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**Datasheet for the decision
of 17 December 2020**

Case Number: R 0010/18

Appeal Number: T 0384/15 - 3.5.03

Application Number: 08766905.7

Publication Number: 2177045

IPC: H04R1/10

Language of the proceedings: EN

Title of invention:
Improved earpiece

Patent Proprietor:
Freebit AS

Opponent:
Santarelli SA

Interveners:
Bose GmbH
Bose Limited

Headword:
Fundamental violation of the right to be heard

Relevant legal provisions:
EPC Art. 112a(2)(c), 113(1)
EPC R. 102(g)

Keyword:
"Decision sufficiently reasoned for purposes of the right to be heard (yes)"
"Petition allowable (no) - no violation of petitioner's right to be heard"

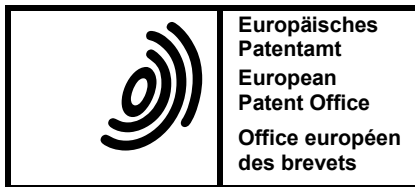
Decisions cited:

G 0003/97, R 0002/14, R 0008/15
European Court of Human Rights:
Ruiz Torija v. Spain, No. 18390/91

Catchword:

1. 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 2.1.1, affirming the relevant part of catchword 1 of R 8/15).

2. A board is presumed to have taken into account a party's submissions that it did not address in the reasons for its decision, meaning that it, first, took note of them and, second, considered them, i.e. assessed whether they were relevant and, if so, whether they were correct. An exception may apply if there are indications to the contrary, e.g. if a board does not address in the reasons for its decision submissions by a party that, on an objective basis, are decisive for the outcome of the case, or dismisses such submissions without first assessing them as to their correctness. (See Reasons, point 2.1.1.2).



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Case Number: R 0010/18

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of the Enlarged Board of Appeal
of 17 December 2020

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Decision under review: **Decision of Technical Board of Appeal 3.5.03 of
the European Patent Office of 27 April 2018.**

Composition of the Board:

Chairman: C. Josefsson
Members: B. Müller
 G. Alt

Summary of Facts and Submissions

[The following text has been taken verbatim from part A of the Enlarged Board's communication of 22 October 2019 annexed to the summons to oral proceedings.]

1. The subject of the petition for review

The patentee's petition received on 22 August 2018 is directed against the decision of Technical Board 3.5.03 in appeal case T 384/15. By that decision, the Board set aside the decision of the opposition division rejecting the sole opposition filed by Santarelli SA against European patent [No.] 2 177 045 and revoked the patent. The decision was pronounced in the oral proceedings of 27 April 2018 and the reasoned written decision was posted on 12 June 2018. The title of the invention is "Improved earpiece".

The petitioner ... [based] the request for review on Article 112a(2)(c) EPC[,], asserting a fundamental violation of the right to be heard pursuant to Article 113(1) EPC on [originally] two counts:

- (i) the Board failed to take into account the petitioner's essential and relevant arguments concerning the inadmissibility of the opposition, and
- (ii) the Board based its finding of lack of novelty of the claimed subject-matter in view of document D2 (US 2005/0008180 A1) on reasons advanced for the first time in the contested decision.

2. The facts and arguments submitted by the petitioner [in the petition]

2.1 Admissibility of the petition

As to the admissibility of the petition, the petitioner refers, in particular, to Rule 106 EPC. According to that rule, a petition under Article 112a(2)(a) to (d) EPC [is] admissible only where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings. This exception applied to both counts set out above because it was only after receipt of the written decision that the fundamental procedural defects became apparent. This fact made it impossible to raise an objection during the appeal proceedings.

2.2 Substance

2.2.1 Summary of the proceedings insofar as they are relevant to the petition

The date of "publication and mention" of the grant of European patent No. 2 177 045 was 18 April 2012. Notice of opposition was filed on 16 January 2013 in the name of Santarelli SA. On its homepage, Santarelli SA described itself as one of the leading intellectual property firms in France, advising clients on matters involving patents, trademarks, industrial designs, as well as domain names. Consequently, Santarelli SA might be regarded as an IP law firm that had filed the notice of opposition on behalf of a third party. In other words, Santarelli SA was not the "true" opponent, but rather, in patent parlance, a "strawman".

When the notice of opposition was filed, as was explained in section 2 of the petitioner's submissions in the appeal proceedings of 22 March 2018, the petitioner was in negotiations with "Bose" concerning a possible license agreement relating *inter alia* to the opposed patent. It was apparent from Exhibit C filed with said submissions that, in order to obtain a license, "Bose" was willing to withdraw its opposition against the patent. No agreement between the parties was reached.

Oral proceedings before the opposition division were held on 26 November 2014 at which the opposition division rejected the opposition. A notice of appeal was filed by the opponent on 20 February 2015, and a written statement setting out the grounds of appeal was filed on 22 April 2015.

A notice of intervention was filed on 7 June 2017 in the name and on behalf of Bose GmbH [hereinafter: intervener 1]. A further notice of intervention was filed on 21 March 2018 in the name and on behalf of Bose Limited [hereinafter: intervener 2].

Oral proceedings were held before Board of Appeal 3.5.03 on 27 April 2018 at which the Board pronounced its decision to set aside the decision under appeal and revoke the patent.

2.2.2 The first count of the petition: the Board failed to take into account the petitioner's essential and relevant arguments concerning the inadmissibility of the opposition

The petitioner submits [in point 5.1.1 of the petition] that According to the established case law, Article 113(1) EPC may be infringed if the reasons for a decision fail to take into account a party's essential and relevant arguments. The right

to be heard also requires that those involved be given an opportunity not only to present comments but also to have those comments considered and fully taken into account in the written decision in a manner that enables [them] to understand, on an objective basis, the reasons for the decision (see R 2/14 of 2[2] April 2016, reasons 6; R 23/10 of 15 July 2011, reasons 2; R 19/12 of 12 April 2016, reasons 6 to 6.3). The Boards have an obligation to discuss in their decisions issues and arguments to the extent that they are relevant for the decision.

As set out in section XII of the contested decision, the petitioner made requests 1.1 to 1.7 before the Board of Appeal. Requests 1.1 to 1.3 read as follows:

1.1 We request that the opposition filed by Santarelli be deemed inadmissible.

1.2 Should the Board be unable to accede to the above request, we request that the following question be referred to the Enlarged Board of Appeal in accordance with Article 112(1)(a) EPC: "If evidence clearly indicates that a strawman opponent is acting on behalf of a party who intervenes in opposition proceedings (Art. 105 EPC), is the involvement of the opponent to be regarded as circumventing the law by abuse of procedure (cf. G 3/97 and G 4/97), the consequence of which being that the opposition is inadmissible?"

1.3 Should the Board accede to neither of the above requests, we request that the interventions be deemed inadmissible and that the appeal of the Appellant be dismissed.

The petitioner contends [in point 5.1.3 of the petition] that from the above it was apparent that the request that the opposition filed by Santarelli SA be deemed inadmissible (request 1.1) was distinct and separate from the request that the interventions be deemed inadmissible (request 1.3). Nevertheless, the Board "lumps them [i.e. the two requests] together" (see reasons, point 1). This in itself impaired the clarity of the Board's reasoning with respect to each request.

It was the petitioner's position (see point 5.1.4 of the petition) that the contested decision did not adequately reflect that the Board had considered and fully taken into

account the petitioner's submissions and arguments relating to request 1.1. In its submissions of 22 March 2018, the petitioner discussed the decision of the Enlarged Board of Appeal in case G 3/97 relating to strawman oppositions. In section 3.5 of those submissions, it was pointed out that in the strawman decision the Enlarged Board conceded that the EPO had almost no procedural means of compulsorily eliciting the truth of the actual circumstances from an opponent which deliberately set out to conceal the existence and identity of a principal. In section 3.6, it was pointed out that when the opposition was filed by a strawman, it became impossible to ascertain with adequate certainty whether the intervener was a true third party or not.

As the Board acknowledged in point 1.1 of the reasons of its decision, the petitioner's position was that by having chosen to protect its anonymity by filing the notice of opposition [under] the name of a strawman, the true opponent had availed itself of the possibility of also intervening in the opposition proceedings since this anonymity allowed "Bose" to pick and choose who they might subsequently wish to present as the true opponent.

The Board's decision manifestly did not address this argument.

Simply saying that it was satisfied that neither Bose GmbH nor Bose Limited [was] apparently involved when the opposition was filed did not change the fact that the true opponent was still out there and, if the patent were still under opposition, could be sued and [thus] intervene and deny being the true opponent. It was the petitioner's position that the fact that this possibility existed during the entire "opposition and appeal procedure" was a circumvention of the law by abuse of

process. This argument was simply not addressed by the Board.
[End of point 5.1.4 of the petition.]

The Board's reference to decision T 305/08 in point 1.5 of the reasons was irrelevant to the question of whether the opposition was admissible since [that decision] was solely concerned with the admissibility of an intervention. In any case, the Board erred in asserting that the same situation as in decision T 305/08 existed in the present case. In T 305/08 the identity of the true opponent was known from the outset. This was the fundamental difference between the circumstances surrounding the present case and [those] of T 305/08, yet it was ignored by the Board. [See point 5.1.5 of the petition.]

That the Board, although acknowledging that there was evidence suggesting a relationship between the appellant and the interveners (see point 1.6 of the reasons), might have been satisfied that the interveners were third parties in the sense of being separate legal entities and not being the principal behind the opponent (see point 1.7 of the reasons) was again only relevant to the question of whether the interventions were admissible. It did not constitute a plausible motivation for finding that the filing of the notice of opposition [under] the name of a strawman under the prevailing circumstances was not to be regarded as a circumvention of the law by abuse of process. [See point 5.1.6 of the petition.]

In conclusion, it was not apparent from the reasons for the contested decision that the petitioner's submissions and arguments regarding request 1.1 had been considered and fully taken into account by the Board. Furthermore, since it was not possible for the petitioner to understand from the contested decision, on an objective basis, the reasons for the decision, it was [not] apparent whether the decision had been based on

grounds or evidence on which the petitioner had had an opportunity to present its comments or not. Clearly, the petitioner was unable to object pursuant to Rule 106 EPC, since the deficiency in reasoning only became apparent from the written decision. The objection was thus admissible and allowable. [See point 5.1.7 of the petition.]

2.2.3 The second count of the petition: the Board based its finding of lack of novelty of the claimed subject-matter in view of document D2 on reasons advanced for the first time in the contested decision

...

[End of extract from the Enlarged Board's communication.]

3. The Enlarged Board's preliminary opinion

In the communication of 22 October 2019 annexed to the summons to oral proceedings, requested by the petitioner as a precaution and scheduled for 9 January 2020, the Enlarged Board set out its preliminary opinion that the petitioner's assertion of a breach of the right to be heard appeared to be clearly unfounded on both counts. As a consequence, the petition appeared to be clearly unallowable within the meaning of Rule 109(2) (a) EPC.

4. The petitioner's response to the preliminary opinion

The petitioner opened its response of 6 December 2019 to the Enlarged Board's communication (hereinafter referred to as "the response") by making the following requests:

1.1 Insofar as our first count is concerned (see section 5.1 of our Petition for Review), we request that the decision of the Board of Appeal T 0384/15 of 27 April 2018 be set aside and that the proceedings be re-opened in accordance with Article 112a(5) EPC and Rule 108(3) EPC.

1.2 Insofar as our second count is concerned (see section 5.2 of our Petition for Review), it is hereby **withdrawn** from consideration.

Thus, the Petition for Review is hereby limited to solely the first count.

1.3 Our request for reimbursement of the fee for the Petition for Review is **maintained** (Rule 110 EPC).

1.4 Our request for oral proceedings is **withdrawn**.

(Emphasis in the original.)

The petitioner then sought to refute the Enlarged Board's preliminary unfavourable opinion on count 1. In its view, it had managed to show that the Board's reasoning in the decision under review did not enable it to establish why its arguments had been found not to be convincing (see point 2.13 of the response).

In view of the petitioner's response, the Enlarged Board cancelled the oral proceedings and declared that the proceedings would be continued in writing.

Reasons for the Decision

[The following text has been taken verbatim from part B of the Enlarged Board's communication of 22 October 2019 annexed to the summons to oral proceedings.]

1. Admissibility of the petition for review

Pursuant to Rule 126(2) EPC, the decision [under review] that was posted on 12 June 2018 is deemed to have been notified on 22 June 2018. The petition for review, together with the respective fee, was received on 22 August 2018 and thus in good time (see Article 112a(4) EPC).

Considering that the petition for review appears to be obviously without merit, no inquiry need[s] to be made ... into the petitioner's contention that it was under no duty to raise an objection according to Rule 106 EPC. According to the petitioner, it could not raise such an objection during the appeal proceedings [on either of the] above [two] counts, because it was only after receipt of the written decision that the corresponding fundamental procedural defects became apparent.

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

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

2.1 First [and sole remaining] count: failure to take into account the petitioner's essential and relevant arguments concerning the inadmissibility of the opposition

2.1.1 The legal framework

Regarding the petitioner's statement (in point 5.1.1 of the petition):

According to the established case law, Article 113(1) EPC may be infringed if the reasons for a decision fail to take into account a party's essential and relevant arguments. The right to be heard also requires that those involved be given an opportunity not only to present comments but also to have those comments considered and **fully taken into account in the written decision in a manner that enables [them] to understand, on an objective basis, the reasons for the decision** (see R 2/14 of 2[2] April 2016, reasons 6; R 23/10 of 15 July 2011, reasons 2; R 19/12 of 12 April 2016, reasons 6 to 6.3). The Boards have an obligation to discuss in their

decisions issues and arguments to the extent that they are relevant for the decision. (Emphasis added)

the Enlarged Board agrees that Article 113(1) EPC may be infringed if it follows from the reasons of a decision that a board of appeal has not taken into account a party's submissions that **the board** considered relevant. In this respect, the Enlarged Board subscribes to the principle expressed in decision R 8/15 (cited in decisions R 16/14, R 1/16, R 7/16, R 9/17, R 2/18 and R 3/18) whose catchword 1, in the pertinent part, reads as follows:

[...] 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.)

The Enlarged Board takes the stance that any requirements for a board relating to the reasons [for] a decision imposed in previous case law that may go beyond the principle spelt out in case R 8/15 cannot be based on Article 113(1) EPC.

In this respect the Enlarged Board again refers to decision R 8/15, in particular catchword 2, [the pertinent part of] which [...] reads:

[...] 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. [...] (See Reasons, point 2.2.3.)

As a consequence of the foregoing, any infringement of requirements going beyond the principle mentioned in the portion of the catchword 1 of R 8/15 quoted above is not subject to scrutiny by the Enlarged Board in review proceedings under Article 112a(2) (c) EPC.

[End of extract from the Enlarged Board's communication.]

Discussion of the petitioner's response

2.1.1.1 The relevance of catchword 1 of R 8/15

The petitioner (in point 2.2 of its response) argues that R 8/15, catchword 1 of which was quoted in part in the communication, does not deal with the section of point 5.1.1 of the petition highlighted in bold above, i.e. that comments must be considered and **"fully taken into account in the written decision in a manner that enables it to understand, on an objective basis, the reasons for the decision"**. In its view, R 8/15 instead seems to deal only with the obligation referred to in the last sentence of point 5.1.1, which reads: "The Boards have an obligation to discuss in their decisions issues and arguments to the extent that they are relevant for the decision". The petitioner in R 8/15 contended not that it could not understand the reasons for the decision but that the reasons were either incomplete or absent.

In this respect, the Enlarged Board notes, first, that, in point 2.12 of the response, the petitioner contends "that the reasons for the Board's decision [in the present case] are lacking" (emphasis in the original). Since the effect of incomplete or absent reasons is that a decision may not be understandable, this objection to the relevance of R 8/15 is not convincing.

Second, the Enlarged Board agrees that the part of catchword 1 of R 8/15 quoted in point 2.1.1 above does not deal with the highlighted portion of point 5.1.1 of the petition - for the simple reason it gave after quoting from that catchword there, i.e.

that any requirements for a board relating to the reasons [for] a decision imposed in previous case law that may go beyond the principle spelt out in case R 8/15 cannot be based on Article 113(1) EPC.

