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D E C I S I O N
of 28 November 1996

Case Number: T 0301/94 - 3.3.2

Application Number: 86110646.6

Publication Number: 0249651

IPC: C03C 4/08

Language of the proceedings: EN

Title of invention:

Glass of green coloration with high ultraviolet light
absorption

Patentee:

AVIR FINANZIARIA S.p.A.

Opponent:

SAINT-GOBAIN EMBALLAGE

Headword:

Green glass/AVIR

Relevant legal provisions:

EPC Art. 54(2)
EPC R. 55(c)

Keyword:

"Public prior use by sale (yes)"
"Novelty (no)"

Decisions cited:

T 0482/89, T 0952/92, T 0406/86, T 0390/88, T 0093/89,
G 0002/88, G 0001/92

Catchword:

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Case Number: T 0301/94 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 28 November 1996

Appellant: AVIR FINANZIARIA S.p.A
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 26 January 1994
revoking European patent No. 0 249 651 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. A. M. Lançon
Members: M. M. Eberhard
J. Van Moer
C. Germinario
W. Moser

Summary of Facts and Submissions

- I. European patent No. 0 249 651 based on application No. 86 110 646.6 and claiming a priority date of 18 June 1986 was granted with effect from 5 February 1992 on the basis of nine claims. Claim 1 reads as follows:

"Green glass of soda lime type having a dominant wavelength between 562 and 567 nm and a filtering power for ultraviolet light with wavelength between 350 and 450 nm higher than 95%, both measured on test pieces of 5 mm thickness, containing as main components SiO₂ between 67 and 74%, Al₂O₃ between 0 and 4.5%, CaO between 6 and 13%, MgO between 0 and 6%, Na₂O between 10 and 15%, K₂O between 0 and 5% and also containing as colouring agents Fe₂O₃, Cr₂O₃ in a mutual ratio of 2 or lower, and sulphides in a concentration of 0.005% or lower".

- II. The respondents (opponents) filed a notice of opposition requesting the revocation of the patent on the grounds of non-patentability pursuant to Articles 52 to 57 EPC, in particular lack of novelty. The respondents' arguments in support of these grounds were based on two instances of public prior use. It was alleged that glass bottles having the claimed characteristics had been marketed by the respondents as well as by the appellants (patentees) before the priority date of the patent in suit. As evidence of the instances of public prior use, the respondents relied *inter alia* on the following documents:

- D1: EP-B-0 037 346,
- D5: Letter from Avir to Saint-Gobain Emballage dated 25 March 1986,
- D6: Letter from Avir with annexed reports of BGIRA dated 16 June 1986,
- D7: Letter dated 23 January 1987 with "Memoria per Avir S.p.A." to the tribunal of Milano,
- D9: Stazione del vetro, results of analysis,
- D10: "Procès-verbal de constat" of 5 April 1993 and 8 December 1993, pages 1 to 40.

III. In a decision posted on 26 January 1994, the patent was revoked on the grounds that the subject matter of claims 1 and 10 lacked novelty. The opposition division did not accept the appellants' arguments challenging the admissibility of the opposition and considered the opposition admissible. It took the view that the subject-matter of claim 1 was not novel over the public prior use of glass bottles produced by the respondents. D10 revealed that these bottles were sold and delivered to a customer, a champagne producer, before the priority date and that they had a composition and optical properties satisfying the conditions defined in claim 1.

IV. The appellants lodged an appeal against this decision on 31 March 1994 and paid the corresponding fee on the same date. A statement of grounds of appeal was filed on 1 June 1994. In a communication enclosed with the summons to oral proceedings, the parties were informed of the board's provisional opinion on the admissibility of the opposition. In the course of the appeal

procedure further evidence (D12 to D23) was filed by both parties. Oral proceedings were held on 28 November 1996. At the hearing the respondents filed additional documents, in particular two written declarations D18a and D19a containing the same statements as the previous declarations D18 and D19 but in which the signature had been certified by a "notaire". Of the additional documents cited by the parties at the appeal stage, only the following ones are of importance for the present decision:

- D12: Letter from dott. P. Ercole to Stazione sperimentale del vetro dated 13 April 1994,
- D13: Letter from Stazione sperimentale del vetro dated 27 April 1994,
- D14: Letter from dott. P. Ercole to Vusu-Glass Institute dated 14 April 1994,
- D15: Fax from Vusu dated 29 April 1994,
- D18a: "Déclaration sur l'honneur" by Mr Le Goff dated 21 October 1996, certified by a "notaire",
- D19a: "Déclaration sur l'honneur" by Mr de Bengy dated 21 October 1996, certified by a "notaire",
- D22: Three letters from Champagne Billecart-Salmon to Saint-Gobain Emballage dated 6 January 1986, 12 May 1986 and 3 June 1986,
- D23: Letter from Champagne Billecart-Salmon to Saint-Gobain Emballage dated 30 October 1996.

V. At the appeal stage, the appellants continued to contest the admissibility of the opposition in writing. However, they did not maintain this objection at the hearing and abandoned their request to reject the opposition as inadmissible. The arguments put forward by the appellants can be summarised as follows:

In the appellants' view, D10 should have been disregarded as not being submitted in due time pursuant to Article 114(2) EPC. The bottles produced by the respondents had not been made available to the public before the priority date since there was no realistic chance for persons skilled in the art to get access to the unfilled bottles shipped from the respondents' premises to the premises of the champagne producer. Articles stored within the premises of a company were not available to the public.

At the hearing, the appellants acknowledged that a skilled person would have been able on the priority date to determine the sulphide content even at low concentrations of 0.005 wt% or less. They contended however, that it was not common general knowledge on the priority date that a green glass having a high UV absorption might contain a very low amount of sulphides. Thus, when analysing such a glass the skilled person would not have paid attention to the sulphide concentration, high sulphide concentrations being known only in connection with amber glass. Therefore, he would not have carried out a sulphide analysis as confirmed by D12 to D15. The sulphide concentration of the glass was a secret or a "hidden" feature within the meaning of decisions G 1/92, item 3 (OJ EPO, 1993, 277) and G 2/88 (OJ EPO, 1990, 93, 469). The glass composition was thus not made available to the public. The principle stated in G 1/92 whereby the whole composition of a product was disclosed if the product could be analysed did not apply to the present case where one feature was de facto a secret one. In

this context, the appellants requested that the following point of law be referred to the Enlarged Board of Appeal:

"Is the composition of a commercialized chemical product accessible to the public in its entirety if at least one of the components was not recognizable for a person skilled in the art on the basis of the knowledge at the priority date, in particular in case the component is present in an unusual small amount."

Furthermore, the requirement of reproducibility stated in G 1/92 was not met. A skilled person would not have been able on the basis of what was generally known on the priority date to reproduce the green glass without undue burden. Without the teaching of the patent in suit routine experimentation would not have led to the desired result as confirmed by D13. Specific conditions had to be fulfilled such as the hearth temperature and the corresponding reducing power (redox number). If the temperature had not been adequate, then the sulphide content would have had too high a value and the UV-absorbing properties would have been impaired. Thus, a tremendous number of experiments would have been necessary to find out the temperature and the reducing conditions leading to the desired optical properties. Therefore, the composition of the glass was not available to the public.

The appellants argued that as the dates of the invoices were close to the priority date, they were not sure whether the shipments of bottles had reached the premises of the champagne producer before the priority

date. In their view, it was established practice in many companies throughout the world that invoices were sent considerably earlier than the corresponding shipment of articles. D10 did not unambiguously show that the analysed bottles were those produced and delivered before the priority date. Doubts were expressed as to whether only one production run was carried out in view of the fact that the orders extended over a period of six months. The appellants questioned the probative value of declarations D18 and D19, pointing out that they were mere statements of a party with no legal consequence in case of a false declaration. No comments were made as regards the corresponding certified declarations D18a and D19a.

VI. The respondents presented *inter alia* the following arguments:

The sale of bottles to a customer, such as a champagne producer, in a purely commercial operation and thus without obligation of confidentiality, constituted a public act. D13 and D15 did not permit the conclusion that a skilled person would not have considered analysing the sulphide content of a green glass. As a skilled person would have been aware of the importance of the sulphide content and its influence on glass colour before the priority date (see D1, and amber glass), he would have analysed the sulphide content. Moreover, it followed from G 1/92 that the question whether or not a skilled person would have analysed the marketed bottles was not relevant.

A skilled person, knowing that the glass contained less

than 50 ppm sulphides, would have had no difficulty in reproducing the glass. The temperature of more than 1200°C in the proximity of the furnace discharge mouth was usual for this kind of glass and corresponded to the desired viscosity. It was not necessary to know the redox number of the vitrifiable mixture to reproduce the glass. A skilled person would have introduced reducing materials into the starting mixture and measured the dominant wavelength of the obtained glass. He would then have re-adjusted the colour by the addition of coal or sulfate, depending on whether the glass was too green or too yellow.

