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**Datasheet for the interlocutory decision
of 6 April 2022**

Case Number: T 1474/19 - 3.5.07

Application Number: 11771337.0

Publication Number: 2633434

IPC: G06F17/30

Language of the proceedings: EN

Title of invention:

METHODS AND SYSTEMS FOR PROVIDING ACCESS TO DATA AND
MEASUREMENTS IN A MANAGEMENT SYSTEM

Applicant:

Schneider Electric IT Corporation

Headword:

Payment by debit order/SCHNEIDER ELECTRIC

Relevant legal provisions:

EPC Art. 108

EPC R. 6(4), 6(5), 6(6)

RFees Art. 2(1), 5(1), 5(2), 7(2), 8

Arrangements for deposit accounts (ADA), version in force from
1 December 2017

Keyword:

Appeal fee (paid) - appeal deemed to have been filed

Decisions cited:

G 0002/97, G 0001/12, G 0001/18, R 0004/09, J 0011/85,
J 0004/91, J 0027/92, J 0015/98, J 0014/08, J 0014/12,
J 0008/18, J 0008/19, T 0130/82, T 0152/82, T 0017/83,
T 0170/83, T 0152/85, T 0290/90, T 0451/90, T 0905/90,
T 0690/93, T 0045/94, T 0161/96, T 0806/99, T 0079/01,
T 0971/05, T 0871/08, T 1265/10, T 0642/12, T 2364/12,
T 2317/13, T 2035/14, T 0198/16, T 2620/18, T 3023/18,
T 0225/19, T 0317/19, T 0703/19, T 1000/19, T 1060/19,
T 1222/19, T 2575/19, T 0333/20, T 0444/20, T 0637/21

Catchword:

I. A debit order has to be interpreted on its substance, according to the (objectively) clear intention of the appellant expressed therein to pay a fee in the applicable amount.

II. Under the Arrangements for deposit accounts valid as from 1 December 2017 (ADA 2017), a debit order having the clear purpose of paying a particular fee (here: the appeal fee) authorises the EPO to debit that fee in the applicable amount.



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Case Number: T 1474/19 - 3.5.07

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.5.07
of 6 April 2022

Appellant: Schneider Electric IT Corporation
(Applicant) 132 Fairgrounds Road
West Kingston, RI 02892 (US)

Representative: Murgitroyd & Company
Murgitroyd House
165-169 Scotland Street
Glasgow G5 8PL (GB)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 11 February
2019 refusing European patent application No.
11771337.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair J. Geschwind
Members: R. Winkelhofer
M. Jaedicke
P. San-Bento Furtado
R. de Man

Summary of Facts and Submissions

- I. On 11 April 2019, the appellant filed a notice of appeal through their professional representatives Murgitroyd & Company via EPO Online Filing. This notice stated, *inter alia*, that "Instructions to debit the Appeal Fee on our Deposit Account are enclosed". The notice of appeal was accompanied by a completed EPO Form 1038E "Letter accompanying subsequently filed items", indicating "11e Appeal fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC" in the "Fees" box 15-1 and "EUR 1 880.00" as the "Amount to be paid". The box "Method of payment" box indicated that "The European Patent Office is hereby authorised, to debit from the deposit account with the EPO any fees and costs indicated on the fees page".

- II. Murgitroyd & Company have a deposit account with the European Patent Office to settle fees due to the Office. EUR 1 880 was debited from the account effective on 11 April 2019. On this date, the balance of the account was well above that amount.

- III. By communication of 25 April 2019, using EPO Form 2901, the appellant was made aware that in accordance with Article 2(1) item 11 of the Rules relating to Fees ("RFees"), a reduced appeal fee of EUR 1 880 was due on the condition that the appeal was filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC and that a declaration to this effect was filed. A formal check revealed that the reduced fee had been paid but no such declaration had been submitted. The communication added that the "declaration may still

be filed within the time limit under Article 108 EPC. Otherwise the appellant(s) are not eligible for the reduced fee, meaning that the full amount of the fee for appeal is due. If the missing amount is not paid within the above-mentioned time limit, the notice of appeal may be deemed not to have been filed or the appeal may be considered inadmissible".

- IV. On 3 May 2019, the appellant submitted another completed Form 1038E which in the "Fees" box 15-1 had "011 Appeal fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC" selected and further indicated an "Amount to be paid" of "EUR 375.00". A written submission accompanying Form 1038E stated: "We hereby enclose our instructions to debit the missing amount (€375) of the Appeal Fee on our Deposit Account, in order to meet the total amount of €2.255."
- V. EUR 375 was debited from the account effective on the same date.
- VI. The Examining Division referred the case to the boards of appeal, noting that the appeal fee had not been paid fully within the time limit of Article 108 EPC and that the appeal might be considered inadmissible.
- VII. On 11 June 2019, the appellant filed a statement of grounds of appeal.
- VIII. In a communication of 13 June 2019, the board raised the issue of whether the full amount of the appeal fee had been paid in time.
- IX. With a submission dated 20 June 2019, the appellant requested that the appeal be considered admissible and

that the appeal fee be considered validly paid, stating that together with the notice of appeal, the wrong (i.e. reduced) appeal fee had been paid, which the appellant - a multinational corporation - was clearly not eligible for. Their intention had clearly been to pay the full (i.e. not reduced) fee. After a telephone conversation with the EPO on 2 May 2019 in which the appellant had been told to "just pay the missing part of the Appeal fee", the shortfall was paid on 3 May 2019. In view of the shortfall being a small amount or the initial underpayment being an error subject to correction, and in view of the appellant's clear intention to pay the full amount, the appeal fee should be considered validly paid, and the appeal should be deemed admissible.

- X. Alternatively ("in case the Board of Appeal disagrees ... and still considers the Appeal inadmissible"), the appellant requested, by a further submission of 20 June 2019, re-establishment of rights into the time limit for paying the appeal fee.

- XI. Finally, a refund of the fee for re-establishment was requested in case the appeal was considered admissible by the board without the need for a re-establishment of rights.

- XII. The board was extended to consist of three technically and two legally qualified members (Article 21(3)(b) EPC and Article 9 RPBA 2020).

Reasons for the Decision

Appeal fee payment and legal framework

1. Pursuant to Article 108 EPC, notice of appeal must be filed, in accordance with the Implementing Regulations, within two months of notification of the impugned decision. A notice of appeal must not be deemed to have been filed until the appeal fee has been paid. The time limit for payment must in principle be deemed to have been observed only if the full amount of the fee has been paid in due time, and underpayment by a small amount may be, under certain circumstances, overlooked (Article 8 RFees). If the full amount of the fee is paid only after expiry of the two-month period for filing the notice of appeal, the appeal is deemed not to have been filed (see G 1/18 OJ EPO 2020, A26).
2. In accordance with Article 1(4) of the Decision of the Administrative Council of 13 December 2017, CA/D 17/17 (OJ EPO 2018, A4), Article 2(1), item 11 RFees was amended to set the appeal fee at EUR 1 880 for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC (a small or medium-sized enterprise [SME], a non-profit organisation, or a university or a public research organisation) and at EUR 2 255 for an appeal filed by any other entity. This applies to appeals filed on or after 1 April 2018 (Article 3(4) of Decision CA/D 17/17). Therefore, it applies to this case, where the notice of appeal was filed on 11 April 2019. Prior to 1 April 2018, there was a uniform appeal fee of EUR 1 880 for all appellants and appeals.
3. Under Article 5(1) and (2) and 7(2) RFees, the fees due to the European Patent Office must be paid by payment or

transfer to a bank account held by the Office (EPO), or by other methods of paying fees as allowed by the President of the Office, who must in this case also lay down the date on which such payments are to be considered to have been made.

4. The "Arrangements for deposit accounts" as revised by the Decision of the President of the EPO of 27 September 2017, supplementary publication 5 - OJ EPO 2017 (ADA 2017), valid from 1 December 2017 and applying to the case at hand, make available debiting procedures for fees by way of deposit accounts as a recognised method of payment (point 1 ADA 2017). Such a deposit account set up for the purposes of fee payment may be opened upon request and can be used by the EPO to withdraw funds from, if so instructed, provided that the account holds sufficient funds (points 2.1, 3.1, 4.1 and 5.2.2 ADA 2017).
5. Pursuant to point 5.1.1 ADA 2017, debiting occurs on the basis of an electronic debit order signed by the account holder or authorised representative (for example, using EPO Form 1038E, see point 5.1.2 ADA 2017).
6. Provided there are sufficient funds in the deposit account on the date the EPO receives the debit order, this date will be considered the date on which the payment is made. The debit order may also specify that a payment order should be executed at a date later than the submission date (point 5.4.1 ADA 2017).
7. Neither point 5.1.1 nor point 5.4.1 nor any other provision of the ADA 2017 requires that a fee amount be specified in the debit order.

8. As an alternative to a debit order for individual fees, an automatic debit order may be used (point 5.1.1 ADA 2017), with further conditions for the automatic debiting procedure (point 7 ADA 2017) being laid down in the "Arrangements for the automatic debiting procedure (AAD)" (see Annex A.1 to the ADA 2017, supplementary publication 5 - OJ EPO 2017). Filing an automatic debit order authorises the EPO to debit fees automatically as the proceedings progress (points 1 and 5.1 AAD), with the debit to be effected in the amount applicable for the fee on the date considered the decisive payment date (points 5.3 and 6 AAD). The EPO automatically debits, on the basis of the electronically stored procedural data, the appropriate amounts of all fees due in the proceedings, including any subsequent appeal or review proceedings, for which the order has been filed, and treats the payment as received in due time. Once an automatic debit order has been filed, the user of the automatic debit procedure does not usually need to take any further action to ensure correct and timely payment (Annex A.2 to the ADA 2017 - Information from the EPO concerning the automatic debit procedure). If after debiting a fee the EPO becomes aware of any change in the legal basis on which they made the debit, they may have to amend the debit retroactively to the original decisive payment date. The same applies if the EPO finds that an automatic debit order was wrongly executed (points 9.1 and 9.2 AAD Annex A1).
9. The ADA 2017 were replaced with the ADA 2019 from 1 October 2019 (supplementary publication 4, OJ EPO 2019) in which "Annex A.2 to the ADA [2019] - Information from the EPO concerning the automatic debiting procedure", in point I.9, clarifies that the automatic debiting procedure "takes account of circumstances under which the

appeal fee is reduced, debiting accordingly only the reduced amount".

