

Art. 113(2) EPC, had taken a decision on the patent on the basis of a text which had neither been submitted nor agreed by the proprietor of the patent.

In T 543/92 and T 89/94 the opposition division unintentionally failed to take account of a document introducing amended claims. In both cases the patent was revoked. The board ruled that once an item of mail had been received at the EPO it had to be considered to have been received by the organ deciding the case. Responsibility for the correct processing of mail thereafter lay with the relevant departments within the EPO. The decision under appeal was thus in breach of Art. 113(2) EPC.

In T 1351/06, the main request had not been withdrawn and had therefore remained pending. As a result, the decision to grant the patent on the basis of the text approved by the applicant as an auxiliary request was contrary to Art. 113(2) EPC.

In T 736/14 the board held that, if an applicant whose application is non-unitary responds unclearly and/or in a misleading way to an invitation from the examining division to designate which searched invention it wishes to prosecute further, it could not be automatically assumed that the applicant selected the invention covered by the main request for examination. Rather, the examining division had to clarify, e.g. via a further communication, which of the searched inventions the applicant actually wanted it to examine. Confronting the applicant with an irrevocable decision not to admit an auxiliary request covering one of the inventions searched constituted a substantial procedural violation of the applicant's right to be heard. The examining division had presented the applicant with a fait accompli.