

- b) Cases in which Article 113(1) EPC was not violated even though new claims or relevant documents were introduced

In T 484/89 the board held that the opposition division was empowered under Art. 114(1) EPC to take account of and refer to all relevant documents cited. In the case in question the opposition division had considered it necessary to refer to a document during the oral proceedings. In such cases the parties should, at their request, be granted an adjournment or else new oral proceedings should be appointed. Since no such request was made, according to the decision and the record of the oral proceedings, Art. 113(1) EPC had not been breached.

In T 608/08 the board considered that, in principle, when the patent proprietor submits new claims during oral proceedings, an opponent must be afforded an opportunity to familiarise itself with the new situation, which must at least involve a sufficiently long interruption of the oral proceedings. However, that applied only to requests incorporating new content. In the case at issue, the new auxiliary requests consisted of a combination of features from sub-claims belonging to the main request. The technical features of the sub-claims were straightforward and did not put the subject-matter of the main request in a new and more complex technical context. Consequently, the admission of the auxiliary request did not entail a surprisingly new procedural situation requiring the opposition division to interrupt the oral proceedings (in contrast to T 783/89, in which a completely reformulated text of the claim introduced a new feature; see above).

In T 1031/12 the appellant claimed that a new document had unexpectedly been mentioned for the first time at the end of the oral proceedings before the examining division, without its being given an opportunity to present counter-arguments. The board noted that the representative had been afforded the time he himself had identified as necessary for a reply. Therefore he had had not only the opportunity but also sufficient time to comment.

In T 376/98 the examining division had referred to document D4 for the first time during the oral proceedings, and had stayed the oral proceedings to give the applicant time for consideration. When the oral proceedings were resumed, the appellant requested a decision based on the documents on file. Regarding the introduction of D4 at the oral proceedings, the board noted that no procedural limitations were placed upon the examining division to cite relevant documents during any stage of the examination procedure, as long as the applicant was given a fair chance to comment on the objections raised before a final decision was taken (see T 1198/97). In the board's opinion, the appellant's request for a decision could only be taken to mean that the appellant was not interested in a further debate about the relevance of D4.

In T 566/91 the opposition division based its decision to revoke the patent on a version of a citation which was more complete than the version which had been cited by the opponents when filing the opposition. The decision of the department of first instance was thus based, albeit inadvertently, on evidence on which the parties had not had the opportunity to comment. In order to comply with Art. 113 EPC in the appeal proceedings,