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**Datasheet for the decision  
of 1 February 2019**

**Case Number:** T 0174/16 - 3.3.05

**Application Number:** 07834895.0

**Publication Number:** 2081672

**IPC:** B01J13/00, B22F9/14, B22F1/00

**Language of the proceedings:** EN

**Title of invention:**  
CRISTALLINE METALIC NANOPARTICLES AND COLLOIDS THEREOF

**Patent Proprietors:**  
Nano Technologies Group  
Amerdeen Spolka z o.o.

**Opponent:**  
Nano-Tech Polska sp. z.o. spolka komandytowa

**Headword:**  
Request for postponement/NANO TECHNOLOGIES

**Relevant legal provisions:**  
EPC Art. 113(1)  
EPC R. 103(1) (a)  
RPBA Art. 11

**Keyword:**

Decision to refuse request to postpone oral proceedings  
reasonable and taking all relevant factors of the  
circumstances of the case into account (no)  
Right to be heard - substantial procedural violation (yes)  
Remittal to the department of first instance - fundamental  
deficiency in first instance proceedings (yes)  
Reimbursement of appeal fee - equitable by reason of a  
substantial procedural violation

**Decisions cited:**

G 0007/93, G 0002/97, T 0460/95, T 1505/06, T 2526/11,  
T 0447/13, T 1102/03, T 1691/15

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0174/16 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 1 February 2019**

**Appellant:** Nano Technologies Group  
(Patent Proprietor 1) 629 Zaininger Avenue  
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**Appellant:** Amerdeen Spolka z o.o.  
(Patent Proprietor 2) ul. Jesionowa 30  
05-816 Michalowice (PL)

**Representative:** Kondrat, Mariusz  
Kondrat & Partners  
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02-087 Warszawa (PL)

**Respondent:** Nano-Tech Polska sp. z.o. spolka komandytowa  
(Opponent) ul.Grzybowska 16/22  
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**Representative:** Kacperski, Andrzej  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 2 December 2015  
revoking European patent No. 2081672 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**            E. Bendl  
**Members:**            A. Haderlein  
                             P. Guntz

### **Summary of Facts and Submissions**

- I. The appeal was filed by the appellants (patent proprietors) against the decision of the opposition division to revoke the patent in suit.
- II. In the proceedings before the opposition division, the parties were summoned to oral proceedings to be held on 10 November 2015 in Munich.
- III. According to the decision under appeal (see item 2.1 of the Reasons), the following occurred the day before the oral proceedings:

*"On the initiative of P [i.e. the representative of the proprietors, now appellants] a phonecall took place with the first examiner on Monday 09.11.2015 at about 13h45. During this P explained that he would not be able to come to the oral proceedings on the 10.11.2015 and asked if it would be possible to postpone its date. The first examiner replied that he would discuss this issue with the other members of the opposition division.*

*At about 14h45 the first examiner asks the Formalities officer to contact P to take care of this issue and states that a request from P is necessary in writing.*

*After that P and the formalities officer telephone several times and P sends a fax dated 09.11.2015, 15h06, which comprises the request for postponement of oral proceedings. The reason given in the fax is that P cannot come from Warsaw (Poland), because his flight has been cancelled due to a strike from Lufthansa."*

- IV. This fax contained
- a letter dated 9 November 2015 and signed by the representative of the appellants, requesting cancellation of the oral proceedings scheduled and asking for a new date to be fixed,
  - a copy of flight tickets issued to the representative and to two accompanying persons whose attendance had previously been announced in writing, the tickets being for flight LH1615 starting on 9 November 2015,
  - a printout headed "Lufthansa Current travel information" dated 9 November 2015,
  - a printout dated 9 November 2015 concerning flight details of Lufthansa flight LH1615 of that date,
  - a printout dated 9 November 2015 headed "Lufthansa® - Your flight selection",
  - a printout headed "LOT - Flights" and
  - a printout headed "DB BAHN - Verbindungen - Ihre Auskunft".

- V. On 10 November 2015, oral proceedings took place before the opposition division in the appellants' absence and in the presence of the opponent's representative, two accompanying persons and a member of the public (see impugned decision, item 2.2 of the Reasons). The proceedings opened at 09.00 hrs. In the course of the proceedings, the members of the opposition division received a copy of the afore-mentioned fax at 9.45 hrs (see the minutes of the oral proceedings).

The proprietors' request for postponement was discussed with the opponent and finally refused by the opposition division (impugned decision, item 2.4 of the reasons). The patent was ultimately revoked by the opposition division.

VI. The reasons in the impugned decision for refusing the request for postponement can be summarised as follows:

Postponement of oral proceedings can be granted only for serious reasons as set out in the Guidelines E-III, 7 of 2015 and in the Official Journal 1/2009, page 68, 2.2. Reference was made to decision T 1102/03. The request for postponement must be filed as soon as possible after the grounds for preventing the party concerned from attending the oral proceedings have arisen. As can be seen from the fax dated 9 November 2015, top of page 4, the booked flight was cancelled at the latest on 9 November 2015, 4.30 hrs, i.e. about 11 hours before the request was filed. At the oral proceedings the opponent's representative and a member of the public, both coming from Poland, stated that mass media in Poland had already published information about the strike on Saturday 7 November. Consequently, the request for postponement was filed late. Nor were any reasons given in the fax as to why the request was not submitted earlier and why the appellants' representative did not find out about the strike earlier.

The representative of the opponent, two accompanying persons and a member of the public had travelled from Warsaw and Krakow (Poland) to Munich. An accompanying person had travelled from Krakow to Munich by airplane. It was thus possible to fly from places close to Warsaw or to other places close to Munich. Other airlines were also available. It would also have been reasonable to go to the airport despite the strike and to attempt to rebook. No reasons were provided in the fax why it was not possible to go to the airport to try to rebook the flight or why such an attempt failed. It was also possible to go by car, which would have taken some

10 hours, as confirmed by "Google Maps" and also by the member of the public, who stated that they had come by car. In the afternoon of 9 November 2015, there had been sufficient time to go by car, which would have required only a reasonable effort. Hence, it was possible to get to Munich using alternative travel means. In view of the evidence before the opposition division and in particular in view of the submissions by the persons present at the oral proceedings, the reasons given in the fax submitted by the appellants were insufficient to justify postponement of the oral proceedings at such short notice.

VII. With its grounds of appeal, the appellants filed a main claim request and first to third auxiliary claim requests.

VIII. The arguments of the appellants, as far as relevant to the present decision, may be summarised as follows:

The opposition division's decision to refuse the request for postponement was flawed. The request for postponement was not filed late, because the appellants' representative only found out about the strike on the morning of 9 November 2015, when he tried to perform an online check-in. As soon as he had found out about the strike he did everything he could to remedy the situation. While the written request was filed by fax only at about 15.00 hrs, the representative tried to contact the opposition division by telephone as early as 12.20 hrs, immediately after he had found out that rebooking of the flight was not possible, and around 13.45 hrs there was a telephone conversation with the first examiner of the opposition division, who was informed of the situation. It was not possible to fly to Munich on 9 November 2015. The fact



that three people on the side of the opponent were present at the oral proceedings and came from Warsaw and Krakow cannot justify the assumption made by the opposition division that it was possible to fly to Munich. It was not possible to drive by car in particular because the appellants' representative does not have a driving licence. Immediately after the representative had been informed by the EPO that a written request was necessary, such a request was prepared and submitted by fax at about 15.00 hrs. The opposition division's argument that the representative could have gone to the airport in order to try to rebook was unreasonable. The representative had contacted the airline trying to rebook his flight, but to no avail. It was therefore pointless to go to the airport in order to try to rebook the flight.

Not only was the opposition division's decision unreasonable, but the appellants had also been misled by the EPO, in that the formalities officer had assured the appellants' representative in several telephone conversations that the oral proceedings would be postponed.

IX. No submissions were received by the opponent (respondent).

X. Requests

The appellants request that the decision under appeal be set aside, and that the case be remitted to the opposition division for further prosecution. In the alternative, it requests that the patent be maintained based on the main claim request or one of the first to third auxiliary claim requests filed with the statement of grounds of appeal.

## **Reasons for the Decision**

1. *Request for postponement of the oral proceedings before the opposition division*

1.1 It is within the discretion of the opposition division to grant a request for postponement of the oral proceedings before it. When arriving at its decision the opposition division has to consider all relevant factors of the particular circumstances of the case and must exercise its discretion in a reasonable way (T 1505/06, Reasons 1.3 and 1.4; T 447/13, Reasons 2 and 3 referring to G 7/93, Reasons 2.6, and citing T 2526/11, Reasons 2.2).

1.2 In exercising this discretion, the principles to be applied are set out in the Notice from the EPO dated 18 December 2008 concerning oral proceedings (OJ EPO, 1/2009, page 68) reflected in the Guidelines Part E-II, 7, 2015, in force at the relevant date. According to this Notice,

*"oral proceedings... will be cancelled and another date fixed at the request of a party only if the party concerned can advance serious reasons which justify the fixing of a new date. The request to fix another date shall be filed as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen. The request shall be accompanied by a sufficiently substantiated written statement indicating these reasons."*

1.3 The reasons given in the impugned decision essentially boil down to two aspects, namely that the request for

postponement was filed late and that it was in fact possible for the appellants to attend the oral proceedings, so the reasons advanced could not be considered serious reasons within the meaning of the above provisions.

- 1.4 Given the discretion of the opposition division the principal task of the board of appeal is to consider whether, when exercising its discretion, the opposition division took all relevant factors of the particular circumstances of the case at hand into account, and whether it exercised its discretion in a reasonable way.
- 1.4.1 According to the impugned decision, the airline had published information concerning the cancellation due to the strike at the latest on 9 November 2015 at 4.30 hrs in the morning and, according to the statements by the persons present at the oral proceedings before the opposition division, mass media in Poland had already published information about the strike on 7 November. Filing the written request only at 15.06 hrs on Monday 9 November was therefore late.
- 1.4.2 It is not reasonable to rely only on statements made by persons associated with the opponent attending the oral proceedings in the absence of the proprietor and by an unidentified member of the public (see item 2.2 of the Reasons of the impugned decision) to arrive at the conclusion that the appellants could and should already have been aware of the strike on 7 November 2015. In any event, the opposition division did not consider the fact that 7 November 2015 was a Saturday and that Monday 9 November was the first working day after the alleged publication of the strike in the Polish mass media. Moreover, in its decision the opposition

division refers to "about 11 hours" that had lapsed between the publication of the cancellation of the flight on the airline's website and the filing of the written request. This suggests that the opposition division was of the opinion that the appellants could and should have filed the request at a time close to 4.30 hrs on Monday 9 November, which is of course entirely unreasonable. What is more, the opposition division did not consider the fact that the appellants' representative had contacted the opposition division by telephone at the latest at 13.45 hrs on 9 November, and that thereafter several telephone conversations between the appellants' representative and the formalities officer took place (see item 2.1 of the Reasons of the impugned decision). The opposition division merely considered the time of receipt of the written request, which was 15.06 hrs. Moreover, the evidence submitted with the written request clearly shows that the appellants' representative had made a reasonable effort to find alternative travel means, and it cannot be held against it that it filed the written request only after having made such an effort and after having collected evidence thereof. For these reasons and considering the particularities of the case at hand, it was unreasonable to draw the conclusion that the request for postponement was filed late, i.e. not "as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen".

- 1.4.3 It was also unreasonable to consider it "possible by taking due care" to travel by airplane and that "at least going by car would still have been possible" (see item 2.3 of the Reasons of the impugned decision).

In this respect, the opposition division did not consider the evidence provided in the fax to show that flying using other airlines was not possible and showing four pages of flight connections of another airline. Instead, the opposition division relied only on the submissions by the persons present at the oral proceedings, i.e. persons representing the opponent and the unidentified member of the public. Nor was any person identified whose flight had been cancelled due to the strike and who managed to rebook their flight or to use another airline. It appears that one person present at the oral proceedings flew from Krakow to Munich. But it is unreasonable to conclude therefrom that it was possible to fly to Munich "from other places close to Warsaw", as argued in the impugned decision. Since Krakow is some 300 km away from Warsaw, it can certainly not be considered "close to Warsaw". Moreover, the fact that a plane was flying from Krakow to Munich does not mean that it would still have been possible to book places on such a flight on 9 November, when many other flights had been cancelled due to the strike. Nor is it clear what the opposition division meant when it stated that it was possible to fly "to other places close to Munich".

Moreover, it is not reasonable to expect the appellants' representative to take the car on the afternoon of the day before the oral proceedings by referring to "Google Maps" for a total (net) driving time of "8 - 10 hours", as the opposition division did, irrespective of whether the appellants' representative had a driving licence. Whether a person present at the oral proceedings came by car from Warsaw is immaterial in this respect. Thus, it can certainly not be said that the appellant's representative "did not [make] all efforts [...] to get to the oral proceedings in

Munich".

It is thus unreasonable to consider the cancellation of the flight, along with the impossibility of using other travel means, not to constitute "serious reasons" within the meaning of the above provisions.

- 1.5 In the impugned decision, reference is made to T 1102/03. This decision dealt with a request for postponement due to booked holidays and concerned proceedings including more than two parties. This decision is thus of little relevance to the case at hand.
- 1.6 For the above reasons, the opposition division exercised its discretion in an unreasonable way and moreover did not take all relevant factors of the particular circumstances of the case into account. As the opposition division's decision not to postpone the oral proceedings prevented the appellants from properly exercising their right to be heard pursuant to Article 113(1) EPC, the opposition division committed a substantial procedural violation.
- 1.7 According to the appellants, they were also misled by the opposition division's formalities officer, who had allegedly confirmed to the appellants' representative that the oral proceedings would be cancelled. Put differently, the appellants argue that holding the oral proceedings in their absence amounted to a breach of the principle of the protection of legitimate expectations.
  - 1.7.1 In the case at hand, it has been established that several telephone conversations took place between the appellants' representative and the formalities officer

of the opposition division (see the impugned decision, page 5, first paragraph) the day before the oral proceedings. Regrettably, the public file does not contain any minutes of these conversations drawn up by the EPO. The board, which has access to the complete file, has established that the non-public part of the file likewise contains no such minutes drawn up by the EPO which could have a procedural bearing on the present case (see T 1691/15, Reasons 3).

- 1.7.2 On the other hand, in order for a party to claim that it has relied on incorrect information in accordance with the principle of legitimate expectations, it has to be established that the erroneous information from the EPO was the direct cause of the action taken by the party and objectively justified its conduct (T 460/95 of 16 July 1996, Reasons 4, and G 2/97 Reasons 4.1). In the case at hand, the appellants have not submitted that a particular action (or the omission of a particular action) was the direct consequence of the alleged erroneous information. The action taken by the appellants, i.e. their absence from the oral proceedings, appears to have been caused by the impossibility of the appellants' travelling to Munich due to the airline strike and the non-availability of other travel means, rather than by the alleged erroneous information.
- 1.7.3 The question of whether the opposition division committed a further procedural violation by its formalities officer allegedly issuing misleading information can remain open, however, since the board already accedes to the appellants' main request for the reasons set out in 1 to 1.6 above.

2. *Remittal and reimbursement of the appeal fee*

As shown above, the board has ascertained that there was a substantial procedural violation in opposition proceedings. Therefore, the decision under appeal must be set aside and the case must be remitted to the opposition division for further prosecution (Article 11 RPBA).

In these circumstances, the board considers a reimbursement of the appeal fee to be equitable and decides that the appeal fee is to be reimbursed (R. 103(1)(a) EPC).



## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated