

In T 922/02 (ex parte) the board stated that the provisions of Art. 113(1) EPC were only complied with in a case where the decision was taken after remittal for further prosecution, if the notification and invitation was made after the remittal, typically by announcing the resumption of the proceedings, setting out the objections, if any, and asking the appellant whether or not he wished, within a fixed period of time, to present his comments or modify his request(s). Otherwise any final decision would come as a surprise to the appellant, which was contrary to the principle of good faith and fair hearing established by Art. 113(1) EPC. The board followed in this respect the case law developed in T 892/92 (OJ 1994, 664) and T 120/96 for opposition proceedings, which was equally applicable to examination proceedings, because the right to be heard was an essential procedural principle governing both procedures.

In T 281/03 of 17 May 2006 the issue of inventive step was not discussed at the oral proceedings, and the opposition division, after deliberating and announcing its decision on novelty, immediately announced the decision to reject the oppositions. The board held that, in order to guarantee the right to be heard, there should have been an explicit step, recorded in the minutes, giving the opponent the opportunity to comment on inventive step before the final deliberation, or alternatively an opportunity after the deliberation to comment on the opposition division's conclusion.

In T 451/06 the board distinguished the situation at hand from that in decision T 281/03. In the case underlying T 281/03, the opposition division had failed to give the opponent an opportunity to comment on lack of inventive step, thereby depriving the opponent of any possibility of substantiating a ground of opposition (see G 1/95). By contrast, in the case in hand, the opponent had been given the opportunity to substantiate the ground of opposition of lack of inventive step. The chairman's invitation to present all the objections in respect of inventive step had in effect been an invitation to the opponent to present both its "main and auxiliary requests". After the initial statement of the chairman that the issue to be discussed was lack of inventive step, the substantiation of the ground of opposition was exclusively the responsibility of the opponent.

#### 2.5.2 Issuing of decision before expiry of time limit to comment

In T 663/99 the board decided that the patent proprietor's right to be heard was violated if the time limit fixed under R. 57(1) EPC 1973 (R. 79(1) EPC) for presenting comments on the opposition had not expired by the date of handing over a revocation decision to the EPO's internal postal service (see also T 804/94).

In T 1081/02 the board of appeal decided that the principle of the right to be heard had been violated, since the opposition division, after inviting the patent proprietor to file the documents considered necessary to maintain the patent within two months, did not wait until this time limit had expired but issued an interlocutory decision prior to its expiry.

In T 685/98 (OJ 1999, 346), the board held that the phrase "fails to reply in due time to any invitation under ... paragraph 2" in Art. 96(3) EPC 1973 (Art. 94(4) EPC) had to be construed in the light of the purpose of the invitation pursuant to Art. 96(2) EPC 1973 (Art. 94(3) EPC) and R. 51(2) EPC 1973 (R. 71(1) EPC), which was to afford the applicant