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## DIFFERENT FACT-FINDING AT THE EPO BOARDS OF APPEAL: IS IT POSSIBLE?

As recently as last year the Boards of Appeal (BoAs) of the European Patent Office (EPO) introduced new rules of procedure to emphasize that their role is to conduct a judicial review of first instance proceedings in examination or opposition. The new rules introduced significant limitations on the possibility of introducing new evidence, facts and arguments on appeal.

Despite that, a BoA decision issued on December 7, 2020 held that BoAs have a broad power to overrule findings of fact made in first instance proceedings.

In that decision, the BoA referred to an earlier BoA decision according to which BoAs should only overrule a finding of fact made in a first instance proceeding by an EPO first instance division if that division's assessment of the evidence has one of the following shortcomings:

- a) Failure to consider essential points;
- b) Consideration of irrelevant matters;
- c) Drawing of illogical conclusions.

In the December 7, 2020 decision, the BoA addressed the question of whether, when reviewing a finding of fact made by a first instance division, the BoA should only determine that one of the above criteria has been met, or whether it should overrule the finding of fact made by the first instance division if the BoA considers that finding to be wrong even though it does not fulfil one of the above criteria.

The BoA considered that if one of the above criteria had to be met for a finding of fact to be reviewed, this would amount to *"a considerable restriction of a board's competence"*. Instead, the BoA recalled that the BoAs have *"competence to review appealed decisions in full, including points of law and fact"*, and even referred to art. 6 of the European Convention on Human Rights, according to which there must be at least one judicial instance that can review a case in full, i.e. the law and the facts, while emphasizing that the BoAs are the only judicial body to review decisions by the first instance divisions of the EPO.

As a result, in the December 7, 2020 decision the BoA reviewed a finding of fact made by a first instance division regarding the alleged prior public use of a claimed invention, which the first instance division had found to be novelty-destroying for the invention. Following that review, the BoA concluded that the first instance division had erred in finding that all features of the invention had been made available to the public by way of that prior public use, as the evidence of such prior public use left some room for doubts that could not be resolved.

This is certainly an important decision as it clarifies and reinforces the role of BoAs at the EPO, which represent a legitimate and essential safeguard for all users of the EPO system.