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**Datasheet for the decision  
of 24 February 2025**

**Case Number:** R 0017/23

**Appeal Number:** T 1137/21 - 3.3.05

**Application Number:** 13774183.1

**Publication Number:** 2909144

**IPC:** C01B39/02, C01B39/46, B01J29/70

**Language of the proceedings:** EN

**Title of invention:**  
POST-TREATMENT OF A ZEOLITIC MATERIAL

**Patent Proprietor:**  
BASF SE

**Opponent:**  
Hoffmann Eitle

**Headword:**  
Petition for review

**Relevant legal provisions:**  
EPC Art. 112, 112(1), 112a(2)(c), 112a(2)(d), 113(1), 123(2),  
125  
EPC R. 106, 107(2), 109(2)(a)  
RPEBA Art. 13, 14(2)

**Keyword:**

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

**Decisions cited:**

R 0001/08, R 0001/11, R 0006/11, R 0019/11, R 0008/13,  
R 0004/16, T 2273/10, T 1621/16, T 1137/21



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**Case Number:** R 0017/23

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 24 February 2025**

**Petitioner:**

(Patent Proprietor)

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**Decision under review:**

**Decision of the Technical Board of Appeal 3.3.05  
of the European Patent Office of 16 June 2023.**

**Composition of the Board:**

**Chairman**

I. Beckedorf

**Members:**

E. Mille

P. Scriven

## **Summary of Facts and Submissions**

- I. The petition for review concerns decision T 1137/21 of technical Board of Appeal 3.3.05 ("the Board") of 16 June 2023. In this decision, the Board dismissed the appeal of the appellant - patent proprietor.
- II. The appellant ("petitioner") filed a petition for review of the above decision in due time. The petition was based on the grounds that fundamental violations of Article 113(1) EPC (Article 112a(2)c) EPC) allegedly occurred during the appeal proceedings. The petitioner requested that decision T 1137/21 be set aside and that the proceedings before the Board be re-opened.
- III. The Enlarged Board, in its composition under Rule 109(2)(a) EPC, summoned the petitioner, in accordance with their auxiliary request, to oral proceedings, scheduled for 24 February 2025, and issued a communication under Articles 13 and 14(2) RPEBA on 27 January 2025, expressing its preliminary opinion on the admissibility and allowability of the petition.

The petitioner filed further comments regarding the petition, by letter dated 24 January 2025, in which it also notified the Enlarged Board of the participation of Mr Kirchberg in the written proceedings and as co-representative at the oral proceedings. The latter also filed further comments on the petition, in letter of the same date; and the petitioner as well as its co-representative filed comments in response to the preliminary opinion of the Enlarged Board, respectively by letters dated 4 and 5 February 2025.

IV. The petitioner's case can be summarised as follows:

Section II.1 of the petition - refusal to refer questions concerning a lack of uniformity of the case law

The petitioner objected that the decision of the Board, refusing the referral of questions of the appellant to the Enlarged Board of Appeal in view of diverging case law, constituted a fundamental violation of its right, under Article 113(1) EPC, to be heard by the Enlarged Board.

They expresses the view that the possibility for a board to refuse a request for referral under Article 112 EPC was a legal deficit, in breach of principles of procedural law generally recognised in the contracting states and at the European level.

They claimed for a further development of law under Article 125 EPC in that this deficit should be either resolved by the Enlarged Board, if Article 112 EPC contains a legal loophole or by the EPO Administrative Council, at the instigation of the Enlarged Board, in order to extend the list of these defects to such refusals of a request for referral to the Enlarged Board.

Section II.2 of the petition - uniform application of the law in accordance with Article 112(1) EPC

The petitioner expressed the view that, if a previous decision, as T 1621/16, had concluded that a lack of uniformity existed and had attempted to unify the case law in view thereof, and if the Board decided differently from that previous decision, as allegedly

the decision under review, and thus confirmed the lack of uniformity, then a referral to the Enlarged Board was mandatory. Not making such a referral would constitute a violation of the right to be heard.

Section II.3 of the petition - right to a fair trial  
(Article 47 CFREU, Article 6 ECHR)

The petitioner claimed that a refusal of a request for referral in view of a manifest divergence in the case law amounted to a denial of a fair trial and thus constituted a fundamental procedural defect.

Section II.4 of the petition - Board of Appeal decision  
in the case T 1621/16

The petitioner expressed its view that the correct application of the conditions for compliance of claim 1 of the main request with Article 123(2) EPC, as set out in T 1621/16, would have led to a different decision in the case at hand.

Section II.5 of the petition - applicability of  
T 1621/16 to the case at hand

The petitioner challenged the reasons given, in Reasons 1.8.3 of the decision under review, for the conclusion that T 1621/16 was not applicable to the case at hand and appeared to hold the view that the above reasons, had not been raised during the appeal proceedings.

Section II.6.a of the petition - decision on the  
request for referral

The petitioner put forward that, contrary to the opinion of the Board in the decision under review, the

addition of further criteria, beyond those set out in the decision in case T 1621/16, constituted case-law which was necessarily divergent from T 1621/16, which referrals under Article 112(1) EPC expressly sought to avoid.

Section II.7 of the petition - point of law of fundamental importance raised by the grounds for the decision under review

The petitioner submitted that the decision under review contained grounds that had not previously been communicated to the parties. More specifically, it put forward that, in its preliminary opinion, dated 27 March 2023 (points 7.2 - 7.4), the Board, in line with T 2273/10, considered that claim 1 of the main request failed to comply with the prohibition in Article 123(2) EPC, due to the selection of a very specific combination among numerous possibilities and different degrees of preference, and that claim 1 thus corresponded to multiple selections from a large number of lists and possibilities, without any pointer in the description.

On the contrary, according to the petitioner, in the decision under review, it was not the different degrees of preference which were considered relevant, but the sheer number of possibilities given in the claims for specifying the subject-matter (Reasons for the Decision, at the last paragraph under 1.4) and the large number of selections made (Reasons, 1.6).

The petitioner thus considered that the preliminary opinion of the Board created expectations on the issue in question, and that the decision under review was

surprising in not being in line with those expectations.

The petitioner considered, as expressed in section II.8 of its letter dated 5 February 2025 and during oral proceedings before the Enlarged Board, that the "sheer number of possibilities" in point 1.4 of the decision under review did not refer to the "varying degrees of preference".

The petitioner further expressed the view, in the petition that, in the decision under review, the Board referred, for the first time, to additional criteria beyond those indicated in T 1621/16, for the assessment of compliance with Article 123(2) EPC (i.e. the number of degrees of freedom and the number of possible selections and combinations). This, according to the petitioner, constituted new grounds compared to the Board's preliminary opinion, such additional criteria constituting a point of law of fundamental importance that would have raised further questions for referral to the Enlarged Board of Appeal, if they had been shared with the parties before the written decision was issued. Thus, by not allowing them to take a position on these grounds, the petitioner's right to be heard had been violated.

In section II.8 of its letter dated 5 February 2025 and during the oral proceedings before the Enlarged Board, the petitioner stated that, if the additional criteria beyond those of T 1621/16, in terms of the number of possibilities, was indeed discussed during the appeal proceedings, nothing indicated that they would be the sole additional criteria taken into account by the Board in its decision, to the exclusion of the



criterion of different degrees of preference, that was equally put forward in the Board's preliminary opinion.

## **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(2) EPC have been met.
2. Under Rule 106 EPC, a petition for review is only admissible where the objection to the alleged 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. Meeting the requirements under Rule 106 EPC is a precondition for access to the review procedure, since it is an extraordinary legal remedy in respect of otherwise final decisions of the boards.
3. In the case at hand, it is apparent from the minutes of the oral proceedings before the Board (pp. 2 and 3), that the Board did not state that it would refer questions raised by the appellant to the Enlarged Board of Appeal, in order to ensure uniform application of the law, notably in view of allegedly diverging decisions T 2273/10 and T 1621/16, but expressed its intention to dismiss the appeal. The parties were then asked if they had further remarks or requests and there were none, so that the debate was then closed.
4. It was only afterwards, that the appellant raised an objection under Rule 106 EPC, grounded on the rejection of the appellant's request for referral, so that, according to the appellant, its right to be heard by the Enlarged Board of Appeal had been violated. The

objection was then discussed with the parties, and, after deliberation by the Board , was not allowed. The decision that the appeal was dismissed was then announced.

5. The objection under Rule 106 EPC was thus not raised in a timely manner by the petitioner, as noted in the decision, under Reasons 4.2 (p. 21), even though the objection was discussed with the parties before the decision to dismiss the appeal was announced. This was acknowledged by the petitioner at the oral proceedings (paragraph bridging pages 2 and 3 of the minutes which reads, in part: *"The appellant confirmed that they were able to present their case on the question whether the proposed questions should be referred to the EBA. However, due to the decision not to refer those questions to the EBA, the appellant is deprived of the possibility to present their case there."*).
6. In the letters of the petitioner and those of Mr Kirchberg of 24 January, and 4 and 5 February 2025, it is stated that the minutes did not reflect the Board's intention not to refer questions to the Enlarged Board, but only that the issue of the necessity of this referral was discussed with the parties and that the Board's refusal to refer these questions - and the alleged consequent violation of the petitioner's right to be heard - appeared only after the closure of the debate and the Board's announcement that the appeal was dismissed. Therefore, the petitioner's question under Rule 106 EPC was not raised late.
7. However, the minutes mention that the relevance of the questions proposed for referral to the Enlarged Board was discussed with the parties, before the closure of

the debate. This implies that the Board, in the context of this discussion, took a (negative) position as to this relevance.

8. In any event, in the view of the Enlarged Board, when the parties were asked if they had further comments or remarks before the closure of the debate, the petitioner could then have raised, at least provisionally, a question under Rule 106 EPC, in case the Board dismissed its request for referral of questions to the Enlarged Board. However, according to the minutes, it did not.
9. The petitioner also considers that a decision not to admit the objection under Rule 106 EPC that it raised after closure of the debate cannot be inferred from the minutes and that this objection was duly raised before the decision was given.
10. However, in the view of the Enlarged Board, the fact that the chair announced, after this closure, that the appeal was dismissed, without reference to a possible referral, clearly shows that such a referral was not allowed. In addition, the decision under review (Reasons, 4.2 last paragraph, p. 21) states that "Even if the arguments had been put forward in time, they would not have been successful", which shows that the Board nevertheless regarded the Rule 106 EPC objection as late.
11. Therefore, the petition is clearly inadmissible, insofar as it is based on sections II.1 to II.6 of the petition, concerning the argument that refusal to refer questions to the Enlarged Board of Appeal infringed the petitioner's right to be heard.

12. In section II.7 of the petition, the petitioner expressed the view that the decision under review invoked grounds that had not been raised during the written procedure or during the oral proceedings before the Board, so that it had not been able to present its comments on it, and its right to be heard was violated.
13. On this topic, the petition addresses, essentially, the reasoning of the decision to be reviewed. Therefore, the benefit of the doubt is given to the petitioner as to its possibility of raising an objection during the oral proceedings (see R 1/11, Reasons 1.4).
14. The petition, thus, is not clearly inadmissible insofar as the arguments in section II.7 are concerned.

**Allowability of the petition for review**

Section II.7 of the petition - point of law of  
fundamental importance raised by the grounds for the  
decision under review

15. Regarding the petitioner's submission that the decision under review comprises grounds that were not previously communicated to the parties and the Board deviated from the view it had expressed in the provisional opinion on the reasons why claim 1 of the main request failed to comply with the prohibition in Article 123(2) EPC, the Enlarged Board is of the view that neither is correct.
16. Indeed, in point 1.3 of the Reasons (p. 9), the decision states that the requirements of Article 123(2) EPC are not met since many features of claim 1 of the main request appear in varying degrees of preference in the original dependent claims or in the general part of the description.

17. Besides, in point 1.4 of the Reasons (p. 10), the decision further states that claim 1 is the result of multiple selections of very specific features from different dependent claims in the application as originally filed. These selections were made from among numerous possibilities with different degrees of preference. This, in the opinion of the Enlarged Board, relates to the large number of selections referred to in point 1.6 of the decision under review.
18. In the Board's conclusion, in point 1.4 (p. 11), it is stated that *"In view of the sheer number of possibilities, the subject-matter of claim 1 at issue is not directly and unambiguously derivable from the dependent claims, even when the general part of the description is taken into account."* This *sheer number of possibilities*, however, refers to the above *varying degrees of preference* in point 1.3 and *numerous possibilities and different degrees of preference* earlier in point 1.4.
19. There is thus, contrary to the petitioner's opinion, no discrepancy between the Board's preliminary opinion and the decision under review, on these points. In addition, a Board is not obliged to share its detailed reasoning on a discussed issue, before the written decision is communicated (see R 4/16, R 8/13).
20. As for the petitioner's view, expressed in section II.8 of its letter dated 5 February 2025, that the *sheer number of possibilities* in point 1.4 of the decision under review did not refer to the *varying degrees of preference*, the last paragraph of point 1.3 reads *"In such a case, a systematic approach to deciding whether the requirements of Article 123(2) EPC are met cannot*

*be followed; this has to be decided on a case-by case basis."* Then comes point 1.4, regarding *numerous possibilities and different degrees of preference*. Therefore, it is the Enlarged Board's conclusion that, in the final paragraph of point 1.4 of the decision under review, the *sheer number of possibilities* refers both to the *varying degrees of preference* and to the *numerous possibilities and different degrees of preference* is justified.

21. Regarding the petitioner's view that, in the decision under review, the Board referred, for the first time, to additional criteria, beyond those indicated in T 1621/16, for the assessment of compliance with Article 123(2) EPC, which, according to the petitioner, constituted new grounds compared to the Board's preliminary opinion, the Enlarged Board notes that it is in the petitioner's response, dated 16 May 2023, to this provisional opinion, that it put forward that the Board's objections revealed a lack of uniformity in the case law of the boards of appeal, in particular in view of decision T 1621/16. This, therefore, was an argument that could not have been addressed in the Board's preliminary opinion. It also appears, from the minutes of the oral proceedings before the Board, that the question of allegedly diverging decisions T 2273/10 and T 1621/16, and the relevance of the proposed questions to be referred to the Enlarged Board was discussed.
22. The Board, in the decision under review, states that the appellant's argument that the number of possibilities should not play a role as regards whether the subject-matter of the claim was directly and unambiguously derivable from the application as originally filed was not persuasive. The number of selections and the number of alternatives within each

selection definitely played a role (Reasons for the Decision, point 1.8.3). It thus appears that the issue of further criteria beyond those mentioned in T 1621/16 was actually discussed with the parties, at the latest during oral proceedings.

23. The reference to such additional criteria, in the decision under review, does not, therefore, relate to new grounds, stated for the first time in the Board's decision, and on which the appellant had had no opportunity to comment.
24. Concerning the petitioner's argument, also in section II.8 of its letter dated 5 February 2025, that if the additional criterion of the number of possibilities was indeed discussed during the appeal proceedings, nothing indicated that this would be the sole additional criterion taken into account by the Board in its decision (thus excluding the criterion of different degrees of preference, equally put forward in the preliminary opinion), the Enlarged Board considers that both criteria were actually taken into account in the Board's decision, under the generic expression *sheer number of possibilities*. The alleged new ground, in the decision under review (one criterion retained instead of two, as in the Board's preliminary opinion ) is thus not recognised by the Enlarged Board. Thus, the alleged resulting fundamental legal questions raised by this new ground, according to the petitioner, are without foundation.

#### **Final remarks**

25. What the petitioner primarily complains of, is that the Board arrived at conclusions different from the petitioner's own. The Enlarged Board understands that a

party may have a different view from 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 that it may, therefore, wish to have the case reviewed. However, the Enlarged Board has no competence to review the case as to its merits, including as to whether correct conclusions have been drawn by the Board.

26. The grounds on which a petition for review can be based are enumerated in Article 112a(2) EPC. As derivable from the wording (*... only ... on the grounds ...*), the list of possible grounds for review is exhaustive (see also R 1/08, Reasons 2.1; R 6/11, Reasons 11.1). Article 112a(2) EPC makes it clear that review proceedings are limited to fundamental procedural defects and criminal acts. Those are intolerable for the legal system and override the principle that - in the interest of legal certainty - proceedings which have led to a final decision should not be re-opened.
27. In section 3 b) of his letter dated 4 February 2025 and during the oral proceedings, Mr Kirchberg held the view that the above list of grounds must be supplemented, since Article 112a(2) (d) EPC contained an "opening clause" to the effect that procedural deficiencies must result from the Implementing Regulations of the EPC so that the discretionary/arbitrary refusal of a request for referral should be identified in these Regulations as a "fundamental procedural defect" by the EPO Administrative council under Article 33.1.d EPC, which should be reviewable by the Enlarged Board.
28. However, under no circumstances may a 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 further instance. This has been explicitly excluded by the legislator (see 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 Book of the Boards of Appeal (CLBA), 11th edition, 2025, V.B. 3.1 and V.B.3.5.3, and the decisions cited there, e.g. R 19/11, Reasons 2.2).

29. 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 and the minutes of the oral proceedings. As far as the correctness of the decision as to its substance has been objected to by the petitioner, this cannot be reviewed by the Enlarged Board.
30. From the above, it results that the petition for review is clearly not allowable under Rule 109(2)(a) EPC, insofar as the arguments in section II.7 are concerned.

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated