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**Datasheet for the decision  
of 29 March 2021**

**Case Number:** R 0013/20

**Appeal Number:** T 1971/17 - 3.3.02

**Application Number:** 10720343.2

**Publication Number:** 2421887

**IPC:** C07K7/23

**Language of the proceedings:** EN

**Title of invention:**  
METHOD FOR THE MANUFACTURE OF DEGARELIX

**Patent Proprietor:**  
Polypeptide Laboratories A/S

**Opponent:**  
Fresenius Kabi Deutschland GmbH

**Headword:**  
Petition clearly inadmissible

**Relevant legal provisions:**  
EPC Art. 112a(2)(c), 113(1)  
EPC R. 106  
RPBA 2020 Art. 15(2)(c)

**Keyword:**

Obligation to raise objections - objection raised (no)

**Decisions cited:**

R 0002/19

**Catchword:**



**Große Beschwerdekammer**  
**Enlarged Board of Appeal**  
**Grande Chambre de recours**

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Case Number: R 0013/20

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 29 March 2021**

**Petitioner:** Polypeptide Laboratories A/S  
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**Other party:** Fresenius Kabi Deutschland GmbH  
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**Representative:** Fresenius Kabi Deutschland GmbH  
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**Decision under review:** **Decision of the Technical Board of Appeal 3.3.02  
of the European Patent Office of 18 May 2020.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** W. Van der Eijk  
A. de Vries

## **Summary of Facts and Submissions**

- I. The petition for review lies from a decision of Technical Board 3.3.02 (hereafter: the Board) in case T1971/17 of 18 May 2020 in an appeal against the decision of the opposition division to reject the opposition against European patent No. 2 421 887. In the decision under review the opposed patent was revoked.
  
- II. The petitioner is the patent-proprietor and the respondent in the appeal proceedings. The petition is based on the ground that a fundamental violation of the right to be heard (Article 112a(2)(c) juncto Article 113 EPC) occurred, because a request of the petitioner to postpone the oral proceedings was refused by the Board.
  
- III. The background of this request was as follows. The oral proceedings were scheduled for 18 May 2020, a date on which in connection with the Covid-19 pandemic, many travel restrictions in Europe were in force. As a result it turned out to be impossible for employees of the petitioner, in particular one of the inventors, to be present at the oral proceedings. For that reason the petitioner filed on 7 May 2020 a request to change the date for the scheduled oral proceedings, stating that their presence was of high value for the petitioner.

On 14 May 2020 the petitioner informed the Board that they would attend the oral proceedings on 18 May 2020 with two professional representatives and that they were in the process of evaluating whether one of the inventors could also physically attend the proceedings.

In its communication dated 15 May 2020 the Board informed the petitioner of its decision to refuse the request. The Board stated that according to Article 15(2) RPBA 2020 a request for a change of date may be allowed if the party has put forward serious reasons; in case a party is represented these serious reasons must relate to the representative. Furthermore the Board made a reference to Article 15(2)(c)(iii) RPBA 2020 according to which provision the unavailability of a duly represented party as a rule does not justify a change of date.

The Board was of the view that the petitioner had not explained why the presence of the employees of the petitioner was important and on what topics they would make a contribution, and thus why an exception to the rule would have to be made.

At the oral proceedings only the two professional representatives were present. The minutes of the oral proceedings make no mention of any discussion on the topic of the request for a change of date or of an objection under Rule 106 EPC in this connection. Also the decision is silent on this issue.

- IV. In a communication dated 13 November 2020 the Enlarged Board commented on the petition, in particular on the question whether the petition was admissible, concluding provisionally that the condition mentioned in Rule 106 EPC was clearly not met. The Enlarged Board found that there was no indication in the file that the petitioner had raised an objection under Rule 106 EPC before or during the oral proceedings against the refusal to postpone the oral proceedings and pointing to a violation of its right to be heard. The petitioner reacted to the communication with a submission dated

25 January 2021, presenting further arguments on the admissibility of the petition.

- V. During the oral proceedings held on 29 March 2021 the petition, in particular the issue of admissibility, was discussed with the petitioner.
- VI. The petitioner requested that:
- the decision under review be set aside
  - the case be reopened before the Board of Appeal
  - the petition fee be reimbursed.

### **Reasons for the Decision**

#### 1. Admissibility

1.1 As indicated above, the Enlarged Board did not find an indication in the file that an objection under Rule 106 EPC was explicitly raised. However, Rule 106 EPC stipulates that a petition for review is only admissible "where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings".

1.2 In this respect the petitioner has stated in the petition the following: "In accordance with Rule 106 EPC the objection was raised during the appeal proceedings in terms of the request for postponement, however, this request was rejected." (see petition, page 6, last paragraph before the conclusion).

1.3 The petitioner has not argued that after the refusal of its request it raised the issue again during the appeal

proceedings. The question is thus whether the request for postponement itself can be seen as an objection under Rule 106 EPC.

- 1.4 The Enlarged Board has come to the conclusion that this is not the case. According to the consistent case law of the Enlarged Board an objection under Rule 106 EPC is a procedural act and a precondition for access to the extraordinary legal remedy under Article 112a EPC. It must be expressed in such a form that the Board dealing with the appeal is able to recognize immediately and without a doubt that an objection under Rule 106 EPC is intended, so that it may react immediately and appropriately to address the objection. It is additional to and distinct from other statements, such as arguing or even protesting against the conduct of the proceedings or against an individual procedural finding. (See Case law of the Boards of Appeal, 9th edition 2019, V.B.3.6.1 and 3.6.2 and the decisions mentioned there.)

As such a request for postponement of oral proceedings does not meet these criteria. The Enlarged Board has also noted that nothing in the formulation of the request suggests that its refusal would be seen by the petitioner as a violation of its right to be heard. Furthermore, it was not formulated as a conditional objection under Rule 106 EPC, but clearly as a "normal" request for postponement.

- 1.5 The petitioner has argued that the mentioning of the importance of the presence of employees of the petitioner, in light of their expert knowledge of the invention, was an indication that for the petitioner a justified defense of the patent was not possible on the scheduled date of 18 May 2020. There was thus at least

an implicit statement that a refusal of the request would be seen as a violation of its right to be heard.

- 1.6 The Enlarged Board cannot follow this argument. Firstly, the concept of an implicit objection is at odds with the above summary of the case law of the requirements for an objection under Rule 106 EPC. Secondly, as also pointed out by the Board in its refusal of the request for postponement, the reasoning for the request was quite general and the petitioner did not specify why the presence of the employees was important and on which topics they would make a contribution. Also for that reason the Enlarged Board cannot see why the Board should have understood that refusing the request would be a violation of the right to be heard of the petitioner and thus that the request was also an objection.
- 1.7 The petitioner has also drawn attention to the fact that, unlike the other party to the appeal proceedings, it had not received a communication from the Board dated 6 May 2020 on the holding of oral proceedings in person during the Covid-19 pandemic. In this communication parties were asked to confirm that they envisaged not to be affected by the travel restrictions and would be able to attend oral proceedings in person. The communication also indicated that a failure to respond would lead to the postponement of the oral proceedings. Instead, the petitioner was contacted by the registrar of the Board by telephone on the question of attendance at the oral proceedings. Regarding this phone call the petitioner (see petition, page 3, last paragraph) states the following: "In the phone call the professional representative declared that attending oral proceedings would be possible for him, presumably not for the party itself or the inventors."



The failure to send the communication of 6 May 2020 to the petitioner deprived it of the option to trigger postponement of the oral proceedings by not responding. As the petitioner only learned about this communication after the oral proceedings, it was not possible to object against the missed opportunity to trigger a postponement by not responding.

1.8 The Enlarged Board finds it unfortunate that the petitioner did not receive the 6 May 2020 communication. Things might indeed have been different in case the petitioner had received this communication. However, the Enlarged Board cannot see what impact this circumstance has on the ability of the petitioner to object to not postponing the oral proceedings. This alleged violation of the right to be heard occurred before the oral proceedings. After the refusal to postpone, the petitioner could and should have objected in writing before the oral proceedings or orally during the oral proceedings. The fact that all of this would not have been necessary if the petitioner had received the 6 May 2020 communication before the oral proceedings and had then decided not to respond is probably true but also hypothetical. However, this hypothetical different constellation cannot shed a different light on what the petitioner could and should have done under the prevailing, real circumstances.

1.9 The petitioner also referred to decision R 2/19, where the petition for review was deemed to be admissible although no objection was raised during oral proceedings. In that case, however, the alleged violation related to the reasoning in the written decision and thus to something that occurred after the

oral proceedings were closed. In the present case the alleged violation occurred before the oral proceedings.

2. For the above reasons the Enlarged Board is of the view that the petition for review is clearly inadmissible because the condition of Rule 106 EPC has not been met. In light of this conclusion, the Enlarged Board refrains from commenting on the question of allowability.

## Order

### **For these reasons it is decided that:**

The petition for review is unanimously rejected as being clearly inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated