Case Number: T 0161/96 - 3.3.4

D E C I S I O N
of 12 August 1998 correcting errors in the decision of the Technical Board of Appeal 3.3.4 of 3 November 1997

Appellant: (Opponent 01)
Novo Nordisk A/S
Novo Allé
2880 Bagsvaerd (DK)

Representative:
Patentanwälte
Beetz - Timpe - Siegfried
Schmitt-Fumian - Mayr
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80538 München (DE)

Other party: (Opponent 02)
Pharmacia & Upjohn AB
112 87 Stockholm (SE)

Other party: (Opponent 03)
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Representative:
Nash, David Allan
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Respondent: (Proprietor of the patent)
Mallinckrodt Group Inc.
2315 Sanders Road
Northbrook
Illinois 60062 (US)

Representative:
Holmes, Michael John
Frank B. Dehn & Co.
European Patent Attorneys
179 Queen Victoria Street
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 19 January 1996 concerning rejection of opposition I as indamissible.**

Composition of the Board:

Chairwoman: U. M. Kinkeldey
Members: W. Moser
R. E. Gramaglia

In application of Rule 89 EPC the decision given on 3 November 1997 is hereby ordered to be corrected as follows:

Page 14, line 5 from below and page 15, line 2: replace "T 630/93" by "T 690/93".

The Registrar:

D. Spigarelli

The Chairwoman:

U. M. Kinkeldey

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D E C I S I O N
of 3 November 1997

Case Number: T 0161/96 - 3.3.4

Application Number: 87307406.6

Publication Number: 0303746

IPC: A61K 37/36

Language of the proceedings: EN

Title of invention:
Stabilization of growth promoting hormones

Patentee:
Mallinckrodt Group Inc.

Opponents:
Novo Nordisk A/S
Pharmacia & Upjohn AB
Genentech, Inc.

Headword:
Underpayment of opposition fee/NOVO NORDISK

Relevant legal provisions:
EPC Art. 14(2), (4), 99(1), 112(1), 114, 125
EPC R. 6(3), 9(3), 56(1), 69
RFees Art. 9(1), 12(1)

Keyword:
"Underpayment of more than 40% of the opposition fee - amount not small"
"Act of informing an opponent within the meaning of Rule 69(2), second sentence EPC - not belonging to the duties entrusted to formalities officers of the opposition division"
"Payment of the lacking amount not to be considered to have been made in time by virtue of the principle of good faith - no obligation placed on the opposition division to warn the appellant of the underpayment of the opposition fee"
"Referral of a question to the Enlarged Board of Appeal (no) - only questions on a specific point of law, and not questions to individual cases which cannot be examined isolated from the respective facts, may be be referred to the Enlarged Board of Appeal"

"Reimbursement of the opposition fee (yes)" - opposition I deemed not to have been filed"

Decisions cited:
G 0005/88, G 0007/88, G 0008/88, J 0011/85, J 0013/90, J 0027/92, T 0130/82, T 0162/82, T 0214/83, T 0231/85, T 0184/91, T 0690/93

Headnote:

I. The requirements in connection with the principle of good faith to be observed by the EPO are the same vis-à-vis all parties involved in proceedings before the EPO, be they applicants, patent proprietors or opponents.

II. In case it is assumed that even an underpayment of the opposition fee, which is solely due to a deficiency within the area of responsibility of the opponent concerned, may give rise to an obligation by the EPO to warn the opponent of the impending loss of rights, the requirements for the very existence of such an obligation imply that (i) the formalities officer of the opposition division receives a payment sheet, indicating said underpayment, from the cash and accounts department within the opposition period, that (ii) the payment of the lacking amount by the opponent on his own initiative before the end of the opposition period must objectively be excluded, and that (iii) the opponent can still pay the lacking amount within the opposition period.

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Beschwerdekammern | Boards of Appeal | Chambres de recours

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D E C I S I O N
of the Technical Board of Appeal 3.3.4
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Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 19 January 1996 concerning rejection of opposition I as indamissible.

Composition of the Board:

Chairwoman: U. M. Kinkeldey
Members: W. Moser
R. E. Gramaglia

Summary of Facts and Submissions

I. The European patent application No. 87 307 406.6 was filed on 21 August 1987. The mention of the grant of the corresponding European patent with the publication number 0 303 746 was published on 19 November 1992. The opposition period of nine months (Article 99(1) EPC) expired on 19 August 1993.

II. Notice of opposition I (EPO Form 2300) was filed by the appellant (opponent 01) on 12 August 1993; at the same time of the total amount of DEM 1200 of the opposition fee only DEM 700 were paid by means of an enclosed cheque.

Under point XI of the EPO Form 2300, the filing office of the EPO indicated in writing that the sum of DEM 700 had been paid by cheque. The cheque was forwarded to the cash and accounts department. On Tuesday, 17 August 1993, a formalities officer of the opposition division despatched EPO Form 2316 (communication of a notice of opposition) together with the notice of opposition I. On Thursday, 19 August 1993, the cash and accounts department issued a payment sheet indicating that only DEM 700 had been paid. The formalities officer received the payment sheet on Monday, 23 August 1993.

III. By communication pursuant to Rule 69(1) EPC dated 16 September 1993, the appellant was informed that the notice of opposition I was deemed not to have been filed because the opposition fee had not been paid in full within the opposition period.

IV. On 21 September 1993, the appellant paid the lacking amount of the opposition fee, i.e. DEM 500.

V. On 26 November 1993, the appellant requested that the opposition fee be considered to have been paid in due time and that the notice of opposition I be deemed to have been filed validly within the opposition period. Moreover, he applied for a decision by the EPO under Rule 69(2) EPC.

VI. By a communication dated 23 December 1993, another formalities officer of the opposition division informed the appellant that the opposition fee was deemed to have been paid in full within the prescribed time limit and that, consequently, the notice of opposition I was deemed to have been filed. It was argued that the EPO should have drawn the appellant's attention to the fact that the fee had not been paid in full and that, therefore, the principle of protection of legitimate expectations, as laid down in decision J 13/90 (OJ EPO 1994, 456), was applicable.

VII. By a letter dated 26 May 1994, received by the EPO on 30 May 1994, the respondent (patent proprietor) submitted that, contrary to the indication expressed in the communication of 23 December 1993 (point VI above), the notice of opposition I should be ruled inadmissible. He argued that underpayment might only be overlooked if the circumstances justified it, for example if a party had relied upon inaccurate information of the EPO. However, there existed no such circumstances in the present case.

VIII. By its decision in writing posted 19 January 1996, which has been given orally at the end of oral proceedings held on 11 December 1995, the opposition division rejected opposition I as inadmissible. The reasons for the decision were essentially as follows:

- The underpayment of more than 40% of the fee could not be regarded as a small amount which could be overlooked. In decision J 27/92 (OJ EPO 1995, 288) it had been held that at the most 20% of the fee to be paid could be regarded as a small amount within the meaning of Article 9(1) of the Rules relating to Fees.

- The principle of good faith or equal treatment did not allow opposition I to be treated as admissible. In decision J 13/90 (above) it had been held that the principle of good faith required the EPO to warn the applicant of any impending loss of rights if such warning could be expected in all good faith. A warning could be expected if the deficiency was readily identifiable for the EPO and the applicant could still correct it within the time limit.

- If an opposition was filed one week before expiry of the opposition period, it could not be expected that the formalities officer of the opposition division would be able to establish within the remaining time up to the expiry of the opposition period that the opposition fee paid was insufficient. Rather, it had to be borne in mind that it took some time for the documents to come to the file and to arrive on the desk of the formalities officer.

- An opponent had to be extremely careful to check the admissibility requirements when filing his notice of opposition one week before expiry of the opposition period. He took the risk that the EPO would not notice rectifiable mistakes within the few remaining days because he had not given the EPO enough time to do this. Moreover, the principle outlined in decision J 13/90 (above) had

been put into question by decision T 690/93 of 11 October 1994 (not published), where it had been stressed that there was no justification for the idea that the principle of good faith imposed an obligation on a Board of Appeal to warn a party of deficiencies which were within the area of the party's own responsibility.

- In addition, it had to be taken into account that applying the principle of good faith in favour of an opponent adversely affected the patent proprietor. In an *inter partes* procedure, the EPO had to avoid any action that could undermine its absolute impartiality with respect to the patentee. Thus, even if the EPO had recognised the mistake in due time, it was questionable whether it could have warned the opponent without violating the principle of impartiality and the patent proprietor's rights.

IX. Notice of appeal and a statement of the grounds of appeal were filed by the appellant on 11 December 1995, and the appeal fee was paid at the same time. Furthermore, in order to complete the statement of the grounds of appeal, the appellant filed additional submissions on 21 May 1996.

