

**Internal distribution code:**

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

**Datasheet for the decision  
of 29 September 2025**

**Case Number:** R 0002/25

**Appeal Number:** T 0314/20 - 3.3.04

**Application Number:** 08787264.4

**Publication Number:** 2187879

**IPC:** A61K31/00, A61K31/70,  
A61K31/7034, A61P3/10,  
A61P3/04, A61P3/06, A61K9/00,  
A61K9/14, A61K9/16, A61K9/20,  
A61K9/48

**Language of the proceedings:** EN

**Title of invention:**  
PHARMACEUTICAL COMPOSITION COMPRISING A GLUCOPYRANOSYL-  
SUBSTITUTED BENZENE DERIVATIVE

**Patent Proprietor:**  
Boehringer Ingelheim International GmbH

**Opponents:**  
Generics (U.K.) Limited  
STADA Arzneimittel AG  
Hexal AG  
ZAKLADY FARMACEUTYCZNE POLPHARMA S.A.

**Headword:**  
Petition for review

**Relevant legal provisions:**  
EPC Art. 112a(1), 112a(2), 112a(2)c), 112a(4), 113  
EPC R. 106, 107, 109(1) second sentence, 109(2)(a), 115(1)  
RPEBA Art. 13, 14(2)

**Keyword:**

Petition for review-clearly unallowable

**Decisions cited:**

G 0001/03, G 0002/21, R 0012/09, R 0015/09, R 0004/11  
R 0018/12, R 0002/13, R 0008/13, R 0016/13, R 0009/14  
R 0007/15, R 0008/17, T 0951/92, T 1423/15, T 0116/18  
T 0233/18



**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

**Case Number:** R 0002/25

**D E C I S I O N  
of the Enlarged Board of Appeal  
of 29 September 2025**

**Petitioner:** Boehringer Ingelheim International GmbH  
(Patent Proprietor) Binger Strasse 173  
55216 Ingelheim am Rhein (DE)

**Representative:** Hoffmann Eitle  
Patent- und Rechtsanwälte PartmbB  
Arabellastraße 30  
81925 München (DE)

**Other party:** Generics (U.K.) Limited  
(Opponent 1) Building 4, Trident Place  
Mosquito Way  
Hatfield Herts AL 10 9UL (GB)

**Representative:** Ter Meer Steinmeister & Partner  
Patentanwälte mbB  
Nymphenburger Straße 4  
80335 München (DE)

**Other party:** STADA Arzneimittel AG  
(Opponent 2) Stadastrasse 2-18  
61118 Bad Vilbel (DE)

**Representative:** Kernebeck, Thomas  
Kernebeck Patentanwalts GmbH  
Stiftstraße 2  
60313 Frankfurt am Main (DE)

**Other party:** Hexal AG  
(Opponent 3) Industriestrasse 25  
83607 Holzkirchen (DE)

**Representative:** Elkington and Fife LLP  
Prospect House  
8 Pembroke Road  
Sevenoaks, Kent TN13 1XR (GB)

**Other party:** ZAKLADY FARMACEUTYCZNE POLPHARMA S.A.  
(Opponent 4) Ul. Pelplinska 19  
83-200 Starogard Gdanski (PL)

**Representative:** Elkington and Fife LLP  
Prospect House  
8 Pembroke Road  
Sevenoaks, Kent TN13 1XR (GB)

**Decision under review:** **Decision of the Technical Board of  
Appeal 3.3.04 of the European Patent  
Office of 16 November 2023**

**Composition of the Board:**

**Chair:** C. Josefsson  
**Members:** B. Burm-Herregodts  
P. Lanz

## **Summary of Facts and submissions**

I. The petition for review concerns decision T 0314/20 of Technical Board of Appeal 3.3.04 (the Board) dated 16 November 2023 (the decision under review). The decision was notified on 20 December 2024.

### *The appeal proceedings*

II. The appeals were against a decision of an opposition division rejecting the oppositions filed by four opponents and maintaining the patent as granted. All four opponents appealed against the decision of the opposition division.

III. The Board's communication under Article 15(1) RPBA, issued on 6 October 2023, set out that during the oral proceedings it might be necessary to discuss whether the claimed subject-matter fulfilled the requirements of Article 56 EPC in view of the most relevant prior art, the objective technical problem to be solved and whether the solution to the objective technical problem would have been obvious to the skilled person.

The Board further referred to the use of the post-published experimental data upon which the petitioner wished to rely to demonstrate one or more technical effects linked to the claimed combination in comparison with the combinations of document D2, preliminarily established as the closest prior art for the claimed invention.

The Board drew the parties' attention to the fact that it might be necessary to assess whether any such effect could be taken into account in light of decision G 2/21, referring explicitly to points 93 and 94 of the

Reasons and order No. 2 of G 2/21 (see communication of 6 October 2023, point 2.2.8, pages 6 to 7).

IV. The minutes of the oral proceedings demonstrate that the parties were heard on the prior art used as the starting point for the inventive-step analysis of the subject-matter of claim 1 of the patent as granted, the distinguishing features between claim 1 and the closest prior art, and whether the petitioner - the respondent in the appeal proceedings - could rely on post-published evidence and the alleged technical effect shown by it.

The minutes further state that the parties were invited by the Chair to express their views on the understanding of the terms "*encompassed by the technical teaching*" and "*embodied by the same originally disclosed invention*" used in order No. 2 of G 2/21 since the alleged technical effect possibly shown by experimental report D56 and the evidence contained in it could be relevant to the outcome of the proceedings. The petitioner was also asked to explain what it considered to be the originally disclosed invention in light of the wording of order No. 2 of G 2/21 (see minutes of the oral proceedings, page 3, paragraphs 2 and 3).

After deliberation, the Chair announced the Board's conclusion that the technical effect possibly shown in experimental report D56 could not be taken into account to formulate the objective technical problem (see minutes of the oral proceedings, paragraph bridging pages 3 and 4).

Two questions for referral to the Enlarged Board of Appeal were submitted. After a break, the Board decided that these questions should not be referred. The Board also concluded that the subject-matter of claim 1 of

the patent as granted did not involve an inventive step (see minutes, page 5).

The decision that the patent was revoked (for lack of inventive step) was announced at the end of the oral proceedings.

- V. A written decision was notified on 20 December 2024. In the decision under review, the Board set aside the decision under appeal, refused a request for referral of questions to the Enlarged Board of Appeal and revoked European patent No. 2 187 879.

*The petition for review*

- VI. On 18 February 2025, the respondent-patent proprietor (the petitioner) filed a petition for review of decision T 0314/20 pursuant to Article 112a(2)(c) EPC and Article 113 EPC. It was submitted that the petitioner's right to be heard had been violated by the Board in notifying a written decision based upon grounds and evidence on which the petitioner did not have an opportunity to present its comments.
- VII. In the petition for review, the petitioner requested that:
- the decision under review be reviewed by the Enlarged Board of Appeal and be set aside
  - the proceedings before the boards of appeal be reopened
  - the members of Board of Appeal 3.3.04 who participated in taking decision T 0314/20 be replaced
  - oral proceedings be held if the Enlarged Board of Appeal was not minded to accede to the petitioner's request in the written procedure

*The proceedings before the Enlarged Board of Appeal*

VIII. Summons to oral proceedings pursuant to Rule 115(1) EPC in conjunction with Rule 109(1), second sentence, EPC were notified to the petitioner on 23 May 2025. The Enlarged Board, in its composition in accordance with Rule 109(2)(a) EPC, issued a communication pursuant to Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal on the same day. In the Enlarged Board's preliminary view, the petition was not clearly inadmissible but clearly unallowable.

IX. The petitioner filed a further written submission on 23 July 2025, within the two-month time limit set in the Enlarged Board of Appeal's communication.

X. The Enlarged Board held oral proceedings via videoconference on 29 September 2025. The petitioner was heard and addressed the allowability of the petition for review in four points. It confirmed its final requests to be the same as its initial requests. At the end of the oral proceedings, the present decision was announced.

XI. The petitioner's case can be summarised as follows.

In its petition for review, its further written submission of 23 July 2025 and during oral proceedings before the Enlarged Board of Appeal, the petitioner submitted in general that the decision under review is based on considerations arrived at by the Board only after the oral proceedings and that new legal concepts were introduced that were not part of the appeal proceedings resulting in a written decision based on grounds and evidence on which the petitioner did not have an opportunity to present its comments, contrary to Article 113(1) EPC.

In particular, the petitioner submitted the following.

(a) The decision under review introduced an unknown legal standard, i.e. that the purpose of the two requirements in order No. 2 of G 2/21 was the prevention of speculative inventions. The Board based this new standard on decision T 116/18, which was only made public after the oral proceedings in T 314/20. Neither the unknown legal standard nor T 116/18 was part of the appeal proceedings.

(b) The Board surprised the parties in turning away in its written decision from the discussion about the general principles in G 2/21 and the two criteria in order No. 2 of G 2/21 during the appeal proceedings and misguided the parties in not hearing them on the legal reasoning underlying the decision under review.

(c) The decision under review introduced a second unknown legal standard for the completeness of composition inventions that was not part of the appeal proceedings.

(d) The Board in the decision under review made a new factual assertion in point 6.24 of the Reasons namely that the combinations 165 to 168 having the same level of preference [*as the claimed combination 97*], achieve the same increase in plasma levels of active GLP-1 in patients with metabolic disorders and related diseases as combination 97.

## **Reasons for the Decision**

### *Admissibility of the petition for review*

1. Under Article 112a EPC, any party to appeal proceedings adversely affected by the decision of a board may file a petition for review of the decision by the Enlarged Board of Appeal.

2. The petitioner has argued that it is adversely affected by the decision under review setting aside the decision under appeal and revoking the patent. It argued that the alleged violation of the right to be heard only became apparent to the petitioner after receiving the written decision, which was allegedly based on unknown legal standards and a new factual assertion.
3. The Enlarged Board accepts that no objection under Rule 106 EPC was raised and that it is not clearly apparent that it could have been raised during the appeal proceedings.
4. The petition for review was duly filed within the time limit of Article 112a(4) EPC and after payment of the prescribed fee.
5. The requirements under Articles 112a(1) and 112a(4) EPC in conjunction with Rule 107 EPC and Article 112a(2) EPC in conjunction with Rule 106 EPC being met, the Enlarged Board of Appeal considers the petition to be not clearly inadmissible.

*Allowability of the petition for review*

6. The Enlarged Board comes to the conclusion that there was no violation of the right to be heard for the following reasons and that the petition for review is therefore clearly unallowable.
7. Article 112a(2) (c) EPC provides that a petition may only be filed on the grounds that a fundamental violation of Article 113 EPC occurred. Under Article 113(1) EPC, the decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. The principle codified in this provision implies that a party must not be objectively

taken by surprise by the reasons for the decision when reference to unknown grounds or evidence is made.

7.1 The arguments of the petitioner, as cited above under (a) and (c), that the decision under review, which allegedly introduces two unknown legal standards, is based on grounds and evidence on which it did not have the opportunity to comment, cannot be accepted.

7.1.1 The petitioner argued that the Board had introduced a first new legal standard by defining the purpose of the two requirements in order No. 2 of G 2/21 as preventing speculative inventions, basing this standard on decision T 116/18, which was only made public after the oral proceedings in T 0314/20 had taken place. Neither the new legal standard nor T 116/18 was discussed during the appeal proceedings.

The petitioner further argued that the decision under review introduced a second new legal standard for the completeness of composition inventions which was not discussed with the parties and which, in view of both G 2/21 and G 1/03, appeared surprising.

In its further written submissions of 23 July 2025 and during the oral proceedings before the Enlarged Board of Appeal, the petitioner stated that the debate during oral proceedings was guided by the Board and limited to the two terms, so there was no opportunity to extensively discuss G 2/21.

7.1.2 The Enlarged Board holds that "*grounds or evidence*" under Article 113(1) EPC are to be understood as meaning the essential legal and factual reasoning on which the decision is based (see decisions R 8/17, Reasons 15; R 16/13, Reasons 3.3).

In other case law, it was ruled that "*grounds or evidence*" under Article 113(1) EPC should not be narrowly interpreted as meaning a requirement of the EPC but had to be understood as referring to the legal and factual reasons leading to refusal of the application (see decisions T 951/92, Headnote I; T 1423/15, Reasons 2.1; T 233/18, Reasons 1; see also Case Law of the Boards of Appeal of the European Patent Office, 11th edn., 2025 (CLB), III.B.2).

- 7.1.3 The minutes of the oral proceedings support that the parties were given the opportunity during oral proceedings to present their comments on decision G 2/21, in particular the terms "*encompassed by the technical teaching*" and "*embodied by the same originally disclosed invention*" used in order No.2 of G 2/21 (see minutes, page 3).
- 7.1.4 Before the oral proceedings, the petitioner was made aware of the relevance of the decision G 2/21 in the Board's communication under Article 15(1) RPBA. The Board stated in point 2.2.8 of its communication that it "*would like to draw the parties' attention to the fact that [...] it may, in a next step, need to be assessed whether any such specific effect(s) can be taken into account in light of the decision G 2/21 (see in particular sections 93 and 94 and point 2 of the order)*".
- 7.1.5 In its written decision, the Board referred extensively to G 2/21 and the arguments discussed by the parties during the oral proceedings (see points 6.15 ff).
- 7.1.6 The petitioner did not refute that the allegedly new standards were derived from G 2/21 as the starting point alone or in combination with other case law of the boards. The petitioner has not demonstrated that it was prevented from commenting on decision G 2/21 or

from addressing it in full. The Enlarged Board therefore concludes that the petitioner not only had the opportunity to comment on the decisive aspects and thus the grounds underlying the decision under review but did extensively do so.

7.2 The arguments of the petitioner, as cited above under (b), that the written decision under review is based on a surprising legal reasoning by the Board, cannot be accepted.

7.2.1 The petitioner argued that the essential legal reasoning in the decision under review was surprising because it deviates from the discussion of the general principles in G 2/21 and the two criteria in order No. 2 of G 2/21. It was argued that the Board misguided the parties by not hearing them on this legal reasoning.

In its further written submissions of 23 July 2025 and at the oral proceedings before the Enlarged Board of Appeal, the petitioner argued that the debate during the oral proceedings in appeal was limited to the meaning of the two requirements in order No. 2 of G 2/21 and that in the decision under review it was not only considered that the purpose of these two requirements was not stated in G 2/21 but that this could remain undefined in the decision under review.

The petitioner further argued that in abandoning the two requirements in order No. 2 of G 2/21 in the decision under review, the Board deviated from "*the Enlarged Board's interpretation or explanation of the Convention in G 2/21*" and should therefore have referred the questions filed by the petitioner to the Enlarged Board of Appeal (see further submission of 23 July 2025, page 4).

- 7.2.2 The Enlarged Board holds that a board must be able to draw its own conclusion from the discussion of the grounds put forward (see decisions R 8/17, Reasons 16; R 8/13, Reasons 2-1; R 16/13, Reasons 3.3).

There is no legal obligation for a board to disclose in advance to the parties how and why, on the basis of the decisive issues under discussion, it will come to its conclusion, nor can such an obligation be supported by the right to be heard.

Parties are not entitled to advance indications of all reasons for a decision in detail (see e.g. decisions R 12/09 of 15 January 2010, Reasons 11; R 15/09, Reasons 4.6; R 4/11, Reasons 2.5; R 18/12, Reasons 15; R 2/13, Reasons 2.1.2; R 9/14, Reasons 2.2; R 7/15, Reasons 2.7.4; R 8/17, Reasons 16; see also CLB, V.B. 4.3.5).

- 7.2.3 In the decision under review, the Board based its decision on grounds that had been discussed. The Board, *inter alia*, decided on inventive step of the claimed subject-matter and whether the technical effects linked to the distinguishing features were proven by post-published evidence and could be taken into account to formulate the objective technical problem. The Board's understanding and interpretation of G 2/21 is part of the reasoning given in the written decision.

The petitioner argued that the reasoning of T 116/18 could not have been part of the oral proceedings since this decision only became publicly available on 27 November 2023, *i.e.* after the oral proceedings in case T 314/20 had been held. It therefore refers to T 116/18 as post-published case law.

Even if the Board, as has been put forward by the petitioner, had introduced in the written decision one

or more new standards, there is no indication that the development of such standards would go beyond the limits of the Board's competence when such standards are based on grounds that form part of the appeal proceedings and on which the parties had the opportunity to comment on and commented on.

- 7.2.4 In its further submission of 23 July 2025, the petitioner argued that *"absent any indication in the procedure before the TBA that Art 21 RPBA may become relevant, petitioner had every reason to trust that the legal reasoning would be based on the guidance provided by order 2 of G 2/21"*. The Board, in abandoning order No. 2 of G 2/21 in the decision under review, surprised the petitioner and violated its right to be heard.

The petitioner submitted two questions for a referral to the Enlarged Board of Appeal during the oral proceedings of T 0314/20. As confirmed in the minutes of the oral proceedings, the parties were heard on the requested referral. After a break, the Board concluded that no referral was needed and that the subject-matter of claim 1 of the patent as granted did not involve an inventive step (see minutes, pages 4 and 5).

As stated above, a board must be able to draw its own conclusion from the discussion of the grounds put forward. The petitioner cannot have been surprised by the Board's decision not to refer any questions to the Enlarged Board of Appeal since this had been announced at the oral proceedings after discussing the requested referral.

The reasoning of the petitioner that, due to the decision not to refer, it could trust that the legal reasoning would be based on the guidance provided by order No. 2 of G 2/21 cannot call into question the fact that decision under review is based on grounds

that form part of the appeal proceedings and on which the parties had the opportunity to comment on and extensively commented on.

- 7.2.5 The Enlarged Board therefore concludes that the petitioner has not established that it had objectively been taken by surprise by unknown grounds or evidence referred to in the decision under review.
- 7.3 The arguments of the petitioner, as cited above under XI.(d), that the written decision under review is based on a new factual assertion in point 6.24 of the Reasons, namely that combinations 165 to 168, having the same level of preference as claimed combination 97, achieve the same increase in plasma levels of active GLP-1 in patients with metabolic disorders and related diseases as combination 97.
  - 7.3.1 The petitioner has argued that the Board's considerations in point 6.20 that the preference level for these combinations is similar does do not justify the Board's factual assertion that these combinations show the "*same increase in plasma levels of active GLP-1*".
  - 7.3.2 The petitioner had, relying on the experimental data depicted in Figures 1 to 3 and Table 1 of document D56, argued that the claimed combination increased the plasma level of active GLP-1 in patients with diabetic diseases in a stronger and more prolonged manner than two other combinations. The Board did not agree.
  - 7.3.3 In point 6.16 of the decision under review, the Board found that it was common ground that the invention disclosed in the application as originally filed related to combinations of SGLT2 inhibitors with DPP IV inhibitors. It was furthermore undisputed that one of

the effects is an increase in active GLP-1 levels as found in point 6.17 of the decision under review.

The Board rebutted the petitioner's argument that the currently claimed combination was disclosed in the application as filed as the most preferred embodiment (see points 6.19 and 6.20 of the decision under review) and held that combinations 97 and 165 to 168 were at an equal level of preference as shown by the paragraph directly below Table 1 on page 33, lines 2 to 5 of the application as filed, which mentioned that, *inter alia*, the combinations numbered 97 and 165, 166, 167 and 168 are most preferred.

It was then concluded that the skilled person, having the common general knowledge in mind, would at the filing date *understand* from the application as originally filed that the claimed invention encompassed the teaching that combination 97 would, *inter alia*, give rise to an increase in plasma levels of active GLP-1 and that combinations 165 to 168, having the same level of preference, would give rise to the same increase in plasma levels of active GLP-1.

The Board then found that the purported technical effect relied upon by the petitioner, the technical effect being that the claimed combination increased the plasma level of active GLP-1 in a stronger and more prolonged manner than combinations 165 and 167, would not be derived by the skilled person, having the common general knowledge in mind and based on the application as filed as being encompassed by the technical teaching of the claimed invention.

7.4 According to the minutes, the inventive-step assessment and the petitioner's argument that the post-published evidence showed a technical effect of an increased plasma level of active GLP-1 in the claimed invention

in a stronger and more prolonged manner than with two other combinations was discussed extensively during oral proceedings. The petitioner explicitly referred to Table 1 and page 33, lines 2 to 5 of the application as filed during the debate.

- 7.5 Assessing whether the Board made a correct assessment of inventive step would amount to a review of the substance of the case on its merits and is therefore a matter which falls outside the competence of the Enlarged Board of Appeal.
- 7.6 The Enlarged Board therefore is unable to review the decision under review on this point.
- 8. In light of the reasons above, it has not been established on the basis of the petitioner's submissions that a violation of its right to be heard under Article 113 EPC or that any fundamental violation within the meaning of Article 112a(2)(c) EPC occurred. The petition for review is therefore clearly unallowable.

**Order**

**For these reasons it is decided that:**

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

The Registrar:

N. Michaleczek



The Chair:

C. Josefsson