

### 3.3.6 No violation where evidence irrelevant to the outcome of the case

In T.361/00 the board ruled that there was no point hearing the author of statutory declarations as a witness at oral proceedings because, in view of the other aspects on file that had been discussed, it would not change its decision.

### 3.3.7 No violation of right to be heard where evidence of limited probative value

In T.103/15, the appellant (opponent) invoked the right to be heard to challenge the opposition division's disregarding the test report (D9) it had submitted as evidence. It argued that the reliability of D9 and the fact that its author had not been disclosed had not been an issue during the written phase of the opposition proceedings, not being raised by the opposition division until the oral proceedings, and alleged that it had thus been taken by surprise when the opposition division announced that D9 would not be taken into account. On evaluation of the evidence, the board held that, with respect to the probative value of test evidence, it was important not only to indicate the conditions under which those tests had been conducted, but also to specify the names of the testers and their employers so that the relationship between the testers and the party could be established if necessary. The appellant had been given the opportunity to provide the relevant information about the authorship of the test report D9 during the oral proceedings, but had refused to do so. In view of the test report's limited probative value, the board did not take it into account when reviewing the opposition division's decision (see also chapter III.G.4.2.2 a) below).

For another case where the board accepted the opposition division's decision to disregard evidence, see T.1680/15.

### 3.3.8 Violation of the right to defend a case

In T.1872/08 the board decided that in not admitting the additional comparative tests offered by the patentee, the opposition division had not taken into account that the patentee deemed further comparative data to be absolutely necessary in order to overcome its objections as to inventive step. The opposition division had thus **deprived the patentee of the possibility to defend its case effectively**. See also T.2294/12, in which the examining division had disregarded comparative tests.

### 3.3.9 Direct and indirect evidence of the state of the art

When evaluating evidence, it is necessary to distinguish between a document which is alleged to be part of the state of the art within the meaning of Art. 54(2) EPC, and a document which is not itself part of the state of the art, but which is submitted as evidence of the state of the art or in substantiation of any other allegation of fact relevant to issues of novelty and inventive step (T.1110/03, OJ 2005, 302). In the first situation, a document is **direct evidence** of the state of the art; its status as state of the art cannot normally be challenged except on authenticity. In the second situation, a document is also **evidence** albeit **indirect**; it provides a basis for an inference about, e.g. the state of the art, common general knowledge in the art, issues of interpretation or technical prejudice etc. – an