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Via e-mail: EBAamicuscuriae@epo.org
Registry of the Enlarged Board of Appeal
of the European Patent Office
Att.: Mr Nicolas Michaleczek
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G 2/24

Our Ref.

Frankfurt,
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With regard to invitation to file written statements on the
questions referred to the Enlarged Board of Appeal in case
G 2/24 ("Skin cleanser")

I hereby respectfully submit some brief observations that reflect
my personal view as a professional representative before the
EPO.

The referring Board questions the conclusions drawn by the
Enlarged Board of Appeal in decision G 3/04. I concur with the
referring Board that the overall decision of G 3/04 ought to be
reviewed. In particular, the conclusion drawn in decision G 3/04
that an intervener who intervenes at the appeal stage could
only acquire the status of an opponent, see e.g. at r. 10 of the
decision, should in my view be reassessed.

I suggest in this regard that a view held in decision G 4/91 be
re-assessed, namely that there would be one common two-
month period for appeal under Article 108 EPC, applicable to all
parties alike. This issue directly affects the point in time where
an intervener can acquire an appellant status, and has
apparently not been questioned in decision G 3/04.

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TE:TE

Prior to addressing this issue, I have a minor observation on the question whether Article 107 EPC is applicable to an intervener. My main point will then follow, namely the question what consequences it formally has with regard to the time limit of Article 108 EPC for an intervener, if the intervener enters proceedings at the appeal stage. In my view there is a divergence between formal and practical aspects / aspects of procedural economy.

In this regard, from the Travaux préparatoires at BR/144e/71, see point 7.9, it can be taken that the appeal proceedings were regarded as forming part of the opposition proceedings. I will thus follow this understanding by referring to the “appeal stage” as the second instance that continues opposition proceedings as a juridical review. This understanding seems to be consistent with the primary objective of the appeal proceedings as defined in point 47 of document CA/3/19 on the amended rules of procedure of the Boards of Appeal.

1. ADMISSIBILITY

I have no doubts that both referral questions concern a point of law of fundamental importance, and are therefore admissible.

2. APPLICABILITY OF ARTICLE 107 EPC TO AN INTERVENER

This issue has been thoroughly addressed by the referring Board of Appeal, and I only wish to add one point.

The referring Board has persuasively explained that there are compelling reasons for seriously questioning whether applying Article 107 EPC to an intervener in appeal proceedings in the way presently done at the EPO conforms with the position of an intervener that appears to have been the legislative intent when drafting Article 105 EPC.

Doubts based on the different previous wordings of Article 107 EPC in languages other than English

It should be noted that what is presently Article 107 EPC, was at the time of the Travaux préparatoires, prior to the diplomatic conference, draft Article 106, which read as follows, see the Travaux préparatoires at BR/199e/72:

Article 106: Persons entitled to appeal and to take part in appeal proceedings

Any party to proceedings adversely affected by a decision may appeal. Any other participants in the proceedings shall be parties to the appeal proceedings as of right, with the exception of those who have abandoned that right.

Apart from the last sentence part “with the exception of those who have abandoned that right”, this text appears identical the version of Article 107 EPC as presently in force.

However, the German version of this article read as follows:

Artikel 106: Beschwerdeberechtigte und Verfahrensbeteiligte

Die Beschwerde steht denjenigen zu, die an dem Verfahren teilgenommen haben, das zu der Entscheidung geführt hat, soweit sie durch die Entscheidung beschwert sind. Die übrigen an diesem Verfahren Beteiligten mit Ausnahme derjenigen, die auf ihre Beteiligung an diesem Verfahren verzichtet haben, sind am Beschwerdeverfahren beteiligt.

The German text thus states that the appeal is only open to those who participated in the proceedings leading to the decision. This cannot apply to an intervener and this must have been clear to German speaking members of delegations, taking the German version as the basis for discussions.

The French version of the article read as follows:

Article 106: Personnes admises à former le recours et à participer à la procédure

Quiconque a participé 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 participants à ladite procédure sont de droit parties à la procédure de recours, à l'exception de ceux qui ont renoncé à ce droit.

In accordance with the German version, the French text stipulates that anyone who participated in the proceedings leading to a decision may appeal against that decision. It seems reasonable to assume that French speaking delegation members used this text as the basis for discussions, but may not necessarily have been aware of the English version of the text. This puts some serious doubts on the understanding on non-English delegations that Article 107 EPC, or Art. 106 at that time, was intended to apply to an intervener.

The German text as in force in the form of Article 107 EPC, now simply stipulates “Jeder Verfahrensbeteiligte”, and the French text says “Toute partie à la procédure aux prétentions de laquelle une décision n'a pas fait droit ...”. The latter excludes a patentee who has not been adversely affected by the decision of the first instance.

It therefore appears that the French and German versions have been aligned with the English version at some late point in time before the EPC was adopted. The word “Beschwer” in German can in my view in every day use carry with it a sense that the party concerned has also been a party to the first instance proceedings. However, this may

simply reflect the typical situation in proceedings. The Duden dictionary provides “rechtlicher Nachteil” as the explanation for “Beschwer”. This exactly matches the English version of Article 107 EPC (draft Article 106).

There seems to be no mention of the role of an intervener in the minutes of the diplomatic conference in Munich in 1973 on the final version of Article 107 EPC. The minutes of the conference mention that the last portion of the draft Article “with the exception of those who have abandoned that right” was deleted following a further meeting, subsequent to an initial request of the Member States of the European Communities.

It can in any case be said that the present version of Article 107 EPC, as adopted, encompasses an intervener in all three languages, as the intervener will invariably be adversely affected as long as the patent has not been revoked. This is also the way that Article 107 EPC has been applied in decision T 886/96: if an opposed patent has been revoked in opposition proceedings, an intervener is not adversely affected by this decision. See r. 2.5 of decision T 886/96.

Otherwise an intervener can in principle file an appeal, which leads me to the primary point of this submission:

It seems to be generally accepted that if an intervener joins proceedings at the appeal stage after expiry of the two months period after issuance of the decision of the Opposition Division, the intervener cannot be in a position where he is still able to file an appeal. I hereby call this understanding of the situation into question.

3. STATUS AND POTENTIAL STATUS OF AN INTERVENER

As per Article 105(2) EPC, the intervention is to be regarded as an opposition once the intervener has become a party to the proceedings. However, I fail to see that Article 105 EPC stipulates that this status remains unalterable in the sense that an intervener is once and forever tacked to the status of an opponent. The Enlarged Board of Appeal did not adopt this position either, see below. Nonetheless, it seems that Technical Boards of Appeal have adopted this interpretation vis-à-vis decisions G 4/91 and G 3/04. See decision T 144/95, referring to decision G 4/91, or decision T 1108/02, referring to decision G 3/04.

However, already decision G 4/91 acknowledged under r. 6 that contrary arguments were clearly possible on this point. In the case at issue, the Enlarged Board of Appeal saw no need to decide on the issue, see r. 7 of the decision. This was only the case in decision G 3/04: In decision G 3/04, the Enlarged Board of Appeal held under r. 11 that an intervener in proceedings before the opposition division had a right of appeal under Article 107 EPC.

The question that I ask here is whether an intervener should – from a procedural perspective – not always be treated as entering proceedings in a fictional position as if being in the first instance. Of course, the proceedings may have already progressed to the appeal stage; but does Article 105 EPC not specifically address the intervener's position rather than the stage that proceedings have meanwhile reached for all other parties?

All that I could find in the Travaux préparatoires in this regard is at BR/144e/71 under point 82, where intervention at the appeal stage had been discussed: The prescriptions for opposition proceedings are to be suitably applied to the intervention. The German version states that "... dass die Vorschriften für das Einspruchsverfahren ... auf den Beitritt entsprechend anzuwenden sind". An intention can be read into this statement that, irrespective of the actual stage of proceedings, initially an intervener is subject to the provisions relating to opposition proceedings.

4. TIME PERIOD FOR FILING A NOTICE OF APPEAL

For opposition proceedings, Art. 99 EPC sets a period of nine months from the publication of the mention of grant, which is a fixed date for any potential party to the proceedings. However, the situation is different for filing an appeal.

Article 108 EPC, which applies to any appealable decision and not just to opposition proceedings, sets a time limit of two months from notification of the decision, not "from such decision", as wording in r. 4 of decision G 4/91. The German version of Article 108 EPC reads: "innerhalb von zwei Monaten nach Zustellung der Entscheidung". The date that triggers the period for filing an appeal is thus the date of notification of the decision. Article 119 EPC stipulates that decisions shall be notified by the European Patent Office of its own motion in accordance with the Implementing Regulations. Rule 125 EPC provides that notification is "*a matter of course*" and shall take the form of an original document, ..., a computer print-out bearing the seal of the EPO or an electronic document containing such seal or otherwise certified. Under Rule 125(2)(d) EPC, notification may also be made by public notice, but only in accordance with Rule 129 EPC, i.e. where notification de facto turns out to be impossible. Otherwise, postal services, electronic communication or delivery by hand on the premises of the office are the available options. Where the office cannot prove that a document has been duly notified, or it has not been properly notified, Rule 125(4) EPC provides that the date of delivery is the date on which the office can establish that the document was received.

As I understand it, Article 108 EPC applies independently to each party to opposition proceedings. The overall picture that there is one common time limit of 2 months simply results from the fact that in practice the decision of the Opposition Division is sent to all parties to the proceedings on the same day.

As noted above, irrespective of the question whether Article 107 EPC applies to an intervener or not, there seems to be no reason why Articles 108 and 119 EPC should not apply to an intervener. An intervener is certainly one of “those concerned of decisions” under Rule 125 EPC.

According to Article 105(2) EPC, the intervener joins proceedings having the status of an opponent, see above. An intervener who joins proceedings only at the appeal stage therefore still needs to be served the decision of the Opposition Division “*as a matter of course*”.

The mere fact that the intervener will already have got knowledge of the decision of the Opposition Division cannot and will not supersede the clear requirements of Article 119 EPC and Rule 125 EPC. In my opinion this follows not least from the legislator’s intent expressed in BR/144e/71 of the Travaux préparatoires, namely that the appeal proceedings are part of the opposition proceedings. With this understanding, the intervener is not only concerned by the decision issued of the Opposition Division, the decision is also a decision that has been taken in the proceedings that the intervener has joined, even if intervention occurs at the appeal stage.

In summary, the decision thus has to be served on the intervener. Not serving the decision of the Opposition Division on the intervener at this stage would appear to contravene Article 119 EPC and Rule 125 EPC.

According to Article 108 EPC, the intervener then has a period of two months from the notification of the decision. If he files a notice of appeal and pays the appeal fee within this period, he becomes an appellant.

The question of what happens if the sole appellant withdraws the appeal, as decided in decision G 8/91, would thus only arise if the intervener decided not to file an appeal against the decision of an Opposition Division. The only requirement for appeal proceedings to continue with an intervener would otherwise only be that at the time of intervention there were proceedings pending.

5. CONCLUSION

In summary, the answer to the first question is in my view ‘no’ if the decision of the Opposition Division has been served on the intervener by the Board of Appeal when joining the proceedings. If it has not, there is a procedural defect that needs to be remedied. Proceedings may then be continued with the intervener if he files an admissible appeal.

The answer to the second question is in my opinion ‘yes’.

6. FINAL THOUGHTS

As already expressed by the referring Board, the view of decision G 4/91 that opposition proceedings are terminated by the decision of the Opposition Division, and then re-opened by a timely filing of a notice of appeal appears problematic. Applying Article 108 EPC in the above manner would mean that an intervener cannot join proceedings during the period of two months from the notification of the decision to the other parties, i.e. the parties that were already parties in the first instance proceedings. It appears questionable that such a situation, as expressed in G 4/91, would correspond to the legislator's intent.

Yours sincerely,



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