The reason the Enlarged Board highlighted the above portion of point 5.1.1 of the petition in its communication was not that it considered it to be pertinent, as point 2.11 of the response might suggest, but that the petitioner had already done so, relying on this portion as its core argument. This reason should be clear from the opening wording of point 2.1.1 above: "Regarding the petitioner's statement ...".

In the Enlarged Board's view, the principle embodied in the portion quoted from catchword 1 of R 8/15 is substantially narrower than the "established case law" referred to in point 5.1.1 of the petition, according to which comments by those involved must be considered and "fully taken into account in the written decision in a manner that enables [them] to understand, on an objective basis, the reasons for the decision". This finding is not restricted to comments that the board considers relevant; taken literally, it would apply to any comments made by a party. This finding anyway does not follow from the decision in case R 2/14, to which, along with other decisions, the petitioner links it. Rather, the relevant criterion enunciated in R 2/14 (in point 6 of the Reasons) and deduced from the seven decisions in petition cases cited there is as follows:

This requirement [i.e., the right to be heard] includes the party's right to have the **relevant** submissions and arguments considered and fully taken into account in the written decision in a manner that enables it to **understand, on an objective basis**, the **reasons** for the decision. (Emphasis added.)

There are thus parallels between the two decisions R 2/14 and R 8/15 in that both require only that the boards deal with relevant submissions in their decisions, and not that they

deal with a party's comments in general, as is suggested in the portion of point 5.1.1. of the petition quoted above. The Enlarged Board holds that it is as a rule the board that decides which of a party's submissions, or comments are relevant, irrespective of whether they are essential in a party's view.

In addition, catchword 1 of R 8/15 can be understood to mean that a party must be able to **understand, on an objective basis**, that the board **substantively considered** these submissions (but need not understand the reasons given; see the following paragraph). As it is put in that catchword, the reasons should enable the party

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 [...] for violation of Article 113(1) EPC. [...] (See Reasons, point 2.2.2.)

However, the Enlarged Board of Appeal takes the view that, if a party is able to glean from, e.g., the decision that the submissions deemed relevant have been considered, it is not necessary for compliance with the right to be heard that the party also understands the substance of the considerations and, in particular, why the Board has arrived at its conclusions, i.e. why it found the relevant submissions to be convincing (correct) or not. In other words, R 8/15 held, contrary to the finding in R 2/14, that Article 113(1) EPC does not impose any requirement that a party be able "to understand, on an objective basis, the **reasons** for the decision". This view is in line with catchword 2 of R 8/15, the relevant part of which is quoted above, after the quote from its catchword 1, and which states that the right to be heard must be interpreted more narrowly than the duty to state reasons. The Enlarged Board reiterates that failure to comply

with the latter is not as such a ground for a petition under Article 112a EPC.

2.1.1.2 Catchword 1 of R 8/15: principle and exception

The petitioner argues (in point 2.3 of the response) that it was hard to understand the logic behind catchword 1 of R 8/15: If a decision of a board of appeal does not address submissions that a party believes are **essential** for its case, then one of **two** possibilities exists: either the Board has given the submissions adequate consideration and found them **not** to be relevant for the decision, or it has (perhaps inadvertently) **not taken them into consideration** at all. Not taking them into consideration is a clear violation of Article 113(1) EPC. However, it becomes **impossible** for the disadvantaged party **to determine from the decision which of the two possibilities lay behind the decision**. In other words, if the decision does not address the party's submissions, how does the party know [whether] the Board's view was that they were not relevant or [whether] the Board overlooked them? For this reason, we urge that Catchwords 1 and 2 of R 8/15 must be applied narrowly. Otherwise, should R 8/15 be applied broadly, it would result in Article 113(1) EPC being contravened only if a Board were to have explicitly acknowledged that certain issues/arguments were relevant for the decision but then had proceeded to not take them into account. (Emphasis added.)

The Enlarged Board agrees that these two possible reasons for not taking **essential** submissions of a party into account exist: either the board considered those submissions but found them to be irrelevant or it simply did not consider them at all. The Enlarged Board also agrees that not considering them at all would amount to an infringement of Article 113(1) EPC. (There is also a third possibility, which is a precondition for the second one to come into play: the board did not even take note of the submissions in the first place.)

In the Enlarged Board's view, it is to be presumed that a board took account of a party's submissions that it did not address in the reasons for its decision, meaning that it, in a first step, it took note of them and, in a second step,

considered them, i.e. assessed whether they were relevant and, if so, whether they were correct.

However, the Enlarged Board agrees with the petitioner that an exception to this presumption may have to be made if there are indications that may result in its rebuttal, e.g. if a board does not address in the reasons for its decision submissions by a party that, on an objective basis, are decisive for the outcome of the case, or dismisses such submissions without assessing them as to their correctness. This may be an indication that the board did not take note of such decisive submissions or did not consider them, i.e. assess whether they were relevant and, if so, whether they were correct.

Submissions that are "decisive" in the above sense or "in any event relevant" (see point 30 of the judgment of 9 December 1994 handed down by the European Court of Human Rights ("ECHR") in the case *Ruiz Torija v. Spain*, No. 18390/91, cited below), may, but need not be, identical to those submissions that an appellant itself considers to be essential. This is because the latter submissions may, in a given case, be clearly unfounded and, if so, a board need not refer to them in the reasons for its decision in order to comply with the party's right to be heard. In this respect, the Enlarged Board follows the findings reached by the ECHR in its *Ruiz Torija v. Spain* judgment:

29. The Court reiterates that Article 6 para. 1 (art. 6-1) [of the European Convention on Human Rights] obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument ...

30. ...[the applicant before the ECHR] pleaded, inter alia, that the **action** brought by the lessor [plaintiff] for his eviction **was time-barred**.

The Court notes that it is **not its** task to examine whether the limitation plea was **well-founded**; it falls to the national courts to determine questions of that nature. It confines itself to observing that it is not necessary to conduct such an examination in order to conclude that the submission was **in any event relevant**. If the [second-instance court] Audiencia Provincial had held the submission to be well-founded, it would of necessity have had to dismiss the plaintiff's action.

Moreover, the Court is not persuaded by the Government's argument that the submission based on limitation was so **clearly unfounded that it was unnecessary for the appeal court to refer to it**. The fact that the first-instance court allowed evidence to be adduced in support of this submission suggests the contrary. Accordingly, since the issue of limitation would have been **decisive** in this instance, the Audiencia Provincial **should have addressed the submission in its judgment**.

It is therefore necessary to establish whether in the present case the **silence** of the appeal court can reasonably be construed as an **implied rejection**. The court was under no obligation to examine the question of limitation before considering the arguments on the merits... In addition, the **question** whether the action was time-barred fell within a completely different legal category from that of the grounds for termination of the lease; it therefore **required a specific and express reply**. In the absence of such a reply, it is **impossible to ascertain** whether the Audiencia Provincial **simply neglected** to deal with the submission that the action was out of time or whether it **intended to dismiss it** and, if that were its intention, what its reasons were for so deciding. There has therefore been a violation of Article 6 para. 1 (art. 6-1).

(Emphasis added.)

In the Enlarged Board's view, the decisive submission in the above case was the plea that the action brought by the lessor for the applicant's eviction was time-barred.

Applying the parts of catchwords 1 and 2 of R 8/15 quoted in this decision, while at the same time accepting that an exception in relation to the part of catchword 1 may have to be made, the Enlarged Board cannot see any risk that, as suggested by the petitioner, Article 113(1) EPC would be "contravened only if a Board were to have explicitly

acknowledged that certain issues/arguments were relevant for the decision but then had proceeded to not take them into account".

As a consequence, the Enlarged Board does not share the petitioner's concern (raised in point 2.14 of its response) as to:

[...] whether the last sentence of Catchword 1 [starting with "Article 113(1) EPC is infringed if..."] really serves the intended purpose, namely to allow a party 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 for violation of Article 113(1) EPC (see point 2.3 above).

2.1.1.3 R 8/15 (catchwords 1 and 2) is current case law

The Enlarged Board's intention, in its communication, was to set out its view that R 8/15 (catchwords 1 and 2) was current case law. The decision in case R 8/15 was pronounced in oral proceedings on 18 July 2016 and dispatched with reasons on 5 December 2016. Earlier decisions holding that Article 113(1) EPC required that a party had to be able "to understand, on an objective basis, the reasons for the decision" (see point 5.1.1 of the petition, citing R 2/14, R 23/10 and R 19/12) were not, as the petitioner alleged, "established" but, rather, previous case law. To stress this point, the Enlarged Board mentioned a number of recent decisions citing R 8/15, i.e. R 16/14, R 1/16, R 7/16, R 9/17, R 2/18 and R 3/18.

The petitioner has attempted to cast doubt on this finding in the communication by picking out two of these decisions, namely R 7/16 (Reasons, point 3.1.2) and R 9/17 (Reasons, point 2), the latter of which merely affirms, and quotes from, the former. In R 7/16 it was held:

3.1.2 The right to be heard not only implies that a party is given the opportunity to present its views but also that its

arguments are taken into account and considered. The reasoning in a decision should be such that a **party can establish that the deciding body actually considered its arguments and can understand why - in case of an adverse decision - its arguments were found not to be convincing.**

Assessing the completeness of the reasoning would usually be beyond the scope of scrutiny under Article 113(1) EPC. For 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 as being part of the procedure and that it found to be relevant, there will be no violation of Article 113(1) EPC (R 8/15 of 18 July 2016, Reasons, points 2.2.2 and 2.2.3 [summarised in catchwords 1 and 2, respectively]).

(Emphasis and split into two paragraphs added.)

The Enlarged Board notes that the first part of the passage quoted above, which is similar to the case law cited in the highlighted portion of point 5.1.1 of the petition, requires that the reasons for a decision should make it possible for the party to understand why its arguments were not found to be convincing. At the same time, however, R 8/15, according to which reasons may be incomplete, is cited as well in relation to the second part of the quoted passage. That concession makes it clear that not all arguments need to be addressed in the reasons for a board's decision and, as a logical conclusion, that a party therefore need not be able to understand why certain arguments that the board considered relevant were omitted from its reasons, as long as it is apparent that the board substantively considered them but presumably then found them to be unconvincing (incorrect).

In conclusion, the Enlarged Board is of the opinion that R 7/16 and R 9/17 do not conflict with the finding that R 8/15 is the current case law on the requirements under Article 113(1) EPC as to the reasons to be given by a board for a decision.

Nor has the Enlarged Board found any other decisions handed down after the dispatch of the reasoned decision in case R 8/15 on 5 December 2016 that would be at odds with the ruling in that decision.

2.1.1.4 Conclusion re legal framework

In the light of the foregoing, the Enlarged Board maintains the position it took in its communication and quoted in point 2.1.1 above, subject to the possible exception set out in point 2.1.1.2.

2.1.2 Application of the legal framework to the case in hand

2.1.2.1 Plea of inadmissibility of opposition raised on appeal

In point 5.1.4 of the petition, the petitioner claims that the contested decision does not adequately reflect that the Board considered and took fully into account the submissions and arguments it put forward in the appeal proceedings in support of its request 1.1, which reads as follows: "We request that the opposition filed by Santarelli be deemed inadmissible." It points out that it argued in those proceedings that, in choosing to protect its anonymity by filing the notice of opposition under the name of a straw man, the true opponent had availed itself of the possibility of also intervening in the opposition proceedings since this anonymity allowed Bose *to pick and choose who they might subsequently wish to present as the true opponent.*

(Emphasis in italics added; it corresponds to the emphasis in italics added to the quote from point 1.8 of the Enlarged Board's communication appearing at the end of point 2.1.2.2 below)

The Enlarged Board notes that, in its reply of 22 March 2018 to the Board's communication attached to the summons to oral proceedings (hereinafter: "the reply"), the petitioner submitted extensive arguments as to why the **opposition** was inadmissible (see point 2 of that reply, under the heading "Inadmissible opposition by Santarelli SA", in particular sub-points 2.2, 2.10 and 2.12 (final sub-point), all quoted below).

2.2 We will show that there is clear and convincing evidence (cf. r. 5 of G 3/97) that Santarelli SA is acting on behalf of one or more divisions within Bose Corporation. The assumed infringer and intervener, Bose GmbH, is a part of Bose Corporation. [The second intervener, Bose Limited, intervened at a later stage of the proceedings.] A requirement for an admissible intervention under Article 105(1) EPC is that it is filed by a third party, i.e. not an existing party to the proceedings. **By having chosen to protect its anonymity by filing the notice of opposition in the name of a straw man, the true opponent has availed itself of the possibility of also intervening in the opposition proceedings** because it is impossible, at least at first glance, for the EPO or any other party to ascertain whether the intervener is a third party or not. This constitutes an **abuse of process allowing circumvention of the law as laid out in Article 105(1) EPC**. As a consequence, the opposition filed in the name of Santarelli SA is to be deemed **inadmissible** ex tunc. In turn, this means that there were **no pending opposition proceedings** when the notice of **intervention was filed** by Bose GmbH. Consequently, the notice of **intervention is also inadmissible**.

2.10 In section 13.1 of its Communication pursuant to Article 15(1) RPBA, the Board points out that Bose Corporation is a different legal entity to Bose GmbH. While this may be true, it is not pertinent to our objection. **Because the true opponent chose to preserve its anonymity** by filing the notice of opposition in the name of a straw man, we will never know with the requisite degree of legal certainty exactly who the true opponent is. It is this **possibility to pick and choose who they might subsequently wish to present as the true opponent**, depending on the circumstances, which results in an **abuse of process**.

2.12 What **all this** means is that it is impossible to ascertain whether **instructions issued to Santarelli SA were given solely by Bose Corporation or one or more of its divisions**, including Bose GmbH. **Again**, this results in circumvention of the law by

abuse of procedure. Consequently, the opposition by Santarelli SA is to be deemed inadmissible. As a result, so too is the intervention by Bose GmbH.

(Emphasis added)

It should be added that the reasoning the petitioner gave in the reply (of 22 March 2018, in point 4) in support of its plea of inadmissibility of the **intervention** by Bose GmbH (intervener 1; the second intervention on behalf of Bose Limited (intervener 2) had only been filed on 21 March 2018) was very brief and comprised only 11 lines of text. It amounted to an assertion that the intervener Bose GmbH was a legal entity within Bose Corporation and thus one of a group of joint opponents. As such it could not intervene as a third party.

2.1.2.2 The Board's assessment of the plea of inadmissibility of the opposition

In point 5.1.4 of the petition, the petitioner went on to argue that:

The Board's decision manifestly does not address this argument. Simply saying that it is satisfied that *neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed* does not change the fact that the true opponent is still out there and, if the patent were still under opposition, could be sued and thereby intervene and deny being the true opponent. It is the Petitioner's position that the fact that this possibility existed under the entire opposition and appeal procedure is a *circumvention of the law by abuse of process* and **this argument is simply not** addressed by the Board.

(Emphasis added, that in italics corresponding to the emphasis in italics in the quotation of point 1.8 below, in 2.1.2.2 *in fine*.)

The Enlarged Board notes that, in this passage, the petitioner refers to section 1 of the reasons for the decision under review. In **point 1.1** the Board gave the gist of points 2.2 and 2.10 of the petitioner's reply (both quoted above), in which

it had identified two separate assertions of abuse of process, i.e.

- in protecting its anonymity by filing the opposition under the name of a straw man, the true opponent has availed itself of the possibility of also intervening in the opposition proceedings, which "constituted an abuse of process" (point 2.2) and
- that anonymity had also allowed "Bose" to pick and choose who they might subsequently wish to present as the true opponent, "which also resulted in an abuse of process" (point 2.10).

The petitioner, in the portion of point 5.1.4 of the petition quoted above (at the beginning of point 2.1.2.2 of this decision), considered that these two perceived abuses of process were interlinked, the first one (point 2.2 of the reply) following from the second one (point 2.10 of the reply), and that, taken together, they constituted one single abuse of process.

The Enlarged Board agrees. The wording "Because the true opponent chose to preserve its anonymity ..." used in point 2.10 makes it clear that the "second" abuse of process is to be regarded as linked to the "first" one.

In **point 1.2** the Board referred to the argument that "Bose GmbH (and by implication Bose Limited) would be one of the joint opponents and thus not able to intervene as a third party". In **point 1.3** it then dismissed this argument, holding that there was no question that the two interveners were third parties (see also the first sentence of point 1.4 quoted below).

In **point 1.4** the Board introduced its subsequent assessment as follows:

Although the interveners are "third parties", **it still has to be considered whether**, by invoking Article 105 EPC, **there has been an attempt by the opponent and/or interveners to circumvent the law by abuse of process** and thus whether there are grounds for holding the **opposition** and/or interventions **inadmissible**. (Emphasis added.)

In the following five **points 1.5 to 1.9** the Board considered the question raised in point 1.4 in detail. **Point 1.8**, whose wording reflects that used to assert the "second" abuse of process and to which point 5.1.4 of the petition refers (see text highlighted in italics), reads:

The argument that the anonymity created by using a straw man allowed Bose *to pick and choose who they might subsequently wish to present as the true opponent*, depending on circumstances, is also not convincing. In the present case, *neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed*. Bose has not presented anyone as the "true opponent", and indeed has had no need to do so. (Emphasis added.)

2.1.2.3 Analysis of the Board's assessment of the plea of inadmissibility of the opposition

- (i) No exception to applicability of catchword 1 of R 8/15

The exception to the principle embodied in catchword 1 of decision R 8/15 and discussed in point 2.1.1.2 of this decision does not apply, because, in section 1 of the decision under review, the Board did examine the petitioner's decisive submission in the petition, i.e. the plea of inadmissibility of the opposition due to abuse of process.

- (ii) Section 1, in particular point 1.8, complies with catchword 1 of R 8/15

Board considered petitioner's arguments to be relevant

The Board's summary of the essence of points 2.2 and 2.10 of the reply makes it clear from the outset that it not only took note of the petitioner's **arguments** but also considered them to be **relevant** to the admissibility of the opposition, i.e. to whether that had been an abuse of process in so far as:

- in protecting its anonymity by filing the opposition under the name of a straw man, the true opponent had availed itself of the possibility of also intervening in the opposition proceedings (point 2.2) and
- that anonymity had also allowed "Bose" to pick and choose who they might subsequently wish to present as the true opponent (point 2.10).

The Board considered both points in relation to the admissibility of the opposition **and** the interventions jointly, even though the petitioner had raised them only in relation to the admissibility of the opposition. The petitioner objected (in point 5.1.3 of the petition) that the Board "lumps [the requests that the opposition be deemed inadmissible and that the interventions be deemed inadmissible] together. This in itself impairs the clarity of the Board's reasoning with respect to each request." However, the Enlarged Board notes that it was the petitioner which, in point 2.2 of its reply, had mentioned, in the context of the admissibility of the opposition, that filing the opposition under the name of a straw man constituted "an abuse of process allowing circumvention of the law as laid out in Article 105(1) EPC", i.e. the provision dealing with the conditions for filing an intervention. It was thus the petitioner itself which had made a connection between the admissibility of the opposition and the interventions in the first place, and it was possibly this

that led to the Board's subsequent "lumping together" of the two issues in the decision under review.

Whether the decision answers the petitioner's essential arguments

In its communication attached to the summons to oral proceedings (see part B 2.1.2), the Enlarged Board responded to point 5.1.4 of the petition by drawing attention to points 1.4 to 1.9 of the decision under review and quoting both points 1.4 and 1.8. It then stated its preliminary opinion that the Board's discussion in points 1.5 to 1.9 does substantively assess the petitioner's arguments set out in point 5.1.4 of the petition and reproduced above. This discussion therefore meets the decisive criterion of catchword 1 of R 8/15 [...].

In the response (see point 2.10), the petitioner disagreed with this view:

Whilst **point 1.8** [of the decision under review] does indeed show that the Board **did consider the question** of whether the anonymity created by using a straw man allowed *Bose to pick and choose who they might subsequently wish to present as the true opponent*, the fact remains that **simply stating** that the Petitioner's argument *is not convincing* **clearly does not enable the Petitioner to understand, on an objective basis, the reasons** (i.e. the explanation or justification) for the decision. (Emphasis added)

The Enlarged Board notes that, in point 1.8 of the decision under review, the Board not only referred to the argument put forward by the petitioner, as highlighted in italics in the preceding paragraph, but also said:

In the present case, neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed. Bose has not presented anyone as the "true opponent", and indeed has had no need to do so.

The Enlarged Board does, however, agree with the petitioner that, although considering "the question of whether the anonymity created by using a straw man allowed Bose to pick

and choose who they might subsequently wish to present as the true opponent", the Board's statement in point 1.8 does not expressly deal with the petitioner's view that this situation amounted to a circumvention of the law by abuse of process and that the opposition therefore had to be deemed to be inadmissible.

It cannot be inferred that the Board's finding that "neither Bose GmbH [intervener 1] nor Bose Limited [intervener 2] were apparently involved when the opposition was filed" was intended as an implicit answer that the question of the "true" opponent was irrelevant because there was no other potential opponent left. On an objective basis, it cannot be assumed that the Board considered this finding to rule out the possibility of the "true" opponent intervening in the proceedings before the opposition division to be excluded, given that Bose Corporation was "operating as the mother company, with [several] local subsidiary sales / import companies" (see point 2.11 of the reply) which, during both the opposition proceedings before the opposition division and the appeal proceedings before the Board, could have been sued and then acted as interveners and that one of those companies could have been the "true" opponent.

It follows that point 1.8 "does not enable the Petitioner to understand, on an objective basis, the reasons... for the decision" on its objection to the admissibility of the opposition.

Points 1.5 and 1.6 of the decision under review (possibly relating to the "first" abuse of process), in which the Board discussed decision T 305/08 and concluded that it dealt with the same situation as that in issue in the present case, irrespective of whether or not this case relates, as the

petitioner contends, solely to the admissibility of the interventions, do not answer the aforementioned question either. Nor do points 1.7 and 1.9.

The Enlarged Board also agrees with the conclusion drawn in point 5.1.4 of the petition (quoted above, at the beginning of section 2.1.2 of this decision) that

Simply saying that it is satisfied that neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed does not change the fact that the true opponent is still out there and, if the patent were still under opposition, could be sued and **thereby intervene and deny being the true opponent**. It is the Petitioner's position that the fact that this possibility existed under the entire opposition and appeal procedure is a circumvention of the law by abuse of process **and this argument is simply not addressed by the Board**. (Emphasis added.)

The Enlarged Board's agrees with the petitioner's above statement irrespective of the fact that, in the review proceedings, it was only in the response (in point 2.8) that it provided the following clarification of this point:

Because the identity of the true party behind a straw man opposition is unknown, an assumed infringer is able to intervene even if it is the principal behind the opposition. This means that an intervener who is the (anonymous) principal behind the opposition is able [among other things] **to introduce new grounds and evidence into the opposition proceedings at stages during the opposition proceedings at which a bona fide opponent would not be allowed to**. In our view, this amounts to a circumvention of the law by abuse of process, the consequence of which being that the opposition is to be deemed to be inadmissible. (Emphasis added.)

The Board's finding in point 1.8 that "neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed. Bose has not presented anyone as the 'true opponent', and indeed has had no need to do so", does not answer the question of the legal impact, if any, of the danger perceived by the petitioner that the "true opponent", if sued by the petitioner, might have acted as an intervener. The fact that the Board found that no such situation had materialised does

not answer the question of the legal significance, if any, of the potential for it to do so. The same is true of the Board's conclusion that the opponent had "no need" to present anyone as the "true opponent" (apparently because its appeal had anyway been successful).

Whether not answering the petitioner's essential arguments violates the right to be heard

Nevertheless, not answering this question, i.e. the main point the petitioner had made in relation to the admissibility of the opposition, does not amount to a violation of the right to be heard. The Enlarged Board reaches this conclusion because it is possible to understand, on an objective basis, from section 1 of the decision under review, in which the Board set out and discussed the facts and arguments submitted by the petitioner on the issue of inadmissibility of the opposition (and the interventions) for abuse of process, that it had substantively considered those submissions. This applies in particular to the Board's findings in point 1.8, in which it identified the petitioner's submissions referred to as relevant and, at least briefly, addressed them in substance. That shows that the Board, having taken note of the submissions (step 1) and considered them to be relevant, assessed their correctness from its point of view, i.e. whether it found them to be convincing (step 2), even if it expressly concluded that they were not. Nothing more is required under the legal framework set out in section 2.1.1 of the present decision.

It is not for the Enlarged Board to guess why the Board assessed the petitioner's assertion of circumvention of the law by abuse of process this way and, for example, speculate as to whether it considered the perceived danger that the

"true opponent" might have acted as an intervener to be beside the point because it would imply that any opposition filed by a straw man was an abuse of process per se, as it would enable the entity behind the straw man to intervene in the capacity of an assumed infringer under Article 105 EPC. Under the case law of the Enlarged Board, in particular G 3/97 (of 21 January 1999, OJ EPO 1999, 245), discussed by the petitioner in point 2 of its reply, an opposition filed by a straw man is in principle admissible (it is "inadmissible if the involvement of the opponent is to be regarded as circumventing the law by abuse of process"; see headnote 1(b)). See, to that effect, point 3 (page 4) of intervener 1's response of 11 April 2018 to the reply of 22 March 2018 submitted by the petitioner (patent proprietor) :

The Proprietor's line of argument would result in the nonsensical finding that any strawman opposition is inadmissible as another legal entity behind the strawman could later on become a "third party" with a right to intervene.

Nor can the Enlarged Board judge whether the Board's reasons for its assessment are right or indeed whether they are at odds with substantive law. In proceedings under Article 112a EPC the Enlarged Board is not empowered to rule on the correct application of substantive law by a board of appeal (see Case Law of the Boards of Appeal of the EPO, 9th edition 2019, point V.B.3.4.3). More specifically, it is "not entitled to review the quality or correctness of the reasoning of a decision" (R 9/17, point 4.2.4).

2.1.2.4 Conclusion re compliance with the right to be heard

As regards the first, and only remaining, count of the petition, the Enlarged Board concludes that the Board complied in the decision under review with the requirements of Article 113(1) EPC, as specified in the part of catchword 1 of

decision R 8/15 quoted above. It follows that this count is clearly unfounded.

3. Reimbursement of petition fee

Since the petition is not allowable, the Enlarged Board cannot order reopening of the proceedings before Board of Appeal 3.5.03 under Rule 108(3) EPC and, therefore, also cannot order the reimbursement of the fee for the petition for review.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



N. Michaleczek

C. Josefsson

Decision electronically authenticated