

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 27 May 2009**

Case Number: J 0002/08 - 3.1.01

Application Number: 05027368.9

Publication Number: 1635262

IPC: G06F 11/273

Language of the proceedings: EN

Title of invention:

Device diagnostics

Applicant:

Sony Deutschland GmbH

Opponent:

-

Headword:

Pending application/SONY

Relevant legal provisions:

EPC Art. 97(3), 112(1), 112(3)

EPC R. 36(1)

Article 7 of the Revision Act of 29 November 2000

Article 2 of the Decision of the Administrative Council of
7 December 2006

Article 8(2) of the Protocol on Recognition

§ 39, paragraph 1, German Patent Law (Patentgesetz, PatG)

Art. 500 of the French Civil Procedure (Nouveau Code de
Procédure Civile, NCPC)

Relevant legal provisions (EPC 1973):

EPC Art. 10(2)a, 10(2)c, 64(1), 76, 80, 90(2), 93(1), 97(1),
97(4), 106, 108, 125, 175(2), 175(3)

EPC R. 13(1), 13(3), 25(1), 29(1), 39, 48(2), 51, 51(4), 68(1),
69(1), 69(2), 78(2), 92(1)p, 98(2)

Keyword:

"Pending application" - "Definition"
"Divisional application"
"Appeal period"
"Application of Article 125 (no)"
"Violation of good faith (no)"
"Referral to the Enlarged Board (yes)"

Decisions cited:

G 0004/91, G 0012/91, G 0002/97, G 0001/05, G 0001/06,
R 0005/08, J 0007/96, J 0002/01, J 0024/03, J 0028/03,
J 0003/04, J 0007/04, J 0018/04, J 0003/06, J 0010/07,
T 1177/00
Bundesgerichtshof, Beschl. v. 28.3.2000 - X ZB 36/98 (BPatG)

Catchword:

The following point of law is referred to the Enlarged Board of Appeal:

Is an application which has been refused by a decision of the Examining Division thereafter still pending within the meaning of Rule 25 EPC 1973 (Rule 36(1) EPC) until the expiry of the time limit for filing a notice of appeal, when no appeal has been filed?



Case Number: J 0002/08 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 27 May 2009

Appellant: Sony Deutschland GmbH
Kemperplatz 1
D-10785 Berlin (DE)

Representative: Müller - Hoffmann & Partner
Patentanwälte
Innere Wiener Strasse 17
D-81667 München (DE)

Decision under appeal: Decision of the Receiving Section of the
European Patent Office of 9 August 2007.

Composition of the Board:

Chairman: B. Günzel
Members: T. Bokor
S. Hoffmann

Summary of Facts and Submissions

- I. The present appeal proceedings concern an appeal against the decision of the Receiving Section, posted 9 August 2007, deciding *inter alia* that European patent application No. 05027368.9 was not considered to have been validly filed as a divisional application and that the appellant's request that the noting of loss of rights pursuant to Rule 69(1) EPC 1973 be set aside was refused.
- II. The notice of appeal was filed on 19 September 2007, and the appeal fee was paid on the same day. The statement setting out the grounds of appeal was filed on 7 December 2007.
- III. The earlier European patent application No. 01102231.6 [the parent application] was refused by the Examining Division in the course of oral proceedings held on 23 November 2005. According to the minutes of the oral proceedings, the decision of the Examining Division was announced at the end of the oral proceedings. The written decision was dated 27 January 2006.
- IV. According to the appellant (i.e. the applicant), immediately after the oral proceedings, the representative of the appellant discussed with the members of the Examining Division the possibility of filing a divisional application. He expressly requested that the written decision should be sent out sufficiently late so that he would have time to prepare a divisional application. The members of the Examining Division did not inform him that this was no longer possible, but promised to adhere to his request. The

written grounds for the decision were posted on 27 January 2006.

- V. No appeal was filed against the decision refusing the parent application.
- VI. The application in suit, application No. 05027368.9, was filed on 14 December 2005 as a divisional application to the above-mentioned parent application No. 01102231.6.
- VII. The appellant was informed by notification dated 1 February 2006 (EPO Form 1133) that the divisional application would be published on 15 March 2006 under publication number 1635262. The application was published on the date indicated.
- VIII. On 25 April 2006 the Receiving Section issued a communication "Noting of loss of rights pursuant to Rule 69(1) EPC" (EPO Form 1044) informing the appellant that the application was not being processed as a divisional application because when it was filed, the pending earlier European patent application had been finally refused, withdrawn or deemed withdrawn.
- IX. By letter filed with the EPO on 28 June 2006 the appellant requested the reversal of the noting of loss of rights in accordance with Rule 69(2) EPC 1973. After having informed the appellant of its preliminary opinion on the matter and after the appellant had filed several replies to the communication, the Receiving Section issued the decision under appeal.
- X. The decision essentially held that the parent application ceased to be pending on the date of the oral

proceedings, when the decision to refuse the application was given and thereby took legally binding effect, relying on the Notice of the EPO dated 9 January 2002 concerning the amendment of Rules 25(1), 29(2) and 51 EPC [1973], published in the OJ EPO 2002, 112 (hereinafter "the Notice"). The date of the legal effect of decisions was explained in G 12/91 (OJ EPO 1994, 285). The decision under appeal also referred to Rule 68(1) EPC 1973, which stated that decisions may be given orally. According to the decision under appeal "*It is beyond any doubt*" that an application was no longer pending after the announcement of the decision to refuse in oral proceedings. There is no need to apply Article 125 EPC 1973, and to take into consideration the "German practice" as submitted by the appellant (see point XVI(1) below) because there is Rule 25 EPC 1973 concerning the filing of divisional applications as a procedural provision and the case law is also clear on the matter. The appellant could not rely on the principle of legitimate expectations either, and could not invoke the alleged late notification of the Rule 69(1) communication (see point VIII above). Accordingly, the filing of the divisional application on 14 December 2005 was out of time.

XI. As a main request in the appeal, the appellant requested that the decision under appeal be set aside. As an auxiliary request the appellant requested that the Board refer the following questions or essentially similar questions to the Enlarged Board of Appeal:

A: Until when is an earlier European patent application pending in the sense of Rule 25(1) EPC in case that

- i) a European patent application has been refused at the end of oral proceedings by an Examining Division,
- ii) a European patent application has been refused by an Examining Division in written proceedings,
- iii) a European patent application has been refused by a Board of Appeal in oral proceedings, and
- iv) a European patent application has been refused by a Board of Appeal in written proceedings.

B: If the answer to questions i) and ii) under A is that pendency in the sense of Rule 25(1) EPC ends once a decision has been announced in case of oral proceedings or once it has been notified in case of written proceedings, must an appeal which ensures pendency be filed and be admissible? Or is it sufficient that the appeal be only effective (Notice of Appeal was filed timely and Appeal Fee was paid timely but no Grounds of Appeal or unsubstantiated Grounds of Appeal were filed)?

C: If the answer to questions i) and ii) under A is that pendency in the sense of Rule 25(1) EPC ends once a decision has been announced in case of oral proceedings or once it has been notified in case of written proceedings, what is the status of an application during the appeal period? Is it not pending at all or is it "provisionally pending" (German "schwebend anhängig")?

XII. In a communication pursuant to Article 15(1) RPBA the Board indicated its preliminary opinion of the case, partly based on decisions G 12/91 (*supra*), G 4/91 (OJ EPO 1993, 707), G 1/05 (OJ EPO 2008, 271) and G 1/06 (OJ EPO 2008, 307), T 1177/00 of 24 July 2003 (not published in OJ), J 28/03 (OJ EPO 2005, 597) and J 18/04

(OJ EPO 2006, 560) and brought document CA/127/01 to the attention of the appellant. This document was the preparatory document at the time when Rule 25 EPC 1973 was amended to the wording applicable in the present case before the entry into force of the EPC 2000. For further details reference is made to the file.

- XIII. In response to the communication of the Board, the appellant maintained its requests, and additionally requested that the Board should "suggest" to the President of the European Patent Office (hereinafter: EPO) to propose an appropriate amendment of the EPC based on her powers pursuant to Article 10(2)c) EPC, or at least to amend the Notice, in order to clarify the issue when an application is considered pending in case of a refusal of the application.
- XIV. Oral proceedings were held on 4 September 2008. At the end of the oral proceedings the appellant was informed that the Board would refer a question to the Enlarged Board of Appeal and that this decision would be given in writing.
- XV. The appellant relied on two different lines of argument: Firstly, the notion of a "pending application" must be construed in its favour. Secondly, it relied on the principle of good faith.
- XVI. Appellant's main argument is that the parent application was still pending when the divisional application was filed, because an application must be considered to be pending as long as the applicant has the possibility of filing an appeal. Accordingly, in those cases where no appeal is filed, the application ceases to be pending

when the time limit for filing an appeal expires. Expressed differently, the pending status ends only when the application can be considered as finally refused, in the sense that an appeal is no longer possible. In support of this interpretation of the term "pending application" in Rule 25 EPC 1973, the appellant relies on various arguments:

- (1) The Notice (see point X) is not part of the Convention, hence the Receiving Section erred in relying on it when construing the term "pending application". Instead, this term must be construed either on the basis of the EPC alone, or (by the obligatory application of Article 125 EPC 1973) on the basis of the practice of the contracting states. Since the EPC is silent about the exact meaning of this term, the procedural law generally recognized in the contracting states must apply, such as the "German practice". In particular, the interpretation desired by the appellant is supported by the German legislation on administrative procedures (Verwaltungsverfahrensgesetz) and the "Graustufenbild" decision of the German Federal Supreme Court ("Bundesgerichtshof", BGH), see BGH Beschl. v. 28.3.2000 - X ZB 36/98 (BPatG), also published in GRUR 2000, 688. This latter decision is mainly based on the principle of procedural economy, and this same principle should apply before the EPO, since this principle is generally recognized in the contracting states. The appellant did not mention any other contracting state apart from Germany, as a state where this principle was specifically relied on for

divisional applications. Art 500 of the French Civil Procedure (Nouveau Code de Procédure Civil, NCPC) was also cited by the appellant, and the appellant alleged that this gave support to the idea that a procedure only ends when the time limit for filing an appeal expires. The appellant also submitted, without however giving any details, that the US and Japan had a regulation similar to the German model.

- (2) Even the EPC itself gives a clear indication that there is a difference between applications which are "refused" and "finally refused", since the wording "finally refused" appears in Rule 48(2) EPC 1973, while for example in Article 97(1) EPC 1973 the term "refusal" is used simply. The legal significance of the term "finally refused" must be seen in the fact that no legal remedy exists for an applicant to continue the proceedings once the application has been finally refused. This is equivalent to the notion of "rechtskräftig zurückgewiesen" in German law, and indeed in the German text of Rule 48(2) EPC 1973 this German expression is equated with "finally refused". The Receiving Section also erred in citing G 12/91, since this decision only concerned the point in time when the deciding body becomes bound by its own decision and in German legal terminology the "Bindungskraft", but not "Bestandskraft" is achieved.
- (3) At least the German native speakers involved in the preparation of the document CA/127/01 must have had the German example before them when the

amendment of Rule 25 EPC 1973 was proposed to the Administrative Council. It was also known to them that the term "finally refused" is equivalent to the German legal expression "rechtskräftig zurückgewiesen", and accordingly they must have envisaged a provision for the filing of divisional applications along the lines of the already existing "German practice".

- (4) The legal requirement that applications which have not yet been finally refused must be published pursuant to Rule 48(2) EPC 1973 also demonstrates that such applications are still pending, because the necessity of publication arises from the fact that such applications may still be continued. This further supports that even based on the EPC alone a "pending application" must be one which has not yet been "finally refused".
- (5) Existing case law of the Boards of Appeal does not give any guidance for the present case. The decisions cited by the Board in the annex to the summons to the oral proceedings are not applicable, either because they concerned different issues or because they were handed down before the applicable wording of Rule 25 EPC 1973 was introduced.
- (6) The present practice of the European Patent Office creates a discrepancy between different types of proceedings, depending on whether a decision is pronounced orally or notified in writing. In the former case, the applicant can expect to know in advance the date of the refusal, while in the

latter he cannot. Thus in written proceedings applicants are left in the dark and do not know until which date they may exercise their right to file a divisional application. Such a discrepancy by itself violates the general principles of procedural law recognized in the contracting states, and therefore contravenes Article 125 EPC 1973. For this reason alone the appealed decision must be set aside. Instead, the interpretation proposed by the appellant solves this problem, because appellants would always know when the time limit for filing an appeal expires.

XVII. The appellant also contends that the EPO has violated the principle of good faith on several occasions.

- (1) The first violation occurred when the Examining Division, though being aware that the appellant intended to file a divisional application, omitted to inform the representative after the oral proceedings before the Examining Division that the filing of a divisional application was no longer possible after the announcement of the decision at the oral proceedings, unless an appeal was filed. Instead, the Examining Division simply promised the representative that the decision would be sent out sufficiently late so that the appellant would have enough time to file a divisional application.
- (2) The second violation occurred when the divisional application was published. This action of the EPO harmed the appellant doubly. Firstly, the fact of the publication itself made the appellant believe that everything was in good order with the

application, and the appellant could legitimately expect that this was indeed the case. Secondly, the divisional application was filed with a new set of claims, and the appellant would have had no interest in the publication of these claims, had he been aware that the application was not considered to have been validly filed. Thus apart from not having been warned beforehand or simultaneously with the publication, the publication of the newly but potentially invalidly filed subject-matter was in itself a further violation of the rights of the appellant, namely of its right to protection of confidence as regards the subject-matter of the application. According to the appellant, it is a basic principle of any patent law that the patent office will only publish subject matter for which the appellant has a genuine possibility to obtain protection.

- (3) A third violation occurred when the Receiving Section delayed the sending out of the "Noting of Loss of Right pursuant to Rule 69(1) EPC" form, in which the appellant was informed that the Receiving Section considered the filing of the divisional application as invalid. This notice was sent out more than four months after the filing of the divisional application. Had this notice been sent earlier to the appellant, he would still have been in a position to file an appeal against the decision to refuse, and thereby a loss of rights could have been avoided. Instead, the appellant had the impression that the delay in sending out the notice was in fact deliberate, while no

Official Notice of the EPO has ever been published where this "unfaithful practice" of the EPO would have been brought to the attention of applicants.

- (4) As a result, by taking no action (instead of proactively warning the appellant) the EPO induced the appellant into believing that everything was in good order with the divisional application, until it became too late to file an appeal against the decision refusing the parent application.
- (5) The appellant also alleged a possibly non-uniform practice of the EPO in handling the procedural situations similar to those underlying the present appeal, but no specific evidence was presented in support of this contention.

Reasons for the decision

1. The appeal is admissible.

Transitional provisions

2. The Receiving Section based its decision of 9 August 2007 on Rule 25 EPC 1973. In the meantime the EPC 2000 has entered into force.
3. According to Article 2 of the Decision of the Administrative Council of 7 December 2006 amending the Implementing Regulations to the European Patent Convention 2000 (OJ EPO 2007, 89) the Implementing Provisions to the EPC 2000 shall apply to all European patent applications, ...insofar as the foregoing are

subject to the provisions of the EPC 2000. This means that a Rule of the Implementing Provisions is to be applied where, or in so far as, the European patent application in question is subject to the Article of the EPC 2000 to which that Rule relates and which is specified and supplemented by it (J 10/07, OJ EPO 2008, 567, point 1.3 of the Reasons, J 3/06, OJ EPO 2009, 170, point 3 of the Reasons).

4. Pursuant to Article 7 of the Revision Act of 29 November 2000, as a general rule, the previous version of the Convention shall apply to patent applications pending at the time of entry into force of the EPC 2000, unless regulated differently by the Administrative Council. Rule 25 EPC 1973 relates to the application of Article 76 EPC 1973, which latter is not affected by the decision of the Administrative Council regulating the transitional provisions (Decision of 28 June 2001 on the transitional provisions under Article 7 of the Revision Act of 29 November 2000). Accordingly, in the present appeal the legal situation is governed by Rule 25 EPC 1973. This is also appropriate, since the underlying legal issue is the recognition of a purported filing date before 13 December 2007, and all the other relevant events of the present case occurred before this date. As a consequence, to the extent that it is necessary to refer to other provisions of the EPC for consideration of the point of law which is set out in the following, it is also the legal regime as established by the EPC 1973 that must be considered.

The formal basis for the decision of the Receiving Section

5. The point of law, upon which the case hinges, is the interpretation of the term "pending application" in the wording of Rule 25(1) EPC 1973, specifically the question when the pending status of the application ends if no appeal is filed against a decision to refuse, in particular if the decision was given orally by the Examining Division. The decision under appeal held, by referring to decision G 12/91 (*supra*), point 2. of the Reasons, that the pending status ends when a decision to refuse has been pronounced in oral proceedings and no divisional application can be filed [thereafter], under Rule 25 EPC (addition by the Board). This legal assessment is hereinafter referred to as "EPO practice". In contrast to this decision, the appellant asserts that the pending status ends when the time limit for filing an appeal against the decision to refuse expires. This is hereinafter referred to as "German practice".

6. The Receiving Section did not make a formal error in relying on the Notice even though the Notice which has been issued by the President of the EPO by virtue of Article 10(2)a) EPC 1973 is not a legal norm. Its purpose is to give guidance and thereby ensure a uniform application of the law by the first instance with respect to certain types of cases in the interest of equal treatment and legal certainty for applicants. Therefore, such ancillary regulations must be applied by the departments of first instance, unless they are found to contravene the EPC. Therefore, the reference by the Receiving Section to the Notice cannot be objected to on formal grounds.

Interpretation of the term "pending application" by the first instance

7. It remains, however, to be examined by the Board whether the interpretation of the term "pending application" as provided by the Receiving Section and based on the Notice is correct as to its substance.
8. The Notice explains that "an application is pending ... until **the date** that the application is refused,.."
(emphasis by the Board). Further, if an appeal is filed against the decision to refuse, a divisional application may still be filed while appeal proceedings are "under way".
9. The Notice is not particularly precise concerning the exact date when an application is refused. Nevertheless, it is implicit in the Notice that an application is no longer pending during the time limit for filing an appeal as long as no appeal is filed, but ends on the date of the refusal by the Examining Division. Moreover, by referring to and citing literally from decision G G 12/91 ((*supra*), point 2. of the Reasons), the Receiving Section has taken the position, which is not explicitly set out in the Notice, that in case of a decision to refuse being given orally the application is thereby refused and the application ceases to be pending as of that date unless an appeal is filed against the decision.
10. By contrast, the appellant asserts that the interpretation of the term "pending" must be based on the understanding that the pending status only ends when the refusal becomes final and that is the case when an

appeal is no longer possible. Hence, the date of the final refusal corresponds to the end of the period for filing the notice of appeal (Article 108 EPC, first sentence).

11. The Board concurs with the appellant that the use of the term "pending" in the EPC does not provide an answer to the question before the Board. This term is used on five occasions in the English text of the EPC 1973 but no particular teaching can be derived therefrom. Only Article 175(2) and Rule 25 EPC 1973 contain the term "pending application". Article 175(3) EPC 1973 refers to "pending opposition", Rule 13(3) EPC 1973 refers to a "pending proceedings" and Rule 92(1)p EPC 1973 employs the phrase "pending a final decision".

12. The German and French equivalents of the term "pending" in Rule 25 EPC 1973 (anhängig, en instance) provide no further guidance. It is worth noting that both the French and German expressions "en instance" and "anhängig" also appear in Rule 13(3) EPC 1973, but also in Article 112(3) and Rule 98(2) EPC 1973, referring to a "pending appeal" (recours en instance, anhängige Beschwerde) and to pending proceedings (procédures en instance, anhängige Verfahren), respectively. Only the German text uses "anhängig" in Article 8(2) of the Protocol on Recognition in the sense of "filing a claim" [in order to establish a "pending" claim in a civil suit] (anhängige Klage).

13. Thus it appears that the term "pending" may equally well refer

(1) to pending proceedings before a given instance or

(2) to pending substantive rights or

(3) to procedures covering proceedings before several instances of the EPO.

The legislative history

14. Rule 25(1) was adopted by the Administrative Council on the basis of document CA/127/01. Its original language was English, so it is appropriate to quote the relevant passages directly:

"RULE 25 EPC

3. The present Rule 25(1) causes many problems in practice. For example, a communication under Rule 51(4) is not issued in every application, while applicants often realise after approval that they omitted to file a divisional and try to re-open proceedings in any possible way.

4. The objective of the amendment of Rule 25 in 1988 was to have a final date for filing a divisional which the applicant would have in his own hands, but which would still be early enough to ensure that the public would be informed by means of an indication on the printed patent specification that a divisional application had been filed.

5. During the 1999 EUROTAB meeting it came to light that many contracting states have a far more liberal policy than the EPO as to the last day for filing a divisional, and accept a divisional on any pending application. It is proposed to amend Rule 25 EPC

accordingly. The word "any" clarifies that it is irrelevant what kind of application the parent is. The parent could thus be a divisional application itself.

6. **Grant proceedings are pending** until the date that the European Patent Bulletin mentions the grant (cf J 7/96, OJ 1999, 443), or **until the date that an application is finally refused** or (deemed) withdrawn [emphases by the Board]. The applicant is aware of the date on which the grant of the patent will be published, so he will know until when he can file a divisional. Under the proposal, the public will no longer be informed by the patent specification that a divisional has been filed, but since interested parties nowadays tend to rely on electronic databases for patent information, and these databases will be able to show within a short time whether a divisional has been filed, the proposed system should have no drawbacks for third parties."

15. For the sake of completeness, the crucial sentence in point 6 of the CA document reads as follows in the German and French version:
- a. "Das Erteilungsverfahren ist bis zu dem Tag anhängig ... an dem die Anmeldung rechtskräftig zurückgewiesen wird.."
 - b. "La procédure de délivrance est en instance jusqu'à la date à laquelle ... la demande a été définitivement rejetée ...".

Conclusions to be drawn therefrom as regards the interpretation of the term "pending application"

16. These wordings in the three official languages appear to support the contention of the appellant that the legislator must have had an interpretation of "pending application" in mind according to which the pending status ends as a consequence of the "final refusal of the application".
17. It is undisputable that an appealable decision is not yet final by its pronouncement or its notification. Furthermore, wherever the EPC uses the term "finally refused" this is correctly equated to the German expression "rechtskräftig zurückgewiesen". It is also accepted that the final (res judicata) character of a first-instance decision (Rechtskraft) will only ensue upon expiry of the time limit for filing an appeal.
18. However, the question remains to be answered whether or not the reasoning contained in the CA-document provides in itself a sufficient basis for simply equating, (in case of a refusal), the condition in Rule 25 EPC 1973 of a "pending application" with the criterion of a refusal not yet being final, keeping in mind that this condition is a prerequisite for the right to file a divisional application. The notion in Rule 25 EPC 1973 of a "pending application" has been defined by the Legal Board in its decision J 18/04 (*supra*, see point 9 of the Reasons,) as setting a condition of a substantive nature, rather than just defining a point in time up to which a divisional application can still be filed. This decision held that the parent application is pending when its subject-matter still exists, i.e. is still claimable

when the divisional application is filed (as opposed to subject-matter having been abandoned).

19. As regards the overall teaching derivable from the reasoning contained in the said CA-document, it also appears from the remaining explanations underlying the proposed change to Rule 25 EPC 1973 that the legislator was primarily concerned with the possibility of filing a divisional application in those cases where the parent application was granted, and extended the notion of "pending" to include the period between the decision to grant and the publication of the grant. This is also illustrated by the citation of decision J 7/96 in the said CA-document. No particular attention has been paid to the cases in which the parent application is refused. The CA document does not discuss either the situation where an appeal is filed (or not filed). Apparently the legislator did not feel the need to have a more precise explanation of what is meant by the "date of final refusal". The other concern of the legislator was the possibility of filing divisional applications from parent applications themselves being divisional applications, and the possible omission of the publication of divisional applications from the published patent specification. None of these issues has a bearing on the present case.

Rule 48(2) EPC

20. Rule 48(2) EPC 1973 is the only provision in which the term "finally refused" appears in the Convention. There is, however, nothing which would indicate that it was intended thereby to set up the requirement of a "pending" application. The term "pending" does not

appear in this rule, and the legal issues underlying this appeal need not be examined when the rule is being applied by the European Patent Office. Rule 48(2) EPC 1973 merely concerns the technical preparations for the publication of the application, but not any legal effects that may arise from the final refusal of the application other than that the application shall not be published when finally refused before the termination of the technical preparations for publication.

21. Rule 48(2) EPC 1973 implements Article 93(1) EPC 1973, requiring the publication of patent applications immediately following the expiry of the 18 month time limit. To this end Rule 48(2) provides that only such applications should be withheld from publication, which have been finally refused. Even the appellant appears to admit that on the basis of this rule applications which are refused but for which the refusal has not yet become final should proceed to publication, even if they may turn out to be finally refused by the time the publication is effected.

22. Rule 48(2) EPC 1973 can therefore not support the contention that a refused application must proceed to publication because it must be considered as pending until the decision becomes final. On the contrary, such applications must also proceed to publication in spite of the above-mentioned possibility that they may turn out to be finally refused by the time the publication is effected. Thus Rule 48(2) merely recognises that a non-final refusal may still be reversed and therefore the application must be published but it adds nothing with regard to the question of whether a refused application is still pending until its refusal has become final.

Jurisprudence having dealt with the issue of "pending" in related circumstances

23. While the Legal Board has not yet had occasion to decide on the issue presently before it, the point in time up to which the applicant's right to file a divisional application still subsists in connection with a decision to grant has been the subject of several decisions of the Legal Board. In these decisions the Legal Board has approved the position of the EPO that even after issuance of the decision to grant there is still a pending application and, as a consequence a divisional application may still be validly filed, up to (but not including the date of) the publication of the mention of grant in the European Patent Bulletin. According to this jurisprudence the pending status of the application ends with that publication (J 28/03 (*supra*), points 4. and 5. of the Reasons, see also J 24/03 of 17 February 2004, point 4. of the Reasons, J 7/04 of 9 November 2004, point 3. of the Reasons, J 3/04 of 20 September 2005, points 8. and 12. of the Reasons).
24. Even though the above cited decisions of the Legal Board mainly only refer to the Notice and do not explain their position in detail, it can be derived from them that they are based on the principle enshrined in Article 97(4) EPC 1973 (Article 97(3) EPC) that the decision to grant a European patent shall not take effect until the date on which the European Patent Bulletin mentions the grant. This provision had already been relied on in decision J 7/96 (*supra*) in order to explain that during the period between the decision to grant the patent and the publication of the mention of grant the application

is deemed to be still pending before the EPO and may, for example, be withdrawn or transferred (point 6.3 of the Reasons). It is to be noted, however, that decision J 7/96 (*supra*) was not directly concerned with the question of whether there was still a pending application. It concerned the issue of whether there were still proceedings pending before the European Patent Office which could be suspended in accordance with Rule 13(1) EPC 1973, in order to avoid the rights derivable from the patent coming into existence under Article 97(4) EPC 1973, in conjunction with Article 64(1) EPC 1973, for the allegedly unlawful patent applicant.

25. The principle underlying the reasoning of the cited decisions of the Legal Board is that the date on which the decision (to grant) takes effect is the date on which the pending status of the application ends. If this principle could also be applied to the situation of a refusal of the application, then this would support the position of the Receiving Section that after a decision to refuse has taken effect, the pending status of the application ends and a divisional application can no longer be filed, given that according to G 12/91 (*supra*) a decision to refuse takes effect after notification of a written decision or after pronouncement of such a decision in oral proceedings before the Examining Division (see also R 5/08 of 5 February 2009, point 11 of the Reasons).

26. In decision G 4/91 (*supra*) the Enlarged Board of Appeal held in the context of considering the right of a third party to intervene in opposition proceedings that following the decision of the opposition division there are no (longer) pending proceedings irrespective of the

date on which the decision becomes final (see for this the official German text of point 7. of the Reasons "kein Verfahren anhängig" and "Zeitpunkt ... Entscheidung...rechtskräftig" and see also the corresponding French translations "procédure en instance" and "passée en force de chose jugée". Insofar the translation of the cited passages into English reading "proceedings in existence" and "date... decision...takes legal effect" seems to be incorrect but it must be noted that this text was a correction to the former English version containing the wording "that ... proceedings... are pending (!) (OJ EPO 1993, 339, point 7 of the Reasons). See also the correct French translations "procédure en instance" and "passée en force de chose jugée". However, G 4/91 (*supra*) decided directly only on the point in time up to which (opposition) proceedings are pending.

27. On the other hand, it was acknowledged in decision J 28/03 (*supra*), obiter dictum, again by referring to and approving the Notice, that in case of an appeal against a decision to refuse the parent application a divisional application is allowed as long as the appeal procedure has not been terminated, independently of the outcome of the appeal (points 6, 11 and 15 of the Reasons). The decision, as regards the consequences of an appeal filed, in the case under consideration against a decision to grant, underlines that the suspensive effect of an appeal means that no legal effect may ensue from the contested decision until the final decision of the Board is taken (points 12. and 14. of the Reasons). However, according to this decision, the status of the application as pending application additionally depends

- on the admissibility of the appeal (see points 16, 17 of the Reasons).
28. Taking both principles addressed in decision J 28/03 (*supra*) together, this would mean that an application would cease to be pending when a decision to refuse the application is taken by the Examining Division, but that it would become pending again once an admissible appeal has been filed. That appears to be the position of the EPO and to be the reason why, before issuing the Rule 69(1) communication in the present case the Receiving Section awaited the expiry of the appeal period in the refused parent application to see whether the decision to refuse was appealed or not.
29. By contrast, in its decision "Graustufenbild" relied on by the appellant for his case before the Legal Board the BGH has held that under German law, even in the absence of an appeal filed against the decision to grant, the applicant can validly divide the application up to the expiry of the period for appeal against the decision (BGH, decision of 28.3.2000 - X ZB 36/98 (BPatG), GRUR 2000, 688, point II.2.c) of the Reasons).
30. It is to be noted that although § 39, paragraph 1, German Patent Law (Deutsches Patentgesetz, PatG) solely speaks of the "application" and unlike Rule 25 EPC does not use the expression "pending" it is nevertheless the understanding of the Court that it is a prerequisite for the subsisting possibility to divide the application that the application (still) exists. This is no longer the case once a decision on the application has become final (*loc.cit.*, point II.2.a) of the Reasons).

31. The legal purpose of the provision in § 39, paragraph 1, German Patent Law allowing the division of the application at any time is to ensure that this can indeed be done at any time up to the point in time in which full protection arises from the grant.

32. In the cited decision of the BGH essentially two reasons are given as to why dividing the application ought still to be possible at this stage:
 - a. One reason is that not acknowledging the subsisting right of the applicant to divide the application would be in contradiction to the principle that even after issuance of the decision to grant the applicant may still dispose over his request [for grant, and thereby over the subject-matter of the application] in other respects, i.e. by withdrawing it (loc. cit, II.2.c).

 - b. Another reason is that denying the possibility of dividing the application at this stage would mean that this right would first extinguish but would then come into existence again with the filing of an appeal. By this construction the applicant would be forced to file an unnecessary appeal just to keep his right to divide the application alive until expiry of the appeal period (loc. cit, II.2.c).

33. The Board recognizes that both the EPO practice and the "German practice" have each its merits and drawbacks. Without wishing to provide an exhaustive analysis, some considerations are worth mentioning.

34. According to the EPO practice the pending status is terminated when the decision takes effect. This could be explained as reflecting the idea that the notion "pending application" means "substantively" pending, since it is the primary legal effect of a decision to refuse to decide on and thereby dispose of any legal claims of the applicant to a patent for the subject-matter contained in the application. Until a decision is taken, the applicant is still entitled to dispose over the subject-matter of the application. As long as the application is pending, the applicant may make amendments to the subject-matter, or at the very least he has the power to withdraw the application (by analogy to possible actions after decision to grant but before publication of the grant, cf J 7/96 (*supra*), point 6.3 of the Reasons). These possibilities end when the application has been refused.
35. Under this view, the EPO practice not to accept divisional applications filed after a decision to refuse has been taken would be consistent with the principle that an applicant does not possess more substantive rights in the divisional application than in the parent application, since any rights can only derive from those available in the parent application at the time of filing the divisional application (see J 2/01 (OJ EPO 2005, 88), point 6. of the Reasons, confirmed in G 1/06 (*supra*), point 11.2 of the Reasons). If there are no more substantive rights available in the parent, there can be no more in a divisional application either.
36. However, since after a decision to refuse the applicant is capable of initiating appeal proceedings he may then directly dispose over the subject-matter again, and the

EPO does indeed recognise the filing of such divisional applications. Thus, the EPO practice also seems to be based on the understanding that a pending application is tied to the existence of pending proceedings.

37. As has been set out above, decision J 28/03 (*supra*) has acknowledged, obiter dictum, that in case of an admissible appeal against a decision to refuse the parent application a divisional application is allowed as long as the appeal procedure has not been terminated, independently of the outcome of the appeal (points 6, 11 and 15 of the Reasons).
38. In any case, whether the term "pending application" is construed as referring to the substantive existence of the subject-matter in the application or rather as referring to pending application proceedings, in both cases it is the decision to refuse - more precisely its taking effect - which is the decisive event. Similarly, in both cases the decision to refuse would first bring an end to the pendency of the subject-matter of the application, and then the subject-matter would come into existence again when an appeal has been filed, i.e. it would be pending again.
39. Under that view, a gap in the pending status of an application could be seen to exist which would undermine or at least be in conflict with the suspensive effect of the appeal, said suspensive effect meaning that no legal consequences may ensue from the contested decision as long as the appeal is pending (see J 28/03, loc.cit., points 12 and 14 of the Reasons). Moreover, it could also create legal uncertainty as regards any rights derivable from a later granted patent for the period in

question. Furthermore, acknowledging that the filing of a divisional application is possible in a time span in which no application is pending in the sense that its subject-matter is not pending would contradict a substantive principle as recently confirmed in decisions G 1/05 and G 1/06 (OJ EPO 2008, points 11.1 and 11.2 of the Reasons, in connection with sequences of divisional applications) of the Enlarged Board of Appeal: the specific and much more favourable legal status accorded to a divisional application as compared to a normal application, i.e. that the divisional application is accorded the - earlier - filing date of the parent application, is only justified if the subject-matter concerned existed throughout all times after its disclosure in the parent application.

40. Moreover, it would be less than convincing not to recognise the filing of a divisional in the interim period after refusal but before filing an appeal, if it becomes possible later as a result of an appeal. Indeed the EPO and the jurisprudence of the Boards of Appeal recognise the filing of divisional applications in the latter case. Thus the EPO practice is not quite consistent in requiring the existence of pending proceedings for the purposes of filing a divisional application. Hence "pending application" in Rule 25 EPC 1973 cannot be equated automatically to "pending proceedings" in the EPO practice.

41. It seems to be a further disadvantage of the EPO practice that the date of the end of the pending status of a given application is to be determined in a different manner depending on whether the decision to refuse is given orally or in written proceedings.

Furthermore, as the appellant has submitted, the taking of and the date of notification of the written decision is not - at least not precisely - foreseeable for the applicant and he may thus be surprisingly deprived of the possibility to still file a divisional application. By contrast, the end of the period for filing an appeal is determined for both kinds of cases in a uniform manner on the basis of the notification of the written reasons of the decision. Hence, the applicant having been notified of the decision would be still in a position validly to file a divisional application.

42. It is further unclear in EPO practice whether the pending status ends before, on, or only after the decisive date. For example, the current practice of the office is to allow the filing of a divisional application even on the date of the oral proceedings, whereas in the case of a decision to grant a divisional application can only be filed on the last day before the decisive date (the latter having been confirmed by the Legal Board, see J 7/04 (*supra*) point 3 of the Reasons). To complicate things further, in case of written proceedings, the date of the decision (posting date) is different from the date of taking legal effect vis-à-vis the applicant (date of notification, i.e. on the tenth day following posting, Rule 78 (2) EPC 1973). It is still an unanswered question whether the application is pending or not on the day of the presumed notification. As this issue is, however, not relevant for the present case, it will not be pursued further here.

43. In contrast, in the "German practice" the pending status of the patent application is not tied to actually existing proceedings before any given instance. As long

as the applicant is still potentially capable of initiating proceedings which latter may permit the applicant to dispose over the application, even if within certain limits, it can be said that the substantive rights of the applicant are not yet completely extinguished and thus the application may be considered as still pending. It stands to reason that by referring to the notion of "finally refused" the legislator of Rule 25 EPC 1973 also indicated that a pending status does not require existing proceedings before a given instance.

44. This solution has inherent advantages from a practical point of view. The decisive date is easily determined, because the expiry of the time limit for filing an appeal is a well-established notion, in any type of proceedings. This is a date which is known to the applicants, irrespective of the fact whether the decision was made orally or in writing. In this legal construction the date when the application ceases to be pending is exactly defined, namely on the day following the expiry of the time limit for filing an appeal.

45. On the other hand, this solution may prompt applicants to file divisional applications in parallel with or even instead of filing an appeal after a decision to refuse, given that they would be in the position to file the divisional application not only knowing the result of the decision to refuse, but also the detailed reasons. Thus it may be even more tempting for applicants to use the instrument of divisional applications for initiating a second examination on essentially the same invention as that of the parent, and not for actually dividing out

subject matter being effectively different from that being claimed in the parent.

Article 125 EPC 1973

46. It derives from the foregoing that there are no directly applicable provisions in the EPC nor is there jurisprudence which would define the notion of a "pending application" so as to give a clear answer to the question before the Board. Therefore, the appellant's arguments in relation to Article 125 EPC 1973 have to be considered as well.
47. Firstly, the Board notes that the appellant did not provide and the Board is not aware of convincing evidence that the desired interpretation of the term pending application in the case of an application being refused is based on a "generally recognised principle of procedural law" within the meaning of Article 125 EPC 1973.
48. The mere fact alone that the decision of the BGH settled this question in Germany does not elevate this legal solution to a "generally recognised principle". Therefore, the solution of the "Graustufenbild" decision (*supra*), i.e. the "German practice", cannot be adopted as a result of a direct application of Article 125 EPC 1973 as the appellant alleges. This does not mean that the reasoning of that decision would not be considered as such (as the Board has done in point 32 above) when deciding on the right approach to be taken to the notion of "pending application" in the present context.

49. The cited French legal provision, Art. 500 NCPC (see point XVI (1) above) is worded as follows:

"Le jugement est exécutoire, sous le conditions qui suivent, à partir du moment où il passe en force de chose jugée à moins que le débiteur ne bénéficie d'un délai de grâce ou le créancier de l'exécution provisoire."

In English:

"The judgment is enforceable, depending on the following conditions, from the moment of becoming *res judicata*, unless the debtor enjoys a grace period, or the creditor is entitled to provisional enforcement."

This provision has nothing to do with the filing of divisional applications, but concerns the enforcement of judgments. This is one of the legal effects of a judgment, and this legal effect is suspended, subject to various conditions, which has no bearing on the present case. Enforcement of judgments is an issue which is entirely beyond the scope of the EPC, being a matter for national law. Thus the cited provision does not demonstrate in any way that either in the French civil procedure - or even less in the administrative procedure - proceedings must generally be considered as pending (in French "en instance") until the expiration of the time limit for filing an appeal.

50. As regards the principle of economy of procedure relied on by the appellant, it can be accepted to be a generally recognised procedural principle in the contracting states. It is certainly legitimate in many instances or even necessary to take procedural economy

into account when interpreting procedural provisions. However, this principle is hardly applicable directly in the sense that it could form a basis for creating rights of the appellant which cannot be derived from the existing legislation. As mentioned above, the issue before the Board touches on substantive rights. It is mostly the prerogative of the legislator and not that of the judiciary to decide to what extent economy of procedure should take precedence over other legal principles when substantive rights are affected. Even if a point of law which is qualified as being of fundamental importance should concern procedural issues only, economy of procedure could probably not be chosen as the decisive factor when deciding on the point.

51. Nor can the undisputed difference between oral and written proceedings be accepted as the reason for immediately applying Article 125 EPC 1973 with the result desired by the appellant. Rule 68(1) EPC 1973 shows that there was a clear legislative intention to allow written as well as oral proceedings, including the possibility to bring a matter to an end at the oral proceedings. Hence, differences in the legal consequences ensuing from such differences in the procedures must also have been approved by the legislator. It is noted that Rule 68(1) EPC 1973 was adopted by the Diplomatic Conference establishing the Convention. Thus it is irrelevant whether or not this differentiation, or "discrepancy" contravenes any generally recognised principle in the contracting states, apart from the fact that the appellant has shown nothing of this kind. On the contrary it transpires from the decision "Graustufenbild" (point II.2.a of the Reasons)

that the very same distinction is also known in German patent law.

52. Accordingly, on the basis of the arguments presented by the appellant Article 125 EPC 1973 cannot be applied for the purposes of interpreting the term "pending application" in the case before the Board.

Point of law of fundamental importance

53. The Board considers that the determination of the point in time up to which applicants may file a divisional application is a point of law of fundamental importance in the sense of Article 112(1) EPC. It directly affects the fundamental right of applicants to file divisional applications. Moreover, even though there is some jurisprudence of the Enlarged Board and of the Legal Board on related issues, as has been set out above, the notion of "pending application" within the meaning of Rule 25 EPC 1973 does not appear to be defined precisely. It must be also noted that Rule 25 EPC 1973 was not changed in substance, but simply renumbered to the presently applicable Rule 36(1) in the EPC 2000, thus the ambiguity of the term "pending" remains. As is apparent from the above, the Board is of the opinion that the answer to the specific question before the Board cannot clearly be derived from the text of the EPC, or through the application of Article 125 EPC 1973. There is also no directly applicable case law on the issue. Furthermore, it may appear doubtful whether the liberal practice of the EPO of allowing the filing of divisional applications after notification of the decision of grant (before the publication in the Patent Bulletin) is entirely consistent with the restrictive

practice adopted for the filing of divisional applications after the refusal of an application by the Examining Division.

Violation of the principle of good faith

54. Independently of the arguments treated above, the appellant has also relied on arguments based on the violation of good faith (see point XIII above). Pursuant to Article 112(1), first sentence, EPC a question may be referred to the Enlarged Board only if the referring board considers that a decision of the Enlarged Board is required. This means that in the present case the Board should also examine whether the appeal might be allowed on other grounds, here on the alleged ground that the EPO has violated the principle of good faith (also called as the principle of protection of legitimate expectations). The appellant has invoked several acts of the EPO, and alleged that each of these establishes a violation of the principle of good faith, justifying that the appeal should be allowed on this basis. These acts are examined by the Board in turn.

55. The Board is unable to see any violation of good faith in the behaviour of the Examining Division (see point XIII.1). Firstly, the given situation was an informal conversation following oral proceedings and, thus, not a procedural situation, in which any remarks from the Division could reasonably be interpreted as a formal legal advice. This is all the more so since examiners are normally not handling such procedural issues and are therefore not experts on such issues. Legal issues of valid filing dates are generally handled by the Receiving Section. It is exclusively the responsibility

of the applicant and his representative to decide on the factually and legally most appropriate filing actions to be taken. In the present case the appellant was acting through a professional representative, who could be expected to be familiar with the procedural matters in general, but also the fact that any questions of the filing date should be clarified with the Receiving Section.

56. Furthermore, it has not been alleged that the representative specifically asked whether the filing of a divisional application would still be possible, or under what circumstances it would still be possible. According to the submissions of the appellant, the representative simply asked for a delay in sending out the written decision, also indicating that the purpose of the requested delay was the filing of a divisional application and the Division had simply promised to do as requested.
57. No violation of good faith can be established either from the fact that the purported divisional application was published shortly after its filing, even before the issuance of the Noting of Loss of Rights pursuant to Rule 69(1) form (see point XIII.2). Neither the fact of the publication itself, nor the fact that the publication occurred practically immediately after the filing may be objected to.
58. Concerning the fact of the publication, it is well established that it is not directly connected with the legal status of the application, though the EPO undertakes everything possible to avoid the publication

of applications that have ceased to be pending irrevocably, see Guidelines A, Chapter VI. 1.2.

59. As stated above (see point 20), Rule 48(2) EPC 1973 only concerns the technical preparations for publication. It is undisputed that this rule expressly instructs the EPO not to publish applications which have been finally refused (see point 21). Otherwise, no inverse conclusions can be drawn from the fact that an application is published. Rule 48(2) EPC 1973 does not forbid the publication of applications that may later turn out to be finally refused by the time the publication is effected.
60. Article 93(1) EPC 1973 requires that an application shall be published not just any time "after the expiry of ...eighteen months", but *expressis verbis* "as soon as possible" after this period, demonstrating that there is an overriding public interest in the timely publication of the application. This is why an application must proceed to publication pursuant to Rule 48(2) 1973, unless it has been established by the time the technical preparations for its publication are to be made that the application in question has been finally refused. This is exactly how the divisional application was dealt with in the present case. The cited provisions imply that an applicant must be prepared to accept the risk of publication even when there are no chances of obtaining any protection for the published subject-matter. From the above it follows that no legitimate expectations concerning the validity of an application may be based on the fact that an application has been published.

61. The appellant also argues that the publication ought not to have occurred at least until a valid filing date was accorded to the application (see point XVII 2 above). The Board accepts that such an expectation on the part of the applicants is not unreasonable or inequitable *per se*. However, neither Article 93 EPC 1973 nor Rule 48(2) EPC 1973 contain any special provisions for the publication of divisional applications (or for any other application where the question of a valid filing date might still be open by the time the application must proceed to publication). Most importantly, there are no provisions of the Convention which would permit any delaying of the publication. It is thus in keeping with the cited provisions that the overriding public interest in the timely publication of the application prevails over the applicant's interest in keeping the application unpublished until it is established that a filing date may be accorded, all the more as the parent application had already been published. Thus the EPO was correct in publishing the divisional application even if the issue of a valid filing date was not yet finally settled.
62. Finally, the Board is unable to recognise any violation of the principle of good faith in the fact that the Noting of Loss of Rights pursuant to Rule 69(1) EPC was sent out after the expiry of the time limit for filing an appeal in the parent application (see point XVII 3 above). Such a communication is not just a warning to the applicant but a procedural act of the EPO having defined requirements and entailing significant legal consequences. Thus it not only made sense to wait until the end of the appeal period, but rather the Receiving Section was obliged to do so. A communication under Rule 69(1) EPC 1973 may be sent out only if the

Receiving Section is satisfied that the legal requirement of a loss of rights having occurred has indeed been fulfilled. On the basis of the EPO practice this was only the case after expiry of the period for filing an appeal in the parent application.

63. It is true that in certain circumstances applicants may have a right to expect a warning from the EPO if it is clear that without such a warning the applicant would inadvertently miss a time limit (see G 2/97, OJ EPO 1999, 123 - Headnote). Such was, however, not the situation in the present case. An applicant's reasons for filing an appeal against a decision to refuse or for not doing so may be manifold and, even in the event of a divisional having been filed after the refusal, the applicant's decision may still depend on quite different considerations than just the possibility of maintaining the pending status of the parent application and thereby also validating the divisional application. The EPO is unaware of the applicant's interests and intentions and therefore can have no procedural obligation to warn the applicant about any "omitted acts" (i.e. an appeal) in the parent application.
64. On the other hand, for the sake of completeness it is noted that in the proceedings concerning the parent application the appellant was informed of the possibility of appeal and also of the applicable time limit by way of reference to Articles 106 to 108 EPC 1973, on the cover page of the written decision posted 27 January 2006 (EPO Form 2007). Thus neither the proceedings concerning the divisional, nor that of the parent were tainted with procedural error.

65. The arguments of the appellant concerning the non-uniform practice of the EPO were not substantiated and the Board is also not aware of such a divergence.
66. As demonstrated above, the arguments of the appellant based on the alleged violation of good faith (protection of legitimate expectations) must fail. Accordingly, the outcome of the appeal is dependent on the legal assessment of the term "pending" as explained above.

The referred question

67. The questions as formulated by the appellant are not all relevant for a decision on the present case. Strictly speaking only issue A i) is to be decided by the Board (see point XVI above). However, in its decision G 12/91 (*supra*), point 2. of the Reasons, the Enlarged Board of Appeal had already held that a decision given orally becomes effective by virtue of it being pronounced and that the equivalent of this moment in written proceedings is the moment the decision is notified. More recently, in its decision R 5/08 of 5 February 2009 (points 11. et seq. of the Reasons) the Enlarged Board of Appeal has confirmed this statement both as already having been established by the Enlarged Board in the said decision and as being the position generally accepted in all EPO proceedings (both statements were contested by the petitioner). Therefore, firstly, the fact that the divisional application was filed after the oral pronouncement of the decision to refuse but before the notification of the written reasons for the decision appears to be immaterial for the decision on the present case. Secondly, on the basis of G 12/91 and R 5/08 it appears to the Board that the legal question determining

the answer to question A i) is actually not dependent on the fact whether the first instance decision was pronounced orally or notified in writing. Rather it is the more general question of whether an application is still pending within the meaning of Rule 25 EPC 1973 (Rule 36(1) EPC) after it has been refused until the expiry of the time limit for filing an appeal if no appeal is filed. Therefore, the referred question has been formulated by this Board in a more general manner, also encompassing question A ii). By contrast, the other questions relating to the end of the pending status in appeal proceedings need not be answered for the purposes of the present appeal, and therefore cannot be referred to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

The following point of law is referred to the Enlarged Board of Appeal:

Is an application which has been refused by a decision of the Examining Division thereafter still pending within the meaning of Rule 25 EPC 1973 (Rule 36(1) EPC) until the expiry of the time limit for filing a notice of appeal, when no appeal has been filed?

The Registrar:

The Chairwoman:

S. Fabiani

B. Günzel