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**Datasheet for the decision
of 14 February 2018**

Case Number: T 1897/17 - 3.4.01

Application Number: 13707893.7

Publication Number: 2823489

IPC: G21K1/06

Language of the proceedings: EN

Title of invention:

METHOD OF PRODUCING A FRESNEL ZONE PLATE FOR APPLICATIONS IN
HIGH ENERGY RADIATION

Applicant:

Max-Planck-Gesellschaft zur Förderung der Wissenschaften

Headword:

-

Relevant legal provisions:

EPC Art. 108, 122(1), 99(1), 112a(4)

EPC R. 101(1), 136, 126(2), 77(1), 108

Vienna Convention on the Law of Treaties (1969) Art. 31, 32

GebO Art.2 No.11

Keyword:

Re-establishment of rights - time limit for filing notice of appeal

Admissibility of appeal - filed within time limit (no) - late filed appeal to be rejected as inadmissible, not deemed not to have been filed

Decisions cited:

J 0021/80, J 0016/82, J 0009/00, G 0005/83, G 0001/14,
R 0004/15, T 0264/88, T 0374/90, T 0489/93, T 0608/94,
T 0804/95, T 0988/97, T 0154/98, T 0445/98, T 0778/00,
T 0015/01, T 0079/01, T 0314/01, T 0122/02, T 1026/06,
T 1691/06, T 1801/06, T 0046/07, T 1289/10, T 1535/10,
T 2210/10, T 2017/12, T 1553/13, T 0181/14, T 1325/15,
T 1946/15, T 2406/16, T 0327/17



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Case Number: T 1897/17 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 14 February 2018

Appellant: Max-Planck-Gesellschaft zur Förderung
(Applicant) der Wissenschaften
Hofgartenstrasse 8
80539 Munich (DE)

Representative: Hannke, Christian
Hannke Bittner & Partner
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Prüfeninger Straße 1
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 1 June 2017
refusing European patent application No.
13707893.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman F. Neumann
Members: P. Fontenay
R. Winkelhofer

Summary of Facts and Submissions

- I. The decision of the examining division, to refuse European patent application No. 13 707 893.7, was posted on 1 June 2017.
- II. On Monday 14 August 2017, the applicant filed a notice of appeal against this decision and paid the appeal fee.
- III. On 25 August 2017, the appellant (applicant) requested re-establishment of rights into the time limit for the notice of appeal, enclosing documentary evidence including an affidavit ('Eidesstattliche Versicherung') of 24 August 2017 of Mr von M.
- IV. In the request for re-establishment of rights (in the following: 'request') the appellant declares that Mr von M. had been working in the patent attorney firm of the appellant's representative, Mr H., since 2009. Mr von M. had since qualified as a German patent attorney, and he had already passed three papers of the European Qualifying Examination. He had been preparing submissions for the European Patent Office since at least 2010, in close cooperation and under the supervision of Mr H. or one of the other European Patent Attorneys in the firm.

The appellant further declares that, when the examining division's decision was notified to the representative in early June 2017, the deadline for filing the notice of appeal - 11 August 2017 - was correctly registered in the firm's electronic ICT management system and Mr von M. was earmarked in the system as the person responsible for the file. Mr von M. then communicated the decision to the appellant (contact person: Mr C.)

who passed this information on to the inventors. On 12 July 2017, in an email addressed by one of the inventors to the representative, it was stated that "Essentially, we would like to appeal to this decision". Despite several attempts, Mr von M. could not reach any of the inventors by phone to discuss the current file.

In parallel to the current file, Mr von M. was treating a further (second) file from the same inventors. This second file concerned a potential PCT application, for which the deadline for filing would expire on Saturday 12 August 2017. With regard to this potential PCT application, Ms S., a very reliable colleague of Mr von M., had been earmarked in the system as the person responsible for monitoring the time limit for the filing of the application. In effect, Mr von M. and Ms S. were both working on this second file in close cooperation.

In view of the deadlines approaching for both files, Mr von M. tried to contact Mr C. on 10 August 2017 at around 16:35. However, Mr C. was only available on the next day at around 10:00.

The ICT management system in the representative's firm was configured to display an overview of the next time limits due to expire when the system powered up. Moreover, on Friday 11 August 2017, in accordance with the usual practice within the firm, Ms A., who was the person responsible for monitoring Mr von M.'s time limits, gave Mr von M. a printout of the list of time limits due to expire within the next days. Ms A., as was her usual practice, also kept a copy of this list for herself so as to monitor the time limits for the files registered in the name of Mr von M.

Mr von M.'s list for 11 August 2017 contained two items: the current file, for which the time limit for filing a notice of appeal would expire that day, and a further file from the same applicant, also with a deadline which would expire that day, and for which a submission for oral proceedings had to be prepared.

In a phone conversation on 11 August 2017 at around 9:45, Mr von M. reminded Mr C. of the urgency of both the case at hand and the potential PCT application. The third case concerning the submission for oral proceedings was not discussed. Mr C. promised to contact the inventors for further instructions on both files discussed; if no such instructions should be given, they agreed that the notice of appeal for the case at hand, as well as the PCT application, with no amendments vis-à-vis the priority application, should be filed that day.

Around 11:40 an email of one of the inventors was received, with the instruction to file the PCT application as envisaged, while it was silent on instructions for the file at hand. Mr von M. forwarded this information to Ms S. for her to prepare the PCT application, which she could then finalise at around 13:00. The filing of the notice of appeal in the case at hand was further postponed.

Following that, Mr von M. prepared the submission for oral proceedings in the third file, which, in fact, turned out to take longer than expected. He finally gave it to Ms S. for finalisation at around 16:15, who then filed the submission at around 16:30 in cooperation with Mr H., the responsible patent attorney in that file.

While still working on the above-mentioned submission for oral proceedings, Mr von M. had been asked by Ms A. about the status of the two files appearing on his list for that day. Erroneously, he informed her that the second file on the list had already been finalised, thereby confusing the case at hand with the PCT application file. In fact, the PCT application file had never actually appeared on his list, as monitored by Ms A., but only on Ms S.' list. Mr von M. indicated that he was still working on the submission for oral proceedings but assured Ms A. that she did not have to concern herself any more about the time limits for that day. Relying on the information provided by Mr von M., Ms A. marked both cases with time limits of 11 August 2017 on Mr von M.'s list as settled.

At around 16:35 Mr von M. was then called by his wife, to inform him about a bicycle accident of their three-year-old son. She urged Mr von M. to come home as soon as possible, in order to take care of their six-year-old daughter. This bad news unsettled Mr von M. so much that he completely forgot about the time limit for filing the notice of appeal in the case at hand. When rushing off at around 17:00, he was not reminded about the notice of appeal by Ms A., who had previously been wrongly informed that the case had been taken care of, and he did not inform any of his colleagues about it. Since everyone was of the opinion that everything that had to be settled that day had already been taken care of, neither Mr. H, nor any of the other European Patent Attorneys in the firm received any indication that the notice of appeal still had to be filed.

Only on the following working day, Monday 14 August 2017, did Mr von M. realise that the notice of appeal

had not been filed. On realising this, he filed the notice of appeal right away.

Thus, the patent attorney firm had a well functioning system to note and monitor time limits which only failed in this specific case due to the combination of exceptional factors. All persons involved had continuously been supervised by a European Patent Attorney, exercising all due care needed.

In addition to the series of events outlined above, it was noted that on 11 August 2017 the firm's ICT management system had not been working properly, thus diverting the attention of Mr von M. - who was also responsible for the ICT management system in the firm - on several occasions.

The appellant concludes that, taking into account these circumstances, the time limit for filing the notice of appeal was missed despite all due care on the side of the appellant and the representative.

- V. The appellant's statement setting out the grounds of appeal was filed on 9 October 2017, including a subsidiary request for oral proceedings "[i]f the Appeal Board considers not granting a patent based on any one of the requests filed herewith".

- VI. No request for oral proceedings in the proceedings for re-establishment of rights was made by the appellant. However, several enquiries were made, both via phone and in writing, as to when a decision of the Board was to be expected.

Reasons for the Decision

1. An applicant can be reinstated into the time limit of filing a notice of appeal if the applicant was unable to observe this time limit despite all due care required by the circumstances having been taken (Art. 122 (1) in conjunction with Art. 108 EPC).
2. It not only rests with the appellant to exercise all due care, but with all persons acting on its behalf. Notably, also an appellant's professional representative including the representative's assistants have to exercise all due care. All of these persons' acts are finally attributed to the appellant (Case Law III.E.5.5). All due care by the representative includes, among other duties, the reasonable instruction and continuous supervision of assistants (Case Law III.E.5.5.4.(a) and (b)).
3. Based on the appellant's assertion of the facts, which are supported by the documentary evidence, all persons in the patent attorney's firm involved in the present case worked under the guidance and supervision of a qualified European Patent Attorney. No circumstances have come to light which could cast any doubt on the reliability of any of these persons, in particular on Mr von M., the person responsible for the preparation of the notice of appeal in the case at hand.
4. In accordance with established case law, one of the criteria to establish whether "all due care required by the circumstances" has been taken, is that the representative must be able to communicate effectively with his or her client. Specifically, to exercise due care, a professional representative that has been instructed to file an appeal, has to take all necessary measures

to obtain any additional instructions needed to discharge his or her duty (Case Law III.E.5.5.2(a)). In addition thereto, the representative has to commence work on a file reasonably clear of a deadline, to be sure to complete all necessary steps in good time (Case Law III.E.5.5.2(d)).

5. In the present case, neither of these criteria have been satisfied.

In the email of one of the inventors of 12 July 2017, the intention to appeal the examining division's decision had already been aired, albeit in terms which Mr von M. interpreted as being somewhat uncertain ("Essentially, we would like to appeal this decision"). Nevertheless, the urgency and importance of the matter was flagged with Mr von M., as the steps to take were noted in the ICT management system, including deadlines and exclamation marks to underline their importance (see Annex 4 to the request, "Fristen-Liste"). Despite initial repeated unsuccessful attempts to reach the inventors for clarifying whether an appeal should actually be filed (as well as for instructions regarding the potential PCT application), Mr von M. only tried contacting the appellant (Mr C. as the relevant person) in the late afternoon of 10 August 2017, the day before the deadline of 11 August 2017 was due to expire, to inform him about the failed attempts to reach the inventors, and to decide about whether to file an appeal.

Thus, although Mr von M. attempted to reach the inventors for clarification of their instructions, Mr von M. only managed to contact the appellant on the date of the deadline for filing the appeal. It may be left open whether due care was lacking on the side of Mr von M.

or on the side of the appellant: the result was that any meaningful communication only actually took place on the date of the deadline. This very late communication between Mr von M. and the appellant was, however, due to the fact that Mr von M. only attempted to reach the appellant (as opposed to the inventors) the day before the deadline. In view of the potential delays in communication, Mr von M. thereby risked getting himself into a situation where he could not be sure of being able to file the appeal before expiry of the time limit.

6. A further criterion for establishing whether "all due care required by the circumstances" has been exercised, is that the non-compliance with a time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law III.E.5.2 ff). In a larger firm with normally numerous time limits to monitor, a "normally satisfactory monitoring system" would have to contain an effective system of cross-checks, such a system being independent of the person responsible for monitoring the time limits, notably to prevent misunderstandings between a representative and an assistant (Case Law III.E.5.4.4).
7. In the present case, this criterion has also not been satisfied.

The time limit monitoring system used at the representative's firm appears to have a system of cross-checks built into it. Specifically, the time limits in the present case were displayed on Mr von M.'s computer and on a printout given to him by Ms A. Furthermore, Ms A. kept a copy of the printout so that she could separately monitor which actions had been completed.

However, in the present case, this system of cross-checks broke down due to an erroneous statement by Mr von M.

On 11 August 2017, Mr von M. had two files on his list of deadlines for that day. The first file was the present case concerning the filing of a notice of appeal and the second file concerned the submission for oral proceedings. In actual fact, Mr von M. had to deal with three files that day, only two of which had found their way onto Ms A.'s list of Mr von M.'s deadlines (see Annex 11). The PCT application from the same applicant as the other two files had also to be filed and was to be treated in close collaboration with Mr von M.'s colleague Ms S.

The file regarding the PCT application (which was not on Ms A.'s list) had been finalised in the early afternoon by Ms S. (with the involvement of Mr von M., as detailed above). While he was busy with the draft submission for oral proceedings (the second file on his list), he was asked by Ms A. about the two files on the list. At this point in time, the case at hand, with the notice of appeal to prepare, had not yet been started. Mr von M., though, confusing the PCT application file as finished early afternoon and the case at hand, told Ms A. that the latter had already been sent off. That erroneous response of Mr von M., while in itself being explainable due to the fact that the PCT file and the appeal file both had the same applicant, deprived Ms A. of any further possibility to realise the mistake later. For her, all cases on the list were to be ticked off, in accordance with Mr von M.'s assertion.

This confusion and the resulting mistake were due to the incomplete listing of files to be treated by Mr von

M. that day. This demonstrates that the representative's system of recording and monitoring time limits was not water-tight and that an effective system of cross-checks was not in place. Ms A.'s list of actions for that day only included two files, whereas Mr von M. actually had to deal with three. Moreover, it would appear that Ms A. was apparently unaware of the existence of the PCT file. A system which allows for such incomplete information cannot be considered to be a satisfactory system for monitoring time limits.

A further detail to be noted in this respect is that Mr von M. was not, on the relevant date, yet a qualified European Patent Attorney. In such a situation, the qualified representative supervising Mr von M. is responsible for monitoring Mr von M.'s activities in the firm, effectively creating a further layer of cross-checking. In actual fact, the supervising representative did not appear to be involved in the monitoring process at all, despite the fact that responsibility for filing the appeal ultimately lay with him. For reasons which have not been supplied, the supervising representative did not take any action to remedy the fact that the notice of appeal had not been filed before Mr von M. left the office that day, the error only being later discovered by Mr von M. himself.

8. For these reasons alone, it has to be concluded that "all due care required by the circumstances" has not been taken.
9. Against this background, it does not need to be examined whether there were further issues regarding the actions and supervision of any of the assistants involved in the present case.

In particular, there is no need to examine if the accident of Mr von M.'s son and the resulting needs of his daughter - with the consequence that Mr von M. left the office immediately - could be considered a further issue in the context of all due care taken. Likewise, there is no further need to consider whether there was an effective system of staff substitution in place (cf. Case Law III.E.5.4.5).

Furthermore, there is no need to examine what impact Mr von M.'s distraction by ICT issues had on him that day and what influence this had on the series of events which resulted in the time limit for the notice of appeal being missed.

10. The appellant notes, as an aside, that, using internal Form 2701, the European Patent Office had initially erroneously recorded that the notice of appeal had been filed within the time limit. It was only when the appellant drew attention to the fact that it had in fact been filed late, that the EPO realised its mistake.

It is very much appreciated that the appellant pointed out this mistake. However, neither such an initial error nor the appellant's indication can have any bearing on the request for re-establishment of rights, let alone on the (calculation of the) time limit itself. In particular, a 'confirmation' of an appeal's timeliness cannot render a late filed appeal timely. Moreover, admissibility issues can and have to be examined at every stage of the appeal procedure (see Case Law IV.E.2.7, e.g. T 15/01). At the point in time at which the notification was issued, the admissibility

check by the Boards of Appeal - which may have uncovered this mistake - had yet to be performed.

11. Therefore, the request for re-establishment of rights into the time limit for the notice of appeal has to be refused.
12. No request for oral proceedings in the proceedings for re-establishment of rights was made. With this decision being based on the appellant's own argumentation regarding the facts of the case, there was also no reason to hold oral proceedings ex officio.
13. In accordance with R. 126 (2) EPC, the examining division's decision was deemed to be delivered on 11 June 2017, with the time limit for the notice of appeal (Art. 108 EPC) expiring on 11 August 2017, a Friday and regular working day of the European Patent Office. From this follows that the notice of appeal, which was undisputedly filed on 14 August 2017, together with the payment of the appeal fee, was filed too late.
14. The legal consequence of this finding, as will be explained below, is that the appeal has to be rejected as inadmissible (R. 101 (1) EPC in conjunction with Art. 108 EPC; T 79/01, T 122/02, T 1289/10, T 1535/10 and T 2210/10; cf. T 264/88, T 489/93).
15. The board does not concur with the majority interpretation in decisions of the Boards of Appeal that an appeal is 'deemed not to have been filed', if the notice of appeal or the payment of the appeal fee were received outside the two-month time limit of Art. 108 EPC (Case Law IV.E.8, J 16/82, T 804/95, T 445/98, J 9/00, T 778/00, T 314/01, T 1691/06, T 1026/06

[regarding the appeal fee, with a different assessment as to the fee for the request for re-establishment of rights] T 46/07, T 327/17, T 1553/13 of 23 November 2016, T 181/14, T 1946/15, T 2406/16; cf. J 21/80, T 2017/12 and T 1553/13 of 20 February 2014).

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").

In T 2017/12 and T 1553/13 (of 20 February 2014), the question of the consequences of the late payment of the appeal fee was addressed in detail, with a careful analysis of the diverging case law outlined above and the question as to whether a late-filed notice of appeal and/or late payment of the appeal fee causes the appeal to be inadmissible or deemed not to have been filed, was referred to the Enlarged Board of Appeal.

T 2017/12 and T 1553/13 both noted that none of the decisions in favour of the second solution (appeal not deemed to have been filed) had given any reasons for their interpretation of Art. 108 EPC, second sentence.

Referring to G 5/83, which had determined that the EPC was to be interpreted according to Art. 31 and 32 of the Vienna Convention on the Law of Treaties, T 2017/12 (and, in similar terms, T 1553/13) further states that Art. 31 (1) leg. cit. requires, as a first step of interpreting a legal norm, the establishment of its ordinary meaning:

'...the ordinary meaning of Article 108 EPC, second sentence, "Notice of appeal shall not be deemed to have been filed until the fee for appeal has been filed," appears to be that before the appeal fee has been paid the appeal is deemed not to have been filed, and once the fee has been paid the aforementioned provision no longer applies, with the consequence that the appeal is filed. No relationship between the payment of the appeal fee and the time limit for filing the appeal can be derived from the literal wording of Article 108 EPC. Furthermore, the board is not able to establish, based on the text of the EPC or its preamble, that the parties to the EPC wanted Article 108 EPC, second sentence to be read "Notice of appeal shall not be deemed to have been filed until the appeal fee has been paid [in time]", nor is the board aware of any other source of interpretation as mentioned in Article 31 (2) and (3) of the Vienna Convention that would establish this.'

T 2017/12 (similarly, T 1553/13, also in the following) continues in saying that, according to Art. 32 of the Vienna Convention, supplementary means of interpretation should only come into play,

'...in order to confirm the meaning resulting from the application of Article 31 or if the interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result. The board considers that the latter is not the case. Thus supplementary means of interpretation can only be used to confirm the meaning resulting from the application of Article 31. In this regard, the board notes that there is nothing in the travaux préparatoires directly concerning the interpretation of present Article 108 EPC, second sentence. But it may appear that document IV/6.514/61-D indirectly confirms the board's interpretation.'

T 2017/12 further quotes the travaux préparatoires IV/6.514/61-D, these reading that:

'... Die Feststellung, dass seine eingelegte Beschwerde mangels rechtzeitiger Gebührenzahlung als nicht erhoben gilt, wird dem Beschwerdeführer in einer wiederum beschwerdefähigen Entscheidung zugestellt werden müssen. Es erscheint nicht erforderlich, diesen Grundsatz im Abkommen selbst festzulegen. Ob in der Ausführungsordnung zu diesem Abkommen eine entsprechende Bestimmung aufgenommen werden soll, wird später zu entscheiden sein.'

T 2017/12 then concludes:

'Furthermore, it seems that 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 [*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].

In neither of the cases T 2017/12 and T 1553/13 did the Enlarged Board of Appeal have to decide on the questions posed (see G 1/14).

T 1325/15 then returned to the majority interpretation of Art. 108 EPC, second sentence, that '*... no appeal exists where a notice of appeal was not (deemed to be) filed in due time*', arguing that this result was in line with numerous other EPC provisions where no distinction was made between late filing and non-filing of a document. T 1553/13 (of 23 November 2016, the final decision in this case) came to the same conclusion on the grounds that the Enlarged Board in R 4/15 had now found that a petition for review under Art. 112a (4) EPC, last sentence, was deemed not to have been filed when the respective fee had been paid out of time. With Art. 108 EPC, second sentence, and Art. 112a (4) EPC, last sentence, having essentially the same wording, T 1553/13 further argues that they should be interpreted in the same way. This line was followed in T 2406/16.

In the current board's view, also this latest line of argumentation does not provide any convincing reasons to question the conclusion that a notice of appeal is deemed to have been filed on the day of (late) payment of the appeal fee, with the consequence that the appeal, which only comes into legal existence on the day of (late) payment, will be rejected as inadmissible (R. 101 (1) EPC). This conclusion is in line with T 79/01, T 122/02, T 1289/10, T 1535/10 and T 2210/10 and the detailed reasoning in T 2017/12 and T 1553/13 of 20 February 2014.

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 fulfill 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.

Against this backdrop, the assumption in T 1325/15 of a general rule, and the justification for a different result being that "no distinction is to be made [in the EPC] between the late filing and the non-filing of a document", cannot stand: (only) the late filing of a legal remedy, and the late payment of the respective fee, is subject to a decision rejecting as inadmissible this legal remedy.

While the parallels between the procedural rules for appeal, opposition and petition for review could speak in favour of their identical treatment (this was the view taken in T 1553/13 of 23 November 2016 and T 2406/16, both of which refer to R 4/15), R 4/15 did not elaborate on the reasons for why late payment of the fee for petition for review should result in the petition for review being deemed not to have been filed, as opposed to being found inadmissible. Therefore, no conclusions can be drawn from R 4/15 for the question to decide here.

16. To summarise, there is no basis for the assumption that the appeal is not deemed to have been filed. It is to be rejected as inadmissible.

17. This means that there is no reason to enter into the substance of the appeal and thus no reason to consider the appellant's subsidiary request for oral proceedings on the merits, made in the statement of grounds of appeal. As a result, such oral proceedings do not have

to be appointed (T 374/90, T 608/94, T 988/97, T 154/98, T 1801/06).

18. The question remains whether the appeal fee could be reimbursed in the present case. This examination has to take place even in the absence of a request thereto (see T 489/93, T 314/01, T 46/07).

A fee can only be reimbursed if such reimbursement is explicitly provided for by the law or if it was paid without any legal basis (see, e.g., T 1026/06, T 2017/12).

In the present case, the appeal fee was paid in accordance with Art. 108 EPC and Art. 2 (1) No. 11 of the Rules relating to Fees in order to validly form an appeal and so was not paid without any legal basis. Since also none of the conditions of R. 103 EPC apply here, the appeal fee cannot be reimbursed.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairwoman:



R. Schumacher

F. Neumann

Decision electronically authenticated