

EPC 2000

- Review of BoA Decisions by the Enlarged Board of Appeal

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Petition for review by the Enlarged Board of Appeal

Art. 112a, R 104 - 110

- General
- Procedural defect
- Criminal act
- Admissibility of petition
- Procedure before the EBA
- Time limits
- Allowability of petition
- Protection of third parties
- Publication in Register/Patent Bulletin

General

- Limited judicial review of BoA decisions
 - Appeal proceedings marred by **fundamental procedural defects**
 - **Criminal act** could have influenced BoA's decision
- **Petition has no suspensive effect!**
- **Preliminary examination** by a three-member panel of the EBA to deal quickly with clearly inadmissible or non-allowable petitions

General

- **No review of application of substantive law!**
- Not a procedure to promote further development of the law or ensure its uniform application (in contrast to proceedings under Art. 112 EPC)
- ***Applicable to BoA decisions after entry into force of EPC 2000***

Procedural defect

Art. 112a, R 104

- **Improper composition of BoA**
 - participation of an excluded member
 - personal interest (Art. 24(1))
 - representative of a party (Art. 24(1))
 - involvement in decision under appeal (Art. 24(1))
 - suspicion of partiality (Art. 24(4))
 - participation of a person not appointed as a board member
- **Fundamental violation of Art. 113**
- **Failure, contrary to Art. 116, to arrange oral proceedings**
- **No decision on a request relevant to BoA decision**

Criminal act

Art. 112a, R 105

- Criminal act which **may have had an impact** on **decision** of BoA
- **Competent court or authority has finally established that** criminal act occurred
- **Conviction not necessary** (i.e. establishing that act took place is sufficient)
- Examples
 - forging/manipulating prior art documents
 - bribery
 - intimidating/threatening a board member
 - perjury by a witness

Admissibility of petition

Art. 112a, R 108(1), (2)

- **Party adversely affected** by decision of BoA
- **Ground** for challenging decision
- **Time limit**
 - 2 months after notification of BoA decision
 - 2 months after criminal act finally established; not later than 5 years after notification of BoA decision
- Petition must **indicate**
 - **reasons** for setting BoA decision aside
 - **facts and evidence** on which petition is based

R 107

Admissibility of petition

Art. 112a, R 108(1), (2)

- Payment of **fee for petition for review**: € 2 500
- **Objection to procedural defect was raised during appeal proceedings** and rejected by BoA R 106
 - *unless* the objection could not be raised during appeal proceedings

Procedure before EBA

Art. 112a, R 109

- **Preliminary examination by EBA (3 members)**

- 2 lawyers + 1 technically qualified member
unanimously reject petitions if obviously
inadmissible or unallowable

R 109(2)(a)

- decision without involvement of other parties and on
basis of petition (i.e. submissions filed in due time),
after oral proceedings if necessary

R 109(3)

- **Examination by EBA (5 members) of petitions after
successful preliminary examination**

- 4 lawyers + 1 technically qualified member
- Procedure according to normal rules for appeals

R 109(2)(b)

Time limits

Art. 112a, R. 109(1)

(Shortened) time limits

- **Period of notice for summoning parties** to oral proceedings (R. 115) can be less than two months
- **Period for summoning witnesses, experts, etc.** to oral proceedings (R. 118) can be less than two months
- **Periods to be specified by the Office** (R. 132): no minimum or maximum
- Use in oral proceedings of EPO official language other than language of proceedings
 - at least one month's notice before oral proceedings (R 4(1))

BUT: EBA can specify a different period

Allowability of the petition

Art. 112a

- If the **petition is allowable** (serious procedural defect or criminal act), then:
 - decision set aside by EBA and **proceedings reopened** before **BoA** responsible, in a different composition if necessary R 108(3)
 - reimbursement of fee for petition for review R 110
 - new proceedings before BoA

Protection of third parties

Art. 112a(6)

Any person who, in a designated contracting state, has

- in good faith
- used or made effective and serious preparations for using an invention which is the subject of the published application or the patent
- in the period between the challenged decision of the BoA and the publication of the decision on the petition for review

may **without payment continue such use** in the course of his business

Provision similar to Art. 122(5)

Publication in Register/Bulletin

- Petition for review
 - entry in European Patent Register
- Decision of EBA
 - entry in European Patent Register
 - publication in European Patent Bulletin
- Decision of BoA
 - entry in European Patent Register

R 143(2)

R 143(1)(y)

Art. 129(a), 112a

**Thank you for
your attention!**