

## **ENLARGED BOARD OF APPEAL**

**Opinion of the Enlarged Board of Appeal dated 22 January 2003**

**G 1/02**

(Translation)

Composition of the board:

Chairman: P. Messerli

Members: J.-C. Saisset

P. Lançon

W. Moser

C. Andries

R. Teschemacher

G. Davies

**Headword: Formalities officers' powers**

**Article: 10(2)(a), 10(2)(i), 15, 18(2), 19, 19(1), 19(2), 21, 21(3)(a), 21(3)(b), 21(3)(c), 21(4), 33(3), 90, 91, 91(3), 99(1), 102(5), 106, 112(1)(b), 164(2) EPC**

**Rule: 9, 9(3), 51(4), 55(c), 56(1), 56(2), 56(3), 57(1), 69(1), 69(2) EPC**

**Notice of the Vice-President of Directorate-General 2 dated 28 April 1999, points 4 and 6**

**Keyword: "Opposition divisions - formalities officers - decisions - powers"**

*Headnote*

*Points 4 and 6 of the Notice from the Vice-President Directorate-General 2 dated 28 April 1999 (OJ EPO 1999, 506) do not conflict with provisions of a higher level.*

### **Summary of proceedings**

I. In T 295/01 of 7 September 2001 (OJ EPO 2002, 251), Board of Appeal 3.3.4 ruled on a case in which, under Rule 69(1) EPC, a formalities officer had communicated a loss of rights to an opponent - incurred because the opposition fee was paid after the time limit laid down in Article 99(1) EPC - and then, under Rule 69(2) EPC, given a decision refusing - on the grounds that the opposition was deemed not to have been filed - the opponent's request that the communication be set aside. That was the decision under appeal.

Board 3.3.4 held that point 6 of the Notice from the Vice-President Directorate-General 2 dated 28 April 1999 "concerning the entrustment to formalities officers of certain duties normally the responsibility of the Opposition Divisions of the EPO" (hereinafter "the Notice") conflicted with Rules 9(3) and 56(1) EPC. The Notice was published in OJ EPO 1999, 506, as Section II of a more general notice from the Vice-President Directorate-General 2, with the same date and published in the same OJ issue (page 503), concerning the entrustment to non-examining staff of certain duties normally the responsibility of examining as well as opposition divisions. The board ruled that, by analogy with the provisions of Article 164(2) EPC, these rules were of a higher level than the Notice and therefore prevailed. The EPO President's powers under Rule 9(3) EPC could not extend to entrusting EPO employees with duties (or powers) which, under other provisions of equal ranking in the hierarchy of the law, fell within the competence of someone else.

Board 3.3.4 therefore set the formalities officer's decision aside, on the grounds that he was not competent to take it, and remitted the case to the opposition division.

II. In T 1062/99 of 4 May 2000 (unpublished), Board 3.2.1 ruled on another case in which the opposition fee had been paid after expiry of the opposition period. In this second case, the formalities officer had simply sent the opponent a letter informing him that the opposition was inadmissible because it had not been filed within the time limit laid down by Article 99(1) EPC. Board 3.2.1 ruled that the formalities officer's letter was an appealable decision, and it made no difference that the decision had been taken not by the opposition division itself but by a formalities officer on its behalf, that being in accordance with the internal allocation of duties devised by the EPO for its own operational efficiency.

Board 3.2.1 concluded by upholding the formalities officer's decision and dismissing the appeal on the grounds that he had been right to regard the opposition as filed late and consequently inadmissible.

III. Taking the view that T 295/01 and T 1062/99 were divergent, and to ensure uniform application of the law, the President in a letter of 3 July 2002 requested the Enlarged Board of Appeal under Article 112(1)(b) EPC to give its opinion on the following important points of law in connection with the Notice:

**1. Does point 6 of the Notice conflict with provisions of a higher level?**

**2. Does point 4 of the Notice conflict with provisions of a higher level?**

The full text of the above referral (original: German) was published in OJ EPO 2002, page 466.

IV. On the question of how the two decisions diverge, the President says that if Board 3.2.1 in T 1062/99 had not regarded the formalities officer as competent, it would have had to note this ex officio and draw the necessary legal consequences. Then, citing the Enlarged Board in opinion G 3/93 (OJ EPO 1995, 18), he argues

that it makes no difference whether Board 3.2.1 reached its conclusion about this official's powers directly or as obiter dictum; in either case, its comments could still cause considerable legal uncertainty and therefore justified referral.

