

## **2.8. Changes in the composition of the competent department of first instance**

Generally, changes in the composition of the competent department of first instance do not, in themselves, constitute a violation of the right to be heard if they take place before oral proceedings. In principle, the right to be heard is also not violated if the composition stays the same after oral proceedings.

For further cases, also with regard to changes in the opposition division's composition prior to the oral proceedings, see chapter III.K.1.3.2 "Change in composition of opposition division during opposition proceedings".

### **2.8.1 Composition change before oral proceedings**

In T 1090/18 the board found that, in principle, the opposition division composition change after the summons to oral proceedings and before the oral proceedings did not lead to the conclusion that the patent proprietor (appellant in the case in hand) had been denied its right to be heard if the new member had had sufficient opportunity to familiarise themselves with the case and the opportunity to hear both parties at the oral proceedings. The board saw no reason for doubting that these conditions were fulfilled with respect to the interlocutory decision under appeal. See also T 1652/08.

The same principles apply in proceedings before the examining division, according to T 2344/16.

### **2.8.2 Composition change during oral proceedings**

In T 960/94 the composition of the opposition division had changed between the decision announced orally and the written decision. The board decided that issuing the written decision on behalf of an opposition division whose first member was not present at the oral proceedings amounted to a substantial procedural violation of both Art. 113(1) and 116 EPC, as it had been issued on behalf of a first member before whom the parties had been given no opportunity to present their comments at oral proceedings.

In T 862/98 the decision of the department of first instance was signed by an opposition division different from that before which the oral proceedings had taken place. Oral proceedings being a fundamental expression of the right to be heard (see e.g. T 209/88), any findings at oral proceedings relevant to the final decision should be made in the presence and with the involvement of those members giving the final decision. The board decided that changes in the composition of an opposition division after oral proceedings should generally be avoided, even if no final substantive decision had been given orally. Where changes were unavoidable, new oral proceedings must in general be offered to the parties (see the analogous rule in Art. 8(1).RPBA 2020). Such offers might be forgone in exceptional cases.

In T 837/01, the final decision of the opposition division had only been signed by three members of the division, whereas the copy sent to the parties bore the name of all four members, including the legally qualified examiner. Upon enquiry by the board, it turned