

# Part 7 Chapter I: Common provisions governing procedure

## Art.113

**Basic principles of decisions**  
 Right to be heard  
 Loss of rights  
 Signature

**Art.113**  
 (1) Right of parties to comment  
 (2) EPO considers/decides on text submitted or agreed

### Art.113 Right to be heard and basis of decisions

(1) 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.**

(2) The EPO shall **examine,** and **decide upon,** **the EPA or the EP** **only in the text submitted to it,** or **agreed,** by the **applicant or the proprietor** of the patent.



**R.111**  
 (1) Decision given orally thereafter written  
 (2) Decision must be reasoned + possibility to appeal

### R.111 Form of decisions

R.111 <=> R.68 EPC1973

(1) Where **oral proceedings are held before the EPO,** the **decision may be given orally.**  
 The decision shall **subsequently be put in writing** and **notified** to the parties.

(2) Decisions of the EPO which are open to appeal **shall be reasoned** pointing out the **possibility of appeal** and **drawing the attention** of the parties to **Art.106 to 108,** the text of which shall be attached.  
 The parties **may not invoke the omission of the communication.**

### Basic principles of decisions

**E.X.1.1** **Art.113(1) EPC** is intended to ensure that **no party can be taken by surprise** by grounds for a decision against his application on which he did **not have an opportunity** to present his comments.

Decisions are to be produced **in writing**  
 same applies to decisions delivered **at end of oral proceedings**

**No complete rules** can be laid down about **form and content of decisions,** which will depend on the requirements of each particular case.

The written decision will contain:  
 the **names** of the parties to the proceedings (applicant, proprietor, opponents) and, if applicable, their representatives;  
 the **order** (operative part), and, if necessary, the facts and submissions;  
 the **reasoning;**  
 the communication of **the possibility of appeal (R.111(2));** and  
 the **signature(s)** and the name(s) of **employee(s) responsible.**



**E.X.1.3**

Even in those cases in which decision **contains no communication of means of redress,** **appeal can be filed** if decision is incorrect, e.g. if grant was not made on basis of documents that applicant had approved.

If decision is produced by employee responsible using a computer, **EPO seal may replace the signature.**  
 If it is produced **automatically** by a computer **employee's name may also be dispensed with (R.113(2)).**

### Decisions which do not terminate proceedings = interlocutory decisions

An interlocutory decision **can only be appealed together with the final decision** unless it allows **separate appeal.**

Competent department will use its discretion as to the need for an interlocutory decision

To avoid fragmentation of proceedings such decisions will be **the exception rather than the rule** and will be given only if duration or cost of proceedings as a whole is thereby reduced. The interests of parties will also be borne in mind as appropriate.

**E.X.3** In normal course, interlocutory decision will be contemplated **only for purpose of ruling that separate appeal may be made** as only in this way can decision be obtained on preliminary point before final decision terminating proceedings is reached. (proceedings suspended until decision has become final)

Interlocutory decisions must state the reasons on which they are taken  
 it is decided **not to allow separate appeal,** reasons for this ruling **may be given in final decision instead.**

If A ruling to **allow separate appeal** must be **part of order** of the decision **T756/14**

### Decisions taken by Exam Div or Oppo Div

In substantive examination applicant must have opportunity of presenting his comments on all grounds invoked against his application.

**E.X.2** In opposition proceedings, if patent is to be **revoked** it must be ensured that **patent proprietor in particular** is given **sufficient opportunity to defend himself** and similarly, if oppositions are to be **rejected** or to be **maintained in amended form,** **opponents in particular** must be given the **same opportunity.**  
 A decision may be based on grounds indicated in document from one of the parties, provided document has been sent to other party so that he has had opportunity to comment

**T263/93** If **more than 2 months** have elapsed between despatch of document "only for information" and issue of the decision, this generally means that party has had **sufficient opportunity to comment** and his **right to be heard has therefore not been infringed**

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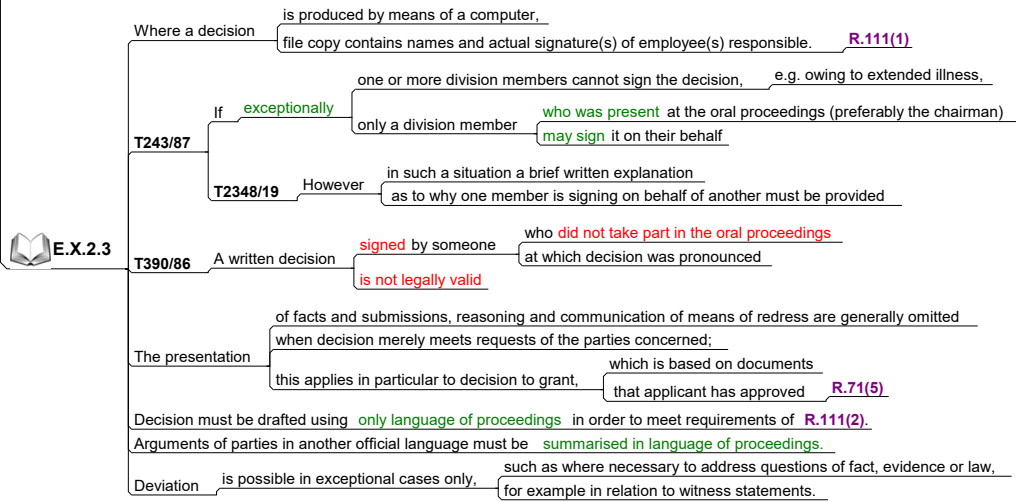
Art.113

## Basic principles of decisions

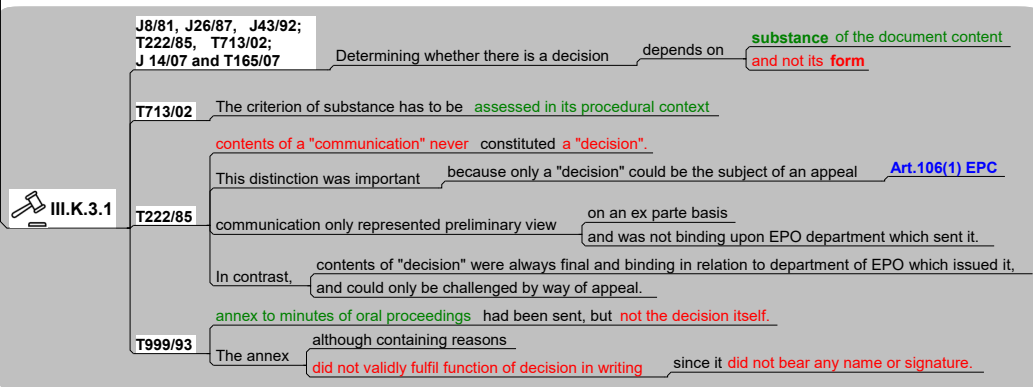
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### Form

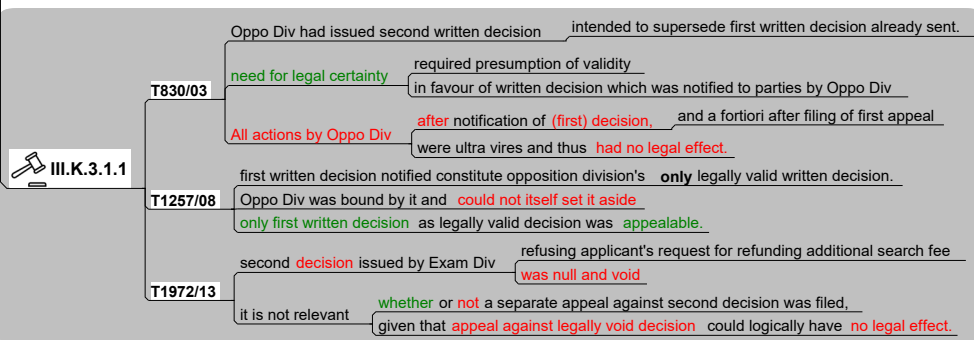
#### Requirements as to form



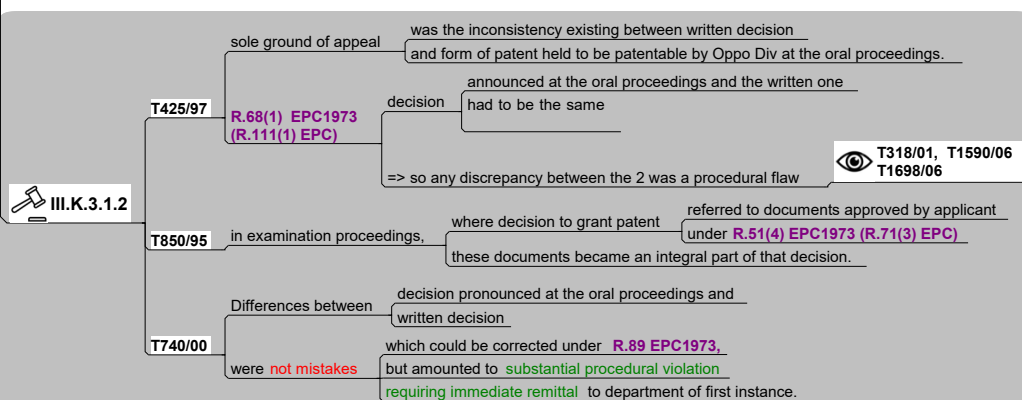
#### When is there a decision?



#### Cases involving two decisions



#### Inconsistency between oral and written decisions



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## Basic principles of decisions

### Content



E.X.2.7

The decision normally deals with all independent claims of valid request(s) that were discussed during proceedings.  
A single ground is enough to refuse application, so it is not always necessary to deal with all dependent claims.  
If however a particular dependent claim has been discussed, decision includes relevant arguments  
Any additional requests still outstanding must be dealt with in refusal decision.  
If, e.g. new oral proceedings were requested in circumstances where Art.116(1), second sentence applies decision must give reasons for rejecting that request.  
Formulations implying doubt or uncertainty, such as "seems" or "apparently", must be avoided in decisions.

### Order



E.X.1.3.1

The order (or "operative part") of decision must clearly state request of parties and extent to which this request is complied with T756/14  
It may be as follows: "The European patent application ... is hereby refused pursuant to Art.97(2) EPC."; "The opposition to the European patent ... is hereby rejected."; or "The request for re-establishment of rights is hereby rejected".

### Binding nature of decisions on appeals



E.X.4

If remitted by BoA for further prosecution that department is bound by ratio decidendi of BoA Art.111(2) insofar as facts, e.g. subject-matter of patent and relevant state of the art, are the same.  
Oppo Div is not bound by a decision of BoA  
on appeal against decision from Exam Div T167/93 exclusive phrasing of the last sentence of Art.111(2)

### Pointing out right to appeal in accordance with R.111(2) EPC



III.K.3.2

R.111(2) EPC => appealable EPO decisions must be accompanied by communication pointing out possibility of appeal and drawing the attention of the parties to Art.106-108 EPC which specify how to file appeals.  
parties cannot invoke any omission to communicate this possibility R.111(2), second sentence, EPC  
However EPO's failure to enclose the text of Art.106-108 EPC with decision neither invalidated decision nor amounted to substantial procedural violation T42/84 T231/99 T493/08

### Facts and submissions



E.X.1.3.2

Facts and submissions have to be given insofar as they are significant for the decision.  
Under facts, a brief description of case and a summary of main reasons on which decision is based and of most important replies of parties is given.  
These points, however, are to be covered in detail in the subsequent reasoning

### Reasons for the decision



III.K.3.4

R.111(2) EPC expressly stipulates that appealable decisions are to be reasoned.



E.X.1.3.3

The deciding instance will draft decision based on one or more grounds forming basis of decision.  
The statement of grounds must first set out and substantiate the reasons for the decision, citing the individual EPC articles and rules involved.  
It is essential that parties have been given an opportunity to comment on all grounds on which the decision is based.  
When several grounds are used in decision, it is imperative to link them in a logical way in particular avoiding having a subsequent ground contradict an earlier one.  
Furthermore, chain of grounds must be structured so that it starts with the main ground.  
All significant arguments advanced by party to proceedings are carefully examined and comprehensively discussed in decision.

### Purpose of duty to provide reasons



III.K.3.4.1

T70/02 This principle is intended to ensure fairness between EPO and parties to proceedings and enable the decision to be reviewed on appeal  
T652/97 EPO can only properly issue decision against party if that decision is adequately reasoned

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## Basic principles of decisions

### Content

#### Reasons for the decision

##### Requirement of sufficient reasoning

**T740/93; T1709/06; T2352/13; T278/00, T1182/05** a "reasoned" decision should deal with all important issues of dispute. upon which decision was based

The grounds and all decisive considerations in respect of factual and legal aspects of case must be discussed in detail in the decision.

**T292/90** decision should discuss the facts, evidence and arguments which are essential to the decision in detail. It also has to contain the logical chain of reasoning which led to the relevant conclusion.

reasoning does not mean that all the arguments submitted should be dealt with in detail, but it is a general principle of good faith and fair proceedings

**T70/02** that reasoned decisions contain in addition to logical chain of facts and reasons on which every decision is based, at least some motivation on crucial points of dispute in this line of argumentation in so far as this is not already apparent from other reasons given.

**T1123/04** if BoA had to reconstruct or even speculate as to possible reasons not enough for a negative decision in first-instance proceedings.

As a rule, decision within meaning of R.68(2) EPC1973 should be complete and self-contained. The reasons were inadequate if only arguments advanced by Exam Div were unsubstantiated claims.

##### Deficient reasons

**a) Deficient reasons sufficient for purposes of R.111(2) EPC**

There are isolated decisions where deficient reasons have been treated as being sufficient as long as they amounted to some form of reasoning at all.

**T856/91** regarded incomplete and poor reasoning as being sufficient for the purposes of R.68(2) EPC.

**T1231/03** contested decision contained an assessment of main points in dispute and was therefore sufficiently reasoned.

Decision's defects in terms of its content incoherent line of argument inaccurate formulation of technical problem and allegedly erroneous assessments were not an infringement of R.68(2) EPC1973 in this case.

**T647/93** reasons cited by Exam Div in its refusal decision were somewhat "enigmatic" and without basis in EPC1973. even if those reasons were therefore ill-founded

However, this did not mean that decision did not contain any at all within meaning of R.68(2) EPC1973 or that there had been a substantial procedural violation.

**b) Deficient reasoning insufficient for purposes of R.111(2) EPC**

**T70/02** simply stating "no convincing arguments have been found in your letter" in response to letters in which objections put forward were exhaustively discussed by applicant, did not comply with R.68(2) EPC1973.

**T1291/13** decision did not deal with crucial plausible counter-arguments presented by the applicant. referred to T70/02

BoA decision must contain at least some reasoning on crucial points of dispute, i.e. deal with at least main counter-arguments presented by applicant to be sufficiently reasoned.

**T1366/05** mere summary of party's submissions does not constitute sufficient reasoning.

**T534/08** it was not clear from wording of contested written decision why Oppo Div had come to its conclusion, whether or not it had adopted respondent's arguments entirely, or whether or not it had had its own objections. This too was regarded by board as being insufficient.

unsubstantiated assertions were made by Exam Div

**T548/08** Instead of logical chain of reasoning as to why e.g. claims were not supported by description, entire burden of analysis and argument was put on applicant and board, who were expected to work out for himself the true nature of Exam Div's objections.

**T1929/12** decision was fundamentally flawed if it did not indicate features or combination of features in claims in question that were considered to extend beyond content of originally filed application ( Art.123(2) EPC )

**c) No reasons for decision**

**T493/88** decision of Oppo Div rejecting opposition had not been correctly reasoned within meaning of R.68(2), first sentence, EPC1973 failed to state reasons why it considered that subject-matter also involved an inventive step.

**T1553/07** had not explained why it believed that there had been public prior use and how it had arrived at this conclusion. Nor was it apparent what its considerations had been in arriving at its conclusion regarding novelty

**T153/89** Exam Div had given no reasons for finding in its decision that the subject-matter of dependent claims was not inventive

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Basic principles of decisions

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Reasons for the decision

Right to be heard – right to have submissions taken into consideration

R8/15; J 7/82  
 T508/01; T763/04  
 T1123/04; T246/08

Right to be heard under **Art.113(1) EPC** is not just a right to present comments but also to have those comments duly considered.

**III.K.3.4.2**

T1123/04 opportunity to present comments and arguments guaranteed by **Art.113(1) EPC** is fundamental principle of examination, opposition and appeal procedures and cited finding in **T508/01** that this is not just a right to present comments but also to have those comments duly considered.

T246/08 it had to be clear from reasons that core arguments had been addressed in substance in arriving at decision. Decision had to show that all potentially refutative arguments adduced by a party were actually refutable.

T763/04 merely repeating the parties' submissions was not enough.

Special cases

a) References to communications

**III.K.3.5** "Decisions according to the state of the file".

b) Reference to a board decision or case law

T1205/12  
 T1206/12

mere reference to jurisprudence of BoAs did not by itself constitute or replace argument in first instance decision. deciding body also had to make clear that it adopted the argument and explain why, in what respect and to what extent this argument applied to case at hand.

T227/95 contested decision contained no reasons on the merits of the case but merely stated: "for the reasons it is referred to the decision of the board of appeal dated 24.01.94" (meaning **T 27/92**). However, **T527/92** contained no such reasons since the case was remitted to Oppo Div for further prosecution. Requirements of **R.68(2) EPC1973** were not met.

c) Assessment of inventive step without assessing prior art

**III.K.3.4.5**

T2375/10 since requirement of inventive step under **Art.56 EPC** had to be assessed in light of prior art, decision of Exam Div without referring to prior art was insufficiently reasoned within meaning of **R.111(2) EPC** **T306/09**

d) Identical decision after remittal for further prosecution

T740/93 case had been sent back to department of first instance because of procedural violation (incorrect composition of Oppo Div). new Oppo Div rendered decision which was nearly identical to the first one. decision under appeal contained reasoning Although as to why subject-matter was considered to lack inventive step and referred to points of dispute raised in proceedings up to first decision, it did not contain any direct reference to important issues of dispute raised in first statement of grounds of appeal and failed to comment upon other issues of dispute. It thus did not meet the requirements of **R.68(2) EPC1973**.

e) Dealing with issues that go beyond the decision itself

T473/98 it is entirely appropriate and desirable in interests of overall procedural efficiency and effectiveness findings which could obviate remittal in event of the revocation being reversed on appeal

T615/95 Exam Div's decision should not normally be supplemented by annexes dealing with issues having no relation to issues dealt with in reasons for this decision.

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Basic principles of decisions

Decisions according to the state of the file



E.X.2.5

Applicants may request decision

"on the file as it stands" or "according to the state of the file",

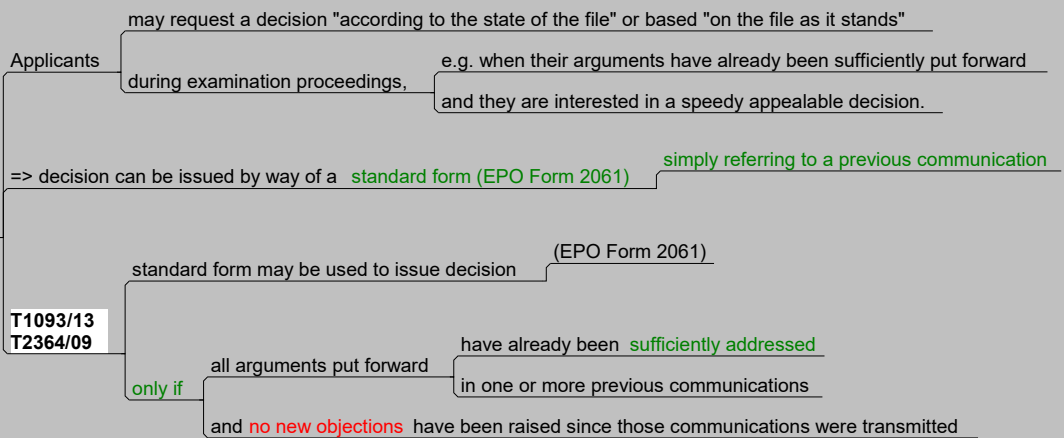
e.g.

when all arguments have been sufficiently put forward in proceedings  
 and applicant is interested in speedy appealable decision

Request for decision "according to the state of the file"



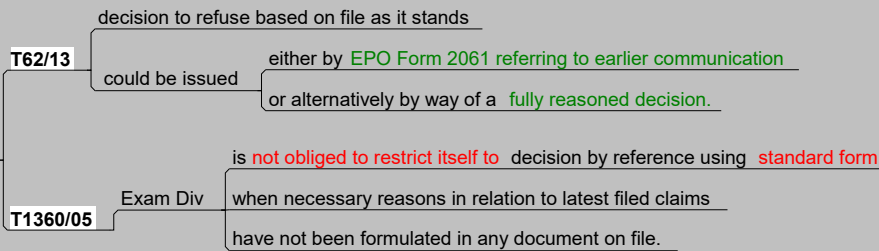
III.K.3.5.1



No absolute right to decision issued by way of EPO Form 2061



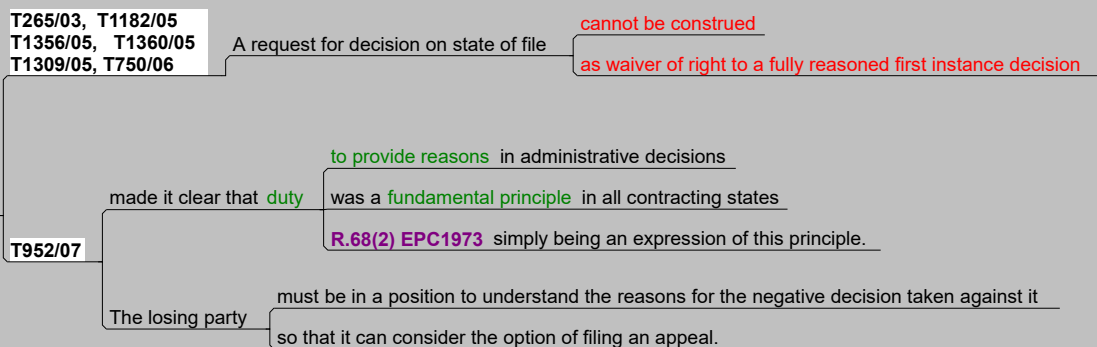
III.K.3.5.2



No waiver of right to reasoned decision



III.K.3.5.3



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**Basic principles of decisions**

**Decisions according to the state of the file**

**Reasons for decision by way of EPO Form 2061**

**a) Requirements**

T278/00, T861/02, T897/03  
 T276/04, T1182/05, T1309/05  
 T1356/05, T1360/05, T1709/06  
 T952/07, T1612/07, T1442/09  
 T177/15, T180/10

a standard decision based "on the state of the file" which refers to one or several communications  
 only meets the "reasoned" requirement of **R.68(2) EPC1973 (R.111(2) EPC)**  
 if BoA is not left to reconstruct the applicable reasons by piecing together various arguments from the file and if it leaves no doubt as to which claim version the arguments relate to.

T963/02 decision issued by way of EPO Form 2061 and referring to one or more earlier communications  
 only met criteria for a reasoned decision if cited communication itself met those criteria i.e. reasons for decision were clear

T353/11 decision under appeal referred solely to communication annexed to summons to attend oral proceedings  
 communication did no more than to identify closest prior art and distinguishing feature of invention  
 indicate that it was "not clear" whether examples of application illustrated distinguishing feature  
 state it would be examined whether or not process was inventive, and invite appellant to file comparative example.

III.K.3.5.4

It neither gave explicit conclusion with respect to inventive step, nor any reasons as to why claimed process was not inventive.

Thus, Exam Div did not issue a reasoned decision within the meaning of **R.111(2) EPC**.

T177/15, T652/97  
 T278/00

**b) Reference to more than one communication**

T897/03 decision that leaves it to appeal board and appellant to speculate as to which of reasons given by Exam Div in different communications might have been decisive for refusal of application could not be considered to meet requirements of **R.68(2) EPC1973**

T180/10 two communications had been referred to.  
 However, contrary to what was stated in second communication ("the applicant's explanations ... have been carefully considered")  
 it was apparent that Exam Div had ignored all appellant's arguments since this communication and, therefore, the decision were silent on them.  
 The requirements of **R.68(2) EPC1973** were not fulfilled.

T1946/17 blanket statement like "arguments were carefully considered" but "no new evidence" was provided, in communications to which decision refers cannot be considered to address arguments raised and thus constitutes insufficient reasoning.

**Documents included in the "state of the file"**

III.K.3.5.5

The "state of the file" is not restricted to those documents on file which were issued by the EPO, also includes all those documents and arguments but which were filed by the applicant prior to (or even simultaneously with) his request for a decision "on the status of the file" (T 265/03, T 1360/05).

T583/04 It does not include the note of a telephone conversation  
 This was the summary record of a conversation.  
 Whereas phone call note is a record of a dialogue, a communication under **Art.96(2) EPC1973** constitutes a unilateral legal notice to a party.

This does not exclude possibility of the statements made orally by phone in a formal communication from Exam Div being confirmed and adopted in inviting observations with a term set for reply.

T750/06

T1356/05 minutes of oral proceedings are most probably not meant to be included in the term "previous communications" and it is thus not appropriate to refer to them in the standard decision.

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## Basic principles of decisions

### Timing

#### Consideration of time limits

E.X.1.2

**A decision** may not be given until any time limit set has expired, unless all parties affected by time limit expressly agree that it need no longer be observed or have submitted their final opinions before it expires.

**As a rule** decisions will not be given until an internal EPO time limit (e.g. 20 days) following upon official time limit (but from which parties may derive no rights) has expired.

so as to ensure that documents received at end of period officially allowed have actually been entered in the files when the decision is being taken and can be taken into account in the decision.

### Date of decision

#### Entry into force of decisions

III.K.2.1

G12/91

distinguished between decisions taken after closure of debate in oral proceedings and decisions taken following written proceedings.

Where oral proceedings are held, decision may be given orally. Decision becomes effective by virtue of its being pronounced.

Equivalent of that point in time in written proceedings is moment the decision is notified.

Once it has been pronounced or if written proceedings notified, decision enters into force and cannot be amended, even by department that issued it.

A decision may only be revoked by department that issued it by way of interlocutory revision under Art.109 EPC1973 if one of the parties has filed an admissible and well-founded appeal.

#### Completion of internal decision-making process

III.K.2.2

G12/91

T2573/11

T798/95

point in time at which decision enters into force i.e. the moment it is pronounced or notified, is not the last moment at which parties could still submit observations.

This had to be done at earlier point in proceedings to allow decision-making department time to deliberate and then issue its decision based on parties' submissions.

For oral proceedings this moment is the closing of the debate

For written proceedings date on which formalities section handed over date-stamped, post-dated decision to EPO postal service. This point in time should be clearly indicated in the decision.

if it was clearly indicated in decision on which date formalities section handed decision over to EPO postal service this date was thus the date on which written proceedings before the decision-making department were completed.

request for amendment filed after completion of proceedings up to grant before Exam Div was to be disregarded even if filing of request and completion of proceedings occurred on the same date.

#### Date EP takes effect and jurisdiction after pendency

III.K.2.3

J42/92

Art.97(3) EPC => decision to grant EP takes effect on date on which mention of the grant is published in EP Bulletin

Request under R.139 EPC for amendments to the description or claims can only be filed during pendency of application or opposition proceedings

there was no reason why once no application or opposition proceedings were pending before EPO,

on the question of corrections

decisions should not fall within the sole jurisdiction of the national courts or other authorities responsible for proceedings in which this question might arise

T777/97





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Basic principles of decisions

Right to be heard and timing of decisions

Decision could not be expected

**III.B.2.5.1**

- T849/03**
  - In examination procedure
    - decision should not catch the parties unawares.
    - right to be heard is therefore violated
      - not only in event of failure to inform applicant beforehand of reasons forming basis of rejection
      - but also if at the time decision is issued, applicant had no reason to expect such decision
- T611/01**
  - by Exam Div
    - substantial procedural violation was occasioned
      - holding out to appellants prospect of further opportunity to file arguments before any decision would be issued,
      - and then issuing decision without providing for that opportunity
    - (regarding a false impression raised concerning amended claims, see also **T309/94**).
  - Oppo Div
    - after deliberating and announcing its decision on novelty
    - immediately announced decision to reject oppositions
  - T281/03**
    - issue of inventive step was not discussed at the oral proceedings
    - thereby depriving opponent of any possibility of substantiating a ground of opposition
    - => right to be heard violated

Issuing of decision before expiry of time limit to comment

**III.B.2.5.2**

- T663/99**
  - patent proprietor's right to be heard was violated
    - fixed under **R.57(1) EPC1973** for presenting comments on opposition
    - if time limit had not expired by date of handing over revocation decision to EPO's internal postal service
- T1081/02**
  - since Oppo Div
    - principle of right to be heard had been violated
      - after inviting patent proprietor to file documents
      - considered necessary to maintain patent within 2 months
      - did not wait until this time limit had expired
      - but issued an interlocutory decision prior to its expiry.

Immediate refusal after communication

**III.B.2.5.3**

- T201/98**
  - Exam Div does not exceed its discretionary power by immediately refusing application after only single communication.
- T1002/03**
  - However, decision must comply with **Art.113(1) EPC**,
    - i.e. must be based on grounds on which applicant has had opportunity to present comments
    - is not sufficiently given in single communication
- T435/07**
  - If factual basis so that applicant has to speculate about Exam Div's assessment and thus is not put in position to properly defend its rights, requirements of **Art.113(1) EPC** cannot be considered to be met;
    - => coming to final decision after such single deficient communication results therefore in a substantial procedural violation
- T305/14**
  - only if a preceding communication pursuant to **Art.94(3) EPC** sets out the essential legal and factual reasoning to support a finding that a requirement of EPC has not been met, can a decision based on such a finding be issued without contravening **Art.113(1) EPC**.

Invitation to oral proceedings at short notice

**III.B.2.5.4**

- T166/04**
  - late introduction of additional prior art documents even if they formed part of critical argumentation, together with invitation to oral proceedings was not necessarily improper,
    - BoA time frame of 2.5 months for applicant to respond was in conformity with **R.71(1) EPC1973 (R.115(1) EPC)** and was not unduly short

Notification

**E.X.6** Decisions must be notified as a matter of course **Art.119 EPC**

**III.K.5**

- Under **R.111(1) EPC** decision delivered during oral proceedings must be put in writing and notified to the parties.
- The date of notification is relevant with regard to filing of appeal (**Art.108 EPC** and **R.111 EPC**).
- The legal fiction of deemed notification set out in **R.126(2) EPC** applies whereby letter is deemed to be delivered on tenth day following its handover to the postal service provider.

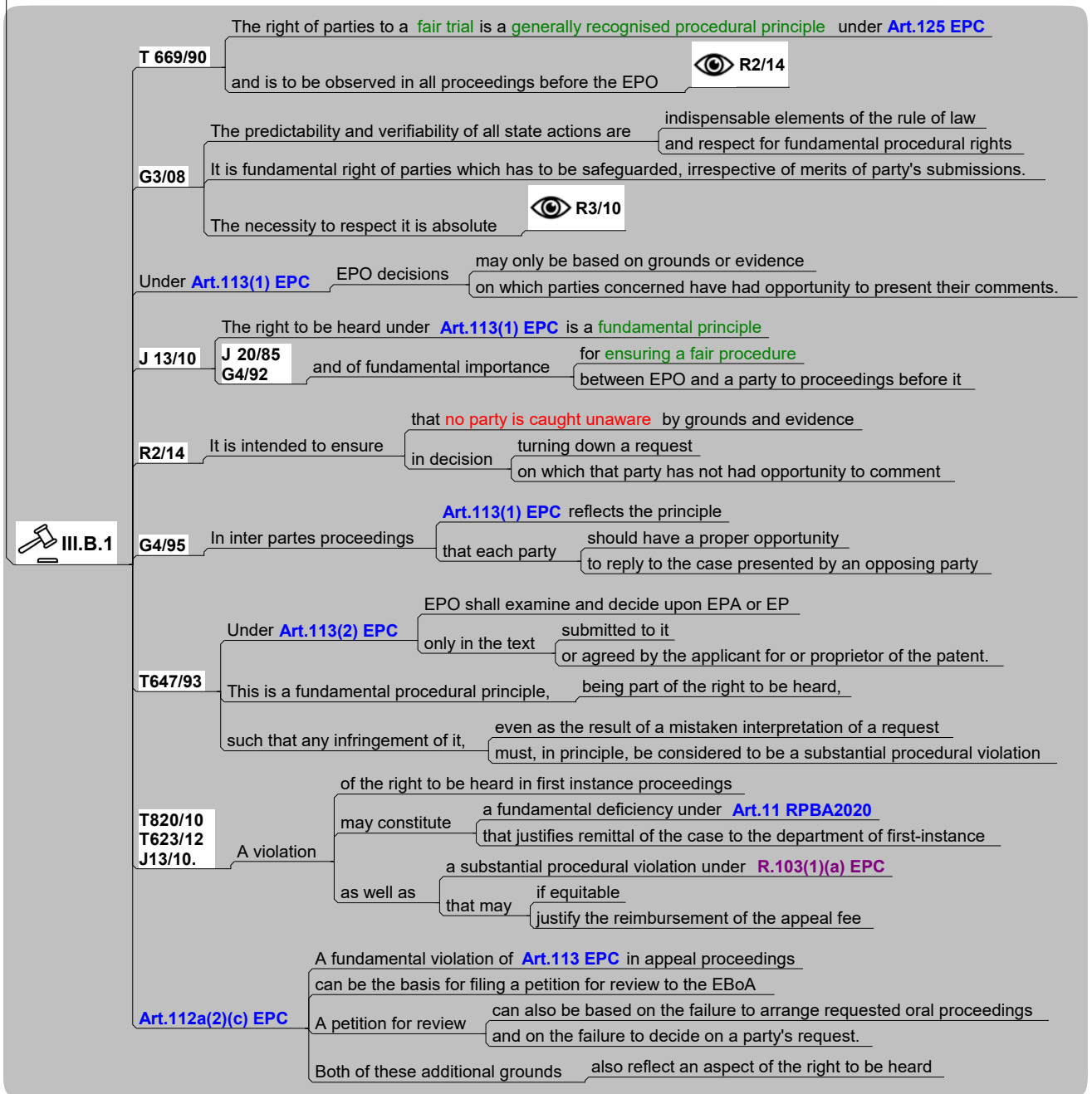
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Right to be heard

Introduction



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Right to be heard

Violation of right to be heard examined ex officio

**III.B.2.1** T186/02 BoAs can examine facts of case of their own motion pursuant to Art.114(1) EPC and verify whether or not Art.113 EPC has been complied with by first instance department

Causal link between violation of right to be heard and final decision

Appeal proceedings

**III.B.2.2.1** When reviewing appeal proceedings EBoA's review is limited to "fundamental" violations of right to be heard. This requires causal link between alleged violation and final decision. Such causal link does not exist when even if procedural violation can be demonstrated, same decision would have been taken for other reasons

First instance proceedings

**III.B.2.2.2** T689/05 When reviewing first instance proceedings boards' review is not limited to fundamental violations of right to be heard. However, remitting case to department of first-instance under Art.11 RPBA also requires a "fundamental" deficiency in first instance proceedings, and under R.103(1)(a) EPC appeal fee is only reimbursed in case of a "substantial" procedural violation. linked these concepts stating that "fundamental" deficiency within meaning of Art.11 RPBA is not caused by all procedural violations but rather only by "substantial" procedural violation. substantial procedural violation was defined J7/83 as objective deficiency affecting entire proceedings T682/91 as deficiency adversely affecting rights of parties T990/91 since there had been no need for Exam Div to put forward new argument which was supererogatory and incidental in order to refuse the application, lack of opportunity to reply to it could not be considered to be a violation of right to be heard.

Grounds, Facts & Submissions

Facts and submissions

**E.X.2.4** Facts and submissions must clearly indicate what is subject of application and show on which documents the decision is based. In examination this requirement is achieved by including a detailed reference to the application documents which are subject to decision, including any amendments to e claims or to description as well as maintained auxiliary requests. In addition, Exam Div may cite text of any important claim(s) or passages of description in decision. In opposition, the text of independent claim(s) and other especially important claims or passages of description on which decision is based must be cited verbatim in language of proceedings (R.3(2)) either by copying text into the decision or annexing a copy of claims. As regards the dependent claims, it may be sufficient to refer to the file content.

Late-filed submissions

**E.X.2.10** T755/96 If Exam or Oppo Div has exercised its discretion under Art.114(2) or R.116 to refuse late-filed facts, evidence or requests, its decision must give the reasons for its refusal. A mere reference to discretionary power given under Art.114(2) or R.116 is not sufficient

# Part 7 Chapter I: Common provisions governing procedure

Art.113

**Basic principles of decisions**  
**Right to be heard**  
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**Right to be heard**

**Grounds, Facts & Submissions**

**Main and auxiliary requests**

**E.X.2.9**



**Surprising grounds or evidence**

**General principles**

**III.B.2.3.1**

- R3/13 T1378/11** a party **may not be taken by surprise** by reasons of a decision referring to **unknown grounds or evidence**
- T1634/10 T2405/10 T1378/11** board of appeal is not required to provide parties in advance with all foreseeable arguments in favour of or against a request In other words, parties are **not entitled to advance indications** of all reasons for a decision in detail
- T1065/16** lack of reproducibility as ground for opposition had **not been subject of opposition proceedings until oral proceedings** It therefore amounted to **fresh ground for opposition** As it had **not been given sufficient opportunity to comment** on this new ground for opposition, opposition division had **infringed Art.113(1) EPC** and thus committed a **substantial procedural violation.**
- T2351/16** Exam Div had issued decision of refusal after only one communication under **Art.94(3) EPC** this as such did not constitute a violation of appellant's right to be heard However **an additional argument** in support of division's objection **mentioned for the first time in decision** constitutes a violation of applicant's right to be heard = **substantial procedural violation**

**Meaning of "grounds or evidence"**

**III.B.2.3.2**

- T532/91, T105/93 T187/95, T1154/04 T305/14** "Grounds or evidence" under **Art.113(1) EPC** are to be understood as meaning **essential legal and factual reasoning on which the decision is based**
- T375/00** appellant (opponent) considered that technical problem mentioned by Oppo Div in its decision was different from that discussed in preceding proceedings BoA appellant's **right to be heard had not been violated** because **definition of objective problem** was part of arguments, **not part of grounds** as specified in **Art.113(1) EPC1973**
- T33/93** **citation of a board of appeal decision** for first time in the decision under appeal was **not fresh ground or piece of evidence** within meaning of **Art.113(1) EPC1973** but a **mere repetition of arguments** since it only confirmed position duly brought to appellant's attention
- T2238/11** appellant argued that Exam Div had surprisingly concluded in "Further Remarks" section in decision under appeal that claimed subject-matter lacked novelty and objected that it had not been heard on that aspect. However, decision under appeal had been based on lack of inventive step, **not on lack of novelty.** BoA **party's right to be heard** was not violated if party did not have the opportunity to comment on observations in an obiter dictum **The "Further Remarks" section** in decision under appeal **did not form part of actual decision.**

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Right to be heard

Surprising grounds or evidence

Opportunity to comment on evidence


**III.B.2.3.3** 

J20/85 pointed out that a decision on an issue of fact could only properly be made by EPO after all the evidence on which such decision was to be based had been identified and communicated to the party concerned.

Exam Div based its conclusions concerning critical issues at least in part on two Wikipedia entries cited in the decision.


T1401/16 However this evidence was never referred to during examination proceedings and both entries were mentioned for very first time in appealed decision itself. => applicant had no opportunity to present its comments in that respect. This constituted violation of provisions of Art.113(1) EPC.

Documents supplied by applicants but used against them

**III.B.2.3.4** 


T18/81 T188/95 Right to be heard has not been observed if decision to refuse application is based essentially on documents which though supplied by applicant in support of his case are used against him to produce an effect on which he has not had an opportunity to make observations.

Document cited containing information already known

**III.B.2.3.5** 


T643/96 Exam Div relied in its decision on document for which it gave only incomplete bibliographic data. BoA Exam Div's failure to provide applicant with copy of document did not amount to substantial procedural violation regarding right to be heard because document added nothing to case and contained only information already known to applicant.

Reliance on the International Preliminary Examination Report (IPER)

**III.B.2.3.6** 

T587/02 if only communication preceding decision to refuse application merely draws attention to an IPER, requirements of Art.113(1) EPC are met provided IPER constitutes reasoned statement as required by R.51(3) EPC 1973 using language corresponding to that of EPC.

Change of provisional opinion

**III.B.2.3.7** 

T68/94 appellant submitted that Oppo Div had violated Art.113 EPC1973 by changing its provisional opinion after oral proceedings without giving appellants opportunity to comment on grounds on which contested decision was based. board pointed out that provisional opinions were never binding purpose of oral proceedings was to summarise and discuss parties' arguments. All arguments in case had been known to both parties.

T1824/15 members of Exam Div were free to change their minds at any point in procedure including during oral proceedings as long as requirements of Art.113(1) EPC were fulfilled.

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Right to be heard

Consideration of parties' arguments, submissions and evidence

Analysing parties' arguments

**E.X.2.8** All significant arguments advanced by a losing party to proceedings are carefully examined and comprehensively refuted in the decision.  
 The decision **must substantiate division's view** that **none of submitted arguments overcome objections it has raised**.  
 However **facts not in dispute** need be **mentioned only briefly**.  
**Arguments** by parties which are **clearly irrelevant** to issues involved **do not need to be discussed**.

Refusal to admit amendments under R.137(3)

**E.X.2.11** When in exercising its discretion under **R.137(3)** **Exam Div** refuses to admit amended claims it must give reasons for so doing.  
 If **no other requests are on file** then there is no text agreed by the applicant and the application is to be **refused** under **Art.113(2)**.

General principles

**III.B.2.4.1** **R5/15** it is **not necessary to consider each and every argument** of parties in detail in decision.  
 boards may also refute arguments implicitly, and **may disregard irrelevant arguments**

Decision must demonstrably show that arguments were heard and considered

**III.B.2.4.2** **T206/10** The deciding department **must demonstrably hear and consider the comments**  
**T2352/13** **Merely repeating** parties' submissions is **not enough**;  
 rather, it has to be **clear from the reasons** that substance of their core arguments has been addressed in arriving at decision  
**J7/82; T1039/00; T778/98, T1312/10** A decision which **fails** to take into account **arguments submitted by a party** and which **is based on a ground** on which **party had had no opportunity to present its comments**, contravenes **Art.113(1) EPC** and **constitutes a substantial procedural violation**  
**T1411/07** patent proprietor had **challenged admissibility of opposition on ground of lack of substantiation** but opposition division had found it admissible **without stating any reasons**.  
 BoA opposition division's **failure to make any reference** to patent proprietor's submissions a breach of **R.68(2) EPC1973 (R.111(2) EPC)** and a **substantial procedural violation**.

No obligation to address each and every argument

**III.B.2.4.3** **T1898/11; T1557/07** **Provided that** reasons given enable parties concerned to understand whether decision was **justified or not**, deciding organ is **under no obligation** to address each and every argument presented by party concerned  
 Moreover a party has no absolute right to be heard separately on each and every one of its auxiliary requests

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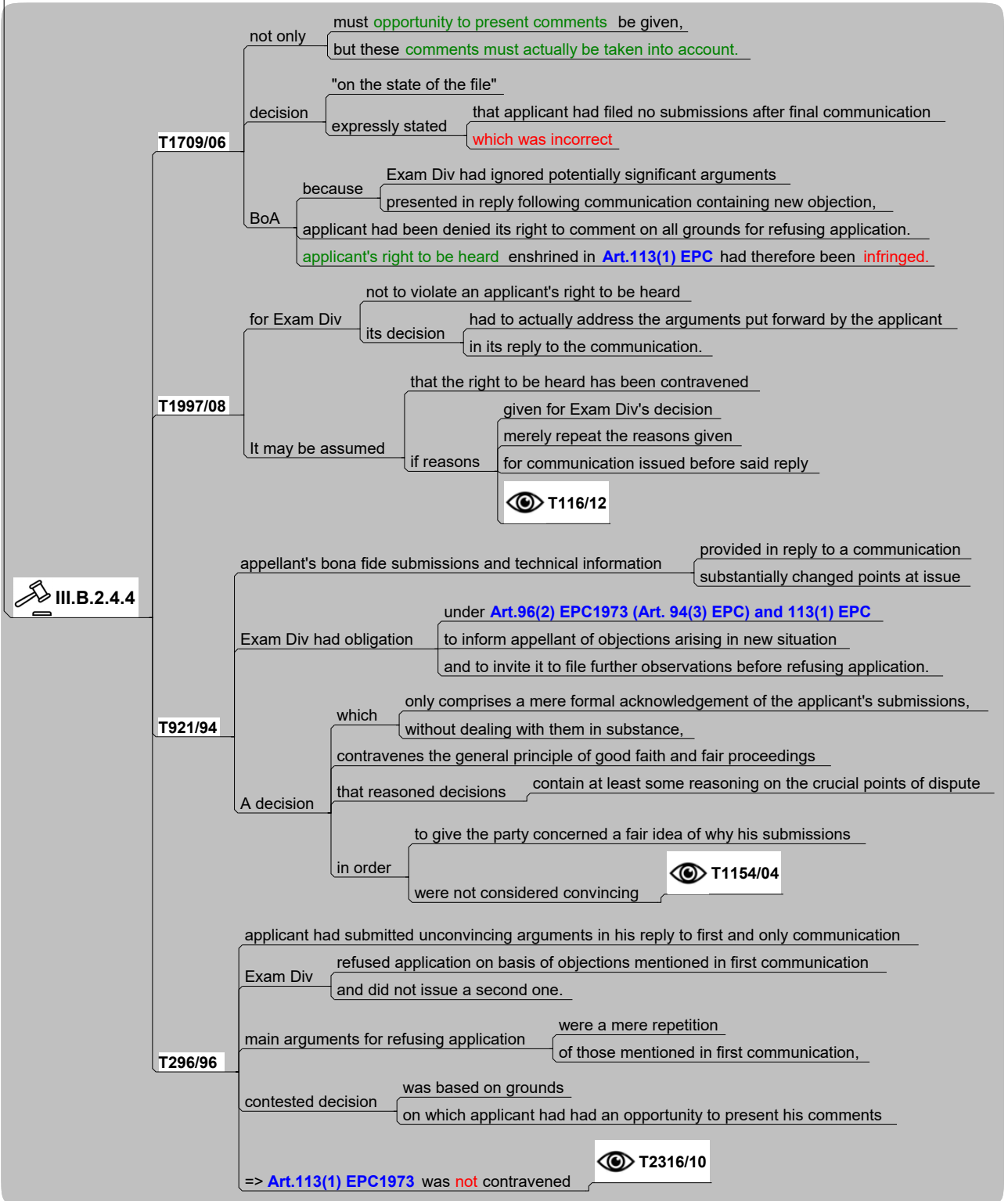
Right to be heard



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Consideration of parties' arguments, submissions and evidence

Failure to consider submissions made after communication



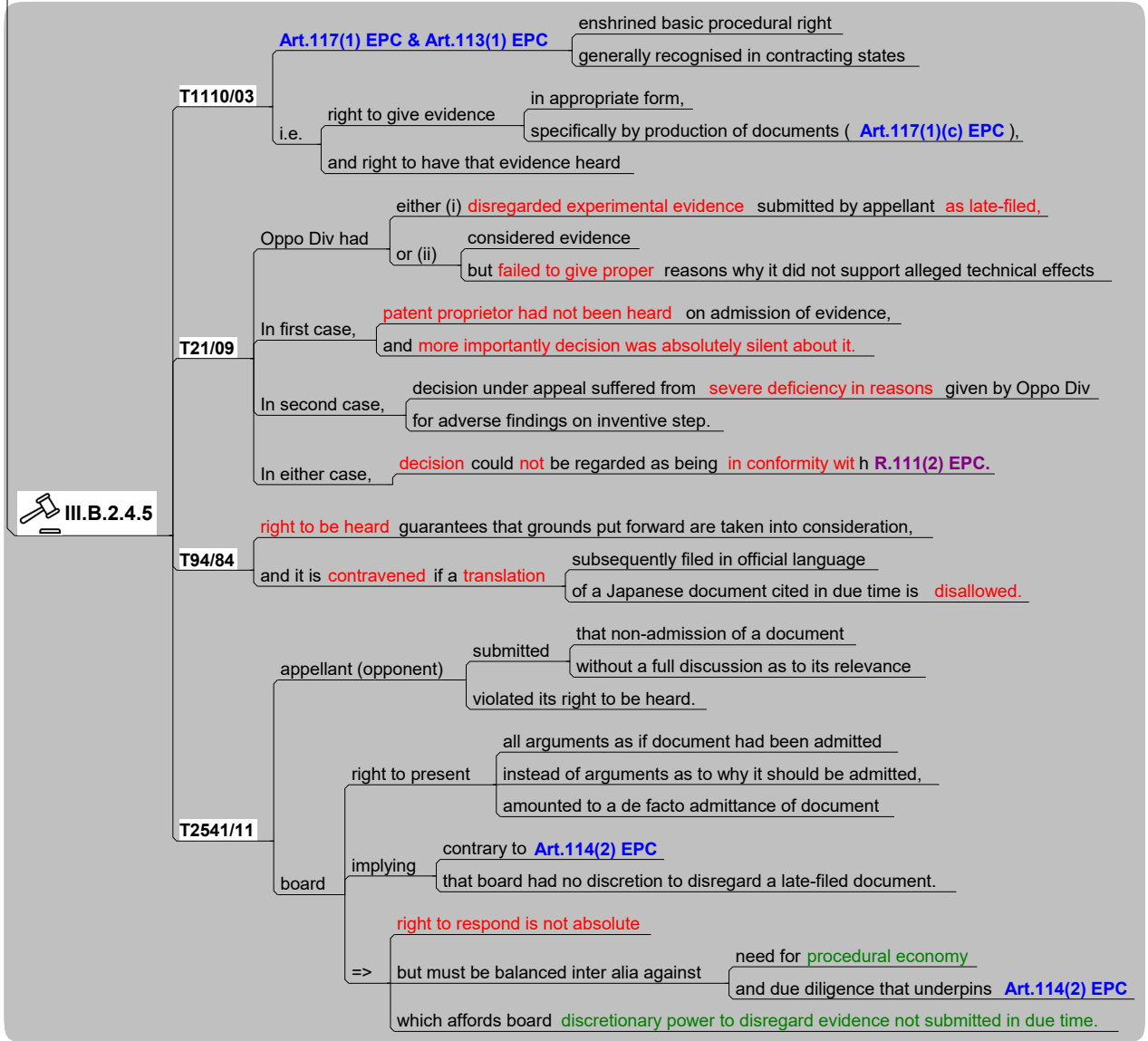
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Right to be heard

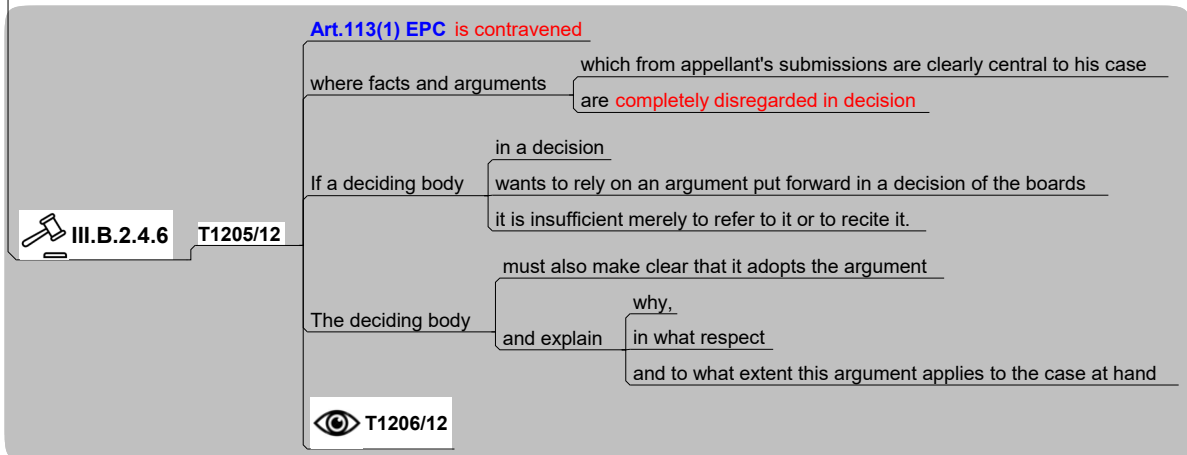
Consideration of parties' arguments, submissions and evidence

Failure to consider evidence



III.B.2.4.5

Mere reference to jurisprudence



III.B.2.4.6

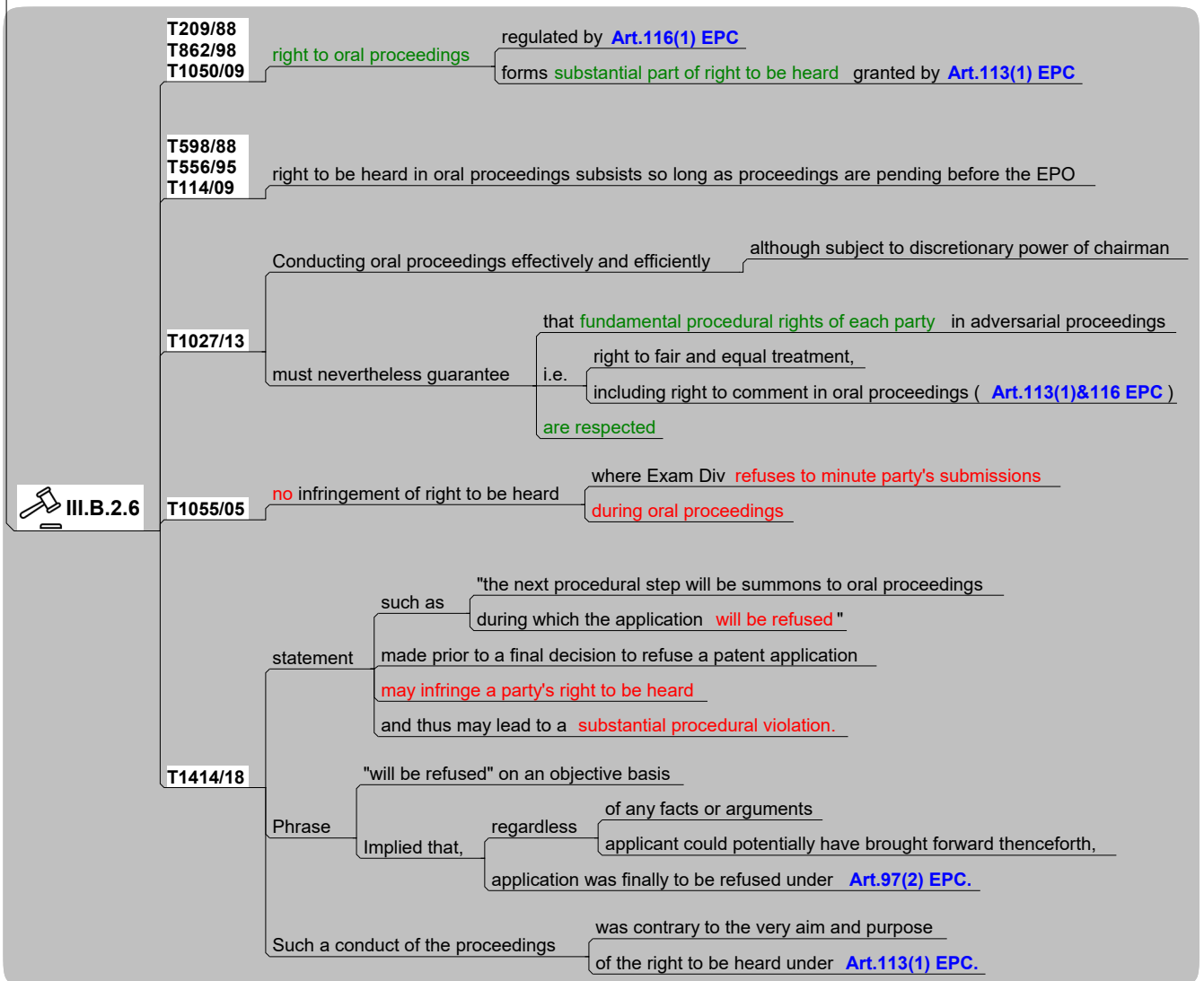


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Right to be heard in oral proceedings



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Introduction of new claim or relevant document

T2434/09 The applicant does **not have a right in principle** to continuation in writing  
 party's right to be heard under **Art.113(1) EPC** is also observed  
 if applicant is **given adequate amount of time to study document and present comments.**  
 How much time is sufficient depends on nature of newly introduced document and preceding procedure

a) Cases in which Art.113(1) EPC was violated in relation to the introduction of new claims or relevant documents

T951/97 although document D4 had been mentioned in ESR  
 it had not been cited at any stage in examination procedure prior to oral proceedings  
**half an hour adjournment of oral proceedings** had been too short a period  
 for an adequate analysis of **complex text of D4.**  
 As D4 was essential to finding of Exam Div in relation to inventive step,  
 BoA decision was based on evidence on which applicants had **not had sufficient opportunity to present their comments**  
 as required by **Art.113(1) EPC1973** T492/03

T783/89 Oppo Div had proposed a new version of the main claim at the start of the oral proceedings  
**giving opponents 10 minutes to consider it.**  
 BoA ruled that this had taken opponents by surprise  
 and that time given had **not been sufficient to study allowability of amendments.**

T2235/12 Exam Div had introduced **2 days before oral proceedings**  
 2 additional documents and new objection into procedure  
 Appellant request for a postponement of the oral proceedings was rejected  
**did not attend oral proceedings**  
 BoA new objection was not related to points indicated in summons  
 appellant should have been given adequate opportunity to react to new objection  
 Attending oral proceedings would not have changed fact that **timeframe was too short**  
 for representative to get instructions from client  
 and to prepare for oral proceedings with new focus.  
**rejecting appellant's request** for postponement of oral proceedings **infringed appellant's right to be heard.**

III.B.2.6.1

T482/16 by rejecting the appellant's request for postponement of the oral proceedings  
 Exam Div had not provided appellant with the appropriate opportunity to present its comments  
 on **documents** Exam Div had introduced for the **first time during the oral proceedings**

b) Cases in which Art.113(1) EPC was not violated even though new claims or relevant documents were introduced

T484/89 Oppo Div empowered under **Art.114(1) EPC1973**  
**to take account of and refer to all relevant documents cited**  
 Oppo Div had considered it necessary to refer to a document during oral proceedings.  
 In such cases **parties should at their request**  
**be granted an adjournment** or else **new oral proceedings** should be appointed.  
 Since no such request was made according to decision and record of oral proceedings,  
**Art.113(1) EPC1973** had **not** been breached.

T376/98 Exam Div had referred to document D4 for first time during oral proceedings  
 and had stayed oral proceedings to give applicant time for consideration  
 When oral proceedings were resumed, appellant requested decision based on documents on file.  
 BoA **appellant's request for decision** could only be taken to mean that appellant was **not interested**  
**in further debate about relevance of D4.**

c) Cases where no new claims or relevant documents were introduced

T195/84 appellant (patentee) objected at oral proceedings that new grounds on inventive step were presented  
 to which he had not had an opportunity to reply.  
 BoA did not share this opinion as **appellant had been aware that such prior art existed,**  
 and had **thus had sufficient time to consider it in full.**  
 Furthermore he had **not requested any additional time** and had **not asked for an adjournment.**

T327/92 Oppo Div at oral proceedings had relied on a document as closest prior art against an amended main claim,  
 which had been cited in opposition against a dependent claim only.  
 BoA did **not** consider this substantial procedural violation,  
 as patentee was dealing with **document which had always been part of the opposition,**  
 and **could further examine this document at oral proceedings.**

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## Right to be heard in oral proceedings

### Introduction of new arguments

**III.B.2.6.2**

**T248/92**

Exam Div had based its decision on arguments submitted for first time during oral proceedings.  
 Exam Div's decision had **not been taken contrary** to **Art.113(1) EPC1973** .  
 Although one of purposes of oral proceedings was to settle as far as possible all outstanding questions relevant to decision they did not have a constraining effect in sense of requiring immediate decision to be taken at end of those proceedings which had obviously been crucial to decision.  
 If appellant he could have asked for oral proceedings to be adjourned or for proceedings to be continued in writing so that he could study carefully newly introduced arguments, on basis of argument first submitted by opponent during oral proceedings that several auxiliary requests did not comply with **Art.123(2) EPC** .

**T623/12**

Oppo Div gave patent proprietor only one opportunity to file a new claim based on one of previous auxiliary requests, and warned that "other requests may suffer from other deficiencies under **Art.123(2) EPC** ". It then decided that new auxiliary request still did not comply with **Art.123(2) EPC** .  
 Oppo Div's warning did not provide patentee with basis for informed choice since neither objections nor requests affected by them were specified.  
 BoA By acting in this manner Oppo Div did not exercise its discretion in respect of admissibility of patentee's late-filed request => **deprived patent proprietor of proper opportunity to comment** on admissibility of its further request

### Introduction of new ground of opposition by opposition division

**III.B.2.6.3**

**T515/05**

appellant had based its opposition only on grounds of **Art.100(a) EPC1973** .  
 Oppo Div itself introduced in summons to oral proceedings a further ground for opposition under **Art.100(b) EPC1973** .  
 At beginning of oral proceedings chairman stated that no discussion of ground of opposition under **Art.100(b) EPC1973** would take place because it had **not been sufficiently substantiated by opponent**.  
 Denying appellant opportunity to comment on this ground albeit introduced by Oppo Div itself was considered **substantial procedural violation**.  
 Fact that appellant did not file written arguments in response to summons to attend oral proceedings did not deprive it of its right to be heard.  
 Appellant was entitled to expect that it would still have an opportunity to comment on this new ground during oral proceedings.

### Hearing witnesses

**III.B.2.6.4**

**T142/97**

Oppo Div had **violated opponent's right to be heard** under **Art.113(1) EPC1973** by **not hearing witness offered** in connection with prior use that had been adequately substantiated in notice of opposition

**T959/00**

Oppo Div's **failure to hear witness**, and **absence** in decision under appeal of any reference to **reason** why it had not been necessary to hear witness amounted to **fundamental procedural violation of right to be heard** .  
 if assertions made in unsworn witness declaration remained contested,

**T474/04**

request to hear the witness had to be granted before these assertions were made basis of decision against contesting party.

**T909/03**

hearing of witness took place in morning and oral proceedings continued in afternoon  
**not necessary** for party to be given **copy of minuted testimony** before commenting on that testimony.  
 BoA During oral proceedings party had been given **sufficient opportunity to comment**.  
**No substantial procedural violation** had thus occurred.

where oral evidence of a witness was requested by a party  
 competent department should grant this request **only if it considered this oral evidence necessary** to clarify matters that were decisive for the decision to be taken.

**T716/06**

where an opponent requested that a witness be heard on an alleged public prior use and on the disclosure of a certain feature by this prior use,  
 However competent department **as a rule had to grant this request** before deciding that the alleged public prior use was neither established nor constituted a novelty-destroying state of the art.

**T1100/07**

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## Right to be heard in case of non-attendance of oral proceedings

**III.B.2.7** R.115(2) EPC R.71(2) EPC1973  
 proceedings may continue without duly summoned but non-attending party  
 however case law of boards demonstrates, non-attending party's right to be heard under Art.113 EPC must not be ignored

## Facts and evidence put forward for first time during oral proceedings

**III.B.2.7.1** G4/92 T 2138/14 (ex parte)  
 explicitly relates to inter partes proceedings only  
 decision against party who had been duly summoned but who failed to appear at oral proceedings could not be based on facts put forward for first time during those oral proceedings. in view of right to present comments  
 New arguments on the other hand did not constitute new grounds or evidence but were reasons based on facts and evidence already put forward. requirements of Art.113(1) EPC could thus be satisfied  
 established case law that a non-attending party's right to be heard under Art.113(1) EPC must not be ignored

## Non-attendance at oral proceedings before boards – case law on G4/92

**III.B.2.7.2** T341/92 T802/12 T1448/09 T1049/93 T414/94  
 it was possible to base a decision on a ground discussed for the first time during oral proceedings.  
 at least if the stage reached in the case was such that absent albeit duly summoned patent proprietors could have expected the question to be discussed and were aware of actual basis on which it would be judged.  
 BoA did not consider itself prevented by reasons of procedural law from rendering a decision on the basis of Art.123(3) EPC, on an issue brought up by the board for the first time at the oral proceedings.  
 argued that the situation differed from G4/92 in that the extension of the protection conferred, to which objection had been made arose solely from a comparison of the wordings of the claims and therefore not from facts that had only been introduced during oral proceedings.  
 dismissed appeal on basis of Art.123(3) EPC, which had been discussed for first time at oral proceedings  
 appellant could have expected amendments it had made to be examined at oral proceedings as to their conformity with requirements of the EPC  
 T802/12 A party duly summoned to oral proceedings could not rely on proceedings being continued in writing or case being remitted to department of first instance simply because he had not attended the oral proceedings ( Art.15(3) and (6) RPBA )  
 refusal of EPA was based on the common general knowledge as illustrated by document D3.  
 That stance was first taken in oral proceedings before Exam Div, which appellant did not attend.  
 G4/92 => arguments could be presented at any time even during oral proceedings in absence of a party but the same did not apply to new facts forming basis for decision.  
 T1448/09 A reference to common general knowledge could be presented as argument, but existence of that knowledge was matter of fact.  
 If its alleged existence was disputed, facts relevant in that regard had to be established.  
 That meant that the party against which this knowledge was cited had to have the opportunity to dispute or accept it.  
 In the case in hand, appellant had neither been aware of Exam Div's invocation of common general knowledge until decision was announced, nor of the existence of document D3 and by extension on existence of invoked common general knowledge. This violated appellant's right to be heard on relevance of document D3  
 T1049/93 BoA duly summoned respondent (opponent) chooses not to attend oral proceedings can still consider prior art which might be an obstacle to the maintenance of the patent in suit. The opportunity to be heard is offered by summoning the parties to a hearing before the board. => right to be heard is exhausted to the extent that it concerns facts and arguments in support of his position. G4/92 should not be construed as extending or prolonging the rights of a voluntarily absent party  
 T414/94 Absent party (opponent) no general prohibition on amending requests during a party's absence from oral proceedings. must expect reactions of the opposing party (patentee) within the legal and factual framework of the case established prior to oral proceedings, and the possibility of decisions taking account of, and being based on, such reactions.

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Right to be heard in case of non-attendance of oral proceedings

Non-attendance at oral proceedings before boards – Art.15(3) RPBA2020

T706/00 introduction of [Art.11\(3\) RPBA2003](#) (now [Art.15\(3\) RPBA](#))  
 superseded findings of [G4/92](#) for non-attendance at oral proceedings before boards

J15/10  
 T1625/06  
 T628/07

appellant can reasonably expect that during oral proceedings  
 board will consider objections and issues raised in its communication.

By not attending oral proceedings,  
 appellant effectively chooses  
 not to avail itself of opportunity to present its observations and counter-arguments orally  
 but instead to rely on its written case

a) Ex parte proceedings

T991/07 with reference to [Art.15\(3\) &12\(2\) RPBA 2007](#)  
 it could base its decision without infringing appellant's right to be heard ( [Art.113\(1\) EPC](#) ).  
 on objections which would be new to appellant,  
 but which could not be communicated to it  
 due to fact that appellant was not present at oral proceedings

T578/14 duly summoned appellant who of her own volition did not attend oral proceedings  
 could not be placed in a more advantageous position  
 than she would have been if she had attended.

appellant's voluntary absence could not therefore be a reason for board  
 not to raise issues it would have raised if appellant had been present

III.B.2.7.3

T1000/03 appellant had been duly summoned  
 and at oral proceedings could easily have corrected minor deficiencies in description.  
 To delay decision pending their correction was uncalled for (see [Art.11\(3\) RPBA 2003](#), [Art.15\(3\) RPBA 2007](#) ).  
 Under [Art.113\(2\) EPC](#) ,  
 board had to keep to text submitted by appellant (applicant),  
 who by not appearing at oral proceedings had taken the risk of application being refused  
 even for easily remediable deficiencies (see also the ex parte case T1903/06).

b) Inter partes proceedings

T986/00 with reference to [Art.113\(2\) EPC](#) and [Art.11\(3\) RPBA 2003](#) ([Art.15\(3\) RPBA 2007](#))  
 patent proprietor who chooses not to be represented at oral proceedings  
 should ensure that he has filed all amendments he wishes to be considered.

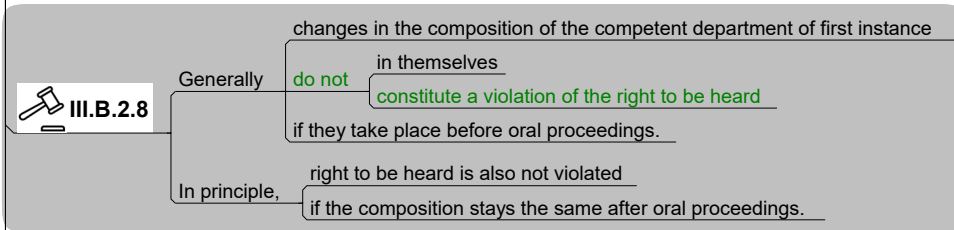
All the more when proprietor had been expressly warned  
 about possible necessity of amending claims and description.

T1010/13 oral proceedings took place in presence of appellant I only.  
 Although appellants II, III and IV did not attend the oral proceedings,  
 principle of the right to be heard pursuant to [Art.113\(1\) EPC](#) was observed  
 BoA since that article affords only opportunity to be heard,  
 and by absenting itself from oral proceedings a party gives up that opportunity

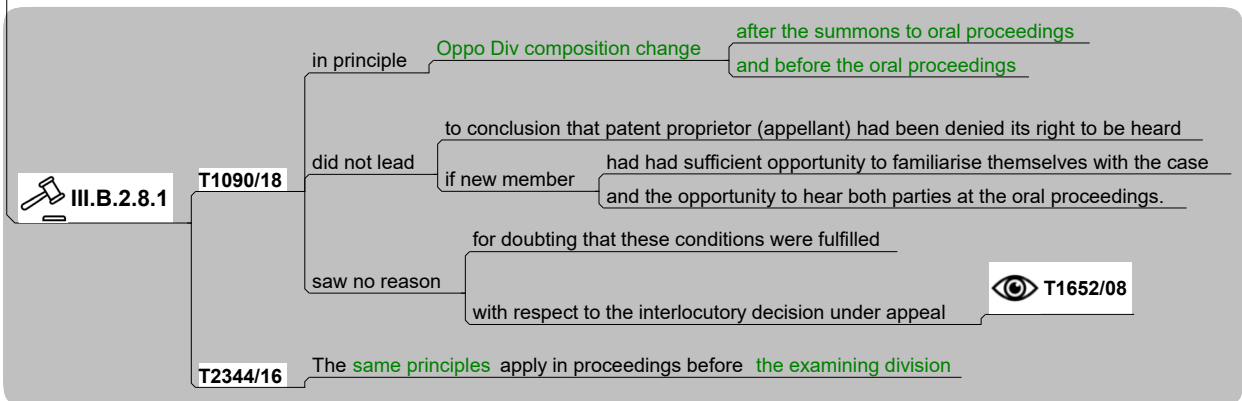
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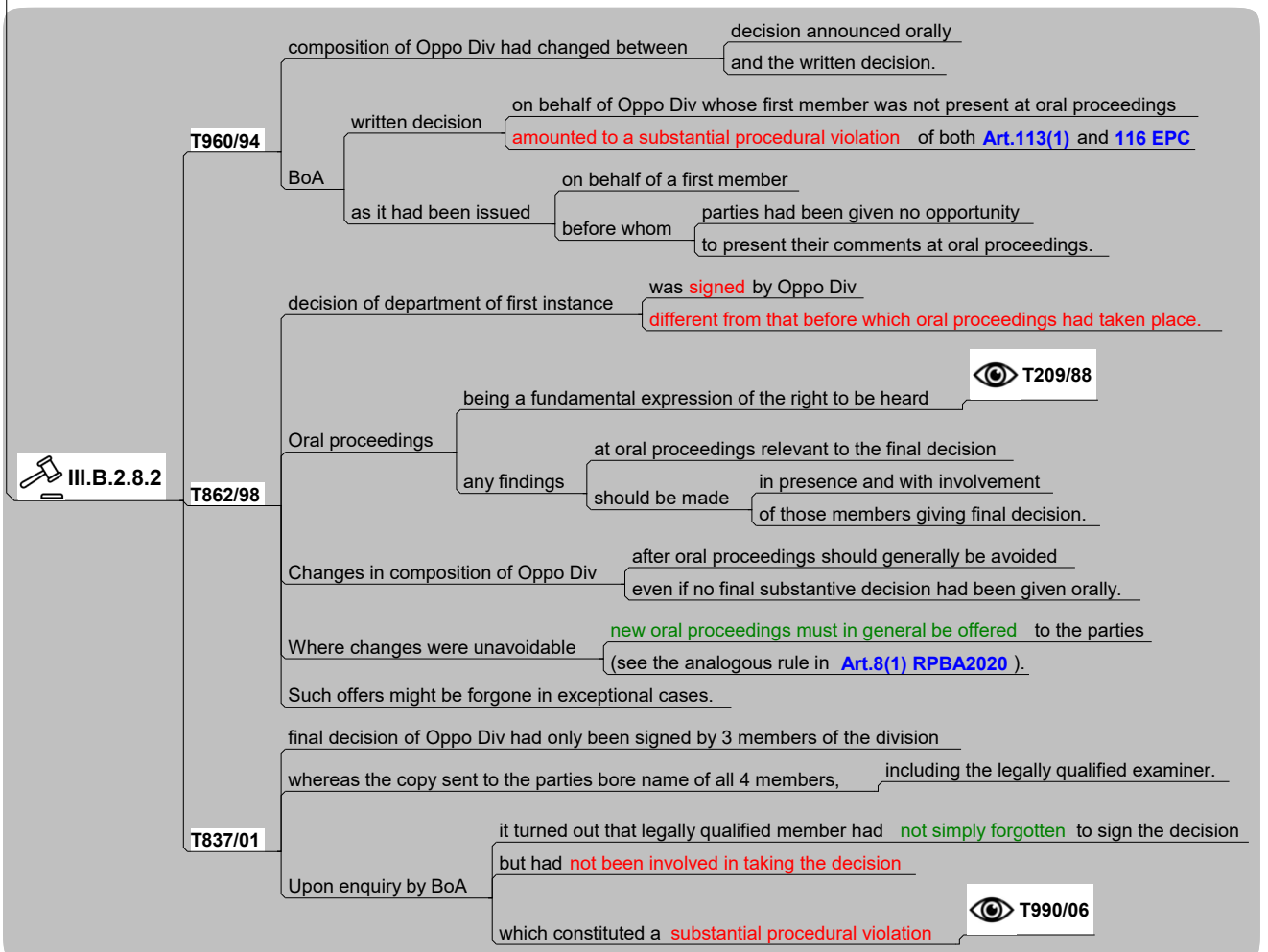
Changes in the composition of the competent department of first instance



Composition change BEFORE oral proceedings



Composition change DURING oral proceedings



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**Authoritative text**

EPO must decide upon EPA or EP only in text submitted to it,  
 or agreed by applicant or proprietor Art.113(2)  
and last used as a basis for proceedings.

=> amended version proposed by Exam Div or Oppo Div  
may only be adopted as basis for decision if it has been approved by applicant or proprietor.

In case of one or more auxiliary requests directed to alternative texts for grant or maintenance of a patent  
every such request qualifies as text submitted  
or agreed by the applicant or proprietor within meaning of Art.113(2)


When considering such requests it is essential that they are treated in the correct order.


=> if only allowable request is an auxiliary request,  
but is accompanied by higher auxiliary request for oral proceedings e.g. request for oral proceedings  
if main request cannot be granted

then communication under R.71(3) could not be issued on basis of allowable request,  
but instead oral proceedings in accordance with higher request would have to be appointed,  
or a further communication under R.71(1) issued

If order of requests is not clear from applicant's submissions then it would be necessary to contact applicant  
to clarify the situation before proceeding.

**General**

**III.B.3.1** T996/12 Art.113(2) EPC guarantees fundamental principle of party disposition (ne ultra petita)  R14/10

T1477/15 it is generally accepted that in appeal proceedings the principle of party disposition applies  R13/13 Reasons 15

meaning that parties can put forward, withhold or withdraw their requests as they see fit.

In other words if patent proprietor withdraws or no longer agrees to a text (2 auxiliary requests in this case)  
this principle prevents BoA from deciding on these issues.

**Requirement of text submitted by applicant**

**III.B.3.2** T1440/12 intention behind Art.113(2) EPC1973 is that EPO may not maintain patent according to particular text  
unless proprietor has consented unambiguously to patent being maintained in that form.

"text submitted" means a text submitted by proprietor with clear intention that patent be maintained according to that text  
at least as an auxiliary measure

In case in issue although 6 new requests were enclosed with reply to statement of grounds of appeal,  
proprietor/respondent did not actually request maintenance of patent on basis of any of them,  
but merely described them as "6 auxiliary requests that proprietor may subsequently choose to rely upon".

This phrase although submissions in question were termed "requests",  
made it clear that proprietor was not at that point requesting maintenance of patent based on them  
but merely leaving open the possibility that it might choose to make such request subsequently.

**Requirement of text agreed by applicant**

**III.B.3.3** T73/84 EP was to be revoked if patent proprietor stated in opposition or appeal proceedings  
that he no longer approved text in which the patent was granted  
and would not be submitting an amended text

T1244/08 such a statement immediately terminates appeal proceedings,  
and it is not possible to retract it and continue proceedings

BoA no mention anywhere in either minutes or decision that patent proprietor had approved amended text.

T861/16 since principle of tacit acceptance (qui tacet consentire videtur) was not established in EPC  
not enough to ask patent proprietor if it wished to comment on amendments to description carried out by Oppo Div  
Oppo Div had to ensure that patent proprietor had given its agreement.  
absence of patent proprietor's approval of version as maintained = substantial procedural violation (Art.113(2) EPC).

T1558/18 Oppo Div's decision to terminate opposition proceedings with result that contested patent had been maintained unchanged,  
had been at direct odds with the appellant's request that the patent be maintained in an amended version.  
The contested decision thus infringed the fundamental procedural principle of "party disposition" enshrined in Art.113(2) EPC

**Cases where EPO is uncertain or mistaken about approval of text**

**III.B.3.4** T382/10 to avoid any misunderstanding in particular when requests were amended during oral proceedings  
Exam Div should clarify final requests before pronouncing its decision at conclusion of oral proceedings

T1104/14 failure to obtain clarification where needed amounted to procedural violation  
because it was then not clear which version of patent was being put forward by patent proprietor  
for decision resulting in a breach of Art.113(2) EPC.

T1351/06 main request had not been withdrawn and had therefore remained pending.  
As a result, decision to grant the patent on basis of text approved by applicant as an auxiliary request  
was contrary to Art.113(2) EPC1973.

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**Signature**

**R.112 Noting of loss of rights** R.112 <=> R.69 EPC1973

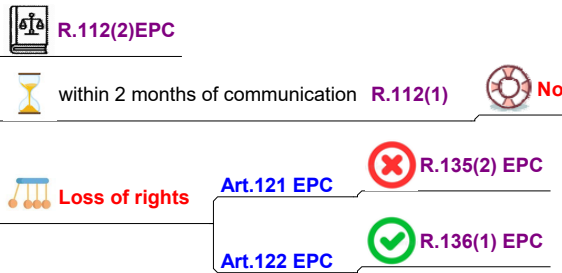
(1) If the EPO notes that a **loss of rights has occurred**, **without any decision concerning** the refusal of the EPA or the grant, revocation or maintenance of the EP, or the taking of evidence, **it shall communicate this** to the party concerned.

(2) If the party concerned considers that the **finding of the EPO is inaccurate**, **it may, within 2 months** of the communication under **paragraph 1, apply for a decision** on the matter.

The EPO shall take such decision **only if it does not share the opinion** of the **party requesting it; otherwise, it shall inform that party.**



**Ask for decision under R.112(2)**



**Loss of rights**

**Cases of loss of rights**

**E.VIII.1.9.1** If a party to proceedings or a third party **fails to comply with a time limit** laid down in EPC or fixed by the EPO, this will result **without any decision** concerning refusal of EPA or grant, revocation or maintenance of EP, or the taking of evidence.

**Noting and communication of loss of rights**

**E.VIII.1.9.2** If there has been loss of right a **formalities officer** will **note such loss of rights and communicate this to person concerned.**  
 The communication will be notified to person concerned as a matter of course

**Purpose of notification of loss of rights under R.112(1) EPC**

**III.K.4.1** **J7/92** purpose of notification under **R.69(1) EPC1973** is **not to give applicant** a chance to take at least remedial action by way of request for re-establishment of rights.

**Form of notification of loss of rights under R.112(1) EPC**

**III.K.4.2** **J43/92** **R.69(1) EPC1973** **did not prescribe any particular form** for the communications provided therein, distinguishing them from other communications or notifications under EPC.  
**A reference to time limit** to apply for a decision was **not necessarily decisive** as to true nature of communication.  
 Whether document constituted communication pursuant to **R.69(1) EPC1973** should be derived from its substantive content and its context **J8/81, T713/02, J24/01**

**Responsibility for issuing decisions under R.112(2) EPC**

**III.K.4.4** **OJ2014, A6** decision of the President of the EPO responsibility for issuing communications and decisions within meaning of **R.112(2) EPC** transferred to formalities officers working for Exam and Oppo Divs

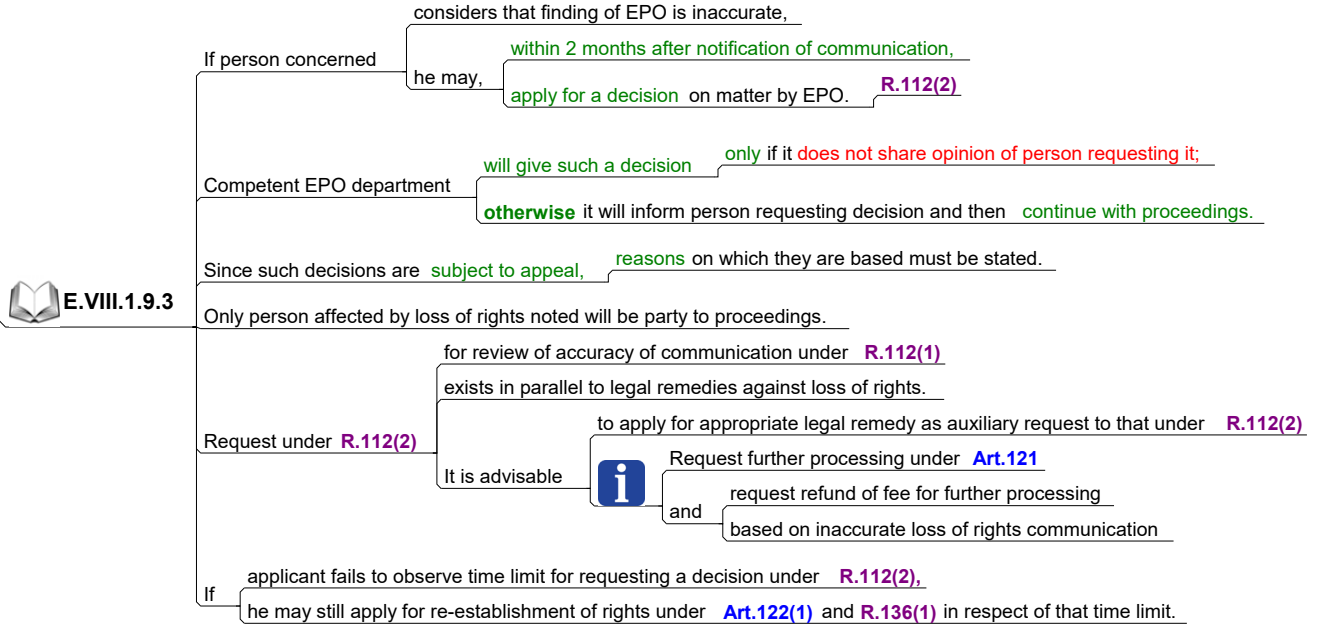


Art.113

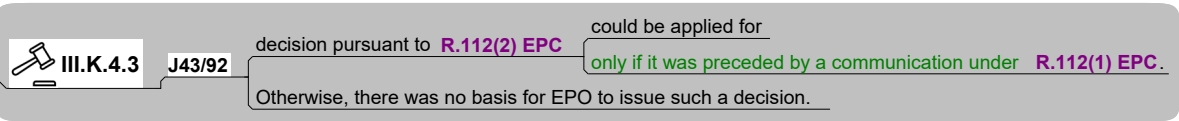
Basic principles of decisions  
 Right to be heard  
 Loss of rights  
 Signature

Loss of rights

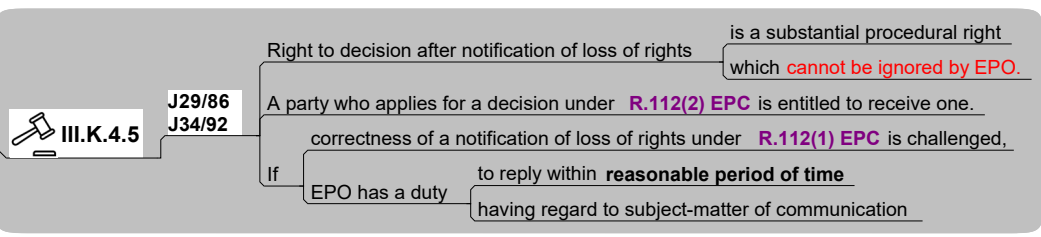
Decision on loss of rights



Request for a decision under **R.112(2) EPC** subsequent to communication



Right to a decision under **R.112(2) EPC**



Art.113



Basic principles of decisions  
 Right to be heard  
 Loss of rights  
 Signature



R.113 Signature, name, seal

(1) Any decisions, summonses, notices and communications from the EPO shall be signed by, and state the name of, the employee responsible.

(2) Where a document referred to in paragraph 1 is produced by the employee responsible using a computer, a seal may replace the signature.

Where the document is produced automatically by a computer, the employee's name may also be dispensed with.

The same shall apply to pre-printed notices and communications.

Signatures on a decision under R.113 EPC



III.K.3.3

R.113(1) EPC is not just a mere formality but an essential procedural step in decision-taking process.

J16/17 The name and signature serve to identify decision's authors and express that they unconditionally assume responsibility for its content.

This requirement is aimed at preventing arbitrariness and abuse and ensuring that it can be verified that competent body has taken decision.

It therefore constitutes an embodiment of the rule of law.

T989/19 cover page of Exam Div's decision had not been signed by all the division's members, this amounted to a substantial procedural violation and the decision was invalid.

Under R.113(1) EPC EPO decisions had to be signed by the employee responsible and state their name.

Since in addition Art.18(2) EPC stipulated that Exam Divs consisted of 3examiners, signatures of all 3 of those examiners were required.

Decisions to be signed



III.K.3.3.1

R.113 EPC decisions, summonses, notices and communications from EPO must be signed by, or bear the seal of, the employee responsible.

T390/86 if the decision of particular division was to be legally valid it had to bear signatures of members who had been appointed to that division to decide the issue.

Art.113



Basic principles of decisions  
Right to be heard  
Loss of rights  
Signature

Signatures on a decision under R.113 EPC

Examples of invalid signatures



III.K.3.3.2

a) When decision is announced in oral proceedings

**T390/86** in a case where final substantive decision has been given orally by Oppo Div during oral proceedings, subsequent written decision giving reasons for such oral substantive decision if is signed by persons who did not constitute opposition division during oral proceedings => decision is invalid.

**T243/87** decision null and void where one of the 3 signatures was provided by a member who had not attended the oral proceedings.

b) Director's signature in place of examiner's signature

**T211/05** a director's signature purporting to be on behalf of second examiner was invalid because nothing in the EPC1973 authorised a director to sign on behalf of a member of Exam Div to which he did not himself belong

Examples of valid signatures



III.K.3.3.3

a) Computer-generated communications

**T225/96** forms accompanying decisions are never signed because they are computer-generated and therefore, under R.70(2) EPC1973 (R. 113(2) EPC), a seal may replace the signature.

b) Death of examiner between oral proceedings and written decision

**T1170/05** 1 of examiners had died => decision of 1st instance bore signatures of only 2 of 3 members of division chairman signing on behalf of the deceased examiner. => decision was valid.

c) Decision in written proceedings

**T777/97** only 2 of members of Oppo Div had signed the contested decision refusing a request for correction, one purporting to sign on behalf of the absent chairman. Conclusions reached in T243/87 could be applied by analogy. Only those members who had taken the decision could decide on a request for its correction, Thus but if one of the 3 members of decision-making department was absent (here: the chairman), one of the others (here: the first examiner) could sign on that absent member's behalf

d) Illegible signature

**D8/82** surname of signature appeared only as a mark in which one could still discern the first letter and which was recognisably intended as a signature. it was valid since in several contracting states of EPO there is no requirement that a signature be legible or recognisably composed of letters.

e) Draft decisions

**T225/96** only the first examiner on Oppo Divn had signed the contested decision. sent case back to the division for regularisation, BoA but the 3 non-signing members replied that they were not prepared to put their names to a text issued without their knowledge or approval. in general, the decision as notified to the parties was presumed to be authentic.

**T837/01** where it was clear that the document sent to the parties was merely a draft. This amounted in board's view to a substantial procedural violation. Had signatures simply been missing this could have been corrected under R.89 EPC1973 (now R.140 EPC)