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**Datasheet for the decision
of 12 February 2024**

Case Number: R 0021/22

Appeal Number: T 0097/22 - 3.3.04

Application Number: 18188695.3

Publication Number: 3456342

IPC: A61K38/52, A61P1/00, A61K9/48

Language of the proceedings: EN

Title of invention:
AGENT FOR USE IN THE CASE OF FRUCTOSE INTOLERANCE

Patent Proprietor:
Vitacare GmbH & Co. KG

Opponent:
STADA Arzneimittel AG

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 11(3), 112a(1), 112a(2)(b), 112a(2)(c), 113, 116
EPC R. 108(1)
RPBA 2020 Art. 1(3), 5(1)
Business Distribution Scheme Art. 4(1)

Keyword:

Petition for review - clearly inadmissible

Decision to appoint rapporteur - decision of a Chair, not of a Board

Decision not to hold oral proceedings on appointment of rapporteur - decision of a Chair, not of a Board

Violation of the right to a judge appointed by law

("gesetzlicher Richter") - violation of right to be heard



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Case Number: R 0021/22

D E C I S I O N
of the Enlarged Board of Appeal
of 12 February 2024

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Decision under review: **Decisions of the Chair of Technical Board of Appeal 3.3.04 of 2 August 2022 and 14 September 2022.**

Composition of the Board:

Chairman I. Beckedorf
Members: D. Rogers
P. Scriven

Summary of Facts and Submissions

- I. The petition for review concerns appeal proceedings T 0097/22 of Board of Appeal 3.3.04.
- II. On 1 July 2022, the Chairs of Boards 3.3.04 and 3.3.08 signed an order transferring case T 0097/22 from Board 3.3.04 to Board 3.3.08. This order was communicated to the parties in a communication dated 6 July 2022.
- III. In a letter dated 6 July 2022, the Proprietor-Respondent objected to the transfer from Board 3.3.04 to Board 3.3.08. In a further letter, dated 19 July 2022, the Proprietor-Respondent gave further reasons as to why it objected to the transfer of the case. The Proprietor-Respondent indicated that it considered the transfer to violate the right to have a case considered and decided upon by the judge designated or appointed by law. The Proprietor-Respondent pointed out that this right was guaranteed at the constitutional level in Germany. The Proprietor-Respondent also stated that it did not consider that the order of the Chairs provided a justifiable reason for the transfer.
- IV. In a communication dated 2 August 2022, the registrar of Board 3.3.04 made reference to the Proprietor-Respondent's submissions of 6 and 19 July 2022. In the light of these submissions, the registrar stated that the case would be transferred back from Board 3.3.08 to Board 3.3.04. This communication also stated that the Chairs of 3.3.04 and 3.3.08 had further decided to designate a member of Board 3.3.08 as rapporteur.

- V. In its reply to the statement of grounds, dated 4 August 2022, the Proprietor-Respondent objected to the designation of a member of Board 3.3.08 as rapporteur in the case, which was now again before Board 3.3.04 (see point 6, page 2/84 of the reply to the grounds of appeal). The Proprietor-Respondent argued that this designation was not in accordance with Article 4(1) of the Business Distribution Scheme ("BDS"). The Proprietor-Respondent also requested oral proceedings specifically to consider this point.
- VI. In a letter dated 2 September 2022, the Proprietor-Respondent re-iterated and amplified its objections to the designation of a member of Board 3.3.08, as rapporteur for this case in Board 3.3.04. The Proprietor-Respondent further requested oral proceedings to discuss this issue.
- VII. In a communication dated 14 September 2022, the registrar, on behalf of the Chair of Board 3.3.04, set out the Chair's consideration and rejection of the Proprietor-Respondent's arguments set out above. This communication also stated that the Petitioner had no right to oral proceedings on this issue.
- VIII. In a letter dated 30 September 2022, the Proprietor-Respondent further argued that the Chair of Board 3.3.04 had not followed the provisions of the BDS in designating a member of Board 3.3.08 as rapporteur in this case and that this constituted a violation of the right to a judge appointed by law ("gesetzlicher Richter") which is a concept rooted in German constitutional law and also applicable to proceedings under the EPC. The Proprietor-Respondent also argued, at point 2.17, that it had a right to oral proceedings

to discuss this point.

- IX. On 12 October 2022, the Proprietor-Respondent (henceforth "the Petitioner") filed a petition for review. The grounds for the petition were given as Article 112a(2)(b) and (c) EPC. These grounds are, respectively, that the Board of Appeal included a person not appointed as a member of the Boards of Appeal; and that a fundamental violation of the right to be heard took place (Article 113 EPC).
- X. The Petitioner argues that, as regards its petition under Article 112a(2)(b) EPC, this article, when read in German, has the meaning that a person needed to be appointed to a particular board and not the boards of appeal as a whole. This could be derived from the use of the singular "...nicht zum Beschwerdekammermitglied ernannt war..." whereas the English version used a plural, "...not appointed as a member of the Boardss of Appeal...". The Petitioner relied on the German version. As the member was not appointed to board 3.3.04, a petition may be filed under this article.
- XI. The petition identifies two decisions that are subject of complaint. The first is that set out in the Board's communication of 2 August 2022, that designates a member of Board 3.3.08 as rapporteur. The second is that set out in the communication of 14 September 2022, which rejects the Proprietor-Respondent's request for oral proceedings to discuss the composition of Board 3.3.04 in this case.
- XII. As regards the decision to designate a member of Board 3.3.08 as the rapporteur, the Petitioner argues that this was not done in accordance with the BDS. The BDS, in the context of the EPC system, expressed the

principle of "gesetzlicher Richter" ("legal judge"), a constitutional principle under German law. A violation of this principle was a violation of the right to be heard (see pages 12 and 13 of the petition).

XIII. The Petitioner argues that if the decision to designate a rapporteur could not be challenged by way of a petition for review at an early stage, this could lead to problems. For example, the incorrectly designated rapporteur might influence the other members of the board during a lengthy period of time, if this incorrect designation could only be decided upon, in a reviewable way, at the main oral proceedings of the appeal. To be an effective legal remedy, an earlier solution was required.

XIV. As regards the decision not to hold oral proceedings to discuss the composition of Board 3.3.04, the Petitioner argues that the right to oral proceedings in Article 116 EPC was not restricted. The Board communication of 14 September 2022 was not correct when it stated:

"The right to present oral arguments in proceedings concerning the merits of a patent or patent application as stipulated in Article 116 EPC does not apply to the decision of the chair regarding the composition of the board responsible for the decision in this proceedings. Therefore no separate oral proceedings on this issue are arranged."

XV. The Petitioner responded to the preliminary opinion of the Enlarged Board in a letter dated 27 September 2023 and argued that the decisions that are the subject of this petition were decisions of the Board of Appeal and not decisions of the Chair. This was because a chair of a board of appeal had no autonomous position under the

EPC and that decisions on the composition of a board were thus made by the board, therefore bringing such decisions under the wording of Article 112a EPC. The Petitioner further argued that a proper interpretation of Article 112a EPC would result in decisions by chairs on the composition of a board being decisions against which petitions could be filed.

XVI. Oral proceedings were held on 12 February 2024.

XVII. The Petitioner requests that:

- 1) the decision of Technical Board of Appeal 3.3.04 of 2 August 2022, designating a member of Board 3.3.08 as the rapporteur in application of Article 4(2) BDS be reviewed;
- 2) the above decision be set aside;
- 3) board 3.3.04 set up a composition in compliance with Article 3(1) of the BDS;
- 4) the petition for review fee be reimbursed;
- 5) oral proceedings are requested if the Enlarged Board is not minded to grant the above requests;
- 6) should the Enlarged Board have doubts as to the facts set out in the petition, it is requested that: the Chairs of Boards 3.3.04 and 3.3.08 give explanations of the transfer of the case between the boards and the designation of a member of Board 3.3.08 as rapporteur, and that the Chairs of Boards 3.3.04 and 3.3.08 be heard before the Enlarged Board.

Reasons for the Decision

The Board of Appeal included a person not appointed as a member of the Boards of Appeal - Article 112a(2)(b) EPC

1. Article 11(3) EPC sets out how members of the Boards of Appeal are appointed (in German, "ernannt", the Petitioner relied upon the German language version of this article in its arguments, see para X above). It concerns appointment to the Boards of Appeal as a whole. This language ("appointed", "ernannt") is repeated in Article 112a(2)(b) EPC. The Enlarged Board thus considers that Articles 11(3) and 112a(2)(b) EPC both refer to the same appointment, that is to the Boards of Appeal as a whole, and not the attachment of a member to a particular board or boards.
2. The Enlarged Board thus comes to the view that, for the ground of petition under Article 112a(2)(b) EPC to be applicable, a member of a particular board must be someone who has not been appointed to the Boards of Appeal under Article 11(3) EPC. The Petitioner's arguments relying on the use of the singular "board of appeal" in the German language version, ("nicht zum Beschwerdekammermitglied ernannt"), fail to persuade in the light of the above analysis. The Petitioner has not argued that the member in question had not been appointed to the boards in accordance with Article 11(3) EPC, hence the petition fails under this head.
3. The petition thus does not comply with Article 112a(2)(b) EPC and is therefore to be rejected as inadmissible under Rule 108(1) EPC in respect of this ground for review.

*Decisions for which review is sought under Article 112a(2)(c)
EPC*

4. The Petitioner identifies two decisions against which it is filing a petition for review under Article 112a(2)(c) EPC - violation of the right to be heard. First, the decision to designate a member of Board 3.3.08 as rapporteur, and second, the decision to refuse to hold oral proceedings to discuss this issue. These decisions are set out in the communications from the registrar of Board 3.3.04 dated 2 August 2022 and 14 September 2022, respectively.

Decision to designate a member of Board 3.3.08 as rapporteur

5. Article 1(3) of the Rules of Procedure of the Boards of Appeal ("RPBA") provides that the Chair of each Board of Appeal shall determine the composition of the Board for each particular case, and Article 5(1) RPBA provides that it is the Chair of the Board who shall designate the rapporteur. Thus the decisions on the composition of a board and the designation of the rapporteur are made by the Chair.
6. At point 1 of the petition, the Petitioner identifies the decision of 2 August 2022 as being a decision of Board 3.3.04. The Petitioner has argued that a Chair has no autonomous decision making powers under the EPC. Thus decisions that, on their face, are made by a Chair are to be considered decisions of a board.
7. The Enlarged Board cannot follow this reasoning, as the BDS and the RPBA explicitly grant the Chair of a board

decision making powers relating to determining the composition of a board and designating a rapporteur.

8. Thus the Enlarged Board finds that the decision to appoint a member of Board 3.3.08 as rapporteur was made by the Chair and not by the Board.

Decision to refuse oral proceedings

9. The Petitioner has explicitly argued that a decision on the composition of the Board was made by the Board, and not by the Chair. The Enlarged Board has rejected this position (see above).
10. As regards the decision to reject the request for oral proceedings on the issue of the Board's composition, the Petitioner has not explicitly argued that this decision was a decision of the Board, rather the Petitioner appears to proceed upon the implicit basis that if the decision on the composition was made by the Board, then the decision to reject the request for oral proceedings to discuss this issue was also made by the Board.
11. The Enlarged Board accepts the logic of the Petitioner's position. It is certainly usual practice that a judge or a judicial body that makes a substantive or procedural decision in a case would also decide whether to hold oral proceedings to discuss these issues. This follows from the intimate connection between the oral proceedings and the decision-making process. As the Enlarged Board has found that the decision on the composition was made by the Chair, it thus follows that the Chair has also made the decision

to reject the request for oral proceedings to discuss this composition.

Conclusion on the petition under Article 112a(2)(c) EPC

12. Article 112a(1) EPC sets out the circumstances in which a petition for review may be filed:

"Any party to appeal proceedings adversely affected by the decision of the Board of Appeal may file a petition for review of the decision by the Enlarged Board of Appeal."

13. The decision referred to above in Article 112a(1) EPC is a decision of a board. The decision to appoint a member of Board 3.3.08 as rapporteur and the decision not to hold oral proceedings on this issue were decisions of the Chair. Thus, these decisions cannot be subject to a petition for review.
14. The petition thus does not comply with Article 112a(1) EPC and is, therefore, to be rejected as inadmissible under Rule 108(1) EPC in respect of the ground for review under Article 112a(2)(c) EPC.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated