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**Datasheet for the decision
of 31 March 2026**

Case Number: R 0003/24

Appeal Number: T 1656/17 - 3.5.04

Application Number: 08745686.9

Publication Number: 2145330

IPC: H04N9/04, H04N19/186, H04N19/85
G06T3/40, H04N1/64

Language of the proceedings: EN

Title of invention:
VIDEO CAMERA

Patent Proprietor:
RED.COM, LLC

Opponent:
D Young & Co LLP

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(2) (c), 112a(2) (d), 113(1)
EPC R. 104(b)
RPBA Art. 19(1)

Keyword:
Breach of secrecy of deliberation (Article 19(1) RPBA) a
fundamental defect under Article 112a(2) (d) EPC or *per se*
leading to violation of right to be heard (no)
Petition allowable (no) no violation of petitioner's right to
be heard

Decisions cited:

R 0012/23

Catchword:

1. A request to uphold an appeal on the basis of a specific piece of prior art is not a request in the meaning of Rule 104(b) EPC (point 3.1 of the Reasons).
2. Article 112a(2) (d) EPC is not a "catch-all clause" for procedural defects. It merely empowers the legislature to define defects in the Implementing Regulations in addition to the defects mentioned in Article 112a EPC. Rule 104 EPC exhaustively defines exactly two defects; a violation of any of the provisions of the RPBA is not among them. (R 12/23, point 3.1 *affirmed*.) (See point 3.2 of the Reasons).

This applies in particular to an asserted violation of Article 19(1), third sentence, RPBA according to which "[t]he deliberations shall be secret." A remedy for the breach of the secrecy of the deliberation does exist: board members may be liable to disciplinary action by the Administrative Council. (See points 4.1.2 and 4.3.1 of the Reasons).



**Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours**

Boards of Appeal of the
European Patent Office
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Case Number: R 0003/24

**DECISION
of the Enlarged Board of Appeal
of 31 March 2026**

Petitioner: RED.COM, LLC
(Patent Proprietor) 34 Parker
Irvine, CA 92618 (US)

Representative: KIPA AB
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Other party: D Young & Co LLP
(Opponent) 3 Noble Street
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Representative: D Young & Co LLP
3 Noble Street
London EC2V 7BQ (GB)

Decision under review: **Decision of the Technical Board of
Appeal 3.5.04 of the European Patent
Office of 13 January 2023**

Composition of the Board:

Chair: I. Beckedorf
Members: B. Müller
M. Alvazzi Delfrate

Preliminary Note

This decision consists in essence of the communication by the Enlarged Board of Appeal (EBA) pursuant to Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) of 4 November 2025 (hereinafter also referred to as "the communication"), marked as such and amended editorially. The communication comprising the EBA's preliminary opinion has been adapted editorially. Parts III and 4.3, have been added. Emphases in bold are, unless otherwise indicated, those of the EBA.

Summary of Facts and Submissions

I. The subject of the petition

The patent proprietor's petition for review filed on 9 January 2024 is directed against the decision of Technical Board 3.5.04 (hereinafter: "the Board") in appeal case T 1656/17. By that decision, the Board dismissed the patent proprietor's appeal against the decision of the opposition division revoking European patent number 2 145 330. The Board's decision was pronounced in the oral proceedings of 13 January 2023 and the reasoned written decision was handed over to the delivery service on 30 October 2023.

The title of the invention is: Video Camera.

The petition for review is based on the grounds (see point 4) that:

- there is a fundamental procedural defect in the Decision in accordance with Article 112a(2)(d) EPC and Rule 104(b) EPC [first defect],
- there is a fundamental procedural defect in accordance with Article 112a(2)(d) EPC and Article 12(2) and 12(4) RPBA 2007 [second defect],
- there is a fundamental procedural defect in accordance with Article 112a(2)(d) EPC and Article 19(1) RPBA 2020 [third defect].

In particular, the Decision fails to provide a decision on the combination of prior art under appeal. The Decision also fails to provide any reasoning why the document selected as the new closest prior art would be a better starting point than the documents considered to be closest prior art by the Opposition Division (hereinafter the "OD").

Further, the Decision is based on grounds or evidence on which Appellant did not have an opportunity to present our comments contrary to the requirements set out in Article 113(1) EPC.

(The narrow-spaced text portions above and those below are all quotations.)

The Enlarged Board of Appeal (EBA) notes that in the grounds for the petition a violation of Article 113(1) EPC is asserted in conjunction with all three fundamental procedural defects under Article 112a(2)(d) EPC.

II. The facts and grounds as set out in the petition

1. First procedural defect (point 5 of the petition)

1.1 Article 112a(2)(d) EPC in conjunction with Rule 104(b) EPC

In the decision under review, the Board concluded that “all the requests”, i.e. the main request and auxiliary requests 1, 2, 3a, 4, and 6 lacked inventive step starting from document D10.

However, according to the decision by the OD (of 23 May 2017, point 14.2.1), the closest prior art could be represented by D5, D6, D7 or D8. The OD concluded (in point 14.2.2) that D5 was a proper closest prior-art document. The OD then decided that the main request and auxiliary requests “1 to 7” lacked inventive step starting from D5 (D5*) in view of D9 and revoked the patent on this basis. (The EBA notes that the auxiliary requests the OD decided on were numbered from 1 to 6.)

The OD did not conclude that D10 represented the closest prior art based on the arguments filed by the opponent during the opposition proceedings.

The only decision under appeal was therefore the decision by the OD to revoke the patent based on the combination of D5 (D5*) in view of D9. However, in the decision by the Board there is no decision based on the prior art combination under appeal, i.e. D5 (D5*) in view of D9.

Instead, the decision, in respect of all the pending requests, was based on lack of inventive step starting from D10, a new closest prior art document. Not only did the decision “lack a decision based on the combination of art in the appealed decision by the OD.” The decision also lacked any reasoning why D10 would be a better starting point than D5 (D5*), or any of the other documents that the OD considered as potential closest prior art documents, i.e. D6, D7 or D8.

Thus, there was a fundamental procedural defect, because the Board did not provide a written decision on a request relevant to the decision (see Rule 104(b) EPC), i.e. the appellant’s request that the decision by the OD should be set aside since the patent as granted was inventive over D5 (D5*) in view of D9.

1.2 Violation of the right to be heard (Article 112a(2)(c) EPC in conjunction with Article 113(1) EPC)

The petitioner refers to the case law according to which Rule 104(b) EPC “reflects an aspect of the right to be heard” (see Case Law of the Boards of Appeal, 10th ed. 2022, V.B, 4.4.2, hereinafter referred to as “Case Law”). The reasons in the above point 1.1 were therefore also relevant under Article 112a(2)(c) EPC.

1.3 Objection under Rule 106 EPC

This objection could not have been raised during the appeal proceedings because the fundamental procedural defect that there was no decision based on D5 (D5*) in view of D9 and no reasoning why D10 was the appropriate starting point instead of D5 (D5*) only became apparent after the decision had been issued.

2. Second procedural defect (point 6 of the petition)

2.1 Article 112a(2)(d) EPC in conjunction with Article 12(2) and 12(4) RPBA 2007

The Board never decided upon the reasons of the OD relying on D5 as closest prior art. It is petitioner's position that the Board is bound to decide on the reasons given by the OD and, should it not be convinced, the decision by the OD should be set aside. Not providing a decision starting from D5 as the closest prior art was a contradiction to Article 12(2) RPBA 2020. The same standard should have been applied to Article 12 RPBA 2007 in view of established case law, such as G 9/91 and G 10/91.

Instead, the Board explained under point 2 of the reasons why the Board had the power to examine the respondent's objections on lack of inventive step, starting from document D9 or D10 raised against the patent as granted or the patent as amended.

A party had the right to know why the decision of the OD could not hold and had "to be replaced by other reasons". However, it was not until the decision was delivered that this reason for a petition became apparent. It was thus not possible to raise an objection under Rule 106 EPC during the oral proceedings.

The decision by the OD that the main request and auxiliary requests "1 to 7" [1, 2, 3A, 4, 6] lacked inventive step starting from D5 (D5*) in view of D9 was never contested by the respondent's representative (hereinafter: "the representative") in the response to the appeal. The representative only made references to previous arguments submitted "before the decision by the OD" ["...had been handed down", the EBA supposes]. Thus, because this decision by the OD was never contested by the respondent, the arguments that the respondent had sufficiently substantiated its objection of lack of inventive step starting from document D10 in its reply with regard to Article 12(4) RPBA 2007 in combination with Article 12(2) RPBA 2007 constituted a new "line of attack" that was improperly introduced during the appeal proceedings. In respect of this term the petitioner referred to the explanatory remarks to Article 12(2) RPBA 2020 (Supplementary publication 2, OJ EPO 2020, 17 at page 55).

The petitioner continues to argue that the boards of appeal reviewed appealed decisions on points of law and facts. The reasoning the Board provided in the decision under point 2 of the reasons was therefore incorrect.

2.2 Violation of the right to be heard (Article 112a(2)(c) EPC in conjunction with Article 113(1) EPC)

Introducing D10 as a closest prior art document during the appeal proceedings constituted a substantial procedural violation that denied the appellant's right to fair and complete proceedings that did not violate the appellant's right to be heard, Article 113 EPC.

Objections 1, 2, 3 and 6 were timely raised during the appeal proceedings, thus the present petition for review was clearly admissible (Rule 106 EPC).

The EBA notes that, with all these objections, it is asserted that a violation of Article 113 EPC took place by

- considering the respondent's response to the grounds of appeal to be sufficiently substantiated with regards to D10 in view of D9 and
- proceeding with a discussion regarding inventive step starting from D10 in view of D9 for the main request and auxiliary requests 1, 2 and 4.
(See decision, points XIV (a), (b), (c) and XIX.)

3. Third procedural defect (point 7 of the petition)

3.1 The failure to hand down a decision "in accordance with Article 112a(2)(d) EPC and Article 19(1) RPBA 2020"

The decision referred on page 9, point XIV(d) to "the room incident" which occurred when one of the respondent's representatives (the above "representative") entered the room where the Board was deliberating and closed the door. In this respect, the decision read (at page 10):

Upon resuming the oral proceedings, the Board did not make any comment on the room incident. However, the room incident was discussed after the appellant had stated that this incident violated the appellant's right to be heard under Article 113(1) EPC and that it wished to raise an objection under Rule 106 EPC.

In the decision regarding the "room incident", under point 26.1, the Board referred to the minutes of the oral proceedings with regard to a statement by the chair during the oral hearing (see point 26.1.1) and a statement of the representative (see point 26.1.2).

The chair's statement included the sentence: "The chairwoman immediately asked him [i.e. the representative] to leave the room as the Board was deliberating...".

The Board stated (in point 26.1.3 of the decision) that: “The Board further notes that these descriptions [statements by the chair and the representative] have not been challenged by the appellant.”

The petitioner asserts that this latter sentence is not correct. According to the minutes (on page 42), the petitioner contested that it followed from the representative’s witness statement that he entered the room without the Board immediately noticing him being in the room.

In this respect the petitioner, during the oral proceedings, filed an objection pursuant to Rule 106 EPC. The important part of objection 4, which could be found under point XXVII (X) (i) of the decision, was the breach of secrecy:

The appellant’s right to be heard under Article 113(1) EPC was violated because of the room incident. **Article 19(1), third sentence, RPBA 2020 stated that the Board's deliberations had to be secret.** It was thus a severe problem when a party entered the room during a Board's deliberation and closed the door without the other party being present. (Emphasis added.)

According to the last sentence of Article 19 RPBA 2020 the deliberations of Board shall be secret. The decision was circling around what information the above respondent’s representative may have gained during the “room incident”. But the fact that the respondent’s representative entered the room during the deliberation, without being invited, means that the deliberation could no longer be considered as being secret.

However, the decision by the Board failed to include a decision with respect to Article 19(1) RPBA 2020. “That breach of secrecy is considered to lead to a violation of Art 113(1) EPC.” Instead, the decision stated in a conclusionary fashion under point 26.1.3:

The Board agrees with the appellant that the respondent's representative should not have entered the room during the interruption of the oral proceedings for the Board's deliberation. However, the Board cannot identify any violation of the appellant's right to be heard under Article 113(1) EPC in the course of the room incident.

Based on the objection filed, that decision could not be taken without first providing a decision with respect to Article 19(1) RPBA 2020.

The petitioner failed to find any case law which related to Article 19(1) RPBA 2020, such as when the secrecy had been breached by a representative entering the room during the deliberation of the Board. It would therefore be relevant for the EBA to answer the questions:

1. When is the secrecy of the deliberation of the Board considered to be breached?
2. What would the appropriate remedy, or sanction, be when the secrecy of the deliberation by the Board has been breached?

3.2 Contradiction between decision and minutes on whether deliberation was ongoing when representative entered the room (Article 113 EPC)

In addition, a surprise statement appeared in the decision on page 167:

It can be assumed that the Board, **if it had still been deliberating**, would have interrupted the deliberation as soon as the respondent's representative entered the room. (Emphasis added.)

This new information that the deliberation by the Board apparently was over at the time of the “room incident” was new information of which the appellant could find no evidence in the record. The minutes were silent with respect to this information. This new information contradicted the evidence from the minutes indicating that the Board was still deliberating at the time of the “room incident”:

The chairwoman immediately asked him to leave the room **as the Board was deliberating**. (Emphasis added.)

The decision therefore, at least partly, relied on “legal and factual reasoning” on which the appellant had not had the possibility to comment. Consequently, a fundamental violation of the appellant's right to be heard under Article 113 EPC occurred.

The present petition for review based on the “room incident” was clearly admissible because an objection was raised timely during the appeal proceedings (Rule 106 EPC).

3.3 No decision on part of objection 4 (Article 112a(2)(d) in conjunction with Rule 104(b) EPC)

As first became apparent after the decision was issued, a decision on part of objection 4 had not been provided in the decision (Rule 104(b) EPC). The above reasons were therefore also relevant under Article 112a(2)(c) EPC. Thus, the present petition for review was further clearly admissible because an objection with respect to the lack of a decision could not be raised during the appeal proceedings (Rule 106 EPC).

3.4 New “legal and factual reasoning” on which petitioner could not comment (Article 112a(2)(c) in conjunction with Article 113(1) EPC)

The decision also relied on new “legal and factual reasoning” on which the appellant had not had the possibility to comment. Consequently, a fundamental violation of the appellant's right to be heard under Article 113 EPC occurred. Thus, the present petition for review was clearly admissible because an objection with this aspect could not be raised during the appeal proceedings (Rule 106 EPC).

4. Request for a different composition of the Board

The Board should be prepared to consider all arguments of the parties and to provide the parties the opportunity to comment on any further grounds or evidence that it has considered *ex officio*.

The above procedural defects and violations appeared to help with the consistency of the decision. It was easier to provide a consistent decision on the lack of inventive step of all requests starting from D10 if a decision on lack of inventive step starting from D5 (D5*) in view of D9 did not need to be written and by not providing any reasoning with respect to why D10 would be a better starting point.

The approach adopted by the Board that issued the decision indicated that it already had an outcome in mind regardless of what would be discussed at the hearing.

Finally, the fact that the decision was issued more than nine months after the last day of the oral proceedings was detrimental to legal certainty. It seemed that the previous composition of the Board might be overburdened and therefore it would be warranted to distribute the present case to a Board that had a lighter case load and was in a position to issue a completely reasoned and objective decision of the case in an adequate time frame.

III. The petitioner's response to the EBA's communication

The Enlarged Board of Appeal issued a communication pursuant to Articles 13 and 14(2) RPEBA dated 4 November 2025 in preparation of oral proceedings, originally set for 12 December 2025 but cancelled after the petitioner's announcement that no representative would attend the oral proceedings (see letter dated 7 December 2025). The petitioner, however, made the following submissions on the merits of the case.

The response is in respect to the "room incident" (point II.3 above). It reads verbatim:

The secrecy of deliberation is not a relative or harm-based requirement. The moment a party's representative entered the deliberation room during deliberations, secrecy was broken. This breach is a fundamental procedural defect within the meaning of Article 112a(2)(d) EPC. The Board's subsequent speculative reconstruction of the incident — without giving the petitioner the opportunity to comment — constitutes an additional violation of Article 113(1) EPC. The EBA's preliminary opinion incorrectly imposes a harm requirement that has no basis in EPC law, RPBA 2020, or judicial practice in any Contracting State.

The EBA's preliminary opinion improperly **requires the petitioner to prove what information the intruder actually obtained**. This imposes an evidentiary burden that no party could ever meet, because breaches of deliberation secrecy occur by their nature without witnesses or records.

The EPO's judicial system depends on the **appearance and reality of impartial and independent decision-making**. If breaches of deliberation secrecy are dismissed unless the aggrieved party can reconstruct the internal dynamics of the Board's deliberations — something both factually and legally impossible — the rule ceases to have any deterrent effect.

By raising the standard of proof to an unattainable level, the **EBA's approach effectively nullifies Article 19(1) RPBA 2020** and creates structural incentives for future breaches. If no remedy exists unless the petitioner can demonstrate precisely what was overheard — something the secrecy rule

itself prevents them from discovering — then no intrusion will ever meet the threshold for a procedural defect.

Such reasoning is incompatible with judicial practice in most, if not all, Contracting States, where any third-party presence in the deliberation room constitutes a per se violation of deliberation secrecy, irrespective of demonstrable harm.

To preserve the integrity, impartiality, and legitimacy of the EPO judicial system, a breach of deliberation secrecy must remain a per se fundamental procedural defect. Anything less renders the protection illusory and undermines confidence in the appeal system as a whole.

IV. Requests

The petitioner requests that:

- the decision under review be set aside and that appeal proceedings be re-opened before the Board of Appeal responsible under Rule 12b(4) EPC (Article 112a(5) EPC and Rule 108(3) EPC)
- the members of the Board who participated in taking the decision be replaced (Rule 108(3) EPC),
- the petition for review fee be reimbursed (Rule 110 EPC).

Reasons for the Decision

1. Admissibility of the petition for review

Pursuant to Rule 126(2) EPC (in the version in force until 31 October 2023), the decision that was handed over to the delivery service on 30 October 2023 is deemed to have been notified on 9 November 2023. The petition for review based on Article 112a(2)(c) and (d) EPC, together with the respective fee, was received on 9 January 2024. This was in good time: see Article 112a(4), second sentence, EPC requiring the petition to be filed within two months of notification of the decision to be reviewed.

As to the requirements of Rule 106 EPC, the petitioner, in respect of the various asserted fundamental procedural defects, contended that it had either filed corresponding objections or that such filing was not possible because the respective defect became apparent only from the decision under review. Considering that the petition for review is obviously without merit, the EBA assumes, favourably for the petitioner, that it has complied with Rule 106 EPC in respect of all asserted defects.

Given that the remaining requirements for its admissibility appear to have been met, the petition for review is considered not to be clearly inadmissible.

2. The essence of the asserted first and second fundamental procedural defects

Both the first and the second asserted defects revolve around the petitioner's view that the case law, "such as" decision G 9/91 and opinion G 10/91, required the Board to scrutinise the OD's examination of inventive step starting from document D5 (D5*) as closest prior art in view of D9 in respect of all claim requests, i.e. the main request and auxiliary requests 1, 2, 3a, 4, and 6. It was wrong for the Board to start instead, and exclusively, from document D10 as closest prior art, which the OD had not examined.

2.1 Defect 1: Article 112a(2)(d) EPC and Rule 104(b) EPC

The petitioner asserts that the Board did

- (i) not decide on the request "that the decision by the OD should be set aside since the patent as granted is inventive over D5 (D5*) in view of D9" and
- (ii) not explain why D10 was a better starting point than D5 (or D6, D7 or D8).

2.2 Defect 2: Article 112a(2)(d) EPC and Article 12(2) and (4) RPBA 2007

The petitioner asserts that

- (i) not providing a decision starting from D5 as the closest prior art was a contradiction with the standard embodied in Article 12(2) RPBA 2020 that should have been applied in view of in particular G 9/91 and G 10/91,
- (ii) the Board's starting from D10 as closest prior art amounted to a "new line of attack".

2.3 In addition to the above assertions, the petitioner asserts a violation of its right to be heard (Articles 112a(2)(c) and 113(1) EPC) in respect of both defects.

3. Analysis of the first and second asserted fundamental procedural defects

3.1 Defect 1 (i): no decision on a request

The petitioner contends that the Board did not decide on the request "that the decision by the OD should be set aside since the patent as granted is inventive over D5 (D5*) in view of D9", in simplified terms: to uphold the appeal on the basis of D5.

This is not a request in the meaning of Rule 104(b) EPC. Regarding that meaning it is said in the "Case Law" (in section V.B.4.4.2 under the heading "Rule 104(b) EPC – failure to decide on a party's request"):

In R 19/10 it was acknowledged by the Board that the EPC does not contain an explicit definition of the term "request". However, according to the common practice in the proceedings before the EPO, requests are in general directed to executable legal consequences sought by the parties. The arguments provided by the parties in support of these legal consequences do not normally

belong to the legally binding requests (see also R 17/11). In R 3/14 the Board explained that only requests submitted in writing or requests which the party had been recorded in the minutes of the oral proceedings fell under R. 104(b) EPC (see also travaux préparatoires, CA/PL 5/02 Rev. 1 Add. 1, p. 27).

The parties' final requests as set out in the decision under review (in point XIX *in fine*) were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the patent be maintained as amended on the basis of the claims according to one of auxiliary requests 1 and 2 filed with the statement of grounds of appeal, auxiliary request 3a filed with the letter dated 17 October 2022, and auxiliary requests 4 to 6 filed with the statement of grounds of appeal.

The respondent requested that the appeal be dismissed.

The EBA notes that the request in point 2.1(i) above is not mentioned among the appellant-petitioner's final requests.

Independent thereof, the request, insofar as it requires examining inventive step from D5 (D5*) is not "directed to executable legal consequences sought". The executable legal consequence was solely the setting aside of the decision under appeal irrespective of the arguments on which the appellant relied to this end.

The appellant (petitioner) asked the Board to examine inventive step starting from D5 (D5*) and overturn the decision in case the Board did not agree with the OD. In its view, the Board was not entitled to start from D10.

The petitioner's opinion that the OD's decision to start from D5 was correct and that it was not for the Board to examine D10 were arguments in support of the legal consequence that the decision should be overturned. The petitioner's goal that the Board hand down a decision based on these specific arguments was, however, not attained, because the Board selected D10 as the prior art to be examined first and, in view of the outcome of this examination, no longer examined D5.

As a consequence, one cannot consider from the body of the appellant's submissions before the Board that to uphold the appeal on the basis of D5 is a request in the meaning of Rule 104(b) EPC.

It follows that the petition in respect of the first leg of the first asserted defect is obviously not well founded.

3.2 Defect 2 (i): no decision starting from D5

Any violation of Article 12(2) and (4) RPBA 2007 would not be covered by the provisions of Article 112a(2)(d) EPC. The grounds for a petition for review have been exhaustively defined in Article 112a(2) EPC in conjunction with Rule 104 EPC.

Article 112a(2)(d) EPC is not a catch all clause for procedural defects. It merely empowers the legislature to define defects in the Implementing Regulations in addition to the defects mentioned in Article 112a EPC. Rule 104 EPC exhaustively defines exactly two defects; a violation of any of the provisions of the RPBA is not among them. (Cf. R 12/23, point 3.1.)

Against this backdrop, the first leg of defect 2, i.e. the petition, as far as it is based on Article 112a(2)(d) EPC in conjunction with Article 12(2) and (4) RPBA 2007, is obviously unfounded.

The submissions made in respect of these latter provisions will instead be considered as an assertion of violations of the right to be heard and be dealt with together with the further assertions of a violation of this right.

3.3 Defect "right to be heard"

In respect of apparently both legs of the above defects 1 and 2, the petitioner argued that its right to be heard was infringed (Article 112a(2)(c) in conjunction with Article 113(1) EPC). This contention must, in the EBA's opinion, be considered as referring to the Board's examination of inventive step starting from D10 instead of D5 (D5*), not explaining why D10 was a better starting point and not deciding on D5 (D5*) as closest prior art.

The petitioner does not assert that it was not given an opportunity to provide its comments on the facts and grounds relating to the proper prior art document to start from in examining inventive step. Both the decision (in point 2, also referred to by the petitioner) and the minutes (pages 4 to 7) provide ample evidence of the petitioner's active contribution to the debate on this topic. The letter of Article 113(1) EPC is therefore obviously fulfilled in respect of the proper starting point: the Board's decision was based "on grounds and evidence" (interpreted as the essential legal and factual reasoning; see Case Law, III.B. 2.3.2) on which the petitioner had an opportunity to present its comments.

The question of whether the Board's examination of inventive step starting from D10 instead of D5 (D5*) was correct relates to the merits of the decision.

In this context it must be noted that the EBA, in proceedings under Article 112a EPC, is generally prevented from assessing the correctness of a decision. In the "Case Law" under the heading: "[V.B.]3.4.3 No suspensory effect - review of substantive law excluded" the following principle is set out *inter alia*:

Under no circumstances may the petition for review be a means to review the application of substantive law. ... The Enlarged Board has no competence under Article 112a EPC to examine the merits of the decision and to go into the substance of a case... It is not the purpose of petition

for review proceedings to evaluate whether or not the reasons selected by the Board are appropriate...; the Enlarged Board cannot replace a Board's substantive assessment with its own... The Enlarged Board cannot act as a third instance or second-tier appellate tribunal in petition proceedings...

It follows that the EBA does not have the power to assess the correctness of the Board's examination of inventive step starting from D10 instead of D5 (D5*).

The Board's examination of inventive step starting from D10 instead of D5 (D5*) implies that the Board selected a closest prior art. If the Board concludes on the basis of the selected item that the subject-matter of a claim is not based on an inventive step starting from said closest prior art, then it follows from logic that there is no need to assess other items of prior art. It follows further that there is no need to explain why a specific item was selected as closest prior art. Not providing such an explanation can therefore not constitute a violation of the petitioner's right to be heard.

In conclusion, no violation of the right to be heard can be found in respect of the first and second asserted fundamental procedural defects.

4. The third fundamental procedural defect (point 7 of the petition)

4.1 The failure to hand down a decision on Article 19(1) RPBA

4.1.1 The petition is obviously unfounded insofar as the defect is based on a violation of Article 112a(2)(d) in conjunction with Article 19(1) RPBA 2020. As explained above (in point 3.2), Article 112a(2)(d) EPC is no catch all clause for procedural defects. The only two defects it currently refers to are those mentioned in Rule 104(a) and (b) EPC.

4.1.2 The petition is also based on one of these two defects, i.e. Rule 104(b) EPC.

The petitioner's arguments

According to the petitioner, based on objection 4, the decision that the right to be heard (Article 113(1) EPC) was not violated, could not be taken without first providing a decision with respect to Article 19(1) RPBA 2020 (see bottom of page 8 to top of page 9). According to the petitioner, "[t]he important part of objection 4" (point XXVII (x) (i) of the decision) was the breach of secrecy:

The appellant's right to be heard under Article 113(1) EPC was violated because of the room incident. **Article 19(1), third sentence, RPBA 2020 stated that the Board's deliberations had to be secret.** It was thus a severe problem when a party entered the room during a Board's deliberation and closed the door without the other party being present. (Emphasis added.)

The petitioner failed to find any case law, which related to Article 19(1) RPBA 2020, such as when the secrecy had been breached by a representative entering the room during the deliberation of the Board. It would therefore be relevant for the EBA to answer the questions:

1. When is the secrecy of the deliberation of the Board considered to be breached?

2. What would the appropriate remedy, or sanction, be when the secrecy of the deliberation by the Board has been breached?

Apparently, the petitioner is of the view that “a decision with respect to Article 19(1) RPBA 2020” would have been required holding, in particular, “That breach of secrecy is considered to lead to a violation of Art 113(1) EPC.” Instead, the decision stated in a conclusionary fashion under point 26.1.3 that the “room incident” did not lead to a violation of the right to be heard.

The EBA’s analysis

It is assumed, favourably for the petitioner (appellant before the Board), that the Board was in a position to understand from the appellant’s submissions that it requested “a decision with respect to Article 19(1) RPBA 2020” even though no such request is among the appellant’s final requests (see point 3.1 above).

- The petitioner’s view on the meaning of “a decision with respect to Article 19(1) RPBA 2020” as a precondition for assessing compliance with the right to be heard

The petitioner, in particular by means of the above two questions, itself expressed doubts as to the nature of such a decision.

Answering the second of the two questions, i.e. what would be the appropriate remedy, or sanction, when the secrecy of the deliberation by the technical Board has been breached, the EBA notes that under the EPO’s Staff Regulations members of the boards of appeal must maintain strict secrecy concerning the Boards’ deliberations. Any misconduct by a Board member may make them liable to disciplinary action by the Administrative Council being Board members’ appointing authority. If applicable, before such action is taken, the matter must be referred to a Disciplinary Committee for a reasoned opinion. (The EBA notes *obiter* that it sees no indications in the file of misconduct on the part of any one of the Board members handling the present case.)

Thus the answer to the first question, when is the secrecy of the deliberation of the Technical Board considered to be breached, would, only in case of any action taken by the Administrative Council, be for that body to provide. The EBA is not aware of any such decision having been adopted so far.

In any case, a decision on Article 19(1) RPBA entailing possible remedies or sanctions in case the secrecy of the deliberation was breached could not have been handed down by the very body the secrecy of whose deliberations would need to be investigated, that is by the Board that gave the decision under review.

- The Board's "decision" on Article 19(1) RPBA

The Board, in point 26.1 of its decision, did extensively address the "room incident" denying that the representative could have gained any information from the deliberation

In point 26.1.3 (at the end of the second paragraph) the Board concluded that the "room incident" could not give cause to question the fair and orderly conduct of the oral proceedings or that the respondent's representative obtained knowledge or information about the case from the Board in an unfair manner. Nor did the Board accept the appellant's argument that even if the Board did not talk with the respondent's representative about substantive matters of the case, he may nevertheless have gained information about the case while being in the deliberation room with the Board (see the beginning of the third paragraph).

- Summary

In summary, the asserted defect that the Board failed to decide on Article 19(1) RPBA pronouncing a remedy or sanction has no purpose, because the Board would not have been the appropriate body for giving such a decision. Insofar as the Board did deal with the "room incident" in the decision, the asserted defect has no basis.

4.2 Article 113(1) EPC

4.2.1 Breach of the secrecy of deliberation

With objection 4 relied on in the petition the petitioner asserts that: "The appellant's right to be heard under Article 113(1) EPC was violated because of the "room incident". Article 19(1), third sentence, RPBA 2020 stated that the Board's deliberations had to be secret."

In the context of the criticised failure to hand down a decision under Art 19(1) RPBA the petitioner contends that the required decision under Article 19(1) RPBA should cover "That breach of secrecy is considered to lead to a violation of Article 113(1) EPC." (See bottom of page 8.)

The EBA's answer to these assertions is as found below:

First, it follows from the reasons given in point 3.1 above that no violation of Article 113(1) EPC in connection with a failure to adopt a decision under Article 19(1) RPBA can be detected: the Board could not have handed down a decision pronouncing a remedy or sanction. On the other hand, the Board did address in its decision the topic of its compliance with the requirement of the secrecy of its deliberations.

Second, it is not conceivable to the EBA why, as the petitioner apparently believes, non-compliance Article 19(1), third sentence, RPBA according to which “[t]he deliberations shall be secret” would automatically entail a violation of the right to be heard.

As to the “room incident”, the petitioner has not asserted that it was *generally* unable to comment on the facts and grounds given in the decision under review relating to that incident. Rather, the incident was discussed during the oral proceedings (see point XIV(d) of the decision). The petitioner also filed objection 4 and objection 5 (expanding on objection 4) pursuant to Rule 106 EPC (see *idem* and point XIX) that were discussed in point 26.1 of the decision.

The petitioner, however, made two *specific* assertions relating to the right to be heard in connection with the “room incident”. They will be discussed in the following two sections.

4.2.2 Contradiction between decision and minutes on whether deliberation was ongoing when representative entered the room

The petitioner (in the second part of page 9 and the first para. of page 10) points to a “surprise statement” in the *decision* (on page 167) amounting to a discrepancy with the minutes: the decision suggested that the deliberation of the Board had been finished when the respondent’s representative entered the room:

“It can be assumed that the Board, **if it had still been deliberating**, would have **interrupted** the deliberation **as soon as** the respondent's representative **entered** the room.” (Emphasis added.)

Conversely, in the *minutes* it was said that the deliberation was still ongoing:

“The chairwoman **immediately** asked him to leave the room **as the Board was deliberating...**” (Emphasis added.)

The EBA notes that in the section of the decision addressing the “room incident” the respective part of the minutes is reproduced at the outset of point 26.1.1; it includes the above sentence. The representative’s witness statement is set out in point 26.1.2. The “surprise statement” is made in point 26.1.3 analysing the “room incident” on the basis of points 26.1.1 and 26.1.2.

According to the above sentence in the *minutes*, when the representative entered the room, he was immediately asked to leave it; this implies that the deliberation was interrupted. The above sentence in the *decision* leaves open whether the Board was deliberating when the representative came into the room. Yet, if so, according to the decision, the Board would have interrupted the deliberation.

The legal effect of both sentences thus is the same: according to both sentences, the representative was unable to obtain knowledge of the contents of the deliberation. It follows that the fact that the petitioner could not comment on the sentence in the decision had no causal

connection with the outcome of the case, i.e. the assessment of whether any of the claim requests was allowable.

A violation of the right to be heard must therefore be denied.

4.2.3 Decision incorrect: not undisputed that representative was immediately asked to leave

The petitioner's assertions

The petitioner denies that the chair immediately (after entry) asked the representative to leave the room (see middle of page 7 to top of page 8). It contends that the second sentence of point 26.1.3 is not correct:

26.1.3 [first sentence] The Board finds that the descriptions of the sequence of events in the room incident in the minutes [set out in point 26.1.1] and the witness statement [reported in point 26.1.2] are substantially the same and do not contradict each other.

[second sentence] The Board further notes that these descriptions have not been challenged by the appellant.

Nor was the more specific third sentence of the second paragraph of point 26.1.3 correct:

It is undisputed that the respondent's representative had immediately been asked by the chair to leave the room...

The petitioner puts forward that, according to the minutes (on page 42), it contested that it followed from the representative's witness statement that he entered the room without the Board immediately noticing him being in the room. Rather, the representative "had been in the room for some time before the chairwoman had seen him." In the petitioner's view, it was enough that there was a suspicion that the respondent's representatives had gained information they should not have.

The EBA's view

The Board made it clear, as set out in the preceding section, that in no case could the representative have gained knowledge of the contents of the deliberation. As a consequence, whether or not

It is undisputed that the respondent's representative had immediately been asked by the chair to leave the room..."

is immaterial. What is decisive is that the Board affirmed that the representative could not have gained knowledge of the deliberation, because the Board itself witnessed the facts surrounding the "room incident".

As the question of whether the above statements by the Board are disputed or not is immaterial, it is also immaterial that the Board did not address this dispute in its decision. It follows that the petitioner's right to be heard cannot have been infringed for this reason.

4.2.4 New “legal and factual reasoning” on which petitioner could not comment

It is not clear to which reasoning this point (final paragraph of point 7 on page 10 of the petition) relates. To the extent that it is the reasoning dealt with above, the petition is clearly unfounded. Otherwise, the objection is unclear and cannot be assessed.

4.3 Discussion of the petitioner’s response to the EBA’s communication

The petitioner’s response relates to the “room incident” only (see point III above).

4.3.1 Article 19(1) RPBA

The petitioner contends that the secrecy of deliberation was not a relative or harm-based requirement. The moment a party’s representative entered the deliberation room during deliberations, secrecy was broken. This breach was a fundamental procedural defect within the meaning of Article 112a(2)(d) EPC.

In respect of these comments, the EBA can only repeat what it held above in point 3.2: the petition is obviously unfounded insofar as the defect is based on a violation of Article 112a(2)(d) in conjunction with Article 19(1) RPBA 2020. Article 112a(2)(d) EPC is no catch all clause for procedural defects. The only two defects it currently refers to are those mentioned in Rule 104(a) and (b) EPC.

The petitioner’s demands that

[t]o preserve the integrity, impartiality, and legitimacy of the EPO judicial system, a breach of deliberation secrecy must remain a per se fundamental procedural defect. Anything less renders the protection illusory and undermines confidence in the appeal system as a whole.

This demand can only be interpreted as a request to lawmakers to amend the Implementing Regulations such that Article 19(1) RPBA be mentioned therein, e.g. in Rule 104, as a (further) fundamental defect under Article 112a(2)(d) EPC.

In this context, the EBA also repeats that a remedy for the breach of the secrecy of the deliberation currently does exist: board members may be liable to disciplinary action by the Administrative Council (see point 4.1.2, first indent under the “EBA’s analysis”).

Given that the EBA is not empowered, in proceedings under Article 112a EPC, to scrutinise whether board members’ conduct meets the requirements of Article 19(1) RPBA, the EBA, in its communication, imposed no requirement at all on a recognition of a breach of the secrecy of deliberation, in particular no “harm” requirement.

Against this backdrop, it is not intelligible how “the EBA’s approach [to the “room incident” set out in its communication reproduced above in points 4.1 and 4.2] “effectively nullifies Article 19(1) RPBA 2020”.

As a consequence, to the extent that the petitioner’s response thereto relates to that provision, it is plainly beside the point.

It is therefore strictly *obiter* that the EBA will still briefly discuss below the petitioner’s statement in respect of the conditions for a deterrent effect of Article 19(1) RPBA that [t]he EPO’s judicial system depends on the *appearance* and *reality* of impartial and independent decision-making.

The EBA agrees. Yet, if the board members are unaware of anybody overhearing their deliberation, which, as the decision is saying, happened in this case regarding the representative (see above, point 4.2.3), they cannot be influenced in their decision-making. The board members’ impartiality and independence can therefore not be impaired by the presence of a person during their deliberation, in this case, of the representative. This is also the appearance that is conveyed to the public.

4.3.2 Article 113(1) EPC

4.3.2.1 On the “harm” requirement

A violation of the right to be heard will be found if the party concerned had not had an opportunity to present its comments on the essential legal and factual reasoning on which a decision is based (see above, point 3.3). This may be referred to as a “harm” requirement. Any criticism of the EBA imposing this requirement that follows from Article 113(1) EPC is obviously unfounded.

In connection with Article 19(1) RPBA the petitioner criticises that

The EBA’s preliminary opinion improperly requires the petitioner to prove what information the intruder actually obtained. This imposes an evidentiary burden that no party could ever meet, because breaches of deliberation secrecy occur by their nature without witnesses or records.

...

If no remedy exists unless the petitioner can demonstrate precisely what was overheard — something the secrecy rule itself prevents them from discovering — then no intrusion will ever meet the threshold for a procedural defect.

This criticism is obviously based on the EBA’s analysis of the asserted breach of Article 113(1) EPC (see above, point 4.2). It presumably pertains to the paragraph in the communication (in the middle of point 4.2.1) starting with the sentence

Supposing ***arguendo*** (in contradiction with the findings in section 4.2.3 below) that the representative did perceive part of the deliberation, with the Board being unaware thereof, and had

the representative so been enabled to adapt his strategy in the oral proceedings, this might have amounted to a – coincidental – undeserved and thus unfair advantage. ...

This sentence clearly is a hypothetical assumption expressly identified as running counter to the EBA's preliminary opinion. The analysis of this hypothesis apparently still induced the petitioner to come to its above conclusion that the EBA required a party to prove the contents of the deliberation, which might be impossible to do. In order to remove any basis for such a distortion of the preliminary opinion, the EBA has removed the foregoing paragraph from the reproduction of the communication above in point 4.2. It is thus not part of this decision.

4.3.2.2 On the specific reference to the right to be heard

The Board's subsequent speculative reconstruction of the incident — without giving the petitioner the opportunity to comment — constitutes an additional violation of Article 113(1) EPC.

This criticism obviously relates to point II.3.2 of the facts and submissions part of this decision. It has been addressed, and refuted, in point 4.2.2 of the communication, which has been reproduced, and thus ratified, in the reasons above.

4.3.3 Conclusion

In conclusion, the petitioner's criticism of points 4.1 and 4.2 of the EBA's communication relating to the "room incident" in its response is obviously unfounded. As a consequence, the EBA affirms its preliminary view on these points, which now becomes final.

5. Overall conclusion

The EBA affirms its preliminary view not only on point 4.1 and 4.2, but on its communication as a whole, except for the paragraph in point 4.2 mentioned above in point 4.3.2.1.

None of the asserted procedural defects have occurred. The petition therefore has to be dismissed as clearly unallowable under Rule 109(2)(a) EPC. As a consequence, the requests that:

- the decision under review be set aside and that appeal proceedings be re-opened;
- in the event that the proceedings are re-opened, that they be entrusted to another Board of Appeal;
- the fee for the petition be reimbursed

have to be refused because the conditions of Rule 108(3) EPC have not been met.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly unallowable.

The Registrar:

The Chair:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated