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**D E C I S I O N**  
of 19 February 1996

**Case Number:** G 0002/94

**Application Number:** 92118493.3

**Publication Number:** 0 600 104

**IPC:**

**Language of the proceedings:** DE

**Title of invention:**  
Bedienungssperre für Betätigungsgestänge

**Applicant:**  
W. Hautau GmbH

**Opponent:**  
-

**Headword:**  
Representation/HAUTAU II

**Relevant legal provisions:**  
EPC Art.

**Keyword:**  
"Oral submissions by an accompanying person in ex parte proceedings"  
"Oral submissions by a former member of the Board of Appeal in either ex parte or inter partes proceedings"

**Decisions cited:**  
-

**Headnote:**

I. A Board of Appeal has a discretion to allow an accompanying person (who is not entitled under Article 134(1) or (7) EPC to represent parties to proceedings before the EPO) to make submissions during oral proceedings in ex parte proceedings, in addition to the complete presentation of a party's case by the professional representative.

II. (a) In ex parte proceedings a professional representative should request permission for the making of such oral submissions in advance of the day appointed for oral proceedings. The request should state the name and qualifications of the person for whom permission is requested, and should specify the subject-matter of the proposed oral submissions.

The Board of Appeal should exercise its discretion in accordance with the circumstances of each individual case. The main criterion to be considered is that the Board should be fully informed of all relevant matters before deciding the case. The Board should be satisfied that the oral submissions are made by the accompanying person under the continuing responsibility and control of the professional representative.

(b) During either ex parte or inter partes proceedings, a Board of Appeal should refuse permission for a former member of the Boards of Appeal to make oral submissions during oral proceedings before it, unless it is completely satisfied that a sufficient period of time has elapsed following termination of such former member's appointment to the Boards of Appeal, so that the Board of Appeal could not reasonably be suspected of partiality in deciding the case if it allowed such oral submissions to be made.

A Board of Appeal should normally refuse permission for a former member of the Boards of Appeal to make oral submissions during oral proceedings before it, until at least three years have elapsed following termination of the former member's appointment to the Boards of Appeal. After three years have elapsed, permission should be granted except in very special circumstances.



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Enlarged  
Boards of Appeal

Grande  
Chambres de recours

Case Number: G 0002/94

**D E C I S I O N**  
of the Enlarged Board of Appeal  
of 19 February 1996

**Appellant:**

W. Hautau GmbH  
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D-31689 Helpsen (DE)

**Representative:**

Fricke, Joachim, Dr.  
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**Decision referring a  
point of law:**

Decision of the Legal Board of Appeal of the  
European Patent Office dated 22 September and  
17 November 1994 in case J 11/94.

**Composition of the Board:**

**Chairman:** P. Gori  
**Members:** G. D. Paterson  
C. Andries  
G. Gall  
W. Moser  
R. Schulte  
P. van den Berg

## Summary of Facts and Submissions

I. Case J 11/94 is currently pending before the Legal Board of Appeal pursuant to Article 21(3)(c) EPC, and is solely concerned with legal procedural issues which arise in an appeal from a decision of an Examining Division. The case is an appeal in ex parte proceedings.

Oral proceedings were appointed in the case. At the hearing on 22 September 1994, the Appellant was represented by a professional representative in accordance with Article 134(1) EPC. The professional representative was accompanied by a former chairman of the Legal Board of Appeal of the EPO who had retired from this appointment at the end of 1992. At the beginning of the hearing, the professional representative requested permission for the former Legal Board chairman to address the Legal Board of Appeal on behalf of the Appellant in addition to and as a supplement to his own submissions. Reservations were expressed by the Board in relation to this course of procedure, and the Appellant's representative requested that a point of law on the question of representation should be referred to the Enlarged Board of Appeal. Following deliberation by the Legal Board of Appeal, the oral proceedings were adjourned. In due course the following questions were referred to the Enlarged Board of Appeal, pursuant to Article 112(1)(a) EPC, in Decision J 11/94 (OJ EPO 1995, 596).

- \* (1) May a Board of Appeal exercise discretion in deciding whether or not a person not entitled under Article 134(1) and (7) EPC to represent parties to proceedings before the EPO may make submissions during oral proceedings in addition to the pleading by the professional representative?

