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Datasheet for the decision of 19 April 2023

Case Number: R 0014/22

Appeal Number: T 0574/19 - 3.3.07

Application Number: 10705984.2

Publication Number: 2400954

IPC: A61K9/20, A61K9/28, A61K31/439

Language of the proceedings: EN

Title of invention:
PROCESS FOR FORMING SOLID ORAL DOSAGE FORMS OF SOLIFENACIN AND ITS PHARMACEUTICALLY ACCEPTABLE SALTS

Patent Proprietor:
KRKA, d.d., Novo mesto

Opponents:
Alfred E. Tiefenbacher (GmbH & Co. KG)
Patentree, Lda

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(1), 112a(2), 112a(4), 113(1)
EPC R. 104, 106, 107, 109(2)(a)
RPEBA Art. 13, 14(2)
RPBA 2020 Art. 15(1)

Keyword:
Petition for review - clearly unallowable
Written reasoned decision - Fundamental violation of Article 113(1) EPC (no)

Decisions cited:
R 0008/17

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Große Beschwerdekammer

Enlarged Board of Appeal

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Case Number: R 0014/22

D E C I S I O N
of the Enlarged Board of Appeal
of 19 April 2023

Petitioner: (Opponent 1)	Alfred E. Tiefenbacher (GmbH & Co. KG) Van-der-Smissen-Straße 1 22767 Hamburg (DE)
Representative:	Hamm & Wittkopp Patentanwälte PartmbB Jungfernstieg 38 20354 Hamburg (DE)
Other party: (Patent Proprietor)	KRKA, d.d., Novo mesto Smarjeska cesta 6 8501 Novo mesto (SI)
Representative:	Hoefer & Partner Patentanwälte mbB Pilgersheimer Straße 20 81543 München (DE)
Other party: (Opponent 2)	Patentree, Lda Rua Salazares 842 4149-002 Porto (PT)
Representative:	Patentree Edificio Net Rua de Salazares, 842 4149-002 Porto (PT)
Decision under review:	**Decision T 574/19 of the Technical Board of Appeal 3.3.07 of the European Patent Office of 18 January 2022**

Composition of the Board:

Chairman	C. Josefsson
Members:	M. Blasi
	E. Bendl

Summary of Facts and Submissions

I. The petition for review concerns decision T 574/19 dated 18 January 2022 by which Technical Board of Appeal 3.3.07 (the board) set aside the contested decision rejecting the oppositions and remitted the case to the opposition division with the order to maintain the patent in amended form on the basis of the claims of auxiliary request III.

II. The petition for review submitted by appellant-opponent 1 (the petitioner) is based on Article 112a(2)(c) EPC, i.e. that a fundamental violation of the petitioner's right to be heard under Article 113(1) EPC occurred. The petition was duly filed, and the required fee was paid.

III. In the decision under review, the board concluded that while the subject-matter claimed in the main request and auxiliary requests I and II did not involve an inventive step, the claims of auxiliary request III were allowable. In relation to inventive step of the subject-matter claimed in auxiliary request III, the board accepted that the feature of the average particle size of the main excipient as defined in claim 1, which, *inter alia*, distinguished the subject-matter of claim 1 from the solvent-free method disclosed in document D1, was associated with the issue of stickiness of the mixture. On the basis of considerations on this technical effect, the objective technical problem was formulated, and the board concluded that the claimed solution was not obvious.

IV. The petitioner is of the view that the board, in its reasoning for acknowledging an inventive step of the subject-matter claimed in auxiliary request III, did not consider the submissions presented by the petitioner in the letter dated 22 November 2021 and that it was likely that the claims of auxiliary request III would not have been found allowable had these submissions been taken into account. With this second assertion, the petitioner implies that the violation of Article 113(1) EPC was fundamental within the meaning of Article 112a(2) EPC as it could not be excluded that the board would otherwise have come to a different conclusion.

The arguments which the petitioner contended were not taken into account by the board despite being relevant and essential are the petitioner's submissions on page 3, third paragraph to page 6, third paragraph of the letter dated 22 November 2021 (see petition for review, page 7, first paragraph).

V. As regards the proceedings before the board, the following can be noted.

(a) The points in dispute between the parties included, *inter alia:*
- which starting point was to be used in the assessment of inventive step
- how the objective technical problem should be formulated under the problem-solution approach

(b) In the decision under appeal, the opposition division had assessed inventive step starting from either of two methods disclosed in document D1, wet granulation and dry granulation, and concluded that the subject-matter claimed in the patent

involved an inventive step starting from either of the two methods.

(c) On appeal, the petitioner submitted in the statement of grounds of appeal that, in fact, the (dry/solvent-free) direct compression method should be taken as the closest prior art, not the wet granulation method. The petitioner, contesting the opposition division's formulation of the objective technical problem when starting from the direct compression method, presented its view on the formulation of the problem and presented arguments on obviousness.

(d) In the proceedings before the opposition division and again during the appeal proceedings, the patent proprietor contested that the dry granulation/ direct compression method could be taken as a starting point for assessing inventive step and argued that the wet granulation method should be chosen in document D1 as the single starting point for the assessment. However, the patent proprietor did assert lines of defence for the presence of an inventive step for both alternative starting points and submitted sets of claims of auxiliary requests I to VII. In relation to auxiliary request III, the patent proprietor submitted that "*[m]ain excipient particle size advantageously contributes to overcoming the problems caused by the strong aggregation properties of solifenacin salts leading to poor content uniformity and sticking of the mixture to the punches during compression, as well as contributes to an advantageous bioavailability*" (reply to appeals, item V.3.).

(e) In a subsequent letter, the petitioner rebutted the patent proprietor's arguments on the starting point for assessing inventive step, reiterated its position on the formulation of the objective technical problem and presented counter-arguments against the patent proprietor's submissions on inventive step starting from wet granulation. In relation to auxiliary request III, the petitioner submitted that given the absence of a relevant comparison, it could not be derived from the patent whether the particle size distribution of the main excipient as claimed was indeed the decisive parameter which solved the problem of poor content uniformity (which was inherent to the direct compression method) for solifenacin succinate.

(f) In preparation for the oral proceedings, the board stated the following on inventive step in point 2.3.1 in the communication under Article 15(1) RPBA 2020:

"*(a) Starting from the solvent-free methods of D1*

*As pointed out by the respondent, D1 only exemplifies the wet granulation method, and contains no actual example of any solvent free method. D1 further expresses a clear preference for the wet granulation [...] Nonetheless, the opposition division found that the solvent-free method of D1 qualified as a suitable starting point for the assessment of inventive step, because it is was [*sic*] clearly and unambiguously disclosed in D1, and D1 in general addressed the problem of stability. This point will be debated during the oral proceedings.*"

In the subsequent passage, the board identified the differences between the solvent-free direct compression method of document D1 and the process of claim 1 of the main request and indicated that it was inclined to formulate the objective technical problem as the opposition division had done. It continued by stating:

"*It will be debated whether the problem may be formulated as the provision of appropriate excipients for the preparation of a crystalline solifenacin (salt)-containing solid formulation using direct compression, as submitted by appellant 1. The Board however emphasizes that the statement of the problem should not contain pointers to the solution as this would result in an ex post facto assessment of inventive step. The Board preliminarily notes that appellant 1's statement of the problem appears to* [...]"

The board subsequently provided comments on obviousness, noting that this point would be discussed at the oral proceedings, as it did on inventive step when starting from other starting points. Under point 3 of the communication, the board stated the following about the auxiliary requests:

"*In the event that the main request is found to be not allowable, the auxiliary requests will be considered.*
In particular, with respect to inventive step for auxiliary requests III, IV, V, VIII and IX, it may be discussed whether the particle size distributions of the main excipient defined therein credibly lead to improvements with respect to

bioavailability, content uniformity and sticking of the mixture to the punches during compression."

(g) The petitioner, in its letter dated 22 November 2021, replied to the board's communication. In point 1, the petitioner stated its requests and under the heading "*2. Fehlende erfinderische Tätigkeit*" (lack of inventive step), the petitioner referred to two issues mentioned by the board as issues for discussion at the oral proceedings, namely:
- whether the solvent-free direct compression method of document D1 could form the starting point for assessing the inventive step of the subject-matter claimed in the main request
- how the objective technical problem should be formulated

Under point 2.1 headed "*Direktverpressung als Ausgangspunkt in der Bewertung der erfinderischen Tätigkeit*" (direct compression as the starting point in the assessment of inventive step), the petitioner explained why, in its opinion, the solvent-free direct compression method of document D1 should be considered the starting point for assessing inventive step.

The petitioner reiterated its previous submissions that the skilled person would not have been deterred from carrying out the direct compression method because of stability considerations and that the skilled person would have known how to resolve any drawbacks associated with the direct compression method (letter dated 22 November 2021, page 2, last paragraph to page 3, last full paragraph).

The petitioner then presented further submissions with considerations on the low drug concentration in the tablets of document D1 and the examples of the patent (letter dated 22 November 2021, starting on page 3, last paragraph). On the basis of these further submissions, the petitioner concluded that, *inter alia,* the skilled person would have assumed that the issue of sticking would not occur for tablets with a low drug concentration (letter dated 22 November 2021, page 4, fourth paragraph) and that the skilled person would generally have preferred the direct compression method to prepare the tablets described in document D1, which contained solifenacin (salt) only in a low concentration (page 5, penultimate paragraph of the letter).

In the next passage in the letter (page 5, final paragraph to page 6, paragraphs before point 2.2), the petitioner summarised the arguments mentioned previously in its submissions and concluded that the skilled person would indeed have considered preparing tablets containing solifenacin (salt) by direct compression.

In subsequent point 2.2 of the letter dated 22 November 2021, headed "*Formulierung der objektiven technischen Aufgabe*" (formulation of the objective technical problem), the petitioner reiterated its position on how the objective technical problem should be formulated when starting from the direct compression method of D1.

This letter did not address any other point indicated for discussion at the oral proceedings in

the board's communication under Article 15(1) RPBA 2020.

(h) At the oral proceedings before the board, after a discussion of inventive step of the main request and the board's announcement of its negative conclusion, the auxiliary requests were discussed, including a discussion of inventive step for auxiliary request III (minutes of the oral proceedings, passage bridging pages 2 and 3).

VI. The Enlarged Board of Appeal (Enlarged Board) in its composition pursuant to Rule 109(2)(a) EPC, summoned the petitioner to oral proceedings as requested and issued a communication pursuant to Article 13 and Article 14(2) RPEBA in preparation for the oral proceedings.

VII. By the date set in the Enlarged Board's communication, the petitioner had made further written submissions on the merits of the review case.

VIII. Oral proceedings before the Enlarged Board took place on 19 April 2023.

The petitioner requested that decision T 574/19 be set aside and that the proceedings before the board be re-opened.

Before the oral proceedings were closed, the present decision was announced.

Reasons for the Decision

Admissibility of the petition for review

1. The requirements under Article 112a(1) and (4) EPC in conjunction with Rule 107 EPC have been met.

2. Pursuant to Rule 106 EPC, a petition under Article 112a(2)(c) EPC, like the one in hand, is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the board, except where such objection could not be raised during the appeal proceedings.

3. The petitioner submitted that it could not have raised an objection to a procedural defect on which the petition was based during the appeal proceedings since it could not know that its submissions in the letter dated 22 November 2021 would not be taken into account by the board in the inventive-step assessment.

4. The Enlarged Board accepts that the asserted procedural defect became apparent for the petitioner after having received the written reasoned decision and that, therefore, the petitioner could not have raised an objection during the appeal proceedings.

5. The petition for review is thus not to be considered as clearly inadmissible.

Allowability of the petition for review

6. The Enlarged Board holds that the petition for review is clearly unallowable. No violation of Article 113(1) EPC as submitted by the petitioner has occurred, let alone a fundamental one.

7. Under Article 113(1) EPC, decisions may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. This implies not only that a party be given the opportunity to present its views but also that its relevant submissions be taken into account and considered.

8. A board ignoring essential and relevant submissions presented by a party may amount to a fundamental violation of the party's right to be heard within the meaning of Article 112a(2)(c) EPC, as correctly indicated by the petitioner with reference to R 8/17, Reasons 25, in which the Enlarged Board held: *"According to the established case law, Article 113(1) EPC may be infringed if the reasons for a decision fail to take into account a party's essential and relevant arguments. The right to be heard also requires that those involved be given an opportunity not only to present comments but also to have those comments considered, i.e. reviewed as to their relevance for the decision in the matter (see R 23/10 of 15 July 2011, reasons 2; R 19/12 of 12 April 2016, reasons 6 to 6.3). The boards have an obligation to discuss in their decisions issues and arguments to the extent that they are relevant for the decision. On the other hand, they may disregard irrelevant arguments, and the refutation of arguments may be implicitly inferred from the particular*

reasoning. Accordingly, the boards' obligation to consider a party's argumentation is shaped by the circumstances of each case."

9. However, the Enlarged Board does not find that the petitioner's right to be heard was violated in the circumstances of the case in hand.

10. For the claims of auxiliary request III considered allowable by the board, including the issue of inventive step, the petitioner had been given the opportunity to present its comments in written procedure and at the oral proceedings. This was not contested.

11. The petitioner submitted at the oral proceedings before the Enlarged Board that it had been surprised by the reasoning in the decision under review in that the two effects of content uniformity and stickiness of the tabletting mass were considered separately in the assessment of inventive step.

12. This can, however, only be considered a subjective surprise which cannot change the fact that the petitioner knew the issues which might be raised and had adequate opportunity to comment on them. In point 3 of the communication under Article 15(1) RPBA 2020, the board had highlighted that "*whether the particle size distributions of the main excipient defined therein credibly lead to improvements with respect to bioavailability, content uniformity and sticking of the mixture to the punches during compression*" might be discussed at the oral proceedings for the auxiliary requests, auxiliary request III explicitly included.

The Enlarged Board cannot derive anything from that communication or the minutes of the oral proceedings before the board which would have prevented the parties from presenting their points of view on the effects which they consider associated or not with the distinguishing feature of the particle size distribution. Nor can it see anything which would have suggested that each of these technical effects, asserted by the patent proprietor (see section V.(d) above), might not be considered on its own.

13. With regard to the petitioner's complaint that the board ignored essential and relevant submissions contained in the letter dated 22 November 2021, the Enlarged Board finds no violation of Article 113(1) EPC, contrary to the petitioner's view.

14. The Enlarged Board cannot establish that:
- the argument as suggested by the petitioner in the petition for review can be derived from these submissions
- the submissions relied upon should be considered relevant and essential arguments for establishing the technical effects associated with the differences between the subject-matter of claim 1 of auxiliary request III and the solvent-free method of document D1 as the closest prior art
- the submissions were ignored by the board

15. According to the petitioner, it had been argued in the passage on page 3, third paragraph to page 6, third paragraph of the letter that there was a causal link between the solifenacin succinate's concentration in the tabletting mass (and not the particle size of the main excipients as decided by the board) and the reduction of the stickiness of the tabletting mass,

i.e. that it was the low drug concentration which caused the effect of reducing the stickiness of the tabletting mass, while the effect would not be achieved for high drug concentrations (see petition for review, page 10, fourth paragraph; page 11, fourth paragraph, final sentence and page 12, first paragraph).

16. However, the passage relied upon by the petitioner does not contain a statement or argument addressing the presence or absence of technical effects associated with the technical feature of the particle size distribution which distinguished the subject-matter claimed in auxiliary request III from the direct compression method disclosed in document D1. Nor does the passage contain a statement or argument that the effect on the mixture's stickiness would not be achieved when preparing tablets with high drug concentrations.

The absence of such a statement or argument was also acknowledged by the petitioner in its letter dated 9 February 2023 (see paragraphs bridging pages 6 and 7) and, for the feature of the particle size distribution, not disputed at the oral proceedings before the Enlarged Board.

17. The Enlarged Board further notes that the petitioner had presented the submissions of the letter dated 22 November 2021, which were allegedly not considered by the board, in a specific context, namely to convince the board of how the two issues to be discussed at the oral proceedings mentioned under the heading lack of inventive step (see section V.(g) above) should be resolved, i.e. that:

- the dry solvent-free direct compression method should be taken as the starting point for assessing inventive step
- the objective technical problem should be formulated as suggested by the petitioner

18. The contents of the passage on inventive step were indeed exclusively dedicated to these two issues of the direct compression method as the starting point for the assessment of inventive step and the formulation of the objective technical problem, respectively.

19. In point 2.1 of the letter dated 22 November 2021 on the determination of the starting point for assessing inventive step, hence the first step of the problem-solution approach, the petitioner relied on several aspects, including drug concentration, to support its position. Considerations on the drug concentration were not presented for other aspects of the problem-solution approach, let alone for the claims of auxiliary request III and its distinguishing features.

20. Drug concentration was relied upon by the petitioner in its line of argument that a sticking of the tabletting mass to the punches due to the solifenacin salt's property to aggregate had not to be expected for low-dose tablets. Thus, because the tablets of D1 were - like the tablets in the patent - low-dose tablets, since the skilled person would have known how to overcome any drawbacks of direct compression and in view of a general preference for the direct compression method due to stability considerations, the direct compression method of D1 should form the starting point for assessing inventive step.

21. None of the other matters indicated by the board in its communication under Article 15(1) RPBA 2020 as points for discussion at the oral proceedings, including the technical effects associated with the feature of the particle size distribution as contained in the claims of the auxiliary requests, was addressed in the letter dated 22 November 2021.

22. As derivable from the decision under review, the board considered the issue of the starting point for the assessment of inventive step of the subject-matter claimed in the main request, provided reasons why it considered inventive step starting from both the wet granulation method and the solvent-free direct compression method of D1, and explicitly dealt with arguments presented by the patent proprietor that the solvent-free method of D1 could not form the starting point (decision under review, point 2.2 of the Reasons with sub-points on pages 12 to 15).

23. At the oral proceedings before the Enlarged Board, the petitioner confirmed that it did not claim that the board, having agreed with the petitioner that the solvent-free direct compression method was a starting point in the assessment of inventive step, had to address the petitioner's submissions made under point 2.1 of the letter dated 22 November 2021 (i.e. including the passage on which the petitioner relied in its petition for review) in its reasoning on the determination of the starting point for assessing inventive step.

24. The petitioner, however, was of the view that the submissions on drug concentration, albeit made for determining the starting point for assessing inventive step, should have been considered by the board also in

any further context in which these submissions become relevant for the board's decision, without the petitioner having to repeat or refer to them in these other possible contexts. And since the petitioner had addressed the issue of stickiness in the selection of the starting point, there had been no need for the petitioner to address the issue in another stage of the problem-solution approach, e.g. when formulating the objective technical problem.

The board's obligation to address these submissions whenever they became relevant was due to the fact that the petitioner, when making the submissions, had not known the board's reasoning. While it was not put into question that the board need not give its reasoning before delivering its decision, the consequence of this was that the board had to address all submissions presented whenever they became relevant in the board's reasoning ("[p]*arties must expect that their arguments will be put by the Board of Appeal in that context it considered it most appropriate when rendering its decision*", letter dated 9 February 2023, page 8, point 2).

While it was admitted that the argument had not been made in the petitioner's submissions dated 22 November 2021 (see point 16 above), "*it should have been obvious to the Board of Appeal that a high-dose tablet would not solve the objective technical problem as formulated by the Board*" (letter dated 9 February 2023, paragraph bridging pages 4 and 5).

25. The Enlarged Board notes that the petitioner is complaining that the board did not consider (and address in the reasoning of its decision) arguments which the petitioner did not actually make. In other

words, according to the petitioner, the board should have taken the petitioner's submissions presented in a relevant context (the aspect of low drug concentration presented by the petitioner in its line of argument on the determination of the starting point for assessing inventive step) also into account in a different context (technical effect associated with the distinguishing feature of the particle size distribution and formulation of the objective technical problem) and further elaborate on those submissions by adding anything that would be missing if they had been presented in that other context and address those further elaborated submissions in that other context.

26. It is, however, the petitioner and its representative that were responsible for the conduct of the petitioner's case, and it was for them to submit the necessary arguments to support the petitioner's case. It was not the board's task to make the argument for the petitioner by taking the petitioner's submission out of the relevant context in which it had been presented and by elaborating on the submissions on the basis of what would be obvious and beneficial for the petitioner to argue. To the contrary, a board must be impartial and retain neutrality towards the parties involved in the proceedings and, hence, cannot make the case for a party.

27. The petitioner stated at the oral proceedings that it was not uncommon for a board to address a party's argument, albeit presented in a different context, if the argument was relevant for the board's decision.

28. However, the case at hand is not about addressing a presented argument but about addressing an argument which had not actually been made and about whether the

asserted non-consideration of such an argument represents a fundamental violation of Article 113(1) EPC.

29. The petitioner also referred to the fact "*that the petitioner succeeded in the appeal with respect to the main request*" and, "[a]*ccordingly, the petitioner could expect that its line of argumentation as submitted with letter dated 22 November 2021 was successful*" (letter dated 9 February 2023, page 8, point 1).

30. The Enlarged Board can understand that the board's announcement at the oral proceedings that the subject-matter claimed in the main request was considered not to involve an inventive step may have raised the petitioner's expectation that the board had considered its argument convincing.

31. Objectively, however, the Enlarged Board cannot derive such an expectation from the circumstances at the time the letter dated 22 November 2021 was drafted or at the oral proceedings when the board announced its conclusion of lack of inventive step for the main request.

32. The proceedings in appeal case T 574/19 were *inter partes* proceedings involving three active parties including two appellant-opponents, the petitioner being one of them. In fact, the other appellant-opponent had advanced an objective technical problem different from that of the petitioner in its objection of lack of inventive step against the main request (see appellant-opponent 2's statement of grounds of appeal, point 6.5.2.2 and decision under review, section XII.(b)). Hence, a parallel but different line of argument existed which could also have been the

cause of the appellants' success in respect of the main request.

33. Furthermore, the board, in its communication under Article 15(1) RPBA 2020, had stated that it was "*inclined to formulate the problem as the opposition division did*" and had provided an explanation why it did not agree with the problem set out by the petitioner in its statement of grounds of appeal (see communication under Article 15(1) RPBA 2020, page 11, second paragraph: "*problem should not contain pointers to the solution as this would result in an ex post facto assessment of inventive step*" and "*appellant 1's statement of the problem appears to anticipate that the differentiating feature lies with the excipients*"). While the petitioner in its later letter dated 22 November 2021 on the objective technical problem reiterated its position and presented counter-arguments to the board's considerations, the possibilities remained that the board would still not accept the petitioner's line of argument and that a finding of lack of inventive step by the board, although desired by the petitioner, would be based on a line of argument presented by a different party. Bearing these possibilities in mind, the petitioner could have presented subsidiary lines of argument for if the board did not accept the petitioner's main line of argument.

34. At the oral proceedings before the Enlarged Board, the petitioner further submitted that the letter dated 22 November 2021 as a whole had not been taken into account and considered by the board. While it was not contested that the letter had been received, as is clear from section X. of the decision under review, the board ignored the whole content as the board nowhere

addressed the points made in that letter, including those made on the formulation of the objective technical problem presented in point 2.2.

35. The Enlarged Board, however, does not agree. In the first paragraph of point 2.2 of the letter dated 22 November 2021, the petitioner replied to the board's envisaged formulation of the objective technical problem as indicated in the board's communication under Article 15(1) RPBA 2020. The petitioner submitted that when starting the assessment of inventive step from the direct compression method, the objective technical problem could not be an "alternative" process because the sets of claims of all claim requests related to the preparation of a tablet using direct compression. In the decision under review, point 2.4 of the Reasons, the board addressed this further submission and explained that, "[*c*]*ontrary to appellant 1's opinion, formulating the problem as the provision of an alternative to the solvent-free process of D1 does not mean that the solution cannot be a solvent-free process, defined by further features*".

In the second paragraph of point 2.2 of the letter dated 22 November 2021, the petitioner maintained that its formulation of the objective technical problem was not based on hindsight and stated that an ex post facto assessment would be present only if the problem as formulated suggested that the solution to the problem lay in the choice of the three specific excipients as claimed. The board, however, remained of the view that "[*s*]*uch a formulation [as suggested by the petitioner] anticipates that the differentiating feature lies with the excipients, and thus contains a pointer to the solution*" (decision under review, point 2.4 of the Reasons).

Regarding the submissions presented under point 2.1 of the letter, the Enlarged Board, for the considerations set out above, cannot establish that the board, by not having addressed them in the decision under review, violated the petitioner's right to be heard.

36. The Enlarged Board thus concludes that the petitioner had the opportunity to present its comments on inventive step of the subject-matter claimed in auxiliary request III, including on the technical effect(s) associated with the features distinguishing the claimed subject-matter from the solvent-free direct compression method of D1, the formulation of the objective technical problem and obviousness.
The argument on which the current petition for review was based had not actually been made, let alone against auxiliary request III.

37. The petitioner considering the board's finding on the presence of an inventive step incorrect on substance is a matter which cannot be assessed by the Enlarged Board, as acknowledged by the petitioner at the oral proceedings. A petition for review can only be based on the limited number of grounds exhaustively set out in Article 112a(2) and Rule 104 EPC, and a review of the decision taken by the board as to its merits is not among them.

38. As the Enlarged Board does not find any violation of Article 113(1) EPC as suggested by the petitioner, let alone a fundamental one, the petitioner's request for the setting aside of the decision under review and the reopening of the proceedings before the board cannot be granted.

Order

For these reasons it is decided that:

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

The Registrar: The Chairman:

N. Michaleczek C. Josefsson

Decision electronically authenticated