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Ex post facto analysis epo guidelines

As readers of this blog will be aware, the EPO applies a rather special and unique method for inventive step analysis, the "problem-solution approach". This approach breaks the statutory question of Art. 56 if the invention was, given the state of art, obvious to a person expert in art, up to a three-phase test. This involves (1) determining the 'closer preceding art' (2) the formulation of 'objective technical problem', and (3) the assessment if the invention claimed would be obvious to the qualified person. One could stop this approach by replacing a single problem (the determination of inventive objectivity/pass) with three problems. This is due to the fact that the parties today often discuss (i) what the nearest anterior art was, (ii) what the objective problem was, and of course (iii) if the invention, expressed as a solution to the technical problem objective, was obvious or not at the date of priority or deposit. This contribution will focus on the question (i), i.e. the question of what is (or should be) the nearest preceding art, and if the approach of the EPO towards the nearest previous art has changed over the last two years. The jurisprudence of the Appeal Commissions has developed some criteria to identify the document that is used as a starting point for the evaluation of the inventive step, the so-called "previous art nearest". Usually, the nearest previous art is the document that shares the invention or objective itself, and requiring the minimum of structural and functional changes (e.g. t 606/89). epo's appeal commissions are quite careful that this approach is objective and rules out of perspective, "if properly applied". For example, case law book states: according to the Board of Appeal (cf. t 1/80, gu 1981, 206; t 20/81, gu 1982, 217; t 24/81, gu 1983, 133; t 248/85, gu 1986, 261), the assessment of the inventive phase must be based on the objective, not subjective, of the achievement of the inventor. Starting from the objectively prevalent state of art, the technical problem must be determined on the basis of objective criteria and consideration given if the solution disclosed is obvious to the qualified person. Although the problem and solution approach is not mandatory, its correct application facilitates the objective assessment of the inventive step. The correct approach to the problem and the solution defines an ex post facto analysis which uses in an inimitable way the knowledge of the invention (t 564/89, t 645/92, t 795/93, t 730/96 and t 631/00). In principle, therefore, the approach of the problem and solution must be used; However, if an other method is taken exceptionally, the reasons for this generally approved approach should be given, but we are honest: at least the nearest anterior art cannot be determined without sight, i.e. without knowing in advance (ex post facto). This is almost by definition: How can one determine whether a certain previous art is near or far from invention, if one supposes not to know the invention? Thus the task is to determine first the nearest anterior art having knowledge of the invention, and then determine the problem that the invention "objectively" solves vis à vis to this nearest previous art (again once it requires the invention to be known), and then try to forget the invention completely when you judge the third question of obviousness. This may or may not work, but excluding perspective is probably the most difficult task in determining the inventive step however, regardless of the methodology used. The concept of anterior art closer to the problematic solution approach has been invented to facilitate and objective the inventive step examination. The facilitation lies in the presumption that if the invention is not obvious from the nearest previous art document, then it will also be non-obvious from further to previous art distance. Thus, if and when a document can be clearly identified as the nearest anterior art, the inventive step examination can be concentrated and limited on this document (in combination with any further document from the state of art). The question is what happens when (a) several documents are (probably) about as close to invention and (b) if no document qualifies as a reasonable starting point.scenario (a) an adverbs were, at least in the past, usually allowed to present multiple attacks for inventive shortcomings even if they start from different art documents "closer," however, a decision of the appeal commission and a subsequent modification of the guidelines for the G-VII examination, 5.1 about 18 months ago raised concerns that the opposition division can take a step-by-step approach and select the nearest previous art document before proceeding problems. This could, in fact, require that an opponent identifies his approach "best case" from the beginning of the process and concentrates on one approach. In particular, the guidelines now cite 320/15 stating: ... applying the troubleshooting approach from different starting points, for example from several previous documents, is required only if it has been demonstrated with conviction that these documents are equally valid traces. in particular in opposition proceedings the structure of the problem-solution approach is not that of a forum where the opponent