

**Opinion of the Enlarged Board of Appeal dated 18 July 2019
G 1/18**

(Translation)

Composition of the board:

Chair: C. Josefsson

Members: G. Weiss
I. Beckedorf
F. Blumer
G. Eliasson
S. Granata
W. Sieber

Headword: Filing an appeal

Legal provisions applied (EPC 1973):

Article 108
Rule 65(1)

Legal provisions applied (EPC 2000):

Articles 108, 112(1)(b)
Rule 101(1)

Keywords: "Appeal deemed filed" – "Appeal admissible" – "Appeal fee – reimbursement"

Headnote

1. An appeal is deemed not to have been filed in the following cases:

(a) where notice of appeal was filed within the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;

(b) where notice of appeal was filed after expiry of the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;

(c) where the appeal fee was paid within the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND notice of appeal was filed after expiry of that two-month time limit.

2. In the cases referred to in answers 1(a) to (c), reimbursement of the appeal fee is to be ordered ex officio.

3. Where the appeal fee was paid within or after the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND no notice of appeal was filed at all, the appeal fee is to be reimbursed.

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A. SUMMARY OF PROCEEDINGS

I. Referral under Article 112(1)(b) EPC

In a letter dated 7 June 2018, the President of the European Patent Office (EPO) referred the following point of law to the Enlarged Board of Appeal under Article 112(1)(b) EPC:

"If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?"

In that referral, the President of the EPO wrote that the requirements of Article 112(1)(b) EPC had been met: different boards of appeal had given different decisions on that question and an answer to it was necessary "in order to ensure uniform application of the law". As evidence of different decisions, the referral cited T 1897/17 as representing the "minority" view in the case law that the appeal is inadmissible and T 1325/15 and T 2406/16 as representing the "majority" view in the case law that the appeal is deemed not to have been filed. The President of the EPO added that the answer "is certain to have an impact on the practice of the Office's departments of first instance", several EPC provisions having similar wording.

The different board decisions analysed by the President of the EPO in his referral have been summarised as follows.

1. T 1897/17 – 3.4.01 dated 14 February 2018 – "minority" view in the case law

In this case, notice of appeal had been filed and the fee paid after expiry of the two-month time limit under Article 108, second sentence, EPC. The board, having refused the appellant's request for re-establishment of rights in respect of the two-month time limit, rejected the appeal as inadmissible (and not "deemed not to have been filed") and found that the appeal fee could not be reimbursed. It held the wording of Rule 101(1) EPC to be very clear: where an appeal did not meet the requirements of Articles 106 to 108 EPC, the board was to reject it as inadmissible. The legal fiction in Article 108, second sentence, EPC – that notice of appeal was not deemed to have been filed until the appeal fee had been paid – could only be understood as setting an additional (implicit) condition for an appeal to be admissible: payment of the appeal fee. The board held too that the procedural consequences of that fiction were not laid down in Article 108 EPC, but were governed exclusively by Rule 101(1) EPC, which provided that the appeal was inadmissible. Recalling the arguments made in the 2014 referring decisions T 2017/12 (OJ EPO 2014, A76) and T 1553/13 (OJ EPO 2014, A84), it found that interpretation to comply with the rules laid down in the Vienna Convention on the Law of Treaties ("Vienna Convention") and that an analysis of the subsequent decisions on the matter, T 1325/15 and T 2406/16 (see below), and of Enlarged Board decision R 4/15 of 16 September 2016, did not produce any convincing reasons to doubt the conclusion that the appeal was inadmissible. The board observed that the wording of Article 108, second sentence, EPC was used in other EPC articles too (Articles 99(1) and 112a(4), last sentence). The fundamental difference between those three articles and other EPC provisions was that the

former were associated with specific procedural rules: Rules 101(1), 77(1) and 108(1) EPC. Those rules confirmed and complemented the clear wording of Article 108, second sentence, and of Articles 99 and 112a(4) EPC, i.e. that appeals, oppositions and petitions for review were inadmissible where the requirements for admissibility – which under the EPC included payment of a fee on time – were not met. Rejecting an appeal found to be inadmissible therefore had to be seen as a requirement to ensure legal certainty. The board concluded that there was no legal basis for the assumption that the appeal was deemed not to have been filed; thus it had to be rejected as inadmissible.

2. T 1325/15 – 3.5.07 dated 7 June 2016 – "majority" view in the case law

In T 1325/15, notice of appeal had been filed and the appeal fee paid after expiry of the prescribed two-month time limit. The board first of all explained that in numerous decisions the boards of appeal had interpreted Article 108, second sentence, EPC as meaning that an appeal did not come into existence, i.e. that notice of appeal was deemed not to have been filed, where notice of appeal was filed after expiry of the two-month time limit and/or the appeal fee was paid after that time limit. It reaffirmed that the principles of legal certainty and uniform application of the law required a board having to decide on a point of law to take into account how that point had been decided in other decisions. In this regard, it held that, where there was a consistent precedent in the case law that had been considered a satisfactory and predictable solution for many years, there had to be a compelling reason for preferring a different interpretation leading to a different solution. In the case before it, it came to the conclusion that there was no compelling reason to deviate from the well-established approach of regarding an appeal filed after expiry of the time limit as not having been filed. That approach was consistent with an interpretation of the EPC in accordance with the rules of interpretation as codified in the Vienna Convention, under which the starting point for interpreting a provision was its wording. The board then observed that various EPC provisions required a certain document to be filed in due time or within a particular time limit; the general rule was that the late filing of a document was to be treated in the same way as a failure to file it. Article 108, first sentence, EPC required notice of appeal to be filed within two months of notification of the decision. The board thus concluded, in line with the argument underlying what was clearly the prevailing view in the boards' case law, that where notice of appeal was not filed in due time the appeal did not exist legally and consequently the appeal fee had to be reimbursed.

3. T 2406/16 – 3.3.05 dated 21 September 2017 – "majority" view in the case law

In T 2406/16, notice of appeal had been filed within the prescribed two-month time limit, but the appeal fee was paid after its expiry. The board concurred with the conclusions reached in T 1325/15. It too referred to the aforementioned Enlarged Board decision R 4/15, in which it had been held that a petition for review under Article 112a(4), third sentence, EPC, was deemed not to have been filed where the associated fee had been paid after expiry of the time limit. The Enlarged Board had also held that, since Articles 108, second sentence, and 112a(4), third sentence, EPC had essentially the same wording, they had to be interpreted in the same way. The board noted too that the final decision in T 1553/13, taken after the Enlarged Board's finding that the referral was inadmissible (G 1/14, OJ EPO 2016, A95), had

been exactly in line with the conclusions in R 4/15. Given those decisions, the board concluded that the appeal was deemed not to have been filed and that the appeal fee, having therefore been paid unduly, had to be reimbursed.

4. T 1946/15 – 3.2.02 dated 19 October 2016 and T 198/16 – 3.5.04 dated 20 March 2018 – "majority" view in the case law

The referral cites these two decisions too, which are in line with the "majority" view in the case law.

II. Statements by third parties

In accordance with Article 10 of its Rules of Procedure, the Enlarged Board invited the public to file written statements on the President of the EPO's referral (OJ EPO 2018, A71). Following that invitation, the EPO received nine written statements, which can be consulted on its website, in the section devoted to the Enlarged Board of Appeal. Most of the *amicus curiae* briefs supported the "majority" view in the case law, i.e. where notice of appeal is filed and/or the appeal fee is paid after the two-month time limit under Article 108, second sentence, EPC, the appeal is deemed not to have been filed and the fee paid must be reimbursed.

B. REASONS FOR THE OPINION

I. Admissibility of the referral

1. Corrected reading of the referred question

The use of the expression "*la taxe de paiement*" ["payment fee"] in the wording of the first part of the question [in the original French], "*Lorsque la formation d'un recours et/ou la taxe de paiement ...*", is unclear and appears to be a mistake. As rightly pointed out in a third-party statement, neither the EPC nor the Rules relating to Fees provide for a "*taxe de paiement*" (German translation proposed in the *amicus curiae* brief: "*Zahlungsgebühr*" or "*Auftragsgebühr*"). Nonetheless, the Enlarged Board considers that this error can easily be corrected simply by reading the referral as a whole, the term "*taxe de paiement*" meaning "*le paiement de la taxe de recours*" ["payment of the appeal fee"]. Moreover, this is how the question was corrected for publication in the EPO Official Journal (OJ EPO 2018, A71), with a footnote explaining the Enlarged Board's reading [of the French question] for the purpose of its translation. Thus the question referred to the Enlarged Board is to be read as follows:

"If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?"

2. Requirements for admissibility – Article 112(1)(b) EPC

Article 112(1)(b) EPC provides that, in order to ensure uniform application of the law, or if a point of law of fundamental importance arises, the President of the EPO may

refer a point of law to the Enlarged Board of Appeal where two boards of appeal have given different decisions on that question.

The Enlarged Board therefore has to examine whether the referral is admissible under Article 112(1)(b) EPC, i.e. whether

(i) the point of law referred requires an answer in order to ensure uniform application of the law or is of fundamental importance

and

(ii) two boards of appeal have given different decisions on that point of law.

(1) As to the first requirement for admissibility which any referral must meet – whether it was made by a board of appeal under Article 112(1)(a) EPC or by the President of the EPO under Article 112(1)(b) EPC – the referral states in point 34 that the "*answer [... to the question] is certain to have an impact on the practice of the EPO's departments of first instance (including the examining and opposition divisions); several EPC provisions have wording similar to Article 108 EPC and the current practice provides for clear legal consequences where a request is filed late or the corresponding fee paid late, those consequences normally resulting in reimbursement of that fee since the request is deemed not to have been filed*". Section D.II of the referral analyses the various EPC provisions with wording similar to Article 108, first and second sentences, EPC, as well as the boards' practice and case law on the matter.

The Enlarged Board agrees with the President of the EPO. The answer is a "point of law of fundamental importance" because not only (a) will it – as the President has stressed – have an impact beyond the question asked, but also (b) it is likely to be relevant to a high number of similar cases.

(a) The legislator chose the same wording as that in Article 108, second sentence, EPC, and its associated Rule 101(1) EPC, for Article 99(1), second sentence, EPC (notice of opposition/payment of the opposition fee), and its associated Rule 77(1) EPC, and for Article 112a(4), fourth sentence, EPC (petition for review/payment of the petition for review fee), and its associated Rule 108(1) EPC.

Because of the similarity in the wording chosen by the legislator, it goes without saying that the answer given to the referred question, including the part on reimbursement of the fee paid, will have direct implications for the other legal situations mentioned above.

(b) The question of the legal effect where the appeal fee is not paid within the two-month time limit or where notice of appeal was filed after that time limit although the appeal fee was paid in due time, i.e. whether the appeal is rejected as inadmissible or deemed not to have been filed, is a point of law of fundamental importance, since it is relevant in a potentially high number of cases before the boards of appeal and is thus of great interest, particularly – though not only – to the parties to appeal proceedings. Moreover, an answer on this point of law is important not just for users of the European patent system but also for all the boards of appeal

and the EPO itself given that, as was also emphasised in the *amicus curiae* briefs, a decision on the legal fiction of the appeal (or request) not having been filed, or alternatively its admissibility or inadmissibility, and on whether or not any fee paid is to be reimbursed as a consequence, will have to be taken in numerous other legal situations. The interpretation of Article 108, second sentence, EPC will therefore have an impact that clearly goes beyond the question asked in the referral.

(2) The second requirement for admissibility of the referral, which relates to the uniform application of the law, is also met. In his referral, the President of the EPO cites different decisions, analysing on the one hand T 1897/17 – 3.4.01 as representing the "minority" view in the case law and on the other hand T 1325/15 – 3.5.07 and T 2406/16 – 3.3.05 as two decisions representing the "majority" view in the case law (see above). According to the Enlarged Board's case law, the phrase "different decisions" in Article 112(1)(b) EPC has to be understood in the sense of "conflicting decisions" (see e.g. G 3/08, OJ EPO 2011, 10, point 7.3.7, last paragraph, of the Reasons). In this referral, the cited decisions differ on the outcome of the appeal proceedings, the first holding that the appeal is inadmissible and the appeal fee cannot be reimbursed and the other two holding that the appeal is deemed not to have been filed and that the appeal fee must be reimbursed. The two legal outcomes are entirely different and thus "conflicting"; the legal reasons for them are different, and even "conflicting".

3. It follows that the referral is admissible.

II. Application of Article 108, first and second sentences, EPC by the boards of appeal and the Enlarged Board of Appeal

1. Article 108, first and second sentences, EPC – scenarios

Article 108, first and second sentences, EPC 2000: "*Notice of appeal shall be filed, in accordance with the Implementing Regulations, at the European Patent Office within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.*"

From the wording of Article 108, first and second sentences, EPC and taking into account the case law of the Enlarged Board of Appeal and the boards of appeal on this subject, there are three possible scenarios:

- Scenario 1: the appeal was filed within the prescribed two-month time limit AND the appeal fee was paid AFTER expiry of that two-month time limit.
- Scenario 2: the appeal was filed AFTER expiry of the two-month time limit AND the appeal fee was paid AFTER expiry of that two-month time limit.
- Scenario 3: the appeal fee was paid within the prescribed two-month time limit AND the appeal was filed AFTER expiry of that two-month time limit.

The different scenarios can be represented as in the following table:

		Appeal/notice of appeal	
		Filed in due time	Filed > 2 months
Appeal fee	Paid in due time		3
	paid > 2 months	1	2

The wording of Article 108, first and second sentences, EPC is likely to have been the reason why the President of the EPO formulated his question using the conjunction "... and/or ...". Most of the *amicus curiae* briefs also analysed and commented on the question referred to the Enlarged Board by looking at these different legal scenarios.

For each scenario, two questions must be answered:

- is the appeal admissible or deemed not to have been filed or, in other words, what is the legal consequence? AND

- must any appeal fee paid be reimbursed?

2. "Majority" view in the case law

(1) Scenario 1 – the appeal was filed WITHIN the prescribed two-month time limit AND the appeal fee was paid AFTER expiry of that two-month time limit

This is the classic case where the appellant initiated the appeal procedure within the two-month time limit by filing notice of appeal meeting the requirements laid down in the Implementing Regulations but paid the appeal fee after that time limit had expired. This also covers the scenario where the appellant filed an appeal within the two-month time limit but omitted to pay the appeal fee.

According to the "majority" view in the case law, where the appeal fee was not paid at all or paid only after expiry of the two-month time limit, the appeal is deemed not to have been validly filed and therefore the appeal does not exist.

The decisions taken in such cases by the Legal Board of Appeal and the technical boards of appeal are, in chronological order, the following (the list is not exhaustive; it contains those decisions regularly analysed or referred to in others and those mentioned in reference works on European patent law): J 2/78 dated 1 March 1979 (OJ EPO 1979, 283), J 21/80 dated 26 February 1981 (OJ EPO 1981, 101), J 16/82 dated 2 March 1983 (OJ EPO 1983, 262), T 105/85 – 3.3.1 dated 5 February 1987, J 24/87 dated 6 November 1987, T 742/96 – 3.2.5 dated 5 September 2000, T 1486/11 – 3.3.05 dated 13 April 2012, T 2274/11 – 3.5.06 dated 29 August 2012,

J 5/15 dated 22 June 2015, T 181/14 – 3.5.02 dated 13 July 2017, T 2406/16 – 3.3.05 dated 21 September 2017.

(a) J 2/78 was the first decision taken in scenario 1. Since the appeal fee had not been paid, the Legal Board, without however giving any reasons, held that the appeal "*is not deemed to have been filed*" (wording corresponding to that of Article 108, second sentence, EPC 1973). J 2/78 was followed by J 21/80, where the appeal fee had been paid late. The Legal Board held: "*As there is no admissible appeal in existence, the appeal fee paid late must be reimbursed*" (see point 4 of the Reasons). The decision did not give any further reasoning. The Order states (language of the proceedings: French): "*Le recours contre la décision de la Section de dépôt du 12 mai 1980 est considéré comme non formé.*" J 21/80 was then followed by J 16/82. In points 2 and 9 of the Reasons, the Legal Board held (language of the proceedings: German):

"2. Zu den Voraussetzungen einer rechtswirksamen Beschwerde gehört, daß die Beschwerdegebühr innerhalb der nach Artikel 108 EPÜ vorgeschriebenen 2-Monatsfrist entrichtet wurde. Andernfalls gilt die Beschwerde nach Artikel 108 Satz 2 EPÜ nicht als eingelegt (siehe Entscheidung der JurBK J 21/80 vom 26. Februar 1981, ABI. EPO 1981, 101).

*9. Da eine Wiedereinsetzung somit nicht stattfinden kann, gilt die Beschwerde gem. Artikel 108 Satz 2 EPÜ als nicht eingelegt. Artikel 108 Satz 2 EPÜ ist **entsprechend seiner Entstehungsgeschichte** in Zusammenhang mit Satz 1 in dem Sinne zu verstehen, dass die Beschwerde nicht als eingelegt gilt, wenn die Beschwerdegebühr nicht innerhalb der in Satz 1 genannten Beschwerdefrist entrichtet worden ist (siehe auch die bereits unter Nr. 2 erwähnte J 21/80 vom 26. Februar 1981, ABI. EPA 1981, 101)." (emphasis added).*

In J 16/82 the Legal Board made passing reference to the drafting history of Article 108 EPC ("*Entstehungsgeschichte*"), without explaining why the provision had been interpreted in that way.

(b) In the other decisions cited above, the boards held that the appeal had not been filed and that the appeal fee had to be reimbursed as a result, but without stating explicitly in the reasons for their decisions why they had reached that conclusion. The same applies to the recent decision T 2406/16 analysed in the referral, which refers to earlier decisions.

(c) In R 4/15 dated 16 September 2016, after late payment of the petition for review fee the Enlarged Board held, without however giving specific reasons, that the petition for review was deemed not to have been filed and ordered reimbursement of the fee (language of the proceedings: English): "*From the above, the Enlarged Board concludes that the fee for petition for review was paid out of time. It therefore unanimously decides that the petition for review is deemed not to have been filed. In the absence of a petition for review, there is no legal basis for paying the fee involved, which must therefore be reimbursed.*" (see points 10 to 12 of the Reasons).

(2) Scenario 2 – the appeal was filed AFTER expiry of the two-month time limit AND the appeal fee was paid AFTER expiry of that two-month time limit

The decisions taken in this situation by the technical boards of appeal are, in chronological order, the following (the list is not exhaustive; it contains decisions regularly analysed or referred to in others and those mentioned in the referral, the *amicus curiae* briefs and reference works on European patent law): T 60/01 – 3.5.2 dated 1 October 2000, T 2056/08 – 3.2.04 dated 15 January 2009, T 585/08 – 3.5.04 dated 20 October 2009, T 1325/15 – 3.5.07 dated 7 June 2016, T 1553/13 – 3.2.06 dated 23 November 2016, T 1954/13 – 3.3.04 dated 27 October 2017.

(a) The boards that have dealt with cases of the appeal being filed AND the appeal fee being paid after expiry of the two-month time limit, where generally a request for re-establishment of rights has been filed, have not explained why the appeal had to be deemed not to have been filed when finding that the request for re-establishment of rights had to be refused; they have referred to Article 108, second sentence, EPC and concluded that the appeal is deemed not to have been filed or that the appeal does not exist. See, for example, the above-mentioned decisions T 60/01 – 3.5.2, points 3 and 4 of the Reasons, T 2056/08 – 3.2.4, point 5 of the Reasons and T 585/08 – 3.5.04, points 22 and 24 of the Reasons.

(b) Only in T 1325/15 – a decision cited and analysed in the referral – did the board (3.5.07), having reached the interim conclusion that the request for re-establishment of rights had to be refused, explicitly give reasons for its finding that the appeal was deemed not to have been filed (see points 34 to 43 of the Reasons). First, it mentioned (see point 38 of the Reasons) that, according to the rules of treaty interpretation as codified in the Vienna Convention, the starting point for the interpretation of any provision was its wording; the result of that interpretation had to be confirmed, for example by a systematic interpretation of the provision taking into account its function and position within the EPC as a whole. Then it examined (see point 39 of the Reasons) the assumption that the late filing of the appeal was, at least to an extent, legally effective and not to be treated as if no notice of appeal had been filed at all. In this regard, it noted (see point 40 of the Reasons) that numerous provisions of the EPC specified that a certain document was to be filed within a particular time period or "in due time". In the latter case, the Implementing Regulations either specified the relevant time limit or left it to the EPO to do so ("*within a period to be specified*"). In almost all of those cases, the EPC also specified the legal consequence of not filing the document "*in due time*" without, however, distinguishing between late and non-filing. In a few cases, filing the document in due time was an essential condition for triggering the applicability of another provision and the consequence of late or non-filing was simply that that other provision was not applicable. For example, if an applicant did not file the certificate under Article 55(2) EPC within four months of filing the European patent application (Rule 25 EPC), it could not benefit from the Article 55(1) EPC exhibition exception. Under the EPC, the general rule was that the late filing of a document was treated in the same way as its non-filing. The board then concluded (see point 41 of the Reasons) that Article 108, first sentence, EPC required that notice of appeal be filed within two months of notification of the decision. If no notice of appeal was filed, then no appeal came into existence. Since the EPC made no distinction

between the late and non-filing of a document, no appeal existed where notice of appeal had not been filed in due time.

(c) In T 1954/13 dated 27 October 2017, Board 3.3.04 likewise explained the reasons for its decision that the appeal was deemed not to have been filed. In point 42 of the Reasons, it held that it followed from the consideration that the first and second sentences of Article 108 EPC were to be read together that, for the appeal to be deemed filed, not only did notice of appeal have to be filed but also the appeal fee had to be paid within the two-month time limit under Article 108, first sentence, EPC (see, along the same lines, J 16/82, point 9 of the Reasons, and T 778/00, OJ EPO 2001, 554, point 2.2 of the Reasons). The link between the two sentences was even clearer from the wording of the English version of Article 108, second sentence, EPC 1973 ("**The notice of appeal shall not be deemed to have been filed until after the fee for appeal has been paid**") (board's emphasis). Thus the board interpreted Article 108, second sentence, EPC as meaning that payment of the appeal fee within the two-month time limit was a further requirement for an appeal to be filed. That was also in line with the "general concept" of the EPC that a request/petition was deemed to have been filed only if payment was made in due time (e.g. request for examination, re-establishment of rights, limitation/revocation, opposition or petition for review).

(3) Scenario 3 – The appeal fee was paid WITHIN the prescribed two-month time limit AND the appeal was filed AFTER expiry of that two-month time limit

The following is a list of the decisions concerning scenario 3 taken by the Legal Board of Appeal and the technical boards of appeal and mentioned in the referral, the *amicus curiae* briefs and the specialist literature on European patent law (this list is not exhaustive):

J 19/90 dated 30 April 1992, T 371/92 – 3.3.3 dated 2 December 1993 (OJ EPO 1995, 324), T 696/95 – 3.2.3 dated 16 November 1995, T 266/97 – 3.2.03 dated 22 June 1998, T 445/98 – 3.2.1 dated 10 July 2000, T 778/00 – 3.2.4 dated 6 July 2001 (OJ EPO 2001, 554), T 1479/09 – 3.2.04 dated 25 November 2009, T 1943/09 – 3.4.03 dated 31 May 2010, T 377/11 – 3.3.10 dated 14 December 2011, T 861/12 – 3.3.01 dated 2 March 2016, T 181/14 – 3.5.02 dated 13 July 2017, T 327/17 – 3.3.09 dated 14 December 2017, T 2520/17 – 3.3.05 dated 9 April 2018.

(a) In J 19/90, the Legal Board held that merely paying the appeal fee did not constitute validly filing the appeal and thus that the appeal was deemed not to have been filed. That was the case even where it was stated that an "appeal fee" was being paid in relation to a specified patent application and where EPO Form 1010, ("Payment of fees and costs") had been used. The following decisions came to the same conclusion: T 371/92, T 696/95, T 266/97, T 778/00, T 1479/09, T 1943/09, T 377/11, T 861/12, T 181/14 and T 2520/17, although these decisions did not give any explanation as to the resulting legal effect, i.e. that the appeal was deemed not to have been filed or was non-existent.

(b) Only in T 445/98 and T 778/00 did the boards consider the wording of Article 108 EPC and the legal effect where notice of appeal was filed after the two-month time limit although the appeal fee had been paid in due time.

Point 5 of the Reasons for T 445/98 (language of the proceedings: English) reads as follows: "..., the Board considers that Article 108 EPC distinguishes two stages of the appeal: the first stage relates to the existence of the appeal which requires two conditions: the notice of appeal must be filed in writing at the European Patent Office within two months after the date of notification of the decision appealed from, and the fee for appeal must have been paid. Only if the appeal fulfils these two requirements of Article 108 EPC is it deemed to have been filed, i.e. the appeal is in existence. The second stage of appeal, which relates to the issue of admissibility, can only come into effect where an appeal is in existence. On the contrary where the appeal is deemed not to have been filed, the issue of admissibility does not even arise."

Point 2.2 of the Reasons for T 778/00 (language of the proceedings: German) reads as follows: "... Einlegung der Beschwerde und Zahlung der Beschwerdegebühr in Artikel 108 Satz 1 und 2 EPÜ [sind] als zwei getrennte Erfordernisse der Beschwerde geregelt. Nach diesen Bestimmungen kann die Zahlung der Beschwerdegebühr die Einlegung der Beschwerde nicht ersetzen. Ansonsten hätte es genügt, die Zahlung der Beschwerdegebühr vorzuschreiben, des weiteren Erfordernisses der Einlegung der Beschwerde hätte es nicht bedurft. Dieser Struktur der Vorschrift entspricht auch ihr Wortlaut. Satz 2 ist mit Satz 1 durch die zeitliche Bestimmung "erst" verbunden und knüpft damit an eine eingelegte Beschwerde an, die nur dann Wirksamkeit erlangen kann, wenn die in Satz 2 geregelte Bedingung, d. h. die Zahlung der Gebühr, eintritt. Dieser Zusammenhang wird auch aus Artikel 4 (1) GebO deutlich, nach dem mangels abweichender Regelung eine Gebühr mit dem Eingang des entsprechenden Antrags fällig wird (vgl. Gall, Münchner Gemeinschaftskommentar, 10. Lfg. 1986, Art. 51 EPÜ, Rdn 86, 105). Dies hat aber auch zur Folge, daß die Beschwerdegebühr erst mit Einlegung der Beschwerde fällig wird. Geht keine Beschwerde ein, so ist die Beschwerdegebühr ohne Rechtsgrund gezahlt und daher zurückzuzahlen (ständige Rechtsprechung seit T 41/82, ABI. EPA 1982, 256, Gründe Nr. 1)."

(c) In R 18/13, the petition for review had been filed and the fee paid after expiry of the two-month time limit under Article 112a(4), second sentence, EPC. The Enlarged Board, after refusing the request for re-establishment of rights, held (language of the proceedings: German): "*Infolgedessen gilt der Antrag auf Überprüfung als nicht gestellt. Die gezahlte Überprüfungsgebühr ist ohne Rechtsgrund gezahlt worden und ist daher zurückzuzahlen.*" (see point 26 of the Reasons).

3. "Minority" view in the case law

A search revealed only 15 decisions in which the boards had held that the appeal had to be rejected as inadmissible where notice of appeal had been filed and/or the appeal fee paid after expiry of the two-month time limit under Article 108 EPC. The Enlarged Board had reached that conclusion in only one decision. Those decisions are, in chronological order:

T 489/93 – 3.2.4 dated 25 February 1994, T 1100/97 – 3.2.5 dated 8 May 1998,
T 79/01 – 3.3.4 dated 25 March 2003, T 122/02 – 3.2.4 dated 23 June 2003,
T 260/06 – 3.4.03 dated 18 July 2006, T 1465/07 – 3.4.02 dated 9 May 2008,
T 1926/09 – 3.3.05 dated 28 September 2010, R 2/10 dated 3 November 2010,

T 1289/10 – 3.5.06 dated 13 April 2011, T 1535/10 – 3.2.03 dated 13 May 2011, T 2210/10 – 3.2.02 dated 15 September 2011, T 1234/11 – 3.2.03 dated 21 December 2011, T 742/11 – 3.4.03 dated 29 March 2012, T 2450/16 – 3.5.04 dated 9 October 2017, T 1897/17 – 3.4.01 dated 14 February 2018, T 1823/16 – 3.5.01 dated 28 June 2018.

The boards gave reasons why the appeal had to be rejected as inadmissible in only three of these decisions: T 489/93 – 3.2.4, T 79/01 – 3.3.4 and T 1897/17 – 3.4.01.

(a) In T 489/93, notice of appeal had been filed and the appeal fee paid after expiry of the two-month time limit. The board, despite ordering reimbursement of the appeal fee on the basis that the appeal had to be deemed not to have been filed, nevertheless found the appeal to be inadmissible. Point 9 of the Reasons for the decision reads as follows (language of the proceedings: German): "*Die Beschwerde war daher als unzulässig zu verwerfen, Regel 65 (1) EPÜ. Der Wortlaut in Regel 65 (1) EPÜ [1973] [N.B. corresponds to Rule 101(1) EPC 2000] 'als unzulässig' ist in einem weiteren Sinn verwendet, d. h. umfaßt sowohl den Fall der existenten (aber "unzulässigen") wie den der nicht existenten Beschwerde.*"

(b) In T 79/01, the appeal was rejected as inadmissible because only part of the appeal fee had been paid. The board considered that to be a logical interpretation of Rule 65(1) EPC 1973, finding in point 10 of the Reasons (language of the proceedings: English):

"There is no reason to provide the appellant with a more favourable treatment in case of late (or insufficient, as in the present case) payment of the appeal fee (ie the appeal is deemed not been filed and the appeal fee is reimbursed) as in case of, for example, late filed statement of grounds (inadmissibility of the appeal). Moreover the "travaux préparatoires" seem to support this interpretation. In the "Materialien zum EPÜ" (IV/6514/61-D) is provided for, with reference to the "Entscheidungsmöglichkeiten der Beschwerdekammer", that "Die Kammer kann feststellen, dass die Beschwerde wegen Nichtentrichtung der Gebühr unzulässig ist"."

(c) In T 1897/17, notice of appeal had been filed and the appeal fee paid after expiry of the two-month time limit under Article 108 EPC. The board explained why the appeal had to be rejected as inadmissible, holding in the second paragraph of point 15 of the Reasons (language of the proceedings: English):

"According to the clear wording of R. 101 (1) EPC, which is an Implementing Regulation of Art. 106 to Art. 108 EPC, if an appeal does not fulfil the legal requirements of (here) Art. 108 EPC, the board of appeal shall reject it as inadmissible. The legal fiction of Art. 108 EPC, second sentence, that the notice of appeal shall not be deemed to have been filed until the appeal fee has been paid, can, in the board's view only be understood as setting an additional (implicit) condition for an appeal to be admissible, namely the (timely) payment of the appeal fee. No procedural consequences follow from Art. 108 EPC, second sentence; these are exclusively governed by R. 101(1) EPC, providing for the rejection of the appeal as inadmissible if the appeal does not comply with Art. 108 EPC, i.e. also in the case of late payment of the appeal fee (cf. T 79/01, quoting the travaux préparatoires to

the EPC, IV/6514/61-D: "Die Kammer kann feststellen, dass die Beschwerde wegen Nichtentrichtung der Gebühr unzulässig ist"). "It then cited the analysis of the travaux préparatoires in referrals T 2017/12 (points 3.4.2 and 3.4.3) and T 1553/13 (G 1/14 and G 2/14) before concluding that "... it would appear incorrect to read Article 108, second sentence, EPC in a way it is not worded [namely, that it was to be read as "Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid in time", remark of the current board] ...". Lastly, having analysed the provisions in question (Article 108, together with Rule 101(1) EPC) and similar ones (Article 99(1), together with Rule 77(1); Article 112a(4), together with Rule 108(1) EPC), the board came to the conclusion that there was no basis in the EPC for declaring the appeal not to have been filed: "It is true that the wording of Art. 108 EPC, second sentence, "... not be deemed to have been filed ...", is also used in other provisions of the EPC, notably Art. 112a(4) EPC, last sentence and Art. 99(1) EPC (further examples are listed in T 2017/12). There is, however, a fundamental difference between these three provisions on the one hand, and other provisions of the EPC using the same or similar wording on the other hand: in these three cases, specific procedural (implementing) rules exist, namely R. 101(1) EPC, R. 77(1) EPC and R. 108(1) EPC. They confirm and complement the (clear) wording of Art. 108 EPC, second sentence, Art. 99(1) EPC, second sentence, and Art. 112a(4) EPC, last sentence respectively: to reject as inadmissible a legal remedy (appeal, opposition or petition for review) attacking an EPO decision, if it does not fulfil the requirements for admissibility, which, in the system of the EPC, include the timely payment of the respective fee. In all three cases, EPO decisions would become finally binding on the parties, if not attacked by means of the respective legal remedy. The rejection of a legal remedy found inadmissible is a requirement to ensure legal certainty, a principle also generally recognised in the EPO's Contracting States.

Consequently, R. 101 (1) EPC and R. 77 (1) EPC can be seen as the implementing provisions envisaged by the travaux préparatoires (as cited in T 2017/12 "Ob in der Ausführungsordnung zu diesem Abkommen eine entsprechende Bestimmung aufgenommen werden soll, wird später zu entscheiden sein."), confirming and supplementing the (ordinary) meaning of Art. 108 EPC, second sentence and Art. 99 (1) EPC, second sentence respectively, by explicitly stating the procedural consequence arising from the late-filing of the respective fee, i.e. to reject the appeal or opposition as inadmissible. The travaux préparatoires do not cover Art. 112a EPC as this article was only introduced into the EPC 2000."

(d) In the other decisions cited above, regardless of the situation – i.e. whether notice of appeal was filed before or after expiry of the time limit for appeal and/or the appeal fee was paid before or after expiry of that time limit – the appeals were rejected as inadmissible and reimbursement of the appeal fee was not ordered. The decisions did not give any reasons for the appeals' inadmissibility.

(e) In R 2/10 dated 3 November 2010, in which the petition for review fee had been paid in due time, the Enlarged Board held that the petition for review was inadmissible, without however explaining the legal effect.

4. Literature/doctrine

The "majority" view in the case law has been unconditionally and unanimously endorsed by the specialist literature: Singer, *Europäisches Patentübereinkommen*, 1. Auflage, 1989, Artikel 108 EPÜ, Rdnr 5; Bühler in Singer/Stauder, 7. Auflage 2016, Artikel 108 EPÜ, Rdnr 27; Keussen in Benkard, 3. Auflage 2019, Artikel 108 EPÜ, Rdnr. 64 ff; Moufang in Schulte, 10. Auflage 2017, Anhang zu § 73 PatG, Artikel 108 EPÜ, Rdnr. 19 ff; Moser in *Münchener Gemeinschaftskommentar*, 20. Lieferung, Juli 1997, Artikel 108 EPÜ, Rdnr. 27; Gall in *Münchener Gemeinschaftskommentar*, 10. Lieferung, Februar 1986, Artikel 51, Rdnr. 398; Paterson, *The European Patent System*, London 1992, notes 2-44; Weiss/Ungler, *Die europäische Patentanmeldung und der PCT in Frage und Antwort*, 9. Auflage 2017, Kapitel 16 "Beschwerdeverfahren", Punkt 16.5, Rdnr 1545; Visser "The annotated European Patent Convention", 26th edition 2018, Article 108, points 1 to 4.

Singer, in the first edition of his above-mentioned work, published in 1989, summarised the legal situation in question as follows: "*Die Beschwerde gilt nach Satz 2 erst als eingelegt, wenn die Beschwerdegebühr entrichtet worden ist. Diese Formulierung findet sich bereits in dem ersten Arbeitsentwurf von 1961 und bedeutet, dass vor Zahlung der Gebühr keine wirksame Beschwerde vorliegt; der Beschwerdeschriftsatz ist lediglich ein Stück Papier ohne rechtliche Wirkung.*" He explicitly mentions the working document likewise cited in the aforementioned decisions, which will be analysed in section X below in the context of the *travaux préparatoires* for the provisions in question.

III. Rules of interpretation of the EPC

The EPC has to be interpreted in accordance with the rules laid down in the Vienna Convention concluded on 23 May 1969, even though the European Patent Organisation is not a party to it. In its earliest decisions (G 1/83, OJ EPO 1985, 60; G 5/83, OJ EPO 1985, 64; and G 6/83, OJ EPO 1985, 67; see "Preliminary Observations: Interpretation of the European Patent Convention"), the Enlarged Board acknowledged the applicability of those rules. They have been recognised and applied in several of its decisions and by the boards of appeal too (G 2/02 and G 3/02, OJ EPO 2004, 483; G 2/08, OJ EPO 2010, 456; J 9/98 and J 10/98, OJ EPO 2003, 184; T 128/82, OJ EPO 1984, 164; T 1173/97, OJ EPO 1999, 609; *Case Law of the Boards of Appeal*, 8th edition 2016, chapter III.H.1). The relevant articles of the Vienna Convention (Articles 31 and 32) read as follows:

"Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) *Leaves the meaning ambiguous or obscure; or*

(b) *Leads to a result which is manifestly absurd or unreasonable."*

It follows from a joint reading of these two articles that the provisions of a treaty (in this case the EPC) initially have to be interpreted in accordance with the "ordinary" meaning to be given to the terms in their context and in the light of the treaty's object and purpose. A judge thus cannot deviate from the clear provisions of the law, which is a principle linked to the requirement of good faith.

Moreover, it follows from Article 32 of the Vienna Convention that the *travaux préparatoires* and the circumstances in which the EPC was concluded have to be taken into consideration in order to confirm a meaning or to determine a meaning when the initial interpretation according to the ordinary meaning would lead to an ambiguity or an absurd result.

IV. Application of the rules of interpretation

1. Literal interpretation

The wording of the relevant provisions in the EPO's three, equally authentic official languages is as follows:

Article 108, première et deuxième phrases EPC 2000 : "*Le recours doit être formé, conformément au règlement d'exécution, auprès de l'Office européen des brevets dans un délai de deux mois à compter de la signification de la décision. Le recours n'est réputé formé qu'après le paiement de la taxe de recours.*"

Article 108, first and second sentences, EPC 2000: "*Notice of appeal shall be filed, in accordance with the Implementing Regulations, at the European Patent Office within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.*"

Artikel 108 erster und zweiter Satz EPÜ 2000: "*Die Beschwerde ist nach Maßgabe der Ausführungsordnung innerhalb von zwei Monaten nach Zustellung der Entscheidung beim Europäischen Patentamt einzulegen. Die Beschwerde gilt erst als eingelegt, wenn die Beschwerdegebühr entrichtet worden ist.*"

According to the Enlarged Board's case law and applying the above principles laid down in the Vienna Convention (see, in particular, G 2/12, OJ EPO 2016, A27, points V to VII of the Reasons, and the numerous references there to other Enlarged Board decisions and opinions), when interpreting EPC provisions, the Enlarged Board usually starts by looking at the wording of the relevant provision but, even where this wording reveals the provision's meaning clearly, it must then be examined whether the outcome of this literal interpretation is confirmed by the meaning of the words in their context.

(1) According to Article 108, first sentence, EPC, initiating an appeal requires that notice of appeal be filed in line with the conditions set out in the Implementing Regulations and within two months. In other words, the appellant must submit a document giving notice of appeal that contains, among other things, a request defining the subject of the appeal (Article 108, first sentence, EPC in conjunction with Rule 99(1)(c) EPC), i.e. a declaration of the appellant's wish to challenge a first-instance decision. In the absence of such a declaration, no appeal proceedings are initiated and the first-instance decision is not open to review by a board. The EPC's three official languages are equally authentic under Article 177(1) EPC but there are some differences in the wording adopted in each one for this first sentence of Article 108 EPC. The English version begins with the term "*notice of appeal*", whereas the French and German versions use "*le recours ...*" and "*die Beschwerde ...*", respectively, as opposed to "*l'acte de recours ...*" and "*die Beschwerdeschrift ...*". This cannot be taken as a basis for inferring any legislative intent. The initial versions of this first sentence of Article 108 EPC 1973, now EPC 2000, were drafted in French and German only and used the words "*recours*" and "*Beschwerde*" respectively. Whichever language is taken, the article's first sentence provides that an appeal is initiated by filing notice of appeal within a period of two months and in accordance with the conditions laid down in the Implementing Regulations. In what follows, "notice of appeal filed" and "appeal filed" are to be understood as synonyms, as are "notice of appeal not filed" and "appeal not filed".

(2) The second sentence of Article 108 EPC adds that filing an appeal requires that an appeal fee be paid: "*Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.*" This second sentence contains a legal fiction:

"Notice of appeal shall not be **deemed** to have been filed until the fee for appeal has been paid." (emphasis added).

(a) On a first reading of this second sentence (narrow literal interpretation), its legal fiction can be understood to mean that, on this basis, solely the date of filing the appeal can be established. If, for example, notice of appeal is filed within the two-month period but the appeal fee is filed after expiry of that period, the appeal is deemed, in accordance with this narrow literal reading, to have been filed on the date the appeal fee is paid, that is, in this example, after the two-month period, with the result that the appeal is inadmissible under Rule 101(1) EPC ("*If the appeal does not comply with Articles 106 to 108, Rule 97 or Rule 99, paragraph 1(b) or (c) or paragraph 2, the Board of Appeal shall reject it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 has expired.*"). Interpreted this way, there is no question that notice of appeal has been filed if the legal fiction applies solely to the payment of the appeal fee mentioned in the second sentence of Article 108 EPC (see, by contrast, the broad literal interpretation below, where there are implications for the filing of the notice of appeal).

(b) On a second reading of this second sentence (broad literal interpretation), the legal fiction is that, in order for the appeal to be regarded as filed, the appeal fee must have been paid within the two-month period prescribed in the first sentence of Article 108 EPC. The use in the English version of the second sentence in the EPC 2000 of "... *until* ..." (in the EPC 1973 version: "... *until after*..."; in French: "*n'... qu'*..."; in German: "... *erst ... wenn* ...") introduces a temporal link with the first sentence and thus relates to a filed appeal which becomes effective only if the condition laid down in the second sentence, is satisfied, i.e. the fee was paid either at the same time or later but still within the two-month period. This "temporal" component of the two acts becomes clear from the English wording of Rule 20(2), first sentence, EPC 1973 (which corresponds to Rule 22(2), first sentence, EPC 2000), the wording of which is similar to that of Article 108, second sentence, EPC: "*The request shall not be deemed to have been filed **until such time as an administrative fee has been paid.***" (emphasis added). In other words, for an appeal to be validly filed, the appeal fee must be paid within two months; its payment within this period is a necessary precondition for an appeal's valid initiation. A notice of appeal meeting the conditions laid down in the Implementing Regulations and filed within the prescribed two-month period (Article 108, first sentence, EPC) will initiate an appeal only if the appeal fee is also paid within that same two-month period (Article 108, second sentence, EPC). Conversely, if the appeal fee is not paid or is paid belatedly, the legal fiction provided for in the second sentence of Article 108 EPC comes into play and the appeal is deemed not to have been filed or, in other words, the document produced as notice of appeal within the two-month period is deemed not to have been received.

This joint reading of the first two sentences of Article 108 EPC is consistent with that in the above-cited decisions J 16/82, point 9 of the Reasons, T 778/00, point 2.2 of the Reasons, and T 1954/13, point 40 of the Reasons, all of which reflect the majority view in the case law. It is also confirmed in G 1/86 of 24 June 1987 (OJ EPO 1987, 447), which, in point 8 of the Reasons, first paragraph, states (language of the proceedings: German): "*Erst wenn die Beschwerde eingelegt und die entsprechende Gebühr entrichtet worden ist, liegt eine Beschwerde vor. Mit diesen*

beiden Handlungen leitet der Beschwerdeführer das Verfahren ein. Der Rechtszug ist eröffnet." The Enlarged Board can only concur with that finding.

Interim conclusion:

On a literal interpretation based on a joint reading of the first two sentences in Article 108 EPC (broad literal interpretation), an appeal is validly filed only if the appeal fee is paid within the prescribed two-month period. There is no inconsistency in the provision's wording in its three language versions. The legal fiction associated with payment of the appeal fee within the two-month period is the mechanism whereby the point in time at which the appeal was initiated is determined.

Conversely, it is as a result of this legal fiction in Article 108, second sentence, EPC, that, where notice of appeal is produced during the two-month period **but** the appeal fee is paid after it or not at all, the appeal is deemed not to have been filed, i.e. no legal process is launched or, in other words, the appeal must be declared non-existent. This literal interpretation of Article 108, first and second sentences, EPC leads to a result in keeping with the provision's purpose.

2. Systematic interpretation

In accordance with the principles set out in the above-cited Vienna Convention, systematic interpretation forms a second pillar on which the construction of a legal provision and its terms may be based (see, in particular, G 2/12, OJ EPO 2016, A27, points V to VII, and the references made there to other Enlarged Board decisions/opinions). This second method of interpretation involves establishing the meaning of an expression in the context of the provision at issue, taking into account its position and functions within a coherent group of related legal norms.

A number of other EPC provisions contain the legal fiction that a document has not been filed in the event of non-payment of the applicable fee: Article 135(3), second sentence, EPC: conversion fee; Rule 22(2), first sentence, EPC: administrative fee; Rule 88(3), third sentence, EPC: fee for the awarding of costs; Rule 89(2), second sentence, EPC: intervention fee; Rule 123(3) EPC: fee for the conservation of evidence; Rule 136(1), third sentence, EPC: fee for re-establishment of rights. In all these legal circumstances, the filed document (for example, a request for transfer of the European patent application) will be regarded as filed only if the applicable fee (for example, the administrative fee under Rule 22(2), first sentence, EPC) has been paid. In other words, non-payment of the applicable fee results in a legal fiction that the (originally) produced document has not been filed.

The EPC uses this legal fiction as a mechanism in other legal situations unrelated to non-payment of a fee too. For instance, Article 14(4) EPC allows natural or legal persons having their residence or principal place of business within a contracting state having a language other than English, French or German as an official language to file documents which have to be filed within a time limit (for example, a reply to a communication from the examining division) in an official language of that state but also requires that they file a translation into an official EPO language in accordance with the Implementing Regulations. If they fail to do so within the prescribed time limit, the document is deemed not to have been filed (Article 14(4), third sentence, EPC). Other EPC provisions require performance of a subsequent

act (generally the filing of a document) as a consequence of a previous act and stipulate that, if this subsequent act is not performed, the immediate legal effect is that the first act is fictionally treated, variously, as "deemed not to have been filed", "deemed not to have been made" or "deemed not to have been taken". Examples include Rule 5 EPC, which deals with a failure to file certification of the translation of a document; Rule 50(3) EPC, which deals with a failure to provide a signature missing from a document; Rule 56(4) EPC, which deals with withdrawal of subsequently filed missing parts of the description or missing drawings; and Rule 152(6) EPC, which deals with a failure to file a professional representative's authorisation. As a further example, the board in T 1325/15, cited above, mentioned that an applicant failing to file a certificate of exhibition in time, that is, within four months of filing the European patent application, as required under Rule 25 EPC, could not benefit from the non-prejudicial nature of the disclosure as provided for under Article 55(1) EPC. Considered in this light, the wording of Article 108, second sentence, EPC fits in with the scheme of EPC provisions applying a legal fiction that a submitted document has not been filed or that it has been fictitiously withdrawn.

Interim conclusion:

A systematic interpretation of the EPC provisions as a whole shows that the legislator envisaged several legal situations in which the legal consequence of failure to perform a second act is that the first act is deemed, by way of a legal fiction, not to have been performed. The wording used to express this legal fiction varies but in all cases stipulates the non-existence of the first act performed as the consequence.

3. Teleological interpretation

Like national and international courts, the Enlarged Board applies the method of teleological interpretation to construe EPC provisions. To this end, it examines their objective sense and purpose (e.g. G 1/88, OJ EPO 1989, 189, point 5 of the Reasons; G 1/03, OJ EPO 2004, 413, point 2.1.1 of the Reasons). Its starting point is a determination of the rationale underlying the provision in question (*ratio legis*) because the interpretation must not be contrary to the provision's spirit (G 6/91, OJ EPO 1992, 491, point 8 of the Reasons).

Article 108, first and second sentences, EPC contains a legal fiction governing the filing of a notice of appeal. The EPC provides for a number of legal situations to be governed by a legal fiction. For instance, the mechanism of a deemed withdrawal of a European patent application in the event of a failure to pay fees (e.g. in Article 78(2) EPC for filing and search fees; Article 86(1) EPC for renewal fees; and Article 94(2) EPC for examination fees) or to perform an act (e.g. in Article 14(2), third sentence, EPC for a failure to file a translation of the European patent application into one of the EPO's official languages; Article 94(4) EPC for a failure to reply to a communication from an examining division; and Article 110 in conjunction with Rule 100(3) EPC for a failure to reply to communication from a board of appeal) has been applied by the legislator in order to set up a simplified file-management procedure under which a duly reasoned refusal decision is not required. This simplifying measure of deeming the application not to have been filed was first introduced in national patent legislation, in particular in Austria (see *Verordnung der Bundesregierung of 12 July 1923 über die Vereinfachung der behördlichen*

Einrichtungen und des Verfahrens auf dem Gebiete des gewerblichen Rechtsschutzes, Artikel 1, Punkt 20, Bundesgesetzblatt der Republik Österreich 1923, S. 1363) and the Nordic countries (for Sweden, see paragraph 5 of its Patent Law of 16 May 1884, as amended by Law No. 192 of 5 June 1931 (S.F.S. 1931:192), based on proposal No. 136 of 26 February 1931, approved by letter to the king No. 239 of 20 May 1931); it was later adopted in articles and rules of the EPC (see also Weiss/Ungler, *Die europäische Patentanmeldung und der PCT in Frage und Antwort*, 9. Auflage 2017, Fußnote 60). The applicant, patent proprietor or opponent receives, instead of a reasoned decision refusing their request or European patent application, a communication informing them the loss of rights resulting from their – deliberate or unintentional – failure to act.

Rule 69 EPC 1973 (now Rule 112 EPC 2000) laid down the procedure for noting a loss of rights. Under this simplified procedure, triggered by a mere failure to observe the time limit in question, the file can be closed without thereby infringing the rights of the applicant, patent proprietor or opponent. As will be shown in sections V and X below, in the context of the initial deliberations on the future Article 108 EPC and those on the future Rule 69 EPC 1973 (now Rule 112 EPC 2000), the wording of Article 108, first and second sentences, EPC is in line with this legislative intent to create, as for other legal situations, a simplified and effective procedure in keeping with the overall purpose of the procedure laid down in the EPC.

In the context of appeal proceedings, the boards' registries have been entrusted with the task of implementing this simplified procedure for closing a case. The Presidium of the Boards of Appeal transferred the boards' competence to communicate a loss of rights under Rule 112(1) EPC to the registries in accordance with Article 6(2) of the Rules of Procedure of the Boards of Appeal (see Article 2, item (7), of the decision of the Presidium of the Boards of Appeal dated 12 November 2007, OJ EPO 2008, Supplement 1, 49).

Interim conclusion:

A teleological interpretation, i.e. an interpretation of the meaning in the light of the purpose of Article 108, first and second sentences, EPC, leads to the same interim conclusion as was reached on a literal and a systematic interpretation. By way of the legal fiction laid down in Article 108 EPC and linked to payment of the appeal fee, the legislator intended to introduce, as it had done for several other legal situations, a simplified procedure for closing a file. The wording chosen for the filing of notice of appeal is to be interpreted in that context.

V. Legal consequence in cases of failure to perform one or both of the acts within the two-month time limit under Article 108 EPC

Neither Article 108 EPC nor any other provision of the EPC or its Implementing Regulations **expressly** lays down the legal consequence arising in the scenarios envisaged above.

The same goes for the other, similarly worded EPC provisions, for instance those on filing notice of opposition (Article 99(1) EPC) or a petition for review (Article 112a EPC). Only for the filing of a request for examination (Article 94(1), first and second

sentences, EPC) did the legislator expressly provide, in Article 94(2) EPC, for application of the legal fiction of a deemed withdrawal of the patent application "*if no request for examination has been made in due time*".

1. The "majority" view in the case law has inferred from the provisions' silence and by simple reference to the *travaux préparatoires* on Article 108 EPC (see above J 16/82, point 9 of the Reasons) that the applicable legal consequence is that the appeal is deemed not to have been filed. By contrast, the "minority" view in the case law, based on an analysis of the *travaux préparatoires* on Article 108 EPC and a reading of Rule 65(1) EPC 1973 (now Rule 101(1) EPC), which refers to Article 108 EPC (see above T 79/01, point 10 of the Reasons), has concluded that the appeal is inadmissible.

2. In referring decisions T 1553/13 and T 2017/12, cited above, and in decision T 1897/17, the boards concluded that the appeal was inadmissible on the basis of a mere reading of Part IV/6.514/61-F (see detailed analysis below) of the *travaux préparatoires* relating to draft Article 93, which later became Article 108 EPC. They found as follows:

– "... [dass] *die Fiktion der nicht erhobenen Beschwerde bei nicht rechtzeitiger Zahlung der Beschwerdegebühr erwogen wurde, aber weder diese Formulierung, noch das damit verbundene Verfahren in die endgültige Fassung des Europäischen Patentübereinkommens übernommen wurden*" (see T 1553/13, point 8.4.3, fourth paragraph, of the Reasons; language of the proceedings: German; emphasis added);

– "... *the provisions and the procedure originally envisaged were different from the ones eventually adopted. In particular the draft article explicitly defined an appeal for which the appeal fee was not paid on time as being deemed not to be filed. This definition of what seems to be a special case does not exist in the article as it was finally adopted. There is no record of a discussion of this point with reference to the present wording. Thus it cannot be ruled out that the legislators in fact adopted the present wording because they no longer wished to make the situation of an appeal fee being paid late into such a special case.*" (T 2017/12, point 3.4.3, fourth paragraph, of the Reasons; language of the proceedings: English).

These findings are incorrect.

For the purposes of interpreting international treaties, ancillary use may be made of materials relating to their legislative history. Under Article 32 Vienna Convention, recourse may be had to supplementary means of interpretation, particularly the preparatory work of a treaty and the circumstances in which it was concluded, in order to confirm the meaning arrived at by application of Article 31 or to determine the meaning when application of Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable (J 8/82, OJ EPO 1984, 155, point 13 of the Reasons; J 4/91, OJ EPO 1992, 402, point 2.4.2 of the Reasons; T 128/82, OJ EPO 1984, 164, point 9 of the Reasons; G 2/07, OJ EPO 2012, 130, point 4.3 of the Reasons; and G 1/08, OJ EPO 2012, 206, point 4.3 of the Reasons).

An analysis of the *travaux préparatoires* relating to former Rule 69(1) EPC 1973 (now Rule 112(1) EPC), and not to Article 108 EPC, shows that the legislator had initially envisaged making express provision there for the legal effect of a loss of rights in the event of the appeal not being filed but that, in the course of the discussions on the rule, and with a view to simplifying things, it preferred to use a general wording covering all legal situations involving a loss of rights in the final version of Rule 69(1) EPC 1973.

3. Analysis of the legislative history of Rule 69(1) EPC 1973

(1) In the preliminary draft of the Implementing Regulations drawn up by the "Implementing Regulations" Sub-Committee of Working Party I at its meeting on 23 to 27 November 1970, "Re Article 69, No. 1" was worded as follows: "*(1) If the European Patent Office notes that a European patent application is deemed to be withdrawn, it shall so notify the applicant in accordance with the provisions of Article 161 of the Convention. (2) If the applicant considers that the European patent application should not be deemed to be withdrawn, he may, within a period of two months from the notification referred to in paragraph 1, apply for a decision ...*" (see BR/67 e/70).

(2)

(a) According to point 40 of the minutes of the "Implementing Regulations" Sub-Committee's meeting on 12 to 14 January 1971: "*The regulation Re. Article 69, No. 1 (BR/67/70, page 14) drawn up by the Sub-Committee ... is intended to lay down a simplified procedure in the event of the European Patent Office noting that an application for a European patent is deemed to be withdrawn. The use of such a procedure – which reduces the workload of the Office while protecting the applicant's right of appeal – was justified because in reality only simple questions of fact were concerned, for example the payment of a fee within the time required. On a proposal from the United Kingdom delegation, the Sub-Committee considered that this simplified procedure could be extended to other cases where only simple questions of fact were concerned. Consequently, the Sub-Committee adopted a text in which four new cases were added ...*" (see BR/84 e/71).

(b) The wording of "Re. Article 69, No. 1" that was adopted as "Re. Article 159, No. 11" was as follows:

*"(1) If the European Patent Office **notes that***

(a) a European patent application is deemed to be withdrawn in whole or in part,

(b) ...,

(c) ...,

*(d) a **notice of opposition or appeal is deemed not to have been given, or***

(e) ...,

it shall so notify the person concerned in accordance with the provisions of Article 161 of the Convention." (see BR/81 e/71) (emphasis added)

(3) Point 24 of the minutes of Working Party I's meeting on 22 to 26 November 1971 shows that, following the Working Party's acceptance of a proposal made by the British delegation that provision be made for other cases of loss of rights, it had been considered that "... *the list included in that provision might prove to be **incomplete** and that it might therefore be appropriate to seek a **general formulation**, covering all cases in which a request was deemed not to have been made following non-payment of fees.*" (see BR/144 e/71, point 24, and BR/134 e/71) (emphasis added).

(4) That last recommendation was then deliberated on by Working Party I and at the intergovernmental conference. A general wording was put forward at the Munich Diplomatic Conference. Rule 70(1) (which became Rule 69(1) EPC 1973) was worded as follows: "*(1) If the European Patent Office notes that the loss of any right results from the Convention, without any decision concerning the refusal of the European patent application or the grant, revocation or maintenance of the European patent, or the taking of evidence, it shall communicate this to the person concerned in accordance with the provisions of Article 118.*"

This mechanism of informing parties of a noting of a loss of rights has also been mentioned by van Empel in "The Granting of European Patents", Leyden 1975, point 393: "*As for the normal sanction to non-payment of fees ... the party concerned will be informed by the EPO of his loss of rights, pursuant to Rule 69(1). If he disagrees with the finding of the EPO he may, of course, argue his case and may eventually take the case to a Board of Appeal (Rule 69(2)).*"

Provisional conclusion:

It is true – as pointed out in the above-cited referring decisions T 1553/13 and T 2017/12 and in T 1897/17, likewise cited above, in which the board observed: "... *the legislator in fact elsewhere used explicit wording to specify the consequences of a late-filed request. An example can be found in Article 94(2) EPC, which reads: "If no request for examination has been made in due time, the application shall be deemed to be withdrawn." Consequently, it would appear incorrect to read Article 108, second sentence, EPC in a way it is not worded.*" (see T 2017/12, point 3.4.3, fifth paragraph, of the Reasons; T 1553/13, point 8.4.3, fourth paragraph; T 1897/17, point 15, page 15, last paragraph – that the consequence "the appeal is deemed not to have been filed" has not been laid down expressly in Article 108 EPC.

However, an analysis of the *travaux préparatoires* relating to Rule 69 EPC 1973 (now Rule 112(1) EPC) shows that the legislator did intend to stipulate there expressly the legal consequence that notice of appeal is deemed not to have been filed in that it grouped together in that single, generally worded provision all legal situations involving a loss of rights that do not result from a decision concerning the refusal of the European patent application or the grant, revocation or maintenance of the European patent, or the taking of evidence (Rule 112(1) EPC: "*(1) If the European Patent Office notes that a loss of rights has occurred, without any decision concerning the refusal of the European patent application or the grant, revocation or maintenance of the European patent, or the taking of evidence, it shall communicate*

this to the party concerned."). In other words, rather than listing all possible scenarios (in which the consequence is a legal fiction of the type "deemed", expressed in phrases such as "application deemed withdrawn", "deemed not to have been filed", "deemed not to have been made" or "deemed not to have occurred") in order to avoid the risk of omitting some of them, the legislator preferred to provide for them all implicitly by way of a generally worded negative expression that excludes the other, clearly defined situations involving a decision concerning the refusal of the European patent application or the grant, revocation or maintenance of the European patent, or the taking of evidence.

As a result, the party in question (applicant, patent proprietor, opponent, etc.) is informed of any failure to pay fees, including the appeal fee, and particularly of a belated payment of the appeal fee, in accordance with this provision.

Indeed, this is how the Enlarged Board read Article 99(1), third sentence, EPC in G 1/90 (OJ EPO 1991, 275, point 8 of the Reasons): "*The opposition procedure relates to a patent which has already been granted, and the loss of patent rights through failure by the patent proprietor to observe a time limit is alien to it. **Apart from non-payment of the opposition fee (Article 99(1), 3rd sentence, EPC), there are no legal consequences that take the form of a legal fiction.***" (emphasis added).

VI. Scenarios 1 and 2 – interim conclusions

Given the above finding, the answer to the question relating to scenarios 1 and 2 is that notice of appeal is deemed not to have been filed (fiction of non-filing of the appeal). It is recalled that, in scenario 1, notice of appeal is filed WITHIN the prescribed period of two months AND the appeal fee is paid AFTER expiry of that two-month period, whereas in scenario 2, notice of appeal is filed AFTER expiry of the two-month period AND the appeal fee is paid AFTER expiry of that two-month period (see table on page 12 [of original French opinion]).

VII. Appeal deemed not to have been filed – inadmissible appeal and Rule 101(1) EPC

In view of the discussions in the decisions cited above, the Enlarged Board considers it necessary to set out its point of view on the links between Article 108, first and second sentences, EPC and Rule 101(1) EPC (formerly Rule 65(1) EPC 1973). Based on the wording of Rule 101(1) EPC, the "minority" view in the case law considers the appeal inadmissible in the scenarios at issue. Once again, Rule 101(1) EPC is worded as follows: "*If the appeal does not comply with Articles 106 to 108, Rule 97 or Rule 99, paragraph 1(b) or (c) or paragraph 2, the Board of Appeal shall reject it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 has expired.*" This wording is the same as that of Rule 65(1) EPC 1973, save for the references to the Implementing Regulations, which have since been renumbered.

Articles 106, 107 and 108 EPC lay down the requirements which must be met by expiry of the specified periods of two and four months for an appeal to be regarded as having been filed and found admissible. According to Article 108, first and second

sentences, EPC, appeal proceedings are initiated by a first act, namely the filing of notice of appeal, which the appellant must perform within two months of notification of the contested decision, but the appeal will not be deemed to have been filed until the appeal fee has been paid. Only if these two acts have been performed within the prescribed two-month period will the appeal be deemed to have been filed and so considered to exist. Once its existence has been established, it remains to be decided, in a second step, whether it is admissible. For this, a number of requirements must be met, all within the two-month period: for instance, there must be an indication of the contested decision (Article 106 in conjunction with Rule 99(1)(b) EPC), of the appellant (Article 107 in conjunction with Rule 99(1)(a) EPC; on this, see the Enlarged Board's decision in G 1/12, OJ EPO 2014, A114, points 17 to 23 of the Reasons) and of the appellant's address (Article 107 in conjunction with Rule 99(1)(a) EPC). Another requirement for admissibility of the appeal is that the statement of grounds of appeal be filed by expiry of a period of four months at the latest (Article 108, third sentence, EPC). If these requirements are not met before the time periods expire, the appeal is to be rejected as inadmissible under Rule 101(1) EPC unless any deficiency has been remedied before the relevant period under Article 108 EPC has expired. This two-step approach to initiating appeal proceedings (acts required to file notice of appeal and acts required for the appeal to be admissible) has been analysed and applied in a number of board decisions; see, for example, T 445/98, cited above, points 5 to 7 of the Reasons; and T 1954/13, cited above, point 43, second paragraph, of the Reasons. In other words, the admissibility of an appeal cannot be examined until it has been validly filed. In this context, the term "appeal" in Rule 101(1) EPC must be understood in the sense of "filed appeal" ("*If the **filed** appeal does not comply with Articles 106 to 108 ...*") (emphasis added). Thus, the reference made in Rule 101(1) EPC to Article 108 EPC (without specifying any particular sentence of that article) must be read as relating to its third sentence; the appeal will be rejected as inadmissible if the statement of grounds of appeal is either not filed at all or not filed in time.

VIII. Reimbursement of the appeal fee

The EPC provides for reimbursement of the appeal fee in Rule 103 EPC (formerly Rule 67 EPC 1973), which clearly specifies when this is available and does not refer to the legal scenarios envisaged in the question referred to the Enlarged Board by the President of the EPO.

Considered from the point of view of the two possible outcomes to the question referred to the Enlarged Board ("appeal deemed not to have been filed" or "appeal inadmissible"), reimbursement of the appeal fee is relevant only if the Enlarged Board finds that there is no appeal or, in other words, that the appeal is deemed not to have been filed. As explained above, that is the finding for scenarios 1 and 2.

For the payment of fees to the EPO, and especially when it comes to determining the date on which they are due, reference must be made to Article 4(1) of the Rules relating to Fees (RFees), which states: "*Fees in respect of which the due date is not specified in the provisions of the Convention or of the PCT or of the Implementing Regulations thereto shall be due on the date of receipt of the request for the service incurring the fee concerned.*" According to that article, the "due date" is not the last day of the period prescribed for paying a fee, as it is under many national and

international laws, but the first day on which that fee may be validly paid. As is apparent from Article 4 RFees (see above), that day is generally specified in the EPC provisions but, if not, it is the date of receipt of the request for the service incurring the fee concerned. Save in expressly specified exceptional cases (for example, payment of the "European" renewal fee), a fee cannot be validly paid before its due date. If it were to be paid before the fact rendering it payable, it would have to be reimbursed on the basis that it had been paid for no reason. In other words, if a given procedure (for example the opposition procedure before the EPO) has not yet been initiated (in this example by notice of opposition) when a fee is paid, the payment of that fee (in this example, the opposition fee) would be treated as having no legal basis, which would justify its reimbursement *ex officio*.

When it comes to appeal proceedings before the boards, the due date of the appeal fee is the date on which notice of appeal is filed (on this point, see Gall, Münchner Gemeinschaftskommentar, 10. Lfg. 1986, Art. 51 EPC, Rdnr. 86, 105, and the settled case law since J 21/80, J 16/82 and T 778/00, cited above). This means that the appeal fee becomes payable only on the filing of notice of appeal. If no notice of appeal has been filed, any payment of the appeal fee will have to be regarded as devoid of legal basis and, in accordance with the established case law since T 41/82, OJ EPO 1982, 256, point 1 of the Reasons, the fee will have to be reimbursed *ex officio*. If notice of appeal has been filed in time or after the prescribed two-month period but the appeal fee, albeit having therefore fallen due, has been paid after that period, the appeal proceedings are deemed not to have been initiated. Since notice of appeal is deemed not to have been filed, the appeal fee is no longer due and must therefore be reimbursed on the basis that it was paid for no reason.

Interim conclusion:

In view of the above, for scenarios 1 and 2, for which it has been concluded that the appeal is deemed not to have been filed, i.e. that it does not exist, the appeal fee must be regarded as having been paid for no reason and its reimbursement must therefore be ordered *ex officio*.

IX. Scenario 3 – interim conclusions

It is recalled that the legal situation in scenario 3 is that the appeal fee is paid WITHIN the prescribed two-month period AND notice of appeal is filed AFTER expiry of that two-month period.

In this scenario, the appeal fee has been paid within the prescribed two-month period but before its due date. As explained above, the appeal fee becomes due only when notice of appeal is filed and so, if that notice is filed after expiry of the two-month period, the fee is due only on the date of its filing or at the same time as it is filed. Scenario 3 is therefore similar to scenario 2, where the two acts (filing of notice of appeal and payment of the appeal fee) are performed after the two-month period; the date of payment of the appeal fee is postponed to the date of filing of the notice of appeal, i.e. until after the two-month period. As held above for scenario 2, the appeal does not exist and so the fee has been paid for no reason and must be reimbursed.

X. "*Travaux préparatoires*" on Article 108, first and second sentences, EPC

The legislative history of Article 108, second sentence, EPC was first referred to in J 16/82 of 2 March 1983 (cited above; see point II 2.(1) of the opinion), albeit only in a cursory reference to its "*Entstehungsgeschichte*". It was in T 79/01 of 25 March 2003 (point 10 of the Reasons) that a board analysed document IV/6.514/61-F of 26 September 1961 to support its position that the appeal fee did not have to be reimbursed because the appeal was to be rejected as inadmissible. In the first edition of his "*Europäisches Patentübereinkommen*", 1989, Art. 108, para. 5, Singer referred to this document when concluding that the legal consequence of non-payment of the appeal fee was that the appeal was deemed not to have been filed. The boards in T 2017/12 dated 24 February 2014 and T 1553/13 dated 20 February 2014 (referring decisions leading to G 1/14 and G 2/14) analysed the texts (in particular, document IV/6.514/61-F) and discussions that led to the versions of the provisions that there were finally adopted at the Munich Diplomatic Conference in October 1973. Teschemacher commented on this analysis in *Mitteilungen der Patentanwälte* 2018, page 314 ff. T 1897/17, cited above (see referral and point I.1. of the opinion) addressed the analyses and conclusions reached in T 2017/12 and T 1553/13.

Since the "majority" and "minority" views in the case law both take the *travaux préparatoires* as the basis for their reasoning, the Enlarged Board considers it necessary to look at the draft articles and related discussions in detail.

(1) Haertel Draft of the Convention, Articles 1 to 100 (hereinafter: "Haertel Draft"; French version numbered IV/5569/61-F) – draft Articles 93(1) and 97(1)

(a) Draft Article 93(1) and discussion:

(α) The "Haertel Draft" put forward a draft Article 93 which later became Article 108 EPC and which, in its paragraph 2, second sentence, reads: "*si la taxe de recours n'est pas acquittée dans ledit délai* [of two months set in paragraph 1] [the expression "*ledit délai*" in the French version is "*rechtzeitig*" in the German version], *le recours est considéré comme non formé.*" [brackets added].

The "*Remarques*" on draft Article 93(2) on page 9 of the Haertel Draft include: "*Le paragraphe 2 traite du versement de la taxe de recours qui est nécessaire pour réduire le nombre des recours arbitraires ... La constatation qu'un recours formé est considéré comme non venu faute de paiement de la taxe de recours dans les délais prévus devra être signifiée au requérant par une décision qui pourra elle-même faire l'objet d'un recours. Il ne semble pas nécessaire d'énoncer ce principe dans la Convention même. Il y aura lieu de décider par la suite s'il convient de prévoir une disposition à cet effet dans le règlement d'exécution de la Convention.*"

(β) Discussion of draft Article 93 – IV/6.514/61-F:

The above draft of Article 93 was discussed at the Patents Working Party's third meeting, held in Brussels on 25 September to 6 October 1961. According to the report on the session on 25 September 1961 (see page 3 of document IV/6.514/61-F, "*Discussion de l'article 93 de l'avant projet de Convention*"): "*Le groupe marque*

son accord sur le fond de l'alinéa 2 de l'article 93. M. Van Benthem demande si la Convention prévoit un recours contre la constatation que le recours est considéré comme non formé par suite du non-paiement de la taxe. Le Président lui répond que, dans ces cas, un recours en droit devrait être possible devant le tribunal européen des brevets". It was then decided to send draft Article 93 back to the drafting committee.

(b) Draft Article 97(1) and discussion:

(α) Draft Article 97(1) and (2) was worded as follows:

"1) Si le recours n'est pas admissible ou s'il n'a pas été formé dans les formes ou dans le délai prescrits, la chambre de recours le rejette comme non recevable. " 2) Si le recours n'est pas matériellement fondé, la chambre de recours le rejette comme non fondé."

Only the first paragraph concerns admissibility of the appeal. The "Remarques" on draft Article 97(1) and (2), on page 17 of the draft include: "*Les paragraphes 1 et 2 établissent une distinction terminologique entre l'échec d'un recours parce que certaines conditions de forme ne sont pas remplies et l'échec d'un recours faute d'un fondement matériel. Dans le premier cas [paragraphe 1], le recours est 'rejeté comme non recevable'. Il en est ainsi, par exemple, lorsque le recours a été formé par une personne dont les intérêts ne sont pas lésés par la décision attaquée ou encore lorsque le recours a été formé tardivement mais que la taxe de recours a été versée dans les délais. (Toutefois, si la taxe de recours n'a pas été versée ou a été versée tardivement, le recours est, en vertu de l'article 93, paragraphe 2, considéré comme 'non formé').*" [square brackets added].

(β) Discussion of draft Article 97 – IV/6.514/61-F:

The wording of draft Article 97, which later became Article 111 EPC, was discussed at the Patents Working Party's third meeting, on 26 September 1961 (see page 6 of IV/6.514/61-F, "*Discussion de l'article 97 de l'avant-projet de Convention*"). It is reported that:

"Le président expose que les trois premiers alinéas de l'article règlent les cinq façons possibles pour la Chambre de recours de se prononcer sur le recours.

1. La Chambre peut constater que la requête est irrecevable par suite du non-paiement de la taxe (article 93, al. 2).

2. Si le recours n'est pas matériellement fondé, la chambre de recours le rejette comme non fondé.

3. Si le recours est fondé en tout ou en partie, la chambre de recours annule en tout ou en partie la décision attaquée et peut soit statuer elle-même sur le fond ou renvoyer l'affaire pour suite à donner à l'instance qui avait pris la décision attaquée."

The first point was not discussed. It was then decided to refer draft Article 97 back to the drafting committee.

(c) Conclusions drawn from the drafts of Articles 93 and 97 and the related discussions:

- The first draft of Article 93 provided that the appeal "*est considéré comme non formé*" if the appeal fee is not paid. The Working Party approved the proposed wording during its discussions. According to the "*Remarques*" on draft Article 93, the procedure for challenging a "*constatation qu'un recours formé est considéré comme non avenu faute de paiement de la taxe de recours ...*" was to be decided on later. That was the answer Mr Van Benthem received from the chairman of the meeting on the draft article.

- The "*Remarques*" on draft Article 97 in the "Haertel Draft", referring to draft Article 93(2), make clear that the legal consequence of a failure to pay the appeal fee or failure to pay it in time is that the "*le recours est ... considéré comme 'non formé'*".

- Draft Article 97(1) provides that the appeal is to be rejected as inadmissible if it is not filed within the prescribed period; as an example of where this will be the case, the "*Remarques*" give a situation in which the fee is paid in time but notice of appeal is filed after the prescribed period. However, the meeting's chairman, referring to Article 93(2), described draft Article 97 during the related discussions as providing for inadmissibility of an appeal in the case of non-payment of the appeal fee, which seems to contradict the wording of that provision's draft.

(d) Draft Articles 93 and 97 – later discussions

Following the initial discussion of draft Articles 93 and 97, the drafting committee redrafted them (see document IV/5569/1/61-F dated 26 and 28 September 1961). The provisions on filing appeals (draft Article 93) were combined in a single paragraph, the second sentence of which was worded as follows: "*Le recours n'est réputé comme formé qu'après le paiement de la taxe de recours prescrite dans le règlement relatif aux taxes pour cette convention.*" Draft Article 97(1) was redrafted as follows: "*Si le recours n'est pas conforme aux prescriptions des articles 91 à 93 ou à celles du règlement d'exécution de la présente convention, la chambre de recours le rejette comme non recevable.*" These redrafted versions were amended only minimally and correspond to the versions of Article 108, second sentence, and Rule 65(1) that were later adopted at the Munich Diplomatic Conference in 1973.

(2) Interpretation of the *travaux préparatoires* in the decisions cited in the referral: T 79/01 and T 1897/17, which cites T 2017/12 ("minority" view in the case law)

(a) T 79/01, point 10 of the Reasons: in support of its finding that the appeal was inadmissible, the board cited the *travaux préparatoires* in document IV/6.514/61-D and the statement made there, under "*Entscheidungsmöglichkeiten der Beschwerdekammer*", that: "*Die Kammer kann feststellen, dass die Beschwerde wegen Nichtentrichtung der Gebühr unzulässig ist*". It thus referred solely to the summary given by the chairman of the Patents Working Party's 3rd meeting by way of introduction to the discussion of draft Article 97, and omitted, first of all, to mention that Article 93(2), as referred to by the chairman (see above), expressly provided for

the legal sanction that the appeal was deemed not to have been filed. It further omitted to highlight, by reference to Article 93(2), the obvious contradiction between the possible decision outcomes (inadmissible or deemed not filed). Nor, lastly, did it refer to any other part of the wording of or the discussions on the provisions in question. As a result, the Enlarged Board considers the decision to be erroneous on this point.

(b) In T 1897/17, which cites T 2017/12, the board, citing document IV/6.514/61-D (see above), concluded in point 3.4.3 of the Reasons: "*It is thus clear that the provisions and the procedure originally envisaged were different from the ones eventually adopted. In particular the draft article explicitly defined an appeal for which the appeal fee was not paid on time as being deemed not to be filed. This definition of what seems to be a special case does not exist in the article as it was finally adopted. There is no record of a discussion of this point with reference to the present wording. Thus it cannot be ruled out that the legislators in fact adopted the present wording because they no longer wished to make the situation of an appeal fee being paid late into such a special case.*"

The board's conclusion is erroneous and is not supported by the course of the discussions: following the discussion of draft Articles 93 and 97 (see above), the legal fiction expressed as "*recours ... considéré comme non avenue ...*" was in fact retained by the drafting committee in the redrafted Article 93 (see above document IV/5569/1/61-F), and the deletion of the expression "*dans les délais*" (or "*rechtzeitig*" in the German version) suggests that the legislator intended to include, besides cases of late payment, a failure to pay the fee at all, without thereby ruling out that the legal sanction (deemed non-filing of the appeal) was to be communicated to the appellant (see, to that effect, Teschemacher in "*Mitteilungen der Patentanwälte*" 2018, 314, 318). Consequently, to conclude – as did the boards in T 1897/17 and T 2017/12 – that the legislator no longer wished to treat late payment of the appeal fee as a special case (with the result that the appeal is deemed not to have been filed) amounts to an interpretation that goes beyond the discussions and the draft articles adopted.

Conclusions:

The *travaux préparatoires* show:

1. The legal fiction that "*notice of appeal is deemed not to have been filed*" if the appeal fee was not paid or was paid late had been envisaged by the legislator as early as 1961 and was kept in the provisions after discussion and redrafting (see drafts of Article 93 and "*Remarques*" on draft Article 97).

2. Point 1 of the introductory summary given by the meeting chairman on opening the discussion on draft Article 97, which related to possible board decision outcomes, is contradictory: he referred to inadmissibility of the appeal **and** the legal fiction provided for in Article 93(2). It cannot therefore be inferred from it that the appeal is to be treated as inadmissible in the event of non-payment of the appeal fee.

3. The wording of draft Article 97(1), taken together with the "*Remarques*" on draft Article 97 (inadmissibility of the appeal) appears to cover only situations in which the appeal fee is paid within the prescribed period but notice of appeal is filed after that period; that cannot be treated as analogous to the other scenarios at issue.

XI. Case law of the boards of appeal on non-payment of the opposition fee

Article 99(1), last sentence, EPC, which has a wording similar to that of Article 108, second sentence, EPC, provides that opposition is filed only on payment of the opposition fee.

The technical boards of appeal have been called on to consider when "opposition is deemed filed" in a number of decisions (the following list is not exhaustive): T 47/88 – 3.3.1 dated 17 October 1988; T 473/93 – 3.3.2 dated 1 February 1994; T 748/93 – 3.3.3 dated 19 April 1994; T 806/99 – 3.4.2 dated 24 October 2000; T 1048/00 – 3.2.3 dated 18 June 2003; T 1200/01 – 3.5.2 dated 6 November 2002; T 1530/06 – 3.4.02 dated 10 September 2008; T 1265/10 – 3.2.04 dated 15 April 2011; T 1644/10 – 3.3.05 dated 26 October 2011.

In all these decisions, the technical boards have found that, where the fee was not paid within the nine-month period or was paid late, the opposition had to be deemed not to have been filed and, in those cases where the fee had been paid late, ordered its reimbursement. In none of those decisions did the boards set out explicitly the reasons for finding that this was the legal consequence. Only in T 748/93, cited above, did the board draw a parallel between the legal situations of filing an opposition and filing an appeal. Referring to G 1/86, cited above, it pointed out that opposition proceedings could be considered to have been initiated only if notice of opposition had been filed and the opposition fee had been paid: "*... before a prospective appellant has lodged the appeal and paid the appeal fee, or equally before a prospective opponent has effectively filed a notice of opposition and paid the opposition fee, he does not assume the role of a party, because the respective proceedings are not yet in existence.*" (language of the proceedings: English).

Thus, having regard to the boards' case law on the filing of an opposition, it must be concluded that, regardless of the scenario, there is unanimity on this point, i.e. opposition proceedings are closed by way of the fiction that "opposition is deemed not to have been filed" and the opposition fee must be reimbursed. This case law merely confirms the interim conclusions reached above.

C. Conclusion

Having regard to its findings above, the Enlarged Board of Appeal concludes that, whatever the scenario at issue, the "majority" view in the boards' case law is applicable and the "minority" view is no longer to be applied.

The point of law referred to the Enlarged Board of Appeal by the President of the EPO is answered as follows:

1. An appeal is deemed not to have been filed in the following cases:

(a) where notice of appeal was filed within the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;

(b) where notice of appeal was filed after expiry of the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;

(c) where the appeal fee was paid within the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND notice of appeal was filed after expiry of that two-month time limit.

2. In the cases referred to in answers 1(a) to (c), reimbursement of the appeal fee is to be ordered *ex officio*.

3. Where the appeal fee was paid within or after the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND no notice of appeal was filed at all, the appeal fee is to be reimbursed.