

Following T 1063/06, the board held in T 852/09 that since the enhancers to be used were characterised in functional terms only and the claim merely represented for the skilled person an invitation to perform a research programme, he/she could not carry out the invention within the entire scope claimed without undue burden (see also T 155/08).

In T 2070/13 the board indicated in its preliminary opinion that an adequate test method for anti-adherence was lacking and that no suitable compounds were defined within the claimed families of compounds. In particular, the argument of the respondent (patent proprietor) that the skilled person could carry out the invention by way of routine optimisation using standard procedures was not convincing. The board stated that no standard procedure was disclosed in the patent in suit and none was referred to during the whole proceedings. Even if a specific model test procedure were used to determine the anti-adherence, this did not significantly reduce the extent of the experimental programme required to identify the appropriate anti-adherent materials. The board concluded that the skilled person was unable to identify suitable materials displaying anti-adherence due to the large number of potential materials listed, several of these listed materials also describing large families of compounds; the skilled person would be faced with an experimental programme in order to establish which of the listed materials satisfied the claimed criterion of anti-adherence.

If the patent claims require that a specific aim should be achieved (in this case, that a specific value of a parameter should not be reached), then there is no guarantee that the invention can be carried out in accordance with Art. 100(b) EPC if the patent affords the skilled person no clue as to how he can achieve this aim outside the scope of the embodiments without an undue burden of research (T 809/07).

In T 518/17 the board stated that a reasonable amount of trial-and-error experimentation might be acceptable for the purposes of finding that a claimed invention could be carried out without undue burden. This, however, presupposed that sufficient information was available that led the skilled person directly towards success through the evaluation of initial failures. Based on the evidence on file, the board considered that information on critical process variables was lacking here. The skilled person would therefore need to repeat the lengthy optimisation and improvement process, without any guarantee of success. Such a situation was often described in the case law as an invitation to perform a "research program" and considered to amount to an undue burden.

6.8. Post-published documents

Sufficiency of disclosure must, in principle, exist at the effective date of a patent, while post-published documents may be used as evidence that the disclosure is reproducible without undue burden only under certain circumstances.

In the absence of any tangible proof in the patent specification that the claimed concept can be put into practice, post-published documents can be used as evidence whether the invention merely disclosed at a general conceptual level was indeed reproducible without undue burden at the relevant filing date (T 994/95 and T 157/03). In T 1262/04 of 7 March 2007, the board considered that this principle applied at least to cases such as the