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**Datasheet for the decision  
of 1 February 2008**

**Case Number:** T 0064/07 - 3.3.02

**Application Number:** 99907491.7

**Publication Number:** 1052974

**IPC:** A61K 9/08

**Language of the proceedings:** EN

**Title of invention:**

Compositions containing organic compounds

**Applicant:**

Novartis AG, et al

**Opponent:**

-

**Headword:**

Epothilone compositions/NOVARTIS AG, ET AL

**Relevant legal provisions:**

EPC Art. 109 (1)

EPC R. 103

**Relevant legal provisions (EPC 1973):**

EPC R. 67

**Keyword:**

"Interlocutory revision"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0064/07 - 3.3.02

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.02  
of 1 February 2008

**Appellant:** Novartis AG  
Lichtstrasse 35  
CH-4056 Basel (CH)

**Representative:** de Weerd, Petrus G.W.  
Novartis International AG  
Corporate Intellectual Property  
CH-4002 Basel (CH)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 8 November 2006  
refusing European application No. 99907491.7  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** U. Oswald  
**Members:** J. Riolo  
P. Mühlens

## **Summary of Facts and Submissions**

- I. European patent application No. 99 907 491.7 was refused by a decision of the Examining Division posted to EPO's postal service on 1 November 2006.
- II. The decision was based on a set of 13 claims filed on 23 February 2006 with a letter of 22 February 2006.
- III. As set out in the decision under appeal, the Examining Division was of the opinion that the subject-matter of claims 10 and 11 of the set of claims filed on 23 February 2003 was directed to a method of therapeutic treatment of a subject which is excluded from patentability according to Article 52(4) EPC (1973).
- IV. The appellant (applicant) lodged an appeal against this decision and filed a new set of 11 claims, wherein claims 10 and 11 filed on 23 February 2003 relating to unpatentable matter were deleted, with its grounds of appeal dated 4 January 2007.
- V. The appellant requested that a patent be granted on the basis of the set of claims filed with its grounds of appeal and that the Examining Division rectify its decision based on Article 109 EPC.

## **Reasons for the Decision**

1. The appeal is admissible.

2. In the amended set of claims submitted by the appellant with its grounds of appeal, claims 10 and 11 of the set of claims, which led to the Examining Division's refusal, were deleted.
3. In view of the fact that these amendments overcome the objection of the Examining Division that led to the rejection of the application, the decision should have been rectified in accordance with Article 109(1) EPC.
4. In that respect, the Board notes however that the Examining Division had no opportunity to do so, as it would appear from "EPO Form 2701 06.01". Indeed, as foreseen under point III. of this form, the formalities officer should have forwarded this form to the Examining Division, so that it could have the opportunity to decide whether the decision could be rectified under Article 109(1) and should not have sent the appeal direct to the EPO Boards of Appeal, bypassing the procedural step prescribed by Article 109(1) EPC, namely consideration for interlocutory revision.
5. This constitutes a substantial procedural violation, which delayed the procedure.
6. According to Rule 67 EPC (1973) (corresponding to Rule 103 EPC 2000), the reimbursement of appeal fees shall be ordered if it is equitable by reason of a substantial procedural violation.

In the present case, the question of reimbursement of the appeal fee does not, however, arise, since this procedural irregularity occurred subsequent to the

taking of the decision under appeal and had no bearing on the appellant's need to file the appeal.

7. Under these circumstances, the case is remitted to the first instance for further prosecution.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar

The Chairman

A. Townend

U. Oswald