Substance of a debit order - clear intention to pay a fee - jurisprudence of the boards

10. In the case at issue, on 11 April 2019 - under the ADA 2017 - a single (non-automatic) debit order using EPO Form 1038E was filed, together with the notice of appeal, via EPO Online Filing.
11. The appellant refers to T 152/82 OJ EPO 1984, 301, arguing, *inter alia*, that a debit order has to be unambiguously recognisable and show that there is a clear intention for a particular payment to be made. The appellant argues that the debit order in question showed their clear intention to pay the full (non-reduced) amount of the appeal fee.
12. In T 152/82, the board indeed dealt with a situation very similar to the current case, where the appeal fee had been increased (rather) recently, but only the old amount had been indicated in the debit order, and the difference was paid by another debit order after expiry of the time limit of Article 108 EPC. As in the case at hand, the party in question also requested that the appeal be considered filed in time and, in the alternative, for the re-establishment into the relevant time limit.

The board in T 152/82 held that "A debit order must be carried out notwithstanding incorrect information given in it if the intention of the person giving the order is clear." (Headnote). Although the then version of the ADA required that the debit order be for one or more specific fees and that it contain "the particulars necessary to identify the purpose of the payment", it did not

stipulate that the amount - or indeed the correct (applicable) amount - had to be given at all. While the party submitting the order had to clearly specify the precise payment obligation they wished to fulfil, they did not necessarily have to specify the amount of the fee or fees to be paid. The EPO had to execute a debit order for which the purpose of the payment was clear, in accordance with its substance, and without any further enquiry, even when the amount of the fee in question was not, or was incorrectly, indicated. The substance of the debit order had to be assessed on the basis of the appellant's intention expressed in the order, which could only mean that they wished that the valid amount of the appeal fee be debited. Where it is not possible to establish a clear intention on the basis of the debit order alone, the file may also have to be relied upon.

The ruling date of payment would be the date of receipt of the debit order which, although containing a deficiency, was deemed to be clear from the instructions given. The case should be treated in the same way as when a debit order, correct in every way, was not carried out for some time through an oversight by the EPO or where, by error, only an insufficient amount had been charged to the account of the EPO. What mattered was that on the date on which the delayed or additional debit was first attempted, there was a sufficient amount in the account to cover the debit. As the appellant and account holder had already taken steps to debit the outstanding amount by means of a further debit order, the original debit order was clear, despite the incorrect fee amount indicated in it, and the payment was to be regarded as made on time.

13. In later decisions, the boards explicitly confirmed and built upon T 152/82 (see, *inter alia*, T 17/83 OJ EPO

1984, 307; T 170/83 OJ EPO 1984, 605; T 152/85 OJ EPO 1987, 191; T 971/05; and T 1265/10).

T 17/83 held that the statement in the notice of appeal that a debit order for payment of the appeal fee had been issued was itself to be interpreted as a debit order in the absence of any record of the original debit order, even if neither the account number nor the amount of the fee had been given. The owner's name unambiguously identified the account. Knowing that the appeal fee was due, the clear intention of the appellant had been to issue a debit order for the (applicable, i.e. correct) fee.

In accordance with T 170/83, for payment by debit account, the core issue was not so much the timely receipt of money as such, as the money would normally have already been deposited with the EPO, but the timely authorisation for the EPO to use the money for a given purpose. The holder of a deposit account had entered into a special legal relationship with the EPO, with the result that, notwithstanding formal deficiencies, the necessary authorisation in due time for the EPO to avail itself of deposited funds could be based on an appraisal of the circumstances, provided that the person issuing the debit order was known and it was clearly intended that fees falling due in known proceedings before the EPO be paid by debit order. Therefore, an obvious error in submitting, as an annex to a notice of opposition, a form for the Dutch Patent Office, specifying an incorrect currency and amount, instead of the appropriate EPO form, had to be disregarded, and the EPO could and had to regard itself as authorised to effect withdrawal without further clarification. The board concluded that the debit order, despite its defects, on its proper interpretation alone, authorised the EPO to debit the opposition fee.

T 152/85 held that, even in light of the jurisprudence, the notice of opposition in question, which did not contain any reference to payment of the opposition fee at all, could not be considered a clear and unambiguous instruction to debit. It was not possible to derive a clear and unambiguous intention to pay the fee from a particular identified deposit account.

In T 451/90, a debit order for an amount corresponding to the opposition fee had been attached to the notice of appeal, and the difference with the appeal fee had been paid in response to an EPO communication drawing the appellant's attention to the payment situation. Referring to T 152/82, the board noted that it had been the appellant's clear intention to pay the appeal fee (in the applicable amount) and concluded that the appeal was admissible.

In T 806/99, the notice of opposition using EPO Form 2300, in section X ("payment of the opposition fee is made") stated that "payment of the opposition fee is made as indicated by the enclosed voucher for payment of fees and costs (EPO Form 1010)". However, this voucher was missing. The representative had regularly paid via debit order from an account known to the EPO, and the detailed opposition had obviously required a lot of effort to prepare. The formulation of the statement and the circumstances clearly pointed to the intention to pay, and the missing form was considered to be of no harm; as a consequence, the payment was regarded as timely. In addition, it was noted that the case was very different from the situation in T 45/94, where the fee had been paid via bank transfer to the German Patent Office; no deposit account with the EPO had existed, and no declaration to pay had been submitted to the EPO.

T 971/05 also endorsed T 152/82, stating that the amount paid by debit order could be interpreted or even corrected by the EPO to comply with the actual fees.

J 14/08 concluded that, absent any mention of a fee or payment, no clear intention to pay a (renewal) fee was derivable from the mere filing of a request for re-establishment when there was only limited time for payment remaining.

The board in T 1265/10, in basically the same situation as T 806/99, likewise recognised the clear intention of the opponent to settle the (opposition) fee by authorising the EPO to withdraw the fee, for a specific case from an identifiable account, which was sufficient for payment of the fee.

In T 2364/12, the notice of opposition included the statement: "Die erforderliche Einspruchsgebühr werden wir online von unserem Konto ... abbuchen. Sollte bis zum Tag des Ablaufs der Frist keine Abbuchung erfolgt sein, bevollmächtigen wir hiermit vorsorglich das Europäische Patentamt, den Betrag fristgerecht abzubuchen." [translation by the board: "We will debit the required opposition fee online from our account If no direct debit has been made by the expiry date of the time limit, we hereby authorise the European Patent Office as a precautionary measure to debit the amount in due time."] In contradiction with T 871/08 of 23 February 2009, which concerned the same opponent and came to a different conclusion (see below), it was held that the second sentence in combination with the first sentence constituted a clear and unambiguous conditional debit order, namely on the condition that no payment had been made by online debiting prior to the last day of the

nine-month time period, and that such a conditional debit order was permitted under the ADA 2007 then in force. [The current board notes that a further requirement that debit orders must be "unconditional" was introduced in the ADA 2009 (point 6.3), remaining in the ADA versions of 2014 and 2015 and being removed from the ADA 2017]. T 2364/12 further held that the EPO had an obligation to monitor conditions as "these facts can be easily ascertained as part of the standard examination of the admissibility and formal requirements [of notices of opposition] ...". Ergo, the (opposition) fee had been paid in due time.

J 14/12 applied the principles of the jurisprudence to the applicant's request to debit the fees which had fallen due with the previous filing of a divisional application via EPO Form 1001E, which had not specified any mode of payment but had been accompanied by an "Internal fee calculation sheet" as automatically generated by EPO Online Filing, where the applicant had listed the renewal fees for the third to tenth years. The request did not indicate the purpose of the payment in greater detail. It was found that this request, read in conjunction with the internal fee calculation sheet, was a clear, unambiguous and unconditional debit order for renewal fees for the third to tenth years but not for the eleventh and twelfth years.

In T 2035/14, the appellant had filed a debit order for EUR 1 240 on 8 October 2014, alongside a notice of appeal, and was then notified of a loss of rights as the appeal fee had been increased to EUR 1 860 as from 1 April 2014. The difference was made up later. Referring to T 152/82, the board found that the intention of the appellant had unambiguously been to pay the applicable

amount and that the (full) payment had therefore been made in time.

14. As a summary of the jurisprudence discussed above concerning the validity of a debit order submitted under the ADA:

Notwithstanding formal deficiencies, a debit order in line with the prescribed (from 1 December 2017 only: electronic) filing requirements has to be assessed on its substance, in view of the party's clear intention objectively expressed in the order, to pay a particular fee (e.g. appeal fee) from an identifiable account. No fee amount needs to be specified. On this basis, the EPO is authorised to and must debit the intended fee in the applicable, i.e. correct, amount.

15. In this context, in accordance with the jurisprudence of at least some Contracting States (see e.g. Austrian Supreme Court OGH 5 Ob 103/02v and Austrian RIS-Justiz RS0037416; 1 Ob 2054/96g and RIS-Justiz RS0106326; and German OLG Saarbrücken 5 W 16/91), a declaration/procedural act should be interpreted according to its objective contents, without taking into account any subjective elements. In line with this and as a general rule, an interpretation which allows for the declaration/procedural act to be valid should be preferred.

While this general rule seems to support the board's decision in this case, the decision is based on other reasons given below. Consequently, there is no need to take a stand on whether this general rule might apply under Article 125 EPC.

Substance of a debit order - clear intention to pay a fee - jurisprudence of the boards pursuing a "more literal" approach

16. Other lines of jurisprudence have taken a "more literal" approach in the interpretation of a debit order, putting more emphasis on the incorrect amount specified in the order.

At times, this has led to appeals being considered not validly filed in cases in which the appellant was confused by a system with two appeal fees (see T 17/83).

T 79/01 (an inter partes case where a completely random appeal fee [EUR 356 instead of EUR 1 020] had been specified in the debit order, an amount not related to any recent increase in the appeal fee, and when there were not yet two appeal fees) explicitly rejected, *inter alia*, T 152/82 and held that only the mere fact of (full) fee payment was decisive; not the appellant's intention. This was all the more the case in inter partes proceedings owing to the principle of impartiality. Moreover, there could not be any legitimate expectations of the users to be warned of deficiencies, and the board had no such obligation to provide any warning.

In T 198/16, the appellant stated in the notice of appeal that the appeal fee had been paid "via the enclosed EPO form 1010", which was, however, not appended. Deviating from the jurisprudence of, *inter alia*, T 152/82 and explicitly from T 1265/10 (see above), it was held that "... the intention to authorise debiting of the deposit account does NOT already allow the EPO to act on such authorisation and carry out such intent" and that "equalling the intention to pay to a payment is detached from the reality of business transactions and is therefore unacceptable". However, T 198/16 also cited

point 6.3 of the then applicable ADA 2015 (which required that the fee amount be specified in the debit order), stating that a debit order must be clear, unambiguous and unconditional and holding that the language used in the notice of appeal constituted no such clear, unambiguous and unconditional debit order.

T 1000/19 (see point 22. below) likewise explicitly rejected applying the jurisprudence of T 1265/10 in view of the ADA 2017, which required a debit order to be filed in a specific electronically processable format. However, upon favouring a correction via Rule 139 EPC, the board finally arrived at the conclusion that the fee had been validly paid.

In T 1060/19, the notice of appeal read: "The appeal fee in the amount of EUR 1,880.00 shall be debited from our deposit account no. ... In case of underpayment and/or missing fees, the EPO is also authorized to debit the legally prescribed amount from our deposit account no." Just as in the case at issue, in the notice of appeal there was no further indication that the appellant was a privileged entity that could benefit from the reduced amount. Likewise, in EPO form 1038E, "The Appeal fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC" was indicated in the "Fees" box 15-1, with the total "Amount to be paid" specified as "EUR 1 880.00". The appellant paid the full amount of EUR 2 255 (again) outside the time limit, via a debit order, and requested re-establishment of rights arguing, *inter alia*, that in the absence of a declaration of entitlement to the reduced fee, the EPO should have debited the full amount right from the beginning. In addition to the argument based on the sentence concerning the case of underpayment, the appellant further argued that there was a clear intention to pay the proper (in

the absence of such a declaration, full) fee and to pursue the appeal. The board did not agree. It held that an express instruction to debit the full fee had only been given outside the appeal period, and no declaration of entitlement to the reduced fee had been filed.

17. In T 1222/19, as in T 1060/19 and the case at issue, only the reduced appeal fee had been mentioned in EPO Form 1038E, and no declaration or other indication as to a privileged entity had been filed. Only the reduced fee was debited, and the difference was paid upon a further debit order outside the time limit. The appellant stated that the amount before 1 April 2018 had been erroneously put in Form 1038E, which happened to be identical to the new, reduced fee. The board held that the full amount had not been paid (in time) and that the appeal was not deemed to have been filed.

T 333/20 also, under essentially the same factual circumstances, came to the conclusion that the debit order in question was only for the reduced fee, and the appeal was likewise not deemed to have been filed as the board had not been able to determine if the appellant was a privileged entity, and they could therefore not take advantage of the reduced fee.

T 3023/18 (again, under essentially the same factual circumstances) held that, *inter alia*, T 152/82 concerned a situation where there had only been a single applicable fee and the intention of the party had been relatively easy to establish. However, with two different appeal fees, the one to be paid depended on the internal details of the party. "Thus, if the party pays the reduced fee, then the intention of that party is to take advantage of the reduced fee possibility." The non-filing of a declaration was no evidence of a clear intention to pay

the full appeal fee as this could also have been a mistake. In view of Rule 6(6) EPC, the appellant was responsible for assessing eligibility for the reduced fee; the EPO had no duty to carry out any ex officio enquiry to determine an appellant's entitlement. Thus, it was not possible to establish that the intention was to pay the full fee (see also T 2620/18).

Correction of errors in a debit order via Rule 139 EPC - jurisprudence of the boards

18. The appellant further requests correction of the debit order via Rule 139 EPC and that the appeal fee be considered validly paid.
19. There are further lines of jurisprudence which indeed address whether a debit order can be corrected via Rule 139 (formerly Rule 88) EPC.
20. T 152/82 considered such a correction "superfluous" but "possible per se" because the debit order in question was clear, while T 17/83 held that it could not be ruled out that Rule 88, first sentence, EPC 1973 also applied to debit orders, without giving any further reasoning. T 170/83 explicitly rejected the application of former Rule 88 EPC 1973, as did T 152/85, for the reason that only "documents" could be corrected, while fee payment was a factual requirement to be fulfilled within the time limit which could not be rectified later if it had been omitted. Even the requested correction of the notice of opposition to include an order for payment could not alter the fact that the opposition fee had not been paid in time.
21. On the other hand, J 8/19 and interlocutory decision T 317/19 of 22 October 2019, both after a thorough and

detailed analysis of the general jurisprudence on Rule 139 EPC, including G 1/12 OJ EPO 2014, 114, came to the conclusion that such a correction was a viable option.

In J 8/19, the notice of appeal was accompanied by a completed EPO Form 1038E, with the indication in the "Fees" box being "011 Appeal fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC", but with the "Amount to be paid" box showing EUR 1 860 instead of EUR 2 255. EUR 1 860 was debited from the professional representative's deposit account. After having been notified of this issue by the board, the difference was paid, and Form 1038E was corrected upon request via Rule 139 EPC because the appellant's intention to pay the (correct) fee had been immediately apparent from Form 1038E. The retroactive effect of the correction of the debit order meant that the fee payment had been effected in time.

In T 317/19 of 22 October 2019, the notice of appeal stated: "We are paying the appeal fee from our deposit account ... by way of the attached fee sheet." In the accompanying EPO Form 1038E, the "Fees" box (as in J 8/19) read "011 Appeal fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC". The indicated amount to be paid was EUR 2 255, but the method for payment was not specified. After having been notified of this issue by the board, the full amount was paid, and Form 1038E was likewise corrected upon request via Rule 139 EPC.

Thus, these boards held that correction of the debit order under Rule 139 EPC was possible, under the requirements set by G 1/12, as the corrections should introduce what was originally intended, and the errors to

be remedied were incorrect statements or omissions. Notably, it could immediately be seen from the documents to be corrected (EPO Forms 1038E) and the indication in the "Fees" boxes that the original intention had been to pay the (full) appeal fee. In accordance with point 5.4.1 of the ADA 2017, and as the balance of the deposit accounts were sufficient on the dates of the (retroactively corrected) debit orders, these dates were considered the payment dates.

T 444/20 essentially concerned the same situation as the current case, with the "Fees" box 15-1 indicating "11e Appeal fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC" and an "Amount to be paid" of "EUR 1 880.00". The "Method of payment" box stated: "The European Patent Office is hereby authorised, to debit from the deposit account with the EPO any fees and costs indicated on the fees page." The board explicitly referred to T 317/19 of 22 October 2016 and T 2620/18 (see below), coming to the conclusion that the appellant, as a well-known large entity, had intended to pay the correct (i.e. full) fee amount but had been confused by the reduced amount being identical to the former sole amount and had confused these amounts when filling in EPO Form 1038E. This was then corrected under Rule 139 EPC upon request, and the appeal was deemed filed.

T 2620/18, likewise in essentially the same situation as the case at hand, also recognised the error of the appellant, which had been confused by the reduced amount being identical to the former sole ("old") amount and by the layout of EPO Form 1038E. The board, however, came to the conclusion that the mere filing of a further debit order could not be interpreted as an implicit request for correction under Rule 139 EPC and that a request for

correction had not been filed in due time. With regard to the jurisprudence of T 152/82 (see above), the board held that it could not easily be applied in a "system of staggered appeal fees" ("System gestaffelter Beschwerdegebühren") and concluded that the omission of a declaration under Rule 6(6) EPC was not a clear indication that the appellant intended to pay the non-reduced amount of the appeal fee. The appeal was not deemed filed.

22. In T 1000/19, notice of opposition was filed via EPO Form 2300E within the time limit of Article 99 EPC accompanied by a submission reading "we ... have today authorized the ... EPO to debit the due opposition fee of 785 € from our deposit account". EPO Form 2300E, however, in the payment box for the method of payment indicated "Not specified". The board, referring to T 152/85, allowed the requested correction of EPO Form 2300E under Rule 139 EPC with a retrospective (*ex tunc*) effect, and deemed the opposition to have been filed.

Protection of legitimate expectations - jurisprudence of the boards

23. The boards have also drawn upon, in extensive jurisprudence over a broad range of cases, the principle of the protection of legitimate expectations ("good faith", Schutz von "Treu und Glauben" or "Vertrauensschutz" in German; see Case Law of the Boards of Appeal, 9th ed., III.A.). In essence, this principle implies that measures taken by the EPO should not violate the reasonable expectations of parties to the proceedings.

In the current context of (appeal) fee payment, the principle of the protection of legitimate expectations

was considered on a number of occasions, giving a mixed picture on how this could render the fee as being validly paid.

In G 2/97 OJ EPO 1999, 123 (see also, *inter alia*, R 4/09, T 690/93 and T 161/96 OJ EPO 1999, 331, the latter for the opposition fee), it was considered that there was no obligation to warn an appellant of a fee being due, even if the error was easily recognisable and could still be remedied.

In J 8/18, however, the appellant had paid EUR 1 880 and a further EUR 2 255, which was then refunded. The board, in essence, held that the appellant could legitimately expect, with the regular fee being reimbursed, the appeal to be considered admissible or deemed validly filed.

In T 703/19, a notice of appeal expressly stating the intention to pay the fee had been filed. However, the payment box in the accompanying EPO Form 1038E did not give the necessary information for payment, which was only made later, upon notification of loss of rights. The board found that the intention to pay the appeal fee had been clear, and the missing specification of the payment method was an obvious, easily recognisable and remediable error. The appellant could expect to be warned of the error. The payment was deemed valid.

In T 2575/19 of 18 October 2019, a notice of appeal had been filed using the "Annotations" field of EPO Form 1038E, and the method of payment had not been specified in the dedicated box. The number of the deposit account was also (only) given in the "Annotations" field. The appeal fee was not debited. The board held that the EPO was required to warn an applicant of omissions or errors which could lead to a final loss of rights if such a

warning could be expected in good faith. No such warning had been issued to the appellant. The debit order was considered valid, and the appeal fee was deemed to have been paid on the date of filing of the notice of appeal.

Small amount of underpayment - jurisprudence of the boards

24. Finally, in the very context of appeal fee payment, there is also jurisprudence on when the underpayment of a fee is considered a small amount within the meaning of Article 8 RFees.

The appellant argues that the appeal fee has been underpaid by 17% of the total amount and should be considered to be validly paid in view of this provision.

T 130/82 OJ EPO 1984, 172 concerned a case where the appeal fee had been increased (from GBP 141 to GBP 157 for appeals filed from 1 November 1981) and where the appellant had erroneously only paid the "old" fee. In this case, the board put the shortfall in relation to the full amount, concluding that a shortfall of GBP 16 was, in relation to GBP 157, small (i.e. 10%). Subsequently, shortfalls of around 10% (see also J 11/85 OJ EPO 1986, 1) or 20% have been considered small (see e.g. T 290/90 OJ EPO 1992, 368; J 27/92 OJ EPO 1995, 288; T 161/96 OJ EPO 1999, 331; and J 15/98 OJ EPO 2001, 183).

However, in T 905/90 OJ EPO 1994, 306 and 556, it was held that a shortfall of 20% was not "small". Moreover, in T 642/12, the board held that unpaid "small amounts" which could be overlooked, i.e. which did not have to be paid later, had to be "insignificant or negligible amounts", such as differences caused by unexpected bank transfer costs and currency exchange rates. In T 3023/18

and T 637/21, it was even concluded that such amounts could not exceed a few euros.

Substance of a debit order - clear intention to pay a fee - initial observations on the circumstances of the current case

25. To this board, the most persuasive approach is based on the principles set out in, *inter alia*, T 152/82. If these are to be applied to the case at hand, it has to be noted first that the appellant filed a notice of appeal and that sufficient funds had been made available in a deposit account identified in the debit order. The appellant is a multinational company.

The notice of appeal was timely filed on 11 April 2019 via EPO Online Filing, making reference to the appended debit order. In the accompanying Form 1038E (in the "Fees" box 15-1), the amount of EUR 1 880 was selected, which applies to natural persons or other entities referred to in Rule 6(4) and (5) EPC only. The form further states that "The European Patent Office is hereby authorised, to debit from the deposit account with the EPO any fees and costs indicated on the fees page".

By communication of the EPO via EPO Form 2901 on 25 April 2019, after the time limit of Article 108 EPC had expired (on 21 April 2019), the appellant was informed that the reduced appeal fee would require a declaration of being a natural person or other privileged entity. A few days later, they submitted another, corrected Form 1038E, with "011 Appeal fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC" selected in the "Fees" box and an indication that the shortfall of EUR 375 was to be paid. Subsequently, a statement of grounds of appeal was filed, and, in response to the board's communication

raising the issue of whether the appeal fee had been paid in time, a (subsidiary) request for re-establishment was made, alongside the request for the appeal fee to be considered validly paid.

Substance of a debit order - clear intention to pay the appeal fee - further considerations on the appeal fee legislation and EPO Online Filing

26. Before drawing conclusions in the case at hand, a further general aspect should be mentioned in the context of debit orders, especially for filing done by parties or professional representatives with a low number of appeal filings: the comparably recent advent of two appeal fee levels, which has also seen the introduction of new EPO Form 1038E in which the applicable amount has to be selected.

This form provides two options, "011 Appeal fee for an appeal filed by an entity other than those referred to in Rule 6(4) and (5) EPC" and "11e Appeal fee for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC", which might easily be confused. While EPO Online Filing was designed to set off an internal warning in case of payment of, or an explicit debit order for, only EUR 1 880 when the appellant completes and submits Form 1038E to the EPO, the system does not directly warn the appellant that they might have to file a declaration or otherwise give an indication to show that the conditions of Rule 6(4) and (5) EPC are fulfilled and that only then a reduced fee would be due.

27. Moreover, the legislator set the new, reduced fee at exactly the same level as the previous, general fee until

31 March 2018. This may have further increased the likelihood of a mistake being made in the selection of the appropriate appeal fee option.

For appeals filed from 1 April to 30 September 2018, Article 3(5) of Decision CA/D 17/17 provided for a "grace period": "If within six months of 1 April 2018 a fee is paid in due time but only in the amount due before 1 April 2018, that fee shall be deemed to have been validly paid if the deficit is made good within two months of an invitation to that effect from the European Patent Office."

The "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) detailed the setting out of "eligibility criteria for the reduced fee and information about the new procedure" and a preferred wording for a declaration of entitlement to benefit from the reduced fee. EPO Form 1101bis "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" was created for use in this context, containing detailed information on the new rules. Detailed information on the new procedure was also provided on the EPO website.

With Article 1(1) of the Decision of the Administrative Council of 12 December 2019, CA/D 12/19 (OJ EPO 2020, A3), Article 2(1), item 11 RFees was again amended to the effect that, from 1 April 2020, the appeal fee was set at EUR 1 955 for an appeal filed by a natural person or an entity referred to in Rule 6(4) and (5) EPC and at

EUR 2 705 for an appeal filed by any other entity. Its Article 6(4) provides for another "grace period" until 30 September 2020, as the previous scheme applicable to the current case had done.

The provision of a six-month grace period (also) in this context demonstrates that the legislator was at least aware that possible difficulties for appellants could arise with the introduction of fee increases. Such difficulties may (and did) occur also after the expiry of the grace period. The same conclusion that possible difficulties with the new rules were expected can be drawn from the above-mentioned notice from the EPO of 18 December 2017. Moreover, it was observed that "... some amount of study might be required to fully grasp the meaning of ... the Notice" (see communication of 25 November 2019 in T 1060/19, referring to point 11 of the notice). Lastly, EPO Form 1101bis "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", with its in-depth information on the new rules, likewise shows that it was felt there was even a need to provide a detailed explanation on the usage of the form.

The considerable number of cases before the boards regarding the question of the "correct", i.e. applicable appeal fee, in particular cases where the "wrong" option was unintentionally selected in EPO Form 1038E, is a strong indication that these difficulties have effectively materialised (see T 444/20, Reasons 2.4.2 (a): "... this [the reduced amount for privileged entities being identical to the amount previously due for all cases, board's addition] ... may have given rise to

confusion."; T 2620/18, Reasons 5.3; and T 3023/18, Reasons 6).

The introduction of the fee reduction for natural persons and entities referred to in Rule 6(4) and (5) EPC clearly aimed to maintain access to justice for these persons and entities and not to introduce a new admissibility hurdle for other appellants. However, exactly the latter seems to have happened, perhaps in part because of the design of EPO Online Filing, which might be somewhat prone to errors. As a result, fee payment may not be smooth in every case, and this may have severe negative implications for appellants and their legal positions. In many cases, the grace period is of no use to the appellant as it is no longer applicable when the error occurs. In any case, the fee payment procedure should not be to the detriment of appellants whose clear intentions might be obscured by a system which also does not warn them when an incorrect amount is indicated in the debit order.

Substance of a debit order - clear intention to pay the appeal fee - summary and conclusions for the case at hand

28. In accordance with Article 108 EPC, there is a single appeal fee, with Article 2(1), item 11 RFees only making the applicable amount of the fee dependent on the appellant's legal status.
29. One way of paying the appeal fee is by debit order to be executed by the EPO. The ADA 2017, just like the rules applicable when T 152/82 was handed down, specifies, in point 5.1.1, the requirements of a debit order for

individual fees like the appeal fee. Thus, it requires the indication of one or more fees. It does not, however, require specifying the amount of the fee to be paid.

Pursuant to point 5.4.1 of the ADA 2017, and provided there are sufficient funds in the deposit account on the date the debit order is received by the EPO, the date of receipt of the debit order is considered the payment date. As explained in T 170/83, it is the receipt of the debit order which authorises the EPO to avail themselves, for the debit order's specified purpose, of funds already deposited with the EPO and which thus completes the payment.

Since no amount needs to be specified, the EPO has to execute a debit order for a particular fee, for which the purpose of the payment is clear, in accordance with its substance, even if no or an incorrect amount is given (see again T 152/82, Reasons 7). The EPO has to establish from the debit order, the other documents on file and the circumstances of the case, which fee the appellant intended to pay and what the applicable fee amount is for the payment to be valid. As far as the determination of the applicable amount is concerned, this is similar to how the EPO processes payments under the automatic debiting procedure (see points 8 and 9 above).

30. In T 79/01, it was held that the EPO debiting a different, much higher amount than the wrong amount specified in a debit order was contrary to general principles of court procedure, such as, in inter partes proceedings, the principle of impartiality or equal treatment of parties to the proceedings. The EPO had to refrain from any activity from which one of the parties could take an unwarranted advantage. However, following the board's interpretation of the ADA 2017 as set out above, it is the filing of the debit order that constitutes valid fee payment, not the debit order's subsequent administrative processing by the EPO. This interpretation is advantageous to parties as they are protected against specifying an incorrect fee amount in a debit order, but the board fails to see why this advantage would be "unwarranted". A requirement for the valid filing of an appeal is that the applicable amount of the appeal fee be timely paid to the EPO, not that the appellant correctly specify this amount.
31. Hence, if an incorrect, i.e. non-applicable, amount is specified in the debit order, this is irrelevant to the question of validity of the fee payment. Depending on the status of the appellant, either the reduced amount or the full amount applies. Article 2(1), item 11, RFees does not make the amount dependent on the filing of the declaration referred to in Rule 6(6) EPC (see also T 225/19), but its presence in the file may enable the EPO to determine if entitlement to the reduction exists, as might common-knowledge circumstances, e.g. the appellant being a natural person.
32. In the current case, the debit order on EPO Form 1038E was filed together with the notice of appeal, which in turn explicitly states that the "instructions to debit the Appeal Fee on our Deposit Account are enclosed". It

specifies the appeal fee and authorises the EPO to debit the fee from the deposit account in the applicable amount. As it is undisputed that the appellant is not entitled to the appeal fee reduction, and the declaration referred to in Rule 6(6) EPC was indeed not filed, the applicable amount of the fee is EUR 2 255.

Thus, the appellant's clear intention was to pay the appeal fee to file a valid appeal, the applicable amount being EUR 2 255.

33. The debit order was received by the EPO on 11 April 2019, together with the notice of appeal. As there were sufficient funds in the deposit account on 11 April 2019, this is to be considered the (full) payment date (see again T 152/82: "As the original debit order was clear despite the incorrect fee amount indicated in it, the only possible conclusion is that the appellant's payment is to be regarded as made on time.").
34. The date of 11 April 2019, as the payment date of the appeal fee in the applicable (full) amount, was well within the time limit of Article 108 EPC.

Thus, the appeal is to be considered validly filed, and will have to be examined as to its admissibility and on its merits in accordance with Article 110 and Rule 100 EPC.

35. Thus, there is no need for the board to take a stand on the jurisprudence on correction via Rule 139 EPC, in particular whether correction of a debit order with retroactive effect on the date of factual payment is an option. Even if it were an option, if a case does not pass the hurdle of the clear intention to pay a fee, in accordance with the jurisprudence of T 152/82 on the

basis of the debit order, it might also not qualify for correction under Rule 139 EPC.

36. There is also no need to take a stand on the jurisprudence on legitimate expectations. In accordance with, *inter alia*, T 152/82, the payment is considered to be validly made by understanding and executing the debit order according to its substance, i.e. to pay the (appeal) fee in the applicable amount. Hence, the question can remain open whether in the case at hand the principle of good faith required the EPO to warn the appellant of a shortcoming in the electronic debit order before the expiry of the time limit for filing the notice of appeal.
37. In light of this, the board also need not take a stand on the further question of whether the difference between the reduced and the full fee may be considered a "small amount" within the meaning of Article 8 RFees and, if so, whether it may justifiably be overlooked.

Request for re-establishment of rights - fee reimbursement

38. The request for re-establishment of rights into the time limit for paying the (full) appeal fee has only been made conditionally, in the alternative ("in case the board disagrees ... and still considers the Appeal inadmissible"). As the condition did not occur, the request is redundant and does not have to be examined on its merits.
39. As a consequence, the fee for the request for re-establishment is to be reimbursed (see T 152/82, J 4/91, T 2317/13, T 317/19 of 22 October 2019, T 703/19, and in particular - for basically the same reasons as the case at hand - T 451/90 and T 2035/14).

Order

For these reasons it is decided that:

1. The appeal is deemed to have been filed.
2. The fee for the request for re-establishment of rights is reimbursed.

The Registrar:

The Chair:



S. Lichtenvort

J. Geschwind

Decision electronically authenticated