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Case Law of the Boards of Appeal, 10th edition (update 2024) – references in issue 7/2024 and following

In the table summarising the decision data for an abstract, the links to the CLB, 10th edition, lead to the [HTML version](#), which was updated in June 2024. In the body of any given abstract, references to the CLB mirror those provided by the board in the underlying decision.

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Abstracts of decisions

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1. Article 056 EPC | T 1272/22 | Board 3.2.07

Article 056 EPC

Case Number	T 1272/22
Board	3.2.07
Date of decision	2024.11.12
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (no) – synergistic technical effect derivable from application as originally filed (no) – partial problem approach justifiable (yes)
Cited decisions	G 0002/21
Case Law Book	I.D.4.1.2b), I.D.9.3.2 , 10th edition

In [T 1272/22](#) the appellant (opponent) and respondents (patent proprietors) disputed whether there was a synergistic effect between the distinguishing features, even if it were considered they served the same purpose. The board, applying Headnote II of G 2/21, could not see that the skilled person would have derived the synergistic technical effect referred to by the respondents when considering the application as originally filed. There was no explicit mention of any relationship between the two features and the position of the critical section for the efficiency of the connection, which the respondents had also relied on in its arguments in support of there being synergy, was not defined in the contested patent. The alleged synergy did not appear to the board to be derivable by the skilled person from the application as originally filed and it therefore held the partial problem approach was thus justified in the case in hand.

023-3-25

2. Article 056 EPC | T 2412/22 | Board 3.5.06

Article 056 EPC

Case Number	T 2412/22
Board	3.5.06
Date of decision	2024.11.27
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (no) – number of differences over prior art neither decisive nor a reliable indicator for the presence of an inventive step
Cited decisions	
Case Law Book	I.D.9.21.2 , 10th edition

In [T 2412/22](#) the invention related to continuous learning of a deep learning model for a specific autonomous vehicle and the appeal lay from the decision of the examining division to refuse the application for lack of inventive step over D1. In its communication the board indicated to the appellant that it tended to agree with the examining division that all differences were obvious starting from D1.

The appellant argued that the examining division's (and the board's) analysis was ex post facto. Without knowledge of the invention the skilled person had no reason to modify D1 in a way so as to arrive at the claimed invention. D1 and the claimed invention were conceptually different and pursued different objectives. The claimed invention focused on continuous learning for a specific autonomous vehicle, the model retrained with specific video data and stored in a library for efficient fine-tuning. The selection step ensured the proper model was selected and updated. In contrast, D1 focused on real-time adaptation, where a (single) generic stock model was adapted to a driver on the vehicle itself during operation of the vehicle. The appellant disputed that storing a stock model implied a library, and even if that were the case, there was no need for a selection step from a "library" with a single entry.

The board noted that the appellant's description of the invention differed from the claimed invention, which was broader and less detailed. The continuous learning aspect was not part of the claim, and the library's content was not defined as dynamic. The selection of a model from the library was broadly formulated, including

methods such as basing selection on vehicle type alone. The claim therefore covered providing a deep learning model to an autonomous vehicle based on a static library, where a managing device selected and retrained a model using vehicle video data before transmitting it to the vehicle. Although the library might not be strictly necessary, it was something that the person skilled in the art would certainly consider.

For inventive step, however, the question was not what D1 disclosed, but how the person skilled in the art would modify it, e.g. in order to improve it. In general, the person skilled in the art would consider well-known alternatives and in the case in hand the board was convinced that the person skilled in the art would consider the alternative of performing the adaptation on a central server rather than onboard the vehicle. It concluded that the person skilled in the art would arrive in an obvious manner at subject matter falling within the scope of the claimed invention. Therefore, claim 1 of the main request lacked inventive step.

With regard to the auxiliary requests, the appellant had also submitted that to arrive at the invention starting from D1 a number of modifications were needed. There was no reason for the person skilled in the art to perform all of them. The added features, in particular in the fourth auxiliary request, further increased the already large number of differences over D1.

The board remarked that the number of differences over a certain piece of prior art was neither decisive nor a reliable indicator for the presence of an inventive step.

First, the number of differences itself might be deceiving. One modification might imply or make obvious several other differences. For instance, as in the case in hand, performing the computations on a server instead of on the user vehicle, implied data transmission, and with it a host of other associated "differences" which might or might not be specified in a claim, like an antenna, a transmission protocol, etc. A library implied storage, indexing, a retrieving mechanism and so forth. Also, in complex systems it was very easy to accumulate a large number of individual differences while simply considering the different options available to the person skilled in the art.

Secondly, whether several modifications combined to provide an inventive overall contribution did not depend on their number. For instance they might be obvious solutions to independent, "partial problems".

Ultimately, the board held that the claimed invention had to contain a (new and) non-obvious technical teaching, which it did not see reflected in any of the requests on file. The board thus concluded that the auxiliary requests, as the main request, were not allowable for lack of inventive step.

024-3-25

3. Article 056 EPC | T 0228/23 | Board 3.3.07

Article 056 EPC

Case Number	T 0228/23
Board	3.3.07
Date of decision	2024.09.24
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (no) – post-published evidence taken into account (yes) – technical effect derivable from application as originally filed (yes)
Cited decisions	G 0002/21, T 0116/18
Case Law Book	I.D.4.3.3c , 10th edition

In [T 228/23](#) the appellants-opponents had essentially argued that the alleged improvement of drug release when preparing tablets by dry granulation compared to direct compression would not be encompassed by the technical teaching of the original application nor embodied by the same originally disclosed invention.

The board considered that the alleged specific effect of faster and more complete release profile was indeed derivable from the original application in view of the references to immediate release, desired dissolution profiles and dissolution performance. In particular, the description of the immediate release profile in the context of the invention in the original application defined an increase of the release percentage and/or a reduction of the release time. This suggested that a faster and more complete release profile constituted a purpose of the invention. This technical effect was thus encompassed by the technical teaching of the original application as required by G 2/21.

It remained to be determined whether the second criteria set in G 2/21 was met, i.e. whether the effect was embodied by the same originally disclosed invention.

The board considered that although the original application disclosed the preparation of tablets by direct compression or dry granulation without indicating whether one of these methods was preferred over the other, the fact that all the examples of the original application concerned dry granulation indicated that dry granulation would be

preferred over direct compression in general in the context of the application. The board considered that in this specific case of a very limited number of embodiments defined in the original application, one of these being also the subject-matter of the closest prior art and the other one being generally preferred, and in the absence of any legitimate reason at the effective date to doubt that the alleged effect could be achieved with the claimed subject-matter (see T 116/18 of 28 July 2023, point 11.14 of the Reasons), that the appellant-patent proprietor should be entitled to specify a preference for one of said originally disclosed embodiments over the other in connection with said effect. In the present case, the alleged effect of faster and more complete release profile for tablets obtained by dry granulation compared to direct compression thus did not change the nature of the claimed invention, as defined in G 2/21 (point 93 of the Reasons), so that it was embodied by the same originally disclosed invention.

In line with G 2/21, the board held that the alleged technical effect of faster and more complete release profile in so far as it was supported by the post-published experimental data on file was thus to be taken into account when assessing the inventiveness of the claimed subject-matter.

025-3-25

4. Article 084 EPC | T 2116/22 | Board 3.3.07

Article 084 EPC

Case Number	T 2116/22
Board	3.3.07
Date of decision	2024.12.18
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 054, 084, 112(3), 113(1) EPC
EPC Rules	Rule 106 EPC
RPBA	
Other legal provisions	
Keywords	claims – claim interpretation – limitation in the light of the description (no) – stay of the proceedings in view of pending referral G 1/24 (no) – objection under R. 106 EPC (dismissed)
Cited decisions	T 0166/84, T 0426/00, T 1044/07, T 1875/07, T 1473/13, T 1870/16, T 0439/22
Case Law Book	II.A.6.3.4 , V.B.2.5.4 , 10th edition

In [T 2116/22](#) the interpretation of the terms "coating" and "coated" in claim 1 of the main request was relevant to assess novelty.

The appellants-patent proprietors argued that these terms had to be interpreted taking into account the whole patent. The skilled person would have understood the coating step and the thrombin-coated gelatin granules defined in the claims as being limited respectively to a process as specified in paragraph [0014] of the patent and to thrombin coated gelatin granules prepared thereby.

The board observed that the wording of the claim did not restrict the coating step to the specific coating conditions mentioned in paragraph [0014] of the patent. While the limitation of the final product being a "dry and stable" hemostatic composition may imply some limitations on the process steps, these encompassed any process features resulting in a dry and stable product such as indeed the ones described in paragraph [0014] of the patent but also any other process features providing a dry and stable product. The board further noted that the term "coating" or "coated" had a clear meaning in the field of pharmaceutical preparations and corresponded to the application of a material to the surface of a pharmaceutical solid product. This was usually done by applying the coating material as a solution or suspension to the pharmaceutical solid product and evaporating the vehicle. Paragraph [0014] of the

patent did not provide a different definition of the term "coating" or "coated" than the one commonly accepted in the art. The description provided first a description of the process in broad terms as in claim 1 before describing more specific embodiments and preferred features, such as in paragraph [0014]. Whether read alone or in the light of the entire description, the meaning of the coating step or the coated product remained the same.

In the context of the discussion regarding the interpretation of the terms "coating" and "coated", the appellants-patent proprietors had requested that the board stay the proceedings in view of the pending referral G 1/24.

The board stated that the provisions in the EPC concerning a stay of proceedings following a referral to the Enlarged Board only concerned the referring board (Art. 112(3) EPC). There was, however, no legal basis in the EPC nor in the Rules of Procedure of the Boards of Appeal requiring that any other board stay its proceedings to await the outcome of the proceedings before the Enlarged Board. The decision whether or not to stay the proceedings in such cases was thus a discretionary one.

According to the board, the strict approach taken in T 166/84, namely to stay the proceedings whenever the outcome of the proceedings depended entirely on the outcome of the referral, had been applied by some boards (e.g. T 426/00, T 1875/07 and T 1044/07). However, it had also been put into question for lack of a legal basis, and considered not to apply to proceedings before the Boards of Appeal (e.g. T 1473/13 and T 1870/16). The board was of the view that a strict application of the approach taken in T 166/84 would in effect deny a board its discretion as to whether to stay the proceedings. The discretion was however the inevitable consequence of the fact that there was no legal basis for requiring a board that had not referred the relevant questions to the Enlarged Board to stay the proceedings. Moreover, the outcome of the referral G 1/24 was not decisive for the decision in the case at hand.

The board decided not to stay the proceedings in view of the pending referral G 1/24 and concluded that claim 1 of the main request was not novel. During the course of the oral proceedings, the appellants-patent proprietors filed an objection under R. 106 EPC. The board reiterated that the decision to stay the proceedings remained a discretionary one. The appellants-patent proprietors had had ample opportunities to present their comments on the issue of a stay of the proceedings, so that no violation of their right to be heard occurred (Art. 113(1) EPC). Moreover, the outcome of the referral G 1/24 was not decisive for the decision in the present case, including on novelty of the main request. Therefore, the board dismissed the objection under R. 106 EPC.

026-3-25

5. Article 084 EPC | T 0583/23 | Board 3.3.09

Article 084 EPC

Case Number	T 0583/23
Board	3.3.09
Date of decision	2025.01.31
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 084 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claims – claim interpretation – board's interpretation deviating from the interpretation adopted by both parties – dependent claims
Cited decisions	T 0107/14, T 0303/20
Case Law Book	II.A.6.1 , II.A.6.2 , 10th edition

In [T 583/23](#) the parties agreed that claim 1 related to a closed composition, i.e. a smoke condensate that did not include other components than those stated in the claim.

The board noted that claim construction, namely the meaning that a skilled person would give to the wording of a claim, was a question of law. In determining this, the board was not bound by the parties' views on the matter. The smoke condensate composition defined in claim 1 was introduced by the term "comprising." Due to the open-ended nature of this formulation, the inclusion of additional ingredients was, in principle, not excluded. Moreover, the scope of claim 1 included smoke condensates having a low pH of between 2.0 and 3.5, which were a preferred embodiment in the patent. These smoke condensates must necessarily comprise acids. Likewise, claims 2 and 3 contained further limitations which were not in line with a "closed" interpretation of claim 1.

Citing T 107/14 and T 303/20, the respondent (opponent) had argued that claim 2 as granted was a "false dependent claim" because it altered the closed composition of an allegedly closed independent claim 1. The board disagreed. As suggested in T 107/14, whether a particular amendment extended beyond the content of the application as originally filed must be assessed based on the information that is clearly and unambiguously disclosed in the entire application as originally filed, i.e.

on the merits of the specific case. The same holds true for the interpretation of a specific claim and the question of whether it is a dependent claim or not.

According to the board, the indication "and the rest water" in claim 1 did not rule out the presence of further components in the smoke condensates, as long as water complemented the composition to 100 wt%. Such an interpretation of claim 1 was technically not nonsensical. By contrast, it was in line with e.g. claims 2 and 3 when interpreted as "truly dependent claims", and it led to a scenario which was not at variance with the teaching of the patent itself.

For these reasons, the board construed claim 1 as encompassing smoke condensates which could comprise other components than those explicitly specified in the claim ("open claim formulation"), such as, undoubtedly, acids.

027-3-25

6. Article 105 EPC | T 1841/23 | Board 3.5.05

Article 105 EPC

Case Number	T 1841/23
Board	3.5.05
Date of decision	2024.12.11
Language of the proceedings	EN
Internal distribution code	B
Inter partes/ex parte	Inter partes
EPC Articles	Articles 105(1)(a), 105(2), 113(1) EPC
EPC Rules	Rule 106 EPC
RPBA	Article 15(2), 15(6) RPBA 2020
Other legal provisions	
Keywords	
Cited decisions	G 0001/94, T 1961/09
Case Law Book	III.C.6.1.4 , III.P.4 , 10th edition

In [T 1841/23](#) the board had accelerated the appeal proceedings due to parallel infringement proceedings before the Unified Patent Court. The board summoned the parties to oral proceedings to be held on 11 December 2024. According to its preliminary opinion, the patent was most likely to be revoked on the ground of added subject-matter. A notice of intervention was filed ca. three weeks before the arranged oral proceedings and the patent proprietor quickly requested their postponement. By communication of 26 November 2024 the board invited the proprietor and opponent 1 to file observations on the notice of intervention by 4 December 2024. Oral proceedings were held on 11 December 2024 as originally scheduled.

According to the board, the proprietor's argument, in effect invoking the right to be heard, that two weeks was an insufficient period to fully respond to the notice of intervention, had no bearing on the question of the date for oral proceedings as governed by Art. 15(2) RPBA. The same applied to its complaint that new arguments were put forward in the notice of intervention, and that the discussion had developed into an intertwined tripartite debate. As the proprietor's core concern was the right to be heard, and since oral proceedings served to protect that very right by providing another opportunity for parties to present their comments, the continuation of the oral proceedings before the board did not adversely affect the parties to the appeal proceedings.

The board also disagreed with the proprietor's suggestion, invoking decision T 1961/09, that continuing the oral proceedings before the board could only be fair to the proprietor if the intervener did not make any submissions at all. The implications

of an intervention filed shortly before the arranged oral proceedings had to be determined on a case-by-case basis. In the board's view, there seemed to be no appreciable disagreement between the two boards in methodological terms. In the present case, unlike the one underlying T 1961/09, the notice of intervention did not raise any further objections or new issues, but only argued on old topics.

The board then moved on to the added subject-matter objections against the patent and concluded that all claim requests were unallowable under Art. 123(2) EPC. After the board reached this conclusion but before any decision was announced, the proprietor submitted a written objection under R. 106 EPC.

The board observed that the proprietor's right to be heard was at the heart of the R. 106 objection. At issue was the decision to revoke the patent because recurring feature F3 was not originally disclosed, thus contravening Art. 123(2) EPC. The board noted that this ground and evidence had been around since the beginning of the opposition proceedings, and the evidence was entirely by the proprietor's own hand. It could not agree with the proprietor's view, namely that any late-refining or further developing of the arguments on the same old ground and evidence would raise concerns with respect to the right to be heard. The board recalled that a first indication of what the board found particularly relevant in this case had already been given in the preliminary opinion, in which the added-matter objection was one of merely two substantive objections addressed. The notice of intervention was evidently never considered relevant as a basis for the decision on the appeal, since an objection being most likely prejudicial to the opposed patent's maintenance was already in the proceedings. The proprietor could not have been taken by surprise by the grounds and evidence forming the basis of the present decision. Moreover, the proprietor had an opportunity to present its comments on them.

While an admissible intervention was to be treated as an opposition (Art. 105(2) EPC), its filing shortly prior to the oral proceedings before a board did not generally excuse the proprietor, and in particular it did not hand them a voucher for more time. Its concrete implications for opposition appeal proceedings were rather to be determined on a case-by-case basis, under the provisions of the EPC and the RPBA. Nor were opposition appeal proceedings designed to serve as a placeholder for tactical considerations in parallel proceedings for infringement. They were rather an existential challenge to the title, on the basis of which enforcement was pursued in the infringement proceedings, and parameters such as legal certainty and procedural economy were also involved. Any difficulties for the proprietor in drafting auxiliary requests that also provided the best scope of protection, considering the ongoing infringement proceedings, were not a reason to delay the opposition appeal proceedings.

For these reasons, which also translated into a lack of "special reasons" under Art. 15(6) RPBA, the board did not refrain from deciding on the appeal on a ground for opposition that appeared also in the notice of intervention. As a result, the objection submitted by the proprietor under R. 106 EPC was dismissed.

028-3-25

7. Article 117 EPC | T 2463/22 | Board 3.3.09

Article 117 EPC

Case Number	T 2463/22
Board	3.3.09
Date of decision	2024.12.04
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 054(2), 056, 117 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	law of evidence – standard of proof – discussion in view of T 1138/20 – required degree of conviction
Cited decisions	G 0003/19, G 0002/21, T 1465/05, T 2466/13, T 1054/18, T 1138/20, T 1311/21, T 0832/22, <i>Re B (Children)</i> [2008] UKHL 35
Case Law Book	I.C.3.2.4b), I.D.3.3 , III.G.4.3 , 10th edition

In [T 2463/22](#) the opposition division had held that the prior uses had not been proven beyond reasonable doubt (up to the hilt), in particular with regard to whether the products of the prior uses had actually been delivered. The parties before the board focused on which standard of proof had to be applied in view of G 2/21 and T 1138/20 and whether the applicable standard had been met. In the respondent-proprietor's view, T 1138/20 was an isolated decision, not compatible with G 2/21.

On the required standard of proof, the present board observed that G 2/21 recognised that different concepts as to the standard of proof had been developed in the case law. According to T 1138/20 only one standard should be applied, namely "the deciding body must be convinced, taking into account the circumstances of the case and the relevant evidence before it, that the alleged fact occurred".

In the present board's view, under the principle of free evaluation of evidence, it was always decisive in the evaluation of evidence that the members of the deciding body were personally "convinced". Moreover, they had to always be convinced of whether, as stated in T 1138/20, "the alleged fact has occurred". The board stated this was true regardless of which standard of proof was applied. The standard of proof refers to the nature or degree of conviction that the members of the deciding body must have to be satisfied that an alleged fact occurred (see T 832/22).

According to the board, and with reference to a UK House of Lords decision, two important aspects had to be stressed. Firstly, that the standard of proof is related to the required degree of conviction of the members of the deciding body. Secondly, that it is not related to what is evaluated by the deciding body. Hence, also when a lower standard of proof such as the balance of probabilities is applied, the deciding body must assess whether or not the alleged fact indeed occurred. In other words, also when such a standard of proof is applied, the question is not whether the alleged fact might have occurred with some probability. The board considered G 2/21 (points 31 and 45 of the Reasons) consistent with this understanding.

The more specific question as to whether there was only a single standard of proof or more than one could be left unanswered according to the board. The board held that if the deciding body was convinced beyond reasonable doubt that an alleged fact had occurred, there was no need to decide how many standards of proof there were and which one was applicable (see T 832/22).

The board then gave some consideration to the assessment of factual allegations using the beyond reasonable doubt standard of proof. The European Patent Organisation being an independent international organisation, the board stated the standard had an autonomous meaning within this autonomous legal order. Secondly the board agreed with T 832/22 that it seemed expedient to focus on the term "reasonable".

The board then considered the prior uses, focusing especially on prior use relating to the sale of product 5 (sample of a powder mix from a specific lot number), the content of the sample and whether it was available to the public. In view of all the information (including invoices, affidavit, emails, test report, excerpt from database), which also involved evidence provided by a third party (the buyer), the board was convinced beyond reasonable doubt that product 5, with a specific lot number, was sold prior to the effective date of the patent. Since it had also been shown that product 5 disclosed all features of claim 1, lack of novelty prejudiced the maintenance of the patent as granted. Concerning the third auxiliary request, product 5 was suitable for use as closest prior art. The board referred to the reluctance sometimes in the case law to treat an object of a prior use as the closest prior art. Often, there was neither information on what the object did and what properties it had in the technical environment in which it was applied nor on how the process for its manufacture could be modified. These considerations indeed spoke against regarding a prior use as a suitable starting point for assessing inventive step. In the case in hand however, the skilled person was faced with a different situation. The board concluded that the third auxiliary request did not involve an inventive step. The decision of the opposition division was set aside and the patent revoked.

029-3-25

8. Article 123(2) EPC | T 2029/23 | Board 3.3.09

Article 123(2) EPC

Case Number	T 2029/23
Board	3.3.09
Date of decision	2025.01.07
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 123(2) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	amendments – added subject-matter (no) – ranges of parameters
Cited decisions	T 1919/11
Case Law Book	II.E.1.5.1 , II.E.1.5.1c , 10th edition

In [T 2029/23](#) the patent concerned a method for preparing gelatin-based candy that did not require a drying step or the use of a single-use starch mould to extract moisture from the liquid composition.

The board decided to set aside the decision under appeal, in which the opposition division had concluded that claim 1 of the main request did not meet the requirements of Art. 123(2) EPC.

Claim 1 of the main request differed from claim 1 of the application as filed in that claim 1 of the main request specified that (1) the gelatin had a bloom value of 200 to 300 and (2) the liquid candy composition was allowed to set at a temperature below 10°C for 10 to 30 minutes.

Regarding the bloom value of the gelatin, the board explained that the widest range for a bloom value disclosed in the claims of the application as filed was 200 to 300 (claim 8). Adding this feature to claim 1 of the main request merely specified the gelatin to be used in the invention. Hence, this amendment was directly and unambiguously derivable from the application as filed. This was also the case for the setting temperature, for which the board found that a setting temperature below 10°C was directly and unambiguously derivable from claim 3 of the application as filed.

As regards the range of 10 to 30 minutes for the setting time, the board distinguished the case in hand from the case underlying T 1919/11, in which the competent board had decided that the amendment combining a lower limit and an upper limit from two

separate sentences (or "lists") of upper and lower limits was not allowable because the disclosure in the parent application as filed did not represent a range and such a combination was arbitrary. Instead, in the case in hand, there was a single sentence, namely claim 4 of the application as filed, that contained a general range (1 hour or less) and only two preferred narrower ranges (30 minutes or less and 10 minutes or less). The lower two values of this range were used to draw up the range in claim 1 of the main request. This amendment in itself did not produce added subject-matter.

Furthermore, the board observed that the application as filed explicitly stated that for a relatively fast setting time, the temperature during setting was to be kept low. The skilled person would have readily understood that there was a correlation between the setting temperature and the setting time.

Therefore, the board established that claim 1 of the main request met the requirements of Art. 123(2) EPC.

030-3-25

9. Rule 071(3) EPC | T 1224/24 | Board 3.2.01

Rule 071(3) EPC

Case Number	T 1224/24
Board	3.2.01
Date of decision	2025.02.25
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Articles 097(1), 113(2) EPC
EPC Rules	Rules 071(3), 071(5), 071(6), 103(1)(a), 140 EPC
RPBA	
Other legal provisions	
Keywords	communication under R. 71(3) EPC – drawings missing – deemed approval of the text for grant under R. 71(5) EPC (no) – substantial procedural violation (yes) – patent granted without approval of the text for grant (yes) – reimbursement of appeal fee (no)
Cited decisions	G 0001/10, J 0004/09, T 2081/16, T 1003/19, T 0265/20, T 0408/21, T 1823/23
Case Law Book	IV.B.3.2.3b , 10th edition

In [T 1224/24](#) the appeal was directed against the decision of the examining division to grant a European patent on the basis of the application documents indicated in the communication under R. 71(3) EPC dated 13 December 2023.

This communication had not indicated that the text intended for grant differed from the applicant's request regarding the drawings. Furthermore, no prior communication from the examining division had proposed amendments to the drawings filed by the applicant, or contained any comments on them. All communications had stated that, for the figures, the examination was carried out on the amended drawing sheets 1/4-4/4 as filed upon entry into the regional phase before the EPO. However, the file contained no explicit approval from the applicant for the removal of the remaining 48 originally filed drawings. It appeared that neither the members of the examining division nor the appellant had realised that several of the original drawing sheets were omitted and only the amended drawing sheets 3/52, 28/52, 37/52 – renumbered 1/4-4/4 – were considered by the examining division.

In accordance with T 1003/19, T 1823/23 and T 2081/16, the board held that the legal consequence set out in R. 71(5) EPC could only apply if the communication

under R. 71(3) EPC reflected the examining division's intention regarding the application documents on which the patent was to be granted. This conclusion was drawn from the unambiguous wording of R. 71(3) EPC, which uses the verb "intends", clearly indicating the intention of the examining division. Deemed approval under R. 71(5) EPC could only occur after a text compliant with R. 71(3) EPC had been communicated to the applicant. R. 71(5) EPC is not a stand-alone provision. Simply paying the fee and filing translations does not trigger deemed approval regardless of the communicated text's content. The text must conform to R. 71(3) EPC, to which R. 71(5) EPC refers, and align with the examining division's intention regarding the application documents that form the basis for granting the patent. Otherwise, the subsequent fee payment and translation filing remain ineffective.

The board further stated that R. 71(6) EPC allows the applicant to request reasoned amendments or corrections to the communicated text. However, this provision applies only to texts communicated in accordance with R. 71(3) EPC, which reflect the examining division's intention regarding the application documents that form the basis for granting the patent. This specifically addresses situations where the communication refers to the correct documents intended for grant, but these documents contain clerical mistakes or inaccuracies that the applicant wishes to rectify, or the applicant is not satisfied with the amendments explicitly proposed by the examining division to the text they submitted. However, if the communicated text does not reflect the examining division's intention for granting the patent, neither the absence of a correction or amendment request under R. 71(6) EPC, nor the payment of the fee and filing of translations under R. 71(5) EPC will have any legal consequence. The board found that this conclusion did not only align with the clear wording of R. 71(3) EPC, but also safeguarded the applicant from being seriously prejudiced by the impossibility to request corrections under R. 140 EPC (see G 1/10).

The decision under appeal was based on a text that had neither been submitted nor had been agreed upon by the applicant. Therefore, the decision did not comply with Art. 113(2) EPC and the board set it aside.

The board was aware of T 265/20, where the board in charge did not follow the approach taken in T 1003/19 and T 2081/16 and ultimately dismissed the appeal. However, according to the present board, T 265/20 did not represent diverging case law, as the circumstances in that case were different.

The request for reimbursement of the appeal fee had been withdrawn by the appellant. The board on its own did not consider reimbursement equitable, despite the substantial procedural violation affecting the decision under appeal (R. 103(1)(a) EPC). The board pointed out that the applicant had had several opportunities during the examination proceedings to identify the error regarding the drawing sheets.

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10. Article 13(2) RPBA | T 0458/22 | Board 3.4.02

Article 13(2) RPBA 2020

Case Number	T 0458/22
Board	3.4.02
Date of decision	2024.11.29
Language of the proceedings	FR
Internal distribution code	B
Inter partes/ex parte	Inter partes
EPC Articles	Article 114 EPC
EPC Rules	
RPBA	Article 13(2) RPBA 2020
Other legal provisions	
Keywords	late-filed arguments on admissibility of the appeal – obligation to consider late-filed arguments on admissibility of the appeal (no) – admissibility of the appeal to be assessed ex officio at any stage of the proceedings
Cited decisions	T 0289/91, T 0522/94, T 0015/01, T 1688/07, T 0670/09, T 2223/10, T 0198/15, T 1006/21, T 1174/21
Case Law Book	V.A.2.7 , V.A.4.1.1 a) , V.A.4.2.2 , 10th edition

Dans l'affaire [T 458/22](#), l'intimée a fait valoir pour la première fois après notification de la communication en vertu de l'art. 15(1) RPCR, que le recours était irrecevable.

La requérante a fait valoir que les faits contestés étaient présents dans la procédure depuis le début et qu'aucune circonstance exceptionnelle ne justifiait l'admission de cette nouvelle objection à ce stade de la procédure.

La chambre était consciente de l'existence d'une jurisprudence qui considère que la question de la recevabilité d'une opposition ou d'un recours peut et doit être soulevée d'office à tous les stades de la procédure, même au cours de la procédure orale dans le cadre d'un recours (Jurisprudence des Chambres de recours de l'Office européen de brevets, 10e édition, juillet 2022, V.A.2.7). Les chambres dans les affaires T 289/91, T 15/01, T 522/94, T 1688/07, T 2223/10 et T 198/15 ont interprété ce principe initialement formulé dans la décision T 289/91 en ce sens qu'elles n'ont pas le pouvoir d'appréciation de ne pas prendre en considération une objection tardive à la recevabilité, même si elle a été soulevée par une partie pour la première fois lors de la procédure orale devant la chambre.

La présente chambre a considéré qu'elle possède un pouvoir d'appréciation pour ne pas prendre en compte l'objection à la recevabilité du recours soulevée par l'intimée.

Une objection à la recevabilité d'un recours ou d'une opposition soulevée par une partie constitue un moyen invoqué au sens de l'art. 114(1) CBE. Le libellé de l'art. 114 CBE ne fait pas d'exception pour des faits tardifs relatifs à la question de la recevabilité d'une opposition ou d'un recours. La question de savoir si le mémoire de recours est conforme aux exigences de la règle 99(2) CBE peut comprendre des faits ainsi que des arguments, par exemple la question de savoir s'il contient ou non des motifs pour lesquels il y a lieu d'annuler la décision attaquée.

Le libellé des art. 101(1) et 110 CBE et des règles 77(1) et 101(2) CBE ne fait apparaître aucune nécessité d'une requête par une partie pour l'examen de la recevabilité, ni une quelconque restriction quant au moment où la chambre examine la recevabilité d'une opposition ou d'un recours. Il s'ensuit que la chambre de recours peut statuer sans requête, c'est-à-dire ex officio, sur la question de la recevabilité du recours ou l'opposition, et ce à tout moment de la procédure. En cela la chambre est en accord avec la ligne de jurisprudence précitée.

Toutefois, la chambre a considéré qu'il ne découle pas des dispositions précitées que les faits invoqués tardivement par une partie concernant la question de la recevabilité doivent toujours être pris en considération par une chambre de recours. Le libellé des art. 12 et 13 RPCR ne limite pas le pouvoir d'appréciation d'une chambre de recours de manière à en exclure la question de la recevabilité d'un recours ou d'une opposition.

La chambre ne partage pas le point de vue exprimé aux points 25 et 26 de la décision T 1006/21, selon lequel les dispositions des art. 12 et 13 du RPCR limitent uniquement les modifications des faits et du fond d'un recours, mais que les requêtes procédurales ne constituent pas des modifications au sens de ces dispositions.

Elle partage en revanche l'avis contraire exprimé au point 1.3.2 de la décision T 1774/21, selon lequel le libellé du RPCR a été délibérément choisi pour faire la distinction entre les "requêtes" générales (voir l'art. 12(2) et (3) RPCR) et les "modifications d'une demande de brevet ou d'un brevet" (voir l'art. 12(4), deuxième phrase, RPCR, l'art. 13(1), troisième phrase, RPCR). Ce point de vue est supporté également par le tableau présentant les modifications du RPCR avec remarques explicatives (publication supplémentaire 2, JO 2020, 17), selon lesquelles "Dans ce contexte [de l'art. 12(2) RPCR], le terme 'requêtes' n'est pas limité aux textes modifiés de demandes de brevet ou de brevets".

En l'espèce, l'objection à la recevabilité du recours par l'intimée n'est pas prise en compte en vertu de l'art. 13(2) RPCR, car il n'y a pas de circonstances exceptionnelles justifiant l'admission.

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