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**Datasheet for the decision
of 29 August 2025**

Case Number: R 0004/24

Appeal Number: T 0116/18 - 3.3.02

Application Number: 12002626.5

Publication Number: 2484209

IPC: A01N43/56, A01N51/00

Language of the proceedings: EN

Title of invention:
Insecticide compositions

Patent Proprietor:
Sumitomo Chemical Company, Limited

Opponent:
SYNGENTA LIMITED

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(2)(c), 112a(4), 113(1)
EPC R. 106
EPC 1973 R. 107(2)
RPEBA Art. 12(1)

Keyword:

Petition for review - clearly inadmissible or unallowable

Decisions cited:

G 0002/21, R 0001/08, R 0012/09, R 0019/11, R 0015/12,
R 0008/13, R 0008/17, T 0536/07, T 1677/11, T 0184/16



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Case Number: R 0004/24

D E C I S I O N
of the Enlarged Board of Appeal
of 29 August 2025

Petitioner:

(Opponent)

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Decision under review:

**Decision of the Technical Board of Appeal 3.3.02
of the European Patent Office of 28 July 2023.**

Composition of the Board:

Chairman

I. Beckedorf

Members:

D. Rogers

K. Bengi-Akyurek

Summary of Facts and Submissions

I. This case concerns a petition for review against the decision T 116/18 of Board 3.3.02 ("the Board") of 27 November 2023 ("the Decision"). The Petitioner was the opponent-appellant in said case.

Referral to the Enlarged Board of Appeal - G 2/21

II. The proprietor-respondent relied on a technical effect for the assessment of inventive step. The only evidence of this technical effect was found in a document published after the filing date of the underlying patent application. Whether, and under what conditions, this technical effect could be taken into account in the assessment of inventive step was subject to divergent case law. This led the Board to make a referral to the Enlarged Board of Appeal which resulted in decision G 2/21.

III. The Board then sought to apply G 2/21 to the facts of T 116/18. In particular, the Board had to apply Order No. 2 of G 2/21.

IV. The issue of how to interpret Order No. 2 of G 2/21 was the subject of extensive submissions by both parties. The Board specifically drew attention to this issue in its communication in preparation of the oral proceedings in T 116/18. This issue was also discussed in the oral proceedings before the Board.

V. The petition is made under Article 112a(2)(c) EPC, i.e. that a fundamental violation of Article 113(1) EPC (right to be heard) occurred. The Petitioner claims that the Decision was not based on grounds or evidence

on which it had an opportunity to present its comments (Article 113(1) EPC).

- VI. This ground for petition has two bases. The first is that the test the Board applied in Reasons 11.11 of the Decision was not one upon which the Petitioner had had an opportunity to comment.

The Petitioner argues that the Board based the Decision on whether certain conditions according to Order No. 2 of G 2/21 were fulfilled. In doing so, the Board applied a test that the Petitioner had not had the opportunity to comment on. The Petitioner only became aware of the test that the Board had applied when it read Reasons 11.11 of the Decision. The application of this test thus constituted a violation of the Petitioner's right to be heard as it had not been in a position to make submissions on this test.

- VII. The second is that Reasons 11.12, 11.13 and 17.1 of the Decision purport to set out certain of the Petitioner's arguments, whereas the Petitioner considers that its arguments are not correctly represented. A violation of its right to be heard has occurred as the Petitioner did not have an opportunity to address these misunderstandings.

Petitioner's arguments in the oral proceedings before the Enlarged Board

- VIII. In the oral proceedings before the Enlarged Board, the Petitioner argued that the Board did not follow Order No. 2 of G 2/21, and did not provide reasons why the test (the Petitioner considers this to be the old "*ab initio* implausibility test") that the Board did apply fell within this order. As a consequence, the

Petitioner never had the possibility to comment on the issue of whether Order No. 2 of G 2/21 could be interpreted in this way. The Petitioner further argued that the Board's approach to this issue was so contrary to good sense and the plain wording of Order No. 2 of G 2/21 that the Petitioner never considered it necessary to argue against such a position and was objectively surprised by the Board's decision once it had the opportunity to read it.

IX. The Petitioner also argued at the oral proceedings before the Enlarged Board that the Board made two "cognitive" errors in its decision.

- The first of these concerned the Board's finding that a double negation was equivalent to a positive assertion, or the factual application of what is termed the "*ab initio* implausibility approach".
- The second cognitive error (see Reasons 17.4.1 of the Board's decision) involved considering two different compounds as being similar, a conclusion that was based on document D26, a document that the Board did not admit into the proceedings. This was a further violation of the right to be heard.

X. The final point argued by the Petitioner at the oral proceedings before the Enlarged Board concerned the Board's decision not to admit document D25 into the proceedings. The Petitioner withdrew this head of its arguments at the end of the oral proceedings, it will therefore not be further considered in this decision.

XI. During the oral proceedings before the Enlarged Board, the Petitioner submitted a document, i.e. "Notes in Case R004/24", that set out in skeleton form some of

the oral submissions made before the Enlarged Board in the oral proceedings.

Reasons for the Decision

1. The Enlarged Board considers that the Petitioner was not able to raise an objection under Rule 106 EPC during the appeal proceedings as regards the two bases set out in the petition.
2. The issue of how to interpret Order No. 2 of G 2/21 was the subject of extensive submissions by both parties. The Board specifically drew attention to this issue in its communication in preparation of the oral proceedings in T 116/18, see para 4.1 and 4.2 of its communication dated 14 June 2023 which state:

"4.1 According to a first possible interpretation, the answers of G 2/21 could be understood as follows: post-published evidence cannot be disregarded solely on the ground that it was not published before the filing date of the patent and was filed after that date (answer to question 1). However, the effect which this evidence addresses cannot be relied upon in the formulation of a technical problem if it was not plausible/credible or not implausible in view of the application as filed supplemented by the common general knowledge (answers to questions 2 and 3). In other words, it may be argued that the Enlarged Board has endorsed at least the *ab initio* plausibility and *ab initio* implausibility lines of case law by formulating the same criterion for both lines and stating that this criterion would have led to the same result as (im-) plausibility considerations in the respective cases (G 2/21, points 71, 72, 93 and 94 of the reasons). Therefore, a first possible interpretation appears to be that a patent proprietor can rely upon a technical effect and that post-published evidence filed as proof thereof, in the present case D21 (and D23) can be taken into account provided that the effect is credible/plausible/not implausible for the skilled

person having regard to the application as filed and the common general knowledge.

4.2 A second possible interpretation may be that a patent proprietor can rely upon a technical effect and that post-published evidence filed as proof thereof can be taken into account provided that this effect is derivable from the application as filed and (thus) does not change the nature of the claimed invention. This would be the criterion that has been applied in decisions which focused only on whether the effect was disclosed in the application as filed, irrespective of whether the effect was plausible/not implausible/credible at the filing date (T 440/91 (point 4.1 of the Reasons), T 851/11 (point 4.2.2 of the Reasons), T 1422/12 (catchword and point 2.3.2 of the Reasons), T 235/13 (point 2.6 of the Reasons), T 31/18 (point 2.5.2 of the Reasons)). Therefore, under this approach, it would be neither necessary nor relevant to ask whether the effect relied upon was plausible/not implausible/credible to the skilled person at the filing date. Contrary to the above, this approach would mean that the case law on plausibility would no longer be applicable. This would be true for both standards identified by the board (type I and type II) in the referring decision (points 13.4 and 13.5 of T 116/18)."

This issue was also discussed at the oral proceedings before the Board.

3. The Board answered how to interpret Order No. 2 of G 2/21 in Reasons 11.11 of the Decision. The complete text of Reasons 11.11 of the Decision states (emphasis added):

"As regards the second requirement (ii) formulated in order no. 2, namely that the effect must be derivable as being embodied by the same originally disclosed invention, in the board's view, the following question is to be asked: would the skilled person, having the common general knowledge on the filing date in mind, and based on the application as filed, have **legitimate reason to doubt** that the technical teaching at issue, i.e. the purported technical effect together with the claimed subject-matter, is an embodiment of the

originally disclosed invention, i.e. the broadest technical teaching of the application as filed?

In other words again, the question to be asked can also be formulated **as it was by the respondent**: would the skilled person, having the common general knowledge on the filing date in mind, and based on the application as filed, have **legitimate reason to doubt** that the purported technical effect can be achieved with the claimed subject-matter?

Requirement (ii) is met unless the above question is to be answered in the affirmative."

4. It appears to the Enlarged Board that the Board raised the issues set out in Reasons 11.11 of the Decision already in points 4.1 and 4.2 of its communication dated 14 June 2023.
5. The proprietor-respondent's submissions of 14 July 2023, fourth paragraph on page 8/13, specifically confirm the proprietor-respondent's agreement with the Board's position set out in point 4.1 of its communication dated 14 June 2023 and further add the following conclusion (see third paragraph on page 9/13; emphasis added):

"Thus, in the decisions cited by the Enlarged Board of Appeal at reasons 66 to 69 of G 2/21, post-published evidence was disregarded only if the skilled person would have had **legitimate reasons to doubt** that the purported technical effect would have been achieved on the priority date of the patent in suit based on the application as filed or the common general knowledge."
6. The proprietor-respondent further amplified this position in its submissions on 25 July 2023, where on pages 5/7 and 6/7, it discusses cases T 536/07, T 1677/11 and T 184/16.
7. The Board thus formulated and applied a test (i.e. "legitimate reason to doubt") that was apparently not

applied hitherto in the jurisprudence of the Boards of Appeal in the context of assessing inventive step but that had already been proposed by the proprietor-respondent.

8. It is sufficient for a party's right to be heard to be respected if a board's decision is based upon an argument put forward by another party to the proceedings (see e.g. R 12/09 of 15 January 2010, Reasons 11, first sentence: "[...] irgend einem der am Verfahren Beteiligten vorgebracht worden ist [...]").
9. A board must be able to then draw its own conclusion from the discussion of the grounds put forward (see decisions R 8/13 of 15 September 2015, Reasons 2). Thus, the right to be heard does not go so far as to impose a legal obligation on a board to disclose in advance to the parties how and why, on the basis of the decisive issues under discussion, it will come to its conclusion. This is part of the reasoning given in the written decision (R 1/08 of 15 July 2008, Reasons 3; R 15/12 of 11 March 2013, Reasons 5).
10. There is no violation of the right to be heard, if a board, after hearing the parties in inter partes proceedings, subsequently reaches its own conclusions which are then reflected in the written decision (R 19/11 of 2 October 2012, Reasons 2.2, 3rd para, last sentence).
11. The Enlarged Board also notes that, for a party's right to be heard to be respected, it is enough if the Enlarged Board finds that the board's conclusions on a particular issue were not unrelated to the discussions arising in the proceedings on this issue (see R 19/11

of 2 October 2012, Reasons 2.2).

12. In addition, parties are not entitled to advance indications of the reason or reasons for a decision before it is taken (see R 8/17 of 18 June 2018, Reasons 16).
13. At the oral proceedings before the Enlarged Board, the Petitioner expanded upon its submissions concerning the above points. The Petitioner argued that the Board's interpretation of Order No. 2 of G 2/21 was so far beyond what could be expected that the Petitioner could not have been required to argue against such an unlikely interpretation. The Petitioner further argued that the Board's reasoning contained two "cognitive" errors, the first of these being that the Board found that a double negation was equivalent to a positive assertion, that is "[...]the factual application of what is termed the 'implausibility approach' [...]" (see para 18 and 19 of "Notes in Case R004/24").
14. The Enlarged Board considers that these arguments, although made for the first time at the oral proceedings before it, are a mere development of the arguments advanced in the petition, and are to be admitted into the proceedings. These arguments address the correctness of the Decision, rather than whether the right to be heard was respected. The Enlarged Board therefore sees no reason to alter its conclusions set out above in the light of these submissions.

Admissibility of second "cognitive error" argument

15. The Petitioner also identified for the first time in the oral proceedings before the Enlarged Board what it called a second "cognitive error" in the reasoning of

the Board's decision. This is set out in para 30 to 34 of the "Notes in Case R004/24".

16. The Enlarged Board considers that this is a new submission, as it concerns the non-admission of document D25, an issue not raised in the petition. It was filed *after* the time limit for filing a petition under Article 112a(4), second sentence, EPC. The Enlarged Board decides not to exercise its discretion under Article 12(1) RPEBA to admit this submission, as no special reasons exist for doing so.

Representation of Petitioner's arguments in the Decision

17. Turning now to the Petitioner's concerns regarding how its arguments are represented in Reasons 11.12, 11.13 and 17.1 of the Decision, the Enlarged Board considers that this part of the petition is not sufficiently substantiated and does not comply with Rule 107(2) EPC. This is because the petition does not contain any positive case on what the Petitioner's actual arguments on these points were, and it is left to the Enlarged Board to read through the entirety of the Petitioner's submissions before the Board and determine itself if these have been correctly represented in Reasons 11.12, 11.13 and 17.1 of the Decision. In addition, these Reasons of the Decision may set out arguments given at the oral proceedings before the Board, for which no other record exists.
18. Even assuming that the petition has been sufficiently substantiated on these points, the Enlarged Board considers that the above cited Reasons correctly summarise the arguments made by the Petitioner.

19. Reasons 11.12 of the Decision states that the Petitioner argued that it is a necessary precondition for requirement (ii) ["embodied by the same originally disclosed invention"] to be satisfied that the application as filed contains experimental proof that the purported technical effect is actually achieved with the claimed subject-matter at issue.
20. This appears to be the argument put forward at least on page 3, seventh para, and page 4, first para, of the Petitioner's letter dated 14 July 2023.
21. Reasons 11.13 of the Decision states that the Petitioner argued that it is a necessary precondition for requirement (ii) ["embodied by the same originally disclosed invention"] "[...] to be fulfilled that the application as filed contains a positive verbal statement about the purported technical effect". It is noted that the use of the word "verbal" is unfortunate as a patent application does not speak. The Enlarged Board thus reads this statement as if the word "verbal" is removed.
22. This appears to be the argument put forward at least on page 3 of the Petitioner's letter dated 14 July 2023.
23. Thus, Reasons 17.1 states that the requirement (ii) ["embodied by the same originally disclosed invention"] was satisfied "[...] only if the application as filed contained either experimental proof that the purported technical effect was actually achieved with the claimed subject-matter at issue or a comparable positive verbal statement [...]".
24. Reasons 17.1 does not add anything additional to what has already been dealt with in Reasons 11.12 and 11.13

of the Decision.

25. The Enlarged Board considers that in summarising the arguments of the parties a board has a wide discretion on what language it uses. It is also a party's responsibility to ensure that its advocacy is of a sufficient standard that the board can understand its arguments.
26. The same considerations regarding a violation of the right to be heard, (see para 8 to 12 above), thus apply to the second basis of the petition as to the first.
27. In the case at hand, the Enlarged Board cannot establish that a violation of the right to be heard under Article 113(1) EPC occurred as asserted by the Petitioner.

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:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated