

other reasons (see chapter V.B.4.3.2 ""Fundamental" violation of Article 113 EPC – causal link and adverse effect").

2.2.2 First instance proceedings

When reviewing first instance proceedings the boards' review is, in principle, not limited to fundamental violations of the right to be heard.

However, remitting a case to the department of first-instance under Art. 11 RPBA 2020 also requires a "fundamental" deficiency in first instance proceedings, and under R. 103(1)(a) EPC the appeal fee is only reimbursed in case of a "substantial" procedural violation. In T 689/05 the board linked these concepts, stating that a "fundamental" deficiency within the meaning of Art. 11 RPBA is not caused by all procedural violations but rather only by a "substantial" procedural violation. In J 7/83 a substantial procedural violation was defined as an objective deficiency **affecting** the entire proceedings, in T 682/91 as a deficiency adversely **affecting** the rights of the parties (see chapter V.A.11.6.2 "Violation must be substantial and affect the entire proceedings").

In T 990/91 the lack of opportunity to reply to a supererogatory and incidental argument put forward by the examining division could not be considered to be a violation of the right to be heard, let alone a substantial one.

2.3. Surprising grounds or evidence

2.3.1 General principles

Art. 113(1) EPC requires that decisions may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

According to the Enlarged Board of Appeal (see chapter V.B.4.3.8 "Reasons for a decision allegedly surprising"), this implies that a party may not be taken by surprise by the reasons of a decision, referring to unknown grounds or evidence (R 3/13; see also T 1378/11). A purely subjective surprise, however, has no bearing on whether a party had an adequate opportunity to comment. "Grounds or evidence" within the meaning of Art. 113(1) EPC need not emanate from the board, it is sufficient if another party raises the objection (R 2/08). If the reason given in a decision corresponds to an argument put forward by the other party (see also T 405/94), the petitioner was aware of it and thus not taken by surprise (R 4/08, R 12/09 of 15 January 2010, R 8/14) unless the board clearly indicated that it regarded those arguments as not convincing (R 11/12).

In T 996/09 the board held that the right to be heard was a fundamental guarantor for the parties that proceedings before the EPO would be conducted fairly and openly (with further reference to J 20/85 and J 3/90) and was intended to ensure that the parties to the proceedings were not taken by surprise by grounds mentioned in an adverse decision (following T 669/90, T 892/92, T 594/00 and T 343/01; see also T 197/88, T 220/93). In T 435/07 the board held that the grounds on which a decision were based had to be communicated to the applicants in such a way that they were put in the position to defend