

f) References

See also in this chapter: T 703/12 (timing of a request that a witness be heard – generic reference to submissions in opposition); T 480/11 (late witness); T 838/92 (impartiality of a witness); T 267/06 (need to order the hearing of a witness); T 716/06 (whether the evidence offered was useful); T 1096/08 and T 225/03 (first-instance department wrongly decided not to hear the witnesses); T 1100/07 (department of first instance's decision not to order hearing of witnesses justified in one case but not in the other); T 190/05 (citing T 474/04 extensively and specifying how the department of first instance should have proceeded); T 361/00 (unnecessary to hear author of unsworn written statements as a witness because statements irrelevant to outcome of the decision); T 1210/05 (conclusions based exclusively on the testimony of a witness); T 832/13 (serious doubts due to the general nature of the statement); R 6/12 (hearing witnesses/experts not ordered by the board).

2.4.2 Difference between witnesses and experts

The boards of appeal have drawn a distinction between the hearing of witnesses and the hearing of **opinions by experts**: a witness is put forward to substantiate facts of which he/she has personal knowledge. In T 311/01 the appellant (opponent) offered witness testimony on the skilled person's knowledge and understanding of the cited prior art. However, the testimony was offered as evidence not of specific facts but of the knowledge and ideas of skilled persons in the technical field concerned, so that the appellant was in fact offering experts, not witnesses. Regarding itself expert enough with regard to the features and advantages described in the prior art, the board refused to hear the proposed "witnesses" (see also T 1511/06, T 1676/08 and T 32/10).

In T 480/11 the subject on which the proposed technical expert Mr J. intended to speak according to the appellant's request was not simply a technical issue but an event in the past, namely the performance of experiments and the results obtained thereby, which had taken place at the appellant's laboratory. So the appellant's request was actually directed to hearing Mr J. as a witness rather than as a technical expert. The board decided not to hear Mr J, as the respondent would have had to be given sufficient opportunity to challenge the witness statement and it would have been necessary to adjourn the oral proceedings.

2.4.3 Expert opinions (Article 117(1)(e) EPC)

The decisions reported below concern requests that the board take evidence from an independent expert under Art. 117(1)(e) EPC and R. 121 EPC (the case law shows that the boards refused those requests). Such cases are to be distinguished from those where opinions of a party's expert are submitted as evidence (which are more common).

T 753/09 stated that an **expert declaration** had to be regarded **not just as an argument**, but as evidence pursuant to Art. 117(1)(e) EPC.

Under the established case law of the boards of appeal, obtaining an expert opinion as per Art. 117(1)(e) EPC and R. 121 EPC is essentially to be considered only when a board