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

Case Number: R 0027/24

Appeal Number: T 1664/22 - 3.3.08

Application Number: 17194268.3

Publication Number: 3282021

IPC: C12Q1/68, C12P21/00, C07K14/00,
A61K38/17

Language of the proceedings: EN

Title of invention:
MIRAC PROTEINS

Applicant:
BioAtla, Inc.

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(1), 112a(2)(c), 112a(4), 113(1), 116(1)
EPC R. 106, 107, 109(2)(a), 110
RPEBA Art. 1

Keyword:
Petition for review - clearly unallowable - fundamental
violation of Article 113 EPC (no)

Decisions cited:

R 0001/08, R 0003/10, R 0019/10, R 0023/10, R 0006/11,
R 0008/11, R 0017/11, R 0019/11, R 0013/12, R 0015/12,
R 0019/12, R 0005/13, R 0016/13, R 0002/14, R 0001/15,
R 0008/15, R 0007/16, R 0008/17, J 0007/82, T 0951/92,
T 1423/15, T 0233/18



Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: R 0027/24

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

Petitioner:

(Applicant)

BioAtla, Inc.
11085 Torreyana Road, Suite 100
San Diego, CA 92121 (US)

Representative:

De Vries & Metman
Overschiestraat 180
1062 XK Amsterdam (NL)

Decision under review:

**Decision of the Technical Board of Appeal 3.3.08
of the European Patent Office of 16 May 2024.**

Composition of the Board:

Chair

I. Beckedorf

Members:

B. Burm-Herregodts

M. Alvazzi Delfrate

Summary of Facts and Submissions

- I. The petition for review concerns decision T 1664/22 ("the decision under review") of Technical Board of Appeal 3.3.08 ("the Board") dated 16 May 2024.
- II. The applicant ("the petitioner") filed a petition for review of said decision in due time and form. It was submitted that the Board had violated the petitioner's right to be heard in holding the main request and auxiliary requests to be unallowable for not complying with the requirements of Article 56 EPC.
- III. The appeal was against a decision of the examining division to refuse the European patent application No. 17 194 268.3. The application had been filed as a divisional application of the earlier European patent application No. 10 751 262.6 filed under the Patent Cooperation Treaty and published as WO 2010/104821.

The examining division had found the following.

- The subject-matter of the claims of the main request and of auxiliary requests 1 to 3 lacked clarity (Article 84 EPC).
- The claims of auxiliary requests 4 to 7 lacked an inventive step (Article 56 EPC).

- IV. With its appeal, the applicant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or, alternatively, on the basis of the first to third auxiliary requests.
- V. In a communication pursuant to Article 15(1) RPBA, the Board expressed a provisional opinion on Articles 84

and 56 EPC. The Board was *inter alia* of the following preliminary opinion.

- Claim 1 of the main request lacked an inventive step in view of document D3 alone.
- Claim 1 of the first and second auxiliary requests could not overcome the inventive-step objection.
- Claim 1 of the third auxiliary request included the amendments of both the first and second auxiliary requests.
- The appeal therefore was likely to be dismissed.

The appellant did not submit a written response to this communication.

Oral proceedings with the appellant present were held on 16 May 2024. The appellant was heard on the inventive step of the main request and of all the auxiliary requests, as confirmed in the minutes of the oral proceedings.

The Board decided that the main request and all the auxiliary requests lacked an inventive step and dismissed the appeal. The decision was announced at the end of the oral proceedings. The written decision was notified on 18 September 2024.

VI. The petitioner argues the following.

- The Board did not provide sufficient reasoning why it did not accept the petitioner's argument that the solution to the objective technical problem in the main and auxiliary requests was inventive in view of document D3 alone or in combination with document D1.
- The Board did not provide any reasoning for its conclusion that the main request and the auxiliary requests lacked an inventive step.

Requests

- VII. The petitioner requests in essence that:
- the decision under review be set aside
 - the proceedings regarding European patent application No. 17 194 268.7 be re-opened
 - the fee paid for the petition for review be reimbursed.
- VIII. On page 1 of its petition for review, the petitioner formally requested the re-opening of the proceedings regarding European patent application No. 17 194 268.7. There is only one reference in the petition for review to the patent application ending ".7"; the other references to the patent application at issue mention No. 17 194 268.3. The Enlarged Board assumes that the first reference contains a clerical error and that the petitioner's request relates to the re-opening of the proceedings concerning European patent application No. 17 194 268.3.

Reasons for the Decision

Written proceedings

1. The petitioner did not request oral proceedings, and the Enlarged Board does not consider this to be expedient (Article 116(1) EPC).
2. The Enlarged Board, in its current composition under Rule 109(2) (a) EPC, therefore takes the decision in the written proceedings in consideration of the petitioner's written submissions in reviewing the contested decision of the Board (Article 113(1) EPC).

Admissibility of the petition for review - compliance with Rule 106 EPC

3. The Enlarged Board considers this petition to be a petition under Articles 112a(2)(c) and 113(1) EPC.
4. A petition under Article 112a(2)(c) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board, except when such objection could not be raised during the appeal proceedings (Rule 106 EPC).
5. The petitioner has argued that it is adversely affected by the decision under review and that it only became aware of the lack of reasoning in the Board's written decision after it had been notified of this decision.
6. The Enlarged Board therefore considers the petition not to be clearly inadmissible, taking into account that the alleged violation of the right to be heard raised by the petitioner only became apparent to it after it received the written decision. Therefore, the Enlarged Board is of the opinion, in the petitioner's favour, that an objection under Rule 106 EPC could not have been raised during the appeal proceedings.

Allowability

7. The petitioner has submitted that its right to be heard was violated for the following reasons.

The petitioner argued the following.

- a) The Board did not provide sufficient reasoning why it did not accept the petitioner's arguments that the

main request and second auxiliary request were inventive in view of document D3 alone and that the first and third auxiliary requests were inventive in view of document D3 in combination with document D1.

b) The Board did not provide any reasoning for its conclusion that the main request and the auxiliary requests lacked an inventive step.

c) The petitioner cannot establish that its relevant submissions and arguments were considered and fully taken into account by the Board and is thus unable to understand and reproduce the Board's conclusions.

8. The Enlarged Board concludes that no fundamental violation of Article 113 EPC occurred, and so there was no violation of the right to be heard based on these grounds. It also concludes that the petition for review is clearly unallowable for the following reasons.

9. Under Article 112a(2)(c) EPC, a petition may only be filed on the grounds that a fundamental violation of Article 113 EPC occurred.

Article 113(1) EPC stipulates that the 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, implying that a party may not be taken by surprise by the reasons for the decision when reference to unknown grounds or evidence is made.

The "grounds or evidence" under Article 113(1) EPC are to be understood as the essential legal and factual reasoning on which the decision is based (see also decisions R 8/17, reasons 15; R 16/13, reasons 3.3).

In further case law it has been ruled that "grounds or evidence" under Article 113(1) EPC should not be narrowly interpreted in the sense of a requirement of the EPC but had to be understood as referring to the legal and factual reasons leading to refusal of the application (see decisions T 951/92, headnote I; T 1423/15, reasons 2.1; T 233/18, reasons 1; see also Case Law of the Boards of Appeal of the European Patent Office, 11th edition, July 2025 ("CLB"), III.B.2).

10. The petitioner's arguments a), b) and c) all concern the alleged insufficient reasoning in the decision under review by the Board, namely that the petitioner's submissions on the inventive step of the main request and all the auxiliary requests were left unanswered in the written decision and no reasoning for the Board's conclusion on inventive step was provided.
11. The petitioner has not disputed that it was *heard* during oral proceedings. The minutes of the oral proceedings demonstrate that the issue of inventive step with regard to the main request and all the auxiliary requests was discussed (see minutes, p. 1). If a board of appeal, after having heard the parties, takes a decision with which a party or the parties disagree, there can be no violation of Article 113 EPC (see R 6/11, reasons 6).
12. The petitioner has not denied that documents D3 and D1 had been discussed in the written proceedings and that the Board had set out its preliminary opinion on inventive step in the communication under Article 15(1) RPBA. The petitioner had not responded in writing after receiving this communication.

13. Allegedly insufficient reasoning in a decision cannot be considered in review proceedings unless this involves a fundamental violation of Article 113 EPC (see also CLB, V.B.2.4.2; R 6/11, reasons 6; R 1/08, reasons 2.1; R 19/11; R 5/13; R 1/15, reasons 3.5; R 8/15, reasons 2.2.2; R 7/16, reasons 3.1.1).
14. The Enlarged Board finds that in the decision under review, the Board, after having applied the problem-solution approach, concluded that claim 1 of the main request and auxiliary requests 1 to 3 lacked inventive step.
15. The petitioner agrees that, in the Board's inventive-step assessment for the main request, the Board correctly identified document D3 as the closest prior art, accepted, in the petitioner's favour, the distinguishing features to be two additional selection criteria (iii.a and iii.b, involving a comparison of the activity of the mutant antibodies with the activity of the parent antibody (reasons 3)) and maintained the objective technical problem proposed by the petitioner (reasons 7).

However, the petitioner does not agree with the Board's conclusion that the distinguishing features are obvious screening steps. The petitioner points out that the Board did not present any reasoning, facts or evidence for this conclusion.
16. In the decision under review, the Board did explain why it considered the solution to the objective technical problem to be obvious for the skilled person; see points 9 and 10 of the reasons. In its petition, the petitioner cited point 10 of the reasons of the

decision under review to support its assertion of insufficient reasoning, as follows:

"It is true that, as argued by the appellant, none of the cited prior art suggests a method wherein the activity of the mutant antibody should be compared to the activity of the parent antibody, nor does it provide any reason to compare to the activity of the parent antibody in accordance with selection criteria iii.a and iii.b of claim 1."

Point 10 of the reasons was only cited in part. In the decision under review, this passage continued as follows:

"Nevertheless, the skilled person needs no indication or incentive to use additional selection criteria, e.g. to add further screening steps, such as those of iii.a and iii.b, or any other screening steps related to antibody activity, for which no technical effect has been demonstrated, in order to provide a further or improved method for preparing conditionally active antibodies, by applying standard and more stringent optimization steps."

17. Contrary to the petitioner's assertion, the Board provided sufficient reasoning to show that the petitioner's submissions in this respect had indeed been considered and fully taken into account and why they were found unconvincing. Under Article 112a EPC, the Enlarged Board of Appeal does not have jurisdiction or competence to decide on the merits of the case. The question of whether or not the distinguishing features - steps iii.a and iii.b of claim 1 - can be considered to be an obvious screening step relates to substantive issues in the case and therefore cannot be the subject of this review (see R 6/11, reasons 6, with reference

to R 1/08, reasons 2.1 and the travaux préparatoires cited therein).

18. The petitioner's argument c) concerned the assertion that it was unable to establish that its relevant submissions and arguments had been considered and fully taken into account by the Board and also unable to understand and reproduce the Board's conclusions.
19. The right to be heard under Article 113(1) EPC is an important procedural right intended to ensure that no party is caught unaware, in a decision turning down its request, by grounds and evidence on which that party has not had the opportunity to comment (see R 2/14 of 22 April 2016, reasons 6; see also R 3/10, reasons 2.10; J 7/82, headnote II and reasons 11). This requirement includes the party's right to have the relevant submissions and arguments considered and fully taken into account in the written decision in a manner that enables it to understand, on an objective basis, the reasons for the decision (see R 19/10, reasons 6.2 and 6.3; R 23/10, reasons 2; R 8/11, reasons 1.2.9; R 17/11, reasons 4; R 15/12, reasons 5(b); R 13/12, reasons 2.2; R 19/12 of 12 April 2016, reasons 6.1 and 6.2)
20. As set out above, the Board applied the problem-solution approach to assess the inventive step of the main request and the auxiliary requests, and this was discussed with the petitioner during the oral proceedings.
21. A deciding board must be able to draw its own conclusions from the discussion of the grounds put forward. 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 - or at least those foreseeable as the core of the discussion - it will come to its conclusion. This is part of the reasoning given in the written decision (see R 8/17, reasons 15 and 16; R 1/08, reasons 3.1; R 15/12, reasons 5; R 16/13, reasons 3).

22. The Enlarged Board therefore finds that the Board took all of the petitioner's arguments into account in its written decision. The written decision allows the petitioner to understand, on an objective basis, the reasons for this decision. A violation of the petitioner's right to be heard has not been substantiated.
23. The Enlarged Board therefore concludes that there was no fundamental violation of either Article 113 EPC or Article 112a(2)(c) EPC. The petition is clearly unallowable.

Reimbursement of the fee for the petition for review

24. As the petition under review is clearly unallowable, there is no basis for a reimbursement of the petition fee (Rule 110 EPC).

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated