Internal distribution code:

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

Datasheet for the decision of 27 November 2023

Case Number: R 0020/22

Appeal Number: T 3143/19 - 3.2.04

Application Number: 15820303.4

Publication Number: 3188590

IPC: A01G27/04, A01G9/02, A01G9/04, A01G31/00

Language of the proceedings: EN

Title of invention:
PLANT POT HAVING DRAIN OPENING

Applicant:
Van Den Ende, Peter Hubertus Elisabeth

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 56, 112a(1), 112a(2), 112a(4), 113(1)
EPC R. 104, 105, 106, 107(1)(a), 107(2), 108(2), 109(2)(a), 124
RPEBA Art. 13, 14(2)

Keyword:
Petition for review - clearly unallowable
Written reasoned decision - Fundamental violation of Article 113(1) EPC (no)

Decisions cited:
R 0001/08, R 0006/11, R 0019/11, R 0008/15

Europäisches Patentamt
European Patent Office
Office européen des brevets

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 0020/22

D E C I S I O N
of the Enlarged Board of Appeal
of 27 November 2023

Petitioner: (Applicant)	Van Den Ende, Peter Hubertus Elisabeth De Heugden 95 6411 DN Heerlen (NL)
Representative:	Verhees, Godefridus Josephus Maria Brabants Octrooibureau B.V. De Pinckart 54 5674 CC Nuenen (NL)
Decision under review:	**Decision T 3143/19 of the Technical Board of Appeal 3.2.04 of the European Patent Office of 6 July 2022**

Composition of the Board:

Chairman	C. Josefsson
Members:	M. Blasi
	M. Müller

Summary of Facts and Submissions

I. The petition for review (petition) concerns decision T 3143/19, transmitted to the appellant-applicant on 16 August 2022, by which Technical Board of Appeal 3.2.04 (the board) dismissed the appeal filed against the examining division's decision to refuse European patent application No. 15 820 303.4. The application is entitled "Plant pot having drain opening".

II. The petition was filed by the appellant-applicant (the petitioner) on 6 October 2022 and the prescribed fee was paid on the same date via debit order from an EPO deposit account. The petition is based on Article 112a(2)(c) EPC, namely that a fundamental violation of the petitioner's right to be heard under Article 113(1) EPC occurred.

III. After having received the minutes of the oral proceedings before the board, the petitioner submitted in a letter addressed to the board that, surprisingly, nothing was to be found in the minutes about the most important argument presented by the petitioner at the oral proceedings.

IV. The board issued a communication in reply, indicating that the letter was understood to contain a request for correction of the minutes. The board stated that it did not dispute that the argument considered missing from the minutes had indeed been presented, but given that the minutes were not a verbatim record of arguments presented, parties could not expect the minutes to contain their detailed arguments in the exact form as presented at the oral proceedings. Accordingly, the

board saw no reason to correct or supplement the minutes.

V. In the decision under review, the board concluded that the subject-matter claimed in the main request did not involve an inventive step pursuant to Article 56 EPC. Starting from the disclosure of document D1 as the closest prior art, the person skilled in the art faced with the objective technical problem of providing a suitable alternative to the water and nutriment retention means of D1 would have replaced the perlite used in the well of D1 with a water-absorbent polymer, which was a material for storing, retaining or otherwise providing a water buffer for plants that belonged to the skilled person's common general knowledge.

VI. The Enlarged Board of Appeal (Enlarged Board) in its composition pursuant to Rule 109(2)(a) EPC summoned the petitioner to oral proceedings as requested and issued a communication pursuant to Article 13 and Article 14(2) RPEBA in preparation for the oral proceedings. The petitioner was also invited, in accordance with Rule 108(2) EPC, to provide the missing address as required under Rule 107(1)(a) EPC.

VII. Within the time limit set in the Enlarged Board's communication, the petitioner provided the missing address and submitted comments on the Enlarged Board's preliminary opinion in writing.

VIII. Oral proceedings before the Enlarged Board took place on 27 November 2023, in the course of which the petitioner made oral submissions on the merits of the case. As the final requests, the petitioner requested that decision T 3143/19 be set aside and that the

proceedings before the board be re-opened. Before the oral proceedings were closed, the present decision was announced.

IX. The petitioner's case is summarised as follows.

The petitioner's right to be heard had been violated because the board, in its reasoning for denying an inventive step of the subject-matter claimed in the main request, did not consider the most important argument presented by the petitioner at the oral proceedings.

As set out in the letter sent to the board after the minutes of the oral proceedings were received, the argument was that "*in case the person skilled in the art would replace the perlite of D1 by the polymers of D2 the polymers would be continuously saturated with water and therefore the roots of the plant will not grow into the polymers as is the case in D2*".

The fact that the board had not used the term "continuously" in its written reasoned decision, and the fact that the minutes of the oral proceedings before the board made no reference to the argument proved that the board had not actually taken the argument into account when deciding on the appeal case at the oral proceedings. Had the board duly considered the argument when taking its decision at the oral proceedings, it could not have arrived at the decision taken since the decision was incorrect in substance.

At the oral proceedings before the board, the petitioner had clearly emphasised that continuous saturation had a negative effect on growing plants. Had the board, at the oral proceedings, given a

preliminary opinion before taking the final decision, the petitioner could have recognised the board's understanding of the argument and would have had the opportunity to highlight the fact that the board had missed the essence of the petitioner's argument. Instead, after the petitioner had presented the argument at the oral proceedings, the board, after deliberation, immediately gave its decision.

The problem-solution approach applied by the board was wrong. The difference between D1 and the subject-matter of claim 1 was not only the polymer granules themselves but also that the granules were continuously in contact with water. The Enlarged Board was asked to assess whether the problem-solution approach had been correctly applied, should this be regarded as a ground for review, because otherwise there would be real inventions that lacked protection due to a combination of teachings which the person skilled in the art would never have made.

Reasons for the Decision

Admissibility of the petition for review

1. The petition for review is not clearly inadmissible. It meets the requirements under Article 112a(1) and (4) EPC in conjunction with Rule 107 EPC.
In particular, the petition was filed as a reasoned statement in accordance with Rule 107(2) EPC within the relevant two-month time limit pursuant to Article 112a(4) EPC.

2. The deficiency of the petitioner's missing address was remedied within the time limit set by the Enlarged Board in accordance with Rule 108(2) EPC.

3. Concerning the obligation to raise objections under Rule 106 EPC, it is clear from the petitioner's submissions that it was only upon reading the written reasoned decision that the petitioner became aware that the most important argument had been disregarded and that, in the petitioner's view, the board had incorrectly applied the problem-solution approach. The Enlarged Board thus accepts that an objection in respect of the procedural defect at issue could not have been raised during the appeal proceedings. The requirement to duly raise objections under Rule 106 EPC is therefore not prejudicial to the admissibility of the current petition.

Allowability of the petition for review

4. The petition is clearly unallowable. The Enlarged Board finds that the board took the petitioner's argument into consideration, as can be derived from the board's written reasoned decision. As far as the correctness of the decision in substance has been objected to by the petitioner, this cannot be reviewed by the Enlarged Board.

5. First and foremost, the petitioner submitted that the board did not take the petitioner's most important argument into account.

6. If a board ignores essential and relevant arguments presented by a party, this may amount to a fundamental violation of the party's right to be heard provided for in Article 113(1) EPC. The right to be heard requires

not only that those involved be given an opportunity to present comments, but also that those comments be taken into consideration by the deciding body (see e.g. R 8/15, Reasons 2.2.2).

7. The argument which the petitioner contended was not taken into consideration by the board despite being relevant and essential was that "*in case the person skilled in the art would replace the perlite of D1 by the polymers of D2 the polymers would be continuously saturated with water and therefore the roots of the plant will not grow into the polymers as is the case in D2*" ("the argument").

8. The Enlarged Board has no reason to doubt that the argument was raised in the appeal proceedings. The board, in its letter replying to the petitioner's complaint about the content of the minutes of the oral proceedings before the board, had acknowledged that the argument had been presented at oral proceedings.

9. It can be derived from the decision under review that the board had taken the petitioner's argument into consideration, especially in view of the following passages.

10. In point 2.5.5 of the Reasons of the decision under review, in the section on obviousness, the board stated: "*The Board is unconvinced by the appellant's further argument that the person skilled in the art would not replace the perlite of D1 by the polymer of D2 because the polymers would be saturated with water and therefore the plant will not grow therein. As observed under item 2.4.1 above the self cited prior art makes use of polymer gel that may also be saturated with water, the application in its explanation of this*

prior art however does not contain any indication that roots might be unable to grow through this saturated polymer. There is especially no teaching in the application that the advantages of gel, as explained on page 1, lines 19-20 of the application, namely that gel forms a water buffer and provides protracted water supply to the plant, cannot be achieved by the pot of D1. Furthermore as also exposed in the same item 2.4.1 above, the drainage holes 47 in D1 drain any excess water above the well level, irrespective of whether they would result from saturated particulate material or perlite as in D1 or from another water absorbing material, including polymer particles (e.g. D2 page 9, paragraph 2). Therefore this possible saturation with water would not deter the skilled person from replacing the particulate material of D1 with another one such as polymer gel grains."

11. In point 2.4.1 of the Reasons, to which reference was made in point 2.5.5, the following is stated under the heading "*Objective technical problem*": "*In relation with the self cited prior art EP-A-1 139 716, the application exposes the drawback that water may be on the top of the saturated gel layer (page 1, lines 28-30), and formulates the problem of draining excess water which was the main object of the application as filed (page 2, lines 5-9). The fact that gel might be saturated with water in the prior art is merely presented as a disadvantage or undesired effect that is addressed in the present application with additional drainage holes. Contrary to the appellant's argument the application in relation to that self cited prior art does not indicate that the roots are unable to grow into saturated gel, but merely that it is not optimal (page 1, line 32).*"

12. The Enlarged Board fails to see that the board ignored the petitioner's argument. On the contrary, the decision under review demonstrates that the board had taken the petitioner's argument into consideration since reasons are given as to why the argument was found not to be convincing. Whether or not the board, from the petitioner's perspective or from a technical point of view, has drawn the correct conclusions from the argument is a matter which must not be assessed in review proceedings (see also points 19 et seq. below).

13. The petitioner pointed out that the decision under review did not use the term "continuously" and that the absence of this term proved that the argument had not been taken into account. The Enlarged Board, however, does not accept this line of argument. It is derivable from the decision under review that the argument was considered. Except for the word "continuously" the argument is reflected almost verbatim in the decision under review and addressed therein by the board as to its merits. The Enlarged Board cannot see that the omission of the word "continuously" in the decision is relevant in the circumstances of the case in hand as the board had taken into account and considered the consequence, or effect, of the fact that "*the polymers would be (continuously) saturated with water*", namely that "*therefore the roots of the plant will not grow into the polymers*" (see decision under review, Reasons, e.g. point 2.4.1 "... *the roots are unable to grow into saturated gel...*" and point 2.5.5 "... *the plant will not grow therein...*").

14. Furthermore, contrary to the petitioner's point of view, the mere fact that the minutes of the oral proceedings before the board do not mention the petitioner's argument does not mean that the board did

not duly consider the argument when taking the decision at the oral proceedings. In accordance with Rule 124 EPC, minutes of oral proceedings are drawn up by the person responsible. They should contain *inter alia* the essentials of the oral proceedings and the relevant statements made by the parties. What is considered essential or relevant, including the level of detail applied for drawing up the minutes, is primarily at that person's discretion. While it may be assumed that what is laid down in the minutes properly reflects the course of the oral proceedings, minutes of oral proceedings before a board of appeal in general do not contain a comprehensive list – let alone a verbatim record – of all arguments presented by the parties at the oral proceedings. Therefore, it is not appropriate to conclude on the basis of the content of the minutes that a party's argument presented at oral proceedings was not considered by the board when taking the decision just because that argument is not reflected in the minutes.

15. The petitioner also complained that the board, at the oral proceedings, had neither provided a preliminary opinion nor mentioned its understanding of the argument, and so the petitioner could not recognise that the board had missed the essence of the petitioner's argument and could not highlight this oversight.

16. However, while the right to be heard pursuant to Article 113(1) EPC provides a guarantee for parties that the decision can only be based on grounds or evidence on which the parties concerned had had an opportunity to present their comments, this right does not go so far as to compel a board to indicate in advance the details of its considerations or to inform

the parties of the final position that it intends to adopt (see also R 8/15, Reasons 2.1.2.2; R 19/11, Reasons 2.2)

17. In light of the above considerations, the Enlarged Board cannot see any violation of the petitioner's right to be heard under Article 113(1) EPC, let alone a fundamental one.

18. The petitioner further asked the Enlarged Board to assess whether the board's application of the problem-solution approach was correct. The petitioner takes the view that it was based on incorrect considerations. In the Enlarged Board's view, this argument reflects in essence the petitioner's conviction that the board's considerations led to the wrong result, namely that the claimed invention was held not to involve an inventive step while an inventive step should have been acknowledged had the petitioner's argument been properly considered.

19. However, the Enlarged Board has no competence to review the case as to its merits, including whether the board had drawn correct conclusions.

20. The grounds on which a petition for review can be based are listed in Article 112a(2) EPC. As derivable from the wording ("... *only ... on the grounds...*"), the list of possible grounds for review is exhaustive (see also R 1/08, Reasons 2.1; R 6/11, Reasons 11.1). The grounds in Article 112a(2)(a) to (e) EPC relate to the members who took the decision, a fundamental violation of Article 113(1) EPC, "*any other fundamental procedural defect defined in the Implementing Regulations*" and criminal acts (see Rule 105 EPC). Regarding "*other fundamental procedural defects*", the

legislator has only defined two situations in which such a defect may have occurred: a board failing to arrange the holding of oral proceedings requested by the petitioner and a board deciding on the appeal without deciding on a request relevant to that decision (see Rule 104 EPC).

21. Accordingly, Article 112a(2) EPC makes it clear that review proceedings are limited to fundamental procedural defects and criminal acts. Those are intolerable for the legal system and override the principle that - in the interest of legal certainty - proceedings which have led to a final decision should not be re-opened.

22. Under no circumstances may the petition for review be a means to review the application of substantive law, as a review of the correct application of substantive law would amount to the Enlarged Board being a third instance. This has been explicitly excluded by the legislator (see also explanatory remarks 1 to 5 on Article 112a EPC, OJ EPO 2007, Special edition No. 4, and established case law since decision R 1/08).

23. Thus, the Enlarged Board has no competence under Article 112a EPC to examine the merits of a board's decision and go into the substance of a case, not even indirectly (see e.g. R 19/11, Reasons 2.2).

24. The Enlarged Board understands that a party may have a different view to the deciding board on technical or legal considerations and may even be convinced that a decision is wrong from a technical or legal point of view and may, therefore, wish to have the case reviewed.

25. However, for want of the required competence under Article 112a EPC, the Enlarged Board is prevented from considering the decision under review in substance and therefore also cannot further consider the petitioner's submissions that the problem-solution approach applied by the board was incorrect, having led the board to the wrong conclusions.

26. As the petition is unanimously found clearly unallowable, the petitioner's request that decision T 3143/19 be set aside and that the proceedings before the board be re-opened cannot succeed.

Order

For these reasons it is decided that:

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

The Registrar: The Chairman:

N. Michaleczek C. Josefsson

Decision electronically authenticated