

an opportunity to exercise his right to present comments in accordance with Art. 113(1) EPC 1973 (Art. 113(1) EPC). Hence, a letter from the applicant which neither exercised nor waived that right was not a reply for the purposes of Art. 96(3) EPC 1973 (Art. 94(4) EPC). In the case in hand, the examining division believed erroneously that the applicant, by making a simple procedural request, had forfeited his right to present comments during the remainder of the term set for reply. Thus the precipitate refusal, while there were still some two months of the term for reply unexpired, did contravene Art. 113(1) EPC.

2.5.3 Immediate refusal after communication

An examining division does not exceed its discretionary power by immediately refusing an application after only a single communication. However, the decision must comply with Art. 113(1) EPC, i.e. must be based on grounds on which the applicant has had an opportunity to present comments (see T 201/98 and T 1002/03; see also T 84/82, OJ 1983, 451 and T 300/89, OJ 1991, 480; see chapter IV.B.2.3. "Refusal after a single communication"). If the factual basis is not sufficiently given in the single communication so that the applicant has to speculate about the examining division's assessment and thus is not put in the position to properly defend its rights, the requirements of Art. 113(1) EPC are not met; coming to a final decision after such a single deficient communication results therefore in a substantial procedural violation (T 435/07).

In T 305/14 the board stated that 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 the EPC has not been met, can a decision based on such a finding be issued without contravening Art. 113(1) EPC. In the case at hand, the board held that the decisive statement had been put forward in the communication in an abstract way only, without the necessary logical chain between the given statement and the particular technical facts of the case. Because the appellant learnt about the essential reasoning for the first time in the impugned decision, it did not have an opportunity to present its comments with respect to that reasoning.

2.5.4 Invitation to oral proceedings at short notice

In T 166/04 the board held that the late introduction of additional prior art documents together with an invitation to oral proceedings was not necessarily improper, even if they formed part of a critical argumentation. The board considered that the time frame of two and a half months for the applicant to respond was in conformity with R. 71(1) EPC 1973 (R. 115(1) EPC) and was not unduly short. Further, apart from the non-extendable time limit, the appellant had had an opportunity to respond to the summons in writing as if he had responded to a communication under Art. 96(2) EPC 1973 (Art. 94(3) EPC), which he had actually done by submitting amendments and further arguments. In addition, the board pointed out that the applicant had decided not to participate in the first-instance oral proceedings during the course of which he could have made further submissions.