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**Datasheet for the decision
of 17 July 2025**

Case Number: R 0002/24

Appeal Number: T 0100/22 - 3.2.04

Application Number: 17708571.9

Publication Number: 3264956

IPC: A47J43/07, A47J43/046

Language of the proceedings: EN

Title of invention:
A BOWL ASSEMBLY

Patent Proprietor:
Kenwood Limited

Opponent:
SEB S.A.

Headword:

Relevant legal provisions:

EPC Art. 112a(2), 112a(2)(c), 113(1)
EPC R. 104, 106, 108(1), 109(2)(a), 107(1), 107(2)
RPEBA Art. 13, 14(2), 14(4)

Keyword:

Petition for review - clearly inadmissible - clearly
unallowable - obligation to raise objection - fundamental
violation of Article 113 EPC (no)

Decisions cited:

R 0010/09, R 0015/10, R 0007/12, R 0024/22, T 0732/21

Catchword:



Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours

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Case Number: R 0002/24

D E C I S I O N
of the Enlarged Board of Appeal
of 17 July 2025

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Decision under review: **Decision of the Technical Board of Appeal 3.2.04
of the European Patent Office of 29 September
2023.**

Composition of the Board:

Chairman C. Josefsson
Members: Y. Podbielski
Martin Müller

Summary of Facts and Submissions

- I. The petition for review ("the petition") filed by the appellant-patent proprietor ("the Petitioner") concerns the appeal proceedings in case T 100/22 before the technical Board of Appeal 3.2.04 ("the Board"). The Board revoked the patent in its decision dated 29 September 2023 ("the Decision"). The Board decided that the subject-matter of claim 1 of the main request lacked novelty in view of D3, that the subject-matter of claim 1 of the first auxiliary request lacked an inventive step starting from D3 in combination with D4, and that auxiliary request 2 was not admitted into the proceedings.
- II. The petition is based on the ground that fundamental violations of Article 113(1) EPC - the Petitioner's right to be heard - had occurred, and thus on Article 112a(2)(c) EPC. The Petitioner alleges five distinct fundamental violations of Article 113(1) EPC:
- (a) in the Decision the Board failed to consider the Petitioner's argument that the opponent had failed to substantiate the date of availability to the public of prior art documents. This concerned document D4 and was thus critical to the outcome of the Board's assessment of auxiliary request 1 ("the first objection");
 - (b) the decision regarding the availability of D4 to the public was based on a point made by the Board for the first time in the Decision. The Petitioner had thus not had an opportunity to comment thereon ("the second objection");

- (c) the decision on novelty of the main request was based on points relating to the subject-matter of the Thermomix TM31 forming part of the teachings of D3, which were made by the Board for the first time in the Decision. The Petitioner had thus not had an opportunity to comment thereon ("the third objection");
- (d) the decision on obviousness of auxiliary request 1 was based on points relating to the sealing ring of D3 appearing for the first time in the Decision. The Petitioner had thus not had an opportunity to comment thereon ("the fourth objection");
- (e) the Board applied its discretion under Article 13 RPBA incorrectly. The Petitioner argues that this only became apparent on receipt of the Decision in which the reasoning of the Board was explained ("the fifth objection").

- III. In its petition the Petitioner requested that
 - the Decision be set aside and the proceedings before the Board be re-opened,
 - the fee for the petition be refunded, and
 - oral proceedings take place in case the Enlarged Board of Appeal was not minded to grant the above requests.
- IV. The Enlarged Board of Appeal ("the Enlarged Board") summoned the Petitioner to oral proceedings.
- V. In a communication dated 10 April 2025 and sent pursuant to Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal ("RPEBA"), the Enlarged Board, in its composition according to

Rule 109(2)(a) EPC, set out its provisional opinion.
According to that opinion, the petition

- was clearly inadmissible, in so far as it was based on the first objection, and
- was clearly unallowable, in so far as it was based on any of the second to fifth objections.

VI. No substantive response to the communication was received. In its letter dated 30 June 2025 the Petitioner declared that they would not be attending the oral proceedings scheduled for 1 July 2025. The oral proceedings were cancelled.

Reasons for the Decision

Decision in the written procedure

1. By declaring that they would not be attending the oral proceedings, the Petitioner is relying on their written submissions only (Article 14(4) RPEBA). The request for oral proceedings has become moot. This decision is thus issued in the written procedure.
2. The Petitioner has not made any further substantive submissions after the issue of the communication, and the Enlarged Board sees no reason to depart from its provisional opinion. The Reasons for this decision are based on that opinion.

Admissibility of the petition

3. The petition for review was filed within the prescribed time-limit and complies with the requirements of Article 112a(1) and (2) EPC and of Rule 107(1) and (2) EPC. No objection was raised under Rule 106 EPC.

4. Pursuant to Rule 106 EPC a petition for review under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.
5. Whether the requirements of Rule 106 EPC are fulfilled is to be judged with regard to each individual procedural defect alleged (Case Law of the Boards of Appeal of the European Patent Office, 10th edition ("CLB"), V.B.3.6.2c)).
6. The first objection is that Board did not consider the Petitioner's argument that the opponent had failed to substantiate the date of availability to the public of prior art documents. The Petitioner's argument was first presented in their written submissions dated 5 September 2023 (paragraphs 2.1 to 2.8) in reply to the Board's communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal ("RPBA").
7. Noting that the Board had suggested in its communication that auxiliary requests 2-11 should not be admitted into the appeal proceedings for lack of substantiation, the Petitioner argued that the opponent had failed to substantiate why D4 and D7, both not patent literature, should be considered as prior art documents. There was nothing on file in the appeal proceedings which suggested that these documents had ever been available to the public. As a consequence, the inventive step attack based on the combination of D3 with D4 should not be admitted, if the Board were to apply the same logic as for the non-admittance of auxiliary requests 2-11.

8. In the petition, the Petitioner draws a clear distinction between what they refer to as the "substantiation argument" which was not addressed in the Decision, and the issue of whether D4 was available to the public, which was addressed in the Decision. This is also evident from the distinction made between the first and second objections. The substantiation argument was a procedural one, leading to the question of whether the inventive step objection based in part on D4 should be admitted (petition, paragraphs 16, 21 and 27-29).
9. The substantiation argument was raised during the oral proceedings before the Board when it was discussed whether the subject-matter of claim 1 of auxiliary request 1 involved an inventive step when starting from D3 as the closest prior art. According to the uncontested parts of the minutes the Petitioner raised an argument that D4 was not proven prior art and the Chair pointed out that this was introduced very late (page 2 of the minutes, 5th full paragraph and the Petitioner's letter dated 31 October 2023). This issue was not further discussed and the discussion continued with other points related to the inventive step objection (petition, paragraph 13). After deliberation by the Board the Chairman announced the conclusion of the Board that the subject-matter of claim 1 of auxiliary request 1 lacked an inventive step in light of documents D3 and D4 (page 2 of the minutes, 6th full paragraph).
10. The Petitioner argues that they were unable to raise an objection under Rule 106 EPC before learning in the Board's communication in reply to the request for

correction of the minutes that the substantiation argument had not been taken into account.

11. The Enlarged Board does not share this view. The substantiation argument was used by the Petitioner to argue that the inventive step objection based on the combination of documents D3 and D4 should not be admitted into the appeal proceedings. The Board gave no decision or opinion on the admittance of that inventive step objection during the oral proceedings. Neither was there any discussion of, nor decision on, the admittance of the substantiation argument itself. Instead, the discussion on inventive step in substance continued, (see page 2 of the Board's communication dated 14 November 2023, petition, paragraph 13). As this discussion also concerned the combination of D3 with D4 (page 2 of the minutes), this necessarily presupposed that D4 was prior art. It was thus evident from the course of the oral proceedings that the substantiation argument was not considered by the Board. It is immaterial in this regard whether that argument had been withdrawn or not.
12. The Petitioner had numerous opportunities to raise an objection under Rule 106 EPC during the oral proceedings before the Board. The first one was after the Chairman had noted that the Petitioner's argument was very late and the discussion moved on to other issues concerning inventive step. The second was after the announcement of the Board's conclusion on inventive step. The third was when the Chair asked, prior to closing the debate, whether any party had any further comments or requests. As the Petitioner could have raised an objection under Rule 106 EPC during the oral proceedings but failed to do so, the petition for review, in so far as it is based on the first

objection, is clearly inadmissible (Rule 109(2)(a) EPC in combination with Rules 106 and 108(1) EPC).

13. With regard to the second to fifth objections the Enlarged Board considers that the petition, in so far as it is based on these, is admissible or at least not clearly inadmissible.

Allowability of the petition

No opportunity to comment on a point made in the decision for the first time regarding the availability of D4 to the public (second objection)

14. The second objection is that the Decision contains a new point about the public availability of D4, which had not previously been mentioned in the proceedings and on which the Petitioner had thus had no opportunity to comment. In the Decision the Board stated with regard to D4 that it can be inferred from the version number (20120816/230) on page 9 of D4, that it was available to the public well before the priority date of the patent (25 February 2016) (Reasons 4.6).
15. Pursuant to Article 113(1) EPC decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. "Grounds or evidence" are the essential legal and factual reasoning on which a decision is based (CLB III.B.2.3.2). Whilst a board is not required to provide the parties in advance with all foreseeable arguments in favour or against a request, a party may not be taken by surprise by the reasons of a decision referring to unknown grounds or evidence (CLB V.B.4.3.5 and 4.3.8a)).

Whether a party is taken by surprise is to be judged on an objective basis.

16. The specific reference to the version number of D4 had not been made in the written proceedings and there is no evidence that it had been mentioned in the course of the oral proceedings. However, the Enlarged Board does not consider that the Petitioner's right to be heard was violated for the reasons set out below.
17. In the written proceedings the Petitioner did not use the argument that D4 had not been publicly available before the priority date of the patent as part of its reasoning on inventive step. None of the Petitioner's written submissions prior to the Board's communication mention the public availability of D4. When it was mentioned for the first and only time in the written proceedings this was done as part of the procedural request for non-admittance of the inventive step objection in the submissions dated 5 September 2023.
18. With regard to the oral proceedings, the Petitioner has clearly assigned the mention of the lack of public availability of D4 to the substantiation argument, which the Petitioner described as a procedural one. The debate on inventive step during the oral proceedings on inventive step thus also did not cover the public availability of D4.
19. It is apparent from the file history that the discussion on inventive step focused on the technical teachings of D3 and D4, whether the skilled person would have combined these documents, and whether, had they done so, this would have led to the claimed invention. The Board dealt with these arguments in the Decision. The Board's reasoning on these points,

without the issue of the public availability of D4, is the "essential legal and factual reasoning" of the Decision.

20. The Enlarged Board does not consider the reference to the version number of D4 as surprising. In its submissions dated 5 September 2023 the Petitioner stated that there was "no publication date (or similar) anywhere in D4" (paragraph 2.4). The Board's reference to the version number in its Decision is a direct response thereto. In this context the Enlarged Board notes that D4 is a short document, and the version number is in plain view to the reader, especially when looking for a publication date. Therefore, the Board's reference to the version number was clearly based on a fact, on which the Petitioner had an opportunity to comment, and was accordingly objectively foreseeable.

21. In view of the above, the petition for review, in so far as it is based on the second objection, is clearly unallowable.

No opportunity to comment on a point made in the decision for the first time regarding the subject-matter of the Thermomix TM31 forming part of the teachings of D3 (third objection)

22. The Petitioner argues that part of the Board's essential reasoning on the novelty of the subject-matter of claim 1 of the main request in view of D3 was mentioned for the first time in the Decision. The Petitioner did thus not have an opportunity to comment thereon.

23. One of the Petitioner's central arguments concerning novelty of the subject-matter of claim 1 of the main request in view of D3 was that there was an inherent

contradiction in D3 that meant that there was no unambiguous disclosure of the relevant features of claim 1. According to the Petitioner this contradiction was well explained by the Board in the Decision (Reasons 3.2) as follows (emphasis added by the Enlarged Board):

"In particular, it [the Petitioner] argued that the skilled person is familiar with the *Thermomix TM31* from the company *Vorwerk* which they know to have a bowl aperture of hexagonal shape. Therefore, D3's references to a blanking plug *for a TM31 apparatus*....are contradicted by D3's disclosure in the same paragraphs that the TM31's mixing bowl has a *circular* aperture...which D3's blanking plug precisely fits...to seal the aperture, which can but imply a cylindrical plug. Moreover, the contradiction is compounded by D3's explicit disclosure...that the blanking plug is cylindrical."

24. The Board answered this argument in points 3.3-3.10 of the reasons for the Decision. Firstly, the Board observed that the skilled person had no need to speculate about or investigate what aperture shape the mention of the name Thermomix TM31 might imply because paragraph 2 of D3 told them explicitly that the TM31 had a circular aperture, the precisely fitting plug was cylindrical and the figures confirmed this idea. D3 thus directly and unambiguously disclosed an embodiment of a mixing bowl having a circular aperture and a cylindrical plug to fit the aperture (Reasons 3.4). Secondly, there was no contradiction or ambiguity to be found in the claim of D3 (Reasons 3.5). Thirdly, the skilled person's reading of D3 was also not contradictory when taking their common general

knowledge into account (Reasons 3.7). The Petitioner objects to the last line of reasoning as being new and surprising.

25. According to the Petitioner the entirety of points 3.7. and 3.7.1 appeared for the first time in the Decision. They read as follows:

"3.7 The only remaining question, would be whether the skilled person's reading of D3 is contradictory when taking their common general knowledge into account. In the Board's view it is not."

"3.7.1 Such a contradiction would be predicated on the skilled person having in mind a non-circular shaped aperture on reading D3's references to TM31. In this regard, the Board notes that these references are purely to the name *TM31* and not to a particular document (such as D4). In accordance with established jurisprudence, common general knowledge is to be found in basic textbooks and the like. In the Board's view, knowledge of the shape of the aperture in a bowl of an apparatus traded under the name TM31 would not fall under this category. This is all the more true since *TM31* may refer to different versions of a product having different technical specifications, as indeed has been pointed out by the appellant-proprietor (see its letter of 21 July 2022, point 7.21)."

26. The Enlarged Board notes that the Petitioner's argument that D3 was contradictory rested on the assumption that the skilled person was familiar with the Thermomix TM31 and knew it to have a bowl aperture of hexagonal shape. The Petitioner repeatedly referred to D4, a user guide for a Thermomix TM31, which showed that it had a

noncircular, near-hexagonal hole (submissions of 15 March 2022, paragraph 2.5, and of 5 September 2023, paragraph 5.7). The Petitioner did not further specify why the skilled person would, when reading D3, be bound to think of the non-circular, near-hexagonal hole as disclosed in D4, apart from suggesting that D3 relates overtly to an attachment for a particular known appliance, namely the Thermomix TM31 of which D4 is a user manual (submissions of 5 September 2023, paragraph 5.18.b.v.). In the Enlarged Board's view this argument inherently also contains the assumption that the skilled person, when reading a reference to "TM31", would, based on their common general knowledge, imagine a device with all the properties disclosed in D4. The Petitioner is thus incorrect when suggesting that there was no argument on file as to whether "TM31" (and thus part of the content of D4) constituted part of the common general knowledge. The Petitioner may not have presented the argument as such explicitly, but it was nevertheless inherent in its submissions.

27. The facts cited in the Board's reasoning in point 3.7.1 in response thereto can thus not be considered as surprising. The reasoning is based on D3 - a document central in the proceedings - and on observations in this regard which are entirely plain and evident, such as the fact that TM31 happens to be a name and that D3 does not refer to any particular document, especially not to D4. Equally, the reference to the fact that TM31 may refer to different versions of a product was also part of the proceedings, notwithstanding that this reference was made in a different context, as correctly noted by the Petitioner. Also the Board's statement that common general knowledge is found in basic textbooks and the like is indeed established case law. Thus, none of the reasons given by the Board are based

on facts or evidence on which the Petitioner did not have an opportunity to comment. The reasons can therefore not be considered surprising.

28. In this context it must be borne in mind that a board is not required to provide the parties in advance with all foreseeable arguments in favour or against it (see point 15 above). There is no denial of the right to be heard when the Board, after hearing the parties, subsequently reaches its own conclusion which it then records in the written decision (see e.g. R 7/12, Reasons 13, R 15/10, Reasons 9).
29. In view of the above, the Decision of the Board is not based on facts and evidence on which the Petitioner did not have an opportunity to comment. The petition for review, in so far as it is based on the third objection, is clearly unallowable.

No opportunity to comment on a point made in the decision for the first time regarding the sealing ring of D3 (fourth objection)

30. The Petitioner argues that part of the Board's essential reasoning on the lack of an inventive step of the subject-matter of claim 1 of auxiliary request 1 was mentioned for the first time in the Decision. The Petitioner did thus not have an opportunity to comment thereon.
31. The inventive step objection in question is the combination of D3 and D4. As part of the argument on obviousness the Petitioner had argued that the skilled person would not have adapted the plug of D3, with its circular sealing ring, in light of D4, to arrive at the invention, because this would not only have involved

making the plug non-circular, near-hexagonal, as to its relevant cross-section, but also to provide a sealing ring with the same non-circular, near-hexagonal shape, while retaining the ability of that sealing ring to perform the sealing function set out in D3.

32. The Petitioner argues that the following parts of the Decision, which concern the sealing ring, are new and surprising:

"4.7.2 It is implicit that D3's sealing ring is already elastic, heat resistant, food-safe and under an appropriate tension for it to stay on D3's cylindrical plug and provide an appropriate counter-force...."

"4.7.3 Thus the only question is whether the skilled person would be able to adapt D3's circular sealing ring to a hexagonal shape. In the Board's view, such an elastic sealing ring would automatically conform to the shape of such a hexagonal plug without any or with only minimal modifications requiring no more than the skilled person's routine skills, such as choosing a ring diameter suitable for keeping the ring under sufficient tension on the plug. Nor is the Board convinced that it would be problematic for an elastic circular sealing ring to fit snugly around the corners of the hexagonally shaped plug and to withstand the stresses induced by conformity to such a shape, with its flat surfaces interspersed by corners. This is because, as can best be seen in D4, page 14, figure 2, D4's hexagonally shaped tool-mount has *smooth rounded* corners, so it is without the abrupt changes in shape that the

appellant-proprietor envisages might cause problematic stresses and misalignments."

33. With regard to the reasoning in point 4.7.3 of the Decision the Petitioner emphasised in particular that the following points had been made for the first time in the Decision: (i) the issue of the person's routine skills and the specific example of choosing a suitable ring diameter; (ii) that the Board was not convinced that it would be problematic for an elastic circular sealing ring to fit snugly around the corners of the hexagonally shaped plug and to withstand the stresses induced by conforming to such a shape; and (iii) the reference to D4, page 14, figure 2 as showing "smooth rounded corners" of the tool-mount.
34. As set out above with regard to the second and third objections, whilst a board is not required to provide the parties in advance with all foreseeable arguments in favour or against a request, a party may not be taken by surprise by the reasons of a decision referring to unknown grounds or evidence. Provided the party is not taken by surprise, there is no denial of the right to be heard when the Board, after hearing the parties, subsequently reaches its own conclusion. The Enlarged Board thus needs to consider the file history to establish whether the Petitioner was taken by surprise by the Board's reasoning in points 4.7.2 and 4.7.3 of the Decision or whether that reasoning was objectively foreseeable.
35. As regards point 4.7.2, first sentence, of the Reasons for the Decision, the Enlarged Board notes that this characterisation of the sealing ring follows directly from its function as set out in the preceding paragraph of the Decision, namely to hold the plug, when the

apparatus is in the cleaning mode, perfectly in the aperture by providing a counter-force that squeezes the plug's sealing collar against the upper rim of the aperture (Reasons 4.7.1).

36. The Petitioner itself had observed in its submissions dated 5 September 2023 that when the plug of D3 was pushed in, the sealing ring compresses and then nestles against the underside of the bowl to provide a counterforce that holds the plug securely in place and allows the sealing surface on the collar to seal around the aperture, without using any additional locking mechanism (paragraph 10.22). The elasticity of the sealing ring was addressed in the opponent's submissions of 21 July 2022 (paragraph bringing pages 2 and 3, cited below). In view thereof, the Enlarged Board does not consider the characterisation of the sealing ring in the first sentence of point 4.7.2 of the Reasons for the Decision as surprising.
37. Point 4.7.3 of the Decision addresses the issue of whether the skilled person would be able to adapt D3's circular sealing ring to a hexagonal shape. The issue of whether the sealing ring (also referred to as the "annular seal") in D3 was compatible with the non-circular, near hexagonal shape of the aperture of D4 was considered in the decision of the opposition division (point 2.6.3 of the decision of the opposition division) and also featured prominently during the appeal proceedings (see submissions of the Petitioner dated 21 July 2022, paragraph 7.14; dated 19 December 2022, page 3, paragraphs 2 and 3; dated 5 September, paragraphs 10.18-10.31; see submissions of the opponent dated 21 July 2022, p. 2 to 3). As acknowledged by the Petitioner the question whether the sealing ring of D3 would not work with a hexagonal plug was also discussed

during the oral proceedings before the Board (petition, paragraph 86).

38. The specific issue of whether the skilled person would be able to adapt D3's circular sealing ring to a hexagonal shape (as addressed in point 4.7.3 of the Decision) featured in the written proceedings. In its submissions dated 21 July 2022 the opponent argued as follows (paragraph bridging pages 2 and 3):

"Si une adaption avait été nécessaire pour optimiser le fonctionnement recherché, il ne fait aucun doute que l'homme du métier aurait sans difficulté adapté le bouchon d'obturation, en particulier le joint annulaire, à l'aide de ses connaissances générales. L'homme du métier aurait par exemple pu adapter la taille et l'élasticité de ce joint annulaire en fonction de l'ouverture du bol, en particulier pour coopérer avec une ouverture non-circulaire sensiblement hexagonale."

"If an adaptation had been necessary to optimise the desired function, there is no doubt that the person skilled in the art would have had no difficulty in adapting the plug seal, in particular the sealing ring, using their general knowledge. The person skilled in the art would, for example, have been able to adapt the size and elasticity of this sealing ring to suit the bowl opening, in particular to cooperate with a substantially hexagonal non-circular opening." (translation and underlining added by the Enlarged Board).

39. The Petitioner, in its submissions dated 19 December 2022, acknowledged the opponent's argument that the skilled person would have been able to make the

adjustment necessary to make the plug, and in particular the annual seal, work with a non-circular aperture based on their common general knowledge (page 3, 2nd paragraph). The Petitioner replied that this would be impossible.

40. From the above it appears that the argument that the skilled person, using their common general knowledge, could adapt the size and elasticity of the sealing ring to fit a near hexagonal shape of an aperture was on file during the appeal proceedings. Thus, the Board's reference to the person's routine skills and the specific example of choosing a suitable ring diameter for keeping the ring under sufficient tension on the plug (point 4.7.3, 2nd sentence of the Reasons) cannot be considered surprising. The Board in essence followed the argument of the opponent.
41. The last two sentences of point 4.7.3 of the Decision address an argument of the Petitioner, namely that the abrupt changes in shape (the hexagonal shape) might cause problematic stresses and misalignments.
42. In its submissions dated 5 September 2023 (paragraph 10.29) the Petitioner countered the argument that the skilled person would have employed a circular sealing ring when modifying D3 to adopt the non-circular, nearly hexagonal shape of D4. The circular sealing ring disclosed in D3 would not have worked at all with a non-circular, nearly hexagonal plug and aperture. It was the wrong shape to correspond with the plug and aperture. This was especially so, given the need to fulfil all of the following requirements: (i) to fit through the aperture, (ii) to nestle against the underside of the bowl to provide a counterforce that holds the plug securely in place and provide sealing

around the aperture, and (iii) to achieve all this without distorting and wearing, especially since there would be regions around the sealing ring that would have little contact with the bowl or that would not touch the bowl at all, while there were other regions that had significant compressive contact with the bowl.

43. The Petitioner has not disputed, and it is also apparent from the above that the question of the contact between the sealing ring and the edges of an aperture was discussed. It was also not disputed that mention was made of the "rounded hexagonal shape" of the aperture and tool mount of D4 (e.g. point 9.4 of the Board's preliminary opinion, which concerns Figure 2 on page 14 of D4). However, the Petitioner emphasises that the shape of the aperture and tool mount of D4 was at no point linked to the technical problem and associated prejudice away from adopting a solution involving D4. Furthermore, the "rounded hexagon shape" had never been equated to a shape having "smooth rounded corners."
44. The Enlarged Board is not convinced by the Petitioner's argument. The central finding of the Board on the question whether the skilled person would be able to adapt D3's circular sealing ring to a hexagonal shape is given in the second sentence of point 4.7.3 of the Decision, namely that such an elastic sealing ring would automatically conform to the shape of such a hexagonal plug without any or with only minimal modifications requiring no more than the skilled person's routine skills, such as choosing the correct ring diameter (see also point 40 above).
45. The further two sentences of point 4.7.3 of the Decision simply illustrate in some detail what this may

look like (snug fit), thereby also answering to the issue of the alleged stresses and misalignments as argued by the Petitioner. Whilst not every detail in this illustration might have formed part of the discussion, there is no doubt that the evidence on which it is also based, namely figure 2 on page 14 of D4, was repeatedly referred to in the proceedings and that it is a fairly limited figure with limited ways of interpreting it. The Enlarged Board would like to repeat in this context that there is no denial of the right to be heard when the Board, after hearing the parties, subsequently reaches its own conclusion which it then records in the written decision.

46. In view of the above, the Enlarged Board concludes that the Decision of the Board is not based on facts and evidence on which the Petitioner did not have an opportunity to comment. The petition for review, in so far as it is based on the fourth objection, is clearly unallowable.

Incorrect exercise of the Board's discretion (fifth objection)

47. The Petitioner submits that the Board had used its discretion incorrectly when not admitting auxiliary request 2 at least for two reasons. The first was that the Board took no account of the case law, in particular T 732/21 as argued by the Petitioner, when stating that the late filing of an auxiliary request itself did not create exceptional circumstances justifying its admittance. Secondly, in its ruling that no exceptional circumstances existed, the Board overlooked that the newly filed second auxiliary request was a simplification of all previous auxiliary requests rather than a wholly new request.

48. What the Petitioner is seeking is a review of the way in which the Board exercised its discretion not to admit the auxiliary request. However, this generally does not lie within the jurisdiction of the Enlarged Board.
- 48.1 The competence of the Enlarged Board is limited by the grounds for a petition for review set out in Article 112a(2) EPC in conjunction with Rule 104 EPC. These grounds are exhaustive and cover fundamental procedural defects and a criminal act having had an impact on the decision. Their purpose is to ensure that intolerable deficiencies in individual appeal proceedings can be remedied. This has to be contrasted to the review of the merits of a decision by a Board of Appeal, which falls outside the jurisdiction of the Enlarged Board.
- 48.2 Not being competent to decide on the merits of a case necessarily implies that the Enlarged Board is not competent to review a board's exercise of discretion unless it involves a fundamental violation of the right to be heard (see CLB V.B.3.4.3; R 10/09, Reasons 2.2; and more recently R 24/22, Reasons 11).
- 48.3 The Petitioner invoked Article 112(2)(c) EPC and thus a fundamental violation of Article 113 EPC. Yet the issue of whether auxiliary request 2 should be admitted into the proceedings was discussed during the oral proceedings, as is apparent from the minutes. This has not been contested by the Petitioner. The Petitioner's arguments have little to do with a violation of the right to be heard. Instead, with the suggestion that the Board did not take account of case law and inadequately assessed the content of auxiliary request 2 against the previous set of auxiliary requests, the Petitioner is questioning the way in

which the procedural provision of Article 13(2) RPBA was applied by the Board. This, however, cannot be a ground for a petition for review, for the reasons set out above.

49. It follows that the petition for review, in so far as it is based on the fifth objection, is clearly unallowable.

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