

In T.1695/14 too, the board found that the request had been implicitly withdrawn. It also held that requests not later pursued as the main request or as an auxiliary request but instead (implicitly) withdrawn did not remain in the proceedings; the procedural law allowed for pending or withdrawn requests, but not for ones on hold.

## 6. Examination procedure

### 6.1. Direct rejection of auxiliary request by examining division

In T.488/94, the board stated that before refusing an application in the case of main and auxiliary requests, the examining division in accordance with Art. 113(1) EPC 1973 would not only have to communicate its arguments regarding non-allowability of the main request to the applicant, but also regarding non-allowability of the auxiliary request, if the result of the subsequent examination of the auxiliary request was also negative. A "direct" rejection of an auxiliary request without preceding communication of the grounds on which the rejection was based would only comply with the requirements of Art. 113(1) EPC 1973 under rather exceptional circumstances, e.g. if there could be no doubt about the fact that the arguments already communicated to the applicant with respect to the subject-matter of the main request equally applied to the subject-matter of the auxiliary request (at least implicitly).

### 6.2. Rejection in advance of further request by examining division

According to T.1105/96 (OJ 1998, 249), an applicant has a right both to file one or more auxiliary requests in addition to a main request, and to maintain all such requests even if the examining division communicated its view that all except the last auxiliary request were inadmissible or unallowable, and he was then entitled to a reasoned appealable decision in respect of rejection of each such request (see also T.1029/16). Where an examining division had communicated its view that a further request in the form of an amended text of a claim would be allowable, the rejection in advance of such a further request unless all preceding requests were abandoned was an unlawful exercise of discretion under R. 86(3) EPC 1973 (R. 137(3) EPC) and a substantial procedural violation under R. 67 EPC 1973 (R. 103 EPC).

### 6.3. Practice of proposing one main and one or more auxiliary requests

The board in T.1351/06 referred to the decisions T.79/89 (OJ 1992, 283), T.169/96, T.1105/96, (OJ 1998, 249) and to Legal Advice No. 15/05 (rev. 2, OJ 2005, 357; now incorporated into the Guidelines, see Guidelines H-III, 3 – March 2022 version), where it was held that it was standard practice at the EPO that the applicant was able to propose one main and one or more auxiliary requests at the examination stage, to amend the text of the application. The board saw no reason why the applicant should not also be able to do so in response to a communication under R. 51(4) EPC 1973 (R. 71(3) EPC), especially in cases where that communication had not been preceded by a communication under Art. 96(2) EPC 1973 (Art. 94(3) EPC) and thus constituted a "first communication" within the meaning of R. 86(3) EPC 1973 (R. 137(3) EPC).