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Abstracts of decisions

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1. Article 024(3) EPC | T 0417/22 | Board 3.3.10

Article 024(3) EPC

Case Number	T 0417/22
Board	3.3.10
Date of decision	2025.07.07
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 024(3) EPC
EPC Rules	Rule 102(c) EPC
RPBA	
Other legal provisions	
Keywords	suspicion of partiality – procedural step taken (yes) – objection admissible (no) – replacement of members of the board of appeal (no)
Cited decisions	G 0003/08, T 1286/23
Case Law Book	III.J.3.2 , III.J.5.3 , 11th edition

[See also abstract under Article 21 RPBA.](#)

Before focusing on the parties' procedural requests, the board in [T 417/22](#) dealt with the patent proprietor's objection of suspected partiality of the legal member of the board.

The board recalled that according to Art. 24(3), second sentence, EPC, an objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step. In this regard the question arose as to what exactly constituted in this case the reasons for objection within the meaning of Art. 24(3), second sentence, EPC and when the patent proprietor had become aware of these reasons.

In the board's understanding, the patent proprietor's reasons for the objection against the legal member were stated to be based on two facts: the allegedly biased opinion formulated in the board's preliminary opinion dated 22 May 2025 and the fact that the legal member had also sat on the board that issued referral decision T 1286/23 and inevitably must have played a decisive role, given the point of law that had been and was at the heart of the matter.

Concerning the point in time when the party had become aware of the reasons for the objection, the patent proprietor submitted that they had only become aware of the

fact that the legal member in the present case had also acted as legal member in T 1286/23 on 4 July 2025. The patent proprietor also indicated that the reasons for the bias in the board's communication had become clear only once the patent proprietor had realised that the same legal member had been involved. Furthermore, general procedural fairness dictated that the board ought to have called the parties' attention to the fact that the legal member had been the same in both cases.

The board observed that, first of all, it had no obligation to point out to the parties that its members may have participated in decisions dealing with similar or even the same issues. Such facts alone cannot establish any suspicion of partiality (G 3/08).

Furthermore, the board held that if the alleged bias in the board's communication had become apparent only once the patent proprietor had realised the involvement of the same legal member in the referral decision T 1286/23, the objection should still have been made before undertaking a procedural step on 27 June 2025. The board observed that from an objective point of view, the patent proprietor must be presumed to have been aware of the board's composition in the case T 1286/23 at this point of time. The board recognised that the wording of Art. 24(3), second sentence, EPC suggested that factual, i.e. subjective knowledge of the reason for exclusion was required. However, subjective knowledge of a party was effectively impossible to verify for either the board or other parties. Thus, accepting subjective awareness of a party as the admissibility condition for the application of Art. 24(3), second sentence, EPC would lead to the result that a party could effectively raise an objection anytime in the proceedings, simply by stating that even if the necessary facts had been at their disposal, they subjectively had not recognised a relevant relationship between them. This would effectively make Art. 24(3), second sentence, EPC a provision without effect, which could not have been the legislative intention.

Thus, the board accepted the intervener's argument that the patent proprietor had dealt with T 1286/23 in great detail and, therefore, must be presumed to have known the decision in its entirety, including the composition of the deciding board, before they undertook a procedural step on 27 June 2025. In this regard, the board pointed out that the names of the board members form part of the decision pursuant to R. 102(c) EPC. That the name of the legal member in the present case must have been known to the patent proprietor since the beginning of the proceedings, at least since the issuance of the board's communication, had been undisputed. Accordingly, the patent proprietor had to be presumed to have been aware of the fact that the same legal member had been involved in both cases by the time they filed their submissions dated 27 June 2025. The board concluded that an objection under Art. 24(3), first sentence, EPC against the legal member on this basis was inadmissible, even if the board were to accept, for the benefit of the patent proprietor, that the alleged bias had not had to be apparent until they had realised the involvement of the same legal member.

Consequently, the board refused the request for replacement of the legal member.

089-09-25

2. Article 056 EPC | T 1065/23 | Board 3.3.09

Article 056 EPC

Case Number	T 1065/23
Board	3.3.09
Date of decision	2025.05.22
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	Art. 12(4), (6) RPBA 2020
Other legal provisions	
Keywords	inventive step – obviousness – range values excluding values suitable for achieving advantageous effects – non-arbitrary selection
Cited decisions	
Case Law Book	I.D.4.1.3 , 11th edition

[See also abstract under Article 84 EPC.](#)

In case [T 1065/23](#), the purpose of the invention was the provision of a pea protein composition comprising pea proteins having a low solubility. Such protein extracts had superior properties when used in processes for manufacturing bakery products and beverages.

Opponent 2 argued that as solubility was a relative property, it should not be taken into account for selecting the closest prior art. In the board's view, this argument was not convincing. From the patent and the documents used for formulating the inventive-step attacks, it was evident that before the relevant date, the skilled person distinguished pea proteins having a "high" versus a "low" solubility. Thus, even in the absence of precise thresholds, the skilled person distinguished these protein forms. The board found that D2, which aimed to obtain proteins having a high solubility, did not represent the closest prior art. D12 could be considered the closest prior art.

Relying on the submission in opponent 1's statement of grounds of appeal, opponent 2 argued that experimental report D30 provided evidence that the alleged effects could not be achieved across the entire scope claimed. The desired nitrogen solubility index of less than 15% was thus not achieved across the entire scope claimed. The board stated, however, that opponent 1's new allegation of facts based on D30 was not only late filed but also raised new complex issues which should have

been addressed during the opposition proceedings (not admitted – Art. 12(4) and (6) RPBA).

Opponent 2 considered that the underlying technical problem was merely the provision of an alternative method for extracting pea proteins and an alternative pea protein extract. The board did not agree. Starting from D12 and taking into account the effects shown in the patent, the underlying technical problem was the provision of a pea protein extract and a method for its manufacture, where the extract had a combination of a lower nitrogen solubility index, gel strength and viscosity, resulting in improvements in processes (for bakery products and beverages).

As to obviousness, opponent 2 also argued that the selection of the cut-off values 4.0 and 5.8 defining the claimed pH range was arbitrary and could thus not involve an inventive step. The experimental report D15 showed that the preferred low nitrogen solubility index of less than 15% mentioned in claim 11 was obtained not only when the pH was inside, but also when it was outside the claimed pH range, e.g. at a pH of 6.2. For this reason alone, the claimed subject-matter was obvious over the teaching of D12. The board was not convinced by this argument; Table 2 of D15 showed that all protein extracts heated at a pH of 6.2, i.e. above the claimed range, had a higher nitrogen solubility index than those heated at a pH within the claimed range. The results showed a clear pattern indicating the advantage of working within rather than outside the claimed pH range. For claim 1 to be inventive, it was not necessary to achieve a nitrogen solubility index lower than 15%. This was not an absolute threshold required for the method to be inventive. What was relevant was that the nitrogen solubility index obtained was lower than that obtained at pHs outside the range.

The fact that the cut-off values 4.0 and 5.8 of the claimed pH range might exclude lower or higher pH values suitable for achieving advantageous effects was not, as such, a reason to consider the selection of the claimed cut-off values as "arbitrary" and the claimed subject-matter as obvious in view of the prior art. It would be illogical if a claim defining a feature by reference to a range was considered to lack an inventive step for the sole reason that the invention could have been claimed more broadly, specifying a broader range. This would lead to the absurd situation that a claim defining a broad range involved an inventive step, whereas a claim defining a narrower range, falling within that broad range, did not (see also Catchword). What counts is that the available evidence makes it credible that subjecting a slurry containing precipitated pea protein at a pH within the claimed range to the claimed heating step induces effects which go beyond those obtainable by carrying out the method of the prior art.

090-09-25

3. Article 069 EPC | T 2027/23 | Board 3.5.05

Article 069 EPC

Case Number	T 2027/23
Board	3.5.05
Date of decision	2025.06.30
Language of the proceedings	EN
Internal distribution code	B
Inter partes/ex parte	Inter partes
EPC Articles	Article 069 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claim interpretation – description and drawings consulted for defining the skilled reader – narrow claim interpretation (no) – assessing novelty
Cited decisions	G 0001/24, T 1924/20, T 1465/23, T 1999/23 UPC_CoA_335/2023, UPC_CFI_278/2023, UPC_CFI_230/2024 German Federal Court of Justice (BGH), decision of 7 September 2004 (Bodenseitige Vereinzelungseinrichtung) UK Court of Appeal, European Central Bank v DSS [2008] EWCA Civ 192
Case Law Book	II.A.6.3.4 , II.A.6.3.1 , 11th edition

In [T 2027/23](#) the board identified three major takeaways from G 1/24:

First, the wording of the claims forms the "basis" for their interpretation and the description and the drawings should always be "consulted" or "referred to". However, G 1/24 is silent as to the very purpose of such "consultation" or "reference". In particular, it cannot be inferred from G 1/24 whether the description and the drawings should be "consulted" for the purpose of, for example, deriving "explanatory aids" to claim interpretation (see e.g. UPC_CoA_335/2023, second headnote), confirming the ordinary meaning of a claim feature, determining the function or the purpose of a claim feature, or simply defining the technically skilled reader of a claim (see e.g. T 1924/20).

Second, discrepancies in claim interpretation practice between national courts, the UPC and the Boards of Appeal are undesirable and should thus be avoided.

Third, it is up to a patentee to remedy discrepancies between the description and the claims. In other words, patentees are the masters of their fate.

Moreover, the board stated that it found no authority for interpreting a claim more narrowly than the wording of the claim as understood by the person skilled in the art would allow, and that this was for several reasons:

- (a) First, because "consulting the description" did not imply any specific result of such consultation: A consultation of two conflicting authorities did not a priori determine who is master. Decision G 1/24 did not require the boards to give the description preference over the wording of the claim. To the contrary, according to the Order of G 1/24, "the claims are the starting point and the basis for assessing the patentability of an invention", and as the present board added, in line with UPC_CoA_335/2023, second headnote, the claims are the "decisive basis".
- (b) Second, such interpretation would contradict the well-established jurisprudence of the Boards of Appeal, which was essentially confirmed in decision G 1/24 (see e.g. also T 1999/23).
- (c) Third, such an interpretation would directly contradict the second takeaway from decision G 1/24, namely a harmonised claim interpretation between national courts or the UPC and the Boards of Appeal.

The board referred to decisions from the UPC and the German Federal Court of Justice and concluded that to align the judicial practice of the Boards of Appeal with that of the national courts and the UPC, a claim should not be interpreted, based on features set out in embodiments of an invention, as having a meaning narrower than the wording of the claim as understood by the person skilled in the art. In cases of discrepancy between the claim language and the description, it falls upon the patentee to remedy this incongruence by amending the claim. It is not the task of the Boards of Appeal to reach such alignment by way of interpretative somersaults.

In the present case, the board "consulted" the description and drawings to define the technically skilled reader from whose perspective the claim features (d) to (f) were to be interpreted.

091-09-25

4. Article 083 EPC | T 0867/23 | Board 3.3.07

Article 083 EPC

Case Number	T 0867/23
Board	3.3.07
Date of decision	2025.01.21
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 083 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	sufficiency of disclosure (yes) – second medical use – proof of the claimed therapeutic effect – post-published evidence
Cited decisions	G 0002/21, T 0609/02, T 0979/23
Case Law Book	II.C.6.8 , II.C.7.2.2 , II.C.7.2.3b , II.C.7.2.3c , 11th edition

In [T 867/23](#) the board decided on the basis of the patent as granted (main request). Claim 1 was worded as a purpose-limited product claim in accordance with Art. 54(5) EPC. The treatment of "primary negative symptoms of schizophrenia" was a functional feature of claim 1.

The parties were in dispute regarding whether the application as filed made the claimed therapeutic effect plausible, and whether post-published evidence could be taken into account. The question was whether, on the basis of the evidence contained in the application as filed, cariprazine was demonstrated to have the claimed therapeutic effect on primary negative symptoms of schizophrenia.

In support of its reasoning, the board cited G 2/21 (point 77 of the Reasons), in which the Enlarged Board had explained that, in order to meet the requirement of sufficiency of disclosure, "[...] the proof of a claimed therapeutic effect has to be provided in the application as filed, in particular if, in the absence of experimental data in the application as filed, it would not be credible to the skilled person that the therapeutic effect is achieved. A lack in this respect cannot be remedied by post-published evidence."

In the board's view, this statement of the Enlarged Board did not set a new standard for reliance on post-published evidence in the context of sufficiency of disclosure, i.e.

a standard which would depart from the previously cited case law summarised in G 2/21 (as noted in T 979/23). Following G 2/21, a reliance on post-published evidence was not ruled out generally in the context of sufficiency of disclosure for second medical use claims. The reliance on post-published evidence could also not be limited to situations in which it served no useful purpose, i.e. cases in which the effect was already convincingly proven in the application to such an extent that the use of post-published evidence, as a superfluous confirmation of the already proven effect, would be of no relevance. The board explained that, in other words, the scope of reliance on post-published evidence was not zero.

In the case in hand, the board considered that the application as filed contained experimental data reflecting an effect on primary negative symptoms of schizophrenia, and thus disclosed the suitability of cariprazine for the claimed therapeutic indication (see T 609/02). Under these circumstances, the board established that post-published evidence D13 could be taken into account to back up the findings in the application as filed.

The board found that D13 confirmed the findings of the patent, and showed improvements in negative symptoms while excluding indirect effects related to positive, depressive, or EPS (extrapyramidal) symptoms as causal factor. Accordingly, D13 supported the conclusion that cariprazine was effective on primary negative symptoms and refuted the appellants' objection that the improvement could relate to secondary negative symptoms. Therefore, the criteria of sufficiency of disclosure were satisfied.

092-09-25

5. Article 084 EPC | T 1065/23 | Board 3.3.09

Article 084 EPC

Case Number	T 1065/23
Board	3.3.09
Date of decision	2025.05.22
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 084, 100 EPC
EPC Rules	
RPBA	
Other legal provisions	Guidelines, F-IV, 4.12
Keywords	claims – product-by-process claims – claim format is not a ground for opposition
Cited decisions	G 0003/14, T 0150/82
Case Law Book	II.A.7.3 , IV.C.2.2.7 , 11th edition

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

In [T 1065/23](#), claim 10 of the first auxiliary request, which became the main request, defined a pea protein extract obtainable by the method of claims 1 to 9.

The board noted that the method of claim 1 was characterised by a step in which a precipitated pea protein contained in a slurry having a pH of 4.0 to 5.8 was subjected to a specific heat treatment. As shown in Examples 2 and 3 of the opposed patent, pea protein extracts subjected to this step had a significantly lower nitrogen solubility index, gel strength and viscosity than those which were heated at a different pH or were kept at the claimed pH but were not subjected to the claimed heating step. Moreover, Examples 4 and 5 showed that protein extracts obtained by the claimed method, which had these physicochemical properties, had better wine-finishing and baking properties. For example, they allowed a reduction of the water content in the dough used to prepare biscuits, while preserving or even improving sensory properties.

Opponent 2 argued among other things that claim 10 had to be rejected because its product-by-process format was, as such, not allowable. The claimed product could be described by specific features defining e.g. its properties. Citing decision T 150/82 and section F-IV, 4.12 of the Guidelines, opponent 2 submitted that the product-by-process format could only be used if it was impossible to claim/define the product other than in terms of a process of manufacture. It argued that, assuming that the product obtainable by the method of claim 1 had low solubility, gel strength and

viscosity, these parameters could and should have been used to define that product. Hence, the criteria for drafting a product-by-process claim were not fulfilled, and claim 10 should not be allowed.

The board did not agree with these conclusions. It held that the mere fact that claim 10 was drafted as a product-by-process, despite the fact that the claimed product could be satisfactorily defined by reference to its composition, structure or other testable parameter, is not a ground for opposition set out in Art. 100 EPC. The issue could be, at most, one of a lack of clarity. Section F-IV, 4.12 of the Guidelines mentioned by opponent 2 indeed related to the requirement of clarity. Furthermore, decision T 150/82 related to an appeal against the refusal of a patent application and not to an appeal concerning an opposition filed against a granted patent. Consequently, this decision was not applicable.

For these reasons, the board held that considering that claim 10 was a granted claim, its format could not be objected to on the ground that it was drafted in the product-by-process format or that it lacked clarity (G 3/14).

093-09-25

6. Article 112a(2)(c) EPC | R 0012/23 | EBA

Article 112a(2)(c) EPC

Case Number	R 0012/23
Board	EBA
Date of decision	2025.08.08
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 112a(2)(c), 113(1) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	petition for review – clearly unallowable – fundamental violation of the right to be heard (no)
Cited decisions	R 0002/14, R 0008/15, R 0010/18, T 0435/21
Case Law Book	V.B.4.3 , V.B.4.3.11a , V.B.3.5.3 , 11th edition

In [R 12/23](#) the Enlarged Board of Appeal (hereinafter referred to as "EBA") summarised the petitioner's assertions concerning procedural deficiencies regarding the ground for petition mentioned in Art. 112a(2)(c) in conjunction with Art. 113(1) EPC as follows:

- (i) the petitioner had had no opportunity during the oral proceedings to argue on the standard applied by the board in the written decision;
- (ii) the board had neglected the "gold standard" as one of two alternative approaches
 - in the decision, the board had applied only the "essentiality test" and not also the "gold standard" thereby contravening R 2/14 and
 - the board had provided no opportunity to discuss the "gold standard", during the oral proceedings; and
- (iii) the decision was not sufficiently reasoned on the "gold standard" or on the "essentiality test".

The EBA found that the first alleged procedural deficiency was obviously unfounded, because it was in direct contradiction with the petitioner's own conclusion which made it clear that the discussion in the oral proceedings had been "identically" mirrored in the written decision.

On the second alleged procedural deficiency, the EBA stated that it could not find that the board had obviously not applied the "gold standard" due to the fact that it may also have examined the criteria of the "essentiality test". The EBA had to rely on the board's declaration that it had applied the "gold standard", given that the EBA was prevented from scrutiny of the application of the law, i.e. whether the board had applied the "gold standard" in an incorrect manner.

The EBA considered whether the R 2/14 rationale would at all apply to the case in hand and concluded that in R 2/14 it had been held that the board would have needed to address (three) alternative **factual** approaches to assessing sufficiency of disclosure. In the case in hand, however, the (two) approaches in question were **legal** approaches. Having opted for one of them and thus having determined the law, the board was under no obligation to apply the facts of the case to an alternative legal approach.

In this regard, the EBA noted that a board deciding on a case must establish the facts and apply the law to them. If a party puts forward several alternative sets of facts in order to support a specific finding of law, then the board must assess whether any of these sets support that finding and may only reject the suggested finding once it has concluded that none of the sets of facts justifies it. The EBA emphasised that there is no need to discuss alternative legal approaches, as distinguished from factual approaches, in the decision, because the board determines the law, in particular the correct legal approach. However, even though this had not been necessary, the board in the case in hand had still applied both approaches, i.e. the "gold standard" and the "essentiality test".

The finding that the requirement to discuss alternative approaches set out in R 2/14 did not apply in this case presupposed that the board had given the party an opportunity to provide its comments on the correct legal approach. The petitioner itself stated that this had been the case. If, during the oral proceedings, the petitioner had considered that the board should not apply the "essentiality test" under the guise of the "gold standard", then it should have alerted the board to its view. The EBA concluded that there had been no violation of the petitioner's right to be heard with respect to the second asserted procedural deficiency.

Concerning the third asserted procedural deficiency, the EBA recalled the criteria laid down in R 8/15 and R 10/18. It held that in line with point 1 of the Catchword of R 8/15, the board had addressed submissions it had identified as being relevant, in the reasons for the decision. The question was whether the board had also substantively considered those submissions as also required in point 1 of that Catchword. The EBA held that this had been the case and thus considered the third asserted procedural deficiency clearly unfounded.

The EBA concluded that the petition for review was clearly unallowable, since none of the three asserted fundamental deficiencies constituted a violation of the right to be heard.

094-09-25

7. Rule 071 EPC | T 0387/25 | Board 3.3.05

Rule 071 EPC

Case Number	T 0387/25
Board	3.3.05
Date of decision	2025.08.06
Language of the proceedings	EN
Internal distribution code	C
Inter partes/ex parte	Ex parte
EPC Articles	Articles 107, 112(1), 113(2) EPC
EPC Rules	Rule 071 EPC
RPBA	Articles 20(2), 21 RPBA 2020
Other legal provisions	
Keywords	examination procedure – basis of decision to grant – text submitted or agreed by applicant (no) – deemed approval under R. 71(5) EPC (no) – substantial procedural violation (yes)
Cited decisions	G 0001/10, T 0854/12, T 2081/16, T 2864/18, T 1003/19, T 2277/19, T 0265/20, T 0408/21, T 1823/23, T 1224/24
Case Law Book	IV.B.3.2.3b , III.L.2.1 , 11th edition

In case [T 387/25](#) the patent proprietors had appealed the examining division's decision to grant a patent because the drawings had been omitted in the supporting documents indicated in the communication pursuant to R. 71(3) EPC.

The board noted that in the present case the drawings clearly formed part of the application as originally filed, and also of the application documents on which the European regional phase was to be based. The appellants explicitly maintained the "drawings as presently on file" in their submissions during examination proceedings when filing amended claims. They never agreed to the omission of the drawings, and in particular did not expressly agree to the text intended for grant in the communication pursuant to R. 71(3) EPC. This distinguishes the present case from the situations underlying T 2277/19 and T 2864/18.

Following decisions T 2081/16, T 1003/19, T 408/21, T 1823/23 and T 1224/24, the board held that the legal consequence outlined in R. 71(5) EPC (the deemed approval of the notified text) did not apply in the present case. According to the board, it is not sufficient that an applicant, having received a communication formally referring to R. 71(3) EPC, pays the required fee and files the required translations. The legal consequence of R. 71(5) EPC only arises if the communication sent also

complies with the substantive requirements of R. 71(3) EPC, i.e. it actually contains the text in which the examining division intends to grant the patent, on the basis of the documents filed by the applicant, possibly supplemented by individual marked amendments.

The present board noted that the strict approach to the mechanism of R. 71 EPC advocated in T 265/20, in which the competent board did not follow the approach taken in T 1003/19 and T 2081/16, was not applied in the later decisions T 408/21, T 1823/23 and T 1224/24. In addition, the circumstances of the case at hand differed even more from the situation underlying T 265/20. In the present case, the appellants had in fact brought the relevant error, i.e. the omission of all the drawing sheets by the EPO – over which they had no influence – to the EPO's attention when it first occurred. In this case, the formalities officer's reply led them to understand that the drawing sheets would be taken into account in the event of a B1 publication. It followed that the decision to grant was based on an application in a text which was neither submitted nor agreed by the applicants, so the requirements of Art. 113(2) EPC had not been complied with. Hence, the board decided that the appeal was admissible and the decision under appeal was to be set aside.

According to the board, it has been established case law since T 1003/19 that an examining division's error in compiling the documents intended for grant in a communication under R. 71(3) EPC that makes a clearly unintentional omission of part of the documents proposed by the applicant for grant as indicated in the applicant's last request can still be corrected if the applicant files an appeal against the subsequent grant of the patent within the time limit under Art. 108 EPC, at least if the applicant did not explicitly consent to the incorrect compilation. T 265/20 did not support that case law; but this remained a single decision and was not followed by other boards.

The board held that the present decision did not deviate from G 1/10. It found that a referral to the Enlarged Board of Appeal was not required either to ensure uniform application of the law or to align the case law and Guidelines (see points 3.1 to 3.9.5 of the Reasons).

The board noted that the Guidelines, e.g. in H-VI, do not properly distinguish between cases where a mistake was already contained in an applicant's request or was explicitly approved by an applicant, and cases like the one at hand: where an examining division, by mistake and unintentionally, deviated from the appellant's latest request when listing the documents intended for grant in a communication under R. 71(3) EPC and this was neither pointed out to the applicant nor explicitly acknowledged by it. However, a divergence between the Guidelines and the case law of the boards is not necessarily a reason for a referral to the Enlarged Board. Rather, Art. 20(2) RPBA assumes that under normal circumstances it is enough to state sufficient grounds to enable the decision to be readily understood, such that the Guidelines may be adapted where necessary.

095-09-25

8. Article 15a RPBA | T 0745/23 | Board 3.3.08

Article 15a RPBA 2020

Case Number	T 0745/23
Board	3.3.08
Date of decision	2025.03.20
Language of the proceedings	EN
Internal distribution code	C
Inter partes/ex parte	Inter partes
EPC Articles	Articles 112(1)(a), 116 EPC
EPC Rules	
RPBA	Articles 15(1), 15a RPBA 2020
Other legal provisions	
Keywords	oral proceedings by videoconference – request for oral proceedings to be held in person (refused) – discretionary decision – videoconference considered appropriate (yes) – referral to the Enlarged Board of Appeal (no)
Cited decisions	G 0001/21, T 2432/19
Case Law Book	III.C.8.3.3 , III.C.8.3.3b , V.B.2.3.2 , V.B.2.3.3 , V.B.2.3.6 , 11th edition

In [T 745/23](#) the board had summoned the parties to oral proceedings on the EPO premises. The respondent had requested that the oral proceedings be held by videoconference. The appellant had requested, in response, that the oral proceedings be held in person, or, alternatively, that the board refer to the Enlarged Board the following questions:

- "1. Is the conduct of oral proceedings as a videoconference in appeal proceedings outside a general emergency situation without the consent of the parties in accordance with the provisions of the EPC?
2. If yes, on which criteria should the discretion be exercised if a Board of Appeal decides on its own motion to hold oral proceedings as a videoconference pursuant to Art. 15a(1) RPBA against the request of a party?"

In the communication under Art. 15(1) RPBA, the board had found the case in hand suitable for being heard by videoconference. The appellant had not responded to this communication, and hence, according to the board, had not objected to the board's intention to grant the respondent's request for a videoconference. Therefore, the board had changed the venue of the oral proceedings to videoconference.

At the oral proceedings, the appellant argued that Art. 15a RPBA did not define the criteria for exercising the board's discretion. This gave rise to different practices and legal uncertainty. Since, according to G 1/21, oral proceedings in person were the gold standard, there could be doubt as to whether Art. 15a RPBA was actually in line with the EPC.

The board disagreed. Art. 15a RPBA provided the board with the discretion to decide to hold oral proceedings pursuant to Art. 116 EPC by videoconference if the board considered it appropriate to do so, either upon a party's request or of its own motion. Its scope was general and not limited to a pandemic situation. In G 1/21, the Enlarged Board had expressly acknowledged that oral proceedings in the form of a videoconference were oral proceedings within the meaning of Art. 116 EPC. The board failed to see how Art. 15a RPBA as such violated any EPC provisions governing the fair conduct of proceedings and the right to be heard.

Furthermore, the board stated that it interpreted the discretionary power set out in Art. 15a RPBA within the framework of decision G 1/21. This decision had not excluded videoconference oral proceedings a priori, but had set certain limitations and restrictions, especially when a party did not give its consent. The board exercised its discretion in view of the particular circumstances of the case and of the reasons provided by each party in support of their opposing requests as to the format. Thus, also the party not consenting to a videoconference should provide some reasons as to why it considered that videoconference, in the case in hand, was not suitable or why the party was otherwise disadvantaged. In the case in hand, the appellant, however, had not submitted any objective or subjective reason why the case in hand should not be heard by videoconference. In the absence of any further submissions by the appellant regarding the format of the oral proceedings, the board had had no reason to (again) change the format of the oral proceedings.

The board rejected the appellant's request for referral. The first question proposed for referral had already been answered by the Enlarged Board in section C.5 of G 1/21. This section undoubtedly had a general character, despite the judgement essentially being limited to the pandemic (as also acknowledged in T 2432/19). The board held that in the case in hand, it failed to identify a departure from the teaching of G 1/21, and thus a need to (again) refer the first question in order to decide the present case. The posed question thus did not warrant a referral, which would otherwise be of theoretical interest only.

With regard to the second question proposed for referral, the board found that any answer to it depended on the specific case and providing anything more than general instructions would risk compromising the principle of judicial discretion. The board held that, for this reason alone, it could not be regarded as a point of law suitable for being referred to the Enlarged Board.

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9. Article 21 RPBA | T 0417/22 | Board 3.3.10

Article 21 RPBA 2020

Case Number	T 0417/22
Board	3.3.10
Date of decision	2025.07.07
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 107, 112(1)(a) EPC
EPC Rules	
RPBA	Article 21 RPBA 2020
Other legal provisions	
Keywords	stay of proceedings (yes) – pending referral
Cited decisions	G 0003/04, G 0002/24, T 1286/23
Case Law Book	V.B.2.5.4 , V.B.2.5.2 , V.B.2.3.2 , 11th edition

[See also abstract under Article 24 EPC.](#)

In [T 417/22](#) an intervention had been filed in August 2024. The intervener had stated that the grounds filed with their intervention constituted grounds for both opposition and appeal. In May 2025, opponent 1 and the patent proprietor withdrew their appeals. The intervener's final main request was that the board stay the proceedings and wait for the outcome of referral G 2/24. The first auxiliary request was that the board refer the same question on the status of the intervener to the Enlarged Board of Appeal (hereinafter referred to as "EBA"). The second auxiliary request was that the board remit the case to the opposition division for further prosecution. The patent proprietor's final main substantive request was that the proceedings be terminated by application of the principles derivable from G 3/04.

The board examined the procedural options available to it. In this context, the board emphasised that there was a pending appeal that the board needed to decide on, even if the decision may only concern the admissibility of the appeal. According to the board, even if it were to grant the patent proprietor's request and decide to follow the interpretation given by G 3/04, it could not close the proceedings without issuing a formal decision.

Furthermore, the board agreed with the referring board of T 1286/23 that the guiding decision G 3/04 may require revision. The board found that while it was procedurally straightforward for it to make a referral to the EBA for the purpose of reviewing G 3/04, pursuant to Art. 21 RPBA, in view of pending referral G 2/24, the board had

an additional option. Rather than referring the case itself, the board could stay the proceedings until the outcome of pending referral G 2/24 is known. The board observed that, despite the lack of an explicit legal basis, staying the proceedings appeared to be a reasonable and pragmatic solution given that the board's own referral would cause more problems without achieving any procedural benefit. It also noted that the case law recognised the stay of the proceedings as a viable procedural option for a board in the event of a pending referral. Furthermore, the board was not aware of any case law that categorically denied the procedural possibility of staying the appeal proceedings as a matter of principle, nor had the parties pointed to any such case law.

The board stated that if it deemed it justified to revise a decision or opinion of the EBA under Art. 112 EPC, and if the referral was expected to address the same legal issues that the board would refer to the EBA, then staying the proceedings offered significant procedural advantages over the board's own referral under Art. 112(1) EPC and Art. 21 RPBA. Therefore, the board concluded that, under the right circumstances, staying proceedings in view of an already pending referral was a legitimate alternative to the board's own referral. As such, it was implicitly covered by Art. 21 RPBA as a legally correct procedure where a board intended to deviate from an interpretation of the EPC given in an earlier decision or opinion of the EBA.

Accordingly, the board held that it effectively had the three procedural options discussed during the proceedings. The board could issue a decision without delay on the basis of the principles derivable from G 3/04, thereby effectively dismissing the intervener's appeal as inadmissible and terminating the substantive proceedings. Alternatively, the board could make a further referral to seek a change to the interpretation of the law given in G 3/04. Further, the board could stay the proceedings until the pending referral G 2/24 answered the question of whether and how an intervener joining the appeal proceedings may obtain appellant status within the meaning of Art. 107 EPC. As neither the parties nor the board itself favoured the board's own referral, there was no need to discuss in detail all the conditions for such a referral. Instead, the board had to choose between staying the proceedings and applying G 3/04 unreservedly. For this, it was sufficient for the board to establish that a hypothetical referral would fulfil the requirements of Art. 112(1)(a) EPC for essentially all the reasons provided in the referring decision T 1286/23, given the relevant similarities between the cases.

After having provided reasons for deviating from G 3/04, the board stated that it saw no convincing substantive argument supporting the patent proprietor's proposition that the case before the board would be less suitable for the board's own referral than the case underlying the decision T 1286/23. Upon weighing up the interests of the parties, the board concluded that it was more equitable to stay the proceedings, which resulted in limited disadvantages for both parties, but did not affect their substantive position in the opposition proceedings. The appeal proceedings were thus stayed until the proceedings in referral G 2/24 are terminated.

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10. Article 18 RPDC | D 0001/23 | DBA

Article 18 RPDC

Case Number	D 0001/23
Board	Disciplinary Board of Appeal
Date of decision	2025.08.01
Language of the proceedings	EN
Internal distribution code	N/A
Inter partes/ex parte	N/A
EPC Articles	Articles 125, 131 EPC
EPC Rules	
RPBA	
Other legal provisions	Article 18 Additional Rules of Procedure of the Disciplinary Committee of the epi (RPDC), Articles 1(1), 6(3), 25(1) Regulation on discipline for professional representatives (RDR), point 3(b), 3(d), 5(a) of the epi Code of Conduct (CC)
Keywords	summary dismissal under Art. 18 RPDC – admissibility of anonymous complaint – power and obligation of the epi Disciplinary Committee to conduct inquiries ex officio – remittal (yes)
Cited decisions	G 0004/97, D 0019/99, D 0001/18, D 0055/21
Case Law Book	V.C.3 , 11th edition

[D 1/23](#) was an appeal by the epi President against a decision of the epi Disciplinary Committee summarily dismissing a complaint made in respect of two professional representatives. The complaint, submitted anonymously to the epi Secretariat by email, pointed out that the two professional representatives: had an email that appeared to be that of a third person who was not a professional representative before the EPO; did not appear on the website that could be linked to that email; and were not at all active, or possibly already dead.

The epi President requested that the decision under appeal be set aside, based on three grounds: (1) the Chamber of the epi Disciplinary Committee dealing with the complaint (the "Chamber") erred by summarily dismissing the complaint when the alleged facts, if proven correct, could have constituted a breach of the rules of professional conduct; (2) the complaint should have been admissible even when filed anonymously; and (3) the Chamber had failed to use its own powers to investigate the complaint.

The DBA explained that before a complaint can be summarily dismissed under Art. 18 RPDC, the Chamber must establish that the complaint clearly does not disclose any fact that would only raise the suspicion that a breach of the rules of professional conduct had occurred. Thus, the primary requirement for the application of Art. 18 RPDC was directed at the facts only, and not at their final legal assessment. A complaint that passes the hurdle of Art. 18 RPDC, in the sense that it should proceed to a more detailed examination and the involvement of the professional representative concerned, need not set out a complete and convincing case: it is sufficient if the facts presented make an allegation of a possible breach not wholly implausible, so that the facts presented may well be a result of a breach, even if further investigations may be necessary to establish whether a breach indeed occurred.

According to the DBA, no recognisable analysis was made in the Chamber's decision whether the facts of the complaint, if proven, may have represented a breach of the rules of professional conduct. Even under the assumption that the Chamber implicitly examined the required conditions of Art. 18 RPDC, none of the two apparent reasons given in the decision (i.e. formal deficiencies in the complaint, such as the lacking name, address and signature, and lack of at least a passive legitimation) could justify a summary dismissal. It was not disputed that a complaint under the RDR could not be based on acts of others who may illegally exploit the name of a deceased representative (as long as the others are not epi members). However, the formulations of the complaint left open the possibility that the representatives were still alive and knowingly permitted the use of their names. This would clearly be a breach of Art. 1(1) RDR. Posing as a straw man was equivalent to the making of a misleading statement, which would also contravene point 3(b) and (d) CC. Moreover, allowing a person who was not entitled to act as a professional representative to carry out the functions reserved for professional representatives with the help of a straw man would be a circumvention of the law (G 4/97).

The DBA concurred with the Chamber that anonymous complaints should not be encouraged. An anonymous complaint by an epi member, if later discovered, might in itself result in disciplinary measures against that member, as a direct violation of point 5(a) CC. Notwithstanding, an examination of an anonymous complaint was still required in view of the overall purpose and legal structure of the disciplinary proceedings under the RDR.

The DBA concluded that the facts of the case demonstrated that more detailed investigations were required before the complaint could be dismissed, or possibly a disciplinary measure may be decided. Such further investigations had to be conducted by a first-instance body, in the present case the Disciplinary Board of the EPO. A remittal to the epi Disciplinary Committee did not seem possible, in view of the expiration of the nine-month period under Art. 6(3) RDR (D 1/18, D 55/21).

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