



FÉDÉRATION INTERNATIONALE DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE
COMMISSION D'ÉTUDE ET DE TRAVAIL (CET)

CET WORKING DOCUMENT

SUBJECT:	Petition for Review under Art. 112a EPC: The Enlarged Board of Appeal's practice with respect to violations of the right to be heard (Art. 113 EPC)	DATE:	4 December 2009
PURPOSE:	Information	REFERENCE:	EXCO/AR10/CET/1404
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		MEETING DATE:	10 – 14 January 2010
		DISTRIBUTION:	All attendees

Executive Summary

With the EPC 2000 (in force since 13 December 2007) the possibility for reviewing decisions made by the Boards of Appeal of the European Patent Office was introduced. It allows a party to appeal proceedings which was adversely affected by the decision of the Board of Appeal to file a Petition for Review if fundamental procedural violations had happened during appeal proceedings.

About twenty cases have already been decided by the EnBoA up to now. Most of these cases raised violations of the "Right to be Heard" during appeal proceedings. Up to now, only one of these cases ended in a successful challenge of the appeal decision (Case R 7/09).

In this case the patentee received a favourable decision by the Opposition Division. The opponent filed a Notice of Appeal that was delivered and received by the patentee. However, the opponent's Appeal Brief with the reasons did not reach the office of the representative of the patentee (although it was present in the electronic file on the EPO's webpage). The patentee therefore did not submit any reply. Since the opponent had asked for oral proceedings only as an auxiliary request, the Technical Board of Appeal (TBA) entirely revoked the patent without oral proceedings.

The EnBoA allowed the Petition for Review requested by the patentee, because he had not been given the opportunity to be heard in the appeal proceedings. The case was therefore re-opened before the TBA.

However, more interesting is that the EnBoA in its decisions already delivered has provided guidelines under which a petitioner succeeds under this head (violation of Art. 113 EPC). The EnBoA has defined two prerequisites:

- (1) A petitioner has to establish that the decision under review is based on an assessment or on reasoning relating to grounds or evidence which the adversely affected party was not aware of and had no opportunity to comment upon, and
- (2) The petitioner also has to prove that a causal link exists between this procedural defect and the final decision, otherwise the alleged defect could not be considered decisive and hence not fundamental.

These two grounds have already been provided in a number of decisions (R 1/08, R 11/08, R 6/09, and R 13/09) so that they already represent established case law.

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