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**Datasheet for the decision
of 30 January 2026**

Case Number: R 0014/25

Appeal Number: T 0345/24 - 3.2.06

Application Number: 19164452.5

Publication Number: 3711729

IPC: A61F13/15, A61F13/531,
A61F13/475, A61F13/532,
A61F13/533, A61F13/42,
A61F13/536

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLES

Patent Proprietors:
Ontex BV
Ontex Group NV

Opponents:
Drylock Technologies NV
Essity Hygiene and Health Aktiebolag

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(2)(c), 113(1)
EPC R. 106, 109(2)(a)
RPBA Art. 13(1)

Keyword:
Objection under R. 106 EPC raised (no) or not possible (no)
Fundamental defect under Article 112a(2)(c) EPC leading to
violation of right to be heard (no)

Decisions cited:

-

Catchword:

-



**Große Beschwerdekammer
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Grande Chambre de recours**

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Case Number: R 0014/25

D E C I S I O N
of the Enlarged Board of Appeal
of 30 January 2026

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Decision under review: **Decision of the Technical Board of
Appeal 3.2.06 of the European Patent
Office of 24 March 2025.**

Composition of the Board:

Chair: C. Josefsson
Members: B. Müller
 P. Acton

Summary of Facts and Submissions

Preliminary note

This part of the decision consists to a large extent of the communication of the Enlarged Board of Appeal pursuant to Article 13 and 14 (2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) (hereinafter also referred to as "the communication"). Points 7 to 9 have been added as well as the first paragraph in point 5.2 and a number of editorial adaptations have been made. Emphases in bold typeface are, unless otherwise indicated, those of the Enlarged Board of Appeal (also referred to as "the EBA"). Single-spaced text portions are quotations.

- I. The patent proprietors' petition for review filed on 4 July 2025 is directed against the decision of Technical Board 3.2.06 (hereinafter: "the Board") in appeal case T 0345/24. By this decision, the Board set aside the decision of the Opposition Division maintaining European patent No. 3 711 729 in amended form according to auxiliary request 1 and revoked the patent. The decision was pronounced in the oral proceedings of 24 March 2025, and the reasoned written decision was handed over to the delivery service on 8 May 2025.
The title of the invention is: Absorbent Articles.
- II. The Petitioners' requests are verbatim that:
 - The Decision be set aside and proceedings before the Board of Appeal be reopened
 - Reimbursement of the Petition fee
 - Oral Proceedings prior to any adverse decision, including a decision that the Petition is inadmissible or unallowable.
- III. An appeal had been filed by each of the appellant/opponent I and the appellants/patent proprietors against the interlocutory decision of the Opposition Division in which it found that European patent No. 3 711 729 in an amended form (amended on the basis of auxiliary request 1) met the requirements of the EPC. The appellant/opponent I requested that the decision under appeal be set aside and the patent be revoked. The appellants/patent proprietors requested in their statement of grounds that the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained on the basis of the claims of one of auxiliary requests 1 to 26, or 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, all filed with the statement of grounds of appeal (hereinafter also referred to as "auxiliary requests 1 *et seq.*").

- IV. The petition is based on two fundamental procedural defects, i.e. two different violations of the right to be heard (Art. 112a(2)(c) in conjunction with Article 113(1) EPC): the petitioners were denied the possibility to comment on
- the Board's qualification of the above auxiliary requests 1 *et seq.* as an **amendment** – these requests were subsequently not admitted to the appeal proceedings – and
 - their request for remittal of the case to the department of first instance for further prosecution.

V. The first fundamental procedural defect

V.1 The course of the proceedings

After the Board in the oral proceedings had found the main request not to be allowable, the patent proprietors filed a new auxiliary request 1 to be ranked immediately after the main request. Should that new request be admitted, all the lower-ranking auxiliary requests, including original auxiliary request 1, were withdrawn. The new auxiliary request 1 included features from claims 8 and 12 as filed.

The Board discussed whether exceptional circumstances in the meaning of Article 13(2) RPBA justified the filing of new auxiliary request 1 during the oral proceedings. The Board came to a negative conclusion and did not take that request into account.

The Board also did not admit any of the pending auxiliary requests 1 *et seq.*, including original auxiliary request 1 on the basis of which the Opposition Division had maintained the patent. All these other requests constituted an amendment in the meaning of Article 13(1) RPBA. They were not convergent with new auxiliary request 1 (that was not admitted). The lack of convergence followed from the fact that the features of at least claim 12 as filed that were comprised in claim 1 of the new auxiliary request were not included in any of these lower-ranking auxiliary requests 1 *et seq.*

In the following sections V.2 and V.3 the course of the oral proceedings leading to the Board's qualification of auxiliary requests 1 *et seq.* as an amendment, which is at the heart of the first asserted fundamental defect, as reflected in the subsequent written decision, will be set out in greater detail. To this end, the relevant portions of the minutes and the

decision in pertinent part will be reproduced verbatim. The patent proprietors' assertions in respect thereof will follow, equally verbatim, in point 5.4.

V.2 The minutes

[extract from page 3 starting at the second full paragraph]

After resumption of the oral proceedings the patent proprietor filed a **new auxiliary request 1** and stated that the **other auxiliary requests would be withdrawn** on the **condition** that **this request be admitted**.

The parties were heard on the issue of admittance of the newly filed auxiliary request 1 under Article 13(2) RPBA.

After deliberation the Chairman informed the parties of the board's decision not to take the newly filed auxiliary request 1 into account pursuant to Article 13(2) RPBA.

Furthermore, the Chairman informed the parties of the board's **preliminary opinion** a) that **all further auxiliary requests were not convergent** with the **newly filed auxiliary request 1** and **should therefore not be admitted** pursuant to Article 13(1) RPBA, and b) that none of the further auxiliary requests appeared to overcome the objections of added subject-matter discussed with respect to the main request.

At the patent proprietor's request the oral proceedings were interrupted for 30 minutes in order to give the patent proprietor the opportunity to consider its requests.

After resumption of the oral proceedings, the patent proprietor stated that it would maintain all its requests. Asked by the Chairman, the **patent proprietor** stated that it **did not wish to comment** on its further auxiliary requests.

[extract from page 4 starting at the top of the page]

After deliberation the Chairman informed the parties of the board's decision not to admit auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, all filed with the statement of grounds of appeal, into the proceedings pursuant to Article 13(1) RPBA.

Final requests [emphasis in the original]

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained on the basis of auxiliary request 1 filed during oral proceedings before the board, or on the basis of one of auxiliary requests 1 to 26, or 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, all filed with the statement of grounds of appeal.

[end of the extract of the minutes]

V.3 The decision under review

[extract from page 21]

4. Further auxiliary requests - auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A as filed with the proprietor's grounds of appeal

Article 13(1) RPBA

4.1 At oral proceedings before the board, a higher ranking auxiliary request 1 was filed than all auxiliary requests previously on file. **Consequently**, all the auxiliary requests previously on file assumed a **new ranking** below auxiliary request 1 filed during the oral proceedings before the board, such that e.g. auxiliary request 1 as filed with the grounds of appeal in fact becomes the second auxiliary request. The fact that the requests maintained their original numbering is irrelevant to the fact that these are now re-ranked. Such a **re-ranking** is (due to the procedural effects of such a change, such as consideration of alternate subject-matter) an **amendment** to the proprietor's appeal case and its **admittance** is at the **discretion** of the board. Under such circumstances the Board's discretion is to be exercised in view of inter alia procedural economy (see Article 13(1) RPBA, last sentence).

4.2 Auxiliary request 1 filed at oral proceedings before the board includes features taken from claims 8 and 12 as filed. The features of at least claim 12 as filed are, however, present in none of the lower ranking auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A such that **each of these lack convergence with the auxiliary request 1** filed at oral proceedings. A lack of convergence of requests falling under Article 13(1) RPBA is usually seen to be contrary to procedural economy, not least since the opposing party and the board would need to consider claims directed to subject-matter broader than that previously decided upon.

4.3 At oral proceedings the board's **preliminary view** was given that auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A were **not convergent** with the higher ranking auxiliary request 1 filed at oral proceedings before the board. **Consequently the re-ranking** of these requests was an **amendment** to the proprietor's appeal case which was, in the present case, contrary to procedural economy and would **not** be **admitted**. **To this preliminary opinion the proprietor explicitly refrained from providing any counter-arguments.**

4.4 Although not ultimately decisive due to the aspect of adverse procedural economy, it may be added that the board had also indicated (see the minutes) that none of the auxiliary requests anyway seemed to overcome the objection of added subject-matter with regard to the main request.

4.5 As a result of the foregoing, the board confirmed its preliminary opinion and exercised its discretion under Article 13(1) RPBA not to admit auxiliary requests, which were still numbered 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, into the proceedings.

[end of extract of the decision]

V.4 The petitioners' (patent proprietors') assertions

The petitioners (patent proprietors) submit (emphasis in the original) that they

[Extract of the petition, page 3, last two paragraphs; emphasis in bold in the original, emphasis in italics by the EBA]

...stated at no point any withdrawal, renumbering or refiling of [the auxiliary requests] already on file prior to a decision on the new Auxiliary Request. Rather, **only** if the new **conditional** Auxiliary Request 1 ('conditional Request') is admitted, is there any change to these Requests (namely withdrawal).

Neither the Minutes nor Decision show evidence of any clear or unequivocal statement from the Patentee regarding any change to these Requests if the conditional Request is not admitted into these proceedings.

[Extract of the petition, page 4, 3rd but last paragraph]

Despite it undoubtedly being recorded in the Minutes, not anywhere at all in the Decision is there mentioned the condition placed on the conditional Request which was not admitted. Nor again, do the Minutes or Decision state anywhere any clear and unequivocal statement by the Patentee, or question by the Board of Appeal, or discussion at all between the Patentee and Board of Appeal on what the Patentee would do with the remaining **unchanged** Requests on file, which again had not been amended or re-filed or re-numbered as “**assumed**” by the Board of Appeal.

While the Decision and Minutes then state that the Chairman informed the parties of the Board’s preliminary *opinion* on convergency, as can be seen in the language of the Minutes and Decision, the Board of Appeal had **already concluded**, without discussion or an opportunity to be heard for the Patentee, that the Requests on file were amendments.

Accordingly, when the Minutes and Decision state that the Patentee did not provide counter arguments, this was based on the *conclusion* (and not *opinion*) the Board of Appeal had presented that the Auxiliary Requests on file (which had never been changed) were new Requests, or “further” Requests as they seem to name them. Rather, the Board of Appeal *opinion* was based on the “further” Requests being new Requests or amendments.

...

Ultimately, the Board of Appeal had already *concluded*, without any prior discussion with the Patentee, that the Auxiliary Requests were *amendments*, and the Patentee was left only to comment on the Board of Appeal’s expressed *opinion* pursuant to Article 13(1) RPBA. These Requests, including Auxiliary Request 1 upon which the Patent was maintained in first instance proceedings, always on file, were *not amendments*, and the Patentee should therefore have had the opportunity for these to be substantively discussed, and certainly not ruled as amendments without discussion with the Patentee.

[End of extract from the petition]

VI. The petitioners’ submissions regarding the second asserted fundamental defect

The petitioners set out verbatim:

[Extract of the petition, page 5, last but one paragraph]

For the sake of completion, while asked to comment on convergency under Article 13(1) RPBA, the Patentee was not given any opportunity to be heard on remittal to the first instance. This request had never been withdrawn, as evidenced by the final paragraph of the Minutes which confirms the Patentee stated it would maintain all its requests, which therefore includes a request for remittal. Yet surprisingly, in the Decision’s penultimate paragraph remittal is discussed, and it is concluded **there is no remittal request**. Again, regardless of what would have been the outcome of any such discussion, the Patentee was not given the right to be heard on this point, but the Board of Appeal ruled upon this anyway without any discussion whatsoever with the Patentee.

[End of extract from the petition]

VII. Communication of the Enlarged Board of Appeal pursuant to Articles 13 and 14(2) RPEBA (hereinafter also: “the communication”)

In its communication the EBA expressed its preliminary opinion (in point 2.4) that the petition was clearly inadmissible in respect of the first asserted fundamental procedural defect for failure to raise a pertinent objection pursuant to Rule 106 EPC. The exception to the duty to raise an objection under Rule 106 EPC, i.e. that raising an objection was not possible, did not apply.

Regarding the second asserted fundamental procedural defect, the petition was clearly unfounded. The Board had concluded that there was no request on which the remittal request could have been successful. Given that a remittal would thus have had no purpose, there was no need to hear the petitioners on this point.

VIII. Petitioners’ letter in response of 16 January 2026

The petitioners made the following comments on the EBA’s communication that they referred to as the “Opinion” (emphases in the original).

First Fundamental Procedural Defect

Regarding Section 2.3 of the Opinion, as laid out in the Petition for Review (see page 5, first and second paragraphs), and evidenced by the accompanying declarations, the Patentee **did comment** on the conclusion that these Requests were deemed amendments by the Board of Appeal. However, **this had already been concluded without discussion or the opportunity to discuss.**

The provisional opinion presented by the Board of Appeal to the Patentee at Oral Proceedings was not that the original Requests were amendments, but **that because they are amendments there is now allegedly non-convergency** i.e. the Patentee was given the **opportunity to comment on non-convergency** (and added matter) but **not** whether the Requests are **amendments**.

We **reminded** the Board of Appeal that no amendments had actually been made to the filed Auxiliary Requests, because the new Auxiliary Request 1 was a **conditional** Request that would only be admitted if the other Requests are withdrawn. Equally, if the new Auxiliary Request 1 is not admitted, then the original Requests remain ‘untouched’ (i.e. no amendments). Indeed, because of such a conditional nature, it is impossible for the original Requests to be amendments (they are either withdrawn with the new Auxiliary Request 1 introduced, or the new Auxiliary Request 1 is not introduced and therefore the original Requests apply).

Simply because this was not repeated after the thirty minute break or after the Board of Appeal decided to not admit these Requests, does not mean this issue was withdrawn or

not raised by the Patentee i.e. **the 'duty' to inform the Board of disagreement with the treatment of the Requests and requirements of Rule 106 EPC are met.**

What was absolutely clear to the Patentee was that the discussion in the Oral Proceedings was directed to the opinion of non-convergency, as well as a generic indication of added matter (see Minutes of the Oral Proceedings page 3, sixth paragraph), and not at any stage broadened to discuss whether the Auxiliary Requests were **amendments** i.e. the fundamental point was that although the Patentee objected to the conclusion of amendments, the Patentee was only actually given an opportunity to discuss the opinion of non-convergency on the basis that it had been ruled the original Auxiliary Requests were now amendments. Indeed, Section 4.3 of the Decision is **not consistent** with the Oral Proceedings because **re-ranking** of Requests was **not presented** at all as a preliminary view.

As such the Patentee was fundamentally denied the right to discuss whether the Auxiliary Requests, always on file and unchanged, were amendments.

Second Fundamental Procedural Defect

Section 4 of the Opinion states that "the Board's conclusion... follows in a compelling manner when applying the laws of logic". However, whether or not the Board of Appeal appear to be correct or 'logical', and even if the likelihood of the Patentee succeeding in their request would be low (with which we do not necessarily agree), the Patentee was fundamentally not given the right to be heard on this point and explicit and maintained request, yet a ruling on this point **is made** and **only** in the Decision.

IX. Oral proceedings before the EBA

The petitioners referred to the EBA's question in the communication why the petitioners should have been able to comment on the opinion (on convergency) only and not on the conclusion (on the amendment topic) as well. In this respect, the petitioners referred to the minutes of oral proceedings. They read on page 3, sixth paragraph:

Furthermore, the Chairman informed the parties of the Board's preliminary opinion
a) that all further auxiliary requests were not convergent with the newly filed auxiliary request 1 and should therefore not be admitted pursuant to Article 13(1) RPBA...

This was not an opinion on the question of amendment, but only on convergency.

The decision in point 4.1 discussed the re-ranking of the requests, while in point 4.3 it repeated the preliminary opinion announced in the oral proceedings. The re-ranking of the requests was not part of that opinion.

The petitioners objected to a conclusion without any discussion that the originally filed auxiliary requests were an amendment. This was an objection pursuant to Rule 106 EPC; no explicit statement was required; to this end see R 6/22.

In the alternative, the exception of Rule 106 EPC applied based on the fact that the decision, for the first time, mentioned the reranking of the requests (see “Case Law of the EPO Boards of Appeal”, 11th edition of 2025 (hereinafter also abbreviated as “Case Law”), section V.B.3.7.7).

In addition, the right to be heard was infringed because the written decision did not discuss the conditionality of the filing of new auxiliary request 1. The petitioners had argued that auxiliary requests 1 et seq. were no amendments because of that conditionality: they were withdrawn if new auxiliary request 1 was admitted. In this respect, the petitioners referred to the minutes on page 3, second full paragraph that reads:

After resumption of the oral proceedings the patent proprietor filed a new auxiliary request 1 and stated that the other auxiliary requests would be withdrawn on the condition that this request be admitted.

This being an essential point, the decision was not sufficiently reasoned and therefore the right to be heard was infringed (see “Case Law”, section V.B.4.3.11a) citing R 8/15). It was only in the written decision that the petitioners saw that the conditionality was ignored or not considered. If it had been considered, then there would not be no decision under Art. 13(1) RPBA. They were thus unable to raise a pertinent objection pursuant to Rule 106 EPC.

Finally, regarding the request for remittal, Rule 106 was satisfied because the refusal of this request could be seen in the decision only. This defect was inextricably linked to the first defect.

Reasons for the Decision

1. Admissibility of the petition for review in respect of the first fundamental procedural defect asserted in the petition

1.1 Time limit

The written decision under review was handed over to the delivery service on 8 May 2025. The petition for review based on 112a(2)(c) EPC, together with the respective fee, was received on 4 July 2025. This was in time: see Article 112a(4), second sentence, EPC requiring the petition to be filed within two months of notification of the decision to be reviewed.

1.2 The root cause of the first defect

1.2.1 The filing of new auxiliary request 1 under a condition

The petitioners assert that their right to be heard (Art. 112a(2)(c) in conjunction with Article 113(1) EPC) was violated because they were denied the possibility to comment on the Board's qualification of auxiliary requests 1 et seq. as an **amendment**.

In the minutes of the oral proceedings before the Board it is recorded that, after the Board had informed the parties that the patent could not be maintained as granted, and subsequent to a break, the patent proprietor filed a new auxiliary request 1 and stated that the other auxiliary requests would be withdrawn on the **condition** that this request be admitted.

There is disagreement between the petitioners and the Board on how this statement that the petitioners do not contest was to be understood.

1.2.2 The petitioners' view on the consequences of filing new auxiliary request 1

Regarding the impact of their **conditional** filing of the new auxiliary request 1 during the oral proceedings before the Board, the petitioners argue, in summary, as follows:

- if the Board admitted new auxiliary request 1 to the appeal proceedings, then the remaining auxiliary requests filed with the statement of grounds of appeal (auxiliary requests 1 et seq.) were automatically withdrawn.
- Conversely, if new auxiliary request 1 was **not** admitted, then auxiliary requests 1 et seq. remained in the proceedings **as is**.

Consequently, no amendment of auxiliary requests 1 et seq. was conceivable.

In the petitioners' words (see their response to the communication above, under point VIII): ...it is impossible for the original Requests to be amendments (they are either withdrawn with the new Auxiliary Request 1 introduced, or the new Auxiliary Request 1 is not introduced and therefore the original Requests apply).

The petitioners thus apparently were of the opinion that new auxiliary request 1 if not "introduced" was withdrawn or at least, for purposes of the condition, deemed withdrawn.

1.2.3 The Board's view on the consequences of filing new auxiliary request 1

The Board expressed a different view. In the oral proceedings the Board gave the following preliminary opinion:

...all further auxiliary requests were not convergent with the newly filed auxiliary request 1 and should therefore not be admitted pursuant to Article 13(1) RPBA...

In the decision under review the Board, subsequent to the conclusion that newly filed auxiliary request 1 should not be taken into account, the Board considered auxiliary requests 1 et seq. This means that these requests remained in the proceedings. The Board held in point 4.1 that the filing of new auxiliary request 1 triggered a reranking of auxiliary requests 1 et seq. This reranking was an amendment (solely) "due to the procedural effects of such a change, such as consideration of alternate subject-matter". It was only after having made this statement that the Board concluded in point 4.2 that auxiliary requests 1 et seq. were not convergent with newly filed auxiliary request 1.

The fact that each of auxiliary requests 1 et seq. was relegated to a rank immediately below the original rank means that the Board did not consider a consequence of the conditional filing of new auxiliary request 1 to be that it was withdrawn if not admitted. Rather, new auxiliary request 1 maintained its rank between the main request and auxiliary requests 1 et seq.

1.2.4 Differences between the petitioners' and the Board's view

The Board considered that, since the condition for the admittance of new auxiliary request 1 was not met, the pre-existing auxiliary requests 1 et seq. remained in the proceedings. Insofar the Board's view is congruent with that of the petitioners.

The Board's view differs in two respects:

- first, new auxiliary request 1 continued to constitute one of the petitioners' requests even though it was not admitted to the appeal proceedings.
Consequently, auxiliary request 1 et seq. had to be reranked.
- Second, because of the filing of new auxiliary request 1, auxiliary requests 1 et seq. changed their nature: their reranking was an amendment – despite the fact that not a single word or even letter of the reranked requests had been changed.

Given that the conditionality of the filing of the new request is at the heart of the petition (the petitioners focused on it again in their response to the EBA's communication and in the oral proceedings before the EBA), the EBA considers it necessary to make the following basic remarks:

the EBA is not in a position to assess whether the Board's treatment of the conditionality was correct or not. The EBA's review is restricted to the question of whether the petitioners had an opportunity to comment on the Board's qualification of auxiliary requests 1 et seq. as an amendment (in the petitioners' view contradicting the conditional filing of new auxiliary request 1). This is the main fundamental procedural defect on which the petitioners rely. The EBA's review cannot lead to a substantive examination through the back door of the criticised treatment of the conditional filing of new auxiliary request 1 by the Board which lead to the conclusion that the reranking of auxiliary requests 1 et seq. was an amendment to the petitioners' case.

This is because it is established case law of the BoA that, in the framework of Article 112a EPC, the EBA is not in a position to review the application of substantive law. See "Case Law", section V.B.3.5.3 (case references omitted):

The Enlarged Board has no competence under Art. 112a EPC to examine the merits of the decision and to go into the substance of a case..., not even indirectly... . A review of the correct application of substantive law would amount to the Enlarged Board being a third instance which has been explicitly excluded... . It is not the purpose of petition for review proceedings to evaluate whether or not the reasons selected by the board are appropriate...; the Enlarged Board cannot replace a board's substantive assessment with its own... . The Enlarged Board cannot act as a third instance or second-tier appellate tribunal in petition proceedings... .

1.3 Compliance with Rule 106 EPC in respect of the first asserted defect

1.3.1 The legal framework

This rule reads:

A petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.

Both the minutes of the oral proceedings and the written decision are silent in respect of Rule 106 EPC, in particular regarding any objection that the petitioners raised. The same applies to the remainder of the file including the reasoning of the petition. It was only in the response to the EBA's communication and in the oral proceedings before the EBA that the petitioners did comment on this requirement.

1.3.2 The petitioners' position

Background: the grounds for the asserted first procedural defect

The petitioners now assert that the Board's above preliminary opinion revealed that it had already arrived at a (final) *conclusion* that the original auxiliary requests constituted an amendment ("amendments" in the petitioners' parlance). The petitioners were not provided with an opportunity to present their comments on the "amendment" topic before the Board's adoption of that *conclusion*.

In greater detail, the petitioners believe that a distinction has to be made between a *conclusion* and an *opinion* by the Board:

While the Decision and Minutes then state that the Chairman informed the parties of the Board's preliminary *opinion* on convergency, as can be seen in the language of the Minutes and Decision, the Board of Appeal had **already concluded**, without discussion or an opportunity to be heard for the Patentee, that the Requests on file were amendments.

The petitioners argue that they were given an opportunity to comment on the *opinion* only, but not also on the *conclusion*:

Ultimately, the Board of Appeal had already *concluded*, without any prior discussion with the Patentee, that the Auxiliary Requests were *amendments*, and the Patentee was left only to comment on the Board of Appeal's expressed *opinion* pursuant to Article 13(1) RPBA.

On the requirements of Rule 106 EPC: written and oral responses to the communication

Both in the written response and during oral proceedings before the EBA, the petitioners argued that they complied with Rule 106 EPC. They asserted having made a statement constituting an objection (i) or, in the alternative, an objection was not possible (ii).

- (i) An objection pursuant to Rule 106 EPC was raised

The petitioners argue in the written response that, subsequent to the Board's provisional opinion on admittance of auxiliary requests 1 *et seq.*, they **reminded** the Board that no amendments had actually been made to the filed auxiliary requests, because the new auxiliary request 1 was a **conditional** request that would only be admitted if the other requests were withdrawn. Equally, if the new auxiliary request 1 was not admitted, then the original Requests remained "untouched" (i.e. no amendments). Thereby, the patentee met **the "duty" to inform the Board of disagreement with the treatment of the requests and the requirements of Rule 106 EPC were met**. The fact that they did not label their reminder as an objection pursuant to this provision was irrelevant.

The EBA notes, first, that this reminder cannot have been intended to be an objection because the petitioners stated that, in their view, the Board had already decided on the question of whether auxiliary requests 1 *et seq.* were an amendment.

Second, the EBA agrees that neither Rule 106 EPC nor the term “objection” need be mentioned for a statement to qualify as an objection in the meaning of that rule.

Furthermore, what matters is not a party’s intention in making a statement, but rather the Board’s perception of that statement. However, a Board must be in a position to understand criticism objectively as an objection under Rule 106 EPC. The reminder could thus still constitute an objection if the general requirements of a valid objection were met. Those conditions are set out in the “Case Law” (in section V.B.3.7.2); the following conditions are of particular relevance in the case in hand:

[The objection] must be specific, indicating clearly and unambiguously on which procedural defect the petitioner intends to rely.

An objection under R. 106 EPC is additional to and distinct from other statements, such as arguing or even protesting against the conduct of the proceedings or against an individual procedural finding...

The EBA adds that a Board must be able understand that the party

- requests in a formal manner that the Board reconsider its approach on a specific topic and formally accept or reject the party’s criticism and
- will have a right to challenge the line taken by the Board pursuant to Article 112a EPC if the Board rejects the formal criticism.

Only then will it amount to an objection under Rule 106 EPC.

The petitioners’ reminder that the auxiliary requests 1 *et seq.* had never been amended constitutes criticism of the Board’s assessment of the conditionality of the filing of new auxiliary request 1. The reminder does not mention any procedural defect, let alone a violation of the right to be heard by the Board’s conclusion that, due to the filing of new auxiliary request 1, the consequential reranking of auxiliary requests 1 *et seq.* constituted an amendment in the meaning of Article 13(1) RPBA. The Board was thus not in a position to recognise that adopting a formal position on the reminder was requested. Consequently, the reminder cannot qualify as an objection pursuant to Rule 106 EPC.

- (ii) Alternative: no objection under Rule 106 EPC was possible

In the alternative, the petitioners argued that the decision on the amendment point and the minutes were not congruent: the “assumed” reranking of auxiliary requests 1 et seq. was not part of the preliminary opinion given in the oral proceedings. They were therefore unable to formally object to it pursuant to Rule 106 EPC.

The EBA notes that, according to the Board’s preliminary opinion set out in the minutes (on page 3), the Board did mention that auxiliary requests 1 et seq. were not convergent with new auxiliary request 1 and should therefore not be admitted under Article 13(1) RPBA.

[The Board’s preliminary opinion was] that **all further auxiliary requests were not convergent** with the **newly filed auxiliary request 1** and **should therefore not be admitted** pursuant to Article 13(1) RPBA...

It is true that point 4.3 of the decision, while referring to the preliminary opinion announced during oral proceedings, mentions the reranking of auxiliary requests 1 et seq., which cannot be found in the above passage of the minutes:

4.3 At oral proceedings the Board's **preliminary view** was given that auxiliary requests [1 et seq.] were **not convergent** with the higher ranking auxiliary request 1... **Consequently** the **re-ranking** of these requests was an **amendment** to the proprietor's appeal case which was, in the present case, contrary to procedural economy and would **not be admitted**. ...

Regarding the interpretation of the above statement in the minutes, the following considerations are of relevance:

- Article 13(1) RPBA deals with admittance of amendments. The Board’s preliminary opinion can therefore only be understood in the sense that auxiliary requests 1 et seq. constituted an amendment (even though not a single word or even letter of any of these requests had been changed).
- Even though new auxiliary request 1 was not admitted, it still influenced the treatment of auxiliary requests 1 et seq. as an amendment and therefore was still considered by the Board as part of the pending requests.
- If pending new auxiliary request 1 was inserted between the main request and auxiliary requests 1 et seq., then it is difficult to see how the Board could have proceeded accordingly other than by assuming that auxiliary requests 1 et seq. were virtually renumbered by attributing to each of them one rank lower.

In conclusion, the contents of the statement in the decision on the Board’s preliminary opinion, more extensive than in the minutes as it may be, were identical in substance with

the statement in the minutes. The exception to the duty to raise an objection under Rule 106 EPC therefore does not apply.

1.3.3 Conclusion on Rule 106 EPC and admissibility

According to the above passage of the minutes

...the Chairman informed the parties of the Board's **preliminary opinion**

a) that all further auxiliary requests were not convergent with the newly filed auxiliary request 1 and should therefore not be admitted pursuant to Article 13(1) RPBA, and

As found in the previous section, the petitioners' reminder does not qualify as an objection to the preliminary opinion in the meaning of Rule 106 EPC. The EBA takes the stance that it would have been for the petitioners at the point in time of the Chairman's information, or at the very latest before the Chairman pronounced the order of the Board's decision, to raise an objection against the Board's assessment of the reranking of auxiliary requests 1 et seq. as an amendment in view of their non-convergence with the newly filed auxiliary request 1. Further to the Board's preliminary opinion, the petitioners were given 30 minutes to consider their requests. After resumption of the oral proceedings they "... stated that [the patent proprietors] would maintain all [their] requests. Asked by the Chairman, the patent proprietor[s] stated that [they] did not wish to comment on [their] further auxiliary requests". (See the minutes, page 3, last two paragraphs).

Furthermore, as equally found in the previous section, the exception to the duty to raise an objection under Rule 106 EPC, i.e. that raising an objection was not possible, does not apply.

It follows that the petition is **clearly inadmissible** in respect of the **first asserted fundamental procedural defect for failure to raise** a pertinent **objection pursuant to Rule 106 EPC**.

2. Merits of the further fundamental procedural defect asserted during oral proceedings before the EBA

It was for the first time in the oral proceedings before the EBA that the petitioners raised an additional fundamental procedural defect: their right to be heard was infringed because the written decision did not discuss the conditionality of the filing of new auxiliary request 1 (Art. 112a(2)(c) in conjunction with Article 113(1) EPC). This being an essential point, the decision was not sufficiently reasoned and therefore the petitioners' right to be heard was

violated. In this context they referred to section V.B.4.3.11a) of the “Case Law” citing R 8/15. It was only in the written decision that the petitioners saw that the conditionality was ignored or not considered. If it had been considered, then there would be no decision under Article 13(1) RPBA. They were thus unable to raise a pertinent objection pursuant to Rule 106 EPC.

The EBA notes that it is true that the conditionality of the filing of new auxiliary request 1 in the oral proceedings before the Board is not mentioned in the decision at all. It is only mentioned in the minutes meaning that the Board was aware thereof. As quoted above, the minutes read in this regard:

After resumption of the oral proceedings the patent proprietor filed a new auxiliary request 1 and stated that the other auxiliary requests would be withdrawn on the **condition** that this request be admitted.

It is also true, however, that the Board made an extensive assessment of the conditionality in points 4.1 to 4.3 and 4.5. This assessment was different from that made by the petitioners. In section 1.2 above the EBA has laid this out in detail. Nothing more needs to be said in the context of this asserted defect. Therefore, in this respect, the petition is clearly unallowable.

It follows that the question of admittance of this additional defect raised for the first time in the oral proceedings before the EBA need not be answered. It is also immaterial that the exception to making an objection pursuant to Rule 106 EPC would apply as the defect is asserted to have followed from the written decision only.

3. Merits of the second fundamental procedural defect asserted in the petition

Regarding the second asserted fundamental procedural defect, no further assessment of the admissibility of the petition, in particular the need to raise an objection pursuant to Rule 106 EPC, is needed. This is because in this respect the petition is clearly unfounded, as will be explained in the following.

The Board having considered the main request unallowable and not admitted the remaining requests, it held that there was no auxiliary request on the basis of which the case could have been remitted. See point 5 that reads:

...the patent proprietor had initially requested that, if any of the auxiliary requests lower ranked than auxiliary request 1 were to be considered, the case should be remitted to the opposition division. In the absence of any such auxiliary request (albeit all now re-ranked) being admitted, **there was no request to be considered and thus no request on the basis of which a remittal could be ordered.**

The petitioners are wrong to argue that the Board concluded that there was no remittal request. The Board rather concluded that there was no request on which the remittal request could have been successful.

The EBA shares the Board's conclusion which follows in a compelling manner when applying the laws of logic. Given that a remittal would thus have had no purpose, there was no need to hear the petitioners on this point. In both cases, failure to hear a party cannot have any impact on the outcome of the case, i.e. a causal connection is missing.

In its response to the EBA's communication, the petitioners argued that they were "fundamentally not given the right to be heard on this point and explicit and maintained request, yet a ruling on this point **is made** and **only** in the Decision." This may be so, but is irrelevant for the reasons given in the communication that are set out in this section above.

4. Overall conclusion

The petition is clearly inadmissible for failure to raise an objection pursuant to Rule 106 EPC in respect of the first fundamental procedural defect asserted in the petition and clearly unallowable in respect of the defect relied on in the oral proceedings before the EBA and the second defect asserted in the petition (Rule 109(2)(a) EPC).

As a consequence, the requests that:

- the decision under review be set aside and that appeal proceedings be re-opened;
- the fee for the petition be reimbursed

must be dismissed because the conditions of Rule 108(3) EPC have not been met.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



N. Michaleczek

C. Josefsson

Decision electronically authenticated