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**Datasheet for the decision
of 10 April 2026**

Case Number: R 0016/24

Appeal Number: T 0762/22 - 3.2.01

Application Number: 14830649.1

Publication Number: 3080395

IPC: E21D9/00

Language of the proceedings: EN

Title of invention:

PROCEDURE FOR THE CONSTRUCTION OF CROSS PASSAGES IN DOUBLE PIPE
TUNNELS

Patent Proprietor:

SWS ENGINEERING S.p.A.

Opponents:

Körner, Andreas
HERRENKNECHT AKTIENGESELLSCHAFT

Headword:

Petition for review

Relevant legal provisions:

EPC Art. 112a(2)(c), 112a(2)(d), 113, 123(2)

EPC R. 106, 111(2)

CLBA, 10th edition, 2022 II.E.I.9, V.B.3.1, V.B.3.4.2, V.B.
3.4.3

Keyword:

Petition for review - clearly inadmissible - fundamental
violation of the right to be heard (no)

Decisions cited:

G 0002/10, R 0006/11, R 0005/16



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Case Number: R 0016/24

D E C I S I O N
of the Enlarged Board of Appeal
of 10 April 2026

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Decision under review: **Decision of the Technical Board of Appeal 3.2.01
of the European Patent Office of 27 May 2024.**

Composition of the Board:

Chair	C. Josefsson
Members:	D. Rogers
	W. Chandler

Summary of Facts and Submissions

I. This is a petition to review decision T 0762/22, issued on 27 May 2024, ("the Decision"), of board 3.2.01, ("the Board"). The Decision dismissed the appeal of the proprietor and maintained the revocation of the patent.

II. The petitioner was the appellant-proprietor before the Board.

III. The grounds of the petition are:

Article 112a(2)(c) EPC, a fundamental violation of the right to be heard according to Article 113 EPC took place (this ground of petition will be referred to as the "right to be heard" ground); and

Article 112a(2)(d) EPC, a fundamental procedural defect defined in the implementing regulations occurred in the appeal proceedings, in this case a defect according to Rule 111(2) EPC.

Rule 111(2) EPC states:

"Decisions of the European Patent Office which are open to appeal shall be reasoned ..."

This ground of petition will be referred to as the "lack of reasoning" ground.

Right to be heard

IV. A key issue before the Board was added matter, Article 123(2) EPC, and what standard was to be applied for assessing the question of added matter. The petitioner

wished to apply what it refers to as the "essentiality test", whereas the Board, during the oral proceedings suggested that the "gold standard" (derived from decision G 2/10) should apply. The Board referred to the "gold standard" in its Decision (see para 1.3).

V. The petitioner argues that it was given no opportunity at the oral proceedings before the Board to present its case based on the "gold standard". During these oral proceedings the Board also did not give any detailed reasoning as to why it disregarded the "essentiality test" advanced by the petitioner (page 3 of the petition, 2nd para).

VI. The petitioner thus considers that its right to be heard has been violated because it:

"... had only the chance to provide his arguments as to the 'essentiality test', while the decision of the Board is based on the 'gold standard', both without specific motivation as to why the 'essentiality test' is no longer applicable, and without asking if the skilled person is presented with new information, as required by the 'gold standard'" (page 4 of the petition, 3rd para).

Violation of the right to a reasoned decision under Rule 111(2) EPC

VII. The petitioner argues that the Decision does not provide proper reasoning under the "gold standard" (page 4 of the petition, 1st para of 3.2).

VIII. In addition, the petitioner argues that:

"... the Board examined the three points of the 'essentiality test' when actually it should have focussed on what information is presented to the skilled person by the amendment (see G 2/10). The fact that this has not happened, neither in oral proceedings nor in the written decision, is not only a violation of Art. 113 EPC but also of Rule 111(2) EPC" (petition page 4, 7th para).

and also that:

"In the present case, since the Board did not provide reasons which reflect the proper legal basis for assessment of Art. 123(2) EPC, i.e., the 'gold standard' as required by G 2/10, but rather reasons which merely reflect, as the Board itself states, a test 'no longer considered appropriate', the right to a reasoned decision under R. 111(2) EPC is violated" (petition, page 5, 1st full para).

Objection under Rule 106 EPC

IX. The petitioner argues that it could not have raised a Rule 106 EPC objection during the appeal proceedings as it only became aware of the defects in the board's conduct when it received the written decision.