X. The respondent filed observations on 19 June 1996.

XI. On 30 July 1997, as an annex to the summons to attend oral proceedings, a communication conveying the provisional opinion of the Board was sent to the parties.

XII. On 3 October 1997, the respondent filed additional submissions. With letter received on 6 October 1997, the appellant filed a response to the respondent's observations filed on 19 June 1996. The respondent replied to the appellant's letter on 23 October 1997.

XIII. Oral proceedings were held before the Board on 3 November 1997.

XIV. In his written submissions and during oral proceedings before the Board the appellant argued essentially as follows:

- The notice of opposition had been filed on 12 August 1993. The opposition period had ended on 19 August 1993. Within this one week between these dates, the EPO could have alerted him that the opposition fee had been insufficient. In fact, the EPO had been obliged to give such a hint.

- Article 9(1) of the Rules relating to Fees allowed the EPO to give a person making an insufficient payment the opportunity to pay the lacking amount. It was official practice of the EPO to proceed in accordance with Article 9(1) of the Rules relating to Fees. By applying the principle of equal treatment (under Article 125 EPC), the EPO had the duty to proceed accordingly in the present case. The EPO could not arbitrarily select to apply a generally accepted principle of procedural law or not. The discretion was limited by the principle of equal treatment.

- By their very nature, many decisions of the EPO touched public interest. Insofar, the EPO always had to consider this public interest. The latter had the further consequence that also decisions relating to proceedings with only one party were

relevant for the present case, because, when considering the public interest, the EPO was restricted by the same limitations as if two or more parties had taken part in such proceedings. Besides, it had to be noted that Article 9(1) of the Rules relating to Fees made no difference between one-party proceedings and multi-party proceedings. Consequently, the *ratio decidendi* of decision J 13/90 (above), according to which the EPO was obliged to give a warning provided the running term allowed it, was applicable in the present case as well.

- Article 114 EPC required examination by the EPO of its own motion. Furthermore, according to Rule 60(2) EPC, the opposition proceedings could be continued after the opposition had been withdrawn. These two provisions of the EPC clearly showed that the principle of neutrality was not violated by actions of formal nature.

- There were several decisions where oppositions had been deemed admissible, although the opposition fee or the entirety of documents reached the EPO only after expiration of the opposition period, in particular G 5/88, 7/88, 8/88 (OJ EPO 1991, 137), T 214/83 (OJ EPO 1985, 10).

- There was no doubt that the EPO had to be neutral when ruling on novelty and obviousness, which were material issues. This principle was however not violated if the EPO took certain procedural measures. That was the reason why decision J 13/90 (above) was justified, because with procedural measures the EPO did not violate its obligation of neutrality as regarded material questions.

- The principle of good faith had priority over neutrality of the opposition division. Therefore, all parties, be they opponents or the patentee, should be treated in the same way.

- In the communication dated 23 December 1993 it had been acknowledged that the remaining time of the opposition term would have allowed a warning by the EPO. The fact that the opposition division decided contrary to said communication represented therefore a case in point of *venire contra factum proprium*.

- Besides, in decision T 231/85 (OJ EPO 1989, 74) it was stated that the parties could rely on material evidence being forwarded to the deciding authority of the EPO within a few days of receipt.

- It had been easily recognisable for the very first person handling the filed opposition documents that the amount had been insufficient; so much the more as it had been indicated under point XI of the notice of opposition that only DEM 700 had been paid.

- The fee had been paid by cheque. The amount had been debited from the appellant's account on 20 August 1993. This meant that, in fact, the cheque and the corresponding form for payment of fees had been processed by the EPO earlier and, therefore, well within the opposition period. Thus, it would have been easy for the EPO to give the appellant a warning.

XV. In his written submissions and during oral proceedings before the Board the respondent argued essentially as follows:

- It was clear from the use of the word 'may' in Article 9(1) of the Rules relating to Fees that this provision was discretionary. It did not oblige the EPO to warn of underpayment in all circumstances, but merely permitted the EPO to warn of underpayment in appropriate circumstances.

- Article 114 EPC allowed the EPO to examine facts of its own motion, and Rule 60(2) EPC allowed the opposition division to proceed with an opposition after it had been withdrawn. Thus, these provisions allowed the EPO to pursue matters in the public interest when appropriate. However, they provided no indication whatsoever of the obligations of the EPO vis-à-vis a potential opponent who failed to fulfil the requirements of the EPC.

- Rule 56 EPC explicitly excluded underpayment or nonpayment of the opposition fee from deficiencies which had to be drawn to the attention of the potential opponent. Consequently, there was no obligation for the EPO to issue warnings as regards underpayment of the opposition fee.

- Any warning given to an opponent that an opposition fee was insufficient would be to the advantage of the opponent and to the disadvantage of the patentee. Thus, such a warning would have violated the fundamental principle that both sides be given equally fair treatment.

- It was reasonable for the EPO to permit fee payment to be corrected when the error resulted from an erroneous action of the EPO. However, there was not the remotest suggestion that in the present case the incorrect fee payment had been in any way the fault of the EPO.

- Decision J 13/90 (above) had been decided in the context of an entirely different legal situation. Indeed, under point 4 of the Reasons it was made clear that the deficiency in question had immediately been apparent from a letter received four weeks before the deadline. Consequently, and in direct contrast to the present case, there had been sufficient time to issue a warning. On the other hand, decision J 13/90 (above) did not teach that the EPO was obliged to issue a communication whenever a loss of rights occurred. Rather, said decision had been based upon the principle of protection of legitimate expectations (as had been explained in G 5/88, G 7/88 and G 8/88 [above]), and under point 5 of its Reasons it was stated that the EPO "must not omit any acts which the party to the proceedings could legitimately have expected ...".

- The guidelines (at D IV 1.3.3), with which all professional representatives were familiar, clearly stated that the EPO was not obliged to issue a warning if an opposition fee was underpaid. Moreover, they stated explicitly that the issue of such a communication should not be relied upon. Thus, there could be no legitimate expectation of such a warning.

- Decision T 214/83 (above) did not contain the remotest suggestion that the EPO was obliged to issue warnings when fees were underpaid and was therefore irrelevant.

- In decision T 690/93 (above), under point 3.3 of the Reasons it was stated that there was no justification for the suggestion that the protection of legitimate expectations imposed an obligation to warn a party of deficiencies within the area of the party's own responsibility. Consequently, since the payment of the opposition fee was the responsibility of the appellant, no warning of underpayment needed be issued.

- Besides, such a warning would not have been possible in the present case: The payment sheet had been issued on 19 August 1993 (i.e. the final day of the opposition period). Since any warning regarding underpayment had to be issued by the formalities officer, it was obvious that no warning could have been issued before the expiry of the opposition period.

- Decision T 231/85 (above) did not set a specific time limit. In particular, it did not contain the remotest suggestion that documents had to be processed especially speedily when being filed shortly before the deadline in case a party to the proceedings had made a mistake.

- There had been only four clear working days between the receipt of the opposition and the processing of the cheque. It was reasonable to allow a further few days for the payment sheet to

be sent in the internal mail to the formalities department and then to be processed. Thus, in the present case, the papers had been processed as efficiently as could reasonably have been expected.

- The communication of the formalities officer dated 23 December 1993 (point VI above) was of no relevance in view of the facts.

XVI. The appellant requested that the decision under appeal be set aside and that opposition I be deemed to be admissible and the European patent No. 0 303 746 be revoked or the case be remitted to the opposition division for further prosecution (main request).

As an auxiliary request, the appellant requested that the following question be submitted to the Enlarged Board of Appeal:

"Is an opposition to be deemed to have been validly filed under the general principle of the protection of legitimate expectations (principle of good faith) if

- the opposition fee was not paid in full within the opposition term, but with underpayment not to be considered small,

- the EPO had about 1 week until the expiration of the opposition term for warning the opponent to pay the lacking amount, but did not warn the opponent of an imminent loss of rights to be expected,

- the underpayment was paid after receipt of a communication from the EPO pursuant to Rule 69(1) EPC, and

- the Formalities Officer issued a brief communication according to which the opposition fee was deemed to have been paid in full, applying the principle of good faith with reference to J 13/90?"

The respondent requested that the appeal be dismissed or, in the event that the Board decided that opposition I was admissible and allowable, that the case be remitted to the opposition division for further prosecution.

Reasons for the Decision

1. The appeal is admissible.

2. The appellant applied for a decision by the EPO under Rule 69(2), first sentence EPC. By the communication dated 23 December 1993, the appellant was informed within the meaning of Rule 69(2), second sentence EPC by a formalities officer of the opposition division. However, such an act does not belong to the duties entrusted to formalities officers of the opposition divisions by virtue of the powers transferred to the Vice-President of Directorate-General 2 of the EPO by order of the President of the EPO of 6 March 1979, under Rule 9(3) EPC (cf. Notice dated 15 June 1984 as revised and supplemented on 1 February 1989 [OJ EPO 1984, 319; 1989, 178], point 4), and the appellant was supposed to know it.

In addition, the opposition division did not indicate by its conduct that the notice of opposition I was deemed to have been filed. Indeed, the opposition division did not object to the respondent's opinion and arguments expressed in the letter dated 26 May 1994,

according to which the notice of opposition I should be ruled inadmissible. Furthermore, the opposition division refrained from dealing with the notice of opposition I on its merits, and there were no circumstances which, objectively, could have given rise to an impression to the contrary.

From the above it follows that the appellant was not entitled to rely on the communication dated 23 December 1993 that no loss of rights had occurred. The fact that the opposition division decided contrary to that communication did therefore not offend against the generally recognised prohibition of "venire contra factum proprium".

3. Under Article 9(1) of the Rules relating to Fees, a time limit for payment is in principle deemed to have been observed only if the full amount of the fee has been paid in due time. However, sentence four of that provision gives the EPO the discretion, where it is considered justified, to overlook any small amounts lacking without prejudice to the rights of the person making the payment.

It is justified to overlook an underpayment of just over 10% (cf. T 130/82 [OJ EPO 1984, 172], J 11/85 [OJ EPO 1986, 1]). Furthermore, in cases where a party paying fees mistakenly seeks to take advantage of the 20% reduction in fees available in relation to Article 14(2) and (4) EPC under Rule 6(3) EPC and Article 12(1) of the Rules relating to Fees, an underpayment of 20% **at the most** may be regarded as small within the meaning of Article 9(1), sentence four of the Rules relating to Fees (cf. J 27/92 [above]). By

way of contrast, an underpayment of more than 40%, as in the present case, may not be regarded as a small amount which can be overlooked within the meaning of Article 9(1), sentence four of the Rules relating to Fees.

Hence it follows that the time limit for payment of the opposition fee is deemed not to have been observed by the appellant.

4. During the opposition period, the opposition division did not perform any acts which could be misunderstood by the appellant and thereby lead to the present loss of rights. However, the question arises whether or not the opposition division omitted any acts which the appellant could legitimately have expected and which might well have helped to avoid said loss of rights.

The answer to this question depends very much on the definition of the requirements in connection with the principle of good faith to be observed by the EPO; these requirements being the same vis-à-vis all parties involved in proceedings before the EPO, be they applicants, patent proprietors or opponents.

5. As regards these requirements, the jurisprudence of the Boards of Appeal is inconsistent: In decision J 13/90 (above) it is held that the principle of good faith requires the EPO to warn the party in question of any impending loss of rights if the deficiency is readily identifiable and said party can still correct it within the time limit, whereas in decision T 630/93 (above) it is held that there is no justification for the suggestion that the principle of good faith imposes an obligation to warn a party of deficiencies within the area of the party's own responsibility.

6. In accordance with the *ratio decidendi* of decision T 630/93 (above), the opposition division was not obliged to warn the appellant of the underpayment of the opposition fee because this underpayment clearly represented a deficiency within the area of the appellant's own responsibility.

7. The question still arises whether, on the basis of the *ratio decidendi* of decision J 13/90 (above), such an obligation existed in the present case. In this context, the following has to be taken into consideration:

Within the framework of the responsibilities of the opposition division, the formalities officer of the opposition division is entrusted with the duty to send communications to the opponent concerning deficiencies under Rule 56(1) EPC (cf. Notice [point 2 above], point 5), in particular the deficiency of non-compliance of the notice of opposition with the provision of Article 99(1), third sentence EPC. Thus, any warning regarding underpayment of the opposition fee would have to be issued either by the formalities officer of the opposition division or by the opposition division itself (cf. Notice [point 2 above], last sentence).

According to decision J 13/90 (above), an obligation to warn a party of an impending loss of rights exists on condition that the deficiency is readily identifiable and that the party can still correct it in time. In case it is assumed that even an underpayment of the opposition fee, which is solely due to a deficiency within the area of responsibility of the opponent concerned, may give rise to such an obligation, the aforementioned requirements for its very existence do, in the Board's judgement, necessarily imply that

(i) the formalities officer of the opposition division receives a payment sheet from the cash and accounts department within the opposition period, indicating said underpayment;

(ii) that the payment of the lacking amount by the opponent on his own initiative before the end of the opposition period must objectively be excluded; and

(iii) that the opponent can still pay the lacking amount within the opposition period.

The facts underlying decision J 13/90 (above) were such that the deficiency was readily identifiable in time because the party concerned clearly indicated well before the end of the period under Article 122(2), first sentence EPC, that the omitted act would not be completed within said period as required by Article 122(2), second sentence EPC.

By way of contrast, the deficiency was not readily identifiable in time in the present case. The formalities officer of the opposition division received the payment sheet from the cash and accounts department only after the opposition period had elapsed. On the other hand, the indication under point XI of the EPO Form 2300 could not be equated, in terms of conclusiveness, with a payment sheet issued by the cash and accounts department. Moreover, that indication could not objectively be interpreted as excluding the payment of the lacking amount by the appellant on his own initiative before the end of the opposition period, bearing in mind that the appellant could be assumed to observe all due care required by the circumstances.

From the above it follows that even on the basis of the *ratio decidendi* of decision J 13/90 (above) the opposition division was not obliged to warn the appellant of the underpayment of the opposition fee either.

8. On an average, the two filing offices of the EPO in Munich receive between 1800 to 2500 documents every day. These documents have to be provided with a date stamp, sorted, the cheques and fee vouchers sent to the cash and accounts department, and the other documents sent to formalities officers. Subsequently, the cash and accounts department has to sort and process the cheques and fee vouchers, then issue the corresponding payment sheets. Finally, these payment sheets have to be sent in the internal mail to formalities officers.

Against the background of this factual situation it is obvious that, in the present case, the cheque in question has been processed as efficiently as could reasonably be expected. Indeed, the cash and accounts department issued the payment sheet already five working days after the receipt of the cheque, and the formalities officer received the payment sheet already two working days later.

9. The underpayment of a fee leading to a possible loss of rights was not an issue in decisions G 5/88, 7/88, 8/88 (above), T 214/83 (above) and T 231/85 (above) which were cited by the appellant. Thus, in the present case, they are of no relevance.

10. From the above it follows that the opposition division did not contravene its obligation to act in accordance with the principle of good faith. As a matter of fact, the opposition division was not obliged to warn the appellant of the underpayment of the opposition fee

(cf. points 6 and 7 above) and did thus not omit any acts during the opposition period which the appellant could legitimately have expected and which might well have helped to avoid the present loss of rights (cf. point 4 above). Furthermore, the appellant was not entitled to rely on the communication dated 23 December 1993 that no loss of rights had occurred (cf. point 2 above).

Hence it follows that the payment of the lacking amount of the opposition fee on 21 September 1993 may not, by virtue of the principle of good faith, be considered to have been made in time. Consequently, the time limit for payment of the opposition fee is deemed not to have been observed by the appellant (cf. point 3 above), with the consequence that, by reason of Article 99(1), third sentence EPC, the opposition I is deemed not to have been filed. The appellant's main request must therefore be rejected.

11. Under Article 112(1) EPC only questions on a specific point of law, and not questions relating to individual cases which cannot be examined isolated from the respective facts, may be submitted to the Enlarged Board of Appeal (cf. decision T 162/82 [OJ EPO 1987, 533], point 16 of the Reasons; interlocutory decision T 184/91 of 25 October 1991, not published). Since, in the Board's judgement, the question to be referred to the Enlarged Board of Appeal in compliance with the appellant's auxiliary request relates to the present individual case which cannot be examined isolated from the facts, that request has therefore also to be rejected.

12. An opposition which is deemed not to have been filed does not exist. A nonexistent opposition cannot be inadmissible as was held by the opposition division. Hence, the decision under appeal concerning

opposition I has to be set aside. Furthermore, the fee paid (i.e. DEM 1200) for opposition I has to be refunded because it was paid for a nonexistent opposition.

Order

For these reasons it is decided that:

1. The decision under appeal to reject opposition I as inadmissible is set aside.

2. The opposition I is deemed not to have been filed.

3. The reimbursement of the fee paid (i.e. DEM 1200) for opposition I is ordered.

4. The request to refer a question to the Enlarged Board of Appeal is rejected.

The Registrar: The Chairwoman:

D. Spigarelli U. M. Kinkeldey