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

In the table summarising the decision data for an abstract, the links to the CLB, 11th edition, lead to the [HTML version](#), which was updated in June 2026. In the body of any given abstract, references to the CLB mirror those provided by the board in the underlying decision.

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Abstracts of decisions

In this issue:

1.	Article 056 EPC	T 0094/24 Board 3.5.05	1
2.	Article 056 EPC	T 1330/24 Board 3.3.02	3
3.	Article 056 EPC	T 1438/24 Board 3.5.01	5
4.	Article 069 EPC	T 2043/23 Board 3.5.01	7
5.	Article 084 EPC	G 0001/25 EBA	9
6.	Article 108 EPC	T 0110/25 Board 3.3.08	11
7.	Rule 036 EPC	J 0011/25 Board 3.1.01	13
8.	Article 13(2) RPBA	T 0094/24 Board 3.5.05	15
9.	Article 13(2) RPBA	T 0578/24 Board 3.3.03	17
10.	Article 13(2) RPBA	T 1139/24 Board 3.3.02	19

1. Article 056 EPC | T 0094/24 | Board 3.5.05

Article 056 EPC

Case Number	T 0094/24
Board	3.5.05
Date of decision	2026.01.19
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Articles 056, 112(1)(a) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step – problem/solution approach – non-functional modification
Cited decisions	G 0001/19, G 0002/21, T 0176/97, T 0287/23, T 1465/23
Case Law Book	I.D.4.5 , 11th edition

[See also abstract under Article 13\(2\) RPBA.](#)

In [T 94/24](#), the board noted that in the absence of a credible technical effect, the introduction of features (h) to (j) into the hearing aid of document D2 did not credibly contribute to solving a technical problem. If there was no technical effect, there was no technical contribution to the solution of a technical problem.

The board recalled it was established jurisprudence of the boards of appeal that, if a claim feature does not contribute to the solution of a technical problem, it may (i) be disregarded right away in the assessment of inventive step without further qualification, (ii) be considered an arbitrary feature which cannot contribute to an inventive step, (iii) be considered a non-functional feature which cannot justify an inventive step. The board referred in particular to T 176/97, as emphasising that "technically non-functional modifications are [...] irrelevant to inventive step, even if the skilled person would never think of such a modification" and that "if the modifications have no technical relevance and are, from a technical point of view, arbitrary, the new design is not patentable and does not involve an inventive step [...]".

The board stated that this principle had been applied consistently, and recently reaffirmed by itself in decisions T 287/23 and T 1465/23. Hence, as features (h) to (j) did not credibly contribute to the solution of a technical problem over the whole

breadth of claim 1, they were considered by the board to be non-functional or arbitrary features and thus obvious within the meaning of Art. 56 EPC.

The proprietor requested that three questions be referred to the Enlarged Board of Appeal regarding the application of the problem-solution approach. Specifically, the proprietor argued that the board's conclusion, i.e. that no objective technical problem could be formulated if no technical effect was credibly achieved, constituted a "new take" that deviated from the principles established in G 1/19 and G 2/21 and that this was a doctrine "unique to Board 3.5.05".

As to the alleged deviation from the conventional problem-solution approach, this question was based on the assumption that the board had created its "own approach" for the application of the problem-solution approach. The board asserted this was not correct, referring to established case law that subject-matter that is distinguished over the prior art only by arbitrary or non-functional features, which do not contribute to a technical effect over the whole breadth of a claim, cannot be considered to involve an inventive step. The board noted that some boards terminated the problem-solution approach immediately after having established the lack of a credible technical effect, while other boards continued the assessment based on a "less ambitious" objective problem without however necessarily reaching a different conclusion. However also these boards finally held that an inventive step could not be acknowledged on the basis of arbitrary or non-functional features which do not contribute to the solution of a technical problem. Thus despite some variations in the steps applied within the framework of the problem-solution approach, the conclusions were identical such that a referral on this matter was not required. As to the proprietor's argument that the so-called "no objective technical problem" approach was unique to Board 3.5.05 and this "divergence" resulted in procedural unfairness, the board responded that while different boards might apply the problem-solution approach with slight variations depending on the specifics of the case at hand, the core principle – i.e. that arbitrary modifications are obvious and cannot support an inventive step – was a fundamental tenet of the case law applied by the boards across all technical fields. The approach was not unique to Board 3.5.05.

The board likewise rejected proprietor's argument that G 1/19 affirmed the "conventional" problem-solution approach and that the so-called "no objective technical problem" approach was restricted solely to mixed-type inventions. The board stated that it had not deviated from G 1/19; the "no objective technical problem" approach neither relied for authority solely on G 1/19 nor was inspired by it. Instead, the conclusions drawn in G 1/19, point 49 of the Reasons, constituted the inevitable consequence and confirmation of the established jurisprudence as regards the application of the problem-solution approach. Consequently, the board's approach was a consistent application of the acknowledged principle that a patentable invention requires a technical contribution.

As to the claim that the terms "credibility" and "plausibility" were applied inconsistently across Art. 52(2), 56 and 83 EPC, thereby creating legal uncertainty, the board noted that the Enlarged Board had already addressed this issue in G 2/21.

084-09-26

2. Article 056 EPC | T 1330/24 | Board 3.3.02

Article 056 EPC

Case Number	T 1330/24
Board	3.3.02
Date of decision	2026.02.27
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step – comparative tests unsuitable for demonstrating inventive step – modification of compositions in the prior art may not lead to a loss of essential properties
Cited decisions	T 0197/86, T 1872/08, T 2319/14
Case Law Book	I.D.4.3.2 , 11th edition

In [T 1330/24](#), the respondent (patent proprietor) had relied on the comparative composition in D10 to establish a technical effect of the distinguishing features versus the closest prior art D5. Although the comparative composition was not the one of D5, the opposition division had recognised that the comparison made in D10 showed an improvement of stability and cosmetic properties which could be related to the oil content of the compositions. The appellant (opponent) contested this conclusion, arguing that the comparative composition in D10 was not according to D5, but rather according to D3.

The respondent argued that the case law of the boards of appeal did not require a comparison with a composition reproducing exactly the closest prior art. For showing an effect of a distinguishing feature it was permissible, in fact it was even sometimes necessary, that compositions disclosed in the closest prior art were modified so that they differed from the tested compositions representing the claimed invention only in the distinguishing feature(s) of the claim (with reference to in particular T 1872/08, T 197/86 (headnote) and to T 2319/14).

The board agreed with the principles developed in the case law cited by the respondent, in particular with the headnote of decision T 197/86:

"In the case where comparative tests are chosen to demonstrate an inventive step with an improved effect over a claimed area, the nature of the comparison with the closest state of the art must be such that the effect is convincingly shown to have its origin in the distinguishing feature of the invention. For this purpose it may be necessary to modify the elements of comparison so that they differ only by such a distinguishing feature (...)"

The board noted, however, that the circumstances of the present case were different from those relied on by the respondent. The compositions disclosed in D5 were stable (nano)emulsions; the composition of example 1 of D5 was a cream with a viscosity of 3.840 mPa·s. In contrast, the comparative composition relied on in D10 was not a stable emulsion, and no viscosity could be measured. The board highlighted that while it was correct that for a meaningful comparison the example compositions of the closest prior art may be modified in order to only differ by the distinguishing feature(s), they may not be modified in such a way as to lose essential properties reported in the closest prior art so that they become unsuitable for the purpose they are originally designed for.

Thus, the board held that starting from D5 the objective technical problem solved could not be formulated as improving the compositions disclosed in D5 in a certain way. The objective technical problem solved had to therefore be formulated as in the patent itself, namely as the provision of cosmetic compositions being able to accommodate large amounts of oil agents while maintaining stability without stickiness.

085-09-26

3. Article 056 EPC | T 1438/24 | Board 3.5.01

Article 056 EPC

Case Number	T 1438/24
Board	3.5.01
Date of decision	2026.04.16
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 056 EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	inventive step – technical effect – display of information
Cited decisions	T 0115/85, T 0641/00, T 1741/08, T 1802/13
Case Law Book	I.D.9.2.11d , 11th edition

In [T 1438/24](#) the invention concerned the provision of two display areas on an aerosol-generating device, in which the display areas ("inner lighting array" and "outer lighting array" in the claim) graphically presented data to a user that indicated different states of the device. LEDs assigned to the outer lighting array 61 formed a partial or complete annulus surrounding LEDs assigned to the inner lighting array 62; the LEDs were individually driven by control electronics so that the lighting arrays simultaneously presented visual information indicative of two different states of the device, with the outer lighting array indicating the progression through a usage session by increasing or reducing the length of the illuminated portion of the annulus.

The board accepted that the automatic provision of visual indications of conditions prevailing in a technical apparatus may, in principle, produce a technical effect (see T 115/85), in particular where the displayed information supports the user in interacting with the apparatus. However, no such effect was achieved here over D1, which already disclosed the indication of the same technical information as defined in claim 1, namely multiple technical conditions of the device.

The actual difference between claim 1 and D1 resided solely in the decision to present different technical conditions simultaneously. This does not provide the user with any additional insight into the internal operation of the device beyond what is already disclosed in D1. Rather, it merely concerns the manner in which information already available in D1 is presented to the user.

According to the established case law, effects such as improved clarity of presentation or reduced cognitive burden, which merely reflect subjective user preferences, do not constitute technical effects and therefore cannot contribute to an inventive step (T 1741/08, T 1802/13). Moreover, the board noted that it was doubtful whether the display of information relating to the progression of a smoking session could be regarded as assisting the user in controlling the aerosol-generating device. At most, such information may enable the user to adapt their smoking behaviour on the basis of the displayed information, for example by reducing the rate of consumption in order to prolong the smoking session. Such behavioural adaptation, however, does not amount to controlling any technical operation of the aerosol-generating device.

On the basis of inter alia the above assessment of technicality and applying the COMVIK approach (T 641/00), the board considered that the skilled person is not faced with the technical problem formulated by the appellant, but rather with the problem of implementing the non-technical requirement to simultaneously display the progression through a smoking session in an annular area, by increasing or decreasing its illuminated length, and a further technical state of the e-cigarette in an area surrounded by that annular area. The implementation of this requirement in the system of D1 would be limited to routine reprogramming of the processor controlling the LEDs arranged under the illumination area 116. This the board considered obvious. The board held that the invention lacked an inventive step.

086-09-26

4. Article 069 EPC | T 2043/23 | Board 3.5.01

Article 069 EPC

Case Number	T 2043/23
Board	3.5.01
Date of decision	2026.05.12
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 069(1) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	claim interpretation – using the description to interpret the claims – explanatory and confirmatory function – novelty assessment
Cited decisions	G 0001/24, T 0439/22, T 2027/23
Case Law Book	II.A.6.2.2a , 11th edition

In [T 2043/23](#) the interpretation of features 1.8 and 1.8a was crucial for the novelty assessment of claim 1 of the main request. Taken together, these features stated that the electronic circuitry was configured to "determine an adverse condition when a ratio between the measured initial electrical resistance of the heater and a change in electrical resistance from the measured initial resistance is greater than a maximum threshold value [stored in the memory]".

The opposition division had interpreted these features in light of paragraph [17] of the patent, which reads: "The electric circuitry may not actually calculate the ratio or the change in electric resistance and compare the ratio with a threshold value, but may make an equivalent comparison ... For example, the electric circuitry may compare a measured electrical resistance of the heater element ... with a value calculated from the initial electrical resistance and a threshold value stored in memory." Accordingly, the opposition division considered claim 1 not to be limited to a comparison between a resistance ratio and a threshold value (hereinafter "ratio-based comparison"), which was immediately apparent from the claim, but also to encompass an equivalent comparison between a measured resistance and a resistance threshold derived from the initial resistance and a stored threshold value (hereinafter "direct comparison").

The patent proprietor argued that the wording of claim 1 was clear: a ratio in the form $(R - R_0)/R_0$ was to be calculated and compared with a threshold stored in memory.

Any alternative comparisons mentioned in the description, in particular the direct comparison in paragraph [17], were outside the claim's scope.

The board agreed with the opposition division that features 1.8 and 1.8a covered both the ratio-based comparison and the direct comparison. The board stated that, contrary to the proprietor's view, these features did not define specific mathematical operations to be carried out; they merely specified the condition under which the adverse condition was to be detected, namely "when a ratio between the measured initial electrical resistance of the heater and a change in electrical resistance from the measured initial resistance is greater than a maximum threshold value ... stored in the memory". As long as that condition was detected, the claim left open how the detection was achieved mathematically and therefore encompassed any mathematical method of doing so. Recourse to the description, as required by G 1/24, confirmed that one envisaged way of detecting this condition was the direct comparison, the other being the ratio-based comparison.

For the avoidance of doubt, the board noted that the present case differed from situations such as that in decision T 439/22, in which the description and drawings had been relied upon to broaden the scope of a claim beyond what was conveyed by the claim wording read in isolation. Here, by contrast, the description served an explanatory and confirmatory function by assisting the skilled reader in recognising an embodiment already encompassed by the claim wording, without altering the scope of the claim. More specifically, it explained that features 1.8 and 1.8a covered not only the ratio-based comparison, readily apparent from the claim wording, but also the much less apparent direct comparison. It was reasonable to assume that, without consulting the description, reaching the latter conclusion would, at the very least, not have been straightforward. This modest explanatory and confirmatory use of the description was consistent with the principles set out in G 1/24 (see T 2027/23).

087-09-26

5. Article 084 EPC | G 0001/25 | EBA

Article 084 EPC

Case Number	G 0001/25
Board	EBA
Date of decision	2026.09.03
Language of the proceedings	EN
Internal distribution code	A
Inter partes/ex parte	Inter partes
EPC Articles	Articles 052, 053, 054, 055, 056, 057, 069, 076(1), 083, 084, 112(1)(a), 123(2), 123(3) EPC
EPC Rules	
RPBA	
Other legal provisions	
Keywords	point of law of fundamental importance – uniform application of law – adaptation of the description – inconsistency between the claims and the description, and any drawings – legal basis – claim interpretation
Cited decisions	G 0001/24, T 0454/89, T 1989/18, T 2194/19, T 1444/20, T 0056/21, T 0439/22 of 11 December 2025, T 0697/22
Case Law Book	II.A.5.3 , II.A.6.1 , II.A.6.2.1 , II.A.6.2.2 , 11th edition

In [G 1/25](#) the Enlarged Board ("EBA") considered the questions referred by Technical Board of Appeal 3.3.02 in T 697/22 of 29 July 2025.

The EBA pointed out the relevance of G 1/24 for the present referral and endorsed the view that claim interpretation is the result of reading the claims, the description and drawings as a unitary process ("holistic approach"). It noted that while G 1/24 was concerned with claim interpretation when assessing patentability under Art. 52 to 57 EPC, its reasoning nevertheless identified general principles of claim interpretation applied by the Boards of Appeal.

For the purpose of this referral, the EBA held that an inconsistency between the claims and the description, and any drawings, exists where one or more statements in the description, including the drawings, suggest an understanding of a claim which is incompatible with the apparent meaning of the claim, and that incompatibility cannot readily be resolved by applying the principles set out in G 1/24. The necessity to adapt the description or any drawings is not a consequence of the existence of an inconsistency as such, but arises only where, and to the extent that, the

inconsistency has legal significance because it leads to non-compliance with a requirement of the EPC. The EBA further noted that the same considerations may arise where the claims are not amended.

The EBA answered the referred questions as follows.

Question 1: "If the claims of a European patent are amended during opposition proceedings or opposition-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description, including any drawings, of the patent, is it necessary, to comply with the requirements of the EPC, to adapt the description, including any drawings, to the amended claims so as to remove the inconsistency?"

The EBA stated that if the inconsistency is such as to cause a non-compliance with the EPC, question 1 is to be answered "Yes".

Question 2: "If the first question is answered in the affirmative, which requirement(s) of the EPC necessitate(s) such an adaptation?"

The EBA held that the answer to question 2 does not lie in a single provision of the EPC which, in all circumstances, mandates an adaptation of the description, including any drawings, whenever the claims are amended. Whether such an adaptation is required depends on whether, in the circumstances of the case, the inconsistency is such as to result in non-compliance with a requirement of the EPC. Question 2 was therefore to be answered to the effect that the legal basis for any necessary adaptation is the provision of the EPC with which compliance is lacking by reason of the inconsistency in question.

Question 3: "Would the answer to questions 1 and 2 be different if the claims of a European patent application are amended during examination proceedings or examination-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description, including any drawings, of the patent application?"

The EBA stated that the interpretative role of the description and any drawings in assessing the requirements of the EPC is not dependent on the procedural stage. Question 3 was thus answered with a "No".

The Order by the EBA in [G 1/25](#) reads as follows:

"If the claims of a European patent, or patent application, are amended during proceedings before the departments of the EPO, or in appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description, including any drawings, of the patent, or application, and because of that inconsistency Articles 52 to 57, 76(1), 83, 84, 123(2) or 123(3) EPC are not complied with, it is necessary to adapt the description, including any drawings, to the amended claims so as to remove that inconsistency."

088-09-26

6. Article 108 EPC**| T 0110/25****| Board 3.3.08****Article 108 EPC**

Case Number	T 0110/25
Board	3.3.08
Date of decision	2026.07.15
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	Article 108 EPC
EPC Rules	Rule 007a EPC
RPBA	
Other legal provisions	Article 02(1), item 11 RFees
Keywords	admissibility of appeal (yes) – appeal fee (paid) – reduction of fees (yes) – SME (yes)
Cited decisions	T 0676/24
Case Law Book	V.A.2.5.4c , 11th edition

In [T 110/25](#) befand die Kammer, dass die ermäßigte Beschwerdegebühr ordnungsgemäß entrichtet wurde und die Beschwerde als eingelegt galt.

Die Kammer erinnerte zunächst daran, dass R. 7a und 7b EPÜ am 1. April 2024 an die Stelle der R. 6 (3) bis (7) EPÜ getreten sind. Sie hob hervor, dass nunmehr ein Unterschied dahingehend besteht, dass R. 6 (5) EPÜ zur Bestimmung, ob eine Einheit als kleines oder mittleres Unternehmen ("KMU") gilt, auf die Empfehlung 2003/361/EG verwies, R. 7a (2) EPÜ hingegen keinen der R. 6 (5) EPÜ entsprechenden Verweis auf die Empfehlung 2003/361/EG enthält.

Die Kammer stellte zudem fest, dass die Fußnote zu Art. 2 (1), Nr. 11 GebO auf die Mitteilung des EPA vom 18. Dezember 2017 über die ermäßigte Beschwerdegebühr (Art. 108 EPÜ) für eine Beschwerde, die von einer natürlichen Person oder einer in R. 6 (4) EPÜ genannten Einheit eingelegt wird (ABl. 2018, A5), verweist. In Bezug auf die Empfehlung 2003/361/EG wiederholt die Mitteilung in Punkt 6 den Wortlaut von R. 6 (5) EPÜ und erläutert danach die Definition der KMU, die Art. 2 (1) des Anhangs zur Empfehlung 2003/361/EG entspricht. Da sich die Mitteilung allerdings auf die aufgehobene R. 6 (4) und (5) EPÜ stützt, war für die Kammer fraglich, ob die Mitteilung noch Bestand hat. Im Ergebnis stellte sie fest, dass in Bezug auf die Grundlage für die Feststellung, ob ein Unternehmen ein KMU im Sinn der R. 7a (2) a) und b) EPÜ ist, das durch Entrichtung der ermäßigten Beschwerdegebühr Beschwerde einlegen kann, nach den Änderungen der Ausführungsordnung durch Beschluss des Verwaltungsrats CA/D 16/23 vom 14.

Dezember 2023 (ABl. 2024, A3) eine ungewollte Regelungslücke besteht. Nach Auffassung der Kammer ist diese im Sinne der aufgehobenen R. 6 (5) EPÜ, d.h. der integralen Anwendung der Empfehlung 2003/361/EG, zu schließen. Sie kam damit nach eigener Auffassung zum gleichen Ergebnis wie T 676/24, die sich allerdings auf Punkt 7 der Mitteilung des EPA vom 25. Januar 2024 (ABl. 2024, A8) stützte und diesen im Sinn der gestrichenen R. 6 (5) EPÜ interpretierte.

Zum Status der Beschwerdeführerin als KMU stellte die Kammer fest, dass es sich um ein eigenständiges Unternehmen handelte. Dies hatte die Beschwerdegegnerin unter Berufung auf ein KI-generiertes Internet-Suchergebnis in Zweifel gezogen. Die Kammer erachtete dieses Suchergebnis wegen der Möglichkeit einer Halluzination allerdings als nicht glaubwürdig und sah die behauptete wirtschaftliche Abhängigkeit daher als nicht erwiesen an. Folglich kam es bei der Feststellung des Status der Beschwerdeführerin als KMU allein auf die Mitarbeiterzahl und den Jahresumsatz oder die Jahresbilanzsumme des maßgebenden letzten Rechnungsabschlusses der Beschwerdeführerin an.

Der Kammer zufolge war dafür der Jahresabschluss für das Geschäftsjahr 2023 heranzuziehen. Daraus ergab sich für die Kammer bereits der Status der Beschwerdeführerin als KMU im Zeitpunkt der Entrichtung der ermäßigten Beschwerdegebühr in 2024. Die Beschwerdegegnerin hatte eingewandt, dass der Nachweis des Status der Beschwerdeführerin als KMU nicht anhand des Jahresabschlusses 2023, sondern anhand der wirtschaftlichen Verhältnisse, d.h. der Mitarbeiter- und Finanzwerte, im Zeitpunkt der Gebührenentrichtung zu erbringen sei. Dem stimmte die Kammer zwar dahingehend zu, dass die Voraussetzungen für die Einlegung einer Beschwerde durch Entrichtung der ermäßigten Beschwerdegebühr im Zeitpunkt der Gebührenentrichtung gegeben sein müssen. Sie stellte aber klar, dass dies nicht bedeutet, dass der Status als KMU anhand der zu diesem Zeitpunkt gegebenen wirtschaftlichen Verhältnisse nachgewiesen werden muss. Auf die an einem bestimmten Datum während eines laufenden Geschäftsjahres gegebenen Mitarbeiter- und Finanzwerte kommt es daher nicht an.

Auch die Überschreitung der Obergrenze für die Bilanzsumme in 2024 war nach Ansicht der Kammer ohne Auswirkung auf den Status der Beschwerdeführerin als KMU. Sie erklärte, dass ein Unternehmen nicht beiden Finanzschwellenwerten zu genügen braucht und eine von beiden Obergrenzen überschreiten darf, ohne den Status als KMU zu verlieren. Die Kammer mutmaßte, dass die unzutreffende Ansicht der Beschwerdegegnerin auf einen Fehler in der deutschen Fassung von Art. 4 (2) des Anhangs zurückzuführen ist, der nur auf "die in Artikel 2 genannten Schwellenwerte für die Mitarbeiterzahl oder die Bilanzsumme" verweist. Aus der englischen und französischen Fassung geht für die Kammer indessen zweifelsfrei hervor, dass alle in Art. 2 (1) genannten Finanzschwellenwerte überschritten sein müssen, bevor der Status als KMU verloren geht. Davon abgesehen, so die Kammer weiter, verliert ein Unternehmen den Status als KMU erst dann, wenn es in zwei aufeinander folgenden Geschäftsjahren zu einer Überschreitung des Mitarbeiterschwellenwerts und/oder beider Finanzschwellenwerte kommt.

089-09-26

7. Rule 036 EPC

| J 0011/25

| Board 3.1.01

Rule 036 EPC

Case Number	J 0011/25
Board	3.1.01
Date of decision	2026.05.13
Language of the proceedings	DE
Internal distribution code	D
Inter partes/ex parte	Ex parte
EPC Articles	Article 106(1) EPC
EPC Rules	Rule 036 EPC
RPBA	
Other legal provisions	
Keywords	divisional application – pending earlier European patent application (yes) – time limit for filing the statement of grounds of appeal expired
Cited decisions	G 0001/09, G 0002/19, J 0028/94, J 0028/03, J 0003/04, J 0022/13, J 0023/13, J 0001/24
Case Law Book	II.F.3.5.6 , 11th edition

In [J 11/25](#) hatte die Juristische Beschwerdekammer zu entscheiden, ob zu dem Zeitpunkt, als die vorliegende Anmeldung als Teilanmeldung eingereicht wurde, die Stammanmeldung im Sinne der R. 36 EPÜ noch anhängig war.

Die Beschwerdeführerin hatte eine Beschwerde gegen die Zurückweisung ihrer früheren Anmeldung eingelegt. Die Beschwerdeführerin hatte sowohl ihre Beschwerdebegründung als auch eine Teilanmeldung zu der verfahrensgegenständlichen Anmeldung erst nach Ablauf der Beschwerdebegründungsfrist eingereicht.

Die Eingangsstelle erläuterte, dass die Entscheidung, die Stammanmeldung zurückzuweisen, mit Ablauf der Beschwerdebegründungsfrist rechtskräftig geworden sei.

Die Juristische Beschwerdekammer erinnerte jedoch daran, dass gemäß Art. 106 (1) Satz 2 EPÜ eine Beschwerde aufschiebende Wirkung (Suspensiveffekt) hat. Im Allgemeinen könne daher eine erstinstanzliche Zurückweisungsentscheidung erst dann Rechtskraft erlangen, wenn das Beschwerdeverfahren ohne Aufhebung der erstinstanzlichen Entscheidung abgeschlossen werde und die Suspensivwirkung der Beschwerde damit ende. Es stelle sich allerdings die Frage, ob Ausnahmen von diesem allgemeinen Prinzip zu machen seien, wenn eine Beschwerde offensichtlich

unzulässig sei oder geworden sei. In G 2/19 habe die Große Beschwerdekammer festgestellt, dass der Grundsatz der Suspensivwirkung nur im Normalfall gelte, nicht aber dann, wenn eine Person, die überhaupt nicht an dem erstinstanzlichen Verfahren beteiligt sei, Beschwerde eingelegt habe.

Wie von der Juristischen Beschwerdekammer in der vorliegenden Entscheidung erläutert, betrachtete die Kammer in J 22/13 die Stammanmeldung als nicht mehr anhängig, da die Teilanmeldung erst zu einem Zeitpunkt eingereicht worden war, an dem die Beschwerdebegründungsfrist in der Stammanmeldung bereits abgelaufen war, ohne dass eine Beschwerdebegründung eingereicht worden war. Die Kammer sei in J 22/13 offenbar der Auffassung gewesen, dass zwar zunächst durch die wirksame Einlegung der Beschwerde eine Suspensivwirkung eingetreten war, diese jedoch zu einem späteren Zeitpunkt, nämlich nach Ablauf der Beschwerdebegründungsfrist, nicht mehr bestanden habe, da die Beschwerde zu diesem Zeitpunkt offensichtlich unzulässig geworden sei.

Die Juristische Beschwerdekammer hob hervor, dass der vorliegende Fall demjenigen entsprach, der J 22/13 zugrunde lag, nur mit dem Unterschied, dass vorliegend eine Beschwerdebegründung eingereicht wurde, wenn auch erst nach Ablauf der Beschwerdebegründungsfrist.

In Anbetracht der neueren Entwicklung der Rechtsprechung der Beschwerdekammern (G 2/19, J 1/24) erschien es der Juristischen Beschwerdekammer notwendig, die in J 22/13 vertretene Rechtsauffassung zu überprüfen.

Nach Ansicht der Juristischen Beschwerdekammer spricht die neuere Entwicklung der Rechtsprechung dafür, die Suspensivwirkung einer Beschwerde, die in Art. 106 (1) Satz 2 EPÜ ausdrücklich angeordnet ist, nur in ganz besonderen Ausnahmefällen "wegen offensichtlicher Unzulässigkeit" zu verneinen, also etwa dann, wenn – wie bei der Beschwerde eines Dritten – das eingelegte Rechtsmittel nach dem EPÜ grundsätzlich überhaupt nicht zur Verfügung steht.

Wird aber, so die Juristische Beschwerdekammer, wie im vorliegenden Fall, eine zunächst wirksam eingelegte Beschwerde nachträglich dadurch unzulässig, dass die Beschwerdebegründung nicht oder erst nach Ablauf der vorgesehenen Frist eingereicht wird, so ist dies kein ausreichender Grund, eine Ausnahme von Art. 106 (1) Satz 2 EPÜ zu machen und die zunächst eingetretene Suspensivwirkung als bereits mit Ablauf der Beschwerdebegründungsfrist aufgehoben anzusehen. Vielmehr ende die Suspensivwirkung erst mit Ende des Beschwerdeverfahrens, im vorliegenden Fall also, nachdem die Beschwerdekammer die Unzulässigkeit der Beschwerde durch Entscheidung festgestellt hat. Diese Beendigung habe keine retroaktive Wirkung hinsichtlich von Teilanmeldungen, die während des Bestehens der Suspensivwirkung eingereicht worden sind.

Die Kammer war daher der Überzeugung, dass der in J 22/13 vertretene Auffassung nicht mehr gefolgt werden sollte.

090-09-26

8. Article 13(2) RPBA | T 0094/24 | Board 3.5.05

Article 13(2) RPBA 2020

Case Number	T 0094/24
Board	3.5.05
Date of decision	2026.01.19
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) – taken into account (no) – mere "elaboration" of party's appeal case (no) – exceptional circumstances (no) – legitimate response to new development in the appeal proceedings (no)
Cited decisions	T 1190/17, T 1869/18, T 0217/23
Case Law Book	V.A.4.5.1d), V.A.4.5.5c), 11th edition

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

In [T 94/24](#) the board dealt with the admittance of a new line of defence against the inventive step attack starting from document D2. With its response to the board's communication under Art. 15(1) RPBA, the proprietor submitted, for the first time, that D2 did also not disclose features (c), (e) and (f) of the subject-matter of claim 1 of the main request. During oral proceedings the proprietor further added feature (g) in the list of distinguishing features. It argued that its submissions regarding further distinguishing features was not an "amendment" but merely an "elaboration" of its existing appeal case, justified by a shift in focus from D1 (as referred to in the decision under appeal and the statement of grounds of appeal) to D2 (as referenced in the board's preliminary opinion).

However, the board considered this submission to constitute an "amendment" to the proprietor's appeal case within the meaning of Art. 13(2) RPBA. In the impugned decision the opposition division had held that there appeared to be agreement between the parties that features (h) to (j) were the sole distinguishing features over D2. The opposition division itself had also considered D2 to disclose the remaining features. In its reply to the statement of grounds of appeal, the proprietor did not

contest this finding in the appealed decision, nor the related arguments of the opponent in the statement of grounds of appeal, where the disclosure of the remaining features in D2 were explicitly addressed. The board noted that Art. 12(3) RPBA requires the parties to specify expressly all their requests, facts, objections, arguments and evidence. Hence, if a proprietor intended to contest an opponent's arguments as regards the disclosure of features in a prior-art document, it needed to state this expressly. The introduction of factual challenges after the expiry of the time limit for filing the written reply constituted a change in the factual basis of the appeal case. This could not be regarded as a mere "elaboration" of a previous argument.

Regarding admittance of this amendment, the board noted that its preliminary opinion had provided no new information regarding the features in question that could have triggered a new understanding. The mere fact that a new aspect had been raised in the board's preliminary opinion (here departure from the technical effects as underlying the parties' submissions) was not sufficient by itself to acknowledge the presence of "exceptional circumstances" and to admit any new submission made in response thereto at any time. For the amendment to be regarded as a legitimate response to a new development, it needed to be related to the new aspects introduced. In other words, the inclusion of a new argument in the chain of arguments (such as the absence of a credible technical effect) leading to the finding of lack of inventive step did not open the door to the introduction of amendments whose content would have gone well beyond that needed to refute the new argument (see e.g. T 1190/17 and T 1869/18). The board did not consider contesting the disclosure of additional features to be a legitimate response to the doubts raised in the board's preliminary opinion as regards the alleged technical effects.

It also held that the point in time when the proprietor's response was filed was not justified by "cogent reasons", as the proprietor had not submitted its response immediately after having received the board's preliminary opinion, but only nine months later, shortly before the oral proceedings. This however could not be considered legitimate since it confronted the other party and the board at a very late stage of the proceedings with a "fresh case" that would have led the discussion in a completely different direction. This in turn ran counter to the principles of fairness and procedural economy.

Nor could the alleged "shift in focus" from D1 to D2 qualify as an "exceptional circumstance" justifying admittance of the specific amendment as submitted by the proprietor. The opponent's statement of grounds of appeal clearly contained two distinct lines of attack: one starting from D1, one from D2. Pursuant to Art. 12(3) RPBA, the proprietor could reasonably have been expected to provide a complete response to both attacks at the outset of the appeal proceedings.

As a consequence, in the absence of any "exceptional circumstances" justified with cogent reasons and in the interest of procedural economy, the board exercised its discretion under Art. 13(2) RPBA not to admit the proprietor's amendment to its appeal case.

091-09-26

9. Article 13(2) RPBA | T 0578/24 | Board 3.3.03

Article 13(2) RPBA 2020

Case Number	T 0578/24
Board	3.3.03
Date of decision	2026.05.06
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Articles 12(2), 12(6), 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment after notification of Art. 15(1) RPBA communication (yes) – taken into account (yes) – exceptional circumstances (yes) – deletion of claims
Cited decisions	T 1294/16, T 1309/16, T 1943/16, T 1598/18, T 2920/18, T 0339/19, T 2295/19, T 0499/20, T 0847/20
Case Law Book	V.A.4.5.4j), 11th edition

In [T 578/24](#) the board had to decide on the admittance of auxiliary request 3 filed by the appellant after notification of the board's communication pursuant to Art. 15(1) RPBA. It was common ground that auxiliary request 3 only differed from the main request (implicitly admitted by the opposition division) in that dependant claim 4 thereof was deleted and the remaining claims renumbered. This auxiliary request had been filed less than a month before the oral proceedings in order to overcome an objection under Art. 84 EPC against claim 4 set out in the board's preliminary opinion.

One of the main points of contention between the parties was whether auxiliary request 3 should have been filed earlier. The respondents had argued that the objection of lack of clarity against claim 4 of the main request had already been put forward during the opposition proceedings and in the rejoinder of opponent 1. However, the board rejected these assertions and held that such an objection was only fully developed for the first time in its communication pursuant to Art. 15(1) RPBA. The board held that auxiliary request 3 could still have been filed earlier, for instance in direct reaction to the board's communication rather than about six months later. However, this was not a sufficient reason for disregarding auxiliary request 3.

The board agreed with the line of case law according to which exceptional circumstances may be acknowledged if the admittance of an amendment was neither detrimental to procedural economy, nor to the convergent approach laid down in the RPBA, nor to the legitimate interests of a party to the proceedings (e.g. T 1294/16, T 1598/18, T 2920/18, T 339/19, T 2295/19, T 499/20).

This approach was applicable to the case in hand for the following reasons: since auxiliary request 3 only contained claims that were present in the main request dealt with in the decision under appeal and this main request had been constantly defended by the appellant during the appeal proceedings, the convergent approach and the need for procedural economy were respected. In particular, the remaining claims had already been discussed in detail by the parties in their written submissions, so that the respondents' legitimate interests were not adversely affected. The admittance of auxiliary request 3 neither altered the factual or legal framework of the proceedings, nor compromised the procedural rights of the respondents. In addition, since all the claims of auxiliary request 3 were already part of the main request, admitting this request into the proceedings neither complicated the case, nor did it take the respondents by surprise.

Moreover, the board did not regard the facts that the appellant had already filed many other auxiliary requests during the opposition proceedings and that several lower-ranked requests were still operative in the appeal proceedings as valid reasons to disregard auxiliary request 3 at the present stage of proceedings. In the case in hand, filing auxiliary request 3 not only constituted a reasonable reaction in light of the development of the case, but it also solved the objection of lack of clarity without altering the legal and factual framework of the case. Furthermore, the board underlined that, although admitting auxiliary request 3 into the proceedings implied that the case had to be remitted to the opposition division for further prosecution, this procedural step was not caused by the filing of auxiliary request 3 at a late stage of the proceedings but by the fact that several grounds for opposition that were raised by the respondents had not been dealt with in the decision under appeal.

092-09-26

10. Article 13(2) RPBA | T 1139/24 | Board 3.3.02

Article 13(2) RPBA 2020

Case Number	T 1139/24
Board	3.3.02
Date of decision	2026.04.16
Language of the proceedings	EN
Internal distribution code	D
Inter partes/ex parte	Inter partes
EPC Articles	
EPC Rules	
RPBA	Article 13(1), 13(2) RPBA 2020
Other legal provisions	
Keywords	amendment after notification of Art. 15(1) RPBA communication (yes) – taken into account (no) – exceptional circumstances (no) – deletion of claims
Cited decisions	T 1185/17, T 0541/20
Case Law Book	V.A.4.5.1d), V.A.4.5.4h), V.A.4.5.4j), 11th edition

In der Sache [T 1139/24](#) reichte die Beschwerdeführerin (Patentinhaberin) während der mündlichen Verhandlung den Hilfsantrag 43a ein. Dessen Anspruchssatz unterschied sich von Hilfsantrag 43 lediglich dadurch, dass Anspruch 6 gestrichen worden war. Die Kammer entschied, Hilfsantrag 43a nicht in das Verfahren zuzulassen, da nach ihrer Ansicht eine Änderung des Beschwerdevorbringens, aber keine außergewöhnlichen Umstände vorlagen.

Die Beschwerdeführerin hatte u. a. argumentiert, der Anspruchssatz des Hilfsantrags 43a räume alle Einwände der unzulässigen Erweiterung aus und sei daher der Verfahrensökonomie zuträglich. Er verringere darüber hinaus die Komplexität und stelle für die Beschwerdegegnerinnen keine zusätzliche Belastung dar. In einem vergleichbaren Fall (T 541/20) sei ein erst in der mündlichen Verhandlung eingereichter Anspruchssatz ebenfalls zugelassen worden. Auch habe die Kammer ihre Auffassung zur unzulässigen Erweiterung während der mündlichen Verhandlung geändert.

Die Kammer wies jedoch darauf hin, dass sie die Auffassung in der Rechtsprechung teile, wonach es einen kausalen Zusammenhang zwischen den außergewöhnlichen Umständen und dem Zeitpunkt der Änderung des Beschwerdevorbringens geben müsse. Ein solcher sei vorliegend nicht ersichtlich, da der zugrundeliegende Einwand gegen Anspruch 6 des Hilfsantrags 43 bzw. den entsprechenden Anspruch des

Hauptantrags schon in der Einspruchsschrift der Beschwerdegegnerin 3 erstmals vorgebracht und in ihrer Beschwerdeerwiderung wiederholt worden sei. Darauf hätte die Beschwerdeführerin früher reagieren können. Die Meinungsänderung der Kammer in der mündlichen Verhandlung stelle keinen außergewöhnlichen Umstand dar, da die Kammer lediglich der bereits in der Einspruchsschrift und der Beschwerdeerwiderung geäußerten Auffassung gefolgt sei.

Die Kammer hielt den abweichenden Ansatz in der Rechtsprechung, wonach solch ein kausaler Zusammenhang nicht erforderlich sei, aus den folgenden Gründen nicht für überzeugend: Bei der Verfahrensökonomie handele es sich um ein Kriterium zur Ermessensausübung gemäß dem allgemeineren (jedoch zusätzlich anwendbaren) Art. 13 (1) VOBK. Dass ein geänderter Anspruchssatz der Verfahrensökonomie nicht abträglich sei, weil er beispielsweise alle Einwände der Einsprechenden unter den Art. 100 c) und 123 (2) EPÜ ausräume, könne daher nicht zugleich einen außergewöhnlichen Umstand im Sinne von Art. 13 (2) VOBK darstellen. Diese Bestimmung müsse im Sinne des Konvergenzansatzes strenger sein als Art. 13 (1) VOBK (T 1185/17). Würde man akzeptieren, dass ein durch Streichung resultierender geänderter Anspruchssatz zuzulassen ist, weil er alle Einwände unter einem bestimmten Einspruchsgrund ausräumt, so wären in der sich ggf. anschließenden Diskussion auch weitere durch Streichungen erhältliche Anspruchssätze zuzulassen, sofern diese jeweils alle Einwände unter den nachfolgend behandelten Einspruchsgründen ausräumen. De facto würde einer Patentinhaberin damit die Möglichkeit gegeben, wiederholt geänderte Anträge im Sinne einer "Salamitaktik" einzureichen. Ein solches Vorgehen erscheine kaum vereinbar mit einer ökonomischen Verfahrensführung.

Die Kammer fügte noch an, dass nach ihrer Auffassung unabhängig von dem Erfordernis eines kausalen Zusammenhangs jedenfalls im Interesse eines fairen Verfahrens zu prüfen sei, ob das Verhalten der Beschwerdeführerin auch im Vorfeld der mündlichen Verhandlung als verfahrensförderlich anzusehen ist. Dies sei hier nicht der Fall. Der frühzeitig vorgetragene Einwand sei vor der mündlichen Verhandlung weder inhaltlich noch in Form eines darauf abstellenden Anspruchssatzes adressiert worden. Entgegen dem Argument der Beschwerdeführerin habe keine so hohe Anzahl von Einwänden vorgelegen, dass vernünftigerweise nicht von ihr erwartet werden konnte, jedem dieser Einwände zu begegnen. Zudem wies die Kammer darauf hin, dass die Patentinhaberin mit ihren Eingaben zum nach R. 116 EPÜ von der Einspruchsabteilung festgelegten Zeitpunkt und weiteren Eingaben ca. zwei Wochen vor der mündlichen Verhandlung die ursprüngliche Anzahl der Hilfsanträge nahezu verachtfacht habe, ohne die jeweiligen Anspruchssätze in Bezug auf sämtliche Einspruchsgründe substantiiert zu begründen. Dieses Vorgehen sei nicht mit ihrer Pflicht zur Verfahrensförderung vereinbar und spreche dafür, dass die Beschwerdeführerin ihre Verantwortung für die Festlegung eines patentfähigen Gegenstands auf die Einspruchsabteilung und die Beschwerdegegnerinnen verlagert habe.

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