

arguments as to why it should be admitted, amounted to a de facto admittance of the document, implying, contrary to Art. 114(2) EPC, that the board had no discretion to disregard a late-filed document. According to the board, the right to respond is not absolute but must be balanced inter alia against the need for procedural economy and due diligence that underpins Art. 114(2) EPC, which affords the board discretionary power to disregard evidence not submitted in due time.

See also chapter III.G.3.3. "Right to be heard".

2.4.6 Mere reference to jurisprudence

In T 1205/12 the board stated that according to established jurisprudence of the boards of appeal Art. 113(1) EPC is contravened where facts and arguments, which from the appellant's submissions are clearly central to his case are completely disregarded in the decision. The board held that the applicant's arguments had not been dealt with in the impugned decision and stated that the mere reference to jurisprudence of the boards of appeal does not, by itself, constitute or replace an argument in a first instance decision. If a deciding body, in a decision, wants to rely on an argument put forward in a decision of the boards it is insufficient merely to refer to it or to recite it. The deciding body must also make clear that it adopts the argument and explain why, in what respect and to what extent this argument applies to the case at hand (see also T 1206/12, T 1592/13).

2.5. The right to be heard and the timing of decisions

2.5.1 Decision could not be expected

In T 849/03 the board held that a decision should not catch the parties unawares. In the examination procedure the right to be heard is therefore violated not only in the event of failure to inform the applicant beforehand of the reasons forming the basis of a rejection but also if, at the time the decision is issued, the applicant had no reason to expect such a decision (see also T 1022/98 and chapter V.B.4.3.9 "Timing of a decision allegedly surprising").

In T 611/01 the board decided that a substantial procedural violation was occasioned by the examining division holding out to the appellants the prospect of a further opportunity to file arguments before any decision would be issued, and then issuing the decision without providing for that opportunity (regarding a false impression raised concerning amended claims, see also T 309/94).

In T 966/02 the board stated that it had been clear that the appellant (patent proprietor) had regarded both filed notices of opposition as inadmissible and had thus felt that there was no sense in commenting on the facts until the situation had been clarified. The appellant could not have foreseen that the opposition division would give a final decision without first clarifying the procedural situation, and it came as a complete surprise to it that it did so.