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**Datasheet for the decision
of 12 November 2018**

Case Number: R 0003/18
Appeal Number: T 0578/14 – 3.3.01
Application Number: 06824382.3
Publication Number: 1945424
IPC: A01N 55/08, B27K 3/36
Language of the proceedings: EN

Title of invention:
WOOD TREATMENT

Applicant:
Harrower, Norma Ellen Lilette

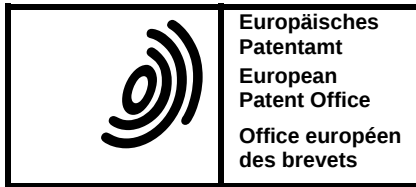
Headword:

Relevant legal provisions:
EPC Art. 112, 112a(2), (4)
EPC R. 107(2), 108(1)

Keyword:
Reliance on, and substantiation of, any fundamental procedural
defect: no
Petition for review clearly inadmissible

Decisions cited:
R 0010/09, R 0010/14, R 0008/15

Catchword:
-



**Große Beschwerdekammer
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Case Number: R 0003/18

D E C I S I O N
of the Enlarged Board of Appeal
of 12 November 2018

Petitioner:
(Applicant)

Harrower, Norma Ellen Lilette
50 Tintagel Chapelhouse Skelmorsdale
Lancashire WN88PF (GB)

Representative:

Peel, James Peter
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Decision under review:

**Decision of the Technical Board of Appeal
3.3.01 of the European Patent Office of
25 April 2017.**

Composition of the Board:

Chairman: C. Josefsson
Members: B. Müller
J. Riolo

Summary of Facts and Submissions

- I. I. With the decision under review, posted on 18 January 2018, Technical Board of Appeal 3.3.1 (hereinafter referred to as "the Board") rejected the request for re-establishment of rights in respect of the (missed) four-month period for filing a statement setting out the grounds of appeal in accordance with Article 108, third sentence, EPC and Rule 99 EPC. The original applicant, Mr Stanimiroff, from New Zealand, had requested an extension of the above period to make it possible for him to find another patent attorney to represent him in the proceedings before the Board. The EPO refused the request, and the original applicant did not file the statement of grounds within the time limit (see decision under review, points IV to VIII).

The application was transferred with effect vis-à-vis the EPO of 19 December 2014 to the now applicant, Ms. Harrower (*ibid.*, at point XVI).

Given that the request for re-establishment of rights was refused, the fact that the statement of grounds had not been filed in due time was not remedied. As a consequence, the Board rejected the appeal as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC. The appeal had been filed against the decision of the examining division, posted on 25 September 2013, refusing European patent application No. 06 824 382.3 on the basis of Article 97(2) EPC.

- II. The complete grounds for the petition submitted are set out verbatim below (emphasis added, formatting in the original omitted):

From document T 0578/14 on page 52 paragraph (c)

"Although the board acknowledged the "estoppel situation""

The EPO became aware of the estoppel situation on 17 January 2014 (the letter makes comment about a previous help ticket), the letter is referenced in document T 0578/14 Reasons for Decision pages 25, 32 and 49.

The EPO then confirms that they are aware of the estoppel situation in a reply dated 21 January 2014, referenced in T 0578/14 Reasons for decision pages 35, 40 (twice), 42 (twice), 43, 46 and 49.

There appears to be under Article 112 no submissions from (a) the board of appeal (b) the president of the EPO, to the Enlarged Board of Appeal regarding the estoppel situation.

From page 23 of T 0578/14 paragraph 3.5:

"According to rule 152(8) EPC a representative is deemed to be authorised until the termination of authorisation has been communicated to the EPO. This legal fiction etc"

From page 42 line 10:

"As set out above, the relevant articles and rules of the EPC make it very clear that the four-month period under Article 108 EPC is non-extendable"

If you choose to replace your representative, which you are legally entitled to do for some unavoidable or unforeseeable reason, there is no possibility within the appeal process to be granted an extension. **This is an estoppel situation.**

From page 42 paragraph 3:

"Mr Stanimiroff was informed by the EPO's email dated 21 January 2014 that the period for filing the statement of grounds of appeal was non-extendable etc"

With Article 133(2) and from page 51 of T 0578/14:

"Although the board acknowledged the "estoppel situation" by highlighting Rule 152(8) EPC, it had sent communication to Mr Stanimiroff's private address"

I petition this organisation to correct this estoppel situation. Making someone aware of the situation lacks an understanding of the definition.

III. With its petition for review pursuant to Article 112a EPC the petitioner requests verbatim:

1. to review the decision of the Technical Board of Appeal dated 25 April 2017 T 0578/14 pursuant to Article 112a EPC;

2. to set the Technical Board of Appeal Decision aside and to order re-opening of the proceedings before the Technical Board of Appeal;
 3. as an auxiliary request, to hold oral proceedings pursuant to Article 116 EPC
- IV. The Enlarged Board of Appeal (EBA) issued a summons to oral proceedings. Annexed to the summons was a communication pursuant to Articles 13 and 14(2) RPEBA setting out the Enlarged Board's preliminary view on the admissibility of the petition. According to that view the present petition was clearly inadmissible for failure to rely on any ground, especially any fundamental procedural defect, within the meaning of Article 112a(2) in conjunction with Rule 104 EPC. It was therefore to be expected that the petition would be rejected under Rule 108(1) and Rule 109(2)(a) EPC.
- V. With a letter of 10 October 2018 the petitioner's representatives filed a document, including an appendix (hereinafter jointly referred to as "the document"), which they were instructed to do by the previous and original applicant. They also informed the EBA that the petitioner did not intend to attend nor would she be represented at the oral proceedings. Further to a request by the EBA for clarification, the representatives declared that the petitioner had approved of the document filed on behalf of the previous and original applicant.
- VI. On 12 November 2018 oral proceedings were held as scheduled in the absence of the petitioner and her

representatives. At the end of the oral proceedings the Chairman announced the decision of the Enlarged Board.

Reasons for the decision

1. Preliminary remarks

1.1 *Oral proceedings held in the absence of the petitioner*

As announced in advance, the duly summoned petitioner did not attend the oral proceedings. Pursuant to Rule 71(2) EPC 1973, the proceedings could continue without the petitioner. In accordance with Article 14(4) RPEBA, the Enlarged Board relied for its decision only on the petitioner's written submissions. The Enlarged Board being in a position to decide the case at the conclusion of the oral proceedings (Article 14(6) and (7) RPEBA), the voluntary absence of the proprietor was not a reason for delaying a decision (Article 14(4) RPBA).

1.2 *Consideration of the document filed on 10 October 2018*

Article 12(1) RPEBOA deals with new submissions filed after expiry of the time limit in proceedings under Article 112a(1) EPC. It reads as follows:
Notwithstanding Rule 109, paragraph 3, EPC the [Enlarged] Board may consider new submissions made by the petitioner after expiry of the time limit for filing petitions for review, if this is justified for special reasons.

In reaction to the Enlarged Board's communication annexed to the summons to oral proceedings a document, including an appendix, was filed. The document was said to "represent the interests of the petition at the oral hearing" (see top of page 3). The aforementioned communication was considered to be "not endorsed legally" and not relevant. Yet the appendix does discuss the communication. The document, including the appendix, elaborates on the grounds of the petition, without adding new grounds, and clarifies the petition to some extent. It does not change the basis of the petition. Against this backdrop, the Enlarged Board chose to consider the document, including the appendix.

2. *Admissibility of the petition*

2.1 *Time limits*

Pursuant to Rule 126(2) EPC, the decision that was posted on 18 January 2018 is deemed to have been notified on 28 January 2018. The petition for review asserting defects in the decision-making process and the decision adopted does not refer to any criminal act within the meaning of Article 112a(2)(e) EPC. The Enlarged Board therefore, favourably for the petitioner, considers that the petition was intended to be based on one or several of sub-paragraphs (a)-(d) of Article 112a(2) EPC. Correspondingly, the document expressly refers to the Board "setting a petition-rule 106-112a, paragraph 2 (a) to (d)" EPC (see document, middle of page 1). The petition was received on 9 March 2018, and the respective fee on 14 March 2018. This means that the petition is deemed to have been filed on that latter date (see Article 112a(4), last sentence).

This was in good time: see Article 112a(4), second sentence, EPC requiring petitions under Article 112a(2) (a)-(d) EPC to be filed within two months of notification of the decision to be reviewed.

2.2 *The legal framework regarding the contents of the petition*

Pursuant to Article 112a(4) EPC, first sentence, the “petition for review shall be filed in a reasoned statement, in accordance with the Implementing Regulations”. According to Rule 107(2) EPC, the “petition shall indicate the reasons for setting aside the decision of the Board of Appeal, and the facts and evidence on which the petition is based.” Pursuant to Rule 108(1):

If the petition does not comply with Article 112a, paragraphs 1, 2 or 4, Rule 106 or Rule 107, paragraph 1(b) or 2, the Enlarged Board of Appeal shall reject it as inadmissible, unless any defect has been remedied before the relevant period under Article 112a, paragraph 4, expires.

According to the case law of the EBA, the contents of a petition must be sufficient for the petitioner's case to be properly understood on an objective basis and must enable the EBA to understand immediately why the decision in question suffers from a fundamental procedural defect. (See the EPO publication “Case Law of the EPO Boards of Appeal”, 8th ed. 2016, at section IV.F.3.6, first paragraph.)

In this respect the Enlarged Board notes that, in the present petition, the petitioner did not expressly rely on any of the grounds of Article 112a(2)(a)-(d) in conjunction with Rule 104 EPC laying down those fundamental procedural defects on which a petition for review may be validly based. Subsequently, in the document, the petitioner only generally referred to Article 112a(2)(a)-(d) (see above, at point 2.1), without indicating and elaborating on any specific one of these grounds.

In analysing the very succinct (effectively one-page) petition, as complemented by the document, with a view to detecting therein any assertion of a ground within the meaning of Article 112a(2)(a)-(d) in conjunction with Rule 104 EPC, the EBA has come to the following findings.

2.3 *The objective of the petition: "... to correct this estoppel situation"*

In the petition for review, the clearest indication as to its thrust is given in the final two paragraphs. In the last paragraph, the petitioner requests the EBA **"to correct this estoppel situation"** (emphasis added).

"Making someone aware of the situation", i.e. by sending a communication to Mr Stanimiroff's (the then applicant's) private address (see the second but last paragraph), "lacks an understanding of the definition", apparently of the "estoppel situation" in the context of the present case. The petition appears to define the alleged estoppel situation in the present case as the lack of a possibility of being granted an extension of the four-month period laid down in Article 108, third

sentence, EPC for filing the statement of grounds of appeal, where the appellant chooses to replace the representative during that period for some unavoidable or unforeseeable reason.

The document, reiterating the objective of the petition to remedy the estoppel situation, confirms this understanding. Under the heading "Petition" (see middle of page 1), it reads:

It is the assertion of the appeal (T 0578/14) that an "estoppel situation" exists. Under rule 106 "in respect of the procedural defect"/ a contradiction between common law procedural law (not substantive law) and the Articles and rules of the EPO

The document subsequently quotes Article 112(1) EPC to describe the activities of the Enlarged Board ("What does the Enlarged Board of Appeal do ?"). It goes on to explain (at the middle of page 2, formatting omitted): The EPO articles and rules take precedence over common law in this example (bases for petition).

If your external contract with your representative is terminated before an appeal proceedings there is no possibility of an extension.

This is stated in the EPO articles and regulation. This is an estoppel situation- it is illegal under common law.

"There are many different types of estoppel which can arise, but the common thread between them is that a

person is restrained from asserting a particular position in law where it would be inequitable to do so"

Does the EPO's laws take precedence over common law?

Should the Enlarged Board of Appeal take steps to ensure the uniform application of law?

In the following, the EBA will use the term "estoppel situation" as used by the petitioner and irrespective of whether the meaning attributed to this term in the present case is correct or not.

2.4 *Whether the objective can be pursued in petition proceedings*

Correcting the so-described estoppel situation would require a finding according to which, under the circumstances of the case at hand, notwithstanding the wording of Article 108, third sentence, EPC, an extension of the four-month time limit to file the statement of grounds of appeal could exceptionally be granted on the basis of legal principles not expressly mentioned in the petition, but clarified in the document in the sense that an estoppel situation was *per se* illegal under common law (see the portion quoted in point 2.3 above).

In this respect, the Enlarged Board of Appeal has taken note of the petitioner's remarks made in the petition and relating to Article 112 EPC, not Article 112a EPC, i.e. that neither a Board of Appeal nor the President of the EPO had apparently referred a question regarding the estoppel situation to the Enlarged Board of Appeal.

As set out above, Article 112 EPC is repeated as a basis for the EBA's activities in the document.

The question in issue, i.e. the estoppel situation as characterized by the petitioner, might, in principle and independent of its potential merits, be eligible for a referral to the Enlarged Board of Appeal under Article 112 EPC. Under Article 112(1) EPC, In order to ensure uniform application of the law, or if a point of law of fundamental importance arises:

(a) the Board of Appeal shall, during proceedings on a case ... refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes... ;

(b) the President of the European Patent Office may refer a point of law to the Enlarged Board of Appeal where two Boards of Appeal have given different decisions on that question.

An absence of such a referral under Article 112 EPC, however, does not entitle the EBA in proceedings under Article 112a EPC to deal with the petitioner's request "to correct this estoppel situation" and set aside the decision under review. This is because the purpose of these two legal provisions, the conditions under which they apply and the powers that they confer are distinct:

- If the conditions of Article 112(1) EPC are met, the Enlarged Board will give an opinion on a specific point of law, such as possibly the alleged estoppel situation in the present case.

Only a Board of Appeal or the President of the EPO have standing to make a referral under Article 112 EPC. Where a Board of Appeal has referred a question in a specific case, it will be that Board which will ultimately give a ruling on the case on the basis of the Enlarged Board's binding answer (Article 112(3) EPC).

- Conversely, under Article 112a EPC, the Enlarged Board may be called upon by a party to appeal proceedings to remedy a fundamental **procedural** defect of those proceedings (or in relation to a criminal act) pursuant to Article 112a(2) in conjunction with Rule 104 EPC. If the petition is allowable, the EBA will set aside the decision under review and re-open proceedings before the Boards of Appeal (Article 112a(5) EPC). Under Article 112a EPC, a review of **substantive** law is excluded. This means that, in the present case brought on the basis of Article 112a EPC, and not Article 112 EPC, the Enlarged Board is not vested with the power to give an answer to the question whether the Board in the decision under review correctly dealt with the "estoppel situation"; more precisely, whether or not it should have granted an exception to the strict time limit of Article 108, third sentence, EPC, possibly after having referred the question whether it was entitled to do so on the basis of certain legal principles, in particular common law principles, to the Enlarged Board of Appeal pursuant to Article 112 EPC.

The Enlarged Board of Appeal has, on several occasions, affirmed the principle that, in the framework of Article 112a EPC, a review of substantive law is excluded. See the first paragraph of section IV.F.3.3.3 of the "Case Law", which reads as follows (citations omitted, emphases added):

Under no circumstances may the petition for review be a means to review the application of substantive law. This restriction is justified because the function of the petition for review is to remedy intolerable deficiencies occurring in **individual appeal proceedings, not to further the development of EPO procedural practice or to ensure the uniform application of the law...** [See also the explanatory remarks to Article 112a EPC, Special edition No. 4 OJ EPO 2007, point 5, page 126.]

The Enlarged Board has no competence under Art. 112a EPC to examine the merits of the decision and to go into the substance of a case..., not even indirectly... A review of the correct application of substantive law would amount to the Enlarged Board being a third instance which has been explicitly excluded... The Enlarged Board **cannot act as a third instance** or second-tier appellate tribunal in petition proceedings...

These considerations also apply to the question whether an appeal is admissible (see the 8th indent under section IV.F.3.3.3), which is at stake in the present review proceedings. More specifically, in R 0010/14 it was held (at point 2.5) that the soundness of a decision, in that case on the admissibility of the

appeal, could not be the subject of the procedure pursuant to Article 112a EPC (in the German original: "die inhaltliche Richtigkeit einer Entscheidung (hier: Zulässigkeit der Beschwerde) [kann] nicht Gegenstand des Verfahrens nach Art. 112a EPÜ sein ...", citing R 0010/09, point 5).

The appendix to the document casts doubt on the validity of the above-quoted case law suggesting that the term "third instance" mentioned in the above quotation

The Enlarged Board cannot act as a third instance or second-tier appellate tribunal in petition proceedings...

means "third party" (see the appendix, at the lower part of page 5 of the document). The Enlarged Board, instead, understands "third instance" as "third tier", the three tiers consisting, in the present case, of the Examining Division, the Boards of Appeal and the Enlarged Board of Appeal.

The EBA can only affirm the validity of the substance of that quotation. As already laid down in detail above, the answer to the question in the appendix (sentence bridging pages 4 and 5 of the document): does the EBA "fix legal problems when referred to by a petition or not? Common sense says they do" is: the EBA does fix legal problems within the bounds of the powers conferred by Article 112a EPC; those powers do not include the scrutiny of the substance of decisions of the Boards of Appeal.

Given that the estoppel situation as defined by the petitioner cannot be the subject of petition proceedings, it is immaterial whether or not the Board, in the decision under review, acknowledged the presence of such a situation. The EBA however rejects the repeated allegations to this effect made in the petition and the document with reference to point 9.2.4(c), page 52, of the decision under review. Rather, in point 9.2.4 (starting at the bottom of page 51) the Board provided a summary, clearly labelled as such, of **allegations made by the petitioner**, but did **not** set out findings **of its own**; in other words: the Board did **not** acknowledge an estoppel situation. See the following extract of the decision under review (emphases added):

9.2.4 **The appellant** also referred to decisions J 0027/94, T 0840/94 (OJ EPO 1996, 680) and T 1908/09 and **submitted that** the board had acted in contravention of the generally recognised prohibition against "venire contra factum proprium" because:

- (a) the EPO had written to Mr Stanimiroff at his private address; and
- (b) in its communication dated 15 July 2014, the board made the statement "In the board's view, this is not a clear statement that you withdrew", which was ambiguous, and in view of the known "estoppel situation" it should have sought more clarification before making ambiguous comments; and
- (c) although the board acknowledged the "estoppel situation" by highlighting Rule 152(8) EPC, it had sent communications to Mr Stanimiroff's private address.

2.5 *No submission of any relevant fundamental procedural defect*

The focus of the petition is on the **substantive** issue of the compatibility of certain EPC provisions with common law in dealing with the estoppel situation as defined by the petitioner. The Enlarged Board is unable to glean from the submissions made in the petition any assertion of any of the fundamental **procedural** defects mentioned in Article 112a(2)(a)-(d) EPC (in conjunction with Rule 104 EPC) of the proceedings before the Board of Appeal.

In particular, the petitioner did not assert that, in the course of those proceedings, it had not had an opportunity to present its comments regarding the "estoppel situation", i.e. it does not assert a violation of the right to be heard under Article 112a(2)(c) in conjunction with 113(1) EPC. According to that latter provision, the decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

In the appendix to the document it is said that no such opportunity was needed because the Board had acknowledged the estoppel situation. This allegation is incorrect, but obviously affirms the Enlarged Board's view.

Nor did the petitioner assert a violation of the right to be heard on the basis that the contents of the decision under review revealed that the Board did not substantively consider the petitioner's submissions regarding the "estoppel situation" (see R 0008/15,

point 2.2.2). On the contrary, the petitioner, both in the petition and in the document, quoted a number of statements from the decision under review mentioning the “estoppel situation”. In the petition, the petitioner maintained that the Board lacked an understanding of its definition, suggesting that the Board did consider the estoppel issue but applied the corresponding law incorrectly. As stated, however, a review of the substantive legal issues surrounding the “estoppel situation” cannot be the subject of proceedings under Article 112a EPC.

2.6 *Other admissibility requirements*

In the absence of a valid ground for the petition having been relied on and substantiated, the question of whether admissibility requirements other than the time limits (found to have been met; see above at point 2.1) have been complied with can remain on open one.

2.7 *Conclusion*

In the light of the above, the Enlarged Board of Appeal arrives at the conclusion that the present petition is aimed at the scrutiny of substantive law, i.e. the compatibility of certain EPC provisions with common law in dealing with the “estoppel situation”. As such scrutiny cannot be the subject of review proceedings, the petition is clearly inadmissible for failure to rely on, and substantiate, any valid ground, more specifically any fundamental procedural defect, within the meaning of Article 112a(2) in conjunction with Rule 104 EPC. The petition must therefore be rejected under Rule 108(1) and Rule 109(2)(a) EPC.

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly inadmissible.

The Registrar:

The Chairman:

P. Cremona

C. Josefsson