

In T 1110/03 (OJ 2005, 302) the board held that enshrined in Art. 117(1) EPC and Art. 113(1) EPC is a basic procedural right generally recognised in the contracting states, i.e. the right to give evidence in appropriate form, specifically by the production of documents (Art. 117(1)(c) EPC), and the right to have that evidence heard. See also T 2294/12 in which one of the appellants had submitted two sets of comparative tests during the written phase; with reference to the right to give evidence in an appropriate form as set out in T 1110/03, the board held that the examining division had denied the appellants their right to be heard because the decision under appeal gave no reason why the division had found the first set irrelevant and did not even mention the second.

In T 1098/07 the board stated that failure to consider evidence will normally constitute a substantial procedural violation in that it deprives a party of basic rights enshrined in Art. 117(1) and Art. 113(1) EPC. In the board's opinion, certain factors may nevertheless mitigate the severity of the violation. Thus, whether or not a failure of the decision to expressly mention material offered by a party in support of its case constitutes a substantial procedural violation will depend on the (prima facie) significance and evidential value of such material. The questions to be asked are: what facts is it intended to prove, how relevant is it to these facts and how likely is it that it will prove them? In the case at issue, the failure to consider the evidence was a pardonable error that had not deprived the appellant of any fundamental rights.

In T 21/09 the board held that the opposition division had either (i) disregarded the experimental evidence submitted by the appellant as late-filed, or (ii) considered the evidence, but failed to give proper reasons why it did not support the alleged technical effects. In the first case, the patent proprietor had not been heard on the admission of the evidence, and, more importantly, the decision was absolutely silent about it. In the second case, the decision under appeal suffered from a severe deficiency in the reasons given by the opposition division for the adverse findings on inventive step. In either case, the decision could not be regarded as being in conformity with R. 111(2) EPC.

In T 2415/09 the appellant (patent proprietor) argued that new documents and experiments submitted by the respondent had only been transmitted to the appellant six weeks before the oral proceedings before the opposition division. The board said it could not comment on the exact period needed to conduct comparative experiments. Even if the periods specified in R. 132(2) EPC did not apply in the case in point (R. 116(1) EPC), they showed that a party could not be required to conduct comparative experiments in a period as short as six weeks. The board concluded that the opposition division had failed to respect the appellant's right to be heard.

In T 94/84 (OJ 1986, 337) the board held that the right to be heard guarantees that grounds put forward are taken into consideration, and was contravened because a translation, subsequently filed in an official language, of a Japanese document cited in due time was disallowed.

In T 2541/11 the appellant (opponent) submitted that the non-admission of a document without a full discussion as to its relevance violated its right to be heard. The board stated that a right to present all arguments as if the document had been admitted, instead of