

In T 252/10 the board noted that the absence of a hint in the prior art that there might still be a desire for further improvement did not mean that an unrecognised problem had been discovered.

In T 971/92 the board emphasised that the appreciation of conventional technical problems which formed the basis of the normal activities of the notional person skilled in the art, such as the removal of shortcomings, the optimisation of parameters or the saving of energy or time, could not involve an inventive step. The appreciation of a technical problem could thus only contribute to the inventive step in very exceptional circumstances. However, if an applicant nevertheless wished to rely on an assertion that the inventive activity resided in the recognition of a technical problem to which the solution was admittedly obvious, then the minimum requirement to be met was that this technical problem be clearly and unambiguously disclosed in the application as filed (see also T 43/97, T 1417/05).

In T 566/91 the invention related to a soft nystatin pastille formulation for treatment of candidiasis in the oral cavity. In the case in point the board did not agree with the submission by the appellants that the technical problem underlying the contested patent consisted in the unrecognised problem of poor patient compliance, as the average skilled person could have posed that problem where – as in that particular case – one necessarily came to light when an object or product was used. Consequently, a problem which amounted to no more than noticing obvious non-compliance with an obvious desideratum in a given situation, namely poor patient compliance using nystatin formulation as a result of the unpleasant taste of the active substance, could not be retained as the actual problem to be solved.

In T 764/12 the technical contribution of the patent in suit resided in identifying a problem which was hitherto not recognised in the prior art, namely the need for protection during storage at ambient environmental conditions of a chewing gum base comprising environmentally degradable polymers. The arguments of the opponent that the claimed invention lacked inventive step because the coating was well known to reduce degradation over time were not relevant. Referring to T 2/83 (OJ 1984, 265) the board acknowledged an inventive step because the perception of the problem had to be considered as being the main contribution to the inventive merits of the solution claimed.

### **9.13. New use of a known measure**

When determining inventive step in the case of a new use of a known measure, the boards of appeal examine whether or not the problem which has been solved with a known measure in a known case differs from the problem posed in the case to be decided. If this examination reveals that there is no fundamental difference between the two problems, it can in principle be concluded that there is no inventive step if the known measure is adopted (see in particular T 39/82, OJ 1982, 419; T 142/84, OJ 1987, 112; T 332/90; T 485/91; T 25/97). In T 39/82 (OJ 1982, 419) the board stated that it could not be considered obvious for the skilled person to use a known measure in a different context since the problems differed fundamentally from one another.