

<p>Registry of the Enlarged Board of Appeal for the attention of Mr W. Crasborn European Patent Office DE - 80298 Munich</p> <p>By email to: wcrasborn@epo.org</p>	<p>Derk Visser Nassastraat 18 2011 PJ Haarlem The Netherlands</p> <p>Tel. +31 23 844 3784 Email dv@vissertel.nl</p> <p>Haarlem, 30 November 2018</p>
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Third party statement according to Article 10 of the Rules of Procedure of the Enlarged Board of Appeal regarding case G1/18

1. The President of the European Patent Office has referred the following question to the Enlarged Board of Appeal¹:
If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?
2. In my opinion, the appeal should be deemed not to have been filed. I will develop my arguments starting with T1897/17, a recent decision of Board of Appeal 3.4.01, which held the appeal inadmissible.
3. In case T1897/17 the notice of appeal was filed and the appeal fee paid both after expiry of the two-month period² of Article 108 EPC. The board held that Rule 101(1) provides the sanction for non-compliance with any of the requirements of Article 108 EPC. The legal fiction of Article 108 EPC, second sentence, that the notice of appeal shall not be deemed to have been filed until the appeal fee has been paid, was understood “as setting an additional (implicit) condition for an appeal to be admissible, namely the (timely) payment of the appeal fee”³. Hence, “the 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.”⁴

¹ See OJ 2018, A71

² The EPC uses the terms ‘time limit’ and ‘period’ for the same legal notion. This Statement uses ‘period’ for the reasons set out in The Annotated European Patent Convention, 25th edition, Article 120, note 2.

³ T1897/17, reason 15

⁴ T1897/17, reason 15

4. The reasoning of T1897/17 gives rise to two comments.
 - a. The board interprets the second sentence of Article 108 EPC as a condition for timely payment of the appeal fee. If this is the correct interpretation, the question should arise why the legislator did not instead choose to word the second sentence of Article 108 EPC as: “Notice of appeal shall be filed and the fee for appeal shall be paid, in accordance with the Implementing Regulations, at the European Patent Office within two months of notification of the decision.” Instead, the legislator connected the payment of the appeal fee with the sanction that the notice of appeal is deemed not to have been filed.
 - b. The board regards the appeal as filed, even though the notice of appeal was not filed within the two-month period as required by Article 108 EPC, but only after its expiry. Hence, the board permits an act completed after expiry of the period in which it should have been carried out to have consequences for the legal status of the appeal.

The more common view within the EPC of acts carried out late is that they have no legal consequences for the procedure. For example, a response under Article 94(3) EPC filed after the period set by the EPO has no effect on the legal status of the application, which will be deemed withdrawn upon expiry of the period. There are no provisions stating that a late-filed notice of appeal and a late-paid appeal fee be treated differently.

5. A general analysis of periods, requirements and sanctions on non-compliance will clarify the case of T1897/17.

A period is a time interval within which a party must carry out an act before the EPO with a defined starting point and a defined duration⁵. Periods are necessary for a well-structured procedure before the EPO and are essential for legal certainty of third parties.

The EPO must examine whether the party carried out the act within the period by assessing the file. The assessment must be made at the moment of expiry of the period. An assessment at a later moment in time might include in the assessment an act carried out after the expiry. Such an inclusion would defy the purpose of setting a period, i.e. of requiring that certain acts must have been completed before expiry of the period. Instead, acts carried out after the expiry should be ignored in the assessment. The only few exceptions where a late filed act may affect the assessment are defined in the law, the most notable exception being the request for a remedy for failing the period⁶.

If a party does not comply with a requirement within the appropriate period, usually a sanction sets in immediately upon expiry of the period⁷. For example, if an application is deemed withdrawn due to non-observance of a period, the deemed withdrawal takes effect at expiry of the non-observed period⁸. If a sanction setting in upon expiry of a non-observed period changes a legal status, this changed legal status must be taken into account for acts carried out after the expiry.

6. Article 108 EPC defines two periods, one of two months and one of four months, and requirements to be met in each of these periods. The wording of the provision makes

⁵ Europäisches Patentübereinkommen, 26. Lieferung, Artikel 120, Rdn 46

⁶ Examples of other exceptions are late receipt of documents (Rule 133 EPC), dislocated mail (Rule 134(5) EPC), the ten-day fail-safe provision for payments (Rfees 7(3)) and late replenishment of a deposit account (ADA 4.1).

⁷ Europäisches Patentübereinkommen, 26. Lieferung, Artikel 120, Rdn 243

⁸ See e.g. G4/98, reason 7.1; J4/11, reason 11; Guidelines A-IV, 1.1.1.

clear that the filing of the notice of appeal belongs to the two-month period and the filing of the grounds of appeal to the four-month period⁹. Case law agrees that the payment of the appeal fee is a requirement of the two-month period.

Applying the above principles of periods to Article 108 EPC, it is clear that the notice of appeal must be filed within the two-month period. A notice of appeal filed after expiry of the period must be considered not filed¹⁰.

The payment of the appeal fee is not restricted to the two-month period according to the wording of Article 108 EPC. However, when the above principles are applied, it is obvious that such a restriction is not necessary. Where notice of appeal has been filed in due time but the appeal fee has not been paid within the two-month period, the notice of appeal is deemed not to have been filed according to Article 108 EPC, second sentence. Hence, at expiry of the two-month period, when the EPO assesses compliance with the requirements to be met in the period, there is no notice of appeal. Although the notice of appeal has actually been filed, there is no notice of appeal by legal fiction. The sanction is that no appeal comes in existence. Accordingly, the second sentence of Article 108 EPC couples the failure to pay the appeal fee within the two-month period with the sanction on not filing a notice of appeal within the same period.

If the legislator had instead phrased said second sentence as “Notice of appeal shall be filed and the fee for appeal shall be paid, in accordance with the Implementing Regulations, at the European Patent Office within two months of notification of the decision”, the law would have had to provide a separate sanction for the case where notice of appeal was filed in due time but the appeal fee was not paid in the two-month period.

The sanction on failing to comply with the requirements within the two-month period takes effect upon expiry of the two-month period. There are no provisions in the EPC that postpone the onset of the sanction. Any act that should have been carried out within the two-month period but is instead carried out after expiry of the period must be disregarded.

⁹ The texts of the first two sentences of Article 108 EPC in the three languages of the EPC diverge in the following wording:

Artikel 110	Article 110	Article 110
Die Beschwerde ist ... einzulegen.	Notice of appeal shall be filed ...	Le recours doit être formé ...
Die Beschwerde gilt erst als eingelegt, wenn ...	Notice of appeal shall not be deemed to have been filed until ...	Le recours n'est réputé formé qu'après ...
Regel 99	Rule 99	Règle 99
Inhalt der Beschwerdeschrift und der Beschwerdebegründung	Content of the notice of appeal and the statement of grounds	Contenu de l'acte de recours et du mémoire exposant les motifs du recours

The German and French text do not indicate how the appeal must be filed, because they do not refer to the notice of appeal that must be filed, the content of which is prescribed by Rule 99 EPC (see the last row of the above table for the title of the rule). The English text of Article 108 EPC is used in this Statement, because it consistently refers to the notice of appeal.

Note also, that the German and French text of Article 108 EPC apply the legal fiction of the second sentence to formation of the appeal, whereas the English text applies it to the filing of the notice of appeal. The context of the second sentence makes clear that the legal fiction is to be applied to the filing of the notice of appeal.

¹⁰ The sanction is not explicitly provided in the EPC. The legislator must have considered it obvious that where a procedure can only be started by filing a request in a specified period and no request has been filed by expiry of the period, the procedure will be non-existent.

7. If at expiry of the two-month period no notice of appeal has been filed or a notice of appeal has actually been filed but is deemed not to have been filed, no appeal will come into existence. Rule 101(1) EPC does not define a sanction for such a situation, because the rule assumes that an appeal is existing: “If the appeal does not comply with ...”. Only after both the notice of appeal has been filed and the appeal fee paid within the two-month period, an appeal will exist. Any defects in this appeal may result in inadmissibility under Rule 101(1) EPC.
8. The principles of the legal notion ‘period’ set out in the above point 5 and the application to Article 108 EPC in point 6 allow the question referred to the Enlarged Board of Appeal to be answered as follows:
 - a. If both notice of appeal is filed and the appeal fee is paid after expiry of the two-month period, there is no notice of appeal at expiry of the two-month period. The sanction of the appeal being non-existent sets in upon expiry of the two-month period. The notice of appeal must be regarded as not filed because it was filed after the expiry and will have no effect on the legal status of the (inexistent) appeal. The payment of the appeal fee lacks legal basis because it was paid after the expiry and must therefore be reimbursed. Although the notice of appeal was actually filed and the appeal fee actually paid, the appeal is deemed not to have been filed.
 - b. If notice of appeal is filed after expiry of the two-month period and the appeal fee is paid in due time, there is no notice of appeal at expiry of the two-month period. The sanction and the fate of the notice of appeal are the same as in the above case (a). The payment of the appeal fee lacks legal basis because there is no procedure in existence for which it was paid. Therefore, the appeal fee must be reimbursed. As in case (a), the appeal is deemed not to have been filed.
 - c. If notice of appeal is filed in due time and the appeal fee is paid after expiry of the two-month period, there is a notice of appeal in the file at expiry of the two-month period. However, this notice of appeal is deemed not to have been filed according to the legal fiction in the second sentence of Article 108 EPC, because the appeal fee had not been paid at expiry. The sanction is the same as in the above case (a). The appeal fee will lack legal basis because the appeal is non-existent. Therefore, the appeal fee must be reimbursed.
9. The principles set out in the above point 5 result in a procedure completely consistent with the established practice of the EPO and the majority case law on the referred question.

I look forward to the considerations and opinion of the Enlarged Board of Appeal.



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