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Datasheet for the decision of 25 September 2025

Case Number: G 0002/24

Appeal Number: T 1286/23 - 3.2.04

Application Number: 14735118.3

Publication Number: 2941163

IPC: A47K7/04, A61H23/02

Language of the proceedings: EN

Title of invention:
SKIN CLEANSER

Patent Proprietor:
FOREO LIMITED

Opponents:
Beurer GmbH
GESKE GmbH & Co. KG

Headword:
SKIN CLEANSER

Relevant legal provisions:

EPC Art.	97(3), 99, 99(1), 99(3), 100, 100(a), 100(c), 105, 105(1), 105(2), 106, 106(1), 107, 108, 112(1), 112(1)(a), 112(2), 113, 114(1), 115, 116, 122, 123(2)
EPC R.	76, 76(1), 84(2), 86, 89, 136
EPC 1973 Art.	99(1), 105, 105(2), 107
EPC 1973 R.	55, 57(4), 79(4)
RPEBA Art.	9, 10, 13, 14
RPBA 2020 Art.	12(2), 21

Law of the Contracting States and the Unified Patent Court:
Switzerland
Code of Civil Procedure (Zivilprozessordnung), Art. 76, 76(1), 76(2)
Federal Act on Civil Procedure (Bundesgesetz über den Zivilprozess), Art. 15(3)
Federal Patent Act (Bundesgesetz über die Erfindungspatente - Patentgesetz), Art. 59c(1)
Patent Regulation (Verordnung über die Erfindungspatente – Patentverordnung), Art. 73(1)
Germany
Patent Act (Patentgesetz), § 59, § 59(2), § 139, § 140
Code of Civil Procedure (Zivilprozessordnung), §§ 66, 67, 69, 269
Code of Administrative Procedure (Verwaltungsgerichtsordnung), §§ 63, 64, 92
France
Code of Civil Procedure (Code de procédure civile), Art. 329, 330(1), 395
Code of Intellectual Property (Code de la propriété intellectuelle), Art. R. 411-32
The Netherlands
Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), Art. 217
Administrative Law Act (Algemene wet bestuursrecht), Art. 8:12b
United Kingdom
Civil Procedure Rules (CPR), R. 3.1, 19.2, 38, 38.2, 38.3, 38.5, 54, 54.17
Unified Patent Court
Rules of Procedure, R. 265, 313, 315, 316, 316A

Keyword:
"admissibility of referrals"- yes
"referral of a point of law anew: substantiated reasons" - yes
"intervention during the appeal proceedings" - yes
"appellant status of the intervener at the appeal stage" – no
"continuation of the appeal proceedings with the intervener after withdrawal of all appeals" - no

Decisions cited:
G 0001/84, G 0001/86, G 0002/91, G 0004/91, G 0007/91, G 0008/91, G 0009/91, G 0010/91, G 0009/92, G 0009/93, G 0001/94, G 0001/99, G 0003/04, J 0028/94, J 0033/95, T 0244/85, T 0026/88, T 0611/90, T 0811/90, T 0392/97, T 1026/98, T 1007/01, T 1108/02, T 0193/07, T 1682/13, T 0439/17, T 1839/18, T 1286/23

Decisions of national courts cited:

Switzerland

Bundesgericht

- 142 III 629
- 142 III 271

Germany

Bundesverwaltungsgericht

- 8 C 2.05

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- Ia ZR 212/63
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- X ZB 18/06
- Xa ZR 110/08 (BPatG)

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- 20 W (pat) 324/05

France

Conseil d'Etat

- n° 120241
- n° 32813
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- n° 40674

Cour de cassation

- n° 04-13.008
- n° 12-18.931
- n° 15-10.577
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United Kingdom

Supreme Court

- MS (Pakistan) v Secretary of State for the Home Department (Respondent) [2020] UKSC 9

High Court of Justice Chancery Division

- Hunt v Aziz [2011] EWHC 714 (Ch)
- The Queen on the application of Philip Morris Brands Sarl v Secretary of State for Health [2014] EWHC 3669 (Administrative Court)

Unified Patent Court – Court of First Instance

- UPC CFI 755/2024
- UPC CFI 457/2023
- UPC CFI 487/2023
- UPC ORD 10348/2025
- UPC ORD 18404/2024

Literature:

Benkard, Europäisches Patentübereinkommen, editors: I. Beckedorf/J. Ehlers, 4th edition, 2023, Art. 99 (Ehlers), Art. 105 (Kley/Thums), Introduction to Art. 106-112a (Keussen), 107 (Keussen)

Münchner Gemeinschaftskommentar, Europäisches Patentübereinkommen, editors:
F.-K. Beier/K. Haertel/G. Schricker, 20th edition, July 1997, Art. 106-112, 107 (Moser)
Schulte, Patentgesetz mit EPÜ, editor: R. Schulte, 12th edition, 2024
Singer/Stauder/Lüginbühl, Europäisches Patentübereinkommen, editors: D. Stauder/S. Lüginbühl, 9th edition, 2023, Art. 105 (Bostedt), Art. 107 (Bühler)
Visser's Annotated European Patent Convention, 2024 edition, Suominen, de Lange, Rudge, Ferara, 2025

Headnote:

After withdrawal of all appeals, appeal proceedings may not be continued with a third party who intervened during the appeal proceedings in accordance with Article 105 EPC.

The intervening third party does not acquire an appellant status corresponding to the status of a person entitled to appeal within the meaning of Article 107, first sentence, EPC.

Europäisches Patentamt
European Patent Office
Office européen des brevets

Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: G 0002/24

D E C I S I O N
of the Enlarged Board of Appeal
of 25 September 2025

Respondent: (Patent Proprietor)	FOREO LIMITED RM. 1801, Easey Comm. Bldg., 253-261 Hennessy Road, Wanchai (HK)
Representative:	Marks & Clerk LLP 15 Fetter Lane London EC4A 1BW (GB)
Appellant: (Opponent 1)	Beurer GmbH Söflinger Straße 218 89077 Ulm (DE)
Representative:	Maiwald GmbH Elisenhof Elisenstraße 3 80335 München (DE)
Intervener: (Opponent 2)	GESKE GmbH & Co. KG Am Lenkwerk 3 33609 Bielefeld (DE)
Representative:	Eisenführ Speiser Patentanwälte Rechtsanwälte PartGmbB Johannes-Brahms-Platz 1 20355 Hamburg (DE)
Referring decision:	**Interlocutory decision T 1286/23 of the Technical Board of Appeal 3.2.04 of the European Patent Office of 11 November 2024.**

Composition of the Board:

Chair:	C. Josefsson
Members:	I. Beckedorf
	D. Rogers
	T. Sommer
	E. Liiv
	G. Pricolo
	W. Chandler

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SUMMARY OF FACTS AND SUBMISSIONS

Referred points of law

I. By interlocutory decision T 1286/23 (hereinafter: the referring decision), Technical Board of Appeal 3.2.04 (hereinafter: the referring board) referred the following questions of law to the Enlarged Board of Appeal (hereinafter: the Enlarged Board) for decision under Article 112(1)(a) EPC in combination with Article 21 RPBA because of its intention to deviate from an earlier decision of the Enlarged Board in case G 3/04:

"After withdrawal of all appeals, may the proceedings be continued with a third party who intervened during the appeal proceedings? In particular, may the third party acquire an appellant status corresponding to the status of a person entitled to appeal within the meaning of Article 107, first sentence, EPC?"

Opposition-appeal proceedings

II. European Patent no. 2941163 concerns an oscillating handheld skin cleanser. The patent was granted for a private person and later transferred to the current patent proprietor Foreo Limited (hereinafter: the patent proprietor).

III. An opposition was filed by Beurer GmbH (hereinafter: opponent 01) based on the grounds for opposition under Article 100(a) and (c) EPC (lack of novelty and inventive step, unallowable extension of the subject-matter).

IV. An intervention by Geske GmbH & Co KG (hereinafter: the intervener) had been filed twice during the opposition proceedings, the first based upon a warning letter issued by the patent proprietor and the second after an action for a

declaration of non-infringement initiated by the intervener before the Landgericht Düsseldorf, but both interventions were deemed insufficient and therefore inadmissible by the opposition division under Article 105(1) EPC.

V. The opposition division issued an interlocutory decision dated 9 May 2023 (hereinafter: the decision under appeal or the opposition division's decision) according to which the patent as amended by auxiliary request 1 and the invention to which it relates were found to meet the requirements of the EPC.

VI. An appeal against said decision was filed only by opponent 01 with the patent proprietor acting as respondent to the appeal.

VII. On 15 August 2023, the intervener declared a third intervention and, in the same letter, stated that they filed an appeal directed to a revocation of the patent in its entirety.

VIII. Opponent 01 withdrew their appeal on 11 April 2024.

IX. The admissibility of the intervention was discussed in a communication of the referring board dated 30 April 2024 and at the oral proceedings held before the referring board with the patent proprietor and the intervener on 27 June 2024.

Summary of the reasons for the referring decision

X. In the reasons for the decision, the referring board first addressed the admissibility of intervener's appeal and intervention. The referring board found the intervener's appeal inadmissible regarding the opposition division's finding on the inadmissibility of the second intervention for being filed outside the period provided for in Article 108,

first sentence, EPC. The admissibility of the intervener's appeal in respect of the substantive issues of the decision under appeal depended on the admissibility of the third intervention.

XI. The referring board concluded that the opposition division's rejection of the first two interventions was not incorrect, though not necessarily the only possible procedural possibility. The third intervention was considered admissible because the intervener was a third party in the meaning of Article 105(1)(a) EPC for being "a party that has not yet had the opportunity to raise grounds of opposition and also to have the prospect to have them examined in substance".

XII. On the admissibility of the referral under Article 112(1)(a) EPC, the referring board reasoned that the remaining question of the admissibility of the intervener's appeal against the substantive issues of the decision under appeal would hinge on the legal question of whether the intervener acquired the status of an appellant within the meaning of Article 107, first sentence, EPC. The legal position of a party to appeal proceedings as such is of fundamental importance and requires the uniform application of the law.

XIII. With regard to the referred questions of law, the referring board discussed in particular decisions G 3/04, T 1026/98, T 1007/01 and T 1839/18. It concluded that the provisions of Article 107 EPC were not applicable one-to-one to interventions, i.e. when the intervener under Article 105 EPC enters the opposition proceedings at the appeal stage. Consequently, either the article was inapplicable, or the conditions of Article 107 EPC, which the intervener could evidently not fulfil, had to be disregarded.

XIV. The referring board noted that the intervention was based on a legal interest extraneous to the EPO proceedings. An intervener should be treated as an opponent with full rights, as if they had been a party to the proceedings from the beginning, i.e. an intervener should be given the opportunity to file their own appeal and continue the proceedings irrespective of a withdrawal of other appeals.

Course of the proceedings before the Enlarged Board

XV. The parties to the appeal proceedings are parties to the present proceedings under Article 112(2) EPC. As the referral concerns the party status of the intervener after the withdrawal of the sole appeal filed by opponent 01, the Enlarged Board invited the patent proprietor, opponent 01 and the intervener to comment in writing on the questions of law referred to the Enlarged Board. No observations have been filed by any of them in response to said invitation.

XVI. Pursuant to Article 9, first sentence, RPEBA, the Enlarged Board invited the President of the European Patent Office (hereinafter: President of the Office) to comment in writing on the questions of law. He submitted his comments dated 14 April 2025. By communication of 16 April 2025, the patent proprietor, opponent 01 and the intervener were given the opportunity to submit their observations on those comments in compliance with Article 9, second sentence, RPEBA within a period of two months. No observations have been submitted.

XVII. By communication published in the Official Journal of the EPO (OJ EPO 2024, A115), the Enlarged Board gave third parties the opportunity to file written statements in accordance with Article 10 RPEBA and received amicus curiae briefs from Compagnie Nationale des Conseils en Propriété Industrielle

(CNCPI), Patentanwaltskammer, The Institute of Professional Representatives before the European Patent Office (epi), Mr Peter de Lange and Mr Torsten Exner. Mr Ronny Hauck and Mr Daniel X. Thomas filed their comments after the period set in the Enlarged Board's communication. These amicus curiae briefs were forwarded to the patent proprietor, opponent 01 and the intervener as well as the President of the Office.

XVIII. The comments of the President of the Office and the amicus curiae briefs are reflected in the reasoning for answering the referred questions.

REASONS FOR THE DECISION

Procedural aspects

1 The Enlarged Board can decide on the referred questions in writing, without issuing a communication or holding oral proceedings, in accordance with Articles 13 and 14 RPEBA and with Articles 113 and 116 EPC. No party has requested oral proceedings, and the Enlarged Board does not consider this to be expedient.

Scope and focus of the referral

2 The points of law referred to the Enlarged Board, although phrased as two questions, are directed to one issue, i.e. the procedural status of an intervener. More specifically, the points concern a specific procedural situation characterised by the following chronological features:

Firstly, a decision in the administrative phase of the opposition proceedings pursuant to Articles 99 et seq. EPC is

appealed by one or more parties to the proceedings before the opposition division pursuant to Articles 106 and 107 EPC.

Second, after the administrative proceedings have been concluded and during the pending judicial proceedings before a board of appeal, a third party declares its intention to intervene in the appeal proceedings pursuant to Article 105 EPC.

Thirdly, the sole appeal, or all pending appeals, are subsequently withdrawn.

3 In this situation, the legal implications of an admissible intervention are called into question, particularly with regard to whether the appeal proceedings can continue with the intervener being treated as an appealing party to the proceedings, with the patent proprietor being deemed the respondent and possibly the opponent being deemed a party as of right, unless the opponent had withdrawn their opposition.

4 The Enlarged Board is also asked to reconsider its earlier ruling in decision G 3/04.

Admissibility of the referral

5 Pursuant to Article 112(1)(a) EPC, a board of appeal shall, during proceedings on a case, either of its own motion or following a request from a party to the appeal, refer any question to the Enlarged Board if it considers that a decision is required in order to ensure uniform application of the law, or if a point of law of fundamental importance arises.

6 Article 21 RPBA requires a board of appeal to refer a question to the Enlarged Board in a case where it considers it necessary to deviate from an interpretation or explanation of

the EPC contained in an earlier decision or opinion of the Enlarged Board.

7 The referred questions concern an aspect of fundamental importance with regard to the determination of a third party's legal status and associated rights in proceedings before the boards of appeal. The Enlarged Board is satisfied with the view of the referring board that the final decision on the appeal hinges on whether the appeal proceedings may continue with the intervener, despite the withdrawal of the sole appeal.

8 Furthermore, the referring board indicated its intention to depart from decision G 3/04.

9 Although Article 21 RPBA allows for, and even encourages, the further development of the case law, thereby granting the boards of appeal ample discretion for referral, the Enlarged Board does not find the prospect of a board of appeal referring a question of law solely because it disagrees with an earlier G-decision or opinion to be particularly appealing in terms of safeguarding consistent case law. In view of the legislative intent of Article 112 EPC to ensure a uniform application of the law, a board of appeal is expected to substantiate why it considers the earlier ruling on the interpretation of the law to have been superseded by a subsequent change in the law or for potential gaps in its reasoning. Another motivation for referring a question that had previously been answered by the Enlarged Board could be that a board of appeal is confronted with a new factual or procedural situation that distinguishes it substantially from the situation underlying the earlier referral. The Enlarged Board takes note of the referring board's criticism of the legal reasoning behind decision G 3/04 and will consider this in the following points.

10 The admissibility of the referral has found explicit or at least implicit support in the opinion of the President of the Office and the amicus curiae briefs.

11 The Enlarged Board finds that the referral is admissible.

On the merits of the referral

Decision G 3/04

12 Because the referring board expressed its disagreement with the ruling and parts of decision G 3/04 (Reasons, point 3.7), said decision is the starting point for analysing and answering the referred questions.

13 In decision G 3/04 the Enlarged Board was concerned with the following questions of law referred to it by interlocutory decision T 1007/01 of Technical Board of Appeal 3.2.05 dated 27 October 2004:

"(1) After withdrawal of the sole appeal, may the proceedings be continued with a third party who intervened during the proceedings?
(2) If the answer to question 1 is yes:
Is entitlement to continue the proceedings conditional on the intervener's compliance with formal requirements extending beyond the criteria for an admissible intervention explicitly laid down in Article 105 EPC; in particular, does the appeal fee have to be paid?"

14 The factual background of the appeal case underlying that referral was similar to the present case. The opponent had filed an appeal against the opposition division's interlocutory decision maintaining the patent in suit in amended form. The opponent, being the sole appellant, then withdrew the appeal shortly after a notice of intervention had been filed during the appeal proceedings. No objections were raised as to the admissibility of the intervention.

15 The Enlarged Board held that after the withdrawal of the sole appeal, the proceedings may not be continued with a third party who intervened during the appeal proceedings. It noted in point 10 of the Reasons (emphasis added)

> "… that the valid intervener only acquires the status of an opponent, irrespective of whether the intervention occurs during the proceedings before the opposition division or at the appeal stage. In either case his rights and obligations are the same as those of other opponents.
> This means that an intervener in proceedings before the opposition division, where all the opponents have withdrawn their oppositions, can continue the proceedings alone and, if need be, file an appeal, since he has the same status as an opponent under Article 99 EPC. For the same reason, if an appeal is filed by someone other than him, he is a party as of right according to Article 107, second sentence, EPC. If the intervention is filed during the appeal proceedings, the intervener, again because he can only acquire the status of an opponent, has the same rights and obligations - apart from the right to raise new grounds of opposition - as any opponent who has not filed an appeal. If in this case the sole, or each, appeal has been withdrawn, the appeal proceedings are terminated in respect of all the substantive issues, including the new grounds for opposition raised by the intervener, for all the parties."

