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**Datasheet for the interlocutory decision
of 11 March 2026**

Case Number: T 0246/23 - 3.3.09

Application Number: 16803229.0

Publication Number: 3296282

IPC: C07C17/358, B01J27/125,
B01J27/135, C07C21/18,
C07B61/00

Language of the proceedings: EN

Title of invention:
METHOD FOR PRODUCING HYDROHALOFLUOROOLEFINS

Patent Proprietor:
Central Glass Company, Limited

Opponent:
ARKEMA FRANCE

Headword:
Suspicion of partiality

Relevant legal provisions:
EPC Art. 24(3), 24(4), 104(1), 114(1)

Keyword:
Suspicion of partiality - (no)
Apportionment of costs - (no)

Decisions cited:

G 0009/92, G 0004/93, T 1544/07, T 0882/17, T 1175/22,
T 0646/08, T 1773/22, T 1472/21

Catchword:



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Case Number: T 0246/23 - 3.3.09

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.3.09
of 11 March 2026

Appellant: ARKEMA FRANCE
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
12 December 2022 concerning maintenance of the
European Patent No. 3296282 in amended form.**

Composition of the Board:

Chairman M. Kollmannsberger
Members: A. Zellner
T. Bokor

Summary of Facts and Submissions

- I. The appellant (opponent) appealed the opposition division's decision concerning maintenance of European patent No. 3 296 282 in the form of auxiliary request 3. The appeal case was allocated to a Board (in the following 'original Board') pursuant to Article 1(3) RPBA composed of members of the Technical Board of Appeal 3.3.10, according to the business distribution scheme in force at that time.

- II. Before the opposition division the patent proprietor's main request was the rejection of the opposition, i.e. the maintenance of the patent as granted. The division decided on the main and first to third auxiliary requests. The proprietor did not appeal and they are now respondents to the opponent's appeal. They filed with the reply to the grounds of appeal auxiliary requests 3, 3a, 4, 4a, 5 and 5a, where the maintained auxiliary request 3 was the main request. Auxiliary request 5b was received on 27 March 2024.

- III. The original Board informed the parties in a communication in preparation to oral proceedings dated 16 January 2025 that it was of the preliminary view that the methods in claim 1 of all the requests lacked an inventive step. No other objections were raised in the communication.

- IV. Oral proceedings before the original Board took place on 7 August 2025. During the oral proceedings, the original Board announced its conclusion that the method in claim 1 of auxiliary requests 3, 3a, 4 and 4a lacked an inventive step. Upon opening of the debate on auxiliary request 5, the original Board informed the

parties of its preliminary view that the request contravened the principle of the prohibition of *reformatio in peius*. The Board considered that claim 1 of the auxiliary request 5 was broader in scope than claim 1 of the upheld auxiliary request 3.

- V. The respondent raised an objection of suspected partiality under Article 24(3) EPC against all Board members. It argued that an objection with respect to the principle of the prohibition of *reformatio in peius* (in the following 'the prohibition') could only be raised by another party, and in no case by a Board of appeal. Since the original Board raised the objection *ex officio*, it was "on the side" of the opponent/appellant and thus could be suspected of partiality within the meaning of Article 24(3) EPC.
- VI. The original Board discussed the admissibility of the objection with the parties in the oral proceedings and announced its decision in the oral proceedings that the objection was admissible. The written interlocutory decision was notified to the parties on 5 September 2025.
- VII. As foreseen by Article 24(4) EPC the composition of the Board has been changed for the purposes of a decision on the objection under Article 24(3) EPC, and the present Board (in the following 'the Board') has taken over the case.
- VIII. The Board issued a communication under Rule 100(2) EPC and invited the parties to present their arguments on the objection under Article 24(3) EPC and to state whether their request for oral proceedings was also maintained for the single issue of the objection. The

Board also indicated that it did not intend to summon to oral proceedings in the absence of such a request.

- IX. The respondent patent proprietor made submissions with letters dated 19 December 2025 and 19 January 2026, and also filed additional auxiliary requests with the latter submission. The appellant opponent made submissions with letters dated 22 December 2025 and 7 January 2026.
- X. The parties were informed with a communication dated 20 January 2026 that the appeal has been transferred to Technical Board of Appeal 3.3.09 according to the amended business distribution scheme for the year 2026.
- XI. The respondent essentially argued that the objection is based on the fact that the original Board raised *ex officio* the prohibition objection. Such an objection could only serve the interests of an opponent, and for this reason, it could only have been raised by the opponent, but not by the Board. This followed from the principle of party disposition. The Board therefore infringed the principle of neutrality. This position was supported by established case law, in particular by decision T 1544/07, where the deciding Board explicitly refrained from raising the prohibition. The original Board's partiality was even more apparent given that the legal member had also sat on the Board that decided case T 1544/07 and must have contributed substantially to that decision. Other indications in the file, in particular the manifest suppression of the facts and arguments in the minutes and in the original Board's decision, also supported the patent proprietor's justified suspicion that the original Board was biased. The opponent refrained from raising the prohibition objection themselves. Taking it up after the pointer

from the original Board is a change of their appeal case, and should not be admitted at this late stage. As a precaution, the proprietor filed further auxiliary requests to counter the original Board's unexpected and new prohibition objection. The raising of the objection did not constitute an abuse of procedure, but a legitimate use of the procedural rights of the party.

XII. The appellant opponent argued that the suspicion was not justified. Article 114(1) EPC gave the Boards of appeal the power to raise objections *ex officio*, and this power was also not limited by the Rules of Procedure of the Boards of Appeal. The argued settled case law did not exist. Later case law, namely decision T 0882/17 held exactly the opposite, and expressly saw it as the Board's obligation to raise the prohibition objection *ex officio*. At any rate, no Board could be seen as partial for the sole reason that they had decided some issue against a party. The original Board's handling of the proceedings had been impeccable throughout the proceedings, including the discussion on the suspicion of partiality. Two members of the original Board sat on a case involving the proprietor shortly after the oral proceedings, and the proprietor had no objection against them in that proceedings. The objection raised by the patent proprietor was manifestly unfounded, and to such an extent that it constituted an abuse of procedure. This had caused an unjustified delay of the proceedings and as such substantial harm to the interests of the opponent. This abuse of the procedure justified the apportionment of costs under Article 104(1) EPC.

XIII. The respondent proprietor requested that the objection of suspected partiality be allowed, and the originally

composed Board be replaced under Article 24(4) EPC for the further conduct of the appeal.

Furthermore, they requested that in the course of the further proceedings any objection based on the prohibition of *reformatio in peius* be considered inadmissible.

XIV. The appellant opponent submitted that the objection under Article 24(3) EPC was to be rejected as unfounded and requested an apportionment of costs. The costs covered by the request for apportionment included all those incurred by the opponent in the present case after the oral proceedings before the original Board, as well as those yet to be incurred.

XV. Neither party requested oral proceedings in their written submissions on the objection under Article 24(3) EPC and on the apportionment of costs under Article 104(1) EPC.

Reasons for the Decision

Decision in written proceedings

1. The parties were invited to comment on all issues that the present decision is going to address, the objection based on the suspicion of partiality and the apportionment of costs. The Board informed them that it did not intend to summon to oral proceedings of its own motion and none of them requested oral proceedings (Article 116(1) EPC). The parties submitted the relevant facts and their arguments and these will be taken into account in the present decision (Article 113(1) EPC). The Board considers that it is in the position to issue its decision on those issues that

need to be decided by the Board, in an analogous application of Article 12(8) RPBA, and that an issuance of a further communication under Rule 100(2) EPC or Article 17(2) RPBA is not expedient.

Admissibility of the objection under Article 24(3) EPC

2. The opponent appears to argue that the objection should not have been found admissible in the first place (see in particular their letter of 22.12.2025, page 2, first paragraph). They also submit that they have not been heard on this issue. However, there is no formal request from the opponent on this issue.
3. According to the uncontested minutes of the oral proceedings before the original Board, the admissibility of the objection was discussed in the oral proceedings, even if only briefly. The present Board does well understand the surprise of the opponent and it is also plausible that the opponent may not have been fully prepared for a full discussion of the admissibility of the objection. However, it is in the nature of such an objection that it may arise quite unexpectedly, and postponing the oral proceedings only for the issue of the admissibility would seem most detrimental for the procedural economy, in view of the totality of the circumstances. The opponent also did not request a postponement of the oral proceedings.
4. The original Board decided that the objection is admissible and the present Board sees neither any special circumstance, nor any legal basis for reviewing this finding of the original Board.

On the merits of the objection

Necessity for a decision on the merits

5. In the Board's communication (see point VIII. above) the parties had been informed that the whole appeal case would have to be re-heard (on the original patentability issues), irrespective of the findings of the current Board on the objection under Article 24(3) EPC, given the imminent retirement of all three affected Board members of the original Board. This fact was not commented on by the parties.

6. The question may arise whether the retirement of the members of the original Board may have made the objection and thereby any decision on this moot, given that the desired outcome, namely the replacement of all three members of the original Board, will anyway be achieved. It could be argued that the proprietor would be no longer adversely affected and therefore would no longer need any decision for defending its legitimate interests (invoking the concept of "fehlendes Rechtsschutzinteresse/fehlendes Rechtsschutzbedürfnis" known in German legal theory).

7. The proprietor did not withdraw the objection, and this is also understandable. At this stage, even if the original Board is going to be replaced irrespective of the decision on suspected partiality, the issue of the prohibition of *reformatio in peius* is in the file, and any subsequent Board dealing with the substance of the opponent's appeal must inevitably make a decision if the objection can be raised or not, either by the Board of its own motion or possibly as a late objection by the opponent. Thus the subsequent Board might be equally confronted with the same allegation of partiality with the same arguments that are before the Board now. An early decision on this issue appears

desirable for both parties and for reasons of procedural efficiency in general.

8. The Board considers that closing the case in this manner would also be an unsatisfactory solution for other reasons, in view of the special circumstances of this issue and in particular the underlying issue of suspicion of partiality, inextricably linked to the concept of public perception. Avoiding a decision, even on the basis of a seemingly justified legal reasoning, could give the impression that there is an attempt to "sweep the issue under the carpet", instead of openly admitting that the original Board's conduct of the proceedings had been tainted with bias against one of the parties, should this have been the case.
9. Also the members of the original Board may have a certain interest in a decision on the case, even if the suspicion of partiality is an occupational hazard for members of a judicial body and they may not be formally entitled to a decision under any circumstances. They are not parties to the proceedings and their personal interests should, as a rule, not have any influence on the conduct of the proceedings. However, their names are in the public file, and the objection touches directly on their personal integrity. Thus a decision on the objection can clarify this matter.
10. Accordingly, the Board holds that a decision on the objection is required.

On the substance of the objection

11. In the Board's understanding, the proprietor relies on two core arguments: (1) the specific nature of the prohibition of *reformatio in peius*, which prevents the

Board from raising it *ex officio*, and (2) the established case law on this matter. Neither of these arguments holds water.

12. As a preliminary remark, it is observed that the proprietor does not seem to dispute the general powers of the Boards to raise objections *ex officio* under Article 114(1) EPC. As the opponent has correctly pointed out, also with extensive references to case law, the Board's inherent powers to raise objections on their own had not been eliminated by the RPBA 2020. The RPBA 2020 may have brought a new perspective on the overall framework of the appeal proceedings, in particular on the parties' possibilities to amend their case, but the Board does not see why this would have brought fundamental changes to the general powers of the Boards to raise objections *ex officio*. This is particularly so for the Board's powers, and indeed duty, to examine such requests for the compliance with the provisions of the Convention that had not been the subject of the appealed first instance decision, and as such anyway constitutes an exception for the purposes of the foreseen judicial review within the meaning of Article 12(2) RPBA. The findings of the relevant decisions of the Enlarged Board (G 9/91, G 10/91) did not become obsolete with the RPBA 2020 entering into force. These decisions are based on the interpretation of the EPC, and not on the RPBA in force at that time, which might have changed with a revision of the RPBA. The EPC 2000 revision also did not change the applicability of these decisions.

