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**Datasheet for the decision
of 8 March 2024**

Case Number: R 0025/22

Appeal Number: T 0608/20 - 3.2.06

Application Number: 11706485.7

Publication Number: 2539493

IPC: D03D15/04, D03D15/08,
D03D27/04, D03D17/00

Language of the proceedings: EN

Title of invention:

WOVEN FABRIC THAT LOOKS AND PERFORMS LIKE A KNITTED FABRIC AND
METHOD OF MAKING THEREOF

Patent Proprietor:

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Opponents:

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Headword:

petition clearly unallowable

Relevant legal provisions:

EPC Art. 21(2), 21(3), 21(3)(c), 21(4), 100(b), 22(2), 112a,
112a(2)(c), 113, 113(1)
EPC R. 107(1), 107(2), 109(2), 109(2)(a), 109(2)(b)

Keyword:

Petition for review - clearly unallowable - causal link
missing

Decisions cited:

G 0001/11, R 0002/14

Catchword:



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Case Number: R 0025/22

D E C I S I O N
of the Enlarged Board of Appeal
of 8 March 2024

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Decision under review: **Decision of the Technical Board of Appeal 3.2.06
of the European Patent Office of 8 July 2022.**

Composition of the Board:

Chairman	C. Josefsson
Members:	T. Bokor
	A. Usuelli

Summary of Facts and Submissions

- I. The patent proprietor in case T 0608/20 has filed a petition for review under Article 112a EPC against the decision of the Technical Board of Appeal 3.2.06 (hereinafter "Board") dated 8 July 2022, dismissing the proprietor's appeal, and thereby confirming the revocation of European patent No. 2539493.

- II. The Board's decision reasoned the revocation essentially on the grounds that the subject-matter of the main request and the admitted auxiliary requests was not sufficiently disclosed (Article 100(b) EPC). Several auxiliary requests were not admitted into the proceedings, but this is not relevant for the petition.

Overview of the opposition and appeal proceedings

- III. In the proceedings before the opposition division the patent was attacked by multiple opponents and later also by interveners. The outcome was that the patent was revoked. The division decided on all three opposition grounds (Article 100(a) to (c) EPC), and found in favour of the proprietor in respect of Article 100(b) and 100(c) EPC, but not in respect of novelty and inventive step under Article 100(a) EPC.

- IV. The opposition division also looked at a claim feature "shrinkage ratio", which later became crucial on appeal (point 2.2.3 of the division's decision), but gave a definition for its own decision and found that the skilled person would be able to work with it.

- V. The proprietor appealed, and some opponents as respondents raised the issue of sufficiency again in

their reply to the proprietor's appeal. Namely, it was opponents 3 and 4 who argued that the "shrinkage ratio" feature was neither defined nor otherwise explained, nor could it be reliably established by the skilled person; see their submissions of 12 October 2020, Chapter III.

- VI. The Board issued a summons to oral proceedings, and in its preparatory communication took up the opponents' argument of insufficiency (point 1.1. of the Board's communication dated 7 December 2021), among other objections.
- VII. The proprietor responded to the Board's communication by letter dated 31 May 2022, and extensively argued on most issues, including sufficiency.
- VIII. Oral proceedings before the Board were held on 7 and 8 July 2022. The contested decision by the Board was announced at the end. The minutes were posted on 13 July 2022, and they do not contain any technical details of the arguments relied on for the various discussed issues. The only substantive issue discussed was the sufficiency under Article 100(b) EPC.
- IX. The Board's decision was posted on 5 October 2022. As announced in the oral proceedings, the refusal of the main request is reasoned with the lack of sufficient disclosure. The Board's substantive reasons on the issue of sufficiency, and in particular the meaning of the "shrinkage ratio" feature, are found in points 1 to 11 of the Reasons.

Proceedings before the Enlarged Board of Appeal

- X. The reasoned petition was filed on 14 December 2022, and the prescribed fee was paid on the same day. The petitioner contends that a fundamental violation of Article 113 EPC occurred, and therefore the petition relies on the ground under Article 112a(2)(c) EPC. The petition is essentially based on the single ground that the Board's decision was based on reasons on which the petitioner had no opportunity to comment, since the Board's arguments had never been put to the petitioner at any earlier point in the proceedings, either by the Board or by the other parties. In point 6.2.3 of the Reasons, the Board presented an entirely new claim interpretation which had no precedent in the proceedings.
- XI. The Enlarged Board of Appeal (in its present composition hereinafter also referred to as the "EBA") issued a communication under Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) and summoned the petitioner to oral proceedings. The communication set out that the petition appeared to be clearly unallowable. The EBA presented its view on the structure and the reasons for the Board's decision, and concluded that the new and surprising reasons in the Board's decision that were objected to did not appear to be decisive for the final decision.
- XII. The petitioner reacted to the communication, and argued that the EBA's approach was wrong. The right to be heard was absolute. It was not up to the EBA to assess the merits of the arguments, and whether or not they would be successful. The EBA's suggestion that the decision would stand without point 6.2.3 of the Reasons

was improper. The EBA could not speculate on what other decisions may have been possible, but had to decide on the basis of the decision actually taken. The plurality interpretation is a question of claim interpretation, which has never been discussed before. It was also causal to the Board's decision, because a claim interpretation inevitably had to underlie all the Board's reasoning.

- XIII. The oral proceedings before the EBA were held on 8 March 2024. At the oral proceedings the petitioner argued that the petition was not clearly unallowable. It emphasised that the Board's claim interpretation must have permeated all the issues discussed and must have been causal to the decision. The threshold for "clearly unallowable" in Rule 109(2)(a) EPC was very high, which meant that the Enlarged Board's level of conviction in reaching such a finding had to be correspondingly high; however, the circumstances of the present case spoke against such a high level of conviction.
- XIV. The petitioner requested that:
- the decision under review be set aside,
 - the proceedings before the Technical Board of Appeal be re-opened and
 - the fee for the petition for review be reimbursed.
- XV. The Enlarged Board announced the decision at the end of the oral proceedings.

Reasons for the Decision

Admissibility

- 1.1 The petition is reasoned, it was filed in a timely manner and the fee was paid (Rule 107(1) and (2) EPC). The petitioner is adversely affected by the decision.
- 1.2 The EBA is also satisfied that there is nothing in the file that would imply that the argument dealt with in point 6.2.3 of the Board's decision had been raised earlier. There is no indication that the alleged defect in the final decision might already have been objected to during the proceedings (Rule 106 EPC).
- 1.3 Accordingly, the petition is admissible.

Allowability

Surprising reasons from the Board, right to be heard

2. The invention concerns a product, namely a woven fabric and a method for manufacturing it. The fabric is woven from multiple yarn types (two types of weft yarn and warp yarn) with a given structure. The crucial feature for the purposes of the petition is that the weft yarns exhibit a certain property: a "shrinkage ratio", and the shrinkage ratios of the two weft yarns are different. The product claim required that "*a plurality of first, hard, weft yarns ... have a first shrinkage ratio and a plurality of second, elastomeric, weft yarns ... have a second shrinkage ratio*". The hard and elastomeric weft yarns were defined relative to each other, in that the elastomeric yarns had a greater shrinkage ratio than the hard yarns. For further details, reference is made to the file.

3. The Board confirmed the revocation of the patent because it found that the skilled person had insufficient information to establish the meaning of the "shrinkage ratio" feature (point 1. of the Reasons of the impugned decision).
4. As stated by the Board, *"Without knowing what this difference in the parameter "shrinkage ratio" means or implies in terms of structural limitation, the invention cannot be said to be reproducible. ... Consequently, the invention defined in claim 1 may only be considered to be sufficiently disclosed if the skilled person, taking into account common general knowledge and the disclosure of the patent, is enabled to make this distinction between the two yarns based on their shrinkage ratio. The (relative) shrinkage ratio of the yarns in the woven fabric must therefore be able to be determined if the invention is to be carried out by a skilled person."* (point 4 of the Reasons).
5. In the major part of the decision, the Board considered the various explanations in the file with regard to the correct interpretation of the feature "shrinkage ratio". It concluded that the shrinkage ratio should be determined for the yarns of the woven fabric (point 4 of the Reasons, last paragraph), but otherwise none of the additional information provided would help to reliably determine the meaning of the feature. The petitioner did not object to these parts of the decision.
6. In point 6.2.3 of the Reasons, the Board made the following observation: *"Claim 1 moreover defines that the shrinkage ratio is a parameter of pluralities of weft yarns and not just a single yarn. It is hence not to be established for an individual yarn, rather it*

relates to a property of plural weft yarns. Which criteria would govern the selection of such plurality of yarns, e.g. how many, under which conditions, is, again, entirely unknown". In the following, this observation by the Board is referred to as the "plurality of yarns" interpretation.

7. The petition is based on the single issue that the reasons given by the Board in point 6.2.3 were not put to the parties at an earlier point in time, and therefore the petitioner could not comment on them. Specifically, the Board gave a definition of the shrinkage ratio that was wholly unexpected by the proprietor and in fact by all parties, namely that the shrinkage ratio was a parameter of a plurality of yarns. The petitioner argues that this definition by the Board must have been decisive for the issue of sufficiency.
8. The EBA accepts that the issue of the plurality of yarns vs. a single yarn does not appear anywhere in the written submissions or in the communications from the Board, at least not in the form as discussed in the disputed point from the Board's reasons.
9. However, even if the Board might have made findings in the written decision that were not previously raised, the role such findings played in the final decision, if any, must be examined.
10. The EBA points to the settled case law on petitions, according to which a board of appeal is not required to provide the parties in advance with all foreseeable arguments in favour of or against a request. In other words, parties are not entitled to advance indications of all reasons for a decision in detail (see CLBA

Chapter V.B.4.3.5, 10th edition 2022 and the decisions cited). Furthermore, a violation of Article 113 EPC can only be considered fundamental within the meaning of Article 112a(2)(c) EPC if there is a causal link between the alleged violation and the final decision (CLBA Chapter V.B.4.3.2 and the decisions cited). In other words, the alleged violation must be decisive for the outcome of the decision.

11. As stated in R 2/14, point 10.3(2) of the Reasons, it is generally sufficient for observing the right to be heard pursuant to Article 113(1) EPC if the grounds given in the written decision correspond to the facts of the case and the arguments put forward by any of the parties to the proceedings, so that the petitioner was aware of it and hence could not be surprised by corresponding grounds. In the present case it has not been argued that new facts emerged from the Board. The claim under consideration was the claim as granted and known to the parties as a question of fact. The features "plurality of [first and second etc.] yarns" were undoubtedly features of the claim, again as a question of fact.

12. Instead, the point of objection concerns claim interpretation as a question of law, this being an issue that falls within the exclusive competence of the Board. A board may adopt the interpretation proposed by one or more parties, but is in no way bound to the submissions by any party in this regard. It is at liberty to determine the most appropriate interpretation according to its own conviction, having considered all the relevant facts, in particular the patent itself. The Board's final conclusion on the correct interpretation of a claim is typically reached during their final deliberations, when all pertinent

facts and arguments are on the table. For this reason alone, it is questionable to what extent parties can expect to know the Board's opinion on claim interpretation in advance, as an aspect of their right to be heard.

13. However, this question need not be answered in the present case. The issue of whether a certain claim interpretation must always be known to the parties in advance is not decisive here, and therefore there is no need for the EBA to examine whether the substance of point 6.2.3 was indeed entirely new in the appeal proceedings, or whether it might have been raised earlier. As set out in the following, the Board's remark on the plurality of yarns was not a decisive issue for its final finding on the issue of sufficiency within the meaning of Article 100(b) EPC.

The significance of the plurality of yarns

14. In order to establish whether the disputed finding by the Board was decisive for its final finding on sufficiency, their decision as a whole must be examined, in the light of the totality of the facts as derivable from the file, in particular the facts and arguments submitted by the parties and the Board's preliminary observations on the argued issues. The EBA analysed the Board's decision in its communication (cf. point XI above) and concluded that the observations in point 6.2.3 of the Reasons were only an additional reason, but not the main reason, for the insufficiency of the patent. Reference is made to points 10 to 15 of the communication.
15. As stated in point 16 of the communication, the EBA came to the conclusion that the single yarn / plurality

of yarns issue was not the decisive issue for the Board. On the contrary, it was abundantly clear that the central issue was the complete lack of definition or any other tangible information relating to the shrinkage ratio, quite independently of the question of whether this was to be established for a single yarn or rather for a plurality of yarns. The latter was only an additional aspect among many other arguments which demonstrated that the skilled person was at a loss when trying to attribute a technically reasonable and consistent meaning to the claimed "shrinkage ratio".

16. The EBA also found that all the other technical arguments examined by the Board appeared to be entirely independent of the question of whether only a single yarn or a plurality of yarns should be examined to determine a shrinkage ratio. None of the opponents' arguments or the Board's observations could be considered a concession that the invention would be sufficiently disclosed if the claim were interpreted as defining the shrinkage ratio for single yarns.
17. The EBA also maintains this opinion against the further arguments brought by the petitioner in its further written submissions and presented in the oral proceedings. In sum, the EBA finds that the whole issue of insufficiency rests on the finding that the Board was unable to interpret the "shrinkage ratio" feature. It is not the case that the Board interpreted the claim and found that the skilled person would have faced insurmountable obstacles in trying to achieve what the claim defined.
18. The petitioner submitted that the right to be heard is an essential, absolute right enshrined in the Convention. It cited a large number of decisions to

underline this argument. It also pointed out that an unexpected claim interpretation from the Board is regularly considered a violation of the right to be heard. This was also demonstrated by several decisions by the Enlarged Board of Appeal, handed down in petition proceedings.

19. The EBA concurs with the petitioner that the right to be heard is an important and fundamental procedural right; however, it appears that the petitioner itself concedes that the right to be heard is not in fact "absolute" in the sense that its violation does not immediately lead to a successful petition. Only a violation that is causal to the ultimate adverse effect can be successful. This is also demonstrated by those arguments by the petitioner which seek to refute the EBA's assessment of the non-decisive character of the Board's findings in point 6.2.3.

20. The EBA does not dispute that the case law of the Enlarged Board supports that an unexpected claim interpretation can be the basis for a successful petition for review; however, this case law cannot be separated from the question of causality and the EBA does not consider that its view is in any way negated by the case law cited. It may be that there was a new and perhaps surprising element of claim interpretation in the present case. The EBA is also well aware that a board's claim interpretation would normally enter into the assessment of all substantive issues and, as such, would normally be considered to be a decisive element for a board's decision; however, in the rather specific circumstances of the present case, the new "plurality of yarns" interpretation is not considered to be decisive for the reasons set out in detail, and therefore is not causal to the Board's final decision

either. This issue was at best secondary to the truly decisive aspect of the claim interpretation, namely the undefined "shrinkage ratio" feature.

21. The petitioner argued that as a matter of principle, the EBA was not competent to assess the merits of a party's arguments, in particular whether they would be successful or not. The EBA understands this argument to mean that, *a fortiori*, the EBA also cannot judge whether or not an argument - either by a party or a board - could have been decisive.
22. The EBA does not dispute that it is not competent to judge the correctness of a decision of a board of appeal, in particular whether a decision was correct with regard to its substance; however, this limited competence of the EBA does not mean that the EBA is in principle prevented from analysing and understanding the Board's reasons, from both a legal and a technical point of view.
23. In order to determine whether an ignored argument by a party or a surprising new argument by a board was indeed causal, the EBA would inevitably have to go into the substance of the case and at least understand the parties' arguments and the board's reasons. The only limit to the Enlarged Board's analysis is a judgement as to whether the board's decision was correct or incorrect on the merits. If this were not the case, the examination of a petition based on Article 112a(2)(c) EPC would be exhausted in the formal examination of whether the board's reasoning can be found verbatim somewhere in the file as a party submission or in a preliminary opinion of the board.

24. Similarly to the typical cases before a technical board of appeal, in which the presence of at least one legally qualified member ensures the necessary legal expertise of the board (Article 21(3) and (4) EPC; see also G 1/11, point 9. of the Reasons), the composition of the EBA under Article 22(2), second sentence, and Rule 109(2) EPC ensures that the necessary technical expertise is present. Where the legislator has considered that only legal questions are likely to be raised, it has provided for a corresponding board composition consisting only of legally qualified members (Article 21(2) and (3)(c) EPC).

25. Accordingly, the EBA holds that it has the power to examine decisions of the Technical Boards of Appeal in petition proceedings under Article 112a EPC for the purpose of determining the decisive character of any reasons given by the Board, irrespective of whether such reasons are of a legal or technical nature. Such an examination does not in itself imply that the EBA must necessarily pass judgement on the substantive correctness of such reasons.

26. The petitioner also submitted that the EBA applied the wrong test by asserting that "the decision would also stand if point 6.2.3 were not there at all", as stated in point 18 of the communication from the EBA. As the petitioner put it, *"The Enlarged Board cannot place themselves in the shoes of the Board, to determine the substance of the matter, or to determine how the Board might have reacted if they had received argument and decided based on the single yarn interpretation. ... The assessment of the Enlarged Board must be on the basis of the Decision made, and not on the basis of a hypothetical decision that was not made."* (petitioner's submissions of 29 January 2024, paragraphs 31 and 32).

27. The EBA agrees with the petitioner that the EBA must assess the decision taken and not a hypothetical decision; however, the EBA's finding that the Board's decision would stand even without the "plurality of yarns" interpretation was not reached by assessing a hypothetical decision. Instead, the EBA analysed the decision in its entirety, determined the significance of all of the Board's arguments and reasoning, and on the basis of this analysis of the decision as a whole, the EBA concluded that the considerations referred to in point 6.2.3 did not in fact carry any weight in the Board's final decision, in the sense that the lack of sufficiency hinged on this issue. In the EBA's view, this approach is correct to establish the causal character of the Board's alleged new and unexpected reasons or, more precisely, the lack of their causal character in the present case.
28. The EBA therefore maintains its view that the decision would also stand, with the same result, without the disputed point 6.2.3. This does not mean that the EBA judges the decision's substantive finding on the issue of sufficiency to be the correct result, but merely that the EBA is convinced that the same substantive result would have been reached without the reasoning in point 6.2.3, and that this substantive result, which emerges from the rest of the decision, does not appear to have been affected to any appreciable extent by the Board's findings in point 6.2.3.
29. The petitioner did not challenge the substance of the EBA's analysis of how it interpreted the Board's decision, except by arguing that no indication of any relative weight of the arguments can be derived from the decision. In particular, it did not argue that the

EBA misunderstood any of the Board's reasoning or made technically incorrect assumptions. It merely challenged the EBA's competence to carry out such an analysis as a matter of principle and argued in the abstract that the Board's claim interpretation must have permeated the entirety of the Board's reasoning, so that whenever the Board mentioned the feature "shrinkage ratio", it must necessarily have understood it to mean "shrinkage ratio of a plurality of yarns". Apart from such abstract arguments, it did not provide any technical arguments or details as to where else and why the "plurality of yarns" interpretation might have played a role in the Board's various findings with regard to the meaning of the "shrinkage ratio" feature. Therefore, the fact remains that the EBA does not see how the "plurality of yarns" interpretation might have influenced the Board's findings on all the other aspects of insufficiency that were discussed in detail in the decision, namely the Board's attempts to understand the meaning of the "shrinkage ratio" feature.

30. At the oral proceedings before the EBA, the petitioner argued that the Board had given its own definition of the "shrinkage ratio" in point 6.2.3, and that this was indeed the only point in the entire decision at which a definition of the "shrinkage ratio" was given. The EBA takes a different view. The Board did not provide a definition of the "shrinkage ratio" feature; cf. point 15 above. The fundamental problem of the lack of definition of this feature remained. The Board only identified an additional problem of sufficiency arising from the claim wording (*"The claim moreover defines that ..."*), which would still need to be overcome even if an acceptable definition of the "shrinkage ratio", possibly for single yarns, were found.

31. The "plurality of yarns" interpretation may have added another element to the perceived insufficiency of the patent, but that was already based on the elements that were already present. The petitioner submits that no party ever proposed that the shrinkage ratio should be measured on a plurality of yarns (paragraph 20 of the petitioner's submissions of 29 January 2024). That is not disputed by the EBA, but this fact alone cannot inevitably make the "plurality of yarns" interpretation a decisive issue. On the contrary, the fact that the opponents argued the lack of sufficiency only on the basis of the "single yarn" interpretation is another indication that the lack of definition of the "shrinkage ratio" feature itself was the decisive issue, and not the question of how shrinkage ratios, possibly defined for single yarns, could be transferred to a plurality of yarns. Therefore, the EBA does not see how this argument by the petitioner would contradict the finding that the "plurality of yarns" interpretation was not a decisive reason on which the whole decision rested.
32. In this regard, the petitioner also appears to confound the problem of the skilled person measuring the shrinkage ratio on a plurality of yarns with the problem of the interpretation of the "shrinkage ratio" feature. It does not transpire from the decision or from any argument by the parties that the problem was mainly one of measurement, in the sense that the skilled person did not know how to measure such mechanical properties as the length of one or more fibres, either without tension or under some predetermined tension. Possible problems of measurement were also mentioned in the decision, e.g. in respect of shrinkage that occurred in the past (point 6.2.2 of the Reasons, third paragraph), but it is clear that this

issue was also only secondary to the more fundamental problem of the lacking definition.

33. Instead, the problem for the skilled person was that it did not know what exactly had to be measured, beyond the fact that it obviously had to be the claimed two types of weft yarns. But from there on the boundary conditions of the measurement, in particular what had to cause the yarns to shrink, were not defined in any greater detail. There were a number of open questions of any possible measurement of the yarns, even when assuming that yarn (or yarn fibre) lengths had to be measured before and after shrinkage. In particular, it was not clear what defined the initial state before shrinkage and what defined the shrunk state of the yarn after shrinkage: is the shrinkage ratio an inherent property of the yarn (but different from elasticity, point 3 of the Reasons) or does it arise as a result of weaving or some other treatment, independently of or in addition to the weaving? Is it defined by the presence or absence of loops? Is it without tension or in a tensioned state? If it is in a tensioned state, what would have defined the tension? All these problems already applied to a single yarn. The Board may have considered there to be a further problem in the combination of the properties of single yarns into the claimed parameter which was considered to apply to a plurality of yarns, but the EBA finds nothing to suggest that this had been considered a problem of measurement, but rather one of claim interpretation, namely a lack of definition.

34. In fact, the Board does not mention anything regarding how the shrinkage ratio is to be determined as a matter of measurement. There is no statement from the Board that the problem lies in the measurement of a plurality

of yarns - the Board only states in point 6.2.3 that the shrinkage ratio *"is hence not to be established for an individual yarn, rather it relates to a property of plural weft yarns. Which criteria would govern the selection of such plurality of yarns, e.g. how many, under which conditions, is, again, entirely unknown"* (EBA's emphasis). From this the EBA understands the Board's problem to be one of claim interpretation and not one of measurement. There is nothing in the Board's reasoning in point 6.2.3 which seems to rule out the possibility that the shrinkage ratio could possibly be measured for individual yarns - if only the skilled person knew how to do so, in the sense of knowing exactly which physical parameter to measure and under what conditions - and it is only an additional problem of how to combine the values obtained for individual yarns into the claimed shrinkage ratio which is considered to be applicable to a plurality of yarns, as a question of claim interpretation.

35. Therefore, the EBA confirms its preliminary opinion that the Board's finding that the shrinkage ratio had to be determined for a plurality of yarns was in itself not decisive for the Board's final conclusion on the insufficient disclosure. Even if this finding did play some role in the Board's final conclusion on the issue of sufficiency, as one consideration among several others, not discussing this detail with the parties before handing down the decision cannot be qualified as a fundamental violation of Article 113 EPC within the meaning of Article 112a(2)(c) EPC.
36. The EBA concurs with the petitioner that in the first stage of the petition proceedings as foreseen by Rule 109(2)(a) EPC, not only must the petitioner pass a

high hurdle, but the Enlarged Board of Appeal must do so too.

37. Rule 109(2) (a) EPC stipulates that "The Enlarged Board of Appeal ... shall reject those [petitions] which are clearly inadmissible or unallowable; such decision shall require unanimity". In the present case, the EBA is satisfied that the petition is admissible, and therefore the question of the "clearly inadmissible" petition does not arise. The question remains of how to interpret the condition "clearly unallowable".
38. One possible interpretation could be that the term "clearly" is meant to indicate a condition where the unallowability of the petition is already manifest on the basis of a superficial examination of the petition. Support for this can be found in the preparatory documents of the EPC 2000: Document MR/2/00 of 13 October 2000 (the Basic Proposal) foresaw the following provisions for the Implementing Regulations that were yet to be adopted:
- "In the interest of a quick and effective screening of petitions for review which are clearly inadmissible or not allowable special procedural provisions must apply to the three-member panel of the Enlarged Board ... The proceedings before this panel shall be as simple and short as possible. Therefore, this body shall decide in written summary proceedings; no oral proceedings shall take place before the panel. A quick screening procedure at the outset of review proceedings to sort out petitions which clearly cannot be successful is essential in order to avoid an inappropriate prolongation of legal uncertainty for third parties. It is also of great importance to counteract effectively intentional prolongation of proceedings by filing a petition for review."* (see point 19, second paragraph

of the explanatory remarks to the proposed new Article 112a EPC).

39. However, while this shortened procedure may seem practical where the majority of petitions can be expected to be well founded and where a *prima facie* examination of the petition already suggests that there is undoubtedly a fundamental procedural defect, it does not seem right to apply such a fast-track procedure unconditionally where a *prima facie* examination suggests that the petition is unallowable. In the latter case, it could lead to the rejection of well-founded petitions, as the crucial aspects of the petition could remain unidentified during a superficial examination of the petition. In this case, it would seem even more problematic to dispense with oral proceedings, contrary to the procedure envisaged in the Basic Proposal. On the other hand, if the foreseen quick screening procedure in practice turned out to constitute only a very low hurdle and most petitions had to be examined by the five-member composition of the Enlarged Board of Appeal within the meaning of Rule 109(2)(b) EPC, this would also appear to be a questionable result. This would clearly go against the legislative intention to prevent the intentional prolongation of the proceedings.
40. In view of these considerations, the EBA holds that the correct criterion for determining whether the petition is "clearly" unallowable within the meaning of Rule 109(2)(a) EPC is not just the depth of the analysis required to understand the case from a legal or technical point of view. Instead, what also matters is the degree of conviction of the individual members of the Enlarged Board as to whether the alleged procedural defect is indeed a fundamental procedural defect within

the meaning of Article 112a(2) (a) to (d) EPC, once the relevant facts of the case have been identified, possibly only after an exhaustive and detailed examination of all the legally and technically relevant facts. The requirement for the members to reach a unanimous opinion is considered a confirmation of this principle.

41. It may seem that this interpretation of Rule 109(2) (a) EPC is contrary to the clear intention of the legislator; however, the EBA notes that the legislator itself was aware that the procedure might have to be modified in the light of future experience with the practical application of Article 112a EPC; see the explanatory remarks to Article 22(2) EPC, point 5, in the Basic Proposal.
42. In the present case, having reviewed the technical facts of the case and the applicable legal framework, and having considered the exclusively legal arguments by the petitioner, the EBA remains fully convinced that the Board's "plurality of yarns" interpretation mentioned in point 6.2.3 of the Reasons was not the decisive reason for the Board's finding of insufficiency. As set out above, the EBA is not aware of any argument that would cast doubt, let alone serious doubt, on this assessment.
43. Accordingly, the petition is considered clearly unallowable and is to be rejected as such.

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