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**Datasheet for the decision
of the Enlarged Board of Appeal
of 6 December 2013**

Case Number: R 0009/12

Appeal Number: T 0716/10 - 3.3.04

Application Number: 04012292.1

Publication Number: 1454990

IPC: C12P 7/64, A23K 1/16,
A23C 9/152, A23C 9/20,
A23L 1/30

Language of the proceedings: EN

Title of invention:
Process for producing unsaturated fatty acid-containing oils

Patent Proprietor:
Suntory Holdings Limited

Opponent:
Martek Biosciences Corp.
DSM IP Assets B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 21, 22, 83, 112(1)(a), 112a(2)(c), 113(1)
EPC R. 106, 107, 110
RPBA Art. 12(2) and (4), 13(3)

Keyword:
"Allowability of petition for review (no)"
"Referral of a question to the Enlarged Board of Appeal under
Article 112 EPC (no)"

Decisions cited:
R 0007/08, R 0015/10

Catchword:
-



Case Number: R 0009/12

D E C I S I O N
of the Enlarged Board of Appeal
of 6 December 2013

Petitioner: DSM IP Assets B.V.
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NL-6411 TE Heerlen (NL)

Representative: Elkenbracht, Johan Christiaan
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Other Party: Martek Biosciences Corp.
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Representative: Mercer, Christopher Paul
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London WC1B 5HA (GB)

Respondent: Suntory Holdings Limited
(Patent Proprietor) 1-40, Dojimahama 2-chome,
Kita-ku, Osaka-shi,
Osaka 530-8203 (JP)

Representative: Stoner, Gerard Patrick
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33 Gutter Lane
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Decision under review: **Decision of the Technical Board of Appeal
3.3.04 of the European Patent Office of
12 October 2011.**

Composition of the Board:

Chairman: W. van der Eijk
Members: E. DufRASne
U. Krause
R. Menapace
M. J. Vogel

Summary of Facts and Submissions

Petitions for review R 7/12 and R 8/12 - Parent application

- I. European patent No. 0 957 173, based on application No. 97937813.0 (hereafter "the parent application"), was granted to Suntory Holdings Limited (hereafter "the proprietor" or "the respondent" in the petition proceedings).
- II. Notices of opposition were filed by DSM IP Assets B.V. and Martek Biosciences Corp. (hereafter respectively "opponent I" and "opponent II" or, jointly, "the opponents") on the grounds of Article 100(a), (b) and (c) EPC.
- III. The Opposition Division revoked the patent on the ground that the claims then on file did not fulfil the requirements of Article 83 EPC. It considered that the measurement method as taught in the patent, using an Ulbon HR-1 gas chromatography column, was unsuitable for measuring the compositional ratio of 24,25-methylenecholest-5-en-3 β -ol (hereafter "24,25-M") mentioned in claim 1. The Opposition Division accepted the opponents' arguments and data showing that the peak used to measure 24,25-M also measured ergosta-5,25-dien-3 β -ol (hereafter "ergosta-5,25") and could comprise more ergosta-5,25 than 24,25-M, and that the ratios of these sterols were unpredictable. It therefore concluded that an objection of insufficiency of disclosure arose, because the skilled person did not know whether or not the purported problem of the contested patent, i.e. to lower the amount of 24,25-M, was solved.

- IV. The proprietor filed an appeal against the decision of the Opposition Division.
- V. In its decision T 1540/08 of 12 October 2011 posted on 7 March 2012, the Board of Appeal set aside the decision of the Opposition Division and remitted the case to the department of first instance for further prosecution.

Claim 1 of the main request remitted for further prosecution reads as follows:

"1. A process of production of unsaturated fatty acid containing microbial oil containing from 30 to 50% arachidonic acid, comprising submerged culturing of a microorganism belonging to the genus *Mortierella* subgenus *Mortierella* in a fermenter with aeration in a medium containing a nitrogen source, and collecting said unsaturated fatty acid-containing oil from the cultured product, characterised by the use of defatted soybean or processed defatted soybean as said nitrogen source, to restrict the compositional ratio of 24,25-methylenecholest-5-en-3 β -ol in said unsaturated fatty acid-containing oil, said composition ratio being not more than 35%."

In its written decision, the Board of Appeal defined as "Y/S comparison" a comparison between the composition ratio of 24,25-M in the oil recovered from the growth medium comprising soybean (S) and the same composition ratio in the oil recovered from the growth medium comprising yeast (Y), all other conditions remaining the same (Reasons, point 6). The Board of Appeal came

to the conclusion that an objection of insufficiency of disclosure based on the impossibility of determining whether or not lowering of the 24,25-M had been achieved, could only arise if it could be demonstrated that a decrease of "the defined 24,25-M ratio" (an unresolved peak area of a mixture of 24,25-M and ergosta-5,25 measured according to the patent with the Ulbon HR-1 gas chromatography column) was not indicative for a decrease of "the actual 24,25-M ratio" (a peak area of pure 24,25-M) in the context of that Y/S comparison. The Board observed that none of the tests provided by the opponents dealt with a Y/S comparison and that they were thus prima facie not relevant (Reasons, point 11 and 12). It concluded that the claims of the main request satisfied the requirements of Article 83 EPC.

VI. Both opponent I and opponent II (hereafter respectively "petitioner I" and "petitioner II" or, jointly, "the petitioners" in the petition proceedings) filed reasoned petitions for review of this decision on 16 May 2012. The corresponding fees were paid on the same day.

The petitions, respectively numbered R 7/12 and R 8/12, are based on the ground in Article 112a(2)(c) EPC, namely that a fundamental violation of Article 113(1) EPC occurred in the appeal proceedings.

VII. On 23 July 2012, the Enlarged Board of Appeal decided to consider the petitions for review in cases R 7/12 and R 8/12, both filed against the decision T 1540/08, in consolidated proceedings in accordance with

Article 8 of the Rules of Procedure of the Enlarged Board of Appeal (hereafter "RPEBA").

Petitions for review R 9/12 and R 10/12 - Divisional application

- VIII. European patent No. 1454990, based on application No. 04012292.1, which is a divisional application (hereafter "the divisional application") of the above-mentioned parent application, was granted to the same proprietor.
- IX. Notices of opposition were filed by the same opponents, on the same grounds.
- X. The Opposition Division revoked the patent on the ground that the claims then on file did not fulfil the requirements of Article 83 EPC, for the same reasons as for the decision in the parent case.
- XI. The proprietor filed an appeal against the decision of the Opposition Division.

As far as the arguments of the parties were concerned, the Board referred to the Facts and Submissions in decision T 1540/08, sections VIII and IX.

- XII. In its decision T 0716/10 of 12 October 2011 posted on 7 March 2012, the Board of Appeal set aside the decision of the Opposition Division and remitted the case to the department of first instance for further prosecution.

The claims were slightly different from the claims in the parent case but the Board considered that the arguments had the same impact.

Hence, in substance, the Board simply referred, for the Reasons for that decision, to points 6 to 21 of the Reasons for decision T 1540/08.

XIII. Each of the opponents filed reasoned petitions for review of decision T 0716/10 in a reasoned statement on 16 May 2012. The corresponding fees were paid on the same day.

XIV. The petitions, respectively numbered R 9/12 and R 10/12, are based on the same ground and the same arguments as cases R 7/12 and R 8/12.

XV. On 23 July 2012, the Enlarged Board also decided to consider the petitions for review in cases R 09/12 and R 10/12, both filed against the decision T 0716/10, in consolidated proceedings in accordance with Article 8 of RPEBA.

All cases

XVI. The petitioners' arguments are the same in cases R 7/12, R 8/12, R 9/12 and R 10/12 (hereafter "all cases") and, to the extent necessary for the decisions can be summarised as follows:

The Board indicated for the first time in the Reasons for the decisions that in order to establish insufficiency of disclosure under Article 83 EPC it could only be demonstrated that a decrease of "the

defined 24,25-M ratio" was not indicative for a decrease of "the actual 24,25-M ratio" **in the context of the Y/S comparison** (Reasons, point 11, bold in the decisions). Also the observation that none of the tests provided by the opponents dealt with that Y/S comparison and that they were thus prima facie not relevant appeared for the first time in the decisions. (Reasons, point 12). These were essential observations by the Board since they supported its conclusion that no convincing evidence had been provided by the opponents showing that the "defined 24,25-M ratio" was not a valid and effective measure for the "actual 24,25-M ratio" (Reasons, point 18).

This analysis was raised neither in the written proceedings nor during the oral proceedings before the Board. It amounted to a new argument and, even more, to a new essential legal and factual reasoning, i.e. new grounds within the meaning of Article 113 EPC. It came as a complete surprise to the opponents with the written decisions. In this situation, the opponents were not given an opportunity to present their comments, in breach of Article 113(1) EPC.

It was not submitted that it was impossible to derive the Y/S comparison from the elements present in the files. It was argued that the Y/S comparison argument, i.e. the requirement of the Y/S comparison for the assessment of sufficiency of disclosure by the evaluation of the correlation between the decrease in "the defined 24,25-M ratio" and the decrease in "the actual 24,25-M ratio", appeared for the first time in the Reasons for the written decisions.

It was not contested that the granted patents made a Y/S comparison, since in the examples and comparative examples (Tables 1 to 3) the use of nitrogen sources derived from soybean (S) was compared with the use of nitrogen sources derived from yeast (Y) as to their effect on the composition ratio of 24,25-M. However, the granted patents referred only to the "defined 24,25-M ratio" measured using the Ulbon HR1 column. Without any reference to the "actual 24,25-M ratio", the Y/S comparison at that time had no relevance for the insufficiency of disclosure objection in relation to the correlation between the two ratios.

The Opposition Division's decisions also referred to the effective evaluation of the "actual 24,25-M ratio" by measurement of the "defined 24,25-M ratio" in the examples (S) compared to the comparative examples (Y) of the patent (decision of 6 June 2008, Reasons, point 5.4, p.13, second paragraph in parent case and decision of 15 January 2010, Reasons, point 2.5, page 7, fifth paragraph in divisional case). However, this did not correspond to the requirement of a Y/S comparison for the assessment of sufficiency. None of the evidence provided in the opposition proceedings relating to sufficiency included a Y/S comparison and the issue of sufficiency was considered by the Opposition Division broadly, i.e. independently of any Y/S comparison.

In the appeal proceedings, many data were submitted and discussed by the parties in order to establish whether or not a correlation existed between the "defined 24,25-M ratio" and the "actual 24,25-M ratio". The debate in appeal and most of the proprietor's arguments

concentrated on these data. In particular, the proprietor's submissions filed on 16 April 2011, points 10 to 16, pages 7 and 8 in parent case and the same filed on 25 May 2010, points 10 to 16, pages 7 and 8 in divisional case, were only presented to explain an argument based on a document (D 56 in parent case and the same numbered D 67 in divisional case) showing the available data as a whole. These submissions concerned whether or not a correlation existed, implicitly admitting the relevance of the document and of the data it contained. The submissions did not imply in any way that the correlation had to be looked at in the context of the Y/S comparison, i.e. the Y/S comparison argument. The Y/S comparison argument was never raised in appeal proceedings by the proprietor, as established by the Facts and Submissions as presented by the Board. Also the Board's preliminary opinion did not mention the Y/S comparison argument. This argument was introduced by the Board for the first time in the decisions as a fundamental point, which amounted to a change of the proprietor's cases by the Board on a decisive aspect, without any warning of the Board's thinking that the opponents might have expected in this regard. Such a change of cases would have required that the opponents be offered an opportunity to globally re-evaluate their submissions. Instead, since the Y/S comparison argument was introduced for the first time in the Reasons for the written decisions, the opponents were prevented from presenting any comments on that point, which amounted to a breach of Article 113(1) EPC.

Moreover, the decisions were inconsistent with the normal practice of the Boards of Appeal, according to

which it was a reasonable expectation of the parties that the Board notified them if it identified, in particular during oral proceedings, a new ground on which they had not commented.

The decisions were also inconsistent with Articles 12(2) and 13(3) RPBA, since the relevance of the Y/S comparison was not contained in the proprietor's statements of grounds of appeal and should not have been admitted later and considered at the Board's discretion because it raised issues the opponents could not reasonably be expected to deal with without postponement of the already summoned oral proceedings.

If the Enlarged Board was minded to follow the position that "no factual situation can be reviewed and any new argument is allowable", it was requested to refer the following question to the Enlarged Board under Article 112 EPC:

"Does Article 113(1) EPC have to be interpreted differently for proceedings before the examining and opposition divisions (as explained in T 951/92, T 105/93, T 778/98 and T 1154/04) and the Technical Boards of Appeal because, in review proceedings, the Enlarged Board of Appeal is not allowed to make any technical assessment (as explained in R 1/08 and R 18/09), even if such technical assessment is necessary to judge whether a decision of a TBA is based on a "new ground, or new evidence on which a party has had no opportunity comment according to Article 113(1) EPC [sic]".

It was contested that the Enlarged Board of Appeal under Article 112a EPC could not refer a question of law to the Enlarged Board under Article 112 EPC, as established in case R 7/08. The "Boards of Appeal" according to Article 22 EPC competent to refer points of law to the Enlarged Board of Appeal under Article 112 EPC could not be restricted to the "Boards of Appeal" within the meaning of Article 21 EPC but should include the Enlarged Board of Appeal in cases under Article 112a EPC. Such a restriction would not be logical, could not have been the intention of the legislator and would leave a lacuna in the operation of the EPO by preventing some questions of law from being referred to the Enlarged Board of Appeal under Article 112 EPC. There should be no limitation on the function of the Enlarged Board of Appeal to decide on points of law under that article.

XVII. The respondent's arguments are the same in all cases and to the extent necessary for the decisions can be summarised as follows:

The issue raised in the petitions was in fact present in the appeal proceedings and the petitioners did have the opportunity to present their comments as required by Article 113 EPC. The petitions relied on and asserted an obligation for the Board to give notice in advance to the parties of its reasoning, which obligation does not exist.

Several passages in the parties' submissions in the opposition proceedings as well as in the Opposition Division's decisions referred to the comparison when using S instead of Y, other factors being equal.

In the appeal proceedings, reference was made to that comparison in the discussion of insufficiency under Article 83 EPC. In particular in the proprietor's submissions filed on 16 April 2011 and 25 May 2010, points 10 to 16 (complete references cited above, point XVI), it was mentioned that none of the opponents' evidence showed that a correlation was absent enabling (for example) comparison of the products of two cultures of the same microorganism under conditions differing only in the nitrogen source used. Further references were made to the comparison as to the content of 24,25-M in the product obtained from the claimed process with the product obtained from the conventional process and to the enablement of the disclosed measurement method for that comparison.

The issue of the relevance of the Y/S comparison for sufficiency of disclosure was part of the appeal proceedings and it was the opponents' responsibility to present their complete case in that respect, and to choose which data they submitted.

It was further clear from all the case law in Article 112a EPC proceedings and from the general nature of appeal proceedings that the Boards of Appeal are under no obligation to give the parties a warning about the reasons for the decisions. Indeed, in most cases, it is impossible for a Board to do so, in particular in order to maintain its neutrality.

The Y/S comparison argument was not a new ground or evidence within the meaning of Article 113 EPC but an actual substantive conclusion of the Board on the basis

of submissions made by the parties. Therefore, the cases were not changed by the Board.

Since the Y/S comparison argument was part of the appeal proceedings, the decisions were not inconsistent with the normal practice of the Boards of Appeal or with Articles 12(2) and 13(3) RPBA.

XVIII. Oral proceedings before the Enlarged Board in its composition under Rule 109(2)(a) EPC were held on 3 May 2013 in all cases. During these proceedings, the Enlarged Board of Appeal decided to submit the petitions for review to the Enlarged Board of Appeal as composed under Rule 109(2)(b) EPC for decisions.

XIX. Oral proceedings before the Enlarged Board in its composition under Rule 109(2)(b) EPC were held on 6 December 2013 in all cases.

XX. The petitioners requested in all cases that:

- (a) the decision under review be set aside, the proceedings before the Boards of Appeal be reopened and the members of the Board of Appeal who participated in the decision be replaced;
- (b) the fees for the petition for review be reimbursed; and
- (c) a question be possibly referred to the Enlarged Board of Appeal.

XXI. The respondent requested in all cases that the petitions be rejected as unallowable.

Reasons for the Decision

Admissibility

1. The petitions were filed within two months of notifications of the decisions, the petitioners were adversely affected by the decisions, the prescribed fees were paid in time, and the petitions identified a ground contained in Article 112a(2) EPC and complied with Rule 107(1) and (2) EPC.
2. Since the petitioners' cases are that they were not heard on a point which first appeared only in the Board's written decisions, they could not have raised their objection during the appeal proceedings and the exception in Rule 106 EPC applies.
3. The respondent has not objected to the admissibility of the petitions, nor does the Enlarged Board see any reason to do so.
4. The petitions are therefore admissible.

Allowability

5. The only issue to be dealt with in the present petition proceedings, common to all cases, is the indication in the Reasons for the decisions that in order to establish insufficiency of disclosure under Article 83 EPC, it could only be demonstrated that a decrease of "the defined 24,25-M ratio" was not indicative for a decrease of "the actual 24,25-M ratio" in the context of the Y/S comparison (Reasons, point 11). This indication was combined by the Board with the

observation that none of the tests provided by the opponents dealt with the Y/S comparison and that they were thus prima facie not relevant (Reasons, point 12). These elements supported the Board's conclusion that no convincing evidence had been provided by the opponents showing that the "defined 24,25-M ratio" was not a valid and effective measure for the "actual 24,25-M ratio" (Reasons, point 18) and that the claims of the main request satisfied the requirements of Article 83 EPC.

6. The petitioners argued that this analysis appeared for the first time in the Reasons for the Board's decisions and amounted to a new ground within the meaning of Article 113 EPC on which they had not had an opportunity to present their comments.
7. It is common ground between the parties that the granted patents referred to the influence of the nitrogen source in a medium for culturing microorganisms for the production of unsaturated fatty acid oils with a reduced compositional ratio of 24,25-M. In the examples and comparative examples in tables 1 to 3, the use of nitrogen sources derived from soybean (S) is already compared with the same derived from yeast (Y) as to their effect on the compositional ratio of 24,25-M in the unsaturated fatty acid oil.
8. It is also common ground between the parties that the decisions of the Opposition Division referred to the restriction of the compositional ratio according to the examples (S) compared to the comparative examples (Y) in the contested patent (decision of 6 June 2008, Reasons, point 5.4, p.13, second paragraph in parent

case and decision of 15 January 2010, Reasons, point 2.5, page 7, fifth paragraph in divisional case).

9. The petitioners also agreed that the respondent made submissions in appeal proceedings about a Y/S comparison and also referred to the data in the patent (petitioner II's letter of 6 November 2013, page 15, first complete paragraph).
10. However, the petitioners argued that the Y/S comparison argument, i.e. the requirement of the Y/S comparison for the assessment of sufficiency of disclosure by the evaluation of the correlation between the decrease of "the defined 24,25-M ratio" and the decrease in "the actual 24,25-M ratio", appeared for the first time in the Reasons for the written decisions.
11. In the appeal proceedings, documents and experimental data filed by the parties related to microorganisms cultured in a medium containing yeast (Y) as nitrogen source. In the proprietor's submissions (in particular as filed on 16 April 2011, points 10 to 16, pages 7 and 8 in parent case and the same as filed on 25 May 2010, points 10 to 16, pages 7 and 8 in divisional case), it referred to the comparison of the products of two cultures of the same microorganism under conditions differing only in the nitrogen source used (including reference to comparative examples in the patent, i.e. Y/S) and to the comparison of the corresponding proportion of 24,25-M, which then corresponds to the "Y/S comparison". Moreover and more broadly, the proprietor indicated in the same passage of its submissions that none of the opponents' evidence showed that a general correlation was absent, which fits with

the wording used by the Board in point 12 of the Reasons for the decisions.

12. Even if these observations were presented with reference to a specific document (D56 in parent case and D67 in divisional case), this document is not restricted to a specific test but covers a collated overview of the data provided by the parties. The Enlarged Board considers that the statements made by the proprietor on that matter cannot be confined to the discussion of whether specific data are correlated or not, but have to be considered in the global framework of the discussion about sufficiency of disclosure. Therefore, they relate to the requirement to demonstrate the absence of correlation between "the defined 24,25-M ratio" and the "actual 24,25-M ratio" in the context of a Y/S comparison, i.e. the so-called Y/S comparison argument. The Y/S comparison argument was then part of the appeal proceedings and did not appear for the first time in the decisions. In the Reasons for the decisions, the Board did not raise a new element but simply reached its conclusion on the basis of elements which were part of the appeal proceedings.

13. The petitioners further argued that the introduction of the Y/S comparison argument in the Reasons for the decisions was a change of the proprietor's cases by the Board which required that the opponents be given a preliminary indication of the Board's reasoning and that they be offered an opportunity to globally re-evaluate their submissions accordingly. As indicated above, the Enlarged Board considers that the Board reached its conclusion on elements which were part of

the appeal proceedings. Hence, there was no change of the cases and no need for the Board to provide the opponents with further time or opportunity to re-evaluate their submissions. It was the duty of the opponents to present complete cases against all arguments put forward by the proprietor in the appeal proceedings. Further, as the case law of petition cases has already made clear, there is no principle requiring a Board to put to a party every possible argument for or against it in advance of making a decision. Such a manner of proceeding would not only be impractical but would essentially require a Board to compromise its neutrality (R 15/10, Reasons, point 9, with references to other R cases). Hence, there is no denial of the right to be heard when the Board, after hearing the parties, subsequently reached its own conclusion which was then recorded in its written decisions. Finally, the fact that the petitioner was surprised by the Board's decisions cannot as such make any difference.

14. Since the Y/S comparison argument was present in the appeal long before the oral proceedings, the Enlarged Board sees no inconsistency with the normal practice of the Boards of Appeal and no need for the Board to have notified the parties of its analysis on that basis.

15. For the same reason, and particularly since support for the Board's conclusion was present in the appeal proceedings before the summons to oral proceedings, there is no inconsistency with Article 13(3) RPBA which concerns amendments sought to be made after oral proceedings have been arranged.

16. The Enlarged Board further sees no reason to reconsider the evaluation by the Board not to hold inadmissible under Article 12(2) and 12(4) RPBA the relevant submissions presented by the proprietor after its statements of grounds of appeal. In the same way, further submissions were filed by the parties in the appeal proceedings after the initial presentations of their cases, required to be complete under Article 12(2) RPBA, which were not held inadmissible by the Board.
17. For the same reason that the Y/S comparison "argument" was not new in the Reasons for the decisions, the Enlarged Board sees no need to consider whether it had to be described as essential legal and factual reasoning and a ground within the meaning of Article 113 EPC.
18. On the same basis, it is irrelevant for the present decisions that the Y/S argument was not mentioned in the Summary of Facts and Submissions in the Board's decisions and in the communications of the Board before the oral proceedings in appeal. The absence of this element from the Summary of Facts and Submissions does not amount per se to a fundamental violation of Article 113 EPC and the communications of the Board were, as usual, provisional and not binding.
19. The petitioners further submitted that since the proprietor abundantly challenged before the Board the data presented by the opponents, this meant that it at least implicitly recognised that they were potentially relevant in order to establish a possible correlation. The Enlarged Board cannot follow this reasoning. In proceedings before the Boards of Appeal, it is normal

and even appropriate for a party to challenge the other party's arguments at different levels, in order to present a complete case. Such a presentation does not imply in itself acceptance of any of the other party's arguments. Hence, it is not decisive in the present cases whether the proprietor confined itself to the Y/S comparison argument or also submitted a further line of arguments. What is decisive is the presence of the Y/S comparison argument in the proceedings, even among other arguments, which the Enlarged Board, as indicated above, considers established.

20. The Enlarged Board accordingly finds the petitions unallowable.

Other request

21. Having reached that conclusion, there is no need to consider the petitioners' requests for reimbursement of the fees for the petitions for review, which cannot succeed under Rule 110 EPC.

Referral to the Enlarged Board

22. The petitioners also requested that a question be referred by the Enlarged Board competent under Article 112a EPC to the Enlarged Board competent under Article 112(1)(a) EPC.

23. Article 112(1)(a) EPC provides for the Board of Appeal to refer a question to the Enlarged Board of Appeal. The Boards of Appeal are defined in Article 21 EPC as distinct from the Enlarged Board of Appeal defined in Article 22 EPC. The legislator made it clear and

explicit in Article 112(1)(a) EPC that referral is open only to the Boards of Appeal, and thus not to the Enlarged Board of Appeal. The Enlarged Board of Appeal sees no room for a different interpretation of this clear procedural provision, or reason to deviate from its former decision on this matter (R 7/08, Reasons, point 4).

Order

For these reasons it is decided that:

The petition is rejected as unallowable.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk