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**Datasheet for the decision
of 11 July 2025**

Case Number: R 0021/24

Appeal Number: T 1097/22 - 3.3.09

Application Number: 11833527.2

Publication Number: 2627197

IPC: G06F19/00, A23L33/00,
A61K31/202

Language of the proceedings: EN

Title of invention:

OPTIMIZED NUTRITIONAL FORMULATIONS, METHODS FOR SELECTION OF
TAILORED DIETS THEREFROM, AND METHODS OF USE THEREOF

Applicant:

Asha Nutrition Sciences, Inc.

Headword:

Petition clearly unallowable

Relevant legal provisions:

EPC Art. 112a(2)(c), 112a(2)(d), 113
EPC R. 104(b)

Keyword:

Petition for review - fundamental violation of Article 113 EPC
(no) - no decision on a relevant request (no) - clearly
unallowable

Decisions cited:

G 0001/93, G 0010/93, G 0002/10, R 0017/11, R 0019/10



Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours

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Case Number: R 0021/24

D E C I S I O N
of the Enlarged Board of Appeal
of 11 July 2025

Petitioner: Asha Nutrition Sciences, Inc.
(Applicant) P.O. Box 1000
Palo Alto, California 94302 (US)

Representative: Lewis Silkin LLP
Arbor
255 Blackfriars Road
London SE1 9AX (GB)

Decision under review: **Decision of the Technical Board of Appeal 3.3.09
of the European Patent Office of 14 June 2024.**

Composition of the Board:

Chair C. Josefsson
Members: T. Bokor
P. Acton

Summary of Facts and Submissions

- I. The applicant (the petitioner) in case T 1097/22 filed a petition for review under Article 112a EPC against the decision of the Technical Board of Appeal 3.3.09 (the Board) dated 14 June 2024. In that decision, the Board dismissed the appeal and thus confirmed the refusal of the European patent application No. 11833527.2. The decision of the Board based the refusal on the ground that none of the main request and the auxiliary request 1 complied with the requirements of Article 123(2) EPC.
- II. The petitioner contends that a fundamental violation of Article 113 EPC occurred in the appeal proceedings and that fundamental procedural defects also occurred. The petition therefore relies on both grounds under Article 112a(2)(c) and (d) EPC.
- III. The first petition ground, violation of the right to be heard, is that the Board did not address numerous arguments of the petitioner. These ignored arguments relate partly to the conduct of the proceedings by the Examining Division and partly to the substantive arguments on the issues of added subject-matter, novelty and inventive step that were also submitted to the Board.
- IV. The second petition ground, occurrence of fundamental procedural defects, is that the Board did not address the objections of the petitioner on the various violations of the right to be heard, which were raised in the petitioner's submissions of 11 June 2024.

Overview of the examination and appeal proceedings

- V. The application is based on the PCT application PCT/US2011/056463 filed on 14 October 2011 and entering the regional phase before the EPO on 2 May 2013. The earlier request for substantive examination and the continuation of the application was confirmed by the appellant in November 2017. The substantive examination started on 10 March 2020. During the examination phase, the applicant filed numerous complaints with the EPO concerning the processing of the application.
- VI. Following an exchange of several communications under Article 94(3) EPC from the Examining Division and written arguments and amendments from the applicant, the Examining Division summoned the applicant to oral proceedings on 23 November 2021, as requested. On 21 October 2021 the applicant withdrew its request for oral proceedings and requested a decision on the state of the file, at the same time filing additional arguments. The Examining Division cancelled the oral proceedings and refused the application with a decision dated 29 November 2021. The main request was refused for non-compliance with the requirements of Article 123(2) EPC, and the various independent claims of an auxiliary request were refused for lack of novelty or lack of inventive step.
- VII. The decision was appealed. The statement setting out the grounds of appeal did not refer to any of the procedural objections of the applicant during the proceedings before the Examining Division but contained only substantive issues. A violation of the right to be heard was not mentioned.

- VIII. The Board issued a communication under Article 15(1) RPBA on 9 November 2023 containing a preliminary opinion that both pending requests contained added subject-matter and summoned the applicant to oral proceedings. The communication also discussed novelty and inventive step.
- IX. The applicant responded by written submissions dated 11 June 2024, referred to here and in the Board's decision as the 'last submissions'. In these last submissions, the applicant withdrew its request for oral proceedings, requested a decision on the state of the file and addressed the points in the Board's communication. A significant part of its arguments consisted of references to its earlier submissions during the proceedings before the Examining Division. Several decisions of the Enlarged Board and other case law on the application of Article 123(2) EPC were cited in support of the applicant's position that the claims did not contain added subject-matter.
- X. The applicant also complained that the Board did not properly take into account the arguments in the grounds of appeal, and - for the first time - that in the proceedings before the Examining Division its right to be heard has not been observed on multiple occasions, and generally the proceedings had been unnecessarily protracted. The procedural complaints about the arguments and evidence ignored by the Examining Division and the violation of its right to be heard had not been mentioned in its statement setting out the grounds of appeal. It was also submitted in the 'last submissions' that the Board found added subject-matter in spite of the positive opinion of the Examining Division, such procedure being contrary to the statements in decision G 10/93.

XI. The Board maintained the oral proceedings and decided the matter in the absence of the applicant-appellant on 14 June 2024. The decision was issued in writing on 18 July 2024. The admittance of any of the new issues raised in the last submissions were not addressed. Some but not all arguments from the last submissions were dealt with in the decision. Among other issues, the decision is silent about the procedure before the Examining Division.

Proceedings before the Enlarged Board of Appeal

XII. The petition for review was filed on 18 September 2024, and the prescribed fee was paid on the same day.

XIII. The Enlarged Board of Appeal (in its current composition, also referred to as the EBA in the following) issued a communication under Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) and summoned the petitioner to oral proceedings. The communication set out that the petition appeared to be clearly unallowable for both petition grounds under Articles 112(2)(c) and (d) EPC.

XIV. The EBA gave its view on the two petition grounds and stated that the Board appeared to have dealt with the relevant arguments of the petitioner in sufficient depth, while some of the arguments put forward by the petitioner not addressed by the Board were apparently not relevant for the Board's decision. Neither a violation of the right to be heard nor any undecided relevant request within the meaning of Rule 104(b) EPC was apparent.

XV. The petitioner responded with further written submissions dated 4 July 2025. It argued that the

petition was allowable and explained which of its arguments were ignored by the Board.

XVI. The oral proceedings before the EBA were held on 11 July 2025. At the oral proceedings, the petitioner submitted further arguments to support that the petition was allowable. It submitted that new arguments were a reaction to new objections from the EBA and were admissible. These new arguments of the petitioner are set out in more detail below. The arguments from the written submissions were maintained and also partly repeated.

XVII. The petitioner requested in the oral proceedings that:

- the decision under review be set aside,
- the proceedings before the Board be re-opened as stipulated by Article 112a(5) EPC
- the fee for the petition for review be reimbursed
- the case be assigned to a new Board following the re-opening of the proceedings

confirming its requests as last stated in writing in its submissions of 4 July 2025.

Reasons for the Decision

Reference to the parallel case R 20/24

1. The appeal case underlying the current petition concerns one of several applications filed by the same applicant. One of these related applications was dealt with in appeal case T 1054/22, also assigned to the Board. Both cases turned on similar issues, and were decided similarly by the Board. Appeal case T 1054/22 is the subject of the parallel petition for review case

R 0020/24. As also confirmed by the petitioner, there are no relevant substantive differences between the two petition cases. Both the reasoning of the Board, the petition grounds and the arguments of the petitioner are similar though not identical. The Enlarged Board's findings are equally similar, with due regard to the differences.

Admissibility of the petition (Rule 106 EPC)

Requirement to raise an objection pursuant to Rule 106 EPC, first and second grounds

2. The petition with reasons was filed in due time and the prescribed fee was paid (Rule 107(1) and (2) EPC). The petitioner is adversely affected by the decision.
3. The EBA is satisfied that the petition is not inadmissible under Rules 106 and 109(2)(a) EPC. The EBA accepts that the petitioner could only have realised upon receipt of the written decision that the latter did not address a number of substantive arguments and evidence in the file. Given that the petitioner did not appear in the oral proceedings and the Board did not issue further communications, the petitioner could not have known which substantive and evidentiary issues the Board would address.
4. The same applies to the second petition ground: the Board's failure to address various objections of the petitioner concerning the violation of the right to be heard. It is not relevant that the petitioner did not refer to Rule 106 EPC when making its objections.
5. Therefore, the petition is admissible.

Allowability of the petition

First petition ground, violation of the right to be heard

6. The first ground is clearly unfounded.

7. As set out in point 9 of the preliminary opinion, the EBA identified the following three groups of ignored arguments in the petition: (1) arguments and evidence in general in the file before the Examining Division (petition page 2, last paragraph to page 3, third paragraph) (2) arguments and evidence in general in the file before the Board (petition page 3, fourth paragraph to page 4 third paragraph) (3) several specifically identified ignored arguments (petition page 4, fourth paragraph). The petitioner did not object to this classification of its submissions by the EBA and did not argue that the EBA had overlooked any core submission in the petition. This classification of the submissions is maintained in the following.

8. The petitioner argued that submissions (arguments and evidence) **in general** were ignored by the Board. In this respect, the EBA stated the following (see point 10 of the preliminary opinion):

"In this regard the EBA notes that a general statement of the petitioner that many or even all of its arguments were ignored cannot be the basis of the successful petition. A board of appeal has no obligation to address each and every argument of a party (CLBA V.B.4.3.10.a). Ignoring an argument of a party can only be seen as a fundamental defect if it is clear that the argument was relevant and objectively would have changed the outcome of the decision (see also CLBA V.B.4.3.2 and V.B.4.3.10.b). However, it is not the task of the EBA to scrutinise the file and to

identify those specific arguments that were ignored and which the petitioner considers as being decisive for its case."

This assessment of the EBA was not contradicted by the petitioner. Rather, in its following written submissions and in the oral proceedings before the EBA, it pointed out the allegedly ignored submissions in greater detail.

9. The EBA confirms its assessment of the **general reference** to allegedly ignored submissions and rejects this as a petition ground that is clearly not allowable on its own. Making a further distinction between these arguments in terms of the procedure before the Examining Division versus the procedure before the Board does not alter this assessment. As set out below, the EBA cannot see any ignored submission that was timely raised in the appeal and also relevant to the Board's decision.

10. As to group (1), the EBA stated the following (see points 11 to 14 of the preliminary opinion):

"11. At this point the EBA also observes that Article 112a(2)(c) EPC is no direct legal basis for dealing with possible violations of the right to be heard by the Examination Division. Petition proceedings under Article 112a EPC are directed only at the appeal proceedings. This follows already from the first paragraph, making it clear that the subject of the proceedings is the decision of the board of appeal, and not that of the Examining Division. This is also implied by the wording of Article 112a(2)(d) EPC, referring to "any other [defect occurring] **in the appeal proceedings**", emphasis by the EBA. Violations of

Article 113 EPC by the Examining Division (or an Opposition Division) can at most be examined for the question whether they had to be treated by the Board at all, but not for the question whether the objected acts or omissions of the Examining Division indeed resulted in a fundamental violation of Article 113 EPC within the meaning of Article 112a(2)(c) EPC. Thus any complaints of the petitioner about the procedure before the Examining Division are only understood by the Enlarged Board in this restricted sense.

12. As to the ignored arguments concerning group (1), they do not seem relevant to the Board's decision. The petitioner did not request any legal effect which were based on these arguments, such as the finding of a substantive procedural violation on the part of the Examining Division and therefore a remittal and/or reimbursement of the appeal fee. No causal relationship has been argued by the petitioner between the issue of added subject-matter before the Board and the majority of the arguments and evidence that had been ignored by the division. Those arguments that were relevant for the issue of added subject-matter were sufficiently treated, as explained below.

13. What more, the complaints about the ignored arguments by the division were also not submitted in the grounds of appeal. Accordingly, there was no need for the Board to address these in its Article 15(1) RPBA communication, so that the petitioner had no reason either to complain about any inaccurate statements of the Board (see bottom of page 3 in the petition).

14. The petitioner appears to put emphasis on the fact that it requested a decision on the state of the file,

both before the Examining Division and before the Board. The petitioner seems to argue that this request should have prompted the examination of the totality of its case, without exception (see petition page 3, citation at the bottom, page 4, citation in the second paragraph). The EBA sees no basis for this expectation of the petitioner. The request for a decision on the state of the file did not have the legal consequence that the Examining Division or the Board would have been obliged to address each and every argument of the applicant that were on file."

11. This assessment of the EBA concerning the ignored arguments of group (1) was not contradicted by the petitioner. Having reviewed these reasons, the EBA confirms them as set out in its communication, and concludes that the Board had no obligation to deal with the petitioner's submissions directed at the proceedings before Examining Division given that these were not relevant to the Board's decision.

12. As to the arguments in group (2), the EBA stated the following (see points 15 to 16 of the preliminary opinion):

"15. The same applies to group (2) and the general reference to the totality of the petitioner's arguments that were effectively disregarded by the Board (petition page 4, third paragraph). A simple statement that all arguments were ignored by the Board is normally not sufficient to establish that disregarding the arguments indeed caused a fundamental violation of Article 113 EPC. The general argument of the petitioner (petition page 4, penultimate paragraph) that all these omissions by the Board were causal to Board's decision on added matter and therefore must be considered

fundamental is without merit. The EBA certainly agrees that only those arguments that could possibly have had a bearing on the issue of added subject-matter can be considered relevant for the petition, but this is clearly not the case for the majority of the arguments to which the petitioner appears to be referring in the petition.

16. The EBA does not dispute that even without further details from the petitioner, it is easily established that the petitioner's statement, taken at face value, is factually correct. The Board's decision indeed does not mention a large part of the arguments and evidence referred to in the grounds of appeal or in the later written submissions of 11 June 2024 (in the following 'last submissions'). But this does not seem objectionable, because the globally disregarded arguments and evidence clearly concerned the issue of novelty and inventive step, both being irrelevant for the question of added subject-matter that had been the single decisive substantive issue of the Board's decision."

13. The petitioner did not refute the EBA's above finding, namely that a large part of the allegedly ignored arguments, in particular those clearly directed at novelty and inventive step, were not relevant.
14. In its submissions dated 4 July 2025 and in the oral proceedings, the petitioner specified for the first time some of its technical arguments that were allegedly ignored by the Board in the examination of added subject-matter for the purposes of Article 123(2) EPC. Reference is made to page 2, first to fifth bullet points in the petitioner's submissions dated 4 July 2025, and to the petitioner's explanations

on the role of omega-3 and omega-6 fatty acids in the course of the oral proceedings before the EBA.

15. The EBA can accept that the new arguments were submitted as a response to the EBA's communication, as stated by the petitioner during the oral proceedings, even if this was not explicitly stated in the written submissions of 4 July 2025. However, this circumstance does not justify their admittance under Article 12(1) RPEBA. The fact that the EBA provides a preliminary opinion and points out the deficiencies of a petition cannot be seen as a special circumstance within the meaning of this article.

16. The EBA holds that these specific technical arguments are new and were not spelt out in the petition for review as being a core argument. They are not a refinement, but rather represent a significant change of the petitioner's case. The EBA is unable to see any indication in the petition that the petition grounds are rooted in ignored technical arguments. Such technical details are not even hinted at in the petition. Those few concrete examples of allegedly ignored arguments that can be identified in the petition (see further below) are all essentially abstract legal arguments. The EBA therefore does not admit the new technical arguments into the petition proceedings under Article 12(1) RPEBA.

17. Moreover, the new legal arguments are also rejected for similar reasons, namely the lacking explanation why the Board's opinion differs from that of the Examining Division (page 3, second bullet points in the petitioner's submissions dated 4 July 2025) and the alleged violation of the principles set out in G 10/93

(page 3, third bullet point, and presumably also the fifth bullet point is part of this argument).

18. These arguments are also new in the petition and the EBA sees no special reasons for their admittance. None of these were raised in the petition as a specific and identifiable objection, under either of the two raised petition grounds raised under Articles 112a(2)(c) and (d) EPC. The EBA also rejects the petitioner's argument submitted at the oral proceedings that the Board's violation of the principles set out in decision G 10/93 was implicitly part of the petition even without any express mention of that decision.

19. Notwithstanding the admittance of these objections, they are also clearly unfounded. The Board was under no obligation to explain why its opinion was **different** from that of the Examining Division on any issue. It was only obliged to give reasons why the claim **did** contain added subject-matter, nothing more. Decision G 10/93 was also complied with as it expressly permits a Board to examine compliance with the requirements of the Convention, including issues decided in the affirmative by the Examining Division. See G 10/93, Headnote: "the board of appeal has the power to examine whether the application [...] meets the requirements of the EPC. The same is true for [...] requirements [...] which [the examining division] regarded as having been met" (EBA's emphasis). This principle articulated by the Enlarged Board is not pre-empted by the passage in G 10/93 (Reasons 4) cited in the last submissions (in appeal case T 1097/22). On the contrary, the petitioner conveniently omitted the last sentence of that passage, which reads: "*If however there is reason to believe that a condition for patentability may not have been satisfied, the board either incorporates it into the*

appeal proceedings or ensures by way of referral to the examining division that it is included when examination is resumed."

20. Thus, it remains that the EBA sees no admissible and relevant argument relating to the group (2) arguments that were ignored by the Board.

21. As to the group (3) arguments, the EBA stated the following (see points 17 to 23 of the preliminary opinion):

"17. The EBA accepts that the petition sufficiently identifies certain specific ignored arguments. These are found in the petition on page 4, fourth paragraph. The EBA could identify the following specific arguments of the petitioner that may be considered as specific instances of the violation of the right to be heard for the purposes of Article 112a(2)(c) EPC.

- i: failure to fully consider and inform the petitioner as to why the requirements of Articles 76(1) and 123(2) EPC were not fulfilled
- ii: failure to assess the skilled person in the field
- iii: failure to assess the case law on the correct application of Article 123(2) EPC cited by the applicant
- iv: generally a divergent application of the case law on Article 123(2) EPC

18. None of these points makes a convincing case, as set out below:

19. As to i: The EBA considers that this argument is no more than a general statement that the petitioner is not satisfied with the reasons it has received from the

Board on the issue of added subject-matter. At most it can be understood as an invitation for the EBA to review the Board's decision in substance, an exercise that is clearly beyond the powers of the EBA in petition proceedings.

20. As to ii: At no point did the petitioner argue, either in the grounds of appeal or in the last submissions, how the skilled person should be defined for the purposes of the application, nor did they argue that the Board was not relying on the correct definition of a skilled person. Accordingly, there was no apparent need for the Board to specifically address this question in more detail. If this argument is understood as an extension of the definition of 'skilled person' to include patent examiners in countries where the patent has been granted, this issue has been addressed by the Board in Reasons 1.26 and 1.27.

21. As to iii: The Board did deal with those cited decisions that it found were worth addressing, see Reasons 1.22. It specifically addressed decision T 201/83 with detailed reasons, see Reasons 1.24 and 1.25. Otherwise the Board was under no formal obligation to analyse all the decisions cited by the petitioner in its written submissions. In any case, the Board did not state that it disagreed with any of them; a fortiori, it was not required to explain why it would disagree with any of them. At no point does the Board make the statements that the petitioner now reads into the impugned decision – essentially an absolute bar to amendments based on a combination of distinct elements in the description (required literal disclosure, prohibition of extraction of values from examples, and prohibition of combination of items from separate

embodiments, or the mind willing to understand the claim is irrelevant for claim construction, i.e. claim interpretation). Instead, the Board explained the legal standard (G 2/10) and that the crucial issue is whether there is a basis within the original disclosure, not for the individual features of the claim but rather for the now claimed specific combination of features. E.g. the Board made it very clear that whether there is a pointer in the application for a certain **combination** of features is always to be decided on a case-by-case basis (Reasons 1.23).

22. The EBA also points out that a party is not entitled to receive a particularly structured statement of reasons in the sense that the Board must necessarily follow the logical structure of the arguments put forward by the parties or that the Board must address every issue raised (see again CLBA V.B.4.3.10.b, as mentioned in point 10. above). It is not apparent to the EBA why this principle would not apply to the case law cited by the parties, except for the situation where a board expressly intends to deviate from an earlier decision, see Article 20(1) RPBA. Even less is a board required to present its reasons in a way that a party will immediately find conclusive and convincing.

23. As to iv: The same reasons as for i, in point 19. above apply. The argument that the Board applied the case law divergently, concerns the substantive merits of the Board's findings, and reviewing it is beyond the powers of the Enlarged Board."

22. The EBA does not see any convincing argument of the petitioner against these findings, either in the submissions of 4 July 2025 or in the arguments presented at the oral proceedings before the EBA.

23. As to (i), this was not commented on by the petitioner.
24. As to (ii), the petitioner submitted that the Board misinterpreted the argument about the corresponding grants in 18 countries, this being put forward as evidence that skilled persons were able to derive the disputed subject-matter. This argument was different to the Board's that the standards of disclosure may differ from those applied in the EPO. Thus, in the petitioner's view, the Board failed to define and assess in the decision the skilled person and their common general knowledge on the date of priority (page 3, first bullet point in the petitioner's submissions dated 4 July 2025).
25. The EBA notes that the petition contained the following single sentence that may be identified as a specific objection of the petitioner concerning the Board's lack of assessment of the skilled person and their common general knowledge: "*The Applicant submits that the Board refrained from assessing who the skilled persons in the field are and what was their common general knowledge on the date of priority.*" (page 4, fourth paragraph, second sentence).

It was merely the EBA's conjecture that these general arguments may have been intended as a reference to the grant of the patent in 18 countries, and this was raised for the first time in the petition proceedings in the EBA's communication. The petition contained no clear and unambiguous argument in this respect. Let alone was there any clear argument that would have permitted the EBA to recognise the Board's alleged misunderstanding of the petitioner's exact argument as indeed being a serious misunderstanding of the substance and that this misunderstanding was

objectively decisive for the Board's decision, this being now argued by the petitioner. Accordingly, the argument is new in the petition, and the EBA sees no special circumstance that justify its admittance under Article 12(1) RPEBA.

26. Furthermore, even if the EBA were to admit this new argument, it would still not prove any violation of the petitioner's right to be heard. The Board might have misunderstood the argument, but this is a question of the substantive assessment. It is clear that the Board took note of the argument and addressed it. Contrary to the petitioner's view, the Board's reasoning also adequately addresses the argument. If disclosure standards are assessed differently, a finding by an EPO organ that there is a lack of disclosure does not necessarily mean that patent examiners in other jurisdictions cannot be considered skilled persons. In other words, at no point does the Board state or even imply that patent examiners are not skilled persons. Thus, there was no need for the Board to consider whether patent examiners in other jurisdictions could be regarded as skilled persons for the purposes of the EPC, nor to treat this as evidence of clear and unambiguous disclosure in the application. Therefore, the Board properly considered the petitioner's argument regarding the granting of patents in many other countries, and no relevant argument of the petitioner was ignored. This petition ground is clearly unfounded.

27. As to (iii) and (iv): The EBA does not see any recognisable counter-arguments from the petitioner against its assessment as set out in points 21 to 23 in the preliminary opinion. It seems that the petitioner merely repeated the argument that the Board ought have analysed the case law cited by the petitioner in the

appeal proceedings (page 4, first paragraph in the petitioner's submissions dated 4 July 2025), but did not address the findings of the EBA. The EBA emphasises again that a Board is not obliged to address every argument of a party, and for this reason the Board had no obligation to individually address each cited decision.

28. The same applies to the mentioned decisions of the Enlarged Board (page 3, fourth bullet point). Apart from that, the EBA considers that the Board did address exactly that argument which the petitioner raises there, namely that the question is the disclosure of the combination of the features and within the totality of the disclosure of the application as filed, as observed already in the EBA's preliminary opinion, point 21, last two sentences, cited also above in point 21. Thus the decision clearly deals with this argument. Whether the Board's analysis of the disclosure under this standard is substantively correct is not open for review.
29. Thus, the EBA confirms its preliminary opinion that the group (3) arguments (see point 7. above) were sufficiently addressed by the Board.
30. In summary, the EBA sees no ignored relevant argument, and therefore sees no violation of Article 113 EPC, let alone a fundamental one. The EBA holds that the first petition ground is clearly unfounded and as such clearly unallowable within the meaning of Rule 109(2) (a) EPC.

*Second petition ground under Article 112a(2)(d) EPC,
fundamental procedural defect*

31. As set out in the EBA's communication, the EBA considers that the petition is clearly unfounded also in respect of the second petition ground.

32. The EBA addressed this petition ground in its preliminary opinion (see points 25 to 27) as follows:

"25. Article 112a(2)(d) EPC stipulates that the **other** fundamental procedural defects - i.e. possible defects beyond those that are defined in sub-paragraphs (a) to (c) of Article 112a(2) EPC - are those defined in the Implementing Regulations. It appears undisputed that these other defects are specified in Rule 104(a) and (b) EPC, being an exhaustive list of such other procedural defects. Though explicitly not so stated, the EBA assumes that the petitioner refers to the procedural defect specified in Rule 104(b) EPC, i.e. a relevant but undecided request (Antrag, requête). The EBA could not identify any undecided request within the meaning of Rule 104(b) EPC.

26. It is at least questionable whether the applicant's submissions addressing the alleged violations of the right to be heard would indeed constitute a "request" for the purposes of this rule. Such requests seek to achieve a direct substantive or procedural legal effect, such as a claim request upon which a patent can be granted or maintained, or a request for the admittance of a document or the like (R 19/10, Reasons 5.1, R 17/11, Reasons 14. and 15., both cited in CLBA V.B.4.4.2). Such requests normally require an express and separate decision of the Board, directly deciding on the request, typically refusing or allowing

the sought substantive or procedural legal effect. As explained above, the petitioner's implied request for the Board to take into account the division's alleged procedural violations did not seek to achieve any separate legal effect. For the same reason, these objections of the petitioner also do not constitute a request in this sense. The relevant request was rather the main request and the auxiliary request 1, seeking to grant a patent on that basis as the legal effect sought. These claim requests have been duly decided on by the Board.

27. Accordingly, the EBA holds that the not treated objections of the petitioner (on the procedure before the examining division or on arguments ignored by the Board) even if discussed and argued by the petitioner in the overall context of certain request (here the request to grant a patent on the basis either the main request or the auxiliary request 1) are not requests in the sense of Rule 104(b) EPC. The petition ground raised under Article 112a(2)(d) EPC must fail for this reason alone."

33. In its submissions of 4 July 2025 and during the oral proceedings, the petitioner did not provide any counter-arguments to this assessment but merely repeated its position that the unaddressed arguments constituted a relevant request and that not addressing them amounted to a fundamental procedural defect within the meaning of Article 112a(2)(d) EPC because they had a bearing on the issue of added subject-matter.
34. Having reviewed these reasons, the EBA confirms them as set out in its communication, and concludes that substantive arguments that were not addressed do not constitute a "relevant request" for the decision on the

appeal for the purposes of Rule 104(b) and Article 112a(2)(d) EPC. At most, such unaddressed arguments might be seen as valid petition grounds under Article 112a(2)(c) EPC, but this is not the case here, as set out above in points 7 to 30. Notwithstanding the legal assessment of unaddressed arguments for the purposes of Article 112a(2)(d) EPC, an unaddressed **relevant** argument is not apparent, and therefore there is no allowable petition ground under Article 112a(2)(c) EPC either.

35. In summary, the second petition ground is also clearly unfounded, and thus the petition as a whole is clearly unallowable and to be rejected under Rule 109(2)(a) EPC.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chair:



N. Michaleczek

C. Josefsson

Decision electronically authenticated