

their rights. An objection against the grant of a patent had to be raised in such a way that the applicants were able to understand its factual basis and to react accordingly without first having to guess what the examining division might have had in mind.

Although parties may not be taken by surprise by the reasons for a decision, it is also settled case law of the Enlarged Board of Appeal under Art. 112a EPC that a board of appeal is not required to provide the 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 (see chapter V.B.4.3.5 "No obligation to provide detailed reasons for a decision in advance"). In T 1634/10, T 2405/10, T 1378/11 and T 1090/18 the boards explicitly applied this case law of the Enlarged Board of Appeal in relation to Art. 112a EPC to first instance proceedings.

In T 1065/16, lack of reproducibility as a ground for opposition had not been a subject of the opposition proceedings until the oral proceedings. It therefore amounted to a fresh ground for opposition and its introduction came as a surprise. In its summons, the opposition division had expressly stated that only novelty and the inventive step of claim 1's subject-matter were to be examined. As the patent proprietor had not been given sufficient opportunity to comment on this new ground for opposition, the opposition division had infringed Art. 113(1) EPC and thus committed a substantial procedural violation.

In T 2351/16 the board found that the examining division had issued a decision of refusal after only one communication under Art. 94(3) EPC as such did not constitute a violation of the appellant's right to be heard (see also chapter IV.B.2.3. "Refusal after a single communication"). However, in its decision the opposition division had raised (for the first time) an additional argument in support of the division's objection, following the applicant's reply to the Art. 94(3) EPC communication. This constituted a violation of the applicant's right to be heard and, therefore, a substantial procedural violation.

2.3.2 The meaning of "grounds or evidence"

"Grounds or evidence" under Art. 113(1) EPC are to be understood as meaning the essential legal and factual reasoning on which the decision is based (T 532/91, T 105/93, T 187/95, T 1154/04, T 305/14). In T 951/92 (OJ 1996, 53) the board ruled that the term "grounds or evidence" should not be narrowly interpreted and was to be understood as referring to the legal and factual reasons leading to refusal of the application, and not in the narrow sense of a requirement of the EPC (see also T 1423/15).

In T 556/15, the examining division's impugned decision was based entirely on a lack of compliance with Art. 123(2) EPC. The board compared the objections under Art. 123(2) EPC raised by the examining division in its two communications with those forming the grounds for its decision. The appellant had never had a chance to comment on those grounds. In the board's view, the term "grounds or evidence" in Art. 113(1) EPC was not to be interpreted narrowly but rather within the meaning of T 951/92 (see also T 233/18). However, this case differed from T 951/92; in T 556/15 the examining division's communications contained objections under Art. 123(2) EPC that, while detailed, did not concern any of the matters on which the decision was ultimately based. The appellant had