X. The Enlarged Board issued a communication setting out its preliminary views on the petitioner. By a letter dated 31 October 2025 the petitioner withdrew its request for oral proceedings and requested that a decision be taken "based upon the current state of the file".

XI. Oral proceedings were cancelled.

Requests

XII. The petitioner requests that the Decision be set aside and that the proceedings before the Board be re-opened.

Reasons for the Decision

Right to be heard

1. The Enlarged Board will first deal with the objection regarding the right to be heard and whether this is admissible.
2. In its communication, dated 28 February 2024, in preparation of the oral proceedings, the Board dealt with added matter in para 1 of section VI. The 2nd para of this states:

“The appellant [the petitioner] does not put forward any additional arguments not already considered by the Opposition Division in the decision. With the addition of the feature IX.1, which is based on figures 2 to 6 and their corresponding description, the appellant has generalized the content of the application as originally filed, thereby committing an unallowable intermediate generalisation (see Case Law of the Boards of Appeal of the EPO - CLBA -, 10th edition, 2022, II.E.1.9).”

3. CLBA II.E.1.9 referred to above sets out the established position regarding the assessment of added matter. This section of the Case Law book specifically refers to the “gold standard” derived from G 2/10 and specifically says that the “essentiality test” is not to be applied. Thus it

can be derived from the communication that the board was intending to apply the "gold standard" and rejected the "essentiality test". This conclusion is supported by the petitioner's recollection of the oral proceedings set out in the paragraph number "i" at the bottom of page 2 of the petition, where it is stated:

"... While the Board mentioned in the course of the oral proceedings that this latter test [the "essentiality test"] is no longer considered appropriate, but that rather the 'gold standard' should be applied ...".

The petitioner then continues this sentence concerned with its recollection of the oral proceedings with its key point regarding the right to be heard:

"... [the board] failed to give the proprietor/petitioner the possibility to argue why, under such 'gold standard', the subject-matter of claim 1 of the main request (corresponding to granted claim 1) was indeed directly and unambiguously derivable from the application documents originally filed."

4. The Enlarged Board considers that it was at this point in the oral proceedings that the petitioner should have raised a Rule 106 EPC objection. This is because the petitioner's own recollection of the oral proceedings suggest that either the board deliberately did not permit the petitioner to make submissions on this point, or that the petitioner chose not to make any submissions. In the first case the petitioner should have at that point made a Rule 106 EPC objection, in the second case, the petitioner cannot have suffered any violation of its right to be heard as it chose to say nothing.

5. The Enlarged Board is thus of the view that the petition is inadmissible as regards the ground under Article 112a(2)(c) EPC, (that a fundamental violation of the right to be heard according to Article 113 EPC took place).

Lack of reasoning

6. Article 112a(2)(d) EPC applies when a fundamental procedural defect defined in the implementing regulations occurred in the appeal proceedings. In this case the petitioner argues that such a procedural defect is when a decision is not reasoned and thus does not comply with Rule 111(2) EPC.
7. The procedural defects that are defined in the implementing regulations that may be subject to a petition do not include those under Rule 111(2) EPC: allegedly insufficient reasoning cannot be considered in review proceedings (R 6/11 para 11 and 11.1, CLBA, V.B.3.4.2), unless this involves a fundamental violation of Article 113 EPC. To the extent that the petitioner has argued that the board has not reasoned its decision, and that this constitutes a violation of its right to be heard, this is dealt with above, where it was found to be inadmissible.
8. The Enlarged Board also notes that Rule 111(2) EPC applies to "... decisions of the European Patent Office which are open to appeal ...". A decision of a board of appeal is not open to appeal. Thus from its wording alone, it is clear that Rule 111(2) EPC cannot set out a procedural defect that could be a ground for a petition.
9. A petition for review is not to be considered as an appeal. Its purpose is not to make the Enlarged Board of

Appeal a third instance (R 5/16 para 7 and CLBA V.B.3.1 and V.B.3.4.3) but to provide for a limited judicial review of decisions of the boards of appeal.

10. The Enlarged Board is thus of the view that the petition is inadmissible as regards the ground under Article 112a(2) (d) EPC.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



N. Michaleczek

C. Josefsson

Decision electronically authenticated