

that common general knowledge would indeed enable the skilled person to carry out the invention (T. 63/06, summary of this case law in T. 347/15). In T. 338/10, citing this approach, the board held that the reasoned arguments submitted by the respondent (opponent) reversed the burden of proof, placing the onus on the appellant to show that the skilled person would have considered it likely that the claimed therapeutic effect was obtainable in the case in point, despite a lack of data and thus only a weak presumption. But since the appellant had not responded by submitting any arguments or evidence, the board held that the patent as granted did not comply with Art. 83 EPC (the principles applicable in the context of that article are recalled for example in T. 518/10, see chapter II.C.9.).

In T. 1889/15, in relation to Art. 83 EPC, the question arose as to how the burden of proof could be discharged by the opponent. The board in T. 63/06 had explained that there was a presumption of validity once a patent had been granted. The weight of submissions required to rebut this presumption depended on its strength. It had then distinguished between two cases. A "strong presumption" existed where the patent contained detailed information on how to put the invention into practice, including test results relating to a particular property. Detailed information or evidence, e.g. in the form of comparative tests, was then required to establish a lack of sufficiency (T. 63/06, section 3.3.1(a)). By contrast, a "weak presumption" applied where the patent did not contain detailed information. Then, less substantial submissions were required and it was adequate to raise serious doubts, e.g. by comprehensive and plausible arguments (T. 63/06, section 3.3.1(b)). In the case at issue in T. 1889/15, there existed a strong presumption of validity in respect of sufficiency of disclosure, and a commensurately high standard of proof was required from the respondent (opponent) to demonstrate that this was not the case, e.g. in the form of comparative tests showing that following the teaching of the patent did not make it possible to obtain reliably the defined ESCR index. However, beyond referring to two examples, which were defective, the respondent had not provided any detailed arguments, let alone verifiable evidence, e.g. in the form of experimental results, to demonstrate any deficiency in the disclosure.

d) Unusual parameters

In T. 131/03 the board pointed out that, once the opponent had established a strong presumption that unusual parameters as those used to define the claimed subject-matter were inherently disclosed in the prior art, the patent proprietor could not merely claim the benefit of the doubt. It was incumbent upon the patentee to establish the extent to which the parameters used in the definition of its invention actually distinguished the claimed subject-matter from the prior art (followed by T. 2732/16). See also T. 1452/16 (unusual parameters – alleged prior use – public availability of a product): as to the possibility for the patent proprietor to obtain samples and test them, the board stated that when testing samples manufactured after the priority date the legitimate question could arise of whether the results obtained were representative of the ratios present in the samples of the prior art. However, by using a parameter which had not been used in the prior art, the burden was on the patentee to prove that the prior art did not fall within the terms of the claim.