

Gap of Information is Reason for Revoking a European Patent



IN SHORT

The Situation: In European patent law, opposition against a patent grant can be based only on particular grounds, with one of the grounds being insufficiency of disclosure, meaning that the invention is not disclosed clearly enough for a person skilled in the art to carry it out.

The Development: The European Patent Office affirmed this principle with its recent rejection of a mechanical device patent, citing a lack of disclosure regarding how certain "angled" and "oblique" openings were to be provided for a particular apparatus seeking patent protection.

Looking Ahead: The Technical Board of Appeal stresses that evidence supporting the common general knowledge of a skilled person must be presented by the patentee/respondent, and it is not the responsibility of an opponent/appellant to prove the opposite.

An opposition against the grant of a European patent can only be based on the grounds specified in Article 100 European Patent Convention, with one of the grounds being that the invention is not disclosed clearly and completely enough for a person skilled in the art to carry it out. This ground of opposition, also referred to as the sufficiency of disclosure requirement, is rarely used successfully.

Insufficiency of disclosure is given in cases where an undue number of experiments ("research program") are necessary for implementing a claimed subject matter. This principle has recently been confirmed by the European Patent Office for a mechanical device patent with its [decision T 0421/16](#).

This recent decision is significant for the following two reasons.

Guidance for the Skilled Person

Each patent must provide sufficient guidance for implementing a claimed subject. The skilled person cannot be left with a trial-and-error approach involving an unacceptable number of trials to close gaps of information.

In the decided case, an "apparatus for the execution of a method for the removal of liquids from particulate material by evaporation through the supply of heat" was claimed. According to the claim, the heat is to be transferred to the particulate material through superheated steam, which also has to condition the particulate material such that it:

- rotates in a fluidized bed above the bottom of an annular chamber with openings in the bottom, allowing the superheated steam to enter into the annular chamber; and
- possibly moves from the region of introducing the particulate material to be dried into the annular chamber to the region to remove the dried particulate material from the annular chamber.



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According to the main claim of the patent, the respective conditioning should be the direct result of the shape of the openings in the bottom, namely by fulfilling the following two requirements: the openings in the bottom are shaped in such a manner that the influx of steam takes place (i) partly at right angles to the bottom; and (ii) partly at angles to the bottom of between 0° and 90°.

On the one hand, the patent covered, among others, curved bottoms without providing any information on how to define its angle. On the other hand, the patent contained no disclosure on how "angled" or "oblique" openings are to be provided in particular for relatively thin bottom plates.

Therefore, the disclosure of the patent was considered to be insufficient by the responsible Technical Board of Appeal at the European Patent Office.

Obvious Choice

In addition to an explicit disclosure, an implicit disclosure also can be provided by a patent. An implicit disclosure covers common general knowledge of the skilled person, but not unobvious choices.

The Technical Board of Appeal, having dealt with the discussed case, stressed that evidence supporting the common general knowledge had to be presented by the patentee/respondent. That is, it was not the task of the opponent/appellant to prove the opposite.

For example, for closing the gap of information on how an angled influx results from specially shaped openings of the bottom—in particular in the form of oblique openings, in addition to simple and thus straight holes—the patentee/respondent alleged that: (i) punching a thin plate would result in protruding collars at the plate's inner side that serve as an additional steam guide, and (ii) suitably drilled plates are on the market. In neither case, however, did the patentee/respondent submit any respective proof.

Thus, the Technical Board of Appeal had to negate the existence of an obvious choice of the skilled person to close the gap of information, and the patent was therefore revoked.

TWO KEY TAKEAWAYS

1. Although not all features of a claimed apparatus have to be disclosed in a patent, at least all structural features necessary to obtain a claimed result have to be explicitly or implicitly described within the patent; otherwise, there will be a gap of information.
2. Common general knowledge can close a gap of information when only respective evidence is submitted.

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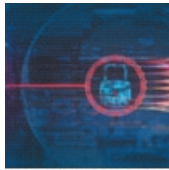


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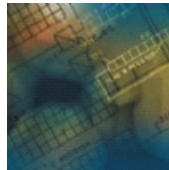


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