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Abstracts of decisions

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1. Article 083 EPC | T 0878/23 | Board 3.3.08

Article 083 EPC

Case Number	T 0878/23
Board	3.3.08
Date of decision	2025.08.26
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 083, 084, 100(b) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	sufficiency of disclosure (no) – reproducibility (no) – ranges – inconsistency between independent and dependent claim – relationship between Article 83 and Article 84 EPC
Cited decisions	
Case Law Book	II.C.5.4e , II.C.6.6.4 , II.C.8.2.2 , 11th edition

In [T 878/23](#) claim 1 of the main request concerned a product claim. The claimed composition comprised an amino acid combination selected from seven combinations containing two or three amino acids selected from cysteine, alanine, lysine and arginine. Claim 1 further specified that the composition contained specified concentrations (amounts) of each of lysine, alanine and arginine (from "8 to 20 wt.%") and cysteine (from "2 to 10 wt.%") based on the composition's total dry weight. Claim 1 thus defined minimum and maximum amounts for each of the four indicated amino acids in the claimed composition. Dependent claim 4 further specified that the composition of claim 1 contained a "total amino acid concentration ... in the range from 3.5 to 36.5 wt%, based on the total dry weight of the composition". Claim 4 added thus a further limit to the composition as defined in claim 1 concerning the used total minimum and maximum concentration (amount) of amino acids.

The board observed that the minimum concentration of amino acids that had to be present in the claimed composition differed between the ranges indicated in claims 1 and 4. The board explained that since a dependent claim (here claim 4) contained more technical features than an independent claim (here claim 1) on which it depended, the subject-matter of a dependent claim was generally more limited than that of the independent one. However, in the case in hand, the compositions specified in claim 4 were broader than those of claim 1, since claim 4 allowed the

presence of lower amino acid concentrations in the claimed composition than claim 1. Since the concentration ranges defined in claims 1 and 4 were mutually exclusive, i.e. incompatible, over a substantial part of their ranges, the skilled person could not technically prepare the composition as defined in claim 4 across substantially the whole breadth claimed, even if taking common general knowledge into account. The subject-matter of claim 4 was therefore insufficiently disclosed.

While appellant I (the patent proprietor) admitted that there was an inconsistency between the concentration ranges indicated in claims 1 and 4, it argued that this inconsistency exclusively resulted in a clarity issue (Art. 84 EPC). The board disagreed. The board explained that the decisive issue did not concern an ambiguity of the scope of protection of the claimed invention, as would be the case, for example, if a specific compound would be defined by an unclear parameter. In the case in hand, standard amino acids were used for preparing the claimed composition. These were specified by standard concentration ranges. The methods for determining these concentrations were standard too. Nevertheless, despite these clear instructions in claims 1 and 4, the skilled person could not prepare the claimed composition over substantially the whole breadth of claim 4 due to the at least in part incompatible or mutually exclusive concentration requirements indicated in claims 1 and 4. Claim 4 thus contained no "forbidden area", but an area which could not be prepared for technical reasons.

The board concluded that Art. 100(b) EPC prejudiced the maintenance of the patent as granted. Since the objections under insufficiency indicated above for claim 4 as granted applied likewise to auxiliary requests 1 to 18, the board held that auxiliary requests 1 to 18 did not comply with the requirements of Art. 83 EPC.

120-12-25

2. Article 084 EPC | T 0866/24 | Board 3.5.05

Article 084 EPC

Case Number	T 0866/24
Board	3.5.05
Date of decision	2025.10.09
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 084 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claims – clarity in opposition appeal proceedings – dependent claims
Cited decisions	G 0003/14, G 0001/24
Case Law Book	II.A.1.4 , IV.C.5.2.2 , 11th edition

In [T 866/24](#), during the oral proceedings before the board, the opponent (respondent) submitted that the unclear features underlying the amendments made to claim 1, which were based on the patent description, were building up on corresponding unclear formulations taken from dependent claim 6 as granted. Raising an objection under Art. 84 EPC against unclear features stemming from granted dependent claims should, in the opponent's view, be admissible under such circumstances.

The board agreed, in principle, with the opponent's concerns. According to the board's perception, there was a recent tendency to examine dependent claims less and less with respect to clarity in examination proceedings despite the fact that their full examination under Art. 84 EPC was not considered "unrealistic" in G 3/14, point 32 of the Reasons. Such a full examination was even expressly encouraged by the Enlarged Board in G 1/24, point 20 of the Reasons (i.e. highlighting "the importance of the examining division carrying out a high quality examination of whether a claim fulfils the clarity requirements of Article 84 EPC"). The board noted that the justification for such leniency may be found in the assumption that the protection conferred by a granted patent is defined only by the independent claims. Where dependent claims are subsequently added to an independent claim in the course of opposition proceedings, opponents are ultimately faced with unclear claim features which, as in the present case, were deemed to have been examined for clarity, although de facto they had not been. Nonetheless, they could not be objected to under Art. 84 EPC due to the conclusions of G 3/14.

The board observed that this result was unsatisfactory, as an independent claim with unclear features leaves much to the readers' imagination. It added that unclear features tend to elude a sensible comparison with the prior art. Furthermore, since opponents may not anticipate with certainty which claim construction will be adopted by the board or a court in infringement proceedings, they may feel obliged to put forward different lines of argumentation for all of the different potential interpretations. In the board's view, categorically barring opponents in such cases from raising clarity objections under Art. 84 EPC causes undue complexities in the discussion on novelty and inventive step, to the detriment not only of opponents but also of the opposition divisions and the boards of appeal.

121-12-25

3. Article 099 EPC | T 1403/24 | Board 3.3.07

Article 099 EPC

Case Number	T 1403/24
Board	3.3.07
Date of decision	2025.09.08
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 099(1) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	admissibility of opposition (yes) – acting on behalf of a third party (no) – circumvention of the law by abuse of process (no)
Cited decisions	G 0003/97, G 0004/97, T 0009/00
Case Law Book	IV.C.2.1.5 , IV.C.2.1.6 , 11th edition

In [T 1403/24](#) the appellant (patent proprietor) contested the admissibility of the opposition filed by opponent 2. It argued that opponent 2 was acting on behalf of opponent 1 or opponent 3. In the appellant's view, this followed from the citation of document D24 in the notice of opposition by opponent 2, because D24 concerned the non-public infringement complaint by the patent proprietor against opponent 1 and opponent 3 in Germany. Moreover, opponent 2 had previously represented a member of the same company group to which opponent 1 belonged in the opposition against the parent patent. Furthermore, the notices of opposition filed on the same day by opponent 2 and opponent 3 included large sections of identical language. As explained in T 9/00, it would be an abuse of procedure for one opponent to file two oppositions. Therefore, according to the appellant, the filing of the opposition by opponent 2 on behalf of opponent 1 or opponent 3 represented an attempt to circumvent the law, which was in view of the considerations in G 3/97 and G 4/97 not admissible.

The board observed that in contrast to the situation in T 9/00, opponent 2 was a distinct legal person from opponent 1 and opponent 3. According to decisions G 3/97 and G 4/97, an opposition filed on behalf of a third party was inadmissible if the involvement of the opponent was to be regarded as circumventing the law by abuse of process, in particular if the opponent was acting on behalf of the patent proprietor or on behalf of a client without possessing the relevant qualifications required by Art. 134 EPC. The decisions G 3/97 and G 4/97 explicitly concluded that a

circumvention of the law by abuse of process did not arise purely because a professional representative was acting in its own name on behalf of a client and that the burden of proof regarding the circumvention of the law by abuse of process was to be borne by the party alleging that the opposition was inadmissible.

The board held that, given the shared interest among opponents in revoking the patent, it was not uncommon for them to exchange documents and coordinate their submissions during opposition proceedings. Therefore, the citation of document D24 by opponent 2, and the presence of similar or identical passages in the notices of opposition filed by opponents 2 and 3, did not establish that opponent 2 acted on behalf of opponent 1 or opponent 3. The appellant had thus not provided convincing evidence that the opposition filed in the name of opponent 2 was filed on behalf of opponent 1 or opponent 3 to circumvent the law by abuse of process. Accordingly, the board confirmed the admissibility of the opposition filed by opponent 2.

122-12-25

4. Article 099 EPC | T 1469/24 | Board 3.4.03

Article 099 EPC

Case Number	T 1469/24
Board	3.4.03
Date of decision	2025.11.06
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 099(1) EPC
EPC Rules	Rule 076(2) EPC
RPBA	
Other legal provisions	
Keywords	admissibility of opposition (yes) – acting on behalf of a third party (no) – circumvention of the law by abuse of process (no) – straw man
Cited decisions	G 0003/97, G 0004/97
Case Law Book	IV.C.2.1.5 , 11th edition

In [T 1469/24](#), the appellant-proprietor contested the admissibility of the opposition, arguing that the opponent had not been correctly identified, so that the requirements of Art. 99(1) and R. 76(2) EPC were not met. They argued that the opponent, Mr N.N., was the representative of one of the subsidiaries of the group of companies against which the proprietor had initiated infringement proceedings before the UPC, and which, in turn, had initiated a central revocation action against the contested patent at the UPC in reaction to the infringement proceedings. Mr N.N. had therefore not been the real opponent, but had acted as a straw man for the group. The real opponent thus avoided being identified as the party challenging the patent. This was a misuse of the opposition procedure, which was intended to allow genuine opponents to challenge patents in a transparent manner. Consequently, the use of a straw man in this case was a clear attempt to circumvent the law by abuse of due process. In addition, according to the proprietor, the straw man, being a patent attorney, did not have a legitimate interest in the outcome of the opposition proceedings.

The board observed that, in an opposition in which the person named as opponent is acting on behalf of a third party, decision G 3/97 identifies two cases where the law is circumvented by abuse of process: 1) if the opponent is acting on behalf of the proprietor, 2) if the opponent is acting on behalf of a client in the context of activities which, taken as a whole, are typically associated with professional representatives,

without possessing the relevant qualifications required by Art. 134 EPC. The board found that neither of these cases applied here.

The board indicated it was aware that these two cases did not constitute an exhaustive list. Nevertheless, G 3/97 sets out some further considerations as to what is not considered a circumvention of the law by abuse of process. For instance, in point 3.2.1 of the Reasons, the Enlarged Board stated that "Though the patent proprietor may have an economic interest in finding out who is trying to attack his patent, such an interest is not legally protected by the legislative arrangements for the opposition procedure". In the present case, even if the group of companies involved in the infringement action had actually avoided being identified, this would not have constituted an attempt to circumvent the law by abuse of due process within the meaning of decision G 3/97.

Moreover, the board recalled the Enlarged Board's observation in G 3/97 that since the EPC legislator explicitly designed the opposition procedure as a legal remedy in the public interest, which is open to any person, it cannot be required that the opponent has an interest in the revocation of the patent. Consequently, the board held that it was irrelevant in the present case whether the opponent Mr N.N. had a genuine personal interest in the outcome of the opposition proceedings.

The board found that, while G 3/97 and G 4/97 may not explicitly state that any opposition by a straw man is admissible, they essentially conclude that an opposition filed by a straw man on behalf of an anonymous party is not objectionable merely because the opponent is acting as a straw man. In particular, the Enlarged Board held that an abuse of process needs not be assumed in those cases where the third party instructing the presumed straw man could have filed an opposition itself. The board recalled that G 3/97 and G 4/97 do not state that the opposition division would be required to investigate *ex officio* whether any of the identified situations that could be considered an abuse of process might be present and concealed by the formally named opponent. On the contrary, the burden of proof is borne by the person alleging that the opposition is inadmissible. The board did not see any such evidence in the file.

The board concluded that the requirements of Art. 99(1) and R. 76(2) EPC were met and that the appeal must be dismissed.

123-12-25

5. Article 112a EPC | R 0016/22 | EBA

Article 112a EPC

Case Number	R 0016/22
Board	EBA
Date of decision	2025.07.07
Language of the proceedings	DE
Internal distribution code	C
Inter partes/ex parte	Inter partes
EPC Articles	Articles 024(4), 106, 112, 112a EPC
EPC Rules	
RPBA	
Other legal provisions	Article 12 RPEBA
Keywords	petition for review – inadmissible – review of interlocutory decision (no) – referral to the Enlarged Board in a petition for review case (no)
Cited decisions	R 0007/08, R 0008/12, R 0002/15, R 0005/23, T 2175/15
Case Law Book	V.B.2.3.1 , V.B.3.4.2 , V.B.3.6 , V.B.3.10 , 11th edition

Der Überprüfungsantrag in [R 16/22](#) war gegen die Entscheidung T 2175/15 vom 1. April 2022 gerichtet, mit der die Beschwerdekammer (in der Besetzung nach Art. 24 (4) EPÜ) den Antrag auf Vorlage von Fragen an die Große Beschwerdekammer abgelehnt, und den Ablehnungsantrag betreffend die Mitglieder der Kammer in ihrer ursprünglichen Besetzung vom 24. Dezember 2021 als unbegründet zurückgewiesen hatte.

Zwei Wochen vor der mündlichen Verhandlung erklärte die Antragstellerin in einem Schreiben, dass sie nach nochmaliger Überprüfung der Rechtslage der Auffassung sei, dass die Große Beschwerdekammer im Verfahren nach Art. 112a EPÜ die Möglichkeit habe, "zur Sicherung einer einheitlichen Rechtsprechung den vorliegenden Fall an die Große Beschwerdekammer gemäß Art. 112 EPÜ vorzulegen". Zu Beginn der mündlichen Verhandlung stellte die Antragstellerin auch den formellen Antrag, der Großen Beschwerdekammer in der Besetzung gemäß Art. 112 EPÜ die Rechtsfrage vorzulegen, ob der Anwendungsbereich von Art. 112a EPÜ auf solche rechtskräftigen Entscheidungen einer Beschwerdekammer beschränkt ist, die ein Beschwerdeverfahren abschließen, oder ob dieser Anwendungsbereich sämtliche rechtskräftigen Entscheidungen einer Beschwerdekammer umfasst.

Im Zusammenhang mit diesem Antrag merkte die Große Beschwerdekammer an, dass gegen die Möglichkeit einer solchen Vorlage allerdings bereits der Wortlaut des EPÜ, der nicht nur in Art. 112 EPÜ klar zwischen "Beschwerdekammer" und "Große Beschwerdekammer" unterscheidet, spricht. Sie fügte hinzu, dass die Große Beschwerdekammer entsprechend in Verfahren gemäß Art. 112a EPÜ auch schon entschieden hat, dass sie der Großen Beschwerdekammer keine Rechtsfragen in einem Verfahren nach Art. 112 EPÜ vorlegen kann (R 7/08, bestätigt z. B. in R 8/12). Was das diesbezügliche Vorbringen der Antragstellerin angeht, konnte die Große Beschwerdekammer keine besonderen Gründe im Sinne von Art. 12 VOGBK erkennen, welche eine Berücksichtigung des verspätet vorgebrachten Antrags auf Vorlage an die Große Beschwerdekammer unter Art. 112 EPÜ rechtfertigen würden. Der Antrag wurde daher als verspätet zurückgewiesen.