Legal nature of the prohibition

13. The prohibition of *reformatio in peius* in appeal proceedings under the EPC, as set out in decisions

G 9/92 and G 4/93 of the Enlarged Board of Appeal, essentially prohibits to put a sole appellant, be it the patent proprietor or the opponent, in a worse position than if it had not filed an appeal.

14. As regards (1), the Board does not consider this prohibition to be so exceptional as to completely escape the Board's powers under Article 114(1) EPC. The prohibition is special to the extent that it cannot arise in opposition proceedings, but only in appeal proceedings. It is also true that it can only be raised against the patent proprietor, and as such it always serves the interests of the opponent - in those cases where the opponent is the sole appellant. Otherwise the prohibition can also be invoked as the defence of the patent proprietor, where the proprietor is the sole appellant (G 9/92 and G 4/93, Headnote I).

15. However, this aspect does not seem relevant. Practically any objection of a Board raised ex officio in an inter-partes procedure will be disadvantageous for only one side in a typical situation, or at least will affect the parties' positions unequally. Therefore, raising such an objection can always be perceived as being in a certain contradiction with the Board's obligation to remain neutral towards the parties. However, if parties were free to raise the objection of suspicion of partiality in all those cases where a Board exercises its powers under Article 114(1) EPC, this would mean that such powers would be effectively eliminated. This would be a manifestly absurd outcome.

16. Furthermore, as to the argument that the prohibition exclusively serves the interests of the opponent, this assumption is at least questionable. The legal effects

of the prohibition are very similar to those of Article 123(3) EPC, which is a provision undisputedly serving the interests of the public as well, not only those of the opponent. Arguably, where a patent is upheld in a limited version and the proprietor does not appeal this decision, also the public may legitimately assume, relying on the relevant decisions of the Enlarged Board G 9/92 and G 4/93, that subject-matter not falling under the claims as maintained cannot be later reclaimed by the proprietor, even if initially covered by the granted claims (see Headnote II).

17. Concerning the conclusions derivable from these decisions, the Board finds the minority opinion to be particularly relevant, although it seemingly concerns another case constellation, namely where the proprietor is the sole appellant (see Reasons 17 in both decisions). The minority opinion held that the principle of ex officio examination has priority even in opposition appeal proceedings where the patent proprietor is the sole appellant. Thus the Boards would have the power to examine ex officio, and most importantly, also to decide, to the detriment of the patent proprietor, in order to protect the interest of the public. This minority opinion was supported by the preparatory materials of the EPC. The relevant information for the present decision is the fact that the Board's powers to examine amendments ex officio in the opposition appeal proceedings had never been considered by the legislator as being fundamentally incompatible with the principles of an inter-partes appeal proceedings.
18. The proprietor puts emphasis on the principle of party disposition, and argues that the Board's raising the prohibition ex officio contradicts this principle. The

Board understands that this principle, also referred to as "*ne ultra petita*" (also referred to by the Enlarged Board in decisions G 9/92 and G 4/93, Reasons 1.), is primarily directed at the scope of the proceedings as determined by the parties initial statements in the proceedings. It is normally understood as prohibiting the court from ordering more than originally requested, not even for the benefit of the requesting party. The Board observes that in those decisions which established the prohibition in the case law of the Boards (G 9/92 and G 4/93, Reasons 1.) the Enlarged Board itself referred to the principle of party disposition as a principle applicable in appeal proceedings before the Boards of Appeal.

19. The proprietor appears to be arguing that, under this principle, the original Board should not have done more than the opponent, because the opponent itself did not invoke the prohibition as a defence. As found by decision T 1544/07, a right protecting a party may be waived, and this waiver must be respected (*volenti non fit iniuria*). This finding appears to be approved by other decisions (T 1175/22, Reasons 2.4, T 0646/08, Reasons 4.)

20. The Board is not convinced that the principle of party disposition should be interpreted so broadly so as to unconditionally prohibit a Board from raising the prohibition on that basis. This principle concerns the substantive outcome of the proceedings, i.e. the scope of the legal effects sought, and does not extend to those legal arguments that are raised by either the parties or the court for achieving the requested legal effects. In the present case, the opponent requested the revocation of the patent in its entirety, and the original Board's finding that the auxiliary request 5

is not allowable, for whatever reason, is clearly within the scope of the appellant opponent's appeal request for revocation.

21. The unconditional bar to apply the prohibition ex officio is also not derivable from the referred T 1544/07, and the subsequent approving decisions, which decisively relied on the circumstance that the opponent itself waived the defence of the prohibition. As the opponent correctly observed, in the present case they did not waive this defence. The fact that the RPBA may prevent them from raising it late cannot be equated to a waiver.

Relevant case law

22. As to (2), this argument is manifestly unfounded. There is no settled case law that would forbid the Board to raise the objection ex officio. This is not even derivable from the cited T 1544/07. In the Board's reading, in that decision the deciding Board only found that it has no obligation to raise this under the special circumstances of the case, where the opponent itself explicitly waived the right to raise it. There is no statement that a Board is prevented to raise it ex officio as a question of principle. The decision as a whole rather appears to suggest that the a Board may, but need not raise it where the affected party renounces this defence.
23. A far more strict position is taken by T 0882/17, see in particular point 3.20 of the reasons, cited by the opponent. After a very detailed analysis, the deciding Board in T 0882/17 squarely disagrees with T 1544/07 and unambiguously states that the Board not just may, but must take the prohibition into account, and also

ex officio. This decision has been followed by other decisions (T 1773/22, Reasons 5.1, T 1472/21, Reasons 3.1.2).

24. Contrary to what the proprietor has argued, the case law is not "settled" at all, and certainly not in the sense as argued by the proprietor. In fact, the proprietor has not shown any case law that would fully support its case. The Board is not aware of any decision stating that a Board is formally not allowed to raise a prohibition, unconditionally and as a matter of principle, under any circumstances (e.g. irrespective of the opponent's later statements). There is no such statement in the Case Law of the Boards of Appeal.

Conclusions on the objection

25. On this basis, the current Board need not analyse the legal position and need not confirm or contradict either of the two cited decisions. To decide the issue before the Board – namely, the objection of suspicion of partiality – it is sufficient for the Board to establish that, contrary to the proprietor's argument, case law is far from settled. The mere existence of another line of case law, T 0882/17, recognising the Board's entitlement to raise the prohibition objection, is sufficient to establish that the original Board cannot be considered partial solely for raising the objection.
26. A Board of Appeal is always entitled and in fact obliged to examine the boundaries of its own powers to raise an ex officio objection. If necessary, the Board is also entitled to question findings of previous decisions on the same issue. Similarly to the Board

handing down T 0882/17, the original Board was also entitled to consider whether they had the power to raise the prohibition objection. They may well have found that the later decision, T 0882/17, was to be followed rather than the earlier decision, T 1544/07. This is particularly the case given the extensive reasoning in T 0882/17. Therefore, the original Board was under no obligation to seek the proprietor's permission or to maintain the objection only contingent on the opponent's intention to pursue it.

27. However, as stated above, this Board need not decide this issue, because it is not necessary for deciding the objection of the suspicion of partiality. At the same time, such a decision would also unnecessarily pre-empt the next Board's decision on the allowance and admittance of the pending auxiliary requests and would thus extend to matters that are not covered by the mandate of the present Board.
28. In this manner the proprietor is not prevented from raising the argument later in the appeal proceedings and to argue that also decision T 0882/07 was wrong. This question can be discussed and may also play a role for the allowance of the auxiliary requests, in case where the subsequent Board (to decide on the matter following this Board's decision) would adhere to the proprietor's request for non-admittance of this objection from the opponent as being belated (see in particular their letter of 19 January 2026, page 2, second paragraph).
29. From this it follows that the Board refuses to order the requested inadmissibility of any objection based on the prohibition (see point XIII. above).

Additional indications of the original Board's bias

30. The Board sees no "additional indications" of any impartiality (see in particular proprietor's letter of 19.12.2025, Chapter III.). The omission of the arguments on the substance of the partiality objection in the decision and in the minutes is logical and also explained in the decision (see Reasons, point 3, last sentence). These arguments are for this Board to judge, and they should be heard from the parties, not from the original Board. It is not the task of the original Board to prepare the case for the decision on the objection against them. It is the responsibility of this Board to make sure that the parties have sufficient opportunity to present their case and to be heard for the purposes of Article 113(1) EPC.
31. Any arguments concerning the involvement of the legal member of the original Board in the earlier case T 1544/07 must be firmly rejected as a baseless speculation. No conclusions can be drawn from the involvement of a certain member in an earlier decision. Apart from the fact that no binding effect arises from such earlier decisions, the legal member may also have disagreed with the earlier decision, purely as a matter of simple logic, given that decisions do not require unanimity and abstentions are not permitted (Articles 19(1) and (3) RPBA). Furthermore, the legal member may also have disagreed with the original Board's decision to raise the prohibition in this case. It remains that no conclusions can be drawn from the fact that the legal member in the original Board was also the legal member in the appeal case T 1544/07.
32. In summary, the Board finds the objection under Article 24(3) EPC unsubstantiated. The objection is

rejected. In theory, the proceedings should continue with the original Board. In the present case the determination of a new composition of the Board is inevitable, in view of the above mentioned retirement of all three members of the original Board.

Request for the apportionment of costs

33. Under Article 104(1) EPC each party to the proceedings bears its own costs, unless a different apportionment of costs is ordered for reasons of equity. The Board sees no basis for the apportionment of costs. Even though the proprietor's objection may have delayed the proceedings and was ultimately held to be unfounded, this alone does not qualify the objection as an abuse of procedure. As the proprietor argued, the objection was raised promptly. As set out above, there is case law that could be seen to support the proprietor's case, at least on a prima facie basis. Despite the existence of another line of case law as represented by T 0882/17, it cannot be said that the case law has been fully settled to the extent that the objection should have been rejected immediately as manifestly unfounded. This might have been the case if there had been a decision on the issue by the Enlarged Board of Appeal or if a substantial body of case law had developed along a well-defined line over a long period of time.

34. The fact that the whole case must be re-heard because of the retirement of the members of the original Board is certainly very unfortunate and the Board sees no reason to doubt that this is against the interests of the opponent. However, this is a circumstance beyond the proprietor's sphere of responsibility and therefore cannot be imputed to it. The procedural delay and the possibility that the holding of another oral

proceedings may be necessary, must be considered acceptable under the circumstances.

35. Under these circumstances the Board cannot qualify the procedural conduct of the proprietor as an abuse of the procedure. Other reasons of equity were not given and are not apparent to the Board. Thus the Board holds that the request for apportionment of costs under Article 104(1) EPC (in conjunction with Article 111(1), second sentence, EPC) is to be refused.

Order

For these reasons it is decided that:

- 1. The objection under Article 24(3) EPC is rejected.**
- 2. The appeal proceedings are continued.**
- 3. The request for apportionment of costs is refused.**

The Registrar:

The Chairman:



K. Götz-Wein

M. Kollmannsberger

Decision electronically authenticated