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**Datasheet for the decision
of 9 December 2025**

Case Number: J 0006/23 - 3.1.01

Application Number: 10719228.8

Publication Number: 2393977

IPC: D06M16/00, D06M23/08,
D06M23/12, A01N63/00

Language of the proceedings: EN

Title of invention:

TEXTILE WITH BIOCONTROLLING PROPERTIES

Patent Proprietor:

Transito NV

Opponent:

HEIQ CHRISAL NV

Headword:

Relevant legal provisions:

EPC Art. 142(2)

Keyword:

The registered patent proprietor ceased to exist under Belgian law (yes)

The Legal Board is empowered to order the Legal Division to exercise its discretion to resume the proceedings pursuant to Rule 142(2), second sentence, EPC in a specific manner (no)

If resumed, the proceedings must be continued without the registered patent proprietor (yes)

Decisions cited:

G 0001/13, J 0012/19

Catchword:



Juristische Beschwerdekammer
Legal Board of Appeal
Chambre de recours juridique

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Case Number: J 0006/23 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 9 December 2025

Appellant: HEIQ CHRISAL NV
(Opponent) Priester Daensstraat 9
3920 Lommel (BE)

Representative: Oryon NV
Tavernierkaai 2
2000 Antwerp (BE)

Former Respondent: Transito NV
(Former Patent Proprietor) Vestingstraat 38 bus 3
2018 Antwerpen (BE)

Decision under appeal: Decision from the Legal Division of the European Patent Office posted/electronically transmitted on 1 February 2023 rejecting the request to resume proceedings pursuant to Rule 142 EPC with the opponent as the sole party

Composition of the Board:

Chairman I. Beckedorf
Members: B. Müller
A. Jimenez

Summary of Facts and Submissions

Preliminary note

This part of the decision consists to a large extent of the Legal Board's communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) (hereinafter also referred to as "the communication").

Points V to VII have been added and a number of adaptations have been made. Emphases in bold typeface are, unless otherwise indicated, those of the Legal Board ("the Board"). Single-spaced text portions are quotations.

- I. The opponent's appeal filed on 4 April 2023 is directed against the decision of the Legal Division (hereinafter also referred to as "the LD") of 1 February 2023 rejecting the opponent's request that opposition proceedings be resumed pursuant to Rule 142 EPC with the opponent as the sole party. On the same day the opponent paid the (reduced) fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC then in force.

With a letter of 11 April 2023, in view of the then recent change of the opponent (from Chrisal NV to Heiq Chrisal NV) , the opponent paid the (full) fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC. At the same time, it requested the refund of the fee paid on 4 April 2023. The EPO refunded that fee.

In its notice of appeal the opponent (hereinafter also referred to as "the appellant") **requested** that the decision under appeal be set aside and **resumption of the**

opposition proceedings be ordered with the opponent as the sole party (primary request).

A statement of grounds of appeal was filed on 11 June 2023. Therein the appellant repeated this request and added the alternate request that the following two questions be referred to the Enlarged Board of Appeal:

1. Is it permissible to resume opposition proceedings under Rule 142(2), 2nd sentence, EPC with the proprietor registered in the European Patent Register, in cases where it has been established that said proprietor has ceased to exist as a legal entity under the relevant national law?
2. If question 1 is answered in the negative, can a resumption of the opposition proceedings be ordered with the opponent as the sole party or shall the opposition proceedings remain interrupted indefinitely?

II. The proceedings so far

Opposition proceedings in respect of European patent number 2 393 977 have been interrupted since 31 January 2017 pursuant to Rule 142(1)(b) EPC owing to bankruptcy proceedings opened against the registered patent proprietor Transito NV; see the communication by the LD of 21 February 2017 to the then proprietor's administrator.

With a letter dated 16 October 2018, the opponent informed the EPO that the Commercial Court of Antwerp, Division Antwerp, had terminated the bankruptcy proceedings for Transito NV thus bringing an end to the existence of the legal entity Transito NV. A page of the Belgisch Staatsblad (Official Gazette), dated 15 October 2018 was enclosed. Therein the notice of the closure of the bankruptcy proceedings was published.

In a communication of 11 January 2019 to Transito NV, the LD stated that proceedings would be resumed with the registered "applicant" on 1 April 2019. A copy of the communication was sent to the opponent.

In response to that communication, the opponent, on 5 February 2019, objected to a resumption of the opposition proceedings with Transito NV acting as the proprietor of the patent under opposition. The opponent requested, as a main request, that the opposition proceedings be resumed with the opponent as the sole party and that the patent be revoked.

In a "communication" of 15 March 2019, the LD denied the opponent party status in the proceedings under Rule 142 EPC.

With a communication pursuant to Rule 84(1) EPC dated 10 April 2019, the parties were informed that the "European patent has been surrendered or has lapsed with effect for all the designated Contracting States. The opposition proceedings may be continued at the request of the opponent, provided that within **two months** from notification of this communication a request is so filed. ..."

According to the result of a communication by telephone with the opponent's representative dated 5 April 2019, it was the latter event that had occurred, i.e. the patent had lapsed.

The opponent appealed against the "communication" of the LD of 15 March 2019. The Legal Board of Appeal (in case J 12/19, in a composition with a different chairman) set aside the "communication", which it considered to constitute a decision and remitted the case to the LD for further prosecution (by decision of 1 February 2021). As

to the opponent's party status, the Board held (in point 2.2.3, third paragraph):

In resumption proceedings, the opponent is party to the main opposition proceedings. Any decision taken in the intermediate resumption proceedings may (adversely) affect the opponent's legal position. The opponent cannot be required to defend its rights only subsequently in the main (opposition) proceedings, after they have been resumed. Such a requirement, as the appellant rightly stated, would delay proceedings and might cause additional costs.

On 8 October 2021, the LD issued a **communication** expressing its **intention to order resumption** of the opposition proceedings pursuant to Rule 142(2), second sentence, EPC **with the patent proprietor** registered in the European Patent Register, **Transito NV**. It **set no specific date** for resumption. The LD addressed the opponent's objection to the resumption with Transito NV acting as the patent proprietor of the patent under opposition. The opponent's grounds were that Transito NV had ceased to exist as a consequence of the decision by the national court to close the bankruptcy proceedings. (See point 2 of the communication.)

In its preliminary opinion on the above main request (of 5 February 2019) the LD stated in particular that

- it **“accepts that Transito NV has ceased to exist as a legal person”** (point 7) and
- it **abstained** (in point 10) from expressing its views on the questions raised by the opponent. The LD then said verbatim (point 11):

Consequently, the following questions have become

irrelevant for the further prosecuting of the case:

- Whether the EPO can exclude that a legal entity that had for all purposes ceased to exist may not be **revived** at some point through the retroactive effect of a provision of national law restoring it;
- Whether it is possible to hold opposition proceedings with the **opponent as a sole party**;
- Whether a European patent can be considered as a **res nullius**.

With a letter of 16 November 2021, the opponent objected to a resumption of the proceedings with Transito NV acting as the proprietor of the patent under opposition. It requested that the opposition proceedings be resumed with it as the sole party. Subsequent to oral proceedings held on 12 December 2022, the LD, on 1 February 2023, handed down the decision under appeal rejecting that request.

III. The decision by the Legal Division (replicated in essence)

1. The opponent had expressed the view that **Rule 142(2)**, second sentence, EPC as amended in 2020 did **not apply** to the case where the party had ceased to exist.

1.1 The LD did not agree with this view. The reason for the amendment was to remedy legal uncertainty in cases where resumption was not possible under the previous legislation in force before 1 July 2020, i.e. in cases where the EPO had not been informed of the identity of the person authorised to continue the proceedings (see Notice from the EPO dated 29 May 2020 concerning implementation of amended Rule 142(2) EPC; OJ EPO 2020, A76 (hereinafter also referred to as the "Notice"; quotations therefrom are set out in point 3.1 of the Reasons below). Accordingly, amended Rule 142(2), second sentence, EPC, provided that if, three years after the publication of the date of interruption in the European Patent Bulletin, the EPO had not been informed of the identity of the person authorised to continue the proceedings, it might set a date on which it intended to resume the proceedings of its own motion.

1.2 This applied where the person entered in the European Patent Register appeared to have ceased to exist according to the national law applicable. In such a case, the EPO did not know who the person authorised to continue the

proceedings would be. In such a case and with a view to avoiding an interruption *sine die*, the aforementioned Notice provided the clarification that if no person authorised to continue the proceedings could be found, then the proceedings would continue with the applicant/ proprietor registered in the European Patent Register (see point 3 of the Notice reproduced *idem*).

2. The Legal Division also did not accept the argument that, **if the opposition proceedings were to be terminated**, the patent would remain as granted and would deprive the opponent of a revocation decision with the retroactive effect provided for in Article 68 EPC. According to the opponent, **were a court-ordered sale to occur, then a third party might still attempt to exercise the rights conferred by the patent.**

2.1 First, it could be inferred from the file that opposition proceedings would not simply be terminated, but could be continued by the EPO of its own motion pursuant to Rule 84(1) EPC, the patent in question having **lapsed** in all the designated contracting states. Whether the patent could then be revoked in the present case lay within the competence of the opposition division.

2.2 Second, if the patent were not to be revoked and "such a person" (apparently a third party in the meaning of point 2 above) were to be found, then this person would be perfectly entitled to exercise its rights.

2.3 The case where the patent proprietor no longer existed did not differ in fact from the situation where the patent proprietor no longer had any interest in the patent, let the patent lapse in all designated contracting states and did not participate at all in the opposition proceedings. In such a case, it was still possible for the opposition division to continue the proceedings of its own motion (see Rule 84 EPC) and, as the case might be, to achieve a revocation of the patent pursuant to Article 68 EPC. Even

in such a case, the patent proprietor remained formally party to the opposition proceedings.

3. The opponent put forward that it was a generally recognised principle of national law and also under the EPC that **legal entities which did not exist could not bring or take part in proceedings** (see decision **G 1/13**, OJ EPO 2015, A42). The opponent argued that under the present circumstances the patent was to be considered as a "**res nullius**" according to Belgian legal literature.

3.1 The LD was not convinced that the concept of *res nullius* could be used in the context of the legal framework of the EPC. Rather, the LD was of the opinion that the issue that needed to be taken into consideration in the first place was the objective of opposition proceedings before the EPO, which was to not allow patents to exist that were not valid under the EPC. Amended Rule 142(2) EPC enabled the EPO to achieve this goal.

3.2 In addition, resumption with the opponent as the sole party would result in a procedurally undesirable consequence such as a "**procedural vacancy**". The LD took the view that such a procedural vacancy was not compliant with the EPC.

4. The opponent put forward that if the opposition proceedings were resumed with the registered patent proprietor, it would cause **important delay** in the proceedings because of the notification process. Furthermore, the opponent would not be able to obtain apportionment of costs as the patent proprietor no longer existed.

4.1 The Legal Division responded that it was true that it would cause delay if each communication would need to be notified twice before public notification pursuant to Rule 129 EPC could be effected. The question remained open whether this would be necessary under the present

circumstances. In any event, public notification was an official tool under the EPC. Possible associated delays were irrelevant in this respect.

4.2 As to apportionment of costs, the opponent would not be able to obtain it either if proceedings were to be resumed with the opponent as the sole party as requested.

IV. The appellant's grounds of appeal in this case and in J 12/19

1. Application of Rule 142 EPC in the case in hand

In the statement of grounds in the present case, the appellant does not dispute that Rule 142(2), second sentence, EPC as amended with effect of 1 July 2020 applies. The appellant however believes that in cases such as this, which involved opposition proceedings with the proprietor no longer existing as a legal person, proceedings may be resumed with the opponent alone. The opponent states verbatim (see grounds in this case, point V, bottom of page 9 to middle of page 10; emphasis in bold in the original, emphasis in italics added):

The Appellant recognizes that amended Rule 142(2) EPC entered into force on 1 July 2020 and is applicable to all proceedings already interrupted on or after that date. We respectfully submit that nothing in amended Rule 142(2) EPC, its preparatory brief (CA/5/20), or the Notice from the EPO dated 29 May 2020 concerning implementation of amended Rule 142(2) EPC (EPO OJ 2020, A76) suggests that a resumption of the opposition proceedings with the proprietor registered in the European Patent Register would be desirable or even possible in the case where it is known that said *proprietor no longer exists as a legal person*. There is no indication in the cited documents that the Administrative Council intended to derogate from the established principle that legal entities which do not exist cannot bring or take part in proceedings. Hence, the statement in point 3 of the cited notice that "the proceedings will continue with the [proprietor] registered in the European Patent Register" must be read as only applying when the proprietor can be

presumed to still be in existence but unable to act on its own behalf.

In the present case, a resumption of the opposition proceedings is believed to still be possible under Rule 142(2), 2nd sentence, EPC, but not with the proprietor registered in the European Patent Register as a party. As there is no other person or entity who can lay any claim to the property in the patent under opposition - in fact, the patent belongs to nobody at this point - **it follows that the opposition proceedings should be resumed with the Opponent as the sole party.**

The opponent explains in greater detail why, pursuant to G 3/99, legal entities that do not exist, such as allegedly Transito NV, cannot take part in proceedings before the EPO (*idem*, page 9 preceding the above quotation):

The Enlarged Board of Appeal has defined the legal personality of a named entity under the EPC as the capacity to sue or to be sued in its own name and on its own account (G 3/99, reasons no. 9). Transito NV no longer has any capacity to sue at all. To the extent that it can still be sued by its creditors, this does not happen "in its own name and on its own account", but in the name of the liquidator *qualitate qua*, and on account of proceeds of the universality of the remaining assets (if any) that previously belonged to the legal person. Hence, on the basis of the capacities that Transito NV has under Belgian law, it must be concluded that it fails both prongs of the "legal personality" test of G 3/99.

It is a well-established principle within the conflicts-of-laws framework of the EPC that the existence or non-existence of a legal entity is exclusively a matter of national law. In G 1/13, the Enlarged Board of Appeal held (at 5.1):

Legal entities such as companies exist only by virtue of the national legal system which governs their incorporation, subsequent existence and cessation (...). So far as the EPC is concerned, the existence or non-existence of a legal entity is exclusively a matter for such national law.

Following this reasoning, the non-existence of Transito NV under Belgian law should be given full effect in proceedings before the European Patent Office.

The Enlarged Board further held (at 5.2):

It is a generally recognized principle of national law and also under the EPC that legal entities which do not exist cannot bring or take part in proceedings.

As a result, non-existent Transito NV cannot continue to be a party to the pending opposition proceedings before the European Patent Office.

As a summary, the appellant states (*idem*, point I, top of page 2):

The only way to reconcile the spirit of Rule 142(2), 2nd sentence, EPC, which aims to avoid endless interruptions of proceedings in cases where no person authorized to represent the affected party can be identified, with the aforementioned principle that legal entities which do not exist cannot take part in proceedings, appears to be a resumption of the proceedings without the affected party. This is why the present Appellant has requested - and continues to request - the resumption of the interrupted opposition proceedings with the Opponent (i.e., present Appellant) as the sole party. This request was denied by the Legal Division in its decision dated 1 February 2023 (the decision that is the subject of the present appeal).

The appellant's reasoning leading to the conclusion that Transito NV no longer exists is laid out in the following section.

2. Legal existence of Transito NV and consequences if it does not exist

2.1 Statement of grounds in the present case

According to the opponent, Transito NV no longer exists as a legal person. The opponent explained this view in point IV of the grounds (see point IV, bottom of page 7 to top of page 9, the following extract starting at the top of page 8; emphasis in the original, footnotes omitted):

...Put succinctly, Transito NV was declared bankrupt on 31 January 2017 and the bankruptcy proceedings were closed by the court on 9 October 2018, whereby the closure of the bankruptcy proceedings also encompassed the dissolution and the closure of the liquidation of the bankruptee and thus the end of its legal existence.

The fact that Transito NV has ceased to exist is no longer in dispute; in the first-instance procedure leading up to the present appeal, the Legal Division unreservedly stated in point 7 of its communication dated 8 October 2021:

"The Legal Division accepts that Transito NV has ceased to exist as a legal person."

As the (non-existent) Proprietor has not challenged the Legal Division's finding that it has ceased to exist as a legal person, this point is believed to be finally decided and beyond the scope of the present appeal.

Should the Legal Board of Appeal nevertheless see a need to form its own opinion on this point, we refer to the following evidence already on file:

- An official extract from the Belgian Crossroads Bank for Enterprises 3 (Exhibit E5 in case J 12/19). This extract clearly marks the present legal situation of Transito NV as "Stopped" (page 2, lines 1-2, stating "Legal Situation: Closing of bankruptcy procedure / Status: Stopped / Start Date: 09/10/2018"). In addition, under the header "Financial Details" the duration of the entity is marked as starting on 20/02/1989 and ending on 09/10/2018. No authorized officers of Transito NV are listed on the extract after 9 October 2018.

2.2 The statement of grounds of appeal in case J 12/19

The appellant explained the "proprietor's situation", in particular the abovementioned evidence (exhibit E5), as follows (see point V, page 10 to page 12, underlining in the original):

...the summary proceedings before the Commercial Court of Antwerp, Division Antwerp, to end the bankruptcy proceedings for Transito NV, have brought an end to the legal existence of the registered patent proprietor. To substantiate this statement, we refer to art. 73, 2nd paragraph, of the Belgian Bankruptcy Code, which states (emphasis added):

La décision de clôture des opérations de la faillite dissout la personne morale et emporte clôture immédiate de sa liquidation lorsqu'il est reconnu que l'actif ne suffit pas pour couvrir les frais présumés d'administration et de liquidation de la faillite.

[For English translations of this and the following two quotations in French see below, point 3.1.3 of the Reasons.]

In general, the dissolution of a company as such does not end its existence immediately under Belgian law, as the company will still be "deemed to exist" for the purpose of its liquidation. Art. 183, §1, of the Belgian Companies code states:

Les sociétés sont, après leur dissolution, réputées exister pour leur liquidation. Toutes les pièces émanant d'une société dissoute mentionnent qu'elle est en liquidation.

It is therefore noteworthy that the decision to close the bankruptcy proceedings not only entails the dissolution of the legal entity, but also closes its liquidation. The combination of these two elements results in the immediate termination of the existence of the legal entity at the end of the bankruptcy proceedings. For the sake of completeness, it is noted that the question whether the dissolved legal entity still owned any assets at the time of the closure of the liquidation proceedings does not come into play, as the "Doppeltatbestand" of German law is not known to Belgian law (cfr. G 1/13, point 2.3.4).

The fact that the decision to end the bankruptcy proceedings of Transito NV designates a liquidator... does not imply that the legal entity continues to exist as such, as that would be in direct contradiction with the fact that the liquidation proceedings are closed by the Court's decision. The appointed liquidator is in principle only required to serve as the named defendant in any law suits brought by creditors between the publication of the notice of the closure of the liquidation proceedings and the end of the five-year prescription period provided in art. 198, §1, of the Belgian Companies Code, concerning acts or omissions that have taken place or debts that have arisen prior to the closure of the liquidation proceedings:

Sont prescrites par cinq ans :
(...)
- toutes actions centre les liquidateurs, en cette qualité ou, a défaut, centre les personnes considérées comme liquidateurs en vertu de l'article

185, à partir de la publication prescrite par l'article 195; (...).

The fact that the need to have a named defendant for suits brought during the abovementioned five-year period is the sole purpose of the designation of a liquidator upon the closure of the bankruptcy proceedings was explicitly confirmed during the parliamentary preparation of the cited provision of the Bankruptcy Code (see the Parliamentary Commission report dated 13 July 2001, submitted as Exhibit E4, p. 107):

...

While the dissolved company's temporarily remaining capacity to be indirectly sued (in the person of its liquidator) could theoretically be considered to constitute a form of continued "passive existence", this existence is a legal fiction, the applicability of which is limited to the purpose for which it was created. In a judgment dated 17 April 2008, the Belgian Supreme Court clearly reaffirmed the basic principle that the closure of the liquidation brings an end to the existence of the legal entity, and explicitly specified that a company's "deemed existence" after the closure of its liquidation serves the protection of the creditors of the company (see Exhibit E6, page 9). The notion that the temporary passive existence of a liquidated company only serves the interests of creditors who seek to recover unpaid debts is backed by nearly a century of Supreme Court precedents (see Exhibits E7, E8, and E9). Accordingly, under Belgian law, Transito NV no longer exists as a legal entity outside the exceptional context of creditors' claims brought against the liquidator.

[end of extract at the bottom of page 12 of the statement of grounds]

[equally, end of extract from the communication]

V. The Legal Board's communication pursuant to Article 15(1) RPBA

The Legal Board's preliminary and non-binding opinion set out in that communication, in summary, was as follows:

- the then primary request that the decision under appeal be set aside and that the opposition proceedings be resumed with the opponent as the sole party could not be granted. This was because the Board could not order the Legal

Division to exercise its discretion under Rule 142(2), second sentence, EPC in a specific manner.

- In the circumstances, the Board stated it might assume that the appellant was deemed to request that the decision under appeal be set aside and the case be remitted to the Legal Division for further prosecution. As a consequence of its analysis, the Board considered that, for formal reasons alone, the rejection of the appellant's request by the LD could not be overturned. The assumed request would therefore also have to be refused.

The Board nevertheless provided an analysis of the legal issues in the event it should arrive at a different final conclusion. The Board assessed in particular whether Transito NV still existed or, rather, had ceased to exist and what were the consequences in the latter case for any continuation of the opposition proceedings.

- The Board arrived at the preliminary conclusion for this hypothetical situation that, subject to certain points being clarified, Transito NV had ceased to exist and the opposition proceedings were to be continued with the opponent alone.

VI. The opponent's response to the Board's communication pursuant to Article 15(1) RPBA

The opponent's response started with the following summary (see the paragraph bridging pages 1 and 2):

The Appellant confirms that the evidence previously submitted in case J 12/19 and in the present case is still relevant, and maintains the arguments based thereon. Section II of the present submission clarifies (i) that the closure of the bankruptcy proceedings for Transito NV was a summary procedure in view of the lack of sufficient assets to bear the expected costs of the management and the liquidation of the bankruptcy, and (ii) that the mention of the closure of the bankruptcy proceedings (and ipso facto of the liquidation) of

Transito NV was published in the Belgian Official Gazette on 15 October 2018.

In section III the opponent provided reasons why it disagreed with the Board's preliminary view that the Board would not be able to grant the opponent's then primary request, because it could not take the place of the Legal Division in exercising the latter's discretionary power to decide whether or not to order the resumption of the interrupted opposition proceedings.

Finally, as a precaution, the opponent submitted a new subsidiary request to remit the case to the Legal Division for further prosecution. The opponent expected that the Legal Division would, in that case, respect the *ratio decidendi* of the order of the Board's decision, even if the order could not formally direct the Legal Division to exercise any of its discretionary powers in a specific way.

The opponent requested that the Board of Appeal set aside the Legal Division's decision dated 1 February 2023, and

- as a main request: order the resumption of the opposition proceedings with the opponent as the sole party; or
- as a subsidiary request, remit the case to the Legal Division for further prosecution.
- The request for a referral to the Enlarged Board of Appeal was formally maintained at a more subsidiary level.

VII. The oral proceedings before the Legal Board

The opponent's main request that the resumption of the opposition proceedings be ordered with the opponent as the sole party was discussed. The opponent said that it was not necessary to discuss the requested referral as there was agreement on the law.

After deliberation, the Chair announced the Legal Board's conclusion that

- the Board was not minded to refer questions to the EBA.
- The primary request could not be granted; a direct resumption of the opposition proceedings was not possible because of the LD's discretion to establish all the requirements of Rule 142(2) EPC.
- But the Board was minded to remit the case to the LD for further prosecution and could conceive of some guiding elements.

In reply, the opponent made its subsidiary request its sole request. That request was that the decision under appeal be set aside and the case be remitted to the Legal Division for further prosecution.

At the end of the oral proceedings, the Chair announced the Board's decision granting that request.

Reasons for the Decision

1. Whether the appeal is deemed to have been filed

The appeal against the decision of the Legal Division of 1 February 2023 was filed on 4 April 2023. At the same time, the opponent paid the (reduced) "Appeal fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC" in force at that time. The Board considers that the conditions of this rule have been met: the opponent had declared to be an SME on EPO Form 1011bis ("Declaration for SMEs, natural persons, non-profit organisations, universities and public research organisations for the purpose of the reduction of the fee for appeal under Article 2(1), item 11 of the Rules relating to Fees and Rule 6(4) and (5) EPC") dated and filed on 21 March 2019 in the previous appeal proceedings J 12/19. According to the file, no doubts have been raised by the EPO in respect of the declaration. Hence, the appeal is deemed to be filed within the two-month time limit of Article 108, first and second sentences, EPC. The time limit is calculated under the then applicable version of Rule 126(2) EPC (providing that "the [registered] letter shall be deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider..."; this provision was applicable to letters notified before 1 November 2023).

With a letter of 11 April 2023, in view of the then recent change of the opponent (from Chrisal NV to Heiq Chrisal NV), the opponent paid the (full) fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC in force at that time. It requested the refund of the reduced fee paid on 4 April 2023, together with the filing of the notice of appeal. The EPO refunded this fee.

The Board notes that payment of the full appeal fee was not required as the opponent, at the relevant point in time of filing the notice of appeal had met the requirements for payment of the reduced fee. (See "Notice from the EPO dated 18 December 2017 concerning the reduced fee for appeal (Article 108 EPC) for an appeal filed by a natural person or an entity referred to in Rule 6(4) EPC", OJ EPO 2018, A5, point 9, first sentence). Given that the requirements of payment for the reduced fee were met, the EPO will have to reimburse the difference between the full and the reduced fee.

In summary, the appeal is deemed to have been filed on 4 April 2023 when both the notice of appeal and the payment of the appeal fee in the appropriate amount were received in compliance with Article 108, first and second sentence, EPC.

2. Whether the appeal is admissible

Adverse effect (Article 107 EPC)

The opponent put forward (grounds, page 7, III.B.) that it was a party to the proceedings pursuant to Rule 142 EPC that led to the decision under appeal, in accordance with the decision in case J 12/19.

The opponent's request to continue the opposition proceedings with the opponent as the sole party was rejected by the Legal Division.

The Board agrees with the opponent in that this rejection is sufficient to make the opponent an adversely affected party in the meaning of Article 107 EPC.

According to the case law of the boards of appeal, under Article 107 EPC, any party to proceedings adversely affected by a decision may appeal. A party is adversely

affected within the meaning of Article 107 EPC if the decision fails to meet that party's wishes.

See Case Law of the Boards of Appeal of the EPO, 11th edition 2025, V.A.2.4.2a).

Legitimate interest

It was in a communication only, and not in a decision, that the LD announced that it would take a decision on the resumption of the proceedings without setting any date. They should be resumed not only with the opponent, but with the proprietor as well that the LD believed to no longer exist. This communication has no immediate legal consequence. It follows that the refusal in the decision under appeal to intend resumption with the opponent alone has no immediate legal consequence either. However, it creates the threat that the LD will proceed to set a date for resumption with the proprietor as well. The opponent strongly disagreeing with the latter way to proceed, it would be required to appeal such a future decision. Due to this threat, a legitimate interest in the present appeal cannot be denied.

Remaining requirements

The remaining admissibility requirements have been met. In particular, the appeal is deemed to have been filed within the time limit (see point 1). A statement of grounds was received in time as well.

In conclusion, the appeal is admissible.

[text from the communication following]

3. Whether the appeal is allowable

The appellant's (opponent's) sole request is that the decision under appeal be set aside and that the case be remitted to the Legal Division for further prosecution.

3.1 The legal framework

The opponent's sole request is based on Rule 142(2), second sentence, EPC. That paragraph reads as follows (emphasis added):

(2) When, in the cases referred to in paragraph 1(a) or (b), the European Patent Office has been informed of the identity of the person authorised to continue the proceedings, it shall notify such person and, where applicable, any third party, that the proceedings will be resumed as from a specified date. If, **three years** after the publication of the date of interruption in the European Patent Bulletin, the European Patent Office has **not been informed of the identity of the person authorised to continue** the proceedings, it **may** set a date on which it **intends to resume the proceedings of its own motion**.

The second sentence was added to paragraph 2 by decision of the Administrative Council of 27 March 2020 (CA/D 2/20, OJ EPO 2020, A36) which entered into force on 1 July 2020. The President of the EPO had submitted the proposed amendment in document CA/5/20 of 12 March 2020. According to this document, the "aim of the amendment is to avoid legal uncertainty in cases where resumption of indefinitely interrupted proceedings is not possible under the current legislation" (see title "SUMMARY" on the cover page). As to the implementation of this amended provision, the document states (emphasis added):

D. PROPOSAL FOR AMENDMENT

10. ...On the expiry of the proposed three-year period as from the publication of the interruption date in the European Patent Bulletin, the EPO will be entitled to set a date of its own motion as of which proceedings **will continue**, taking into account the status of the application or patent and the circumstances of each case.

This **date**, which may be postponed by the Office or upon a reasoned request, will be set in such a manner as to **allow any potential entitled person to assert its rights** to the application or patent.

In a later Notice from the EPO of 29 May 2020 (OJ EPO 2020, A76), further provisions are set out regarding the implementation of amended Rule 142(2) EPC (emphasis added):

2. The resumption date will be set after careful assessment of the circumstances of each case and the status of the European patent application/European patent concerned. Information about the intention to resume proceedings on a specified date will be published in the European Patent Register and the European Patent Bulletin. In the case of a claim of succession in title in respect of the European patent application/European patent concerned, the resumption date may be postponed upon reasoned request and submission of relevant documentary evidence.

3. As a consequence of the *ex officio* resumption, if **no person authorised** to continue the proceedings **can be found**, the **proceedings will continue** with the applicant/**proprietor registered** in the European Patent Register, and procedural actions may become necessary and/or fees due. Failure to comply with relevant time limits may result in a loss of rights pursuant to the corresponding regulations of the EPC.

The Board is of the opinion that Rule 142(2), second sentence, must be read as follows:

...it **may** set a date on which it **intends** to **resume** the **proceedings** of its own motion **and** a date on which the proceedings **will resume**.

The Board considers that the power to express the intention to set a date for the resumption of the proceedings would be meaningless if, depending on the circumstances of the respective case, the power to set that date would not be implied. These dates are expected to generally be identical.

This view is believed to be in line in particular with the President's submissions to the Administrative Council explaining the amendment to Rule 142 EPC reproduced above.

[end of extract from the communication]

3.2 Application of the legal framework to the sole request

The appellant requests that the decision under appeal be set aside and the case be remitted to the Legal Division for further prosecution.

The Board can only set the decision aside if it infringes the law. That will be the case if the LD's intended application of Rule 142(2), second sentence, EPC is not correct. This is what the Board, in its communication assumed, subject to some questions being answered in a specific way. The opponent having answered them in a satisfactory manner, the Board has come to the final conclusion that the decision under appeal does infringe the provisions of that sentence.

The following discussion reproduces in essence the Board's analysis of the legal issues made in section 3.3. of the communication; those portions that raised certain questions have been complemented by the opponent's answers thereto and the Board's assessment thereof.

3.3 The Board's analysis

Upon the Board's invitation in its communication, the opponent confirmed in (point I of) the response thereto that the evidence previously submitted in case J 12/19 and

the present case was still relevant. The Board has verified this evidence.

[text from the communication following]

3.3.1 Whether Transito NV has ceased to exist

3.3.1.1 The relevance of Belgian law for determining the status of Transito NV

In G 1/13 it was held (emphasis added):

6. The Enlarged Board considers that the starting point should be the clearly established principle under the EPC that **national law** should be referred to in order to determine whether a legal entity exists or has ceased to exist, and has capacity to act (see point 5.1, above).

5.1 Legal entities such as companies exist only by virtue of the national legal system which governs their incorporation, subsequent existence and cessation ... So far as the EPC is concerned, the existence or non-existence of a legal entity is exclusively a matter for such national law. See, for example, T 15/01 (OJ EPO 2006, 153), point 9 of the Reasons. The **legal personality** of an entity acting in proceedings under the EPC is to be decided on the same basis as before national courts, namely the **capacity to sue or to be sued in its own name and on its own account**: see G 3/99, op. cit., point 9 of the Reasons.

3.3.1.2 The decisive criterion: "cease to exist"

According to the opponent, Transito NV, as a consequence of its dissolution and simultaneous closure of its liquidation, under Belgian law, no longer exists as a legal person.

As stated in G 1/13 (point 1) the "dissolution" of a company has different meanings under different systems of law. For example under German law, the "Auflösung" (dissolution) of a company is not synonymous with its ceasing to exist.

The same applies to the Belgian law as submitted by the appellant; this is explained below. The Board will therefore, like the appellant, generally rely on the criterion whether the company in question (Transito N.V.) has "ceased to exist" this being the relevant criterion under G 1/13 (see point 5.1) for deciding whether a company has legal personality.

Further, under G 1/13 (point 5.3), "It is a generally recognized principle of national law and also under the EPC that legal entities which do not exist cannot bring or take part in proceedings."

3.3.1.3 Transito NV's bankruptcy and dissolution and the immediate closure of its liquidation

The appellant's submissions

The Board notes that according to the appellant Transito NV was declared bankrupt on 31 January 2017 and the bankruptcy proceedings were closed by the court on 9 October 2018, whereby the **closure of the bankruptcy** proceedings also encompassed the **dissolution** and the **closure of the liquidation** of the bankruptee and thus the end of its legal existence.
(See above, point IV.2.1.)

As evidence of the closure of the bankruptcy proceedings the appellant furnished exhibit E5 in case J 12/19, an official extract from the Belgian Crossroads Bank for Enterprises 3. It does not show that the asserted dissolution of the company took place at the time of the closure of the bankruptcy proceedings. Such dissolution, according to the appellant, follows from Article 73(2) of the Belgian Bankruptcy Code. Pursuant to that provision,

the decision to **close the bankruptcy** operations **dissolves** the **legal entity** and entails the **immediate closure of its liquidation** when it is recognized that the **assets are not sufficient to cover the presumed costs** of administration and liquidation of the bankruptcy.

(This and the further translations below are automated and have been reviewed by the Board. The same applies to the translations below. For the French original of the above provision see point IV.2.2.)

The appellant submits that, while, in general, the dissolution of a company as such does not end its existence immediately under Belgian law, as the company will still be "deemed to exist" for the purpose of its liquidation (Article 183(1) of the Belgian Companies Code). Yet the decision to close the bankruptcy proceedings not only entailed the dissolution of the legal entity, but also closed its liquidation.

[end of extract from the communication]

The applicable law

The Board notes that, according to its research, the provisions of both the Belgian Companies Code and the Belgian Bankruptcy Code that the opponent relies on apply to the case in hand. Both statutes have in the meantime been superseded by new codes:

- A new Belgian Code of Companies and Associations entered into force on 1 May 2019 for any entity newly incorporated (Article 38). For existing entities (i.e. companies incorporated before 1 May 2019) the effective date is 1 January 2020 (Article 39). See the following source: 33192 MONITEUR BELGE – 04.04.2019 – BELGISCH STAATSBLAD of 23 MARS 2019. – Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses, p. 33239.
- Book XX of the Belgian Code of Economic Law governing the law of insolvency (« Livre XX relatif au droit de l'insolvabilité du Code de Droit Economique ») of 13 July 2017 is said to be the primary piece of legislation

governing insolvency and restructuring proceedings in Belgium. The new rules entered into force on 1 May 2018 and have been applicable to insolvency proceedings opened after this date (see Article 72 of the Code).

The bankruptcy proceedings in this case were opened on 31 January 2017, i.e. before 1 May 2018, meaning that the new insolvency statute is not applicable. The bankruptcy proceedings were terminated on 9 October 2018, meaning that the new company code is not applicable either the effective date for pre-existing being 1 January 2020.

The Board's analysis

According to the opponent, the decision to close the bankruptcy proceedings not only entailed the dissolution of the legal entity, but also closed its liquidation. The Board notes that, according to Article 73(2) Bankruptcy Code quoted above, such is only the case "when it is recognized that the **assets are not sufficient to cover the presumed costs** of administration and liquidation of the bankruptcy".

In its communication the Board said that it was not clear to it whether this information could be derived from the extract from the Belgian Crossroads Bank for Enterprises 3 or from any other piece furnished in the course of the present proceedings or those leading to the decision in case J 12/19. The Board invited the appellant to clarify this matter.

In its written **response**, the opponent set out the following:

The closure of the bankruptcy proceedings for Transito NV was published in the Belgian Official Gazette dated 15

October 2018, which the undersigned brought to the attention of the Legal Division with a letter dated 16 October 2018. The publication is reproduced below for the convenience of the Board:

[*the publication*]

The publication in the Official Gazette explicitly mentions that it concerns the summary closure of the bankruptcy (in Dutch: "summiere afsluiting faillissement"), which refers to the procedure of articles 73 and 74 of the Bankruptcy Act¹. This summary procedure is followed when and only when there are insufficient assets to cover the expected costs of managing and liquidating the bankruptcy. As already stated in the Grounds for the Appeal, in such cases the liquidation is immediately closed.

¹ The title of the relevant section of the Bankruptcy Act is "Summiere rechtspleging tot sluiting van het faillissement".

The publication establishing that the requirements of Article 73(2) were fulfilled, it follows that the assets were not sufficient to cover the presumed above costs and the liquidation was therefore terminated immediately.

3.3.1.4 The effect of the designation of a liquidator in the decision to end the bankruptcy proceedings

Case law of the Court of Cassation

[text from the communication following]

The appellant argues that this designation did not imply that the legal entity continued to exist as such. The appointed liquidator was in principle only required to serve as the named defendant in any lawsuits brought by creditors between the publication of the notice of the closure of the liquidation proceedings and the end of the **five-year prescription period** provided in **Article 198(1)** of the Belgian Companies Code concerning acts or omissions

that have taken place or debts that have arisen prior to the closure of the liquidation proceedings:

That provision reads (in English translation):

The following are prescribed after five years:

(...)

- all actions against liquidators, in that capacity or, failing that, against persons considered to be liquidators under Article 185, from the publication prescribed by Article 195; (...).

The appellant argued: while the dissolved company's temporarily remaining capacity to be indirectly sued (in the person of its liquidator) could theoretically be considered to constitute a form of continued "passive existence", this existence was a legal fiction, the applicability of which was limited to the purpose for which it was created. In a judgment dated 17 April 2008, the Belgian Court of Cassation (Cour de cassation - Hof van Cassatie, referred to as "Supreme Court" by the appellant) clearly reaffirmed the basic principle that the closure of the liquidation brought an end to the existence of the legal entity, and explicitly specified that a company's "deemed existence" after the closure of its liquidation serves the protection of the creditors of the company (see Exhibit E6, page 9).

The Board notes that, in the judgment dated **17 April 2008** (in point III.1, page 9), the **Belgian Court of Cassation** in Case number C.07.0054.N (see the appellant's Exhibit E6 in case J 12/19, page 9) held (translation):

Pursuant to Article 183, § 1, of the Companies Code, applicable in this case, companies are, after their dissolution, **deemed to exist for the purposes of their liquidation.**

The **completion of a company's liquidation** in accordance with Articles 194 and 195 of the Companies Code, **in principle, terminates the existence and legal personality** of that company.

The **disappearance** of the legal personality is **not**, however, **absolute**.

In accordance with Article 198, § 1, third indent of the Companies Code, legal actions against **liquidators** as such, i.e., as organs of the company, may be brought no later than **five years after the publication of the closure of the liquidation**.

It follows that the **liquidated company is deemed to continue to exist** for the **purpose of defending itself** against actions brought against it in due course by creditors.

The Board has taken note that the Court of Cassation affirmed this holding in its judgment of 20 September 2019 in joined Cases C.18.0448.F and C.18.0461.F (translation; original French text available at <https://juportal.be/content/ECLI:BE:CASS:2019:ARR.20190920.2>). (Emphasis added.)

In accordance with Articles 194 and 195 of the Companies Code, the closure of the liquidation terminates the company's existence.

Pursuant to Article 198, § 1, of the same code, all actions against liquidators in that capacity, or failing that, against persons considered to be liquidators, are time-barred after five years from the publication of the closure of the liquidation.

This provision, which **derogates from the principle of the extinction of the legal entity**, aims to ensure the protection of creditors.

According to the above judgment of the Belgian Court of Cassation of 17 April 2008, "the **liquidated company is deemed to continue to exist** for the purpose of **defending itself** against actions brought against it in due course by creditors" (wording of the first judgment as translated).

The appellant's conclusions

The appellant draws the following conclusions from the judgment of 17 April 2008 and preceding case law (see statement of grounds in case J 12/19, point V *in fine*, above A.IV.2.2):

The Enlarged Board of Appeal has defined the legal personality of a named entity under the EPC as the capacity to sue or to be sued in its own name and on its own account (G 3/99, reasons no. 9). Transito NV no longer has any capacity to sue at all. To the extent that it can still be sued by its creditors, this does not happen "in its own name and on its own account", but in the name of the liquidator *qualitate qua*, and on account of proceeds of the universality of the remaining assets (if any) that previously belonged to the legal person. Hence, on the basis of the capacities that Transito NV has under Belgian law, it must be concluded that it fails both prongs of the "legal personality" test of G 3/99.

It is a well-established principle within the conflicts-of-laws framework of the EPC that the existence or non-existence of a legal entity is exclusively a matter of national law. In G 1/13, the Enlarged Board of Appeal held (at 5.1):

Legal entities such as companies exist only by virtue of the national legal system which governs their incorporation, subsequent existence and cessation (...). So far as the EPC is concerned, the existence or non-existence of a legal entity is exclusively a matter for such national law.

Following this reasoning, the non-existence of Transito NV under Belgian law should be given full effect in proceedings before the European Patent Office.

The Enlarged Board further held (at 5.2):

It is a generally recognized principle of national law and also under the EPC that legal entities which do not exist cannot bring or take part in proceedings.

As a result, non-existent Transito NV cannot continue to be a party to the pending opposition proceedings before the European Patent Office.

The Board's assessment

The Board has difficulty in reconciling the appellant's foregoing conclusions with the following statement in the above judgment of 17 April 2008 (emphasis added):

...the **liquidated company is deemed to continue to exist** for the **purpose of defending itself** against actions brought against it in due course by creditors.

This statement suggests that it is the company that is being sued and defends itself, not the liquidator *qualitate qua*. This interpretation is confirmed by the judgment of the Court of Cassation of 22 March 1962 submitted by the appellant together with its statement of grounds of appeal in case J 12/19 (apparently as Exhibit E9).

Headnote III reads :

By the closure of the liquidation, the extinction of the company is not absolute, the **company continuing to exist** to respond to the actions that the company's creditors can exercise **against it in the person of its liquidators**, as long as the limitation period is not acquired by the lapse of five years from the publication of the closure of the liquidation. ...

Consequently, the requirements under the EPC defining a legal personality according to G 3/99 and G 1/13 set out above might be met: Transito NV had the capacity to be sued. This might mean, in the Board's view, that, under Belgian law as submitted by the appellant, Transito NV continued to exist subsequent to its dissolution on 9 October 2018.

[end of extract from the communication]

The opponent, in its response to the Board's communication, contested the Board's preliminary finding that Transito NV did continue to exist after 9 October 2018. This question can remain open if the five-year period under Article 198(1) of the Companies Code applies and has lapsed.

The question to be answered is whether the publication of the closure of the bankruptcy proceedings and the dissolution of the company, together with the closure of the liquidation under Article 198(1) of that code, equals the "**publication** prescribed by Article 195" of the code.

The Board repeats that the closure of the bankruptcy proceedings for Transito NV was published in the *Belgian Official Gazette* dated 15 October 2018, and that closure entailed immediate closure of the liquidation under Article 73(2) of the Bankruptcy Code due to a lack of funds. The publication of the closure of the bankruptcy proceedings and thereby the liquidation thus has the same legal consequence as the publication prescribed by Article 195 of the Companies Code which contains formal provisions. The Board is therefore of the opinion that the five-year period of the above Article 198 also applies to the publication of the closure of the bankruptcy proceedings and thereby the liquidation under the above Article 73(2) .

Given that, in the light of the above, all its requirements have been met, Article 198(1) of the Companies Code applies and its conditions have been fulfilled: the five-year period since publication of the end of the bankruptcy proceedings on 15 October 2018 elapsed on 15 October 2023.

It follows that Transito NV no longer exist under Belgian law. According to the appellant, there is no "Doppeltatbestand" as in German bankruptcy law keeping a bankrupt party alive as long as there still is any property left, which, in this case, would be the patent in suit.

The fact that a liquidator *ad hoc* may sell the patent would not revive Transito NV. The opponent stated (see pt. VI grounds J 12/19, emphasis added, footnote omitted):

Under Belgian law, assets of a dissolved company which are discovered **after the closure of the liquidation**, can be sold by an "administrator ad hoc" appointed by the Commercial Court, whereby the proceeds are placed in escrow for the benefit of any creditors that were not

fully compensated in the bankruptcy proceedings. The Belgian Supreme Court has held that such a **sale** does **not** imply that the **dissolved company is actively revived** (Exhibit E11). Hence, **unless and until a sale** of the patent by an "administrator ad hoc" [ad hoc curator] actually takes place, the patent under opposition must be considered as an **ownerless** good.

The Board notes that the judgment cited (exhibit E11 in case J 12/19) is of 21 October 2009 (case number P. 09.0869.F, second part) appears to confirm the appellant's statement:

The appointment of an ad hoc curator for the purpose of realizing an asset that has appeared in kind does not create active legal survival in favour of the company dissolved following its liquidation.

The appellant has not mentioned any provision of Belgian law, either, under which, similar to relevant UK law in case G 1/13, Transito NV might be revived at a later stage.

In the light of the foregoing, the Board agrees to the LD's conclusion in its communication of 8 October 2021 stating that Transito NV can be considered to have ceased to exist.

3.3.2 Consequences of Transito NV having ceased to exist

Transito N.V. having ceased to exist, the following statement in G 1/13 (in point 5.3) becomes applicable:

It is a generally recognized principle of national law and also under the EPC that legal entities which do not exist cannot bring or take part in proceedings.

Transito N.V. is thus not able to take part in resumed opposition proceedings.

[text from the communication following]

The question still arises whether there is no other party currently being the proprietor of the patent. As stated in G 1/13 (in point 2.3.2), under U.K. law, a patent must have an owner. In that case, it was the Crown.

Under Belgian law, as scholarly writers concluded, it is not the State. Rather, according to what would follow from their writings, the patent would be *res nullius*, i.e. not belong to anyone. And in addition it would not be subject to occupancy, i.e. no one could appropriate it. (See statement of grounds in J 12/19, point VI regarding the proprietary situation of the patent in suit.)

There seems to be no statutory nor case law in Belgium dealing with this situation. One can therefore not exclude that a different legal entity, such as the State, might some time in the future be held to be entitled by lawmakers or courts. One might therefore consider following the decision under appeal that, in case the LD decides to resume opposition proceedings (and the opposition division decides to continue them), this should take place with the registered patent proprietor Transito NV - even though, according to the LD, it has ceased to exist. Transito NV would then merely have the function of a placeholder without actively taking part in the proceedings. This would be in line with the position taken in the Notice (in point 3) that does not make an exception for the situation where a patent proprietor has ceased to exist.

Rule 142(2), second sentence, EPC is silent on how to proceed in such a situation. It says:

If, three years after the publication of the date of interruption in the European Patent Bulletin, the European Patent Office has not been informed of the identity of the person authorised to continue the proceedings, it may set a date on which it intends to resume the proceedings of its own motion.

The Board considers that in such a case, if the LD, and subsequently the opposition division, decided to continue the proceedings, this should be done with the opponent alone and not with non-existing Transito NV as well. This is because it is difficult to reconcile the LD's solution with the requirements under G 3/99 and G 1/13 according to which only an existing legal entity can take part in proceedings before the EPO. Furthermore, there is no other person that has claimed its authorisation to continue the proceedings that have been interrupted since 31 January 2017. The interruption was communicated by the EPO on 21 February 2017, i.e. nearly eight and a half years ago.

Admittedly, it is at the heart of Rule 142(2), second sentence, EPC that the person entitled to continue proceedings as proprietor of the patent is unknown, such as in the typical case of protracted bankruptcy proceedings lasting for several years, with an unclear outcome. This may justify, as provided in the Notice, continuing the proceedings with the registered proprietor whose fate is unclear. An exception applies however in cases such as the present one in which it has apparently been established (taking the opponent's facts and evidence at face value) that the registered proprietor has ceased to exist.

Irrespective of the above-mentioned requirement of G 1/13 of the existence of a party for its ability to take part in EPO proceedings, there is no need for a non-existing legal person as a placeholder. There are no legal considerations in the Board's view weighing against conducting proceedings in this case with the opponent alone:

- The aim of amended Rule 142(2), second sentence, EPO is to bring an end to the proceedings to further legal certainty. The three-year period after interruption is meant to make it possible for an entitled person to assert

its property in the patent. Furthermore, after that period has elapsed, the EPO will merely announce resumption of the proceedings. This would have provided additional time for a person considering itself to be entitled to assert its right vis-à-vis the EPO. As mentioned, in this case, nearly eight and a half years have gone by since the interruption of the proceedings was communicated.

- The question of whether Transito NV could be revived was one of three topics not discussed by the LD. In any case, should Belgian law, like U.K. law mentioned in G 1/13, still make this possible (contrary to what is implied in the opponent's assertions), then Transito NV could join opposition proceedings at any time, similar to an intervening assumed infringer (Article 105 EPC). The discussion in G 1/13 on the various possible developments in opposition proceedings where a company ceases to exist, but that company is subsequently restored to existence, is also of interest in this context: procedural steps which have taken place while the opponent company was not in existence must be given full effect (point 19, cf. also point 16.6). Similarly, a person acting on behalf of the proprietor must accept the procedural steps that have taken place during the proceedings before it joined them.

- The question of a procedural "vacancy" discussed in the decision under appeal (in point 3.2) does not play a role in this context. The situation in the decision in which it would have been of relevance, T 15/01, was different: applying the EPC would have triggered an undesirable time gap between two regularly occurring events in the ambit of universal succession: there would necessarily be a gap in time between the loss of party status by a proprietor having ceased to exist and its successor if EPC formalities would need to be completed.

Headnote II: Rule 20(3) EPC does not apply in the context of universal successions in law. The universal successor of a patent applicant or patentee **automatically** acquires party status in proceedings pending before the European Patent Office (see points 4 to 12 of the reasons).

10. ...the application of Rule 20(3) EPC in cases of universal succession would lead to a procedural "vacancy" with respect to the applicant or proprietor for a certain period of time.

9. ...On the one hand, the successor in law would acquire party status only after fulfilling the requirements set out in Rule 20(1) and (2) EPC. On the other hand, the applicant or proprietor on record who ceases to exist automatically loses party status.

In this case, proceedings may be continued without the proprietor that has ceased to exist. Therefore, there is no gap in time or procedural "vacancy". Apart from that, no person entitled to continue the proceedings as patent proprietor or on its behalf has appeared in the past nearly eight and a half years since the interruption has become known. As a consequence, a procedural "vacancy" cannot take place.

- The question of the legal status of the patent, *res nullius* or not, can remain an open one. If there is a person entitled, e.g. the State (contrary to the appellant's submissions), then, as said, that person can assert its right vis-à-vis the EPO at any time.
- The patent in suit will have no proprietor until any court-ordered sale by an administrator ad hoc takes place. If further to such a sale of the patent there will be a new proprietor, then that person will be able to join any continued opposition (or subsequent opposition appeal) proceedings if they are still pending. As stated, a court-ordered sale would not revive the former proprietor.

Against the above backdrop, the opponent is right, in principle, in arguing that Rule 142(2), second sentence,

EPC must be construed in a situation like this where the proprietor has ceased to exist that proceedings are continued with the opponent(s) only. This is subject to both the LD and the opposition division deciding that proceedings are to be continued. The opponent's pertinent statement reproduced above shall therefore be repeated:

The only way to reconcile the spirit of Rule 142(2), 2nd sentence, EPC, which aims to avoid endless interruptions of proceedings in cases where no person authorized to represent the affected party can be identified, with the aforementioned principle that legal entities which do not exist cannot take part in proceedings, appears to be a resumption of the proceedings without the affected party.

[end of extract from the communication]

4. Further proceedings

The Legal Board concluded above that, if the present opposition proceedings are to be continued, then they must be continued with the opponent only. The Board must therefore set aside the LD's decision expressing the view that the proceedings are to be continued with both the opponent and the registered patent proprietor Transito NV that has ceased to exist.

It will be for the LD to exercise its discretion pursuant to Rule 142(2), second sentence, EPC in respect of a possible resumption of the opposition proceedings. If the LD exercises its discretion by resuming the proceedings, then the proceedings will take place with the opponent only until the opposition division in turn subsequently exercises its discretion pursuant to Rule 84(1) EPC. If the opposition division does so by maintaining the continuation of those proceedings, then the opposition division will be bound by the LD's decision to continue them with the opponent only. It is the LD that has exclusive

jurisdiction on the resumption; see the Decision of the President of the EPO of 21 November 2013 (OJ EPO 2013, 600):

Sole responsibility for the following duties shall be vested in the Legal Division
Point 1(2)(b)
(b) Interruption and resumption of proceedings (Rule 142 EPC).

Transito NV having ceased to exist, notifications to it, in particular public notification, would have no purpose and consequently are not necessary.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



C. Eickhoff

I. Beckedorf

Decision electronically authenticated