9.10. Equivalents

According to established case law of the boards of appeal, equivalents which are not disclosed in a published document must not be considered in assessing novelty, as this properly belongs to the examination for inventive step (see **T 167/84**, OJ 1987, 369; **T 446/88**; **T 517/90**; see also Guidelines G-VI, 2 – March 2022 version). In **T 697/92** the board dealt with the concept of "equivalent means", according to which two means were equivalent if, despite having different embodiments, they fulfilled the same function with regard to the same result. Both means performed the same function if they shared the same basic idea, i.e. if they applied the same principle in the same way. The result was the totality of the technical effects produced by the means. In order to be considered as equivalents, the means had to achieve the same kind and quality of result. A means was thus not equivalent if, because of its different embodiment, it led to a result of the same kind but of a different quality or degree of effectiveness. The result did not necessarily even have to be better; it was sufficient for it to be different, since it was not the result itself which was patentable but the means by which it was achieved (see also **T 818/93**, **T 929/02**).

9.11. Selection inventions

In **T 2623/11** the board stated that for selection inventions, only if the selection was connected to a particular technical effect, and if no hints existed which lead the skilled person to the selection, may an inventive step be accepted. In the case in hand, there was no support in the application for the claimed selection being connected to any particular technical effect. Moreover, hints existed in the state of the art which led the skilled person to the selection.

9.12. Problem inventions

The discovery of an unrecognised problem may in certain circumstances give rise to patentable subject-matter in spite of the fact that the claimed solution was retrospectively trivial and in itself obvious (see **T 2/83**, OJ 1984, 265; **T 225/84**). The posing of a new problem did not represent a contribution to the inventive merits of the solution if it could have been posed by the average person skilled in the art (**T 109/82**, OJ 1984, 473). It also had to be taken into consideration that it was the normal task of the skilled person to be constantly occupied with the elimination of deficiencies, the overcoming of drawbacks and the achievement of improvements of known devices and/or products (see **T 15/81**, OJ 1982, 2; **T 195/84**, OJ 1986, 121; **T 455/91**, OJ 1995, 684).

In **T 532/88** the board confirmed the established principle that to address a problem simply by looking for ways of overcoming difficulties arising in the course of routine work did not constitute inventiveness. Following this case law, the boards held in **T 630/92**, **T 798/92**, **T 578/92**, **T 610/95**, **T 805/97**, **T 1417/05** and **T 2303/11** that the posing of the problem could not confer any inventive merit on the claimed subject-matter. Inventive step was however acknowledged in **T 135/94**, **T 540/93**, **T 1236/03**, **T 764/12**, **T 1201/13** and **T 2321/15** on the ground (also) that the posing of the problem was not obvious.