can freely develop as many inventive step attacks as he wishes in hope that one of these attacks has the possibility of success. interesting, t 320/15 mainly concerns an appeal based on a alleged violation of the right of opponent to listen, rather than the assessment of the inventive step itself. Moreover, the council itself did not hesitate from two different documents. However, the decision hashas made its way towards the Guidelines for a particular paragraph, which reads (in our translation from French) as follows: As regards the second objection, the Council notes that, according to the problem-solution approach, the applicant should have selected, at first, the most promising document to arrive at the invention claimed. The applicant reproduces the Opposition Division for not having allowed him to make several choices regarding the nearest previous art document and to validate several attacks based on each of these documents. However, there is no indication in the record that the applicant was not given the opportunity to choose a document other than D4 as the nearest state of art. Moreover, the structure of the problem-solution approach is not constituted by a forum in which the applicant may have developed various attacks based on various documents of the state of art in the hope that one of them would have the possibility to succeed. Therefore, the second objection must be rejected. Thus, T 320/15 does not seem to prohibit an inventive step analysis based on two or more different previous art documents (i.e. using two or more troubleshooting approaches), but seems rather cautious against abuse. The Exam Guidelines also repeatedly stress that more starting points can be appropriate. For example, they say that "there is no need to discuss which document is more "closer" to invention; the only relevant question isthe document used is a feasible starting point for the evaluation of the inventive step". Currently, T 320/15 seems to have not been used by other Boards to prevent an opponent from presenting more than one inventive step attack. Therefore, the practical relevance of this decision must not be overestimated, in particular for the appeal phase. This is even more because several recent decisions rather aim in the opposite direction, supporting a more liberal approach to choosing the starting point for the evaluation of the inventive step. Even in a rather unusual context, the criteria for determining the nearest previous art were tested in T 405/14. In this case, the applicant claimed that the qualified person would never start from the D2 document when the D1 document was available. This argument was based on the fact that the D1 document, in addition to sharing many features with the invention claimed, also faced the same problem of invention, which was (probably) not the case for D2. The Council, however, did not agree and concluded that D1 and D2 were both eligible starting points for the assessment of the inventive step. Despite its finding that the subject-matter claimed was not inventive when, starting from D1, the Council took the issue of analyzing the notion of the nearest previous art in detail. In particular, the Council noted that, depending on the outcome of the objection due to lack of inventive step, the term "closer preceding art" includes two different(cf. Reason 18). On the one hand, when it concludes that a claimed invention is inventive, the notion of "previous art" seems to be based on the hypothesis that there is a metric that defines the distance between objects of previous art and invention, and that an invention that is not evident from the "closer preceding art" would not be evident compared to all other objects of previous art that, by definition, are not so close. Regardless of the fact that the caselaw does not define such a metric as well as indicating which criteria could be considered relevant to it (common characteristics, similar purpose, ...), there are frequent situations in which the identification of a single starting point closer or better is not simple or even possible. The second meaning is often formulated in terms of a requirement for the "closer preceding art" to address the same problem of invention. This is intended to avoid the impediment that leads to a result that the inventive step is lacking. Here, there is no requirement that the "closer preceding art" be unique, because the basic rule is that an invention is lacking inventive step if it would be obvious to the expert person, without hindrance, to any starting point. Moreover, the assumptions behind the concept of "closer preceding art" do not fit well with the general principle, derived from the jurisprudence, which, in order to succeed, an objection of lack of an inventive step must establish logical chain of considerations that would lead the qualified person to the subject-matter claimed. This single requirement opens the door to the elaboration of various scenarios under the resolute approach of the problem, and possibly relying on different elements of previous art as starting points, not even limited to previous art objects that treat the same or similar problem until you avoid the view. Later, the council referred to t 2057/12. in this previous decision, the same council had questioned whether the concept of "closer art" translates into an inventive step analysis that is objective