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**Datasheet for the decision  
of 31 January 2025**

**Case Number:** R 0001/23

**Appeal Number:** T 2911/19 - 3.3.08

**Application Number:** 05736399.6

**Publication Number:** 1735454

**IPC:** C12P19/04, C12P7/06

**Language of the proceedings:** EN

**Title of invention:**  
METHODS FOR DEGRADING OR CONVERTING PLANT CELL WALL  
POLYSACCHARIDES

**Patent Proprietor:**  
Novozymes, Inc.

**Opponents:**  
V.O.  
Gevers & Ores

**Headword:**  
Petition for review

**Relevant legal provisions:**

EPC Art. 112a(2)(c)

EPC R. 106

RPBA Art. 12(4)

RPBA 2020 Art. 12(6)

**Keyword:**

Petition for review - clearly unallowable

**Decisions cited:**

R 0020/10, R 0004/11, R 0013/12, R 0007/13, R 0008/14,  
R 0003/16, R 0006/17, R 0006/20, R 0004/22, R 0024/22,  
T 0640/91, T 2102/08, T 1882/13, T 0089/15, T 0731/16



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**Case Number:** R 0001/23

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 31 January 2025**

**Petitioner:**

(Opponent)

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**Decision under review:**

**Decision of the Technical Board of Appeal 3.3.08  
of the European Patent Office of 8 June 2022.**

**Composition of the Board:**

**Chairman**

I. Beckedorf

**Members:**

F. Blumer

P. Lanz

## **Summary of Facts and Submissions**

- I. The petition for review concerns decision T 2911/19 of 8 June 2022 of Board of Appeal 3.3.08 (the Board), dismissing the appeal of opponent 1 (petitioner) against the opposition division's decision to reject the opposition against European patent no. 1 735 454 "Methods for degrading or converting plant cell wall polysaccharides" granted on 10 May 2017 to Novozymes, Inc.
- II. The petitioner claims that its right to be heard was fundamentally violated in the appeal proceedings because its document D20 was not admitted into the proceedings.

### *Opposition proceedings*

- III. Oppositions were filed by the petitioner and opponent 2. The opponents relied, *inter alia*, on the grounds for opposition under Article 100(b) EPC and Article 100(a) in combination with Article 56 EPC.
- IV. In support of its objection that the claimed method could not be carried out by the skilled person over the whole range claimed, contrary to the requirements of Article 83 EPC, the petitioner filed document D20, an experimental report titled "Experiments regarding the expression of beta-glucosidases of different microorganisms in *Trichoderma reesei* RutC30".
- V. Document D20 was filed on 24 May 2019, the last day for filing submissions under Rule 116 EPC. The opposition division decided not to admit the document. On the one

hand, it agreed with the patent proprietor that the data of D20 were submitted late and that the patent proprietor did not have the opportunity to analyse the data in detail or even provide counter-experiments. On the other hand ("More importantly"), the opposition division found that the data were not relevant such that postponement of the oral proceedings would not have been justified either (Reasons, points 24.1 and 24.2 of the opposition division's decision of 30 August 2019).

- VI. Based on its conclusions that the requirements of Article 83 EPC and the other requirements of the EPC were fulfilled, the opposition division rejected the oppositions.

*Appeal proceedings*

- VII. In appeal, the petitioner argued that the opposition division should have admitted document D20 and that it should be admitted into the appeal proceedings (sections 4.2 and 4.3 of the statement setting out the grounds of appeal). Document D20 was also relied on by the petitioner to support its argument that the claimed invention did not solve the problem over the whole area claimed (section 6.1 of the grounds of appeal).
- VIII. In its communication in preparation for the oral proceedings, the Board gave its preliminary view that document D20 should not be admitted into the proceedings since *"the opposition division exercised its discretion not to admit this document taking into account the correct criteria, i.e. the the relevance of the document and the likelihood that the consideration of the experimental data therein would have an impact*

*on the decision to be taken, and provided reasons for its decision"* (point 15).

- IX. The admittance of D20 was discussed during oral proceedings before the Board. After deliberation, the Chairman announced the Board's decision that the document was not admitted into the appeal proceedings. The petitioner then filed the document "Petition for review by the Enlarged Board of Appeal pursuant to Art. 112a EPC" and confirmed the Board's understanding that this was an objection under Rule 106 EPC (minutes of the oral proceedings, penultimate paragraph on page 2).
- X. After another deliberation, the objection was dismissed by the Board and, at the end of the oral proceedings, the decision that the appeal was dismissed (i.e. that the patent should be maintained as granted) was announced.

*Proceedings before the Enlarged Board of Appeal*

- XI. The petition is based on Article 112a(2)(c) EPC (fundamental violation of Article 113 EPC). It is alleged that the non-admittance of document D20 into the appeal proceedings constituted a fundamental violation of the petitioner's right to be heard.
- XII. The Enlarged Board summoned to oral proceedings and issued a communication pursuant to Articles 13 and 14(2) RPEBA, explaining its preliminary view that no fundamental violation of the petitioner's right to be heard occurred in the course of the proceedings leading to the Board's decision not to admit document D20 into the appeal proceedings.

XIII. During oral proceedings, the petitioner confirmed its requests, namely, 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.

XIV. At the end of the oral proceedings, the Enlarged Board announced its decision.

## **Reasons for the Decision**

### *Admissibility of the petition*

1. The petition for review was filed in due time and form in accordance with Article 112a(4) EPC and Rule 107(1) and (2) EPC, and the corresponding fee was paid.
2. During oral proceedings before the Board, the petitioner filed an objection under Rule 106 EPC after the Chairman had announced that document D20 was not admitted into the appeal proceedings (see above Facts and Submissions, point IX).
3. The Enlarged Board finds the petition not to be clearly inadmissible, as set out in its communication pursuant to Articles 13 and 14(2) RPEBA.

### *Allowability of the petition*

#### Overview

4. In the petitioner's view, the non-admittance of document D20 into the appeal proceedings constituted a

fundamental violation of the petitioner's right to be heard.

5. In its written submissions and during oral proceedings before the Enlarged Board, the petitioner argued, on the one hand, that document D20 was not late-filed during the opposition proceedings since it was filed in reaction to the preliminary view of the opposition division that the requirements of Article 83 EPC were fulfilled. The patent proprietor had sufficient time to react to the experiments of D20.
6. On the other hand, the petitioner set out in detail that the experimental data of D20 were highly relevant not only in view of the assessment whether the patented methods could be reliably carried out (Article 83 EPC) but also in the context whether the problem could be considered to be solved over the entire scope of the claim (Article 56 EPC).
7. For the reasons set out below, the Enlarged Board comes to the conclusion that the petitioner's right to be heard was fundamentally violated neither when the Board reviewed the opposition division's discretionary decision not to admit document D20 in the opposition proceedings, nor in the process leading to the Board's discretionary decision not to admit document D20 into the appeal proceedings.

#### Non-admittance of D20 by the opposition division

8. While the opposition division's discretionary decision not to admit document D20 in the opposition proceedings cannot be reviewed in the present proceedings (see e.g. R 3/16, Reasons, point 8; R 20/10, Reasons, point 2.1), the Enlarged Board has to assess exclusively whether



the parties' right to be heard was fundamentally violated in the context of the decision of the Board not to admit document D20 in the appeal proceedings. In the present case, this decision encompassed the decision not to reverse the opposition division's decision not to admit said document.

9. A discretionary decision of the opposition division not to admit a specific document can be reviewed in appeal proceedings within certain limits. A board of appeal should only overrule the way in which a first instance department has exercised its discretion in a particular case if the board comes to the conclusion that the first instance department in its decision has exercised its discretion according to the wrong principles, or without taking into account the right principles, or in an unreasonable way (T 640/91, Headnote III; see also, for example, T 1882/13, Reasons, point 2.2.2; T 89/15, Reasons, point 2.1). The applicability of this case law was established under Article 12(4) RPBA 2007 (see e.g. T 2102/08, Reasons, point 4.4), and it is now explicitly referred to in Article 12(6) RPBA 2020, first sentence: *"The Board shall not admit requests, facts, objections or evidence which were not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance."* (emphasis added). In the course of this (limited) review of a first instance discretionary decision, the board of appeal has to respect the parties' right to be heard, and fundamental violations of the parties' right to be heard in this context may be a ground for review under Article 112a(2)(c) EPC.

10. When reviewing whether the opposition division exercised its discretion in an erroneous manner in the present case, the Board addressed the relevant arguments presented by the petitioner in this respect (Reasons, points 11 to 19). In particular, the Board analysed the timeline relevant for the opposition division's decision, referring, *inter alia*, to the time spans between the opposition division's raising of the relevant objections, the petitioner's filing of document D20 and the oral proceedings (Reasons, points 13 to 17). The Board further noted that the opposition division also took into consideration the *prima facie* relevance of document D20 (see Reasons, point 18: "*taking into account not only the relevance of the document for the claimed invention, but also the likelihood that the consideration of the experimental data therein would have an impact on the decision to be taken*") before arriving at the conclusion that the opposition division applied the correct criteria in a reasonable manner, and gave sufficient reasons for its exercise of discretion.
11. The Enlarged Board concludes that the Board examined the opposition division's decision not to admit document D20 into the opposition proceedings within its scope of review and that the parties were heard in the course of this examination.
12. The petitioner has not argued that its right to be heard was violated by the Board in the course of the discussion on the opposition division's exercise of its discretion. Under these circumstances, the Enlarged Board can only conclude that no relevant violation of the petitioner's right to be heard occurred in the context of the review of the opposition division's decision.

13. Rather than addressing any potential violation of its right to be heard, the petition (paragraphs 3.1 and 3.2) addresses the substance of the opposition division's decision not to admit document D20 before concluding that D20 had not been late-filed and should have been admitted into the opposition proceedings in view of its *prima facie* relevance. The same applies to the petitioner's submissions during the oral proceedings before the Enlarged Board where, for example, the petitioner's reasons for not filing document D20 earlier were explained. As outlined above, these aspects can be relevant in the present review proceedings only in view of potential violations of the petitioner's right to be heard in the context of the Board's limited review of the opposition division's decision not to admit document D20. As such violations are not at issue, there is no room for a further discussion of the opposition division's decision, in particular its assessment of the *prima facie* relevance of D20.

Board's decision not to admit D20 into the appeal proceedings

14. A board of appeal cannot only reverse a discretionary decision of an opposition division not to admit a document if this decision suffers from an error in the use of discretion. It also has authority to exercise its own discretion under Article 114(2) EPC "de novo" (i.e., as if it were to consider the issue for the first time, regardless of the decision under appeal). This was confirmed by Article 12(4) RPBA 2007 which referred to "*the power of the Board to hold inadmissible facts, evidence or requests which (...) were not admitted in the first instance proceedings*". The authority of a board of appeal to assess "de novo"

the admittance of a piece of evidence that was not admitted into the proceedings leading to the decision under appeal has been clarified in Article 12(6) RPBA 2020, first sentence, second exception ("*unless the circumstances of the appeal case justify their admittance*").

15. One of the criteria regularly applied in the course of exercising discretion on the admittance of late-filed documents is their *prima facie* relevance, i.e. their potential to change the outcome of the proceedings (see e.g. T 731/16, Reasons, point 2.2). *Prima facie* relevance is one criterion among others, it is neither the most relevant nor does it stand alone, i.e. without interdependence on other criteria (see e.g. R 6/17, Reasons, point 3.6).
16. The exercise of a board's discretion in view of its decision to admit or not admit a piece of evidence is subject to a strictly limited review under Article 112a EPC. The Enlarged Board has no power to control the normal exercise of discretion by a board of appeal on the merits. Its task is to review whether the board exercised its discretion in an arbitrary or manifestly illegal manner (see e.g. R 6/17, Reasons, point 3.5, with further references). Only if a board's discretion is exercised in such a manner, a fundamental violation of the right to be heard could be recognised under Article 112a(2)(c) EPC (see e.g. R 6/20, Reasons, point 3; R 24/22, Reasons, point 13; R 4/22, Reasons, point 2.1: "*willkürlich oder offensichtlich rechtswidrig*").
17. The Enlarged Board's limited review of a board of appeal's discretionary decision on the admittance of a piece of evidence implies that the Enlarged Board has

no possibility to assess the admittance of a piece of evidence into the appeal proceedings leading to the decision under review "de novo". In other words, it is not relevant how the Enlarged Board would have decided on the admittance of a piece of evidence at the board of appeal's place (see R 7/13, Reasons, point 4).

18. In the present case, the *prima facie* relevance of document D20 was addressed in the decision under review not only in the context of the review of the opposition division's exercise of discretion (see above point 10) but also in the context of the exercise of the Board's own discretion (Reasons, points 20 to 26). Here, the Board addressed the technical content of D20 before coming to the conclusion that the experimental data in D20 were *prima facie* unlikely to have any impact on the Board's decision on sufficiency of disclosure (point 26).
19. The Enlarged Board fails to see how the petitioner's right to be heard was fundamentally violated in the course of the discussion of the *prima facie* relevance of document D20. It appears that the petitioner even was invited during the oral proceedings before the Board to complement its arguments concerning the *prima facie* relevance of D20. According to the decision under review (Reasons, point 31), the appellant said "*it could not bring forward all the arguments regarding the document and the relevance of the data, since the document had not been admitted*". The Enlarged Board concurs with the Board's view that it was for the petitioner to bring forward all arguments in favour of the admittance of D20, including arguments as to the *prima facie* relevance of the document. The Board could take its decision on the admittance of D20 only after hearing all arguments (including those on the *prima*

*facie* relevance of D20) the parties wished to bring forward.

20. The petitioner could not have been surprised by the Board's invitation to complement its arguments on the *prima facie* relevance of D20 since this issue had been discussed extensively during the entire appeal proceedings (see, for example, section 4.3 of the statement setting out the grounds of appeal and paragraphs 12.41 to 12.59 of the patent proprietor's reply to the grounds of appeal.
21. In the petition for review, section 3.2 on the *prima facie* relevance of the experimental data of D20 addresses the substance of the data in view of the issues at dispute, not the discussion of the *prima facie* relevance of the data during the appeal proceedings or any alleged procedural violation in the context of such discussion. The case law of the Enlarged Board emphasises that an alleged violation of the right to be heard cannot provide the parties with a means to put the Enlarged Board in a position where it is expected to check whether a board of appeal understood an argument correctly or drew the right conclusions from it (see R 13/12, Reasons, point 2.5; R 4/11, Reasons, points 2.2 and 2.3).
22. Section 3.3 of the petition for review is introduced with an allegation that neither the opposition division nor the Board in their preliminary assessments or in the oral proceedings before them referred to the *prima facie* relevance of D20 ("*auf die prima facie Relevanz der D20 eingegangen*"). However, the Enlarged Board notes that since D20 was filed, allegedly in response to the opposition division's communication, the *prima facie* relevance of D20 has always been one of the main

themes of the proceedings before the opposition division and in appeal (see, for example, page 5 of the minutes of the oral proceedings before the opposition division; Reasons, point 24 of the opposition division's decision; section 4.3 of the statement setting out the grounds of appeal and paragraphs 12.41 to 12.59 of the patent proprietor's reply to the grounds of appeal; point 15 of the Board's communication pursuant to Article 15(1) RPBA).

23. In view of the extensive discussion of the *prima facie* relevance of D20 in the written submissions and during oral proceedings before it the Enlarged Board understands that the petitioner considers the *result* of the discussion on admittance, namely the Board's decision not to admit D20, to constitute a fundamental violation of Article 113 EPC. As explained above, the Enlarged Board is not in a position to assess the relevance of a late-filed document in its substance (see also e.g. R 8/14, Reasons, point 3), and it may review only to a very limited extent a board's discretionary decision on the admittance of a document, which decision may be based on the *prima facie* relevance of such document.
24. The petitioner refers to numerous passages of the decision under review where the Board was arguably wrong in its assessment of technical explanations and arguments in the patent specification and in the parties' submissions in the proceedings. The correctness of such assessments of the Board cannot be reviewed by the Enlarged Board. This also applies to the passage starting at the bottom of page 17 of the petition where the petitioner referred to a number of alleged violations of its right to be heard. It is not clear which arguments or evidence was not taken into

account for the Board's decision, and the Enlarged Board cannot review the technical relevance of the numerous passages in the prior art documents and in document D20 that were allegedly not taken into consideration or not understood correctly.

## Conclusion

25. While the objection under Rule 106 EPC filed during the oral proceedings before the Board only referred to the relevance of D20 for the requirements under Article 83 EPC, the petitioner also emphasised the relevance of D20 for the requirements under Article 56 EPC, arguing that D20 would show that the objective technical problem was not solved over the whole scope of the claimed invention, see page 22 of the petition. The Enlarged Board understands that the arguments concerning the *prima facie* relevance of document D20 exchanged in the context of Article 83 EPC equally apply when it comes to the relevance of D20 for the issue of whether the claimed solution is solved over the whole scope of the claimed invention.
26. The Enlarged Board concludes that no fundamental violation of Article 113(1) EPC occurred during the appeal proceedings leading to the decision under review. On the one hand, the Board did not violate the petitioner's right to be heard when it assessed how the opposition division exercised its discretion concerning the admittance of document D20 (see Reasons, point 18; above points 8 to 13). On the other hand, the Board did not violate the petitioner's right to be heard when it exercised its own discretion under Article 12(4) RPBA 2007 and came to the conclusion that neither document D20 nor the petitioner's submissions



concerning this document should be admitted into the appeal proceedings.

## **Order**

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

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated