Europäisches Patentamt
European Patent Office
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Abstracts of decisions

Selected case law of the Boards of Appeal
edited by the Legal Research Service
of the Boards of Appeal

Issue 03 | 2026

Boards of Appeal

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Edited by
Legal Research Service of the Boards of Appeal

For comments and requests please contact: BOA_legalresearchservice@epo.org

Abstracts of decisions

In this issue:

1. Article 056 EPC | T 0769/23 | Board 3.5.05

Article 056 EPC

Case Number	**T 0769/23**
Board	3.5.05
Date of decision	2025.10.01
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) – no credible technical effect over the whole scope claimed
Cited decisions	T 1179/16, T 1465/23
Case Law Book	I.D.4.5, 11th edition

In T 769/23 the board was not convinced that the alleged effect was credibly achieved over the whole scope of claim 1, based on fundamental ambiguities in the claim language which prevented the skilled reader from objectively deriving a technical function for feature (e). Consequently it found that feature (e) did not produce a credible technical effect over the whole scope of the claim. It therefore regarded its as a non-functional modification of the disclosure in document D2.

The board noted that the absence of a credible technical effect over the whole range claimed had direct consequences for the application of the problem-solution approach in the assessment of inventive step. It acknowledged that the case law had developed two main approaches for assessing inventive step in such situations.

The board identified the first approach, seen in decisions such as T 1179/16 and applied by the opposition division in the present case, as to formulate the objective technical problem as "providing an alternative". However, the board considered this approach problematic, at least in the present case, as it could lead to paradoxical outcomes. The "teaching away" exception mentioned in Reasons 3.4.4 of T 1179/16, presupposed a technical, i.e. functional, reason for avoiding a feature. Yet, this created a logical inconsistency if the feature itself had been determined to genuinely have no technical effect. In the board's view, the "teaching away" concept, when assessing inventive step under Art. 56 EPC, must be based on technical reasons, but a feature that is truly non-functional could not be the subject of a technical "teaching

away". The board therefore held that a distinction had to be made between "functional alternatives" and "non-functional modifications". The formulation of the objective technical problem as "providing an alternative" was only appropriate for the former. For the latter, it held a different approach was warranted.

The board found that where distinguishing features constituted non-functional modifications, the problem-solution approach could be concluded without the formulation of an (artificial) objective technical problem (see also the board's earlier decision T 1465/23). Accordingly, it held that an arbitrary and non-functional modification of the prior art could not support an inventive step.

Applying this latter approach to the present case, the board concluded that feature (e) was a non-functional modification of the system of D2. Consequently, it could not contribute to an inventive step.

022-03-26

2. Article 056 EPC | T 1109/24 | Board 3.5.07

Article 056 EPC

Case Number	**T 1109/24**
Board	3.5.07
Date of decision	2025.09.05
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step (no) – could-would approach
Cited decisions	
Case Law Book	I.D.5, 11th edition

In T 1109/24 the board noted that while it was sometimes stated that the proper question to be answered when assessing inventive step was not whether the skilled person could have modified the closest prior art to arrive at the claimed invention but whether they would have done so, the "would" question presupposed that the "could" question was answered in the affirmative. It was often easier to establish that the skilled person could modify the closest prior art to arrive at the invention than to show that they would have done so.

The "could" question could not, however, be ignored in cases where there was not self-evidently a realistic path or "workable route" from the starting point to the claimed invention, as would be the case if the distinguishing features could not reasonably be combined with the closest prior art to obtain the claimed invention. The board found that in such a situation, the invention was not rendered obvious by that prior art and the question whether the distinguishing features achieved a technical effect over the closest prior art was essentially meaningless.

In the present case the board did not see how the skilled person could modify the system disclosed in document D1 to arrive at the claimed invention without fundamentally departing from the essential teaching of document D1, i.e. there did not appear to be a realistic path from document D1 to the invention. The contested decision was silent on this point. Therefore, the subject-matter of claim 1 was not rendered obvious by document D1 alone (Art. 56 EPC). Neither was the system of claim 1 rendered obvious by document D2 or by the combination of documents D1 and D2, either.

23-03-26

3. Article 069 EPC | T 0439/22 | Board 3.2.01

Article 069 EPC

Case Number	**T 0439/22**
Board	3.2.01
Date of decision	2025.12.11
Language of the proceedings	EN
Internal distribution code	B
Inter partes/ex parte	Inter partes
EPC Articles	Articles 069, 123(3) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claim interpretation – consultation of the description and drawings – referral case in G 1/24
Cited decisions	G 0001/24, T 0400/94, T 0860/08, T 2284/09, T 1964/10, T 2758/18, T 1735/19, T 2405/19, T 0169/20 NanoString Technologies v 10x Genomics, UPC_CoA_335/2023, App_576355/2023 of 26 February 2024, as rectified by the order of 11 March 2024
Case Law Book	II.A.6.3.1, II.A.6.3.4, II.E.2.3.1c), 11th edition

In T 439/22 of 11 December 2025 the board applied the conclusions of the Enlarged Board in G 1/24 to interpret the term "gathered sheet" in claim 1 of the referring case.

The board held that in interpreting the language used in a claim, "consulting", "referring to", "using" and "taking into account" the description and figures are synonyms for the act of deriving the necessary information from the patent as a whole to understand which meaning a person skilled in the art would attribute to the terms used in the claim.

Furthermore, the board stated that claim interpretation was the result of both reading the claims and consulting the description and drawings as a unitary process. It explained that this holistic approach followed from the Order of the Enlarged Board, according to which, if, on the one hand the claims are the starting point and the basis for assessing the patentability of an invention under Art. 52 to 57 EPC, the interpretation of the claims requires, on the other hand, that "the description and drawings shall always be consulted when assessing the patentability of an invention under Art. 52 to 57 EPC". Moreover, this was confirmed in point 17 of G 1/24, which

provides that "the finding that the language of a claim is clear and unambiguous is an act of interpretation, not a preliminary stage to such an interpretative act".

The board was of the view that a skilled person aiming to correctly determine the subject-matter for which protection was sought and reading the patent specification with a mind willing to understand would attribute considerable weight to any definition of a term used in the claims. Having cross-checked that the claim in itself and in the context of the other claims made technical sense and was in line with the information presented in other passages of the description, the person skilled in the art would have no reason to disregard such definitions and to give the defined terms a different meaning in the claim. In the case in hand the definition of "gathered" given in paragraph [0035] did not contradict but rather encompassed the commonly accepted meaning of the term "gathered sheet", namely a sheet that is folded and convoluted to occupy a three-dimensional space. The definition was simply not restricted to folded sheets but included other forms of transverse constrictions of the extension of a sheet. The board concluded that the wound tobacco sheet of D1 equated to the "gathered sheet" feature of claim 1 when this term was correctly interpreted according to paragraph [0035] of the description. Hence, the subject-matter of claim 1 of the main request lacked novelty over the content of document D1.

The sole amendment in the auxiliary request was the deletion of paragraph [0035] from the description of the contested patent, which read as follows: "As used herein, the term 'gathered' denotes that the sheet of tobacco material is convoluted, folded, or otherwise compressed or constricted substantially transversely to the cylindrical axis of the rod". The appellant submitted that said deletion altered the interpretation of the term "gathered sheet" in claim 1 and, consequently, the scope of the protection conferred. In the absence of the broader definition provided in paragraph [0035], the term "gathered sheet" no longer encompassed other limiting features, namely that the gathered tobacco sheet was "compressed or constricted substantially transversely to the cylindrical axis of the rod".

The board noted that, in line with the Enlarged Board's holistic approach to claim interpretation in G 1/24, a person skilled in the art reading the claim in the context of the description and figures would try to take a definition found in the description at face value. As long as the definition was technically reasonable and complied with the overall teaching expressed in the claims, description and figures, the skilled person would read the terms in the claim in the sense of the definition, taking into account both the broadening and limiting aspects found in that definition. It was therefore not permissible to consider only the broadening aspects contained in a definition and disregard any limiting aspects. As set out by the Enlarged Board in G 1/24, point 20 of the Reasons, Art. 84 EPC may require that limiting or broadening aspects are expressed in the claim to avoid any unclarity, but a granted claim had to be read in light of all aspects of a definition found in the description. Therefore, the board concluded that the auxiliary request did not comply with the requirement of Art. 123(3) EPC.

024-03-26

4. Article 076(1) EPC | T 1052/23 | Board 3.4.03

Article 076(1) EPC

Case Number	**T 1052/23**
Board	3.4.03
Date of decision	2025.11.11
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 – claim interpretation – unallowable intermediate generalisation
Cited decisions	G 0002/10, G 0001/24, T 2048/22, T 0873/23, T 1069/23, T 1232/23, T 1351/23, T 1465/23, T 1846/23, T 2034/23, T 0412/24, T 1402/24
Case Law Book	II.E.1.3.9, 11th edition

In T 1052/23 the board explained that an amended claim the wording of which was not literally included in the (earlier) application as originally filed, as in the case in hand, must generally be interpreted by using a mind willing to understand and by consulting the description and the drawings, prior to assessing whether the claimed subject-matter can be directly and unambiguously derived from the (earlier) application as filed. The board agreed with the two-step approach applied in T 2048/22 and T 873/23.

The board did not agree with the patent proprietor's narrower interpretation of claim 1, according to which a "selection" or "switching" step between two types of shapes of the printing features of the same printing plate was included. The board observed that, as held by many boards following G 1/24, the consultation of the description did not mean that restrictive features that were contained in specific embodiments in the description could limit the wording of the claims, see for example T 1232/23, T 1465/23, T 1846/23, T 1069/23, T 1351/23, T 412/24, T 2034/23 and T 1402/24. The board was of the view that also the more general statement in paragraph [0008] of the patent relating to the background of the invention and merely pointing to an advantageous method and apparatus would not prompt the skilled person to a narrower interpretation of claim 1.

The board consulted the description when interpreting claim 1 and interpreted it in a broad, technically reasonable manner. According to the board's interpretation, claim 1 did not include the aspect of controlling the top shapes of the printing features on a same printing plate by selecting the first or second illumination intensity, so that the claim was not restricted accordingly. Omitting this essential aspect, which was included in the relevant independent claims of the parent application and presented throughout its description as a core feature of the invention, led to a broadening of the claim which therefore encompassed subject-matter that was not originally disclosed in the parent application as originally filed. Consequently, the omission amounted to an unallowable amendment and to an extension beyond the content of the parent application as filed.

With respect to dependent claims 5 and 6, the board was of the view that the features of said dependent claims were not disclosed in the claims of the parent application as originally filed. They were taken from the description, but from a specific technical context. Claim 5 and 6 as granted constituted unallowable intermediate generalisations of specific examples provided in the parent application as originally filed.

Therefore, the board concluded that the subject-matter of claims 1, 5 and 6 extended beyond the content of the earlier application as filed so that the ground for opposition under Art. 100(c) EPC prejudiced the maintenance of the opposed patent as granted.

025-03-26

5. Article 087 EPC | T 1555/23 | Board 3.3.04

Article 087 EPC

Case Number	**T 1555/23**
Board	3.3.04
Date of decision	2025.11.14
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 087 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	priority – same invention (yes) – further medical use claim – subject-matter directly and unambiguously derivable from priority document (yes) – enabling disclosure in priority document (yes) – validity of the priority date (yes)
Cited decisions	G 0002/98, G 0001/03, T 0609/02, T 0843/03
Case Law Book	II.D.4.6, 11th edition

In T 1555/23 the patent related to the medical use of chimeric antigen receptor-modified T cell (CAR T cell) products for cancer therapy in combination with IL-6 inhibitors for toxicity management. The appellants argued that the subject-matter of claims 1 and 5 was not entitled to the priority of the first priority document (P1).

The board recalled that assessing the requirement of the "same invention" within the meaning of Art. 87 EPC was based on the determination whether the subject-matter claimed could be derived by the skilled person directly and unambiguously, explicitly or implicitly, using common general knowledge, from the previous application as a whole (G 2/98). For the subject-matter of further medical use claims, this entailed assessing whether the priority (or previous) application at the date of its filing rendered it credible that the known therapeutic agent was suitable for the claimed therapeutic application (see e.g. T 843/03). This was consistent with the general teaching in G 1/03 that the process of making the invention has to be completed when an application for a patent is filed.

Appellants II and III argued that the subject-matter of claim 1 was not directly and unambiguously derivable from P1. Their reasoning was essentially based on an interpretation of current claim 1 in which no causal link between the monitoring step and the second-line therapy existed. Such a method without a causal link was not

disclosed in P1. Appellant II further argued that P1 did not disclose the general use of a single cytokine inhibitory therapy for managing toxicity resulting from CAR T cell infusion.

The board disagreed. Claim 1 did not refer to the general use of a (or any) single cytokine inhibitory therapy but rather to IL-6 as the cytokine to be monitored and inhibited when its level was increased. Claim 1 also included a causal link between the result of the monitoring, i.e. increased IL-6 levels, and the administration of an IL-6 inhibitor as a second-line therapy. As also pointed out by the respondents and acknowledged by the opposition division, a basis for IL-6 as the cytokine to be monitored and inhibited when its level is elevated could be found in several passages in P1. A further basis for this subject-matter could be found in claims 1 to 4 of P1. P1 further disclosed: "(CAR) in combination with toxicity management, where a profile of soluble factors from a post T cell infusion patient is generated and a therapy directed against the elevated soluble factor is carried out in order to treat the cancer" and "second-line of therapy appropriate to treat the patient as a consequence of the first-line of therapy". Thus, according to the board, the subject-matter of claim 1 was directly and unambiguously derivable from the disclosure of P1.

Claim 5 required the second-line therapy to be tocilizumab. Appellants II and III also argued that this subject-matter was not directly and unambiguously derivable from P1. The board concluded that the skilled person would have derived directly and unambiguously that the IL-6 inhibitory compound tocilizumab was a preferred embodiment of the cytokine inhibitory therapy disclosed in claims 1 to 5 of P1, i.e. the same invention as in current claim 5.

The appellants further contended that the invention as claimed was not enabled in P1 over its whole breadth, raising several objections, none of which were found convincing by the board. For example, the appellants argued that P1 did not disclose that a single agent, i.e. an IL-6 inhibitory compound, was capable of managing the toxicity arising from CAR T cell treatment and that the document only contained assertions to this effect, while the experimental evidence in Figure 9 was not conclusive. The board noted that, in this context, the relevant question was whether P1 made it credible that tocilizumab was effective in managing toxicity of CAR T cells. The board disagreed with the appellant’s contention that the document only contained assertions to that effect which, in accordance with T 609/02, might not represent sufficient evidence for a therapeutic effect. In the current case, a clinical trial had been conducted, albeit with only one or two patients, and the inventors drew conclusions from it. The board therefore considered the teaching of P1 sufficient to make it credible that the toxicity of CAR T cell therapy could be managed with a single agent.

The board concluded that the invention to which claims 1 and 5 related was disclosed in an enabling manner in P1 and, therefore, the claims enjoyed priority from P1.

026-03-26

6. Article 104(1) EPC | T 1857/23 | Board 3.4.02

Article 104(1) EPC

Case Number	**T 1857/23**
Board	3.4.02
Date of decision	2025.09.19
Language of the proceedings	FR
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 104(1) EPC
EPC Rules	Rule 097(1) EPC
RPBA	Article 16(1) RPBA 2020
Other legal provisions	
Keywords	apportionment of costs – equitable
Cited decisions	T 0008/16
Case Law Book	III.R.2, III.R.2.5, III.R.4.2, 11th edition

See also abstract under Article 13(2) RPBA.

Dans l'affaire T 1857/23 la procédure de recours ne concernait que la requête de l'opposante visant à faire supporter à la titulaire les frais engagés dans les procédures d'opposition et de recours.

Dans la (première) procédure de recours (T 8/16), la titulaire a expliqué en quoi une nouvelle requête subsidiaire différait de la requête subsidiaire non admise par la division d'opposition, sans toutefois produire cette dernière. Dans une notification, la chambre a indiqué qu'elle ne disposait pas du libellé de la requête subsidiaire non admise, car celle-ci ne figurait pas dans le dossier électronique, et elle a invité la titulaire à la déposer. Celle-ci a répondu qu'elle ne parvenait pas à retrouver ni d'exemplaire signé ni une copie de la "requête subsidiaire disparue". La chambre a annulé la décision contestée, renvoyé l'affaire à la division d'opposition, afin de poursuivre la procédure, et ordonné le remboursement de la taxe de recours. L'opposante n'avait pas présenté de requête visant à obtenir une répartition différente des frais.

Dans la (deuxième) procédure d'opposition réouverte, l'opposante a demandé que les frais de cette procédure d'opposition soient supportés par la titulaire. La division d'opposition a révoqué le brevet et rejeté la requête en répartition différente des frais. Seule la titulaire a formé un recours contre la (deuxième) décision de la division d'opposition. Dans ce cadre, l'opposante a demandé une répartition différente des frais liés à la procédure d'opposition et à la procédure du présent recours.

La chambre a conclu que la requête de l'opposante visant à une répartition différente des frais de la procédure d'opposition devait être rejetée comme irrecevable. Le fait de déposer une requête en répartition différente des frais comme seul objet d'un recours (qui en est donc irrecevable) ou de présenter cette requête en simple qualité de partie à la procédure de recours ne peut faire aucune différence. Si l'auteur d'une requête en répartition des frais ayant formé un recours ne peut obtenir gain de cause en vertu de la règle 97(1) CBE, cela s'applique a fortiori à l'auteur d'une telle requête qui n'a pas formé de recours.

Concernant les frais de la procédure de recours, la chambre a observé qu'en ce qui concerne la décision sur la répartition des frais, la première procédure d'opposition, la première procédure de recours, la deuxième procédure d'opposition et la deuxième procédure de recours devaient nécessairement être considérées comme une seule procédure. Le comportement fautif d'une partie dans l'une des phases de la procédure pouvait avoir des conséquences négatives sur les frais des phases suivantes.

La chambre a noté que dans la jurisprudence il y a lieu pour des raisons d'équité d'ordonner une répartition différente des frais si une partie n'a pas agi avec la vigilance voulue, c'est-à-dire lorsque les frais occasionnés sont imputables à une faute commise par négligence ou dans l'intention de nuire. En l'espèce, lors de la première procédure de recours, la titulaire a fondé sa requête en renvoi de l'affaire à la division d'opposition sur un jeu de revendications qu'elle n'avait pas présenté dans son mémoire exposant les motifs du recours. Comme déjà constaté dans la décision T 8/16, en maintenant une requête qui se fondait sur un jeu de revendications qu'elle n'était pas en mesure de produire, la titulaire n'a pas agi avec la vigilance voulue. La perte du jeu de revendications, quelles que soient les circonstances survenues dans la sphère de la titulaire qui l'ont provoquée, constitue une négligence de la part de la titulaire : elle touche à l'obligation essentielle de garantir la complétude des éléments sur lesquels une partie se fonde. Cette obligation découle du principe de diligence procédurale et ne peut être transférée à la division d'opposition. Bien que la division d'opposition ait également commis une faute qui a contribué au renvoi de l'affaire, la titulaire a défini l'objet de la procédure par ses requêtes et maintenu une requête que la chambre n'était pas en mesure d'examiner sans renvoi. Cette négligence a été déterminante, car le renvoi n'était, sans elle, pas garanti au terme de la procédure de recours, même en tenant compte de l'erreur de la division. Le comportement de la titulaire a donc entraîné une prolongation substantielle de la procédure ainsi que des frais supplémentaires pour l'opposante. La chambre a dès lors estimé qu'il était justifié d'imposer l'intégralité des frais exposés par l'opposante dans la présente procédure de recours à la titulaire.

La chambre a noté qu'il est possible que l'opposante ait été en possession de la requête perdue. Cependant, il n'appartient pas à une partie de remplir les obligations incombant à la partie adverse ni de contribuer à la réussite éventuelle de ses requêtes.

027-03-26

7. Article 113(1) EPC | T 0077/23 | Board 3.4.03

Article 113(1) EPC

Case Number	**T 0077/23**
Board	3.4.03
Date of decision	2025.10.21
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 113(1) EPC
EPC Rules	
RPBA	Article 15(1) RPBA 2020
Other legal provisions	
Keywords	right to be heard – oral proceedings before board of appeal – non-attendance at oral proceedings – violation (no)
Cited decisions	
Case Law Book	III.B.2.8.3b), III.C.6.1, 11th edition

Die mündliche Verhandlung vor der Kammer in T 77/23 fand in Abwesenheit der Beschwerdegegnerin (Patentinhaberin) statt. Vor der mündlichen Verhandlung hatte sie schriftlich hilfsweise beantragt, die Angelegenheit zur Behandlung der Hilfsanträge 2, 4 und 6 bis 8 an die Einspruchsabteilung zurückzuverweisen. Weiter hilfsweise hatte sie beantragt, das Patent in geänderter Fassung auf der Grundlage der Ansprüche eines der Hilfsanträge 1 bis 8 aufrechtzuerhalten.

Die Kammer beschloss, die Angelegenheit aus verfahrensökonomischen Gründen nicht an die erste Instanz zurückzuverweisen. Sie hatte zwar in ihrer Mitteilung gemäß Art. 15 (1) VOBK zur Zurückverweisung der Angelegenheit auf Basis der Hilfsanträge 2, 4 und 6 bis 8 an die erste Instanz nicht explizit Stellung genommen. Dennoch sah sie trotz Abwesenheit der Beschwerdegegnerin in der mündlichen Verhandlung das rechtliche Gehör der Beschwerdegegnerin aus den im Folgenden dargelegten Gründen hierzu für gewahrt an:

Die Kammer hatte in ihrer Mitteilung zu allen Hilfsanträgen Stellung genommen. Der Kammer zufolge wäre es unangemessen, zu den Hilfsanträgen Stellung zu nehmen, und dann die Angelegenheit zurückzuverweisen, da die Kammer mit ihrer vorläufigen Meinung die Einspruchsabteilung beeinflussen würde. Somit musste die Beschwerdegegnerin davon ausgehen, dass die Kammer ihrem Antrag auf Zurückverweisung an die erste Instanz nicht nachkommen würde.

Darüber hinaus hatte die Beschwerdegegnerin durch das Fernbleiben von der mündlichen Verhandlung von sich aus auf ihr rechtliches Gehör in dieser Hinsicht verzichtet. Der Kammer zufolge sollte somit die Beschwerdegegnerin von der getroffenen Entscheidung (keine Zurückverweisung) weder überrascht sein, noch ist ihr rechtliches Gehör diesbezüglich verletzt.

Zum weiteren hilfsweise gestellten Antrag der Beschwerdegegnerin, das Patent in geänderter Fassung aufrechtzuerhalten, stellte die Kammer fest, dass jeweils Anspruch 1 der Hilfsanträge 1-8 nicht neu gegenüber der Lehre des Dokuments E1 ist. Der Kammer war bewusst, dass der Einwand mangelnder Neuheit des Anspruchs 1 des Hilfsantrags 8 gegenüber dem Dokument E1 erstmalig in der mündlichen Verhandlung vor der Kammer erhoben wurde. Die Kammer konnte jedoch aus den im Folgenden erläuterten Gründen keine Verletzung des rechtlichen Gehörs der in der mündlichen Verhandlung abwesenden Beschwerdegegnerin erkennen:

Der schriftliche Vortrag beider Parteien zum Hilfsantrag 8 war im schriftlichen Beschwerdeverfahren kurz gehalten worden. Folglich musste die Beschwerdegegnerin damit rechnen, dass eine bis dato nicht erfolgte ausführliche Diskussion zur Neuheit und erfinderischen Tätigkeit erstmalig in der mündlichen Verhandlung geführt werden würde. Darüber hinaus hatte die Kammer in der Mitteilung gemäß Art. 15 (1) VOBK vorgetragen, dass sie die höherrangigen Hilfsanträge 1 bis 7 wegen mangelnder Neuheit gegenüber dem Dokument E1 für nicht gewährbar erachtet. Da Anspruch 1 des Hilfsantrags 8 auf Anspruch 1 des Hilfsantrags 6 basiert, musste die Beschwerdegegnerin der Kammer zufolge damit rechnen, dass, falls Hilfsantrag 8 in der mündlichen Verhandlung behandelt wird, bei der Neuheitsprüfung auch der Unterschied zum Dokument E1 herausgearbeitet werden würde. Somit kann es für die Beschwerdegegnerin nicht überraschend sein, dass der entsprechende Angriff erstmalig in der mündlichen Verhandlung vor der Kammer diskutiert wurde. Nach Ansicht der Kammer ergab sich dies aus einer logischen Fortführung der Prüfung geänderter Ansprüche auf ihre Gewährbarkeit.

Die Kammer betonte, dass eine erstmalige Beurteilung in der mündlichen Verhandlung der Neuheit oder erfinderischen Tätigkeit des beanspruchten Gegenstands gegenüber den im Verfahren diskutierten Druckschriften, welche allerdings nur zu höherrangigen Anträgen diskutiert worden waren, somit eine der mündlichen Verhandlung fernbleibende Partei nicht überraschen kann.

Darüber hinaus kam die Kammer zum Schluss, dass es nicht möglich sein sollte, dass die Beschwerdegegnerin durch ihre Abwesenheit den Umfang möglicher Einwände wesentlich vorgibt und durch ihr Fernbleiben mögliche Einwände exklusiv auf die des schriftlichen Verfahrens beschränkt. Wäre dies zutreffend, könnte die abwesende Partei wesentlich den Verlauf der mündlichen Verhandlung mitbestimmen, sodass der eigentliche Sinn einer mündlichen Verhandlung durch die Abwesenheit einer Partei ad absurdum geführt werden könnte.

028-03-26

8. Article 122 EPC | T 0549/24 | Board 3.2.04

Article 122 EPC

Case Number	**T 0549/24**
Board	3.2.04
Date of decision	2026.01.19
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 122 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	re-establishment of rights – all due care on the part of the applicant – exceptional circumstances – deliberate deception by an assistant designed to circumvent internal controls
Cited decisions	J 0005/80, J 0022/92, T 0283/01, T 0516/09, T 1477/17
Case Law Book	III.E.5.5.4b), 11th edition

In T 549/24, the board held that intentional deception by an assistant designed to bypass existing cross-check controls constitutes exceptional circumstances justifying re-establishment under Art. 122 EPC.

In the case under consideration, the application had been deemed withdrawn pursuant to R. 71(7) EPC, and no remedy had been pursued by the applicant within the time limit set by the communication under R. 112(1) EPC. The examining division had found the request for re-establishment of rights in respect of the time limit for requesting further processing, filed by the then newly appointed representative, to be admissible but not allowable. The examining division could not conclude that the applicant had acted with all due care required by the circumstances, as it found no evidence that the applicant had a satisfactory monitoring system for the activities of Mr R., the assistant in charge of the patent portfolio, nor an effective substitution system for Mr C., the company's CEO and the person bearing ultimate responsibility, who was suffering from deteriorating health.

The board disagreed. It found that Mr C. was not entirely prevented from carrying out his professional duties. While his condition did limit his ability to perform certain tasks, it did not render him completely incapable. Mr R. had been working as Mr C.'s personal assistant when he was entrusted with responsibility for the applicant's

patents. Even during the most severe phase of his illness, Mr C. regularly contacted Mr R. by telephone and made occasional short visits to the office to inquire about the status of the applicant's patents. The board considered that, in the circumstances of the present case, a complete substitution of Mr C. was not necessary to satisfy the required standard of due care. On the contrary, the board regarded this a reasonable arrangement in the case of illness of the responsible person, as it served to compensate for the limitations resulting from Mr C.'s medical condition and allowed him to remain in a position to continue performing his functions, thus complying with the applicable standard of due care.

With regard to the supervision of Mr R., the board considered, in view of the new evidence submitted on appeal, that the applicant did maintain a comprehensive monitoring system, as required by the case law in view of the size of the company, including an online spreadsheet editor for tracking the patent portfolio. This spreadsheet was regularly updated with action points and time-limit reminders. In addition, weekly face-to-face meetings were held with the responsible person whenever Mr C. was present, and, during the most severe phase of Mr C.'s illness, these took the form of regular phone calls and short office visits. The board was therefore satisfied that Mr C. had exercised all due care under the circumstances, including selecting, instructing and supervising his assistant The board noted that Mr R. had deliberately concealed information, going so far as to create a private email account to bypass the company's servers, and had either failed to update or had falsely marked IP records relating to renewal time limits. As a result, Mr C. had been kept unaware of certain time limits, despite having exercised all due care, since Mr R's intentional deception was designed to also bypass the cross-check controls put in place by Mr C. Contrary to the examining division's approach, which did not assess whether Mr R.'s behaviour justified re-establishment of rights, the board held that the disruption caused by Mr R.'s behaviour constituted exceptional circumstances justifying re-establishment under Art. 122 EPC.The board observed that the circumstances of the present case differed meaningfully from those in T 516/09. By contrast, Mr C., acting in his capacity as the applicant's CEO (and not as a professional representative), had implemented a system for tracking time limits using an online spreadsheet tool and actively monitored its operation. This system included cross-checks and regular updates with Mr R. Unlike the representative in T 516/09, Mr C.'s core responsibilities did not centre on patent administration, and he could not reasonably have been expected to detect deliberate deceptions designed to circumvent internal controls. The board therefore concluded that the present case did not present the supervisory deficiencies identified in T 516/09.

Accordingly, the decision under appeal was set aside and the appellant's rights were re-established.

029-03-26

9. Article 12(6) RPBA | T 1319/23 | Board 3.3.03

Article 12(6) RPBA 2020

Case Number	**T 1319/23**
Board	3.3.03
Date of decision	2025.09.05
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Article 12(4), (6) RPBA 2020
Other legal provisions	
Keywords	late-filed lines of defence – admitted (yes) – correct legal basis for an objection – cannot be disregarded
Cited decisions	
Case Law Book	V.A.4.2.2a), 11th edition

In T 1319/23 the appeal lay from the decision of the opposition division revoking the European patent concerned. According to the appealed decision neither the main request nor auxiliary request 1 met the requirement of sufficiency of disclosure. One of the main points of dispute between the parties during the opposition proceedings related to the impossibility to perform TREF measurements with a particular solvent in a certain temperature range.

In its statement of grounds of appeal, the appellant (proprietor) submitted two lines of argument regarding sufficiency of disclosure. In section C.1, it argued that the arguments retained by the opposition division to reach their decision on this point were related to a potential clarity issue rather than sufficiency of disclosure. In section C.4, it submitted that even if the issue identified in the appealed decision related to sufficiency of disclosure, these concerns were irrelevant for most polymers and at most would affect the extreme boundaries of the claim. The board observed that undisputedly the appellant had not put forward these arguments during the opposition proceedings and concluded that they constituted an amendment to the appellant's case (Art. 12(2) and (4) RPBA). Their admittance was therefore at the board's discretion pursuant to Art. 12(4) and (6) RPBA.

Considering that the main request is the patent as granted, the board agreed with the respondent that these arguments could have been submitted earlier.

However, in the board’s view, the appellant was not using the arguments in section C.4 to build a fresh case in appeal. Rather they were strictly linked to a central point of the decision under appeal and merely represented a further development of an existing line of argument, which remained within the same framework of the line of defence adopted in opposition proceedings. In certain aspects, they were also a response to specific concerns expressed by the opposition division in the impugned decision.

Moreover, the board considered that whether an objection relates to clarity or sufficiency of disclosure was a purely legal issue. Contrary to the respondent's view, it could not be disregarded since it was the board's duty to ensure that the parties address the correct legal basis during the proceedings and that this legal basis is the one eventually considered when reaching a decision on the disputed issue. In this regard, the board agreed with the appellant that these arguments concerned the correct application of the law to the underlying facts and were not directed to the presentation of new facts. The board also noted that Art. 12(4) RPBA, which states that the board should, when exercising its discretion, take into account the complexity of the amendment, could not be interpreted as meaning that such additional arguments should be disregarded automatically because of this inherent increased complexity.

In view of the above, the board decided to exercise its discretion pursuant to Art. 12(4) RPBA to admit into the proceedings the arguments put forward by the appellant in sections C.1 and C.4 of the statement of grounds of appeal. Based on these arguments, the board concluded that the issue related to the impossibility to perform TREF measurements in a certain (marginal) temperature range, did not amount to a lack of sufficiency of disclosure pursuant to Art. 100(b) EPC and remitted the case for further prosecution.

030-03-26

10. Article 13(2) RPBA | T 1857/23 | Board 3.4.02

Article 13(2) RPBA 2020

Case Number	**T 1857/23**
Board	3.4.02
Date of decision	2025.09.19
Language of the proceedings	FR
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 112(1)(a) EPC
EPC Rules	
RPBA	Article 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment after notification of Art. 15(1) RPBA communication – procedural request – request for referral of questions to the Enlarged Board of Appeal – taken into account (no) – exceptional circumstances (no) – justified in terms of timing (no)
Cited decisions	T 1707/17, T 2795/19
Case Law Book	V.A.4.2.3j), 11th edition

See also abstract under Article 104(1) EPC.

Dans l'affaire T 1857/23, la veille de la procédure orale devant la chambre de recours, la titulaire a déposé un courrier dans lequel elle demandait que des questions – concernant les conséquences de la perte d'une requête présentée devant la division d'opposition et les responsabilités pour la conservation d'une requête déposée – soient soumises à la Grande Chambre de recours au titre de l'art. 112(1)a) CBE. Ces questions de saisine s'inscrivaient dans le contexte suivant : selon l'avis de la chambre dans une première procédure de recours, la division d'opposition avait commis un vice substantiel de procédure en ne consignant pas au dossier une requête subsidiaire non admise. Dans la procédure d'opposition réouverte et le recours suivant, l'opposante avait déposé une requête en répartition différente des frais pour abus de procédure de la part de la titulaire qui n'était pas en mesure de produire un exemplaire de la requête non admise. Cependant la titulaire avait fait valoir que l'opposante avait également une part de responsabilité.

Sur la question de savoir si cette requête en saisine constituait une "modification des moyens" au sens de l'art. 13(2) RPCR, la chambre a considéré qu'une requête en saisine de la Grande Chambre de recours au titre de l'art. 112(1)a) CBE contient non

seulement des observations purement juridiques, mais aussi, toujours, des éléments de fait selon lesquels une application uniforme du droit doit être assurée ou selon lesquels une question de droit d'importance fondamentale se pose. Une requête tardive en saisine de la Grande Chambre de recours devait donc toujours être considérée comme une "modification des moyens".

La chambre a ensuite rappelé que l'art. 13(2) RPCR impose à la partie non seulement l'obligation d'expliquer la raison pour laquelle l'affaire comporte des circonstances exceptionnelles, mais également la raison pour laquelle sa modification, aussi bien par son contenu que par la date à laquelle elle a été déposée, constitue une réponse justifiée à ces circonstances. En particulier, lorsqu'une partie tente de modifier ses moyens à un stade très avancé de la procédure, les raisons convaincantes visées par l'art. 13(2) RPCR doivent justifier de l'impossibilité de déposer la modification antérieurement (cf. T 1707/17, T 2795/19).

La chambre a relevé qu'en l'espèce, la question de la répartition différente des frais avait déjà été soulevée dans la réponse de l'opposante au mémoire exposant les motifs du recours, de sorte que la titulaire aurait pu, en temps utile, prendre position à ce sujet et renvoyer à la jurisprudence qu'elle jugeait pertinente. La titulaire n'avait pas indiqué de raisons pour lesquelles elle n'avait déposé sa requête en saisine que la veille de la procédure orale. Dans ces conditions, selon la chambre, ni l'opposante ni la chambre n'ont pu examiner cette requête de manière adéquate. Vu ces circonstances, la chambre a exercé son pouvoir d'appréciation en vertu de l'art. 13(2) RPCR en ne prenant pas en compte la requête en saisine présentée par la titulaire.

031-03-26

Contact
Legal Research Service of the Boards of Appeal
Boards of Appeal of the European Patent Office
BOA_legalresearchservice@epo.org