Arguments of the referring board for deviating from G 3/04

16 The referring board expressed its awareness that the legislator did foresee differences between "normal" opposition proceedings and an opposition arising out of an intervention. However, apart from Article 105(2) EPC 1973 and Rules 57(4) and 79(4) EPC 1973, the EPC did not contain any provision directly limiting the procedural options of the intervener in a similar manner when it comes to the substantive examination of its opposition grounds (Reasons, points 3.7.2 and 3.7.3). From a procedural point of view it would be *"more logical"*, for a party intervening at the appeal stage, to require that party to "catch up" with the other parties to the suit by payment of the opposition fee, and to subsequently determine

the available procedural positions of the intervener in accordance with the outcome of opposition proceedings rather than irrespective thereof (Reasons, point 3.7.5).

17 The referring board considered the *"logic"* of decision G 3/04 *"unconvincing"* (Reasons, points 3.8 to 3.8.6) because it saw a contradiction between Article 105 EPC, that did not mention party position or party status, and Article 107 EPC, that left no room for a party status of the intervener. The EPC legislator did not provide any guidance in this regard.

18 In addition, the referring board regarded the *"result"* of decision G 3/04 as *"questionable"* in view of the overall legal framework and the general purpose of an intervention. This called for interpreting Article 105 EPC in such a way that, with regard to Articles 99 and 107 EPC, the legal requirement of having been a party to the proceedings prior to the appeal in order to acquire an independent party status in appeal, was replaced by a legal interest extraneous to the proceedings conducted before the EPO (Reasons, points 3.9 to 3.9.5). This would also be in line with the travaux préparatoires (Reasons, point 3.10).

19 Finally, the referring board saw decision G 3/04 in contradiction to decision G 1/94 in that the latter had found that interveners had more rights than appellants, in particular more substantive rights, which decision G 3/04 appeared to weaken (Reasons, point 3.11).

20 These considerations and, in particular, the conclusions of the referring board that, upon an intervention at the appeal stage, an intervener should be given the opportunity to file their own appeal and continue the proceedings even if the sole or all appeal were withdrawn, appear to find some support in the opinion of the President of the Office and four amicus

curiae briefs (Patentanwaltskammer, epi, Mr Exner and Mr Thomas).

No substantive changes to the legal situation since G 3/04

21 The referred questions concern the legal relationship and interplay between Articles 99(1), 105 and 107 EPC and, in particular, the interpretation of those articles in conjunction with each other.

22 As decision G 3/04 was decided on 22 August 2005 and, thus, before the entry into force of the EPC 2000 on 13 December 2007, an amendment to any of these articles could potentially prompt a reconsideration of the Enlarged Board's earlier conclusions and reasons when analysing the referred questions.

23 Article 99(1) EPC 1973/2000 (Opposition) reads:

Article 99(1) EPC 1973	Article 99(1) EPC 2000
Within nine months from the publication of the mention of the grant of the European patent, any person may give notice to the European Patent Office of opposition to the European patent granted. Notice of opposition shall be filed in a written reasoned statement. It shall not be deemed to have been filed until the opposition fee has been paid.	Within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin, any person may give notice to the European Patent Office of opposition to that patent, in accordance with the Implementing Regulations. Notice of opposition shall not be deemed to have been filed until the opposition fee has been paid.

With the EPC 2000, Article 99(1) EPC has remained in essence the same, only the second sentence of Article 99(1) EPC 1973 has been transferred to the Implementing Regulations. Article 99(1), first sentence, EPC was redrafted and clarified, without change in substance. Article 99(1) EPC contains some requirements for admissibility. Further requirements for admissible oppositions are laid down in

Rule 55 EPC 1973 corresponding to Rule 76 EPC. The time limit of nine months and the payment of the opposition fee have remained in the Convention. Only the formal requirement for the written reasoned statement in Article 99(1), second sentence, EPC 1973 has been transferred to the Rule 76(1) EPC (OJ EPO Special edition 4/2007, 108 and 109 (EN), 122 and 123 (DE), 120 and 121 (FR)).

Thus, the amendment does not alter the main purpose and stipulation of Article 99(1) EPC and, in fact, has not changed it substantively.

24 Article 105 EPC 1973/2000 (Intervention of the assumed infringer) reads:

Article 105 EPC 1973	Article 105 EPC 2000
(1) In the event of an opposition to a European patent being filed, any third party who proves that proceedings for infringement of the same patent have been instituted against him may, after the opposition period has expired, intervene in the opposition proceedings, if he gives notice of intervention within three months of the date on which the infringement proceedings were instituted. The same shall apply in respect of any third party who proves both that the proprietor of the patent has requested that he cease alleged infringement of the patent and that he has instituted proceedings for a court ruling that he is not infringing the patent. (2) Notice of intervention shall be filed in a written reasoned statement. It shall not be deemed to have been filed until the opposition fee has been paid. Thereafter the intervention shall, subject to	(1) Any third party may, in accordance with the Implementing Regulations, intervene in opposition proceedings after the opposition period has expired, if the third party proves that (a) proceedings for infringement of the same patent have been instituted against him, or (b) following a request of the proprietor of the patent to cease alleged infringement, the third party has instituted proceedings for a ruling that he is not infringing the patent. (2) An admissible intervention shall be treated as an opposition.

any exceptions laid down in the Implementing Regulations, be treated as an opposition.	

With the EPC 2000, Article 105 EPC 1973 has been redrafted with the purpose to clarify its meaning. While the details relating to intervention have been transferred to the Implementing Regulations (e.g. Rule 86 EPC), the essential stipulations with regard to the timing (any time after the end of the opposition period, Articles 99(1) and 105(1)), the conditions (pending national infringement proceedings on request of the patent proprietor or pending national proceedings on request of the third party directed to a declaration of non-infringement of the patent, Article 105(1)), and the treatment of an intervention as an opposition (Article 105(2)) have remained the same (OJ EPO Special edition 4/2007, 114 and 115 (EN), 130 and 131 (DE), 126 and 127 FR)).

Thus, the amendment does not alter the main purpose or stipulation of Article 105 EPC, particularly Article 105(2) EPC and does not entail any substantial changes.

25 Article 107 EPC 1973/2000 (Persons entitled to appeal and to be parties to appeal proceedings) reads in the three official languages:

Article 107 EPC 1973	Article 107 EPC 2000
Any party to proceedings adversely affected by a decision may appeal. Any other parties to the proceedings shall be parties to the appeal proceedings as of right.	*(unchanged)*
Die Beschwerde steht denjenigen zu, die an dem Verfahren beteiligt waren, das zu der Entscheidung geführt hat, soweit sie durch die	Jeder Verfahrensbeteiligte, der durch eine Entscheidung beschwert ist, kann Beschwerde einlegen. Die übrigen

Entscheidung beschwert sind. Die übrigen an diesem Verfahren Beteiligten sind am Beschwerdeverfahren beteiligt.	Verfahrensbeteiligten sind am Beschwerdeverfahren beteiligt.
Toute partie à la procédure ayant conduit à une décision peut recourir contre cette décision pour autant qu'elle n'ait pas fait droit à ses prétentions. Les autres parties à ladite procédure sont de droit parties à la procédure de recours.	Toute partie à la procédure aux prétentions de laquelle une décision n'a pas fait droit peut former un recours contre cette décision. Les autres parties à ladite procédure sont de droit parties à la procédure de recours.

While the English version of Article 107 EPC 1973 remained unchanged, the German and French versions were amended for reasons of editorial improvement and adaptation in the three official languages (OJ EPO Special edition 4/2007, 120, 121 (EN), 136 and 137 (DE), 134 and 135 (FR)).

The explanatory notes make it clear that the amendment was not intended to alter the main purpose or stipulation of the first sentence of Article 107 EPC, which has not changed in substance.

26 In conclusion, none of the EPC provisions relevant to the present referral have been amended in a substantive manner after the decision G 3/04 was issued, prompting a reconsideration of the Enlarged Board's findings in that decision regarding the status of an intervener who submitted a notice of intervention at the appeal stage, after which all pending appeals were withdrawn.

Considerations on the legal concept of appeals

27 Under Article 106(1), first sentence, EPC appeals lie from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and the Legal Division. It is such

decisions themselves rather than their grounds that are open to appeal (see T 611/90, Reasons, point 2).

28 The purpose of appeals is to provide the parties to proceedings before the administrative departments of the EPO with legal protection against a possible infringement of their rights under the EPC in a particular case (cf. Münchner Gemeinschaftskommentar, 20th edition, July 1997, Moser, Art. 106-112, reference point 2; Keussen in Benkard, EPÜ, 4th edition, 2023, Introduction to Art. 106-112a, reference point 7).

29 The primary object of the appeal proceedings is the review of the decision under appeal in a judicial manner with regard to their procedural and substantive correctness, however, subject to certain restrictions regulated in the rules of procedure of the boards of appeal (see Article 12(2) RPBA; G 1/86, Reasons, point 14; G 9/91, Reasons, point 18; T 26/88, Reasons, point 12; T 611/90, Reasons, point 3). Thus, appeal proceedings before the boards of appeal are wholly separate and independent from the proceedings at the administrative instance before one of the departments mentioned in Article 106(1) EPC. They are not, and were never intended to be, a mere continuation of the proceedings before the administrative department of the EPO (cf. Case Law of the Board of Appeal, 11th edition 2025, V.A.1.1 and 2.2, with further references).

30 The fact that the boards of appeal act as courts was confirmed in decision G 1/86 (Reasons, point 14). In decision G 1/99 (Reasons, point 6.6), the Enlarged Board held that the appeal procedure is to be considered as a judicial procedure (see G 9/91, Reasons, point 18) proper to an administrative court (see G 7/91 and G 8/91, Reasons, point 7; Keussen in Benkard, supra, Introduction to Art. 106-112a, reference points 4 et

seqq.; Schulte, Patentgesetz mit EPÜ, 12th edition, 2024, Annex to § 73, Art. 106, reference points 3 and 5).

31 The Enlarged Board held in decision G 9/92 (Reasons, point 9) that it is

"… the aim of an appeal … to eliminate an "adverse effect" (Art. 107, first sentence, EPC). It is the duty of the Board of Appeal to examine whether the appeal is admissible and allowable (Art. 110(1) EPC). … However, the subject-matter of the appeal proceedings is always the appeal itself. The appeal may not be simply regarded as a means of commencing the proceedings."

32 Hence, the extent of appeal proceedings is determined by the appeal. Following the principle of ne ultra petita, the initial "request" determines the extent of the proceedings (cf. G 9/92, Reasons, point 1; Keussen in Benkard, supra, Introduction to Art. 106-112a, reference points 9, 25 et seqq.).

33 The Enlarged Board held in decision G 9/92 (Reasons, point 6) that

"… [t]he extent of the power of the Boards of Appeal to decide upon the proper scope of the patent should be considered in conjunction with the effect of withdrawal of the appeal. Appeal proceedings are terminated when the, or each, appeal has been withdrawn. Once the, or each, appeal has been withdrawn, there is no power to continue the proceedings (decisions G 7/91 … and G 8/91 …)."

This is also known as the principle of party disposition or disposition maxim (cf. Keussen in Benkard, supra, Introduction to Art. 106-112a, EPÜ, reference points 21 et seqq.).

34 In conclusion, the appeal proceedings are characterised by the following principles:

(1) The appeal proceedings are of a judicial nature, and they are not a continuation of the proceedings before the administrative departments of the EPO.

(2) The appeal is designed as a remedy on both facts and law for parties to proceedings before the administrative departments of the EPO with the aim to eliminate an "adverse effect" of a decision referred to in Article 107(1) EPC.

(3) The scope of the appeal proceedings is primarily determined by the decision under appeal, the appellant's requests submitted with the notice of appeal and the statement of grounds of appeal, and, in inter partes proceedings, the submissions of the other party or parties in reply to the appellant's statement of grounds of appeal.

(4) The appeal procedure is not an ex officio procedure of the EPO for internal self-control and self-correction. Rather, it depends on the appellant to initiate, determine the scope of, and conclude the procedure within that party's power of disposal, in accordance with the principle of party disposition. This is subject to the prohibitions of a ruling ultra petita and reformatio in peius.

Considerations on the qualification as a party

35 Under Article 107, first sentence, EPC, any party to proceedings adversely affected by a decision taken by an authority as defined in Article 106(1) EPC may appeal. A party is adversely affected within the meaning of this provision if the decision fails to meet that party's procedural requests. This has to be assessed by comparing the requests at the administrative instance with the substance of the contested decision (cf. T 244/85, Reasons, point 3; T 1682/13, Reasons, point 1).

36 The parties to the proceedings leading to the decision under appeal are the persons expressly designated by law as parties to the proceedings for the respective stage of the proceedings, e.g. in Article 99(3) EPC, and, in addition, all those whose legal interests are affected by the decision (e.g. T 811/90 regarding documents excluded from file inspection; J 28/94 regarding a request for suspension of proceedings; J 33/95 regarding a request for suspension of proceedings).

37 More specifically, the parties to the proceedings are first of all the parties for whom the deciding body intended to issue the decision. These are the parties that are named in the rubrum of the decision and may include an intervener at the administrative opposition stage (cf. Münchner Gemeinschaftskommentar, supra, Art. 107, reference point 11; Keussen in Benkard, supra, Art. 107, reference point 5; Schulte, supra, Annex to § 73, Art. 107, reference points 3 et segg.; Bühler in Singer/Stauder/Luginbühl, EPC, 9th edition, 2023, Art. 107, reference point 10; Visser's Annotated European Patent Convention 2024 Edition, 2025, Art. 106, chapter 1).

38 By contrast, a third party that has raised objections under Article 115 EPC (third party observations) in the administrative proceedings leading to the decision under appeal is not a party to these proceedings and therefore not entitled to appeal (cf. Article 115, second sentence, EPC).

39 However, a third party may be entitled to appeal against a decision of the administrative department of the EPO if that department had ignored their participation due to procedural errors or if their right to participate is disputed and the matter is under review (cf. Keussen in Benkard, supra, Art. 107, reference points 6 to 8).

40 A party is adversely affected if the decision, or rather the wording of the order of the decision, deviates to their detriment from a request made by that party (cf. Münchner Gemeinschaftskommentar, supra, Art. 107, reference point 14; Keussen in Benkard, supra, Art. 107, reference point 41, Schulte, supra, Annex to § 73, Art. 107, reference point 12; Bühler in Singer/Stauder/Luginbühl, supra, Art. 107, reference point 19; Visser's Annotated European Patent Convention, supra, Art. 107, chapter 2; T 193/07, Reasons, point 2.2.1, where the board of appeal held that the mere possible disadvantages in later national court proceedings which could result from the decision of the administrative department does not entitle to appeal against it).

41 As to who qualifies as a party to the appeal proceedings, the travaux préparatoires for the EPC 1973 contain the following remarks in the respective original, not translated versions.

42 First working draft of the Agreement on a European Patent Law Articles 91 to 100, 28 July 1961 (IV/5569/61-D):

"Artikel 92 Beschwerdeberechtigte
(1) Die Beschwerde steht den am Verfahren vor dem Europäischen Patentamt Beteiligten zu, soweit sie durch die Entscheidung beschwert sind.
(2) Als Beteiligter im Sinne des Absatz 1 gilt auch der, dessen Beteiligung am Verfahren abgelehnt worden ist.

Bemerkungen:
Diese Bestimmung des Arbeitsentwurfs begrenzt den Kreis der zur Beschwerde berechtigten Personen in zweifacher Hinsicht, einmal durch Beschränkung auf die an dem Verfahren vor dem Europäischen Patentamt Beteiligten, zum anderen durch das Erfordernis einer Beschwer. Die Beschwerde soll nur den Personen zustehen, die am Verfahren vor dem Europäischen Patentamt beteiligt sind. Damit soll die Beschwerdemöglichkeit auf die Personen beschränkt werden, denen das vorliegende Abkommen für die in Betracht kommende Angelegenheit eine Stellung im Verfahren einräumt. Der Begriff das Verfahren ist dabei im weiten Sinn zu verstehen, so dass nicht nur an das Patenterteilungs- und Prüfungsverfahren gedacht ist. Vielmehr fallen unter diesen Begriff z.B. auch das Verfahren zur

Nennung des Erfinders, das Verfahren der Aussetzung im Falle der widerrechtlichen Entnahme (Artikel 19 Abs. 4) sowie die noch zu entwerfenden Verfahren über die Akteneinsicht und bei der Verwaltung der endgültigen europäischen Patente. Wie der Begriff des Verfahrens ist auch hier der Ausdruck "Beteiligter" im weitesten Sinn zu verstehen. Naturgemäß ist der Kreis der Beteiligten im Sinn dieses Artikels weitergezogen als in Artikel 90a Abs. 2 für das Prüfungsverfahren. Dort ist der Ausdruck "Beteiligter" ausdrücklich auf die Dritten beschränkt, die Antrag auf Prüfung gestellt oder sich dem Prüfungsverfahren angeschlossen haben. Eine Beschränkung der Beschwerdemöglichkeit auf die an Verfahren Beteiligten ist in allen Rechtssystemen üblich. Absatz 2 führt einen in Artikel 91 Abs. 2 zum Ausdruck kommenden Gedanken konsequent weiter. Es soll eindeutig festgelegt werden, dass auch die Frage, ob jemand Beteiligter ist oder nicht, von der Beschwerdekammer überprüft werden kann. Artikel 91 Abs. 2 besagt u.a., dass die Feststallung, dass kein rechtswirksamer Anschlussantrag gemäß Artikel 85 vorliege, mit der Beschwerde angegriffen werden kann. Artikel 92 Abs. 2 soll klarstellen, dass diese Berechtigung nicht mit der Begründung zunichte gemacht werden kann, dass dem abgewiesenen Antragsteller im Anschluss die Beschwerde nicht zustehe, da festgestellt sei, dass er mangels rechtswirksamen Antrags nicht als Beteiligter anzusehen ist.
Auch bei dem Erfordernis der Beschwer handelt es sich um eine von der Rechtsprechung wohl sämtlicher Vertragsstaaten geforderte Voraussetzung für die Einlegung eines Rechtsmittels. Dieser allgemeine Verfahrensgrundsatz ergibt sich aus der Überlegung, dass Gerichte, gerichtsähnliche Instanzen und Behörden von niemandem ohne Anlass und Notwendigkeit in Anspruch genommen werden können. Beschwert ist jemand nur dann, wenn ihm das, was er beantragt hatte, versagt worden ist.”

43 Preparatory Documents 1972 Munich Diplomatic Conference for the Setting up of a European system for the grant of patents, 1973 (M6498-IV-64-F):

“Article 107
Cet article traite des personnes admises à former le recours. Il débute par ces mots : «Quiconque a participé à la procédure». Le Royaume-Uni estime que ce «quiconque» devrait être précisé à savoir le titulaire du brevet et les tiers au sens de l’article 96, §2.
Le Président observe que d’autres tiers peuvent intervenir, ceux qui par exemple auraient demandé la publication d’un dossier. La portée de ce «quiconque» doit donc se dégager

selon la procédure donc il s'agit. En conclusion, le groupe estime qu'il serait inutile et même dangereux de changer l'expression «quiconque a participé».”

44 Conference document drawn up by the General Drafting Committee Convention Articles 84 to 111, Munich, 30 September 1973 (M/146/R 4):

“Article 106 Persons entitled to appeal and to be parties to appeal proceedings. Any party to proceedings adversely affected by a decision may appeal.
Any other parties to the proceedings shall be parties to the appeal proceedings as of right.”

45 In conclusion, the requirements for qualifying as a party to appeal proceedings are characterised by the following principles:

(1) A party entitled to appeal within the meaning of Article 107, first sentence, EPC is only the person who had formally participated in the proceedings before the administrative department that issued the impugned decision.

(2) A third party that has not been admitted as a party to the proceedings before the administrative department which issued the impugned decision is therefore not entitled to appeal, unless the third party's entitlement to participate in the proceedings was ignored due to procedural error or incorrect application of the law.

(3) An adverse effect is determined with regard to the procedural situation of a party participating in the proceedings that led to the decision under appeal and only exists if a decision of an administrative department falls short of the request of a party to the proceedings or deviates from it without their consent.

(4) Any other "negative" or "disadvantageous" impact or effect of a ruling by an administrative department of the EPO on a third party that has not formally participated in the proceedings before the administrative department does not fulfil the legal threshold required by Article 107, first sentence, EPC.

Considerations on the legal concept of interventions

46 The EPC provides for only one legal instrument for a third party to challenge the grant of a European patent, i.e. the filing of an opposition pursuant to Article 99 EPC based on a ground for opposition mentioned in Article 100 EPC. The filing of an opposition is restricted in particular by the non-extendable opposition period of nine months of the publication of the notice of grant of the European patent (cf. Articles 97(3) and 99(1), first sentence, EPC). Failure to observe this time limit leads to the inadmissibility of the opposition and cannot be rectified by a request for restitutio in integrum in the event of failure to observe a time limit pursuant to Article 122 and Rule 136 EPC. Once the opposition period has expired, a European patent can in principle only be challenged in the courts or before other national authorities of the EPC contracting states, including the Unified Patent Court (UPC).

47 The legal concept of intervention, as set out in Article 105 EPC, establishes a special legal framework for the legal institution of an opposition. This takes place outside the period for filing an opposition provided for in Article 99 EPC, but still before the competent departments of the EPO, which includes the boards of appeal as the centralised judiciary in the proceedings under the EPC. This exceptional

nature inherently precludes an extensive interpretation and application of this legal remedy.

48 Article 105 EPC is intended to provide third parties after the elapse of the opposition period with the right to have the validity of a European patent, which they are alleged to infringe, examined in the procedure provided for under the EPC at the administrative stage before the opposition division and / or at the judicial stage before the boards of appeal.

49 In decision G 1/94 (Reasons, point 7), the Enlarged Board stated with regard to the purpose of Article 105 EPC, that

> "… it is common ground that by relying on the centralised procedure before the EPO in cases where infringement and revocation proceedings otherwise would have to be simultaneously pursued before national courts, an unnecessary duplication of work can be avoided, reducing also the risk of conflicting decisions on the validity of the same patent. This speaks no doubt with considerable force in favour of admitting intervention of assumed infringers even at the appeal stage of the proceedings before the EPO."

50 This interpretation of Article 105 EPC is confirmed by the preparatory work of the EPC (travaux préparatoires). Already when it was first decided to introduce a provision corresponding to the present Article 105 EPC (see BR 144e/71), it was generally agreed that the

> "… object of this is to ensure that the presumed patent infringer is not compelled to bring an action for revocation before the courts in the named Contracting States as long as central opposition proceedings are still pending. This would ensure a saving of time and also minimise as far as possible the danger of counter-rulings being made."

51 Under Article 105(1) EPC, to intervene admissibly in opposition proceedings, a party must show either that proceedings for infringement of the same patent have been instituted against them, or that following a request of the proprietor of the patent to cease alleged infringement, the

third party have instituted proceedings for a ruling that they are not infringing the patent. Rule 89 EPC sets out additional requirements. Article 105(2) EPC stipulates that an admissible intervention shall be treated as an opposition.

52 The valid intervener acquires the status of an opponent, irrespective of whether the intervention occurred during the proceedings before the opposition division or at the appeal stage. The intervener can raise any ground for opposition mentioned in Article 100 EPC (cf. G 1/94, Reasons, point 13). This extends their rights beyond those of parties to the appeal who had defined the grounds for opposition under Article 100 EPC in their notice of opposition under Article 99(1) EPC.

53 In other aspects, the intervener's rights and obligations are the same as those of other opponents. As a general principle, an intervener enters into the proceedings at the stage they are at on the date of intervention, including pending time limits (see T 392/97, Reasons, point 4.4).

54 Intervention at the opposition stage in proceedings before the opposition division is normally accessory, i.e. with regard to the necessary pendency of opposition proceedings at the time of accession (see G 4/91, Headnote 1). The intervener is not merely an intervener of the other opponent(s) but enjoys all the rights and obligations of a party to the proceedings, in particular with regard to the right to be heard, the filing of requests, the lodging of an appeal or participation in appeal proceedings (cf. Kley/Thums in Benkard, supra, Art. 105, reference points 4 and 19; Bühler in Singer/Stauder/Luginbühl, supra, Art. 107, reference point 2).

55 In conclusion, the legal concept of an intervention is characterised by the following principles:

(1) The legal remedy of an intervention is governed by a special legal framework which, due to its exceptional nature, inherently precludes an extensive interpretation and application.

(2) The intervention is intended to provide third parties after the elapse of the nine months opposition period with the opportunity to have the validity of a European patent, which they are alleged to infringe, centrally examined.

(3) As a general principle, an intervener enters into the proceedings at the stage they are at on the date of intervention.

(4) An intervener at the opposition stage enjoys all the rights and obligations of a party to the administrative proceedings before the opposition division.

Considerations on the interplay of appeal and intervention

56 The above considerations on the legal concepts of an appeal and intervention as well as on the qualification as a party to appeal proceedings make it necessary to take an integral view of the interplay between appeal and intervention.

57 If an intervention is declared in an admissible manner only at the appeal stage, the intervener cannot procedurally benefit from any status in the administrative proceedings but has to prove vis-à-vis the competent board of appeal that all requirements of Article 105 EPC and Rules 76 to 86 and 89 EPC are met. The valid intervener, who had not been a party to the administrative proceedings leading to the decision under appeal, becomes a party as of right in accordance with Article 107, second sentence, EPC and enters the appeal

proceedings at the stage they are in at the time of effect of the intervention.

58 While it is mainly the purpose of the opposition appeal procedure to give the losing and adversely affected party the possibility of challenging the decision of the opposition division on its merits (cf. G 9/91 and G 10/91, Reasons, point 18), it is the purpose of an intervention to allow an assumed infringer to defend themselves against the patent proprietor's action with all available means of attacking the patent, which he is accused of infringing, including the raising of fresh grounds for opposition under Article 100 EPC (cf. G 1/94, Reasons, point 13; G 3/04, Reasons, point 10).

59 However, as held in decision G 1/94 (Reasons, point 7), "… even in the light of its object and purpose of an intervention, ambiguity remains as to the interpretation of Article 105 EPC in respect of intervention in appeal proceedings." In other words, intervention at appeal needs to fit into the particular legal and procedural framework of the boards of appeal as the first and final judicial instance in the proceedings under the EPC.

60 As already mentioned above in the context of the considerations on the legal concept of appeal, the appeal proceedings are governed inter alia by the principle of party disposition. This procedural principle means that the parties have the right not only to initiate the appeal proceedings but also to dispose of them. From this it follows that the parties determine the start of the proceedings and their scope by their requests, and that a board of appeal, as a matter of principle, may neither initiate nor continue appeal proceedings ex officio without a request from a party if the procedural act which gave rise to the proceedings has been withdrawn, unless procedural law permits continuation (cf.

G 7/91 and G 8/91, Reasons, point 5; Keussen in Benkard, supra, Introduction to Art. 106-112a, reference point 21; Bühler in Singer/Stauder/Luginbühl, supra, Art. 107, reference point 42).

61 While Rule 84(2) EPC permits the EPO to continue opposition proceedings of its own motion in the event of withdrawal of the sole opposition or all oppositions, this discretion may only be exercised by the competent opposition division during the administrative stage of opposition proceedings. The underlying reason for this is the public interest in ensuring that no patents lacking legal validity are maintained. However, at the judicial appeal stage before the boards of appeal the principle of party disposition takes precedence because the public interest is primarily and sufficiently safeguarded by the fact that anyone may, within nine months of the publication of the mention of the grant of the European patent, file an opposition against the patent pursuant to Article 99(1) EPC (cf. G 7/91 and G 8/91; Keussen in Benkard, supra, Introduction to Art. 106-112a, reference point 22; Schulte, supra, Annex to § 73, Art. 106, reference point 11, and Art. 107, reference point 18).

62 Hence, it is this principle, together with the binding nature of the parties' requests, that defines the limits of any procedural action of all involved in appeal proceedings, be it

- the appellant that can actively shape the proceedings by defining the scope of judicial review of a contested administrative decision in their appeal;
- the respondent and other non-appealing parties as of right that can respond to an appeal but cannot extend its scope or continue after withdrawal of the sole or all appeals without infringing the principle of prohibition of reformatio in peius; or

- the board of appeal that, with certain limited exceptions in ex parte appeals, is bound by the parties' requests and submissions without infringing the prohibition of ruling ultra petita; the principle of ex officio examination laid down in Article 114(1) EPO is to be interpreted and applied restrictively in appeal proceedings due to their judicial nature.

63 While an intervener in appeal becomes a party as of right to the proceedings by virtue of Article 107, second sentence, EPC, that party does not enjoy a better or different status to the other non-appealing parties who had formally been parties to the preceding administrative proceedings; this point appears to be key in two amicus curiae briefs (CNCPI, Mr Hauck) for proposing a negative answer to the referred questions. An exception applies only with regard to the assertion of grounds for opposition, as the intervener is not restricted in this respect (cf. G 1/94, Reasons, point 13; G 3/04, Reasons, point 10). This exception, however, does not change the party status in principle, nor does it change the need to fully observe the principle of party disposition.

64 Parties to appeal proceedings as of right do not have a legal status independent of the appeal, because Article 107, second sentence, EPC merely guarantees that they have a right to participate in pending appeal proceedings. Whether or not they actively exercise this right to participate is entirely for them to decide (cf. Schulte, supra, Art. 107 EPC, reference point 18; Bühler in Singer/Stauder/Luginbühl, supra, Art. 107, reference point 43).

65 In the absence of any specific legal provision to the contrary, these limits are equally applicable to third parties entering into pending appeal proceedings by virtue of an admissible intervention. Similarly, these limits do not allow

for an expansive interpretation and application of Article 105(2) EPC mutatis mutandis or even by analogy as suggested by the referring board, the President of the Office and four amicus curiae briefs (epi, Patentanwaltskammer, Mr Exner and Mr Thomas).

66 If the sole or all appeals are withdrawn in opposition appeal proceedings, the appeal proceedings end with regard to all substantive issues for all parties involved. This also applies to any new grounds for opposition raised by the intervener. Therefore, the proceedings cannot be continued with an intervener. The reason for this is the fact that the intervener at appeal does not have the status of an independent appellant but is merely a party as of right in accordance with Article 107, second sentence, EPC. This appears to be supported by decision G 2/91 (Reasons, point 6.1), Kley/Thums in Benkard, supra, Art. 105 (reference point 20a), Keussen in Benkard, supra, Introduction to Art. 106-112a (reference points 22 et seqq.) and Art. 110 (reference point 19), Bühler in Singer/Stauder/Luginbühl, supra, Art. 107 (reference points 5 and 54), Bostedt in Singer/Stauder/Luginbühl, supra, Art. 105 (reference point 33) and Visser's Annotated European Patent Convention, supra, Art. 105 (chapter 1.3) and Art. 107 (chapter 3.1), although Münchner Gemeinschaftskommentar, supra, Art. 107 (reference point 31), expresses an opposing view, depending on the payment of the appeal fee by the intervener, as also suggested by the referring board, the President of the Office and four amicus curiae briefs (Patentanwaltskammer, epi, Mr Exner and Mr Thomas).

67 In conclusion, the interplay of appeal and intervention is characterised by the following principles:

(1) An intervener at appeal cannot procedurally benefit from any status in the preceding administrative proceedings before the opposition division and becomes a party as of right in accordance with Article 107, second sentence, EPC.

(2) As the Enlarged Board acknowledged in decision G 1/94 that ambiguity remains as to the interpretation of Article 105 EPC in respect of intervention in appeal proceedings, intervention at appeal needs to fit into the particular legal and procedural framework of the boards of appeal as the first and final judicial instance in the proceedings under the EPC.

(3) The principle of party disposition, together with the binding nature of the parties' requests, limits the option for procedural action of all involved in appeal proceedings (appellants, respondents, parties as of right and the boards of appeal).

(4) In the absence of any specific legal provision to the contrary, the limits are equally applicable to third parties entering into pending appeal proceedings by virtue of an admissible intervention;

(5) The legal status of the party as of right pursuant to Article 107, second sentence, EPC is not the same as that of the appellant whereby only the latter has the right to dispose of the appeal they have lodged;

(6) If the sole or all appeals are withdrawn in opposition appeal proceedings, the proceedings end with regard to all substantive issues for all parties involved and cannot be continued with an intervener at the appeal stage or any other non-appealing party.

Case law of the boards of appeal

68 A search of the case or practices of the boards of appeal after decision G 3/04 (OJ EPO 2006, 118) has identified 159 decisions, of which two decisions appear to be particularly relevant to the referral. These decisions (T 1108/02 and T 439/17) are presented below, with relevant points from the respective reasons quoted. No decision has been found which does not follow decision G 3/04.

T 1108/02

69 The patent proprietor filed an appeal against the decision of the opposition division, which found the claims of the main request to contravene the requirements of Article 123(2) EPC. During the appeal proceedings, an intervention by a third party (intervener 1) was filed in view of infringement proceedings before the Landgericht Düsseldorf. In addition, a second intervention by another third party (intervener 2) was filed, first based on the service of a declaration of non-infringement in the Tribunale di Milano, and second by virtue of the service of a complaint relating to infringement proceedings before the Landgericht Düsseldorf. Subsequently, the proprietor, being the sole appellant, withdrew its appeal.

The board indicated in a communication that, according to decision G 3/04, the withdrawal of the appeal terminated the proceedings, including the interventions. The interveners requested that the board should deviate from decision G 3/04 or make a referral to the EBA. The board considered diverging from decision G 3/04 but found no basis to do so and rejected the referral request, finding no exceptional circumstances or new legal issues. The board set out in points 13 to 16 of the reasons for the decision that

"[w]here a question of law has been answered in a decision of the Enlarged Board of Appeal, it is the view of this Board that only exceptional circumstances would justify renewed referral of the same or a very similar question. Such a renewed referral would tend to decrease rather than increase legal certainty, and so should generally be avoided on this ground alone.

For the renewed referral leading to the overturn by decision G 9/93 of the previous view allowing a proprietor to oppose his own patent given in decision G 1/84, the exceptional circumstances were that such self-opposition had already been considered in two earlier Enlarged Board of Appeal decisions G 9/91 and G 10/91 … as incompatible with the view taken in these decisions that opposition proceedings under the EPC are in principle to be considered as contentious proceedings between parties normally representing opposing interests.

No such doubts have been thrown by any later Enlarged Board of Appeal decisions on the decision G 3/04.

Another exceptional circumstance might be where a party convinced a board that the Enlarged Board of Appeal had not had before it some material legal aspect, and the referring board were itself convinced that taking this new material legal aspect into account would lead to the question being answered in a different way. A third exceptional situation might be one where other related questions of law to which the Enlarged Board of Appeal had not yet provided an answer did require referral, and in this context the Enlarged Board of Appeal might be asked also to include in its review the existing answer."

The board, finally, agreed with decision G 3/04 and its reasoning which it considered as being directly applicable to the case before it and leading to the conclusion that the appeal proceedings terminated with the withdrawal of the appeal by the patent proprietor as the sole appellant.

T 439/17

70 A third party initially had filed an intervention during opposition proceedings based on German proceedings for preservation of evidence ("*Beweissicherungsverfahren*") instituted by the patent proprietor. The opposition division held that the intervention was not admissible because no

proceedings for infringement within the meaning of Article 105(1)(a) EPC had been brought against the intervener. Both the patent proprietor and the opponent filed appeals against the interlocutory decision of the opposition division to maintain the patent in suit in amended form. During the appeal proceedings, the patent proprietor started an infringement claim (Sections 139 and 140 PatG) against the third party, based on which the third party declared a second intervention. While this second intervention was admissible, the board held that the intervener was not entitled to continue the appeal proceedings independently after both the patent proprietor and the opponent had withdrawn their respective appeals.

The board set out in points 15 and 16 of the reasons for the decision (unofficial translation from German) that

"… it must be concluded that proceedings for the preservation of evidence […]and the subsequent infringement action are to be regarded as two separate proceedings with regard to the application of Article 105(1)(a) EPC. The first intervention is therefore inadmissible, since the second opponent was unable to prove that an action for infringement of the patent had been brought against it prior to the first intervention, so that the requirements of Article 105(1) EPC were not met.

As already mentioned above, the second intervention is admissible, so that opponent 2 has the effective party status as an opponent in the appeal proceedings. However, it is not entitled to continue the appeal proceedings independently after the withdrawal of the appeals by Opponent 1 and the patent proprietor (G 3/04 supra, see headnote and grounds, para. 10, last sentence)."

Interventions in proceedings before the courts of the EPC contracting states and the UPC

71 In order to ensure harmonised application of the EPC and thus to avoid divergences wherever possible in proceedings before the EPO's administrative departments and the boards of appeal

on the one hand as well as in post-grant proceedings before national courts and authorities, including the UPC, on the other hand, the Enlarged Board routinely considers the legal situation and case law in EPC contracting states when deciding on referrals.

Switzerland

72 In Switzerland, it is possible to intervene in civil law and in patent law (via the application of civil law in nullity proceedings). Swiss civil law knows intervention under the Code of Civil Procedure, which is applicable before the cantonal courts, and under the Federal Act of Civil Procedure, which applies to the proceedings before the federal court.

73 Article 76(1) Code of Civil Procedure provides that the intervening party, in order to support the main party, can take all procedural steps that are permissible under the rules of procedure, in particular assert all means of attack and defence and also lodge appeals. However, if the procedural actions of the intervening party contradict those of the main party, they are irrelevant to the proceedings pursuant to Article 76(2) Code of Civil Procedure (see however Federal Court, BGE 142 III 629, which appears to allow exceptions). The intervening party is generally not allowed to lodge an appeal under the Swiss Code of Civil Procedure, if the main party does not wish to do so (see Federal Court, BGE 142 III 271).

74 Article 15(3) Federal Act of Civil Procedure states that the intervener can also take procedural steps and file an appeal against the will of the party if the judgement also affects the intervener's relationship with the opposing party.

75 The Swiss patent law currently recognises an opposition procedure in which anyone can raise objections to the grant of

a patent after it has been granted. The opposition must be filed within nine months of entry of the grant in the register (Article 59c(1) Patent Act, Article 73(1) Patent Regulation). Neither the Patent Act nor the Patent Regulation provide for the involvement of third parties and this does not take place as part of the opposition procedure. In practice, opposition seems to have played a subordinate role to date, which is mainly due to the fact that patent examination is limited under Swiss law. In the context of an action for revocation, the Code of Civil Procedure applies, which allows the involvement of third parties.

76 Swiss administrative law does not contain a provision comparable to an intervention in the civil procedure.

77 No case law has been found in which proceedings were continued by an intervening party after withdrawal of the main action.

Germany

78 Withdrawal of the action generally results in the proceedings being terminated, provided that such withdrawal takes place before the start of the oral hearing (Section 269 of the Code of Civil Procedure), or before the parties' requests are confirmed in the oral hearing (Section 92 Code of Administrative Procedure). Any subsequent withdrawal requires the defendant's consent.

79 Under German patent law, it is possible to intervene in proceedings under Section 59 of the Patent Act. An intervention makes the intervener a full opponent. A third party may also intervene at the appeal. Although the intervener does not acquire the status of an appellant, they do acquire the status of an opponent. If the patent proprietor terminates the opposition proceedings by abandoning the patent, the opponent may continue the proceedings if they can

prove that they have an interest in protecting their rights (see Federal Court of Justice, X ZB 18/06).

80 In German civil law, the intervener must accept the legal dispute as it stands at the time of their intervention. They are entitled to assert means of attack and defence, and to take all effective procedural steps, provided their statements and actions do not contradict those of the main party. Withdrawal of the action by the plaintiff retroactively eliminates the procedural effects of lis pendens. This means that the intervener no longer has the legal option of continuing the legal dispute on behalf of the main party they support. The intervener cannot continue the legal dispute independently, i.e. as their own legal dispute. By joining the proceedings, the intervener becomes a party to the dispute on the side of the plaintiff but does not become a party itself. The same applies in nullity proceedings; reference is made to the decision of the Federal Court of Justice, Ia ZR 212/63 (unofficial translation from German):

"The withdrawal of the action by the plaintiff meant that the procedural effects of lis pendens were retroactively nullified (Section 271(3) sentence 1 ZPO in conjunction with Section 41 o PatG); the nullity proceedings were terminated by the withdrawal of the action. This means that the intervener no longer has the legal option of continuing the legal dispute on behalf of the main party it supports."

and to the decision of the Federal Patent Court, 20 W (pat) 324/05 (unofficial translation from German):

"In contrast to the independent procedural status enjoyed by the opponent and the party joining the proceedings pursuant to Section 59(2) of the German Patent Act, the position of the intervener pursuant to Sections 66 and 67 Code of Civil Procedure is linked to that of the party who has lodged an admissible opposition in due time and otherwise in accordance with the rules. If, for example, the latter withdraws their opposition, the procedural status of the opponent and thus also that of the intervener supporting them ends in accordance with Section 66 of the Code of Civil Procedure, whereas the

procedural status of the party joining the proceedings in accordance with Section 59 (2) of the German Patent Act is not affected by this."

In appeal, if the plaintiff withdraws his appeal against a judgment dismissing the action, the appeal proceedings cannot be continued by an intervener who has not lodged an appeal himself, even if this intervener is considered to be a co-litigant of the main party pursuant to Section 69 of the German Code of Civil Procedure (cf. Federal Court of Justice, Xa ZR 110/08 (BPatG), confirming Federal Court of Justice, Ia ZR 237/63; Federal Court of Justice, II ZB 16-98).

81 An intervention does not take place in German administrative court proceedings. The provisions of Sections 66 et seq. of the Code of Civil Procedure on intervention are not applicable under the Code of Administrative Procedure, either directly or by analogy. Although Section 64 of the Code of Administrative Procedure stipulates that the Code of Civil Procedure may be applied mutatis mutandis where the Code of Administrative Procedure does not contain any provisions on procedure, Section 63 of the Code of Administrative Procedure as lex specialis specifies who can be a party to the proceedings; the intervener is not included in the exhaustive list (cf. Federal Administrative Court, 8 C 2.05).

France

82 In civil proceedings, as long as the defendant has not presented any defence on the merits or raised any objection to the admissibility of the case, the mere withdrawal of the claimant's claim terminates the proceedings (Article 395 of the Code of Civil Procedure). Otherwise, the defendant's acceptance is required. In administrative proceedings, up to the end of the investigation phase ("clôture de

l'instruction"), the judge terminates the proceedings following the withdrawal by the claimant. This is the case irrespective of whether the defendant has refused to accept the withdrawal (see Conseil d'Etat, n° 120241).

83 A distinction is made between principal and ancillary interventions ("intervention principale" and "intervention accessoire"). According to Article 330(1) of the Code of Civil Procedure, intervention is ancillary if it supports the claims of a party. The important distinction from principal intervention is that the intervener does not assert any claim of their own (see Cour de Cassation, 2nd civ., n° 04-13.008; 1st civ., n° 15-10.577). In administrative litigation, intervention can only be ancillary, as confirmed by the Pomar ruling (see Conseil d'Etat, sect., n° 32813). Since intervention cannot have the effect of extending the dispute beyond the scope given to it by the original parties, there is no obstacle in principle to a third party intervening directly in appeal proceedings (see Conseil d'Etat, sect., n° 40674).

84 Whether in administrative or civil proceedings, ancillary intervention is made in support of a party, and the intervener cannot raise a separate claim of their own. The withdrawal of the party supported by the intervener removes the basis for the ancillary intervention (see Conseil d'Etat, sect., n° 105798). The intervener cannot effectively oppose a claimant's withdrawal of their claim, which in principle terminates the proceedings.

85 In civil litigation, intervention may be a principal intervention, in which case the intervener must justify their right to act (standing and interest in bringing proceedings) in relation to the claim they are making. Consequently, the outcome of such an intervention is not linked to that of the main action, if the principal intervener asserts a right of

their own which they alone are entitled to exercise (see Cour de Cassation, 2nd civ., n° 12-18.931; 2nd civ., n° 18-22.984). The principal intervention is characterised by the reliance on a right and a claim that are distinct from those already before the court. Article 329 of the Code of Civil Procedure specifies that a principal intervention is only admissible if the person forming it has standing in relation to the claim they are making. The status required for principal intervention is also the same as that required to act independently.

86 The French procedure in patent law does not contain a provision for third parties to intervene in opposition proceedings before the patent office (INPI). Voluntary intervention (“intervention volontaire”), as opposed to forced intervention (“intervention forcée”), is mentioned in Article R. 411-32 of the Intellectual Property Code only in relation to appeals before the Court of Appeal against decisions of the Director of the INPI, without further details. Patent infringement or invalidity claims are governed by the rules of civil procedure.

The Netherlands

87 Article 217 of the Dutch Code of Civil Procedure provides for two types of intervention. The first ("voeging") is in support of the position of one of the parties while the second ("tussenkomen") allows for a third-party to take an independent position in the proceedings with its own claim.

88 Article 8:12b of the Dutch General Administrative Law provides the possibility for the court to allow persons other than parties to make written or oral submissions.

United Kingdom

89 Patent litigation procedure in England and Wales is governed by the Civil Procedure Rules (CPR). In principle, a claimant has a right to discontinue its claim (Rule 38.2(1) CPR).

90 The exercise of this right can be subject to the court's permission (or, in some cases, the defendant's consent) if an interim injunction has been granted, any party has given an undertaking to the court, or the claimant has received an interim payment in relation to the claim (Rule 38.2(2) CPR). To discontinue a claim the claimant must file a notice of discontinuance (Rule 38.3(1) CPR). This notice takes effect against any given defendant on the date when notice of discontinuance is served on them (Rule 38.5(1) CPR), ending the proceedings (Rule 38.5(2) CPR) subject to any right to apply to set aside the notice.

91 Unlike in copyright and trademark litigation, there is no explicit general provision for intervention in civil proceedings before the High Court and the Court of Appeal. The court can rely on its broad case management powers under Rule 3.1 CPR to "(p) take any […] step or make any […] order for the purpose of managing the case and furthering the overriding objective", which we understand to include allowing a non-party to intervene to whatever extent the court deems appropriate in its discretion (e.g. file limited written submissions, not file any new evidence, make oral submissions or not).

92 In practice, intervention often takes the form of an addition of a party to the proceedings under Rule 19.2 CPR. There is no right for a non-party to be added to the proceedings. Rule 19.2 CPR provides that the court has a discretion to add the new party if: it is desirable to add the new party so that

the court can resolve all the matters in dispute in the proceedings; or there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

93 In Hunt v Aziz [2011] EWHC 714 (Ch), the court noted in an obiter dictum with regard to the validity and effect of the notice of discontinuance under the CPR in point 21):

"Mrs Harb [the intervener] contends that the notice of discontinuance was ineffective because it was served without obtaining her consent as required by CPR rule 38.3(3). I do not agree. CPR rule 38.3(3) applies where the consent of "some other party" is required; but Mrs Harb is not a party to the Claim. In any event, rule 38.3(3) is clearly referring to those cases within rule 38 where the consent of another party is expressly required, that is within rule 38.2(2)(b) (which requires the consent of the defendant who has made an interim payment) or rule 38.2(2)(c) (which requires the consent of every other claimant to the proceedings in a case where there are joint claimants)."

94 Discontinuance of administrative proceedings is regulated by Rule 38 CPR in the same way as civil proceedings. The rules on administrative proceedings provide some detail on the possibility to intervene before administrative courts. Rule 54 CPR distinguishes between parties, interested parties and interveners. Interested parties are persons directly affected by the claim, on whom the claimant must therefore serve the claim form so that they can make submissions in the proceedings. Interveners on the other hand, are non-parties who apply to participate in the proceedings under Rule 54.17 CPR according to which any person may apply to file evidence or make representations at the hearing of the judicial review. The consent of interested parties is required for any consent in order to end the proceedings. No such requirement appears to exist regarding interveners under Rule 54.17 CPR. However, within its broad case management

powers, the court may allow an intervener to be substituted into the place of a party that has decided to abandon the proceedings (see MS (Pakistan) v Secretary of State for the Home Department [2020] UKSC 9 (The Supreme Court); The Queen on the application of Philip Morris Brands Sarl v Secretary of State for Health [2014] EWHC 3669 (Admin)).

Unified Patent Court

95 The Rules of Procedure of the UPC provide that claimants need the court's permission to withdraw their claim (Rule 265 PRUPC). Intervention in proceedings before the UPC is possible and must be made in support of a claim, order or remedy sought by one of the parties (Rule 313 RPUPC). An intervener is, as a rule, to be treated as a party (Rule 315 RPUPC). The Rules of Procedure even provide for the court to invite a third party to intervene (Rule 316 RPUPC) and for a party to request forced intervention (Rule 316A RPUPC).

96 While a number of decisions dealt with the legal consequences of a withdrawal of an action and the question of whether a legitimate interest of the defendant in the action being decided by the court, as well as the general procedural situation of an intervener, no decision could be found that addresses the impact of the withdrawal on an intervener (see UPC CFI 755/2024; UPC CFI 457/2023; UPC CFI 487/2023;, UPC ORD 10348/2025: the intervening party's remedies must be non-contradictory to those of the party who has been supported; UPC ORD 18404/2024: an intervener may not file a revocation claim when the party it supports failed to file any such request before the relevant time limit).

Conclusions from the comparative analysis

97 It follows from this comparative study that the procedural treatment of an intervener essentially depends on the specific regulation applicable in the respective court system. In the absence of a specific statutory provision stating that an intervention is independent of the main parties' procedural actions, an intervention is considered an accessory to the proceedings and ceases to have effect if the proceedings are terminated by the main parties.

Concluding remarks

98 In the absence of any substantive change to the relevant legal framework after the Enlarged Board issued decision G 3/04, and in view of the similar factual and procedural situation underlying the earlier and the present referral, the considerations and findings of decision G 3/04 continue to be in line with the legal concept of appeals, the qualification as a party, the legal concept of interventions and the principles guiding the interplay of appeal and intervention.

99 The appeal proceedings are distinct from the proceedings before the administrative departments of the EPO, in particular before the opposition division. They are governed by specific principles due to their judicial nature and their purpose to review decisions of the administrative departments of the EPO in a judicial manner.

100 A guiding and indispensable procedural principle of the appeal proceedings is the principle of party disposition that, together with the binding nature of the parties’ requests and the prohibitions of ruling ultra petita and reformatio in peius, limits the option for procedural action of all involved

in appeal proceedings (appellants, respondents, parties as of right and the boards of appeal).

101 An intervener at appeal cannot procedurally benefit from any status in the preceding administrative proceedings before the opposition division and becomes a party as of right in accordance with Article 107, second sentence, EPC.

102 As in the laws analysed in the comparative study, awarding an intervener an independent party status would require an explicit legal provision in the EPC. Hence, following and implementing the general, abstract and to some extent rather political observations of the President of the Office, four amicus curiae briefs (epi, Patentanwaltskammer, Mr Exner and Mr Thomas) and, to a certain extent, the referring board, would thus require amending the legal framework, i.e. the EPC and/or the Implementing Regulations.

Final conclusions on the referred questions

103 An admissible intervention by a third party, as defined in Article 105 EPC and based on a notice of intervention filed at the appeal stage in accordance with Rule 89 EPC, is procedurally an accessory to the appeal proceedings initiated by one or more parties adversely affected by the decision under appeal.

104 The intervener does not acquire an appellant status corresponding to the status of a party entitled to appeal within the meaning of Article 107, first sentence, EPC but is a party as of right according to Article 107, second sentence, EPC.

105 After withdrawal of the sole or all appeals, the appeal proceedings cannot be continued with an intervener at appeal.

ORDER

For these reasons it is decided that the questions of law referred to the Enlarged Board of Appeal are answered as follows:

After withdrawal of all appeals, appeal proceedings may not be continued with a third party who intervened during the appeal proceedings in accordance with Article 105 EPC.

The intervening third party does not acquire an appellant status corresponding to the status of a person entitled to appeal within the meaning of Article 107, first sentence, EPC.

The Registrar: The Chair:

N. Michaleczek C. Josefsson

Decision electronically authenticated