

composition is lawful. Any doubt surrounding this casts doubt on the lawfulness of the decision. In the case in question, there were discrepancies between the documents issued to the parties and an internal instruction. Although the division had apparently been first enlarged and then reduced again in size, there was no information about either of these measures on file, so the board was unable to verify whether the decision given at the oral proceedings had been made by a lawfully composed opposition division and whether the written reasons for the decision had been issued by the same panel. The procedure for enlargement of the opposition division by addition of a legally qualified member under Art. 19(2) EPC 1973 – or their later withdrawal – must be verifiable.

In T 1254/11 the board held that an opposition division enlarged to four members pursuant to Art. 19(2) EPC 1973 could in principle be reduced again to three members. It was for the four-person panel to decide on the reduction. In this respect the board concurred with T 990/06. In deciding on the reduction, the opposition division consisting of four members must properly exercise its discretion. The board assumed *arguendo* that the fact that neither a decision to enlarge nor a decision to reduce the opposition division had been added to the publicly available file and the fact that the appointment of the new chairman could only be traced from the internal register of the EPO both constituted fundamental deficiencies of the proceedings before the opposition division. However, unlike in T 990/06, it was possible to determine from the file that the division had been lawfully enlarged and, at a later stage, lawfully reduced again.

In T 1088/11 the board held that in principle, an opposition division may set aside a decision to enlarge its composition. However, where an opposition division has been enlarged according to Art. 19(2) EPC, but the case is nevertheless decided in a composition of three members, there should be clear evidence on the public file that a decision to set aside enlargement was taken by the opposition division in its four member composition prior to the final decision.

1.3.2 Change in composition of opposition division during opposition proceedings

In T 390/86 (OJ 1989, 30) all three members of the opposition division were changed between the oral and written decision. The board held that a decision must at least be written on behalf of and represent the views of the members appointed to decide the proceedings, and must bear signatures which indicate this (see also T 243/87, T 960/94 and T 2076/11).

In T 243/87 the board of appeal developed the principles established in T 390/86, further holding that even though only **one** member of the opposition division had been replaced after the oral proceedings, there was no longer any guarantee that the reasoned decision signed subsequently accurately reflected the point of view of all three members who had taken part in the oral proceedings. The situation in which one of the appointed members was incapacitated (e.g. through illness) was quite different; in such cases one of them could sign on behalf of the member unable to do so after checking that the reasoned written decision represented the point of view of all the members who had taken part in the oral proceedings. This was followed in other cases where only one member of the