

was in fact governed by Art. 114(2) EPC 1973, and the discretionary power to refuse new requests for amendments was governed by Art. 123 EPC 1973 and the corresponding Implementing Regulations. As to the exercise of discretion under R. 71a EPC 1973 to admit or refuse amended claims, the board held that the discretion was to be exercised by considering all relevant factors which arose in a particular case and by balancing the applicant's interest in obtaining proper patent protection for his claimed invention and the EPO's interest in bringing the examination procedure to a speedy close by the issue of a decision (following G. 7/93, OJ 1994, 775). See also T. 545/08.

In T. 755/96 the board also drew a **distinction** between the **application stage** and the **opposition stage**. The reasons given for introducing R. 71a EPC 1973 made it clear that a particular concern was that in opposition proceedings other parties were not taken by surprise. Parties to opposition proceedings were often represented by professional representatives, who would need to consult their clients and technical experts for further instructions to deal with new requests or evidence. Thus, there could be good reasons to refuse material filed after the final date set under R. 71a EPC 1973, or to postpone oral proceedings. However, the same considerations did not apply to an examining division which had its own technical expertise and did not have to obtain instructions from third parties. If prepared for oral proceedings, it should normally, even in relation to requests filed at the oral proceedings, be in a position to assess whether a new request was clearly not allowable. An examining division which in exercising such discretion does not admit amended claims must give the reasons therefore.

In T. 712/97 the respondent (opponent) had filed a report of comparative experiments on the last day of the period set for filing comments pursuant to R. 71a(1) EPC 1973. The opposition division allowed this experimental report into the proceedings, but not the appellant's experimental report in response thereto. The board held that admitting the respondent's experimental report into the proceedings meant that the subject of the proceedings had changed within the meaning of R. 71a(1) EPC 1973 and that the report in question should therefore also have been admitted into the proceedings. That this report would not affect the outcome of the proceedings was in these circumstances not a valid consideration. A party was entitled to know that its response was admitted into the proceedings, even if it proved not to be decisive for the outcome before that instance.

In T. 484/99 the appellant (patentee) alleged that the refusal, under R. 71a EPC 1973, by the opposition division to consider or even look at amendments to the requests presented on the day of the oral proceedings before them amounted to a procedural violation. The board disagreed because it was clear from the wording of R. 71a(2) EPC 1973, that submissions by the patent proprietor presented after the final date did not need to be considered. In T. 64/02 the board stated that R. 71a(2) EPC 1973 also applied to the belated submission of amended patent claims in an auxiliary request, even if those claims had not been requested in the summons (see also T. 1067/08).

In T. 951/97 (OJ 1998, 440) the board held that the subject of the proceedings was changed within the meaning of R. 71a(1) and (2) EPC 1973, inter alia, where the examining division itself introduced a new document, which was pertinent new material, into the proceedings for the first time during oral proceedings convened following a