

thus been unaware of which features of the claims under discussion had violated Art. 123(2) EPC, until it received the decision, despite the appellant having had several opportunities to amend the claims before the decision.

In T 375/00 the appellant (opponent) considered that the technical problem mentioned by the opposition division in its decision was different from that discussed in the preceding proceedings. The board held that the appellant's right to be heard had not been violated, because the definition of the objective problem was part of the arguments, not part of the grounds as specified in Art. 113(1) EPC.

In T 33/93 the board stated that the citation of a board of appeal decision for the first time in the decision under appeal was not a fresh ground or piece of evidence within the meaning of Art. 113(1) EPC, but a mere repetition of arguments, since it only confirmed the position duly brought to the appellant's attention.

In T 1634/10 the examining division had issued a reasoned communication setting out its objections in the light of two prior art documents. The board held that the mere fact that the examining division had not agreed with the submission of the appellant did not amount to a breach of the right to be heard.

In T 2238/11 the appellant argued that the examining division had surprisingly concluded in the "Further Remarks" section in the decision under appeal that the claimed subject-matter lacked novelty and objected that it had not been heard on that aspect. However, the decision under appeal had been based on lack of inventive step, not on lack of novelty. The board held that a party's right to be heard was not violated if the party did not have the opportunity to comment on observations in an obiter dictum (T 726/10 and T 725/05). The "Further Remarks" section in the decision under appeal did not form part of the actual decision.

### 2.3.3 Opportunity to comment on evidence

In J 20/85 (OJ 1987, 102) the board pointed out that a decision on an issue of fact could only properly be made by the EPO after all the evidence on which such decision was to be based had been identified and communicated to the party concerned. In T 820/10 the examining division refused the application on the ground of lack of inventive step in view of documents that were cited for the very first time in the appealed decision itself. The board held that the decision therefore relied upon evidence on which the applicant had not had an opportunity to present its comments. Furthermore, in J 3/90 (OJ 1991, 550) the Legal Board of Appeal held that where the EPO had examined the facts, Art. 113(1) EPC was not complied with unless the parties concerned had been fully informed about the enquiries made, and of the results, and had then been given sufficient opportunity to present their comments before any decision was issued (see also J 16/04).

In T 1401/16 the examining division based its conclusions concerning critical issues, at least in part, on two Wikipedia entries cited in the decision. However, this evidence was never referred to during the examination proceedings and both entries were mentioned for the very first time in the appealed decision itself. In consequence, the applicant had no