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Case Law of the Boards of Appeal, 11th edition (update 2026) – references in issue 6/2026 and following

In the table summarising the decision data for an abstract, the links to the CLB, 11th edition, lead to the [HTML version](#), which was updated in June 2026. 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 053 EPC | T 0941/24 | Board 3.2.02

Article 053 EPC

Case Number	T 0941/24
Board	3.2.02
Date of decision	2026.04.13
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Art. 053(c) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	exceptions to patentability – method for treatment by surgery
Cited decisions	G 0001/07, G 0001/24, T 0836/08, T 1526/17, T 0318/21
Case Law Book	I.B.4.4.4 , 11th edition

In [T 941/24](#) the invention concerned a medical device relating to medical tracking. Typically, a medical tracking device is used to detect the position of markers which are attached to targets, such as objects or anatomical points to be tracked. The application proposed making use of two sensor devices, with each sensor device being able to determine sensor data representing the position of a marker device located on the other sensor device. A control unit can then combine the sensor data of both sensor devices to determine the relative position between them.

The examining division found that the method claim had an embodiment in which a step of attaching a sensor device to a bone was implicit, which constituted a surgical step (G 1/07). The claim at issue read:

"A method of determining a relative position between two sensor devices of a medical tracking system, wherein the sensor devices are independently manoeuvrable and can be positioned in a fixed position relative to targets, comprising the steps of determining, with the two sensor devices, respective sensor data comprising the position of a marker device of another sensor device and transferring the sensor data to a control unit, characterized by determining the relative position between the two sensor devices by the control unit by combining the sensor data."

The board held that for almost any method claim, it is possible to conceive of a more specific claim (i.e. a dependent claim) comprising an additional step that is surgical.

This more specific claim would fall under the scope of the initial method claim which did not recite this additional surgical step. Therefore, if "encompass" were used with the above meaning, virtually all method claims would encompass a surgical step and not be allowable under Art. 53(c) EPC. It is therefore clear that "encompass" in G 1/07 is not used with the same meaning as discussed above.

In the case on which referral G 1/07 was based, a method claim comprised a step of "delivering polarized ¹²⁹Xe gas" to a subject, in that it explicitly recited that step. This step was considered to encompass the specific embodiment described in the patent application whereby the delivery was performed via injection into the heart.

Consequently, G 1/07 uses the term "comprise" in relation to a step that is explicitly recited in a method claim. By contrast, G 1/07 uses the term "encompass" with regard to an embodiment or step that the patent application mentions as a specific implementation of a more generic claimed method step (see the second and third paragraphs of point 3.2 of the Reasons of G 1/07, as well as the remark in point 4.3.1 of the Reasons on "whether or not a step being or encompassing a surgical step excluded from patentability can be omitted ... by simply leaving it out from the claim").

The board accepted that a step of (directly) attaching a sensor device to a bone is to be regarded as a surgical step. However, the claim in question did not explicitly comprise any step of attaching a sensor device to a target, nor any other step encompassing – within the meaning of G 1/07 – attachment of a sensor device to a bone. In addition, the description, which always has to be consulted to interpret the claims when assessing the patentability of an invention under Art. 52 to 57 EPC (G 1/24), does not suggest that the step of attaching the sensor device to a bone is part of the claimed method. Rather, the last paragraph states that the invention "solely relates to the step of navigating, tracking and verifying by acquiring and analyzing data" (see also the second paragraph of each of pages 9 and 10 of the description, which indicate methods that do not form part of the invention).

The board further held that the claim in question concerned a method of determining a relative position between two sensor devices. In contrast to the situation in T 1526/17 or T 318/21, the sensor devices need not be moved in order for their relative positions to be determined. Instead, the method concerned a passive, one-time determination which does not rely on any motion or acceleration by the sensor devices or the targets. It was thus a situation comparable, in respect of the movement of a bone, with determining the position of the distal end of a bone guide wire in the case on which T 836/08 was based. It followed that the method did not comprise a step of moving the sensor devices, either implicitly or explicitly. Therefore, the claimed method did not comprise or encompass movement of an exposed bone. In conclusion, the board held that the claim did not comprise or encompass any surgical steps. Consequently, it did not constitute a method for treatment by surgery within the meaning of Art. 53(c) EPC.

053-06-26

2. Article 069 EPC | T 0420/24 | Board 3.2.07

Article 069 EPC

Case Number	T 0420/24
Board	3.2.07
Date of decision	2026.01.29
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 069 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claim interpretation – consultation of the description – definition in the description
Cited decisions	G 0001/24
Case Law Book	II.A.6.2.2a), 11th edition

In [T 420/24](#) the appellant (patent proprietor) contended that the prior art document D1 disclosed all features of claim 1 of the patent as granted (main request). Among other things, the appellant submitted that the opposition division had incorrectly interpreted the feature "to reduce a cantilevered beam length of the corrugated knife".

To construe this feature in claim 1, the opposition division had used the definition of cantilevered beam length provided in paragraph [0026] of the contested patent, which reads as follows:

"Alternatively or in addition, the fingers 148 may improve the stability of the leading edge of the knife 126 by reducing the cantilevered beam length of the knife 126, which as used herein refers to the length or distance between the cutting edge 127 of the knife 126 and the nearest adjacent extremity of the clamp 132A applying a clamping load to the knife 126. In this case, the nearest adjacent extremity of the clamp 132A is defined by the distal ends of the fingers 148..."

The board recalled that, according to G 1/24, the description and drawings shall always be consulted to interpret the claims when assessing patentability of an invention under Art. 52 to 57 EPC. It disagreed with the appellant's view that the definition in the contested patent was only intended to be understood in relation to the specific embodiment referred to. According to the board, the use of the phrase "which as used herein refers to" indicated that the definition was a general definition.

The board therefore agreed with the opposition division that the skilled person, when interpreting the term "cantilevered beam length", would take into account the clear definition given in paragraph [0026] of the description of the contested patent.

The board concluded that the appellant had not convincingly demonstrated that the decision under appeal was incorrect with respect to the main request.

054-06-26

3. Article 069 EPC | T 0638/24 | Board 3.3.09

Article 069 EPC

Case Number	T 0638/24
Board	3.3.09
Date of decision	2026.03.19
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 069 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claim interpretation – consultation of the description – unspecified and unqualified definition in the description
Cited decisions	G 0001/24
Case Law Book	II.A.6.2.2a , 11th edition

In [T 638/24](#) the appeal was filed by the patent proprietor against the opposition division's decision revoking the European patent.

Claim 1 of the granted patent (main request) read as follows: "A process for the production of a refined oil having a reduced 3-MCPD ester and/or glycidyl ester content characterized in that it comprises subjecting an oil to the following steps, in order: (a) a bleaching step, (b) a deodorization step, and (c) a final bleaching step with activated bleaching clay, and (d) a final deodorization step is carried out at least 40°C lower than deodorization step (b) and the final deodorization step (d) is carried out at a temperature less than 180°C."

The appellant contested the opposition division's finding that this process lacked novelty over D1. In particular, based on paragraph [0044] of the description of the opposed patent, the appellant argued that the wording "having reduced 3-MCPD ester and/or glycidyl ester content" required the process to result in a refined oil having a 3-MCPD ester and/or glycidyl ester content which was lower than that found in an oil subjected to standard refining processes.

The board did not find this argument persuasive. Claim 1 defined neither a "standard" refining process nor the amount of esters found in oils refined by these processes. Furthermore, there was no evidence that certain refining processes were considered "standard" according to common general knowledge at the filing date. Moreover, the

ester content in a refined oil depended on the type of oil used, its origin, the extraction method and the conditions implemented during refinement. For these reasons, the board found that the purported reference to an undefined refined oil, allegedly obtained by an undefined "standard" process, was not suitable to distinguish the claimed invention from the prior art.

The board observed that the reference to "standard refining (i.e. standard degumming, bleaching and deodorization)" in paragraph [0044] of the description did not provide further guidance on how these refining methods should be carried out. There was no evidence that specific standardised methods and working conditions for carrying them out were part of the common general knowledge at the filing date either. Thus, this passage could not be relied upon to limit the scope of claim 1. G 1/24 could not be invoked to construe a claim relying on an unspecified and unqualified definition. The board concluded that, reading claim 1 and consulting the description, taking into account the skilled person's perspective, it was clear that what was claimed was a process which reduced the content of 3-MCPD and/or glycidyl esters in an oil which contained them. Furthermore, the process included the specified steps, in the given order.

On the basis of this claim construction, the board held that claim 1 of the main request lacked novelty over D1.

055-06-26

4. Article 108 EPC | T 0676/24 | Board 3.4.02

Article 108 EPC

Case Number	T 0676/24
Board	3.4.02
Date of decision	2026.02.10
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 108 EPC
EPC Rules	Rules 007a, 007b, 099(1) EPC
RPBA	
Other legal provisions	Article 02(1), item 11 RFees
Keywords	admissibility of appeal (yes) – reduced fee for appeal – declaration of eligibility not prerequisite for valid payment
Cited decisions	T 1678/21, T 0553/25
Case Law Book	III.U.5.2 , V.A.2.5.4c , 11th edition

In [T 676/24](#) opponent 2 argued that the appeal had not been validly filed because the proprietor had paid the reduced appeal fee without being entitled to do so. The board recalled that, under Art. 108, first and second sentences, EPC, "[n]otice of appeal shall be filed... within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid." Moreover, item 11 of Art. 2 RFees set out two different amounts of the fee for appeal: one for an appeal filed by any person referred to in R. 7a EPC and another for an appeal filed by any other person. The board also recalled that R. 7a(2)(a) to (d) EPC reads as follows: "(2) The reduction of fees referred to in paragraph 1 shall be available for: (a) microenterprises; (b) small and medium-sized enterprises; (c) natural persons; (d) non-profit organisations, universities or public research organisations."

The board explained that R. 7a EPC had been inserted by the "Decision of the Administrative Council of 14 December 2023 amending the Implementing Regulations to the European Patent Convention and the Rules relating to Fees, and adjusting the amount of the reduction in the fee for the supplementary European search where the international or supplementary international search report was drawn up by one of the European International Searching Authorities" (OJ 2024, A3, the "Decision"). As the Decision had entered into force on 1 April 2024, by the time the appeal was filed on 13 May 2024, the new R. 7a EPC was already in force.

The board pointed out that the Implementing Regulations, as amended by the Decision, contained no provision corresponding to former R. 6(5) EPC concerning the definition of micro, small and medium-sized enterprises. It noted, however, that section II.7 of the "Notice from the EPO dated 25 January 2024 concerning fee-related support measures for small entities" (OJ 2024, A8) corresponded to former R. 6(5) EPC. This section read: "For the language- and micro-entity-related fee reduction scheme (Rule 7a(2) and (3) EPC), the definitions of SMEs and microenterprises in Article 2 of Commission Recommendation 2003/361/EC of 6 May 2003 (L 124 of 20 May 2003, p. 36) in Annex 2 to this notice apply (the "Recommendation")." The board further noted that the conditions set out in the Recommendation defining the category of micro, small and medium-sized enterprises were correctly summarised in section 6 of the "Notice from the EPO dated 18 December 2017 concerning the reduced fee for appeal (Art. 108 EPC) for an appeal filed by a natural person or an entity referred to in R. 6(4) EPC" (OJ 2018, A5; the "Notice"). Having assessed the three conditions set out in the Notice, the board concluded that the patent proprietor had established that, when it filed the appeal on 13 May 2024, it was an SME within the meaning of the Recommendation.

On the declaration of eligibility for a reduction of the appeal fee, the board noted that R. 7b(1) EPC required a declaration, inter alia, to be an SME, from "[a]pplicants wishing to benefit from a reduction of fees under R. 7a, paragraph 1 or 3". Paragraph 1 referred to the filing or examination fee and paragraph 3 to five different fees, none of them being the appeal fee. The board concluded that R. 7b(1) EPC did not require a declaration of eligibility for a reduction of the appeal fee. Nor did item 11 of Art. 2 RFees, which specifies the reduced fee, and the board found no other legal basis for it (see the analogous conclusion for former R. 6(6) EPC in T 1678/21 and, for R. 7a and 7b EPC, in T 553/25). The board held that evidence of eligibility for a reduction of the appeal fee need not be produced within the appeal period or on the date of payment of the appeal fee, but could instead be produced upon request by the board (see Art. 7(3) RFees), as occurred in the present case.

According to the board, the declaration requirement set out in points 3 to 5 of the section entitled "Declaration of entitlement" of the Notice had no legal basis, nor did the requirement at the bottom of EPO Forms 1038 and 1038bis to print the name and mention the function in a company. Applying the declaration requirement of the Notice *arguendo*, the board found that the patent proprietor had complied with it, since the EPO had never contested the validity of the declaration filed on 13 May 2016. The patent proprietor was therefore entitled to rely on the EPO's tacit acceptance of that declaration and was consequently not required to file a new declaration within the time limit for filing the appeal and at the latest when paying the reduced appeal fee. The patent proprietor had in any event filed a new Declaration for SMEs on EPO Form 1038bis, together with its letter dated 9 January 2026.

The board concluded that the patent proprietor's appeal was deemed to have been filed on 13 May 2024, when the reduced fee for an appeal was received. The proprietor was entitled to pay this reduced fee pursuant to R. 7a(2)(b) EPC.

056-06-26

5. Article 111(1) EPC | T 1088/23 | Board 3.4.03

Article 111(1) EPC

Case Number	T 1088/23
Board	3.4.03
Date of decision	2026.01.22
Language of the proceedings	FR
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 111(1), 114(1) EPC
EPC Rules	
RPBA	
Other legal provisions	Article 11 RPBA 2020
Keywords	appeal examination – extent of examination – examination of own motion
Cited decisions	G 0010/91, T 0031/08, T 1370/15, T 2154/15, T 0862/16, T 2843/19, T 0664/20
Case Law Book	V.A.3.3 , V.A.9 , 11th edition

Dans l'affaire [T 1088/23](#) l'intimée (titulaire du brevet) a fait valoir que la requérante (l'opposante) n'aurait, à tort, pas motivé ses attaques à l'encontre de la plupart des requêtes subsidiaires. En conséquence, les requêtes subsidiaires 5, 13 et 15 sortiraient du cadre juridique de la procédure de recours et devraient donc être acceptées sans examen dans la procédure de recours.

La chambre a observé que l'intimée n'avait pas précisé la base juridique de son argument selon lequel la chambre n'aurait pas le pouvoir de statuer sur les requêtes subsidiaires. La chambre a déclaré ne pas avoir non plus connaissance d'une telle base juridique. La chambre a ainsi rejeté l'argument selon lequel elle devrait ordonner le maintien du brevet sur la base d'une requête subsidiaire pour la simple raison que l'opposante n'avait pas formulé d'arguments. La chambre a souligné qu'au contraire, l'art. 111(1) CBE prévoit explicitement qu'elle dispose de toutes les compétences de la division d'opposition. Le fait qu'elle dispose également du pouvoir de renvoyer l'affaire à la division d'opposition n'y changeait rien. Les exigences de l'art. 101(3) CBE ne pouvaient être remplacées par une simple référence à l'absence d'objections de la part de la requérante à l'encontre de la version modifiée en question.

La chambre n'était en outre convaincue par aucune autre considération qui la priverait du pouvoir d'examiner les requêtes subsidiaires. Cet examen pourrait également être effectué d'office par elle si les circonstances le justifiaient. La

chambre a expliqué que son obligation de neutralité à l'égard des parties n'était pas différente de celle qui incombe à la division d'opposition. Le rôle judiciaire de la chambre en tant que juridiction de deuxième instance ne l'empêchait pas de statuer sur des requêtes qui n'avaient pas encore été tranchées par la division d'opposition. Il était de jurisprudence constante que les parties ne pouvaient bénéficier de deux instances pour toutes les questions. Il semblait en outre incontestable que les chambres de recours statuaient régulièrement sur des requêtes subsidiaires qui n'avaient pas été tranchées par les divisions d'opposition. Si les chambres étaient tenues de renvoyer l'affaire pour toute question non tranchée, cela ouvrirait en théorie la possibilité d'un nombre pratiquement illimité de renvois aux divisions d'opposition. Selon la chambre, cela constituerait un résultat manifestement absurde, même indépendamment des dispositions de l'art. 11 RPCR, qui ne prévoient un renvoi que si des raisons particulières le justifient. Il s'ensuivait qu'une chambre de recours pourrait très bien être amenée à examiner certaines questions, agissant ainsi dans un rôle comparable à celui de l'instance de première instance de l'OEB, puisqu'elle était la première à examiner certains objets, qui n'avaient pas encore été examinés auparavant. Il n'existait donc dans ce cas pas de raison apparente pour considérer que la chambre ne disposait pas des mêmes compétences qu'une division d'opposition, y compris celle de soulever des objections d'office (art. 114(1) CBE). En outre, le comportement de la requérante ne pouvait pas non plus la contraindre à renvoyer l'affaire à la division d'opposition. La décision de renvoi relevait entièrement du pouvoir discrétionnaire des chambres de recours. La chambre a donc jugé qu'elle disposait du pouvoir d'examiner toutes les requêtes subsidiaires et que le silence de l'opposante ne pouvait à lui seul justifier le renvoi de l'affaire à la division d'opposition.

En ce qui concerne la portée de l'examen d'office des requêtes subsidiaires 2, 3, 7, 8 et 11, la chambre a rappelé que, dans sa décision G 10/91, la Grande Chambre a estimé qu'une division d'opposition était habilitée à soulever un nouveau motif d'opposition lorsqu'il existait, de prime abord, de solides raisons de croire que ces motifs étaient pertinents et qu'ils s'opposeraient en totalité ou en partie au maintien du brevet européen. La division devait, pour soulever de nouveaux motifs d'opposition, disposer d'éléments de fait dont elle avait connaissance, soit dans le cadre de la procédure, soit par les connaissances propres de ses membres. A fortiori, la division d'opposition devait également être compétente pour soulever d'office des objections sur la base de motifs d'opposition déjà invoqués dans l'acte d'opposition, en se fondant sur des faits dont elle avait connaissance au vu du dossier et de la procédure en général. La chambre a considéré qu'elle devait disposer des mêmes compétences lorsqu'elle exerçait les compétences de la division d'opposition en vertu de l'art. 111(1) CBE en tant que juridiction de première instance examinant des éléments qui n'avaient pas été examinés auparavant. En conséquence, la chambre a conclu qu'elle était compétente pour examiner la question de l'activité inventive dans le cadre des requêtes subsidiaires, du moins sur la base des faits dont elle avait connaissance à partir du dossier ou de ses propres connaissances générales. A cet égard, la chambre a renvoyé à l'affaire T 1370/15.

057-06-26

6. Article 112a EPC | R 0006/24 | EBA

Article 112a EPC

Case Number	R 0006/24
Board	EBA
Date of decision	2025.11.07
Language of the proceedings	DE
Internal distribution code	C
Inter partes/ex parte	Inter partes
EPC Articles	Articles 112a(2)(c), 113(1) EPC
EPC Rules	Rule 106 EPC
RPBA	Article 15(1) RPBA 2020
Other legal provisions	
Keywords	petition for review – objection raised (no) – inadmissible – fundamental violation of Article 113 EPC (no) – unallowable
Cited decisions	R 0010/18, R 0007/22
Case Law Book	V.B.3.7.2 , V.B.3.7.3 , V.B.3.7.5 , V.B.3.7.7 , V.B.4.3.11 , 11th edition

In [R 6/24](#) machte die Antragstellerin (Einsprechende) in ihrem Antrag auf Überprüfung insgesamt sieben im Wesentlichen unabhängige Einwände der Verletzung ihres Rechts auf rechtliches Gehör als Antragsgründe geltend, die unter folgenden drei „Aspekten“ zusammengefasst sind: (1) Die Kammer habe mehrere von der Antragstellerin vorgebrachte Argumente zur Auslegung und Offenbarung der Merkmale „positive Auswölbung“ und „Griffspanel“ nicht ordnungsgemäß gewürdigt. (2) Die Kammer habe zudem bestimmte entscheidungserhebliche Argumente der Antragstellerin zur mangelnden Neuheit sowie zur mangelnden erfinderischen Tätigkeit überhaupt nicht behandelt. (3) Die Kammer habe das Recht der Antragstellerin auf rechtliches Gehör schwerwiegend verletzt, indem sie ihr Vorbringen im Schriftsatz vom 8. September 2023 nicht zum Verfahren zuließ.

In Bezug auf den ersten und zweiten Aspekt (erster bis sechster Antragsgrund), kam die Große Beschwerdekammer (GBK) zu dem Schluss, dass die Antragstellerin die geltend gemachten Verletzungen ihres Rechts auf rechtliches Gehör nicht bereits während des Verfahrens nach R. 106 EPÜ hätte rügen müssen. Der GBK zufolge war eine solche Rüge nicht bereits durch die Kammermitteilung gemäß Art. 15 (1) VOBK veranlasst gewesen. Die GBK stimmte der Antragstellerin zu, dass sich Art. 113 (1) EPÜ und somit auch Art. 112a (2) c) EPÜ auf die abschließende Sachentscheidung des zur Entscheidung berufenen Organs beziehen und nicht auf

vorläufige Stellungnahmen desselben. Damit wurden die Antragsgründe für die ersten beiden Aspekte als zulässig befunden.

In Bezug auf den dritten Aspekt (siebter Antragsgrund) war die GBK der Meinung, dass ein Einwand mehr als ein angeblicher Hinweis auf einen möglichen Verstoß gegen Art. 113 (1) EPÜ sein muss und stellte fest, dass die Antragstellerin keine erkennbare und wirksame Rüge gemäß R. 106 EPÜ in Bezug auf die Nichtzulassung des Vorbringens der Antragstellerin im Schriftsatz vom 8. September 2023 erhoben hatte. Der siebte Antragsgrund wurde daher als unzulässig befunden.

Hinsichtlich der ersten beiden Aspekte (erster bis sechster Antragsgrund) kam die GBK zu dem Schluss, dass der Antrag auf Überprüfung unbegründet war. Sie lieferte eine detaillierte Begründung in Bezug auf jeden der sechs als zulässig befundenen Antragsgründe. Darunter verwies sie auf die ständige Rechtsprechung der GBK, der zufolge eine Kammer nicht verpflichtet ist, auf jedes einzelne Argument einzugehen. Sie teilte die Ansicht der Antragstellerin nicht, wonach bereits die Nichterwähnung angeblich relevanter Argumente vermuten lasse, dass der Partei das rechtliche Gehör versagt worden wäre. Sie verwies auf die Entscheidung R 10/18, in der die GBK erachtet hatte, dass aus der Gesamtheit der Entscheidung zu entnehmen war, dass die Kammer die fraglichen Argumente berücksichtigt hatte. Die GBK befand, dass diese Vorgehensweise auch im vorliegenden Fall als angebracht erschien.

Ferner merkte die GBK an, dass das in Art. 113 (1) EPÜ verankerte Recht auf Anhörung und das daraus abgeleitete Recht auf Berücksichtigung relevanter Argumente einer Partei nur dann als wirksame Rechte empfunden werden können, wenn die GBK in einem Überprüfungsverfahren nicht nur formell, sondern auch effektiv prüfen kann, ob diese Rechte gewahrt wurden. Sofern eine inhaltliche Würdigung des Vorbringens einer Partei in einem bestimmten Fall für die Beurteilung der Frage unerlässlich ist, ob das Recht der Partei auf Anhörung gewahrt wurde, ist die GBK auch dazu berechtigt, eine solche Beurteilung vorzunehmen. Selbst die Beurteilung, ob der entscheidungsrelevante Charakter eines nicht behandelten Vorbringens für den Durchschnittsleser und nicht nur für den Fachmann unmittelbar ersichtlich war, wie es die Entscheidung R 7/22 verlangt, erfordert eine Analyse der technischen Komplexität des betreffenden Vorbringens und seines Verhältnisses zur Gesamtheit der technischen Fragen. Eine ähnliche technische und rechtliche Beurteilung des gesamten Beschwerdefalls und der vorgebrachten, angeblich nicht behandelten Argumente kann erforderlich sein, wenn zu entscheiden ist, ob die Gründe der Kammer in der Entscheidung zu der Schlussfolgerung führen können, dass die allgemeine Annahme, nämlich dass die fraglichen Argumente berücksichtigt worden sind, als widerlegt anzusehen ist.

Wenn die GBK keine Befugnis zur Prüfung der (zumindest prima facie) Richtigkeit des Vorbringens einer Partei hätte, um festzustellen, ob ein Argument offensichtlich unbegründet ist und die Kammer es daher unbeantwortet lassen könnte, führte dies zwangsläufig dazu, dass sie ausnahmslos eine Verletzung des rechtlichen Gehörs feststellen müsste, wenn ein beliebiger Einwand in der Entscheidung unerwähnt bliebe. Dieses Ergebnis hielt die GBK für unvertretbar.

058-06-26

7. Article 112a(2)(d) EPC | R 0003/24 | EBA

Article 112a(2)(d) EPC

Case Number	R 0003/24
Board	EBA
Date of decision	2026.03.31
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 112a(2)(c) and (d), 113(1) EPC
EPC Rules	Rule 104 EPC
RPBA	Articles 12(2), 12(4) RPBA 2007; Article 19(1) RPBA 2020
Other legal provisions	
Keywords	petition for review – fundamental procedural defect (no) – list of grounds exhaustive – fundamental violation of Article 113 EPC (no)
Cited decisions	R 0017/11, R 0003/14, R 0012/23
Case Law Book	V.B.3.5.2 , V.B.4.4 , V.B.4.4.2 , 11th edition

The petition in [R 3/24](#) was based on the grounds that there was: (a) a fundamental procedural defect in the board's decision in accordance with Art. 112a(2)(d) EPC and R. 104(b) EPC (first defect), (b) a fundamental procedural defect in accordance with Art. 112a(2)(d) EPC and Art. 12(2) and 12(4) RPBA 2007 (second defect) and (c) a fundamental procedural defect in accordance with Art. 112a(2)(d) EPC and Art. 19(1) RPBA 2020 (third defect). Furthermore, a violation of Art. 113(1) EPC was asserted in conjunction with all three alleged defects.

As to the first defect, the petitioner argued that the board had (i) not decided on the request that the decision by the Opposition Division (OD) should be set aside since the patent as granted is inventive over D5 (D5*) in view of D9 and (ii) not explained why D10 was a better starting point than D5 (or D6, D7 or D8).

The Enlarged Board of Appeal (EBA) held that the request referred to by the petitioner was not a request within the meaning of R. 104(b) EPC. It recalled that, according to the common practice in proceedings before the EPO, requests are in general directed to executable legal consequences sought by the parties. The arguments provided by the parties in support of these legal consequences do not normally belong to the legally binding requests (see also R 17/11). The EBA also referred to R 3/14 in which it had explained that only requests submitted in writing or requests which had been recorded in the minutes of the oral proceedings fell under

R. 104(b) EPC. It further specified that the request, insofar as it had required examining inventive step from D5 (D5*) had not been "directed to executable legal consequences sought". The executable legal consequence had been solely the setting aside of the decision under appeal irrespective of the arguments on which the appellant had relied to this end. As to the petitioner's view that the OD's decision to start from D5 had been correct and that it had not been for the board to examine D10, the EBA found that these were arguments in support of the legal consequence that the decision should be overturned. One could not consider from the body of the appellant's submissions before the board that to uphold the appeal on the basis of D5 constituted a request within the meaning of R. 104(b) EPC.

As to the second defect, the petitioner asserted that (i) not providing a decision starting from D5 as the closest prior art had been in contradiction with the standard embodied in Art. 12(2) RPBA 2020, and (ii) the board's starting from D10 as the closest prior art amounted to a "new line of attack". The EBA held that any violation of Art. 12(2) and (4) RPBA 2007 was not covered by the provisions of Art. 112a(2)(d) EPC. The grounds for a petition for review were exhaustively defined in Art. 112a(2) EPC in conjunction with R. 104 EPC. Article 112a(2)(d) EPC was not a catch-all clause for procedural defects (R 12/23). It merely empowered the legislature to define defects in the Implementing Regulations in addition to the defects mentioned in Art. 112a EPC. Rule 104 EPC exhaustively defined exactly two defects, and a violation of any of the provisions of the RPBA was not among them.

With regard to the third defect, the petitioner referred to "the room incident" which had occurred when one of the respondent's representatives had entered the room where the board had been deliberating and had closed the door. The petitioner argued, inter alia, that the board had failed to decide on Art. 19(1) RPBA as a precondition for assessing compliance with the right to be heard. The petitioner also claimed that, once a party's representative had entered the deliberation room during deliberations, secrecy had been broken and that this constituted a fundamental procedural defect under Art. 112a(2)(d) EPC. According to the EBA, the petition was obviously unfounded insofar as the defect was based on a violation of Art. 112a(2)(d) EPC in conjunction with Art. 19(1) RPBA 2020. It recalled that Art. 112a(2)(d) EPC was not a catch-all clause for procedural defects and that the only two defects it referred to were those mentioned in R. 104(a) and (b) EPC. The EBA further noted that any misconduct by a board member in respect of their duty to maintain strict secrecy concerning the boards' deliberations may make them liable to disciplinary action by the Administrative Council, as the appointing authority for board members. In summary, the EBA held that the alleged defect that the board had failed to decide on Art. 19(1) RPBA pronouncing a remedy or sanction served no purpose, because the board was not the appropriate body to take such a decision.

The EBA concluded that none of the asserted procedural defects had occurred. It also found that there had been no violation of the appellant's right to be heard. The petition was therefore dismissed as clearly unallowable.

059-06-26

8. Rule 076(2) EPC | T 1486/23 | Board 3.4.01

Rule 076(2) EPC

Case Number	T 1486/23
Board	3.4.01
Date of decision	2026.03.25
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	Rule 076(2)(c) EPC
RPBA	
Other legal provisions	
Keywords	admissibility of opposition – extent of opposition – unopposed independent claim referring to opposed claims
Cited decisions	G 0009/91, G 0003/14
Case Law Book	V.A.3.2.3c , IV.C.2.2.6 , 11th edition

In [T 1486/23](#) umfasste der in der mündlichen Verhandlung zugelassene Beschwerdehilfsantrag die unabhängigen Ansprüche 1 bis 6 und die abhängigen Ansprüche 7 bis 15.

Die Beschwerdeführerin (Einsprechende) erhob Einwände der mangelnden Neuheit und erfinderischen Tätigkeit gegen die unabhängigen Ansprüche 5 und 6, sowie gegen die Ansprüche 7, 8 und 10, jeweils soweit abhängig von Anspruch 5.

Die Kammer entschied, dass die Gegenstände der Ansprüche 5, 6, 7, 8 und 10 des Beschwerdehilfsantrags den Gegenständen von nicht zum Einspruchsumfang gehörigen Ansprüchen des Patents entsprachen, beziehungsweise gegenüber diesen eingeschränkt waren. Sie durften nur auf ihre Änderungen gegenüber den Ansprüchen des Patents hin geprüft werden, aus denen sich jedoch keine Probleme ergaben. Die Einwände der mangelnden Neuheit und erfinderischen Tätigkeit gegen die o.g. Ansprüche wurden dementsprechend nicht berücksichtigt.

In Bezug auf Anspruch 6 erklärte die Kammer, dass dieser aus dem (nicht zum Einspruchsumfang gehörigen) Anspruch 12 des Patents hervorgegangen war, der auf ein Gerät gerichtet war, das eine "Aufnahmevorrichtung für einen Wechsel-Einsatz nach zumindest einem der Ansprüche 1 bis 11" umfasste. Die in den Ansprüchen 1 bis 11 des Patents definierten Wechsel-Einsätze und ihre Merkmale hatten zwar implizite Auswirkungen auf das Gerät, waren jedoch nicht Teil

desselben. Die Kammer wertete Anspruch 12 des Patents daher gemäß R. 43(4) EPÜ als einen unabhängigen Anspruch.

Die Patentinhaberin hatte die Gegenstände der Ansprüche 1 bis 11 des Patents geändert. Dadurch, dass der Anspruch 12 des Patents eine Referenz auf zumindest einen der Ansprüche 1 bis 11 enthielt, hatte sich durch deren Änderung automatisch auch der Gegenstand des Anspruchs 12 geändert, weshalb dieser nicht unverändert bestehen bleiben konnte. Die Patentinhaberin hatte dementsprechend den Anspruch 12 so geändert, dass der darauf beruhende, gegenwärtige Anspruch 6 statt eines Verweises auf vorausgehende Ansprüche den Gegenstand des Anspruchs 1 des Patents explizit aufnahm. Die Kammer stellte fest, dass der Gegenstand des gegenwärtigen Anspruchs 6 gegenüber dem des Anspruchs 12 des Patents eingeschränkt war.

Für die Kammer stellte sich die Frage, ob der Anspruch 12 des Patents im Einspruchsverfahren überhaupt in dieser Weise geändert und eingeschränkt werden durfte, und, falls dem so war, inwieweit eine solche Änderung in diesem Beschwerdeverfahren geprüft werden konnte. Sie kam zu dem Schluss, dass schon allein aus dem Grund, dass ein unabhängiger, nicht zum Einspruchsumfang gehöriger Anspruch nicht unverändert bestehen bleiben kann, wenn er einen Verweis auf mindestens einen anderen, zum Einspruchsumfang gehörigen und gegenüber seiner erteilten Fassung geänderten Anspruch enthält, die Anpassung eines solchen Anspruchs grundsätzlich möglich sein muss. Der Kammer zufolge müssen Änderungen, auch wenn es sich "nur" um Anpassungen oder Beschränkungen handelt, auf ihre Konformität mit den Art. 84 und 123 EPÜ geprüft werden.

Die Entscheidung G 9/91 verstand die Kammer dementsprechend so, dass nur solche Ansprüche gänzlich außerhalb des Verfahrens stehen, deren Gegenstand überhaupt nicht von den zum Einspruchsumfang gehörigen Ansprüchen mitbestimmt wird. Für die Kammer ergab sich dadurch, neben der in G 9/91 geschilderten, abhängige Ansprüche betreffenden Ausnahme noch eine weitere enge Ausnahme von dem Grundprinzip, dass die von der Einspruchsabteilung oder der Beschwerdekammer vorgenommene Prüfung an den von der Einsprechenden innerhalb der Einspruchsfrist erklärten Umfang des Einspruchs gebunden ist.

Die Kammer stellte klar, dass das in diesem Fall nicht bedeutete, dass das Einspruchsverfahren im Hinblick auf den aus dem nicht zum Einspruchsumfang gehörenden Anspruch 12 des Patents hervorgegangenen Anspruch 6 völlig neu aufgerollt werden konnte. Einwände, die nicht durch Änderungen an den Ansprüchen des Patents hervorgerufen werden, müssen vielmehr unberücksichtigt bleiben; insbesondere solche, die auch auf den Anspruch 12 des Patents zutreffen würden. Da sich die Einwände gegen den Anspruch 6 augenscheinlich nicht aus der Änderung ergaben, wurden sie von der Kammer nicht berücksichtigt.

060-06-26

9. Rule 106 EPC | T 1899/23 | Board 3.3.02

Rule 106 EPC

Case Number	T 1899/23
Board	3.3.02
Date of decision	2026.01.20
Language of the proceedings	EN
Internal distribution code	C
Inter partes/ex parte	Inter partes
EPC Articles	Articles 024(1), 024(4), 112a, 113(1) EPC
EPC Rules	Rules 104, 106 EPC
RPBA	
Other legal provisions	
Keywords	obligation to raise objections – objection regarding the composition of the board's panel – objection dismissed
Cited decisions	G 0001/05, G 0002/08, G 0003/08, G 0001/21, J 0015/04, R 0004/08, R 0008/08, R 0006/11, R 0021/22
Case Law Book	V.B.3.7.2a), V.B.4.1 , V.B.4.2 , III.B.2.10 , 11th edition

[See also abstract under Article 1 RPBA.](#)

In [T 1899/23](#) the appellant raised an objection under R. 106 EPC. It argued that a panel composition that was not in accordance with the business distribution scheme (BDS) had violated the right to have the case considered by the lawfully designated judges, the right to have fair proceedings and the right to be heard. It further submitted that these deficiencies were to be regarded as "severe defects" pursuant to Art. 112a EPC.

The board recalled that, according to the case law (see R 4/08, R 8/08), the reference in R. 106 EPC to the specific procedural defects as set out in Art. 112a(2)(a) to (d) EPC not only implied that the objection should be based on one of these grounds, but also that the party must explicitly indicate which of them was considered to apply.

The board held that while the party's interest in having the case considered and decided by the lawfully designated judges had been acknowledged also for proceedings before the boards of appeal (see e.g. G 1/21 of 16 July 2021, G 1/05, G 2/08, G 3/08, J 15/04), this did not imply that this principle was also covered by the

procedural defects as exhaustively enumerated in Art. 112a(2) EPC. The defects set out in Art. 112a(2)(a), (b) and (d) EPC at least did not encompass a violation of the right to have the case decided by the lawfully designated judges in accordance with the BDS.

The board specified that the appellant's objection with respect to the composition of the panel could not be based on Art. 112a(2)(a) EPC, as this provision explicitly concerned the allocation of members in breach of Art. 24(1) or (4) EPC. The same applied to Art. 112a(2)(b) EPC, as this provision referred to the appointment of a member to the Boards of Appeal as a whole (see R 21/22). Moreover, the appellant's objection could not be based on Art. 112a(2)(d) EPC, since this exclusively covered the defects set out in R. 104 EPC (see e.g. R 6/11) which were not related to the right to be heard by lawfully designated judges.

Hence, there would only be a basis for an objection under R. 106 EPC if an (allegedly) incorrect composition of the panel could be regarded as a fundamental violation of the right to be heard according to Art. 112a(2)(c) and 113(1) EPC. However, for the purposes of the present case, there was no need to decide whether a fundamental defect in the composition of the responsible panel could have indeed been regarded as a violation of the right to be heard under particular circumstances (e.g. if the defect were so severe that the composition was entirely arbitrary) and what consequences this might have had for the continuation of the proceedings. This was because the parties' interest to be heard by the lawfully designated judges (and, accordingly, the right to have fair proceedings) was not affected in the present case. According to the board, the composition of the panel in the case at hand was in accordance with the relevant provisions of the applicable BDS, the RPBA and the EPC.

The board concluded that the composition of the board could not be considered arbitrary, but rather was based on the provisions of the BDS of the Technical Boards of Appeal respectively in force at the relevant points in time. For this reason, the parties' rights to be heard by lawfully designated judges and to have fair proceedings were not impaired.

In the absence of any procedural defect with respect to the composition of the panel, the objection under R. 106 EPC was dismissed.

061-06-26

10. Article 01 RPBA | T 1899/23 | Board 3.3.02

Article 01 RPBA 2020

Case Number	T 1899/23
Board	3.3.02
Date of decision	2026.01.20
Language of the proceedings	EN
Internal distribution code	C
Inter partes/ex parte	Inter partes
EPC Articles	Article 112(1)(a) EPC
EPC Rules	
RPBA	Articles 01, 08 RPBA 2020
Other legal provisions	Article 08 BDS
Keywords	competence of the boards of appeal – composition of the board of appeal – composition in accordance with the BDS
Cited decisions	G 0001/21, J 0015/04, R 0015/11, T 0281/03
Case Law Book	V.A.6 , V.B.2.3.4 , V.B.2.3.7 , 11th edition

[See also abstract under Rule 106 EPC.](#)

In [T 1899/23](#) the board, composed of three former members of Board 3.3.06, had already issued the communication under Art. 15 (1) RPBA and the summons to oral proceedings before the new business distribution scheme (BDS) of the Technical Boards of Appeal of 27 June 2025 entered into force on 1 September 2025. According to that scheme, the IPC class of the present case (C11D) was allocated to Board 3.3.02 as of 1 December 2025. In view of the retirement of the Chair of Board 3.3.06, all other members were assigned to other boards with effect from 1 December 2025. The case was transferred to Board 3.3.02 with effect from 1 December 2025. The composition of the board in the present case remained unchanged.

The board rejected the appellant's request that the case be continued with a panel composed of Board 3.3.02 and its Chair or Vice Chair. It noted that the competence of the panel of a technical board of appeal to assess whether its composition was correct pursuant to the RPBA and the relevant BDS had been acknowledged in T 281/03. However, in G 1/21 of 28 May 2021 and G 1/21 of 16 July 2021, the Enlarged Board held that it was not competent to change its composition or to declare itself to lack competence to deal with the case because of an allegedly incorrect application of the BDS. The board considered the conclusions of the Enlarged Board to be applicable when the party requests to change the composition

of the panel of a technical board of appeal. It stressed that the appellant's final request was not to the effect that the board declare itself to lack competence to deal with the case, but rather that the case be continued with members of Board 3.3.02. The panel held that it had no competence to decide on that request. Since the Chairman of Board 3.3.02 had also confirmed that the composition of the board for the present case remained unchanged, there was no basis for continuing the case with members of Board 3.3.02 and its Chair or Vice Chair. The board noted that this finding was not challenged by the appellant's reference to Art. 8 RPBA, which merely addresses the consequences of a change in the board's composition after oral proceedings, but does not deal with the replacement as such.

The board found the composition of the panel to be in accordance with the relevant provisions of the applicable BDS, the RPBA and the EPC. The amendment in the BDS of 27 June 2025 did not presuppose a new composition of the panel. The board explained that Art. 8 BDS serves to ensure that the board and the composition of the panel, determined objectively on the basis of the BDS before the decision-making process started, remain unaffected by amendments made therein. This prevents interference in the decision-making process due to changes in the responsibility for a specific case triggered by amendments to the BDS. It also ensures that the designated judges can only be replaced pursuant to the specific provisions set out in the BDS, the RPBA or Art. 24(4) EPC. The board underlined that this enhances judicial efficiency constituting an essential element of the right to have fair proceedings (J 15/04).

The board observed that the peculiarity of the present case was that Board 3.3.06 remained in the BDS as an empty shell and became de facto ineffective. As no provision in the BDS explicitly covered this specific constellation, the board applied Art. 8 BDS by analogy, taking into account the following aspects. The BDS is an important element of an independent, reliable and efficient judicial system (R 15/11). Any change in a board's composition without good reason would be contrary to the evident purpose of the BDS and thus detrimental to the public's confidence in the judicial character of appeal proceedings (R 15/11). According to the board, to ensure that this objective is safeguarded for changes during the working year, Art. 8 BDS provides that the responsibility of the board and/or the panel shall not be affected if the BDS is changed and if a communication has already been sent or oral proceedings have been appointed. Replacing the members of a panel that was originally composed on the basis of objective criteria set out in the BDS would run counter to the principle that responsibilities shall be determined before the assessment of a specific case begins.

Furthermore, the board did not see any need for a referral under Art. 112(1)(a) EPC, because the legal loophole in the BDS could be closed by the analogous application of Art. 8 BDS, in line with established legal methodology. Nor did it consider a referral necessary to ensure the uniform application of the law.

062-06-26

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