The President says that who can do what is a question of considerable practical and legal importance; any decision taken by an unauthorised person must be set aside. The divergent decisions make it unclear whether past practice can continue, thus causing considerable legal uncertainty.

The President also takes the view that if his referral to the Enlarged Board were limited to point 6 of the Notice, legal uncertainty about the cases actually underlying T 1062/99 and T 295/01 would persist. Whilst admissibility and deemed filing were two different questions to be considered separately, they were closely linked and in practice both decided by formalities officers. He adds that both decisions were essentially about whether the opposition fee had been paid in time, and the opposition thus validly filed. That was why he was also referring question No. 2 above.

V. Regarding the basis for EPO practice hitherto, the President says that neither Article 15 nor Article 19 EPC mentions the formalities officer, who is therefore not a separate body with independent powers. Such powers as he exercises must therefore be lawfully delegated to him. This can be done under Rule 9(3) EPC, which empowers the President to entrust to EPO employees who are not technically or legally qualified examiners the execution of individual duties normally falling to examining and opposition divisions, provided these duties involve no technical or legal difficulties. On 6 March 1979 the President delegated that power to the Vice-President with responsibility for Directorate-General 2 of the European Patent Office (hereinafter "Vice-President DG 2"), who on 8 January 1982 issued the first notice exercising it in connection with opposition proceedings (OJ EPO 1982, 61). This was later amended on 15 June 1984 (OJ EPO 1984, 319), 1 February 1989 (OJ

EPO 1989, 178) and, most recently, 28 April 1999 (OJ EPO 1999, 506), with point 6 remaining unchanged throughout and entrusting formalities officers with "*decisions in ex parte proceedings on the inadmissibility of the opposition and the intervention of the assumed infringer with the exception of the cases provided for in Rule 55(c) EPC*". Point 4 has never been amended in substance.

VI. Regarding the powers delegated under point 6 - the first question put to the Enlarged Board - the letter of referral emphasises that in T 295/01 the board was justified in finding this provision ambiguous, because it used the expression "*ex parte proceedings*" with reference to the opposition procedure, which was by definition *inter partes*. The referral argues however that in the present context "*ex parte*" is used not in the above sense but to describe the initial examination of admissibility, in which the patentee is not involved. It then cites the "*travaux préparatoires*" (report on the 9th meeting of Working Party I, Luxembourg, 12 to 22 October 1971, BR/135/71, point 134), Rules 56(3) EPC and 57(1) EPC, and the views of *van Empel* ("The Granting of European Patents", Leyden 1975, point 472) and *Paterson* ("The European Patent System", second edition 2001, paragraphs 3-35, 3-36, page 103), adding that patentees need not normally be involved when admissibility is examined; the EPO can check compliance with the requirements itself, and if, in specific cases, it does need to involve the patentee, it can change to *inter partes* proceedings at any time. This flexibility ensures procedural efficiency.

The President goes on to say that the EPO Guidelines for Examination (D-IV, 1.2.2.1 and 1.2.2.2) list the criteria for an admissible opposition, drawing a distinction - based on Rule 56(1) and (2) EPC - between those which must be fulfilled during the opposition period and those which can still be made good thereafter. Those listed in point 1.2.2.2 are checked by formalities officers because they are purely formal and in practice involve no technical or legal difficulties. Of those listed in point 1.2.2.1, only those under (i), (ii) and (vi) are decided, for the same reasons, by formalities officers. Sub-paragraph (i) is about whether notice of opposition was filed within the

nine-month period, whereas (ii) and (vi) involve checking that the patent and the opponent have been properly identified. T 295/01, which concerned compliance with the nine-month period, showed however, in Board 3.3.4's view, that admissibility decisions involved solving complex legal questions. Nonetheless, the President maintains that as a rule such cases are not so complex, because calculating time limits is subject to clear rules. Establishing the necessary facts is likely to be more problematic, but that too is not something which in itself gives rise to technical or legal difficulties.

VII. On the second question - whether formalities officers are entrusted, under point 4 of the Notice of 28 April 1999, with responsibility for "*communications under Rule 69(1) EPC and decisions, and informing the person requesting the decision, under Rule 69(2) EPC*" - the President argues as follows.

In the two decisions leading to referral, the issue was whether notice of opposition was deemed to have been filed, but the boards also commented on the admissibility of oppositions. Under Article 99(1), third sentence, EPC, notice of opposition is not deemed filed until the opposition fee has been paid. Thus this fee has to be paid within the opposition period.

In the case which gave rise to T 295/01, the formalities officer followed the procedure laid down in the Guidelines, first issuing a communication under Rule 69(1) EPC and then, when a decision was requested, issuing one under Rule 69(2) EPC to the effect that the notice of opposition was deemed not to have been filed. So he took no decision about admissibility, and thus was performing a duty entrusted to him under point 4, not point 6, of the Notice.

In T 1062/99, where the opposition fee had likewise been paid after the time limit, the formalities officer said in his "decision" that the opposition was inadmissible. But

here too the basic issue was whether notice of opposition was deemed to have been filed.

The President emphasises the distinction between deeming notice of opposition not filed and regarding it as inadmissible: an opposition is examined for admissibility only if it is deemed to have been filed. For both admissibility and deemed filing, the point is whether the nine-month period under Article 99(1)EPC has been complied with. The former means filing notice of opposition in time, the latter means paying the fee in time. In both cases, this amounts to checking whether the relevant papers were filed in time, but the first step is always to check the payment. Once a decision is taken to the effect that the opposition is deemed not to have been filed, the opposition fee is refunded, because the opposition is then considered never to have existed and payment was therefore made for no reason. That was also the formalities officer's assumption in the case leading to T 1062/99, because he ordered such a refund. But if the opposition is rejected as inadmissible, the fee is not refunded.

Although deemed filing and admissibility are two separate issues, in practice both are decided by formalities officers. Hence the two separate provisions - points 4 and 6 - in the Notice. Given that both issues are so closely linked - and that both T 1062/99 and T 295/01 were essentially about whether notice of opposition was deemed to have been filed - legal uncertainty about the actual underlying cases would persist were the Enlarged Board to comment only on point 6 of the Notice.

## **Opinion**

1. The facts underlying T 1062/99 and T 295/01 are basically the same: in both cases, the opposition fee was not paid within the time limit prescribed by Article 99(1) EPC. Similarly, each board's ruling was based on the fact that it was a formalities officer who took the impugned decision.

1.1 In T 1062/99, Board 3.2.1 examined the various criteria for an admissible appeal and explicitly said it made no difference that the decision in question had been taken by a formalities officer on behalf of the opposition division. Its view was that the Notice (see points I and V above) was the legal basis for this transfer of powers; it did not contest its validity.

1.2 In T 295/01, Board 3.3.4 set aside the impugned decision on the grounds that, notwithstanding the Notice - the validity of which it disputed - competence as regards the consequences of late payment of an opposition fee resided with the opposition division and could not be delegated to a formalities officer.

1.3 Whatever view is taken of whether deemed filing and admissibility are two separate issues, on the narrower question of whether a formalities officer can decide on the consequences of not paying the opposition fee in time it appears that one board thinks he can - because the Notice is valid - whereas the other thinks he can't - because it isn't. The two decisions thus do indeed clearly diverge on the precise point of law - the validity of the Notice's relevant provisions - which has prompted the present referral.

1.4 Consequently, in accordance with Article 112(1), first sentence, EPC, the law's application must be harmonised. The referral to the Enlarged Board is therefore admissible.

2. On the substance, it is accepted that in both cases leading to the two divergent decisions the formalities officer did indeed act under powers specifically delegated to him by the Notice. At issue in the present referral is thus whether those specific delegations are valid.

3. Here it appears that the Vice-President DG 2 made those delegations under powers to apply Rule 9(3) EPC transferred to him by the President on 6 March 1979. So the first step is to establish whether that transfer of powers was valid.

3.1 Rule 9(3) EPC provides that "*The President of the European Patent Office may entrust to employees who are not technically or legally qualified examiners the execution of individual duties falling to the Examining Divisions or Opposition Divisions and involving no technical or legal difficulties*". It was the power thus conferred on him that the President transferred to the Vice-President DG 2.

3.2 Since the President's authorisation to delegate his powers (Article 10(2)(i) EPC) is not subject to any particular restriction, the validity of the transfer as of 6 March 1979 of his powers under Rule 9(3) EPC is fully established.

4. To answer the two questions now referred to it, the Enlarged Board of Appeal must next consider the validity of the two specific delegations to formalities officers ordered by the Vice-President DG 2 in points 4 and 6 of the Notice.

4.1 The Notice's first paragraph indicates that all delegations of duties to formalities officers are explicitly based firstly on the powers transferred by the President on 6 March 1979 and secondly on those conferred by Rule 9(3) EPC. And, in line with the wording of that rule, only individual duties are thus entrusted to formalities officers. So the validity in principle of the delegations made in the Notice is not in itself contestable.

4.2 Next however it is necessary to establish whether the particular duties delegated in points 4 and 6 of the Notice are those which under Rule 9(3) EPC may be entrusted to employees who are not technically or legally qualified examiners, and who in this Notice and its predecessors (see point V above) are referred to as "formalities officers".

5. Point 4 of the Notice empowers formalities officers to carry out the following duties: "*Communications under Rule 69(1) EPC and decisions, and informing the person requesting the decision, under Rule 69(2) EPC*". Point 6 empowers them to take "*decisions in ex parte proceedings on the inadmissibility of the opposition and the intervention of the assumed infringer with the exception of the cases provided for in Rule 55(c) EPC*". So point 4 transfers certain duties prior to decisions, and also the power to take decisions under Rule 69(2) EPC. Point 6 is exclusively about the transfer of decision-making power within specified limits. So the point is whether Rule 9(3) EPC covers the possibility of transferring to formalities officers not only certain duties prior to decisions but also the power, in specific conditions, to take decisions normally the responsibility of opposition divisions.

6. An examination of the scope of Rule 9(3) EPC in the context of the internal law established under the other relevant provisions of the EPC shows the following.

6.1 Rule 9 EPC is entitled "*Allocation of duties to the departments of the first instance*", which in itself indicates part of its purpose. For its various paragraphs determine how duties are allocated to EPO first-instance departments, including opposition divisions. Paragraph 3 (as shown in point 3.1 above) is about delegating certain duties falling inter alia to opposition divisions. Such duties, it says, must involve no technical or legal difficulties. It specifies no other limitation or exclusion. To establish what these duties may be, it is useful to consider those entrusted elsewhere by the EPC to staff without technical or legal qualifications. Articles 90 and 91 EPC, for example, entrust to the Receiving Section certain duties relating to formalities examination of applications on filing, and the section's decisions may give rise to loss of rights (see Article 91(3) EPC) and are appealable (see Article 106 EPC). The Receiving Section is composed entirely of formalities officers who - just like their counterparts working with opposition divisions - receive specialist training but are not required to have studied a technical subject or law at university.

6.2 The EPC's authors made it clear that the purpose of Rule 9(3) EPC is to save the EPO unnecessary staff costs (see "Reports on the Second Preliminary Draft of a Convention Establishing a European System for the Grant of Patents and on the First Preliminary Draft of the Implementing Regulations", Volume II, Munich 1971, General Report on the Implementing Regulations, presented by *Dr R. Singer*, point 30). Hence the requirement that technically or legally qualified examiners be employed only on work where their training is essential and for which they were recruited, namely the examination of inventions for patentability. Clearly, if a duty falling to opposition divisions involves no technical or legal difficulties, it would then be at odds with the purpose of Rule 9(3) EPC to specify all the different types of duties which fall to opposition divisions. Ruling out the possibility of delegating to formalities officers the power to take, on the opposition division's behalf, decisions involving no technical or legal difficulties could have only negative consequences. The formalities officer would then be confined to preparing the decision, and before signing it the opposition division - a collegiate body composed of three technically qualified examiners, plus possibly a lawyer - would have to check everything he had prepared. That would obviously lead to duplication of work and an unduly cumbersome procedure, depriving Rule 9(3) EPC of any useful effect.

6.3 The opposition division's composition is defined, in Article 19(2) EPC, as a collegiate body of three technical examiners which may, in certain circumstances, be enlarged to include a lawyer. The provision makes no mention of formalities officers, nor does anything in the Implementing Regulations permit derogation from the above composition. This might suggest that Rule 9(3) EPC is at odds with Article 19(2) EPC, and under Article 164(2) EPC is to be set aside. That interpretation would not however explain why the Convention's predominance here should be limited to decisions: Article 19 EPC, far from restricting the opposition divisions' competence to decisions, also includes - in its paragraph 1 and the third sentence of paragraph 2 - the proceedings prior to a decision. The Convention's predominance would then cover any measure which might have adverse consequences for any party, including

summonses to oral proceedings or communications noting non-compliance with a time limit. The key to a better understanding of the relation between Article 19(2) and Rule 9(3) EPC resides rather in their genesis (see *Singer/Geuss*, Münchner Gemeinschaftskommentar zum EPÜ, 22. Lieferung, Köln 1998, 6th part, Die Materialien zum EPÜ, point 36 ff).

6.3.1 At the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, the antecedent to the current Rule 9(3) EPC (see *travaux préparatoires*, BR/GT I/90/70 of 23 December 1970) was Article 54 No. 2 and included a proposal from the German delegation on Working Party I's sub-group on the Implementing Regulations. This article was worded as follows:

*Delegation of duties*

*(1) The President of the European Patent Office shall be authorised to entrust to officials who are not technically or legally qualified examiners the execution of individual duties falling to the Examining Sections, Examining Divisions or Opposition Divisions and posing no technical or legal problems, with the exception of the rejection of European patent applications on grounds opposed by the applicant, the grant and revocation of European patents and the rejection of oppositions.*

*(2) A delegation of duties by the President of the European Patent Office in accordance with paragraph 1 shall be published in the Official Journal of the European Patent Office.*

6.3.2 The next meeting accepted the proposal without discussion (see BR/81/71 of 20 January 1971, and the report of the sub-group's 5th meeting (Luxembourg, 12 to 14 January 1971), BR/84/71 of 1 April 1971). A meeting of the sub-group's drafting committee then deleted the second part of the single sentence forming the draft first paragraph, together with the entire second paragraph (see BR/GT I/103/71 of

14 January 1971). The result became Article 54 No. 2 as worded in the Second Preliminary Draft Convention and then in the First Preliminary Draft of the Implementing Regulations, Volume I, Munich 1971. In the final version adopted by the Munich Diplomatic Conference (10 September to 6 October 1973), the reference to "Examining Sections" was deleted because such EPO departments were no longer envisaged.

6.3.3 The above makes two things clear. First, the President's power to delegate, to non-examiners, certain duties falling to EPO departments was originally designed as an implementing provision (see Articles 52 to 54 of the Second Preliminary Draft Convention). This is confirmed by the mutual cross-references in the notes to Article 18 and Rule 9 in the preparatory documents for the Munich Diplomatic Conference, which still appear next to the corresponding provisions (Article 19 and Rule 9) in the current EPC. That shows in turn that the possibility of delegating the power to take certain decisions involving no technical or legal difficulties was clearly envisaged, with only substantive-law decisions excluded (see deleted parts of Article 54 No. 2 cited in point 6.3.1 above). These deletions were made partly for purely editorial reasons, to make the rule clearer, and partly because the limitation "posing no technical or legal problems" was felt to be sufficient. They cannot be interpreted as seeking to set other limits to the President's powers of delegation under Rule 9(3) EPC.

6.3.4 The purpose of Article 19(2) EPC is therefore to establish the collegiate nature of opposition divisions, whose composition had been much debated (see *van Empel*, *The Granting of European Patents*, Leyden 1975, points 441 ff and 465 ff, and the compromise on examining divisions set out in Article 33(3) EPC). Article 19(2) EPC does not say that all duties falling to opposition divisions must be performed entirely by the divisions themselves. Nor does it rule out formalities officers' acting on behalf of opposition divisions, under a business distribution scheme for first-instance departments, to enable technically or legally qualified examiners to devote

themselves to substantive examination. To argue the contrary would be to ignore the original relation between the texts which provided the basis for Article 19(2) and Rule 9(3) EPC. The above also applies in its entirety to the relation between Article 18(2) and Rule 9(3) EPC.

6.4 The possibility under Rule 9(3) EPC of delegating power to take decisions has always been of the utmost importance in ensuring the smooth functioning of the EPO. That is why the original delegation, back in 1982, of duties relating to opposition proceedings (see point V above), empowered formalities officers *inter alia* to decide, under Rule 69(2) EPC, whether or not notice of opposition was deemed to have been filed. Even older, and of greater practical importance, is the first delegation relating to grant proceedings (OJ EPO 1979, 379). This entrusted to formalities officers, for example, examination for compliance with Rule 51(4), first sentence, EPC, and the making of the decision by which the European patent is granted. Over half a million patents have now been granted without the legality of this arrangement being contested: no-one has yet challenged a patent's validity on the grounds that a formalities officer had acted outside his powers.

6.5 On the contrary, the case law shows that the Enlarged Board, and the boards of appeal generally, have always looked very positively on the possibility of delegating such powers. The sole exception is T 295/01, which led to the present referral. T 25/85 (OJ EPO 1986, 81, Reasons point 2) has already noted that in the context of formalities examination a formalities officer is authorised *inter alia* to decide on an opposition's inadmissibility, and as such was the body competent to take the decision under appeal. Whenever the boards have had to rule on formalities officers' decision-taking powers, they have considered whether these were indeed based on Rule 9(3) EPC and a delegation made under it (see established case law since T 114/82 and T 115/82, OJ EPO 1983, 323). Only where a condition for delegation was not fulfilled has a formalities officer's decision been set aside for lack of competence; the lawfulness of such delegations has never been called into question

(see, for example, Case Law of the Boards of Appeal, 4th edition 2001, VII.D.15.4.6, 3rd paragraph; see also T 161/96, OJ EPO 1999, 331, Reasons point 2; J 16/99 and T 1101/99, both cited in the special edition of the OJ EPO on the boards' case law in 2001, pages 63 and 65; and, even more recently, T 178/01 of 25 October 2001, unpublished).

The Enlarged Board has already had occasion to rule on a number of questions concerning appeal proceedings in which a formalities officer's decision had been challenged. In G 2/90 (OJ EPO 1992, 10), for example, the question was: *"Is the Legal Board of Appeal competent for appeals against decisions entrusted to formalities officers under Rule 9(3) EPC?"*. A formalities officer's decision revoking a patent under Article 102(5) EPC gave rise to the referral. The Enlarged Board replied that:

*"1. Under Article 21(3)(c) EPC, the Legal Board of Appeal is competent only to hear appeals against decisions taken by an Examining Division consisting of fewer than four members when the decision does not concern the refusal of a European patent application or the grant of a European patent. In all other cases, i.e. those covered by Article 21(3)(a), 3(b) and (4) EPC, the Technical Board of Appeal is competent.*

*2. The provisions relating to competence in Article 21(3) and (4) are not affected by Rule 9(3) EPC."*

Under Reasons point 3.6, the Enlarged Board ruled that

*"... appeals against decisions entrusted to formalities officers under Rule 9(3) EPC may only concern matters involving no technical or legal difficulties (Rule 9(3) EPC). If they involve no legal difficulties, there is no reason why the three-member Legal Board should be competent to hear the proceedings."*

If the Enlarged Board had taken the view that powers to take decisions falling to opposition divisions could not be delegated to formalities officers, it would have held the referral to be inadmissible because the question put was redundant. Obviously, then, the Enlarged Board - implicitly, perhaps, but unequivocally - has already accepted as a general principle the validity of the Notices issued by the Vice-President DG 2 under Rule 9(3) EPC and delegating to formalities officers duties normally falling to examining or opposition divisions and involving no technical or legal difficulties. It sees no reason to go back on that position now.

7. Lastly, Enlarged Board decisions G 8/91 (OJ EPO 1993, 346, Reasons point 7) and G 9/91 (OJ EPO 1993, 408, Reasons point 18) have clearly stated that opposition - unlike appeal, which is a judicial procedure - is a purely administrative procedure. Opposition divisions are thus purely administrative departments subject to internal guidelines and instructions, provided these are issued by duly empowered authorities. That means that under the powers expressly conferred on him by Article 10(2)(a) EPC the EPO President or his deputy may issue internal administrative instructions such as those under Rule 9(3) EPC which are the subject of the present referral, with a view to ensuring the EPO's smooth functioning (as the article says). The analysis, in the present Opinion, of the measures taken in points 4 and 6 of the Notice under Rule 9(3) EPC shows that this was indeed their purpose.

## **Conclusion**

The Enlarged Board of Appeal answers the two points of law referred to it as follows:

Points 4 and 6 of the Notice of the Vice-President of Directorate-General 2 dated 28 April 1999 (OJ EPO 1999, 506) do not conflict with provisions of a higher level.