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**Datasheet for the decision
of the Enlarged Board of Appeal
of 18 July 2016**

Case Number: R 0008/15
Appeal Number: T 2261/13 - 3.5.02
Application Number: 05812515.4
Publication Number: 1861303
IPC: B61L27/00
Language of the proceedings: EN

Title of invention:

COMMUNICATION, MONITOR AND CONTROL METHOD FOR RAILWAY TRAFFIC

Patent Proprietor:

ASTRAINS S.r.l.

Opponent:

Deutsches Zentrum für Luft- und Raumfahrt e.V. (DLR)

Headword:

Fundamental violation of the right to be heard

Relevant legal provisions:

EPC Art. 112a(2)(c), 113(1)
EPC R. 102(g)

Keyword:

"Parties entitled to advance indications of the reasons for a decision (no)"
"Decision non-reasoned for purposes of the right to be heard (no)"
"Petition allowable (no) - no violation of petitioner's right to be heard"

Decisions cited:

R 0001/08, R 0019/11, R 0015/12, R 0016/13, R 0009/14

European Court of Human Rights:

Luka v. Romania, No. 34197/02; Hadjianastassiou v. Greece,
No. 12945/87; Schumacher v. Germany, No. 14029/05

Catchword:

1. Article 113(1) EPC implies that decisions of the EPO boards of appeal should adequately state the reasons on which they are based in order to show that the parties were heard. A party must be able to examine whether, in its view, the board has afforded it the right to be heard in order to be in a position to decide on whether or not to file a petition under Article 112a(2)(c) EPC (in force since 13 December 2007) for violation of Article 113(1) EPC. One aspect of the right to be heard as covered by Article 113(1) EPC requires a board to consider a party's submissions, i.e. assess the facts, evidence and arguments submitted as to their relevance and correctness. Article 113(1) EPC is infringed if the Board does not address submissions that, in its view, are relevant for the decision in a manner adequate to show that the parties were heard on them, i.e. that the Board substantively considered those submissions. (See Reasons, point 2.2.2.)

2. Assessing the completeness of a decision would usually be beyond the scope of scrutiny under Article 113(1) EPC. As to the reasons for a decision, Article 113(1) EPC must be interpreted more narrowly than, and thus is not a substitute in review proceedings for, the broader legal provisions embodied in Rule 102(g) EPC. Those provisions require a board to give reasons for its decision, but infringement thereof is not as such a ground for review. In other words: for the purpose of compliance with the right to be heard, reasons may be incomplete, but as long as they allow drawing the conclusion that the board, in the course of the appeal proceedings, substantively assessed a certain point being part of the procedure and that it found to be relevant, there will be no violation of Article 113(1) EPC. (See Reasons, point 2.2.3.)



Case Number: R 0008/15

D E C I S I O N
of the Enlarged Board of Appeal
of 18 July 2016

Petitioner:
(Patent Proprietor)

ASTRAINS S.r.l.
Piazza D'Azeglio 5
55049 Viareggio (IT)

Representative:

Gritschneider, Martin
Abitz & Partner Patentanwälte mbB
Postfach 86 01 09
81628 München (DE)

Other Party
(opponent)

Deutsches Zentrum für Luft- und Raumfahrt e.V.
(DLR)
Linder Höhe
51147 Köln (DE)

Representative:

Gerstein, Hans Joachim
Gramm, Lins & Partner Patent- und
Rechtsanwälte PartGmbB
Freundallee 13 a
30173 Hannover (DE)

Decision under review:

**Decision of the Technical Board of Appeal
3.5.02 of the European Patent Office of
12 June 2015.**

Composition of the Board:

Chairman: E. Dufrasne
Members: B. Müller
M. Wieser

Summary of Facts and Submissions

I. The subject of the petition for review

The patentee's petition received on 17 November 2015 is directed against the decision of Technical Board 3.5.02 in appeal case T 2261/13. By that decision, the board set aside the interlocutory decision of the opposition division maintaining European patent number 1 861 303 in amended form and revoked the patent. The decision was pronounced in the oral proceedings of 12 June 2015, and the reasoned written decision was posted on 8 September 2015.

The sole claim of the patent to be maintained according to the opposition division reads as follows:

Method for monitoring and controlling traffic of public transport means, in particular trains, characterized in that it provides:

- mounting, in said transport means, devices (12) apt to receive and transmit data signals,
- spreading, in the area where the traffic has to be monitored, centralized electronic and computerized units (11) dedicated to control adjacent traffic areas with a predetermined layout and extension,
- transmitting, by said devices (12), to said centralized units (11), identification data pertaining to said transport means where said devices are mounted in, the transmission being carried out through via satellite receiving/transmitting means (21'),
- performing, by said centralized units (11), definite procedures for processing said data in order to:

- defining the position of the transport means which are in the monitored area,
- displaying in specific visualization means (16) the geographical location of the transport means in the monitored area,
- detecting possible anomalous traffic situations with respect to the traffic parameters which are stored in said centralized units (11)
- sending to the devices (12) mounted in the vehicles involved in possible anomalous traffic situations, signals which activate alarm procedures and alarm means,
- sending to said devices (12), in case the anomalous traffic situation persists, signals which run breaking means of the vehicles interfaced with said devices

wherein the method further provides:

- direct transmission, at regular intervals, via radio or other means, of data and information among devices mounted in vehicles which are within a certain distance range one from the other, in order to monitor their location and to automatically manage said transport means whenever specific dangerous situations occur,
- as well as automatic starting of alarm procedures in case that anomalous traffic situations are detected, and
- automatic starting of breaking means of the vehicles in case that said anomalous traffic situations persist.

The petitioner bases the request for review on Article 112a(2)(c) EPC asserting a fundamental violation of the right to be heard.

II. **The facts submitted with the petition**

In its **interlocutory decision**, the opposition division assessed inventive step considering document C4 (US 2003/0236598 A1) to be the closest prior art. It upheld the single method claim, which, in its opinion, disclosed feature C, which was not disclosed in any of documents C1 to C5 cited in the opposition. (See section 2.4 of the interlocutory decision.) Feature C is

direct transmission, at regular intervals, via radio or other means, of data and information among devices mounted in vehicles which are within a certain distance range one from the other, in order to monitor their location and to automatically manage said transport means whenever specific dangerous situations occur.

This feature had the technical effect of providing direct communication between vehicles for automatic management of the transport means whenever specific dangerous situations occurred. Hence, it solved the problem of increasing the overall safety in the control system according to C4 (see point 2.4.7). The person skilled in the art looking for improvement of the overall safety in the system would not consider C1 (EP 0 958 987 A2) for combination with the teaching of C4, since C1 did **not** disclose **safety** features but only a system for **increasing the capacity of the network** through smaller train separation distances (see point 2.4.11). C3 (WO 98/37432) and C5 (US 5,757,291 A) could not be read as a direct communication between train control devices in the sense of the claim (see point 2.4.12).

In a **communication** by the board of 30 March 2015 accompanying the summons to oral proceedings, it was said, in particular, that feature C (referred to as feature F) was disclosed in documents C1 and C5, and the question arose whether it was obvious to the skilled person to combine, inter alia, a direct data transmission according to any of these two documents with a method of monitoring or controlling traffic according to C4. (See point 3.2.6.)

In a **reply** of 12 May 2015 (at page 7), the petitioner explained that document C1 was directed to a different field of technology, namely to a train management system, wherein the trains were running on a single track in the same direction and at reduced distance. Such systems were characterised in that dangerous situations, in particular sudden stops of trains, could not be handled anymore, and for that reason the skilled person would not take C1 into account in trying to improve the safety of general railway systems directed to passenger transportation.

With respect to document C5 the petitioner explained in its reply (at page 8) that this document "taught away" from a combination with a system of C4, since C5 disclosed direct transmission of signals between trains running in areas, in order to avoid participation of a central control station, whereas the system of C4 represented a centralised train management system.

With a **communication** of the board dated 9 June 2015, i.e. three days before the oral proceedings, the petitioner was informed that there had been a change in

the composition of the board. Out of the original composition of the board only the rapporteur remained.

Oral proceedings

During the oral proceedings before the board, inventive step in respect of claim 1 to be maintained according to the opposition division was discussed. The discussion mainly related to the disclosure of documents C4, C1 and C5, as well as to the problem solved by the opposed patent in view of the disclosure of C4. The appellant/opponent did not give any reasons why the skilled person would have combined the teaching of documents C1 and C5 with that of C4. Also, no comments from the board were provided in this respect.

After discussion of inventive step in relation to the main request, the chairman stated that the subject matter of the main request was not considered as involving an inventive step with regard to document C4 in combination with C1 or C5. **No reason for the decision to allow a combination of these documents was given.** The patent was finally revoked since auxiliary requests 1 and 2 were rejected on the basis of added subject matter (Article 123(2) EPC).

Decision under review

In the decision under review, the board held that the method of claim 1 of the main request differed from that disclosed in document C4 by two features providing solutions to unrelated problems, among them the above feature labelled C by the opposition division.

In relation to feature C the petitioner submitted that, in the decision under review, the board explained that both documents C1 and C5 disclosed systems for controlling railway traffic. Neither document C5 nor document C1 excluded the application of their teaching to **public transport** railway traffic. The petitioner pointed out that the decision did not contain any explanation with respect to the disclosure of C5, and why the skilled person would combine the teaching of C4 and C5. Only with respect to a combination of document C4 with C1 the board explained that

[In column 3, paragraph [0009],] the criteria for application of the teaching of C1 to public transport are given („Für den Personenverkehr ist ein Fahren im relativen Bremswegabstand daher nur dann vertretbar, wenn ein abruptes Stehenbleiben eines Schienenfahrzeugs mit praktisch 100%iger Sicherheit ausgeschlossen werden kann"). The term „abruptes Stehenbleiben" [sudden stop] is defined at the end of column 2 of C1 as being for example the "Auffahrens auf einen herabgerutschten Bahndamm [sic]", i.e. the collision with parts of the railway embankment that accidentally slid onto the track. **Since it appears possible to comply with these criteria by technical means**, neither the application of the teaching of C1 nor that of C5 to public transport is excluded (paragraph 2.4.2 page 12, last paragraph to page 13, first paragraph, emphasis added [by the petitioner]).

III. **The violations of the right to be heard alleged in the petition**

III.1 *No consideration during oral proceedings or in the preceding written appeal procedure why C4 could be combined with either of C1 and C5*

The chairman of the board, when announcing the decision in the **oral proceedings** to allow a combination of the

teachings of documents C4 with either C1 or C5 gave no reasons why such combination was possible.

More generally, there had **never** been a discussion about whether or why the skilled person would have combined C1 or C5 with C4. In contrast, opponent/appellant had simply made such combination without explaining why the skilled person would have done so.

Accordingly, it was not possible for the petitioner to adequately react during the oral proceedings and,

- either before the decision was taken, to explain the reasons why the understanding of the board was not correct, or
- after the decision on the main request had been announced, to file a new auxiliary request which took into account the understanding of the board.

It followed from the subsequent **written decision**, which is under review, that the board apparently considered the decisive issue enabling the application of the teaching of C1 to public transport to be that an "abruptes Stehenbleiben" (sudden stop) of a train, for example a collision with parts of the railway embankment which accidentally slid onto the track, could be avoided with about 100% certainty. Neither the observations attached to the summons to the oral proceedings nor the discussion which took place during the oral proceedings gave the proprietor any chance of specifying or addressing this issue. The reasons given in the decision under review were therefore surprising.

III.2 *Reasons for the written decision not complete or erroneous*

The petitioner asserted that the board followed the understanding of the opponent/appellant "without giving any reasons". In this regard, the petitioner criticises that the statement "it appears possible" (see the sentence emphasised in the quotation at point II *in fine* above) was no reasoning at all. Moreover, just having the possibility of complying with criteria by technical means would mean that the skilled person would always consider combining the teaching of separate documents, and a technical prejudice could never exist.

III.3 *Change of composition of the board "three days before the oral proceedings"*

The petitioner also submitted that the asserted violation of the petitioner's right to be heard might have come from this change of composition because the board in the new composition "did not really have time to consider all the relevant issues of the opposition and opposition appeal proceedings which had lasted for many years".

IV. In a communication attached to the summons to oral proceedings the Enlarged Board summarised the facts and procedure and set out its preliminary view on the merits of the petition. It considered the petitioner's assertions of three breaches of the right to be heard to be clearly unfounded. As a consequence, the petition appeared to be clearly unallowable within the meaning of Rule 109(2)(a) EPC. It followed that the question of whether the petitioner had complied with its duty to

raise an objection according to Rule 106 EPC could remain an open one.

- V. With a letter of 20 June 2016 the petitioner replied to the Enlarged Board's communication. It expanded on its view that the decision under review contained only incomplete reasons regarding the combination of C4 with C1. This resulted in a non-reasoned decision. Hence, the petitioner's right to be heard was violated.

The petitioner referred, in particular, to the portion of the decision quoted above (at point II *in fine*) which includes the sentence "**Since it appears possible to comply with these criteria by technical means...**".

Neither the opponent/appellant nor the board had indicated which kind of technical means could be employed to avoid a "sudden stop" as defined in C1, e.g. due to a collision with parts of the railway embankment that accidentally slid onto the track. Nor was any evidence of common general knowledge to this effect provided.

- VI. Oral proceedings before the Enlarged Board were held on 18 July 2016. The petitioner discussed its three objections with the Enlarged Board. At the end of the oral proceedings the chairman announced the decision.

VII. **The requests**

The petitioner requests that

- (1) the Enlarged Board of Appeal review the decision,
- (2) the decision be set aside and the proceedings be re-opened,

- (3) the members of the board who participated in the decision be replaced,
- (4) the fee for the petition for review be ordered to be reimbursed.

Reasons for the Decision

1. Admissibility of the petition for review

Pursuant to Rule 126(2) EPC, the decision that was posted on 8 September 2015 is deemed to have been notified on 18 September 2015. The petition for review based on Article 112a(2)(c) EPC, together with the respective fee, was received on 17 November 2015. 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.

Considering that the petition for review is obviously without merit, it can remain an open question whether the petitioner has complied with its duty to raise an objection according to Rule 106 EPC.

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

2. Merits of the petition for review: the violations of the right to be heard asserted by the petitioner

The petitioner raised three objections: it asserted that

- firstly, no consideration was given during oral proceedings or in the preceding written appeal

procedure as to why the skilled person would have combined C4 with either of C1 and C5;

- secondly, the reasons for the written decision were not complete and the decision therefore non-reasoned;
- thirdly, the change of composition of the board "three days" before the oral proceedings might have caused the violation of the right to be heard.

The petitioner based the request for review on Article 112a(2)(c) EPC thereby asserting that "a fundamental violation of Article 113 EPC occurred". The petitioner thus relied on paragraph 1 of that article. Pursuant to its provisions, the decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

2.1 *No consideration during oral proceedings or in the preceding written appeal procedure why C4 could be combined with either of C1 and C5*

This part of the present decision dealing with the petitioner's first objection reproduces (nearly) verbatim, and thereby affirms, the preliminary view expressed in the communication attached to the summons to oral proceedings.

2.1.1 The petitioner's assertions

The petitioner contends that the board breached its right to be heard in **failing to inform it during the oral proceedings** that the reason for the board's finding of lack of inventive step was the fact that

they considered that document C4 could be combined with either of documents C1 and C5.

According to the **reasons** given in the written decision, the teaching of C1 could be applied to public transport railway traffic. In this respect it was **decisive** that a **sudden stop** of a train, for example a collision with parts of the railway embankment which accidentally slid onto the track, **could be avoided** with about 100% certainty. The petitioner asserted that it had not had a chance to address this decisive issue on the basis of the communication attached to the summons to oral proceedings or in those oral proceedings themselves.

More **generally**, there had never been a discussion in the proceedings before the board on why the skilled person would have combined C1 or C5 with C4 and the opponent/appellant simply made such combination without giving any respective reasons.

2.1.2 The Enlarged Board's view

2.1.2.1 The written procedure

In summary, it is the Enlarged Board's view that the petitioner's assertion that **generally** there had never been a discussion on a combination of C4 with C1 is plainly beside the point. In fact, the petitioner had a chance, and has in effect availed itself thereof, to address the **specific** issue that it considered to have been decisive for the board's decision under review relating to a combination of C4 with C1, i.e. that a **sudden stop** of a train could be avoided **with about 100% certainty**. As the combination of C4 with C1 was in

itself a reason for the board to deny inventive step, independent of any possible combination of C4 with C5, there is no need to deal with the question of whether that latter combination had also been properly addressed in the written procedure. This position of the Enlarged Board is explained in greater detail below, consequentially limited to the combination of C4 with C1.

The Enlarged Board notes that the petitioner itself set out explicitly in its very petition (see the middle of page 4) that, in the written procedure before the board, i.e. in its letter of 12 May 2015, it had advanced its position that the documents at issue, in particular C4 and C1, were not compatible. This letter was a reply to the board's communication accompanying the summons to oral proceedings of 30 March 2015. Moreover, in the preceding part of the written procedure, the question of whether C4 could be combined in particular with C1 had been the subject of considerable debate between the parties.

In the statement of grounds of appeal dated 7 January 2014 (at point 2), the opponent/appellant explained on five and a half pages why a lack of inventive step followed on the basis of a combination of C4 and C1.

In its reply of 27 May 2014 (at point 2.2), the petitioner discussed this combination putting forward in particular:

The Opposition Division correctly states that C1 is directed to a different field of technology, namely to a train management system, wherein the trains are running on a single track in the same direction and at a reduced distance, the so-called "relative braking

distance". **Such systems are characterized in that dangerous situations, in particular sudden stops of trains cannot be handled anymore (see para. [0009] of C1).** Already for this reason the skilled person would not take C1 into account in trying to improve the safety of general railway systems directed to passenger transportation.

However, even if the skilled person would take D1 [sic] into account, he/she would only find the teaching of a system comprising a control center, which monitors the position of individual trains in a certain area. ... Normal situations, like increase and decrease of the speed of one of the trains can be handled in such systems. However, **specific dangerous or anomalous situations, like a sudden stop of one of the trains cannot be compensated with such a system.** This risk of not being able to compensate anomalous situations is accepted in such systems. Safety is reduced in these systems in order to increase the transport capacity of the railway.

(Emphases added.)

The Enlarged Board notes that the above-quoted highlighted portions are not included in paragraph [0009] of C1. The portions apparently are a conclusion that the petitioner, rightly or wrongly, drew from that paragraph, which, in pertinent part, is worded as follows:

In comparison with the absolute breaking distance, it is no longer tolerated in respect of the relative breaking distance that a railway vehicle comes to a sudden stop, e.g. due to a collision with parts of the railway embankment that accidentally slid onto the track. As to passenger traffic, travelling in relative breaking distance can only be accepted if a sudden stop can be excluded with a degree of safety that comes close to 100%. In contrast, for freight traffic with small loads, a low residual risk can definitely be accepted. (Translation by the Enlarged Board; emphasis added.)

The German original reads:

Im Vergleich zum absoluten Bremswegabstand wird beim relativen Bremswegabstand nicht mehr toleriert, daß ein Schienenfahrzeug abrupt, beispielsweise wegen Aufffahrens auf einen herabgerutschten Bahndamm, zum Stehen kommt. Für den Personenverkehr ist ein Fahren im relativen Bremswegabstand daher nur dann vertretbar, wenn ein abruptes Stehenbleiben eines Schienenfahrzeugs mit praktisch 100%iger Sicherheit ausgeschlossen werden kann. Für den Güterverkehr mit kleinen Lasten hingegen ist ein geringes Restrisiko durchaus tragbar.

(Emphasis added.)

In a response to the petitioner's submissions of 7 October 2014 the opponent/appellant contended, in particular, that the petitioner's argument that **specific dangerous or anomalous situations, like a sudden stop of one of the trains could not be compensated with such a system** was wrong and provided respective explanations (see middle of page 4 to end of page 6).

In its comments of 12 May 2015 to the communication of the board of 30 March 2015 (at point 3.3), already referred to above, the petitioner inter alia repeated the above-quoted submissions made in its reply to the appeal of 27 May 2014.

From the above it follows that, in the written procedure before the board, a discussion between the parties did take place, both generally about why the skilled person would have combined C1 with C4, and also more specifically, about the question of whether the system of C1 could safely handle a sudden stop of a train.

2.1.2.2 The oral proceedings before the board

The petitioner further contends that the board should have informed it in the oral proceedings about its stance on the combination of C4 with C1 or C5 in order to enable it to submit counter-arguments or to file a new auxiliary request on the basis of that stance. In the absence of such information, the petitioner had not had a chance to address the "decisive issue" regarding a combination of C4 and C1, i.e. that a sudden stop of a train could be avoided with about 100% certainty.

The Enlarged Board notes that the petitioner's view would presuppose an obligation on the part of the board to provide its analysis of the facts, evidence and arguments that were the subject of the proceedings before delivering its decision. However, while the right to be heard covers all the factual and legal aspects which form the basis for the decision-making process, the right to be heard does not cover the final position which the board intends to adopt. Rather, the party concerned must anticipate a possible adverse decision on the point in question (in the present situation, on the contested compatibility of documents C4 and C1) on the basis of the board's assessment of the facts, evidence and arguments in the procedure. In such a situation it is up to the party to make any respective submissions of its own motion.

In this respect, the Enlarged Board draws the petitioner's attention to its established case law enunciated for the first time in its decision in case R 1/08. This position was affirmed in R 9/14 of 24 February 2015 where it was held (at point 2.2) that

...in petition proceedings under Article 112a EPC the Enlarged Board has always held (since R 1/08 of 15 July 2008) that the parties' right to be heard under Article 113(1) EPC does not mean that Boards have to tell them about every conceivable reason for the decision. So in oral proceedings a Board is under no obligation to address all the factors that feature in its subsequent decision and to discuss them in detail with the parties. It suffices that their relevance at least becomes clear during the proceedings and that the parties can be assumed to know enough about technical and legal matters to be aware of their significance.

As to the interpretation of specific passages of the state of the art, such as paragraph [0009] in the present case, the Enlarged Board has held in several decisions:

If that principle [that parties are not entitled to advance indications of the reason or reasons for a decision before it is taken] applies to the reasons for a decision generally, it must apply equally to an interpretation of a passage in the state of the art forming only part of such reasons.

(See R 19/11, at point 2.2, third paragraph, affirmed in R 15/12, at point 5a), and R 16/13, at point 3.2.)

In its written decision under review the board accepted that document C4 and C1 could be combined on the basis of its interpretation of paragraph [0009]. The petitioner had cited that paragraph in the written appeal procedure. The board (at point 2.4.2, second but last paragraph) held in particular that "In column 3, paragraph [0009], the criteria for application of the teaching of C1 to public transport are given...". The board thus gave an interpretation to paragraph [0009] that was in direct contrast to the petitioner's reading put forward during the written procedure. As the petitioner rightly set out in its petition, however, "the review procedure is not the right opportunity to

argue inventive step". Hence, the correctness of the interpretation of paragraph [0009] by the board is not the subject of the present review proceedings.

Rather, what is decisive for the question of compliance with the right to be heard is the fact that this paragraph had been addressed in the written procedure. Furthermore, in its communication attached to the summons to oral proceedings, the board had given an indication that it considered combining document C1 (and C5) with C4, and in the oral proceedings those documents were indeed discussed.

Under these conditions, from an objective perspective, it cannot come as a surprise that the board, as expressed in its written decision summarised in pertinent part above, did not follow the petitioner's view that the documents could not be combined. After all, if the board had not considered this possibility, then the discussion of the documents during the oral proceedings would have had no purpose. If the petitioner was still surprised by the board's conclusion drawn from paragraph [0009] and the view based thereupon that C1 could be combined with C4, then such a subjective surprise is irrelevant to the question of any violation of the right to be heard.

Given that the discussion in the oral proceedings of inventive step on the basis of a combination of C4 with C1 complied with the petitioner's right to be heard, the question of whether the same was true as to the combination of C4 with C5 is moot.

2.2 *Written decision is not reasoned because reasons given are not complete*

2.2.1 The petitioner's contentions

In the petitioner's view the decision under review contains only incomplete reasons regarding the combination of C4 with C1 and no reasons at all as to the combination of C4 with C5. This fact resulted in a non-reasoned decision. Hence, the petitioner's right to be heard was violated. Below the Enlarged Board will first proceed to a discussion of the reasons regarding the combination of C4 with C1.

As to this combination, the petitioner referred, in particular, to the portion of the decision quoted above (at point II *in fine*) which includes the sentence **"Since it appears possible to comply with these criteria by technical means..."**. Neither the opponent/appellant nor the board had indicated which kind of technical means could be employed to avoid a "sudden stop" of a train as defined in C1, e.g. due to a collision with parts of the railway embankment that accidentally slid onto the track. Nor was any evidence of common general knowledge to this effect provided.

2.2.2 The relationship between the right to be heard and the reasons for a decision given by a board of appeal

Rule 102(g) EPC provides that "The decision [of a board of appeal] shall contain ... the reasons...". However, a petition for review cannot be brought for infringement of Rule 102(g) EPC because this provision is not covered by the exhaustive list of the grounds

for review under Article 112a(2) EPC. Yet a lack of reasoning can be relevant in review proceedings under Article 112a EPC if it may amount to a fundamental violation of the right to be heard as embodied in Article 113(1) EPC, which is a ground for review under paragraph 2(c). The Enlarged Board repeats that, under Article 113(1) EPC, the decisions of the EPO "may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments".

In the Enlarged Board's view Article 113(1) EPC implies that decisions of the EPO boards of appeal should adequately **state the reasons** on which they are based in order **to show** that the parties were **heard**. A party must be able to examine whether, in its view, the board has afforded it the right to be heard in order to be in a position to decide on whether or not to file a petition under Article 112a (2)(c) EPC (in force since 13 December 2007) for violation of Article 113(1) EPC. One aspect of the **right to be heard** as covered by Article 113(1) EPC requires a board to consider a party's submissions, i.e. assess the facts, evidence and arguments submitted as to their relevance and correctness. Article 113(1) EPC is infringed if the board does not address submissions that, in its view, are relevant for the decision in a manner adequate to show that the parties were heard on them, i.e. to show that the board substantively considered those submissions.

As to the relationship between the right to be heard and the duty to state the reasons for a decision, the Enlarged Board notes that the European Court of Human

Rights (ECHR) arrived at an analogous conclusion. The Court interpreted Article 6(1) of the European Convention on Human Rights (hereinafter: Article 6(1)) as set out below. Article 6(1), in pertinent part, provides: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal ..."

Article 6(1) implies that judgments of courts and tribunals should adequately **state the reasons** on which they are based in order **to show** that the parties were **heard** and to ensure the possibility of public scrutiny of the administration of justice. In other words, Article 6 places a "tribunal" under a duty to conduct a **proper examination** of the submissions, arguments and evidence, without prejudice to its assessment or to whether they are **relevant** for its decision, given that the Court is not called upon to examine whether arguments are adequately met. Nevertheless, although Article 6 (1) obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. See *Luka v. Romania*, No. 34197/02, of 21 July 2009, at point 55. [Emphases added, citations of case law omitted.]

The Enlarged Board interprets other case law of the ECHR in the sense that the reasons for a judgment are necessary to enable the party concerned to bring an appropriate and effective appeal (*Hadjianastassiou v Greece*, No. 12945/87, of 16 December 1992, points 29 et seq.) and, conversely, that national superior courts, such as the German Federal Constitutional Court, whose decisions are not subject to appeal, in principle, need not give reasons (*Schumacher v. Germany* No. 14029/05 of 26 February 2008, at point 4, and the case law cited there).

2.2.3 Application of the foregoing principles to the present case

As already explained in greater detail in section 2.1 above, a core point identified by the board in line with the parties' submissions was the question of whether the skilled person would combine C4 with C1. In the course of the whole proceedings before the EPO the petitioner consistently disputed such a possibility because, for safety concerns, C1 could not apply to passenger transportation to which C4 relates. The opposition division agreed with the petitioner on this point, but the board reversed the opposition division's finding. As a consequence, under the legal principles just spelled out, the board needed to adequately address this point in the decision under appeal, or at least in the course of the appeal proceedings as a whole, so as to show that the board substantively considered the point in the decision-making process.

In this respect the Enlarged Board notes that the board, in the paragraph of the decision under review quoted by the petitioner and reproduced above, at point II *in fine*, discussed the applicability of C1 to passenger transportation on the basis of paragraph [0009] of the description of C1. Assuming *arguendo* that the petitioner rightly criticized the sentence "Since it appears possible...", then the board gave either incorrect or, as the petitioner asserts, incomplete reasons for its finding that C4 could be combined with C1 as a consequence of which the subject-matter of the claim lacked inventive step.

Neither deficiency, however, would be an eligible subject of the present review proceedings:

It is common ground that the **correct** application of substantive law in a decision cannot be assessed in the framework of review proceedings. The examination of whether or not a European patent application or patent meets the requirements of Article 56 EPC is a matter of substantive law.

Assessing the **completeness** of a decision would usually be beyond the scope of scrutiny under Article 113(1) EPC, which, as indicated, requires adequate reasons to enable whether a board has substantively dealt with the relevant issues. As to the reasons for a decision, Article 113(1) EPC must be interpreted more narrowly than, and thus is not a substitute in review proceedings for, the broader legal provisions embodied in Rule 102(g) EPC. Those provisions require a board to give reasons for its decision, but infringement thereof is not as such a ground for review. In other words: for the purpose of compliance with the right to be heard, reasons may be incomplete, but as long as they allow drawing the conclusion that the board, in the course of the appeal proceedings, substantively assessed a certain point being part of the procedure and that it found to be relevant, there will be no violation of Article 113(1) EPC.

The Enlarged Board recalls the petitioner's contention that the statement "Since it appears possible..." in the quotation from the decision under review (see above, at point II *in fine*) was no reasoning at all. In the petitioner's view it was impossible to exclude a

sudden stop of a train with a degree of safety that came close to 100%. The decision under review mentioned no technical means with the employ of which such sudden stop could be avoided nor gave evidence of common general knowledge to this effect. The board's decision, having failed to address this central issue for the question of a possible combination of C4 with C1, was wholly unreasoned as to this combination.

The Enlarged Board disagrees. The board may have arrived at its conclusion on the basis of the opponent/appellant's detailed submissions explaining why, in its view, the petitioner was wrong (see point 2.1.2.1, third but last paragraph). Alternatively, the board may have come to its conclusion on the basis of some unspecified reading of C1 or some unspecified common technical knowledge of the skilled person.

The reasons given in the decision, seen in the light of the preceding debate in the written and oral proceedings before the board, would be inadequate if they did not reflect a substantive assessment by the board of the point in question. Against the background of the above findings, however, it is clear that this point, i.e. whether or not C4 and C1 could be combined, was indeed the subject of substantial debate by the parties and the board in the appeal proceedings so that the sentence "Since it is possible...", supposing *arguendo* it to be incomplete, gives no hint that the board did not give sufficient thought to the possibility of a combination of the two documents and thus made a substantive inquiry into this issue. Accepting *arguendo* the petitioner's view on this point, then the board provided incomplete reasoning meaning

that a duty to give reasons derived from Rule 102(g) EPC might have been infringed, but not the right to be heard as embodied in Article 113(1) EPC.

To sum up: the reasons given regarding the combination of C4 with C1 may be incomplete, but they allow drawing the conclusion that the board substantively assessed this combination. For purposes of the right to be heard, the reasons are therefore adequate and Article 113(1) EPC was not violated in this respect.

Finally, the board held a combination of C4 with either C1 or C5 to constitute a basis for denying inventive step and gave sufficient reasons for the former combination (of C4 with C1). As a consequence, the question of whether it can be considered that sufficient reasons for a combination of C4 with C5 were provided can be left open.

2.3 *Change of composition of the board "three days before the oral proceedings"*

As to the facts, it should be clarified first that the oral proceedings before the board took place on 12 June 2015, and that only the chairman had been replaced on 8 June 2015 (that fact was communicated to the petitioner on 9 June 2015), i.e. four days before the oral proceedings. The legal member had been replaced on 2 March 2015. The rapporteur had remained the same during the whole of the appeal proceedings.

The Enlarged Board considers that, in analogy to the principle enunciated above that decisions of the EPO boards of appeal should adequately state the reasons on

which they are based in order to show that the parties were heard, the composition of the board should be such as to ensure that it does not in itself prevent the board from properly hearing the parties. The Enlarged Board reiterates that, according to Article 113(1) EPC, the decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

It would therefore have been for the petitioner to state any facts, evidence or arguments that the board relied on in the decision under review, but, as a consequence of the only (about) three days available for the new chairman, the petitioner had not been heard. The petitioner however made no such statement. It merely asserted that "three days were not enough" for the chairman to get a thorough command of the case. The petitioner did not submit any facts that would suggest that the change of the composition of 8 June 2015 had an impact on its right to be heard in that it had prevented the board from hearing the parties on all the factual and legal aspects which formed the basis for the decision-making process. The surmise that the board in the new composition might not have had sufficient time during the "three" remaining days to consider all the relevant issues of the case must therefore be dismissed.

In the oral proceedings the petitioner argued in addition that the technical field had subtle peculiarities. (About) three days might not have been enough for the new chairman to get acquainted with the corresponding issues. The technical field was train

management systems which involved not only technical aspects, but also non-technical elements: safety and reliability were most important. All technical aspects finally came down to the need for ensuring 100% reliability (disregarding occasional human failures).

The Enlarged Board notes that these considerations give no hint that the chairman would not have been able to get thoroughly acquainted with the file in three to four days. The aspects of safety and reliability, in particular, were highlighted by the parties and dealt with especially in paragraph [0009]. It is therefore not at all apparent that three to four days might not have been sufficient to alert the new chairman to the importance of these aspects.

2.4 Conclusion on whether the petition is allowable

Given that the petitioner's three objections relating to breaches of the right to be heard are clearly unfounded, the Enlarged Board unanimously concludes that the petition is clearly unallowable within the meaning of Rule 109(2)(a) EPC.

3. Reimbursement of petition fee

Since the proceedings before Board of Appeal 3.5.02 are not reopened, under Rule 110 EPC, the Enlarged Board cannot order the reimbursement of the fee for the petition for review.

Order

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

The Registrar:

The Chairman:

P. Martorana

E. Dufrasne