In Bezug auf die Zulässigkeit von Überprüfungsanträgen gegen Zwischenentscheidungen befand die Große Beschwerdekammer, dass im Hinblick auf R 5/23 und R 2/15 eine uneinheitliche Rechtsprechung vorliegt. Allerdings habe die Große Beschwerdekammer in einem Verfahren nach Art. 112a EPÜ keine Möglichkeit, eine entsprechende Rechtsfrage zur Sicherung einer einheitlichen Rechtsanwendung nach Art. 112 EPÜ der Großen Beschwerdekammer vorzulegen. Zum Begriff der "Entscheidung" in Art. 112a EPÜ erklärte die Große Beschwerdekammer, dass sich unterschiedliche Verfahrenshandlungen des EPA durchaus bezüglich ihrer Anfechtbarkeit unterscheiden können, auch wenn sie in gleicher Weise als "Entscheidungen" bezeichnet werden. Sie teilte die in den Entscheidungen R 2/15 und R 5/23 vertretene Auffassung, dass die Bestimmungen von Art. 106 (2) EPÜ im Rahmen des Überprüfungsverfahrens nicht anwendbar sind. Die grundsätzlichen Überlegungen hinter Art. 106 EPÜ, die einer selbständigen Beschwerde gegen Zwischenentscheidungen entgegenstehen (z. B. Vermeidung von Verzögerungen), seien dagegen durchaus auf das Überprüfungsverfahren unter Art. 112a EPÜ anwendbar. Diese Überlegungen sprechen gegen eine Möglichkeit der Überprüfung von Zwischenentscheidungen unter Art. 112a EPÜ.

Der Großen Beschwerdekammer zufolge sind auch der Sinn und Zweck des Überprüfungsverfahrens, insbesondere die Ausgestaltung als außerordentlicher Rechtsbehelf, Aspekte, die nicht für eine Gleichsetzung von Überprüfungsanträgen mit Beschwerden im Hinblick auf die Anfechtungsmöglichkeiten oder gar für eine großzügigere Praxis sprechen, sondern eher für eine strengere Beurteilung der Zulässigkeit bei Überprüfungsanträgen. Darüber hinaus impliziert der Wortlaut von Art. 112a (5) EPÜ, der auf die Wiederaufnahme des Verfahrens "vor den Beschwerdekammern" Bezug nimmt, dass vor den Beschwerdekammern eben kein Verfahren mehr anhängig ist. Diese Regelung stützt jedenfalls nach Auffassung der Großen Beschwerdekammer die Auslegung, nach der Zwischenentscheidungen nicht selbständig bzw. gesondert unter Art. 112a EPÜ überprüft werden können.

Der Antrag auf Überprüfung wurde folglich als unzulässig verworfen.

124-12-25

6. Article 123(2) EPC | T 1424/23 | Board 3.2.02

Article 123(2) EPC

Case Number	T 1424/23
Board	3.2.02
Date of decision	2025.11.24
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 123(2) EPC
EPC Rules	
RPBA	Art. 11 RPBA 2020
Other legal provisions	
Keywords	amendments – added subject-matter – application as filed
Cited decisions	G 0003/89
Case Law Book	II.E.1.2.1 , 11th edition

In [T 1424/23](#) the board explained that when assessing compliance with Art. 123(2) EPC, it has to be established whether the application has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed. Citing G 3/89, the board recalled that the content of the application as filed consists of the description, claims and drawings as filed, i.e. on the filing date. In the case in hand, the application as filed had been published during the international phase.

However, the decision under appeal discussed the amendments made to claim 1 compared to the amended claim 1 filed on entry into the European phase. The board observed that the claims filed on entry into the European phase did not correspond to those of the application as filed. It therefore established that the claims filed on entry into the European phase did not provide a basis for assessing compliance with Art. 123(2) EPC.

As it appeared that the examining division had incorrectly relied on the claims filed on entry into the European phase for its Art. 123(2) EPC assessment, the board concluded that a proper Art. 123(2) EPC assessment might not have been carried out. Consequently, it remitted the case to the examining division for further prosecution.

125-12-25

7. Article 134 EPC | T 1262/22 | Board 3.3.04

Article 134 EPC

Case Number	T 1262/22
Board	3.3.04
Date of decision	2024.09.17
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Art. 108 EPC
EPC Rules	R. 152(1), (6), (8) EPC
RPBA	
Other legal provisions	Article 1 of the Decision of the President of the EPO dated 12 July 2007
Keywords	representation – filing of the authorisation – authorisation of the professional representative filing the notice of appeal – deficiency remedied
Cited decisions	T 1685/08, T 1846/11, T 0924/17
Case Law Book	III.V.4.1 , 11th edition

In [T 1262/22](#), the respondents (patent proprietors) alleged that the appeal was inadmissible because the notice of appeal was filed by a professional representative (K) who was not authorised at the time of filing.

Under Art. 1(1) of the Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations, in the version as applicable at the time the notice of appeal in question was filed, a professional representative was required to file a signed authorisation only in the circumstances set out in Art. 1(2) and (3) of said decision. This was the case if a change of professional representatives had occurred without the EPO being notified that the previous representative's authorisation has ended.

In the case in hand, while representation during the opposition proceedings had been undertaken by professional representative B, the notice of appeal was signed by new professional representative K. Since B had not informed the EPO of the termination of its authorisation, it was still deemed authorised before the EPO, as provided for by R. 152(8) EPC. Hence, the board found there was nothing unusual in the fact that the EPO continued to communicate with B, nor could it be concluded on this basis that K was not authorised, as submitted by the respondents. From the legal framework, pursuant to R. 152(1) EPC and the said Decision of the President of 2007, the new representative K had to file an authorisation granted by the opponent/appellant; it did

so of its own motion on 5 April 2022, the authorisation having been granted by the opponent on 25 March 2022.

In accordance with R. 152(2) EPC, filing the authorisation on 5 April 2022 remedied the deficiency concerning the representation of the opponent/appellant before the relevant period for filing an appeal under Art. 108 EPC expired, i.e. 12 April 2022. Therefore, the consequence indicated in R. 152(6) EPC, according to which if the required authorisation is not filed in due time any procedural step taken by the representative is deemed not to have been taken, did not materialise. The notice of appeal was thus validly filed.

This conclusion was not affected by the fact that at the time the notice of appeal was filed, B was also acting as the professional representative for this case, since the system of representation before the EPO permits representation by several representatives, as long as the applicable rules mentioned are respected. Nor was this conclusion affected by the fact that K's authorisation bore a signature which was dated 25 March 2022, i.e. after the filing of the notice of appeal. Contrary to the respondents' submissions, the EPC does not express a requirement that the authorisation be signed before the filing of the notice of appeal; this would even be inconsistent with R. 152(2) EPC, which allows for a deficiency to be remedied. An authorisation is an internal legal relationship between the representative and the party. Accordingly, the question of whether an authorisation was in existence at the time the notice of appeal was filed is irrelevant for the EPO, as long as any deficiency concerning the party's representation is remedied within the time limit under Art. 108 EPC.

The respondents further submitted that the EPO's letter dated 11 April 2022, with which K was asked to confirm whether they intended to take over representation of the opponent, showed that there were doubts about the effectiveness of the authorisation filed on 5 April 2022. The respondents concluded that K did not actually take over representation until the reply of 3 May 2022, meaning that they clearly were not authorised when filing the notice of appeal. The board did not agree. The EPO's letter was aimed merely at clarifying if B was still a representative in addition to K, or whether K had taken over as the sole representative. K's reply of 3 May 2022 could also not be understood as an actual taking over of representation for the first time. Such a conclusion would disregard the fact that K had already filed an authorisation granted by the opponent/appellant on 5 April 2022. Nothing more was actually required.

According to the board, the decisions cited by the respondents were not applicable.

The notice of appeal was therefore validly filed.

126-12-25

8. Rule 071(3) EPC | T 0712/25 | Board 3.3.03

Rule 071(3) EPC

Case Number	T 0712/25
Board	3.3.03
Date of decision	2025.10.01
Language of the proceedings	FR
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Articles 097(1), 107, 113(2) EPC
EPC Rules	Rules 071(3), 071(5), 101(1) EPC
RPBA	
Other legal provisions	
Keywords	communication under R. 71(3) – drawings missing – substantial procedural violation (yes) – patent granted without approval of the text for grant (yes) — reimbursement of appeal fee (yes)
Cited decisions	T 1003/19, T 1823/23, T 1224/24, T 0387/25
Case Law Book	IV.B.3.2.3b , 11th edition

Dans [T 712/25](#) la demande initiale de brevet contenait une page 1/1 de dessin comprenant un unique dessin dénommé figure 1. La division d'examen avait soulevé des objections d'activité inventive et de clarté à l'encontre des revendications de la demande telle que déposée, sans soulever aucune objection concernant le dessin. En réponse à ces objections, le requérant a déposé le 2 février 2022 des revendications modifiées. Dans sa notification au titre de la règle 71(3) CBE, la division d'examen a fait référence à la description et aux revendications, mais pas au dessin. Il ressortait par ailleurs de cette notification que seule la page 53 de la description avait été supprimée et il n'était pas mentionné que le dessin aurait également été supprimé. Le requérant a indiqué dans son courrier du 23 décembre 2024 que son accord à la délivrance du brevet était conditionné à l'inclusion dans le texte de la page de dessin telle que déposée lors de l'entrée en phase régionale.

La chambre a rappelé que, conformément à la règle 71(5) CBE, le requérant est réputé avoir approuvé le texte qui lui a été communiqué en vertu de la règle 71(3) CBE s'il acquitte les taxes requises et produit les traductions dans le délai fixé dans ladite règle. Selon la jurisprudence issue de la décision T 1003/19 (voir aussi T 1823/23, T 1224/24 et T 387/25), cette conséquence juridique de la règle 71(5) CBE ne s'applique que lorsque le texte communiqué au requérant est identique au texte sur la base duquel la division d'examen a l'intention de délivrer le brevet, comme le prévoit la règle 71(3) CBE, et reflète la "volonté réelle" de la division

d'examen. Le texte auquel il est fait référence dans une notification au titre de la règle 71(3) CBE correspond en principe à la requête du requérant et à l'intention de la division d'examen. Toutefois, quand tel n'est pas le cas, la division d'examen ne pouvant statuer sur une demande de brevet européen que sur la base du texte présenté ou accepté par le requérant (art. 113(2) CBE), celle-ci n'est autorisée à suggérer de sa propre initiative que des modifications mineures qu'elle peut raisonnablement attendre du requérant, et il est d'usage de les indiquer non seulement dans le "Druckexemplar" annexé à la notification au titre de la règle 71(3) CBE, mais également dans cette notification. Plus précisément, dans l'affaire T 1003/19, il a été estimé que le retrait de toutes les pages de dessin représentant un mode de réalisation de l'invention ne pouvait être accepté par le requérant, d'autant plus que la description faisait toujours référence aux dessins et que leur suppression n'avait pas été indiquée comme modification dans la notification au titre de la règle 71(3) CBE dans le champ prévu à cet effet. Il a également été statué dans ce sens dans les affaires T 1823/23 et T 387/25, qui concernaient également un cas où les dessins avaient été omis de la notification au titre de la règle 71(3) CBE, ainsi que dans l'affaire T 1224/24 concernant l'omission de 48 des 52 pages de dessin.

La chambre a souligné que la page de dessin 1/1 faisait partie de la demande WO 2020/128200 A1 et était encore présente dans la demande lors de l'entrée en phase régionale. Elle était cependant absente du "Druckexemplar" et de la notification au titre de la règle 71(3) CBE. Si le requérant avait été informé de la suppression de la page 53 de la description, il ne l'avait pas été de celle de la page de dessin. L'absence de la page de dessin n'était par ailleurs pas cohérente avec les références faites à la figure 1 dans les pages de la description destinées à la délivrance du brevet. Selon la chambre, la division d'examen n'avait certainement pas l'intention d'omettre la page de dessin sans raison, en l'absence d'objections soulevées à son encontre, sans en informer le requérant et sans supprimer les références correspondantes dans la description, ce d'autant plus que le requérant avait déjà signalé cette absence et n'avait donné son accord au texte destiné à la délivrance du brevet que sous réserve que la page de dessin soit incluse. Par conséquent, la division d'examen n'a pas communiqué le texte sur la base duquel elle avait l'intention de délivrer le brevet.

La chambre a considéré que, conformément aux décisions T 1003/19, T 1823/23, T 1224/24 et T 387/25, la conséquence juridique prévue à la règle 71(5) CBE ne s'appliquait pas en l'espèce, la notification envoyée ne satisfaisant pas aux exigences de la règle 71(3) CBE. Le texte sur la base duquel le brevet a été délivré n'étant pas conforme à la requête du requérant, il n'a pas été fait droit aux prétentions du requérant au sens de l'art. 107 CBE. Toutes les autres conditions prévues à la règle 101(1) CBE étant remplies, le recours était recevable.

La chambre a estimé que la division d'examen a commis un vice substantiel de procédure et, dans les circonstances de l'espèce, qu'il était équitable de rembourser la taxe de recours.

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9. Rule 116 EPC | T 1398/23 | Board 3.4.02

Rule 116 EPC

Case Number	T 1398/23
Board	3.4.02
Date of decision	2025.03.21
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 054(1), 111(1), 114(2) EPC
EPC Rules	Rule 116(1) EPC
RPBA	Article 11 RPBA 2020
Other legal provisions	
Keywords	late submissions – correct exercise of discretion (no) – right to respond to a new objection with a new set of claims
Cited decisions	
Case Law Book	IV.C.5.1.2a , IV.C.5.1.7b , 11th edition

In [T 1398/23](#) entschied die Kammer, dass die Nichtzulassung des Hilfsantrags 2 durch die Einspruchsabteilung fehlerhaft war.

Die Einspruchsabteilung hatte den Antrag als verspätet angesehen, da er nach Ablauf der Frist nach R. 116 (1) EPÜ eingereicht worden war. "Um die Fairness des Verfahrens zu garantieren", prüfte sie daher, ob die Patentinhaberin den Antrag früher hätte einreichen können. Die Einspruchsabteilung stellte ferner fest, dass Hilfsantrag 14 rechtzeitig vor der Frist gemäß R. 116 (1) EPÜ eingereicht worden war, und dass der neu eingereichte Hilfsantrag 2 fast identisch zu Hilfsantrag 14 war, mit dem Unterschied, dass die Ansprüche 6 bis 10 aufrechterhalten wurden.

Aufgrund dieser Konstellation, kam die Einspruchsabteilung zu dem Schluss, dass die Patentinhaberin keinen Grund gehabt hatte, einen neuen Antrag mit zusätzlichen Ansprüchen einzureichen. Eine Änderung der Strategie einer Partei, die unabhängig vom Verfahrensverlauf ist, sei keine gültige Begründung für ein spätes Vorbringen. Der Hilfsantrag 2 hätte spätestens kurz vor Ablauf der Frist gemäß R. 116 (1) EPÜ eingereicht werden müssen und wurde daher von der Einspruchsabteilung gemäß Art. 114 (2) EPÜ nicht ins Verfahren zugelassen.

Die Kammer kam jedoch zu dem Schluss, dass die Einspruchsabteilung die Ausgangslage unzutreffend ermittelt hatte. Maßgeblich war der Kammer zufolge, dass die Einsprechende am letzten Tag der Frist gemäß R. 116 (1) EPÜ erstmals

einen Einwand unter Art. 54 (1) EPÜ in Bezug auf das Dokument D2 erhoben hatte und die Einspruchsabteilung in der mündlichen Verhandlung von ihrem Ermessen Gebrauch machte, diesen neuen Einwand zum Verfahren zuzulassen, auf dessen Basis der beanspruchte Gegenstand des Hauptantrags und des Hilfsantrags 1 dann als nicht neu angesehen wurden. Hilfsantrag 14 war hingegen eingereicht worden, bevor der Einspruchsabteilung der Einwand fehlender Neuheit im Hinblick auf D2 überhaupt bekannt war. Hilfsantrag 14 war ersichtlich ein Versuch, die davor erhobenen Einwände der Einsprechenden zu beheben bzw. der vorläufigen Meinung der Einspruchsabteilung Rechnung zu tragen. Dies bedeutet, dass Hilfsantrag 14 nicht als Reaktion auf den neuen Einwand unter Art. 54 (1) EPÜ im Hinblick auf D2 angesehen werden durfte. Entgegen der Auffassung der Einspruchsabteilung war Hilfsantrag 14 daher nicht Teil der Ausgangslage, die bei der Bestimmung der durch die Einreichung von Hilfsantrag 2 bewirkten Änderung zu berücksichtigen war.

Ausgehend davon, dass ein neuer Einwand unter Art. 54 (1) EPÜ erst am letzten Tag der Frist nach R. 116 (1) EPÜ erhoben worden war, dieser erst in der mündlichen Verhandlung durch die Einspruchsabteilung zum Verfahren zugelassen worden war und dann zur Ablehnung der Neuheit des beanspruchten Gegenstands führte, war die Einreichung eines neuen Hilfsantrags in der mündlichen Verhandlung als rechtzeitige und angemessene Reaktion zu bewerten. In diesem Falle lag die Zulassung des neuen Hilfsantrags 2 nicht im Ermessen der Einspruchsabteilung, sondern der Hilfsantrag 2 musste zugelassen werden.

Auch wenn Hilfsantrag 2 im Vergleich zu Hilfsantrag 14 nur zusätzliche Ansprüche aufweist, kann das Recht der Patentinhaberin, auf einen neuen Einwand mit einem neuen Anspruchssatz (Hilfsantrag 2) zu reagieren, nicht durch einen Anspruchssatz (Hilfsantrag 14) erschöpft werden, der sich bereits vor Einreichung des Einwands im Verfahren befand.

Da die Entscheidung der Einspruchsabteilung, den Hilfsantrag 2 nicht zuzulassen, fehlerhaft war, war die angefochtene Entscheidung aufzuheben. Die Kammer hob die angefochtene Entscheidung auf und verwies die Angelegenheit zur weiteren Entscheidung an die Einspruchsabteilung zurück (Art. 111 (1) EPC, Art. 11 VOBK).

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10. Article 12(6) RPBA | T 1125/23 | Board 3.2.05

Article 12(6) RPBA 2020

Case Number	T 1125/23
Board	3.2.05
Date of decision	2025.07.10
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Articles 12(2), 12(4), 12(6), 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment to case – amendment within meaning of Art. 12(4) RPBA 2020 (yes) – should have been submitted in first instance proceedings (yes) – reason in opposition proceedings to address the issue – complexity of amendment (yes) – detrimental to procedural economy (yes)
Cited decisions	
Case Law Book	V.A.4.3.7f , 11th edition

Im Verfahren [T 1125/23](#) wurde der Hauptantrag der Beschwerdeführerin (Patentinhaberin) unstrittig erstmals mit der Beschwerdebegründung vorgelegt. Er unterschied sich von den Ansprüchen des erteilten Patents lediglich in der Streichung des abhängigen Anspruchs 4. Die Beschwerdegegnerin beantragte, den Hauptantrag nach Art. 12 (6) VOBK nicht im Beschwerdeverfahren zuzulassen.

Die Beschwerdeführerin trug vor, durch die Streichung des Anspruchs 4 werde der einzige Einwand, auf dem die angefochtene Entscheidung hinsichtlich des Patents in der erteilten Fassung beruhe, ausgeräumt. Wie von der Kammer festgestellt, war allerdings unstrittig, dass der Einwand der mangelnden Ausführbarkeit gegen den Anspruch 4 des erteilten Patents, auf dem die angefochtene Entscheidung hinsichtlich des Patents in der erteilten Fassung beruhte, bereits in der Einspruchsschrift erhoben worden. Die Einspruchsabteilung befand diesen Einwand in ihrer der Ladung zur mündlichen Verhandlung beigefügten Mitteilung vorläufig für überzeugend. Die dort angeführten Gründe übernahm die Einspruchsabteilung auch in der angefochtenen Entscheidung als tragende Gründe. Sie ging lediglich ergänzend auf Gegenargumente der Beschwerdeführerin ein, ohne dass dies aber nach Ansicht der Kammer zu einer Änderung der Argumentation der Einspruchsabteilung in ihrer Mitteilung geführt hätte. Daher bestand nach Auffassung

der Kammer bereits im Hinblick auf diese Mitteilung Veranlassung, den vorliegenden Hauptantrag einzureichen. Dies werde auch durch die Tatsache unterstrichen, dass die Patentinhaberin zu diesem Zeitpunkt Hilfsanträge einreichte, die sich von vorherigen Hilfsanträgen nur dadurch unterschieden, dass Anspruch 4 gestrichen war. Der vorliegende Hauptantrag wäre daher bereits im Einspruchsverfahren vorzubringen gewesen.

Zudem befand die Kammer, dass die Streichung zu einer völligen Neugewichtung des Verfahrensgegenstandes führen, den faktischen und rechtlichen Rahmen ändern und eine neue Diskussion hinsichtlich Neuheit und erfinderischer Tätigkeit erforderlich machen würde. Die Kriterien der Komplexität und der Verfahrensökonomie (Art. 12 (4) VOBK) sprachen daher nach Ansicht der Kammer gegen eine Zulassung des Hauptantrags im Beschwerdeverfahren. Die Kammer entschied daher, den Hauptantrag der Beschwerdeführerin gemäß Art. 12 (6) VOBK nicht im Beschwerdeverfahren zuzulassen.

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11. Article 12(6) RPBA | T 1865/23 | Board 3.4.03

Article 12(6) RPBA 2020

Case Number	T 1865/23
Board	3.4.03
Date of decision	2025.04.03
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Article 12(4), 12(6) RPBA 2020
Other legal provisions	
Keywords	amendment to case – amendment within meaning of Art. 12(4) RPBA 2020 (yes) – should have been submitted in first instance proceedings (no) – request addressing objection dismissed by the opposition division
Cited decisions	T 1188/16
Case Law Book	V.A.4.3.7c , 11th edition

Im Verfahren [T 1865/23](#) hatte die Kammer die Frage zu prüfen, ob der erstmals mit der Beschwerdeerwidern der Patentinhaberin eingereichte Hilfsantrag 10, der somit als Änderung im Sinne von Art. 12 (4) VOBK angesehen wurde, schon im Einspruchsverfahren hätte eingereicht werden müssen. Die Einsprechenden argumentierten, dies sei der Fall, da die getätigten Änderungen Einwände betreffen, welche schon in der Einspruchsschrift erhoben worden seien. Sie verwiesen in diesem Zusammenhang auf T 1188/16.

Die Kammer teilte die Auffassung der Einsprechenden jedoch nicht. Sie hob hervor, dass die zuständige Kammer in T 1188/16 befand, dass der Hauptantrag schon im Einspruchsverfahren hätte eingereicht werden müssen, da die Einspruchsabteilung in der mündlichen Verhandlung eine unzulässige Änderung bemängelt hatte. Im vorliegenden Fall sei der Sachverhalt jedoch anders.

Die Kammer erläuterte, dass die Einsprechende 1 innerhalb der Einspruchsfrist zwar u.a. bemängelt hatte, dass eine unzulässige Zwischenverallgemeinerung vorliege. In ihrer Erwidern darauf hatte die Patentinhaberin dies aber bestritten und die Einspruchsabteilung hatte ihr in ihrer vorläufigen Meinung zugestimmt und diese Ansicht auch in der angefochtenen Entscheidung vertreten. Nach Ansicht der Kammer gab es daher keinen Grund, den Hilfsantrag 10 schon im

Einspruchsverfahren einzureichen. Da die Ansprüche 1 und 3 des Hilfsantrags 10 die gemäß Art. 123 (2) EPÜ gegen den Hauptantrag erhobenen Einwände beheben konnten, ließ die Kammer den Hilfsantrag 10 zum Beschwerdeverfahren gemäß Art. 12 (4) VOBK zu.

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12. Article 13(2) RPBA | T 0396/23 | Board 3.2.02

Article 13(2) RPBA 2020

Case Number	T 0396/23
Board	3.2.02
Date of decision	2025.07.10
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Article 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment after notification of Art. 15(1) RPBA communication (yes) – exceptional circumstances (yes) – admitted (yes) – no change to the legal or factual framework of the case – compatible with the principles of procedural economy and procedural fairness
Cited decisions	T 2022/22
Case Law Book	V.A.4.5.4.k , 11th edition

In [T 396/23](#) the patent proprietor requested at the oral proceedings that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or on the basis of one of the auxiliary requests 1 to 16 as filed with its statement of grounds of appeal, or auxiliary requests 17 to 20 as filed with its reply to the opponent's appeal, or auxiliary requests 21 to 40 as filed in reply to the opponent's rejoinder, or auxiliary request 41 or 42 as filed in reply to the communication under Art. 15(1) RPBA.

At the oral proceedings the board came to the conclusion that claims 1, 2 and 3 of the main request did not meet the requirements of Art. 83 EPC. Neither did auxiliary requests 1 to 40 which contained the features at issue. The subject-matter of claim 1 of the main request was also found to lack novelty over D1.

With regard to admittance of auxiliary request 41, the board observed that, when exercising its discretion under Art. 13(2) RPBA, it may also rely on the criteria set out in Art. 13(1) RPBA.

Auxiliary request 41 corresponded to auxiliary request 18 filed with the proprietor's reply to the opponent's statement of grounds of appeal, but with claims 1 and 2

removed. The remaining claim of auxiliary request 18, claim 3, was based on independent claim 16 as originally filed, i.e. it had been in the proceedings as an independent claim throughout (although it comprised all of the features of another independent claim). The board underlined that, by drafting claim 3 as one of three independent claims and by presenting arguments in respect of its patentability, the proprietor had clearly indicated its intention to defend this embodiment. Hence, the filing of auxiliary request 41 did not result in a situation for which the opponent or the board were unprepared.

The board pointed out that the admittance of auxiliary request 41 did not change the legal or factual framework of the case and did not require any new substantive discussion. A claim including the restriction contained in the sole claim of auxiliary request 41 had been included in the independent claims ever since the reply to the notice of opposition. A claim including two further features at issue of the sole claim had likewise been on file since the reply to the notice of opposition and had been discussed in the written proceedings. Indeed, the submission of auxiliary request 41 merely served to remove some of the points of dispute, without introducing any new aspect to be discussed, thus improving procedural economy.

The board concluded that the admittance of auxiliary request 41 was compatible with the principles of both procedural economy and procedural fairness and did not change or add anything to the subject of the appeal proceedings. In other cases where new requests were filed that satisfied these conditions, a considerable amount of case law had concluded that there were exceptional circumstances within the meaning of Art. 13(2) RPBA justifying the admittance of the new requests (see e.g. T 2022/22 and the decisions cited therein). The board therefore decided, in view of the circumstances above, to admit auxiliary request 41 into the appeal proceedings.

Since auxiliary request 41 was found to be novel and inventive, the case was remitted to the opposition division with the order to maintain the patent on the basis of auxiliary request 41 and a description to be adapted thereto.

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