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

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

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Abstracts of decisions

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1. Article 024 EPC | T 2175/15 | Board 3.4.02

Article 024 EPC

Case Number	T 2175/15
Board	3.4.02
Date of decision	2024.06.11
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 024 EPC
EPC Rules	
RPBA	
Other legal provisions	Article 13(1) and (3) RPBA 2007 Article 15(4) RPBA 2020
Keywords	suspicion of partiality – suspected partiality of a board member – objectively justified fear of partiality (no) – arbitrary procedural action (no)
Cited decisions	G 0001/05
Case Law Book	III.J.3.1 , III.J.3.3 , III.J.5.3.4 , 10th edition

[See also abstract under Article 104\(1\) EPC on the parallel decision T 2175/15.](#)

Die Zwischenentscheidung [T 2175/15](#) vom 11 Juni 2024 behandelt den ersten von insgesamt fünf Befangenheitsanträgen. Zur Begründetheit des Befangenheitsantrags, stützte die Einsprechende auf Umstände, die ihrer Ansicht nach eine objektiv berechnete Besorgnis der Befangenheit begründeten, und die daher im Rahmen einer objektiven Prüfung zu beurteilen waren (mit Bezug auf G 1/05).

Die Einsprechende sah als maßgebliches, die objektive Besorgnis der Befangenheit der Mitglieder der Kammer in ihrer ursprünglichen Besetzung begründendes Verhalten die Zulassung des Hilfsantrags I bei gleichzeitiger Vertagung der mündlichen Verhandlung an. Hierdurch habe die Kammer willkürlich den insofern eindeutigen Wortlaut von Art. 13 (3) VOBK 2007 ignoriert, demzufolge "Änderungen des Vorbringens [...] nach Anberaumung der mündlichen Verhandlung nicht zugelassen [werden], wenn sie Fragen aufwerfen, deren Behandlung der Kammer oder dem bzw. den anderen Beteiligten ohne Verlegung der mündlichen Verhandlung nicht zuzumuten ist". Die Kammer war jedoch nicht davon überzeugt, dass die Kammer in der mündlichen Verhandlung im eröffneten Anwendungsbereich des Art. 13 (3) VOBK 2007 gehandelt hatte.

Es sei bei verständiger Würdigung des Protokolls der mündlichen Verhandlung keineswegs ersichtlich, dass auch die zweite Voraussetzung in Art. 13 (3) VOBK 2007 – nämlich dass durch die Änderung des Vorbringens Fragen aufgeworfen wurden, "deren Behandlung der Kammer oder dem bzw. den anderen Beteiligten ohne Verlegung der mündlichen Verhandlung nicht zuzumuten ist" – von der Kammer bejaht wurde, auch wenn laut Protokoll diese Voraussetzung tatsächlich diskutiert wurde. Obwohl an einigen Stellen im Protokoll Art. 13 (3) VOBK 2007 ausdrücklich zitiert worden war, hatte die Kammer am Ende der mündlichen Verhandlung ihre Entscheidung über die Zulassung des Hilfsantrags "in Ausübung ihres Ermessens nach Artikel 13 VOBK 2007" verkündet und damit die Anwendung von Art. 13 (3) VOBK 2007 offengelassen. Die Zulassung des Hilfsantrags konnte aber auch auf Grundlage des während der mündlichen Verhandlung ebenfalls erörterten Art. 13 (1) VOBK 2007 erfolgen.

Die Kammer stellte fest, dass es im freien und grundsätzlich nicht überprüfbareren Ermessen eines Vorsitzenden stehe, die mündliche Verhandlung auch ohne rechtliche Notwendigkeit zu vertagen, um eine "faire, ordnungsgemäße und effiziente Durchführung der mündlichen Verhandlung" sicherzustellen (s. Art. 15 (4) VOBK). Mögliche Gründe für eine solche Vertagung seien beispielsweise ein Entgegenkommen gegenüber einem Beteiligten, der ein entsprechendes Bedürfnis geäußert hat, die Ermöglichung eines wohl vorbereiteten Vortrags von ausstehenden Fragen zur Steigerung der Effizienz des Verfahrens, (drohende) zeitliche Engpässe oder etwa die Vermeidung oder Beendigung von Konfliktsituationen. Aus Sicht eines objektiven Betrachters erscheine es ohne Weiteres möglich, dass die Kammer die mündliche Verhandlung aus einem der genannten Gründe vertagt hatte.

Somit stand für die erkennende Kammer nicht mit hinreichender Wahrscheinlichkeit fest, dass die Kammer in ihrer ursprünglichen Besetzung gerade in Anwendung von Art. 13 (3) VOBK 2007 den Hilfsantrag zugelassen und die mündliche Verhandlung vertagt hatte. Darüber hinaus erkannte die erkennende Kammer keine hinreichenden Anhaltspunkte für ein willkürliches Verhalten der als befangen abgelehnten Kammermitglieder, das die objektive Besorgnis der Befangenheit begründen könnte. Aus Sicht eines objektiven Betrachters könnte ein Indiz für willkürliches Verhalten gegeben sein, wenn eine Kammer eine Rechtsanwendung entgegen dem Wortlaut einer Vorschrift vornimmt, ohne dies in irgendeiner Weise hinreichend nachvollziehbar zu erläutern, sozusagen "aus einer Laune heraus". So verhält es sich aber vorliegend gerade nicht. Vielmehr hat die Kammer in der mündlichen Verhandlung ausweislich des Protokolls mehrere Gründe angegeben, warum sie der Ansicht war, dass sie – auch im Falle der Anwendung von Art. 13 (3) VOBK 2007 – ein Ermessen zur Zulassung von verspätetem Vorbringen habe, selbst wenn es hierdurch zu einer Vertagung der mündlichen Verhandlung komme. Da der Befangenheitsantrag der Einsprechenden jedenfalls unbegründet sei, konnte die Frage der Zulässigkeit des Befangenheitsantrags offen bleiben.

141-12-24

2. Article 056 EPC | T 1525/19 | Board 3.3.07

Article 056 EPC

Case Number	T 1525/19
Board	3.3.07
Date of decision	2024.04.12
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 056, 112 EPC
EPC Rules	
RPBA	Article 012(4) RPBA 2007
Other legal provisions	
Keywords	inventive step (yes) – post-published evidence taken into account (yes) – common general knowledge – referral to the Enlarged Board of Appeal (no) – stay of proceedings (no)
Cited decisions	G 0002/21
Case Law Book	I.D.4.3.3c(i) , III.C.7.9 , 10th edition

The decision under appeal in [T 1525/19](#) concerned the opposition division's decision to reject the five oppositions filed against the patent at issue for a solid pharmaceutical dosage form comprising linagliptin as a first active pharmaceutical ingredient in an amount of 5 mg and empagliflozin as a second pharmaceutical ingredient in an amount of 10 mg or 25 mg and one or more excipients.

AR 1 (admitted under Art. 12(4) RPBA 2007) was directed to a solid pharmaceutical dosage form comprising 5 mg linagliptin and 10 or 25 mg empagliflozin. The appellants (opponents) had argued that, in accordance with decision G 2/21, the overadditive effect on GLP-1 levels assigned to the combination of linagliptin and empagliflozin could not be taken into account for the assessment of inventive step. The effect was not derivable from the application as filed or from common general knowledge, since empagliflozin could not be expected to have an effect on GLP-1 levels.

The board disagreed. The application as filed was generally directed to the combination of linagliptin with a SGLT2 inhibitor for improving glycaemic control compared with monotherapy. The mode of action of linagliptin and SGLT2 inhibitors was common general knowledge and it was also disclosed in the application as filed. The fact that the combination of linagliptin and empagliflozin increases GLP-1 levels in an overadditive manner did not change the nature of the effect assigned to the

combination of the invention, it merely related to a difference in intensity, which becomes relevant for comparison with the closest prior art. Therefore, the effect shown in D62 and D64 (post-published evidence) was encompassed by the teaching of the application as filed. The board also found that there was a synergistic interaction between linagliptin and empagliflozin. Therefore, in the light of common general knowledge and Example I of the application as filed, the skilled person would consider it likely that the overadditive glucose excursion observed in Example I of the patent was at least partially due to an increase in the effect on GLP-1 levels compared with linagliptin monotherapy. The effect shown in D62 and D64 was embodied by Example I in the application as filed. G 2/21 did not preclude taking into account the effect merely confirmed by D62 and D64.

Appellant 5 argued that the board's conclusion that D62 and D64 could be taken into account was based on an argument raised for the first time by the board at the oral proceedings on 1 September 2023. The board was not convinced; if appellant 5 had needed time to reconsider its case after the board's conclusion on the consideration of D62 and D64, it could have requested this before the debate was closed. However, no requests or comments were made when the board gave the parties the opportunity to do so before closing the debate. The request to be heard on additional arguments was made more than three months after the oral proceedings.

Appellants 1 and 5 also argued that a reopening of the debate was justified to avoid divergent case law, since Board 3.3.04 had decided in related appeal case T 314/20 that decision G 2/21 did not allow taking D64 into account, and that at least the present appeal proceedings should be stayed until the written reasoned decision in T 314/20 is issued. Furthermore, if the proceedings were not stayed and the debate not reopened, in view of the diverging views on the interpretation of G 2/21, the present board should refer questions to the Enlarged Board. The board again was not convinced. A decision by a different board in a different case did not constitute exceptional circumstances justifying the reopening of the debate. Even if the appeal cases concerned closely related subject-matter, the decision in one appeal case was not binding on the other. This was particularly true considering that the case in T 314/20 was not the same as that presented in the case at hand, at least with respect to technical arguments. Furthermore, in the absence of exceptional circumstances to reopen the debate, the board saw no reason to stay the appeal proceedings until the written reasoned decision in appeal case T 314/20 was issued. The board rejected the requests to reopen the debate, stay the appeal proceedings and refer questions to the Enlarged Board.

The board remitted the case to the opposition division with the order to maintain the patent in amended form with claims 1 to 14 of AR1 as filed with the reply to the statements of grounds of appeal.

142-12-24

3. Article 056 EPC | T 1050/22 | Board 3.3.07

Article 056 EPC

Case Number	T 1050/22
Board	3.3.07
Date of decision	2024.07.09
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (no) – combination invention (no) – obvious combination of known features
Cited decisions	
Case Law Book	I.D.9.3.1 , 10th edition

[See also abstract under Article 76\(1\) EPC.](#)

In [T 1050/22](#), with regard to obviousness, the relevant question was whether the skilled person would have contemplated a reduction of the amount of mannitol to less than 0.5 w/v%, by partially replacing mannitol with propylene glycol and/or glycerine, while at the same time further reducing the concentration of BAC to less than 0.0035 w/v%, in the presence of an anionic polymer and any of the defined suspended active agents, with a reasonable expectation of still meeting appropriate antimicrobial preservation.

The main argument of the respondent was that any technical effect associated with individual distinguishing features over D1 could not be split up and that the nature and concentration of all the components had a combined effect. The respondent claimed that neither D1, nor any other cited prior art document provided any hints towards the claimed combination of ingredients, let alone their concentrations.

The board disagreed and considered that the subject-matter of claim 1 was a simple aggregation of known features and that the implementation of each feature was obvious in view of the cited prior art. There was in the board's view no evidence of a general relationship between the effects from the distinguishing features. It thus considered that, in the present case, the individual differentiating features were mostly the result of specific individual technical effects, and not of a combined technical effect different from the sum of the technical effects of the individual

features. These features and their related effects were per se known from either the closest prior art (D1) or from the additionally cited documents.

The claimed solution involved a combination of several components, including brinzolamide, an anionic polymer, a surfactant, sodium chloride, a first polyol (mannitol or sorbitol), a second polyol (propylene glycol or glycerine), borate, benzalkonium chloride (BAC) as an antimicrobial preservative, and water. However, the board noted that D2 already suggested the use of brinzolamide in ophthalmic compositions in the treatment of glaucoma, which exhibiting poor water solubility had to be formulated in a suspension. This common knowledge was reflected in the teaching of document D18, from which it was known to use anionic polymers such as carbomers as suspending agents for these active agents. Ophthalmic compositions comprising a borate-polyol complex for increasing the antimicrobial efficacy of other antimicrobial agents were known from D1. A borate-polyol system such as claimed was furthermore known from D4. Moreover, D4 disclosed specifically a composition which corresponded qualitatively and quantitatively to the borate/polyol system of claim 1 of auxiliary request 13. D7 disclosed that the tear osmolality corresponded to the claimed osmolality of the composition. In light of the above, the board concluded it would have been straightforward for the skilled person faced with the objective technical problem to modify formulations 9 or 10 of document D1.

Consequently, the subject-matter of claim 1 of auxiliary request 13 did not involve an inventive step (Art. 56 EPC). The remaining auxiliary requests were found to either be contrary to the requirements of Art. 76(1) EPC (auxiliary requests 1-12, 14-18, 20-23) or Art. 56 EPC (auxiliary request 19).

143-12-24

4. Article 056 EPC | T 0279/21 | Board 3.5.01

Article 056 EPC

Case Number	T 0279/21
Board	3.5.01
Date of decision	2024.01.30
Language of the proceedings	EN
Internal distribution code	C
Inter partes/ex parte	Ex parte
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step – technicality – computer implemented invention – workflow rules controlling tasks and tags labelling the states of the tasks
Cited decisions	G 0001/19, T 0894/10
Case Law Book	I.D.9.2.15 , 10th edition

In [T 279/21](#) the invention related to a central control system for providing automated real-time interaction and state-transition-controlled processing of (data) objects. The invention was said, rather generally, to provide a system which was capable of flexibly capturing the external and/or internal factors that may affect the processing of an object within a workflow and that was more capable of being operated by externally or internally occurring boundary conditions or constraints. Furthermore, it was able to react dynamically to changing environmental or internal conditions or measuring parameters that were possibly not known or predictable at the beginning of the workflow process, in particular without human interaction.

The examining division had argued, that the claimed subject-matter related to abstract information modelling concepts at meta-language level in the context of workflows. They had pointed out that the design and modelling of workflows for business processes represented activities in the sphere of methods for doing business.

The appellant had argued that when G 1/19 (e.g. at point 51 of the Reasons) stated that any technical effect going beyond the implementation of the process on a computer may be considered for inventive step, it meant anything beyond a 1:1 mapping between the implementation and a step of the business method being

implemented. In other words, any subject-matter that does not "map" to a step in the business method is technical.

The board agreed that the "implementation" of a business method implies some sort of mapping between non-technical steps of the business method and their technical realisation. Decision G 1/19 had something to say about this mapping, at least in the forward direction, at point 51 of the Reasons, when it rephrased the requirement for technical effect as "technical effect going beyond the simulation's straightforward or unspecified implementation on a standard computer system". Thus, even a 1:1 mapping might be inventive if it is not "straight-forward" (e.g. not standard programming or routine modification of the technical means used), or "unspecified" (e.g. not simply as "means for [carrying out the step]").

But, according to the board, looking for a mapping from "implementation" to the step of a business method in the reverse direction did not make sense as the steps of the non-technical activity do not have to be specified explicitly. They would include any steps that the business person would come up with in a non-technical workflow. The way this was handled was by considering the mapping of the implementation to the effect of the step and to examine whether the effect had any technical character, or whether it would be covered by what the business person would consider as part of the non-technical process. This was, in other words, the standard COMVIK approach where one looks at the effect of a feature in order to pose a technical problem, which might simply be the implementation of the feature, for which the above-mentioned mapping in the forward direction meant in G 1/19 applied.

Thus, looking at the feature of the "operating tags" in the present case, the effect was to define business conditions determining whether a certain task shall be executed or not. This, of course, corresponded to a non-technical step of the workflow system, namely keeping track of the state of a process. Going forward again with the mapping in order to judge inventive step, the implementation was seen to be the use of "operating tags", which even if escaping the "unspecified" classification must surely be "straight-forward".

Furthermore, the board could not see how avoiding the folder data structure of the prior art, as argued by the appellant, represented a technical effect.

The board found the present case comparable to T 894/10, in which the board, in a different composition, held that "all aspects of the idea of modelling and manipulating representations of a workflow are fundamentally non-technical, being essentially aspects of either a business method or an algorithm or both. [...] Technical considerations only come into play when implementing the representation and rules."

The board therefore concluded that the subject-matter of the claim in question lacked an inventive step over the prior art within the meaning of Art. 56 EPC, because the skilled person would adapt the modules seen in the prior art, with additional functions to implement new workflow rules or constraints based on common general knowledge.

144-12-24

5. Article 056 EPC | T 0318/22 | Board 3.3.02

Article 056 EPC

Case Number	T 0318/22
Board	3.3.02
Date of decision	2024.09.09
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (yes) – credibly solved (yes) – technical effect derivable from application as originally filed (yes) – post-published evidence taken into account (yes) – test-data in application as filed rendered the improvement credible
Cited decisions	G 0002/21, T 0939/92, T 0116/18 of 11 October 2021
Case Law Book	I.D.4.1.2b), 10th edition

In [T 318/22](#) the patent comprised data demonstrating that compounds falling within the scope of claim 1 possessed herbicidal activity. That the herbicidal activity was improved compared to structurally close compounds of D7 was demonstrated in the post-filed tests of D9 and D10.

The appellant (opponent) argued that the data in the patent was not sufficient to render the alleged herbicidal effect credible across the scope of the claim and that the data in D9 and D10 should not be taken into account in view of G 2/21. Even if taken into account, the appellant argued, the data in D9 and D10 for two compounds was not sufficient to extrapolate the effect across the scope of the claim.

The board found that the application as filed comprised data demonstrating that a range of compounds falling within the claimed scope possessed herbicidal activity against various plant species, and that the examples of the application as filed adequately demonstrated that herbicidal activity was maintained with variation in the substitution pattern around the periphery. Hence, it was credible on the basis of the application as filed that the claimed compounds possessed the alleged herbicidal activity. The board found that the situation in T 939/92 – which the appellant sought to rely on – was not relevant to the present case.

As to the question whether D9 and D10 could be taken into account in view of G 2/21, the board noted as set out above that the technical effect upon which the respondent relied was explicitly mentioned in and rendered credible by the application as filed. Hence, the requirement in G 2/21 that the skilled person would derive the technical effect as being "encompassed by the technical teaching" and "embodied by the same originally disclosed invention" was met. The board further found that referral T 116/18 and decision G 2/21 appeared to be irrelevant to the present case, since the question to be answered in those cases was whether post-published data in relation to a particular technical effect could be relied on for inventive step when evidence for said effect relied exclusively on said post-published data (see question 1 posed by the referring board in T 116/18). This did not correspond to the present situation.

The board concluded that the data in D9 and D10 and in the application as filed demonstrated that the technical effect of improved herbicidal activity could be attributed to the distinguishing features over the structurally closest compounds disclosed in D7. While this did not constitute absolute proof that all claimed compounds differing from the equivalent compound of D7 only in the distinguishing features would demonstrate the same improvement, this conclusion was rendered credible by the test data. In the absence of any evidence to the contrary, the board therefore accepted that the effect of improved herbicidal activity was achieved over substantially the whole of the claimed scope. Hence, on the basis of referral T 116/18 and G 2/21, D9 and D10 could be relied on in the assessment of inventive step for the claimed subject-matter.

Consequently, the board held the objective technical problem underlying claim 1 was as formulated by the respondent, namely the provision of compounds having improved herbicidal activity against a variety of weeds. Noting that the appellant had not submitted any arguments according to which inventive step would be lacking if the objective technical problem were to be formulated as set out above, the board concluded that the subject-matter of claim 1 involves an inventive step pursuant to Art. 56 EPC.

145-12-24

6. Article 056 EPC | T 2363/22 | Board 3.3.09

Article 056 EPC

Case Number	T 2363/22
Board	3.3.09
Date of decision	2024.06.10
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 056, 123(2) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (yes) – closest prior art – comparative tests not expected with respect to each and every starting point
Cited decisions	G 0002/21
Case Law Book	I.D.4.3.2 , 10th edition

In [T 2363/22](#) the patent at issue related to a dry pet food which comprised a core and a palatability-enhancing coating that contained edible phosphate salt and yeast extract. In both the application as filed and the patent, the reduction in palatability resulting from the decrease in the phosphate salt content was stated to be compensated for by the impact of the yeast extract; that is, the yeast extract enhanced the palatability contribution of the phosphate salt.

The patent proprietor had with its reply to the notice of opposition, filed the declaration D15, which included comparative tests intended to provide a basis for comparing the closest prior art with claim 1. The tests in D15 did not compare every composition that the opponent considered a starting point with the subject-matter of claim 1. However, in a situation where an opponent lodges several inventive-step attacks from various starting points, the board held it was understandable that the patent proprietor might choose to formulate comparative compositions that addressed distinguishing features that all starting points had in common. The patent proprietor was not expected to provide comparative tests with respect to each and every starting point. Rather, the question to be answered was whether the set-up chosen supported the conclusion that a technical effect was credibly achieved, and in particular whether the comparative test was representative of the disclosure used as a starting point. In the case in hand, it was not convincing that the difference identified by the appellant had a decisive effect on the conclusions drawn from D15, let alone that it led to results that lacked technical meaning.

The board was satisfied that the effects highlighted in D15 were, in the words of G 2/21 (OJ 2023, 85), "encompassed by the technical teaching and embodied by the same originally disclosed invention". The data in D15 illustrated with respect to the specific closest prior art cited how yeast extract compensated for the decrease in phosphate concentration.

Considering the technical effect demonstrated, the board determined the problem was to maintain or improve the palatability of a pet food composition. It concluded that contrary to the appellant's view, there was no teaching in D1 or D2 leading to the solution of claim 1. While in these two documents low concentrations of phosphate were suggested and were possible, in principle, there was no indication that this could be done while maintaining palatability. The prior art contained no teaching to this effect, let alone when combined with the use of yeast extract. Therefore, the subject-matter of claim 1 involved an inventive step (Art. 56 EPC).

146-12-24

7. Article 076(1) EPC | T 1050/22 | Board 3.3.07

Article 076(1) EPC

Case Number	T 1050/22
Board	3.3.07
Date of decision	2024.07.09
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 076(1), 100(c), 123(2) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	amendments – added subject-matter (yes) – selections from two lists – (sub)ranges – disclosure of combination in an individualised manner – pointer
Cited decisions	G 0002/10, T 1511/07, T 1731/18, T 1408/21
Case Law Book	II.E.1.6.2a , II.E.1.6.2c , 10th edition

[See also abstract under Article 56 EPC.](#)

In [T 1050/22](#) the board explained that the selection of originally explicitly disclosed limit values defining several (sub)ranges to define an individual range did not necessarily generate subject-matter extending beyond the original disclosure. However, the further combination of such an individual range with another individual range emerging from a second list of ranges and relating to a different feature was not considered to be derivable from the original disclosure, unless there was a clear pointer to such a combination (see for instance T 1511/07, T 1731/18). In the case in hand, the basis for the definition of the indicated combination of ranges was even less evident due to the presentation in the claims and the description of the grandparent application (D5) of lists of upper and lower limits rather than defined ranges (compare with T 1408/21).

According to the board, a relevant pointer was usually a specific indication or teaching in the original application directing the skilled person to a specific combination. Such a specific indication could originate from the original claims and/or from disclosed specific embodiments, in particular when the examples of the application as filed presented a uniform disclosure with regard to the concerned combination of features and all fell under the scope of the claims. However, the

presence of discordant examples could well indicate that the examples did not provide any clear pointer to the combination of features.

In the case in hand, starting from the disclosure in D5, feature (e) represented a first selection from the list of ranges which emerged from the endpoints shown in claim 3 and page 7, while feature (g) represented a further selection from a second list of ranges that was created on the basis of the endpoints shown in claim 1 and page 8 of D5. In the absence of any pointer to the particular combination of claim 1 of the main request, the combination of the range amounts for features (e) and (g) as claimed represented added subject-matter. The board did not identify any passage of the description nor any example as a possible pointer for the combination of such selections. Examples A, M and N, cited by the respondent, corresponded to the only examples where the compounds and their amounts matched with the claimed compounds and amounts. Most of the remaining examples, in particular examples B-K, showed however discordant compositions, so that the examples could not be seen as a clear pointer to the defined combination of features.

The combination of features (e) and (g) with the further selected feature of viscosity of dependent claim 11 was also considered not to be derivable from D5, since there was also no further pointer for such combination. Examples M and N cited by the respondent did not even indicate the viscosity of the compositions disclosed therein.

Consequently, the main request did not meet the requirements of Art. 76(1) EPC. Since the content of D5 was similar to the content of the application as filed, the same conclusion applied with regard to the requirements of Art. 123(2) EPC.

147-12-24

8. Article 083 EPC | T 1669/21 | Board 3.2.03

Article 083 EPC

Case Number	T 1669/21
Board	3.2.03
Date of decision	2024.07.23
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 83, 100(b) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	sufficiency of disclosure – reproducibility (no) – alleged learning machine – precise knowledge of parameters allegedly not necessary due to ability of learning machine to predict by self-learning – alleged irrelevant alternatives filtered out automatically – no concrete examples – lack of detail of disclosure – breadth of the claim
Cited decisions	G 0001/03, T 0923/92, T 0161/18, T 1983/19
Case Law Book	II.C.6.1 , II.C.5.4 , 10th edition

In [T 1669/21](#), machte die Beschwerdeführerin (Patentinhaberin) geltend, die Erfindung sei auch ohne ein konkretes Ausführungsbeispiel im Patent deutlich und vollständig offenbart. Bei dem anspruchsgemäßen Rechenmodell handele es sich um ein Modell des maschinellen Lernens. Angesichts des rasanten Fortschritts sei auch das Erstellen eines geeigneten Rechenmodells des maschinellen Lernens, (anders als in T 161/18) mittlerweile Gegenstand des allgemeinen Fachwissens und bedürfe keiner ausdrücklichen Offenbarung. Die Erfindung strebe eine "umfassende Lösung" zur Vorhersage des Verschleißes der feuerfesten Auskleidung eines metallurgischen Gefäßes an.

Der Begriff "Rechenmodell" war für die Kammer auch im Zusammenhang mit einer Anpassung ("adaptiert") nicht auf ein Modell aus dem Bereich des maschinellen Lernens eingeschränkt. So ist die Tatsache, dass das Modell "adaptiert wird" nicht gleichbedeutend damit, dass das Modell "adaptiv" ist, sich also selbst anpasst bzw. selbstlernend ist. Anspruch 1 war daher nicht auf ein Verfahren zum maschinellen Lernen beschränkt. Für ein solches Rechenmodell gab das Patent weder ein Beispiel noch Anhaltspunkte für die zu modellierenden Zusammenhänge. Schon aus diesem Grund erfüllte der Hauptantrag nicht die Erfordernisse von Art. 83 EPÜ.

Die Ausführbarkeit der Erfindung wurde auch hinsichtlich des von Anspruch 1 mitumfassten Modells maschinellen Lernens geprüft. Das Streitpatent machte hierzu keinerlei Angaben im Unterschied zu T 161/18, wo das verwendete neuronale Netz spezifiziert wurde.

Eine Vielzahl an Möglichkeiten für die Ausgestaltung eines Rechenmodells bestand. Das vorgetragene Fachwissen enthielt jedoch keine Informationen zu den spezifischen Anforderungen, und das Patent enthielt hierzu auch keine. Daher lag bereits in der Wahl eines konkreten geeigneten Rechenmodells des maschinellen Lernens für den Fachmann eine erhebliche Hürde für die Ausführbarkeit der Erfindung. Selbst wenn, wäre der Fachmann dabei auf sich allein gestellt, aus der Vielzahl an möglichen Eingangsgrößen diejenigen Kombinationen auszuwählen. Schon jeder einzelne derartige Versuch für sich genommen stellte einen erheblichen Aufwand dar. Mangels eines konkret nacharbeitbaren Ausführungsbeispiels als Ausgangspunkt im Patent oder einer sonstigen spezifischen Anleitung, welche Parameter relevant sind, fehlte zudem ein Beleg für die grundsätzliche erfolgreiche Ausführbarkeit der Erfindung mit einem anspruchsgemäß trainierten Rechenmodell. Die Beschwerdeführerin trug hierzu vor, es sei nicht erforderlich, weil es gerade das Wesen des maschinellen Lernens sei, dass die Fähigkeit zur Vorhersage der Ausgangsgröße ohne Kenntnis der kausalen Zusammenhänge durch Training selbstlernend erworben werde. Dabei werde der Einfluss irrelevanter Eingangsgrößen von selbst herausgefiltert. Laut der Kammer enthielt die Patentschrift kein einziges konkret nacharbeitbares Ausführungsbeispiel und keine Anhaltspunkte oder Kriterien zur Auswahl geeigneter konkreter Parameter innerhalb der beanspruchten Kategorien.

Bezüglich Menge und Qualität der Trainingsdaten (s. auch T 161/18), wurde das Rechenmodell nur mit einem reduzierten Datensatz trainiert. Die vorgetragene Art der Ausführung der Erfindung und der Trainingsdatenerfassung war nicht im Streitpatent offenbart. Die Beschwerdeführerin konnte nicht plausibel darlegen, dass das Rechenmodell mit einem solchen eingeschränkten Trainingsdatensatz erfolgreich trainiert werden kann. Somit war die Offenbarung des Patents auch bezüglich des für den Erfolg der Erfindung entscheidenden Aspekts der Trainingsdaten allgemein und unvollständig. Der fehlende Detailgrad dieser Offenbarung im Patent stand in keinem Verhältnis zur Breite der beanspruchten Erfindung und dem entsprechenden Aufwand für einen Fachmann, die Lücken zu füllen, um die Erfindung (über ihre Breite hinweg) ausführen zu können.

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9. Article 104(1) EPC | T 2175/15 | Board 3.4.02

Article 104(1) EPC

Case Number	T 2175/15
Board	3.4.02
Date of decision	2024.06.11
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 104(1) EPC
EPC Rules	
RPBA	Article 16(1) RPBA 2020
Other legal provisions	
Keywords	apportionment of costs (no) – not equitable – late filed request – objections of suspicion of partiality
Cited decisions	T 0765/89, T 0026/92, T 0432/92, T 0674/03, T 0490/05, T 0671/08, T 1781/13, T 0482/19
Case Law Book	III.R.2.1.1b), III.R.2.4 , III.R.2.5 , 10th edition

[See also abstract under Article 24 EPC on the parallel decision T 2175/15.](#)

Nachdem beide Beschwerden zurückgenommen wurden, entschied die Kammer in [T 2175/15](#) vom 11 Juni 2024 über die jeweiligen Anträge der Einsprechenden und der Patentinhaber auf anderweitige Kostenverteilung. Die Kammer rief in Erinnerung, dass nach der Rechtsprechung der Beschwerdekammern eine anderweitige Kostenverteilung der Billigkeit entspricht, wenn das Verhalten einer Partei nicht mit der zu fordernden Sorgfalt im Einklang steht, d.h. wenn Kosten durch leichtfertiges oder gar böswilliges Handeln verursacht werden (z. B. T 765/89, T 26/92 und T 432/92). Um festzustellen, ob eine anderweitige Kostenverteilung aus Billigkeitsgründen gerechtfertigt ist, müssen sowohl das Verhalten der Beteiligten als auch die sich daraus ergebenden Kostenfolgen berücksichtigt und gegeneinander abgewogen werden. Eine anderweitige Kostenverteilung aus Billigkeitsgründen kommt daher in Betracht, wenn das Verhalten von Beteiligten unter Verletzung der Sorgfaltspflicht Kosten verursacht hat, die nicht unerheblich sind.

Die Einsprechende hatte vorgetragen, dass aufgrund der erstmaligen und damit verspäteten Einreichung des Hilfsantrags I in der ersten mündlichen Verhandlung eine Vertagung der mündlichen Verhandlung notwendig gewesen sei und es deshalb aus Billigkeitsgründen geboten gewesen sei, den Patentinhabern die dadurch entstandenen Kosten aufzuerlegen.

Die Kammer erinnerte daran, dass Hilfsantrag I ausschließlich die erteilten Verfahrensansprüche umfasste. In ihrer Beschwerdebegründung hatten die Patentinhaber zu dem obiter dictum (zu den Verfahrensansprüchen) in der angefochtenen Entscheidung Stellung genommen. Die Kammer war daher der Ansicht, dass eine Behandlung des Hilfsantrags I in der ersten mündlichen Verhandlung zumutbar gewesen wäre. Deren Vertagung war somit nicht wegen des verspäteten Einreichens des Hilfsantrags I notwendig. Vielmehr erfolgte sie aus Fairness- und Effizienzgründen.

Die Einsprechende hatte ferner vorgetragen, dass eine anderweitige Kostenverteilung auch deshalb gerechtfertigt sei, weil die Patentinhaber wenige Tage vor der anberaumten zweiten mündlichen Verhandlung durch Rücknahme ihrer Beschwerde auf eine Weiterverfolgung des Hilfsantrags wieder verzichtet hatten, so dass der gesamte durch die Einreichung des Hilfsantrags und die Vertagung erzeugte Aufwand überflüssig geworden sei.

Die Kammer konnte aber auch in der Rücknahme der Beschwerde keinen Verstoß gegen grundlegende prozessuale Sorgfaltspflichten seitens der Patentinhaber erkennen. Dieses auf dem Verfügungsgrundsatz basierende Recht könne nicht – auch nicht implizit durch Androhung einer anderweitigen Kostenverteilung – eingeschränkt werden, selbst wenn eine mündliche Verhandlung anberaumt ist und die betroffene Gegenpartei nur kurzfristig davon unterrichtet werden kann. In der Regel sei sogar davon auszugehen, dass die Vorteile einer Beschwerderücknahme für die Gegenpartei die ihr erwachsenen – wenn auch vermeidbaren – Kosten aufwiegen (siehe T 490/05). Zwar wurde mit der Rücknahme der Beschwerde der Patentinhaber die Einsprechende zur alleinigen Beschwerdeführerin und wäre deshalb das im Beschwerdeverfahren geltende Verbot der reformatio in peius hinsichtlich des Hilfsantrags I zu beachten gewesen. Dies bedeutete jedoch nicht, so die Kammer, dass der Hilfsantrag I nach der Rücknahme der Beschwerde der Patentinhaber unmittelbar nicht mehr Gegenstand des Beschwerdeverfahrens war, sondern es hätte zunächst über die Frage entschieden werden müssen, ob das Verbot der reformatio in peius hinsichtlich des Hilfsantrags I greift. Die Kammer konnte daher kein missbräuchliches oder leichtfertiges Verhalten der Patentinhaber erkennen, so dass es nicht der Billigkeit entsprach, eine andere Verteilung der Kosten zugunsten der Einsprechenden gemäß Art. 104 (1) EPÜ und Art. 16 (1) VOBK anzuordnen.

Der Antrag der Patentinhaber auf eine anderweitige Kostenverteilung wurde ebenfalls zurückgewiesen. Die Kammer hielt es nicht für gerechtfertigt, in Ausübung ihres Ermessens nach Art. 104 (1) EPÜ i.V.m. Art. 16 (1) VOBK der Einsprechenden aus Gründen der Billigkeit die Kosten der Patentinhaber wegen der Einreichung von insgesamt fünf Befangenheitsanträgen aufzuerlegen. Sie teilte nicht die Ansicht der Patentinhaber, dass die im EPÜ vorgesehene Möglichkeit eines Befangenheitsantrags nur im Ausnahmefall heranzuziehen sei. Darüber hinaus konnte die Kammer keinen Grund erkennen, warum das Verhalten der Einsprechenden schuldhaft oder verfahrensmisbräuchlich gewesen wäre.

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10. Article 107 EPC | T 1286/23 | Board 3.2.04

Article 107 EPC

Case Number	T 1286/23
Board	3.2.04
Date of decision	2024.11.11
Language of the proceedings	EN
Internal distribution code	A
Inter partes/ex parte	Inter partes
EPC Articles	Articles 099, 105, 107, 108, 112 EPC
EPC Rules	Rule 089 EPC
RPBA	
Other legal provisions	
Keywords	intervention of the assumed infringer – intervention during appeal proceedings – admissibility of appeal by the intervener – party status of the intervener – continuation of proceedings with intervener after withdrawal of all appeals – referral to the Enlarged Board
Cited decisions	G 0002/91, G 0004/91, G 0008/91, G 0009/92, G 0003/04, T 0202/89, T 1026/98, T 1007/01, T 0439/17
Case Law Book	III.P.1.4.2 , III.P.1.6 , III.P.2.2 , V.A.2.4.2 , V.A.2.4.3a), V.A.2.4.3b), 10th edition

In [T 1286/23](#) one of the opponents (the "appellant") filed an appeal against the decision of the opposition division. Thereafter, a third party (the "intervener") declared an intervention and filed an appeal against the opposition division's decision, paying the fees for both opposition and appeal. The board then issued summons for oral proceedings, whereupon the appellant withdrew its appeal.

The board summarised the situation in the light of G 3/04 as such that Art. 105 EPC allows an intervener to join as an opponent and as an opponent only. Neither Art. 105 EPC nor Art. 107 EPC mention any position, and thus also of any possibly different position, of interveners joining at the appeal stage only. An intervener intervening at the appeal stage could not be treated as an appellant because it does not fulfil the requirements of Art. 107, first sentence, EPC, in particular it has not been party to the earlier proceedings. The provisions governing the payment of the appeal fee were also silent about the possibility of payment of an appeal fee by a person who is not an appellant. Given that it is settled case law of the Enlarged Board that appeal proceedings cannot be continued where the (only) appellant has

withdrawn the appeal, the intervener as opponent thus could not by their own motion continue the appeal proceedings.

The board went on to highlight that on a purely literal and systematic interpretation, i.e. without taking into account the legislative intent as derivable from the travaux, Art. 107 EPC simply does not leave any room for interveners to be parties to appeal proceedings at all, be it as appellants, respondents or just other parties. This conclusion however directly contradicted settled case law of the Enlarged Board and the undisputed legislative intent behind Art. 105 EPC, as clearly set out in G 1/94. The board also noted that the conclusion of the Enlarged Board that "the valid intervener only acquires the status of an opponent" in G 3/04 plainly contradicts the provisions of Art. 107, second sentence, EPC, at least as long as "status of an opponent" is read as "status of an opponent who had been party to the proceedings leading to the appealed decision (but is not itself an appellant within the meaning of Art. 107, first sentence, EPC)". Still, it seemed clear that the Enlarged Board in G 3/04 understood an "opponent" in this sense. From this, it followed directly that procedural conditions that intend to put limitations on the party status in Art. 107 EPC could not apply to interveners, at least as long as the so far undisputed legislative intent is respected. At the very least, the requirement of a party status in the earlier proceedings could not hold for an intervener. This then begged the question why the other requirement for acquiring the party status of an appellant, namely the adverse effect, should apply to an intervener, or at the very least why it should be applied in strict combination with the party status in the earlier proceedings.

Considering G 3/04, the board explained that it did not agree that Art. 105 EPC in combination with Art. 107 EPC must be read in the sense that also a third party intervening only at the appeal stage can never become more than a non-appealing opponent. Put differently, the board had serious doubts that an intervener, regardless of the state of proceedings would always have to be treated as no more than a non-appealing opponent. The board proposed that Art. 105(2) EPC should be interpreted as providing that an admissible intervention is to be treated as an opposition, and the intervener enters the proceedings with full rights as if it had been a party to the proceedings from the very beginning. Depending on the outcome of the appealed decision, the intervener should be given the choice of entering the proceedings in any party position open to them. In particular, they must be given the opportunity to file their own appeal in a given case, of course upon payment of the appeal fee.

In the board's view, it followed that the intervener by advancing their grounds of opposition and by properly paying the opposition and appeal fee within the three-month time period of Art. 105 EPC should be entitled to continue the appeal proceedings even upon a withdrawal of the appellant's appeal. This result was however at odds with G 3/04. The board therefore referred the following points of law to the Enlarged Board: "[a]fter withdrawal of all appeals, may the proceedings be continued with a third party who intervened during the appeal proceedings? In particular, may the third party acquire an appellant status corresponding to the status of a person entitled to appeal within the meaning of Article 107, first sentence, EPC?"

150-12-24

11. Rule 109(2)(a) EPC | R 0025/22 | EBA

Rule 109(2)(a) EPC

Case Number	R 0025/22
Board	EBA
Date of decision	2024.03.08
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 022(2), 112a(2)(a) to (d), 113 EPC
EPC Rules	Rule 109(2)
RPBA	
Other legal provisions	
Keywords	procedure for petition for review – composition of the Enlarged Board of Appeal – petition for review – clearly unallowable – causal link missing
Cited decisions	
Case Law Book	V.B.3.10.1 , V.B.3.4.3 , V.B.4.3.2 , V.B.4.3.5 , 10th edition

In the decision under review in [R 25/22](#) the board had confirmed the revocation of the patent because it had found that the skilled person had had insufficient information to establish the meaning of the "shrinkage ratio" feature. The petition for review was based on the issue that the Reasons given by the board in point 6.2.3 had not been put to the parties at an earlier point in time, and that the petitioner (patent proprietor) had thus not been able to comment on them. Specifically, the board had given a definition of the shrinkage ratio that had been wholly unexpected by the proprietor and in fact by all parties, namely that the shrinkage ratio was a parameter of a plurality of yarns. The petitioner argued that this definition must have been decisive for the issue of sufficiency.

The Enlarged Board of Appeal (EBA) accepted that the issue of the plurality of yarns vs. a single yarn had not appeared anywhere in the written submissions or in the communications from the board, at least not in the form as discussed in the disputed point of the board's reasons. However, the EBA held that even if the board might have made findings in the written decision that had not been previously raised, the role such findings played in the final decision, if any, must be examined. In this regard, the EBA pointed to the settled case law on petitions, according to which a board of appeal is not required to provide the parties in advance with all foreseeable arguments in favour of or against a request. Furthermore, a violation of Art. 113 EPC

can only be considered fundamental within the meaning of Art. 112a(2)(c) EPC if there is a causal link between the alleged violation and the final decision.

The EBA found that in order to establish whether the disputed finding by the board had been decisive for its final finding on sufficiency, their decision as a whole must be examined. The EBA held that, in the rather specific circumstances of the present case, the new "plurality of yarns" interpretation was not considered to be decisive for the reasons set out in detail, and was thus not causal to the board's final decision either.

The petitioner argued that as a matter of principle, the EBA was not competent to assess the merits of a party's arguments, in particular whether they would be successful or not. The EBA understood this argument to mean that, a fortiori, the EBA also could not judge whether or not an argument could have been decisive. The EBA did not dispute that it was not competent to judge the correctness of a decision, however this did not mean that the EBA was in principle prevented from analysing and understanding the board's reasons. In order to determine whether an ignored argument by a party or a surprising new argument by a board had indeed been causal, the EBA would inevitably have to go into the substance of the case and at least understand the parties' arguments and the board's reasons.

The EBA noted that its composition under Art. 22(2), second sentence, and R. 109(2) EPC ensured that the necessary technical expertise was present. Accordingly, the EBA held that it had the power to examine decisions of the technical boards of appeal in petition proceedings for the purpose of determining the decisive character of any reasons given by the board, irrespective of whether they were of a legal or technical nature.

Furthermore, the EBA interpreted the condition "clearly unallowable" of R. 109(2)(a) EPC. It held that the correct criterion for determining whether the petition was "clearly" unallowable within the meaning of R. 109(2)(a) EPC was not just the depth of the analysis required to understand the case from a legal or technical point of view. Instead, what also mattered was the degree of conviction of the individual members of the EBA as to whether the alleged procedural defect was indeed a fundamental procedural defect within the meaning of Art. 112a(2)(a) to (d) EPC, once the relevant facts of the case had been identified, possibly only after an exhaustive and detailed examination of all the legally and technically relevant facts.

Having reviewed the technical facts of the case and the applicable legal framework, and having considered the exclusively legal arguments by the petitioner, the EBA remained fully convinced that the board's "plurality of yarns" interpretation mentioned in point 6.2.3 of the Reasons had not been decisive for the board's finding of insufficiency. Accordingly, the petition was considered clearly unallowable.

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12. Article 13(2) RPBA | T 0172/22 | Board 3.2.07

Article 13(2) RPBA 2020

Case Number	T 0172/22
Board	3.2.07
Date of decision	2024.05.07
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 123(2) EPC
EPC Rules	
RPBA	Article 13(1), 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment to a party's case (yes) – deletion of claims – late-filed auxiliary request – should have been submitted in opposition proceedings (yes) – shift of the discussion – admitted (no)
Cited decisions	T 0156/15, T 1569/17, T 0494/18, T 2229/19, T 2295/19, T 1800/21
Case Law Book	V.A.4.2.2d), V.A.4.5.5g), 10th edition

In [T 172/22](#) the opponent (appellant) had lodged an appeal against the decision of the opposition division concerning maintenance of the patent in amended form on the basis of the then auxiliary request 42 (main request in appeal). The respondent (proprietor) submitted auxiliary requests 42a and 72a during oral proceedings before the board.

Auxiliary request 42a corresponded to the main request with claims 1 to 3 deleted and was filed after the board had communicated its intermediary conclusion that claim 1 of the main request did not meet the requirements of inventive step. The respondent asserted that, according to T 1800/21, even if the submission of auxiliary request 42a was to be considered as an amendment to its case, the deletion of an entire category of claims would be admissible under Art. 13(2) RPBA.

Recalling that the question of whether a deletion of a category of claims amounted to an amendment was answered differently by the boards, the present board was of the view that the filing of a new set of claims had to be regarded as an amendment to the appeal case, even if only a category of claims was deleted. Its admittance was therefore subject to the board's discretion (see e.g. T 494/18, T 2295/19, T 1569/17, T 2229/19).

The board observed that the relevant objection on inventive step against claim 1 of the main request was already present in the opposition proceedings. The respondent would have been in the position to submit this request at least with its reply to the statement of the grounds of appeal. Thus, for this reason alone, there were no exceptional circumstances that could justify the filing of this new set of claims at this stage.

Moreover, the deletion of all claims directed to a steel sheet for hot press forming (independent claim 1 and dependent claims 2 and 3) would de facto have required a discussion on the remaining independent claims 4 and 7 of the main request (claims 1 and 4 of auxiliary request 42a), even though this had so far appeared unnecessary and was contrary to the requirements of convergence and procedural economy (Art. 13(1) RPBA). In fact, a request without claims directed to the steel sheet in question but with remaining unamended independent claim 7 of the main request had never been filed by the respondent in the appeal proceedings. This would have imposed a shift of the discussion towards claim 7 of the main request, which was not included in any of the following auxiliary requests. In the board's view, the filing of auxiliary request 42a at this stage in the proceedings was a procedural "salami" tactic to determine which of the remaining independent claims of the main request could be kept unchanged, aimed at establishing an allowable set of claims. This could not be allowed, as it would be contrary to procedural economy (Art. 13(1) RPBA, cf. T 156/15). As a result, T 1800/21 did not apply in the present case. For the sake of completeness only, the board added that even if auxiliary request 42a were to be admitted into the proceedings, it still would not meet the requirements of Art. 123(2) EPC.

The board then turned to auxiliary request 72a, which was filed as a reaction to the admittance of two new documents and the shift of the board's preliminary opinion on Art. 123(2) EPC. The relevant objection on added subject-matter was already present in the opposition proceedings and the respondent could have submitted this request at least with its reply to the statement of the grounds of appeal. A proprietor had to consider the possibility that the board could agree with a raised objection against the maintenance of the patent and had to react promptly. The change in the board's preliminary opinion did not constitute exceptional circumstances that could justify the admittance of auxiliary request 72a. Furthermore, the new documents were not decisive for the conclusions drawn with respect to Art. 123(2) EPC. The respondent had also failed to demonstrate that this amendment would not give rise to new objections that would have to be examined for the first time during the oral proceedings before the board, in detriment to procedural economy. Thus, the board did not admit auxiliary request 72a into the appeal proceedings either.

In conclusion, the decision under appeal had to be set aside, and in the absence of an admissible and allowable request, the patent had to be revoked.

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