

documents of a definite date. Taking into account the very late stage in the proceedings and in the absence of any such documents, it could not be established with a sufficient degree of certainty what had been made available to the public before the priority date of the opposed patent; the board therefore decided to disregard the late-filed evidence (Art. 114(2) EPC). Compare with T 1057/09 (point 5.9 of the Reasons) concerning remaining doubts as to the authenticity of a late evidence.

3.2.4 Comparative tests to demonstrate a technical effect achieved by the claimed invention

In T 2371/13, the party as of right (opponent 1) had requested that the test results filed by the respondent during the examination proceedings and those it had filed in response to the statement of grounds of appeal be excluded from the appeal proceedings. The board refused the request for the following reasons: that an effect is **implausible** owing to the absence of evidence in the patent application is not a sufficient reason for disregarding comparative tests filed subsequently to prove it; disregarding them for that reason is incompatible with the problem-solution approach. As regards taking account of plausibility as part of the inventive-step assessment, and the possibility of considering post-published documents, see also chapters I.D.4.3.3, II.C.6.8, and referral **G 2/21**.

3.2.5 Evidence rejected as prima facie irrelevant

In T 39/14, which concerned a method for improving foaming properties, comparative tests filed by the appellant (opponent) with its notice of appeal were considered **prima facie irrelevant** to inventive step and therefore not admitted (Art. 114(2) EPC and Art. 12(4) RPBA 2007). They could possibly have been used to support an objection under Art. 100(b) EPC but that ground for opposition had not been admitted either.

In T 973/10 the board decided not to admit late-filed evidence of prior use. The board held inter alia that the evidence was anyway not prima facie relevant. The **photographs** produced were not sufficiently compelling evidence because they did not enable it to reach any objective conclusion as to the nature and structural details of the device allegedly disclosed at a meeting (Art. 114(2) EPC in conjunction with Art. 12(4) RPBA 2007).

See also T 1680/15 on how the late filing of various means of evidence in the opponent's possession (including an offer of witnesses, affidavits, invoices) affected the board's decision on whether to consider them.

For information on the concepts and provisions that are now applicable, please see the chapters on late-filed evidence and on RPBA 2020.

3.2.6 Evidence submitted "in due time"

In T 1830/11 the board observed that there are **no provisions** in the EPC **obliging** opponents to provide evidence against every possible fallback position defined in the dependent claims. Thus, if amendments were made to the claims during oral proceedings before the opposition division, the obligation to submit evidence "in due time" under