



**Case Number:** D 0046/07

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 21 July 2008**

**Appellant:** n.n.

**Decision under appeal:** Decision of the Examination Board for the  
European Qualifying Examination dated  
13 August 2007.

**Composition of the Board:**

**Chairman:** J.-P. Seitz  
**Members:** C. Rennie-Smith  
P. Gendraud

## Summary of Facts and Submissions

- I. The appellant appealed, by a notice of appeal both dated and received at the EPO on 13 September 2007, against the decision, posted by registered letter on 13 August 2007, of the Examination Board that, having been awarded 36 marks, he had been unsuccessful in paper A of the 2007 European Qualifying Examination ("EQE"). The appeal fee was also paid on 13 September 2007. The written statement of grounds of appeal was both dated and received at the EPO on 22 October 2007.
- II. Paper A of the 2007 EQE required candidates to draft patent claims, the subject matter of which was alloys, a field in which the appellant has some experience of patent examination. The appellant's extensive submissions in his grounds of appeal consisted in very large part of a detailed assessment as to why he considered that the draft claims he produced in his answer paper were correct according to relevant case law of the Boards of Appeal and the examination policy of the EPO as applied by examiners in the field of alloys and why, in contrast, he considered that the interpretation of such case law and policy as applied by the Examination Board (as illustrated by the "Examiners' Report" and more particularly the model claims therein which the appellant strongly criticised) was incorrect. He alleged that several serious and obvious errors (summarised in A to D on page 23 of his grounds of appeal) had occurred in his case.

As to the first such error, on which the appellant particularly relied, he submitted that it is the constant policy of examiners dealing with alloy claims

to require, for compliance with Article 84 EPC, "closed" claims which specifically recite all the compulsory and optional components of an alloy and impurities and to refuse "open" claims which do not. He cited extracts from case law which indicated this practice was also approved by the Technical Boards of Appeal. In the appellant's answer he had given a "closed" independent alloy claim and corresponding use claim in accordance with that policy and practice. However, the model answer published by the Examination Board uses the word "containing" to identify the non-metallic component or components and is therefore an "open" claim. The Examination Board was therefore expecting candidates to draft claims which would not succeed in practice and would not comply with the EPC as applied by patent examiners and interpreted by case law.

In support of his detailed arguments the appellant annexed to his grounds of appeal copies of claims and Examination Division communications from several European Patent Application cases concerning alloys conducted by the appellant's firm and with which he was familiar as well as a published article by an EPO examiner in the field of alloys.

III. The appellant also referred in his grounds of appeal to "the reluctance of the Disciplinary Board of Appeal to substantively consider issues relating to serious errors in interpretation of the EPC by the Examination Board, such as was indicated in D 1/92" and argued that, since such decisions pre-date the present composition of the Board which now has a majority of legally qualified members, the approach which he called

"abdication of the Board's responsibility to correct serious errors and ensure justice" cannot be based any longer on what he termed "a competence basis".

IV. In letters from the Board dated 7 January 2008, the President of the EPO and the President of the Institute of Professional Representatives ("*epi*") were invited, pursuant to Articles 27(4) REE and 12 RDR, to file observations on the case within a period of two months if they wished to do so. In a written reply of 14 January 2008 the President of *epi* expressed the following opinion:

"The appellant argues that his paper was incorrectly marked because his claims were allowable but were awarded no marks. This appears to be a request for the Board to re-mark the appellant's paper. It is established in the case law of the Board that requests for re-marking do not provide basis for an allowable appeal.

The appellant makes a large number of other requests. However, these requests appear to be inappropriate for an appeal of this nature and should not be allowed.

It is therefore considered that the appeal should be dismissed."

The President of the EPO filed a letter dated 15 January 2008 referring in its heading to this and a large number of other pending appeals. However, the reference to this case was clearly erroneous and the Board was upon inquiry informed by the Examination

Secretariat that the President of the EPO would not file observations on this case.

- V. In a communication of 4 April 2008 containing its preliminary views, the Board referred to the limitations on its jurisdiction which preclude *inter alia* claims of incorrect marking except as regards mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure, to the appellant's argument that such limitations were no longer applicable (see III above), and explained why it considered that argument to be incorrect and why those limitations should apply in this case (see Reasons, points 2 to 4 below).

On that basis the Board considered that the appellant's arguments demonstrated clearly that his opinion and that of the examiners as to his answers were different. While the appellant had alleged several serious and obvious errors had occurred, it appeared to the Board - not least because of the appellant's own submissions - that he could only allege such errors because he considered that his opinion was right and that, accordingly, the different opinion of the examiners was wrong. Such differences of opinion were reflections of value judgements which are not, in principle, subject to judicial review.

After commenting on the appellant's requests in his grounds of appeal, which were substantially revised at the oral proceedings (see IX below), the communication concluded that, on the material then before it, the Board considered the appeal would have to be dismissed and invited the appellant to make further submissions

in writing or at the oral proceedings. The appellant did not reply in writing.

VI. The appellant requested oral proceedings which took place on 21 July 2008 and at which he filed a written summary of his submissions and reformulated requests. His arguments in that summary and as presented at the oral proceedings can be summarised as follows.

The appellant submitted that the question to be considered was:

"Does the Examination Board have the discretion to require answers that violate the EPC in order to achieve a passing grade?"

While the Examination Board has discretionary powers, those are not absolute and can be reviewed if abused (see D 3/89, OJ 1991, 257, Reasons, point 7). If the examiners' evaluation is alleged to have been based on a technically or legally incorrect premise, the decision must be reviewed for abuse of discretion (see D 7/05, OJ 2007, 378, Reasons, point 20; D 6/04 of 30 August 2004, unpublished, Reasons, point 1; D 19/05 of 6 February 2007, unpublished, Reasons, point 2, and "Case Law of the Boards of Appeal of the European Patent Office", Chapter VIII, section 2.6.2). Rule 3 of the Implementing Provisions to the REE requires proposed patent text to comply with the EPC, "in particular Article 84 EPC regarding the clarity of claims". Section 5 of the Instructions to Candidates states that in paper A candidates "are expected to draft an independent claim (or claims) which offers the applicant the broadest possible protection and at the

same time has a good chance of succeeding before the EPO. When drafting the claim(s), candidates should bear in mind the requirements of the Convention...".

The Examiners' Report for Paper A said "The candidates were expected to draft an independent product claim of the following scope" and then cited an "open" alloy claim which would be *per se* invalid as violating Article 84 EPC as the examples drawn from actual practice and the published article filed with the grounds of appeal show. The model claim in the Examiners' Report would in fact have no chance of succeeding, thus at least Section 5 of the Instructions to Candidates had been contravened. The appellant was only required to establish a *prima facie* case of a serious and obvious mistake (see D 2/03 of 17 December 2003, unpublished, Reasons, point 2) and had done at least that. The Examiners' Report is therefore based upon an incorrect legal premise and is reviewable for abuse of discretion.

Since candidates who applied the law correctly lost at least half of the available points, the mistake was "relevant" in that the decision would have been different without the mistake (see D 6/92, OJ 1993, 361, Reasons, point 5). The error "can be verified by application of legal principles based on the regulations and provisions related thereto" (see D 6/92, *loc cit*), so the Board need only consider the case law and examining policy of the EPO to evaluate the error. The Board does not need to consider the appellant's answer so no value judgment arises. As regards his requests the appellant referred to several cases in which the Board has ordered remarking of a

paper (D 10/02, OJ 2003, 275, Reasons, points 10 and 11; D 14/99 of 27 April 2001, unpublished; D 1/94, OJ 1996, 468, Reasons, point 5; D 1/85, OJ 1985, 341, Reasons, point 3.5; D 3/86, OJ 1987, 489; and D 3/87, OJ 1988, 271). The Board also has the power to order that a candidate has passed the EQE (see D 4/89, OJ 1991, 211, Reasons, point 6).

VII. The independent product and use claims submitted by the appellant in his answer paper were:

"1. An AB<sub>2</sub>-type alloy consisting of Ti<sub>a</sub>Zr<sub>(1-a)</sub>M<sub>2</sub>, one or more non-metallic elements selected from the group consisting of sulphur, nitrogen, selenium, carbon and boron, and trace impurities present in the metals from which the alloy is formed, wherein M is one or more elements selected from the group consisting of Mn, Cr, V, Co and Mo, a is from 0 to 1, the non-metallic element(s) is/are present in a total concentration of from 0.1 to 5 atomic percent of all the alloy elements and the AB<sub>2</sub>-type alloy is obtainable by melting all of its components in an inert gas atmosphere furnace.

15. Use of the alloy of any one of claims 1 to 13 for absorbing hydrogen."

The two markers who assessed the appellant's answer paper both gave him no marks out of a possible 30 for the independent product claim, 5 marks out of 5 and 2 marks out of 5 for the two process claims, and no marks out of 20 for the use claims. Thus of a total of 60 available points for independent claims, the appellant was awarded only 7.



VIII. The relevant sections of the Examiners' Report relied on by the appellant said, as regards the independent product claim:

"The candidates were expected to draft an independent product claim of the following scope:

AB<sub>2</sub>-type alloy with Ti and/or Zr as the A-component (or using the formula Ti<sub>a</sub>Zr<sub>1-a</sub>M<sub>2</sub>) and containing at least one non-metallic element selected from B, C, N, S and Se in a total amount of from 0.01 to 5 atomic %.

This claim was worth up to 30 points.

Good candidates realised that the alloy as such was a new and useful material (as an intermediate). A limitation to the powder led to the loss of a significant number of the points allocated (up to 25). Those candidates not specifying the essential non-metals had up to 25 points deducted, a significant number (up to 20) of points was also lost by not incorporating the essential amounts of the non-metal. The candidates limiting the alloys to specific metals (B-component) lost half of the available points. The definition as a composition comprising the alloy would lead to a minor reduction of points due to lack of clarity. The indication of the use (for) or definition as hydrogen storage material of the alloy led to more reduction since the claim should be drafted with the broadest scope possible. Product-by-process claims were not appropriate and

such a mistake also led to a loss of up to 15 points. The definition of B in the formulae as a metal was not expected and no additional points were awarded for this."

As regards the independent use claim, the Examiners' Report said:

"The candidates were further expected to draft an independent use claim directed to the use of the alloy powder as was indicated by the letter to be the only useful form for the purpose of storing hydrogen which also attracted a high number of points, 20 in total of the following scope:

Use of the alloy powder (or particles), having the diameter <100 nm for storing hydrogen.

Significant numbers of points were lost for claims to the use of a range of materials broader than was appropriate to the use. Any essential feature missing/unnecessary limitation led to reduction of up to 3/4 of the points, failing to mention particle size, not specifying the non-metal or its essential amount or the limitation to specific B-component."

- IX. The appellant's requests were in summary (for the appellant's full text see the minutes of the oral proceedings):
  - A. to find that the Examination Board abused its discretion;

- B. to remit the case to the Examination Board for remarking;
- C. if the Board considers such remittal inappropriate, to order that the appellant has passed paper A of the EQE 2007;
- D. reimbursement of the appeal fee;
- E. any other appropriate relief or remedy.

### **Reasons for the Decision**

1. The appeal is admissible.
2. It is well established by the jurisprudence of the Disciplinary Board that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or a provision implementing the REE. This follows axiomatically from Article 27(1) REE which is the basis of the Board's jurisdiction in EQE matters and which reads:

"An appeal shall lie from decisions of the Board and the Secretariat only on grounds of infringement of the Regulation or of any provision relating to its application."

Thus the Disciplinary Board may only review Examination Board decisions for the purposes of establishing that they do not infringe the REE, its implementing provisions or a higher-ranking law. It is not the task of the Disciplinary Board to reconsider the examination

procedure on its merits nor can it entertain claims that papers have been marked incorrectly, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. All other claims to the effect that papers have been marked incorrectly are not the responsibility of the Disciplinary Board of Appeal. Value judgments are not, in principle, subject to judicial review. (See, for example, D 1/92, OJ 1993, 357, Reasons point 4; D 6/92, OJ 1993, 361, Reasons, points 5-6: and D 23/97 of 16 March 1998, unpublished, Reasons, point 5).

3. The appellant was himself aware of this principle in as much as he referred in his grounds of appeal to "the reluctance of the Disciplinary Board of Appeal to substantively consider issues relating to serious errors in interpretation of the EPC by the Examination Board, such as was indicated in D 1/92" (see III above). In order apparently to avoid the application of this principle to his case, the appellant argued that, since such decisions pre-date the present composition of the Board which now has a majority of legally qualified members, the approach which he termed "abdication of the Board's responsibility to correct serious errors and ensure justice" cannot be based any longer on, to use the appellant's term, "a competence basis".
4. In the Board's view the appellant is in this respect mistaken both as to fact and law. While it is correct that, since an amendment to Article 27(3) REE which took effect on 8 June 2000 (see OJ EPO 2000, 320), the Board has been composed of two legally qualified members of the EPO and one professional representative

for the purpose of EQE appeals, the previous composition of three legally qualified members and two professional representatives (see Article 10(1) RDR and Article 27(3) REE prior to the said amendment) also provided a majority of legally qualified members. Further, the relevant case law of the Board has been consistent both prior and subsequent to that change (see the prior decisions referred to in paragraph 2 above and, for examples of subsequent such decisions, D 7/05 OJ 2007, 378, Reasons, point 20 and D 20/05 of 26 January 2006, unpublished, Reasons, point 2 (both cited further below), and the very recent decision D 2/07 of 26 June 2008, unpublished, Reasons, point 2). More importantly however, the principle contained in that case law is based not on any "reluctance" by the Board to consider substantive issues nor on any "abdication" by it of the interests of justice, but on the simple fact that the Board has no jurisdiction to go beyond the limited powers it has been given by the legislation under which it functions. As the Board itself observed in D 20/05 (*op cit*, see Reasons, point 8) and in D 3/89 (OJ 1991, 257, Reasons, point 7) cited by the appellant, if the current practice is considered to have disadvantageous limitations, the way to change it is by amending the relevant legislation.

5. Accordingly the Board cannot, as the appellant suggested in his grounds of appeal, depart from the principle referred to in paragraph 2 above but must consider the appellant's arguments in the light of that principle. It appears that the appellant, having considered the communication containing the Board's views as set out in paragraphs 2 to 4 above, accepted that this must be so since, at the oral proceedings, he

directed his arguments to the serious and obvious error which he said could be established without re-opening the marking procedure (see VI above). The Board will now consider those arguments.

6. The question which the appellant said must be considered, namely,

"Does the Examination Board have the discretion to require answers that violate the EPC in order to achieve a passing grade?"

can clearly only be answered in the negative. Not only would that be, as the appellant submitted, an abuse of discretion, it would also frustrate the purpose of the EQE which must be to test candidates' knowledge of European patent law and practice as it actually is and not an incorrect or distorted form thereof. The Board can also readily agree with the appellant that it can review a decision if it discloses an abuse of discretion (although D 3/89, OJ 1991, 257, Reasons, point 7 cited by the appellant in this context does not refer to the discretionary powers of the Examination Board but to the discretionary powers of the legislature to make rules regulating the EQE). To use the expression frequently found in the case-law of the Board, an abuse of discretion is simply one type of "serious error" which, if established, will allow the Board to review and if necessary change a decision affected by such an error.

7. However, whether called "abuse of discretion" or "serious error", the mistake must be capable both of being established by reference to the REE, its

implementing provisions and higher-ranking laws and of being established immediately or obviously - hence the other expression frequently found in the jurisprudence "so obvious that it can be established without re-opening the entire marking procedure". In other words, the error must be apparent on the face of the case as presented to the Board. The burden of establishing such an obvious error must necessarily lie with an appellant who alleges it. The appellant acknowledged this when he submitted (see VI above) that the error he alleged in his case could be verified by application of legal principles based on the regulations and provisions related thereto so that the Board need only consider the case law and examining policy of the EPO and did not need to consider the appellant's answer so no value judgment arises. However the Board cannot agree that, in the present case, the appellant has in fact established that a serious error (or abuse of discretion) can be so verified.

8. The flaw in the appellant's line of argument is that, after posing the question set out in 6 above (to which, as already indicated, the answer must be negative), and after making the proposition that an abuse of discretion can be reviewed by the Board (with which the Board can also agree), the appellant did not then proceed to discharge the burden upon him of showing that the abuse or mistake was obvious. Instead, he argued that if the examiners' evaluation is **alleged** to have been based on a technically or legally incorrect premise, the decision must be reviewed for abuse of discretion. That is however not the case - to allege an error, at whatever length and in whatever detail, is not to establish that an error occurred, let alone an

error so obvious that it can be immediately identified. This is evident from the very case-law cited by the appellant in support of his proposition that an allegation of a false premise is enough.

9. In D 7/05 (*op cit*, Reasons, point 20) the Board said:

"20. Under Article 27(1) REE, appeals against Examination Board decisions may be filed only on grounds of infringement of the REE or of any provision relating to its application. Article 27(1) REE thus in essence merely gives the Appeal Board the power to review the legality of the process, i.e. to consider whether the examination procedure complied with the relevant regulations and instructions. Hence the Appeal Board's powers of review according to the established case law of the boards of appeal (following D 1/92 and D 6/92, OJ EPO 1993, 357 and 361, see e.g. again D 3/00, loc. cit., point 1 of the reasons) are limited to examining whether the REE, the provisions relating to its application or higher-ranking law have been infringed. **The Appeal Board does not have the power to reconsider the entire examination procedure on the merits and set its evaluation of the merits above that of the Examination Board. Technical review of the marking of an answer in terms of whether it is objectively correct or appropriate, as the appellant demands in the light of German law, is denied to the Appeal Board by Article 27(1) REE** (D 20/96 of 22 July 1998, point 9 of the reasons). **On appeal, the Board can only consider facts constituting a mistake in the examination procedure which can be**



**established without re-opening the whole marking procedure, for example** where the two examiners differ so widely in their marking that the difference in marks alone suggests an infringement of the principle of uniform marking, or where a question is inconsistently or incomprehensibly formulated (D 13/02, point 4 of the reasons), or **where the examiners based their marking on a technically or legally false premise on which the contested decision is based** (D 16/02 of 16 July 2003, point 3 of the reasons, D 6/04 of 16 July 2003, point 3). The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Appeal Board; nor are the Examination Board's criteria for determining the weighting of the expected answers to the examination questions (D 13/02, point 5 of the reasons)." (*Emphasis added. The date 16 July 2003 given for D 6/04 appears to be erroneous, the correct date being 30 August 2004.*)

As is clear from the emphasised passages, in that decision the Board instanced the use of a false technical or legal premise as the basis of a decision as an example of a mistake in the examination procedure which can be established without re-opening the whole marking procedure. The Board clearly did **not** say that a mere allegation of a false premise underlying a decision required a review for abuse of discretion. The passage relied on by the appellant is in fact one of the many re-statements found in the Board's jurisprudence of its very limited powers of review (see paragraph 2 above).

10. Similarly, in the other cases cited by the appellant the Board, again after similar re-statements of those limited powers, made it quite clear that the mistake in question must be obvious. Thus in D 6/04 of 30 August 2004 (unpublished, Reasons, point 1) the Board said:

"Nur wenn der Beschwerdeführer geltend machen kann, daß die angegriffene Entscheidung auf schweren und eindeutigen Fehlern beruht, kann dies von der Kammer berücksichtigt werden. Der behauptete Fehler muß so offensichtlich sein, daß er ohne Wiedereröffnung des gesamten Bewertungsverfahrens festgestellt werden kann, etwa, wenn Prüfer bei ihrer Beurteilung von einer technisch oder rechtlich falschen Beurteilungsgrundlage ausgegangen sein sollten, auf denen die angefochtene Entscheidung beruht."

And, in D 19/05 of 6 February 2007 (unpublished, Reasons, point 2), the Board similarly said:

"The Board cannot reconsider the examination procedure on its merits nor entertain allegations that papers have been marked incorrectly, save to the extent of mistakes which are serious and so obvious that they can be identified immediately without re-opening of the entire marking procedure [see, for example, D 1/92 (OJ 1993, 357), Reasons points 3 to 5 and D 6/92 (OJ 1993, 361), Reasons points 5 to 6 or D 9/00, Reasons point 2]."

It thus appears that, on the basis of the case-law authority referred to by the appellant himself, an error or abuse must be obvious and immediately

identifiable. As the appellant also submitted, it may be sufficient if the obvious or serious mistake can be *prima facie* established without reopening the whole marking procedure (see D 2/03 of 17 December 2003, unpublished, Reasons, point 2).

11. Turning to the appellant's arguments in support of the alleged mistake in his case, the Board considers that he has at least *prima facie* established that the usual approach of EPO policy in alloy cases is to require "closed" claims. It is however not so clear that the Examination Board wanted candidates to provide "open" claims. The Examiners' Report does not appear to set out model claims as such and it certainly does not use the expression "model claims" at all. Rather it says candidates were expected to draft claims of a scope which is then summarised (see VIII above). It is true that, in the case of the independent product claim, this summary includes the word "containing" which suggests a less than "closed" claim, if only because in the decision T 692/99 of 25 October 2002 (unpublished, Reasons, point 2) cited by the appellant, Technical Board of Appeal 3.2.2 said:

"For the sake of clarity, the term "alloy **containing...**" has be replaced in claim 1 by the wording "alloy **consisting of..., optionally ...,** the balance being iron and incidental impurities" thus specifying all compulsory and optional components of the claimed steel alloy."

(The words "has be replaced" appear themselves to be an obvious mistake. The appellant in his grounds of appeal has corrected the mistake so that the cited passage reads:

"For the sake of clarity, the term "alloy **containing...**" has [to] be replaced in claim 1 by the wording "alloy **consisting of...**".

However, the section of the decision from which the cited passage is taken is headed "Amendments; original disclosure; Article 76 EPC" and constitutes references to several amendments and other such matters which the appellant in that case has apparently dealt with itself since the section ends with the sentence:

"The amendments to the claims and to the description, therefore, satisfy the requirements of Articles 76(1), 123(2) and 84 EPC."

It therefore appears to the Board that the cited passage from T 692/99 should probably read:

"For the sake of clarity, the term "alloy **containing...**" has [been] replaced in claim 1 by the wording "alloy **consisting of...**".

While even on that reading the amendment may have been made to comply with usual practice, it does make the case law value of this passage, which is simply reciting with approval steps taken by a party, minimal.

The Board places no great weight on this point. Indeed, it has generally accepted - in the appellant's favour -

his presentation of EPO policy and case-law without raising any inquiry or question as to the accuracy of his presentation).

12. In the Board's judgment, the appellant comes no closer to discharging the burden of identifying an obvious mistake than to show that there is a *prima facie* inconsistency between, on the one hand, the EPO policy and case-law as he presents it and, on the other hand, the summary of the scope of the typical claim which the Examiners' Report says candidates were expected to draft. In the Board's view it is questionable whether that *prima facie* inconsistency is an error, let alone one so obvious that it was immediately identifiable but, assuming (again, in the appellant's favour) that it was, the appellant has certainly not established that the decision under appeal was based thereon (see D 7/05, *op cit*, point 20, cited in paragraph 9 above).
  
13. By the decision in question the appellant was awarded only 7 points out of a possible 60 for his independent product and use claims. He argues that his application of the correct law cost him half of the available points but there is no way the Board can establish whether this is in fact what happened in his case. In any event, it is abundantly clear that both the examiners who marked his paper considered he should lose a very large number of points far in excess of the half which the appellant ascribes to his use of the correct law. This clearly indicates that the examiners found several shortcomings in his draft claims. The pertinent passages from the Examiners' Report (see VIII above) show that a large number of matters were taken into account for each of the product and use claims,

any one or more of which could have lead to the loss of a varying amount of points.

14. Equally, comparison of the appellant's own draft claims (see VII above) with the suggested summary of the scope of claims in the Examiners' Report shows (even if one does not treat the latter as "model claims" as the appellant has done) many differences between the two. Some of these are unrelated to the question of "closed" or "open" claims. For example, the appellant misquoted the range of 0.01 to 5 atomic % as 0.1 to 5 atomic % and the Board simply does not and cannot know whether this lead to a loss of points and if so how many. Another example is that, whereas the appellant argued product-by-process features are frequently found in alloy claims, the Examiners' Report says product-by-process claims were not appropriate and such a mistake led to a loss of up to 15 points. "Not appropriate" would seem to mean not appropriate in the case put in the examination paper but the appellant argues the paper suggested a product-by-process feature was essential - this is quite simply a classic example of a candidate and the examiners having different opinions and, as the case-law makes clear, such differences are reflections of value judgments with which the Board cannot interfere.
  
15. In summary, while the appellant may have shown a prima facie case of inconsistency between current EPO practice (as he presents it) and the approach of the examiners, he has not demonstrated that this is why his paper was marked as it was. Even if the error alleged by the appellant could be accepted as an immediately identifiable error, it has not been established that

the decision under appeal was based on that error. In the circumstances, it is not necessary to consider the appellant's arguments relating to his several requests since the appeal must be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J.-P. Seitz