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**Datasheet for the decision  
of 8 December 2022**

**Case Number:** R 0011/21

**Appeal Number:** T 0760/17-3.3.09

**Application Number:** 05001395.2

**Publication Number:** 1559323

**IPC:** A22C13/00, C08J5/18, C08L29/04,  
C08L77/00

**Language of the proceedings:** EN

**Title of the invention:**  
Smokable polymeric casing

**Patent Proprietor:**  
Viskase Companies, Inc.

**Opponent:**  
Kalle GmbH

**Headword:**  
Petition for review

**Relevant legal provisions:**  
EPC Art. 56, 112a(2)(c)(d), 113(1)  
EPC R. 102, 104, 106  
RPEBA Art. 13, 14(2)  
RPBA 2020 Art. 13(1)(2), 15(1)  
RPBA 2007 Art. 13

**Keyword:**  
Petition for review - partly clearly inadmissible and partly  
clearly unallowable  
Objection under Rule 106 EPC - raised prematurely  
Written reasoned decision - Fundamental violation of  
Article 113(1) EPC (no)

**Decisions cited:**

R 0001/08, R 0008/08, R 0016/09, R 0017/10, R 0006/11,  
R 0021/11, R 0012/14, R 0001/15, R 0008/15, R 0007/16,  
R 0008/17, R 0003/20



**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 0011/21

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 8 December 2022**

**Petitioner:**  
(Patent Proprietor)

Viskase Companies, Inc.  
8205 S. Cass Avenue, Suite 115  
Darien, IL 60561 (US)

**Representative:**

Von Rohr Patentanwälte Partnerschaft mbB  
Rüttenscheider Straße 62  
45130 Essen (DE)

**Other party:**  
(Opponent)

Kalle GmbH  
Rheingaustraße 190-196  
65203 Wiesbaden (DE)

**Representative:**

Plate, Jürgen  
Plate Schweitzer Zounek Patentanwälte  
Rheingaustraße 196  
65203 Wiesbaden (DE)

**Decision under review:**

**Decision T 760/17 of the Technical Board of  
Appeal 3.3.09 of the European Patent Office of  
15 March 2021**

**Composition of the Board:**

**Chairman:** I. Beckedorf  
**Members:** M. Blasi  
M. Alvazzi Delfrate

## **Summary of Facts and Submissions**

- I. The patent proprietor (hereinafter: the petitioner) duly filed a petition for review regarding decision T 760/17 of Technical Board of Appeal 3.3.09 (hereinafter: the Board) revoking the patent in suit. The petition for review is based on the grounds pursuant to Article 112a(2)(c) and (d) EPC, namely that, in several respects, a fundamental violation of the petitioner's right to be heard under Article 113(1) EPC and fundamental procedural defects had occurred.
  
- II. The proceedings before the Board concerned the appeal lodged by the opponent against the opposition division's decision to reject the opposition. The Board held that the claimed subject-matter of the patent as granted and of auxiliary requests I to IX did not involve an inventive step within the meaning of Article 56 EPC. The alternative A, B and C series of the main request and of each of auxiliary requests I to IX, the sets of claims of which were filed by the petitioner on 13 January 2021 ("auxiliary requests of 13 January 2021"), were not admitted into the appeal proceedings by the Board.
  
- III. With the petition for review, the petitioner objected to the non-admittance of the auxiliary requests of 13 January 2021 into the appeal proceedings and to the reasoning in the written decision concerning the non-admittance of the auxiliary requests filed on 13 January 2021 and concerning the lack of inventive step.
  
- IV. The Enlarged Board issued a communication pursuant to Articles 13 and 14(2) RPEBA in preparation for the oral proceedings. Within the time limit set therein, the

petitioner made further submissions in writing and maintained its requests.

- V. Oral proceedings took place before the Enlarged Board on 8 December 2022. Before they were closed, the order of this decision was announced.
- VI. The petitioner requested that
- decision T 760/17 be set aside and the proceedings before the Board be re-opened
  - the fee for the petition for review be reimbursed
  - in the event that the proceedings are re-opened, the members of the Board who participated in taking the set-aside decision be replaced

## **Reasons for the Decision**

### *Admissibility of the petition for review - objection*

1. 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, except where such objection could not be raised during the appeal proceedings. Thus, meeting the requirements under Rule 106 EPC is a precondition for access to the petition for review, an extraordinary legal remedy against final decisions of the boards of appeal.
2. Where the petition for review is based on several procedural defects, the requirements under Rule 106 EPC must be met in relation to each of them and,

consequently, be separately assessed by the Enlarged Board (see also R 8/17, point 4 of the reasons; R 12/14, point 6 of the reasons).

3. The petitioner submitted that the non-admittance of the auxiliary requests of 13 January 2021 into the proceedings constituted a first fundamental procedural defect.
  - 3.1 Regarding compliance with Rule 106 EPC, the petitioner referred to page 15, paragraphs 3 to 5, of the letter dated 13 January 2021. In that passage, contained in the petitioner's submissions as to why the newly filed auxiliary requests should be admitted into the proceedings, the petitioner *inter alia* expressed the view that its right to be heard within the meaning of Article 113(1) EPC would be violated if the Board did not admit these auxiliary requests into the proceedings. In that passage, the petitioner also announced, "*for merely precautionary reason*", that it would challenge "*any contrary decision*" by filing a petition for review according to Article 112a EPC.
  - 3.2 The Enlarged Board does not agree with the petitioner that, in making these statements, the petitioner has fulfilled the obligations under Rule 106 EPC.
  - 3.3 Under Rule 106 EPC, the objection has to be raised in respect of "*the procedural defect*" and dismissed by the Board. This implies that an objection cannot be raised before its cause has actually come into existence. The purpose of Rule 106 EPC is to give the Board a chance to react immediately and appropriately by either removing the cause of the objection or by dismissing it (see also Case Law of the Boards of Appeal, 10th edition 2022, "CLBA", V.B.3.6.1 and R 3/20, point 2.2.1 of the reasons). In other words, an objection cannot be formulated prematurely (see R 8/08,

point 1.2.2 of the reasons; R 17/10, point 2.3 of the reasons; R 21/11, point 10 of the reasons).

- 3.4 The statements on which the petitioner is relying were contained in the letter dated 13 January 2021, with which the new claim requests were filed and, hence, at a point in time at which the Board had not yet taken any steps concerning these claim requests.
- 3.5 As far as the appeal procedure subsequent to the filing of the letter dated 13 January 2021 is concerned, there is nothing on file - neither in the petitioner's submissions before the Enlarged Board nor in the minutes of the oral proceedings before the Board - which would suggest that the petitioner made submissions which could qualify as an objection under Rule 106 EPC.
- 3.6 In its arguments, the petitioner emphasised that it was clear from the wording "*precautionary reason*" that the objection had been formulated conditionally, drawing a parallel with the permissible filing of auxiliary claim requests or conditional procedural requests, objections or submissions in general.
- 3.7 This, however, does not change the fact that the petitioner is relying on statements which were submitted at too early a stage. The petitioner's reference to the filing of auxiliary claim requests or conditional submissions does also not assist its case; making such a request conditional might prevent it from being considered as submitted too late, but does not remedy a premature submission - at least in the context of Rule 106 EPC.
- 3.8 Moreover, the petitioner has not submitted - nor was it apparent to the Enlarged Board - that an objection could not have been raised during the appeal

proceedings, for instance at the oral proceedings before the Board.