(2) If the answer to question 1 is "yes":

(a) What criteria must the Board observe when exercising this discretion?

(b) Do special criteria apply to former Board of Appeal members?"

In this decision, a person who accompanies a professional representative, and who is not entitled either under Article 134(1) EPC or under Article 134(7) EPC to represent parties to proceedings before the EPO, is referred to as an "accompanying person".

In its Decision of referral, the Legal Board of Appeal indicated that different answers to question (1) have been given in Decisions T 80/84 (OJ EPO 1985, 269) and T 598/91 (OJ EPO 1994, 912).

In Decision T 80/84, Board of Appeal 3.4.1 held that representation of a party in oral proceedings can only be undertaken by persons who are duly entitled to represent a party in accordance with Articles 133 and 134 EPC and who are duly authorised to do so, and that accordingly, an accompanying person (in that case an unqualified assistant) may not present even a part of the case of a party during oral proceedings, even under the direct supervision of that party's authorised representative.

In Decision T 598/91, Board of Appeal 3.2.2 distinguished the concept of "pleading" from the concept of "representation", and held that Article 133 EPC does not exclude the possibility of part of a party's case being presented during oral proceedings by an

accompanying person (by way of "pleading"), in addition to pleading by the authorised representative of that party (or in the case of a natural person, in addition to the party itself).

With reference to referred question (2)(b), the Legal Board of Appeal drew attention in its decision of referral to the possible damage to public confidence in proceedings before the Boards of Appeal if former members were allowed to appear on behalf of parties to oral proceedings. Reference was made to the law and practice in France, Germany and the United Kingdom whereby restrictions are imposed upon former judges who subsequently wish to work in private legal practice.

The Legal Board of Appeal also referred to Article 19 of the Service Regulations for Permanent Employees of the EPO (hereinafter referred to as the "Service Regulations"), which states that "A permanent employee shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits".

II. Pursuant to Article 11(a) RPEBA, the President of the EPO was invited to comment in writing upon the referred questions, and he replied with written submissions on 28 April 1995.

In relation to question (1), the President considered that it is a matter of discretion for a Board of Appeal as to whether or not it allows submissions to be made during oral proceedings by an accompanying person **in addition to** submissions by the professional representative.

In relation to question (2)(a), the President considered that essentially, a Board of Appeal should exercise its discretion freely in accordance with the circumstances of each individual case.

In relation to question (2)(b), having regard to Articles 19 and 20(1) of the Service Regulations, the President considered that a certain period of time should elapse before a former member of the Boards of Appeal should appear before a Board of Appeal to which he previously belonged, in order to avoid creating the suspicion that he is deriving some personal advantage from such previous position, and possibly thus causing objections under Article 24 EPC; and he suggested a period of three years as being appropriate in this respect.

III. Written submissions were also filed in connection with the referred questions on behalf of the Institute of Professional Representatives before the EPO (the "EPI"), in its letter dated 3 May 1995.

In relation to question (1), the EPI essentially suggested that the discretion of a Board of Appeal to allow an accompanying person to make oral submissions should be limited to cases where a technical expert would be allowed to elucidate the technical subject-matter, under the control of the authorised representative and pursuant to Article 117 EPC. In relation to question (2)(a), therefore, the EPI suggested that such discretion should be exercised so as to allow "well defined questions of a technical nature" to be elucidated by such an accompanying person, when a Board considers that such a presentation would be useful for a proper understanding of the case under consideration.

The EPI suggested in relation to question (2)(b) that the matter was at least partly answered in reply to questions (1) and (2)(a), and that "former Board members should refrain from pleading before a Board"; but also stated that it "prefers to refrain from submitting observations on the issue".

IV. Observations on behalf of the Appellant in reply to the President's submissions and the submissions on behalf of EPI were filed by letter dated 29 June 1995.

With reference to question (1), the Appellant emphasised that this question is concerned only with additional submissions by an accompanying person. The responsibility for the content of such additional submissions should remain with the authorized representative. Such additional submissions should be in connection with a properly defined issue, and should be under the control of the Chairman of the Board of Appeal.

With reference to question (2)(a), the Appellant suggested how a Board's discretion to allow additional submissions by an accompanying person should be exercised with reference to a number of categories of accompanying persons.

#### **Reasons for the Decision**

1. The questions which have been referred to the Enlarged Board of Appeal in Decision J 11/94 have arisen during an appeal in ex parte proceedings. In relation to referred question (1), as to whether a Board of Appeal may exercise discretion in deciding whether an accompanying person (who is not entitled under



Article 134(1) and (7) EPC to represent parties before the EPO) may make submissions during oral proceedings in addition to the pleading by the professional representative, this question has been fully considered in the context of opposition proceedings in Decision G 4/95, at paragraphs 1 to 8 of the Reasons for the Decision. In relation to this question, it is clear that there is no difference as a matter of principle between the admissibility of such oral submissions in ex parte proceedings and in inter partes, opposition proceedings. For the reasons set out in paragraphs 1 to 8 of Decision G 4/95, therefore, during oral proceedings in an ex parte appeal procedure, an accompanying person is not excluded under Article 133 EPC or otherwise from making oral submissions on either legal or technical issues on behalf of the party to the proceedings, in addition to the complete presentation of the party's case by the professional representative. The Board of Appeal has a discretion to decide whether or not such an accompanying person may make such oral submissions.

As discussed in Decision G 4/95, such oral submissions may involve either the presentation of facts or evidence, or merely argument.

2. When deciding how to exercise such discretion, the consideration which is discussed in paragraph 10 of Decision G 4/95, that a party should not be taken by surprise by oral submissions which are made by an accompanying person on behalf of an opposing party, is of course inapplicable in ex parte proceedings.

Nevertheless, since a Board of Appeal has a discretion to allow or not to allow oral submissions to be made by an accompanying person in ex parte proceedings, it is important that the Board should control the proceedings. Thus, the professional representative should request

permission for the making of such oral submissions in advance of the day appointed for the oral proceedings, in order that the Board should not be taken by surprise and can give proper consideration to the request in advance of the oral proceedings.

As in inter partes proceedings, when requesting such permission, the professional representative should state the name and qualifications of the person for whom permission to make additional oral submissions is requested, and should specify the subject-matter on which such person wishes to speak.

3. The Board should exercise its discretion in accordance with the circumstances of each individual case. In ex parte proceedings, since there is no need to consider the interests of any other party, the main criterion to be considered when exercising such discretion is that the Board should be fully informed of all relevant matters before deciding the case. The Board should be satisfied that the oral submissions are made by the accompanying person under the continuing responsibility and control of the professional representative.
4. Referred question (2) (b) asks whether special criteria apply to the exercise of a Board's discretion in relation to a request for the making of additional oral submissions by a former Board of Appeal member. This question is applicable to any oral proceedings before a Board of Appeal, whether in ex parte or inter partes proceedings, and requires special consideration.

There are no specific provisions either in the EPC or in the Service Regulations which make clear whether a former member of the Boards of Appeal may subsequently practice as a legal practitioner, or even as a European patent attorney, in relation to proceedings before the

EPO, in particular before the Boards of Appeal. The provision in Article 19 of the Service Regulations is of general application, not being restricted to former Board of Appeal members but covering all former permanent employees of the EPO, and does not clearly cover the question under consideration. Thus it could be argued that, in the absence of clear provisions to the contrary, a former Board of Appeal member should be free not only to act as an advisor to a party in relation to proceedings before the EPO, but also to make oral submissions on behalf of such a party during oral proceedings before the EPO, including the Boards of Appeal.

On the other hand, as the Legal Board of Appeal has mentioned in its Decision of referral, if former members of the Boards of Appeal appear and make oral submissions on behalf of parties to proceedings before the EPO, especially before the Board of Appeal, the public may believe that parties on whose behalf former Board of Appeal members make submissions may have an unfair advantage, in that the Boards of Appeal may be suspected of being inclined to favour submissions made by such former members. Obviously this problem cannot be resolved simply by changing the composition of the Board before whom a former member wishes to appear.

There is thus a potential conflict between what may be seen as a right of former Board of Appeal members to seek subsequent employment on the basis of their special knowledge by making oral submissions during proceedings before the EPO, and the need for proceedings before the EPO to be conducted free from any suspicion of partiality.

5. The existence of such a potential conflict is well recognised in the context of national judicial systems, as well as the direction of its resolution. For example, as mentioned by the Legal Board of Appeal in its Decision of referral (see paragraph I above), in France, Germany and the United Kingdom persons who are offered appointments as judges know in advance of acceptance of such appointments that after having served as judges, they are subject to restrictions if they subsequently wish to work in private legal practice. The existence of such restrictions reflects the generally recognised principle of law that parties to legal proceedings are entitled to a fair hearing before judges that cannot reasonably be suspected of partiality.
  
6. In the view of the Enlarged Board of Appeal, it is therefore clear that the above potential conflict must be resolved in the direction of avoiding any suspicion of partiality during the conduct of proceedings before the EPO. The public interest in the proper conduct of proceedings before the EPO must prevail over the personal interest by former Board of Appeal members who wish to make oral submissions on behalf of parties to such proceedings. In the interest of the proper administration of proceedings before the EPO, it is necessary to place some restrictions upon the admissibility of oral submissions by former members of the Boards of Appeal during such proceedings, at least during a reasonable period of time following termination of a person's appointment as a member of the Boards of Appeal.
  
7. As mentioned in the Decision of referral, in the national systems of some Contracting States a particular period of time is prescribed following termination of a judicial appointment during which a former judge may not appear in court as a legal practitioner. In the Enlarged

Board's view, it would be desirable in the interest of legal certainty for the Administrative Council to specify an exact period of time following termination of a person's appointment as a member of the Boards of Appeal, during which such a person may not appear in or conduct oral proceedings before the EPO.

In the absence of such specific legislation, however, the point in time following termination of his or her appointment after which a former member of the Boards of Appeal may make oral submissions in proceedings before the Boards of Appeal is a matter within the judicial discretion of the Boards of Appeal.

8. In accordance with the principles set out in paragraph 2 above, if a party wishes that a former member of the Boards of Appeal should make oral submissions on its behalf at oral proceedings before a Board of Appeal, in addition to the complete presentation of the party's case by the professional representative, the professional representative should request permission from the Board of Appeal for such oral submissions to be presented, in advance of the oral proceedings.

A Board of Appeal should exercise its discretion in relation to such a request by refusing permission for such oral submissions to be made, unless it is completely satisfied that a sufficient period of time has elapsed following termination of such former member's appointment of the Board's of Appeal, so that the Board of Appeal could not reasonably be suspected of partiality in deciding the case if it allowed such oral submissions to be made.

A period of three years should normally have elapsed following termination of a person's appointment as a member of the Boards of Appeal, before he should be given permission to make oral submissions as an accompanying person. Before the expiry of three years, there will normally be too great a risk that the public would consider that the making of submissions at oral proceedings by a former Board of Appeal member would give an unfair advantage to the party on whose behalf such former member appears. On the other hand, after the expiry of three years, in the absence of very special circumstances, there would normally be no such risk.

**For the above reasons, the referred questions are answered as follows:**

1. A Board of Appeal has a discretion to allow an accompanying person (who is not entitled under Article 134(1) or (7) EPC to represent parties to proceedings before the EPO) to make submissions during oral proceedings in ex parte proceedings, in addition to the complete presentation of a party's case by the professional representative.
2. (a) In ex parte proceedings a professional representative should request permission for the making of such oral submissions in advance of the day appointed for oral proceedings. The request should state the name and qualifications of the person for whom permission is requested, and should specify the subject-matter of the proposed oral submissions.

The Board of Appeal should exercise its discretion in accordance with the circumstances of each individual case. The main criterion to be considered is that the Board should be fully

informed of all relevant matters before deciding the case. The Board should be satisfied that the oral submissions are made by the accompanying person under the continuing responsibility and control of the professional representative.

- (b) During either ex parte or inter partes proceedings, a Board of Appeal should refuse permission for a former member of the Boards of Appeal to make oral submissions during oral proceedings before it, unless it is completely satisfied that a sufficient period of time has elapsed following termination of such former member's appointment to the Board of Appeal, so that the Board of Appeal could not reasonably be suspected of partiality in deciding the case if it allowed such oral submissions to be made.

A Board of Appeal should normally refuse permission for a former member of the Boards of Appeal to make oral submissions during oral proceedings before it, until at least three years have elapsed following termination of the former member's appointment to the Boards of Appeal. After three years have elapsed, permission should be granted except in very special circumstances.

The Registrar:

The Chairman:

M. Beer

P. Gori