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Boards of Appeal Case Law 2020

Summaries of decisions in the language of the proceedings



Boards
of Appeal

Note to readers

This publication provides a thematic overview of the case law of the Boards of Appeal in 2020. To allow early availability, the decisions covered in it have been summarised in the language of the proceedings only. The summaries will be published again, together with their translations into the other two official languages of the EPO, in the trilingual "Case Law" Supplement of the EPO Official Journal planned for later this year. The full texts of all decisions referred to can be accessed on the Boards of Appeal web page (www.epo.org/law-practice/case-law-appeals.html).

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Boards of Appeal Case Law 2020

Contents

I. PATENTABILITY	1
A. Exceptions to Patentability	1
1. Product claims for plants or plant material.....	1
2. Medical method	2
2.1 One surgical step in a multi-step method.....	2
B. Novelty	3
1. Availability to the public – obligation to maintain secrecy	3
2. Ascertaining differences – distinguishing features.....	3
3. Chemical inventions and selection inventions – lists	4
4. Second medical use	5
5. Second (or further) non-medical use	5
C. Inventive step	6
1. Distinction between plausibility and obviousness	6
2. Closest prior art – most promising starting point	6
3. Wissensstand des Fachmanns.....	8
4. Effect not made credible within the whole scope of claim – neural network	8
5. Assessment of inventive step	9
5.1 Technical character of an invention	9
5.2 The aim to be achieved in the formulation of the technical problem	10
II. PATENT APPLICATION AND AMENDMENTS	11
A. Claims	11
1. Clarity of claims – indication of all essential features	11
2. Clarity of a claim specifying a norm or standard.....	12
3. Claims supported by the description	12
4. Claim terms with a well-established meaning in the art – use of the description	13
B. Unity of invention	14
1. Determining whether one or several "inventions" – complete search – refund of further search fee	14

C.	Sufficiency of disclosure	15
1.	Reproducibility – neural network	15
2.	Level of disclosure required for medical use – plausibility	15
D.	Priority	16
1.	Right of priority of the applicant or his successor in title	16
1.1	Identity of applicants – multiple applicants in the priority application	16
E.	Amendments	18
1.	Article 123(2) EPC – added subject-matter	18
1.1	Disclosure derived from the whole of the application as filed	18
1.2	Forming a range by combination of end-points of disclosed ranges	19
1.3	Selection from lists – converging alternatives	19
1.4	Disclosed disclaimers	20
2.	Extension of the protection conferred	20
2.1	Change of claim category	20
F.	Divisional applications	21
1.	Designation of contracting states in a divisional application	21
III.	RULES COMMON TO ALL PROCEEDINGS BEFORE THE EPO	22
A.	Right to be heard	22
1.	The right to be heard in oral proceedings	22
B.	Oral proceedings	22
1.	Oral proceedings held by videoconference	22
C.	Law of evidence	24
1.	Evaluation of evidence by the department of first instance	24
D.	Suspected partiality	26
1.	Suspected partiality of members of the departments of first instance	26
1.1	Remittal and rehearing of a case	26
E.	Formal aspects of decisions of EPO departments	27
F.	Apportionment of costs	28

G. Rules relating to Fees	28
1. Keine Rückzahlung von mit Rechtsgrund angeforderten und gezahlten Jahresgebühren	28
2. Debit orders – underpayment of the fee for appeal	29
IV. PROCEEDINGS BEFORE THE DEPARTMENTS OF FIRST INSTANCE	29
A. Examination procedure.....	29
1. Decisions with no text submitted or agreed by the applicant (Article 113(2) EPC)	29
2. Approval of the text by the applicant	30
3. Amendments after the decision to grant.....	31
4. Withdrawal of the patent application.....	31
4.1 Correction of the withdrawal of the application under Rule 139 EPC.....	31
B. Opposition procedure	33
1. Filing and admissibility requirements – payment of opposition fee.....	33
2. Late submissions – concept of "in due time"	34
3. Amendments in opposition proceedings.....	34
3.1 Rule 80 EPC	34
3.2 Time frame for filing amendments	36
V. PROCEEDINGS BEFORE THE BOARDS OF APPEAL.....	37
A. Appeal procedure.....	37
1. RPBA 2020.....	37
1.1 Primary object of the appeal proceedings – Article 12(2) RPBA 2020	37
1.2 Entscheidungsgründe in gekürzter Form	38
2. Party adversely affected (Article 107 EPC)	38
3. Reduced fee for appeal filed by a natural person or an entity	39
4. Inhalt der Beschwerdebeurteilung.....	42
5. Review of first-instance discretionary decisions	43
6. New submissions on appeal.....	44
6.1 Late submission of new arguments	44
6.2 Principles applying to late submissions – inter partes proceedings – RPBA 2007	45
6.3 Article 12(4) RPBA 2007.....	45
6.4 State of proceedings – procedural economy – RPBA 2007	46
6.5 Amendment to a party's case – RPBA 2020.....	46
6.6 Submissions made in the statement of grounds or the reply – first stage of the appeal proceedings – Article 12(3) to (6) RPBA 2020	48

6.7	Submissions made after filing of statement of grounds or reply – second stage of the appeal proceedings – Article 13(1) RPBA 2020	49
6.7.1	New lines of attack in respect of inventive step based on documents submitted during first-instance proceedings – not admitted	49
6.7.2	Neue Dokumente in Reaktion auf Versuchsdaten des Patentinhabers – zugelassen	49
6.8	Submissions made after notification of summons – third stage of the appeal proceedings – transitional cases.....	50
6.8.1	Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020	50
6.8.2	Applicability of Article 13(2) RPBA 2020 in case of postponement of oral proceedings	52
6.8.3	New request in response to preliminary opinion of the board clarifying its objections – admitted	52
6.8.4	Neue Hilfsanträge in Reaktion auf vorläufige Einschätzung der Kammer – zentrale Bedeutung des strittigen Punktes schon vorher offensichtlich – nicht zugelassen	53
6.8.5	Inventive step attack substantiated for the first time at oral proceedings – not admitted	53
6.8.6	Kein anderer sachlicher bzw. patentrechtlicher Streitgegenstand durch die Beschränkung entstanden und prima facie gewährbar – Anträge zugelassen	54
6.8.7	Request does not prima facie overcome objection – not admitted	54
6.9	Submissions made after notification of summons – third stage of appeal proceedings – Article 13(2) RPBA 2020	55
6.9.1	Oral proceedings cancelled after notification of summons – Article 13(2) RPBA 2020 still applies	55
6.9.2	New request based on request filed with statement of grounds and overcoming new objections raised in board’s communication – admitted.....	56
6.9.3	New request based on request filed in response to reply of the respondent and containing editorial amendments to remove inconsistencies – admitted.....	56
6.9.4	New request in response to objections which do not go beyond the framework of the board’s initial objection – not admitted	57
6.9.5	New request in response to change of opinion of the board – not admitted as objection and arguments already known.....	58
6.9.6	Amendment not adding anything of substance to the discussion of the objection raised – not admitted	58
6.9.7	New request in response to board’s preliminary opinion based on earlier objections.....	59
6.9.8	New document and new lines of attack in response to board’s preliminary opinion exclusively based on earlier submissions – not admitted.....	59

7.	Remittal to the department of first instance	60
7.1	Article 11 RPBA 2020 – Special reasons.....	60
7.2	Incomplete search	62
7.3	Zurückverweisung zur Anpassung der Beschreibung.....	62
7.4	Anordnung einer Änderung der Zusammensetzung des erstinstanzlichen Organs.....	63
8.	Reimbursement of appeal fees.....	63
8.1	Substantial procedural violation	63
8.2	Excessive length of proceedings	63
8.3	Withdrawal of appeal or withdrawal of request for oral proceedings under Rule 103(4) EPC (25%).....	64
B.	Proceedings before the Enlarged Board of Appeal.....	68
1.	Referral by the President of the EPO	68
2.	Grounds for petition for review	69
2.1	Article 112a(2)(c) EPC – alleged fundamental violation of Article 113 EPC.....	69
 Annex 1		
	Decisions discussed in the Case Law Report 2020	71
 Annex 2		
	Cited decisions	82
 Annex 3		
	Headnotes/catchwords to 2020 decisions which have been published in the Official Journal	88

I. PATENTABILITY

A. Exceptions to Patentability

1. Product claims for plants or plant material

(Case Law of the Boards of Appeal, 9th ed. 2019 ("CLB"), I.B.3.3.3)

In its opinion **G 3/19** (OJ 2020, A119), the Enlarged Board began by analysing the scope and focus of the referral and held that the two issues underlying it were interlinked and could be combined in the following single question:

"Taking into account developments that occurred after a decision by the Enlarged Board of Appeal giving an interpretation of the scope of the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC, could this exception have a negative effect on the allowability of product claims or product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process feature define an essentially biological process?"

Considering Art. 53(b) EPC on its own, i.e. without reference to R. 28(2) EPC, the Enlarged Board confirmed its earlier decisions in cases **G 1/98** (OJ 2000, 111), **G 2/07** (OJ 2012, 130) and **G 1/08** (OJ 2012, 206), and **G 2/12** (OJ 2016, 27) and **G 2/13** (OJ 2016, 28). Furthermore, the Enlarged Board did not find any subsequent agreement or practice within the meaning of Art. 31(3)(a) and (b) Vienna Convention regarding its earlier interpretation.

The Enlarged Board held that the application of the various methods of interpretation provided for in Art. 31 and 32 Vienna Convention, also taking into account the subsequent developments in the Contracting States, did not lead to the finding that the term "essentially biological processes for the production of plants" in Art. 53(b) EPC was to be read clearly and unambiguously as extending to products defined or obtained by such processes. It therefore endorsed the respective conclusions that it had come to in **G 2/12**.

At the same time, however, the Enlarged Board acknowledged that Art. 53(b) EPC did not prohibit this broader understanding of the process exclusion either. Furthermore, the Enlarged Board recognised that, with the introduction of R. 28(2) EPC, the legal and factual situation underlying decision **G 2/12** had substantially changed. This amendment constituted a new aspect that had arisen since the EPC was signed which could give reason to believe that a grammatical, and restrictive, interpretation of the wording of Art. 53(b) EPC conflicted with the legislator's aims, whereas a dynamic interpretation could bring a result that diverged from the wording of the law. The Enlarged Board held that the exclusion of products exclusively obtained by means of an essentially biological process was not incompatible with the wording of Art. 53(b) EPC, which did not rule out this broader construction of the term "essentially biological processes for the production of plants or animals". The Enlarged Board concluded that, in view of the clear legislative intent of the Contracting States as represented in the Administrative Council and having regard to

Art. 31(4) Vienna Convention, the introduction of R. 28(2) EPC allowed and indeed called for a dynamic interpretation of Art. 53(b) EPC.

Accordingly, the Enlarged Board abandoned the interpretation of Art. 53(b) EPC given in decision G 2/12 and, in the light of R. 28(2) EPC, held that the term "essentially biological processes for the production of plants or animals" in Art. 53(b) EPC was to be understood and applied as extending to products exclusively obtained by means of an essentially biological process or if the claimed process feature defined an essentially biological process. In conclusion, the Enlarged Board of Appeal answered the referral as follows:

"Taking into account developments after decisions G 2/12 (OJ 2016, 27) and G 2/13 (OJ 2016, 28) of the Enlarged Board of Appeal, the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC has a negative effect on the allowability of product claims and product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process.

This negative effect does not apply to European patents granted before 1 July 2017 and European patent applications which were filed before that date and are still pending."

2. Medical method

2.1 One surgical step in a multi-step method

(CLB, I.B.4.3.1)

In T 1631/17 handelte es sich um ein Verfahren zum Herstellen von Zahnersatzteilen. Der Beschwerdeführer (Patentinhaber) legte Beschwerde gegen die Entscheidung der Einspruchsabteilung ein, das Patent zu widerrufen. Es war unbestritten, dass der Wortlaut von Anspruch 1 keinen expliziten Verfahrensschritt beinhaltete, der im Sinne von Art. 53 c) EPÜ als chirurgisch anzusehen gewesen wäre. Allerdings umfasste das beanspruchte Verfahren einen solchen Schritt, was ausreichend ist um unter den Ausschlussbestand des Art. 53 c) EPÜ zu fallen (G 1/07, ABI. 2011, 134). Gemäß der Beschreibung beginnt das erfindungsgemäße Verfahren damit, dass eine erste Abformung von einem Gebiss genommen wird, in dem zunächst provisorisch die fehlende Zahnschubstanz ergänzt wurde. Dieses "fertige" Gebiss wird abgeformt und erst danach werden die Zähne für die zweite Abformung präpariert. Mithilfe der beiden Abformungen wird der Zahnersatz hergestellt. Daraus ergab sich, dass das Ergänzen der fehlenden Zahnschubstanz ein wesentliches Merkmal der Erfindung darstellte. Im vorliegenden Fall insbesondere auch deshalb, weil dieser Schritt genau den Beitrag darstellte, der über den Stand der Technik hinausging. Dieser Verfahrensschritt musste daher bei der Auslegung des Anspruchs mitgelesen werden. Die Präparation der Zähne, die nach der ersten Abformung stattfindet, lag damit ebenfalls zeitlich und räumlich innerhalb des beanspruchten Verfahrens. Das beanspruchte Verfahren konnte ohne eine unmittelbare Durchführung des Zwischenschrittes der Präparation der Zähne nicht durchgeführt werden, weil sonst die zweite Abformung nicht hätte erstellt werden können. Naturgemäß wird die Präparation der Zähne direkt am Patienten

durchgeführt und stellt einen chirurgischen Verfahrensschritt dar, weil dabei invasiv und in erheblichem Maße Körpergewebe entfernt wird.

B. Novelty

1. Availability to the public – obligation to maintain secrecy

(CLB, I.C.3.4.4)

The decisive issue in **T 72/16** was whether the alleged public prior use by the sale and delivery of products was sufficiently proven. In this case Aspen sold a product (48 pipe sections) to Technip. The board concurred with the patent proprietor that it was not a sale and delivery of a commercially available end product which had thus become publicly available. The evidence showed that it was rather a development product, a prototype supplied in the course of an ongoing collaboration programme. Hence, Technip could not be regarded as a mere customer and neither of the partners as a member of the public. According to the jurisprudence of the boards of appeal, such a relationship between two companies which contracted to develop and deliver prototypes and products for test purposes cannot be treated as equivalent to that between a dealer and a customer and in these cases an obligation to maintain secrecy applied. In accordance with the normal practice in those cases there was at least an implicit duty of confidentiality on both companies involved. Thus, the burden of proof was on the appellant (opponent) to establish that there was no confidentiality agreement. The witness' suggestion that the NDA was asymmetric, i.e. only binding on Aspen but not on Technip appeared not to be probable and from experience rather contrary to the situation in comparable cooperation projects, and furthermore not supported by any further evidence. It was not surprising that the witness, an engineer, not an IP specialist, was not aware of all the confidentiality requirements binding the other party.

The board came to the conclusion that Technip was not a mere customer. Rather, Aspen and Technip were engaged as partners in a product development project and their collaboration was governed by an at least implicit confidentiality agreement. None of the prior uses had been proven, so that none of them formed part of the prior art.

2. Ascertaining differences – distinguishing features

(CLB, I.C.5.2.5)

Case **T 1930/14** concerned a method for the purification of antibodies. The opposition division inter alia held that the subject-matter of claim 1 of the main request lacked novelty.

The appellant (patent proprietor) argued that claim 1 was only for methods in which the separation of monomeric antibodies from aggregates was achieved by the weak CM cation-exchange step. He further argued that the claim should be construed according to the principles set out in **T 1931/14**. In the appellant's view, the purpose stated in the claim, i.e. "purifying a monoclonal antibody from aggregates thereof" defined the claimed method's application or use (as opposed to its effect). In line with

decision T 1931/14, this purpose had to be considered as a functional technical feature of the claim, i.e. it represented a limitation of the process.

The board considered that the finding in T 1931/14 "where the stated purpose defines the specific application of the method, in fact it requires certain additional steps which are not implied by or inherent in the other remaining steps defined in the claim, and without which the claimed process would not achieve the stated purpose" (point 2.2.4 of the Reasons) could only hold in cases where it was unambiguously clear that the purpose implied such steps and where it was also unambiguously clear what those steps in fact were. In T 1930/14, the board could identify no indication, either in the claim itself or in the description, that would lead the skilled person to understand that the stated purpose "for purifying a monoclonal antibody from aggregates thereof" implied that the claimed method contained additional steps. The claimed method did not contain any implicit additional steps by virtue of its purpose. Thus, contrary to the appellant's view, there were no steps, allegedly implied by the purpose, that served to differentiate the claimed method from that disclosed in document D1. Claim 1 did not meet the requirements of Art. 54 EPC.

3. Chemical inventions and selection inventions – lists

(CLB, I.C.6.2.1b)

In T 2350/16 argumentierte der Beschwerdeführer (Einsprechende), der Gegenstand von Anspruch 1 sei von der Druckschrift D1 neuheitsschädlich vorweggenommen. Die Kammer befand zunächst, dass D1 alle Merkmale von Anspruch 1 als solche offenbarte. Es blieb jedoch noch zu prüfen, ob D1 diese Merkmale auch in Kombination offenbarte. Die Kammer fasste in einer Tabelle zusammen, wo und in welchem Kontext die Merkmale 1d bis 1h offenbart waren und gab auch an, aus wie vielen Varianten ausgewählt werden musste, um das Merkmal zu erhalten. Sie kam zum dem Schluss, dass alle Merkmale in Kombination offenbart waren. Die Kammer stellte zudem fest, dass die Rechtsprechung betreffend die Auswahl aus Listen hier nicht zur Anwendung kommen konnte, da es sich nicht um (lange) Listen handelte, wie sie in der Chemie gebräuchlich sind, sondern jeweils nur um eine Auswahl aus höchstens zwei oder drei Elementen. Da die D1 alle Merkmale von Anspruch 1 in Kombination offenbarte, war der Gegenstand dieses Anspruchs durch die D1 neuheitsschädlich vorweggenommen.

Die Kammer machte auch Ausführungen zur Rolle des Fachmanns bei der Neuheitsprüfung. Der Beschwerdegegner (Patentinhaber) hatte wiederholt geltend gemacht, dass die D1 Stand der Technik im Sinne von Art. 54 (3) EPÜ darstelle und es daher nicht zulässig sei, "dauernd den Fachmann zu bemühen". Die Kammer konnte dem nicht zustimmen. Auch wenn dies nicht immer explizit erwähnt wurde, ist eine Neuheitsprüfung ohne ständige Bemühung des Fachmanns gar nicht denkbar. Allerdings ist es ihm in diesem Zusammenhang verwehrt, Fragen der Plausibilität oder des Naheliegens, wie sie sich bei der Prüfung der erfinderischen Tätigkeit stellen können, zu behandeln.

4. Second medical use

(CLB, I.C.7.2.4)

In **T 264/17** stellte die Kammer fest, dass das beanspruchte Schmiermittel zum Ersatz der Synovialflüssigkeit in erkrankten Gelenken als Stoff oder Stoffgemisch im Sinne von Art. 54 (4), (5) EPÜ gilt. Die therapeutische Wirkung der beanspruchten perfluorierten Polyether bestand darin, einen Ersatz für die Synovialflüssigkeit in erkrankten Gelenken zu darzustellen. Nach Ansicht der Kammer wurde diese Wirkung durch die stofflichen Eigenschaften der beanspruchten Schmiermittel erzielt. Wie in der Beschreibung erklärt, basierte die schmierende Wirkung der perfluorierten Polyether auf ihren omniphoben Eigenschaften, d. h. darauf, dass sie gegenüber sowohl hydrophoben als auch hydrophilen Flüssigkeiten abstoßend wirken, sich selbständig zusammenziehen und dadurch permanent ein neuer Gleitfilm ausgebildet wird. Diese Stoffeigenschaften werden durch die chemische Struktur der Polyether verursacht. Die physiologische Wirkung der Polyether wurde also über ihre Art der Wechselwirkung (oder nicht-Wechselwirkung) mit biologischem Gewebe erzielt.

Der therapeutische Effekt wurde auch unzweifelhaft von einer chemischen Zusammensetzung verursacht, nämlich von den in Anspruch definierten perfluorierten Polyethern. Ob diese im klassischen Sinn als "Aktivstoffe" bezeichnet werden oder nicht, sei dabei nebensächlich laut Kammer.

5. Second (or further) non-medical use

(CLB, I.C.8.1.1)

In **T 1385/15** stellte die Kammer fest, dass einem Anspruch auf eine weitere nicht-medizinische Verwendung die Neuheit nicht abgesprochen werden kann, wenn die beanspruchte technische Wirkung des Stoffes und die beanspruchte Verwendungsweise nicht in Kombination im Stand der Technik offenbart sind.

Der unabhängige Anspruch 1 des Patents, auf dem die angefochtene Entscheidung beruhte, betraf die Verwendung eines Reinigungsmittels, das wenigstens zwei verschiedene Tenside enthielt, ausgewählt aus wenigstens zwei der drei Gruppen kationische, nichtionische und amphotere Tenside, und anwendungsfertig verdünnt in wässriger Lösung einen pH-Wert von wenigstens 10,5 aufwies, zur Abtötung/Inaktivierung von Mikroorganismen ausgewählt aus der Gruppe bestehend aus Bakterien, Viren und Pilzen bei der maschinellen Desinfektion von Gegenständen.

In der angefochtenen Entscheidung berief sich die Einspruchsabteilung auf die Dokumente D1a und D2 und gelangte zu der Auffassung, der unabhängige Verwendungsanspruch 1 sei nicht neu gegenüber dem Dokument D1a, unter Berücksichtigung von D2. Zwar offenbarten weder D1a noch D2 für sich genommen alle Merkmale des Anspruchs 1 des Patents. Nach Analyse der Entscheidung **G 6/88** (OJ 1990, 114), die für die Beurteilung der Neuheit von Ansprüchen die auf eine zweite nicht-medizinische Verwendung gerichtet sind, einschlägig war, kam sie aber zu dem Schluss, dass das Merkmal "zur Abtötung von (...) Bakterien, Viren und Pilzen" nicht geeignet sei, Neuheit gegenüber D1a herzustellen. Diese technische

Wirkung der im Anspruch definierten Reinigungsmittel sei nämlich bereits aus D2 bekannt und könne daher gemäß dem Leitsatz der G 6/88 ("wenn dieses technische Merkmal nicht bereits früher der Öffentlichkeit zugänglich gemacht worden ist") dem Anspruch keine Neuheit verleihen.

Nach Überzeugung der Kammer war die in der angefochtenen Entscheidung vertretene Rechtsauffassung von G 6/88 nicht gedeckt. In G 6/88 selbst werde in Punkt 8 der Entscheidungsgründe ausgeführt, dass auf mangelnde Neuheit nur erkannt werden kann, sollten alle technischen Merkmale der beanspruchten Erfindung in Verbindung miteinander der Öffentlichkeit zugänglich gemacht worden sein. Die Kammer war daher der Ansicht, dass ein Neuheitseinwand nicht auf die Kombination der Lehre der D1a und D2 gestützt werden konnte.

Zusammenfassend wurde in G 6/88 dargelegt, dass das neuheitsbegründende funktionelle technische Merkmal darin besteht, eine technische Wirkung in einem bestimmten Zusammenhang zu erzielen. Im vorliegenden Fall war daher das funktionelle technische Merkmal die antimikrobielle Aktivität im Zusammenhang mit der im Anspruch genannten maschinellen Desinfektion von Gegenständen. Dieses Merkmal war in D2 nicht offenbart, und konnte diesem Dokument deshalb ohnehin nicht entnommen werden.

C. Inventive step

1. Distinction between plausibility and obviousness

(CLB, I.D.4.6.)

In T 184/16 the board acknowledged plausibility when assessing sufficiency of disclosure and inventive step. Therefore, the board decided to take into account post-published evidence D4. The board noted that acknowledging plausibility was not in contradiction to the finding that the claimed subject-matter was non-obvious in view of the prior art. The criteria for plausibility and obviousness were different. On the one hand, for plausibility of a claimed effect to be acknowledged, it was enough if there were no prima facie serious doubts that the effect could be obtained and, conversely, no a priori reason or indication in the common general knowledge that the effect could not be obtained. On the other hand, obviousness was decided within the framework of the problem-solution approach, where generally an important consideration was whether the claimed solution was suggested and thus made obvious by the prior art. See also chapter II.C.2. "Level of disclosure required for medical use – plausibility".

2. Closest prior art – most promising starting point

(CLB, I.D.3.4.)

In T 1450/16 the appellant (applicant) submitted that the skilled person would not have chosen document D1 as the closest prior art. The board did not agree with the assumption relied on by the appellant that, according to the basic problem-solution approach, the person skilled in the art may be entrusted with the task of selecting the closest prior art or a suitable starting point for the assessment of inventive step, which is the first step in the multi-stage method of that problem-solution approach. In

the board's view, this would mean that the same (fictitious) person as the one who finally assesses the obviousness of a certain claimed subject-matter had already selected their "favourite" prior-art document in order to conduct that assessment. Given that the objective technical problem was to be derived from the distinguishing features established with respect to the selected closest prior art, such a selection would further imply that this skilled person could pose the objective problem to him or herself. However, this would be at odds with the very aim of the problem-solution approach, namely to provide an objective method of evaluating inventiveness, avoiding as far as possible an inadmissible hindsight analysis. The board was aware of case law which at least implicitly indicates that the skilled person may select their "own" closest prior art (see e.g. T 1841/11, T 2057/12, T 1248/13). Rather, the board in the case in hand followed the conclusions drawn, for example, in T 422/93 (OJ 1997, 24, see Headnote 1) and T 1140/09 that the relevant skilled person was to be defined starting from the objective technical problem. In the board's view, the person skilled in the art within the meaning of Art. 56 EPC entered the stage only when the objective technical problem had already been formulated. Thus, the skilled person under Art. 56 EPC was the person qualified to solve the established objective technical problem (see e.g. T 32/81, OJ 1982, 225; T 26/98; T 1523/11) and not necessarily the person versed in the field of the underlying application or in the field of the selected closest prior art, as apparently advocated in T 25/13. The board concluded that, in accordance with the findings in T 855/15, it must be the respective deciding body (whose members cannot be equated with the skilled person as a notional entity; see T 1462/14) – be it the examining division, the opposition division or the relevant board of appeal – that selects the closest prior art rather than the skilled person mentioned in Art. 56 EPC. The board summarised its finding in a Catchword as follows: In the application of the problem-solution approach for the assessment of inventive step, the person skilled in the art within the meaning of Art. 56 EPC enters the stage only when the objective technical problem has been formulated in view of the selected "closest prior art". Only then can the notional skilled person's relevant technical field and its extent be appropriately defined. Therefore, it cannot be the "skilled person" who selects the closest prior art in the first step of the problem-solution approach. Rather, this selection is to be made by the relevant deciding body, on the basis of the established criteria, in order to avoid any hindsight analysis.

In T 787/17 bestimmte die Kammer, dass die D2 dem Erfindungsgegenstand am nächsten kommt und daher als "nächstliegender Stand der Technik" im Sinne des Aufgabe-Lösungs-Ansatzes dient. Innerhalb der D2 kam das Ausführungsbeispiel der Fig. 11a der Erfindung am nächsten. Die Kammer konnte sich dem Vortrag nicht anschließen, dass dieses Ausführungsbeispiel keinen realistischen Ausgangspunkt darstelle, weil es dem Fachmann keine Hinweise liefere, wie er zur Lösung der Aufgabe vorgehen solle. Grundsätzlich ist jedes Element des Stands der Technik auf dem Gebiet der Erfindung, das einen Gegenstand offenbart, der zum gleichen Zweck oder mit demselben Ziel entwickelt wurde, ein möglicher Ausgangspunkt. Einer besonderen Rechtfertigung, z. B. basierend auf Überlegungen des Fachmanns, bedarf es dazu nicht. Insbesondere ist die Frage, ob ein solches Element einen Hinweis zur Lösung der objektiven technischen Aufgabe enthält, für seine Wahl als Ausgangspunkt irrelevant. Dies geht schon daraus hervor, dass die objektive technische Aufgabe erst auf Grundlage des Ausgangspunktes definiert werden kann. Es bedarf auch keiner Rechtfertigung, warum der Fachmann innerhalb

einer vorveröffentlichten Druckschrift, die eine große Zahl von Ausführungsbeispielen umfasst, gerade von einem bestimmten Ausführungsbeispiel ausgehen würde. Jedes der Ausführungsbeispiele stellt ein Element des Stands der Technik dar, das als solches dem (fiktiven) Fachmann bekannt ist und deshalb auch als Ausgangspunkt dienen kann.

3. Wissensstand des Fachmanns

(CLB, I.D.8.3.)

In **T 1601/15** stellte die Kammer fest, dass der Fachmann keiner Anregung bedarf, um sein Fachwissen zur Anwendung zu bringen. Die Kammer war von dem Argument, dass der Fachmann keinen Anlass gehabt hätte, auf sein Fachwissen zurückzugreifen, nicht überzeugt. Der Fachmann bedarf keines Anlasses, um sein Fachwissen zur Anwendung zu bringen. Sein Fachwissen bildet gewissermaßen den technischen Hintergrund für jede Tätigkeit des Fachmanns und fließt in alle seine Entscheidungen ein. In dieser Hinsicht ist das allgemeine Fachwissen von der Lehre fachspezifischer Druckschriften zu unterscheiden. Im vorliegenden Fall wäre die Lösung der Aufgabe für den Fachmann angesichts seines Fachwissens, wie es insbesondere durch die Druckschrift D15 belegt ist, naheliegend gewesen.

4. Effect not made credible within the whole scope of claim – neural network

(CLB, I.D.4.3.)

In **T 161/18** unterschied sich das beanspruchte Verfahren vom Stand der Technik nur durch ein künstliches neuronales Netz. Allerdings war dessen Training nicht im Detail offenbart, wodurch die Verwendung des künstlichen neuronalen Netzes nicht zu einem speziellen technischen Effekt führte, der erfinderische Tätigkeit begründen konnte. Anspruch 1 sah vor, dass "die Transformation der an der Peripherie gemessenen Blutdruckkurve in den äquivalenten Aortendruck mit Hilfe eines künstlichen neuronalen Netzes vorgenommen wird, dessen Gewichtungswerte durch Lernen bestimmt werden". Nach Ansicht der Kammer ging der bloße Hinweis darauf, dass Gewichtungswerte durch Lernen bestimmt werden, nicht über das hinaus, was der Fachmann unter einem künstlichen neuronalen Netz versteht. Daher war das beanspruchte neuronale Netz nicht für die spezielle, beanspruchte Anwendung angepasst. Es erfolgte hier nur eine nicht näher spezifizierte Anpassung der Gewichtungswerte, die in der Natur jedes künstlichen neuronalen Netzes lag. Die Kammer war daher nicht davon überzeugt, dass der vorgetragene Effekt in dem beanspruchten Verfahren über den gesamten beanspruchten Bereich erzielt wurde. Dieser Effekt konnte daher nicht im Sinne einer Verbesserung gegenüber dem Stand der Technik bei der Beurteilung der erfinderischen Tätigkeit berücksichtigt werden. Siehe auch Kapitel II.C.1. "Ausführbarkeit – neuronales Netz".

5. Assessment of inventive step

5.1 Technical character of an invention

(CLB, I.D.9.1.1)

In T 1798/13 the invention concerned forecasting the value of a weather-based structured financial product. The values of these products were based on specific weather measures, such as temperature, precipitation, hours of sunshine, heating degree days, cooling degree days or wind speed.

The examining division essentially considered that the invention had two aspects, namely a) defining and calculating a weather forecast and b) defining and calculating the influence of the weather forecast on a particular financial product. They could not find a technical problem solved by the implementation of either of these aspects. The decision further considered that the introduction of mathematical equations in claim 1 would not render it technical because it was not clear what technical problem these solved.

The board agreed with the appellant that a system for weather forecasting, for example, comprising sensors for measuring specific weather data, had technical character. The invention, however, relied on the use of already measured weather data. It could be argued that this (raw) weather data represented measurements about the physical world and was therefore also technical. The situation would thus be similar to that in T 2079/10, which considered that physical parameters represented technical data and that the choice of which physical parameters were to be measured fell within the competence of the technical skilled person.

In T 2079/10, however, the invention was seen to lie in the improvement of the measurement technique itself, which involved technical considerations about the sensors and their positions. In the case in hand, the measurements themselves did not play a role, the improvement was in the processing of data to provide a better weather forecast.

The applicant's second argument was essentially that an improvement in the weather data by calculating and further processing it was also technical. In the board's view this led to the key issue in this case, namely whether improving the accuracy of given data of a weather forecast was technical. If it was not, then the details of the algorithm, the "mathematics" as the division put it, did not help.

The board held that it was not. The "weather" was not a technical system that the skilled person could improve, or even simulate with the purpose of trying to improve it. It was a physical system that could be modelled in the sense of showing how it works. This kind of modelling was rather a discovery or a scientific theory, both of which were excluded under Art. 52(2)(a) EPC and thus did not contribute to the technical character of the invention.

5.2 The aim to be achieved in the formulation of the technical problem

(CLB, I.D.9.1.4)

In **T 1749/14** the invention was in the field of mobile point-of-sale (POS) terminals for carrying out transactions, e.g. involving a credit card. Conventionally, the merchant possessed such mobile POS terminals and the customer had to provide his identification credentials such as account number and PIN to this merchant's unit. The invention tried to avoid the customer's sensitive information becoming known if the merchant's device was tampered with by allowing a transaction to be carried out without the customer having to present account information and the PIN to the merchant. The board held that the notional business person might have come up with the abstract idea of avoiding the customer having to provide PIN and account information to the merchant. The invention, however, required a new infrastructure, new devices and a new protocol involving technical considerations linked to modified devices and their capabilities as well as security relevant modifications of the transfer of sensitive information using new possibilities achieved by the modifications to the previously known mobile POS infrastructure. This went beyond what the notional business person knew and concerned technical implementation details (how to implement) which were more than a straight-forward 1:1 programming of an abstract business idea. This was in the sphere of the technical expert and subject to the assessment of inventive step (see **T 1082/13**).

In **T 232/14** the invention related to the identification of specially taxed or branded manufactured items (also called units or cartons, e.g. cigarette cartons), packaged into containers (also called cases). Identification allowed products to be authenticated as genuine, tracked and traced, which helped to detect contraband and counterfeit products. The board held that using ranges of unit identifiers to label a number of (consecutive) unit identifiers of manufactured items was, at the level of generality at which it was claimed, on the business side of the line between technical and non-technical subject-matter (see e.g. **T 144/11** points 2.1, and 3.6 to 3.9 of the Reasons). Contrary to the appellant's argument, the board held that the ranges of unit identifiers did have a meaning for the business person. They corresponded to batches of units produced on a production line. (point 2.6 of the Reasons). Even if the "determining of ranges of unit identifiers" achieved a technical effect, such as reducing data storage and data bandwidth requirements, it was a matter of routine design for the skilled person, a software programmer or a database expert, based on common general knowledge to store the first and the last element of a list of items, instead of the whole list. Therefore the determination of ranges of unit identifiers was rather linked to the number of possible ways of organising items of a group of items based on how they were produced, that is, the number of batches, than to the way in which data can be stored.

The board agreed with the examining division that the use of an (electronic) database for the storage of data, that is, the ranges of unit identifiers, was a straight-forward consequence of the requirement specification when implementing it on a data processing system. The person skilled in the art when implementing the business requirements would straight-forwardly store in the database a container identifier for each container, each being coupled in the database to the one or more ranges of unit identifiers allocated to the container. The saving in storage space was a mere "bonus effect".

In **T 2314/16** The invention concerned the distribution of rewards to participants in an affiliate marketing scheme, by which an influencer (called user in claim 1) received a reward for advertising a product or service on a blog or on social media. Participating influencers were each allocated a portion of an advertisement banner displayed on a web site. The visitors to the website did not see the user areas, only an advertising banner. When the visitor clicked on the banner, the user whose portion was clicked on got a reward, distributed according to the sizes of the image portions. The partial areas were allocated such that the reward distribution rates matched the degree of contribution of each user to the advertising.

The board held that the specification of the business method ended with how to determine the reward distribution ratio. The features of dividing the advertisement display area into partial areas and allocating each partial area to a user such that when the partial area was clicked on the user got a reward, were based on technical considerations of the web page system. It was not motivated by any business considerations. In order to come up with this idea, one needed to understand how a web site is built, and in particular how an image map works. Thus, this feature could not be part of the non-technical requirements. Instead it was part of the solution that had to be evaluated for obviousness.

II. PATENT APPLICATION AND AMENDMENTS

A. Claims

1. Clarity of claims – indication of all essential features

(CLB, II.A.3.2.)

In **T 2574/16** claim 1 was directed to a method of accessing electronic information, the last step of which was as follows: "modifying at least one graphical element on the selected portal document based upon the simulation graphical element that is selected and the operational electronic information to thereby simulate an operation of at least one of the operational elements of the at least one operational system". The examining division had found that this last step was unclear (Art. 84 EPC) and caused the claimed invention to be insufficiently disclosed (Art. 83 EPC). One of its objections was that an example disclosed in the description in combination with two figures made it clear that the invention was not limited to simulating an operation in response to the selection of a single simulation graphical element but encompassed simulating an operation in response to the selection of more than one simulation graphical elements. In view of that example, claim 1 could not be interpreted as being restricted to displaying known modifications stored in the operational electronic information.

The board noted that the claim did encompass elaborate simulations going beyond any of the examples disclosed in the application as filed. But this in itself was not a problem of lack of clarity or insufficiency of disclosure. In fact, it was normal for a claim to define the scope of protection in terms that positively define the essential features of the invention. Any particular embodiment falling within the scope of the claim could have further characteristics not mentioned in the claim or disclosed in the application (and could even constitute a patentable further development). In the case

in hand, any method falling within the scope of claim 1 included a step of modifying at least one graphical element to thereby simulate an operation of at least one operational element. This simulation could be very elaborate but also very simple. The contribution of this step to the claimed invention was essentially that some simulation took place, not that such simulation was made possible for the first time. Given at least one operational element of an operational system, the skilled person would have no difficulty in implementing some simulation in the form of at least one modification to at least one graphical element. The contribution made by the step was therefore sufficiently disclosed.

2. Clarity of a claim specifying a norm or standard

(CLB, II.A.3.6.)

In **T 3003/18** opponents 2 and 3 had submitted in respect of previous requests that the definition of the claimed subject-matter by reference to connectors designated by standards or norms was not clear, among other reasons because the corresponding standards or norms included different versions and changed over time and the structural and functional features of the claimed connectors were not clear (cf. T 1888/12, T 783/05). Against this the patent proprietor argued that references to standards in claims were not generally unclear per se; what should be considered in this case were the features of the standard as they related to the claimed invention (cf. T 2187/09, T 1196/15).

According to the board, the clarity of a claim specifying a norm or standard depended on the circumstances of the case, and in particular on the claimed subject-matter. The MTRJ connector specified in claim 1 designated a well-known standardised family of connectors having, on the one hand, specific features that could differ among the connectors of the family and could change over time according to different specific versions of the corresponding standard or norm and, on the other hand, a series of common (or, as noted by the opposition division, generic) features that ensured a predetermined degree of compatibility and interchangeability between the different connectors of the same family. Moreover, these connectors were commonly and generally designated "MTRJ connectors" in textbooks, reference books and the like, without reference to any particular version of the corresponding standard or norm. In addition, in the present case – and contrary to other cases, such as T 1888/12 and T 783/05 (see above) – the features of the MTRJ connector relevant in the technical context of claim 1 were not the specific, but the common features mentioned above, and for this reason the skilled person would understand what was meant in the claimed context by the optic connector being an "MTRJ connector". The same considerations applied to the SC and the LC connectors defined in claim 1.

3. Claims supported by the description

(CLB, II.A.5.)

In **T 695/16**, while the examining division had found claim 1, directed to a sprayhead, to be clear and concise, it had considered neither the figures nor the description of the preferred embodiment to describe in detail at least one way of carrying out the invention claimed (R. 42(1)(e) EPC). The claims were broader than justified by the

extent of the description and drawings and were thus not supported by the description (Art. 84 EPC). It had refused the application on this basis.

Setting the decision aside, the board noted that feature a ("projection" of the circular collar) and feature b ("non-rotating feature" of the inner surface of the over-cap) in the characterising part of claim 1 were indisputably clear to the skilled person, i.e. their structural form, function and interrelation were clear. It was further undisputed that in the description there was at least a verbatim repetition of the characterising features of claim 1. This meant that said features were also disclosed, obviously also in a clear manner, in the description, thereby supporting the wording of claim 1, and the scope of the claims was not broader than justified by the extent of the description. What the examining division considered to be the "missing link" between claim 1 and the description that rendered claim 1 not supported was the lack of denomination of features a and b in the figures and in the text of the description referring to the example presented therein. However, since features a and b were per se clear, a specific denomination of these in the part of the description directed to the specific embodiment depicted in the figures was not mandatory. Any reading of the description and viewing of the figures must be done with the knowledge that features a and b were present and interacted to produce audible signals. The skilled person would recognise the relevant features in the figures, and thereby have a detailed description of them, including their location and their shape. The sprayhead depicted in the figures met the requirements of R. 42(1)(e) EPC in that one way of carrying out the invention claimed was illustrated. In conclusion, both this provision and Art. 84 EPC were met.

4. Claim terms with a well-established meaning in the art – use of the description

(CLB, II.A.6.3.1)

In **T 1642/17** the sole reason for the application being refused was that it did not meet the requirements of Art. 84 EPC. In particular, the examining division held that certain definitions in a document cross-referenced in the description were essential to determine the boundaries of the claims and must be introduced into the description, which should be self-contained. It also referred to established case law that a patent document may be its own dictionary.

The board understood the examining division's objection to be that the claims lacked clarity when read and interpreted in the light of the description. However, it was established case law that where the claims and the terms used in them are clear when read on their own, for instance because they have a well-established meaning in the art, the unambiguous claim wording must be interpreted as it would be understood by the skilled person without the help of the description (see **T 2221/10** and **T 197/10**; also Case Law of the Boards of Appeal, 9th ed. 2019, II.A.6.3.1). As set out in the latter decision, this applied in the event of a discrepancy between the claims and the description. In the case in hand, the board agreed with the examining division that the terms used in the claims had a "generally accepted meaning" to the skilled person. In view of this and the above case law, it concluded that the claims met the clarity requirements of Art. 84 EPC.

It followed that the presence of a cross-reference in the description containing a definition of these terms should not be treated differently to a case where the description itself contains such a definition. In neither case would the effect of the definition of terms which already have a well-established meaning in the art have a negative effect on the clarity of the claims. Indeed, neither the description nor a cross-reference could change a generally accepted meaning of terms in a claim. The board also noted that the parallel drawn by the examining division to the case where the description has to be adapted to ensure compliance with Art. 83 EPC was incorrect, because Art. 84 EPC refers to the claims, whereas Art. 83 EPC refers to the disclosure of the patent application. Instead, to ensure that the application complied with the support requirement of Art. 84 EPC, the examining division could request that the description be adapted to be in line with the claims (see Case Law of the Boards of Appeal, 9th ed. 2019, II.A 5.3).

B. Unity of invention

1. Determining whether one or several "inventions" – complete search – refund of further search fee

(CLB, II.B.3.3., II.B.4.2.)

In **T 1414/18**, the grounds in the examining division's refusal decision consisted of a mere reference to its final communication under Art. 94(3) EPC, in which it had continued to maintain its objection of non-unity, stated that the application would be refused and expressed the view that the applicant's request for a refund of the second search fee would also be refused. The applicant withdrew its request for oral proceedings and requested an appealable decision "according to the state of the file".

The board disagreed with the examining division's approach to the question of unity. It was only if the application related to more than one "invention" that the notion of "a single general inventive concept" (Art. 82 EPC) and the concept of the "same or corresponding special technical features" (R. 44(1) EPC) had to be assessed for this purpose – see also Catchword (1). It first had to be determined whether the application covered only one or several "inventions". The underlying "invention(s)" was (were) to be established on the basis of the technical problem(s) to be solved according to the description (e.g. W 11/89, OJ 1993, 225; W 6/97; T 173/06; T 1888/09; also Guidelines for Examination of November 2017, e.g. F-V, 8, second paragraph, and 8.1, penultimate sentence). From the board's assessment, the original application had to be considered as relating to one invention only. The fact that the main aspect of the invention was predominantly covered by one (more limited) independent claim did not automatically mean that the complementary (broader) independent claim related to another invention. In particular, it did not mean that two different searches had to be carried out to cover both. A complete search should not be restricted to the claims, regardless of how broad or limited they were, but give due consideration to the underlying description and the drawings (Art. 92 EPC). The board concluded that both claims 1 and 2 as originally filed and claims 1 and 2 of the main request (with only added reference signs and minor rewording) were unitary (Art. 82 EPC).

Concerning the requested fee refund, the board held that the decision to refuse a patent application may be understood to implicitly contain the decision to refuse the refund of a further search fee, if the examining division's intent is clear – see also Catchword (2). Although a decision on the refund of further search fees should be indicated in the order of the written decision (e.g. T 756/14), the examining division's intention to refuse the request had been clear from their latest communication. A further search fee was to be refunded by the examining division or the competent board (R. 64(2) EPC, R. 100(1) EPC) if the search division's invitation to pay it was unjustified. The assessment was to be based on the facts and arguments presented therein and on the originally filed claims (inter alia T 188/00, T 1476/09, T 2526/17). As unity of invention on the basis of the originally filed claims had been incorrectly denied by the examining division, the fee was to be refunded.

C. Sufficiency of disclosure

1. Reproducibility – neural network

(CLB, II.C.6.1.)

In T 161/18 nutzte die Anmeldung ein künstliches neuronales Netz zur Transformation der an der Peripherie gemessenen Blutdruckkurve in den äquivalenten Aortendruck. Bezüglich des Trainings des erfindungsgemäßen neuronalen Netzes offenbarte die Anmeldung lediglich, dass die Eingabedaten ein breites Spektrum von Patienten unterschiedlichen Alters, Geschlechts, Konstitutionstyps, Gesundheitszustand und dergleichen abdecken sollten, damit es nicht zu einer Spezialisierung des Netzes kommt. Die Anmeldung offenbarte jedoch nicht welche Eingabedaten zum Trainieren des erfindungsgemäßen künstlichen neuronalen Netzes geeignet sind, oder mindestens einen zur Lösung des vorliegenden technischen Problems geeigneten Datensatz. Das Trainieren des künstlichen neuronalen Netzes konnte daher vom Fachmann nicht nachgearbeitet werden und der Fachmann konnte die Erfindung deshalb nicht ausführen. Die vorliegende, auf maschinellem Lernen insbesondere im Zusammenhang mit einem künstlichen neuronalen Netz beruhende Erfindung war somit nicht ausreichend offenbart, da das erfindungsgemäße Training mangels entsprechender Offenbarung nicht ausführbar war. Siehe auch Kapitel I.C.4. "Wirkung nicht über den gesamten Schutzbereich glaubhaft gemacht – neuronales Netz".

2. Level of disclosure required for medical use – plausibility

(CLB, II.C.7.2.)

In T 184/16 the invention concerned novel compounds having inhibitory activity against the sodium dependant transporter (pharmaceutical compound). The mechanism underlying the treatment of diseases linked to diabetes, and thus for obtaining the claimed therapeutic effect, was based on the inhibition of the sodium-dependent glucose transporter ("SGLT"), and in particular of SGLT2. The link between the therapeutic effect to be obtained according to claim 12 (medical use claim) and SGLT2 inhibition was not contested by the appellant (opponent). The appellant argued that it was not plausible in the application as filed that the claimed therapeutic effect could be obtained using the claimed compounds.

The board acknowledged that a precondition for taking into account post-published evidence to demonstrate a certain effect was that it was already plausible at the filing date that said effect was obtained. Plausibility was acknowledged, and post-published evidence was taken into account, for example in cases where there were no "prima facie serious doubts" about plausibility (T 108/09, T 1760/11, T 919/15). By contrast, in T 1329/04 there were prima facie serious doubts. In the case in hand, the application as filed did not contain any experimental evidence as regards the disputed plausibility, i.e. the plausibility of the claimed compounds being SGLT2 inhibitors. It was thus necessary to determine whether plausibility could nevertheless be acknowledged in view of the common general knowledge and the prior art. The board had no indication, nor did the appellant argue that there existed any, that there was prima facie any serious doubt that the claimed therapeutic effect could be obtained. Furthermore, there was no a priori reason or any indication in the common general knowledge that the claimed therapeutic effect could not be obtained. The board considered it plausible that the therapeutic effect was indeed obtained.

The board held that post-published evidence D4 (comparative examples filed by the respondent/patent proprietor) could be taken into account to support the disclosure in the patent application. The board acknowledged that D4 indeed provided data for SGLT2 inhibition only. However, the claimed therapeutic effect was obtained by SGLT2 inhibition alone. The fact that SGLT1 inhibition might contribute to this effect as well and was not tested in D4 was not relevant. Furthermore, the appellant bearing the burden of proof for its assertion, the board could not conclude, in the absence of any such evidence, that compounds with large substituents were not suitable to obtain the therapeutic effect defined in claim 12. Sufficiency of disclosure was considered to be satisfied.

Post-published D4 and plausibility were also addressed in respect of inventive step and D4 was also taken into account. See also chapter I.C.1. "Distinction between plausibility and obviousness".

D. Priority

1. Right of priority of the applicant or his successor in title

1.1 Identity of applicants – multiple applicants in the priority application

(CLB, II.D.2.2.1)

In T 844/18 one of several applicants for certain US provisional applications from which priority was claimed was missing from the application leading to the patent-in-suit. No question of succession in title arose. Applying the long-established "all applicants" (or "same applicant") approach in line with the boards' case law, the opposition division held that priority had not been validly claimed and revoked the patent for lack of novelty.

The board formulated the core issue thus: "A and B are applicants for the priority application. A alone is the applicant for the subsequent application. Is a priority claim valid even without any assignment of priority right from B to A?" The appellants' (patent proprietors') three lines of attack on the EPO's "all applicants" approach failed to convince the board, and the appeal was dismissed.

The first question raised was whether entitlement to priority should be assessed by the EPO. The board concluded that the instances of the EPO are empowered and obliged to assess the validity of a priority right claim as required by Art. 87(1) EPC, and that this includes examining the issue of "who" concerning priority entitlement. Art. 87(1) EPC does not require that the "any person" who has filed the patent application is legally entitled to do so, merely that they have done so. The board also rejected arguments based on Art. 60(3) EPC by analogy. The EPO only carries out a formal assessment of the person who filed the application. This is, moreover, not inconsistent with its approach to succession in title, which the appellants claimed. The EPO only assesses that a successor in title is the successor in title of the original applicant, which indeed involves a substantial legal assessment but is not an assessment of legal entitlement to a priority right.

Secondly, concerning the interpretation of "any person" in Art. 87(1) EPC, the board found the ordinary meaning of the term in this context to be ambiguous in all language versions (cf. Art. 4A(1) Paris Convention, Art. 31(1) Vienna Convention). It agreed with T 15/01 that the object and purpose of the Paris Convention (cf. Art. 31(1), 33(4) Vienna Convention) is to "safeguard, for a limited period, the interests of a patent applicant in his endeavour to obtain international protection for his invention", and that "the international priority provisions contained in the Paris Convention ... assist the applicant in obtaining international protection for his invention". The appellants relied on those statements in T 15/01 to argue that the Paris Convention's object and purpose favoured their (non-restrictive) interpretation of "any person". This would allow A alone to file another application in another country claiming the same invention without involving B, whereas the "all applicants" approach could lead to the loss of the priority right, and hence possibly of the patent application, where one of the applicants refused to join in as an applicant for the subsequent application. The board reasoned otherwise: the object and purpose of the Paris Convention cannot form the basis for favouring one or some persons to the detriment of all other persons who originally formed part of the group filing a patent application. Furthermore, an applicant can progress an application before the EPO without the active participation of the other applicants named in it. The current practice protects applicants from being "left out" and being forced to resort to international litigation to protect their rights. The board further noted that the priority provisions of the Paris Convention have remained essentially unchanged since 1883 and that there has been no EPO or national case law clearly adopting the appellants' interpretation. The bar for overturning long-established case law and practice should be very high because of the disruptive effects a change may have. The continuation of such long-standing and rationally based practices can be considered an aspect of legal certainty.

Thirdly, with regard to the applicable law, the board held that it is not, as argued by the appellants, the national law of the place of filing of the priority application (here US law) that determines who qualifies as "any person", but the Paris Convention, to which the US is a party and which is thus part of the "supreme Law of the Land" (Art. VI, clause 2, US Constitution). The board also drew on the travaux préparatoires of the Paris Convention from 1880 to conclude that this treaty determines who "any person" is, and that this determination is a purely formal one. The Paris Convention and the EPC provide self-contained definitions of the person who claims priority. This person is defined by the action that they have performed,

i.e. filing a first application. Whether they are the inventors or are actually entitled to be the applicants for this patent are not issues requiring investigation under the Paris Convention. As to the use of US provisional applications to claim priority for a European patent application, the board noted that applicants wishing to do so should be aware of the difficulties that they might face. This was a consequence of the US's adhesion to the Paris Convention.

E. Amendments

1. Article 123(2) EPC – added subject-matter

1.1 Disclosure derived from the whole of the application as filed

(CLB, II.E.1.2.1)

In **T 1121/17** the application as filed concerned a composition comprising a peroxide source (in amounts defined by a range) and an adhesion system. Claim 1 of the main request differed from claim 1 of the application as filed inter alia in that it introduced a feature that limited the nature of the peroxide source (feature (ii)).

In first instance proceedings, the examining division had raised an objection under Art. 123(2) EPC with respect to the then pending auxiliary request against a limitation corresponding to feature (ii). In its reasoning the examining division relied on Guidelines section H-IV, 3.5 (November 2016 version; same paragraph in H-IV, 3.4 of the November 2019 version) dealing with allowability of amendments under Art. 123(3) EPC. This section related to cases in which the initial claim was directed to a composition comprising a component in an amount which was defined by a numerical range of values and in which this claim was then amended by restricting the breadth of that component. In a claim directed to an openly defined composition such a restriction could have the effect of broadening the scope of protection of the claim. The examining division concluded from this that such amended claims contained added subject-matter, as restricting the breadth of the component meant that certain materials were no longer limited by the claim, and therefore could be present in amounts which were excluded from the claim as originally filed.

The board however emphasised that the criterion referred to in the Guidelines was inappropriate for the assessment of compliance with Art. 123(2) EPC. The relevant question for the purposes of Art. 123(2) EPC was whether the amendments remained within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, from the whole of the application as filed ("gold standard" of **G 2/10**, OJ 2012, 376). An amendment having the effect of broadening the scope of protection of a claim as originally filed did not infringe Art. 123(2) EPC if the amended subject-matter derived directly and unambiguously from the whole of the application as filed. In the case in hand the amendment at issue resulted from the literal incorporation of dependent claim 3 into claim 1 and therefore did not present the skilled person with new technical information.

1.2 Forming a range by combination of end-points of disclosed ranges

(CLB, II.E.1.5.1)

Dans la décision **T 113/19**, la chambre a expliqué que le fait que le seul exemple soit en dehors de la nouvelle plage revendiqué ne veut pas dire que cette plage ne peut pas être déduite directement et sans équivoque de la demande telle que déposée. Elle a considéré qu'en l'espèce l'homme du métier comprend à la lecture de la demande telle que déposée, que les compositions ayant (pour la caractéristique en question) au moins une valeur égale au seuil inférieur de la plage générale ont déjà la qualité requise, mais que celles allant au-delà du seuil supérieur sont encore meilleures. La chambre a conclu que la plage telle que revendiquée, qui est limitée à ce qui peut être considéré comme satisfaisant et exclut ce qui est encore mieux, découle directement et sans équivoque de l'enseignement de la demande telle que déposée.

1.3 Selection from lists – converging alternatives

(CLB, II.E.1.6.2)

In **T 1621/16** the board observed that it was established case law that, under certain circumstances, amendments based on multiple arbitrary selections from lists represented an extension of the content of the application as filed under Art. 123(2) EPC (see e.g. **T 727/00**). However the board noted that most decisions following this well-established approach related to amendments based on lists of non-converging alternatives (i.e. mutually exclusive or partially overlapping elements). By contrast, in cases where the amendments were based on selections from lists of converging alternatives (i.e. lists of options ranked from the least to the most preferred, wherein each of the more preferred alternatives is fully encompassed by all the less preferred and broader options in the list), the conclusions had been less consistent (see **T 812/09**, **T 2237/10**, **T 27/16** and **T 615/95**).

Moreover, the boards had generally regarded amendments based on multiple deletions of elements from one or several lists of (non-converging) alternatives as an allowable restriction of the scope of protection under Art. 123(2) EPC, provided that such amendments did not result in singling out particular combinations of specific meaning (see **T 615/95** and **G 1/93**, OJ 1994, 541). The board considered that selections from lists of converging alternatives should not be treated in the same way as selections from lists of non-converging alternatives for the following reasons:

In the case of non-converging alternatives, each alternative represented a distinct feature and therefore selecting specific elements from such lists lead to a singling out of an invention from among several distinct alternatives, which might provide an unwarranted advantage if there was no way to anticipate which of the different inventions would eventually be protected. On the other hand, when fall-back positions for a feature were described in terms of a list of converging alternatives, each of the narrower elements was fully encompassed by all the preceding less preferred and broader options. Consequently, the elements of such a list represented more or less restricted versions of one and the same feature. Thus, amending a claim by selecting one element from a list of converging alternatives did not lead to a singling out of an invention from among a plurality of distinct options,

but simply to a subject-matter based on a more or less restricted version of said feature. There was thus an analogy between selecting an element from a list of converging alternatives and deleting options from a list of non-converging alternatives (as in T 615/95).

The board emphasised that the above considerations did not allow the conclusion that amendments based on multiple selections from lists of converging alternatives necessarily met the requirements of Art. 123(2) EPC. It needed to be assessed whether the specific combination resulting from the multiple selections was supported by the content of the application as filed. For the board, at least the following two conditions needed to be met: i) The combination should not be associated with an undisclosed technical contribution, that is, no unwarranted advantage should be derived from linking the specific combination of more and less preferred alternatives to an inventive selection which was not supported by the application as filed; and ii) the combination should be supported by a pointer in the application as filed. Such pointers could be provided by the example(s) (as in T 27/16 and T 615/95) or by specific embodiment(s) of the application, as this/these generally represented the most detailed and preferred form(s) of the invention.

1.4 Disclosed disclaimers

(CLB, II.E.1.7.2b)

In T 1525/15 the appellant's objection related to a negative feature (or disclaimer) of both independent claims ("free of a micro-embossing design"). The board observed that there was no verbatim disclosure of this feature in the original application. The feature was added during the grant proceedings to establish novelty over document D1, which was state of the art according to Art. 54(3) EPC. The board emphasised that such an amendment was allowable: – if the negative feature was implicitly disclosed as such in the original application; or - if the disclaimer was undisclosed in the original application but complied with the requirements formulated in decision G 1/03 (OJ 2004, 413) of the Enlarged Board of Appeal. In the case in hand the board came to the conclusion that the negative feature was implicitly but nevertheless directly and unambiguously disclosed in the original application. Incidentally, the board also noted that the relevant test for the assessment of amendments was the so-called "gold standard" test (see G 2/10, OJ 2012, 376); the test known as the "novelty test", which was sometimes used in the early days of the boards of appeal, was no longer used (see Case Law of the Boards of Appeal, 9th ed. 2019, II.E.1.3.7). As the negative feature was disclosed as such in the original application, it was not necessary to examine whether the conditions set out in decision G 1/03 (and confirmed in G 1/16, OJ 2018, A70) were fulfilled.

2. Extension of the protection conferred

2.1 Change of claim category

(CLB, II.E.2.6.)

In T 653/16 hatte der Beschwerdeführer (Einsprechende) die Auffassung vertreten, dass der Kategoriewechsel von einer Vorrichtung (schwimmfähige Hafenstromversorgung) im erteilten Anspruch 1 zu einem Verfahrensanspruch zur

Durchführung eines Arbeitsverfahrens (Verfahren zur Versorgung eines im Hafen liegendes Schiffs mit externer Energie) unter Zuhilfenahme der Vorrichtung den Schutzbereich erweiteren, da ein weiterer körperlicher Gegenstand in Form eines Schiffs umfasst werde. Die Kammer teilte diese Auffassung nicht. Sie wies darauf hin, dass der Schutz, den die Anspruchskategorien des Patents in der vorherigen Fassung gewährten, bei einer Änderung der Anspruchskategorie dem Schutzbereich der durch die Änderung eingeführten neuen Anspruchskategorie gegenübergestellt werden muss. Im vorliegenden Fall enthielt das erteilte Patent ausschließlich Patentansprüche, die auf einen Gegenstand per se gerichtet waren. Von der Großen Beschwerdekammer war als ein dem EPÜ zugrundeliegendes Prinzip anerkannt worden, dass ein Patent, in dem ein Gegenstand per se beansprucht wird, für diesen Gegenstand absoluten Schutz gewährt; d. h. für jede bekannte oder unbekannte Verwendung dieses Gegenstands G 2/88, ABl. 1990, 93). Entgegen der Ansicht des Beschwerdeführers wurde der Schutzbereich des nach Hilfsantrag 2 geänderten Patents nicht auf das Schiff erweitert, da dieser Antrag mangels darin enthaltener Vorrichtungsansprüche nicht mehr auf Gegenstände gerichtet war und folglich keinen Gegenstand unter Schutz stellen konnte.

F. Divisional applications

1. Designation of contracting states in a divisional application

(CLB, II.F.4.2)

In J 12/18, interpreting Art. 76(2) EPC in accordance with the recognised rules of interpretation, the Legal Board confirmed that under this provision only those states that had been designated in the earlier application at the time of filing the divisional could be designated in the divisional. A designated state forfeited in the parent application at the time of filing the divisional could not be revived in the divisional one. The fact that the application was referred to as a "divisional" application under Art. 76(2) EPC implied by definition that it was divided from the earlier application and thus at the time of filing it could not be broader than the earlier application it derived from. Only after the filing of the divisional application was its fate separated from changes concerning the earlier application. Likewise, in the context of the required systematic interpretation of Art. 76(2) EPC the Legal Board noted that the nature of a divisional application, which was derived from a parent application thereby benefiting from the parent's date of filing and priority rights, implied that the divisional could not be broader than the parent application, neither its subject-matter (Art. 76(1) EPC) nor its geographical cover. Thus Art. 79 EPC had to be considered. According to Art. 79(3) EPC the applicant could withdraw the designation of a Contracting State at any time up to the grant of the European patent. However, further possibilities, in particular the addition of a Contracting State, which had previously been excluded by withdrawal, were not foreseen in Art. 79 EPC. A revival of the withdrawn designation could only be achieved under particular circumstances if the requirements for a correction under R. 139 EPC were fulfilled. This, for reasons of consistency, had to apply also to a divisional derived from the earlier application. (See also the parallel decisions J 13/18, J 14/18 and J 3/20, which contain identical reasoning on this point.) See also chapter V.A.6.6. "Submissions made in the statement of grounds or the reply – first stage of the appeal proceedings – Article 12(3) to (6) RPBA 2020" below.

III. RULES COMMON TO ALL PROCEEDINGS BEFORE THE EPO

A. Right to be heard

1. The right to be heard in oral proceedings

(CLB, III.B.2.6.)

In **T 1414/18** the board held that a statement such as "the next procedural step will be summons to oral proceedings during which the application will be refused" made prior to a final decision to refuse a patent application may infringe a party's right to be heard and thus may lead to a substantial procedural violation. The phrase "will be refused" – on an objective basis – implied that, regardless of any facts or arguments the applicant could potentially have brought forward thenceforth, the application was finally to be refused under Art. 97(2) EPC. Such a conduct of the proceedings was contrary to the very aim and purpose of the right to be heard under Art. 113(1) EPC, according to which decisions of the EPO organs like a decision of an examining division to eventually refuse a patent application may only be based on grounds or evidence on which a party had indeed an opportunity to present their comments. The board found there to be a causal link between the above substantial procedural violation and the necessity of filing an appeal against the examining division's decision and found the reimbursement of the appeal fee to be equitable. It ordered remittal to the examining division for further prosecution (Art. 111(1) EPC).

B. Oral proceedings

1. Oral proceedings held by videoconference

(CLB, III.C.7.3.)

In the communications concerning oral proceedings before the boards of appeal entitled "Restrictions due to the coronavirus (COVID-19) pandemic and introduction of video-conferencing technology in appeal proceedings", published on the website of the Boards of Appeal on 6 May, 15 May, 25 May 2020 etc. the Boards of Appeal informed the public of the possibility of conducting oral proceedings before the board using videoconferencing technology, which, however, would require agreement from all parties. In the communication of 15 December 2020 it was added that from 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned, as has now been made clear in the new Art. 15a RPBA 2020 adopted by the Boards of Appeal Committee.

In **T 1378/16** the oral proceedings that took place on 8 May 2020 were the first held by videoconference (ViCo) in the history of the boards of the appeal. Unlike some national legal systems, the EPC does not stipulate explicitly the form(s) in which oral proceedings under Art. 116 EPC are to take place. For these reasons, the board considered it appropriate to address briefly the legal basis for oral proceedings within the meaning of Art. 116 EPC. It reasoned as follows: In the past, the boards have rejected requests for oral proceedings to be held by videoconference, mainly on the grounds that there was no "general framework" to this effect. In particular, no provision was made for suitable ViCo rooms and for the public to attend such ViCo-based hearings (see e.g. **T 1266/07**, **T 2068/14**). At the same time, the boards have

held that Art. 116 EPC does not mandate oral proceedings taking place with the physical presence of the parties. As pointed out in T 2068/14, "while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless contains the essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously". Hence, several boards have considered that it was within their discretion to decide whether or not to select this form for the parties' oral submissions (T 2068/14, T 195/14, T 932/16). The present board agreed with this interpretation of the legal framework. Hence, oral proceedings held by ViCo are not excluded by the EPC and fulfil the requirements for holding oral proceedings within the meaning of Art. 116 EPC. The EPC only requires that the public character of the proceedings be ensured (Art. 116(4) EPC). The form in which the parties present orally their arguments – with or without physical presence – is not predetermined by Art. 116 EPC. Indeed, and in contrast to the circumstances under which the decisions mentioned above were issued, the boards of appeal now have at their disposal suitable rooms at their premises for ViCo-based hearings. Furthermore, appropriate provisions have been made for the public to attend such hearings.

T 492/18 dealt with the issue of the attendance of an accompanying person by means of video connection. The appellant requested that the oral proceedings be held by way of video conference, or if this were not allowed, that a member of the appellant's patent department participate in them by video connection. The respondent did not consent to the oral proceedings being held by video conference. Therefore, the board refused the request for the video conference, given the lack of agreement of the respondent and given that travel within Germany was still possible. The oral proceedings took place in person. The board stated that the possibility of holding oral proceedings by video conference was predicated on the boards' ability to offer the necessary technical facilities. These technical facilities must be under the continued control and supervision of the board. To the extent that it was technically feasible, the board must be in the position to control who was participating in the oral proceedings, and to establish that all participants could be seen and heard properly by all persons attending, while also ensuring that it was clear to all who was attending the oral proceedings. These conditions were seen as necessary for the oral proceedings held by video conference to be perceived as equivalent to usual oral proceedings held at the premises of the Office with the parties being physically present.

Additionally, at the time the decision was taken, the technical facilities of the boards of appeal were primarily geared to all parties participating remotely. Facilities for holding oral proceedings in mixed format, with members of a party attending at the Office's premises and other members attending remotely, were not available to the board for the oral proceedings. For these reasons, the board was not able to accede to the appellant's request.

C. Law of evidence

1. Evaluation of evidence by the department of first instance

(CLB, III.G.4.2.1 b))

In **T 1418/17** hatte die Einspruchsabteilung die Vorbenutzung durch Ausstellung und Vorführung der Maschine "UWS 500" als Stand der Technik (Art. 54 (2) EPÜ) als ausreichend bewiesen betrachtet, aber hingegen den Verkauf an verschiedene Kunden dieser Maschine als nicht offenkundig angesehen. Die Kammer stellte fest, dass alle relevanten Argumente der Parteien hinsichtlich beider Vorbenutzungen (Verkauf/Ausstellung) bereits im erstinstanzlichen Verfahren geltend gemacht und berücksichtigt worden waren.

Hinsichtlich der von der Einspruchsabteilung vorgenommenen Feststellung der relevanten Fakten sei zu berücksichtigen, dass vor dem EPA anerkanntermaßen der Grundsatz der freien Beweiswürdigung gilt (G 3/97, ABl. 1999, 245; G 1/12, ABl. 2014, A114), was auch Auswirkungen auf die Überprüfung im Beschwerdeverfahren haben muss (T 1107/12, T 621/14). Soweit kein Rechtsanwendungsfehler vorliegt (wie etwa ein falscher Beweismaßstab), sollte eine Beschwerdekammer daher die Beweiswürdigung eines erstinstanzlichen Spruchkörpers nur aufheben und durch ihre eigene ersetzen, wenn diese erkennbar (i) wesentliche Gesichtspunkte nicht berücksichtigt hat (T 1553/07), oder (ii) sachfremde Erwägungen mit einbezogen hat (T 2565/11) oder (iii) einen Verstoß gegen die Denkgesetze, etwa logische Fehler und Widersprüche in der Begründung, erkennen lässt (T 2565/11).

Nichts von dem war vorliegend erkennbar. Die Kammer erachtete die Entscheidung der ersten Instanz hinsichtlich der Frage der Offenkundigkeit der vorgebrachten Vorbenutzungen vielmehr als rechts- und logikfehlerfrei, so dass die Beweiswürdigung der Einspruchsabteilung nicht zu beanstanden war. Die Kammer schloss sich somit hinsichtlich der Frage des Vorliegens einer offenkundigen Vorbenutzung durch die Verkäufe der "UWS 500" Maschine an verschiedenen Kunden sowie durch ihre Ausstellung und Vorführung auf Messen vor dem Prioritätsdatum des Streitpatents der Feststellungen der Einspruchsabteilung und der Begründung der angefochtenen Entscheidung an und hielt es für sachdienlich, die Gründe für ihre Entscheidung hinsichtlich dieser Punkte (offenkundige Vorbenutzungen) in gekürzter Form nach Art. 15 (8) VOBK 2020 abzufassen. Anders als die Einspruchsabteilung war die Kammer jedoch der Auffassung, dass der Gegenstand des Anspruchs 9 des Hauptantrags von der vorgebrachten offenkundigen Vorbenutzung durch Ausstellung und Vorführung der "UWS 500" Maschine auf Messen neuheitsschädlich getroffen war. Der Hauptantrag war somit nicht gewährbar.

T 1418/17 has to date been cited by two decisions. Decision **T 1057/15** referred to the principles laid down in the second Catchword of **T 1418/17** and endorsed the opposition division's evaluation of the evidence and facts in the case in hand. And **T 1604/16**, even more recent, did not follow **T 1418/17** and considered that the boards have competence to review appealed decisions in full, including points of law and fact (see below).

In T 1604/16, the invention related to a foldable ramp for loading a wheelchair into a vehicle. The opposition division concluded that there had been a prior use of the invention and, more specifically, that on the day the (former) opponent delivered to Ms M. a car with a ramp as depicted in the photographs in E1/1, which took place as indicated in invoice E1, a ramp of this type was made available to the public. E1 showed that a car with a taxi ramp was sold and delivered to Ms M by the (former) opponent before the priority date. The photographs in E1/1 showing Ms M's car were taken by the (former) opponent after the filing date and after the car had had an accident and been repaired. A crucial point was therefore whether the ramp in the photographs was the same as the one delivered to Ms M when she bought the car. Ms M was also heard as a witness. The opposition division had based its assessment on E1, E1/1 and the witness's testimony. The evidence adduced before the board thus included documents E1, E1/1 and the minutes of the hearing of the witness at first instance.

Since the board did not itself hear the witness and only had the minutes as evidence, the question arose whether there were restrictions on its competence to review and set aside the opposition division's finding of fact. There were no issues in terms of the witness's credibility (see in general T 474/04), and the questions and answers reflected in the minutes did not leave any gaps or raise any questions which the board needed the witness to clarify.

In the board's view, the principle of the free evaluation of evidence has no direct bearing on the extent of the boards' competence to review decisions in general, and particularly findings of fact made by a department of first instance. If the criteria set out in T 1418/17 were applied so broadly, this would amount to a considerable restriction of a board's competence. The board referred to the explanatory remarks to Art. 12(2) RPBA 2020 that the boards have competence to review appealed decisions in full, including points of law and fact. The board was well aware that there is case law on a restriction of the boards' competence when reviewing discretionary decisions. However, it did not consider the evaluation of evidence to be a discretionary decision.

The board did not see any reason why it should limit its review of the opposition division's findings of fact in the context of the public prior use by applying the criteria set out in decision T 1418/17. In the case in hand, the evidence lay entirely within the sphere of the (former) opponent, who sold the car, carried out the repairs and took the photographs produced as E1/1. Concerning the photographs in particular, the board noted that the insurance company of the other car involved in the accident would have needed some photographs of Ms M's car at least just after the accident and that there were no such photographs on file. In view of this and several remaining doubts which arose from the content of the minutes, the board held that the evidence produced was insufficient and hence that the opposition division had erred in concluding that the ramp shown in E1/1 formed part of the prior art. See also chapter V.A.1.1. "Primary object of the appeal proceedings – Article 12(2) RPBA 2020".

D. Suspected partiality

1. Suspected partiality of members of the departments of first instance

1.1 Remittal and rehearing of a case

(CLB, III.J.4.2.)

In T 2475/17 entschied die Kammer, die Sache in Anwendung von Art. 111 (1) EPÜ und Art. 11 VOBK 2020 an die erste Instanz zurückzuverweisen, da ein wesentlicher Verfahrensfehler vorlag (Verstoß gegen Art. 113 (2) EPÜ). Die Kammer ordnete auch die Rückzahlung der Beschwerdegebühr in voller Höhe nach R. 103 (1) a) EPÜ an. Wie die Kammer bestätigte, lagen in der angefochtenen Entscheidung noch etliche weitere Fehler vor. Vor diesem Hintergrund hatte der Beschwerdeführer beantragt, die Kammer solle anordnen, dass das Prüfungsverfahren von einer vollständig anders besetzten Prüfungsabteilung durchgeführt werde.

Die Kammer verwies auf G 5/91 (ABl. 1992, 617) wonach das Gebot der Unparteilichkeit grundsätzlich auch für Bedienstete der erstinstanzlichen Organe des EPA gilt, die an Entscheidungen mitwirken, die die Rechte eines Beteiligten berühren. Eine Änderung der Zusammensetzung ist nicht nur dann gerechtfertigt, wenn tatsächlich eine Befangenheit gegeben ist, sondern auch, wenn eine begründete Besorgnis, d. h. ein Anschein, der Befangenheit vorliegt. Jedoch muss der Anschein der Befangenheit auf objektiver Grundlage begründet sein; rein subjektive Eindrücke oder vage Verdächtigungen reichen hierfür nicht aus (G 1/05, ABl. 2007, 362). Die bloße Tatsache, dass ein wesentlicher Verfahrensfehler begangen wurde, bedeutet jedoch nicht notwendigerweise, dass ein Anschein der Befangenheit vorliegt.

Die Kammer wies aber auch darauf hin, dass die Kammern mehrmals festgestellt haben, dass das EPÜ keine Rechtsgrundlage bietet, die es den Kammern erlauben würde, sich an die Stelle der Amtsleitung zu setzen und eine Änderung der Zusammensetzung des erstinstanzlichen Entscheidungsorgans anzuordnen (s. unter anderem T 1221/97, T 71/99, T 2111/13). Da die Zusammensetzung des erstinstanzlichen Organs dem Präsidenten des Amts bzw. seinen Vertretern und nicht dem Organ selbst obliegt, kann Art. 111 (1) EPÜ ein solches Vorgehen nicht rechtfertigen.

Die Kammer erläuterte weiter, dass dessen ungeachtet auch Entscheidungen vorliegen, in denen eine Kammer eine Änderung der Zusammensetzung des erstinstanzlichen Organs angeordnet hat. Dies betraf zum einen Fälle, in denen die angefochtene Entscheidung den Erfordernissen gemäß Art. 19 (2) EPÜ nicht entsprach (s. z. B. T 251/88, T 939/91, T 1788/14). Zum anderen betraf es Fälle, in denen die Kammer eine Verletzung des rechtlichen Gehörs festgestellt hatte (z. B. T 628/95, T 433/93, ABl. 1997, 509; T 95/04 und T 2362/08). Nach Ansicht der Kammer in T 2475/17 ist eine Kammer im letzteren Fall aber nur dann befugt, eine Änderung der Zusammensetzung anzuordnen, wenn sie zum Schluss gelangt, dass die Zusammensetzung des erstinstanzlichen Organs die eigentliche Ursache für die Verletzung des rechtlichen Gehörs darstellt und die Verletzung des rechtlichen Gehörs nur durch eine Änderung der Zusammensetzung geheilt werden kann, also

insbesondere in dem Fall, in dem die berechtigte Besorgnis besteht, dass ein oder mehrere Mitglieder des erstinstanzlichen Organs befangen sind.

Ergänzend merkte die Kammer an, dass eine solche Anordnung der Kammer sich darauf beschränkt, dass die Zusammensetzung zu ändern ist, damit das Recht der Parteien auf ein faires und rechtmäßiges Verfahren gewährleistet werden kann. Der Umfang der Änderung bzw. welches Mitglied der Prüfungs- oder Einspruchsabteilung durch wen ersetzt wird, bleibt den dafür zuständigen Stellen überlassen.

Für den vorliegenden Fall stellte die Kammer jedoch fest, dass der Beschwerdeführer nicht überzeugend dargelegt hatte, dass die Verfahrensfehler in der Zusammensetzung der Prüfungsabteilung begründet waren. Die bloße Behauptung des Beschwerdeführers, dass die festgestellten Verfahrensfehler eine Befangenheit zum Ausdruck brächten und deshalb zu befürchten sei, dass die Prüfungsabteilung bei der Fortsetzung des Verfahrens voreingenommen agieren würde, konnte nach Ansicht der Kammer eine Anordnung der Änderung der Zusammensetzung der Prüfungsabteilung nicht rechtfertigen.

E. Formal aspects of decisions of EPO departments

(CLB, III.K.3.3.)

In **T 989/19** stellte die Kammer fest, dass falls das Entscheidungsformblatt nicht die Unterschrift von allen Mitgliedern einer Prüfungsabteilung enthält, die Entscheidung der Prüfungsabteilung ungültig ist. Dies stellt einen wesentlichen Verfahrensmangel dar.

Nach R. 113 (1) EPÜ sind Entscheidungen des Europäischen Patentamts mit der Unterschrift und dem Namen des zuständigen Bediensteten zu versehen. Da ferner Art. 18 (2) EPÜ vorschreibt, dass sich eine Prüfungsabteilung aus drei Prüfern zusammensetzt, sind auch die entsprechenden Unterschriften von allen drei Prüfern erforderlich (s. a. die Richtlinien für die Prüfung, E-X, 1.3 in der Fassung vom November 2018).

Im vorliegenden Fall hatte der Beschwerdeführer das Fehlen der Unterschrift des zweiten Prüfers zwar nicht geltend gemacht, die Kammer ermittelte dies jedoch von Amts wegen.

Laut ständiger Rechtsprechung der Beschwerdekammern ist das Erfordernis der R. 113 (1) EPÜ, wonach Entscheidungen des Europäischen Patentamts mit der Unterschrift und dem Namen des zuständigen Bediensteten zu versehen sind, keine reine Formsache, sondern ein wesentlicher Verfahrensschritt im erstinstanzlichen Entscheidungsprozess. Name und Unterschrift dienen nämlich dazu, die Verfasser der Entscheidung auszuweisen und zu belegen, dass diese für den Inhalt vorbehaltlos die Verantwortung übernehmen. Dieses Erfordernis soll Willkür und Missbrauch verhindern und nachprüfbar machen, dass das zuständige Organ tatsächlich die Entscheidung getroffen hat. Damit verkörpert es rechtsstaatliche Prinzipien, deren Verletzung einen wesentlichen Verfahrensfehler darstellt und die schriftliche Entscheidung rechtsunwirksam macht (siehe J 16/17 und T 390/86, ABl. 1989, 30).

F. Apportionment of costs

(CLB, III.R.2.1.1 b))

In **T 101/17** the board refused the respondent's (opponent) request for a different apportionment of costs. The respondent argued that the filing of auxiliary requests at the appeal stage – rather than at the stage of opposition – amounted to an abuse of procedure. Although the auxiliary requests were not admitted, it had nonetheless been necessary to prepare for the scenario that they would be admitted and to subsequently address them content-wise. The board considered that the case law of the boards of appeal did not support a different apportionment of costs. The board concurred with the approach taken in **T 1848/10**, namely that preparations for discussing the admission of late-filed documents were part of the normal work that can be expected of a party, as an application of the principle that each party bears its own costs. The board further observed that in order to establish any causal link between the respondent's expenses and the appellant's behaviour, the respondent would have to show that it was particularly the belated filing of requests that caused the expense rather than the filing of requests as such. The board failed to see what additional expenses the respondent had incurred by preparing for a discussion of these requests at the stage of appeal rather than at the stage of opposition, other than for the additional discussion on the admissibility of these requests. As a discussion on the admissibility of requests was a not uncommon occurrence in proceedings in general, this could hardly be credited with separately identifiable expenses. It was at least at this hurdle that the respondent's case failed and the request for a different apportionment of costs had to be refused. See also chapter V.A.6.3. "Article 12(4) RPBA 2007".

G. Rules relating to Fees

1. Keine Rückzahlung von mit Rechtsgrund angeforderten und gezahlten Jahresgebühren

(CLB, III.U.1.)

In **T 2069/18** hat die Prüfungsabteilung in ihrer Zurückweisungsentscheidung auch einen Antrag auf Rückzahlung von 7 Jahresgebühren wegen wenigstens 7-jähriger Untätigkeit der Abteilung im Prüfungsverfahren als unzulässig verworfen. Die Kammer stimmte der Prüfungsabteilung zu, dass eine Rechtsgrundlage für einen solchen Antrag nicht gegeben war. Dies hinderte jedoch nicht die verfahrensrechtliche Zulässigkeit eines solchen Antrags. Der Antrag war zulässig, aber unbegründet.

Die Zahlung der Jahresgebühren richtet sich nach Art. 86 EPÜ. Danach sind für die europäische Patentanmeldung nach Maßgabe der Ausführungsordnung Jahresgebühren an das EPA zu entrichten. An eine bestimmte Tätigkeit oder Untätigkeit der beteiligten Personen ist diese Bestimmung nicht gekoppelt, und zwar weder seitens des Anmelders, noch der Prüfungsabteilung. Das lief vorliegend darauf hinaus, dass die hier betroffenen Jahresgebühren rechtmäßig entstanden und zu Recht angefordert worden sind. Dies hat die Prüfungsabteilung zutreffend festgestellt. Die in der Gebührenordnung vorgesehenen, aber hier nicht einschlägigen Rückerstattungsregelungen, wie z. B. Art. 9 bis 11 GebO, zeigen,

dass der Gesetzgeber des EPÜ 1973 die Möglichkeiten der Rückzahlung von Gebühren für bestimmte Fälle geregelt hat. Im Übrigen erstattet das EPA regelmäßig rechtsgrundlos geleistete Zahlungen aus Billigkeitsgründen von sich aus. Die ursprünglich mit Rechtsgrund angeforderten und gezahlten Jahresgebühren wandeln sich durch eine zögerliche Tätigkeit des Amts im Prüfungsverfahren nicht nachträglich in rechtsgrundlos geleistete um. Tatsächlich soll zum einen durch die Entrichtung von Jahresgebühren sichergestellt werden, dass nur die wirtschaftlich wertvollen Anmeldungen (und Patente) am Leben gehalten werden. Weiterhin dient die Jahresgebühr zusammen mit weiteren nach dem EPÜ vorgesehenen Gebühren der Deckung des allgemeinen Finanzbedarfs, der bei der Unterhaltung einer Behörde wie des EPA, das Monopolrechte erteilt und aufrechterhält, zwangsläufig entsteht.

2. Debit orders – underpayment of the fee for appeal

(CLB III.U.2.2., III.U.4.)

See chapter V.A.3. for **T 2620/18** and **T 3023/18**, in both of which cases the fee for appeal had been paid by debit order in the reduced amount (Art. 2(1), item 11, RFees), although the appellant was not entitled to this reduction (R. 6(4) and (5) EPC).

IV. PROCEEDINGS BEFORE THE DEPARTMENTS OF FIRST INSTANCE

A. Examination procedure

1. Decisions with no text submitted or agreed by the applicant (Article 113(2) EPC)

(CLB, IV.B.3.2.3 a))

In **T 2277/19** the board held that the text referred to in the communication under R. 71(3) EPC had to be regarded as the text intended for grant. Since this text on the basis of which the patent was granted was approved by the appellant, the requirements of Art. 113(2) EPC were met. Thus, the applicant could not be considered to have been adversely affected by the decision under appeal within the meaning of Art. 107, first sentence, EPC. Accordingly, the appeal filed by the applicant was inadmissible pursuant to R. 101(1) EPC.

The appellant had approved the text intended for grant (subject to the correction of some minor errors in the description). Hence, the board considered that the examining division had legitimately expected the applicant to have checked and verified the Druckexemplar, in particular since the applicant had requested some amendments to the text intended for grant. The board found that the examining division did not have any reason to assume that the approval was based on the prerequisite that only drawing pages 1 to 7 were actually intended for publication. Moreover, the appellant expressly waived its right to the issue of a further communication under R. 71(3) EPC. Hence, although R. 71(6) EPC would have allowed the applicant to request further corrections to the communicated text, the appellant did not apparently realise that the documents referred to in the

communication under R. 71(3) EPC did not correspond to the documents in its previous request, i.e. the application documents as amended by its letter dated 20 February 2018.

The appellant argued that the facts in the case in hand were very similar to those of decision T 1003/19 with reference also to T 2081/16. In T 1003/19 the board held that agreement to the communicated text was not decisive, since the applicant had not been notified of the text in which the examining division intended to grant a patent, and only in that case would the provisions of R. 71(5) EPC have applied.

The board did not follow T 1003/19 and T 2081/16. In its view there was no legal basis in the EPC for a distinction between the text referred to in a communication under R. 71(3) EPC and that reflecting what the examining division actually intended. Moreover, R. 71(6) EPC addressed the possibility that the text communicated under R. 71(3) did not reflect the appellant's requests. In the board's judgement, Art. 71(3) EPC thus imposed on the applicant a duty to check and verify this text. The fact that an applicant did not exercise its right to request amendments under R. 71(6) EPC could therefore only be interpreted as approval of the communicated text, i.e. the text intended for grant. Whether the applicant noticed a possible error had no effect on the fact that this approval was binding.

2. Approval of the text by the applicant

(CLB, IV.B.3.2.)

In T 265/20 the board noted that the applicant (appellant), upon receiving the communication pursuant to R. 71(3) EPC with the text intended for grant, in which drawing sheets 1/4 to 4/4 were missing from the list of documents, made no comments. Instead, it paid the fee for grant and publishing and filed the translations of the claims in the other official languages within the period of 4 months. The board held that the prerequisites for the legal consequence foreseen in R. 71(5) EPC were thus fulfilled. The legal consequence was that the applicant was deemed to have given approval to the text communicated to it under R. 71(3) EPC. The unambiguous wording of R. 71(5) EPC did not allow for an interpretation other than the foreseen legal consequence. Firstly, there was no legal basis in the EPC for a distinction between the text referred to in a communication under R. 71(3) EPC and the text really intended by the examining division (see also T 2277/19, point 1.3 of the Reasons). Secondly, it was not the content of the text which triggered the deemed approval under R. 71(5) EPC, but the applicant paying the fee and filing the translations according to R. 71(5) EPC. It followed that it was pointless to explore the "true will" of the members of the examining division when editing the communication pursuant to R. 71(3) EPC. It was the applicant itself with whom the final responsibility for the text remained, not the examining division.

The board held that it was the applicant's responsibility to check whether the text communicated to it corresponded to what it had requested. The fact that an applicant did not exercise its right to request amendments under R. 71(6) EPC could therefore only be interpreted as consent to the communicated text, i.e. the text intended for grant. Whether or not the applicant noticed a possible error in the text had no effect on the fact that its approval, whether given explicitly or deemed to have been given under R. 71(5) EPC, was binding.

The board further considered that decisions T 1003/19 and T 2081/16 did not amount to diverging case law which required a decision of the Enlarged Board of Appeal pursuant to Art. 112(1) EPC to ensure the uniform application of the law. It expressed that it had no doubt that the wording of R. 71 EPC did not allow it to be concluded that the "true will" of the examining division was something that had to be taken into consideration when making a judgement regarding the deemed approval and its binding effect. Moreover, it could identify no convincing reasons in this respect in the cited decisions. See also chapter V.A.2. "Party adversely affected (Article 107 EPC)".

3. Amendments after the decision to grant

(CLB, IV.B.3.6.; IV.B.3.2.2)

In T 646/20 the board found no support for any obligation of the examining division to defer a decision of grant until the expiry of the four months period in a case where the applicant had at any given time within this period of time given approval to grant and thereby allowed the examining division to issue a corresponding decision. It would be rather strange if the examining division had to defer a decision for the eventuality that the applicant had second thoughts. In the case in hand, following the R. 71(3) EPC notification, the applicant gave its explicit approval to issue the decision to grant, however following the decision to grant, the appellant then voiced its disapproval together with a request for further processing – filed on the date that the decision to grant was due to be published in the European Patent Bulletin. The board distinguished the case in hand from T 1/92 (OJ 1993, 685), which related to contradictory statements of the applicant prior to the decision of grant being taken by the examining division. The board in the case in hand was also not convinced by the appellant's argument that an approval sent in response to a R. 71(3) communication could not be interpreted as a waiver of further options or remedies. Every approval of the text of a patent implied a waiver of the remaining infinity of texts in which a patent could be granted.

The board noted in its Catchword that further Member States could not be designated after grant. With reference to decision G 1/10 (OJ 2013, 194), the board concluded that in the interest of legal certainty, the patent in the version as granted should no longer be open to amendments and that the applicant had had "adequate means at his disposal" to remedy beforehand. In the board's view, it was incumbent on the applicant to verify the complete file in order to spot any inconsistencies it may wish to draw attention to. Inconsistencies related to text and the designated Member States in the communication under R. 71(3) EPC and not raised in response thereto must be considered as approved by applicant.

4. Withdrawal of the patent application

4.1 Correction of the withdrawal of the application under Rule 139 EPC

(CLB, IV.B.3.8.2)

In J 6/19 the applicant's request to correct the letter withdrawing the application was received at the EPO on the day on which this letter had been published in the European Patent Register.

The Legal Board recalled that according to the case law, a request for retraction of a letter of withdrawal was no longer possible if the public had been officially notified of the withdrawal (J 10/87, OJ 1989, 323) and if, in the circumstances of the case, even after file inspection, there would not have been any reason for a third party to suspect, at the time of the official public notification, that the withdrawal could be erroneous and later retracted (J 25/03, OJ 2006, 395).

The board noted that the request for withdrawal, which the applicant sought to retract, was unqualified, unambiguous and unconditional and that the request for retraction of the withdrawal would not have been available for file inspection until at least the following day. The board considered that the reasoning of J 25/03, where four days elapsed from the mention of the withdrawal in the European Patent Register to the addition to the file of the request for retraction of the withdrawal, could be applied to the present case. According to this decision the official notification to the public of the withdrawal was a key step and legal certainty would suffer unacceptably if further delay were permitted for retraction of the withdrawal in circumstances, where even after inspection of the file there would not have been any reason to suspect, at the time of the official notification to the public, that the withdrawal, could be erroneous and later retracted. The board in J 6/19 concluded that it was therefore of no relevance to their decision that the request for retraction was received on the same day the withdrawal was published. The time requirement of R. 139 EPC had not been met.

In J 7/19 the board explained that an applicant's ability to correct a withdrawal was subject to several conditions specified by the case law of the boards of appeal, the first of which was the existence of a mistake within the meaning of R. 139(1) EPC, which, according to the case law of the boards of appeal, "may be said to exist in a document filed with the European Patent Office if the document does not express the true intention of the person on whose behalf it was filed" (see J 8/80, OJ 1980, 293; J 4/82, OJ 1982, 385). Therefore, mistakes which resulted in a divergence between the party's actual and declared intent were eligible for correction under R. 139 EPC.

In the case in hand the applicant had mistakenly believed that the claims of the European application did not differ considerably from the claims of the corresponding Japanese application and decided to abandon the application on the basis of this erroneous assumption. The board found there to be no divergence between the applicant's declaration and its true intention and dismissed the appeal. In the case law of the boards, only errors relating to the declaration, its content or its transmission fell under the notion of a mistake within the meaning of R. 139 EPC. The board explained there were good policy reasons for having this limitation. If the notion of a mistake were extended to also cover a scenario where the declaration correctly reflected a party's intentions, but was based on wrong assumptions, any mistaken assessment of the disclosure of the application, the patentability of the invention, the entitlement to priority, the legal provisions or the related case law would make any withdrawal potentially eligible for correction. This would be detrimental to legal certainty. Where the applicant has made a decision on withdrawal without considering all the relevant circumstances, it must bear the consequences.

B. Opposition procedure

1. Filing and admissibility requirements – payment of opposition fee

(CLB, IV.C.2.2.3)

In the case underlying T 1000/19 the opponent's representatives mentioned in their letter accompanying the notice of opposition (filed two days before expiry of the opposition period) that they authorised the responsible EPO department to debit the opposition fee from their deposit account. However, they failed to indicate the payment method in box X of electronic EPO Form 2300E. The opposition division held that the opposition was deemed not to have been filed (Art. 99(1) EPC).

The board first observed that it was highly questionable whether the case law (e.g. T 1265/10, T 152/82, OJ 1987, 191, and T 806/99) according to which, under certain circumstances, the "intention to pay" a fee by debit order could still be regarded as a valid payment, even if the debit order was deficient, still applied under the version of the ADA in force since 1 December 2017. However, neither this legal question nor the question whether the principle of legitimate expectations applied needed to be decided in the case in hand, as the board considered that R. 139 EPC was applicable and that its requirements were complied with.

The opposition division's view that R. 139 EPC was not time-barred and could therefore not be applied to the non-extendable time limit for filing an opposition was rejected by the board as legally incorrect. The board referred to G 1/12 (OJ 2014, A114), in which the Enlarged Board had found that the procedure for correcting errors under R. 139, first sentence, EPC was available in cases of an error in the appellant's name in a notice of appeal. The board noted that the issue whether a notice of appeal contained the name and address of the appellant was inextricably related to the question whether the appeal had been validly filed within the time limit under Art. 108, first sentence, EPC. There could be no doubt that the ratio of G 1/12 also applied if the admissibility of an opposition, or the question whether an opposition was deemed to have been filed, was concerned (T 615/14, T 579/16). Furthermore, the board saw no reason why the lines of reasoning set out in G 1/12 regarding the applicability of R. 139 EPC should not equally apply to a correction of incorrectly filled-in payment form (see T 317/19). Rather, the applicability of R. 139 EPC to debit orders had been acknowledged or at least not ruled out by the boards of appeal (T 152/82, T 17/83 of 20 September 1983).

The board noted, with reference to T 152/85, that R. 139 EPC only applied to a mistake made in a document, not to a factual mistake. Here, the opponent had filed EPO Form 2300E and hence a document within the meaning of R. 139, first sentence, EPC; the mistake in the document was that the payment method was not activated. The board was also satisfied that the requirements for corrections under R. 139, first sentence, EPC as referred to in G 1/12 were fulfilled.

2. Late submissions – concept of "in due time"

(CLB, IV.C.4.3)

In **T 2734/16** stellte die Kammer fest, dass eine neue Angriffslinie auf die erfinderische Tätigkeit, die als Reaktion und unter Verwendung der vom Patentinhaber mit der Einspruchserwiderung eingereichten Dokumente verfolgt wird, nicht per se als verspätet anzusehen ist. Sie kann aus Gründen der Waffengleichheit in das Einspruchsverfahren zugelassen werden, auch wenn die Dokumente im Ergebnis nicht relevanter als andere Dokumente sind. Im vorliegenden Fall hatte der Patentinhaber geltend gemacht, dass Großräsen, von denen die mit der Einspruchserwiderung eingereichten Dokumente Beispiele darstellen sollten, den nächstliegenden Stand der Technik bildeten. Ausgehend hiervon war dem Beschwerdeführer im Rahmen der Waffengleichheit zuzugestehen, die ihm erst durch von der Gegenseite neu eingereichte Dokumente zur Kenntnis gebrachten Tatsachen in seinem eigenen Sinne aufzugreifen und zu einem Gegenangriff mit einer neuen Angriffslinie gegen die erfinderische Tätigkeit zu verwenden. Da dieser Gegenangriff erst möglich geworden war, nachdem der Beschwerdegegner diese Dokumente zu seiner Verteidigung eingereicht hatte, erschien es der Kammer bei Abwägung aller Umstände nicht sachgerecht, die Zulassung der neuen Angriffslinie unter dem Gesichtspunkt der Verspätung und der mangelnden Relevanz der Dokumente, auf die sie gestützt war, abzulehnen. Siehe auch Kapitel IV.A.6.4 "Verfahrensstand – Verfahrensökonomie – VOBK 2007".

3. Amendments in opposition proceedings

3.1 Rule 80 EPC

(CLB, IV.C.5.1.1)

In der Sache **T 2450/17** enthielt Absatz [0008] der Patentschrift nach einer Änderung im Erteilungsverfahren einen unzutreffenden Hinweis auf den Stand der Technik. In der mündlichen Verhandlung vor der Kammer reichte der Beschwerdeführer einen geänderten Absatz [0008] ein, in welchem die unzutreffenden Angaben gestrichen wurden. Eine Vorlage an die Große Beschwerdekammer lehnte die Kammer ab, da sie in der Lage war, die aufgeworfenen Fragen auf der Grundlage der gefestigten Rechtsprechung der Kammern zu beantworten. Zu der Frage, ob die beanstandeten Änderungen nach R. 80 EPÜ zulässig sind, führte sie folgendes aus: In der Rechtsprechung ist anerkannt, dass Bezugnahmen auf den Stand der Technik, soweit dieser im Sinne von R. 42 (1) b) EPÜ relevant ist, auch nachträglich eingefügt werden können, ohne dass dies notwendigerweise als unzulässige Erweiterung des Gegenstands der Patentanmeldung anzusehen wäre. Abgrenzungen vom relevanten Stand der Technik dürfen dabei aber nicht unrichtig oder irreführend sein, andernfalls könnten sie den Gegenstand des Patents doch verändern. Die Beseitigung derartiger Unrichtigkeiten verstößt damit nicht gegen Art. 123 (2) EPÜ, sondern ist im Gegenteil geeignet und geboten, um Konformität mit dieser Vorschrift herbeizuführen. Die Streichung unrichtiger Angaben zum Stand der Technik, von dem die Patentschrift sich abgrenzt, ist daher geeignet, dem Einspruchsgrund gemäß Art. 100 c) EPÜ Rechnung zu tragen. Die Kammer kam auch zu dem Schluss, dass es unzutreffend ist, dass jede Änderung eines unrichtigen Verweises auf den Stand der Technik, der nach R. 80 EPÜ – weil von Art. 100 c) EPÜ

veranlasst – zulässig ist, zugleich eine Verletzung von Art. 123 (3) EPÜ darstellt. Sie wies darauf hin, dass zum einen R. 80 EPÜ bereits erfüllt ist, wenn Änderungen an den Patentunterlagen im Hinblick auf einen potentiell relevanten Einspruchsgrund vorgenommen werden und dass zum anderen im vorliegenden Fall eine Schutzbereichserweiterung nicht gegeben ist.

In **T 1285/15** the last sentence of a paragraph of the patent was deleted to bring the description into line with an intermediate set of claims that had been amended to meet objections made by the opponents. The board observed that the amendment was therefore occasioned by a ground for opposition under Art. 100 EPC and complied with the requirements of R. 80 EPC when it was carried out. The board underlined that the very language of R. 80 EPC ("... occasioned by a ground for opposition ...") made clear that the situation at the time of the amendment needed to be considered when compliance with this provision was examined. The fact that the claims were amended again at a later stage and that, as a consequence, the deletion of the sentence was no longer required, did not lead to the conclusion that the amendment of the description retroactively contravened R. 80 EPC. The original amendment could still be said to have been occasioned by a ground for opposition.

In **T 2063/15** the request at issue comprised two independent claims. However, whilst claim 2 was based on a combination of claims 1 and 9 as granted, claim 1 of auxiliary request 3 was based on a combination of claims 1 and 2 as granted and also additional features taken from the description. The board explained that, with the subject-matter of claim 1 as granted having been found not to be novel, one or more independent claims based on a combination of claim 1 as granted with features of granted claims dependent upon claim 1 could be understood to be occasioned by the ground for opposition under Art. 100(a) EPC. However, with reference to **G 1/84** (OJ 1985, 299), **T 610/95** and **T 223/97**, the board held that the inclusion of the additional independent claim 1, based on claims 1 and 2 as granted in combination with features taken from the description, was no longer simply occasioned by a ground for opposition, since this ground was already addressed through the filing of independent claim 2; the additional independent claim 1 furthermore introduced claimed subject-matter which had no counterpart in the claims of the granted patent (see e.g. Case Law of the Boards of Appeal, 9th ed. 2019, IV.C.5.1.5 b)).

Likewise in **T 1764/17** the board emphasised that the replacement of a granted single independent claim by two or more independent claims could only in exceptional cases be considered to be occasioned by a ground for opposition. An exception could arise if two granted dependent claims were linked in parallel to a single independent claim. Then the filing of two independent claims including each one of the two parallel claim combinations might be possible, thus allowing separate fragments of the scope of protection afforded by the patent as granted to be retained. However, this exception did not apply to the addition of an independent claim directed at an aspect of the invention that was not included in the granted set of claims. In the case in hand, at least one of the two independent claims in the auxiliary requests at issue was directed at subject-matter that incorporated new features extracted from the description, which could moreover be material for the issue of patentability. These independent claims were thus not straight combinations of granted claims and the above exception did not apply.

3.2 Time frame for filing amendments

(CLB, IV.C.5.1.3)

Dans la décision **T 756/18** la chambre a jugé que la division d'opposition outrepassé les limites appropriées de son pouvoir d'appréciation lorsqu'elle déclare n'admettre qu'une seule requête subsidiaire et écarte d'emblée des requêtes supplémentaires sans raisons apparentes valables et sans même avoir examiné si les modifications auraient permis d'écartier toutes les objections valablement soulevées jusque-là sans donner lieu à de nouvelles, les rendant ainsi potentiellement recevables. Il ne ressortait pas de façon apparente du dossier un abus de procédure ou une manœuvre dilatoire de la part de la requérante.

In **T 966/17** argumentierte der Beschwerdeführer (Patentinhaber), dass sein Anspruch auf rechtliches Gehör verletzt worden sei, da die Einspruchsabteilung die in der mündlichen Verhandlung eingereichten Hilfsanträge nicht zum Verfahren zugelassen hatte.

Die Kammer führte zunächst aus, dass sich das Ermessen der Einspruchsabteilung, geänderte Anträge zum Verfahren zuzulassen, grundsätzlich aus Art. 123 (1) EPÜ (erster Satz) in Verbindung mit R. 79 (1) und 81 (3) EPÜ ergibt und begründete dies wie folgt: Nach Art. 123 (1) EPÜ kann die europäische Patentanmeldung oder das europäische Patent im Verfahren vor dem Europäischen Patentamt nach Maßgabe der Ausführungsordnung geändert werden. R. 79 (1) EPÜ eröffnet darüber hinaus im Einspruchsverfahren dem Patentinhaber die Möglichkeit, innerhalb einer von der Einspruchsabteilung gesetzten Frist die Beschreibung, die Patentansprüche und die Zeichnungen zu ändern. Die Zulassung späterer Änderungen steht dagegen im Ermessen der Einspruchsabteilung, wie sich etwa aus R. 81 (3) EPÜ ("wird gegebenenfalls Gelegenheit gegeben") erkennen lässt.

Die Kammer befand, dass eine Änderung der Auffassung der Einspruchsabteilung in der mündlichen Verhandlung in Bezug auf ihre mit der Ladung kommunizierte vorläufige Meinung alleine nicht dazu führen kann, dass in der mündlichen Verhandlung beliebige Anträge ohne ein Ermessen der Einspruchsabteilung zugelassen werden müssen. Nach Auffassung der Kammer war die vom Beschwerdeführer angezogene Entscheidung **T 688/16** vorliegend nicht einschlägig, da die vom Beschwerdeführer eingereichten Hilfsanträge, anders als in **T 688/16**, einen bereits im schriftlichen Verfahren geäußerten Art. 123 (2). Einwand hätten berücksichtigen müssen. Nach Ansicht der Kammer kann, soweit der Beschwerdeführer mit neuen Anträgen auf eine neue Angriffslinie des Einsprechenden und ein neu eingereichtes Dokument reagiert, bei der Entscheidung über die Zulassung berücksichtigt werden, ob die Anträge prima facie gewährbar erscheinen oder ohnehin aufgrund anderer schon länger im Verfahren befindlicher Einwände zurückzuweisen wären.

Die Kammer stellte ferner klar, dass die Parteien in einem strittigen Verfahren kein Anrecht auf eine "detaillierte Anleitung" durch das entscheidende Organ zur Behebung des diskutierten Mangels haben. Stattdessen obliege es jeder Partei, selbst auf den Vortrag des Verfahrensgegners adäquat zu reagieren.

In T 84/17 the appellant (patent proprietor) requested that the decision of the opposition division not to admit its auxiliary requests, submitted during first-instance oral proceedings, be overturned for improper exercise of discretion. It argued that the opposition division had not exercised its discretion in accordance with the right principles, as it had only considered the timeliness of the filing without also considering the prima facie allowability of these requests.

The board, however, concluded that the opposition division had in fact exercised its discretion in a reasonable way and had used the correct principles as set out in G 7/93 (OJ 1994, 775, referred to in T 129/12, T 2415/13). The opposition division had correctly stressed that the auxiliary requests had been filed very late without appropriate justification, the underlying objections having been on file since the notice of opposition and their pertinence commented on in the annex to the summons. In the board's view, the admittance of certain documents, which had been filed by the respondents in response to the opposition division's communication, did not result in the introduction of new arguments that could have justified the filing of the auxiliary requests. Moreover, the opposition division's decision not to admit the requests was not exclusively based on the unjustified lateness but also on the finding that the opponents could not be expected to deal with the specific restrictions of subject-matter introduced with these requests, i.e. the opposition division also considered the substance of the amendments.

In the board's opinion, in the given circumstances, there was no need to discuss all criteria that could theoretically influence the discretionary decision. Rather, if the arguments in the particular case showed that some criteria weighed so heavily that other criteria could not outweigh them, it was not necessary to discuss all criteria. None of the decisions cited by the appellant (T 463/95, T 1485/08, T 544/12) contradicted this finding, as none stated or implied that the right principles for exercising discretion required that the opposition division must always assess the prima facie allowability of a new request.

V. PROCEEDINGS BEFORE THE BOARDS OF APPEAL

A. Appeal procedure

1. RPBA 2020

1.1 Primary object of the appeal proceedings – Article 12(2) RPBA 2020

(CLB, V.A.1.2.)

As set out in Art. 12(2) RPBA 2020, the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based. In the explanatory remarks to Art. 12(2) RPBA 2020 (Supplementary publication 2, OJ 2020) it is stated that this paragraph provides a general definition of the nature and scope of the appeal proceedings in accordance with the established case law. The boards of appeal constitute the first and final judicial instance in the procedures before the European Patent Office. In this capacity, they review appealed decisions on points of law and fact.

In **T 1604/16** the board referred to the explanatory remarks to Art. 12(2) RPBA 2020 that the boards have competence to review appealed decisions in full, including points of law and fact. This was in accordance with Art. 6 ECHR, which stipulates that there must be at least one judicial instance that can review a case in full, i.e. the law and the facts, given that the boards of appeal are the only judicial body to review decisions by the departments of first instance of the European Patent Office. The board was well aware that there is case law on a restriction of the boards' competence when reviewing discretionary decisions taken by the departments of first instance in certain circumstances (G 7/93, OJ 1994, 775, and case law based on this decision). However, it did not consider the evaluation of evidence to be a discretionary decision. See also chapter III.C.1. "Evaluation of evidence by the department of first instance".

1.2 Entscheidungsgründe in gekürzter Form

(CLB, V.A.6.)

In **T 1687/17** stellte die Kammer fest, dass alle relevanten Argumente der Parteien im Beschwerdeverfahren bereits im erstinstanzlichen Verfahren geltend gemacht und berücksichtigt worden waren. Neue Argumente wurden, wie von den Parteien in der mündlichen Verhandlung bestätigt, im Beschwerdeverfahren nicht vorgebracht. Die Kammer schloss sich hinsichtlich aller Fragen den Feststellungen der Einspruchsabteilung und der Begründung der angefochtenen Entscheidung an und hielt es für sachdienlich, die vorliegende Entscheidung hinsichtlich aller Fragen in gekürzter Form nach Art. 15 (8) VOBK 2020 abzufassen.

In **T 2227/15** the board stated that in accordance with Art. 15(8) RPBA 2020, the reasons for its decision were given in abridged form for those issues in respect of which the board agreed with the findings of the opposition division. This clearly did not apply to the appellant's submissions which contained issues on which the impugned decision was not based within the meaning of Art. 12(2) RPBA 2020. Recourse to Art. 15(8) RPBA 2020 required that the board agreed with the findings and reasoning of the decision under appeal in respect of one or more issues. The board concluded from this precondition of concurrence with (parts of) the decision under appeal as well as from the legislator's intention (see explanatory notes to Art. 15(7) and (8) RPBA 2020) that in the reasons for the decision in hand it was possible for the board to refer to those parts of the findings and reasons in the decision under appeal with which it agreed. The board followed the similar approach in decision **T 1687/17**. The board considered that referring to parts of the publicly accessible decision under appeal, and making clear that it fully agreed with and adopted them as its own, was equivalent, but preferable for reasons of procedural economy, to a "copy and paste" or an unnecessary re-phrasing of such parts from the decision under appeal in the board's decision. See also chapter V.A.6.8.1 "Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020".

2. Party adversely affected (Article 107 EPC)

(CLB, V.A.2.4.2)

In **T 265/20** the appellant was adversely affected by the decision to grant a patent, as all the drawing sheets as requested were missing from the text of the granted

patent. The board acknowledged that the appellant was adversely affected by the discrepancy between the appellant's explicit request in the examination proceedings for the grant of a patent and the content of the B1 publication. The impugned decision did not include drawing sheets 1/4 to 4/4, and thus the B1 publication lacked these, and this was clearly less than what was requested by the appellant. The fact that all the drawing sheets were missing was sufficient for the conclusion that the appellant was adversely affected by the impugned decision, irrespective of why the sheets were missing or how the legal framework of R. 71 EPC had to be interpreted.

The board referred to T 2277/19, in which the facts were different from the outset. In that case, the original application contained the description pages, the claims and drawing sheets 1/18 to 18/18. During the examination proceedings, the applicant filed amended drawing sheets 1/7 to 7/7 to replace drawing sheets 1/18 to 18/18 of the application as filed. Drawing sheets 1/7 to 7/7 were included in the text communicated to the applicant under R. 71(3) EPC, but drawing sheets 8/18 to 18/18, which had in fact been previously withdrawn by the applicant, were also included. The applicant then approved the text intended for grant subject to minor amendments. The board held the appeal inadmissible on the ground that the appellant was not adversely affected.

The facts of the case in hand differed in that no drawings at all, i.e. neither the requested ones nor any others, were included in the text communicated to the applicant under R. 71(3) EPC and the Druckexemplar, and in that no explicit approval was given, but approval was rather deemed to have been given. Thus, the board concluded there was no diverging case law and consequently no need to refer the case to the Enlarged Board of Appeal. See also chapter IV.A.2. "Approval of the text by the applicant".

3. Reduced fee for appeal filed by a natural person or an entity

(CLB, V.A.2.5.4)

In den folgenden Fällen haben die Beschwerdeführer innerhalb der Beschwerdefrist nur den ermäßigten Betrag für die Beschwerdegebühr entrichtet, obwohl die Voraussetzungen für eine Ermäßigung nicht vorlagen oder bestritten wurden. Somit stellte sich die Frage, ob die Beschwerden wegen Nichtzahlung der Beschwerdegebühr in der erforderlichen Höhe als nicht eingelegt galten (Art. 108 Satz 2 EPÜ, G 1/18, ABI. 2020, A26).

Nach Art. 1 (4) des Beschlusses des Verwaltungsrats vom 13. Dezember 2017 (CA/D 17/17, ABI. 2018, A4) zur Änderung der Art. 2 und 14 GebO wurde Art. 2 (1) Nr. 11 der GebO neu gefasst. Danach haben die in R. 6 (4) und (5) EPÜ genannten Personen und Einheiten (kleine und mittlere Unternehmen, natürliche Personen oder Organisationen ohne Gewinnerzielungsabsicht, Hochschulen oder öffentliche Forschungseinrichtungen) nur eine ermäßigte Beschwerdegebühr (EUR 1.880) anstatt der vollen Gebühr zu entrichten. Die Mitteilung des EPA vom 18. Dezember 2017 (ABI. 2018, A5) enthält weitere Einzelheiten für die Inanspruchnahme der ermäßigten Beschwerdegebühr. Nach Nr. 3 der Mitteilung müssen Beschwerdeführer, die die ermäßigte Beschwerdegebühr in Anspruch nehmen wollen, ausdrücklich erklären, dass sie eine natürliche Person oder eine Einheit im

Sinne von R. 6 (4) EPÜ sind. Nach Nr. 4 der Mitteilung muss die Erklärung spätestens zum Zeitpunkt der Zahlung der ermäßigten Beschwerdegebühr eingereicht werden. Nach Nr. 11 der Mitteilung gilt die Beschwerde unter Umständen als nicht eingelegt bzw. unzulässig, wenn die ermäßigte Gebühr ohne eine solche Erklärung entrichtet wird.

In **T 1060/19** the board noted that the Council Decision CA/D 17/17 did not require a declaration according to Points 3 and 4 of the Notice. The board nevertheless assumed *arguendo* that the provisions of the Notice that were pertinent to the case in hand were binding. The board observed that Points 3 and 4 of the Notice did not merely interpret decision CA/D 17/17 of the Administrative Council, but imposed additional duties, i.e. in particular an express declaration. The board specified that from point 11 of the Notice it followed that point 4 must be read as meaning that "it is strongly recommended that" the declaration be filed together with the payment. If not, there would be a deficiency which, however, would be amenable to being remedied by supplying the declaration by the end of the two-month appeal period.

The board stated that the declaration of entitlement to benefit from a reduced fee for appeal mentioned in the Notice from the EPO (OJ 2018, A5) could be filed until the end of the appeal period, despite the wording of point 4, last sentence, of the Notice, which must be reconciled with the meaning of point 11 of the Notice.

In **T 225/19** schloss sich die Kammer der Entscheidung **T 1060/19** an, wonach es an einer Rechtsgrundlage fehlt, die Fiktion der Nichteinlegung der Beschwerde bei Zahlung einer ermäßigten Beschwerdegebühr von dem Vorliegen einer der Nr. 3 und 4 der Mitteilung genügenden Erklärung abhängig zu machen. Der Beschluss des Verwaltungsrats CA/D 17/17 bzw. der dadurch neugefasste Art. 2 (1) Nr. 11 der GebO enthalten keine Rechtsgrundlage für die in Nr. 3 und 4 der Mitteilung verlangte Erklärung. Die Mitteilung legt den Beschluss des Verwaltungsrats CA/D 17/17 nicht nur aus und erläutert ihn, sondern stellt das zusätzliche, durch keine Rechtsgrundlage gestützte Erfordernis einer mit der Gebührenzahlung abzugebenden Erklärung auf. Eine Mitteilung des EPA allein vermag als Verwaltungsmaßnahme eine solche erforderliche rechtliche Grundlage jedenfalls nicht zu begründen. Die Beschwerdekammern sind nicht durch Mitteilungen des EPA betreffend die Anwendung und Auslegung von Rechtsvorschriften, sondern nur durch diese gesetzlichen Vorschriften selbst gebunden (J 8/18, Art. 23 (3) EPÜ).

Danach kann eine Erklärung nach Nr. 3 und 4 der Mitteilung jedenfalls nicht schon bei Zahlung der ermäßigten Beschwerdegebühr verlangt werden. Die Kammer ist jedoch befugt und verpflichtet, die Voraussetzungen für die Zulässigkeit und wirksame Einlegung der Beschwerde in jedem Verfahrensstadium, also auch nach Ablauf der Beschwerdefrist, zu prüfen. Diese Befugnis umfasst auch die Frage, ob der Beschwerdeführer im Falle der Zahlung der ermäßigten Beschwerdegebühr nach Art. 2 (1) Nr. 11 GebO die Voraussetzungen nach R. 6 (4) EPÜ erfüllt. Eine Überprüfung durch die Kammer ist insbesondere dann geboten, wenn das Vorliegen der Voraussetzungen nach R. 6 (4) EPÜ von anderen Verfahrensbeteiligten bestritten wird. Dabei entspricht es der Praxis der Beschwerdekammern, eine Erklärung und entsprechende Belege zum Nachweis der Voraussetzungen nach R. 6 (4) EPÜ auch noch nach Ablauf der Beschwerdefrist im Laufe des Beschwerdeverfahrens zu akzeptieren (vgl. **T 3023/18**).

In **T 3023/18** notice of appeal was filed in the name of Borealis AG, and the reduced appeal fee paid, on the last day for doing so. The full appeal fee was paid several weeks later. In its first communication, the board invited the appellant to file the hitherto missing declaration necessary for the fee reduction. The appellant thereupon confirmed that it was not entitled to the reduced fee, stating that this was evident from the notice of appeal since it had not filed a declaration of entitlement, which according to paragraph 4 of the EPO Notice (OJ 2018, A5) should be filed at the same time. There was nothing in the file to indicate that it intended to take advantage of the reduced fee. In addition, Borealis AG was an appellant and patentee familiar to the EPO and a known large entity. Thus, it argued there was an obvious error and its intention to pay the full fee was clear. The EPO should have deducted the full amount.

The board pointed out that the non-filing of the required declaration was not evidence of a clear intention by the appellant to pay the full appeal fee: it could also be a mistake, as well as an indication that the appellant did not consider itself entitled to pay the reduced fee. The board also noted the practice of the boards of appeal to accept such declarations at any time during the appeal proceedings (**T 1222/19**). R. 6(6) EPC made the appellant responsible for assessing whether it was eligible for the reduced fee. This assessment was not straightforward. It was carried out on the basis of Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. The onus was thus clearly with the appellant to assess its own entitlement. The EPO has no duty to carry out any ex officio enquiry to determine entitlement. In the light of the above, the board did not accept that it was possible to establish that the appellant's intention was to pay the full appeal fee. The appeal was deemed not to have been filed and the board ordered reimbursement of both fee amounts (**G 1/18**, OJ 2020, A26).

In **T 2620/18** stützte sich der Beschwerdeführer auf **T 152/82** und die darauf beruhende Praxis des EPA, in Abbuchungsaufträgen genannte Minderbeträge von Amts wegen auf den korrekten Betrag zu korrigieren und die volle Gebühr abzubuchen, sofern die Zahlungsintention des Auftraggebers offensichtlich ist. In Befolgung dieser Praxis hätte das EPA daher rechtzeitig die volle Beschwerdegebühr abbuchen sollen, sodass diese als fristgerecht bezahlt anzusehen sei.

Nach Auffassung der Kammer ist die vorgenannte Praxis des Amtes nicht ohne weiteres auf ein System gestaffelter Beschwerdegebühren anwendbar. Bei der ausdrücklichen Angabe im Abbuchungsauftrag, die ermäßigte Beschwerdegebühr zahlen zu wollen, kann nicht von Amts wegen davon ausgegangen werden, dass der Auftraggeber dennoch die volle Gebühr zahlen wollte. Auch das Fehlen einer Erklärung nach R. 6 (6) EPÜ ist kein eindeutiger Hinweis, dass die Zahlung der vollen Gebühr intendiert ist. Schließlich könnte das Nichteinreichen einer solchen Erklärung auch auf einem bloßen Versehen beruhen bzw. die Absicht bestehen, eine solche Erklärung nachzureichen. Daran ändert auch die Angabe "amtliche Beschwerdegebühr (1880,00 EUR)" in der Beschwerdeschrift nichts, da eben gerade eine gültige Beschwerdegebühr in dieser Höhe besteht und der genannte Gebührenbetrag insofern mit den Angaben im (elektronischen) Abbuchungsauftrag

übereinstimmt. Die Kammer war daher der Auffassung, dass das EPA zu Recht nur die ermäßigte Beschwerdegebühr abgebucht hat.

Die Kammer legte das Vorbringen des Beschwerdeführers in der Beschwerdebegründung inhaltlich als Antrag auf Korrektur des Abbuchungsauftrags aus und hielt es insoweit für glaubhaft, dass der Beschwerdeführer davon ausgegangen war, die volle Beschwerdegebühr bezahlt zu haben. Die Kammer war aber der Auffassung, dass der Berichtigungsantrag nicht unverzüglich gestellt worden war (Kriterium d) der Aufzählung in G 1/12, ABl. 2014, A114, Nr. 37 der Gründe). Das bloße Einreichen eines weiteren Abbuchungsauftrages wurde von ihr nicht als impliziter Berichtigungsantrag angesehen (R. 139 EPÜ). Der Antrag in der Beschwerdebegründung wurde erst sechs Wochen nach dem Bemerkens des Versehens eingereicht. Die vom Beschwerdeführer vorgebrachte Notwendigkeit des Abklärens der Situation zwischen Vertreter und Beschwerdeführer konnte nach Ansicht der Kammer die späte Einreichung nicht rechtfertigen. Auch der Grundsatz des Vertrauensschutzes konnte die Position des Beschwerdeführers nicht stützen, da im vorliegenden Fall weder eine Pflicht der Kammer bestand, den Beschwerdeführer auf den drohenden Rechtsverlust hinzuweisen, noch dies bei gleichem Vorgehen des Beschwerdeführers zu einem anderen Ergebnis hinsichtlich der Unverzüglichkeit geführt hätte.

In den Entscheidungen T 2620/18 und T 3023/18 wurde der Differenzbetrag zur vollen Beschwerdegebühr nicht als geringfügig angesehen. Es kann nicht davon ausgegangen werden, dass der Gesetzgeber bei der Einführung der ermäßigten Beschwerdegebühr lediglich eine geringfügige, gewissermaßen symbolische Gebührenentlastung für natürliche Personen und kleine und mittlere Unternehmen vorsehen wollte.

4. Inhalt der Beschwerdebegründung

(CLB, V.A.2.6.3 e))

In T 2884/18 wurde die Beschwerde als unzulässig verworfen. Die Kammer erachtete es für nicht ausreichend, dass die Beschwerdebegründung sich im Wesentlichen nur mit der Feststellung der Einspruchsabteilung in der angefochtenen Entscheidung, wonach die behauptete offenkundige Vorbenutzung nicht ausreichend bewiesen ist, auseinandersetzte. Fehlende Neuheit gegenüber der offenkundigen Vorbenutzung wurde nicht im gebotenen Umfang substantiiert.

Die Kammer erklärte, dass ein vollständiger Sachvortrag, wie ihn Art. 108 EPÜ und Art. 12 VOBK 2020 verlangen, bei einer kumulativ aufeinander aufbauenden Argumentationslinie die Darlegung sämtlicher Tatsachen erfordert, die erst gemeinsam das behauptete rechtliche Ergebnis tragen. Es kann insoweit spiegelbildlich nichts anderes gelten als beim Vorgehen gegen eine Entscheidung, die mehrere alternative Gründe aufzählt, warum ein Patent nicht erteilbar bzw. bestandsfähig ist. Hier ist es in der Rechtsprechung der Beschwerdekammern anerkannt, dass eine Beschwerdeschrift nur ausreichend substantiiert ist, wenn sie sich mit allen Gründen, die der Patentfähigkeit entgegenstehen, befasst. Erst dann ist dargelegt, dass die Entscheidung aufgehoben werden sollte, vgl. T 922/05. Gleiches muss umgekehrt gelten, wenn mehrere Gründe nur kumulativ die Patentfähigkeit eines aufrecht erhaltenen Patents in Frage stellen, wie hier

Zugehörigkeit einer Vorbenutzung zum Stand der Technik und Vorwegnahme der Erfindung durch die Vorbenutzung. Wird von mehreren kumulativ zur Änderung der Entscheidung darzulegenden Tatsachen nur eine ausreichend substantiiert, ist die Beschwerde unzulässig.

5. Review of first-instance discretionary decisions

(CLB, V.A.3.5.4)

In **T 2603/18** hat die Kammer in ihrer Mitteilung zur Vorbereitung der mündlichen Verhandlung die Frage gestellt, inwieweit die Zulassung der D23 im Einspruchsverfahren von der Kammer überprüft werden kann. D23 wurde erstmals in der mündlichen Verhandlung vor der Einspruchsabteilung und damit nach dem gemäß R. 116 (1) EPÜ gesetzten Zeitpunkt vorgelegt. Die Einspruchsabteilung hatte gemäß R. 116 (1) Satz 3 EPÜ ein Ermessen, dieses verspätet vorgebrachte Beweismittel nicht zu berücksichtigen. D23 wurde jedoch in das Einspruchsverfahren zugelassen. Die Kammer stellte fest, dass D23 Teil der dieser Beschwerde zugrunde liegenden Entscheidung geworden ist, da sich die angefochtene Entscheidung auf D23 stützt. Sie ist daher schon allein deshalb im Beschwerdeverfahren zu berücksichtigen. Andernfalls wäre eine (vollständige) Überprüfung der angefochtenen Entscheidung nicht möglich (s. auch **T 26/13**, **T 1568/12**). Eine Überprüfung der Ermessensentscheidung der Einspruchsabteilung kann daher im vorliegenden Fall nicht zum Ausschluss der D23 führen. D23 befindet sich deswegen im Verfahren. Gemäß Art. 12 (4) VOBK 2007 hat die Kammer die Befugnis, Tatsachen, Beweismittel oder Anträge nicht zuzulassen, die bereits im erstinstanzlichen Verfahren hätten vorgebracht werden sollen oder dort nicht zugelassen worden sind. Art. 12 (4) VOBK 2007 findet somit keine Anwendung auf Beweismittel, die im erstinstanzlichen Verfahren vorgebracht und zugelassen worden sind. Die VOBK bietet daher keine rechtliche Grundlage für eine Nichtzulassung der D23.

Auch in **T 467/15** stellte die Kammer fest, dass der Beschwerdekammer nicht die Möglichkeit gegeben ist, ein Vorbringen, das die Einspruchsabteilung unter Wahrung ihres Ermessensspielraums ins Einspruchsverfahren zugelassen hat, im Beschwerdeverfahren unberücksichtigt zu lassen. Es erscheint fraglich, ob die Entscheidung, einen Hilfsantrag zuzulassen, im Beschwerdeverfahren gleichwohl im Hinblick auf das Vorliegen von Ermessensfehlern zu überprüfen ist (eine entsprechende Prüfung im Hinblick auf zugelassene Dokumente wurde z. B. vorgenommen in: **T 572/14**, **T 1227/14**, **T 2197/11**, **T 1652/08**, **T 1209/05**), wenn eine der Parteien dies begehrt, oder ob auch eine solche Prüfung nicht zu erfolgen hat (vgl. **T 26/13** unter Hinweis auf **T 1852/11**), weil ein zugelassener Antrag, der die Grundlage der angefochtenen Entscheidung bildet, selbst bei ermessensfehlerhafter Zulassung seitens der Einspruchsabteilung im Beschwerdeverfahren nicht mehr vom Verfahren ausgeschlossen werden könnte.

In **T 487/16** the appellant (patent proprietor) requested that D7 be excluded from the appeal proceedings. D7 was filed after expiry of the opposition period. Despite the opposition division having discretion under Art. 114(2) EPC to "disregard" facts or evidence not submitted in due time, it decided not to disregard it. On the contrary, D7 was admitted into the proceedings and the opposition division based its decision regarding lack of inventive step on it. The board stated that since D7 was part of the

opposition proceedings and the decision was based on D7, it was part of the appeal proceedings (see also Art. 12(2) RPBA 2020). Furthermore, considering that the aim of the appeal proceedings was to review the decision under appeal in a judicial manner and in view of the appellant's main request for maintenance of the patent as granted, which required a review of the decision with regard to the conclusion drawn *inter alia* on the basis of D7, the board saw no legal basis on which it could be excluded from the appeal proceedings. Thus, in this regard, the board confirmed the case law developed under RPBA 2007 (cf. T 26/13, T 1568/12, T 2603/18). For the sake of completeness, the board added that Art. 12(4) RPBA 2007 would not provide a basis for excluding D7 from the appeal proceedings either since the document was admitted into the proceedings by the opposition division.

In T 617/16 the board noted that the EPC did not provide a legal basis for excluding, in appeal proceedings, submissions (such as prior-art documents) which were admitted into the first-instance proceedings, in particular when the impugned decision was based on them (see e.g. T 1549/07, T 1852/11, T 1201/14). In view of the very aim of the appeal proceedings to review the decision under appeal in a judicial manner according to Art. 12(2) RPBA 2020, such submissions are automatically part of the appeal proceedings (T 487/16, T 2603/18). Accordingly, the board saw no reason to revert the opposition division's decision to admit D13 into the opposition proceedings.

In T 2049/16 the opposition division admitted D20, which was filed by the opponent one month before oral proceedings, because it found it to be *prima facie* relevant. It was argued that the opposition division should not have admitted the document because its late filing constituted a tactical abuse of proceedings. The board, however, was not convinced that the opponent's behaviour could be deemed an abuse of proceedings. The board considered whether it was possible to reverse the admittance on appeal. The board was not aware of any explicit legal basis that would make it possible to retroactively exclude evidence that has been admitted into the proceedings and decided upon by the department of first instance. In this respect, the board shared the opinion expressed in T 617/16.

6. New submissions on appeal

6.1 Late submission of new arguments

(CLB, V.A.4.10.1)

In T 1875/15 the board followed the finding in T 1914/12 that a board has in principle no discretion not to admit late-filed arguments. However, it also noted that if a late-filed objection included new allegations of fact, the board had, under Art. 114(2) EPC, the discretion not to admit it into the proceedings. The board held that the respondent's objection under Art. 100(c) EPC, which had been raised for the first time during the oral proceedings before the board, included not only legal but also factual (and technical) considerations, namely what the term "poly"-olefin" in the passage concerned meant. The respondent's allegation that it had to be read as "poly-alphaolefin", such that the corresponding feature in claim 1 as granted was not based on the application as filed, was not an argument but rather an allegation of a fact, namely, the fact that the skilled person would have interpreted the term "poly"-olefin" in this passage of the application as filed as to directly and unambiguously

mean "poly-alphaolefin". Therefore, the respondent's late-filed objection included a new allegation of fact. Thus, under Art. 114(2) EPC the board had the discretion not to admit the respondent's late-filed objection. The board held that this finding was in agreement with T 1914/12, according to which a "fact" had to be understood as a piece of (allegedly) factual information, on which a party based its case. The present case was also in line with decisions T 635/14 and T 1381/15, in which the entrusted boards also regarded late-filed objections as new allegations of fact.

6.2 Principles applying to late submissions – inter partes proceedings – RPBA 2007

(CLB, V.A.4.2.1)

In T 369/15 hob die Kammer hervor, dass für den Beschwerdeführer (Einsprechenden) zwar keine rechtliche Verpflichtung bestand, zu eingereichten Hilfsanträgen Stellung zu nehmen. Allerdings obliege es jedem Verfahrensbeteiligten, alle für ihn relevanten Tatsachen, Beweismittel, Argumente und auch Anträge so frühzeitig und vollständig wie möglich vorzubringen. Die vom Beschwerdeführer erstmals in der mündlichen Verhandlung erhobenen Einwände gegen die erfinderische Tätigkeit von Hilfsantrag 1, der zwar erst nach Anberaumung der mündlichen Verhandlung eingereicht worden war, aber im Wesentlichen Hilfsanträgen entsprach, die mit der Beschwerdeerwiderung eingereicht worden waren, wurden daher von der Kammer bei ihrer Entscheidung, Hilfsantrag 1 nach Art. 13 VOBK 2007 zuzulassen, nicht berücksichtigt. Auch eine möglicherweise unvollständige Substantiierung eines mit der Beschwerdeerwiderung eingereichten Hilfsantrags konnte dem Beschwerdeführer nach Ansicht der Kammer nicht als Rechtfertigung dafür dienen, sich schriftlich überhaupt nicht zu Hilfsantrag 1 zu äußern.

6.3 Article 12(4) RPBA 2007

(CLB, V.A.4.11.1)

In T 101/17 Art. 12(4) RPBA 2007 still applied, as the statement of grounds of appeal had been filed before the entry into force of the RPBA 2020. The board recalled that this provision codified the principle that each party should submit all facts, evidence, arguments and requests that appear relevant as early as possible so as to ensure a fair, speedy and efficient procedure (e.g. T 162/09). With reference to T 1848/12 and the case law cited therein, the board emphasised that an appellant was not at liberty to bring about the shifting of its case to the appeal proceedings as it pleased, and so to compel the board either to give a first ruling on the critical issues or to remit the case to the opposition division. Conceding such freedom to an appellant would run counter to orderly and efficient opposition-appeal proceedings. In effect, it would allow a kind of "forum shopping" which would jeopardise the proper distribution of functions between the departments of first instance and the boards of appeal and would be unacceptable for procedural economy generally (G 9/91, OJ 1993, 408, T 1705/07, T 1067/08). The board then examined the case in hand in the light of the foregoing approach. The novelty objection to be overcome by the auxiliary requests had been in the proceedings already since the filing of the opposition; its framework of facts and arguments had remained unchanged throughout the opposition proceedings. Nonetheless the appellant had restricted its case to defending the

patent as granted without providing any fallback positions by filing auxiliary requests. The board left open at which point it would have been incumbent on it to file an auxiliary request to address the novelty objection (in response to the opposition, in response to the preliminary opinion of the opposition division, both raising the objection, or when invited to do so at the oral hearing). However, the board noted that the appellant had taken none of these opportunities and for reasons of equity in appeal was restricted to defending the patent in unamended form. For these reasons, the board decided not to admit any of the auxiliary requests filed at the appeal stage. See also chapter III.F. "Apportionment of costs" above.

6.4 State of proceedings – procedural economy – RPBA 2007

(CLB, V.A.4.4.2b))

In **T 2734/16** hatte die Kammer (vor Inkrafttreten der VOBK 2020) über die Zulassung von Dokumenten zu entscheiden, die der Beschwerdeführer im Rahmen der Diskussion über die erfinderische Tätigkeit nach Einreichung seiner Beschwerdebegründung vorgebracht hatte. Von der mangelnden Relevanz abgesehen, überzeugte auch der angegebene Grund für die Verspätung des Vorbringens die Kammer nicht. Das späte Einreichen von zufällig bekannt gewordenen Entgegnungen war nach Auffassung der Kammer nicht schon allein deswegen zulässig, weil sie in der japanischen Sprache verfasst waren und ihre Auffindbarkeit deswegen unter Umständen erschwert gewesen sein mochte. Dies galt umso mehr, als dem Einreichenden die Bedeutung japanischer Unternehmen auf dem fraglichen technischen Gebiet bekannt war und deshalb Veranlassung zu rechtzeitigen umfassenden Recherchen bestand. Siehe auch Kapitel IV.B.2. "Verspätetes Vorbringen – Begriff der "Verspätung".

6.5 Amendment to a party's case – RPBA 2020

In der Sache **T 1480/16** reichte der Beschwerdeführer I (Patentinhaber) in der mündlichen Verhandlung einen Hilfsantrag 5 ein, der auf dem mit der Beschwerdeerwiderung eingereichten Hilfsantrag 3 beruhte und in dem lediglich die Verfahrensansprüche gestrichen wurden. Die Kammer stellte zunächst fest, dass die Zulassung von Hilfsanträgen, die von einer Partei nach der Beschwerdebegründung oder Beschwerdeerwiderung eingereicht wurden, im Ermessen der Kammer nach Art. 13 (1) VOBK 2020 liegt (siehe Art. 24 VOBK 2020 und die Übergangsbestimmungen gemäß Art. 25 (1) VOBK 2020). Die Anwendbarkeit von Art. 13 (2) VOBK 2020 war vorliegend ausgeschlossen (Art. 25 (3) VOBK 2020) und Art. 13 VOBK 2007 war somit weiter anzuwenden. Im vorliegenden Fall konnte die Kammer jedoch keine Änderung des Beschwerdevorbringens erkennen. Die Streichung der Verfahrensansprüche im Hilfsantrag 5 gegenüber dem mit der Beschwerdeerwiderung eingereichten Hilfsantrag 3 wurde von der Kammer nicht als Änderung des Beschwerdevorbringens gesehen, da sich dadurch keine geänderte Sachlage ergab. Es war insbesondere keine neue Diskussion hinsichtlich Neuheit oder erfinderischer Tätigkeit zu führen. Hinsichtlich der vom Beschwerdeführer II angegriffenen Aufnahme des Begriffs "gleichzeitig" in das Merkmal I) des Anspruchs 1 führte die Kammer aus, dass dieses nun explizit ausdrücke, was die Einspruchsabteilung in dem von ihr aufrechterhaltenen Anspruch 1 als in Merkmal I) implizit realisiert und damit für die erfinderische Tätigkeit begründend angesehen hatte. Dagegen hatte der Beschwerdeführer II sich mit seiner Beschwerde gewandt.

Der Beschwerdeführer I hatte daraufhin bereits mit seiner Beschwerdeerwiderung vorsorglich den Hilfsantrag 3 eingereicht und den Begriff "gleichzeitig" in Anspruch 1 aufgenommen. Auch die vom Beschwerdeführer II vorgebrachten Einwände zur Klarheit und unzulässigen Zwischenverallgemeinerung wurden vom Beschwerdeführer I bereits schriftlich in seiner Beschwerdeerwiderung behandelt, so dass darin kein geändertes Vorbringen zu sehen war. Da die Kammer vorliegend keine Änderung des Vorbringens erkennen konnte, kam sie zu dem Schluss, dass die Voraussetzungen des Art. 13 (1) VOBK 2020 nicht gegeben waren. Der zugelassene Hilfsantrag 5 wurde von der Kammer als gewährbar angesehen.

In **T 482/19** the auxiliary requests at issue were based on requests filed during first instance opposition proceedings, wherein the product claims had been deleted. Both requests were filed after the parties had been summoned to oral proceedings. The appellant 1 (patent proprietor) argued that these deletions were not an amendment to the case as they contained no new subject-matter. The board however distinguished its case from **T 1480/16** (see above, decided by the same board). In the present case, the method claim was more limited than the product claim. These limiting features had not played any role in the appeal procedure, as the submissions of the parties were mainly related to the product claims that were present in all requests on file. However, if the board were to admit these features, they would need to be considered in particular in relation to the issue of inventive step and this would result in a substantial and unexpected change in the discussion at the oral proceedings. Therefore the filing of the auxiliary requests at issue constituted an amendment of the patentee's case according to Art. 13 RPBA 2020. Since the appellant did not provide any exceptional circumstances, the board did not admit the request pursuant to Art. 13(2) RPBA 2020.

In der Sache **T 995/18** hingegen kam dieselbe Kammer zum gleichen Ergebnis wie in **T 1480/16**. Der in der mündlichen Verhandlung eingereichte Hilfsantrag 1 beruhte auf dem Hauptantrag der angefochtenen Entscheidung, der mit der Beschwerdeerwiderung eingereicht worden war und somit bereits Gegenstand des Verfahrens war; in diesem Antrag wurde lediglich ein abhängiger Anspruch gestrichen. Die Kammer sah in der Streichung des abhängigen Anspruchs keine Änderung des Beschwerdevorbringens, da sich dadurch keine geänderte Sachlage ergab (siehe **T 1480/16**), wie dies der Fall sein könnte, wenn die Streichung eine völlige Neugewichtung des Verfahrensgegenstandes mit sich brächte. Vorliegend bereinigte der Verzicht auf einen abhängigen Anspruch das Verfahren nur um einen Streitpunkt, ohne die anderen Ansprüche in ein neues Licht zu setzen und ohne sonstige Auswirkungen auf das Beschwerdevorbringen des Patentinhabers. Wie von der Kammer erläutert, war dieser Verzicht daher vergleichbar mit dem Verzicht auf einzelne Einwände oder Angriffslinien eines Einsprechenden, der zurecht ebenso wenig als unter dem Zulassungsvorbehalt der Kammer stehend angesehen wird.

In **T 1217/17** entschied die Kammer mehrere in der Beschwerdeerwiderung nur erwähnte, nicht ausreichend substantiierte Argumentationslinien nicht zu berücksichtigen. In der mündlichen Verhandlung kündigte der Beschwerdegegner (Einsprechende) eine "Expandierung" dieses Vortrags an. Dies sei kein neues Vorbringen im Sinne des Art. 13 (1) VOBK 2020, sondern eine in jeder Phase des Beschwerdeverfahrens zulässige Weiterentwicklung von in der

Beschwerdeerwiderung bereits erwähnten Argumenten, die sich auf im Verfahren befindliche Entgegenhaltungen stützten.

Die Kammer stellte für einen Teil der Argumentationslinien fest, dass in der Beschwerdeerwiderung nichts vorgetragen, sondern lediglich auf die Argumentation im Einspruchsverfahren verwiesen wurde. Daher wäre jeglicher Vortrag in der mündlichen Verhandlung als ein vollkommen neues Beschwerdevorbringen anzusehen. Zu anderen Argumentationslinien merkte die Kammer an, dass der Beschwerdegegner in der Erwiderung keine logische Argumentationskette zur mangelnden erfinderischen Tätigkeit vorgetragen hatte. Auch in diesem Fall würde daher jeglicher Vortrag dazu eine substantielle Änderung des Beschwerdevorbringens beinhalten. Bei den angekündigten Ausführungen handele es sich auch nicht lediglich um neue Argumente, sondern auch um neue Tatsachen, wie z.B. die in der Beschwerdeerwiderung fehlende Merkmalsanalyse, sowie die Angabe der konkreten Passagen in den genannten Beweismittel, die nach Auffassung des Beschwerdegegners Merkmale des Anspruchs 1 vorwegnahmen.

6.6 Submissions made in the statement of grounds or the reply – first stage of the appeal proceedings – Article 12(3) to (6) RPBA 2020

In **J 12/18** the appellant (applicant) requested to designate all EPC Contracting States, including those withdrawn in the parent application, and appealed the decision of the Receiving Section to refuse the inclusion of the withdrawn designations. During the oral proceedings the appellant presented for the first time submissions concerning the protection of its legitimate expectations. Since, in the case in hand, the summons to oral proceedings had been notified before the RPBA 2020 came into force, the Legal Board concluded that Art. 13(2) RPBA 2020 did not apply (Art. 25(3) RPBA 2020). However, Art. 12(4) to (6) RPBA 2020 applied according to Art. 25(1) RPBA 2020 because the exception in Art. 25(2) RPBA 2020 only covered submissions in the statement of grounds of appeal, but not subsequent submissions in the appeal proceedings. Moreover, Art. 13(1) RPBA 2020, which referred to Art. 12(4) to (6) RPBA 2020, applied according to Art. 25(1) RPBA 2020.

The Legal Board exercised its discretion under Art. 12(4) and (6) and 13(1) RPBA 2020 not to admit the new submissions; the appellant could and should have presented the facts that formed the basis for the alleged protection of legitimate expectations earlier in the proceedings. The appellant argued that it had relied on an EPO communication of 10 August 2016 issued in the parallel case **J 14/18**. However, the Legal Board observed that if the appellant had really trusted the content of this communication, it would have been aware of this fact from the moment of taking note of that information. The Legal Board also considered that the new objection would require the assessment of several issues (causal link between the erroneous information in another case and the reaction of the appellant, requirement of proof therefore, reasonableness of the appellant's reaction) and that this would be detrimental to procedural economy. Moreover, the objection would introduce a completely new aspect on which the assessment and the reasoning in the appealed decision were not focused. The Legal Board further underlined that a party had to present the complete case already with the statement of grounds of appeal (Art. 12(3) RPBA 2020). The appeal was dismissed. See also chapter II.F.1. "Designation of contracting states in a divisional application" above.

6.7 Submissions made after filing of statement of grounds or reply – second stage of the appeal proceedings – Article 13(1) RPBA 2020

6.7.1 New lines of attack in respect of inventive step based on documents submitted during first-instance proceedings – not admitted

In **T 256/17** the board had to decide whether to admit two new lines of attack based on lack of inventive step, which the appellant (opponent) had filed in response to the respondent's reply to the statement of grounds of appeal. Both were based on documents submitted during the first-instance proceedings, but one of them combined for the first time two documents previously discussed as the closest prior art and the other, starting from a known combination, argued on the basis of a different technical problem. The appellant gave no reasons for submitting these objections for the first time after having filed the statement of grounds of appeal.

The board did not see any reason for the appellant not having submitted the newly filed lines of attack in the opposition proceedings. It pointed out that, by its course of action, the appellant had prevented the respondent from reacting to the attack during the opposition proceedings and the opposition division from deciding on the matter. With their late submission the appellant had confronted the board and the respondent with a fresh case, which was contrary to the very aim of appeal proceedings, which was to review the decision under appeal in a judicial manner (see Art. 12(2) RPBA 2020). The board thus decided to exercise its discretion not to admit the new lines of attack into the proceedings pursuant to Art. 12(4) RPBA 2007 in conjunction with Art. 12(2) RPBA 2007, which essentially corresponded to Art. 12(3) RPBA 2020, and Art. 25(2) RPBA 2020, as well as pursuant to Art. 13(1) RPBA 2020 in conjunction with Art. 25(1) RPBA 2020.

6.7.2 Neue Dokumente in Reaktion auf Versuchsdaten des Patentinhabers – zugelassen

In **T 23/17** hielt die Kammer im Rahmen der Ausübung ihres Ermessens nach Art. 13 (1) VOBK 2020 das Vorbringen des Beschwerdeführers (Einsprechenden) für plausibel und nachvollziehbar, dass die Einreichung neuer Dokumente (nach Einreichung der Beschwerdebeurteilung aber vor der Zustellung der Ladung zur mündlichen Verhandlung) in Reaktion auf die vom Beschwerdegegner (Patentinhaber) in seiner Beschwerdeerwiderung vorgelegten Versuchsdaten und damit "zur Lösung der von einem anderen Beteiligten im Beschwerdeverfahren in zulässiger Weise aufgeworfenen Fragen" im Sinne von Art. 13 (1) VOBK 2020 erfolgte. Die Kammer vermochte nicht zu erkennen, dass es einen Grund gegeben hätte, diese Dokumente zu einem früheren Zeitpunkt des Verfahrens einzureichen. Hinsichtlich der weiteren Voraussetzung in Art. 13 (1) VOBK 2020, wonach der Beschwerdeführer angeben muss, weshalb er die Änderung seines Vorbringens erst in dieser Phase des Beschwerdeverfahrens einreicht, befand die Kammer Folgendes: Die Begründung des Beschwerdeführers war im vorliegenden Fall ausreichend und eine Forderung nach der Angabe weiteren rechtfertigender Gründen, wie sie in Art. 13 (1) VOBK 2020 vorgeschrieben sind, nicht gerechtfertigt. Denn obwohl nach Art. 25 (1) VOBK 2020 die revidierte Fassung des Art. 13 (1) VOBK anzuwenden war, war zu berücksichtigen, dass diese Vorschrift tatsächlich zum Zeitpunkt der Einreichung der betreffenden Dokumente noch nicht in Kraft oder in der jetzigen Fassung bekannt war und somit vom Beschwerdeführer nicht

beachtet werden konnte. Da im Übrigen die Nichtzulassung vom Beschwerdegegner erstmals in der mündlichen Verhandlung beantragt wurde, bestand auch insoweit nach der Einreichung dieser Dokumente für den Beschwerdeführer kein Anlass, rechtfertigende Gründe für die späte Einreichung vorzutragen.

6.8 Submissions made after notification of summons – third stage of the appeal proceedings – transitional cases

6.8.1 Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020

Dans l'affaire **T 634/16** les requêtes subsidiaires en question ont été déposées en réponse à la notification de la chambre indiquant son opinion préliminaire. Leur dépôt a eu lieu avant l'entrée en vigueur du RPCR 2020, alors que la décision de la chambre dans la présente affaire a été prise lors de la procédure orale qui a eu lieu après l'entrée en vigueur. Pour déterminer les dispositions applicables, la chambre a relevé que les dispositions transitoires prévoient l'application générale du règlement révisé et excluent seulement l'application immédiate de quelques dispositions spécifiques des art. 12 et 13 révisés. Le paragraphe 2 de l'art. 25 RPCR 2020 traite de certaines dispositions de l'art. 12 RPCR 2020 qui régissent le fondement de la procédure de recours et non des modifications apportées à un stade ultérieur de la procédure de recours. Le paragraphe 3 de l'art. 25 RPCR 2020 exclut l'application de l'art. 13(2) RPCR 2020 qui régit l'admission des moyens présentés, par exemple, après la signification de la citation à la procédure orale. En l'espèce, cette citation avait été envoyée aux parties avant l'entrée en vigueur du RPCR 2020. Et la chambre juge ainsi que, pour décider de l'admission de ces requêtes, en lieu et place de l'art. 13(2) RPCR 2020, l'art. 13 RPCR 2007 continue à s'appliquer. Faisant également référence aux travaux préparatoires du règlement révisé (BOAC/5/19, p. 51; CA/3/19, page 13, point 65), la chambre a conclu qu'en plus de l'art. 13 RPCR 2007 selon les dispositions transitoires à l'art. 25(3) RPCR 2020, l'art. 13(1) RPCR 2020 est généralement applicable aux recours en instance et notamment au recours dans le cas présent.

La chambre a noté par ailleurs que l'art. 13(1) RPCR 2020, comparé à sa version de 2007, est plus détaillé au regard des conditions régissant l'admission des modifications des moyens invoqués. Cependant, la chambre n'a pas trouvé de contradiction ni même d'incompatibilité entre les deux dispositions mais considère plutôt, vu aussi la jurisprudence développée au sujet des critères applicables sous le régime de l'art. 13(1) RPCR 2007, que la version révisée codifie et cristallise la pratique établie en la matière. Dans l'exercice de son pouvoir d'appréciation selon l'art. 13(1) RPCR 2020, la chambre n'a pas admis les requêtes en question dans la procédure.

In **T 32/16** the same board reiterated in respect of a similar procedural situation that both Art. 13 RPBA 2007 – including its version of Art. 13(1) – and Art. 13(1) RPBA 2020 were applicable at the same time. No contradiction could be found in the wording of Art. 13(1) RPBA 2020 compared to Art. 13 RPBA 2007. The revised wording was more detailed in listing the requirements on the party making an amendment to its appeal case and the criteria to be used by the board when exercising its discretion; this difference, however, merely reflected much of the case law developed under Art. 13(1) RPBA 2007. See also chapters V.A.6.8.3 "New

request in response to preliminary opinion of the board clarifying its objections – admitted" and V.A.7.3 "Remittal for adaptation of the description" below.

In **T 2227/15** the board noted that the appeal proceedings in hand, in which oral proceedings were held on 29 January 2020, were governed by the RPBA 2020 (Art. 24 and 25(1) RPBA 2020), except for Art. 12(4) to (6) and 13(2) RPBA 2020, instead of which Art. 12(4) and 13 RPBA 2007 remained applicable (Art. 25(2) and (3) RPBA 2020). The general applicability of the RPBA 2020 to the proceedings in hand included Art. 13(1) RPBA 2020. The board noted that Art. 25 RPBA 2020 systematically reflected the structure relating to the admissibility of parties' submissions during appeal proceedings, which, according to the RPBA 2020, was characterised by a convergent approach, divided into three different stages. Art. 25(2) and (3) RPBA 2020 was clearly directed to and limited to two narrow exceptions, i.e. to provisions governing the parties' submissions made either at the outset of the appeal proceedings, which marked the first level of the convergent approach (initial stage) or at an advanced stage of the appeal proceedings, which corresponded to the third level of the convergent approach (ultimate stage). Only those provisions which specifically governed the initial stage and the ultimate stage were excluded from an immediate application of the RPBA 2020, leaving the intermediate stage, i.e. the second level of the convergent approach (Art. 13(1) RPBA 2020), to be governed by the general rule set out in Art. 25(1) RPBA 2020. Thus, where the summons to oral proceedings or a R. 100(2) EPC communication was notified before 1 January 2020, Art. 13(1) RPBA 2020 applied simultaneously with Art. 13(1) and (3) RPBA 2007. See also chapters V.A.1. "RPBA 2020" and V.A.6.8.5 "Inventive step attack substantiated for the first time at oral proceedings – not admitted".

In **T 1597/16** war die Ladung zur mündlichen Verhandlung am 14. Januar 2020 vor dem Inkrafttreten der VOBK 2020 zugestellt und der (nunmehrige) Hauptantrag vor dem Inkrafttreten eingereicht worden. Wie die Kammer feststellte, war daher für Fragen der Änderung des Beschwerdevorbringens eines Beteiligten Art. 13 (1) und (3) VOBK 2020 anzuwenden, nicht aber Art. 13 (2) VOBK 2020; vielmehr galt insofern weiterhin Art. 13 VOBK 2007 (vgl. Art. 25 (3) Satz 2 VOBK 2020). Sie stellte auch fest, dass Art. 13 (1) VOBK 2020 grundsätzlich bei Änderungen des Beschwerdevorbringens eines Beteiligten nach Einreichung seiner Beschwerdebegründung oder Erwiderung anzuwenden ist, ganz gleich, ob diese Änderungen vor oder nach Ablauf einer in einer Mitteilung nach R. 100 (2) EPÜ bestimmten Frist bzw. vor oder nach Zustellung einer Ladung zur mündlichen Verhandlung eingereicht worden sind. Siehe auch Kapitel V.A.6.8.6 "Kein anderer sachlicher bzw. patentrechtlicher Streitgegenstand durch die Beschränkung entstanden und prima facie gewährbar – Anträge zugelassen".

In der Sache **T 584/17** nahm der Beschwerdeführer in der mündlichen Verhandlung seinen Antrag auf Zulassung eines Dokuments zurück, woraufhin der Beschwerdegegner erstmals dessen Zulassung beantragte. Die Kammer sah dies als geändertes Vorbringen des Beschwerdegegners im Sinne von Art. 13 (1) und (3) VOBK 2007 an, der gemäß Art. 25 (3) VOBK 2020 im vorliegenden Fall statt des Art. 13 (2) VOBK 2020 weiterhin anzuwenden war.

Die Kammer hielt es im vorliegenden Fall nicht für erforderlich, die in Art. 13 (1) VOBK 2020 angegebenen Kriterien zusätzlich heranzuziehen. Sie vertrat aber mit

Verweis auf die Erläuterungen in Dokument CA/3/19 die Auffassung, dass es in der dritten Stufe des nach der VOBK 2020 anzuwendenden Konvergenzansatzes der Kammer freisteht, die in Art. 13 (1) VOBK 2020 angegebenen Kriterien heranzuziehen, wenn sie in Anwendung des Art. 13 (2) VOBK 2020 über die Zulassung von geänderten Vorbringen entscheidet. Nach Ansicht der Kammer steht ihr dies auch frei, wenn Art. 13 (2) VOBK 2020 nicht anwendbar ist, sondern weiterhin Art. 13 VOBK 2007. Jedoch merkte die Kammer an, dass die Ermessenskriterien in Art. 13 (1) VOBK 2020 im Wesentlichen den Kriterien entsprechen, die von der Rechtsprechung im Rahmen von Art. 13 (1) VOBK 2007 entwickelt wurden (s. auch T 634/16, T 32/16). Auch im Hinblick auf die Zulassung des in der mündlichen Verhandlung eingereichten Hilfsantrags sah die Kammer die zusätzliche Heranziehung der in Art. 13 (1) VOBK 2020 angegebenen Kriterien als möglich an, sah aber im vorliegenden Fall keinen Grund dazu.

6.8.2 Applicability of Article 13(2) RPBA 2020 in case of postponement of oral proceedings

In T 950/16 a first summons to oral proceedings had been notified before entry into force of the RPBA 2020. However, following a request for postponement, the oral proceedings were cancelled, and a new summons was issued on 7 February 2020. About one month before the oral proceedings new documents were submitted. In order to establish the applicable provision of the RPBA, the board considered which of the summonses qualified as "the summons" in Art. 25(3) RPBA 2020. The board made reference to the "Explanatory remarks" on Art. 25(1) RPBA 2020 (Supplementary Publication 2, OJ 2020), according to which the transitional provisions of Art. 25 RPBA 2020 intended to protect the "legitimate expectations which parties may have had at the time of filing" their submissions. As noted by the board, the reasons for a further summons were diverse and not in every case caused by the parties. It would thus be undue to make the applicability of the law dependent on the date of a later summons. Hence, the admittance of the new documents was governed by Art. 13 RPBA 2007 in the case in hand.

6.8.3 New request in response to preliminary opinion of the board clarifying its objections – admitted

In T 32/16, with regard to the respondent's reasons for submitting the request in issue only in response to the board's preliminary opinion (Art. 13(1), 3rd sentence, RPBA 2020) and its justification for this amendment to its appeal case (Art. 13(1), 1st sentence, RPBA 2020), the board highlighted the special circumstances of the case in hand, where the board's communication had crystallised for the first time what the board itself had deduced to be the relevant elements of the appellant's lengthy arguments concerning its objections under Art. 100(c) EPC. Although the appellant had stated that its set of arguments was always supposed to have been understood in the way the board had deduced, the board took the view that its statement could be understood as having identified the salient argument for the first time. In the context of the very special circumstances of the case, the board accepted the respondent's reasons for submitting the (now) main request at such a late stage. The board also noted that the respondent's amended request had been submitted on the day it received the board's preliminary opinion. It had thus responded without delay to the objections once these had been identified. Regarding the criterion stated in Art. 13(1), last sentence, RPBA 2020 as to whether the

respondent had demonstrated that the amendment prima facie overcame the issues raised by the appellant or by the board and did not give rise to new objections, the board noted that the main request directly addressed the objections of added subject-matter. In its written response, the respondent had also stated from where the amendment was taken (Art. 12(4) RPBA 2020). The board noted that the introduced terminology was an explicit recitation of the language used in the application as filed. Demonstration of how these amendments overcame the objection in this particular case, where the lacking features as such had at least already been identified by the appellant, was thus self-evident in the amendments made. The amendments were furthermore not complex (Art. 13(1) RPBA 2007; Art. 13(1), 2nd sentence, RPBA 2020 with reference to Art. 12(4) RPBA 2020) in any sense, nor had this been argued to be the case. See also chapters V.A.6.8.1 "Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020" and V.A.7.3 "Zurückverweisung zur Anpassung der Beschreibung".

6.8.4 Neue Hilfsanträge in Reaktion auf vorläufige Einschätzung der Kammer – zentrale Bedeutung des strittigen Punktes schon vorher offensichtlich – nicht zugelassen

In **T 136/16** übte die Kammer unter Berücksichtigung der in Art. 13 (1) VOBK 2020 aufgeführten Kriterien ihr Ermessen dahin gehend aus, die beiden nach der Ladung zur mündlichen Verhandlung eingereichten Hilfsanträge nicht zuzulassen. Bei Hilfsantrag 1 führte zum einen die vorgenommene Änderung prima facie zu einem neuen Einwand nach Art. 84 EPÜ. Zum anderen hätte diese Änderung nach Auffassung der Kammer bereits in einem früheren Stadium des Beschwerdeverfahrens erfolgen können und müssen. Bereits die Einspruchsabteilung hatte in der angefochtenen Entscheidung auf die zentrale Bedeutung der Auslegung eines streitigen Begriffs im Anspruch hingewiesen. Während die Einspruchsabteilung diesen Begriff eingeschränkt im Sinne des Absatzes 7 der Beschreibung verstanden hatte, hatte der Beschwerdeführer (Einsprechende) in der Beschwerdebeurteilung dieser engen Auslegung anhand anderer Passagen der Beschreibung detailliert widersprochen. Der Beschwerdegegner (Patentinhaber) hätte also bereits mit seiner Erwiderung Anlass gehabt, die vorgenommene Änderung durchzuführen, die auf dem zuvor umfangreich diskutierten Sachverhalt beruhte. Der Beschwerdegegner hatte keinen Anlass davon auszugehen, dass die Beschwerdekammer in jedem Fall der Linie der Einspruchsabteilung folgen würde. Auch das Argument, dass die Vielzahl der vorgetragenen Angriffe ohne eine vorläufige Beurteilung der Kammer der Formulierung sinnvoller Hilfsanträge entgegengestanden hätte, überzeugte die Kammer im Hinblick auf die zentrale Bedeutung der Auslegung des betreffenden Begriffs in nahezu allen vorgetragenen Einwänden nicht. Zudem sah die Kammer unter diesen Umständen die Vorlage von Hilfsanträgen mit dieser Änderung erst zu diesem Zeitpunkt im Beschwerdeverfahren als der Verfahrensökonomie abträglich an.

6.8.5 Inventive step attack substantiated for the first time at oral proceedings – not admitted

In **T 2227/15**, applying Art. 13(1) RPBA 2020 as well as Art. 13 RPBA 2007, in particular Art. 13(1) and (3) RPBA 2007, the board did not admit the appellant's inventive step attack based on D1 in combination with common general knowledge.

The board considered that this attack had been substantiated for the first time at the oral proceedings before it; the appellant's earlier general submissions on inventive step were regarded as unsubstantiated and were not taken into consideration, since they did not constitute the party's complete case within the meaning of Art. 12(2) RPBA 2007, corresponding to Art. 12(3) RPBA 2020. In reply to the board's communication, the appellant had provided neither substantiated arguments nor comments on the preliminary opinion of the board in this regard. Thus, in the board's view, the respondent had every reason to believe that a lack of inventive step objection was no longer being pursued. Considering all the circumstances of the case, the board concluded that admitting this attack into the proceedings would not only substantially add to and considerably change the complexity of the matter to be discussed, but would also be contrary to the need for procedural economy and would take the respondent by surprise. See also chapters V.A.1. "RPBA 2020" and V.A.6.8.1 "Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020" and V.A.6.8.5 "Inventive step attack substantiated for the first time at oral proceedings".

6.8.6 Kein anderer sachlicher bzw. patentrechtlicher Streitgegenstand durch die Beschränkung entstanden und prima facie gewährbar – Anträge zugelassen

In **T 1597/16** lag die Zulassung des vor Inkrafttreten der VOBK 2020 eingereichten neuen Hauptantrags gemäß Art. 13 (1) VOBK 2020 und Art. 13 (1) VOBK 2007 im Ermessen der Kammer. Nach Auffassung der Kammer hatte der Beschwerdegegner keine triftigen Gründe dafür angegeben, dass er diese Anspruchsänderung erst in der Endphase des Beschwerdeverfahrens eingereicht hatte. Er hatte lediglich ausgeführt, die vorläufige Einschätzung der Kammer in der Mitteilung nach Art. 15 (1) VOBK 2007 habe erstmals Veranlassung für den neuen Antrag gegeben, was die Kammer aber nicht überzeugte, da diese Mitteilung keine gänzlich neuen Fragen aufgeworfen hatte, sondern die darin erwähnten Einwände bereits seit der Anfangsphase des Beschwerdeverfahrens bekannt waren. Nichtsdestotrotz entschied die Kammer, den neuen Hauptantrag aus folgenden Gründen in das Verfahren zuzulassen: Durch die vorgenommene Beschränkung des beanspruchten Gegenstandes auf zwei von drei im erteilten Anspruch¹ enthaltenen Alternativen war kein anderer sachlicher bzw. patentrechtlicher Streitgegenstand entstanden. Der Beschwerdeführer (Einsprechende) war sofort in der Lage, einen Einwand mangelnder erfinderischer Tätigkeit zu formulieren, und konnte im Übrigen auf das schriftliche Vorbringen, das dem erstinstanzlichen Vorbringen entsprach, verweisen. Zudem erschien der Kammer der neue Antrag prima facie gewährbar, weil er alle noch offenen Einwände auszuräumen schien, ohne neue Fragen aufzuwerfen. Siehe auch Kapitel V.A.6.8.1 "Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020".

6.8.7 Request does not prima facie overcome objection – not admitted

In **T 1187/15** the appellant (applicant) filed auxiliary request XI during the oral proceedings before the board. It was filed as a response to the board's conclusion, reached during the oral proceedings, that claim 1 of the requests on file did not comply with the requirements of Art. 123(2) EPC. In the exercise of its discretion under Art. 13(1) RPBA 2020 the board took into account, inter alia, whether the party had demonstrated that the amendments, prima facie, overcame the issues raised by the board and did not give rise to new objections. The board noted that this criterion

was also a key one developed in the case law of the boards of appeal on a board's exercise of its discretion under Art. 13(1) RPBA 2007. Art. 13 RPBA 2007 also applied in the case in hand as the summons to oral proceedings had been notified prior to 1 January 2020 (Art. 25(3) RPBA 2020). The board found that auxiliary request XI, prima facie, did not overcome the objections under Art. 123(2) EPC since the omission of certain features constituted an unallowable intermediate generalisation. In view of this and the fact that the appellant had had an opportunity to respond to the points raised by the board of its own motion, the board exercised its discretion not to admit auxiliary request XI into the proceedings.

Moreover, the board rejected the appellant's request for another interruption to prepare a further request which would replace auxiliary request XI. The board emphasised that if a party decided to file requests before the oral proceedings which overcame only some of the board's objections in the hope that they could convince the board not to maintain its other objections, then they ran the risk that additional requests filed during the oral proceedings would not be admitted into the proceedings. It was not compatible with the principle of procedural economy that oral proceedings were conducted in such a way that the appellant was given the opportunity to repeatedly file new requests until a version of the claims was found that was acceptable to the board.

6.9 Submissions made after notification of summons – third stage of appeal proceedings – Article 13(2) RPBA 2020

6.9.1 Oral proceedings cancelled after notification of summons – Article 13(2) RPBA 2020 still applies

In **T 2279/16** the appellant (applicant), replying to the summons to oral proceedings issued after the entry into force of the RPBA 2020, informed the board that they would not attend the oral proceedings. After the board cancelled these, the appellant filed new auxiliary requests.

The board observed that it was not explicitly stated in Art. 13(2) RPBA 2020 whether this provision still applied if, after notification of a summons to oral proceedings, they were subsequently cancelled. In the board's opinion, Art. 13(2) RPBA 2020 was applicable at least in the case where this cancellation was occasioned by a statement from an/the appellant that it would not be represented at the oral proceedings. The board explained that the provisions of Art. 13(2) RPBA 2020 applied either after the expiry of a period specified in a communication under R. 100(2) EPC or "after notification of a summons to oral proceedings", and that there was nothing in the wording of the article to indicate any exceptions to this, or that the effects of Art. 13(2) RPBA 2020 were dependent on the subsequent procedural history. Where an appellant decided that it would not be represented at oral proceedings, a board could decide to cancel the oral proceedings. To conclude that such a decision should have the effect of returning the appellant to a more favourable position regarding the admission of new requests would be inconsistent with the aim and purpose of Art. 13 RPBA 2020, which was to provide a convergent approach to limiting the possibilities for a party to amend its appeal case.

The combination of documents on which the board based its inventive step objection in its preliminary opinion was exactly the same as the one which led to the refusal of

the application, and hence this was not a new objection from the board (even if the board's reasoning differed in certain details). The board emphasised that the fact that the board in this case had issued a preliminary opinion in which it came to the same conclusion as the examining division did not constitute "exceptional circumstances" within the meaning of Art. 13(2) RPBA 2020. Moreover, the appellant's submission did not contain "cogent reasons" (or indeed any reasons) why the auxiliary requests should be admitted. The new auxiliary requests were therefore not admitted.

6.9.2 New request based on request filed with statement of grounds and overcoming new objections raised in board's communication – admitted

In **T 1278/18** the board exercised its discretion pursuant to Art. 13(2) RPBA 2020 to admit the new request (filed after oral proceedings had been arranged), for the following reasons: The claims of the new request differed from those of the first auxiliary request (filed with the statement of grounds of appeal) in so far as they comprised amendments made in response to objections under Art. 84 and R. 29(7) EPC 1973 and Art. 123(2) EPC raised for the first time in the board's communication pursuant to Art. 15(1) RPBA 2020. Moreover, the independent claims of the new request differed from the independent claims of the main request, on which the appealed decision was based, essentially by the added limitations which had already been introduced in the first auxiliary request filed with the statement of grounds of appeal with the aim of overcoming all objections of lack of novelty raised in the appealed decision. The board considered that they could be regarded as an appropriate reaction to the appealed decision (Art. 12(4) RPBA 2007). The board was also satisfied that the amendments to the claims were supported by the information in the application documents as originally filed, as indicated by the appellant, and concluded that the amendments to the claims clearly overcame all outstanding objections without introducing new issues.

6.9.3 New request based on request filed in response to reply of the respondent and containing editorial amendments to remove inconsistencies – admitted

In **T 131/18** war der infragestehende Hauptantrag (der als Hilfsantrag 6 nach der Zustellung der Ladung zur mündlichen Verhandlung eingereicht worden war) abgesehen von zwei Änderungen wörtlich und inhaltlich identisch mit einem bereits in Reaktion auf die Beschwerdeerwiderung eingereichten Hilfsantrag 3. Letzterer erfüllte nach Ansicht der Kammer die Voraussetzungen für eine Zulassung zum Verfahren nach Art. 13 (1) VOBK 2020 (wurde aber in der mündlichen Verhandlung nicht aufrecht erhalten). Die beiden im Hauptantrag zusätzlich enthaltenen Änderungen betrafen Unstimmigkeiten, die in Hilfsantrag 3 verblieben waren: Der Beschwerdeführer (Patentinhaber) hatte einen als Verstoß gegen Art. 123 (2) EPÜ gewerteten Wortlaut in Anspruch 1 ausgeräumt, jedoch im abhängigen Anspruch 2 beibehalten. Auch hatte er einen nicht ganz klaren Ausdruck nur in Anspruch 1 ersetzt, nicht aber im Verfahrensanspruch 6. Im Hauptantrag wurden diese Unstimmigkeiten beseitigt. Die Kammer stimmte mit dem Beschwerdeführer überein, dass es sich nur um redaktionelle Anpassungen handelte, die hauptsächlich durch die Mitteilung der Kammer nach Art. 15 (1) VOBK 2020 veranlasst waren, und wertete dies als außergewöhnliche Umstände im Sinne des Art. 13 (2) VOBK 2020. Den Einwand des Beschwerdegegners, eine Zulassung stünde im Widerspruch zum erkennbaren Willen des Gesetzgebers, Verfahrensverzögerungen durch wiederholte Nachbesserungsversuche zu unterbinden, wies die Kammer zurück. Mit Art. 13 (2)

VOBK 2020 sei nicht beabsichtigt worden, geringfügige Anpassungen wie die Behebung offensichtlicher Unstimmigkeiten oder grammatikalischer Fehler, die z. B. nach R. 139 EPÜ zulässig wären, nach Ladung zur mündlichen Verhandlung grundsätzlich zu verhindern.

6.9.4 New request in response to objections which do not go beyond the framework of the board's initial objection – not admitted

In case **T 2214/15**, amendments contained in auxiliary request 2 intended to overcome the board's objections of lack of support and lack of clarity raised in its preliminary opinion gave rise to further objections concerning clarity and added subject-matter. This request was therefore not allowed. In reaction, the appellant (applicant) filed auxiliary request 3 during the oral proceedings before the board. Applying Art. 13(2) RPBA 2020, the board did not admit this amendment to the appellant's case into the proceedings because there were no exceptional circumstances in the present case.

The board pointed out that the topics of discussion in view of auxiliary request 2 did not differ in substance from those identified in the summons. The amendments were unsuccessful attempts at overcoming previously identified issues of clarity and lack of support already raised in the summons. The further objections concerning clarity raised by the board during the oral proceedings did not go beyond the framework of the previous discussions, which were defined by the underlying claim deficiencies. The board noted that if the appellant's argument that identifying newly introduced problems represented exceptional circumstances were correct, this would mean that the appellant would have to be given repeated opportunities to file amended claims until no new problems were introduced, which would be at odds with the primary object of the appeal proceedings of a judicial review of the impugned decision (Art. 12(2) RPBA 2020).

Concerning its objection under Art. 123(2) EPC raised during oral proceedings against one of the amendments in auxiliary request 2, the board observed that, given the strict third level of the convergent approach implemented by Art. 13(2) RPBA 2020, identifying an amendment aimed at overcoming an objection raised in the summons as being non-compliant with Art. 123(2) EPC could not be considered to be an exceptional circumstance. An appellant had to be aware that every amendment would have to be examined for compliance with Art. 123(2) EPC and that the earliest possible moment for this was during the oral proceedings if said amendment was filed in reaction to the summons. This was the ordinary development of the appeal proceedings, and it also did not go beyond the framework of the underlying claim deficiency.

In the present case, there were thus no exceptional circumstances justifying taking into account a further amended claim request. The identification of problems newly introduced when the appellant attempted to solve issues discussed in the proceedings up to that point was rather to be seen as the ordinary development of the discussion. Contrary to the appellant's submission, in the board's opinion the present case was a typical one, where a central objection (that of lack of support) had been among the grounds for refusal, was identified and agreed with by the board. and was the central topic throughout the appeal proceedings, thus typically not warranting the opportunity to file a further auxiliary request.

6.9.5 New request in response to change of opinion of the board – not admitted as objection and arguments already known

Nach Auffassung der Kammer in T 752/16 stellt eine Änderung der vorläufigen Meinung der Kammer zu einem bestimmten Einspruchsgrund keinen "außergewöhnlichen Umstand" im Sinne von Art. 13 (2) VOBK 2020 dar. In diesem Fall hatte die Kammer ihre Meinung zur erfinderischen Tätigkeit aus einer ersten Mitteilung nach Art. 15 (1) VOBK 2020 in einer zweiten Mitteilung revidiert. Die geänderte Meinung basierte aber auf bereits in der Beschwerdebegründung des Beschwerdeführers genannten Einwänden und Argumentationslinien. Nach Ansicht der Kammer ist es im Hinblick auf Art. 13 (2) VOBK 2020 unerheblich, ob die in der Mitteilung nach Art. 15 (1) VOBK 2020 geäußerte vorläufige Meinung der Kammer von einer vorherigen Stellungnahme oder der angefochtenen Entscheidung abweicht. Mit einer für die Beteiligten ungünstigen vorläufigen Meinung könne prinzipiell jederzeit im Verfahren vor den Beschwerdekammern vor Verkündung der Entscheidung gerechnet werden. In diesem Zusammenhang rief die Kammer in Erinnerung, dass die Mitteilung einer vorläufigen Meinung nach Art. 15 (1) VOBK 2020 primär den Rahmen der mündlichen Verhandlung absteckt und eine die effiziente Vorbereitung der Beteiligten auf diese Verhandlung erleichternde Verfahrensmaßnahme darstellt, nicht hingegen eine "Einladung" zu weiteren Änderungen (siehe z.B. T 1459/11). Ein Patentinhaber könne nicht so lange Änderungen in Reaktion auf die vorgebrachten Einwände eines Einsprechenden zurückhalten bis er sich mit einer für ihn negativen vorläufigen Meinung einer Beschwerdekammer konfrontiert sieht bzw. den Eindruck gewinnt, dass die Kammer nicht seiner Ansicht und Argumentation folgt (siehe z.B. T 136/16, T 2072/16). Zudem sah die Kammer die neuen Hilfsanträge, die Anlass zu neuen Einwänden gaben, als abträglich für die Verfahrensökonomie an. Sie ließ sie daher gemäß Art. 13 (1) und (2) VOBK 2020 nicht zu.

6.9.6 Amendment not adding anything of substance to the discussion of the objection raised – not admitted

In T 953/16 the appellant (applicant) submitted that the new auxiliary requests at issue were filed in response to a clarity objection raised by the board in its communication under Art. 15(1) RPBA 2020, that its response was the first opportunity to respond to such an objection, and that therefore these requests were a legitimate response to the objections raised in the board's communication. The board noted, however, that although the amendments made to claim 1 in these requests constituted an attempt to clarify the claims, the inventive-step objections raised by the board in its communication already took those features into account in its interpretation of claim 1. It was therefore apparent to the board that the amendments did not add anything of substance to the discussion of inventive step, and therefore, they did not address all of the outstanding issues raised by the board. In view of the board's negative conclusions on inventive step for the higher-ranking requests, the board saw no exceptional circumstance that could justify the admission of the new auxiliary requests into the appeal proceedings. Hence, the board decided not to take them into account (Art. 13(2) RPBA 2020).

6.9.7 New request in response to board's preliminary opinion based on earlier objections

In **T 1187/16** stellte die Kammer Folgendes fest: Falls sämtliche in einer Mitteilung der Kammer behandelten Einwände bereits Gegenstand des bisherigen Verfahrens waren, kann diese Mitteilung das Vorliegen außergewöhnlicher Umstände im Sinne von Art. 13 (2) VOBK 2020 nicht begründen.

Im vorliegenden Fall hatte der Beschwerdeführer (Patentinhaber) in Reaktion auf die Mitteilung der Kammer nach Art. 15 (1) VOBK 2020 einen neuen Hilfsantrag eingereicht. Wie die Kammer bemerkte, waren aber die in dieser Mitteilung behandelten Einwände gemäß Art. 123 (2) EPÜ bereits in der Erwiderung des Beschwerdegegners (Einsprechenden) ausführlich dargelegt worden. Das Argument des Beschwerdeführers, die Kammer habe mit dieser Mitteilung einen neuen Aspekt eingeführt (nämlich die Erfindungswesentlichkeit eines Merkmals für die Ausführbarkeit der Erfindung), war aus der Sicht der Kammer unzutreffend (da dieser Punkt der Mitteilung sich auf Art. 123 (2) EPÜ bezog). Die Kammer kam daher zu dem Schluss, dass der Beschwerdeführer bereits vor Zustellung der Ladung zur mündlichen Verhandlung ausreichend Gelegenheit gehabt hätte, im Hinblick auf die bestehenden Einwände vorsichtshalber Hilfsanträge einzureichen. Verfahrensökonomische Aspekte sowie die Tatsache, dass der Beschwerdeführer den Hilfsantrag mehr als einen Monat vor der mündlichen Verhandlung eingereicht hatte, waren vor diesem Hintergrund unbeachtlich.

Auch befand die Kammer, dass die Tatsache, dass sie in der betreffenden Mitteilung eine von der Einspruchsabteilung in der angefochtenen Entscheidung abweichende vorläufige Meinung zum Ausdruck gebracht hatte, keinen außergewöhnlichen Umstand im Sinne von Art. 13 (2) VOBK 2020 darstellte. Das Beschwerdeverfahren dient der Überprüfung der angefochtenen Entscheidung und der Beschwerdeführer hätte daher mit der Möglichkeit rechnen können und müssen, dass die Kammer zu einer von der Einspruchsabteilung abweichenden Auffassung gelangt. Die Kammer übte ihr Ermessen nach Art. 13 (2) VOBK 2020 dahingehend aus, den neuen Hilfsantrag nicht in das Beschwerdeverfahren zuzulassen.

6.9.8 New document and new lines of attack in response to board's preliminary opinion exclusively based on earlier submissions – not admitted

In **T 908/19** a further document and new lines of attack were filed in reply to the preliminary opinion accompanying the summons from the board (issued after the entry into force of the RPBA 2020). The appellant justified the late submission of this amendment to its case only at the oral proceedings, by arguing that neither the document nor the objections could have been raised earlier since they were filed in response to the board's preliminary opinion expressed in the annex to the summons. The board could not accept this argument, as its preliminary opinion was based exclusively on the submissions made by the parties in their grounds or reply. Nor did the appellant identify any particular aspect that would be new or surprising to it, but rather appeared motivated by the fact that the board had expressed itself provisionally in favour of the respondent. Thus, the board saw no exceptional circumstances, let alone ones that had been reasoned, that could justify the late filing of these submissions; the late-filed submissions were therefore not admitted into the proceedings (Art. 13(2) RPBA 2020).

7. Remittal to the department of first instance

7.1 Article 11 RPBA 2020 – Special reasons

(CLB, V.A.7.)

Under Art. 11 RPBA 2020 the board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

In **T 731/17**, in view of the application's filing date, the appellant requested the board to exercise its discretion under Art. 111(1) EPC to decide that the subject-matter claimed was patentable. Under Art. 11 RPBA 2020, a case is not to be remitted to the department whose decision was appealed unless special reasons present themselves for doing so. The board noted that this provision has to be read in conjunction with Art. 12(2) RPBA 2020, which provides that it is the primary object of the appeal proceedings to review the decision under appeal in a judicial manner. The board stated that inventive step over documents D1 to D4 had not yet been assessed in detail. Moreover, it might need to be investigated whether document D2 belonged to the state of the art under Art. 54(2) EPC at all. Not remitting the case to the examining division would require the board to perform these tasks in both first- and last-instance proceedings and to effectively replace the examining division rather than review the contested decision in a judicial manner.

In **T 1966/16** the board stated that the sole ground for the refusal set out in the decision under appeal, namely a lack of inventive step, was not justified. The board, however, identified several potential deficiencies in claims 1-7 with respect to Art. 83, 84 and 123(2) EPC. The decision under appeal did not address these issues. The board held that special reasons were apparent in the case in hand because the examining division had not taken an appealable decision on essential outstanding issues with respect to Art. 83, 84 and 123(2) EPC. As set out in Art. 12(2) RPBA 2020, the primary object of the appeal proceedings was to review the decision under appeal in a judicial manner. This principle would not be respected if the board were to conduct a complete examination of the application. Consequently, Art. 11 RPBA 2020 did not entail the board carrying out a full examination of the application for compliance with the requirements of Art. 83, 84 and 123(2) EPC, for which no decision at first instance existed yet.

In **T 1531/16** führte die Kammer aus, dass nach dem in der der revidierten Fassung von Art. 11 Satz 1 VOBK 2020 zum Ausdruck kommenden gesetzgeberischen Willen eine Zurückverweisung nur bei Vorliegen besonderer Gründe, mithin ausnahmsweise, erfolgen sollte. Nach der Legaldefinition in Art. 11 Satz 2 VOBK 2020 ist ein solcher besonderer Grund regelmäßig dann anzunehmen, wenn das dem Beschwerdeverfahren vorausgegangene und mit der angefochtenen Entscheidung beendete Verfahren unter einem wesentlichen Mangel litt. Im Übrigen ergibt sich aus den Erläuterungen zu Art. 11 VOBK 2020 (Zusatzpublikation 2, OJ 2020, 46, 54), dass im Einzelfall zu prüfen ist, ob besondere Gründe im Sinne dieser Vorschrift vorliegen, und dies dann zu verneinen ist, wenn die Kammer alle relevanten Fragen mit angemessenem Aufwand entscheiden kann. Vor diesem Hintergrund gelangte die Kammer nach Abwägung aller relevanten Umstände des

vorliegenden Falles zum Ergebnis, dass die für die Patentierbarkeit maßgeblichen Fragen eben nicht mit angemessenem Aufwand im Beschwerdeverfahren entschieden werden konnten, sondern vielmehr im fortzusetzenden Prüfungsverfahren erst einmal die dafür notwendigen Grundlagen zu schaffen sind.

In **T 3247/19** insufficiency of disclosure was the sole ground for refusal mentioned in the contested decision. The appellant requested that the case be remitted to the examining division. The board noted that no further requirements for patentability were mentioned or examined in the contested decision; – that the appellant had not presented any arguments relating to the further requirements for patentability; and that the appellant explicitly requested that the case be remitted to the examining division.

As there were no substantive arguments present in the appeal proceedings relating to any patentability issues other than Art. 83 EPC, the board could not come to a decision regarding further patentability requirements on the basis of the current appeal case alone. The board was aware that, according to Art. 11, first sentence, RPBA 2020, a remittal for further prosecution should only be undertaken, exceptionally, when special reasons apply. After considering all the relevant circumstances of the case at hand, the board came to the conclusion that the issues relevant to patentability in the case in hand, including but not limited to, the examination of novelty, inventive step and clarity, could not be decided upon without undue burden (cf. explanatory notes to Art. 11 RPBA 2020, Supplementary publication 2, OJ 2020).

In **T 350/17** the board noted that while an opposition division has the discretion not to admit late-filed requests, there is no discretion, regardless of how late a request is filed, to deny the patentee's right to discuss the admittance of a request. The board decided to remit the case to the opposition division. The respondents argued that remitting the case would unnecessarily delay the proceedings and that, since the issue of admittance of auxiliary request 2 had already been decided upon by the board, there was no special reason under Art. 11 RPBA 2020 to justify the remittal.

The board did not accept this argument because the non-admittance of auxiliary request 2 by the opposition division not only concerned the question of admissibility as such but also precluded a discussion on inventive step. Thus, the consequences of the substantial procedural violation by the opposition division went beyond the mere question of admissibility, essentially depriving the parties and the board of a basis for a discussion on inventive step. Furthermore the board considered that, in the case in hand, the patentee's request to have the question of inventive step examined at two different levels of jurisdiction took precedence over procedural economy, because the patentee was deprived of a decision at first instance on this matter as a result of the substantial procedural violation. For the sake of completeness, the board also noted that the concept of "special reasons" in Art. 11 RPBA 2020 should not be narrowly interpreted in a way which unduly restricts the discretion of the board to remit a case enshrined in Art. 111(1) EPC, as this would be contrary to the spirit of the Convention, which, in case of conflict, takes precedence (see Art. 23 RPBA 2020).

7.2 Incomplete search

(CLB, V.A.7.)

In **T 547/14** wurde, da der Gegenstand der Patentanmeldung als nicht technisch angesehen wurde, keine Recherche durchgeführt. Eine abschließende Prüfung ohne Recherche war jedoch nicht möglich. Da der Zweck des Beschwerdeverfahrens vorrangig darin besteht, die Entscheidung der ersten Instanz zu überprüfen (Art. 12 (2) VOBK 2020) und die Erfindung auf der Basis der als technisch angesehenen Merkmale weder recherchiert noch auf Neuheit und erfinderische Tätigkeit geprüft worden war, lagen hier besondere Gründe vor, die es rechtfertigten die Angelegenheit zur Durchführung einer Recherche und zur weiteren Prüfung an die erste Instanz zurückzuverweisen, wie vom Beschwerdeführer beantragt worden war.

In **T 97/14** the board found that the decision under appeal was not sufficiently reasoned. Furthermore, the appellant's arguments had not been properly taken into account. In the board's judgment, these substantial procedural violations were a fundamental deficiency and consequently a special reason for remitting the case (Art. 11 RPBA 2020). In the grounds of appeal, the appellant had requested that the board settle the case in appeal proceedings rather than remit it for further prosecution. The board noted that, although the request had since then been withdrawn, the appellant had certainly had a valid point. The application had been pending for 18 years, and in those circumstances, it would be preferable if the case could be finally settled without further delay. The appellant had consistently argued that, since the claimed invention related to web services, the closest prior art for the purpose of assessing inventive step should be in that field. Consequently, the documents cited in the supplementary European search report and during examination (D1 and D2), relating to remote procedure calls, were argued to be unsuitable as a starting point for inventive step. The board agreed with the appellant that the closest prior art should be in the field of web services. The board furthermore found it inconceivable that "synchronous web services" constituted a complete representation of the state of the art in that field. The examining division's choice of the closest prior art rather seemed to have been based on what was available at the oral proceedings when the examining division decided to discard D2. The board remitted the case for further prosecution because the search was not complete.

7.3 Zurückverweisung zur Anpassung der Beschreibung

(CLB, V.A.7.8.)

In **T 32/16** the board stated that, regarding adaptation of the description to the new claims, the respondent's (patent proprietor's) preference to perform this at the oral proceedings was not followed. The required amendments to the description were seen to be of not inconsiderable scope, and the appellant indicated its need to fully consider any amendments made without being under time pressure. Under these circumstances, the board thus decided to remit the case to the opposition division under Art. 111(1) EPC for the description to be adapted to the claims found allowable. With regard to Art. 11 RPBA 2020, the board noted that remittal of a case for adaptation of the description was not a remittal for "further prosecution" (See

explanatory remarks to Art. 11 RPBA 2020, Supplementary publication 2, OJ 2020), such that no "special reasons" needed to be present. See also chapters V.A.6.8.1 "Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020" and V.A.6.8.3 "New request in response to preliminary opinion of the board clarifying its objections – admitted" above.

7.4 Anordnung einer Änderung der Zusammensetzung des erstinstanzlichen Organs

(CLB, V.A.7.)

T 2475/17 setzte sich die Kammer mit der Frage der Ermächtigung einer Kammer, im Falle einer Zurückverweisung an die erste Instanz eine Änderung der Zusammensetzung dieses Organs anzuordnen, auseinander, s. dazu Kapitel III.D.1.1 "Remittal and rehearing of a case".

8. Reimbursement of appeal fees

8.1 Substantial procedural violation

(CLB, V.A.9.5.)

In **T 74/17** stellte die Kammer fest, dass die gerügten Verfahrensschritte der Einspruchsabteilung keine wesentlichen Verfahrensmängel darstellten und somit die Beschwerdegebühr nach R. 103 (1) (a) EPÜ nicht zurückgezahlt werden musste.

Die Kammer erklärte, dass ein behaupteter Verfahrensmangel nur dann in einer Beschwerde berücksichtigt werden kann, wenn er sich auf die beschwerdefähigen Teile einer Entscheidung ausgewirkt hat, d.h. wenn er die Partei beschwert hat. Verfahrensmängel, die lediglich nicht beschwerdefähige Aspekte einer Entscheidung betreffen, sind für die Entscheidung über die Beschwerde nicht relevant, und aus diesem Grund brauchte die Kammer nicht festzustellen, ob sie wesentlich waren oder nicht. Im Umkehrschluss zeigt dies, dass dann solche Verfahrensmängel in keinem Kausalzusammenhang zu den Ergebnissen der angefochtenen Entscheidung stehen.

8.2 Excessive length of proceedings

(CLB, V.B.9.5.11(a)(ii))

Dans l'affaire **T 1243/17**, la chambre a expliqué qu'elle n'était pas convaincue que la jurisprudence de la CEDH permettait de conclure que la durée de la procédure d'examen auprès de l'OEB avait vocation à être systématiquement prise en compte dans l'appréciation du délai raisonnable visé par l'art. 6(1) CEDH, première phrase (voir à ce titre l'analyse de la décision de la CEDH du 2 mai 2013 *Kristiansen et Tyvik As v. Norvège* dans la décision **T 1824/15** concernant le déroulé de la procédure devant l'office norvégien des brevets). Selon la chambre, si cette décision a retenu une violation du droit d'accès à un tribunal au titre de l'art. 6(1) CEDH, elle ne s'est pas prononcée s'agissant d'une éventuelle violation du droit d'être entendu dans un délai raisonnable. Par ailleurs, et contrairement aux faits de la cause ayant conduit à la décision susvisée – où existait déjà dans le cadre de la procédure administrative une "contestation" soumise aux chambres (non judiciaires) de recours

de cet organisme – la procédure d'examen considérée dans l'affaire T 1243/17 était une procédure purement non contentieuse et unilatérale, et donc préalable à l'existence d'une « contestation » permettant l'application de l'art. 6(1) CEDH. La chambre a néanmoins estimé que les principes développés par la CEDH concernant la durée de la procédure fournissaient un cadre utile pour évaluer la longueur de la procédure. La chambre relève qu'en l'espèce la décision attaquée a été rendue un peu plus de 17 ans après la date du dépôt de la demande, et observe que la procédure d'examen, du moins entre le rapport de recherche et la première notification, a "stagné sans explication" pendant plus de huit ans, ce qui est normalement inacceptable (voir T 315/03, T 1824/15, et T 2707/16). Cependant, la requérante n'a pas formulé de réclamation contre cette stagnation, alors que, selon la jurisprudence de la CEDH, elle est censée raccourcir la procédure dans la mesure du possible. La chambre considère aussi qu'un demandeur a un devoir de coopération avec la division d'examen, devoir que la requérante n'a pas rempli. Indiquant finalement que la requérante n'avait formulé aucune demande précise, notamment au titre du remboursement de la taxe de recours (règle 103 CBE), en lien avec la violation alléguée de l'art. 6(1) CEDH, la chambre n'a donc ordonné aucun remboursement.

8.3 Withdrawal of appeal or withdrawal of request for oral proceedings under Rule 103(4) EPC (25%)

(CLB, V.A.9.)

R. 103(4) EPC provides that: [t]he appeal fee shall be reimbursed at 25%

(a) if the appeal is withdrawn after expiry of the period under paragraph 3(a) [i.e. where a date has been set for oral proceedings, later than a month after a communication in preparation for oral proceedings] but before the decision is announced at oral proceedings;

(b) if the appeal is withdrawn after expiry of the period under paragraph 3(b) [i.e. in the absence of a set date for oral proceedings, after expiry of the period for the appellant to file observations on a communication from the Board] but before the decision is issued;

(c) if any request for oral proceedings is withdrawn within one month of notification of the communication issued by the Board of Appeal in preparation for the oral proceedings, and no oral proceedings take place.

In T 1610/15 beschloss die Kammer, dass dem Beschwerdeführer die Beschwerdegebühr in Höhe von 25% nach R. 103 (4) c) EPÜ zurückzuerstatten war. Im vorliegenden Fall nahm der Beschwerdeführer innerhalb eines Monats nach Zustellung der ersten Mitteilung der Kammer nach Art. 15 (1) VOBK 2020 seinen Antrag auf mündliche Verhandlung zurück. Auch der Beschwerdegegner I nahm seinen Antrag auf mündliche Verhandlung innerhalb dieser Frist zurück. Der Beschwerdegegner II hingegen nahm erst nach Ablauf der einmonatigen Frist nach R. 103 (4) c) EPÜ seinen Antrag auf mündliche Verhandlung zurück. Die Kammer stellte fest, dass der Antrag des Beschwerdeführers auf mündliche Verhandlung fristgerecht zurückgenommen wurde. Nach Ansicht der Kammer wirkte sich die verspätete Rücknahme des Antrags auf mündliche Verhandlung des

Beschwerdegegners II nicht nachteilig für den Beschwerdeführer aus. Nach dem Wortlaut von R. 103 (4) c) EPÜ sei es nicht Voraussetzung, dass alle vorliegenden Anträge auf mündliche Verhandlung innerhalb eines Monats ab Zustellung einer von der Beschwerdekammer zur Vorbereitung der mündlichen Verhandlung erlassenen Mitteilung zurückgenommen werden. Es reiche vielmehr aus, dass ein Antrag auf mündliche Verhandlung fristgerecht zurückgenommen werde, damit die erste Voraussetzung für eine anteilige Rückzahlung der Beschwerdegebühr gemäß R. 103 (4) c) EPÜ erfüllt sei. Die zweite Voraussetzung der R. 103 (4) c) EPÜ, dass keine mündliche Verhandlung stattfand, war im vorliegenden Fall auch erfüllt.

In **T 777/15** the board decided that R. 103(4)(c) EPC did not apply in relation to the appellant that had not requested oral proceedings, even though: (i) another appellant had requested oral proceedings and withdrawn its request within the time specified in R. 103(4)(c); and (ii) no oral proceedings took place.

The board explained that R. 103(4)(c) EPC provides: (i) an incentive to a party that initially requested oral proceedings before the board, to reconsider any such request at a later stage of the appeal proceedings; and (ii) a reward by way of a partial reimbursement of this party's appeal fee, if the party abandons its request. Accordingly, an appealing party not having requested oral proceedings in the proceedings before the board, could not benefit from another party's withdrawal of the request for oral proceedings.

In **T 1730/16** the board held that the conditions for partial reimbursement of the appeal fee (25%) in accordance with R. 103(4)(c) EPC were met. In line with the appellant's request, the board had scheduled oral proceedings and given its preliminary opinion in a communication pursuant to Art. 15(1) RPBA 2007 annexed to the summons to oral proceedings. In accordance with the restrictions that had been imposed owing to the spread of coronavirus (COVID-19), the board had postponed the date of the oral proceedings. In preparation for the (postponed) oral proceedings, the board had then sent a communication drawing attention to the COVID-19 constraints for oral proceedings. Within a month of this communication the appellant had withdrawn its request for oral proceedings.

The board decided that R. 103(4)(c) EPC did not specify particular criteria with which a communication had to comply for it to qualify for a possible reimbursement other than that it must have been issued by the board "in preparation for the oral proceedings". The board's latest communication concerned technical and organisational aspects of the scheduled oral proceedings and was thus a communication issued in preparation for the oral proceedings. A first communication pursuant to Art. 15(1) RPBA 2007 having been issued by the board at a previous stage of the appeal proceedings was therefore not prejudicial to a reimbursement of the appeal fee under R. 103(4)(c) EPC.

In **T 73/17** entschied die Kammer, dass die Voraussetzungen von R. 103 (4) c) EPÜ nicht erfüllt waren. Die Kammer war der Ansicht, dass der Gesetzgeber offenbar zwischen einer bloßen Ankündigung der Nichtteilnahme an einer mündlichen Verhandlung und einer ausdrücklichen Rücknahme des Antrags auf mündliche Verhandlung unterscheidet. R. 103 (4) c) EPÜ nennt explizit eine Rücknahme des Antrags auf mündliche Verhandlung als eine zwingende Voraussetzung für die anteilige Rückzahlung und lässt eben nicht allein das Nichtstattfinden einer

mündlichen Verhandlung dafür genügen. Vorliegend war nur der Rückzahlungstatbestand nach R. 103 (4) a) EPÜ erfüllt.

In der vorliegenden Sache nahm der Einsprechende seine Beschwerde mit Schriftsatz vom 25. Mai 2020 mehr als einen Monat nach Zustellung der Mitteilung der Beschwerdekammer gemäß Art. 15 (1) VOBK 2020 zur Vorbereitung der ursprünglich für den 6. Juli 2020 anberaumten mündlichen Verhandlung zurück. Die Kammer stellte fest, dass der Umstand, dass die Notwendigkeit zur Durchführung der ursprünglich für den 6. Juli 2020 anberaumten mündlichen Verhandlung infolge der Rücknahme der Beschwerde der Einsprechenden wegfiel und deshalb der Termin zur mündlichen Verhandlung aufgehoben wurde, nichts an der Einschlägigkeit der R. 103 (4) a) EPÜ änderte. Auch wenn die vorliegende Entscheidung im schriftlichen Verfahren erging, lag nach dem für die Beschwerdekammer erkennbaren gesetzgeberischen Willen der Rückzahlungstatbestand nach R. 103 (3) c) EPÜ, der eine hälftige Rückzahlung der Beschwerdegebühr vorsieht, nicht vor. Die Rücknahme der Beschwerde durch den Einsprechenden erfolgte nicht während der Prüfungsphase, sondern erst in der Entscheidungsphase des vorliegenden Beschwerdeverfahrens und war unter den Rückzahlungstatbestand nach R. 103 (4) EPÜ zu subsumieren, deren Voraussetzungen evident erfüllt waren. Da der Einsprechende in seinem Schriftsatz vom 25. Mai 2020 zugleich erklärt hatte, nicht am anberaumten Termin zur mündlichen Verhandlung teilzunehmen, stellte sich die Frage, ob dadurch daneben auch noch der Rückzahlungstatbestand nach R. 103 (4) c) EPÜ zum Tragen kommen könnte. Die Kammer erklärte, dass abgesehen davon, dass der Schriftsatz des Einsprechenden nicht innerhalb eines Monats ab Zustellung der Mitteilung gemäß Art. 15 (1) VOBK 2020 eingereicht wurde, die Absichtserklärung des Einsprechenden, an der mündlichen Verhandlung nicht teilzunehmen, nicht als eine Rücknahme im Sinne der R. 103 (4) c) EPÜ seines bereits in seiner Beschwerdeschrift hilfsweise gestellten Antrags auf mündliche Verhandlung zu qualifizieren sei. Nach ständiger Rechtsprechung kann der Antrag eines Beteiligten auf mündliche Verhandlung nur durch eine eindeutige gegenteilige schriftliche Willenserklärung zurückgenommen werden. Diese Voraussetzung wird in der Rechtsprechung bei einer bloßen Ankündigung, nicht an der mündlichen Verhandlung teilzunehmen, regelmäßig nicht als erfüllt angesehen. Die Kammer hob hervor, dass der Rücknahmeerklärung eine entscheidende Bedeutung zukommt, so dass schon aus Gründen der Rechtssicherheit gerade auch für die Verfahrensbeteiligten eine ausdrückliche und eindeutige schriftliche Rücknahmeerklärung notwendige Tatbestandsvoraussetzung für die anteilige Rückzahlung der Beschwerdegebühr ist.

In **T 517/17** the board considered that the conditions for partial reimbursement of the appeal fee, as set out in R. 103(4)(c) EPC, were fulfilled. In particular, the appellant's unqualified indication that it would not attend the scheduled oral proceedings satisfied the requirement in R. 103(4)(c) EPC that the request for oral proceedings be withdrawn. This was the case even though the appellant did not expressly withdraw the request for oral proceedings.

The board explained that it was aware that, in drawing the above conclusion, it departed from the extensive obiter dictum set out in decision **T 73/17** (see above). It stated that, if it was true that the express announcement of not attending arranged

oral proceedings before the board was equivalent to a withdrawal of the request for them, this had to be true and valid for *all* effects that the EPC and the case law attach to a withdrawal. It did not appear to be justified to qualify the express announcement as *equivalent* to a withdrawal for the purposes of the question of whether appointed oral proceedings shall take place, but as *not equivalent* for the purposes of the question of whether fees shall be refunded. Such a conclusion was neither supported by the wording of R. 103(4)(c) EPC nor by the preparatory document CA/80/19, which does not comment on the wording of the withdrawal, but only on its *timing*: "the appeal fee is reimbursed at a rate of 25% if ... the decision is eventually issued without the oral proceedings taking place" (see CA/80/19 of 4 October 2019, point 85). Against this background, it was not necessary to assess whether CA/80/19 could constitute evidence for the intentions of the legislator. Nor did the board have to decide whether it was possible or necessary to resort to the preparatory work associated with new R. 103 EPC for the specific issue discussed here, considering the requirements laid down in Art. 32 of the Vienna Convention on the Law of Treaties.

In **T 2044/16** stellte die Kammer fest, dass der Umstand, dass die Kammer bereits einen inhaltlich ausführlichen Vorbereitungsbescheid gemäß Art. 15 (1) VOBK 2020 erlassen hatte, nach dem Wortlaut von R. 103 (4) c) EPÜ nicht ausschließt, eine Rückzahlung auch im Hinblick auf eine spätere, ergänzende Mitteilung der Kammer zu gewähren, die innerhalb eines Monats zur Rücknahme des Antrags auf mündliche Verhandlung geführt hat. R. 103 (4) c) EPÜ verlange keine inhaltliche Qualität der vorbereitenden Mitteilung und erstrecke sich daher auch auf rein organisatorische Vorbereitungsbescheide. Die zum Rückzahlungstatbestand der R. 103 (2) b) EPÜ (seit 01.04.2020 R. 103 (3) b) EPÜ) in **T 265/14** diskutierten Erwägungen seien auch auf die vorliegende Fallkonstellation übertragbar. Die Kammer erklärte, dass der mit der Einführung unter anderem des neuen Rückzahlungstatbestands nach R. 103 (4) b) EPÜ verfolgte Zweck entscheidend sei, nämlich einen Anreiz zu geben, unnötige Arbeitsschritte (vorliegend die Vorbereitung und Durchführung der mündlichen Verhandlung) zu vermeiden und damit die zur Verfügung stehende Arbeitszeit möglichst effizient zu nutzen. Dass der zweite Vorbereitungsbescheid aufgrund der aktuellen Situation (Vorsichtsmaßnahmen im Hinblick auf die COVID19-Pandemie) erst einen Monat vor der mündlichen Verhandlung erging, könne nicht zulasten des Beschwerdeführers gehen, der durch seine Antragsrücknahme den Weg für einen effizienten Abschluss des Verfahrens im schriftlichen Verfahren geebnet hatte. Auch wenn der vorgesehene Termin in einer solchen Situation nicht mehr für eine andere Verhandlung genutzt werden könne, wie in Randziffer 82 von CA/80/19 angesprochen, bleibe doch der oben angesprochene Zeitgewinn für die Kammer und die anderen Beteiligten. Vor allem könnten die hier gegebenen zeitlichen Umstände nicht dazu führen, R. 103 (4) c) EPÜ unterhalb ihres recht eindeutigen Wortlauts ("innerhalb eines Monats ab Zustellung einer von der Beschwerdekammer zur Vorbereitung der mündlichen Verhandlung erlassenen Mitteilung") auszulegen. Die Frist nach R. 103 (4) c) EPÜ wird, wie die Kammer schlussfolgerte, im Ergebnis durch jede vorbereitende Mitteilung der Kammer erneut ausgelöst. Die Kammer ordnete an, dass die Beschwerdegebühr in Höhe von 25% zurückzuerstatten war.

In **T 110/18** the appellant had withdrawn its request for oral proceedings within one month of notification of the second communication pursuant to Art. 15(1)

RPBA 2020, which was exceptionally issued in view of the COVID-19 outbreak. The board followed the rationale of T 265/14 (of the same board in a different composition) and concluded that the requirements for a 25% reimbursement of the appeal fee according to R. 103(4)(c) EPC had been met. The board explained that its decision was also in accordance with the explanations given in the explanatory document to the R. 103 EPC change (see CA/80/19, point 82) since in the case in hand the oral proceedings cancelled due to the COVID-19 outbreak did not have to be rescheduled.

In T 1678/17 the appellant withdrew its request for oral proceedings and requested a partial refund of the appeal fee. The request for oral proceedings was not in fact withdrawn within one month of notification of the communication issued by the board of appeal in preparation for the oral proceedings. However, in view of the Notice from the EPO dated 1 May 2020 concerning the disruptions due to the COVID-19 outbreak (OJ 2020, A60) and R. 134(2) and (4) EPC, the board held that the conditions for reimbursement of 25% of the appeal fee, stipulated in R. 103(4)(c) EPC, were fulfilled.

B. Proceedings before the Enlarged Board of Appeal

1. Referral by the President of the EPO

(CLB, V.B.2.4.)

In G 3/19 (OJ 2020, A119) the Enlarged Board rephrased the two questions set out in the referral of the EPO President into a single question that articulated the real issue at stake:

"Taking into account developments that occurred after a decision by the Enlarged Board of Appeal giving an interpretation of the scope of the exception to patentability of essentially biological processes for the production of plants or animals in Art. 53(b) EPC, could this exception have a negative effect on the allowability of product claims or product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process feature define an essentially biological process?"

It considered that the issues underlying the referral concerned a point of law of fundamental importance within the meaning of Art. 112(1) EPC which required a uniform application of the law.

Concerning the second admissibility point under Art. 112(1)(b) EPC ("different decisions" of "two Boards of Appeal"), the Enlarged Board considered the term "different" had to be interpreted in the light of the provision's object and purpose according to Art. 31 Vienna Convention (G 3/08, OJ 2011, 10, point 7 of the Reasons et seq.; G 3/95, OJ 1996, 169, point 8 of the Reasons). The purpose of the EPO President's power to refer points of law to the Enlarged Board was to establish uniformity of law within the European patent system. Having regard to this purpose, the term "different decisions" had to be understood restrictively in the sense of "conflicting decisions". Legal development could not on its own form the basis for a referral, because case law did not always develop in a linear fashion, and earlier approaches may be abandoned or modified.

The EPO President argued that the approach adopted in T 1063/18, according to which the interpretation of Art. 53(b) EPC given in decisions G 2/12 (OJ 2016, A27) and G 2/13 (OJ 2016, A28) (hereinafter G 2/12) would exclude any subsequent clarification in the Implementing Regulations which deviated from that interpretation, differed from other decisions relating to the EU Biotech Directive (e.g. T 272/95, OJ 1999, 590; T 315/03, T 666/05 and T 1213/05). The Enlarged Board found the aforementioned decisions could be read as acknowledging that a subordinate but later provision of the Implementing Regulations could have an impact on the interpretation of a higher-ranking and previously enacted provision of the Convention, irrespective of a particular interpretation given to the latter in an earlier decision by a board of appeal. In T 1063/18, the board of appeal did not examine whether the interpretation of Art. 53(b) EPC could be affected by R. 28(2) EPC on the basis of Art. 31(3) Vienna Convention. Rather, it established that R. 28(2) EPC was in contradiction to the particular interpretation of Art. 53(b) EPC given in decision G 2/12 before the Rule was adopted (points 24 to 26 and 46 of the Reasons) and that the Administrative Council was not competent to amend Art. 53(b) EPC by means of R. 28(2) EPC (points 31 to 36 of the Reasons). As a consequence, the board disregarded R. 28(2) EPC pursuant to Art. 164(2) EPC because it considered the Rule to deviate from the interpretation given in an earlier decision of the Enlarged Board. The Enlarged Board found that this aspect constituted the difference from other aforementioned board of appeal decisions, which evaluated the impact of a later-adopted provision of the Implementing Regulations on the construction of a provision of the Convention. Hence, the Enlarged Board considered that there were different decisions of two boards of appeal on the question whether an amendment to the Implementing Regulations can have an impact on the interpretation of an Article of the EPC. As a consequence, the EPO President's referral complied with the requirements of Art. 112(1)(b) EPC and was admissible within the terms of the question as re-phrased by the Enlarged Board. See also chapter I.A.1. "Product claims for plants or plant material".

2. Grounds for petition for review

2.1 Article 112a(2)(c) EPC – alleged fundamental violation of Article 113 EPC

(CLB, V.B.4.3.10)

In R 10/18 the Enlarged Board held that the petition was clearly unallowable. The petitioner (patent proprietor) had asserted that its right to be heard had been violated, arguing that the board had failed to consider the petitioner's argument that filing the opposition using a straw man amounted to a circumvention of the law by abuse of process and that the opposition therefore should have been deemed inadmissible. The Enlarged Board acknowledged that previous cases (e.g. R 2/14) held that Art. 113(1) EPC required that a party had to be able to understand, on an objective basis, the reasons for a board's decision. However, the Enlarged Board explained that the current law (see R 8/15, Catchwords 1 and 2) provides that one aspect of the right to be heard as covered by Art. 113(1) EPC requires a board to consider a party's submissions, i.e. assess the facts, evidence and arguments submitted as to their relevance and correctness. Art. 113(1) EPC is infringed if the board does not address submissions that, in its view, are relevant for the decision in a manner adequate to show that the parties were heard on them, i.e. that the board substantively considered those submissions. The Enlarged Board added that a

board is presumed to have taken into account a party's submissions that it did not address in the reasons for its decision, meaning that it, first, took note of them and, second, considered them, i.e. assessed whether they were relevant and, if so, whether they were correct. An exception may apply if there are indications to the contrary, e.g. if a board does not address in the reasons for its decision submissions by a party that, on an objective basis, are decisive for the outcome of the case, or dismisses such submissions without first assessing them as to their correctness.

In the underlying appeal, the board had stated that it was satisfied that the two interveners had not been involved when opponent 1 filed the opposition. The Enlarged Board agreed with the petitioner that the board, although considering the petitioner's argument alleging an abuse of process, did not expressly deal with it or enable the petitioner to understand the reasons for this decision on admissibility of the opposition. However, the Enlarged Board found that not answering the main point the petitioner had made in relation to the admissibility of the opposition, did not amount to a violation of the right to be heard because it was possible to understand, on an objective basis, from section 1 of the decision under review, in which the board set out and discussed the facts and arguments submitted by the petitioner on the issue of inadmissibility of the opposition (and the interventions) for abuse of process, that the board had substantively considered those submissions. The exception to the principle embodied in Catchword 1 of decision R 8/15 therefore did not apply.

ANLAGE 1	ANNEX 1	ANNEXE 1
Im Rechtsprechungsbericht von 2020 behandelte Entscheidungen	Decisions discussed in the Case Law Report 2020	Décisions traitées dans le rapport de jurisprudence 2020
I. PATENTIERBARKEIT	PATENTABILITY	BREVETABILITÉ
A. Ausnahmen von der Patentierbarkeit	Exceptions to patentability	Exceptions à la brevetabilité
1. Erzeugnisansprüche auf Pflanzen oder Pflanzenmaterial	Product claims for plants or plant material	Revendications de produit relatives à des végétaux ou à du matériel végétal
G 3/19 14.05.20	G 3/19 14.05.20	G 3/19 14.05.20 1
2. Medizinische Methoden	Medical method	Méthodes de traitement médical
2.1 Chirurgischer Verfahrensschritt in einem mehrstufigen Verfahren	One surgical step in a multi-step method	Une étape chirurgicale dans une méthode à plusieurs étapes
T 1631/17 3.2.08 31.07.20	T 1631/17 3.2.08 31.07.20	T 1631/17 3.2.08 31.07.20 2
B. Neuheit	Novelty	Nouveauté
1. Zugänglichmachung – Geheimhaltungsverpflichtung	Availability to the public – obligation to maintain secrecy	Accessibilité au public – obligation de confidentialité
T 72/16 3.2.05 20.02.20	T 72/16 3.2.05 20.02.20	T 72/16 3.2.05 20.02.20 3
2. Feststellung von Unterschieden – unterscheidende Merkmale	Ascertaining differences – distinguishing features	Constatation de différences – caractéristiques distinctives
T 1930/14 3.3.04 28.11.19	T 1930/14 3.3.04 28.11.19	T 1930/14 3.3.04 28.11.19 3
3. Chemische Erfindungen und Auswählerfindungen – Listen	Chemical inventions and selection inventions – lists	Les inventions dans le domaine de la chimie et les inventions de sélection – listes
T 2350/16 3.2.05 18.10.19	T 2350/16 3.2.05 18.10.19	T 2350/16 3.2.05 18.10.19 4
4. Zweite medizinische Verwendung	Second medical use	Deuxième application thérapeutique
T 264/17 3.3.10 22.09.20	T 264/17 3.3.10 22.09.20	T 264/17 3.3.10 22.09.20 5
5. Zweite (bzw. weitere) nicht medizinische Verwendung	Second (or further) non-medical use	Deuxième (ou autre) application non thérapeutique
T 1385/15 3.3.10 03.12.19	T 1385/15 3.3.10 03.12.19	T 1385/15 3.3.10 03.12.19 5
C. Erfinderische Tätigkeit	Inventive step	Activité inventive
1. Unterscheidung zwischen Plausibilität und Naheliegen	Distinction between plausibility and obviousness	Distinction entre plausibilité et évidence
T 184/16 3.3.02 12.12.19	T 184/16 3.3.02 12.12.19	T 184/16 3.3.02 12.12.19 6

2.	Nächstliegender Stand der Technik – erfolgversprechendster Ausgangspunkt	Closest prior art – most promising starting point	État de la technique le plus proche – point de départ le plus prometteur
	T 1450/16 3.5.03 17.01.20	T 1450/16 3.5.03 17.01.20	T 1450/16 3.5.03 17.01.20 6
	T 787/17 3.2.05 11.10.19	T 787/17 3.2.05 11.10.19	T 787/17 3.2.05 11.10.19 7
3.	Wissensstand des Fachmanns	The skilled person's level of knowledge	Niveau de connaissance de l'homme du métier
	T 1601/15 3.2.05 04.12.19	T 1601/15 3.2.05 04.12.19	T 1601/15 3.2.05 04.12.19 8
4.	Wirkung nicht über den gesamten Schutzbereich glaubhaft gemacht – neuronales Netz	Effect not made credible within the whole scope of claim – neural network	Effet non démontré de façon crédible dans toute la portée de la revendication – réseau de neurones
	T 161/18 3.5.05 12.05.20	T 161/18 3.5.05 12.05.20	T 161/18 3.5.05 12.05.20 8
5.	Beurteilung der erfinderischen Tätigkeit	Assessment of inventive step	Appréciation de l'activité inventive
5.1	Technischer Charakter einer Erfindung	Technical character of an invention	Caractère technique d'une invention
	T 1798/13 3.5.01 25.05.20	T 1798/13 3.5.01 25.05.20	T 1798/13 3.5.01 25.05.20 9
5.2	Angabe einer Zielsetzung bei der Formulierung der technischen Aufgabe	The aim to be achieved in the formulation of the technical problem	L'objectif à atteindre dans la formulation du problème technique
	T 1749/14 3.5.01 03.04.20	T 1749/14 3.5.01 03.04.20	T 1749/14 3.5.01 03.04.20 10
	T 232/14 3.5.01 06.10.20	T 232/14 3.5.01 06.10.20	T 232/14 3.5.01 06.10.20 10
	T 2314/16 3.5.01 07.09.20	T 2314/16 3.5.01 07.09.20	T 2314/16 3.5.01 07.09.20 11
II.	PATENTANMELDUNG UND ÄNDERUNGEN	PATENT APPLICATION AND AMENDMENTS	DEMANDE DE BREVET ET MODIFICATIONS
A.	Patentansprüche	Claims	Revendications
1.	Klarheit der Ansprüche – Angabe aller wesentlichen Merkmale	Clarity of claims – indication of all essential features	Clarté des revendications – indication de toutes les caractéristiques essentielles
	T 2574/16 3.5.07 21.11.19	T 2574/16 3.5.07 21.11.19	T 2574/16 3.5.07 21.11.19 11
2.	Klarheit eines Anspruchs, der eine Norm oder einen Standard angibt	Clarity of a claim specifying a norm or standard	Clarté d'une revendication mentionnant une norme ou un standard
	T 3003/18 3.4.02 12.02.20	T 3003/18 3.4.02 12.02.20	T 3003/18 3.4.02 12.02.20 12
3.	Stützung durch die Beschreibung	Claims supported by the description	Fondement des revendications sur la description
	T 695/16 3.2.07 05.05.20	T 695/16 3.2.07 05.05.20	T 695/16 3.2.07 05.05.20 12
4.	Anspruchsbegriffe mit einer im Stand der Technik anerkannten Bedeutung – Heranziehung der Beschreibung	Claim terms with a well-established meaning in the art – use of the description	Termes de la revendication ayant une signification bien établie dans l'état de la technique – utilisation de la description
	T 1642/17 3.3.04 16.11.20	T 1642/17 3.3.04 16.11.20	T 1642/17 3.3.04 16.11.20 13

B.	Einheitlichkeit der Erfindung	Unity of invention	Unité de l'invention	
1.	Bestimmung, ob es sich um eine oder mehrere "Erfindungen" handelt – vollständige Recherche – Rückzahlung einer weiteren Recherchegebühr	Determining whether one or several "inventions" – complete search – refund of further search fee	Détermination de l'existence d'une ou de plusieurs "inventions" – recherche complète – remboursement d'une taxe additionnelle acquittée au titre de la recherche	
	T 1414/18 3.5.03 15.07.20	T 1414/18 3.5.03 15.07.20	T 1414/18 3.5.03 15.07.20	14
C.	Ausreichende Offenbarung	Sufficiency of disclosure	Possibilité d'exécuter l'invention	
1.	Ausführbarkeit - neuronales Netz	Reproducibility – neural network	Exécution de l'invention – réseau neuronal	
	T 161/18 3.5.05 12.05.20	T 161/18 3.5.05 12.05.20	T 161/18 3.5.05 12.05.20	15
2.	Erforderlicher Umfang der Offenbarung bei einer medizinischen Verwendung – Plausibilität	Level of disclosure required for medical use – plausibility	Niveau de divulgation nécessaire pour les utilisations médicales – caractère plausible	
	T 184/16 3.3.02 12.12.19	T 184/16 3.3.02 12.12.19	T 184/16 3.3.02 12.12.19	15
D.	Priorität	Priority	Priorité	
1.	Prioritätsrecht des Anmelders oder seines Rechtsnachfolger	Right of priority of the applicant or his successor in title	Droit de priorité du demandeur ou de son ayant cause	
1.1	Identität der Anmelder bei mehreren Anmeldern der Prioritätsanmeldung	Identity of applicants – multiple applicants in the priority application	Identité des demandeurs – plusieurs demandeurs dans la demande fondant la priorité	
	T 844/18 3.3.08 16.01.20	T 844/18 3.3.08 16.01.20	T 844/18 3.3.08 16.01.20	16
E.	Änderungen	Amendments	Modifications	
1.	Artikel 123 (2) EPÜ – Erweiterung des Gegenstands	Article 123(2) EPC – added subject-matter	Article 123(2) CBE – extension de l'objet de la demande	
1.1	Aus der Gesamtheit der Anmeldung in der eingereichten Fassung entnommene Offenbarung	Disclosure derived from the whole of the application as filed	Divulgation dérivée de l'ensemble de la demande telle que déposée	
	T 1121/17 3.3.07 16.10.20	T 1121/17 3.3.07 16.10.20	T 1121/17 3.3.07 16.10.20	18
1.2	Festlegung eines Bereichs durch Kombination von Endpunkten offener Bereiche	Forming a range by combination of end-points of disclosed ranges	Création d'une plage en combinant les points limites de plages divulguées	
	T 113/19 3.3.05 17.01.20	T 113/19 3.3.05 17.01.20	T 113/19 3.3.05 17.01.20	19
1.3	Auswahl aus Listen – konvergierende Alternativen	Selection from lists – converging alternatives	Sélection à partir de listes – alternatives convergentes	
	T 1621/16 3.3.06 14.10.19	T 1621/16 3.3.06 14.10.19	T 1621/16 3.3.06 14.10.19	19
1.4	Offenbarte Disclaimer	Disclosed disclaimers	Disclaimers divulgués	
	T 1525/15 3.2.05 14.01.20	T 1525/15 3.2.05 14.01.20	T 1525/15 3.2.05 14.01.20	20
2.	Erweiterung des Schutzbereichs	Extension of the protection conferred	Extension de la protection conférée	
2.1	Kategoriewechsel	Change of claim category	Changement de catégorie	
	T 653/16 3.2.04 24.01.20	T 653/16 3.2.04 24.01.20	T 653/16 3.2.04 24.01.20	20

F.	Teilanmeldungen		Divisional applications		Demandes divisionnaires		
1.	Benennung der Vertragsstaaten in einer Teilanmeldung		Designation of contracting states in a divisional application		Désignation des États contractants dans une demande divisionnaire		
	J 12/18 3.1.01 19.05.20		J 12/18 3.1.01 19.05.20		J 12/18 3.1.01 19.05.20		21
III.	GEMEINSAME VORSCHRIFTEN FÜR DIE VERFAHREN VOR DEM EPA		RULES COMMON TO ALL PROCEEDINGS BEFORE THE EPO		PRINCIPES DIRECTEURS DE LA PROCÉDURE DEVANT L'OEB		
A.	Rechtliches Gehör		Right to be heard		Droit d'être entendu		
1.	Rechtliches Gehör in der mündlichen Verhandlung		The right to be heard in oral proceedings		Le droit d'être entendu pendant la procédure orale		
	T 1414/18 3.5.03 15.07.20		T 1414/18 3.5.03 15.07.20		T 1414/18 3.5.03 15.07.20		22
B.	Mündliche Verhandlung		Oral proceedings		Procédure orale		
1.	Mündliche Verhandlung als Videokonferenz		Oral proceedings held by videoconference		Procédure orale sous forme de visioconférence		
	T 1378/16 3.5.03 08.05.20		T 1378/16 3.5.03 08.05.20		T 1378/16 3.5.03 08.05.20		22
	T 492/18 3.2.04 12.10.20		T 492/18 3.2.04 12.10.20		T 492/18 3.2.04 12.10.20		23
C.	Beweisrecht		Law of evidence		Droit de la preuve		
1.	Beweiswürdigung der ersten Instanz		Evaluation of evidence by the department of first instance		Appréciation faite par la première instance		
	T 1418/17 3.2.01 17.07.20		T 1418/17 3.2.01 17.07.20		T 1418/17 3.2.01 17.07.20		24
	T 1057/15 3.5.03 29.09.20		T 1057/15 3.5.03 29.09.20		T 1057/15 3.5.03 29.09.20		24
	T 1604/16 3.2.02 07.12.20		T 1604/16 3.2.02 07.12.20		T 1604/16 3.2.02 07.12.20		25
D.	Besorgnis der Befangenheit		Suspected partiality		Partialité		
1.	Besorgnis der Befangenheit von Mitgliedern der erstinstanzlichen Organe		Suspected partiality of members of the departments of first instance		Soupçons de partialité à l'égard de membres des instances du premier degré		
1.1	Zurückverweisung und erneute Verhandlung		Remittal and rehearing of a case		Renvoi et réexamen d'une affaire		
	T 2475/17 3.2.05 09.03.20		T 2475/17 3.2.05 09.03.20		T 2475/17 3.2.05 09.03.20		26
E.	Formale Aspekte der Entscheidungen der Organe des EPA		Formal aspects of decisions of EPO departments		Aspects formels des décisions des instances de l'OEB		
	T 989/19 3.5.03 25.05.20		T 989/19 3.5.03 25.05.20		T 989/19 3.5.03 25.05.20		27
F.	Kostenverteilung		Apportionment of costs		Répartition des frais		
	T 101/17 3.2.04 29.01.20		T 101/17 3.2.04 29.01.20		T 101/17 3.2.04 29.01.20		28

G. Gebührenordnung	Rules relating to Fees	Règlement relatif aux taxes	
1. Keine Rückzahlung von mit Rechtsgrund angeforderten und gezahlten Jahresgebühren T 2069/18 3.5.05 21.01.20	No refund of duly imposed and paid renewal fees T 2069/18 3.5.05 21.01.20	Pas de remboursement des taxes annuelles dûment exigées et acquittées T 2069/18 3.5.05 21.01.20	28
2. Abbuchungsauftrag – nicht ausreichende Zahlung der Beschwerdegebühr T 2620/18 3.2.06 16.09.20 T 3023/18 3.3.09 06.12.19	Debit orders – underpayment of the fee for appeal T 2620/18 3.2.06 16.09.20 T 3023/18 3.3.09 06.12.19	Ordres de débit – paiement insuffisant de la taxe de recours T 2620/18 3.2.06 16.09.20 T 3023/18 3.3.09 06.12.19	29 29
IV. VERFAHREN VOR DER ERSTEN INSTANZ	PROCEEDINGS BEFORE THE DEPARTMENTS OF FIRST INSTANCE	PROCÉDURES DEVANT LES INSTANCES DU PREMIER DEGRÉ	
A. Prüfungsverfahren	Examination procedure	Procédure d'examen	
1. Entscheidungen mangels einer vom Anmelder vorgelegten oder gebilligten Fassung (Artikel 113 (2) EPÜ) T 2277/19 3.2.02 11.12.19	Decisions with no text submitted or agreed by the applicant (Article 113(2) EPC) T 2277/19 3.2.02 11.12.19	Décisions rendues en l'absence d'un texte soumis ou accepté par le demandeur (article 113(2) CBE) T 2277/19 3.2.02 11.12.19	29
2. Zustimmung des Anmelders zum Text T 265/20 3.5.05 26.10.20	Approval of the text by the applicant T 265/20 3.5.05 26.10.20	Accord sur le texte par le demandeur T 265/20 3.5.05 26.10.20	30
3. Änderungen nach dem Erteilungsbeschluss T 646/20 3.2.04 11.11.20	Amendments after the decision to grant T 646/20 3.2.04 11.11.20	Modifications produites après la décision de délivrance T 646/20 3.2.04 11.11.20	31
4. Zurücknahme der Patentanmeldung	Withdrawal of the patent application	Retrait de la demande de brevet	
4.1 Berichtigung der Zurücknahme der Anmeldung nach Regel 139 EPÜ J 6/19 3.1.01 15.01.20 J 7/19 3.1.01 15.01.20	Correction of the withdrawal of the application under Rule 139 EPC J 6/19 3.1.01 15.01.20 J 7/19 3.1.01 15.01.20	Rectification du retrait de la demande en vertu de la règle 139 CBE J 6/19 3.1.01 15.01.20 J 7/19 3.1.01 15.01.20	31 32
B. Einspruchsverfahren	Opposition procedure	Procédure d'opposition	
1. Einspruchseinlegung und Zulässigkeitsvoraussetzungen – Entrichtung der Einspruchsgebühr T 1000/19 3.3.03 20.03.20	Filing and admissibility requirements – payment of opposition fee T 1000/19 3.3.03 20.03.20	Formation de l'opposition et conditions à remplir pour qu'elle soit recevable – paiement de la taxe d'opposition T 1000/19 3.3.03 20.03.20	33
2. Verspätetes Vorbringen – Begriff der "Verspätung" T 2734/16 3.2.03 15.10.19	Late submissions – concept of "in due time" T 2734/16 3.2.03 15.10.19	Moyens invoqués tardivement – Notion de production "en temps utile" T 2734/16 3.2.03 15.10.19	34

3.	Änderungen im Einspruchsverfahren	Amendments in opposition proceedings	Modifications au cours de la procédure d'opposition	
3.1	Regel 80 EPÜ	Rule 80 EPC	Règle 80 CBE	
	T 2450/17 3.3.05 10.01.20	T 2450/17 3.3.05 10.01.20	T 2450/17 3.3.05 10.01.20	34
	T 1285/15 3.2.05 18.11.19	T 1285/15 3.2.05 18.11.19	T 1285/15 3.2.05 18.11.19	35
	T 2063/15 3.2.06 12.12.19	T 2063/15 3.2.06 12.12.19	T 2063/15 3.2.06 12.12.19	35
	T 1764/17 3.2.04 22.09.20	T 1764/17 3.2.04 22.09.20	T 1764/17 3.2.04 22.09.20	35
3.2	Zeitrahmen für die Einreichung von Änderungen	Time frame for filing amendments	Calendrier afférent au dépôt de modifications	
	T 756/18 3.2.07 16.12.19	T 756/18 3.2.07 16.12.19	T 756/18 3.2.07 16.12.19	36
	T 966/17 3.2.01 30.10.20	T 966/17 3.2.01 30.10.20	T 966/17 3.2.01 30.10.20	36
	T 84/17 3.3.06 22.09.20	T 84/17 3.3.06 22.09.20	T 84/17 3.3.06 22.09.20	37
V.	VERFAHREN VOR DEN BESCHWERDEKAMMERN	PROCEEDINGS BEFORE THE BOARDS OF APPEAL	PROCÉDURES DEVANT LES CHAMBRES DE RECOURS	
A.	Beschwerdeverfahren	Appeal procedure	Procédure de recours	
1.	VOBK 2020	RPB 2020	RPCR 2020	
1.1	Vorrangiges Ziel des Beschwerdeverfahrens – Artikel 12 (2) VOBK 2020	Primary object of the appeal proceedings – Article 12(2) RPBA 2020	Objet premier de la procédure de recours – Article 12(2) RPCR 2020	
	T 1604/16 3.2.02 07.12.20	T 1604/16 3.2.02 07.12.20	T 1604/16 3.2.02 07.12.20	38
1.2	Entscheidungsgründe in gekürzter Form	Reasons for decisions in abridged form	Formulation des motifs d'une décision sous forme abrégée	
	T 1687/17 3.2.01 09.01.20	T 1687/17 3.2.01 09.01.20	T 1687/17 3.2.01 09.01.20	38
	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	38
2.	Materielle Beschwerdeberechtigung (Artikel 107 EPÜ)	Party adversely affected (Article 107 EPC)	Partie déboutée (article 107 CBE)	
	T 265/20 3.5.05 26.10.20	T 265/20 3.5.05 26.10.20	T 265/20 3.5.05 26.10.20	38
3.	Ermäßigte Beschwerdegebühr bei Beschwerden natürlicher Personen oder bestimmter Einheiten	Reduced fee for appeal filed by a natural person or an entity	Montant réduit de la taxe de recours lorsque le recours est formé par une personne physique ou une entité	
	T 1060/19 3.5.06 11.02.20	T 1060/19 3.5.06 11.02.20	T 1060/19 3.5.06 11.02.20	40
	T 225/19 3.2.05 16.10.20	T 225/19 3.2.05 16.10.20	T 225/19 3.2.05 16.10.20	40
	T 3023/18 3.3.09 06.12.19	T 3023/18 3.3.09 06.12.19	T 3023/18 3.3.09 06.12.19	41
	T 2620/18 3.2.06 16.09.20	T 2620/18 3.2.06 16.09.20	T 2620/18 3.2.06 16.09.20	41
4.	Inhalt der Beschwerdebegründung	Content of the statement of grounds of appeal	Contenu du mémoire exposant les motifs du recours	
	T 2884/18 3.2.01 28.05.20	T 2884/18 3.2.01 28.05.20	T 2884/18 3.2.01 28.05.20	42

5.	Überprüfung erstinstanzlicher Ermessensentscheidungen	Review of first-instance discretionary decisions	Révision de décisions prises par les instances du premier degré dans l'exercice de leur pouvoir d'appréciation
	T 2603/18 3.2.06 20.02.20	T 2603/18 3.2.06 20.02.20	T 2603/18 3.2.06 20.02.20 43
	T 467/15 3.5.02 10.12.19	T 467/15 3.5.02 10.12.19	T 467/15 3.5.02 10.12.19 43
	T 487/16 3.2.06 30.04.20	T 487/16 3.2.06 30.04.20	T 487/16 3.2.06 30.04.20 43
	T 617/16 3.5.03 10.07.20	T 617/16 3.5.03 10.07.20	T 617/16 3.5.03 10.07.20 44
	T 2049/16 3.2.05 06.10.20	T 2049/16 3.2.05 06.10.20	T 2049/16 3.2.05 06.10.20 44
6.	Neues Vorbringen im Beschwerdeverfahren	New submissions on appeal	Nouveaux moyens invoqués dans la procédure de recours
6.1	Verspätetes Vorbringen neuer Argumente	Late submission of new arguments	Présentation de nouveaux arguments
	T 1875/15 3.3.02 03.12.19	T 1875/15 3.3.02 03.12.19	T 1875/15 3.3.02 03.12.19 44
6.2	Grundsätze zum verspäteten Vorbringen – Inter partes Verfahren – VOBK 2007	Principles applying to late submissions – inter partes proceedings – RPBA 2007	Principes régissant les moyens invoqués tardivement – Procédure inter partes – RPCR 2007
	T 369/15 3.2.05 02.10.19	T 369/15 3.2.05 02.10.19	T 369/15 3.2.05 02.10.19 45
6.3	Artikel 12 (4) VOBK 2007	Article 12(4) RPBA 2007	Article 12(4) RPCR 2007
	T 101/17 3.2.04 29.01.20	T 101/17 3.2.04 29.01.20	T 101/17 3.2.04 29.01.20 45
6.4	Verfahrensstand – Verfahrensökonomie – VOBK 2007	State of proceedings – procedural economy – RPBA 2007	État de la procédure – économie de la procédure – RPCR 2007
	T 2734/16 3.2.03 15.10.19	T 2734/16 3.2.03 15.10.19	T 2734/16 3.2.03 15.10.19 46
6.5	Änderung des Vorbringen eines Beteiligten – VOBK 2020	Amendment to a party's case – RPBA 2020	Modification des moyens invoqués par une partie – RPCR 2020
	T 1480/16 3.2.01 05.02.20	T 1480/16 3.2.01 05.02.20	T 1480/16 3.2.01 05.02.20 46
	T 482/19 3.2.01 12.10.20	T 482/19 3.2.01 12.10.20	T 482/19 3.2.01 12.10.20 47
	T 995/18 3.2.01 22.10.20	T 995/18 3.2.01 22.10.20	T 995/18 3.2.01 22.10.20 47
	T 1217/17 3.2.01 25.09.20	T 1217/17 3.2.01 25.09.20	T 1217/17 3.2.01 25.09.20 47
6.6	Vorbringen mit Einreichung der Beschwerdebegründung oder Erwiderung – erste Phase des Beschwerdeverfahrens – Artikel 12 (3) – (8) VOBK 2020	Submissions made in the statement of grounds or the reply – first stage of the appeal proceedings – Article 12(3) to (6) RPBA 2020	Observations faites dans le mémoire ou la réponse – première phase de la procédure de recours – Article 12(3) à (6) RPCR 2020
	J 12/18 3.1.01 19.05.20	J 12/18 3.1.01 19.05.20	J 12/18 3.1.01 19.05.20 48
	J 14/18 3.1.01 19.05.20	J 14/18 3.1.01 19.05.20	J 14/18 3.1.01 19.05.20 48
6.7	Vorbringen nach Einreichung der Beschwerdebegründung oder Erwiderung – zweite Phase des Beschwerdeverfahrens – Artikel 13 (1) VOBK 2020	Submissions made after filing of statement of grounds or reply – second stage of the appeal proceedings – Article 13(1) RPBA 2020	Observations faites après le dépôt du mémoire ou de la réponse – deuxième phase de la procédure de recours – Article 13(1) RPCR 2020
6.7.1	Neue Angriffslinien gegen die erfinderische Tätigkeit gestützt auf im erstinstanzlichen Verfahren eingereichte Unterlagen – nicht zugelassen	New lines of attack in respect of inventive step based on documents submitted during first-instance proceedings – not admitted	Nouvelles lignes d'attaque concernant l'activité inventive basées sur des documents soumis au cours de la procédure de première instance – non admises
	T 256/17 3.2.07 17.04.20	T 256/17 3.2.07 17.04.20	T 256/17 3.2.07 17.04.20 49

6.7.2	Neue Dokumente in Reaktion auf Versuchsdaten des Patentinhabers – zugelassen	New documents in response to patent proprietor's experimental data – admitted	Nouveaux documents en réponse aux données d'essai du titulaire de brevet – admis	
	T 23/17 3.3.03 30.01.20	T 23/17 3.3.03 30.01.20	T 23/17 3.3.03 30.01.20	49
6.8	Vorbringen nach Erhalt der Ladung zur mündlichen Verhandlung – dritte Phase des Beschwerdeverfahrens – Übergangsfälle	Submissions made after notification of summons – third stage of the appeal proceedings – transitional cases	Observations faites après la signification d'une citation – troisième phase de la procédure de recours – cas transitoires	
6.8.1	Gleichzeitige Anwendung des Artikel 13 VOBK 2007 und des Artikel 13 (1) VOBK 2020	Simultaneous application of Article 13 RPBA 2007 and Article 13(1) RPBA 2020	Application simultanée de l'article 13 RPCR 2007 et de l'article 13(1) RPCR 2020	
	T 634/16 3.2.06 10.01.20	T 634/16 3.2.06 10.01.20	T 634/16 3.2.06 10.01.20	50
	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	50
	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	51
	T 1597/16 3.2.03 14.01.20	T 1597/16 3.2.03 14.01.20	T 1597/16 3.2.03 14.01.20	51
	T 584/17 3.4.02 10.02.20	T 584/17 3.4.02 10.02.20	T 584/17 3.4.02 10.02.20	51
6.8.2	Anwendbarkeit des Artikel 13 (2) VOBK 2020 bei Verlegung der mündlichen Verhandlung	Applicability of Article 13(2) RPBA 2020 in case of postponement of oral proceedings	Applicabilité de l'article 13(2) RPCR 2020 en cas de report de la procédure orale	
	T 950/16 3.2.08 25.09.20	T 950/16 3.2.08 25.09.20	T 950/16 3.2.08 25.09.20	52
6.8.3	Neuer Antrag in Reaktion auf vorläufige Einschätzung der Kammer – zugelassen	New request in response to preliminary opinion of the board clarifying its objections – admitted	Nouvelle requête en réponse à l'opinion provisoire de la chambre clarifiant ses objections – admise	
	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	52
6.8.4	Neue Hilfsanträge in Reaktion auf vorläufige Einschätzung der Kammer – zentrale Bedeutung des strittigen Punktes schon vorher offensichtlich – nicht zugelassen	New auxiliary requests in response to the board's preliminary opinion – fundamental importance of the point at issue already clear beforehand – not admitted	Nouvelles requêtes subsidiaires en réponse à l'opinion provisoire de la chambre – importance fondamentale du point litigieux déjà claire au préalable – non admises.	
	T 136/16 3.2.06 03.03.20	T 136/16 3.2.06 03.03.20	T 136/16 3.2.06 03.03.20	53
6.8.5	Angriff auf die erfinderische Tätigkeit in der mündlichen Verhandlung erstmals substantiiert – nicht zugelassen	Inventive step attack substantiated for the first time at oral proceedings – not admitted	Attaque relative à l'activité inventive motivée pour la première fois lors de la procédure orale – non admise	
	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	T 2227/15 3.2.07 29.01.20	53
6.8.6	Kein anderer sachlicher bzw. patentrechtlicher Streitgegenstand durch die Beschränkung entstanden und prima facie gewählbar – Anträge zugelassen	Limitation not leading to any new disputed points of fact or patent law and prima facie allowable – requests admitted	Limitation ne conduisant à aucun nouveau point de fait ou de droit des brevets contesté et admissible à première vue – demandes admises.	
	T 1597/16 3.2.03 14.01.20	T 1597/16 3.2.03 14.01.20	T 1597/16 3.2.03 14.01.20	54
6.8.7	Antrag räumt Einwand nicht prima facie aus – nicht zugelassen	Request does not prima facie overcome objection – not admitted	Requête ne surmontant pas prima facie l'objection – non admise	
	T 1187/15 3.2.02 20.01.20	T 1187/15 3.2.02 20.01.20	T 1187/15 3.2.02 20.01.20	54

6.9	Vorbringen nach Zustellung der Ladung – dritte Phase des Beschwerdeverfahrens – Anwendung von Artikel 13 (2) VOBK 2020	Submissions made after notification of summons – third stage of appeal proceedings – Article 13(2) RPBA 2020	Observations faites après la signification de la citation – troisième phase de la procédure de recours – Article 13(2) RPCR 2020	
6.9.1	Mündliche Verhandlung nach Zustellung der Ladung abgesagt – Artikel 13 (2) VOBK 2020 gilt weiterhin T 2279/16 3.4.03 03.06.20	Oral proceedings cancelled after notification of summons – Article 13(2) RPBA 2020 still applies T 2279/16 3.4.03 03.06.20	Procédure orale annulée après signification de la citation – l'article 13(2) RPCR 2020 reste applicable T 2279/16 3.4.03 03.06.20	55
6.9.2	Neuer Antrag auf der Grundlage des mit der Beschwerdebeurteilung eingereichten Antrags, der neue in der Mitteilung der Kammer erhobene Einwände ausräumt – zugelassen T 1278/18 3.2.03 04.06.20	New request based on request filed with statement of grounds and overcoming new objections raised in board's communication – admitted T 1278/18 3.2.03 04.06.20	Nouvelle requête basée sur une requête déposée avec le mémoire et surmontant les nouvelles objections soulevées dans la notification de la chambre – admise T 1278/18 3.2.03 04.06.20	56
6.9.3	Neuer Antrag basierend auf einem Antrag, der als Antwort auf eine Erwiderung des Beschwerdegegners eingereicht wurde und redaktionelle Änderungen enthält um Unstimmigkeiten zu beseitigen – zugelassen T 131/18 3.2.04 02.10.20	New request based on request filed in response to reply of the respondent and containing editorial amendments to remove inconsistencies – admitted T 131/18 3.2.04 02.10.20	Nouvelle requête basée sur une requête déposée en réplique à la réponse de l'intimé et contenant des modifications rédactionnelles pour supprimer des incohérences – admise T 131/18 3.2.04 02.10.20	56
6.9.4	Neuer Antrag in Reaktion auf Einwände, die nicht über den Rahmen des ursprünglichen Einwands der Kammer hinausgehen – nicht zugelassen T 2214/15 3.5.02 21.07.20	New request in response to objections which do not go beyond the framework of the board's initial objection – not admitted T 2214/15 3.5.02 21.07.20	Nouvelle requête en réponse à des objections qui ne dépassent pas le cadre de l'objection initiale de la chambre – non admise T 2214/15 3.5.02 21.07.20	57
6.9.5	Neuer Antrag in Reaktion auf Meinungsänderung der Kammer – nicht zugelassen, da Einwände und Argumente bereits bekannt T 752/16 3.5.03 27.08.20	New request in response to change of opinion of the board – not admitted as objection and arguments already known T 752/16 3.5.03 27.08.20	Nouvelle requête en réponse à un changement d'avis de la chambre – non admise car objection et arguments déjà connus. T 752/16 3.5.03 27.08.20	58
6.9.6	Änderung, die nicht Substantielles zu dem erhobenen Einwand beiträgt – nicht zugelassen T 953/16 3.5.03 14.04.20	Amendment not adding anything of substance to the discussion of the objection raised – not admitted T 953/16 3.5.03 14.04.20	Modification n'ajoutant rien de substantiel à la discussion de l'objection soulevée – non admise T 953/16 3.5.03 14.04.20	58
6.9.7	Neuer Antrag als Antwort auf eine vorläufige Stellungnahme der Kammer aufgrund früherer Einwände T 1187/16 3.5.02 13.07.20	New request in response to board's preliminary opinion based on earlier objections T 1187/16 3.5.02 13.07.20	Nouvelle requête en réponse à l'opinion provisoire de la chambre basée sur des objections antérieures. T 1187/16 3.5.02 13.07.20	59
6.9.8	Neues Dokument und neue Angriffslinien als Antwort auf die vorläufige Stellungnahme der Kammer, die ausschließlich auf früherem Vorbringen beruht – nicht zugelassen T 908/19 3.2.04 25.05.20	New document and new lines of attack in response to board's preliminary opinion exclusively based on earlier submissions – not admitted T 908/19 3.2.04 25.05.20	Nouveau document et nouvelles lignes d'attaque en réponse à l'opinion provisoire de la chambre fondée exclusivement sur des observations antérieures – non admis T 908/19 3.2.04 25.05.20	59

7.	Zurückverweisung an die erste Instanz	Remittal to the department of first instance	Renvoi à l'instance du premier degré	
7.1	Artikel 11 VOBK 2020 – besondere Gründe	Article 11 RPBA 2020 – Special reasons	Article 11 RPCR 2020 – Raisons particulières	
	T 731/17 3.5.07 15.01.20	T 731/17 3.5.07 15.01.20	T 731/17 3.5.07 15.01.20	60
	T 1966/16 3.3.07 20.01.20	T 1966/16 3.3.07 20.01.20	T 1966/16 3.3.07 20.01.20	60
	T 1531/16 3.2.07 25.05.20	T 1531/16 3.2.07 25.05.20	T 1531/16 3.2.07 25.05.20	60
	T 3247/19 3.2.07 04.03.20	T 3247/19 3.2.07 04.03.20	T 3247/19 3.2.07 04.03.20	61
	T 350/17 3.3.06 04.09.20	T 350/17 3.3.06 04.09.20	T 350/17 3.3.06 04.09.20	61
7.2	Unvollständige Recherche	Incomplete search	Recherche incomplète	
	T 547/14 3.5.01 29.01.20	T 547/14 3.5.01 29.01.20	T 547/14 3.5.01 29.01.20	62
	T 97/14 3.5.01 25.05.20	T 97/14 3.5.01 25.05.20	T 97/14 3.5.01 25.05.20	62
7.3	Zurückverweisung zur Anpassung der Beschreibung	Remittal for adaptation of the description	Renvoi pour adaptation de la description	
	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	T 32/16 3.2.06 14.01.20	62
7.4	Anordnung einer Änderung der Zusammensetzung des erstinstanzlichen Organs	Ordering a different composition of the department of first instance	Dispositif ordonnant une modification de la composition de l'instance du premier degré	
	T 2475/17 3.2.05 09.03.20	T 2475/17 3.2.05 09.03.20	T 2475/17 3.2.05 09.03.20	63
8.	Rückzahlung der Beschwerdegebühr	Reimbursement of appeal fees	Remboursement de la taxe de recours	
8.1	Wesentlicher Verfahrensmangel	Substantial procedural violation	Vice substantial de procédure	
	T 74/17 3.2.04 16.09.20	T 74/17 3.2.04 16.09.20	T 74/17 3.2.04 16.09.20	63
8.2	Übermäßig lange Verfahrensdauer	Excessive length of proceedings	Durée excessive de la procédure	
	T 1243/17 3.5.06 04.12.20	T 1243/17 3.5.06 04.12.20	T 1243/17 3.5.06 04.12.20	63
8.3	Rücknahme der Beschwerde oder Rücknahme des Antrags auf mündliche Verhandlung gemäß Regel 103 (4) EPÜ (25%)	Withdrawal of appeal or withdrawal of request for oral proceedings under Rule 103(4) EPC (25%)	Retrait du recours ou retrait de la requête en procédure orale selon la règle 103(4) CBE (25%)	
	T 1610/15 3.2.05 09.10.20	T 1610/15 3.2.05 09.10.20	T 1610/15 3.2.05 09.10.20	64
	T 777/15 3.3.01 17.11.20	T 777/15 3.3.01 17.11.20	T 777/15 3.3.01 17.11.20	65
	T 1730/16 3.3.01 28.10.20	T 1730/16 3.3.01 28.10.20	T 1730/16 3.3.01 28.10.20	65
	T 73/17 3.2.07 15.06.20	T 73/17 3.2.07 15.06.20	T 73/17 3.2.07 15.06.20	65
	T 517/17 3.5.03 27.10.20	T 517/17 3.5.03 27.10.20	T 517/17 3.5.03 27.10.20	66
	T 2044/16 3.2.01 24.06.20	T 2044/16 3.2.01 24.06.20	T 2044/16 3.2.01 24.06.20	67
	T 110/18 3.3.05 12.06.20	T 110/18 3.3.05 12.06.20	T 110/18 3.3.05 12.06.20	67
	T 1678/17 3.5.05 30.06.20	T 1678/17 3.5.05 30.06.20	T 1678/17 3.5.05 30.06.20	68
B.	Verfahren vor der Großen Beschwerdekammer	Proceedings before the Enlarged Board of Appeal	Procédures devant la Grande Chambre de recours	
1.	Vorlage durch den Präsidenten des EPA	Referral by the President of the EPO	Saisine de la Grande Chambre par le Président de l'OEB	
	G 3/19 14.05.20	G 3/19 14.05.20	G 3/19 14.05.20	68
2.	Gründe für einen Überprüfungsantrag	Grounds for petition for review	Motifs de la requête en révision	

2.1	Artikel 112a (2) c) EPÜ – angeblicher schwerwiegender Verstoß gegen Artikel 113 EPÜ	Article 112a(2)(c) EPC – alleged fundamental violation of Article 113 EPC	Article 112bis(2)c) CBE – violation fondamentale alléguée de l'article 113 CBE				
	R 10/18	17.12.20	R 10/18	17.12.20	R 10/18	17.12.20	69

ANLAGE 2**Zitierte Entscheidungen****Entscheidungen und
Stellungnahmen der Großen
Beschwerdekammer über
Vorlagefragen**

G	1/84	24.07.85	OJ 1985,299
G	2/88	11.12.89	OJ 1990,093
G	6/88	11.12.89	OJ 1990,114
G	5/91	05.05.92	OJ 1992,617
G	9/91	31.03.93	OJ 1993,408
G	1/93	02.02.94	OJ 1994,541
G	7/93	13.05.94	OJ 1994,775
G	3/95	27.11.95	OJ 1996,169
G	3/97	21.01.99	OJ 1999,245
G	1/98	20.12.99	OJ 2000,111
G	1/03	08.04.04	OJ 2004,413
G	1/05	07.12.06	OJ 2008,271
G	1/07	15.02.10	OJ 2011,134
G	2/07	09.12.10	OJ 2012,130
G	1/08	09.12.10	OJ 2012,206
G	3/08	12.05.10	OJ 2011,010
G	1/10	23.07.12	OJ 2013,194
G	2/10	30.08.11	OJ 2012,376
G	1/12	30.04.14	OJ 2014,A114
G	2/12	25.03.15	OJ 2016,A27
G	2/13	25.03.15	OJ 2016,A28
G	1/16	18.12.17	OJ 2018,A70
G	1/18	18.07.19	OJ 2020,A26
G	3/19	14.05.20	OJ 2020,A119

ANNEX 2**Cited decisions****Decisions and opinions of the
Enlarged Board of Appeal on
referrals**

ECLI:EP:BA:1985:G000184.19850724	35
ECLI:EP:BA:1989:G000288.19891211	21
ECLI:EP:BA:1989:G000688.19891211	5, 6
ECLI:EP:BA:1992:G000591.19920505	26
ECLI:EP:BA:1993:G000991.19930331	45
ECLI:EP:BA:1994:G000193.19940202	19
ECLI:EP:BA:1994:G000793.19940513	37, 38
ECLI:EP:BA:1995:G000395.19951127	68
ECLI:EP:BA:1999:G000397.19990121	24
ECLI:EP:BA:1999:G000198.19991220	1
ECLI:EP:BA:2004:G000103.20040408	20
ECLI:EP:BA:2006:G000105.20061207	26
ECLI:EP:BA:2010:G000107.20100215	2
ECLI:EP:BA:2010:G000207.20101209	1
ECLI:EP:BA:2010:G000108.20101209	1
ECLI:EP:BA:2010:G000308.20100512	68
ECLI:EP:BA:2012:G000110.20120723	31
ECLI:EP:BA:2011:G000210.20110830	18, 20
ECLI:EP:BA:2014:G000112.20140430	24, 33, 42
ECLI:EP:BA:2015:G000212.20150325	1, 2, 69
ECLI:EP:BA:2015:G000213.20150325	1, 2, 69
ECLI:EP:BA:2017:G000116.20171218	20
ECLI:EP:BA:2019:G000118.20190718	39, 41
ECLI:EP:BA:2020:G000319.20200514	1, 68

ANNEXE 2**Décisions citées****Décisions et avis de la Grande
Chambre de recours concernant des
saisines****Entscheidungen der Großen
Beschwerdekammer über Anträge
auf Überprüfung**

R	2/14	22.04.16
R	8/15	18.07.16
R	10/18	17.12.20

**Decisions of the Enlarged Board of
Appeal on petitions for review**

ECLI:EP:BA:2016:R000214.20160422	69
ECLI:EP:BA:2016:R000815.20160718	69, 70
ECLI:EP:BA:2020:R001018.20201217	69

**Décisions de la Grande Chambre de
recours concernant des requêtes en
révision****Entscheidungen der Juristischen
Beschwerdekammer**

J	8/80	3.1.01	18.07.80
J	4/82	3.1.01	21.07.82
J	10/87	3.1.01	11.02.88
J	25/03	3.1.01	27.04.05
J	16/17	3.1.01	12.07.18
J	8/18	3.1.01	27.03.19
J	12/18	3.1.01	19.05.20
J	13/18	3.1.01	19.05.20

**Decisions of the Legal Board of
Appeal**

OJ 1980,293	ECLI:EP:BA:1980:J000880.19800718	32
OJ 1982,385	ECLI:EP:BA:1982:J000482.19820721	32
OJ 1989,323	ECLI:EP:BA:1988:J001087.19880211	32
OJ 2006,395	ECLI:EP:BA:2005:J002503.20050427	32
	ECLI:EP:BA:2018:J001617.20180712	27
	ECLI:EP:BA:2019:J000818.20190327	40
	ECLI:EP:BA:2020:J001218.20200519	21, 48
	ECLI:EP:BA:2020:J001318.20200519	21

**Décisions de la chambre de recours
juridique**

J	14/18	3.1.01	19.05.20	ECLI:EP:BA:2020:J001418.20200519	21, 48
J	6/19	3.1.01	15.01.20	ECLI:EP:BA:2020:J000619.20200115	31, 32
J	7/19	3.1.01	15.01.20	ECLI:EP:BA:2020:J000719.20200115	32
J	3/20	3.1.01	19.05.20	ECLI:EP:BA:2020:J000320.20200519	21

**Entscheidungen der Technischen
Beschwerdekammern**
**Decisions of the technical boards of
appeal**
**Décisions des chambres de recours
techniques**

T	32/81	3.2.01	05.03.82	OJ 1982,225	ECLI:EP:BA:1982:T003281.19820305	7
T	152/82	3.3.01	05.09.83	OJ 1984,301	ECLI:EP:BA:1983:T015282.19830905	33, 41
T	17/83	3.3.01	20.09.83	OJ 1984,307	ECLI:EP:BA:1983:T001783.19830920	33
T	152/85	3.2.01	28.05.86	OJ 1987,191	ECLI:EP:BA:1986:T015285.19860528	33
T	390/86	3.3.01	17.11.87	OJ 1989,030	ECLI:EP:BA:1987:T039086.19871117	27
T	251/88	3.3.01	14.11.89		ECLI:EP:BA:1989:T025188.19891114	26
T	939/91	3.3.04	05.12.94		ECLI:EP:BA:1994:T093991.19941205	26
T	1/92	3.3.02	27.04.92	OJ 1993,685	ECLI:EP:BA:1992:T000192.19920427	31
T	422/93	3.3.01	21.09.95	OJ 1997,025	ECLI:EP:BA:1995:T042293.19950921	7
T	433/93	3.4.01	06.12.96	OJ 1997,509	ECLI:EP:BA:1996:T043393.19961206	26
T	272/95	3.3.04	23.10.02	OJ 1999,590	ECLI:EP:BA:2002:T027295.20021023	69
T	463/95	3.5.02	29.01.97		ECLI:EP:BA:1997:T046395.19970129	37
T	610/95	3.3.02	21.07.99		ECLI:EP:BA:1999:T061095.19990721	35
T	615/95	3.3.01	16.12.97		ECLI:EP:BA:1997:T061595.19971216	19, 20
T	628/95	3.4.01	13.05.96		ECLI:EP:BA:1996:T062895.19960513	26
T	223/97	3.2.01	03.11.98		ECLI:EP:BA:1998:T022397.19981103	35
T	1221/97	3.4.02	13.10.98		ECLI:EP:BA:1998:T122197.19981013	26
T	26/98	3.4.01	30.04.02		ECLI:EP:BA:2002:T002698.20020430	7
T	71/99	3.4.02	20.06.01		ECLI:EP:BA:2001:T007199.20010620	26
T	806/99	3.4.02	24.10.00		ECLI:EP:BA:2000:T080699.20001024	33
T	188/00	3.4.03	05.05.03		ECLI:EP:BA:2003:T018800.20030505	15
T	727/00	3.3.06	22.06.01		ECLI:EP:BA:2001:T072700.20010622	19
T	15/01	3.3.04	17.06.2004	OJ 2006,153	ECLI:EP:BA:2004:T001501.20040617	17
T	315/03	3.3.08	06.07.04	OJ 2006,015	ECLI:EP:BA:2004:T031503.20040706	64, 69
T	95/04	3.4.03	29.09.04		ECLI:EP:BA:2004:T009504.20040929	26
T	474/04	3.3.07	30.06.05	OJ 2006,129	ECLI:EP:BA:2005:T047404.20050630	25
T	1329/04	3.3.08	28.06.05		ECLI:EP:BA:2005:T132904.20050628	16
T	666/05	3.3.04	13.11.08		ECLI:EP:BA:2008:T066605.20081113	69
T	783/05	3.3.05	08.07.08		ECLI:EP:BA:2008:T078305.20080708	12
T	922/05	3.2.04	07.03.07		ECLI:EP:BA:2007:T092205.20070307	42
T	1209/05	3.3.01	17.12.07		ECLI:EP:BA:2007:T120905.20071217	43
T	1213/05	3.3.04	27.09.07		ECLI:EP:BA:2007:T121305.20070927	69
T	173/06	3.3.04	10.08.06		ECLI:EP:BA:2006:T017306.20060810	14
T	1266/07	3.5.03	26.11.09		ECLI:EP:BA:2009:T126607.20091126	23
T	1549/07	3.3.03	13.12.10		ECLI:EP:BA:2010:T154907.20101213	44
T	1553/07	3.2.01	08.06.10		ECLI:EP:BA:2010:T155307.20100608	24
T	1705/07	3.3.10	10.06.10		ECLI:EP:BA:2010:T170507.20100610	45
T	1067/08	3.3.09	10.02.11		ECLI:EP:BA:2011:T106708.20110210	45
T	1485/08	3.3.01	20.12.12		ECLI:EP:BA:2012:T148508.20121220	37
T	1652/08	3.3.10	12.04.11		ECLI:EP:BA:2011:T165208.20110412	43
T	2362/08	3.3.07	14.03.11		ECLI:EP:BA:2011:T236208.20110314	26
T	108/09	3.3.02	14.02.13		ECLI:EP:BA:2013:T010809.20130214	16
T	162/09	3.5.05	13.09.12		ECLI:EP:BA:2012:T016209.20120913	45
T	812/09	3.3.06	08.07.11		ECLI:EP:BA:2011:T081209.20110708	19
T	1140/09	3.4.03	18.01.12		ECLI:EP:BA:2012:T114009.20120118	7

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T	2187/09	3.5.02	23.10.14	ECLI:EP:BA:2014:T218709.20141023	12
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T	1265/10	3.2.04	15.04.11	ECLI:EP:BA:2011:T126510.20110415	33
T	1848/10	3.3.04	28.02.11	ECLI:EP:BA:2011:T184810.20110228	28
T	2079/10	3.5.01	19.04.18	ECLI:EP:BA:2018:T207910.20180419	9
T	2221/10	3.3.08	04.02.14	ECLI:EP:BA:2014:T222110.20140204	13
T	2237/10	3.3.09	27.11.12	ECLI:EP:BA:2012:T223710.20121127	19
T	144/11	3.5.01	14.08.18	ECLI:EP:BA:2018:T014411.20180814	10
T	1459/11	3.3.03	21.07.15	ECLI:EP:BA:2015:T145911.20150721	58
T	1523/11	3.5.07	17.01.17	ECLI:EP:BA:2017:T152311.20170117	7
T	1760/11	3.3.01	16.11.12	ECLI:EP:BA:2012:T176011.20121116	16
T	1841/11	3.4.03	03.12.15	ECLI:EP:BA:2015:T184111.20151203	7
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T	2197/11	3.3.01	17.02.16	ECLI:EP:BA:2016:T219711.20160217	43
T	2565/11	3.2.01	05.04.16	ECLI:EP:BA:2016:T256511.20160405	24
T	129/12	3.3.06	29.05.15	ECLI:EP:BA:2015:T012912.20150529	37
T	544/12	3.3.09	22.11.13	ECLI:EP:BA:2013:T054412.20131122	37
T	1107/12	3.3.05	19.09.17	ECLI:EP:BA:2017:T110712.20170919	24
T	1568/12	3.2.03	30.04.15	ECLI:EP:BA:2015:T156812.20150430	43, 44
T	1848/12	3.2.07	16.12.16	ECLI:EP:BA:2016:T184812.20161216	45
T	1888/12	3.2.01	15.01.15	ECLI:EP:BA:2015:T188812.20150115	12
T	1914/12	3.2.05	13.06.18	ECLI:EP:BA:2018:T191412.20180613	44, 45
T	2057/12	3.4.01	09.05.18	ECLI:EP:BA:2018:T205712.20180509	7
T	25/13	3.2.08	20.11.14	ECLI:EP:BA:2014:T002513.20141120	7
T	26/13	3.2.05	02.12.16	ECLI:EP:BA:2016:T002613.20161202	43, 44
T	1082/13	3.5.01	31.01.19	ECLI:EP:BA:2019:T108213.20190131	10
T	1248/13	3.2.03	23.07.15	ECLI:EP:BA:2015:T124813.20150723	7
T	1798/13	3.5.01	25.05.20	ECLI:EP:BA:2020:T179813.20200525	9
T	2111/13	3.2.05	22.07.14	ECLI:EP:BA:2014:T211113.20140722	26
T	2415/13	3.3.09	06.10.15	ECLI:EP:BA:2015:T241513.20151006	37
T	97/14	3.5.01	25.05.20	ECLI:EP:BA:2020:T009714.20200525	62
T	195/14	3.5.06	12.02.19	ECLI:EP:BA:2019:T019514.20190212	23
T	232/14	3.5.01	06.10.20	ECLI:EP:BA:2020:T023214.20201006	10
T	265/14	3.3.05	03.07.18	ECLI:EP:BA:2018:T026514.20180703	67, 68
T	547/14	3.5.01	29.01.20	ECLI:EP:BA:2020:T054714.20200129	62
T	572/14	3.3.01	28.09.16	ECLI:EP:BA:2016:T057214.20160928	43
T	615/14	3.3.09	27.10.15	ECLI:EP:BA:2015:T061514.20151027	33
T	621/14	3.2.03	18.01.18	ECLI:EP:BA:2018:T062114.20180118	24
T	635/14	3.3.02	04.03.19	ECLI:EP:BA:2019:T063514.20190304	45
T	756/14	3.4.01	21.09.18	ECLI:EP:BA:2018:T075614.20180921	15
T	1201/14	3.5.05	09.02.17	ECLI:EP:BA:2017:T120114.20170209	44
T	1227/14	3.2.05	12.07.17	ECLI:EP:BA:2017:T122714.20170712	43
T	1462/14	3.4.01	01.10.19	ECLI:EP:BA:2019:T146214.20191001	7
T	1749/14	3.5.01	03.04.20	ECLI:EP:BA:2020:T174914.20200403	10
T	1788/14	3.2.01	15.02.16	ECLI:EP:BA:2016:T178814.20160215	26
T	1930/14	3.3.04	28.11.19	ECLI:EP:BA:2019:T193014.20191128	3, 4
T	1931/14	3.2.04	21.02.18	ECLI:EP:BA:2018:T193114.20180221	3, 4
T	2068/14	3.5.06	30.07.15	ECLI:EP:BA:2015:T206814.20150730	23
T	369/15	3.2.05	02.10.19	ECLI:EP:BA:2019:T036915.20191002	45
T	467/15	3.5.02	10.12.19	ECLI:EP:BA:2019:T046715.20191210	43
T	777/15	3.3.01	17.11.20	ECLI:EP:BA:2020:T077715.20201117	65

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T	1187/15	3.2.02	20.01.20	ECLI:EP:BA:2020:T118715.20200120	54
T	1196/15	3.5.07	18.10.16	ECLI:EP:BA:2016:T119615.20161018	12
T	1285/15	3.2.05	18.11.19	ECLI:EP:BA:2019:T128515.20191118	35
T	1381/15	3.3.09	08.03.19	ECLI:EP:BA:2019:T138115.20190308	45
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T	1601/15	3.2.05	04.12.19	ECLI:EP:BA:2019:T160115.20191204	8
T	1610/15	3.2.05	09.10.20	ECLI:EP:BA:2020:T161015.20201009	64
T	1824/15	3.5.06	26.07.16	ECLI:EP:BA:2016:T182415.20160726	63, 64
T	1875/15	3.3.02	03.12.19	ECLI:EP:BA:2019:T187515.20191203	44
T	2063/15	3.2.06	12.12.19	ECLI:EP:BA:2019:T206315.20191212	35
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T	2227/15	3.2.07	29.01.20	ECLI:EP:BA:2020:T222715.20200129	38, 51, 53
T	27/16	3.3.06	10.10.18	ECLI:EP:BA:2018:T002716.20181010	19, 20
T	32/16	3.2.06	14.01.20	ECLI:EP:BA:2020:T003216.20200114	50, 52, 62
T	72/16	3.2.05	20.02.20	ECLI:EP:BA:2020:T007216.20200220	3
T	136/16	3.2.06	03.03.20	ECLI:EP:BA:2020:T013616.20200303	53, 58
T	184/16	3.3.02	12.12.19	ECLI:EP:BA:2019:T018416.20191212	6, 15
T	487/16	3.2.06	30.04.20	ECLI:EP:BA:2020:T048716.20200430	43, 44
T	579/16	3.3.03	18.01.17	ECLI:EP:BA:2017:T057916.20170118	33
T	617/16	3.5.03	10.07.20	ECLI:EP:BA:2020:T061716.20200710	44
T	634/16	3.2.06	10.01.20	ECLI:EP:BA:2020:T063416.20200110	50, 52
T	653/16	3.2.04	24.01.20	ECLI:EP:BA:2020:T065316.20200124	20
T	688/16	3.2.04	22.07.19	ECLI:EP:BA:2019:T068816.20190722	36
T	695/16	3.2.07	05.05.20	ECLI:EP:BA:2020:T069516.20200505	12
T	752/16	3.5.03	27.08.20	ECLI:EP:BA:2020:T075216.20200827	58
T	932/16	3.3.07	26.11.20	ECLI:EP:BA:2018:T093216.20181126	23
T	950/16	3.2.08	25.09.20	ECLI:EP:BA:2020:T095016.20200925	52
T	953/16	3.5.03	14.04.20	ECLI:EP:BA:2020:T095316.20200414	58
T	1187/16	3.5.02	13.07.20	ECLI:EP:BA:2020:T118716.20200713	59
T	1378/16	3.5.03	08.05.20	ECLI:EP:BA:2020:T137816.20200508	22
T	1450/16	3.5.03	17.01.20	ECLI:EP:BA:2020:T145016.20200117	6
T	1480/16	3.2.01	05.02.20	ECLI:EP:BA:2020:T148016.20200205	46, 47
T	1531/16	3.2.07	25.05.20	ECLI:EP:BA:2020:T153116.20200525	60
T	1597/16	3.2.03	14.01.20	ECLI:EP:BA:2020:T159716.20200114	51, 54
T	1604/16	3.2.02	07.12.20	ECLI:EP:BA:2020:T160416.20201207	24, 25, 38
T	1621/16	3.3.06	14.10.19	ECLI:EP:BA:2019:T162116.20191014	19
T	1730/16	3.3.01	28.10.20	ECLI:EP:BA:2020:T173016.20201028	65
T	1966/16	3.3.07	20.01.20	ECLI:EP:BA:2020:T196616.20200120	60
T	2044/16	3.2.01	24.06.20	ECLI:EP:BA:2020:T204416.20200624	67
T	2049/16	3.2.05	06.10.20	ECLI:EP:BA:2020:T204916.20201006	44
T	2072/16	3.5.05	03.07.19	ECLI:EP:BA:2019:T207216.20190703	58
T	2081/16	3.5.03	15.11.18	ECLI:EP:BA:2018:T208116.20181115	30, 31
T	2279/16	3.4.03	03.06.20	ECLI:EP:BA:2020:T227916.20200603	55
T	2314/16	3.5.01	07.09.20	ECLI:EP:BA:2020:T231416.20200907	11
T	2350/16	3.2.05	18.10.19	ECLI:EP:BA:2019:T235016.20191018	4
T	2574/16	3.5.07	21.11.19	ECLI:EP:BA:2019:T257416.20191121	11
T	2707/16	3.5.07	11.12.18	ECLI:EP:BA:2018:T270716.20181211	64
T	2734/16	3.2.03	15.10.19	ECLI:EP:BA:2019:T273416.20191015	34, 46
T	23/17	3.3.03	30.01.20	ECLI:EP:BA:2020:T002317.20200130	49

T	73/17	3.2.07	15.06.20	ECLI:EP:BA:2020:T007317.20200615	65, 66
T	74/17	3.2.04	16.09.20	ECLI:EP:BA:2020:T007417.20200916	63
T	84/17	3.3.06	22.09.20	ECLI:EP:BA:2020:T008417.20200922	37
T	101/17	3.2.04	29.01.20	ECLI:EP:BA:2020:T010117.20200129	28, 45
T	256/17	3.2.07	17.04.20	ECLI:EP:BA:2020:T025617.20200417	49
T	264/17	3.3.10	22.09.20	ECLI:EP:BA:2020:T026417.20200922	5
T	350/17	3.3.06	04.09.20	ECLI:EP:BA:2020:T035017.20200904	61
T	517/17	3.5.03	27.10.20	ECLI:EP:BA:2020:T051717.20201027	66
T	584/17	3.4.02	10.02.20	ECLI:EP:BA:2020:T058417.20200210	51
T	731/17	3.5.07	15.01.20	ECLI:EP:BA:2020:T073117.20200115	60
T	787/17	3.2.05	11.10.19	ECLI:EP:BA:2019:T078717.20191011	7
T	966/17	3.2.01	30.10.20	ECLI:EP:BA:2020:T096617.20201030	36
T	1121/17	3.3.07	16.10.20	ECLI:EP:BA:2020:T112117.20201016	18
T	1217/17	3.2.01	25.09.20	ECLI:EP:BA:2020:T121717.20200925	47
T	1243/17	3.5.06	04.12.20	ECLI:EP:BA:2020:T124317.20201204	63, 64
T	1418/17	3.2.01	17.07.20	ECLI:EP:BA:2020:T141817.20200717	24, 25
T	1631/17	3.2.08	31.07.20	ECLI:EP:BA:2020:T163117.20200731	2
T	1642/17	3.3.04	16.11.20	ECLI:EP:BA:2020:T164217.20201116	13
T	1678/17	3.5.05	30.06.20	ECLI:EP:BA:2020:T167817.20200630	68
T	1687/17	3.2.01	09.01.20	ECLI:EP:BA:2020:T168717.20200109	38
T	1764/17	3.2.04	22.09.20	ECLI:EP:BA:2020:T176417.20200922	35
T	2450/17	3.3.05	10.01.20	ECLI:EP:BA:2020:T245017.20200110	34
T	2475/17	3.2.05	09.03.20	ECLI:EP:BA:2020:T247517.20200309	26, 63
T	2526/17	3.4.03	16.04.18	ECLI:EP:BA:2018:T252617.20180416	15
T	110/18	3.3.05	12.06.20	ECLI:EP:BA:2020:T011018.20200612	67
T	131/18	3.2.04	02.10.20	ECLI:EP:BA:2020:T013118.20201002	56
T	161/18	3.5.05	12.05.20	ECLI:EP:BA:2020:T016118.20200512	8, 15
T	492/18	3.2.04	12.10.20	ECLI:EP:BA:2020:T049218.20201012	23
T	756/18	3.2.07	16.12.19	ECLI:EP:BA:2019:T075618.20191216	36
T	844/18	3.3.08	16.01.20	ECLI:EP:BA:2020:T084418.20200116	16
T	995/18	3.2.01	22.10.20	ECLI:EP:BA:2020:T099518.20201022	47
T	1063/18	3.3.04	05.12.18	ECLI:EP:BA:2018:T106318.20181205	69
T	1278/18	3.2.03	04.06.20	ECLI:EP:BA:2020:T127818.20200604	56
T	1414/18	3.5.03	15.07.20	ECLI:EP:BA:2020:T141418.20200715	14, 22
T	2069/18	3.5.05	21.01.20	ECLI:EP:BA:2020:T206918.20200121	28
T	2603/18	3.2.06	20.02.20	ECLI:EP:BA:2020:T260318.20200220	43, 44
T	2620/18	3.2.06	16.09.20	ECLI:EP:BA:2020:T262018.20200916	29, 41, 42
T	2884/18	3.2.01	28.05.20	ECLI:EP:BA:2020:T288418.20200528	42
T	3003/18	3.4.02	12.02.20	ECLI:EP:BA:2020:T300318.20200212	12
T	3023/18	3.3.09	06.12.19	ECLI:EP:BA:2019:T302318.20191206	29, 40-42
T	113/19	3.3.05	17.01.20	ECLI:EP:BA:2020:T011319.20200117	19
T	225/19	3.2.05	16.10.20	ECLI:EP:BA:2020:T022519.20201016	40
T	317/19	3.5.04	22.10.19	ECLI:EP:BA:2019:T031719.20191022	33
T	482/19	3.2.01	12.10.20	ECLI:EP:BA:2020:T048219.20201012	47
T	908/19	3.2.04	25.05.20	ECLI:EP:BA:2020:T090819.20200525	59
T	989/19	3.5.03	25.05.20	ECLI:EP:BA:2020:T098919.20200525	27
T	1000/19	3.3.03	20.03.20	ECLI:EP:BA:2020:T100019.20200320	33
T	1003/19	3.3.05	30.08.19	ECLI:EP:BA:2019:T100319.20190830	30, 31
T	1060/19	3.5.06	11.02.20	ECLI:EP:BA:2020:T106019.20200211	40
T	1222/19	3.4.02	08.11.19	ECLI:EP:BA:2019:T122219.20191108	41
T	2277/19	3.2.02	11.12.19	ECLI:EP:BA:2019:T227719.20191211	29, 30, 39
T	3247/19	3.2.07	04.03.20	ECLI:EP:BA:2020:T324719.20200304	61
T	265/20	3.5.05	26.10.20	ECLI:EP:BA:2020:T026520.20201026	30, 38

T	646/20	3.2.04	11.11.20		ECLI:EP:BA:2020:T064620.20201111	31
PCT Widerspruch			PCT protests			Réserves au titre du PCT
W	11/89	3.3.02	09.10.89	OJ 1993,225	ECLI:EP:BA:1989:W001189.19891009	14
W	6/97	3.3.01	18.09.97		ECLI:EP:BA:1997:W000697.19970918	14

ANLAGE 3

Leit- und Orientierungssätze der
im Amtsblatt veröffentlichten
Entscheidungen des Jahres 2020

ANNEX 3

Headnotes/catchwords to 2020
decisions which have been
published in the Official Journal

ANNEXE 3

Sommaires/exergues des
décisions de l'année 2020
publiées dans le Journal Officiel

Case Number: G 3/19, OJ EPO 2020, A119

Date of opinion: 14 May 2020

Headnote:

Taking into account developments after decisions G 2/12 and G 2/13 of the Enlarged Board of Appeal, the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC has a negative effect on the allowability of product claims and product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process.

This negative effect does not apply to European patents granted before 1 July 2017 and European patent applications which were filed before that date and are still pending.