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European Patent Office
Mr Carl Josefsson
Chairman of the Enlarged Board of Appeal
80298 Munich

By email to: cjosefsson@epo.org

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epi Amicus Curiae Brief Regarding G1/18

Dear Mr Josefsson,

epi files the present *amicus curiae* brief in order to assist the Enlarged Board in its deliberations.

Admissibility

epi considers that the reference to the Enlarged Board is admissible. There are clearly diverging decisions from different Boards of Appeal (T1897/17 on the one side and T1325/15 and T2406/16 on the other side), as explained in the President of the EPO's reference. It is an important point of law as it will have effects on the practice within the EPO. Moreover, it is an important question for the users of the EPC system as it could have wide ranging effects on users' practices. **epi** therefore considers that the Enlarged Board should admit the reference and issue an opinion on it.

Interpretation of Article 108

epi notes that Article 108(1) refers to the conditions which must be met if an appeal is to be deemed to be "filed". This word occurs in both the relevant sentences of Article 108(1) in English. (In the German text, the relevant words are "einzulegen" and "eingelegt". In the French text, the relevant word is "formé" in both sentences.) This contrasts with the wording in Rule 101, where the word used is "inadmissible" ("unzulässig" in German and "irrecevable" in French). It is therefore clear that Article 108 and Rule 101 are addressing different situations. Article 108 sets the conditions which must be met before an appeal is considered to have been filed at all. In contrast, Rule 101 is dealing with situations where an appeal is considered to have been filed, because the conditions of Article 108 have been met, but where the appeal has deficiencies which mean that, although it is deemed to be filed, it is inadmissible¹.

It is logical that there should be a difference between filing and admissibility. In order to determine whether an appeal has been filed, all that needs to be done is to determine whether a document

¹ **epi** can see that there is a slight problem in that Rule 101 does refer to Article 108. However, this seems a minor problem in that a Rule cannot over-ride the provisions of an Article. Article 108 is clear in that it relates to the filing of an appeal and so its provisions in this respect must over-ride any provision in Rule 101 to the contrary. In any event, any perceived conflict could easily be overcome by amending Rule 101 so that it does not refer to Article 108.



purporting to be a notice of appeal has been filed and whether the appeal fee has been paid. This is merely a clerical action and does not need any involvement of a Board. On the other hand, deciding whether the appeal is admissible cannot be a clerical action but must involve the Board. It is logical that a determination as to whether an appeal has been properly filed should be made before a Board gets involved in determining admissibility².

Therefore, in **epi's** view, the meaning of Article 108 is clear in that it sets the conditions which must be met before an appeal can be considered to be properly filed.

Article 51 EPC

epi considers that it is also useful to look at Article 51(2) EPC. This reads as follows:

“(2) Time limits for the payment of fees other than those fixed by this Convention shall be laid down in the Implementing Regulations.”

It is clear from this that there are two types of time limits for paying fees to the EPO. The first type consists of the time limits set in the EPC itself. The second type consists of the time limits set in the Implementing Regulations. The Implementing Regulations do not set a time limit for paying the appeal fee. Therefore, the time limit for paying the appeal fee must be set in the EPC itself. It can be seen that Article 108 itself is headed “Time limit and form”. It is therefore abundantly clear that Article 108 must be setting the time limit not only for filing the notice but also for paying the appeal fee³. Certainly, this has been the accepted reading of Article 108 ever since the inception of the EPC⁴.

It is therefore **epi's** view that Article 108, when read in the context of Article 51, clearly means that the two month time limit applies to both the filing of a notice of appeal and the payment of the appeal fee. Therefore, if either a notice of appeal is not filed or the appeal fee is not paid within the two months, the appeal is deemed to be not filed and so it can never have come into existence.

² This also applies to the other instances referred to by the President of the EPO, for instance for filing an opposition. Again, it needs to be checked whether something purporting to be an opposition has been filed and whether the opposition fee has been paid before involving an opposition division to determine whether the opposition is admissible.

³ If this is not the case, then there is no provision in the EPC or the Implementing Regulations setting the time limit for paying the appeal fee. If there is no time limit for paying the appeal fee, then this leads to absurd consequences in that a party could file an admissible notice of appeal but not pay the appeal fee and the Board would have to point out this deficiency, which could then be remedied by paying the appeal fee at any time the appellant chooses. This is clearly not what was intended by the drafters of the EPC in 1973 or 2000. Similar absurd consequences would apply in all the analogous situations identified by the President of the EPO.

⁴ This is confirmed, for instance, in T144/95 where, in paragraph 8 of Section 2.8.1., the Board stated that: “Furthermore it is pointed out that it is clear from Article 108 EPC that an appeal fee has to be paid within a time limit of two months after the date of notification of the decision appealed from. While Article 99 EPC lays down that an opposition fee has to be paid within a time limit of nine months, Article 105 EPC provides an exception in that the intervention can be filed and the opposition fee paid after the opposition period has expired. On the other hand, the EPC does not provide an exception for the appeal fee time limit.”



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The consequence of this is that, if the appeal fee is paid after the expiry of the two month time limit, there is no appeal for it to be applied to and so it is to be refunded.

epi considers that the Enlarged Board should answer the question posed by the President of the EPO in line with the comments made above.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Francis Leyder', enclosed within a blue oval shape.

Francis Leyder
epi President