

would only "involve something" where (amongst other criteria) "the issues of fact are the same". But it had said nothing about any "cross-procedural" application. In the case in point, the board anyway took the view that the above criterion from T 167/93 was clearly not fulfilled, because the subject-matter (the "something" in the sense of T 167/93) requiring the division's or board's decision was not the patent granted for the parent application; rather, it was the divisional-derived patent and whether the requests submitted were legally sustainable in view of the objections raised, and – in contrast to T 51/08 – the requests (sets of claims) for decision in the two sets of proceedings were also not identical. Moreover, the underlying facts were different since further evidence had been submitted. The board's conclusion was that in the case in hand the appeal decision on the parent patent could have no *res judicata* effect in the opposition (or opposition appeal) proceedings as regards the reproducibility of the divisional-derived patent in suit.

#### 2.4.4 Re-filing of same subject-matter

In T 1287/07 the appellant had submitted before the board that re-filing the same subject-matter comprised in an earlier divisional application which had been withdrawn and converted into a national right was an abuse of procedure. The board clarified that this re-filing did not fall within the grounds for opposition exhaustively listed in Art. 100 EPC, and there was no legal basis for revoking the patent in suit on this basis. Therefore, the alleged re-filing of the same subject-matter could not result in the revocation of the patent in suit.

In T 1437/10 the appellant filed new requests during oral proceedings which claimed subject-matter essentially identical to the scope of protection of the granted European patent for which the appellant was the proprietor and for which the application at issue was the earlier application in accordance with Art. 76(1) EPC. Consequently, the subject-matter of the new requests had already been decided in favour of the appellant and a second decision on the same subject-matter was superfluous. The board therefore exercised its discretion under Art. 13(1) RPBA so as not to admit the new requests into the procedure.

On the related issue of "double patenting" see in this chapter II.F.5. below.

### 3. Filing a divisional application

#### 3.1. Right to file a divisional application

##### 3.1.1 Applicant of earlier application entitled to file divisional application

In J 20/05 the Legal Board held that only the applicant of the earlier (parent) application was entitled to file the divisional application. It stated that, fundamentally, it is the entitlement acquired by virtue of the parent application that gives the right to file a divisional application. This means that the rights in respect of the divisional application derivable from the parent application extend to, but are also limited to, the rights existing in the parent application at the filing date of the divisional application. The entitlement to file a divisional application under Art. 76 and R. 25 EPC 1973 (now R. 36 EPC) was a