and takes into account all realistic circumstances, or if it rather excludes the documents that would in practice be taken into account by the qualified person. In the event of further investigation, the Council translated the following conclusions (cf. t 405/14, reason 19; added emphasis:) the experience teaches that a document that shares a common purpose with a claimed invention, as well as a large number of features, in order to solve the same or similar problem, will not necessarily allow a convincing objection of oiviality to be raised against such invention, while this invention could indeed be less evident. in this regard, all the elements of preventive art considered as starting points that allow the elaboration of a realistic attack within the meaning of Article 56 of the CPE can be consideredas "the nearest preceding art", although this terminology currently accepted is a bit misleading. The approach therefore excludes any abstract notion of metrics. It follows that any objection of lack of inventive step must be assessed on its merits and that a document selected as a starting point cannot be excluded only because an apparently more promising element of the previous art is available. Where does he leave us? T 405/14 may suggest that, in principle, the concept of "closer" art and its primacy in the first step of the approach to problem solving is fundamentally questioned. If the term "closer previous art" (CPA) involves "no metric", any document can qualify, provided that there is a logical (obvious) way from there to invention. The expansion of the existing concept of CPA, however, can compromise predictability, which is often praised by professionals as an important advantage of the problem solution approach. In any case, the Council's observations in T 405/14 can be seen as a word of caution against a too narrow concept of the "closer preceding art". A document covering the same problem or use, does not necessarily have the most common characteristics with the invention, but may nevertheless be a suitable starting point for the evaluation of the inventive step. This understanding would be fully in line with T 1841/11 in which the Council was held (cf. Catchword): The nearest anterior art should concern the same or at least a similar purpose/objective) as a claimed invention. a particular purpose of the same purpose is available, it is not excluded that a document relating to a similar purpose can be considered as a better choice – or at least equally plausible – of earlier art, provided it is immediately evident to the expert person that what is revealed in the document could be adapted to the purpose of the invention claimed in a simple way, using no more of general common knowledge (reasons, point 2.6) if, despite the availability of the same However, this difference is not one that can legitimately be invoked in support of inventive step. the approach to problem solving presupposes that the expert has a purpose in mind from the beginning of the inventive process, which in this case is the manufacture of a known type of semiconductor substrate consisting of a silicon-germanium film. in this conceptual framework, it cannot be logically supportedthe qualified person would find no reason to incorporate the silicon-germanium. Moreover, a subject which would not be directed to incorporate this difference in the teaching of the document considered as the nearest anterior art, or that this would require more than common general knowledge, would not constitute, in this case, a subject in favor of inventive step, but rather an argument that this document is not actually a promising starting point. similar considerations can be found in t 1518/17 (see also t 1841/11). These decisions seem to suggest that the "previous art" is (or should be) no longer and no less than the "promising springboard" towards the invention (which can, at least in our opinion, be determined only once the approach to the solution of problems was fully carried out) even in t 1742/12, the council actually treated the terms "closer" and "promising" as equivalent observations and made the following: ... a preceding piece of art on the basis of which the invention claimed is not obvious can no longer be closure of a document on the basis of which the invention claimed appears evident, because it is evident in this situation that the first does not represent the most promising trampoline from which to get to the invention (see t 824/05, reason 6.2), on the basis of t 1742/12 and t 1824/05, the guidelines conclude that "the applicant or the holder cannot refute the argumentthe subject-matter claimed lacks inventive step, submitting that a more promising trampoline is available". It was precisely this argument that the applicant relied on T 405/14 and that it was rejected by the Council. (1) In view of the above case-law, it seems that the problem-solution-approach is matured in a 4-phase test, which involves: (1) identify a reasonable starting point between existing art available as a candidate "closer previous art"; (2) assess the technical results (or effects) obtained from the invention claimed and define the objective technical problem; (3) examine whether the qualified person, having regard to the state of art, should have reached. epo guidelines ex post facto analysis

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