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**Datasheet for the decision
of 21 November 2025**

Case Number: R 0016/23

Appeal Number: J 0006/22 - 3.1.01

Application Number: 14811009.1

Publication Number: 3008767

IPC: H01M4/36, H01M4/58, H01M4/62,
H01G11/38, H01G11/50

Language of the proceedings: EN

Title of invention:

BIO-MINERALIZED CATHODE AND ANODE MATERIALS FOR
ELECTROCHEMICAL CELL

Applicant:

Upreti, Shailesh

Headword:

Petition for review

Relevant legal provisions:

EPC Art. 15, 108 sentence 3, 112a(1), 112a(2) (c), 112a(2) (d), 112a(4), 112a(5), 113(1), 116(1), 116(2), 122, 125

EPC R. 88(4), 101(1), 104(a), 106, 108(3), 109(2) (a), 109(2) (b), 109(3), 127(2), 131(2), 131(4), 136

RPEBA Art. 13, 14(2)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 6(1), 53

Vienna Convention on the Law of Treaties (1969) Art. 31, 32

Keyword:

Petition for review - failure to arrange oral proceedings -
decision under review set aside - re-opening of proceedings

Decisions cited:

G 0001/97, G 0003/98, G 0002/19, G 0001/21, R 0003/10,
R 0012/12, R 0008/13, R 0004/22, J 0012/15, T 0383/87,
T 0093/88, T 0125/89, T 0766/90, T 0686/92, T 0556/95,
T 0400/02, T 1544/06, T 2300/08, T 0663/10, T 0671/12,
T 1824/15, T 2707/16, T 0166/17, T 1790/17, T 2687/17,
T 3258/19

Catchword:

1. As oral proceedings had been requested by the appellant-applicant in the event that an adverse decision on the request for re-establishment of rights and on the appeal were taken, the Board should have arranged for the holding of oral proceedings pursuant to Article 116(1) EPC before taking any such adverse decision.

2. The failure to arrange oral proceedings constitutes a fundamental procedural defect within the meaning of Article 112a(2) (d) and Rule 104(a) EPC since, as a result, the appellant-applicant did not have the opportunity to present the case orally on the decisive issues of re-establishment of rights and the admissibility of the appeal.

3. As a consequence, the decision is to be set aside, proceedings before the Board are to be re-opened and the fee for the petition for review is to be reimbursed.



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Case Number: R 0016/23

D E C I S I O N
of the Enlarged Board of Appeal
of 21 November 2025

Petitioner: Upreti, Shailesh
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Representative: Potter Clarkson
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Decision under review: **Decision J 6/22 of the Legal Board of Appeal**
3.1.01 of 26 July 2023

Composition of the Board:

Chairman C. Josefsson
Members: M. Blasi
P. Acton
E. Mille
H. Deichfuß

Summary of Facts and Submissions

- I. The petition for review concerns decision J 6/22 dated 26 July 2023, electronically transmitted to the appellant-applicant (petitioner) on 1 August 2023. With this decision, the Legal Board of Appeal (the Board) rejected the petitioner's request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal and rejected the appeal as inadmissible.
- II. The petition for review was filed on 10 October 2023, and the associated fee was paid on the same date. The petition is based on the grounds pursuant to:
- Article 112a(2)(d) EPC in combination with Rule 104(a) EPC, i.e. the Board's failure, contrary to Article 116 EPC, to arrange for the holding of oral proceedings requested by the petitioner, and
 - Article 112a(2)(c) EPC, for the reason that a fundamental violation of Article 113(1) EPC has occurred
- III. The appeal procedure which was terminated by the decision under review can be summarised as follows.
- (a) The proceedings were initiated by the petitioner against the examining division's decision dated 16 February 2022 by their filing a notice of appeal and paying the prescribed fee. In the contested decision, the examining division had rejected the petitioner's request for re-establishment of rights under Article 122 EPC in respect of the time limit for paying the 7th year renewal fee plus additional fee and had found the application to be deemed to have been withdrawn.

- (b) In the notice of appeal dated 26 April 2022 and received on the same day, the petitioner *"requested to:*
1. *set the decision aside and re-establish EP patent, or*
 2. *arrange oral proceedings via video-conference in case that the decision cannot be set aside."*
- (c) In a communication dated 15 July 2022 (EPO Form 3028), the petitioner was informed by the Board that
- *since no statement setting out the grounds of appeal had been received within the four-month time limit pursuant to Article 108, third sentence, EPC, it had to be expected that the appeal would be rejected as inadmissible*
 - *any observations had to be filed within two months of notification of the communication, otherwise the Board would issue a written decision rejecting the appeal as inadmissible pursuant to Article 108 EPC in conjunction with Rule 101(1) EPC and*
 - *"[t]he Board assumes that the Appellant's request for oral proceedings does not apply to the issue of inadmissibility of the appeal because no grounds of appeal have been filed in due time. This assumption will not be made if the Appellant so states within the specified period."*
- (d) On 12 September 2022, the petitioner filed a letter containing a request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal, together with a debit order for the payment of the prescribed fee.

Several enclosures were filed with the letter, including a declaration signed by professional representative "K" (Annex 7), a medical certificate in two language versions (Annexes 8 and 9) and a document entitled "*Omitted act: Grounds of Appeal*", the content of which referred to enclosed Annexes 10 to 19.

The letter closed with the statement "*An oral proceeding pursuant to Art. 116 EPC is respectfully requested in case the EPO would envisage to reject our request for Re-establishment of rights*".

- (e) Subsequently, the Board issued the decision under review dated 26 July 2023, rejecting the petitioner's request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal and rejecting the appeal as inadmissible.

In points 1 to 10 of the reasons for the decision, the Board considered the request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal and found that it could not be established that all due care required by the circumstances had been taken.

The Board further found that, due to the rejection of the request for re-establishment, the statement of grounds of appeal had been filed late and the appeal had to be rejected as inadmissible (see point 11 of the reasons).

In a subsequent part of the reasoning for the decision entitled "*Decision in written procedure*"

(points 13 to 59 of the reasons), the Board set out why "[t]he decision ... is handed down without the oral proceedings requested by the appellant in his 2nd request for re-establishment" (see point 13 of the reasons) and why "[t]he initial request for oral proceedings in the notice of appeal has ... become obsolete" (see point 59 of the reasons).

- The Board, relying on a "requirement for immediate and complete substantiation of the request [for re-establishment of rights]", corresponding to a so-called "principle of 'Eventualmaxime' or 'Häufungsgrundsatz' in contracting states with a German law tradition", considered that "no factual assertions were made at least on the provision of staff-substitution measures in the case of illnesses such as K's" within the relevant time limit and that, "[f]rom the outset, the request for re-establishment into the time limit for the grounds of appeal thus had to fail" and that the petitioner "could also not complement his factual assertions before the Board at a later point" (see points 15 and 17 of the reasons).

The Board found that "[a]s a consequence, no further procedural steps are permissible, notably no further communication by the Board and no appointment of oral proceedings. Neither would serve any legitimate purpose." (see point 18 of the reasons). It held that "[i]t is not the purpose of oral proceedings in the context of proceedings for re-establishment to give the appellant a (further) chance to substantiate their factual assertions or to provide evidence despite the absence of factual assertions" and that "the appellant is even prevented from validly submitting new factual

assertions at this stage, including in oral proceedings" (see point 19 of the reasons).

- Subsequently, the Board set out its view that the *"'absolute' right to oral proceedings upon a party's request is subject to inherent restrictions by the EPC and procedural principles generally recognised in the contracting states of the EPO (see Article 125 EPC)"* (see point 21 of the reasons) and described procedural situations in which, in practice, no oral proceedings take place even though they have been requested.

- In points 33 and 34 of the reasons, the Board stated that *"[i]n all these examples identified by the jurisprudence of the boards, oral proceedings would unduly prolong the proceedings, instead of bringing them to an end as quickly as possible. Thus, they would run counter to the requirement of legal certainty in due time while serving no legitimate purpose"* and it found that, in addition to the right to oral proceedings, the *"requirement of legal certainty in due time"* was likewise recognised as a fundamental principle enshrined in the EPC, referring *inter alia* to decision G 3/97 [sic, should read: G 7/93, concerning an examining division's exercise of discretion].

- In point 37 of the reasons, the Board summarised that *"if oral proceedings do not serve any legitimate purpose, as in the current case, the requirement of legal certainty in due time trumps and even prevents a board from appointing oral proceedings"*.

- The Board subsequently considered its conclusion on the scope of Article 116(1) EPC as being also in line with the established jurisprudence of the boards applying the rules of interpretation of Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

- In the context of a dynamic interpretation of the EPC, it identified three "*considerations*" which have "*arisen since the Convention [the EPC] was signed which might give reason to believe that a literal interpretation of the wording of the relevant provision [i.e. Article 116(1) EPC] would conflict with the legislator's aims, which might thus lead to a result which diverges from the wording of the law*" (see points 42 et seq. of the reasons):
 - (i) the evolution of the instrument of re-establishment of rights under Article 122 EPC and Rule 136 EPC and of the relating case law, notably a gradual development of the "*principle of the 'Eventualmaxime'*"

 - (ii) the far-reaching changes in the operating circumstances of the Boards of Appeal over the years, resulting from the increasing importance of the European patent system, which have led to a considerable workload for the boards while at the same time the stakeholders' interest in a timely adjudication of cases has increased

 - (iii) "*most importantly, the concepts and principles of national and international*

procedural law have themselves seen tremendous evolution over the years, ... notably on the guarantees of a fair trial before a tribunal of law" in view of the development of the case law of the European Court of Human Rights (the Court) on Article 6(1) ECHR and Article 47(2) Charter of Fundamental Rights of the European Union, "*recognised as binding standards and general yardsticks for fair proceedings before the boards and as both expressing fair trial principles of procedural law generally recognised in the contracting states of the EPO (see Article 125 EPC)"* (see points 46 et seq. of the reasons)

The Board referred in points 47 and 48 of the reasons to a number of decisions of the Court. It derived from this case law that:

- "*over the years, [the Court] has also identified occasions where oral proceedings could or even should be dispensed with in pursuit of a party's right to a fair trial"*
- the "*more recent case law of [the Court] also increasingly emphasises the demands of procedural efficiency and economy, against the backdrop of an increasing recurrence to courts"*
- and that "*[i]n the court's more recent view ... the routine holding of hearings is perceived as a likely obstacle to the compliance with the reasonable-time requirement of Article 6(1) ECHR"*.
In this context, "*the [Court] reiterates the principle of dynamic*

interpretation ... in referring to the ECHR as 'a living instrument which ... must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today'"

- The Board found that *"all these considerations support the conclusion that a literal interpretation of Article 116(1) EPC conflicts with the legislature's aims ... when oral proceedings serve no purpose and would thus only prolong proceedings to no one's avail"* and that a *"narrow interpretation of Article 116(1) EPC thus has to make way for a dynamic and evolutive understanding instead, in light of the provision's object and purpose."* *"The very purpose of Article 116(1) EPC, with a view to the procedural principles outlined above, can be seen as providing for the essential right to be heard in oral proceedings only in so far as these serve a legitimate purpose and thus do not run counter to the requirement of legal certainty in due time as a further essential element of a fair trial for all parties"* (see points 50 and 51 of the reasons).

"In light of the principles of a fair trial and legal certainty in due time, there is no absolute right to oral proceedings under all circumstances" (see point 53 of the reasons).

- Accordingly, the Board held that *"[n]o oral proceedings have to be appointed in re-establishment proceedings where the 'Eventualmaxime' principle may - like in the current case - deprive oral proceedings of its very function as a further cornerstone of a fair trial"*

and might even run counter to it." (see point 54 of the reasons) and, considering the limited resources of the Boards of Appeal "*oral proceedings could not be appointed*" (see points 57 and 58 of the reasons).

- IV. The petitioner requested that
- decision J 6/22 be set aside
 - the proceedings before the Board be re-opened and
 - the fee for the petition for review be reimbursed
- V. The Enlarged Board of Appeal (Enlarged Board), in its composition pursuant to Rule 109(2) (a) EPC, decided to submit the petition for review to the Enlarged Board as composed under Rule 109(2) (b) EPC for decision on the petition for review.
- VI. The Enlarged Board summoned the petitioner to oral proceedings as requested, and issued a communication pursuant to Article 13 and Article 14(2) RPEBA, drawing attention to matters that could be of significance in the current case.
- VII. The petitioner responded to this communication and provided further comments.
- VIII. At the oral proceedings before the Enlarged Board, the petitioner presented the case and, at the end, the Chairman announced the Enlarged Board's decision.
- IX. The petitioner's case of relevance to this decision is summarised as follows.

The Board failed, contrary to Article 116 EPC, to arrange for the holding of oral proceedings requested by the petitioner, which represented a fundamental

procedural defect within the meaning of Article 112a(2)(d) EPC and Rule 104(a) EPC. Furthermore, the decision was based on grounds or evidence on which the petitioner had not had any opportunity to comment, representing a fundamental violation of Article 113(1) EPC within the meaning of Article 112a(2)(c) EPC.

An objection under Rule 106 EPC in respect of the procedural defect could not be raised during the appeal proceedings because the procedural defects of issuing the decision without providing the petitioner with an opportunity to be heard and without arranging the requested oral proceedings had resulted in termination of the appeal proceedings.

In relation to the non-arrangement of the holding of oral proceedings requested by the petitioner, the petitioner submitted the following.

- The petitioner had made a request for oral proceedings and such proceedings had to be appointed.

- It was acknowledged that it was established case law that the absolute right to oral proceedings on request enshrined in Article 116(1) EPC was subject to limitations, in accordance with a conventional construction. Examples were given in the decision under review in points 21 to 33. However, this was a high threshold. The present case did not meet this threshold in the established case law. This was implicit in the decision because a detailed explanation was made by means of a dynamic interpretation of the EPC.

- The conclusions in the decision under review that procedural economy was a justification for denying the petitioner's right to an oral hearing was against the established case law of the Boards of Appeal.
- The long-standing interpretation of the Boards of Appeal was correct and still applied.
 - Application of Article 125 EPC was not appropriate because there was no absence of procedural provisions in the EPC concerning the right to oral hearings.
 - Article 116(1) EPC was a specific implementation of the petitioner's right to be heard. The legislator considered it to be of sufficient importance that the right to oral proceedings on request was afforded its own article in the EPC. The limitations of the right were expressly set out in Article 116(2) EPC. The jurisprudence of the Boards of Appeal had already construed the word "*shall*" in Article 116(1) EPC.
 - The importance of the right to oral proceedings was fundamental to the EPC contracting states, including after the EPC 2000 revision, as also shown by new Article 112a EPC and the Travaux préparatoires of the EPC 2000.
 - To the extent that any conclusion could be drawn from the implementation of the Unitary Patent system, it appeared that the absolute nature of the right to be heard remained of paramount importance to the contracting states of the UPC. Rule 21(1) UPR is similar to Article 116(1) EPC.

- The decision did not provide a convincing case for the proposed dynamic interpretation. The petitioner disagreed with the finding in point 43 of the reasons that several considerations had arisen.

- (i) The proposed application of the doctrine of "*Eventualmaxime*" as set out in the decision was stricter than, and contrary to, the established case law of the Boards of Appeal. Even if it did apply, that would not have affected the petitioner's ability to exercise its legitimate rights to make the case orally.

- (ii) The changes in the circumstances referred to in point 45 of the reasons did not appear to be examples taken into account in Articles 31 or 32 Vienna Convention; further, the success of the EPC and the implementation of the UPC were the original objectives by the legislator as evidenced by the time and effort expended by the member states.

- (iii) The petitioner did not agree with the finding in point 46 that developments in international procedural law justified the interpretation of Article 116(1) EPC adopted in the decision under review. Article 6(1) ECHR would not require a different interpretation of Article 116(1) EPC that went against the prevailing case law of the Boards of Appeal.

The cited ECHR decisions did not evidence a coherent pattern supporting the thesis that there was a principle of procedural law generally recognised in the EPC contracting states that would require that issues of procedural economy should be read into the interpretation of the word "*shall*" in Article 116(1) EPC.

The adoption of the text of the EPC 2000 on 28 June 2001 was a relevant date for the assessment of whether there were subsequent developments that might affect the interpretation of Article 116(1) EPC under a dynamic interpretation.

Of the cited decisions of the Court, only three had been handed down significantly after the adoption of the revised EPC. Decision *Koottummel v. Austria* no. 49616/06 (10 December 2009) was in line with the prevailing case law of the EPO, and the reasoning was in the petitioner's favour and provided no cause for the opposite interpretation to be adopted in construing Article 116(1) EPC. Decision *Micallef v. Malta*, no. 17056/06 (15 October 2009), passages of which were cited in point 48 of the reasons, concerned interim measures rather than oral proceedings. Decision *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10 (2 October 2018) concerned the question of whether Article 6(1) ECHR required the holding of an oral hearing even though the applicable national law did

not require an oral hearing. In the current case, Article 116(1) EPC did require the holding of oral proceedings requested by the petitioner.

- To the extent that they differed, the test whether oral proceedings could not be held should have been that the proceedings would "*not make sense*" rather than that they "*serve no purpose*" in view of overall concerns of procedural economy. Secondary considerations such as speedy conduct of the proceedings or procedural economy were not valid considerations for ignoring the petitioner's request for oral proceedings.
- The circumstances of the present case were not those of decision G 2/19, where application of the absolute right that oral proceedings shall be held on request would have made no sense.
- Oral proceedings would neither not have made sense nor have been "*without purpose*" because the hearing would have allowed the petitioner to exercise its legitimate rights to make its case orally. In accordance with decision T 383/87, it seems that the petitioner might have been able to present the case better orally than in writing, even if the Board considered that it had no new lines of argument.
- Allowing the petitioner to present its case would have allowed it to address the objections to the request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal and the inadmissibility of the appeal.

- Not only did the Board fail to appoint the oral proceedings requested by the petitioner, it did not provide any sort of opportunity to be heard before making the decision.

- The Board's refusal to hold the oral proceedings requested by the petitioner to hear the matter in which there were outstanding issues, and its proceeding to hand down the decision which was adverse to the petitioner on these issues was a fundamental procedural defect. It resulted in an absolute loss of the petitioner's right to make oral submissions. The case under review in R 3/10 was similar and the reasoning in points 2.8 to 2.11 of decision R 3/10 was highly relevant.

Reasons for the Decision

Admissibility of the petition for review

1. The petition for review is admissible.

2. The petition was duly filed in a reasoned statement and the required fee was paid in due time, in accordance with Article 112a(4) EPC, Rule 127(2) EPC as in force until 31 October 2023 and Rule 131(2), (4) EPC.

3. The decision against which the petition for review is directed terminated the appeal proceedings before the Board and, since the petitioner's appeal was rejected as inadmissible, adversely affects the petitioner within the meaning of Article 112a(1) EPC.

4. As the petition is based on the grounds in Article 112a(2)(c) and (d) EPC, it is only admissible under Rule 106 EPC if an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board, except where such objection could not be raised during the appeal proceedings.
5. The Enlarged Board accepts that no objections could have been raised by the petitioner during the appeal proceedings before the Board in relation to the alleged procedural defects and that, therefore, the exception provided for in Rule 106 EPC applies.

Allowability of the petition for review

6. The petition for review is also allowable because a fundamental procedural defect under Article 112a(2)(d) EPC in conjunction with Rule 104(a) EPC has occurred in the appeal proceedings as the Board, contrary to Article 116 EPC, failed to arrange for the holding of the oral proceedings requested by the petitioner.
7. The petitioner had initially requested oral proceedings in the notice of appeal and, again, in the letter received within the time limit set in the Board's communication dated 15 July 2022 (EPO Form 3028).
8. The Board did not dispute that, at the time of the decision, requests for oral proceedings had been made, and not subsequently withdrawn, in relation to the issues that led to the final decision.
9. The Board, however, did not arrange for the holding of the oral proceedings requested by the petitioner before

making its decision that terminated the appeal proceedings.

10. This was contrary to Article 116 EPC.

10.1 It is well-established since the very first decisions of the Enlarged Board that the legal provisions of the EPC are interpreted by applying the principles of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see G 1/83, OJ EPO 1985, 60, Reasons 1 to 6; Case Law of the Boards of Appeal, 11th edn. 2025, "CLBA", III.H.2.2 and decisions cited therein).

It follows from a reading of Articles 31 and 32 Vienna Convention taken together that the provisions of a treaty (here the EPC) must first be construed according to the ordinary meaning of the terms in their context and in the light of its object and purpose. It can also be derived from the wording of Article 32 Vienna Convention that preparatory documents are primarily to be taken into consideration in order to confirm a meaning or to determine a meaning, if the first and ordinary means of construction would lead to ambiguity or to an absurd result.

As set out in the decision under review (see point 42 of the reasons with further references), it is also established (see decision G 3/98, OJ EPO 2001, 62, Reasons 2.5) that a dynamic interpretation might come into play where considerations have arisen since the EPC was signed which might give reason to believe that a literal interpretation of the wording of the relevant provision would conflict with the legislator's aims.

10.2 Article 116(1), first sentence, EPC provides that "*[o]ral proceedings shall take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings*".

According to the wording of this provision, formulated accordingly in all three official languages, the aspect of expediency refers only to the first alternative, where oral proceedings take place at the EPO's own initiative. Thus, the department concerned with a request for oral proceedings made by a party to the proceedings has no discretion over whether or not oral proceedings take place. The holding of the requested oral proceedings is mandatory for all departments entrusted to carry out the procedures laid down in the EPC (Article 15(a) to (g) EPC). Accordingly, the EPC establishes a party's right to oral proceedings upon request in proceedings before the EPO.

10.3 However, the EPC provides that oral proceedings do not have to take place in all circumstances. In accordance with Article 116(1), second sentence, EPC, Article 116(2) EPC and Rule 88(4) EPC, oral proceedings, even if requested, need not take place in one of the following situations:

- the request is for second or further oral proceedings before the same department where the parties and the subject of the proceedings are the same
- the Receiving Section does not consider oral proceedings to be expedient, provided that it does not intend to refuse the European patent application
- after issuance of a final decision containing an apportionment of costs, in the subsequent procedure

for the fixing of costs a decision is to be taken on the amounts of costs to be paid

None of these situations applied in the circumstances underlying the decision under review.

- 10.4 The right to oral proceedings upon request applies without any distinction as to whether the proceedings are before the administrative departments of the EPC, or before the Boards of Appeal, as the first and final judicial instance in the procedures before the EPO, i.e. also in the proceedings before the Legal Board of Appeal. It may be noted in this context that Article 116 EPC likewise applies, at all stages, in the proceedings concerning a petition for review under Article 112a EPC.
- 10.4.1 This extraordinary legal remedy was introduced by the legislator in response to decision G 1/97 in the course of revising the EPC in 2000 in order to enable an adversely affected party to request a review of a board of appeal decision.
- 10.4.2 It is worth noting that, during the preparatory work for creating of that legal remedy, a draft provision which was aimed at limiting the scope of the right to oral proceedings in these proceedings was rejected.
- 10.4.3 According to that proposal, the Enlarged Board of Appeal in a three-member composition, i.e. entrusted with examining whether a petition might have to be rejected as clearly inadmissible or clearly unallowable, could arrive at such a negative decision by unanimity and "*in written proceedings*" without any need to hold oral proceedings (CA/PL 5/02, draft Rule 67f(3); document available via <https://>

www.epo.org/en/legal/epc/archive/documentation-epc-revision-2000). This was based on the consideration that "[t]he proceedings before this panel shall be as simple and as short as possible. Therefore, this body shall decide in written summary proceedings; no oral proceedings shall take place before this panel. A quick screening procedure at the outset of review proceedings to sort out petitions which clearly cannot be successful is essential in order to avoid an inappropriate prolongation of legal certainty for third parties" (Basic Proposal for the Revision of the EPC, MR/2/00, Article 112a, explanatory remarks, point 19; similar also to CA/PL 17/00, point 25).

10.4.4 However, during user consultation, it was pointed out that "*the right to have oral proceedings is a fundamental right of the parties which should not be forgotten even in cases which are deemed to be 'clear'*" (see epi comments on Rule 67f, CA/PL 10/02 Add. 9) and the draft provision was considered not compliant with Article 116 EPC and Article 113 EPC (see AIPPI comments on Rule 67f, CA/PL 10/02 Add. 10). During further discussions amongst the contracting states, several delegations likewise raised concerns in view of Article 116 EPC against the proposal of only written proceedings before the Enlarged Board in the three-member composition (see CA/PL PV 19, points 60 to 71), with the consequence that this proposal was abandoned (see CA/PL 5/02 Rev. 2, Rule 67f).

10.4.5 As a consequence, the reference to "*written proceedings*" no longer appears in the text of the provision that was ultimately adopted (now Rule 109(3) EPC), which means that such a negative decision regarding clear inadmissibility or clear non-allowability of a petition for review cannot be taken

by the Enlarged Board without due account being taken of Article 116 EPC. Hence, the legislator designed the review procedure such that "*in proceedings under Rule 109(3) EPC, the petitioner will be invited to attend oral proceedings if he has so requested, or if the Enlarged Board of Appeal considers this expedient, in which case it will issue an invitation of its own motion*" (OJ EPO 2007, Special edition No. 5, explanatory remarks concerning Rule 109).

10.4.6 In order to compensate for any delays resulting from the holding of oral proceedings, and thus to allow for expeditious proceedings, the legislator has at the same time provided for derogations from certain timing requirements, in particular from the requirement to observe a notice period of at least two months for the summons to oral proceedings (see CA/PL 5/02 Rev. 2, Rule 67f(1) with reference to Rule 71 EPC 1973, corresponding to current Rule 115 EPC; CA/150/02 Add.1, explanatory remarks on Rule 67f).

10.5 Furthermore, Rule 104(a) EPC relating to Article 116 EPC was included as a possible ground for review under Article 112a(2)(d) EPC, in addition to the ground under Article 112a(2)(c) EPC relating to Article 113 EPC, so demonstrating that Article 116 EPC is significant of itself, in particular alongside Article 113(1) EPC. In this respect, the legislator confirmed that "*[t]he right to oral proceedings, addressed in Rule 104(a) EPC 2000, is an important aspect of the right to be heard. Ignoring a request for oral proceedings may therefore constitute a fundamental procedural defect, which merits the same treatment as the cases covered by Article 112a(2)(a) to (c) EPC 2000*" (OJ EPO 2007, Special edition No. 5,

explanatory remarks concerning Rule 104; similar CA/PL 5/02 Rev. 1 Add. 1).

10.6 Against this background and in view of the overall purpose and objective of the EPC of creating a legal framework for the filing and examination of European patent applications, for granting European patents and for proceedings after the grant of such patents, it can be inferred that a party does have the right to oral proceedings upon request before the EPO where a European patent application or European patent is at stake on the basis of issues on which no oral proceedings have yet taken place.

10.7 As held by the Enlarged Board in decision G 1/21 of 16 July 2021 (OJ EPO 2022, A49, Reasons 34), with reference to decision R 3/10 (Reasons 2.11 therein; see also R 12/12, Reasons 7 and, similar, e.g. T 1790/17, Reasons 7; T 3258/19, Reasons 1.1.4, T 383/87, Reasons 9), *"the purpose of oral proceedings ... [is] to allow each party to make an oral presentation of its arguments, to allow the Board to ask questions, to allow the parties to respond to such questions and to allow the Board and the parties to discuss issues, including controversial and perhaps crucial issues. The value of oral proceedings is that matters may as a result be clarified and the Board may ultimately be satisfied that a party's position is the right one, although it was not so satisfied by the written submissions alone."*

As already stated in decision T 383/87, Article 116(1) EPC guarantees the right of any party to request oral proceedings, i.e. to argue its case orally before the relevant instance of the EPO. This includes the right for the party requesting oral proceedings

merely to present orally what it has already submitted in writing (see also R 3/10, Reasons 2.11 confirming T 125/89, Reasons 7), without having to fear that, if it does so, the deciding body will order a different apportionment of costs for that reason alone (see also T 125/89, Reasons 7; T 383/87, Reasons 9).

10.8 Article 116(1) EPC, taking into account the purpose of this provision, is thus intended to ensure that a party is entitled, upon request, to make oral submissions on its case at oral proceedings before the deciding body, prior to a decision which adversely affects that party.

10.9 When taken literally, however, Article 116(1) EPC ("*[o]ral proceedings shall take place ... at the request of any party to the proceedings*") would require oral proceedings to take place under all circumstances, if requested by a party and if none of the situations explicitly provided in the EPC (see point 10.3 above) applies.

10.10 As set out in the decision under review (points 24 et seq. of the reasons), the case law of the Boards of Appeal has established that, in specific situations which may be considered as covered by the wording of Article 116(1) EPC, a decision taken without prior oral proceedings despite a request for oral proceeding having been made can be considered as not being in conflict with that provision.

10.10.1 As also mentioned in the decision under review, this concerns, in particular, the following situations.

- The party that requested oral proceedings states that it will not attend the appointed oral

proceedings (see also point 24 of the reasons and decisions cited therein).

- An appellant that made a request for oral proceedings in the notice of appeal did not reply to the Board's communication in which the appellant was informed of the fact that the statement of grounds of appeal was missing (see also points 25 and 31 of the reasons and decisions cited therein).
- The decision which is going to be taken on the basis of the written submissions will be in favour of, or will not otherwise adversely affect, the party that had requested oral proceedings (see also points 28 and 29 of the reasons and decisions cited therein).

In the above cases, the party that had requested oral proceedings either is not adversely affected by the final decision or has made clear, in the proceedings before the deciding body, that it will not actually exercise its right to make oral submissions at the oral proceedings.

In a considerable number of these cases, a potential conflict with Article 116(1) EPC was found by the deciding Board not to arise from the outset by looking at the request for oral proceedings: either a certain interpretation was given to the request for oral proceedings (e.g. as being made on the condition that the party's main request would not be granted on the basis of the written submissions, see CLBA, III.C.5.6, or as not being applicable in the case of a missing statement of grounds of appeal unless this was contested by the requesting party) or the request for oral proceedings was considered to be affected by another, subsequent statement by the requesting party (e.g. the party's announcement of non-attendance at the

oral proceedings led to the request for oral proceedings being implicitly withdrawn or becoming ineffective, see CLBA, III.C.5.3.2).

In other cases, however, the deciding Board, looking at the scope of the party's right, found no conflict with Article 116(1) EPC, holding that it could not be the purpose of Article 116(1) EPC that a party that had requested oral proceedings unconditionally but at the same time stated that it would not attend oral proceedings, could oblige a Board to hold oral proceedings in its absence (see also CLBA, III.C.5.3.2.d) and e.g. T 663/10, Reasons 1.3; T 671/12, Reasons 2; T 166/17, Reasons 1.2) or to have the case decided on the date of the scheduled oral proceedings (see also CLBA, III.C.3.1).

Thus, in these decisions, the scope of Article 116(1) EPC was interpreted more narrowly in terms of its aim and purpose.

10.10.2 Additionally, there is reference in the decision under review (point 32 of the reasons) to two early decisions that referred to "*exceptional circumstances amounting to an abuse of law*", suggesting that there may be situations in which oral proceedings do not have to be held for this reason. It was, however, clarified in these decisions that merely making use of the right to oral proceedings in situations where no new arguments were presented at the oral proceedings by the party that had requested them, or where the chance of winning the case before the deciding body was small, did not constitute situations amounting to an abuse of procedure and that, accordingly, neither was the obligation to hold oral proceedings dispensed with nor

could a different apportionment of costs be made for this reason alone.

10.10.3 Furthermore, the decision under review (points 26 and 34 of the reasons) refers to decision G 1/97 (OJ EPO 2000, 322). This decision concerned a situation which existed before the legal remedy of a petition for review, now provided for in Article 112a EPC as an extraordinary legal remedy, had been introduced, i.e. prior to the entry into force on 13 December 2007 of the revised EPC ("EPC 2000"). In a referral, the Enlarged Board was asked what administrative or jurisdictional measures should be taken in a situation in which a request was filed by a party adversely affected by a final decision of a Board of Appeal on the basis of an alleged violation of a fundamental procedural principle and aimed at the revision of that decision (see G 1/97, *supra*, section VIII and Reasons 1).

The Enlarged Board held that, given that the request did not fall within the scope of any of the legal remedies provided for in the EPC and that such a remedy could also not be created by judicial means, a request aimed at the revision of a final decision taken by a Board of Appeal could not be validly submitted (see G 1/97, *supra*, Reasons 2(f), 4, 3(b), 3(d) and 6). It concluded that "*[s]ince the requests in question cannot be validly filed and must eventually be refused as inadmissible because they are based on a remedy (in the broad sense) which is non-existent, it seems evident that such an application would prolong the proceedings in a way that would be difficult to reconcile with the requirement for legal certainty. For this reason, the board concerned will be able to consider a request aimed at the revision of its own*

decision immediately and without any further procedural formalities" (see G 1/97, supra, Reasons 6, last paragraph; also points 1 and 2 of the Order), i.e. without holding oral proceedings.

10.10.4 Similarly, decision G 2/19 (OJ EPO 2020, A87) concerned a situation in which a non-existent legal remedy was filed: a third party initiated a means of redress, in the form of an appeal directed against the decision on the grant of a patent and including an auxiliary request for oral proceedings. It was requested that the decision be set aside and examination proceedings be resumed since the claims as granted were not clear within the meaning of Article 84 EPC. The third party argued that, owing to the limited number of grounds for opposition, it would otherwise have no legal remedy.

The Enlarged Board considered that this amounted to *"an attempt to circumvent the rules and is thus a clearly inadmissible means of redress. A means of redress is clearly inadmissible where, for example, it is initiated by a person who has no standing to do so (here: a third party within the meaning of Article 115 EPC) or with the aim of seeking relief for a grievance which the European Patent Convention not only does not recognise but in fact excludes as a subject of appeal under Article 106(1) EPC (here: an alleged lack of clarity to be removed from the patent claims for the purposes of Article 84 EPC"* (see G 2/19, supra, Reasons B.II.5).

On the issues addressed in the referral as to whether it was compatible with the EPC to decide on such a request filed in the form of an appeal without holding oral proceedings, even though the filing party had requested them, the Enlarged Board held: *"8. Even if*

[the person] is ultimately considered a *de facto* party to the proceedings pending before the technical board of appeal following the filing of its appeal ..., that alone is not sufficient to confer a right to the scheduling of oral proceedings. Instead, Article 116(1), first sentence, EPC is to be interpreted narrowly, such that a purely formal position as *de facto* party to appeal proceedings is not enough to confer a right to require that oral proceedings be held if the person requesting them has no standing to appeal, because they were not a party to the foregoing proceedings in the legal sense, or if - as is also the case here - the grievance they invoke is not appealable. Instead, a board called on to examine their request may immediately refuse it as inadmissible in writing and, as the Enlarged Board put it in G 1/97 (see point 6, last paragraph, of the Reasons), without further procedural formalities." (see Reasons B.II.8)

The Enlarged Board confirmed that "[g]iven the variety in the scope of application of Article 116(1), first sentence, EPC, its nature cannot be considered to be, as it were, absolute. The legislator clearly intended it to serve as a basic rule governing the typical cases facing the departments of the European Patent Office in their everyday practice. However, it cannot be ruled out that exceptions to this basic rule may be made where - as in the case underlying this referral - its application would make no sense in the specific circumstances of an individual case" (see Reasons B.II.2).

10.11 The situation underlying the decision under review, in which the petitioner had requested oral proceedings, with this request covering the issues of re-establishment of rights and the admissibility of the

appeal lodged against the examining division's decision relating to the petitioner's patent application, does not fall under any of the categories established in the case law and outlined above.

- 10.12 In particular, although this is suggested in point 59 of the reasons for the decision under review, the situation is not comparable to that in which case law has held that an appellant's initial request for oral proceedings, which was contained in the notice of appeal, had become "*obsolete*". Whereas in those cases the respective appellant who had requested oral proceedings did not respond to a Board's communication informing the appellant of the missing statement of grounds of appeal, the petitioner in the current case did respond, leaving no doubt as to the petitioner's intention to pursue the appeal, including the request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal.

Hence, under Article 116 EPC, the oral proceedings requested by the petitioner should have been arranged before the decision under review was taken.

- 10.13 Furthermore, the Enlarged Board sees no indication that a dynamic interpretation could lead to the conclusion that Article 116(1) EPC leaves room for weighing up, on the one hand, the petitioner's right to present the case orally before the Board before the adverse decision was taken and, on the other hand, aspects relating to the expeditious conduct of the appeal proceedings, legal certainty or the prospects of success of the petitioner's appeal, or to a conclusion that the Board was not obliged to arrange for the holding of oral proceedings requested by the petitioner.

- 10.14 In the context of a dynamic interpretation, the Board relied on three considerations set out in points 44 to 48 of the reasons for the decision under review which, in its view, supported its conclusion that the petitioner's right to oral proceedings upon request under Article 116(1) EPC had to be restricted in view of the requirement of timely legal certainty.
- 10.14.1 The petitioner submitted that it was not permissible, by relying on a dynamic interpretation, to arrive at an interpretation of Article 116(1) EPC that contradicted its wording, which in these circumstances left no room for discretion and in which efficiency aspects had already been taken into account.
- 10.14.2 The Enlarged Board is not persuaded that the considerations relied upon in the decision under review could lead to the result that the requested oral proceedings by the petitioner were not mandatory under Article 116(1) EPC, nor that the petitioner's right to oral proceedings could be balanced against considerations relating to the requirement of timely legal certainty or procedural economy.

In the current case, the Enlarged Board therefore does not need to assess the extent to which dynamic interpretation is permissible, nor does it need to define in general terms the limitations of the right to oral proceedings upon request under Article 116(1) EPC, as the petitioner seemed to suggest.

It should be noted that even in decision G 2/19, the Enlarged Board refrained from giving an answer that went beyond the specific circumstances underlying the referral: in the referral decision, the Enlarged Board

was concerned with the following general question:

"1. In appeal proceedings, is the right to oral proceedings under Article 116 EPC limited if the appeal is manifestly inadmissible?" (see G 2/19, supra, Facts and Submissions III.)

The Enlarged Board, however, considered that this *"first question ... amounts to a generalisation applying to all cases in which an appeal appears to be 'manifestly inadmissible'. Compared with what specifically needs to be clarified for the purposes of the underlying case, an answer to this question is only of extraneous and rather academic interest. That is insufficient to find the question admissible, especially as its reference to the criterion of a 'manifestly inadmissible appeal' introduces an imprecise legal notion not taken from the European Patent Convention, which, therefore, does not offer a more detailed basis for defining it more precisely ... For the Enlarged Board to be able to give an opinion on such a generalised question, it would have to establish workable, generally applicable criteria for defining the notion of a manifestly inadmissible appeal or else come up with a list of the specific scenarios covered by it. However, there is no need to do so for the purposes of the underlying case."* (see G 2/19, supra, Reasons A.IV.)

10.14.3 As a first consideration, reference was made in the decision under review to evolution of the instrument of re-establishment of rights and refinement by the case law of the Boards of Appeal.

The Enlarged Board notes that, while the scope of application of re-establishment of rights was narrowed down by replacing it, to some extent, by further

processing, the requirements for re-establishment of rights (Article 122(1) EPC) and the procedure involved (Rule 136 EPC) have remained unchanged over the years, notably during the EPC 2000 revision (see OJ EPO 2007, Special edition no. 4, Article 122, explanatory remarks, points 2 and 5).

Furthermore, developments in case law concerning re-establishment of rights cannot alter or contradict Article 116(1) EPC, according to which the petitioner was entitled to present the case orally before the decision was taken, regardless of whether there was any prospect of success in view of these developments.

The petitioner referred to the revision of the EPC and correctly pointed out that Article 116(1) EPC was not amended by the Revision Act of 29 November 2000 (for minor editorial changes to Article 116 EPC in the three official languages, see OJ EPO 2007, Special edition No. 4).

Nor did the legislator amend the scope of application of Article 116 EPC at the level of the Implementing Regulations when they were adopted by the Administrative Council by a Decision of 7 December 2006. The provisions concerned with oral proceedings and taking of evidence essentially remained the same, except for being renumbered and some of them being transferred from former Article 117 EPC 1973 into the Implementing Regulations (see Rules 71 to 76 EPC 1973 which became Rules 115 to 124 EPC 2000; OJ EPO 2007, Special edition no. 5, Implementing Regulations, Part VII, Chapter III).

This suggests that there is no reason to believe that the legislator had any concerns about the scope of the

right to oral proceedings as it existed at that time and had been interpreted by the Boards of Appeal until then.

- 10.14.4 The second consideration referred to in the decision under review relates to aspects such as a timely adjudication of cases and the creation of legal certainty.

These are indeed aspects of great importance. The starting point is, however, that they are to be taken into account within the legal framework as provided by the legislator. In the view of the Enlarged Board, they are not sufficient on their own to justify a dynamic interpretation that would limit the scope of application of Article 116(1) EPC in such a way that a right to oral proceedings could be balanced against them.

- 10.14.5 As a third consideration, reference was made in the decision under review to the development of the case law of the European Court of Human Rights (the Court) on Article 6(1) ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms, in force since 3 September 1953) which provides that "*[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*".

The decision under review analysed that case law and found that the Court, applying the principle of dynamic interpretation, is pursuing a changed general approach with regard to Article 6(1) ECHR by departing from its case law which favours a rather "*absolute*" obligation

to hold oral proceedings, and is instead giving weight to a further obligation under that provision, namely that proceedings be conducted within a reasonable time (see decision under review, point 47 of the reasons). The decision under review concludes that, in view of this, "[a] narrow interpretation of Article 116(1) EPC" likewise "has to make way for a dynamic and evolutive understanding instead" and that, therefore, the petitioner's right to oral proceedings under Article 116(1) EPC was provided "only in so far as [the oral proceedings] ... do not run counter to the requirement of legal certainty in due time." (see points 50 and 51 of the reasons).

However, the Enlarged Board sees no basis for adopting a different general approach with regard to the requirement under Article 116(1) EPC that oral proceedings must take place upon a party's request.

Article 6(1) ECHR has been recognised by the Boards of Appeal of the EPO as relevant to decisions under the EPC, in particular in the context of Article 125 EPC, as an indicator of principles of procedural law generally recognised in the contracting states and as a yardstick (see also e.g. T 2707/16, Reasons 26; T 1824/15, Reasons 2.3.5; CLBA, III.H.7 with cited decisions). It is also established case law that the EPC must be applied in a way which supports the fundamental principles of Article 6(1) ECHR (see also R 4/22, Reasons 2.11 and 2.12; R 8/13 of 20 March 2015, Reasons 2.2; CLBA, III.J.1.3).

Indeed, Article 6(1) ECHR ensures that certain minimum standards must be observed in the proceedings before the deciding authority.

It may be noted in this context that Article 53 ECHR provides that "*[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*" The aim of a provision of this kind, found in many human rights instruments, is normally to ensure that the rights and freedoms protected by the instrument are applied as minimum standards and not seen as a ceiling for protection.

Article 6(1) ECHR cannot therefore be invoked in order to justify a restrictive interpretation of Article 116(1) EPC. Consequently, decisions of the Court in which no objection was raised to the fact that a decision was taken without holding oral proceedings are not, from the outset, suitable for supporting the Board's reasoning.

- 10.15 Therefore, the Board's failure to arrange for the holding of the oral proceedings requested by the petitioner was contrary to Article 116 EPC.
- 11. Furthermore, in view of this, a fundamental procedural defect under Article 112a(2)(d) EPC has occurred.
- 11.1 Under Rule 104(a) EPC, where a Board of Appeal, contrary to Article 116 EPC, has failed to arrange for the holding of oral proceedings requested by the petitioner, a fundamental procedural defect under Article 112a(2)(d) EPC "*may*" have occurred, so indicating that not every such failure constitutes a fundamental procedural defect. As stated in the Travaux préparatoires "*[i]t is up to the Enlarged Board of Appeal to assess the seriousness of the procedural*

defect. Only the non-appointment of oral proceedings which contravenes Article 116 EPC will be a reason for re-opening appeal proceedings." (OJ EPO 2007, Special edition No. 5, explanatory remarks concerning Rule 104; similar CA/PL 5/02 Rev. 1 Add. 1).

- 11.2 In the case underlying the petition for review, the Board, in its decision terminating the appeal proceedings, rejected the request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal and rejected the appeal as inadmissible, even though the petitioner had requested that oral proceedings be held in the event that the Board intended to reach such negative decisions. The issues in relation to which oral proceedings were requested but not held and the final decision terminating the appeal proceedings were thus linked. Hence, the procedural defect of not arranging for the holding of oral proceedings, contrary to Article 116 EPC, was a fundamental one within the meaning of Article 112a(2)(d) EPC in conjunction with Rule 104(a) EPC.
- 11.3 To arrive at this conclusion, the Enlarged Board, in particular, did not have to additionally assess whether or not the outcome of the decision under review could or would have been different if the procedural defect of not arranging for the holding of oral proceedings had not occurred. This is because, due to the failure to arrange for the holding of oral proceedings, the right of the petitioner, as the party that had requested the oral proceedings and was adversely affected by the decision under review, to make oral submissions in the proceedings before the Board prior to the final decision was not respected. For this reason alone, the decision under review as a whole is

affected by the procedural defect, which therefore constitutes a fundamental procedural defect within the meaning of Article 112a(2)(d) EPC.

11.4 This is in line with the established case law of the Boards of Appeal which deals with cases in which the department that took the decision under appeal (e.g. the Receiving Section, Examining Division or Opposition Division), contrary to Article 116 EPC, did not hold oral proceedings requested by the appealing party before reaching the contested decision adversely affecting that party. After the competent Board of Appeal had become aware of this, it set aside the decision under appeal on the grounds that the deciding department did not hold the requested oral proceedings, by considering the decision null and void from the outset and without further examination of whether the outcome of the contested decision might or would have been different if oral proceedings had taken place before that department prior to the decision (see e.g. J 12/15, Reasons 6 and 7; T 2687/17, Reasons 2 and 8; T 2300/08, Reasons 8 and 9; T 1544/06, Reasons 1.2 and 3.1; T 400/02, Reasons 2 and 3; T 556/95, OJ EPO 1997, 205, Reasons 6 and 7; T 686/92, Reasons 3; T 766/90, Reasons 2.1; T 93/88, Reasons 2; CLBA, III.C.5).

11.5 Furthermore, this approach is also in line with the case law of the Enlarged Board of Appeal. While the Enlarged Board is not aware of a case in which circumstances identical to the current case had occurred, the considerations set out in decision R 3/10 appear relevant.

11.5.1 In the case underlying decision R 3/10, the competent Board had revoked the patent as it considered the subject-matter of claim 1 of the main and auxiliary

requests to be novel, but to lack inventive step. The Enlarged Board assessed the situation existing at the time of the oral proceedings before the Board and concluded that, as a result of a misunderstanding, the petitioner-patent proprietor had had no opportunity at all to make oral submissions on the issue of inventive step before the Board made its decision (see R 3/10, Reasons 2.9).

- 11.5.2 Since the Board's negative decision on the main request was exclusively due to a finding of lack of inventive step, there was thus no opportunity for the losing party, that had requested oral proceedings, to present its case on inventive step orally. The situation in that case is thus similar to a situation in which no oral proceedings took place at all. Taking account of the fact that oral proceedings actually had taken place, the petition for review in that case was based on the ground that the petitioner's right to be heard under Article 113(1) EPC had been violated in a fundamental manner within the meaning of Article 112a(2) (c) EPC.
- 11.5.3 As held by the Enlarged Board, *"the right of any party for oral proceedings to be held on request and to present its case orally is ..., with respect to the party's right to be heard on its case, a more specific embodiment of the general principle enshrined in Article 113(1) EPC, but is by no means subordinate to the latter provision or less important in any respect"* (see R 3/10, Reasons 2.11, third paragraph).
- 11.5.4 The Enlarged Board concluded that this violation of the petitioner's right to be heard orally was objectively a *"fundamental"* one since the negative decision on the

main request was exclusively due to the denial of inventive step by the Board (see R 3/10, Reasons 2.9).

11.5.5 With this conclusion, the Enlarged Board composed under Rule 109(2)(b) EPC did not concur with the respondents-opponents' view. They had argued that a conclusion to the effect that the outcome of the decision would have been different if the alleged procedural defect had not occurred could not be based on mere speculation that the presentation by the petitioner of oral arguments on the issue of inventive step would have altered matters, and furthermore, a completely separate reason for lack of inventive step was given in the decision under review, not mentioned in the petition (see R 3/10, Section VII.4).

11.5.6 In reply thereto the Enlarged Board stated that "*[i]n order to answer the question of whether a fundamental violation of the petitioner's right to be heard occurred as a result of the petitioner's not having been heard on inventive step, it is ... irrelevant whether the respondents are right in their assessment of the clear obviousness of the claimed solution*" and that "*[i]n a case such as the present, in which the ground of opposition, i.e. lack of inventive step, on which the revocation was based, was not discussed at all in the oral proceedings, it is also irrelevant that that issue was discussed in writing between the parties ...*" (see R 3/10, Reasons 2.10 and 2.11). In the latter context, the Enlarged Board referred to the established jurisprudence according to which the parties' "*right to be heard in oral proceedings, Articles 113(1) and 116(1) EPC, is not restricted to new and substantial arguments which have not yet been presented in writing. Therefore, the fact that the petitioner made submissions on inventive step*

in writing is not a valid reason for denying that the petitioner's right to be heard under Article 113 EPC was violated in a fundamental manner, as a result of its not having had the opportunity to present its arguments orally on the decisive issue of inventive step, entailing the rejection of the petitioner's main request."

- 11.5.7 It is thus also consistent with the considerations set out in decision R 3/10 to classify the Board's failure, contrary to Article 116 EPC, to arrange for the holding of oral proceedings requested by the petitioner as a fundamental procedural defect within the meaning of Article 112a(2) (d) EPC.
12. As a fundamental procedural defect under Article 112a(2) (d) EPC in combination with Rule 104(a) EPC has occurred, the petition for review is allowable. Therefore, pursuant to Article 112a(5) EPC and Rule 108(3) EPC, the decision under review is to be set aside and the proceedings before the Board are to be re-opened.
13. The further objection that the petitioner had had no opportunity to present comments on the grounds or evidence on which the decision under review was based, and that this constituted a fundamental violation of the petitioner's right to be heard (Article 112a(2) (c) EPC and Article 113(1) EPC), therefore does not need to be addressed here.
14. As the proceedings before the Board are to be re-opened, the fee for the petition for review is to be reimbursed pursuant to Rule 110 EPC and, hence, irrespective of the petitioner's request to this effect.

Order

For these reasons it is decided that:

1. The decision under review is set aside.
2. The proceedings before the Legal Board of Appeal are re-opened.
3. The fee for the petition for review is reimbursed.

The Registrar:

The Chairman:



N. Michaleczek

C. Josefsson

Decision electronically authenticated