

(revocation) because unlike in that case the patent had already been revoked by the opposition division and thus could not be revoked again. However, the order to dismiss the appeal ultimately had the same outcome, namely that the decision to revoke the patent became final.

The board in T.706/00 pointed out that the EPO cannot depart from a request once made. It can only grant or deny the request; it cannot grant more, less or even something different. Unless a grantable text is submitted, at least auxiliarily, the request is rejected in full. In T.549/96, the board noted that an applicant had to unambiguously indicate, at the end of the proceedings, which text he proposed. Otherwise, the examining division would be unable to decide on the basis of which version it should proceed and the application would eventually have to be refused, since there would be no clear request at all. Thus, if an applicant failed to indicate his approval of the text of an allowable subsidiary request, e.g. by express disapproval or by maintaining one or more unallowable higher-preference requests, the examining division could refuse the application under Art. 97(1) EPC 1973 (Art. 97(2) EPC) (see also T.976/97).

In T.237/96 the board held that Art. 113(2) EPC could not be interpreted in the sense that the examining division was bound to accept any amendment which the applicant might propose, only to ensure that there was a version approved by him. In circumstances in which, as in the case in question, amendments proposed by the applicant after the R. 51(4) EPC 1973 (R. 71(3) EPC) communication were with good reason not allowed by the examining division by virtue of R. 86(3) EPC 1973 (R. 137(3) EPC) and the applicant did not give its agreement to any other version, the established practice of the EPO, sanctioned by consistent case law, was to refuse the application on the ground that there was no version approved by the applicant within the meaning of Art. 113(2) EPC.

In the inter partes case T.917/95 a patent proprietor had submitted a new claim but no amended description or drawing. The descriptions and drawings relating to the previous claims were incompatible with the new claim. Because the proprietor failed to appear at the oral proceedings, no documents were available on the basis of which the patent could have been maintained (see also T.725/00 and T.1174/01).

In T.255/05 the board held that under Art. 113(2) EPC, it is the applicant's responsibility to define the text on the basis of which it requests a patent to be granted. When the appellant, even after having been invited to do so by the board, does not clearly indicate the order in which its requests are submitted and what the exact content of each of these requests is, there is no text submitted or agreed by the applicant within the meaning of Art. 113(2) EPC, and no request which could be considered by the board.

In T.690/09 the examining division had refused to consent to the latest submitted set of claims under R. 137(3) EPC, despite these being maintained by the applicant. The board held that this would not automatically revive the previous set of claims that the examining division had consented to consider, unless the applicant had indicated that he was relying on these as an auxiliary request. According to the board, deciding to refuse an application on the ground that claims are not allowable contravenes Art. 113(2) EPC if the applicant is no longer putting forward these claims and amounts to a substantial procedural violation