The respondents argued that it was not usual practice in France to send invoices prior to shipment of the products. D19a and D23 proved that the issue of the invoices and the shipment of the bottles were concomitant. As the customer's premises were situated only about 10 km from the glass factory, it was evident that the bottles were delivered on the same day.

D18a showed that there was only one production run in 1986 for the bottles designated "Billecart Salm.SP 77.5 CH.F." and that the composition of the glass was not changed during this run. The same starting materials were used during the whole run and daily tests were carried out so that the slightest fluctuations could be compensated. Therefore, the analysed bottles necessarily had the same composition as the bottles delivered before the priority date. Concerning the invoice of 21 March 1986, the respondents explained that the bottles with the reference "Billecart Salm. SP

77.5 CH.F" could be distinguished from the bottles designated "Billecart Salmon 77.5 CH.81" in particular by their colour and by the different marks on the bottom corresponding to the different places of production.

- VII. The appellants requested that the decision under appeal be set aside and that the patent be maintained as granted. They further requested that the point of law mentioned above (item V) be referred to the Enlarged Board of Appeal if the board did not agree with the opinion that a skilled person would not have analysed the sulphide concentration on the priority date. The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. The appellants argued that D10 should have been disregarded by the opposition division under Article 114(2) EPC since it had been submitted after expiry of the opposition period and was not relevant. The board shares the opposition division's opinion that D10 is of such relevance that it had to be introduced into the proceedings. The reasons for this are readily apparent from the following considerations.
3. The respondents contended that green glass bottles produced by themselves and exhibiting all the characteristics recited in claim 1 as granted had been

sold to a customer, namely a champagne producer, before the priority date.

D10, which was submitted by the respondents as evidence of this alleged prior use, comprises a first "procès-verbal de constat" drawn up by a "huissier de justice" and dated 5 April 1993 and a second one dated 8 December 1993, as well as the enclosures referred to in these reports. The evidentiary value of such official reports drawn up by a "huissier de justice" was no longer questioned at the appeal stage. D10 and its enclosures reveal the following:

In April 1986 champagne bottles having a special shape were produced by the respondents in their factory in Oiry, on the order of a customer, Billecart-Salmon SA, producer of champagne. The respondents submitted that, because of the special form of these bottles, they were produced only once a year in a single production run when ordered by the said customer. The report of the corresponding production run (page 7 of D10) shows that 182 160 bottles designated "Billecart Salm. SP 77.5, bague SP.BS, teinte CH.F" were produced in one run of six days from 15 to 21 April 1986. A letter from the champagne producer confirms that he had ordered 140 000 of these special bottles on 6 January 1986 (see D22, page 1). D10 also comprises invoices dated 21 May 1986, 22 May 1986, 23 May 1986 and 13 June 1986, ie before the priority date, concerning the sale and delivery of 75 834 bottles having the same reference as in the run report. The additional invoices dated 18 June 1986, 19 June 1986 and 7 July 1986 show that further bottles produced in the same campaign were also delivered on

and after the priority date. According to D10 the bottles of special shape produced in 1986 in the factory at Oiry can be distinguished from other bottles produced in a different year and in another factory by different marks on the bottom (for 1986: the letter T surrounded with six dots and for the factory at Oiry: the letters S and G with two points in between). On 8 July 1986 a number (21 134) of the delivered bottles were used to bottle champagne at the premises of the champagne producer. The bottles which were removed by the "huissier de justice" from the cellar of the champagne producer on 5 April 1993 bore the two said marks on the bottom and came from this bottling operation (see D10 pages 2, 4 and 5). Six of these bottles were analysed by two different laboratories (the laboratories of the Institut National du Verre in Belgium and of Saint-Gobain Recherche). The analyses enclosed in D10 show that the results obtained by both laboratories for the compositions and the optical properties all fall within the ranges defined in claim 1 of the patent in suit and that they are in sufficient agreement with each other to be reliable.

- 3.1 The appellants expressed doubts as to whether the bottles mentioned in the invoices dated earlier than the priority date, ie 21 May, 22 May, 23 May and 13 June 1986, had really been delivered to the consignee before the priority date. It was argued in this respect that in many companies throughout the world invoices were sent considerably earlier than the corresponding shipment of the articles. However, according to the "déclaration sur l'honneur" by the "Responsable administratif et financier" in the

respondents' company (D19a) invoices relating to the delivery of bottles to customers are issued concomitantly with the shipment of the bottles from the factory and this was already so in 1986. The issuing of the invoices occurs as soon as the delivery order is issued by the factory when the bottles are shipped, and notification thereof is effected by an E.D.P. system. The customer himself confirmed that the invoices concerning the supply of bottles from the respondents were sent simultaneously with the delivery of the bottles (see D23). The board has no reason to doubt these statements, which were not contested by the appellants. As the premises of the champagne producer Billecart-Salmon are situated, according to the respondents' uncontested statement, about 10 km from the factory, it is also credible that the bottles were supplied to the consignee on the same day or days immediately following. A letter from the champagne producer dated 12 May 1986 and addressed to the respondents shows that a first delivery of the bottles designated "speciales Billecart-Salmon" was planned for 20, 21, 22 and 23 May 1986 (see D22). In view of the documents provided in evidence and of the concordance of their content the board is convinced that the bottles with the reference "Billecart-Salm.SP 77.5 CH.F SP.BS" mentioned in at least the three invoices dated 21, 22, 23 May 1986 (ie 72 864 bottles) had been delivered to the champagne producer before the priority date (18 June 1986). In this context, the board notes that the EPC does not contain any restrictions with regard to the kind of evidence which can be produced in proceedings before the European Patent Office and that the principle of free evaluation of evidence applies to

any kind of evidence submitted in these proceedings (see Singer, "Europäisches Patentübereinkommen", 1989, pages 507, 509 and 513). The probative value of a "déclaration sur l'honneur", the signature of which was certified by a "notaire", depends on the particular circumstances of the case.

Moreover, it was not disputed that the sale of the said bottles to the champagne producer took place without any obligation to maintain secrecy (tacit or express obligation). In these circumstances, and following the well-established case law of the boards that a single sale is sufficient to render the sold product available to the public, provided the buyer is not bound by an obligation to maintain secrecy (see for example T 482/89, OJ EPO, 1992, 646), the board comes to the conclusion that the bottles sold and delivered to the champagne producer before the priority date were made available to the public.

- 3.2 Taking into account that the "Billecart Salm.SP 77.5 CH.F. SP.BS" bottles mentioned in the invoices were not all delivered to the consignee before the priority date, the question arises whether or not the champagne bottles filled on 8 July 1986 and removed from the customer's cellar for analysis were bottles received before the priority date and, if not, whether the glass compositions reported in D10 are representative of all the bottles produced from 15 to 21 April 1986. The bottles delivered before the priority date cannot be distinguished from those delivered thereafter either by their form, their colour or a mark thereon. Although the number of bottles delivered between the priority

date and the date of the champagne bottling (8 July 1986) is somewhat lower than the number of bottles delivered before the priority date, it is however comparatively high. In these circumstances, the possibility that all six bottles analysed were received after the priority date cannot be ruled out. In this context, the respondents have provided a "déclaration sur l'honneur" by the director of the respondents' factory in Oiry (D18a) in which it is stated that in 1986 a single production run was carried out in this factory from 15 to 21 April 1986 for the production of the champagne bottles with the reference SP 77.5 Billecart Salmon in compliance with an order placed by a customer, Billecart Salmon, and that the composition of the glass used to produce these bottles had not been changed during this run. At the oral proceedings, the respondents further explained that the same starting materials were used during the whole run and that composition analyses were performed during this run as well as daily checks on the bottles' colour, so that eventual fluctuations might be compensated by action on the batch composition. The board sees no reason to doubt the veracity of these statements and explanations taking into account that (i) the production run was carried out to fulfil a customer's order of 140 000 bottles of a specific kind in January 1986 (see page 1 of D22), (ii) the designation of the bottles, in particular the colour "CH.F" indicated in the report of the production run (page 7 of D10), is also mentioned in all the invoices concerning the delivery of the ordered bottles, whether they were dated before or after the priority date, and (iii) there are no apparent reasons why the bottle manufacturer would have

changed the colour and hence the composition of the ordered bottles, thus deviating from the customer's order. It should also be noted that, contrary to the appellants' allegation, it is not the order of the 140 000 bottles which extended over a period of several months, but the delivery of these bottles. For the preceding reasons, the board considers that the results of the analysis shown on pages 26 to 40 of D10 are representative of the "Billecart Salm.SP 77,5 CH.F. SP.BS" bottles delivered either before or after the priority date.

At the oral proceedings the respondents further explained that the special "Billecart Salm.SP 77.5 CH.F. SP.BS" bottles could be easily distinguished from the bottles with the reference "Billecart Salmon 77.5 CH.81 SP.BS", which were both mentioned in the invoice of 21 May 1986, in particular by their colour and by the different mark identifying the place of production on the bottom, the latter bottles having been produced in a different factory. These facts remained uncontested. Furthermore, there is also no doubt that the shape of the said special bottles was sufficiently different from that of normal champagne bottles possibly produced in 1986 in the same factory and delivered to the same customer. In these circumstances, the board is convinced that the bottles removed from the customer's cellar were those referred to as "Billecart Salm.SP 77.5 CH.F. SP.BS" in the invoices concerned.

3.3 According to the opinion of the Enlarged Board of Appeal in G 1/92 (OJ EPO, 1993, 277), the chemical

composition of a product is state of the art when the product as such is available to the public and can be analysed and reproduced by a skilled person, irrespective of whether or not particular reasons can be identified for analysing the composition.

- 3.4 It follows from the considerations in items 3.1 and 3.2 above that green glass bottles produced by the respondents from 15 to 21 April 1986 and having the composition, dominant wavelength and filtering power characteristics reported in D10 were made available to the public before the priority date. Therefore, following G 1/92, if the two requirements of analysability and reproducibility were fulfilled, the said chemical composition of the green glass as well as the optical parameters, ie dominant wavelength and filtering power would be state of the art taking into account that these optical parameters represent intrinsic characteristics of the glass composition, and not characteristics depending on a particular use or application of the glass.

As regards the analysability of the glass, the appellants expressly declared at the oral proceedings that a skilled person would have been able to determine the composition of the said green glass before the priority date, including the low sulphide concentration, using the methods of analysis known at that time. Furthermore, both the "Stazione sperimentale del vetro" and the "BGIRA" had been able to determine low contents of sulphides in green glass before the priority date, as shown by the corresponding documents D6 and D9 reporting said analyses, and these reports

did not contain any restriction or warning as regards the accuracy of the results. In these circumstances, the board considers that a skilled person would have been able to determine sulphide concentrations of 0.005% or less in a green glass with sufficient accuracy before the priority date.

- 3.5 The appellants' arguments that a skilled person would not have been able on the basis of the common general knowledge on the priority date to reproduce the green glass having the composition and the optical properties stated in D10 without undue burden are not convincing. It was not disputed by the appellants that a skilled person knowing the glass composition would also have been aware of the approximate temperature which has to be used at the proximity of the furnace discharge mouth to obtain the desired viscosity allowing the subsequent forming operation, and that a temperature of above 1200°C was usual for this kind of glass. As regards the reducing conditions, there is also no doubt that the method of preparation of amber glass belonged to the common general knowledge before the priority date, and therefore that it would have been well known to a skilled person how to prepare a glass in a reducing environment in order to form a relatively high amount of sulphide ions. The fact that the green glass to be produced contains a lower amount of sulphide ions than amber glass does not mean that a skilled person would not have been able to arrive at such a glass. It would have been immediately apparent to a skilled person that the relative amount of reducing components to oxidising components in the batch composition had to be changed.

Thus, as pointed out by the respondents, a skilled person would have started with a certain amount of reducing materials such as coal and/or blast furnace slag in the batch mixture and would have measured either the sulphide content of the obtained glass (or its dominant wavelength), and then re-adjusted the sulphide amount (or the colour) by modifying the amount of reducing agent or oxidising agent depending on whether the sulphide amount was too low or too high (or the glass too green or too yellow). Therefore, even without knowing the redox number of the vitrifiable mixture, a skilled person would have been able by routine experimentation to reproduce the green glass having the said composition. The statement in D13 that "a continuous production in an industrial plant would have required rather long times, particularly in the early experimental stages" does not prove that the requirement of reproducibility set out in G 1/92 is not met. What is required in this decision is not that **continuous** production on an **industrial scale** be possible without undue burden, but that a skilled person be able to prepare the product without undue burden on the basis of his general technical knowledge and knowing the composition or internal structure of the product, whatever the scale of production (laboratory, pilot or industrial scale).

- 3.6 The appellants argued that the sulphide concentration of the glass was a "hidden" or secret feature in the sense of decisions G 2/88 and G 1/92 (item 3). In the appellants' view, as it was not common general knowledge on the priority date that a green glass having a high UV absorption might contain a very low

amount of sulphide, the skilled person would not have carried out a sulphide analysis and, therefore, the glass composition was not made available to the public. The board cannot follow this line of argument for the following reasons:

Item 3 of opinion G 1/92 refers to the use of a known compound for a particular purpose, based on a new technical effect as defined in G 2/88, and it is stated in this context that such characteristics cannot be regarded as having already been made available to the public when the compound itself is available to the public. The situation considered by the Enlarged Board of Appeal is however different from that of the present case, since it concerns a claim relating to a new use of a known compound reflecting a newly discovered technical effect and not a claim to the compound itself. It is the new technical effect which constitutes a hidden or secret feature, not the composition itself or one component thereof.

Furthermore, when arguing that the chemical composition of the green glass was not made available to the public because the skilled person would not have analysed the sulphide content on the basis of the common general knowledge at the priority date, the appellants in fact introduce an additional requirement for the chemical composition to be available to the public. This additional requirement is that the skilled person should be able to recognize a priori, on the basis of the common general knowledge, which components the commercially available product might contain and in which amounts. Such an additional requirement would not

be in agreement with the essence of opinion G 1/92, where only analysability and reproducibility of the commercially available product are required for its chemical composition to be state of the art. According to opinion G 1/92, it is the fact that direct and unambiguous access to some particular information is possible which makes the latter available, whether or not there is any reason for looking for it. As, in the present case, the skilled person would have been able to both analyse the commercially available green glass using the analytical methods known at the priority date and reproduce it without undue burden, the chemical composition of this glass is state of the art even if it had not been common general knowledge that a green glass with high UV absorption might contain a relatively low, but measurable, amount of sulphides. In these circumstances, there is no need to investigate whether D12 to D15 prove that the skilled person would not have determined the sulphide concentration of such a glass.

4. The question for referral to the Enlarged Board of Appeal reads as follows: "Is the composition of a commercialized chemical product accessible to the public in its entirety if at least one of the components was not recognizable for a person skilled in the art on the basis of the knowledge at the priority date, in particular in case the component is present in an unusual small amount". It is implicit from the context in which this question was submitted at the oral proceedings that the said non-recognisable component or the component present in an "unusual small amount" could be analysed on the priority date using

the analytical methods known on that date. However, in the appellants' view, if the skilled person was not aware, on the basis of the general knowledge on the priority date, of the fact that at least one of the components might be present in the product or might be present in an "unusual small" amount, he would not perform an analysis of this component and, therefore, the chemical composition of the marketed product would not be available to the public. In other words, for the chemical composition of a marketed chemical product to be available to the public, the skilled person should be able to recognize a priori (ie before performing an analysis), on the basis of the general knowledge on the priority date which component(s) the product might contain or whether a component might be present in a very small amount. With such an additional requirement, products which are commercially available, analysable and reproducible would be removed from the public domain only because it was not common general knowledge on the priority date that at least one of the components might be present therein or might be present in a very small amount. There is no support in the EPC for such an additional requirement. As pointed out in opinion G 1/92 and already indicated in the preceding point, "it is the fact that direct and unambiguous access to some particular information is possible, which makes the latter available, whether or not there is any reason for looking for it". If the commercially available product can be analysed using the analytical methods known on the priority date, then it is irrelevant whether or not a skilled person would analyse the product or a component thereof, or whether there are reasons for not analysing a particular

component. The board therefore comes to the conclusion that when a commercially available product can be analysed by the analytical methods known on the priority date and can also be reproduced, its chemical composition is state of the art even if a skilled person could not have recognized a priori (ie before performing an analysis), on the basis of the common general knowledge on the priority date that at least one component was present in the product, or was present in an "unusual small" amount. Taking into account that the answer given by the board to the question submitted follows clearly from the previous case law (see T 952/92, OJ EPO, 1995, 755; T 406/86 OJ EPO, 1989, 302; T 390/88 not published in OJ) and is in complete agreement with the essence of opinion G 1/92, which overruled decision T 93/89 (OJ EPO, 1992, 718), the board has decided not to refer this question to the Enlarged Board of Appeal.

5. It follows from the above that the green glass having the characteristics recited in claim 1 of the patent in suit does not differ from the green glass produced and sold by the respondents before the priority date. Therefore, the subject matter of claim 1 as granted does not meet the requirement of novelty set out in Articles 52(1) and 54(2) EPC. For this reason the appellants' request that the patent be maintained as granted must be refused.

6. In view of these findings, it was not necessary to examine the alleged prior use based on the commercial availability of glass bottles produced by the appellants.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request to refer a question to the Enlarged Board of Appeal is rejected.

The Registrar: The Chairman:

P. Martorana P. A. M. Lançon