



Europäisches  
Patentamt

European  
Patent Office

Office européen  
des brevets

Große  
Beschwerdekammer

Enlarged  
Board of Appeal

Grande  
Chambre de recours

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [X] To Chairmen and Members  
(C) [ ] To Chairmen  
(D) [ ] No distribution

**Datasheet for the decision  
of the Enlarged Board of Appeal  
of 29 January 2018**

**Case Number:** R 0004/17  
**Appeal Number:** T 1277/12 - 3.3.03  
**Application Number:** 03739465.7  
**Publication Number:** 1490411  
**IPC:** C08F 2/22  
**Language of the proceedings:** EN

**Title of invention:**

Method for controlling the stability of emulsions and  
stabilized emulsions

**Patent Proprietor:**

RHODIA CHIMIE

**Opponent:**

BASF SE

**Headword:**

Fundamental violation of right to be heard/RHODIA CHIMIE

**Relevant legal provisions:**

EPC Art. 112a(2)(c), 113(1)  
EPC R. 79(1) 100(1), 106, 107, 110, 126(2)

**Keyword:**

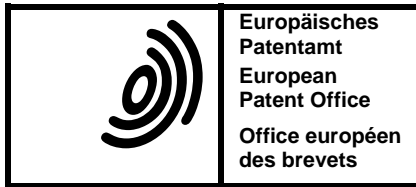
Petition for review - allowable: fundamental violation of  
Article 113(1) EPC (notice of appeal and grounds of appeal  
never notified to respondent/patent proprietor)

**Decisions cited:**

R 0007/09

**Catchword:**

-



**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  
Fax +49 (0) 89 2399-4465

Case Number: R 0004/17

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 29 January 2018**

**Petitioner:**  
(Patent Proprietor-  
Respondent)

RHODIA CHIMIE  
25, quai Alphonse Le Gallo  
92512 Boulogne-Billancourt Cedex (FR)

**Representative:**

RHODIA CHIMIE  
Direction de la Propriété Industrielle  
40 Rue de la Haie Coq  
93306 Aubervilliers (FR)

**Other Party:**  
(Opponent-Appellant)

BASF SE  
Global Intellectual Property  
GVX-C006  
67056 Ludwigshafen (DE)

**Decision under review:**

**Decision T 1277/12 of the Technical Board of  
Appeal 3.3.03 of the European Patent Office  
dated 7 April 2017.**

**Composition of the Board:**

**Chairman:** C. Vallet  
**Members:** D. Rogers  
T. Bokor  
C. Kunzelmann  
R. Moufang

## Summary of Facts and Submissions

- I. The Opposition Division rejected the opposition against the patent in suit and maintained the patent as granted.
- II. The Opponent appealed and requested that the decision of the Opposition Division be set aside and that the patent be revoked. The appeal case was assigned to Board of Appeal 3.3.03 with the case number T 1277/12.
- III. Under cover of a registered letter dated 11 June 2012 the Board of Appeal sent the notice of appeal to the Respondent-Proprietor. Under cover of a registered letter dated 7 August 2012 the statement of the grounds of appeal was sent to the Respondent-Proprietor. The Board of Appeal sent a further letter of the Opponent-Appellant to the Respondent-Proprietor under cover of a registered letter dated 23 August 2012. These three registered letters were all sent without advice of delivery. No reply to any of these letters was filed by the Respondent-Proprietor.
- IV. The Board of Appeal neither issued a communication nor summoned the parties to oral proceedings before it. In the light of the lack of response from the Respondent-Proprietor, the Board of Appeal considered itself to be in a position to issue a decision revoking the patent without the need to hold oral proceedings.
- V. The decision of Board of Appeal 3.3.03 in case T 1277/12 was sent to the parties under cover of a registered letter with advice of delivery dated 12 April 2017. It is this decision that is the subject of the petition for review.

VI. The Respondent-Proprietor, (henceforth the "Petitioner"), filed a petition for review of decision T 1277/12. The basis for this petition is that, in the Petitioner's view, a fundamental violation of its right to be heard had taken place - Article 112a(2)(c) EPC and Article 113(1) EPC.

VII. The Petitioner argued that it had no record of ever having received the letters referred to in point III above and that it had no knowledge of the existence of the appeal until it received the decision in the appeal case (see point V above). As a consequence of this the Petitioner was unable to exercise its right to be heard and it had been obviously impossible for it to raise this objection during the appeal proceedings, Rule 106 EPC. Thus the Petitioner was not given the opportunity to be heard in those proceedings, contrary to Article 113(1) EPC, so that the requirement of Article 112a(2)(c) EPC was met.

The Petitioner further filed hardcopies of two screenshots of its internal data base in order to demonstrate that it had not had any knowledge of the appeal proceedings prior to receiving the Board's decision.

The Petitioner requested that the Enlarged Board of Appeal set aside decision T 1277/12 and re-open proceedings before the Board of Appeal and that the petition fee be refunded in accordance with Rule 110 EPC.

VIII. In a letter dated 25 September 2017 the Other Party, (the Opponent-Appellant before the Board of Appeal) made submissions against the petition for review. The Other Party submitted that it was not plausible, ("unglaublich"), that three non-arriving letters were then followed by a fourth letter that reached its destination, when all letters were sent to the same address. The Other Party further submitted that an internal reorganisation of the Petitioner could be the reason for the apparent non-receipt of the above mentioned letters.

IX. The parties did not respond to the Enlarged Board's communication setting out its preliminary view in this case.

## **Reasons for the Decision**

### *Formal requirements for admissibility*

1. The Petition fulfils the formal requirements for admissibility (time limits, form, Rules 106, 107 EPC, and payment of fees). Hence, the petition is admissible.

### *Allowability of the petition*

2. Rule 126(2) EPC provides that in the event of any dispute about whether a letter from the EPO reached the addressee or on which date, it is incumbent on the EPO to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be. In the present case the Office was not able to

establish by internal investigations that the critical communications reached their destination, as required by the applicable cited Rule.

3. In the absence of any relevant evidence from outside the EPO, the Opponent-Appellant's notice of appeal, statement setting out the grounds of appeal and its letter must be considered not to have been communicated to the Petitioner. Such communication is required by Rule 100(1) in conjunction with Rule 79(1) EPC.
4. Although the notice of appeal, statement setting out the grounds of appeal and letter were available to the public by way of electronic file inspection, parties must be able to rely on the EPO complying with the relevant provisions of the EPC and, at least for the purposes of Article 113(1) EPC, they and their representatives have no duty to monitor the proceedings themselves by regularly inspecting the electronic file. There is also no evidence that the Petitioner learnt of these documents by other means.

In respect of the implausibility of the non-arrival of letters put forward by the Other Party the Enlarged Board considers that it cannot be expected that the Petitioner should prove a negative, that is the non-receipt of a letter, or provide a plausible explanation for non-receipt (*negativa non sunt probanda*). The Other Party also suggested that an internal reorganisation of the Petitioner could have been the cause of the non-receipt of the documents. The Enlarged Board notes that the decision under review was sent to "Rhodia Chimie, Direction de la Propriété Industrielle", that is to the same addressee, and at the same address, as all the

communications issued by the Board of Appeal between 25 October 2011 and 12 April 2017. The EPO's file shows that between 25 October 2011 and 11 April 2012, and on 18 April 2017 the Petitioner received the EPO's communications. It is only in the period 11 June 2012 to 23 August 2012 that mail was apparently not received by the Petitioner. Thus the same entity at the same address has received communications both before and after the period of apparent non-receipt. The Petitioner has not submitted any comment on this argument. From the evidence before the Enlarged Board it does not appear that during the relevant time a reorganisation of the Petitioner took place. However, this argument is of no bearing as long as the EPO is not in a position to establish that the letters reached their destination. The issue would have been different if, as a matter of evidence, the letters were known to have reached their destination in the sense of Rule 126(2) EPC, but were not processed by the addressee due to an internal reorganisation, i.e. under circumstances within the control of the addressee.

5. It follows that in the appeal proceedings under consideration the Petitioner had, within the meaning of Article 113(1) EPC, no opportunity at all to comment on the grounds for the decision under review. This qualifies as a fundamental violation of Article 113(1) EPC pursuant to Article 112a(2)(c) EPC, so that the petition and the request for reimbursement of the fee for the petition (Rule 110 EPC) have to be allowed (see R 7/09, points 4 to 6 of the Reasons).

**Order**

**For these reasons it is decided that:**

1. The decision under review is set aside and the proceedings before Board of Appeal 3.3.03 are re-opened.
2. Reimbursement of the petition for review fee is ordered.

The Registrar:

The Chairperson:

C. Eickhoff

C. Vallet