

concluding that it could not be construed as prohibiting a change in the examining division's original composition prior to oral proceedings.

In T 2348/19 the board held that if a member of the department of first instance, who participated in the oral proceedings before that department, is unable to act at the time the reasoned decision is to be issued, for example due to death or a longer lasting illness, one of the other members may sign on behalf of the incapacitated member. However, in such a situation, a written explanation as to why one member is signing on behalf of another must be provided. In the absence of such an explanation, the contravention of R. 113(1) EPC constitutes a substantial procedural violation.

## **1.2. Examining division**

Art. 18(2) EPC stipulates that an examining division must consist of three technical qualified examiners. If the examining division considers that the nature of the decision so requires, it shall be enlarged by the addition of a legally qualified examiner.

In T 714/92 the board held that the taking of a decision on a date on which the examining division no longer existed in its stated composition, without the examining division ensuring that it be apparent from the part of the file open to public inspection that the member who left the examining division had agreed the text of the decision before leaving, had to be considered as a substantial procedural violation. Thus the impugned decision was set aside as void ab initio and without legal effect.

In T 160/09 the board found it permissible for the second examiner at oral proceedings to be different from the one who signed the summons. This was not at all comparable to the situation in T 390/86 (see in this chapter III.K.2.2.), where the written decision had not been signed by those members of the opposition division who had delivered the decision during oral proceedings. There is no prohibition on changing the composition of a division, nor is the EPO required to follow a particular procedure to do this.

## **1.3. Opposition division**

Art. 19(2) EPC stipulates that an opposition division must consist of three technical examiners, at least two of whom must not have taken part in the proceedings for grant of the patent to which the opposition relates. An examiner who has taken part in the proceedings for grant of the patent may not be chairman of the opposition division.

### **1.3.1 Enlargement of the opposition division by addition of a legal member**

Under Art. 19(2), fifth sentence, EPC, the opposition division can enlarge its composition by adding a legally qualified member where it deems this to be necessary.

In T 990/06 the board held that the opposition division's composition should be clear and transparent at all crucial stages of the proceedings so that the parties could verify compliance with Art. 19(2) EPC 1973 and check that the division members were impartial in keeping with G 5/91 (OJ 1992, 617). It is essential that the opposition division's