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**Datasheet for the decision  
of 10 March 2025**

**Case Number:** R 0001/24

**Appeal Number:** T 1225/21 - 3.3.03

**Application Number:** 11809023.2

**Publication Number:** 2668229

**IPC:** C08K5/00, C08K5/20

**Language of the proceedings:** EN

**Title of invention:**

ADDITIVE COMPOSITIONS AND THERMOPLASTIC POLYMER COMPOSITIONS  
COMPRISING THE SAME

**Patent Proprietor:**

Milliken & Company

**Opponents:**

TotalEnergies One Tech Belgium  
Adeka Corporation

**Headword:**

Petition for review



**Relevant legal provisions:**

EPC Art. 56, 112a(1), 112a(2), 112a(2)(c), 112a(3), 112a(4),  
113(1)

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

RPEBA Art. 13, 14(2)

**Keyword:**

Petition for review - clearly unallowable

Fundamental violation of Article 113(1) EPC (no)

**Decisions cited:**

R 0001/08, R 0001/11, R 0019/11, R 0016/14, R 0008/16





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

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**Case Number:** R 0001/24

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 10 March 2025**

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**Decision under review:** **Decision of the Technical Board of Appeal 3.3.03**  
**of the European Patent Office of**  
**22 September 2023.**



**Composition of the Board:**

**Chairman** I. Beckedorf

**Members:** E. Mille  
J.-M. Schwaller



## **Summary of Facts and Submissions**

- I. The petition for review concerns decision T 1225/21 of Technical Board of Appeal 3.3.03 ("board") of 22 September 2023. In this decision, the board set aside the decision under appeal and revoked the European patent No 2668229.
- II. The appellant - patent proprietor ("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 EPC (Article 112a(2)c) EPC) allegedly occurred during the appeal proceedings. The petitioner requested that decision T 1225/21 be set aside and that the proceedings before the board be re-opened.
- III. The Enlarged Board in its composition pursuant to Rule 109(2)(a) EPC summoned the petitioner upon their auxiliary request to oral proceedings and issued a communication pursuant to Article 13 and Article 14(2) RPEBA on 3 February 2025.
- IV. The petitioner's case may be summarised as follows:

### *Perceptible colour change*

The petitioner puts forward that in Reasons 11 and particularly 11.1 and 11.2 of the decision under review, the board considered that there would be a distinction between the ability of a skilled colourist to "impart substantial and perceptible colour to a polymer composition" and its ability to impart a hue which "may be perceptible only after the composition is compared to a composition that does not contain the



*colouring agent", as required in claim 1 of auxiliary request 13. In particular, the petitioner puts forward that the board considered in Reasons 11.1, that it is not apparent how "a colourist whose task is to impart substantial and perceptible colour to a polymer composition, i.e. using significant amounts of colouring agents, would be aware of  $L^*$ ,  $a^*$  and  $b^*$  coordinates resulting from the use of colouring agents in an amount which does not impact perceptible colour to a polymer composition".*

The petitioner holds the view that at no point was any argument presented before the decision under review was issued in writing relating to a distinction between accessing the colour space defined by the specification and accessing a similar narrow colour space anywhere else on the CIE  $L^*a^*b^*$  spectrum. In particular, the petitioner claims that if point 17 of the Board's preliminary opinion dated 7 July 2023 reads *"the Board did note that it can be inferred from paragraph [0019] that the amount of colouring agent is relatively small compared to compositions in which a colouring agent is used to impart substantial and perceptible colour"*, this would be a generally neutral comment regarding the ability of the skilled person to select a suitable concentration of colouring agent, but not that targeting the claimed region might require different considerations.

Therefore, by not providing such argument before issuing the written decision, the board would have violated the petitioner's right to be heard.



*Related tristimulus values*

The petitioner refers to Reasons 11.3 of the decision under review, which reads (p. 14, 2nd paragraph):  
"neither did the appellant provide technical explanations which would link the concentration of a colouring agent and the coordinates in the CIE  $L^*A^*B^*$  colour space model of a material in which it is comprised. In particular, the appellant did not address related tristimulus values ( $X$ ,  $Y$ ,  $Z$ ) and ( $X_n$ ,  $Y_n$ ,  $Z_n$ ) on the basis of which the  $L^*A^*B^*$  coordinates in the CIE  $L^*a^*b^*$  colour space are based".

According to the petitioner, the effect of concentration of the colouring agent on the related tristimulus values was not raised by either respondent/opponent during the appeal proceedings. Therefore, it considers that it was deprived of the possibility to address this question so that its right to be heard was violated.

*Document D34*

The petitioner criticises that the board would have not provided any comment in the decision under review on the appellant's argument relating to experimental data presented by O2 in document D34 in paragraphs (107) - (115) of its reply to the preliminary opinion of the board and that this argument would be so decisive that failing to take it into account by the board in its decision would amount to a violation of the petitioner's right to be heard.



## **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 were met.
2. Pursuant to Rule 106 EPC, a petition for review is only admissible where objection against an alleged procedural defect was raised during the appeal proceedings and dismissed by the Board, except where this objection could not be raised during these 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 against otherwise final decisions of a board.
3. In the case at hand, the petitioner expresses the view that the decision under review invoked grounds which were raised during the preceding written procedure or during the oral proceedings so that the petitioner was not able to present its comments on such grounds and its right to be heard was consequently violated. As a matter of fact, the petition addresses essentially the reasoning of the decision to be reviewed. Therefore, the benefit of the doubt is to be given to the petitioner as to its possibility of raising an objection during the oral proceedings (see R 1/11, Reasons 1.4).
4. The petition is thus not clearly inadmissible.



## **Allowability of the petition for review**

### *Perceptible colour change*

5. The petitioner's view that no argument was raised by the board before the written decision related to a distinction between accessing the colour space defined in the patent in suit and accessing a similar narrow colour space anywhere else in the CIE L\*a\*b\* spectrum, in particular resulting from the use of colouring agents in an amount which does not impact perceptible colour to a composition, is not correct according to the Enlarged Board.
6. Indeed, point 17 of the board's preliminary opinion referred to by the petitioner, reads that "*no such specific concrete amount [of colouring agent] is indicated, nor is there any teaching as to how it might be approximated. It would therefore appear that iterative experimentation would be the only way to determine this amount.*".
7. Such iterative experimentation implies, contrary to the petitioner's view, that targeting the claimed region might require different considerations according to the Enlarged Board. Besides, paragraph 19 of the preliminary opinion further reads "*There is no explanation in the patent in suit as to how the skilled person would draw any conclusion from the specific colouring agents used in the examples of the patent in suit as to which colouring agent other than those exemplified in the patent in suit, and in what quantities, would make it possible to satisfy the inequalities set out in claims 1 and 2.*"



8. In addition, in Reasons 11.1 of the decision under review, the board underlines that *"As pointed out in paragraph [0019] of the specification, the compositions in the invention contain a relatively small amount of the colouring agent, as opposed to compositions in which a colouring agent is used to impart substantial and perceptible colour to the composition and any article made therefrom. It is emphasized in the same paragraph that the amount of colouring agent present in the thermoplastic polymer compositions is sufficiently low that most observers would describe the polymer composition or any article made therefrom as being not substantially coloured and that the hue imparted to the polymer composition or an article made therefrom by the colouring agent may be perceptible only after the polymer composition is compared to a composition that does not contain the colouring agent."*
9. This information is thus part of the specification of the patent itself, and thus well known by the petitioner, so that it cannot be regarded as amounting to a fresh ground raised by the board in the decision under review.
10. Moreover, paragraphs (103) to (105) of the appellant's response dated 22 August 2023 to the preliminary opinion of the board reads *"the concept of colour strength is well known to the skilled colourist, and they would be expected to have an understanding of or to be able to access information regarding the colour strength of all commercially available colouring agents. Thirdly, the skilled person would add to the polymer the amount of colouring agent predicted by its strength and take a measurement of the colour value. The process stops if the measurement falls within the scope of the claimed inequalities. Fourthly, if*



*necessary, the skilled person would adjust the amount of the colouring agent up or down to reach the claimed colour space. It is common for a skilled colourist to require as few as 2-4 iterations to achieve a colour match, and we estimate a similar number of iterations may be needed to reach the desired colour space".*

11. The conclusions of the board in Reasons 11.1 recited above and Reasons 11.2 which read "*Secondly, no evidence has been provided that the skilled person would have knowledge about L, a\* and b\* coordinates resulting from the addition of colouring agents in general to polypropylene homopolymers or polypropylene random copolymers, when used in amount which do not impart a perceptible colour. Even if some data might be known in some laboratories, this is irrelevant to the question of sufficiency of disclosure, as no evidence has been provided that such knowledge would be available to the notional skilled person, let alone be part of the common general knowledge*" are thus not only based on considerations yet raised in the preliminary opinion of the board and recited in the patent itself, but they actually merely respond to arguments raised by the appellant in its response to this preliminary opinion. They cannot therefore be regarded as fresh grounds according to Enlarged Board, even though the wording of these conclusions is slightly different from that of the said preliminary opinion or of the decision under appeal. This is besides unsurprising since as set out above, the said arguments were only raised after the issue of this preliminary opinion and could thus only be taken into account during the oral proceedings and in the decision under review.
12. In this respect, the Enlarged Board reminds that it is settled case law that a board is not required to



provide the parties in advance with all the 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 Case Law of the Boards of Appeal [CLB], 10th edition 2022, V.B. 4.3.5).

13. Consequently, according the Enlarged Board, it results from paragraph 17 of the board's preliminary opinion and [0019] of the specification that the conclusion of the board in the last paragraph of Reasons 11.1 is that the skilled person, starting from compositions in which the amount of colouring agent is sufficient to impart substantial and perceptible colour to the composition, would not be able to determine the L\* a\* b\* coordinates resulting from the use of colouring agents in an amount which does not impact perceptible colour to a polymer composition without conducting an undue amount of experimentations.
14. During the oral proceedings, the petitioner essentially discussed the merits of the decision under review in its Reasons 3.3 to 11.2 regarding the issue of a distinction between colouring agents imparting a perceptible colour to a polymer or only a hue, and in this context notably put forward that the skilled person would use a spectrophotometer in view of making this distinction and not only its human eye so that it would actually, contrary to the board's view, be aware of L\* a\* b\* coordinates resulting from the use of colouring agents in an amount which does not impart perceptible colour to a polymer.
15. The petitioner did not however further argue on the fact that, according to its view, the considered distinction and the resulting above conclusion of the



board would have been raised for the first time in its written decision.

16. This conclusion is, according to the Enlarged Board, a mere reformulation of the position of the board yet taken in its preliminary opinion and of the disclosure of paragraph [0019] of the specification. The appellant was thus able to take position on this, according to the Enlarged Board. It thus does not appear that its right to be heard was violated in this respect.

*Related tristimulus values*

17. According to the petitioner, the effect of concentration of the colouring agent on the related tristimulus values was not raised by either respondent/opponent during the appeal proceedings, so that the appellant was deprived of the possibility to address this question and its right to be heard was therefore violated.
18. However, the reference to these tristimulus values is taken from different documents referred to by the parties during the appeal proceedings, as mentioned by the board in Reasons 3.2 of the decision under review, which reads: "*This CIE  $L^*a^*b^*$  colour space model is based on the earlier CIE 1931 XYZ colour space model defining a colour by tristimulus values  $(X, Y, Z)$  and the corresponding tristimulus values  $(X_n, Y_n, Z_n)$  of a specified white stimulus (D44, page 1, second and sixth paragraphs and page 3; D28, point 3). (...) The  $L^*$ ,  $a^*$  and  $b^*$  coordinates in the CIE  $L^*a^*b^*$  model are mathematical functions of the tristimulus values  $(X, Y, Z)$  and the corresponding tristimulus values  $(X_n, Y_n, Z_n)$  of the white stimulus (D28, sections 1, 3*



and 4)".

19. As far the question of the link between the CIE  $L^*a^*b^*$  colour space (and thus the tristimulus values  $(X, Y, Z)$  and the corresponding tristimulus values  $(X_n, Y_n, Z_n)$  of a specified white stimulus) and the concentration of colouring agent is concerned, the first paragraph of reasons 11.3 of the decision under review actually merely repeats *quasi expressis verbis* point 17 of the board's preliminary opinion, which reads: "*The appellant's argument that there is a steady and predictable change in colour space as one increases the amount of pigment and that the skilled person could readily work other amounts of this pigment and fall within the defined colour space, is only related to the specific colouring agents and amounts used in the examples, once those colouring agents and their amounts have been found by the skilled person. There is, however, no indication, let alone any evidence in that respect, that a similar trend is generally to be expected for all colouring agents*".
20. In addition, the Enlarged Board notices that the last sentence of p. 14, 2nd paragraph, in reasons 11.3 to which the petitioner refers also makes reference to a document which was discussed by the parties in their submissions, since it reads: "*An indication of the variations of  $L^*A^*b^*$  coordinates in the CIE  $L^*A^*b^*$  colour space model as a function of the concentration of colouring agent is also not provided in declaration D45*".
21. The board thus only took the view in the passage of Reasons 11.3 of the decision under review put forward by the petitioner, that the appellant failed in establishing a link between variations of  $L^*a^*b^*$



coordinates (or corresponding tristimulus values) and the concentration in colouring agents, this question appearing as having been dealt with during the appeal proceedings and notably in the preliminary opinion of the board. It then already took the same view on this topic than in the decision under review.

22. During the oral proceedings, the petitioner essentially discussed the merits of the decision under review in its Reasons 11.3 to 15 regarding the issue of the effect of concentration of the colouring agent on the related tristimulus values, and in this context notably repeated that the skilled person would use a spectrophotometer and not its human eye, and therefore would make a link between the tristimulus values and  $L^*, a^*, b^*$  coordinates and the variation of these coordinates as a function of the concentration of colouring agent.
23. The petitioner did not however further argued on the fact that, according to its view, the considered effect of concentration of the colouring agent on the related tristimulus values was not raised during the appeal proceedings, so that it was deprived of addressing this question.
24. The view taken by the board referred to above in Reasons 21 is thus not a fresh ground raised for the first time in the impugned decision on which the appellant could not have taken position. Its right to be heard was in this regard thus not violated according to the Enlarged Board.



*Document D34*

25. Regarding the alleged absence of comment by the board in the decision under review on the appellant's argument relating to experimental data presented by O2 in document 34 in paragraphs (107) to (115) of its reply to the board's preliminary opinion, which according to the petitioner would amount to a violation of its right to be heard, the Enlarged board firstly underlines that according to the established case law of the Boards of Appeal (see CLB, *supra*, V.B.3.4.3 p. 1580), allegedly insufficient reasoning cannot be considered in review proceedings, and (V.B.4.3.10 b)), while the board has an obligation to discuss in a decision issues and arguments to the extent that they are relevant for the decision, it may disregard irrelevant arguments (see R 16/14), and not addressing specific arguments in the decision was not necessarily a fundamental violation of the petitioner's right to be heard (see R 8/16).
26. In the case at hand, the passage of the considered reply which is relevant according to the Enlarged Board reads: *"The sample compositions additionally contain a suitable colouring agent Quinizarin Blue (Disperse Blue 72). (...) We are of the view that O2 considers these compositions [recited in D34] to comprise all of the structural features required by present claims 1 and 2, and we also consider this to be the case. There is absolutely no suggestion that O2 considers the selection of these components to have required an undue burden. As evidenced by Table 2 of D34, each of the sample compositions satisfied the inequalities of claim 1, with CN10-4 additionally satisfying the inequalities of claim 2. Therefore, it is clear that the teaching of the patent in combination with the common general*



*knowledge of the skilled person relating to suitable polymers, colouring agents and additives, is sufficient in order to work the invention."*

27. The key issue in the above passage is that the appellant takes the view that because O2 would not consider that the selection of the components considered in D34 would require undue burden, this document would confirm that the teaching of the patent in combination with the common general knowledge of the skilled person would disclose the invention sufficiently on the whole scope of the independent claims of this patent.
28. This appears however as a subjective interpretation of the appellant, grounded on a mere assumption on an alleged consideration of O2 regarding a document (D34) cited by the latter.
29. Besides, the response of O2 to the appellant's reply to the preliminary opinion of the Board notably reads (see page 3, 2nd paragraph): *"the comments relating to use of a blue colourant do not consider at least that : very many different types of blue colourant can be used which will behave differently; the level of control needed to arrive at the precise colour space claimed; the control of a\*; and the different scope of claim 2 which requires an absolute a\* and b\* rather than a change in a\* and b\* relative to control in claim 1"*. It thus does not appear that O2 would consider that no undue burden would be required in the determination of a composition comprising any blue colouring agent, which would meet the requirements of claim 1 of the patent in suit.



30. On this question of undue burden, already in its preliminary opinion, the board indicated (p. 18, paragraph 21.2) in relation to a document submitted by the appellant in support of sufficiency of disclosure of the patent in suit, that *"Having regard to the use of colouring agents not explicitly taught in the patent in suit, D45 does not contain any precise indication as to how the skilled person would generally select pigments and predict or adjust their amount in order to generally obtain the colour space defined in claims 1 and 2. The vague technical indications in points 15 to 18 of D45 are not considered by the Board as to provide a concept fit to practice, i.e. which does not rely on an undue amount of experimentation in order to generally find colouring agents other than those specifically tested in the patent in suit. In particular, they do not provide for other colouring agents any indication of the variation of  $a^*$  and  $b^*$  values as a function of the amount of colouring agent. Moreover, they do not take into account all the variables of the compositions whose colour is targeted, including the nature of the thermoplastic copolymers and the additives contained therein."*
31. The question of undue burden thus appears having been discussed in depth during the appeal proceedings, but the board was not convinced by the appellant's arguments and therefore concluded in Reasons 12 (2nd paragraph) of the decision under review that *"In the absence of an indication of suitable common general knowledge which would allow the skilled person to fill the gap between the teaching of the patent in suit and that which would be needed to provide a method over the whole scope for which protection is sought, the skilled person is left for a large part of those methods using colouring agents other than those successfully*



*identified in the patent in suit to develop such missing methodology or to find out by trial and error which methods from the innumerable methods corresponding to the broad structural teaching of the patent in suit meet the desiderata set out in claim 1. This amounts in both situations to an undue burden for the skilled person."*

32. In this context, it cannot be concluded that a subjective interpretation of the appellant grounded on a mere assumption on an alleged consideration of O2 regarding a document (D34) cited by the latter would be a decisive argument on which the Board should have specifically taken position in the decision under review.
33. During the oral proceedings, the petitioner referred to section V.B.4.3.10.a) of the CLB to conclude that the interpretation by the appellant of document D34 should actually have been considered by the board in its written decision.
34. However, as set out above under Reasons 29, O2 responded to the appellant's reply to the preliminary opinion of the Board and denied that it would consider that no undue burden would be required in the determination of a composition comprising any blue colouring agent meeting the requirements of claim 1 of the patent in suit. Though, the appellant did not challenge this response so that in such circumstances, the board had not to explicitly take position on appellant's argument related to experimental data presented by O2 in document D34.



35. Therefore, not doing so would not amount to a violation of the petitioner's right to be heard according to the Enlarged Board.

*Conclusion*

36. What the petitioner primarily complains 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 CLB, V.B.3.1 and V.B.3.4.3, and the decisions cited there, e.g. R 19/11, Reasons 2.2).
37. 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. 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.

38. Therefore, the petition for review is clearly unallowable under Rule 109(2)(a) EPC.

## **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

I. Beckedorf

Decision electronically authenticated