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**Datasheet for the decision  
of 1 October 2019**

**Case Number:** T 0657/17 - 3.3.01

**Application Number:** 03729689.4

**Publication Number:** 1474684

**IPC:** G01N33/48

**Language of the proceedings:** EN

**Title of invention:**

METHOD AND/OR SYSTEM FOR ANALYZING BIOLOGICAL SAMPLES USING A  
COMPUTER SYSTEM

**Applicants:**

Abbott Molecular Inc.  
MetaSystems Hard & Software GmbH

**Headword:**

Interlocutory revision/ABBOTT

**Relevant legal provisions:**

EPC Art. 109(1)  
EPC R. 103(1)(a)

**Keyword:**

Interlocutory revision - competence of the Board of Appeal to  
decide (no)

**Decisions cited:**

G 0003/03, T 0021/02, T 0242/05, T 1703/12, T 2134/12

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0657/17 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 1 October 2019**

**Appellant:** Abbott Molecular Inc.  
(Applicant 1) 1300 E. Touhy Avenue  
Des Plaines, IL 60018 (US)

**Appellant:** MetaSystems Hard & Software GmbH  
(Applicant 2) Robert-Bosch-Strasse 6  
68804 Altlussheim (DE)

**Representative:** Modiano, Micaela Nadia  
Modiano Josif Pisanty & Staub Ltd  
Thierschstrasse 11  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 3 August 2016  
refusing European patent application No.  
03729689.4 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** A. Lindner  
**Members:** R. Hauss  
L. Bühler

## **Summary of Facts and Submissions**

- I. European patent application 03 729 689.4 was refused by the examining division by decision posted on 3 August 2016. On 16 September 2016, a notice of appeal was filed and the appeal fee was paid on the same day. On 13 December 2016, the appellants filed the statement setting out the grounds of appeal and requested that a patent be granted on the basis of an amended set of claims filed therewith. No request for reimbursement of the appeal fee was filed.
- II. On 14 March 2017, the examining division rectified the decision under appeal by crossing the respective box on the internal (non-public) Form 2701. This was communicated to the appellants on 21 March 2017, by the use of Form 2710, which stated that following the appeal of 16 September 2016, rectification was ordered and the decision dated 3 August 2016 was set aside. The appellants were also informed that their request for reimbursement of the appeal fee could not be allowed and that this request would be forwarded to the Board of Appeal for decision.
- III. On 14 March 2017, the case was referred to the Board of Appeal for a decision on a request for reimbursement of the appeal fee after rectification of the appeal.

## **Reasons for the Decision**

1. As an exception to the devolutive effect of an appeal and in the interest of procedural expediency and economy, Article 109(1) EPC provides that the department of the first instance which rendered the decision under appeal has to rectify its decision, i.e.

to grant interlocutory revision, if it considers the appeal to be admissible and well-founded, and the appellant is not opposed by another party. According to G 3/03, in case of interlocutory revision the decision under appeal is set aside and the appeal allowed by the department of the first instance. As a consequence, the appeal is no longer pending and will not be remitted to a board of appeal unless reimbursement of the appeal fee is contentious (G 3/03, OJ EPO 2005, 344, point 2).

2. In G 3/03 the Enlarged Board further stated that it followed from the wording of Rule 67 EPC 1973 (now Rule 103(1)(a) EPC) that the department of the first instance had to examine whether the requirements for reimbursement of the appeal fee were met, regardless of whether or not the appellant had actually submitted such a request. If the department of the first instance came to the conclusion that these requirements were not met, it could not order reimbursement of the appeal fee. In the absence of a request for reimbursement of the appeal fee, the decision of the department of the first instance granting interlocutory revision pursuant to Article 109(1) EPC would make no mention of the issue of reimbursement of the appeal fee, and the appellant would not be adversely affected by the decision (G 3/03, OJ EPO 2005, 344, point 3).
  
3. In the present case, the examining division rectified its decision dated 3 August 2016 on 14 March 2017. On the same day, the decision ordering rectification was handed over to the EPO postal service for notification (see date in the footer of Form 2710) and the matter referred to the Board for a decision on a request for reimbursement of the appeal fee (see internal Form 2703). Form 2710 informing the appellants of the rectification was dispatched on 21 March 2017.

4. A second copy of Form 2701 is on file which appears to be intended to retract the examining division's decision of 14 March 2017 rectifying its decision of 3 August 2016 and to replace it by an order stating that the decision under appeal is not rectified. It is not clear, when and by whom the initial order to rectify the decision dated 3 August 2016 was amended, since this was simply done by crossing out the order granting rectification on the original Form 2701 signed by the examiners.
  
5. However, it is not necessary to assess whether and, if so, until when the examination division could have reversed its decision of 14 March 2017 rectifying the decision of 3 August 2016, and whether the second Form 2701 was legally effective. The examining division's rectification of the decision of 3 August 2016 was notified, by the use of Form 2710, to the appellants on 31 March 2017 (Rule 126(2) EPC). There is no evidence on file that the appellants had previously been informed of a retraction by the examining division of its decision granting interlocutory revision pursuant to Article 109(1) EPC. As from 31 March 2017 at the latest, the decision ordering rectification could no longer be amended. Therefore, the Board holds that the appeal was allowed by the examining division in accordance with Article 109(1) EPC and duly notified to the appellants. Consequently, there is no appeal pending before the Board.
  
6. Furthermore, the Board notes that reimbursement of the appeal fee was not requested on appeal. According to decision G 3/03, the issue of reimbursement of the appeal fee should therefore not have been referred to the Board for decision (see point 2 above). In any case, in the absence of a request for reimbursement of

the appeal fee, this matter does not constitute an ancillary issue to be dealt with in appeal proceedings (see T 242/05 of 20 September 2006, point 2.3, and T 2134/12 of 16 July 2013, point 3).

7. In view of the above, the Board holds that no appeal exists in respect of European patent application 03 729 689.4 for which the Board is responsible pursuant to Article 21(1) EPC. Moreover, in the absence of a request for reimbursement of the appeal fee (Rule 103(1)(a) EPC), the Board is also not empowered to decide on this issue as an ancillary matter. Since no appeal is pending, the Board can only remit the case which was erroneously referred to it, to the department of first instance (following decisions T 21/02 of 20 February 2006, T 242/05 of 20 September 2006, T 1703/12 of 14 March 2013, and T 2134/12 of 16 July 2013).

**Order**

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

The case is remitted to the examining division for further prosecution.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated