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Interlocutory Decision
of 15 April 1999

Case Number: T 0272/95 - 3.3.4

Application Number: 83307553.4

Publication Number: 0112149

IPC: C12N 15/16

Language of the proceedings: EN

Title of invention:
Molecular cloning and characterization of a further gene sequence coding for human relaxin

Patentee:
Howard Florey Institute of Experimental Physiology and Medicine

Opponent:
Aglietta, Amendola et al., Fraktion der Grünen im EP

Headword:
Admissibility of joint opposition or joint appeal/HOWARD FLOREY INSTITUTE

Relevant legal provisions:
EPC Art. 20, 24, 58, 59, 78, 99, 108, 112, 125, 133, 134, 150
EPC R. 17, 26, 55, 60, 63, 64, 65, 66, 78, 81, 85, 90, 92, 100, 101, 102, 106
PCT Art. 9
PCT R. 2, 90
Article 2 Rules Relating to Fees (RRF)

Keyword:
"Joint oppositions - fees due - common representative - joint appeals - admissibility - important point of law - referral to

the Enlarged Board of Appeal"

Decisions cited:
T 0355/86, J 0003/87, J 0035/92, T 0371/92, G 0003/97, G 0004/97

Headnote:
The following questions are referred to the Enlarged Board of Appeal:

1. Is an opposition admissible which otherwise meets the requirements of Article 99 EPC and Rule 55 EPC if it is filed jointly by two or more persons and only one opposition fee is paid?

2. If the answer to question 1 is in the affirmative and a common representative was named under Rule 100(1) EPC in the notice of opposition, is an appeal valid even if it is not filed by this person?

3. If the answers to questions 1 and 2 are in the affirmative, which other requirements, if any, have to be met by a joint opposition or a joint appeal in order to safeguard the rights of the patent proprietor?

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0272/95 - 3.3.4

Interlocutory Decision
of the Technical Board of Appeal 3.3.4
of 15 April 1999

Appellant: (Opponent)
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Respondent: (Proprietor of the patent)
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 18 January 1995 concerning maintenance of European patent No. 0 112 149 in amended form.**

Composition of the Board:

Chairman: U. M. Kinkeldey
Members: C. Holtz
F. L. Davison-Brunel

Summary of Facts and Submissions

BACKGROUND

I. This interlocutory decision concerns the referral to the Enlarged Board of Appeal of questions relating to the admissibility of an opposition and a subsequent appeal jointly filed by a number of persons.

II. A group of **26** natural persons, calling themselves "Fraktion der Grünen im Europäischen Parlament" ("die Fraktion"), filed a notice of opposition on 10 January 1992 against the patent in suit, paying a single opposition fee. This group was named opponent I in the opposition proceedings. In the notice of opposition the professional representative for the group noted that it had been impossible to decide whether the group fell under the term "any person" in Article 99 EPC, since it could not be registered as a legal person, being a group of persons of different nationalities. For this reason, on the same day a separate notice of opposition was filed and the corresponding opposition fee paid on behalf of the chairman of "die Fraktion" named opponent II in the opposition proceedings.

III. On request of the opposition division, authorisations from **18** of the persons named in the joint opposition (opponent I) were filed, as well as an authorisation from opponent II.

IV. In a communication dated 11 November 1992, the opposition division stated that it appeared doubtful whether "die Fraktion" could be a legal personality or

have an equivalent status. Opponent I was reminded that the burden of proof lay with it to provide evidence of its legal status. However, the same communication stated that the opposition could be treated as filed in common by all the individual natural persons mentioned therein, and reference was made to Rule 100(1) EPC.

V. The opposition division concluded in the decision under appeal that opposition I should be seen as filed in common by the persons listed in the notice of opposition, which was possible by way of Rule 100(1) EPC, and that it was immaterial whether or not all the individuals listed were still members of "die Fraktion". This opposition was therefore admissible. On substance, the opposition was rejected and the patent maintained as granted.

VI. **Five** persons from opponent I filed a notice of appeal and paid the appeal fee through a non-professional representative on 28 March 1995. Opponent II did not file an appeal.

VII. In a communication the Board *inter alia* noted the following points with regard to the admissibility of the appeal:

(1) Had there been any appeal at all, since the notice of appeal was signed by a person not meeting the requirements of Article 134 EPC?

(2) Who was the appellant? The Board questioned whether the number of persons appealing could change in relation to the number of persons having filed the opposition. At least doubts arose. The

Board suggested that all persons appealing should sign an authorisation.

(3) The Board also requested a statement pursuant to Rule 65 EPC showing the name(s) and address(es) of the appellant(s).

VIII. In response to the Board's communication, **17** persons filed authorisations for the professional representative on 13 July 1995. It was explained that one person had died since the decision under appeal had been taken. Opponent II filed a declaration that he intented to remain a party as of right under Article 107 EPC.

REQUESTS AND ARGUMENTS

IX. The respondent requests that questions be referred to the Enlarged Board of Appeal regarding the possibility of remedying deficiencies after expiry of the time limit for a notice of appeal; whether a "group" can file a joint opposition and pay only one opposition fee, and if so, whether all the individuals must then be a party to a subsequent appeal or if the right to appeal rests with any combination of the original individuals who filed the single opposition, and finally how many appeal fees must be paid.

X. The appellants request that the request for referral be dismissed.

XI. The respondent's position on the admissibility of a group opposition and appeal may be summarised as follows:

All parties have a right to clarity and certainty as to the requirements for filing oppositions and appeals, which should not be open to financial or procedural abuse. The true identity of the opposing party is questionable, since they did not sign proper authorisations. Furthermore, the right of the opponents to vary in number from 26 to 5 is questionable, since they claim that they together form only one party. A defective notice of appeal cannot be corrected after expiry of the time limit for a notice of appeal, ie in the present case after 28 March 1995, because it must meet the requirements of Rule 64 EPC within the term for the notice of appeal, in view of Rule 65(1) EPC, which stipulates that "each deficiency must be remedied before the relevant time limit laid down in Article 108 has expired.". Finally, decision T 371/92 requires that the appellant must be identified in the notice of appeal, which cannot be corrected after the end of the period for such a notice.

XII. The appellants contend that their original representative acted in good faith, having sought and received advice from the EPO. This representative was told by a formalities officer of the EPO that authorisations for a professional representative could be filed later. The appellants are entitled to rely on that information and their appeal should therefore be declared admissible. Their names and addresses have been submitted. There is no need to refer any question to the Enlarged Board of Appeal, since the right for natural persons to file a joint opposition or appeal is recognised through Rule 100(1) EPC. Decision T 371/92 is not applicable, since it concerned a case where only the appeal fee was paid but no notice of appeal was

submitted.

Reasons for the Decision

1. All other requirements under Article 99 and 108 EPC having been met, the admissibility of the opposition and appeal is dependent upon the answers to the objections raised by the respondent. In the following, an opposition or appeal which has been filed in common by several persons will be called a "joint opposition" or "joint appeal".

ADMISSIBILITY OF JOINT OPPOSITIONS

2. *The practice of the EPO*

2.1 The Board is aware that in the past, joint or common oppositions of the kind described above (see point II) have been accepted by the EPO (see for example the pending opposition case regarding application No. 85 030 449.0 (the "onco mouse" case)).

2.2 The answers to the question concerning the rights and obligations of natural persons acting in common before the EPO are of great importance, since it occurs that groups of persons, whether incorporated or not, wish to join in opposing patents, particularly in contentious technical fields with high media coverage. Both patentees and opponents are therefore justified in seeking to have their procedural rights under the EPC defined.

3. Nominal opponents

3.1 The respondent suggested that, because of the changing number of members of "die Fraktion", a "straw man" situation may have arisen, ie that the opposition was filed by nominal opponents only, and therefore is inadmissible.

3.2 The Board disagrees, for the reason that all the individuals involved in "die Fraktion" were originally named. No new person has been added to this group at the appeal stage. The only question arising from this point seems to be one of the status of the persons so named, not one of their identity.

3.3 It should finally be added that the Enlarged Board of Appeal recently issued decisions G 3/97 and G 4/97, which allow nominal parties to file oppositions, provided that no circumvention of the EPC is attempted thereby. In the present case there is no reason to assume such circumvention.

3.4 Thus, the Board can find no reason under Article 112 EPC to refer any question to the Enlarged Board of Appeal on this point.

4. *The definition of "any person" under Article 99 EPC*

4.1 The main questions before the Board are whether the term "any person" may be interpreted as meaning that a group of natural persons with no legal status of its own may validly file one joint opposition, and whether such an opposition is validly filed on behalf of all of them, although only one fee has been paid.

4.2 The wording of Article 99 EPC indicates that either a natural person or a legal person may file an opposition. Since the term is given in the singular, the immediate interpretation would be that each such person, whether natural or legal, who files an opposition is also obliged to fulfil all the requirements of Article 99(1) EPC, ie also to pay the fee due, and conversely that several persons filing oppositions must each pay this fee.

4.3 The word "representative" is used in the EPC in relation to parties before the EPO in Articles 20, 24, 133, and 134 and in the Implementing Regulations (excluding for the moment Rule 100 EPC) in Rules 17, 26, 55, 60, 63, 66, 78, 81, 85, 90, 92, 101, 102 and 106. In most of these provisions, "representative" is understood as a third person having been appointed to represent a party before the EPO, this person being, in some cases, but not all, a professional representative. In Rule 100 EPC, however, this term could mean both a person out of the group of applicants or opponents and *a third person jointly appointed* by the members of a party. In seeking guidance as to the proper interpretation of Rule 100(1) EPC, Rule 2 of the Regulations under the PCT is helpful, since the term "common representative" is defined there as "meaning an applicant appointed as, or considered to be, the common representative under Rule 90.2", Rule 2.2*bis* PCT. Rule 90.2 PCT governs the situation where there are two or more applicants and they have not appointed "an agent" to represent them. This provision makes it possible for one of the applicants entitled to file an application under Article 9 PCT to be appointed by the other applicants as their "common representative".

Pursuant to Rule 2.2 PCT, the word "agent" is to be construed as meaning an agent appointed under Rule 90.1 PCT. This makes the terminology of the PCT clear. By virtue of Article 150(2), third sentence, EPC, the terminology of the EPC should be construed to correspond to that of the PCT, bearing in mind that the PCT is of a more recent date than the EPC.

4.4 Moreover, the first sentence of Rule 100(1) EPC seems to indicate that a "common representative" is to be understood as different from a "representative" or "professional representative". According to the provision of this sentence, which covers joint applicants for a patent, in the absence of a named common representative, the applicant first named in the patent application shall be considered to be that common representative. This indicates that a "common representative" is a person chosen from a group of persons making up the party in question. This person would then be the individual with whom the EPO corresponds, being the addressee by virtue of Rule 81 EPC to receive such correspondence, to respond to it and in general to speak for the party in question. For this latter situation, however, the board prefers to denote such a person the "spokesperson", since the word "representative" is easily confused with the appointment of third persons, the issue of professional representatives and the provisions of Article 133 and 134 EPC.

4.5 Rule 100(1) EPC was originally only intended to apply to *applicants for a joint patent,* see document BR/67 e/70 prk regarding the then Article 66. If two or more inventors apply for a patent, they are in a legal

situation where they are forced to act in common, in a "procedural community of necessity" (German: 'notwendige Streitgenossenschaft'. Under French law this terminology may lack a corresponding term, since litigation by proxy is not allowed, see point 6.4 below).

4.6 Article 58 EPC gives natural and legal persons equal rights to file a European patent application. Reference to national law is made with regard to equivalents of legal persons. Article 59 EPC expressly provides for the possibility to file a joint European patent application by two or more applicants, whereas a corresponding provision for opponents is missing. This difference may be due to the legal fact that joint applicants are in a situation of "procedural community of necessity", see above, whereas opponents are not.

4.7 Although the scope of Rule 100(1) EPC was limited in the beginning, later, as the provisions for the opposition procedure were being elaborated, the possibility for opponents to retain a common representative was added, see eg the revised Implementing Regulations, Article 102(1) in doc BR/185/72, which included the following additional sentence: 'The same shall apply to third parties acting in common in filing notice of opposition'. The Board has not been in a position to establish the reasons for this addition. However, no provision parallel to Article 59 EPC on joint applications was adopted for oppositions. While, as noted above, patent applicants are forced to act jointly (cf. decision J 35/92 of 17 March 1994, in which the Board declared an action taken by only one of the owners invalid), opponents

have no other common interest than to have the patent revoked, in whole or in part. They may have differing interests regarding the reasons why the patent should be revoked. Such reasons are not immaterial, since it may be essential for one opponent to have a patent revoked for conflicting with Article 53(a) EPC, whereas for another opponent the question of novelty or inventive step may be more important.

4.8 Although Rule 100(1) EPC allows, *mutatis mutandis,* opponents to appoint a common representative among themselves, this fact seems not to allow any conclusion regarding the obligation to pay one or more fees, first and foremost because it does not seem appropriate that an important act such as the payment of a fee - which is a prerequisite under Articles 99(1) and 108 EPC for the opposition or appeal to be considered to have been filed at all - could be governed by an implementing rule, and there only implicitly. The obligation to pay fees is governed by several provisions of the EPC, beginning with Article 78. The Rules Relating to Fees (RFees) indicate that most fees are regulated in the EPC itself, see the listing of fees in Article 2 RFees.

4.9 Further, the object of the fees may also have to be considered, ie do they serve the purpose of preventing unnecessary oppositions or appeals or are they set to correspond to the amount of EPO resources needed to process oppositions and appeals to a final decision? To give just one example of the latter, it is possible to imagine the situation where, for economic reasons, several opponents appoint the same representative but give him separate instructions, for example on the evidence or arguments to be presented against the

patent. In such a case, to pay only one fee would not be satisfactory, from the point of view that the EPO is supposed to be financially self-supporting.

4.10 Another initial observation is that, if natural persons are allowed to file a joint opposition, the same must be valid for legal persons. Incorporated bodies, for example several competitors, would then be able to join in one opposition and pay one opposition fee only.

5. The law of personality and association

5.1 The law of personality governs the right to be recognised as having rights and obligations in law, to appear as a party before authorities, etc. Possessing legal personality also entails the right to instigate proceedings. Legal and natural persons are the two classes of personality. For reference, see for example Halsbury's Laws of England, vol. 9(2), Corporations, page 567 ff. (quoted as 'Halsbury'), and M. Dauses, Handbuch des EU Wirtschaftsrechtes, Beck'sche, München 1993, E. III. Gesellschaftsrecht (quoted as 'Dauses'). For the essentials for forming an association under English law, see Halsbury's, page 596. According to Singer, The European Patent Convention, revised English edition by R. Lunzer, Sweet and Maxwell, 1995, German law allows for a greater diversity of types of incorporated bodies than English law, see under Article 58, points 58.03 and 58.04.

5.2 According to the law of association, in order for a legal person to be recognised as such it must be registered with an authority empowered to receive such applications and to examine that the legal requirements

for the association in question have been met before registering it. These requirements may vary with the type of association formed. There are basically two reasons for forming a legal entity: (1) to limit liability for the natural persons forming it, and (2) to enable a company, for example, to act in the market, negotiating and concluding contracts with other persons, legal or otherwise and to enter into litigation as one entity, regardless of the actual physical persons owning or being employed by it.

5.3 National legal systems often do not recognise a group of persons as having a legal personality of its own, unless it is formed in accordance with this law, ie meets prescribed conditions, which normally means that it must be registered as such a legal person. The reason for this is simply that by being formally recognised as a legal person it is made subject to certain rules and regulations in the interest of society, for example to ensure its identity, and to make it possible for third parties with whom it may want to do business to find its place of business, to make enquiries about it and to seek redress against it outside or inside courts of law.

5.4 The question whether "Die Fraktion" could be considered as a legal person was discussed before the opposition division. Against the above background, for the purpose of the present opposition, "Die Fraktion" does not have a legal personality which is distinct from the personalities of the members of the group. Hence it is not a legal person, but a group of natural persons having filed a joint opposition. Incidentally, there should have been a possibility of registering it under

national law within a EU state, despite of its members being of different nationalities since under EU provisions national law must offer a possibility of registering a legal person where not all the natural persons forming it are of the same nationality; see Dauses, pages 2 to 4. The only condition is that a single state must be chosen under whose law of association the future legal person is to be registered. Such a nationally incorporated body would then, under Articles 52 and 58 of the EEC Treaty, be recognised as a legal personality throughout the Union. If this had been done, the legal person thus created could have instigated an opposition in its own name before the EPO, being "any person" under Article 99 EPC. Its members could then vary, without affecting its status as an opponent capable of conducting the opposition.

6. *National law*

6.1 The acceptance in member states of joint legal actions would be of significance also at the European level. The board has therefore investigated the national systems of the United Kingdom, Germany, France, Spain and Sweden.

6.2 In the **United Kingdom** joint legal actions are allowed, provided that all the members have the same interest, that they have a common grievance and that the relief sought would be beneficial to all. Such actions are called "representative actions". The court makes sure that all the conditions for such an action are met, and has full powers to deny it, eg when the rights of the individual parties are not identical. The plaintiff

bringing the action has control over the proceedings. The members of the party are not full parties, eg they cannot be held primarily liable for costs. Should the representative wish to discontinue the action, others may apply to be addressed as full parties. An order obtained by such a group is binding on all the persons represented; ie none of the represented members can appeal from it. Such a member can however apply to become a defendant. Several persons may however also join together as co-plaintiffs in a single action, either with the leave of the court or for example when some common question of law or fact arises in all the actions. In these circumstances, one or two or more co-plaintiffs may appeal, even though the others refuse to join in the appeal. Co-plaintiffs or joint parties must have the same solicitor and counsel and must not sever the action or take inconsistent steps, ie they cannot make allegations inconsistent with their colleagues' allegations. In such a case, the court may strike out one of them and add him as defendant or grant him leave to commence his own proceedings.

6.3 In **Germany** the issue of the status of party (Parteifähigkeit) and the capacity to instigate a court proceeding (Prozessfähigkeit) are laid down in general rules in the Zivilprozessordnung (ZPO), in §§ 50 ff. In particular, §§ 59 ff ZPO deal with the situation when a plurality of persons files a law suit in common. They act as "Streitgenossen". In the case of nullity suits the Bundesgerichtshof (BGH) has ruled that, although a club has not the status of a party, the suit is not inadmissible for this reason (BGH I ZR 149/56, Mitteilungen der deutschen Patentanwälte 1961, 199). The names of the members of the club can be completed

at any time during the proceedings. Further, during the proceedings the number of the members may change without effect on the admissibility. In a nullity suit a fee is due (§ 81(6) PatG). Admissibility of the suit is not affected, if there is a plurality of plaintiffs but only one fee was paid, if and when the plaintiffs are represented by the same representative, have submitted the same request and have based the suit on the same ground (BGH X ZR 87/84, Mitteilungen der deutschen Patentanwälte 1987, 71; BPatG 2 Ni 34/90, GRUR 1992, 435). For opposition-appeal proceedings requiring the payment of a fee, the BGH has decided that, where a number of opponents in a legal partnership (Rechtsgemeinschaft) filed one appeal and paid only one appeal fee and the payment of the single fee can neither be attributed to the partnership nor to one of the opponent within the time limit for filing the appeal, the appeal is deemed not to have been filed (BGH X ZB 19/82, GRUR 1984, 36). In decision X ZR 87/84 (loc. cit.), however, the BGH expressed the view that this finding may have to be reconsidered in the future.

6.4 Under **French** law, several persons acting jointly may give one of their number the power to litigate on their behalf, but in accordance with the principle that no one can litigate by proxy, their names have to be indicated. A group of persons not having the status of a legal person cannot appear before the courts as such. Each person in the group is a party to the proceedings. Associations which are not recognised as legal persons cannot appeal. Each of the members of the association must in principle appear in the procedure, even if they have appointed a common representative. The problem of whether each person has to pay a fee does not arise in

France, since no fees are levied for proceedings before the courts or administrative bodies.

6.5 Where a written application is filed with an administrative body in **Spain**, any communication or procedural action is made to the common representative or one of the interested persons appointed for this purpose, and, if no such person is appointed, to the first person named. It should be noted that "common representative" here means a third person, not a "spokesperson". Each of the applicants is entitled to act before the administrative body, but they must have legal capacity and capacity to institute proceedings. Each applicant may also make individual submissions, provided that this is done through the common representative or the person appointed as spokesperson. Finally, each applicant may individually lodge an appeal against the decision of the first instance.

6.6 According to **Swedish** law, a joint notice of opposition filed by several natural persons is treated as a single opposition. If the need arises, notification will be made to each of the persons named in the notice. Each is entitled to appeal separately against the decision of the first instance. There is neither an opposition fee nor an appeal fee in the Swedish system.

6.7 This short survey of only five of the EPC contracting states indicates that there is no conformity in national law. Hence, it seems not possible to draw any firm conclusions from national law for the purpose of interpreting the EPC, as provided in Article 125 EPC.

ADMISSIBILITY OF THE APPEAL

7. Remedy of deficiencies under Rule 65(1) EPC

7.1 The respondent's view that Rule 65(1) EPC requires all necessary procedural acts to be concluded before expiry of the term for notice of appeal is not correct. The notice of appeal and the appeal fee must have been received within the period of two months under Article 108 EPC. The decision under appeal and the extent to which it is challenged must be indicated within the same time limit. Failure to meet any of these specific conditions renders the appeal inadmissible (Rule 65(1) EPC in conjunction with Rule 64(b) EPC) whereas information relating to the appellant(s) as mentioned in Rule 64(a) EPC may be completed under the conditions laid down in Rule 65(2) EPC, for which the board can set a time limit. The appeal is only to be rejected as inadmissible if the appellant fails to remedy these latter deficiencies within the specified time limit.

7.2 Thus all information regarding the identity of the appellant may be validly supplied after the time limit for appeal, which means that the appeal cannot be rejected as inadmissible on this ground alone. The Board must conclude from this that no important point of law arises as a result of deficiencies with regard to the names and addresses of the appellants which would require a referral to the Enlarged Board of Appeal under Article 112 EPC.

7.3 The issue in decision T 371/92, OJ EPO 1995, 324, was limited to the filing of the notice of appeal and the payment of the appeal fee. For an appeal to be considered to have been filed at all, each of these

acts must have been completed within the two-month period stipulated in Article 108 EPC (see point 8.1). Therefore, the deciding Board in that case concluded that the notification from the registry of the appeal case number and the board responsible for the case did not constitute a decision under Rule 69(2) EPC that a valid appeal had been filed. In the present case, unlike in T 371/92, the notice of appeal was filed and an appeal fee was paid before expiry of the period in question.

7.4 In the present case, therefore, it only remains to be decided whether the notice of appeal, despite its having been signed by a non-qualified representative, ie a person who does not appear on the list of professional representatives in accordance with Article 134(1) EPC, can be considered as validly filed.

8. *Effects on the present appeal of a joint opposition*

8.1 If it were accepted that Rule 100(1) EPC makes common oppositions by two or more persons admissible, and only one fee is due, the following problem arises at the appeal level in the present case:

8.2 Are all the persons who joined in the opposition before the first instance obliged to act jointly in order to appeal? If so, each person who has not signed the appeal or the power of attorney for the representative will have to be asked if they support the appeal and if they agree to be represented by the five appellants, or if they have lost interest in the appeal. Secondly, if one of them was appointed as spokesperson, but does not appeal, the question arises whether the next person

named may validly file the appeal.

8.3 These questions merit a referral to the Enlarged Board of Appeal.

9. *Representation*

9.1 A separate question raised by the respondent is whether an appeal can be validly lodged by someone who is not a professional representative before the EPO and who is not entitled as a legal practitioner to appear before national authorities in patent matters.

9.2 The Board is inclined to agree with the respondent that a notice of appeal which is fundamentally flawed could not be validly rectified after expiry of the time limit for such a notice, unless the case law of the boards of appeal allowed this on the basis that a relevant provision in the EPC is open for such an interpretation. The Board would also agree that the absence of a valid representation may be such a flaw, as it is a basic prerequisite of the EPC for parties who choose to authorise a representative that the latter is a professional representative qualified to appear before the EPO. The provisions of the EPC in this respect are also very detailed, indicating the importance the legislators of the EPC attached to this question. For example, Rule 101(4) EPC provides that - except for the filing of patent applications - procedural steps are deemed not to have been taken unless an authorisation for the representative has been filed in due time (cf. also decision T 355/86 of 14 April 1987, according to which a notice of opposition was found inadmissible, since the representative had

not filed the requested authorisation within the time limit set by the EPO).

9.3 It was established in the present case by the EPO that the representative filing the notice of appeal was not entitled to appear before national authorities. In the present case, where all the persons filing the opposition are citizens of EPO members states, there is no obligation to be represented by a professional representative (Article 133(1) EPC). However, since they were represented and this representative was not a professional representative for the purposes of Article 134 EPC, it would seem that the appeal filed would not be admissible. Otherwise, they each would have had to sign and file the notice of appeal individually before expiry of the period for filing such a notice.

9.4 However, the non-qualified representative claims to have been guided by formalities officers of the EPO in the opposition division as well as by registrars of the boards, named in a letter received on 13 July 1995. The advice given by those officers was that a notice of opposition/appeal could always be signed by this representative pending the appointment of a new professional representative. This advice seems to be in line with Article 1(2) of the decision by the President of the EPO of 19 July 1991 on the filing of authorisations (OJ EPO 1991, 489), according to which a new representative must file an individual authorisation within a period specified by the EPO. The decision does not mention the procedural effects, if any, of an appeal filed by an non-professional representative. In addition, following the suggestion

in the board's communication (see point 2.3) the appellants have signed individual notices of appeal with authorisation for a professional representative under the EPC.

9.5 The Board is of the opinion that, given the above, the case law of the Boards of Appeal on good faith is applicable to the present case, should the legal situation be such that an appeal is considered as not filed when filed by a non-professional representative. This case law has established that, while a party cannot require advice from the EPO, he or she should be able to rely on advice thus given, see eg J 3/87 (OJ EPO 1989, 3). No detrimental effect may arise from the fact that misleading advice is followed, and the party in question is to be treated as if it had satisfied the legal requirement in question. By analogy, the notice of appeal in the present case could still be considered to have been filed on time, even though it was only later confirmed by a professional representative.

9.6 As recognised above, under the current practice as regards good faith, a flaw in the appeal could be rectified after expiry of the time limit in question, provided the party in question had a legitimate expectation that he was allowed to do so under the EPC.

9.7 The question then arises whether or not Rule 101(4) EPC (cf. 3.2 above), which provides that a procedural step - except for the filing of an application - is deemed not to have been taken if the authorisation is not filed in due time, takes precedence over any legitimate expectation.

10. *Admissibility of the appeal where only one natural person appears as appellant*

10.1 Finally, the Board has also considered whether the problem of the present case could not be resolved by simply requesting the appellants to name one person in whose name the opposition and appeal would be pursued. This approach would make the notice of opposition and the notice of appeal validly filed with the respective fee paid.

10.2 To accept the opposition and appeal in this way would also be supported by the recent decisions G 3/97 and G 4/97 on the so-called "straw man" situation. Since the Enlarged Board of Appeal found that an opposition is not inadmissible for the sole reason that it was made on behalf of a third party (answer 1(a)), the objections by the patent proprietor in the present case that he has a right to know who the opponents are, and that therefore the individuals of the group cannot change, seem to have become less pertinent. This board would also refer to its remarks regarding the nature of oppositions, see point 3.2 above.

10.3 However, since these Enlarged Board of Appeal decisions dealt exclusively with the question of nominal opponents, they have not answered all questions regarding the status and rights of parties to opposition proceedings. For example, the questions of how the common representation should be organised in order to guarantee proper procedural rights to the patent proprietor, of any limitations on the opponents, and of the obligation to pay one or several opposition fees, need to be addressed. The situation of the

present case could not have been envisaged by the Enlarged Board of Appeal in its decisions G 3/97 and G 4/97.

10.4 Furthermore, a change of the members of a joint group of opponents could be tantamount to a change in "personality", in particular in view of the circumstances of the present case, where the number of opponents/appellants appearing has varied from 26 to 18 to 5 to 17.

11. *Referral under Article 112 EPC*

11.1 The above overview of problems concerned with joint oppositions and appeals raises important points of law, which the Board deems to require a referral of questions to the Enlarged Board of Appeal under Article 112 EPC.

Order

For these reasons it is decided that:

The following questions are referred to the Enlarged Board of Appeal:

1. Is an opposition admissible which otherwise meets the requirements of Article 99 EPC and Rule 55 EPC if it is filed jointly by two or more persons and only one opposition fee is paid?

2. If the answer to question 1 is in the affirmative and a common representative was named under Rule 100(1) EPC

in the notice of opposition, is an appeal valid even if it is not filed by this person?

3. If the answers to questions 1 and 2 are in the affirmative, which other requirements, if any, have to be met by a joint opposition or a joint appeal in order to safeguard the rights of the patent proprietor?

The Registrar: The Chairwoman:

U. Bultmann U. Kinkeldey