- 3.9 Consequently, it must be concluded that the requirements under Rule 106 EPC have not been met in relation to the asserted procedural defect concerning the non-admittance of the auxiliary requests of 13 January 2021. As regards this complaint, the petition is therefore clearly inadmissible.
4. The petitioner further submitted that
- (a) the reasoning provided by the Board in the written reasoned decision was deficient in relation to
    - the non-admittance of the auxiliary requests of 13 January 2021 and
    - the assessment of inventive step
  - (b) and the reasoning for lack of inventive step was based on points appearing for the first time in the written reasoning.
5. In relation to these alleged deficiencies, the petition for review is not clearly inadmissible; no objections under Rule 106 EPC could have been raised during the appeal proceedings since any fundamental procedural defect could only become apparent on receipt of the written reasoned decision.

*Allowability of the petition for review*

6. As regards the complaints in relation to which the petition is not considered clearly inadmissible, i.e. the asserted fundamental procedural defects associated with the reasoning in the written decision (see point 4 above), the petition for review is clearly unallowable.



Reasoning concerning non-admittance of the auxiliary requests of 13 January 2021

7. The petitioner considers that fundamental procedural defects have occurred in that:
  - the decision under review did not deal at all with the petitioner's reasoning for filing these auxiliary requests and as to why they should be admitted, as set out in the letter dated 13 January 2021, and none of the arguments and references to pertinent case law was addressed in the decision under review
  - no reasoning was provided in the decision under review as to why not admitting the auxiliary requests would not violate the petitioner's right to be heard under Article 113(1) EPC, or as to why the petitioner's arguments were irrelevant.
  
8. In the letter dated 13 January 2021, the petitioner had set out in great detail why the auxiliary requests filed with that letter should be admitted into the appeal proceedings, relying on various aspects such as *prima facie* allowability, procedural economy, fairness, the need to be given an opportunity to react to the Board's preliminary assessment set out in the communication pursuant to Article 15(1) RPBA 2020 and the low additional complexity. In relation to some of the aspects addressed, the petitioner had made reference to specific board of appeal decisions where a particular aspect had supposedly been established and/or considered.
  
9. While point (g) of Rule 102, second sentence, EPC requires board of appeal decisions to contain reasons, a violation of this obligation is not a ground for petition for review since the list of grounds for review in Article 112a(2) and Rule 104 EPC is exhaustive and does not include point (g) of Rule 102,

second sentence, EPC (concerning the exhaustive character, see also CLBA, V.B.3.4.2 with reference *inter alia* to R 1/08, point 2.1 of the reasons and R 16/09, point 2.3.5 of the reasons, R 6/11, points 11.1 and 11.2 of the reasons).

10. However, deficiencies in the reasoning of a Board's written decision can be the basis for a petition in view of Article 112a(2)(c) EPC if they amount to a fundamental violation of Article 113 EPC (see also CLBA, *ibid.*, in particular R 1/15, point 3.5 of the reasons, R 8/15, point 2.2.2 of the reasons and R 7/16, point 3.1.1 of the reasons).
11. Under Article 113(1) EPC, decisions may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. This implies not only that a party is given the opportunity to present its views but also that its relevant submissions are taken into account and considered.
12. Accordingly, the reasoning in a decision should be such that a party can establish that the deciding body did indeed consider its relevant submissions and can understand why, in the event of an adverse decision, they were found not to be convincing. Assessing the completeness of the reasoning would usually be beyond the scope of scrutiny under Article 113(1) EPC. For compliance with the right to be heard, reasons may be incomplete, but as long as they show that the Board, in the course of the appeal proceedings, substantively assessed a certain point as being part of the procedure and that it found to be relevant, there will be no violation of Article 113(1) EPC (see also R 7/16, point 3.1.2 of the reasons; R 8/15, point 2.2.2 of the reasons).

13. In the letter dated 13 January 2021, the petitioner submitted that *"according to an approach frequently adopted by the Appeal Boards, requests filed after summons of oral proceedings should be admitted and considered ... (i) if sound reasons exist for filing the requests ..., (ii) if the new requests do not extend the scope of discussion ... and (iii) if the new requests are clearly or obviously allowable ..."*, and provided reasons why all of the *"aforementioned three conditions and prerequisites are fulfilled in the present case"*. The passage concerning criterion (i) contains arguments relating to the procedural development of the case, in particular to the issue of whether the Board, in its preliminary assessment of the case in its communication pursuant to Article 15(1) RPBA 2020, had based its opinion, which was not in the petitioner's favour, on issues with which the petitioner had been confronted for the first time on appeal. The same aspect reappeared in the subsequent arguments, through the petitioner's reference to an unforeseeable development in the previous proceedings and the statements that the petitioner could only have reacted adequately at this stage and that Article 113(1) EPC required that parties be given sufficient opportunity to react.
  
14. These arguments were addressed in the decision under review.
  
- 14.1 In section X, last paragraph, the Board summarised the petitioner's argument relevant for the decision to be that the auxiliary requests *"had been filed as a direct and immediate reaction to an objection raised for the first time by the board in its communication under Article 15(1) RPBA 2020"*.

- 14.2 In point 4.2 of the reasons, the Board explained why it considered that its "*preliminary opinion [provided with the communication under Article 15(1) RPBA 2020] was based on facts and arguments which were already discussed in the decision under appeal and in [the other party]'s statement of grounds of appeal*", and why it therefore did not share the petitioner's point of view that the claims of the auxiliary requests of 13 January 2021 "*were filed as an immediate and direct reaction*" to the Board's preliminary opinion and "*addressed an objection raised for the first time by the board*" in said communication.
- 14.3 The Board in point 4.3 concluded that, "*[f]or these reasons, [it] does not find any exceptional circumstances justified by cogent reasons for filing the auxiliary requests [of 13 January 2021] and amending the party's case at an advanced stage of the appeal proceedings*". Referring to Article 13(2) RPBA 2020, it decided not to admit these requests into the appeal proceedings.
15. The Enlarged Board cannot find fault with the fact that other considerations put forward by the petitioner in the letter dated 13 January 2021 were not explicitly addressed in the decision under review. In accordance with the petitioner's own submissions, items (ii) and (iii) did not need to be addressed: the petitioner stated that items (i) to (iii) were prerequisites and that, if all three were satisfied, a Board should admit claim requests filed after the summons. The Board did not agree with the petitioner on item (i), rendering the assessment of (ii) and (iii) moot.
16. In addition, the Board considered the question of admitting the auxiliary requests of 13 January 2021 into the proceedings on the basis of Article 13(2) RPBA 2020. The Board's communication

pursuant to Article 15(1) RPBA 2020 had referred to the corresponding change of legal framework and, having regard to the date of issuance of the summons on the one hand and the transitional provisions of the revised Rules of Procedure of the Boards of Appeal on the other, there was no reason why the petitioner should have assumed that Article 13(2) RPBA 2020 would not be considered for the question of admittance.

17. In referring to case law decisions predating the entry into force and applicability of Article 13(2) RPBA 2020 and, additionally, to aspects that were in the past considered by boards in relation to Article 13 RPBA 2007 (see point 8 above) and are nowadays referred to in Article 13(1) RPBA 2020, the petitioner seems to have regarded these to be pertinent in the situation in hand, despite the changes in the legal framework, but did not provide any corresponding arguments to that effect.
  
18. As can be seen from the section summarising the petitioner's arguments relevant for the decision, the Board did not consider these remaining arguments relevant. In not addressing the decisions or aspects, the Board either did not consider them pertinent under the changed legal framework, or did not consider them to relate to exceptional circumstances or to aspects beyond that which could or should be considered in the Board's exercise of its discretion, or which were subordinate to other considerations and thus not pertinent in that respect. While it may have been desirable for the considerations regarding the lack of relevance of these aspects to have been explicitly set out in the decision under review, not doing so does not amount to a deficiency in the Board's reasoning concerning the non-admittance of the auxiliary requests of 13 January 2021, especially as the petitioner had not presented any arguments as to how, in its view,

these aspects should be linked to the relevant legal provision of Article 13(2) RPBA 2020.

19. Thus, the Enlarged Board cannot establish that the reasoning provided on the non-admittance of the auxiliary requests of 13 January 2021 into the proceedings constitutes a violation of Article 113(1) EPC, let alone a fundamental one.

Reasoning on inventive step concerning the main request and auxiliary requests I to IX

20. In relation to inventive step, the petitioner submitted that the assessment of inventive step was fundamentally deficient for being unreasoned, illogical, contradictory, incorrect or arbitrary. The Enlarged Board, however, as far as it is competent to review the matter, does not agree with the petitioner on any deficiency in the reasoning in that respect. Therefore, the question of whether any such deficiency would have amounted to a fundamental violation of the right to be heard need not be considered further.

21. *Unreasoned and arbitrary conclusions in the decision under review in relation to asserted distinguishing features*

- 21.1 In relation to the comparison of the claimed subject-matter with the prior art, the petitioner submitted that the Board did not acknowledge the first and second of the three asserted distinguishing features against the clear wording of the closest prior art. Therefore, the conclusions in points 2.6 and 2.7 of the decision under review lacked sufficient reasoning and were arbitrary, meaning that there was a fundamental deficiency in the assessment. In relation to the second asserted distinguishing feature, the petitioner also referred to its argument summarised by the Board in

point 2.8 of the reasons, submitting that the Board had correctly summarised the argument but had neglected and ignored it.

- 21.2 However, upon reading points 2.6 to 2.7 of the reasons of the decision under review, the Enlarged Board cannot establish any lack of reasoning in this passage, let alone an arbitrary conclusion as suggested by the petitioner. In these passages, the Board explained why it did not agree with the petitioner's arguments. Point 2.9 of the reasons deals specifically with the petitioner's argument summarised in the preceding point 2.8; the Board provided its reasoning as to why it came to a different conclusion on this issue. The Enlarged Board cannot see any indication that the Board ignored the petitioner's argument by not taking it into consideration.

The deficiency as submitted by the petitioner appears to lie in the fact that the Board reached a different conclusion in substance. However, assessing the correctness of a conclusion reached by the Board as to its merits is not within the scope of review proceedings under Article 112a EPC - this would require a review of the decision in substance, which is not among the grounds on which review proceedings can be based and for which the Enlarged Board therefore has no competence.

22. *Non-acknowledgement of any technical effect: based on erroneous and contradictory conclusions lacking logical, consistent and technically based reasoning*

In the underlying case, the Board considered the presence of an "antiblock agent in the amount specified in claim 1" to be the sole distinguishing feature.

22.1 In support of its contention that an improved effect, namely a higher water vapour transmission rate (MVTR), was associated with this difference, the petitioner had presented document D13 at the oral proceedings before the Board and relied on a comparison of the values relating to films with Mowiol<sup>®</sup> type polymers, which differed from known films on account of the presence of an antiblock agent. According to the petitioner, it was sufficient to show that the technical effect was due to the distinguishing feature. Although the opponent did not contest that technical effect on the merits, the Board denied any technical effect.

22.2 The petitioner's argument relating to the comparison of values is set out in point 2.15 of the reasons of the decision under review. In points 2.16 and 2.17 of the reasons, the Board explained why it did not agree with the petitioner's line of reasoning. Firstly, the patent left *"no doubt that Mowiflex<sup>®</sup> TC 232 is the essential agent for improving the permeability and the oxygen barrier properties of the films according to the invention"*, and according to the patent *"an antiblock agent can be used, optionally, to prevent adherence of film surfaces, e.g. when rolls of film are subjected to heat or pressure. No pointer can be found in the patent that an antiblock agent can improve film permeability"*. Secondly, in point 2.17 of the reasons, the Board explained how the differences in the MVTR values relied on by the petitioner with reference to document D13 could have occurred and that these may have been induced by factors other than the antiblock agent.

It then concluded, as stated in point 2.18 of the reasons, that *"the comparative data presented by the respondent are not suitable to show that the slight increase in MVTR ... is induced by the antiblock agent"*.



22.3 The Enlarged Board cannot establish that the Board's reasoning, by which the petitioner's relevant submissions have been taken into account, was in any way illogical, contradictory or inconsistent as argued by the petitioner. Any assessment by the Enlarged Board of the question of whether the Board's conclusions in relation to the arguments, facts and evidence presented by the petitioner were correct, including the question of which party to the appeal proceedings bore the burden of presenting arguments, facts and evidence, or to what extent any counter-evidence was required, would amount to an assessment of the appeal case on its merits, going beyond the scope of review proceedings.

23. *Petitioner's formulation of the objective technical problem rejected without reasons*

23.1 The petitioner argued that the Board had rejected the formulation of the objective technical problem as providing "*a film having improved smokability and oxygen barrier properties and acceptable mechanical properties*" without giving any substantive reasoning.

23.2 The Enlarged Board notes, however, that the Board did provide reasoning (in points 2.13 to 2.18 of the decision under review) as to why the formulation of the objective technical problem as suggested by the petitioner could not be accepted, thereby taking the petitioner's relevant submissions into account. The Enlarged Board therefore does not agree with the petitioner's objection relating to the lack of reasoning.

24. *Lack of reasoning on inventive step in relation to auxiliary requests I to IX*

24.1 The petitioner submitted that in relation to auxiliary requests I to IX the Board had applied an undue and

retrospective approach and that the written decision lacked reasoning.

- 24.2 The Enlarged Board cannot see any lack of reasoning. In points 3.1 to 3.8 of the decision, the Board dealt with claim 1 of auxiliary request IX, identified the amendments as compared with the main request and assessed whether or not, in light of the parties' submissions, the feature in question was to be considered disclosed in the closest prior art. The Board then assessed whether any technical effect as asserted by the petitioner could be associated with that distinguishing feature and whether the petitioner's arguments in support of inventive step were convincing considering the other party's arguments. In point 3.9 of the decision the Board addressed the petitioner's arguments relating to the combination of features and gave reasons as to why the considerations regarding auxiliary request IX applied equally to auxiliary requests I to VIII.

As regards the correctness of the Board's approach or findings, the Enlarged Board has no competence to review these aspects, as set out above (point 21.2).

25. *Findings on inventive step based on points appearing for the first time in the written reasoning*

The petitioner submitted that its right to be heard had been violated as it had not been given the opportunity to address issues which had appeared in the written reasoned decision for the first time.

26. Firstly, the petitioner referred to the reasoning in point 2.16 of the decision under review, which reads as follows: "*The board does not agree with this interpretation of the results. Paragraphs [0032] and [0070] of the patent leave no doubt that Mowiflex<sup>®</sup>*

*TC 232 is the essential agent for improving the permeability and the oxygen barrier properties of the films according to the invention. According to paragraph [0041] of the patent, an antiblock agent can be used, optionally, to prevent adherence of film surfaces, e.g. when rolls of films are subjected to heat or pressure. No pointer can be found in the patent that an antiblock agent can improve film permeability."*

In the petitioner's opinion, not only the last statement but in fact the entirety of the reasoning had been brought up for the very first time in the written reasoned decision, without having been mentioned before either in the written proceedings or during the oral proceedings.

- 26.1 Point 2.16 forms part of the Board's reasoning as to why it did not accept the petitioner's argument that the technical effect of improved film permeability originated from the presence of an antiblock agent.
- 26.2 The Enlarged Board may accept that the term "*no pointer can be found in the patent*" appears for the first time in the written reasoned decision, but whether new or different terms have been used is not decisive for the question of whether a fundamental violation of the petitioner's right to be heard has occurred.
- 26.3 In the communication pursuant to Article 15(1) RPBA 2020 issued in preparation for the oral proceedings, the Board had stated the following as to whether the issue of the presence of an antiblock agent as a distinguishing feature could be associated with the effect of improved film properties, allegedly conferring better smokability:

"24.1 ... However, these properties are not due to the presence of the antiblocking agent. In fact, as stated on paragraph [0032] of the opposed patent and by [the petitioner] on ... of its reply to the appeal, these properties are induced when the Mowiol<sup>®</sup> polyvinyl alcohol resins included in the films of the prior art are replaced with the specific polyvinyl alcohol Mowiflex<sup>®</sup> TC 232. In [the petitioner's] opinion this is also confirmed by the results shown in ... the opposed patent.

24.2 As noted by [the other party], the definition of the polyvinyl alcohol given in claim 1 encompasses the Mowiol<sup>®</sup> 8-88 resin, used in the patent to prepare the reference examples, which is unsuitable to induce the alleged smokability improvements. This means, that the alleged improvements are not achieved over the entire scope claimed, and cannot be considered to formulate the underlying objective technical problem.

24.3 Concerning the presence of an antiblocking agent, the patent states that this agent is used to block the adherence of the film surfaces during the manufacturing steps, i.e. to prevent blocking during the manufacturing process. Apart from this, there is no evidence that adding an antiblocking agent in the amount indicated in claim 1 induces any new technical effect.

24.4 Thus, it is considered that, starting from [...] the underlying problem is that of providing a film which is not subject to blocking during the manufacturing process."

- 26.4 In light of the above statements in the communication pursuant to Article 15(1) RPBA 2020, the Enlarged Board cannot agree with the petitioner that the aspect that "*[n]o pointer can be found in the patent that an antiblock agent can improve film permeability*" had not been part of the written proceedings, nor can it agree that this was the case for the Board's reasoning in point 2.16 as to why it did not accept the petitioner's argument that the technical effect of improved film permeability originated from the presence of an antiblock agent.
27. Secondly, the petitioner referred to point 2.17 of the reasons of the decision under review in which, in its view, "*the presence of a technical effect over the whole claim breadth or the significant extent of such effect, respectively, was rejected with the merely speculative reasoning that film treatment and manufacturing steps may induce such effect*". It asserted that the reasoning in point 2.17 had been put forward for the very first time in the written reasoned decision.
- 27.1 The Enlarged Board notes that in point 2.17 of the reasons of the decision under review the Board stated: "*Furthermore, as noted by [the other party], the films of D3 have been subjected to different manufacturing steps, which can also influence the MVTR*".
- 27.2 In the passage of the decision under review in which the Board summarised the relevant submissions of the other party presented in writing and at the oral proceedings, the following is stated: "*The claimed film differed from the films of D3 only in that it comprised an antiblock agent. This could possibly prevent 'blocking' of the film. Moreover, there was no evidence that it could improve its permeability. The films of the patent could not be compared to those of D3, due to*

*differences in the manufacturing conditions".*

The petitioner has not asserted that the Board's summary was incorrect.

- 27.3 In view of the above, the Board's conclusion in point 2.17 that the properties of the film could have been influenced by the different manufacturing steps cannot be regarded to have been brought up for the very first time by the Board in its reasoning of the decision under review.
28. No deficiencies as regards the Board's reasoning concerning either inventive step or the non-admittance of the auxiliary requests of 13 January 2021 as asserted by the petitioner can be established, so no violation of Article 113(1) EPC has occurred, let alone a fundamental one.
29. As a consequence of the Enlarged Board's finding, the remaining requests that
- the proceedings before Technical Board of Appeal 3.3.09 be re-opened
  - the members of the Board who participated in the decision be replaced and
  - the fee for the petition for review be reimbursed cannot be granted.

## Order

### For these reasons it is decided that:

The petition for review is unanimously rejected as partly clearly inadmissible and partly clearly unallowable.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated