Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 6 July 2026

Case Number: R 0016/25

Appeal Number: T 1021/23 - 3.5.07

Application Number: 18206048.3

Publication Number: 3467666

IPC: G06F15/16, H04N21/234, G06F16/738, G06F16/71, H04N5/783, H04N7/173, H04N7/24, H04L29/06, H04N21/472, H04N21/44, H04N21/6587, H04N7/00

Language of the proceedings: EN

Title of invention:
VIDEO DISTRIBUTION SYSTEM INCLUDING PROGRESSIVE PLAYBACK

Patent Proprietor:
DIVX, LLC

Opponents:
Netflix International B.V.
Amazon EU S.à.r.l.

Headword:
Petition for review

This datasheet is not part of the Decision
It can be changed at any time and without notice

Relevant legal provisions:
EPC Art. 76(1), 84, 112a(1), 112a(2)(c), 112a(4), 113(1), 123
EPC R. 106, 109(2)(a), 110, 127(2), 131(2), 131(4)
RPEBA Art. 13, 14(2)
RPBA 2020 Art. 13(2), 15(1)

Keyword:
Petition for review - clearly unallowable - fundamental violation of the right to be heard (no)
Objection under Rule 106 EPC - yes

This datasheet is not part of the Decisior
It can be changed at any time and without notic

Europäisches Patentamt
European Patent Office
Office européen des brevets

Große Beschwerdekammer

Enlarged Board of Appeal

Grande Chambre de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: R 0016/25

D E C I S I O N
of the Enlarged Board of Appeal
of 6 July 2026

Petitioner: (Patent Proprietor)	DIVX, LLC 4350 La Jolla Village Drive, Suite 950 San Diego, CA 92122 (US)
Representative:	Patentanwaltskanzlei Matschnig & Forsthuber OG Biberstraße 22 Postfach 36 1010 Wien (AT)
Other party: (Opponent 1)	Netflix International B.V. Karperstraat 10 1075 KZ Amsterdam (NL)
Representative:	Grosch, Marcus Quinn Emanuel Urquhart & Sullivan, LLP Mollstraße 42 68165 Mannheim (DE)
Other party: (Opponent 2)	Amazon EU S.à.r.l. 38 Avenue John F. Kennedy 1855 Luxembourg (LU)
Representative:	Krenz, Constanze DLA Piper UK LLP Maximilianstraße 2 80539 München (DE)
Decision under review:	**Decision T 1021/23 of Technical Board of Appeal 3.5.07 of 14 February 2025**

Composition of the Board:

Chair	C. Josefsson
Members:	M. Blasi
	M. O. Müller

Summary of Facts and Submissions

I. The petition for review, filed by the appellant-patent proprietor (petitioner), concerns decision T 1021/23, announced at the oral proceedings on 14 February 2025 and electronically notified to the parties as a written reasoned decision on 7 July 2025. With this decision, Technical Board of Appeal 3.5.07 (the Board) dismissed the petitioner's appeal against the opposition division's decision to revoke European patent No. 3 467 666.

II. The petition for review was filed on 3 September 2025, and the associated fee was paid on the same date via a debit order from the deposit account.

III. The petition for review is based on the ground under Article 112a(2)(c) EPC in conjunction with Article 113(1) EPC, i.e. that a fundamental violation of the petitioner's right to be heard occurred. The petitioner contends that the Board violated its right to be heard by not allowing the petitioner to present arguments in support of the compliance of auxiliary request 1.2''-b with Article 84 EPC during the oral proceedings on 14 February 2025, which were the second oral proceedings in the appeal proceedings.

IV. The petitioner requested that:
- decision T 1021/23 be set aside and the proceedings before the Board be re-opened
- the fee for the petition for review be reimbursed

V. The Enlarged Board of Appeal, composed as prescribed in Rule 109(2)(a) EPC, summoned the petitioner to oral proceedings in response to the petitioner's request.

In a subsequent communication pursuant to Articles 13 and 14(2) RPEBA, the Enlarged Board informed the petitioner of its provisional opinion.

VI. In a letter dated 4 June 2026, the petitioner made further submissions in writing in support of the petition for review.

VII. At the oral proceedings before the Enlarged Board, the petitioner put forward its arguments and reiterated its requests. At the end of the oral proceedings, the Chairman announced the order of this decision.

VIII. The case leading to the petition for review developed as follows.

(a) First oral proceedings took place on 6 and 7 June 2024. On the first day of these oral proceedings, the set of claims of auxiliary request 1.2''-b, which is the auxiliary request at stake, was filed.

According to the minutes of these first oral proceedings, the course of events was as follows.

- Before auxiliary request 1.2''-b was filed, the following issues had been addressed at the oral proceedings:
  - with respect to the main request (patent as granted): claim construction, stay of proceedings, referral to the Enlarged Board of Appeal and the ground for opposition relating to added subject-matter
  - with respect to auxiliary requests 1.1, 1.2, 1.2', 1.2'' and 1.2''': added subject-matter under Article 76(1) EPC

In the course of these events, after an interruption for deliberation, the Chair informed the parties of the Board's "*opinion*" on some of these issues, specifically on aspects of claim construction and the fact that claim 1 of each of these requests comprised added subject-matter.

- After auxiliary request 1.2''-b was filed, the parties were heard on the issue of admittance ("*admissibility*") of this newly filed request. After deliberation, the Chair informed the parties "*of the board's opinion that [the request] was admissible. The Chair then informed the parties that the next issue to be discussed appeared to be novelty and inventive step of [the request]. In this context, the Chair heard the parties on a possible remittal*" (see minutes of the first oral proceedings, page 5, last two paragraphs).

- In the course of the subsequent discussion, the respondents raised objections under Articles 76(1), 123(2) and (3), and 84 EPC against the claims of auxiliary request 1.2''-b. The admittance ("*admissibility*") of these objections was discussed at the end of the first day and the beginning of the second day of the first oral proceedings.

- After deliberation by the Board, the "*Chair informed the parties of the board's opinion that it admitted the objections under Article 76(1) EPC as far as they related to the amendment made in auxiliary request 1.2''-b (i.e. omitting that the connection is closed), the objections under Article 84 EPC (which should not concern the text of the patent as granted) and the objections raised exclusively by respondent 2 which were all directly*

linked to the amendment made" (see minutes of the first oral proceedings, page 6, fourth paragraph).

- According to the minutes, the Board then dealt with, and dismissed, objections under Rule 106 EPC, which had been raised by the two respondents since not all objections were admitted by the Board.

- Subsequently, the minutes contain the following statements:

  "*The parties agreed to be heard on, and were then heard on, the admitted objections under Articles 76(1), 84 and 123(3) EPC in regard of auxiliary request 1.2''-b and again on the issue of a possible remittal regarding novelty and inventive step of [this request].*

  The Chair then informed the parties that the debate on the main request and auxiliary requests 1.1, 1.2, 1.2', 1.2'', 1.2''' and 1.2''-b and on the issue of a remittal was closed, with the exception that for auxiliary request 1.2''-b the debate for the issues of novelty and inventive step was not closed. The parties agreed to continue the proceedings in writing."

  (see minutes of the first oral proceedings, page 7, second and third paragraphs)

- The Chair then gave the "*decision*" that the "*appeal proceedings will continue in writing*".

(b) Ahead of the second oral proceedings, which took place on 14 February 2025, the Board issued further communications, and the parties filed further submissions.

In particular, the Board issued a communication pursuant to Article 15(1) RPBA dated 31 July 2024 in which it, *inter alia*:

- summarised the course of the first oral proceedings
- provided, under the heading "*First oral proceedings – Main conclusions*", the relevant submissions of the parties and set out its considerations for its opinion on:
  - the main request and auxiliary requests 1.1, 1.2, 1.2', 1.2'' and 1.2''' concerning the issues discussed
  - auxiliary request 1.2''-b in respect of the issues of:
    - the admittance("*admissibility*") of the claim request under Article 13(2) RPBA
    - the (non-)admittance ("*admissibility*") of the objections raised by the respondents under Articles 76(1), 84 and 123 EPC
    - the merits of the admitted objections in relation to claim 1, including a finding of lack of clarity under Article 84 EPC
- addressed, under the heading "*Second oral proceedings – remaining requests*", the further auxiliary requests, indicating that the objections dealt with at the first oral proceedings might also apply to one or more of these further requests
- informed the parties under "*Other procedural matters*" of its intention concerning remittal of the case

(c) After this communication of the Board, further submissions were made:

- by the petitioner, some of which enclosed the claims of further auxiliary requests
- by the respondents

Further communications were issued by the Board.

(d) In the course of the second oral proceedings, which took place on 14 February 2025, the petitioner requested that the debate on auxiliary request 1.2''-b be re-opened. The Board rejected this request. The petitioner also raised the following objection under Rule 106 EPC:

"*We hereby raise a procedural objection based on Art. 112a(2)(c) EPC. The Board explained that the objections in the official communication of 31 July 2024 were preliminary and could be debated during the oral proceedings and that the debate was not concluded on the second day of the oral proceedings. Against this background, the Board should have allowed us to defend the patent on the basis of auxiliary request 1.2''-b.*"

After having heard the petitioner, the Board dismissed the objection and decided not to re-open the debate on auxiliary request 1.2''-b.

Reasons for the Decision

Admissibility of the petition for review

1. The petition is not clearly inadmissible.

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, and Rule 131(2) and (4) EPC. The decision against which the petition for review is directed terminated the appeal proceedings before the Board and adversely affected the petitioner within the meaning of Article 112a(1) EPC since the petitioner's appeal was dismissed.

3. As the petition for review is based on the ground in Article 112a(2)(c) 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 an objection could not be raised during the appeal proceedings.

4. During the second oral proceedings before the Board on 14 February 2025, the petitioner did raise an objection under Rule 106 EPC as regards the Board's position not to re-open the debate on auxiliary request 1.2''-b. This objection was dismissed by the Board at the oral proceedings.

5. Rule 106 EPC is therefore complied with.

Allowability of the petition for review

6. The petition for review is clearly unallowable.

7. The petitioner submitted that its right to be heard had been violated because the petitioner had not been allowed to present its arguments in support of the compliance of auxiliary request 1.2''-b with Article 84 EPC during the second oral proceedings as the Board rejected the petitioner's request for a re-opening of the debate on this auxiliary request. The petitioner considered this violation fundamental because claim 1 of this auxiliary request was found unclear by the Board and, thus, to contravene Article 84 EPC.

8. The Enlarged Board does not find fault with the Board's decision not to re-open, at the second oral proceedings, the debate on whether the set of claims of auxiliary request 1.2''-b complied with Article 84 EPC, the consequence of which was that it did not allow the petitioner to make further submissions in relation to auxiliary request 1.2''-b at that stage of the appeal proceedings.

9. Auxiliary request 1.2''-b was rejected by the Board for lack of compliance with Article 84 EPC in view of such an objection under Article 84 EPC raised by the respondents against claim 1 of this request.

9.1 The Enlarged Board cannot establish that the petitioner had no opportunity to present its comments on this aspect.

9.2 As can be derived from the minutes of the first oral proceedings, the parties were informed during these oral proceedings which of the objections that had been raised by the respondents against auxiliary request 1.2''-b were admitted by the Board. The minutes then explicitly state that "[*t]he parties agreed to be heard on, and were then heard on, the admitted objections under Articles 76(1), 84 and 123(3) EPC in regard of auxiliary request 1.2''-b.*" (see section VIII above). No request for correction of the minutes in this respect was submitted to the Board by any of the parties to the appeal proceedings, including the petitioner.

9.3 Moreover, at the oral proceedings before the Enlarged Board, the petitioner confirmed that, after informing the parties which objections raised by the respondents against auxiliary request 1.2''-b would be admitted and which would not, the Board's Chairperson had confirmed with the parties that they had all made their submissions on these objections.

9.4 Had there been any uncertainty on the petitioner's part as to whether it had understood the objections raised by the respondents correctly, it could have sought clarification at that stage of the proceedings. However, no such point was raised by the petitioner.

9.5 At the oral proceedings before the Enlarged Board, the petitioner highlighted that all this happened at the end of the second day of the first oral proceedings, in the late afternoon, as a lot of the time available had been consumed due to the respondents' objections under Rule 106 EPC raised earlier.

9.6 However, it would have likewise been for the petitioner to request, for example, that the oral proceedings be adjourned so that it could comment in writing on the newly raised and admitted objections to auxiliary request 1.2''-b, including the objection under Article 84 EPC which ultimately led to the rejection of this claim request, or, at least, that the debate on these issues not be closed. Instead, the petitioner accepted that the first oral proceedings before the Board proceed, agreed to be heard on, and was heard on, the admitted objections on substance, and did not object to the Chairperson closing the debate on, *inter alia*, auxiliary request 1.2''-b as regards these newly raised and admitted objections.

9.7 From the above, the Enlarged Board can only conclude that the petitioner did have the opportunity to provide comments on the objections under Article 84 EPC which led to the rejection of auxiliary request 1.2''-b.

9.8 The conclusion that the petitioner's right to be heard was not violated would not change even if the Enlarged Board were to assume that, as alleged by the petitioner, during the first oral proceedings, the debate on, *inter alia,* Article 84 EPC was first closed with regard to auxiliary request 1.2''-b (when it was admitted) and subsequently re-opened (to allow the respondents to present their objections, *inter alia,* under Article 84 EPC).

Re-opening the debate on this issue would not mean that there was no opportunity for the petitioner to comment. On the contrary, it gave the petitioner the opportunity to comment on the compliance of auxiliary request 1.2''-b, *inter alia,* with Article 84 EPC in light of the respondents' objections.

10. Furthermore, the Enlarged Board does not find fault with the Board having rejected the petitioner's request, made at the second oral proceedings, that the debate, which was closed for discussing, *inter alia*, the clarity of auxiliary request 1.2''-b, be re-opened.

10.1 As can be derived from the minutes of the second oral proceedings, the parties were given the opportunity to present their comments as regards the requested re-opening of the debate. Accordingly, the petitioner was heard on its request, and no violation of Article 113(1) EPC occurred in this respect.

10.2 Moreover, the Enlarged Board cannot establish that the Board's decision not to re-open the debate, taken in exercise of its discretion, involved any error in the exercise of that discretion. Specifically, it was neither arbitrary nor manifestly incorrect.

The Board set out its reasoning for its decision not to re-open the debate in point 24.1 ff of the Reasons of the decision under review. The considerations relied upon by the Board included that it had already closed the debate at the first oral proceedings on the issues for which the debate was to be re-opened at the second oral proceedings, that the parties had had the opportunity to present their comments on these issues before the debate was closed, that re-opening the debate was considered an exceptional measure, and that the petitioner, in its subsequent letters dated 16 August 2024 and 17 January 2025, had neither expressed the need to re-open the debate with regard to auxiliary request 1.2''-b nor argued that it had not been given sufficient opportunity to be heard on the objections against that request.

10.3 With respect to the Board's decision not to re-open the debate, the petitioner brought forward in the petition for review that it was unfairly and unequally treated compared to the respondents. The petitioner submitted that even though the Board had already found in the petitioner's favour on Article 84 EPC as regards auxiliary request 1.2''-b when admitting this request, the debate which had at least implicitly already been closed on this issue was re-opened at the first oral proceedings after the respondents' complaints, thereby allowing the respondents to present their objections, including those under Article 84 EPC. In contrast, the debate which had been closed in relation to, *inter alia*, auxiliary request 1.2''-b at the end of the first oral proceedings was not re-opened in the petitioner's favour, despite the petitioner's request to this effect. Moreover, the Board itself, in its communication under Article 15(1) RPBA dated 31 July 2024, had suggested that its conclusions on Article 84 EPC as regards auxiliary request 1.2''-b were merely provisional and therefore could be debated at the second oral proceedings.

10.4 More specifically, the petitioner submitted that, in relation to auxiliary request 1.2''-b, the Board had "*agreed with the proprietor [who had presented arguments on compliance with Articles 76(1), 123(2), 84 and 123(3) EPC] and closed the debate on Art. 100(c) EPC in the proprietor's favour, announcing its intention to proceed to Art. 100(a) EPC*" on the first day of the first oral proceedings (see petition for review, page 8, penultimate paragraph, emphasis in the original). The petitioner found this understanding supported by the minutes of the first oral proceedings

and the Board's communication under Article 15(1) RPBA dated 31 July 2024.

10.5 However, the Enlarged Board cannot see any such support for a finding that the Board had already concluded in the petitioner's favour on compliance with Article 84 EPC.

10.5.1 The minutes of the first oral proceedings do not indicate that, in respect of auxiliary request 1.2''-b, the Board had given any opinion on compliance with substantive provisions such as Article 84, Article 123(2) and (3) or Article 76(1) EPC. A finding that a claim request complies with one or all of these provisions would be a finding separate from the procedural admittance of this request into the proceedings.

When considering the admittance of a claim request, a board of appeal may take into account whether the claims *prima facie* comply with the substantive provisions and whether the claim request overcomes an issue which was prejudicial to a higher-ranking claim request.

However, even if it were assumed that the Board took such an aspect into account when admitting auxiliary request 1.2''-b, this would not mean that it had also made a final assessment of compliance with one or more of these substantive provisions. Hence, the fact that auxiliary request 1.2''-b was admitted by the Board in no way supports the petitioner's assertion that the Board agreed with the petitioner that this auxiliary request was ultimately in compliance with the requirements of Article 84 EPC.

10.5.2 Moreover, the respondents, in their respective letters dated 24 July 2024 and 25 July 2024 containing requests for correction of the minutes, had submitted that the minutes did not appear to reflect the fact that, during the discussion on the admittance of auxiliary request 1.2''-b, respondent I's representative had stated that Articles 76 and 84 EPC would need to be further discussed if the request were admitted by the Board (see respondent I's letter dated 24 July 2024, page 2, last paragraph; respondent II's letter dated 25 July 2024, page 3, paragraph 10). Respondent II had further submitted that "*it should be added that the Board has not given its opinion on the objections admitted against auxiliary request 1.2''-b under Articles 76(1), 84 and 123(3) EPC*" (see respondent II's letter dated 25 July 2024, page 4, paragraph 12).

In response to these requests, the minutes of the first oral proceedings were not corrected since the Board did not consider the statements suggested for inclusion by the respondents to be essential (see communication dated 8 August 2024, page 2). The petitioner did not reply to these requests for correction and, in particular, did not provide, at that stage of the proceedings, any opposing view as regards the content of the discussions at the first oral proceedings.

10.5.3 Furthermore, the petitioner's reference to the communication under Article 15(1) RPBA dated 31 July 2024 likewise does not support an understanding that the Board had concluded that auxiliary request 1.2''-b complied with the provisions of Article 84 EPC.

Point 7.1 of this communication referred to by the petitioner concerns the petitioner's submissions, as summarised by the Board. Indeed, according to this summary, the petitioner had, *inter alia,* relied on three decisions issued by the competent technical board of appeal, at least one of which had admitted a claim request because it was considered clearly allowable. However, the Board's own considerations for admitting auxiliary request 1.2''-b are set out in points 7.3 to 7.5, after also summarising the respondents' submissions in point 7.2. According to the Board, exceptional circumstances under Article 13(2) RPBA had been present as the Board had deviated from its preliminary opinion as communicated to the parties in writing in two relevant aspects and had based the rejection of the main request and auxiliary requests 1.1, 1.2 and 1.2' on a new objection concerning added subject-matter that, in the Board's view, had been raised by the respondents for the first time at the first oral proceedings before the Board.

Hence, considerations as to compliance with substantive provisions such as Article 84 EPC were not relevant to the Board when admitting auxiliary request 1.2''-b.

Finally, the fact that, in the communication under Article 15(1) RPBA dated 31 July 2024 issued in preparation for the second oral proceedings, the Board set out its considerations in relation to the respondents' objections that were raised at the first oral proceedings, including the admitted objection under Article 84 EPC, does not change the fact that the debate on these objections had already been closed at the end of the first oral proceedings. The communication dated 31 July 2024 does not contain any statement to the effect that the Board re-opened the

debate that had been closed at the first oral proceedings, *inter alia,* in relation to auxiliary request 1.2''-b.

10.6 The Enlarged Board can also not establish that, at the first oral proceedings, in addition to the closure of the debate at the end of the second day of the first oral proceedings, an earlier closure and re-opening of the debate had occurred in relation to auxiliary request 1.2''-b, as submitted by the petitioner.

10.6.1 The minutes of the first oral proceedings do not mention a closure and re-opening of the debate other than the closure of the debate, at the end of the second day of the first oral proceedings, in relation to certain issues as stated in the third paragraph on page 7 of the minutes of the first oral proceedings. A prior (first) closure and subsequent re-opening of the debate, especially with regard to submissions relating to Article 76, 84 or 123 EPC concerning auxiliary request 1.2''-b, are not mentioned in the minutes.

10.6.2 At the oral proceedings before the Enlarged Board, the petitioner emphasised that the debate on auxiliary request 1.2''-b had been closed and re-opened, at least implicitly.

10.7 However, the issue of whether the debate on auxiliary request 1.2''-b had been closed at an earlier stage of the first oral proceedings and subsequently re-opened, either explicitly or implicitly, or whether the debate had been closed at this earlier stage at all, is ultimately not decisive.

Even on the assumption that, at the first oral proceedings, as alleged by the petitioner, the debate on auxiliary request 1.2''-b concerning issues under Articles 76(1), 84 and 123(2) EPC had been closed with the admittance auxiliary request 1.2''-b and had subsequently been re-opened to give the respondents the opportunity to make further submissions on Articles 76(1), 84 and 123(2) EPC, the Enlarged Board cannot find that the Board's decision at the second oral proceedings not to re-open the debate on auxiliary request 1.2''-b regarding the issue of whether this request complied, *inter alia,* with Article 84 EPC, after that debate had undisputedly been closed at the end of the first oral proceedings, amounted to unfair and unequal treatment of the petitioner compared with the respondents.

10.7.1 While the respondents, at the first oral proceedings, made it clear, immediately after it became apparent that the Board might not further discuss the compliance of auxiliary request 1.2''-b with the substantive requirements under Articles 76(1), 84 and 123(2) EPC, that they wished to make further submissions on these issues, the petitioner behaved differently.

In its letter of 16 August 2024, submitted in response to the Board's purported change of opinion in its communication under Article 15(1) RPBA dated 31 July 2024, the petitioner stated that "[*a*]*lthough we do not withdraw the previous Main Request and all auxiliary requests up to and including Auxiliary Request 1.2''-b, we acknowledge that decisions on these requests have already been made, and any further discussion on them is unnecessary. We therefore anticipate that any new examination will begin with the*

new requests presented below" (petitioner's letter dated 16 August 2024, page 2, end of section I.).

10.7.2 Hence, the petitioner expressly acknowledged that the discussion on, *inter alia*, auxiliary request 1.2''-b had already taken place. It neither disputed this nor made any further substantive comments on the point on which it had wished to make a submission. The same applies with regard to the petitioner's subsequent letter dated 17 January 2025 (see page 3, first paragraph).

10.7.3 It was only at a much later stage of the proceedings, namely at the second oral proceedings on 14 February 2025, that the petitioner made it clear that it wished to make further submissions on auxiliary request 1.2''-b and accordingly requested a re-opening of the debate. Hence, the timing of the petitioner's request for a second re-opening of the debate is entirely different from that of the respondents' request for a first re-opening of the debate.

10.7.4 The procedural acts and the timing of the petitioner's request for a re-opening of the debate were among the aspects which the Board had taken into consideration for its decision not to re-open the debate on auxiliary request 1.2''-b that had been closed at the end of the first oral proceedings (see point 24.6 of the Reasons of the decision under review and point 10.2 above).

10.7.5 At the oral proceedings before the Enlarged Board, the petitioner emphasised that it replied to the communication under Article 15(1) RPBA by making further amendments and by reducing the number of auxiliary requests. It argued, however, that it had not been permitted to submit further arguments on auxiliary request 1.2''-b, although this would have been a legitimate way to respond.

10.7.6 While, indeed, the petitioner had, subject to admittance, several ways to respond at its disposal, it was only at the second oral proceedings that the petitioner indicated that it wished to present further arguments on auxiliary request 1.2''-b.

11. Lastly, the Enlarged Board cannot identify any violation of the petitioner's right to be heard as guaranteed by Article 113(1) EPC, even if it were to proceed on the basis of the procedural course of events described by the petitioner, namely that the Board, when admitting auxiliary request 1.2''-b at the first oral proceedings, had informed the parties of its view that the requirements of Articles 76(1), 84 and 123 EPC were met but, after allowing the respondents to present objections under these provisions and holding a further discussion at the first oral proceedings, changed its opinion, in particular on compliance with Article 84 EPC, and informed the parties of this for the first time in its communication dated 31 July 2024.

11.1 In these circumstances, the Enlarged Board concludes that the petitioner had been given the opportunity to present its comments on the respondents' objection under Article 84 EPC in the course of the discussion at the first oral proceedings. The fact that the petitioner only learnt at a later stage that one of

these objections, here an objection under Article 84 EPC, was the aspect considered decisive by the Board and on which the rejection of auxiliary request 1.2''-b would be based, is not relevant under Article 113(1) EPC.

11.2 Article 113(1) EPC does not confer any right on the parties, in this case the petitioner, to obtain the opinion of the Board on the aspects on which the parties have been heard before the final decision is taken. Nor did it give the petitioner the right, merely because the Board's opinion was unfavourable to it, to a further opportunity to comment in an attempt to persuade the Board otherwise.

Conclusions

12. In view of the above, the Enlarged Board is unable to establish that a violation of Article 113(1) EPC occurred, let alone a fundamental one within the meaning of Article 112a(2)(c) EPC.

13. The decision under review is therefore not to be set aside, and the proceedings are not to be re-opened. Hence, in accordance with Rule 110 EPC, no reimbursement of the fee for the petition for review can be ordered and, consequently, the petitioner's request for reimbursement of the fee must also be rejected.

14. Thus, the petition for review is clearly unallowable.

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 C. Josefsson

Decision electronically authenticated