Chapter 2
Business Methods

Abstract One of the most evocative and negatively perceived areas in which patents have been granted in some regions is that of “methods of doing business”. While treatment of applications in some jurisdictions, notably the USA, has been positive towards applicants, this has varied over time. In Europe the atmosphere has remained largely sceptical towards the desirability and appropriateness of patent protection being given. At the EPO, case law in related areas has progressed through three main stages, namely the formative years, stretching from the late 1970s to the mid 1980s, through the years where data processing device implemented inventions were first noticeable as a sizable field, i.e. 1985–2000, and finally the period in which there was a rapid increase in numbers, in the late 1990s. This increase was linked to a clearly perceived decrease in quality of content of incoming applications.

In the area of business methods, the ignition spark to the explosion in numbers was the State Street Bank decision in the USA. The interpretation given to that decision by many patent professionals and hopeful entrepreneurs was that absolutely anything could now be patented. This was linked to any idea to do with making money, and the common view seemed to be that Europe would have to follow the US lead. The fuel to the explosion was the belief that “doing business” had absolute priority, and the oxygen was greed. Normally this is not so unusual; greed is the engine of capitalism, when subject to reasonable controls it serves the Public rather well. In this case it would appear however that the control was wobbly.

However, in Europe the patent system is less agile/temperamental than some might desire and others might fear. It is sometimes seen as slow-moving or old-fashioned and stability is rarely appreciated until the negative consequences of rash movement and counter-movement become apparent.

In Europe there appears to be a general consensus, exhibited in a variety of ways, that an invention for which a patent may be granted, should be a technical invention. Slightly differing social programming then seems to make the British system prefer a somewhat helicopter view and “you can’t pull the wool over our
eyes” mentality, while the German system takes the route of systematic serious consideration and evaluation of all parts at face value.

These will be discussed in light of the examples, but may be summarised as follows; the helicopter view is, “so what if there is a computer there? The basic idea is simply a business method, so it’s excluded”, whereas the systematic view is, “there is a computer there . . . what it is doing is of no consequence, but it is there, so the total matter is not excluded, yet to use a computer to do stuff like that is obvious”.

The former route has the value of being pragmatic and within the grasp of the layperson; it usually appears brutally sensible. In the early and middle stages of case law development it was generally followed, as it lay within the “contribution approach” methodology of the Boards of Appeal and so was readily taken up thereafter by the national courts.

The latter, systematic, way however, has the value of carrying less risk of the baby being thrown out with the bathwater. It is to this “technical character” approach that the Boards of Appeal turned when analysing increasing numbers of cases, much to the distress of those national courts which may have less flexibility in amending their manner of working.

Applications in the business method area range from vaguely worded desires to please customers to highly mathematical stock price estimating crystal balls. Following the US court decision “State Street Bank”, (in)famous for its “anything goes” nature, they frequently included absolutely no technical content at all. This set off an avalanche of refusals by the EPO and some national offices, due to what was considered an immediately evident lack of patentability.

In light of the turbulence within stock markets starting in 2008, examples of patents and patent applications by investment houses for “better estimation of the risks and benefits of loans” and “leveraging stock values” do little to enhance the perceived value of a patent system. Such applications still regularly arrive on patent examiners’ desks and with these the question of level of an application as a whole, and how applications may be better structured, is of particular interest.

A related matter should also be mentioned and clarified, namely the initial content of an application and how one should consider filing in regions with varying requirements. This leads to the need for information about how an applicant may or may not amend an application to add information. Within the context of this book, we are adding, from one level to the next, subject matter which changes, in our view, the probability of success of an application. It may not render it allowable against all ammunition and objections that an office may throw at such an application, but should reveal the levels of risk in shades of grey.

Frequently, applications appear to have been drafted with no knowledge of, or regard for, the requirements of regions other than the applicant’s own. At times not even that. The classical example of this is when an application is drafted to US standards, in ignorance of protests which should be voiced by a European attorney, or perhaps simply over these. If you are an applicant or an attorney and you recognise this scenario, ask yourself; however much you trust your doctor and your car mechanic, would you ignore one’s advice over the other, no matter how good they are at their own jobs?
Do you really want to bear the costs of the car crash when the brakes fail or the possible side effects of taking the wrong medicine?

If you are self-medicating or have decided to change the brake pads yourself, good luck; we hope this book is helping!

In the US system it is often regarded as unnecessary or even detrimental to include technical detail which underlies the idea most sought after. In the present examples we will consider the idea of auctioning a commodity through varying information levels in order to arrive at the best overall price/throughput balance for the seller. A European attorney may be jumping up and down clicking his fingers, pleading for technical detail to be added to the application, in order to allow him some room for manoeuvre when later confronted with the objections he expects to receive from the EPO or other offices. If these details are not in the application (at least in the description) then the attorney will be facing some considerable problems later. It is somewhat difficult to argue that there is a technical invention involving how all the bits of a data processing device system handle the data in a very clever and inventive way when the author of the application thought the technical detail so self evident, uninteresting and inconsequential that it wasn’t worth writing in. This impression is compounded where the sales advantages, the philosophy behind the marketing idea and the names of the organisational units of the business plan conspicuously take up that space.

These details are not a hindrance to the existence of a technical invention. That is an argument that an attorney at worst need only briefly present before the EPO, and perhaps at slightly more length before, e.g. the UK office. However an absence of the technical bits and pieces to allow an adequate specification of the implementation and the explanation of the technical invention felt to be necessary in the European system will constitute just such a hindrance.

US applicants in particular frequently do not seem to appreciate a key EPC requirement linked to the first to file system, namely that the applicant cannot simply add later technical matter which goes beyond the content of the application as originally filed. Although an equivalent restriction exists in their own law (35 U. S.C 112, MPEP 2163.06, and indeed in Japanese law, though linked to unity of invention) it is perhaps less rigidly applied due to differences of emphases, however in Europe it is a cornerstone of the system. Although traditionally the application system in Europe has been more bilateral than in Japan, these two first-to-file systems have slowly aligned over the years, including the revision in Japan of the possibility of filing divisional applications in 2007.

The possibility of adding content to an application must necessarily be quite narrow in a first to file system (if you think about it for a moment, it would render the whole idea sort of pointless otherwise). Somewhat obviously, and of great irritation when this is not understood – the more an applicant wants or needs to add something, the less likely it is to be a change which should be allowed!

Accordingly, when drafting an initial application the applicant really should consider (a) accepting the professional advice that he is paying for (b) agreeing to such an application including not only the matter which is primarily interesting for one jurisdiction but also that which is interesting for others. This can be removed
when entering purely regional proceedings, or simply “de-emphasised” though
claim amendment and the direction of argumentation taken. To not do so is to
semi-automatically condemn the application in some regions to irrelevance, use-
lessness or refusal. It is at least going to render the application and its processing
more expensive and less effective in the medium- and long-term.

To the examples; initially with wording quite typical in a large percentage of
applications in the last ten years and which may at last become less frequent in the
wake of consistent handling in Europe and Japan and the latest case law in the USA
(which has attempted to tone down expectations that absolutely everything may get
a patent).

2.1 Example 1: Method of Selling

2.1.1 Description

When a business wishes to sell a certain commodity, it can be problematic that
customers with differing expenditure limits and levels of necessity of purchasing
may be in the marketplace at the same time. The selling business is then in a
position in which they are in doubt as to what price should be set. Too high and they
may never find a buyer, too low and they may not make adequate profits over time.
In order to overcome this they may employ an auction, perhaps with a “reserve”
(a price below which they will no longer sell).

This however may in turn result in competing buyers considering purchase at a
price acceptable to the seller, but wishing to place differing “fringe” conditions
(such as the purchase volume in parts or in total, insurance, legal “get out” clauses,
delivery conditions, etc.) on the prospective purchase (Fig. 2.1).

It is proposed in such a situation to hold a second level of auction in order to find
the best set of conditions, including the basic price, such that the seller and a single
remaining buyer arrive at the best possible set of conditions at which the buyer is
prepared to enter into an agreement with the single buyer, thus reflecting the true
market value and conditions of the commodity for sale.

2.1.2 Claim 1

A method of selling commodities comprising the steps of:

(a) making available information about the commodities to potential buyers
(b) receiving offers from the potential buyers including conditions of purchase
(c) considering the received offers and conditions
(d) setting a final price and any acceptable conditions
(e) if a single potential buyer satisfies step (d), selling the commodity to that buyer
(f) if step (e) is not satisfied, reviewing the final price and conditions of step (d) and
   repeating step (e).
2.1.3 Examiner Observations

It is to be hoped that only a few readers will not share the conclusion of the authors that there is little scope for hope in the European system for such a claim. Disingenuous suggestions that commodities are things, and associated arguments suggesting that, as things are being managed, there is a “real world” effect, are unlikely to bear fruit before most European authorities, including the EPO. A patent examiner is always at pains to look for what is actually being done. Here he will allege, with little danger of being incorrect, that all that is being done is a simple human trading transaction. That is then a business method with no alibi of technical character.

Although in some national offices in Europe, such as the UK and perhaps Denmark or Poland for example, the logic may follow a slightly different path due to an alternative outlook on how to approach such subject matter, the outcome will probably be a communication which is quite brusque. Such differences in Europe are not of great consequence in practical terms to the applicant as the outcome of the examination is quite reliably similar. It may be that there is an objection as to base patentability “as such”, owing to there being no features at all considered to possess technical character, it may be that an authority “plays safe” and prefers to note that there is considered to be a lack of inventive step due to no technical problem or solution being present (the ultimate in negative problem-solution logic) or it may even be that the application is considered insufficiently disclosed for any technically skilled person to carry out (as there is nothing technical to carry out).
The bottom line however, is that in Europe such a claim stands virtually no chance of grant and may even be refused for base lack of patentability.

With regard to the specific example, the examiner in Europe may consider it impossible to carry out a meaningful search of prior art. If so, the applicant will receive a declaration of no search which takes the place of the search report (no, there is not a mechanism for a refund!). The decision to proceed in this way lies with the competent search examiner; it comes prior to substantive discussion with the applicant and is not, in itself, a matter for appeal. It does not imply that there will never be a search carried out. If it is considered later that a refusal with a high presumption of validity cannot reliably be written without reference to documentary evidence, it is incumbent upon the examiner to redress this in due time. If the applicant and his representative turn out to be magicians and turn the situation around, a search would, of course, also be necessary prior to any possibly contemplated grant. It should perhaps be noted that although no refund is foreseen when the applicant receives a declaration of no search in place of a search report, it is also the case that no fee is charged for this later (it is termed an “additional”) search, even when that which gave rise to this delay in the normal procedure may be considered unnecessary and outwith the control of the EPO.

In the USA, although the applicant is unlikely to succeed, the application may be treated with a gravitas that some may find either surprising or alarming. It may be with some dismay that a common or garden member of the public reads apparently quite complex reasoning on the philosophical possibility of the physical nature of data during the analysis of the patentability of such defined matter, arriving at either acceptance or rejection of this, while wondering why the emperor is wearing no clothes.

So let’s move the level of technical definition up a little.

Following consistent and rather blunt refusals in Europe of such applications and a relatively negative stance in Japan, as well as some variation between the “anything under the sun” position taken initially by the USPTO and a later hardening of attitude following considerable criticism, most applicants realised that it would be a good idea to have at least some technical features. In the case of business methods there is almost always a computer involved, or the ubiquitous “data over the internet”. This at least provides a slightly lighter shade of grey.

2.2 Example 2: Method of Selling via a Network

2.2.1 Description

Where a seller is negotiating with buyers for the sale/purchase of a commodity up for auction, it is disadvantageous that the parties must be in one place at one time in order for iterative transfer of information pertinent to complex negotiations to be transferred between them.
In order to remove this requirement, it is desirable that the parties may be in communication, despite geographically or logistically isolated locations. To allow this it is proposed to set up a network to allow the transfer of information between the parties, to store the information in a manner allowing retrieval and use of such data and to allow responses to be transferred over the network (Fig. 2.2). The network may be implemented utilising any data transfer protocol or telecommunications infrastructure.

In this way an efficient flow of information, overcoming the traditional disadvantages and allowing removal of restriction in accessibility to markets and therefore higher movement of goods and profit levels is attained.

### Claim 2

A method of selling commodities via a network comprising the steps of:

(a) transmitting, via a network, information on a commodity to be sold to a plurality of potential buyers

(b) receiving, via the network, a plurality of commodity information pieces, each commodity information piece including a preferred cost and a highest acceptable cost, from the potential buyers

(c) storing the received information pieces for respective potential buyers

(d) setting a cost

(e) determining, using the received information pieces stored in step (c), whether there is any potential buyer who proposes a preferred cost equal to or higher than the cost set in (d)

(f) if there is no acceptable buyer determined in step (e), lowering the cost set, and repeating step (e)
(g) if there is more than one potential buyer found in step (e), determining whether there is more than one potential buyer for whom the cost set is less than or equal to the preferred cost such that a competitive state occurs using the auction ordering information pieces stored

(h) if the competitive state occurs, increasing the auction price by a predetermined value

(i) excluding the potential buyer who proposes an acceptable price lower than the increased auction price and specifying the other potential buyer or potential buyers using the auction ordering information

(j) judging whether the competitive state occurs between the potential buyer or potential buyers specified in the step (i)

(k) repeating the steps (h), (i) and (j) and determining the remaining potential buyer as a successful potential buyer when there is no competitive state at step (j)

(l) if no competitive state occurs in step (g), determining the remaining potential buyer as the successful potential buyer.

2.2.3 Examiner Observations

The immediate tendency of the reader is to start “filling in the blanks” in such claim wording. The complete technical novice will read certain “technical sounding” terms and assume that there is something complicated going on. As there is some form of network and protocols are mentioned in the description it is quite natural that an initially imagined structure involves many technical features, controlling software, hardware and I/O details. However, when one takes a step or two back from the imagined system and contemplates that which is actually defined, one notes that in fact the sole difference between our example 1 (business method) and this one is that in the second version there is some sort of ill-defined network present.

Assuming however that this definition is interpreted by the examiner, in light of the description, as implying the utilisation of a technical telecommunications network of some fashion (as opposed to a human relationship type network, which would be a deliberate misinterpretation, and thus ill-suited to the function of neutral examination), the first hurdle of the European system has been overcome. This first requirement is that there is some quantum of technical definition in the claimed matter, and it is satisfied by the mere presence in this claim of the network for data communication.

Following the logic applied by the Boards of Appeal that even pen and paper utilised in support of a non-technical scheme give technical character, even this vague indication of the involvement of some means possessing technical character is sufficient to progress from consideration of lack of patentability to the wonderful world of novelty and inventive step. It is like getting into a night club via a loosely
swinging outer door only to find a very large and quite menacing doorman just inside.

It is possible that this absolute, and directly noted as very trivial, threshold may be rendered relative through a rapprochement between the case law on both sides of the Atlantic through the medium of the words “adequate specification”, echoes of which are to be found in mathematical modelling case law in Europe and inventive step consideration in the USA, or some other mechanism. At that point there may be a minimum dress code politely but firmly required at the outer door of the nightclub.

We can however for now move on to add exactly some of those “imagined” technical details that were missing above.

2.3 Example 3: Automatic Method of Selling via a Network

2.3.1 Description

Where on-line auctions of goods or services are undertaken, the necessity of participation of human operators results in considerable costs for participating businesses. The present application addresses the problem of presence of operators by introducing a hitherto unknown level of automation to multi-level auction processes, allowing the user to delegate the normal running of the auction to the data processing device system engaged (Fig. 2.3). The counterparts in the auction may or may not be aware of the automation level however they also may employ automated response means to arrive at systems which in mutual communication negotiate according to the rules preset to arrive at an outcome satisfactory to all parties.

Fig. 2.3 Automatic method of selling executed in a server data processing device
It is furthermore of considerable advantage that the devices involved may follow a preset timing pattern in order to allow human intervention, or instead by choice or under preset circumstances may operate at their optimum efficiency to arrive at a solution to the technical problem of managing the information and processing of rules in a minimum of time and in a far more efficient manner than would be the case in a implementation without use of advanced technical means and knowledge.

2.3.2 Claim 3

An automatic method of selling executed in a server data processing device comprising the steps of:

(a) transmitting information on a product to be sold to a plurality of client data processing devices via a network, said information including production pollution information, whereby each client data processing device represents a potential buyer
(b) receiving a plurality of auction ordering information pieces, each including a preferred cost, a maximum price in competitive state, and preferred production pollution information for purchase of said product, from the plurality of client data processing devices via the network
(c) storing the received auction ordering information pieces in the server data processing device for respective potential buyers
(d) setting an auction price
(e) determining whether there is any potential buyer who proposes a preferred cost equal to or higher than the auction price using the auction ordering information pieces stored in the server data processing device
(f) if there is no potential buyer in step (e), lowering the auction price, and repeating the step (e)
(g) if there is more than one potential buyer at step (e), judging whether there is more than one potential buyer for whom the auction price is less than or equal to the preferred cost such that a competitive state occurs using the auction ordering information pieces stored in the server data processing device
(h) if the competitive state occurs, increasing the auction price by a predetermined value
(i) excluding the potential buyer who proposes an acceptable price lower than the increased auction price and specifying the other potential buyer or potential buyers using the auction ordering information
(j) judging whether the competitive state occurs among the potential buyer or potential buyers specified in step (i)
(k) repeating the steps (h), (i) and (j) and determining the remaining potential buyer as a successful potential buyer when there is no competitive state at step (j)
(l) if no competitive state occurs in step (g), determining the remaining potential buyer as a successful potential buyer.
2.3.3 Examiner Observations

The examiner is now faced with a more intricate set of considerations than before. He will seek to break these down to the business and technical but in this case it is not quite so easy.

First he has the fact that although the data being handled is for a buying/selling/negotiation system, which is essentially a business consideration, it is related to pollution related to production. This is of course then linked to many factors for the technically skilled person. If the pollution aspect has an effect in the real world then the business aspect may be linked to that.

We live in a world where pollution “rights” are traded, taxed and penalised by some societies, yet these social and financial pressures are occasioned by the very real industries that produce the pollution and the very real technical apparatus that is required to scrub exhaust gases clean, reduce operating temperatures and develop alternative substances. To what extent does the disclosure affect the levels of pollution caused and how are they controlled?

In the present example the answer is that there is little clue given. The examiner must therefore move on to the second possible area of interest to the technically skilled person and check how the data given to the system interacts with the computer network and processor units defined. As the dealing and processing of the data is still based on the business and administrative considerations involved, the answer is still negative. The system may have its component parts more systematically named, but the actual method performed is still essentially an auction.

The final step of consideration is then to revisit the first aspect – namely data related to production pollution and check if there is any direct link between it and the data network and processing aspects.

Here there is not.

Having thoroughly checked not only the features defined and their interaction, but also the data being handled, the rules applied and the possible link to the purposive use of the system (that is, was there an adequately specified link to the aspect of pollution and any control of that pollution), and coming up blank, the probability is high that the examiner will form a negative opinion on the inventive step of the claimed matter, as there is no technical problem being addressed but rather an implementation of a business method with, at best, a passing concern about pollution as a business aspect.

Whether the examiner will cite documentary evidence of such a network is neither certain nor, from a Patent Office’s point of view, material. Should a reference be considered necessary by the Office concerned in order to write a refusal of the application, then this may be done at any time by most authorities, assuming the applicant has had the right to reply to that refusal, as it does not alter the course already charted but merely adds resolution to the decision taken.

Until this point the business method has looked decidedly negative. It is to be remembered however that the grey is getting slightly lighter. Just what does one
have to do to move on to an in-depth discussion of inventive step with some
opportunity of convincing the Office of the merits of the case?

2.4 Example 4: Automatic Method of Selling via a Network
with Management of Power Production

2.4.1 Description

In modern society, financial value has become multi-faceted, including the neces-
sity of production not only according to monetary limits but also requiring produ-
cers and consumers to take responsibility for the environmental impact of their
industry.

Although in some cases legally enforced, pollution limits may change rapidly
with developments in the level of impact knowledge, and carry other, less tangible
costs than direct fines which may be imposed should pollution units contributed be
exceeded. The “green credentials” of companies can be highly fragile and require
constant supervision and care to ensure that they are not damaged through the
purchase from third parties of products or commodities which contribute to an
exceeding of targets, whether self imposed or regulatory.

Accordingly producers of electrical power must respond to this need by recog-
nising that information flow must be disseminated and made available to purchas-
ing clients in order to allow not only those clients to reassure themselves that the
power they purchase does not exceed their imposed limits, but also to allow the
generators to operate at a maximum efficiency, in technical, production and eco-
nomical terms, when accepting contracts to supply the commodity of power
generation at any particular time.

The technically skilled reader will appreciate that power loading and the asso-
ciated pollution caused are interlinked and when considering multiple manners of
generation ranging from fossil fuel and nuclear reactors on one end of the scale to
wind generation and biomass usage on the other, the dynamic and interactive
balancing of supply and demand characteristics and technical throughput of informa-
tion has a considerable real world impact on the industrial landscape of how
power is generated, distributed, its cost determined, sold and controlled in an
iterative, integrated and interactive manner.

Databases which were until now held on the control and behaviour of power
plants must be seamlessly included not only in an archiving sense but the data
streams utilised to allow constant management of these in cooperation with the
customer and producers needs and restrictions. The effective control of the plant
is therefore automated to within the constraints of the customer first, the producer
second and ultimately the regulatory bodies. Naturally as the limits imposed
are administrative they may, within the technical constraints of the plant and
transmission infrastructure, be exceeded should this be in the interests of the controlling parties (Fig. 2.4)

2.4.2 Claim 4

An automatic method of selling for the commodity that is electrical power supply, and integrated with the management and production thereof, executed in a server data processing device, the method comprising the steps of:

(a) transmitting information on a commodity, currently produced and for auction, to a plurality of client data processing devices via a network, said information including aggregated production pollution information related to the commodity, each client data processing device belonging to a potential buyer

(b) receiving from the plurality of client data processing devices, via the network, a plurality of auction ordering information pieces, each including a preferred cost, a maximum price in competitive state, and preferred production pollution limit information, the plurality of auction ordering information pieces being for the intended purchase of the said commodity

(c) storing the received auction ordering information pieces in a memory which is connected to the server data processing device, the storing being ordered for each of the respective potential buyers

(d) setting an auction price based on historical price data based on previous auction outcomes; gathering in real-time current pollution production information from the electrical power production plants and projected pollution production information for those plants under projected increased loading

Fig. 2.4 Automatic method of selling
(e) determining whether there is any potential buyer who proposes a preferred
cost equal to or higher than the auction price using the auction ordering
information pieces stored in the server data processing device and having
preferred production pollution limit information at a level above that of both
current and projected production levels

(f) if there is no potential buyer in step (e), lowering the auction price, and
repeating step (e)

(g) if there is more than one potential buyer at step (e), judging whether there is
more than one potential buyer for whom the auction price is less than or equal
to the preferred cost such that a competitive state occurs using the auction
ordering information pieces stored in the server data processing device

(h) if the competitive state occurs, increasing the auction price by a predeter-
mined value

(i) excluding the potential buyer who proposes an acceptable price lower than the
increased auction price and specifying the other potential buyer or potential
buyers using the auction ordering information

(j) judging whether the competitive state occurs among the potential buyer or
potential buyers specified in step (i)

(k) repeating steps (h), (i) and (j) and determining the remaining potential buyer as
a successful buyer when there is no competitive state at step (j)

(l) if no competitive state occurs in step (g), determining the remaining potential
buyer as a successful buyer

(m) altering the power production balance between the electrical power generating
plant units at the lowest possible financial production cost while maintaining
the pollution limit of the successful buyer.

2.4.3 Examiner Observations

Here the factor of pollution is now bound into the auctioning process. This in itself
is not enough for some authorities, others may find it convincing. The gathering of
such information is noted as real-time and the totality of cause and effect does
require some thought from the person skilled in the art with a view towards how this
would be done and the manner in which balancing of this type is achieved. The
consideration of how production demand alters pollution levels is very clearly a
technical issue, and the binding of the steering of demand for both a technical
reason and a financial one is key to triggering some soul searching on which parts of
the definition is of technical character and which not, and even whether such a
division is appropriate.

In the present case the examiner has little option but to consider all parts of the
claim in depth, as they are so closely interrelated as to render any division
contrived. Cost is not merely financial here; it is technical (in terms of exhaust,
chemical, physical, etc.), social (quality of life surrounding production sites) and
business-image-promotional (“green credential” advertising possibilities vs. being
slammed in the press as a “dirty company”). It may be that there are legal considerations whereby companies must remain within certain pollution limits or risk sanctions from government. This may even count against the hopeful applicant (after all, if there is a law to say you MUST take care of something, the seeking of the solution becomes obvious and should only standard technology be employed the “innovation” becomes self evident).

It is here that variance in the analytical methods of varying jurisprudence in differing jurisdictions starts to risk differing outcomes. Were the reader to consider the main thrust of the invention to be marketing in financial terms of a commodity, it would be very easy to overlook the total load-balancing and pollution overhead control aspects of the total scheme. Decisions may claim that there is no difference in outcome and therefore differences in “tests” applied are inconsequential, however if there is no difference in outcome there would be no need for a difference in manner of arriving at it.

In the US system this is unlikely to be a bone of contention for an application such as the one proposed, the system having long since passed the consideration of statutory subject matter and possibly having been granted at some earlier and less defined stage.

At the EPO, full consideration would be considered appropriate due to the interplay of the clearly technical aspects and, due to the intimate relationship now created between these and those isolated earlier as so clearly only a selling idea, all the other bits too. The examiner will in all likelihood now go over to an in-depth search of the prior art in the areas of power production control, access in real-time to production data and control of this. The reader may note that in fact the area of concern has shifted in reality to plant control, the end effect of the technical considerations involved in the example. This is not uncommon in applications which start out with very woolly claims but more copious descriptions and which become more refined over the course of examination.
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