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**Datasheet for the decision  
of 21 July 2025**

**Case Number:** R 0022/24

**Appeal Number:** T 2702/19 - 3.5.04

**Application Number:** 13165052.5

**Publication Number:** 2621159

**IPC:** H04N5/228, A61B1/00, A61B1/05,  
A61B17/29, G02B23/24,  
H04N5/225, A61B1/005

**Language of the proceedings:** EN

**Title of invention:**  
Small diameter medical devices containing visualization means

**Patent Proprietor:**  
Odysight.AI Ltd

**Opponent:**  
Keck, Stephan

**Headword:**  
Petition for review

**Relevant legal provisions:**

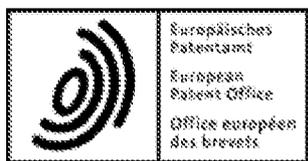
EPC Art. 83, 84, 100(b), 112a(2)(c), 113(1), 114(2), 123(2)  
EPC R. 106, 107(2), 109(2)  
RPBA 2020 Art. 12(4), 12(6), 13(1), 13(2)  
RPEBA Art. 13, 14(2)

**Keyword:**

Petition for review - Clearly unallowable  
Fundamental violation of Article 113(1) EPC (no)

**Decisions cited:**

R 0001/08, R 0010/09, R 0006/11, R 0010/11, R 0017/11,  
R 0019/11, R 0016/13, R 0006/17, R 0007/21, R 0017/24,  
T 0989/15, T 0709/16, T 0752/16, T 0764/16, T 0584/17,  
T 0954/17, T 2429/17, T 0995/18



**Große Beschwerdekammer**  
**Enlarged Board of Appeal**  
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Case Number: R 0022/24

**D E C I S I O N**  
of the Enlarged Board of Appeal  
of 21 July 2025

**Petitioner:**  
(Patent Proprietor)

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**Decision under review:**

**Decision of the Technical Board of Appeal 3.5.04  
of the European Patent Office of  
5 February 2024.**

**Composition of the Board:**

**Chairman** C. Josefsson  
**Members:** E. Mille  
E. Bendl

## Summary of Facts and Submissions

- I. The petition for review concerns decision T 2702/19 of Technical Board of Appeal 3.5.04 ("Board") of 5 February 2024. In this decision, the Board dismissed the appeal of the patent proprietor against the decision of the opposition division to revoke the European patent N° 13165052.5.
- II. The appellant ("petitioner") filed a petition for review of the above decision in due time. The petition was based on the ground that fundamental violations of its right to be heard under Article 113(1) EPC (Article 112a(2)c) EPC) allegedly occurred during the appeal proceedings. The petitioner requested that decision T 2702/19 be set aside and that the proceedings before the Board be re-opened.
- III. The Enlarged Board in its composition pursuant to Rule 109(2) (a) EPC summoned the petitioner upon their auxiliary request to oral proceedings and issued a communication pursuant to Article 13 and Article 14(2) RPEBA on 13 June 2025, to which the petitioner did not respond in substance.
- IV. The petitioner's case may be summarised as follows:  
  
In sections (1) and (3) of the petition, the petitioner complains that the Board in its preliminary opinion: brought forward on its own motion a further Article 83 EPC objection according to which the subject-matter of claim 1 of the main request comprised a problematic open-ended range of the maximum outer diameter of the claimed medical device; started the oral proceedings with a discussion on this issue,

raising further *ex officio* objections in this context; and concluded that said subject-matter was insufficiently disclosed. This problematic open-ended range objection was not discussed during the first-instance proceedings, the resulting decision did not deal with any Article 100(b) EPC ground for opposition and in its reply to the statement of grounds of appeal of the patent proprietor, the respondent/opponent brought another Article 83 objection. Further to the preliminary opinion of the Board and at the oral proceedings, the patent proprietor filed auxiliary requests 1a, 1 and 2, which were regarded by the Board as meeting the provisions of Article 13(2) RPBA but not admitted into the appeal proceedings based on Article 13(1) RPBA because the Board considered that they did not *prima facie* overcome the issues raised by the Board and gave rise to new objections (Reasons 7.6 of the decision regarding auxiliary request 1a, Reasons 8.7 and 8.8 of the decision regarding auxiliary requests 1 and 2).

The petitioner refers notably in section (2) of the petition to R 16/13, whose catchword reads "The right to be heard under Article 113(1) EPC is infringed if a Board of appeal uses, *ex officio*, reasons not put forward in the proceedings to justify its decision, without giving the party disadvantaged thereby the opportunity to comment on those reasons and, as far as the patent proprietor is concerned, to file new requests accordingly, unless it is clear to the Board after the course of the proceedings that it was possible for the party to understand the Board's reasoning from its own specialist knowledge." (Translated from German by the Enlarged Board).

According to the petitioner, these conditions were not met in the case at hand so that its right to be heard was violated.

The petitioner further holds the view in section (3) of the petition that there was a deficiency (lack of consideration in an appropriate way) in the assessment by the Board of the (non) admittance of its auxiliary requests into the appeal proceedings. the petitioner argues that by challenging, allegedly without justification, the admittance of these requests into the appeal proceedings based on Article 13(1) RPBA - considering that they did not *prima facie* overcome its Article 83 EPC objection and gave rise to new objections under Article 84 EPC for auxiliary request 1a (Reasons 7.6 of the decision) and under Article 123(2) EPC for auxiliary requests 1 and 2 (Reasons 8.6 and 8.7 of the decision) - and not only based on Article 13(2) RPBA, the Board exercised its discretion in an arbitrary manner and deprived the patent proprietor of the opportunity to enter into a substantive discussion on the amended subject-matter of said auxiliary requests, thereby violating its right to be heard.

The petitioner also states in section (3) of the petition that it would be apparent from the minutes of the oral proceedings and the decision (Reasons 7.6) that the new Article 84 EPC objection raised against auxiliary request 1a during these oral proceedings was not discussed and that the opponent did actually not raise this objection.

The petitioner, still in section (3) of the petition, claims that the term "maximum diameter" was present in the granted claims already and it would thus not have

been admissible from the very beginning to discuss the alleged lack of clarity of this term and that, regarding auxiliary requests 1 and 2, the respondent and the Board tried to construe a complex situation which actually does not exist and without which the question to be answered when assessing conformance with Article 123(2) EPC would have been different than that considered during the oral proceedings.

In addition, the petitioner holds the view also in section (3) of the petition that it did not have the opportunity to comment on the insufficiency of disclosure issue of the amendment introduced in auxiliary requests 1 and 2, according to which the diameter of the outer tip of the claimed visualization probe is between 1,0 mm and 2,8 mm and the minimum dimension of the claimed CMOS sensor is 0,5 x 0,5 mm and in particular on the fact that the Board referred in reasons 8.6 of the decision to the example shown in Figure 6 of the application as filed and of the patent and noticed that the diameter of the distal tip differed to the diameter of an optical assembly 82. According to the petitioner, by not having this opportunity, its right to be heard was violated.

## **Reasons for the Decision**

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

1. The requirements under Article 112a(1) and (4) EPC in conjunction with Rule 107(2) EPC were met. Pursuant to Rule 106 EPC, a petition for review is only admissible where an objection against an alleged procedural defect was raised during the appeal proceedings and dismissed by the Board, except where this objection could not be

raised during these appeal proceedings.

2. Meeting the requirements under Rule 106 EPC is a precondition for access to the review procedure, since it is an extraordinary legal remedy against otherwise final decisions of a Board.
3. In the case at hand, as it appears from the minutes of the oral proceedings and from the decision under review (p. 6 of the minutes, p. 6 and 35 to 39 of the decision), the patent proprietor raised an objection under Rule 106 EPC during the oral proceedings regarding the same claimed violations of its right to be heard as those set out in the petition and its objection was dismissed by the Board.
4. The petition is thus not clearly inadmissible.

#### **Allowability of the petition for review**

5. As far as the *ex officio* objection under Article 83 EPC raised by the Board in its preliminary opinion is concerned and referred to by the petitioner, the Enlarged Board underlines that in its response to this preliminary opinion, the patent proprietor did not challenge the right of the Board to raise such an *ex officio* objection but only responded to this objection on its merits by filing new auxiliary requests 1 and 2. Neither was a specific objection under Rule 106 EPC raised during the oral proceedings against this right of the Board to raise this *ex officio* objection in its preliminary opinion.
6. Regarding the fact that according to the petitioner, the conditions set out by R 16/13 for a Board to raise *ex officio* objections were not met in the case at hand,

this decision reads in Reasons 4.1 "The present case raises the question of whether it is compatible with Article 113(1) EPC if (...) a Board of Appeal bases its decision on grounds which were not introduced into the proceedings by any of the parties and were not raised for discussion by the Board itself" and in Reasons 6 "claim 1 as granted has thus been denied protection on grounds which the Board of Appeal invoked *ex officio* in support of the decision without giving the parties, in particular the patent proprietor who was disadvantaged by the decision, an opportunity to comment on those grounds and if necessary to file new requests"(Translated from German by the Enlarged Board).

7. Contrary to the situation described in the above reasons of R 16/13, in the case at hand, the patent proprietor could actually file auxiliary requests further to the new Article 83 EPC objection raised by the Board in its preliminary opinion, before the oral proceedings and during the latter as far as auxiliary request 1a is concerned.
8. In addition, as underlined by the petitioner itself, Reasons 9.6 of the decision reads: "As is apparent from the minutes of the oral proceedings before the Board, the parties had ample opportunity to present their comments on the issues discussed, including the question of admittance of the appellant's auxiliary requests. At the oral proceedings before the Board, the appellant also confirmed that the parties had always been asked whether they had further comments or requests before the Board deliberated and that the appellant had been given sufficient time when it had asked for a break. Moreover, it is evident from the minutes of the oral proceedings before the Board that

the appellant did comment on the respondent's objections to the admission of auxiliary requests 1a, 1 and 2 on the grounds that they would *prima facie* give rise to a new objection either of lack of clarity (Article 84 EPC) or of added subject-matter (Article 123(2) EPC). Therefore, the Board cannot accept the appellant's argument that the discussion on the admittance of its auxiliary requests was cut short." This is indeed confirmed by the minutes of the oral proceedings which read (p. 4 to 5): "the appellant filed amended claims of a new auxiliary request 1a (clean and marked-up version). Then the admittance of the appellant's auxiliary request 1a in view of Article 13(2) RPBA as in force from 1 January 2024, and the criteria set out in Article 13(1) RPBA was discussed. (...) It was discussed whether the amended claims of auxiliary request 1a, *prima facie*, overcame the issue of lack of sufficiency of disclosure and whether auxiliary request 1a gave rise to new objections. (...) the Chair informed the parties that the Board had exercised its discretion under Article 13(2) RPBA, taking into account the criteria set out in Article 13(1) RPBA, and had decided not to admit auxiliary request 1a into the appeal proceedings. Then the admittance of the appellant's auxiliary request 1 in view of Article 13(2) RPBA as in force from 1 January 2024, and the criteria set out in Article 13(1) RPBA was discussed. It was discussed whether the amended claims of auxiliary request 1, *prima facie*, overcame the issue of lack of sufficiency of disclosure and whether auxiliary request 1 gave rise to new objections. (...) the Chair informed the parties that the Board had exercised its discretion under Article 13(2) RPBA, taking into account the criteria set out in Article 13(1) RPBA, and had decided not to admit auxiliary request 1 into the appeal proceedings.

(...) Then the admittance of the appellant's auxiliary request 2 was discussed. Both parties had no further comments to add to those they had previously put forward."

9. It thus appears to the Enlarged Board that the patent proprietor had the opportunity to comment on the new Article 83 EPC objections raised by the Board in its preliminary opinion and on new Article 84 and 123(2) EPC issues raised during the discussion of admittance into the appeal proceedings of its auxiliary requests filed further to the said preliminary opinion and during the oral proceedings. The petitioner's right to be heard was consequently not violated in this context according to the Enlarged Board.
  
10. Regarding the petitioner's view that the Board exercised its discretion in an arbitrary manner in taking into account not only Article 13 (2) RPBA but also Article 13(1) RPBA for assessing the admittance into the appeal proceedings of auxiliary requests 1, 1a and 2 and deprived the patent proprietor of a substantive discussion on the merits of these requests, the Enlarged Board underlines that it has no competence under Article 112a EPC to examine the merits of a Board's decision and to go into the substance of a case, not even indirectly (see also Case Law of the Boards of Appeal, 10th edition, July 2022 ("CLA"), V.B. 3.1 and V.B.3.4.3, and the decisions cited in it, e.g. R 1/08, and R 19/11, point 2.2 of the Reasons). The specific way in which the Board actually exercised its discretion on these procedural matters falls outside the Enlarged Board's competence, since this would need a review of all the facts and circumstances of the case, which would necessarily mean going into the merits of substantive issues (see also R 10/09, point

2.2 of the Reasons; R 7/21, point 1 of the Reasons with further references; R 17/24, points 8 - 11 of the Reasons). The discretionary power provided for in Article 114 (2) EPC, as well as in the relevant provisions in the Rules of Procedure of the Boards of Appeal, in this case Article 13 (1) and (2) RPBA, is as such not subject to review by the Enlarged Board unless, under Article 112a(2) (c) EPC, a fundamental violation of Article 113 EPC occurred in the exercise of this discretionary power (see also R 17/11, point 10 of the Reasons with further references). The exercise of discretion by a Board is subject only to a limited review by the Enlarged Board, i.e. it is confined to a review of whether the Board's exercise of discretion was arbitrary or manifestly illegal (see also R 10/11, point 5.2 of the Reasons; R 6/17, point 3.5 of the Reasons; R 7/21, point 2 of the Reasons), thereby involving a fundamental violation of the right to be heard.

11. Further, the CLA reads in its section V.A.4.5.9 "In numerous decisions, the Boards have, in line with the principles set out in the explanatory remarks on Art. 13(2) RPBA 2020 in CA/3/19, pointed out that, at the third level of the convergent approach, the Board may, in the exercise of its discretion under Art. 13(2) RPBA 2020, also rely on criteria applicable at the second level of the convergent approach, i.e. those set out in Art. 13(1) RPBA 2020 (see e.g. T 989/15, T 584/17, T 954/17, T 752/16, T 764/16, T 709/16, T 995/18). According to T 2429/17, at the third level of the convergent approach, the Board may also rely on criteria applicable at the second and first levels of the convergent approach, i.e. those set out in Art. 13(1) and Art. 12(4) to 12(6) RPBA 2020.". These are

thus common case-law principles.

12. Moreover, in the case at hand, the Board did actually explain why it applied not only Article 13(2) RPBA but also Article 13(1) RPBA criteria to determine whether auxiliary requests 1a, 1 and 2 should be admitted into the appeal proceedings. Indeed, Reasons 9.6 of the decision reads "In addition, even if there are exceptional circumstances within the meaning of Article 13(2) RPBA, this does not mean that all new auxiliary requests filed by the appellant in response have to be admitted. The Board has discretion under Article 13(2) RPBA and, in exercising that discretion, may also take into account the criteria of Article 13(1) RPBA and base its discretionary decision on the admittance of an auxiliary request on those criteria (see point 7.1 above). (...) Therefore, the Board finds that it was justified to discuss - on a *prima facie* level - whether the amendments to claim 1 of the appellant's auxiliary requests gave rise to new objections. The Board agrees with the respondent that if amended claims give rise to new objections this is the sole responsibility of the party that filed those claims.". Therefore, regardless of the accuracy of this explanation - the evaluation of which falls outside the competency of the Enlarged Board for the reasons set out above - the exercise by the Board of its discretion in the application of the criteria of both Article 13(2) and 13(1) RPBA in the assessment of the admittance into the appeal proceedings of auxiliary requests 1, 1a and 2 cannot be regarded as being arbitrary. This exercise consequently does not result in a violation of the petitioner's right to be heard.
13. During the oral proceedings before the Enlarged Board, the petitioner insisted on the fact that since

Article 13(1) RPBA was used by the Board in the assessment of the admittance into the appeal proceedings of the auxiliary requests and notably auxiliary request 1a, because it raised according to the opponent a new Article 84 EPC objection, a discussion on the merits of this objection was cut short for the reason that the Board in its application of Article 13(1) RPBA only *prima facie* considered the relevance of this objection.

14. However, as detailed above, the Board did not exercise its discretion arbitrarily in applying the criteria of Article 13(1) RPBA in the case at hand. In the framework of this Article, it was legitimate to consider only the *prima facie* relevance of the said Article 84 EPC objection and conclude that the provisions of Article 13(1) RPBA were not met so that the considered auxiliary request was not admitted into the appeal proceedings, without a further discussion on the merits of said objection.
15. The Enlarged Board further underlines that the fact that in an *inter partes* case, an *ex officio* objection is raised by the Board does not justify that the application of Article 13(1) and (2) RPBA should be different than in an *ex parte* case.
16. As to the petitioner's argument that it would be apparent from the minutes of the oral proceedings and the decision that the new Article 84 EPC objection raised against auxiliary request 1a during these oral proceedings was not discussed and that the opponent did actually not raise this objection, these minutes (page 4) read: "It was discussed whether the amended claims of auxiliary request 1a, *prima facie*, overcame the issue of lack of sufficiency of disclosure and whether

auxiliary request 1a gave rise to new objections" and according to Reasons 7.6 of the decision, it was indeed the respondent's argument that the amended feature lacked clarity.

17. It is thus clear to the Enlarged Board that the said "objections" in the minutes referred at least notably to an objection under Article 84 EPC and that this objection was indeed discussed during the oral proceedings.
18. That, as set out by the petitioner in section (3) of the petition: (i) the term "maximum diameter" was present in the granted claims already and would thus not have been admissible from the very beginning to discuss the allegedly lack of clarity of this term and (ii) regarding auxiliary requests 1 and 2, the respondent and the Board tried to construe a complex situation which actually does not exist and without which the question to be answered when assessing conformance with Article 123(2) EPC would have been different than that considered during the oral proceedings, is irrelevant according to the Enlarged Board.
19. Indeed, the auxiliary requests were not admitted into the appeal proceedings on the basis of the provisions of Article 13(1) RPBA, as set out above, according to the Enlarged Board, the Board did not violate the patent proprietor's right to be heard by applying these provisions in the circumstances of the case at hand.
20. The petitioner criticises the merits on which the Board considered that these provisions were not met and holds the view that the auxiliary requests filed further to the preliminary opinion of the Board and during the

oral proceedings actually overcame the Article 84 and 123(2) EPC issues which according to the Board *prima facie* affected said auxiliary requests.

21. However, as already mentioned, the Enlarged Board has no competence to review the case as to its merits, including whether correct conclusions have been drawn by the Board. The grounds on which a petition for review can be based are enumerated 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).
  
22. Regarding the petitioner's argument also in section (3) of the petition that it did not have the opportunity to comment on the insufficiency of disclosure issue of the amendment introduced in auxiliary requests 1 and 2, firstly, this issue could only be discussed during the oral proceedings since it concerns auxiliary requests filed by the patent proprietor with its letter dated 16 January 2024 in response to the preliminary opinion of the Board. The opponent's response to this preliminary opinion dated 17 January 2024 does not address these requests or the aforementioned letter, most probably because it was prepared before the letter was received. Secondly, it appears from the decision (Reasons 8.2 and 8.3) that this insufficiency of disclosure issue was actually discussed during the oral proceedings, since both parties put forward arguments in support of their respective positions on said issue and the Board as a matter of fact adopted the opponent's position in Reasons 8.5 and 8.6 of the decision. Thirdly, the minutes of the oral proceedings (page 5) show that the Board took a position on the contentious issue regarding auxiliary request 1 and

that the parties had the opportunity to further respond to this position as far as auxiliary request 2 was concerned, which contained the same amendment as auxiliary request 1, but considered that they had no further comments to add to those previously put forward. In addition, as the minutes of the oral proceedings read (p. 6), "The appellant confirmed that the parties had always been asked before the Board deliberated whether they had further comments or requests and that the appellant had been given sufficient time when it had asked for a break.". Lastly, on the specific reference to the example shown in Figure 6 of the application as filed and the patent, the Board only refers to this example as a confirmation of its position and not as a new line or reasoning on which the parties would have had no opportunity to comment during the oral proceedings. As a matter of fact, as set out in the CLA (V.B.4.3.5) "Parties are not entitled to advance indications of all reasons for a decision in detail". Consequently, it does not appear to the Enlarged Board that the patent proprietor had no opportunity to comment on the above issue of insufficiency of disclosure of auxiliary requests 1 and 2, contrary to the petitioner's point of view.

23. Finally, that as set out by the petitioner under section (4) of the petition, the decision would have had a different outcome if the Board had admitted auxiliary request 1a, 1 and 2 into the appeal proceedings appears irrelevant to the Enlarged Board for the same grounds as those set out above in point 21.

## Conclusion

24. What the petitioner primarily complains about is that the Board arrived at conclusions different from the petitioner's. 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. However, the Enlarged Board has no competence to review the case as to its merits, including whether correct conclusions have been drawn by the board. Under no circumstances may the petition for review be a means to review the application of substantive law, since 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). 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 also CLA, V.B.3.1 and V.B.3.4.3, and the decisions cited there, e.g. R 19/11, Reasons 2.2).
25. In light of the considerations set out above, the Enlarged Board concludes that the petitioner's arguments were duly considered by the Board, as can be derived from the Board's written reasoned decision. As far as the correctness of the decision as to its substance has been objected to by the petitioner, this cannot be reviewed by the Enlarged Board.

26. Therefore, the petition for review is clearly unallowable under Rule 109(2)(a) EPC.

## 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