range of Cu of less than 0.007 wt.% in
combination with alloy "A".*

The appellant argued that document D4 disclosed all the features of claim 1. The respondent contested this and pointed out that document D4 did not disclose features S3 and S6.

4.4.1 Feature S3

According to this feature, the weight percentage of copper in the aluminium alloy is less than or equal to 0.007. The appellant referred to the first paragraph on page 8 of translation D4*, which contains the following statement:

"... it is preferable that the amount of manganese (Mn), copper (Cu), and zinc (Zn) be all less than 0.05 wt%, and when there is a severe requirement of a quality with resistance to ink staining, it is preferable that the copper content be in the range of 0.004 ~ 0.020 wt%."

The lower limit of the range given for the copper content (0.004 wt%) directly and unambiguously anticipates feature S3. The fact that the skilled person might have preferred to work in the upper part of the range is irrelevant in this context.

Thus, document D4 discloses feature S3.

4.4.2 Feature S6

According to this feature, the weight percentage of zinc in the alloy is less than or equal to 0.03.

The passage of document D4 cited above (see section 4.4.1) states that the amount of zinc is preferably less than 0.05 wt%.

The opposition division also referred to Table 1, whose alloys do not contain Zn at all, this of course being less than 0.03 wt%. However, none of the alloys listed in this table has all the features S1 to S7.

The opposition division finally found that the claimed range of 0-0.03 wt% Zn was not new over the disclosed range (0-0.05 wt% Zn). The opposition division applied the principles developed in the jurisprudence of the boards, as summarised in decision T 279/89, according to which a selection of a sub-range of numerical values from a broader range is new when each of the following criteria is satisfied:

- (a) The selected sub-range is narrow.
- (b) The selected sub-range is sufficiently far removed from the known range illustrated by means of examples.
- (c) The selected area does not provide an arbitrary specimen from the prior art (purposive selection)

There appears to be a consensus in the more recent jurisprudence that that purposive selection is relevant for assessing inventive step but not novelty (see "Case Law of the Boards of Appeal of the EPO", 10th edition, 2022, section I.C.6.3.1.). The current board also

shares this point of view. Therefore, only points (a) and (b) need to be considered.

The application of these principles leads to the conclusion that the selected range of 0-0.03 wt% Zn is not new over the disclosed range (0-0.05 wt% Zn), if only because the selected sub-range covers 60% of the disclosed range and cannot be said to be "narrow" with respect to the latter.

Thus, document D4 also discloses feature S6.

4.4.3 Conclusion on novelty

The subject-matter of claim 1 lacks novelty over the disclosure of document D4 (Article 54(1) EPC).

4.5 Conclusion on the main request

As the subject-matter of claim 1 of the main request is not new, the main request is not allowable.

5. Admittance of auxiliary requests 2 and 3

Auxiliary requests 2 and 3 were filed for the first time with the respondent's reply to the appellant's statement of grounds of appeal. In application of Article 12(4) RPBA 2007, the board is empowered to hold inadmissible these requests if they could (and should) have been presented in the first-instance proceedings.

The appellant argued that the requests should not be admitted because they were late filed and lacked convergence.

Both auxiliary requests appear to constitute a legitimate and timely reaction to the filing of the improved translation D4* and could therefore be admitted into the proceedings. The alleged lack of convergence appears not to be decisive in view of the fact that the requests were filed at an early stage of the appeal proceedings. However, in view of the fact that the proprietor withdrew their appeal and the upper limit for the weight percentage of Cu has been increased, these requests do not comply with the principle of prohibition of *reformatio in peius* (see decision G 9/92). Consequently, even if they were taken into account in the appeal proceedings, auxiliary requests 2 and 3 would have to be rejected as inadmissible in view of the principle of prohibition of *reformatio in peius*.

Thus, the board has decided not to admit these requests into the proceedings in application of Article 12(4) RPBA 2007.

6. Conclusion

As none of the respondent's requests is allowable, the patent has to be revoked.

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:



N. Schneider

P. Lanz

Decision electronically authenticated