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**Datasheet for the decision  
of 3 February 2025**

**Case Number:** R 0010/23

**Appeal Number:** T 1227/21 - 3.2.07

**Application Number:** 17182187.9

**Publication Number:** 3263231

**IPC:** B07B13/10

**Language of the proceedings:** EN

**Title of invention:**  
METHOD OF SEPARATING PARTICLES

**Patent Proprietor:**  
ADR Technology B.V.

**Opponents:**  
SGM Magnetics S.p.A.  
KM Key Machinery GmbH

**Headword:**  
Petition for review

**Relevant legal provisions:**

EPC Art. 100(a), 100(c), 112a(1), 112a(2)(c), 112a(2)(d), 113, 114

EPC R. 104, 106, 107, 109(2)(a)

RPBA 2020 Art. 12(6), 13(2)

RPEBA Art. 13, 14(2)

**Keyword:**

Petition for review - clearly inadmissible or unallowable  
Fundamental violation of Article 113(1) EPC (no)

**Decisions cited:**

R 0001/08, R 0019/11, R 0015/12, R 0008/13, R 0016/13,  
R 0008/17



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

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**Case Number:** R 0010/23

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 3 February 2025**

**Petitioner:**

(Opponent 2)

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**Other party:**

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**Decision under review:**

**Decision T 1227/21 of the Technical Board of  
Appeal 3.2.07 of the European Patent Office of  
23 March 2023.**

**Composition of the Board:**

<b>Chairman</b>	C. Josefsson
<b>Members:</b>	E. Mille
	M. Harrison

## **Summary of Facts and Submissions**

- I. The petition for review concerns decision T 1227/21 of Technical Board of Appeal 3.2.07 ("board") of 23 March 2023 handed over to the postal service provider on 11 April 2023. In this decision, the board dismissed the appeal against the opposition division's decision rejecting the oppositions against European patent No. 3 263 231.
- II. With letter dated 2 June 2023, the appellant - opponent 2 ("petitioner") filed a petition for review of the above decision of the board. The associated fee was paid by bank transfer on 13 June 2023. The petition was based first on the grounds that fundamental violations of Article 113 EPC occurred (Article 112a(2)c) EPC), and that second a further fundamental procedural defect (Article 112a(2)d) EPC together with Rule 104 EPC) affected the decision for which review was sought. The petitioner requested that decision T 1227/21 be set aside and the proceedings before the board be re-opened. As an auxiliary measure, oral proceedings were requested.
- III. The Enlarged Board in its composition pursuant to Rule 109(2) (a) EPC summoned the petitioner to oral proceedings and issued a communication pursuant to Article 13 and Article 14(2) RPEBA on 26 November 2024, giving two months to the petitioner for responding to this communication.
- IV. The petitioner made further submissions in writing in advance of the oral proceedings on 29 January 2025, essentially reiterating its position and arguing that the two months period of time given for its response

were not met because it did not receive the above communication before 28 January 2025, despite proof to the contrary from Deutsche Post.

V. Oral proceedings before the Enlarged Board took place on 3 February 2025, during which the petitioner presented its oral arguments and confirmed its requests that decision T 1227/21 be set aside and the proceedings before the board be re-opened. At the end of the oral proceedings the present decision was announced.

VI. The petitioner's case may be summarised as follows.

*(i) Inability of the professional representative to take part in the oral proceedings*

The petitioner puts forward that on 22 March 2023, the father of the representative filed a request for postponement of the oral proceedings scheduled for 23 March 2023 together with a medical certificate stating "Verhandlungsunfähigkeit" of the representative. This request indicated that due to the short notice, the father of the representative could not act as the representative at the oral proceedings and that no other representative could be substituted in time. Since the father of the representative ran his patent attorney's office with him, the board however advised the representative (in its communication dated 27 March 2023) that the appellant could be represented by his father, due to which the request for postponement was refused. This communication was transmitted in advance by email on 22 March 2023. Another request for postponement was then filed on the same day by the father of the representative, stating that he himself could in any event not act as the

representative at the oral proceedings due to an infection which prevented him from being able to concentrate sufficiently on the case. No medical certificate was presented with that request but was received by the board on 24 March 2024. Nevertheless, according to the petitioner, this new request was also not allowed by the board, and this was notified to the representative during a telephone call in the morning of the oral proceedings shortly prior to their commencement. The petitioner claims that the representative therefore had no choice but to attend the oral proceedings, despite being allegedly unable to do so. According to the petitioner, the representative pointed out his extreme health impairment at the start of these oral proceedings and despite the fact that the Chairman of the board took good notice of this impairment, he did not react to it as he should have done and did not postpone the oral proceedings. According to the petitioner, these circumstances constituted a violation of Article 113 EPC.

In its submissions of 29 January 2025, the petitioner added that having conducted the oral proceedings despite the health impairment of the representative was "disproportionate" and therefore amounts to a violation of Article 113 EPC.

*(ii) Interpretation during the oral proceedings*

The petitioner puts forward that it requested interpretation by letter dated 18 December 2022 but that the board only granted the request on 22 March 2023 so that, prior to that, it was left hanging in the air in this respect and the petitioner could not foresee how the hearing would proceed, which would according to the petitioner constitute a violation of

the RPBA and of Article 113 EPC.

*(iii) Documents in support of submissions*

The petitioner claims that the non-admittance by the board under Article 13(2) RPBA of documents D24 to D28 and of arguments supported by these documents submitted after the summons to oral proceedings were erroneous because said arguments did not constitute an amendment of the appeal case and were filed in reaction to objections first raised by the board in its preliminary opinion. Therefore, this non-admittance and the resulting decision of the board, which was allegedly not technically understandable, would amount to a violation of Article 113 EPC. Furthermore, the petitioner alleges that a violation of Article 114 EPC occurred in that the board disregarded obvious deficiencies in the decision of the opposition division based on a false assertion made in the patent.

In its submissions of 29 January 2025, the petitioner added that the foregoing documents and arguments were filed because of a misunderstanding of the board in its preliminary opinion in regard to arguments put forward in the statement setting out the grounds of appeal.

*(iv) Added subject-matter - Article 100(c) EPC*

The petitioner claims that the decision under review states that it raised an objection under Article 100(c) EPO only in appeal whereas, according to the petitioner, it had already adopted (during the opposition proceedings) this objection which had been raised at that time by opponent 1. Therefore, the decision not to admit this objection due to it being late filed under Article 12(6) RPBA was erroneous,



which constituted a violation of the RPBA as well as of Article 113 EPC for the petitioner.

In its submissions of 29 January 2025 the petitioner added that the minutes of the oral proceedings before the opposition division supported its position that it had adopted the objection of opponent 1 under Article 100(c) EPC during the opposition proceedings.

*(v) Novelty - Article 100(a) EPC*

The petitioner claims that the decision under review disregarded that a discussion on the relevance of document D19/E2 had already taken place during the opposition proceedings and that, therefore, this decision not to admit a line of argument based on this document under Article 13(2) RPBA was erroneous.

The petitioner further puts forward that even if it were true that this line of argument (relevance of foundry sands and "cinders") had only been raised for the first time in appeal proceedings, a violation of the principle of *ex officio* examination in opposition proceedings under Article 114 EPC would still be present.

In addition, the petitioner held the view that the board did not deal with the fact that the statement of grounds of appeal and again the appellant's letter dated 18 December 2022 argued that the appealed decision was wrong concerning the teachings of documents E1 to E5 regarding the separation of particles from waste incineration ashes. This would, according to the petitioner, also constitute a violation of the RPBA and of Article 113 EPC.

*(vi) Inventive step - Article 100(a) EPC*

The petitioner claims that despite having put forward on page 6 of the statement of the grounds of appeal that casting sand, cinders and waste incineration ashes have the same properties and that the litigious patent states that besides waste incineration ashes, other mixtures of substances can also be processed with the method of this patent, the decision under review did not take this argument into consideration.

Finally, the petitioner criticises the board for not having admitted inventive step arguments into the appeal proceedings based on documents D24 to D28 and therefore violated the RPBA and Article 113 EPC.

## **Reasons for the Decision**

### *Admissibility of the petition*

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 for review is only admissible where the objection against the procedural defect was raised during the appeal proceedings and dismissed by the board, except where this objection could not be raised during the appeal proceedings.
3. Meeting the requirements under Rule 106 EPC is a precondition for access to the petition for review since it is an extraordinary legal remedy against final decisions of the boards.
4. In the present case, the minutes of the oral proceedings do not mention any objection under Rule 106

EPC having been raised by the petitioner during those oral proceedings. No request for correction of those minutes was filed by the petitioner challenging an absence of objections under Rule 106 in the course of the oral proceedings.

5. As far as the violations of Article 113 EPC alleged by the petitioner are concerned, the minutes show that during the oral proceedings no objection was raised against any such violation regarding points (i), (ii), (iii), (iv) and (v) in the section VI above.
6. Furthermore, the petitioner did not explicitly claim in its written submissions that it would only have become apparent after the oral proceedings before the board and upon reading the written reasoned decision that the above points (i) to (v) were disregarded by the board.
7. During the oral proceedings before the Enlarged Board, the petitioner also did not challenge these considerations and repeated its arguments on the merits as set out in its written submissions regarding these points. In particular, during these oral proceedings, the petitioner did not argue that it would not have been in a position to raise an objection under Rule 106 EPC regarding said points in the course of the oral proceedings before the board, which would however have been the proper way to act in such a situation.
8. Accordingly, the petition is clearly inadmissible under Rule 109(2)(a) EPC in as far as points (i), (ii), (iii), (iv) and (v) are concerned.

*Allowability of the petition*

9. As far as point (vi) of section VI above is concerned, the Enlarged Board does not agree that the petitioner's right to be heard was violated by the board regarding this point as the petitioner contends.
10. Pursuant to Article 113(1) EPC, decisions of the European Patent Office, including the boards of appeal, may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. This implies that a party must not be taken by surprise by the reasons for the decision, referring to unknown grounds or evidence. "Grounds or evidence" under Article 113(1) EPC ("Gründe" in the German text and "motifs" in the French text) is to be understood as the essential legal and factual reasoning on which a decision is based (see also R 8/17, Reasons 15; R 16/13, Reasons 3.3). A party has to have an opportunity to comment on the decisive aspects of the case.
11. On the other hand, the deciding board must be able to draw its own conclusions from the discussion of the grounds put forward (see also R 8/17, Reasons 16; R 16/13, Reasons 3.3 with further references). Thus, the right to be heard does not go so far as to impose an obligation on a board to disclose in advance to the parties how and why, on the basis of the decisive issues under discussion, or at least those foreseeable as the core of the discussion, it will come to its conclusion. This is part of the reasoning given in the written decision (see also R 8/17, Reasons 16; R 8/13 of 15 September 2015, Reasons 2; R 15/12, Reasons 5; R 1/08, Reasons 3.1).

12. In the case in hand, the Enlarged Board cannot establish that a fundamental violation of the petitioner's right to be heard occurred as asserted by the petitioner.
13. Regarding the argument that the board did not take into consideration that the petitioner put forward on page 6 of the statement of the grounds of appeal that casting sand, cinders and waste incineration ashes have the same properties, and that the litigious patent states that besides waste incineration ashes, other mixtures of substances can also be processed with the method of this patent, the decision under review (see Reasons 5.1) explicitly refers to pages 6 and 7 of the statement of grounds of appeal and to the argument of the appellant regarding the alleged same properties of various materials but took the view in Reasons 5.2.3 (referred to by the petitioner) that since document E2 discloses the separation of sand and metal based on their weights as opposed to the litigious patent which refers to such a separation based on their dimensions, these processes cannot be equated, so that the skilled person would not deviate from the process taught by E2. It thus does not appear that the argument addressed by the petitioner in this regard was not taken into account by the board in the decision under review but only that it did not find it convincing.
14. Further, regarding the argument that the board did not admit inventive step arguments into the appeal proceedings based on documents D24 to D28, the board did not admit these particular documents into the appeal proceedings and consequently also did not take into account inventive step arguments based on these documents (see Reasons 2.4 of the decision under review). The question of admittance of the

corresponding arguments was thus logically not discussed during the oral proceedings. Hence neither the decision under review, nor the minutes of the oral proceedings refer to any such discussion. The Enlarged Board can only conclude that the board took due account of the appellant's submissions during the appeal proceedings but did not agree with them. Hence, the Enlarged Board holds the view that even though the petitioner may regard the decision under review as being erroneous in this respect, this does not amount to a breach of the RPBA or of Article 113 EPC.

15. During the oral proceedings, the petitioner referred to its written submissions in relation with point (vi) of section VI above.
16. What the petitioner primarily appears to complain about is that the board arrived at conclusions different from the petitioner's ones. The Enlarged Board understands that a party may have a different view to the deciding board on technical or legal considerations and may even be convinced that a decision is wrong from a technical or legal point of view and may, therefore, wish to have the case reviewed. However, the Enlarged Board has no competence to review the case as to its merits, including whether correct conclusions had been drawn by the board. Under no circumstances may the petition for review be a means to review the application of substantive law, since a review of the correct application of substantive law would amount to the Enlarged Board being a third instance. This has been explicitly excluded by the legislator (see also explanatory remarks 1 to 5 on Article 112a EPC, OJ EPO 2007, Special edition no. 4 and established case law since decision R 1/08). Thus, the Enlarged Board has no competence under Article 112a EPC to examine the merits

of a board's decision and go into the substance of a case, not even indirectly (see also Case Law of the Boards of Appeal, 10th edn. 2022, V.B.3.1 and V.B.3.4.3, and the decisions cited there, e.g. R 19/11, Reasons 2.2).

17. In light of the considerations set out above, the Enlarged Board concludes that the petitioner's arguments were duly considered by the board, as can be derived from the board's written reasoned decision. Therefore, the petition for review is clearly unallowable under Rule 109(2)(a) EPC as far as point (vi) of the above section VI is concerned.

## **Order**

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

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

The Registrar:

The Chairman:



M. Schalow

C. Josefsson

Decision electronically authenticated