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**Datasheet for the decision
of 18 April 2012**

Case Number: J 0009/10 - 3.1.01
Application Number: 07109768.7
Publication Number: 2000178
IPC: A63B 23/035, A63B 23/04
Language of the proceedings: EN

Title of invention:
Stationary exercise device

Applicants:
Chuang, Jin Chen
Chuang, Lung Fei

Headword:
Request for refund of the examination fee

Relevant legal provisions:
EPC Art. 94(1), 94(3)
EPC R. 10(2), 10(3), 11(3)
RPBA Art. 13
Decision of the President of the European Patent Office dated
12 July 2007 concerning the entrustment to non-examining staff
of certain duties normally the responsibility of the examining
or opposition divisions

Relevant legal provisions (EPC 1973):
EPC Art. 18(1), 94(1), 94(2), 96(1)
RFees Art. 10b(b)

Keyword:

"Partial refund of the examination fee (yes)"

"Beginning of 'substantial examination' on despatch of EPO Form 2001A generated automatically without the involvement of an examiner (no)"

"Reimbursement of the appeal fee (no)"

Decisions cited:

G 0002/97, G 0001/02, R 0004/09, J 0006/83, J 0008/83,
J 0009/83, J 0014/85, J 0033/86, J 0032/95, J 0032/97,
J 0018/98, J 0014/07, J 0025/10, T 0388/09

Catchword:

A communication pursuant to Article 94(3) EPC on EPO Form 2001A which is automatically generated by a computer and posted by a formalities officer without the involvement of an examiner appointed to the examining division does not constitute a legally effective act of the examining division and cannot therefore be regarded as the beginning of "substantive examination" pursuant to Article 10b(b) of the Rules relating to Fees (inserted by decision of the Administrative Council of 10 June 1988, as last amended by decision of the Administrative Council of 15 December 2005).



Case Number: J 0009/10 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 18 April 2012

Appellants:
(Applicants)

Chuang, Jin Chen
Chuang, Lung Fei
No. 17, Lane 301, Nanyang Road
42083 Fong Yuan
Taichung Hsien (TW)

Representative:

Beck, Michael Rudolf
Beck & Rössig
Cuvilliesstrasse 14
D-81679 München (DE)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 26 November 2009
refusing the request for refund of the
examining fee at a rate of 75% pursuant to the
Rules relating to Fees.

Composition of the Board:

Chairwoman: B. Guenzel
Members: L. Bühler
D. Rogers

Summary of Facts and Submissions

- I. On 6 June 2007, the appellants filed European patent application No. 07109768.7 and requested examination under Article 94(1) EPC 1973. The examination fee was paid with transaction date of 6 July 2007.

- II. An extended European search report was communicated to the appellants on 14 November 2007. Objections under Articles 54 and 56 EPC were raised in the European search opinion. The appellants did not respond to the extended European search report either by filing amended application documents or observations on the objections raised in the European search opinion.

- III. On 15 December 2008, a communication pursuant to Rule 70(2) EPC was sent inviting the appellants to indicate, within 6 months, whether they wished to proceed further with the application. The appellants, on 24 April 2009, filed a reply by which they confirmed their intent to proceed further with the application.

- IV. On 28 May 2009, EPO form 2001A entitled "Communication pursuant to Article 94(3) EPC" was issued inviting the appellants to rectify the deficiencies as mentioned in the European search opinion within a time limit of four months.

- V. With letter dated 13 July 2009, the appellants withdrew their application on condition that 75% of the examination fee was to be reimbursed pursuant to Article 11(b) of the Rules relating to Fees ("RFees").

- VI. In a letter dated 20 July 2009 sent by the formalities officer on behalf of the examining division, the appellants were informed that a refund of 75% of the examination fee was no longer possible since substantive examination had already begun. The appellants were further requested to inform the EPO whether they wished to maintain their notice of withdrawal.
- VII. In a letter filed on 24 July 2009, the appellants contested that substantive examination had begun. They argued that they had only received a formal computer generated letter (EPO Form 2001A) inviting them to respond to the European search opinion attached to the European search report. The appellants observed that such letters seemed to be issued after a fixed time period once the request for examination became effective. The appellants took the view that such formal maintenance of an earlier opinion in an unchanged situation did not involve material work on the case but was simply a formal act. The appellants stressed that the intention of Article 11(b) RFees was to grant the applicant a partial refund where a withdrawal of the application at the examination stage saved work for the EPO. They assumed that the creation of EPO Form 2001A would take not more than 10 minutes work. Retaining all or part of the examination fee would be disproportionate to the insignificant work involved with the despatch of EPO Form 2001A. The appellants therefore asked for reconsideration of their request for refund.
- VIII. In a letter sent by the Directorate 2.5.2 (Quality Management Support) on 31 July 2009, the appellants

were informed that their request to reconsider the refund was to be refused. It was argued that the examining division had *de jure* assumed responsibility for the examination of the application and had issued a first communication under Article 94(3) EPC. In said communication, the objections raised in the European search opinion were maintained since the appellants had not availed themselves of the opportunity to reply to the extended European search report. Accordingly, the substantive examination had already begun at the time the application was withdrawn. The conditions for a refund under Art. 11(b) RFees were therefore not met.

IX. In their response of 11 August 2009, the appellants insisted that the issuance of a communication by which objections raised in the European search opinion are maintained in the absence of a response by the appellants, either by filing amended application documents or observations, was a pure formality. Ascertaining the absence of counterarguments did not involve any substantive examination, irrespective as to whether the check was carried out by an examiner or a formalities officer. The appellants further asked for a decision open to appeal.

X. On 5 October 2009, a communication pursuant to Article 113 EPC was despatched. The appellants were informed that the examining division considered that the communication issued on 28 May 2009 was the first communication under Article 94(3) EPC. The examining division further held that said communication was notified but not issued by a formalities officer. This was considered to be in conformity with Article 94(3) EPC conferring exclusive competence to the examining

division in dealing with substantive law issues. It was pointed out that the formalities officers only notify communications from examining divisions under point 16 of the decision of the President of the European Patent Office dated 12 July 2007 concerning the entrustment to non-examining staff of certain duties normally the responsibility of the examining or opposition divisions (Special edition No. 3, OJ EPO 2007, 106). The appellants were further informed that the examining division intended to refuse their request for refund. The appellants were given an opportunity to comment.

XI. In a short reply the appellants noted that the examining division had not given due consideration to their argument that the formal or substantive nature of an act in examination does not depend on the status of the person acting for the EPO but on the substance of the act. The appellants therefore maintained their request for a refund and requested an appealable decision.

XII. With decision of 26 November 2009, the formalities officer acting on behalf of the examining division refused the request for refund of the examination fee at a rate of 75% pursuant to Article 11(b) RFees. The examining division considered *inter alia* that a refund of the examination fee was excluded, since the withdrawal of the patent application which was made conditional upon the refund was filed after the communication of 28 May 2009, which constituted the first communication in examination proceedings.

XIII. The appellants lodged an appeal against this decision. In their statement of grounds of appeal, the appellants

took issue with the examining division's finding that the communication of 28 May 2009 constituted the beginning of "substantive examination" within the meaning of Article 11(b) RFees. The appellants further objected to the examining division's view that it was irrelevant for the purpose of said provision that the examination of the substantive requirements of patentability was based on the outcome of examining work undertaken in an earlier phase of the patent proceedings. Referring to the Notice of the President of the European Patent Office dated 15 July 1988 concerning the application of - then - Article 10b RFees (OJ EPO 1988, 354), the appellants argued that the aim of Article 11(b) RFees was to provide a refund of the examination fee in relation to the work saved by the examining division once an application has formally entered the examination stage. Comparing the EPO's procedure on 1 October 1988, when Article 10b RFees inserted by decision of the Administrative Council of 10 June 1988 (OJ EPO 1988, 293) entered into force, with the situation after the introduction of the extended European Search Report (EESR) in 2005 (OJ EPO 2005, 5), the appellants further argued that formal acts of the examining division after having assumed responsibility for the grant procedure could not constitute "substantive examination". The appellants submitted in this respect that the refund of the examination fee at a rate of 75%, when first introduced, was not dependent upon whether a first communication in examination had been issued. Rather, it depended upon whether significant work in view of the examination of a European patent application as to its merits had taken place. With the introduction of the extended European Search Report some examination work was

shifted to the search phase which resulted in an increase of the search fee. The prerequisite for a loss of the right to the refund of the examination fee, i.e. the beginning of "substantive examination", was however not altered. "Substantive examination" still meant significant work in view of the examination of a European patent application as set out in Article 94(1), first sentence EPC. However, the appellants considered that the despatch of EPO Form 2001A maintaining the objections raised in the European search opinion did not involve any material work on the case by an examiner. It just required the absence of a response by the applicant to the European search opinion, either by filing amended application documents or observations to be ascertained. This was to be regarded as a non substantive act, irrespective as to whether this assessment was carried out by an examiner or a formalities officer. Since the communication of 28 May 2009 on EPO Form 2001A merely referred to the content of the extended European search report, the examining division had not undertaken "substantive" work in relation to the European patent application in suit at the time the withdrawal was filed. Therefore, the appellants considered the refund to be justified.

XIV. In a letter sent on 18 November 2010, the appellants referred to the proceedings regarding European patent application No. 08398012.8 to illustrate that communications on EPO Form 2001A are generated automatically and without an examiner or a formalities officer considering the state of the file.

XV. With the summons to the oral proceedings the board informed the appellants of the board's preliminary non

binding opinion. The board expressed its view that the refund of the examination fee was governed by the Rules relating to Fees as last amended by decision of the Administrative Council of the European Patent Organisation of 15 December 2005.

Regarding the refund of 75% of the examination fee according to the applicable Article 10b(b) of said Rules relating to Fees, the appeal was considered to focus on the issue of whether the withdrawal had been filed before or after the beginning of "substantive examination". This gave rise to the questions of what "substantive examination" is and what kind of act or acts amount to the beginning of "substantive examination". The board disagreed with the appellants' interpretation of former Article 10b(b) RFees that the aim of this provision was to provide a refund of the examination fee in relation to the work saved by the examining division once an application has formally entered the examination stage. It also disagreed about the contention that only significant work constitutes "substantive examination". However, referring to the decision J 25/10 of 21 July 2011, points 4 to 12 of the Reasons, the board was of the opinion, that the beginning of "substantive examination" pursuant to former Article 10b(b) RFees should be interpreted as requiring a concrete act of the examining division after the request for examination has been filed and pertaining to the examination of whether the European patent application and the invention to which it relates meet the requirements of the EPC.

The board further observed that the appellants had not substantiated their request for reimbursement of the appeal fee.

XVI. The appellant did not reply to the board's communication.

XVII. Oral proceedings took place on 18 April 2012.

Regarding the reimbursement of the examination fee, the Chairwoman confirmed the board's preliminary opinion on the interpretation of the term "substantive examination" in former Article 10b(b) RFees (see point XV). She pointed to an additional issue which underlay several statements by the appellants. She referred to the following passages in the appellants' submissions: In their letter of 18 November 2010 the appellants asserted that EPO Form 2001A was automatically despatched without an examiner or a formalities officer considering the state of the file. Paragraphs 3 and 11 of the statement setting out the grounds of appeal pointed in the same direction. The appellants argued that the EPO Form 2001A is generated automatically and does not bear the name or signature of the appointed primary examiner. The only name indicated in the communication is that of a formalities officer. Also in their letter of 24 July 2009, the appellants had asserted that EPO Form 2001A was a computer generated letter.

The Chairwoman informed the appellants that the issue emerging from these statements was whether the EPO Form 2001A is sent with or without the involvement of an examiner. It was not the modest amount of work involved

in the posting of EPO Form 2001A that would disqualify it from being the beginning of "substantive examination", but the fact that EPO Form 2001A could not be considered to be a communication pursuant to Article 94(3) EPC if it was despatched without the involvement of a person entitled to act.

The Chairwoman informed the appellants that the board had ascertained that EPO Form 2001A was generated automatically, i.e. without the involvement of an examiner, in these cases where the appellant did not respond to the extended European search report either by filing amended application documents or observations on the objections raised in the European search opinion. Therefore, the communication of 28 May 2009 on EPO Form 2001A did not constitute a concrete and verifiable act of the examining division pertaining to the examination in accordance with Article 94(3) EPC. Hence, the communication could not be regarded as the beginning of "substantive examination" pursuant to Article 10b(b) RFees. As a consequence, the board was in the position to allow the appellants' request to order the refund of the examination fee at a rate of 75%.

As regards the request for reimbursement of the appeal fee, the appellants argued that the posting of the communication of 28 May 2009 by a person who was not entitled to act constituted a procedural violation. Upon questioning about the causal link between the alleged procedural violation and the filing of an appeal in the present case, the appellants further submitted that the delegation of the competence to decide on the issue of refund of the examination fee to

formalities officers was *ultra vires*, because such a decision involved difficult legal questions as was evident in the present case. As a consequence, the decision of 26 November 2009 refusing the request for refund of the examination fee at a rate of 75% which was taken by the formalities officer on behalf of the examining division had to be declared null and void. When asked about the reasons for these belated submissions, the appellants asserted that the board had to ascertain *ex officio* that the departments of first instance acted in conformity with procedural law.

XVIII. The appellants requested to set aside the impugned decision and to order the refund of the examination fee at a rate of 75% pursuant to Article 11(b) RFees. The appellants further requested refund of the appeal fee.

Reasons for the Decision

1. *Applicable law*

The Rules relating to Fees have been amended in view of the entry into force of the revised text of the European Patent Convention by decisions of the Administrative Council of 7 December 2006 (OJ EPO 2007, 11) and of 25 October 2007 (OJ EPO 2007, 533). The entry into force of the amended Rules relating to Fees - as far as they are relevant for the present case - is determined by Article 2 of the decision of 7 December 2006 (J 14/07 of 2 April 2009, point 2 of the Reasons).

The examination fee was paid with transaction date of 6 July 2007, i.e. before the entry into force of the

revised text of the European Patent Convention. Thus, pursuant to Article 2 point 3 of the decision of the Administrative Council of 7 December 2006, the Rules relating to Fees in force at the time of payment of the examination fee continue to apply. In the present case, refund of the examination fee is therefore governed by Article 10b RFees inserted by decision of the Administrative Council of 10 June 1988 (OJ EPO 1988, 293), as last amended by decision of the Administrative Council of 15 December 2005.

1.1 The examining division decided on the basis of Article 11(b) RFees which entered into force on 13 December 2007. However, nothing was changed as compared to Article 10b(b) RFees as last amended by decision of 15 December 2005, only the reference to the European Patent Convention in the introductory part has been aligned. Therefore, no material change has been made as regards the refund of the examination fee in the successive versions of the Rules relating to Fees.

2. *Reimbursement of the examination fee*

2.1 The allowability of the present appeal hinges on the issue of whether the condition of the withdrawal of the European patent application, i.e. the entitlement to a refund of 75% of the examination fee according to the Rules relating to Fees, was met or not.

2.2 There are two conditions for the refund of the examination fee according to Article 10b(b) RFees (see the corresponding analysis for Article 11(b) RFees in force as of 13 December 2007 by J 25/10 of 21 July 2011, point 2 et seqq. of the Reasons): First, the patent

- application must have been withdrawn **after** the examining division had assumed responsibility. Second, the withdrawal request must have been filed **before** substantive examination has begun.
- 2.3 The first condition was indisputably met in the present case: The patent application was withdrawn on 13 July 2009, after the examining division had assumed responsibility.
- 2.4 In the written procedure, the fulfilment of the second condition gave rise to the questions of what "substantive examination" is and what kind of act or acts amount to the beginning of "substantive examination". Although, in view of the board's observations presented during oral proceedings (point XVII above), the appellants did not maintain their interpretation of what constitutes the beginning of "substantive examination" according to Article 10b(b) RFees, this issue is relevant for the present case and needs to be considered.
- 2.5 It remains to be considered whether "substantive examination" has started with the communication of 28 May 2009 on EPO Form 2001A which referred to the content of the extended European search report. Relying - as argued by the appellants - on the amount or type of work done by examiners at the moment of withdrawal, deemed withdrawal, or refusal in order to determine the beginning of "substantive examination" would be contrary to legal security. The relevant point in time could not be determined by reference to objective and verifiable criteria. To ensure predictability and verifiability of the application of Article 10b(b)

RFees, the beginning of "substantive examination" must be interpreted as requiring a concrete and verifiable act of the examining division as regards "substantive examination" after having assumed responsibility for the examination of the application (J 25/10 of 21 July 2011, points 5 and 6 of the Reasons). Therefore, the modest amount of work involved in the despatch of EPO Form 2001A does not disqualify the communication as a concrete and verifiable act indicative of the beginning of "substantive examination" pursuant to Article 10b(b) RFees. The issue at present is, rather, whether the drawing up and posting of EPO Form 2001A is an act imputable to the examining division in its composition pursuant to Article 18(2) EPC, to which the examination of the application is entrusted.

2.6 In their written submissions, the appellants had alluded to the fact that EPO Form 2001A was generated automatically (point XVII above). Thus, the question arises of whether EPO Form 2001A is despatched with or without the involvement of an examiner acting in his capacity as primary examiner for the examining division.

2.7 The Guidelines for Examination in the European Patent Office of June 2005 were modified to take into account the introduction of the extended European Search Report with effect from 1 July 2005 (Rule 44a(1) EPC 1973). They merely set forth that if a (negative) search opinion had been issued, and the applicant had not replied to it (which was not mandatory according to Rule 86(2) EPC 1973), a communication referring to the search opinion and setting a time limit for reply was issued as the first communication under Article 96(2) EPC 1973 (C-VI, 3.3). This information was maintained

unaltered in the Guidelines for Examination in the European Patent Office of December 2007 (C-VI, 3.5), except for the legal references being adapted to the revised EPC (Rule 62 and Article 94(3) EPC). The board has however ascertained on the basis of the Internal Instructions (C-VI, 2.4) that the EPO Form 2001A is despatched by a formalities officer in case the appellant has not responded to the extended European search report either by filing amended application documents, or by filing observations on the objections raised in the (negative) European search opinion. According to these Internal Instructions, upon receipt of a computer generated message and having updated the paper file and performed formal checks, the formalities officer completes the EPO Form 2001A and despatches it without the involvement of the notional primary examiner in the name of which EPO Form 2001A is, on its face, sent.

- 2.8 In the letter of 31 July 2009 sent by the Directorate 2.5.2 (Quality Management Support) (point VIII above) it is however argued that the examining division had *de jure* assumed responsibility for the examination of the application and had issued a first communication under Article 94(3) EPC. This argument was maintained in the contested decision which found that the examining division, on receipt of the appellants' reply under Rule 70(2) EPC, assumed responsibility for the examination of the application in suit and issued a first communication under Article 94(3) EPC (point 2 of the Reasons).

The board agrees with the opinion that the examining division assumed responsibility on receipt of the

appellants' reply under Rule 70(2) EPC on 24 April 2009 (point 2.3 above). It was thus within the sole competence of the examiners appointed to form the examining division for the present patent application to issue a communication under Article 94(3) EPC. The board does not agree with the finding of the contested decision that the competent examining division, i.e. the primary examiner acting on behalf of the examining division, issued such a communication.

If a communication of a particular examining division is to be legally valid, it must have been written on behalf of and represent the views of the members who were appointed to that division to examine the issues forming the subject of the communication. In general, the name and signature of the primary examiner entrusted with the work provide for the required identification and authentication (Rule 113(1) EPC). Rule 113(2) EPC permits the replacement of the primary examiner's signature by a seal and to dispense with his name in case the communication was produced automatically by a computer. Nevertheless, the applicant and the public in general must be able to ascertain that the communication has been issued on behalf of, and represents the views of, the members of the examining division. There is, however, no indication in the present file that the appointed primary examiner actually authenticated the communication under Article 94(3) EPC before it was despatched by the formalities officer. Therefore, the communication cannot be attributed to the examining division, but only to the formalities officer the name of which is indicated on EPO Form 2001A.

The formalities officer, on the other hand, had no power to issue a communication under Article 94(3) EPC on the examining division's behalf. Such power has not been transferred to formalities officers by Rule 11(3) EPC in conjunction with the Decision of the President of the European Patent Office dated 12 July 2007 concerning the entrustment to non-examining staff of certain duties normally the responsibility of the examining or opposition divisions (Special edition No. 3, OJ EPO 2007, 106). The corresponding older provisions are Rule 9(2) EPC 1973 in conjunction with the Notice from the Vice-President of Directorate-General 2 of the European Patent Office dated 28 April 1999 concerning the entrustment to non-examining staff of certain duties normally the responsibility of the examining or opposition divisions (OJ EPO 1999, 504, referring to OJ EPO 1984, 317). Point 5 of the Decision of 12 July 2007, applicable in the present case, concerns communications under Article 94(3) EPC regarding formal deficiencies set forth in the legal provisions enumerated in points 1 to 4 of said Decision. None of these legal provisions is pertinent in the present case. Thus, the formalities officer, although acting in good faith, had no power to issue the present communication pursuant to Article 94(3) EPC. As a consequence, the EPO Form 2001A despatched on 28 May 2009 cannot be considered to have the legal effect of a communication pursuant to Article 94(3) EPC sent on behalf of the competent examining division.

- 2.9 It follows from the previous considerations that the communication of 28 May 2009 on EPO Form 2001A did not constitute an act of the examining division pertaining to the examination in accordance with Article 94(3) EPC.

Hence, the communication of 28 May 2009 cannot be regarded as the beginning of "substantive examination" pursuant to Article 10b(b) RFees. There is no indication in the file regarding any other step of the examining division pertaining to the examination of the application No. 07109768.7 which had been taken before the receipt of the appellants' withdrawal on 13 July 2009. In the absence of any indication pointing to the contrary, it has to be taken that the examining division had indeed not taken any action which amounted to a start of the substantive examination. Therefore, the second condition for the refund of the examination fee according to Article 10b(b) RFees was met. In these circumstances, the decision under appeal must be set aside and the appellant is entitled to a refund of the examination fee at a rate of 75%.

3. *Reimbursement of the appeal fee*

3.1 The appellants argued that the despatch of the communication of 28 May 2009 by a person who was not entitled to act constituted a procedural violation.

In order to render the reimbursement of the appeal fee equitable, a causal link must exist between the alleged procedural defect and the decision of the department of the first instance that necessitated the filing of an appeal (T 388/09 of 24 June 2009, point 6 of the Reasons). Such causal link has not been substantiated by the appellant, nor was it evident from the circumstances of the present case. The alleged procedural defect of the communication of 28 May 2009 would have been relevant, if the application had been refused on the basis of said communication. However, in

the present case, the procedural defect of the communication of 28 May 2009 was a preliminary finding of fact relevant for the determination of the beginning of "substantive examination" pursuant to Article 10b(b) RFees. At most, the submission was an alternative line of argument to the appellants main contention that the beginning of "substantive examination" requires substantial or significant work of examination be done (point XIII).

3.2 Even if the procedural defect of the communication of 28 May 2009 had been the sole ground of appeal, there would be no procedural violation, which is a prerequisite for the reimbursement of the appeal fee. Although the formalities officer's conclusion regarding the legal effectiveness of the communication of 28 May 2009 could not be confirmed by the board, this is, however, a matter of consideration and appreciation of facts, i.e. a matter of judgment. The formalities officer's error of judgment neither amounts to a grave abuse of discretion in the appreciation of facts nor constitutes a substantial procedural violation.

3.3 The appellants further submitted that delegating to formalities officers the power to decide on the issue of refund of the examination fee pursuant to Article 10b RFees was *ultra vires*, because this duty could not be transferred to employees who are not technically or legally qualified examiners pursuant to Rule 11(3) EPC, since such a decision involved difficult legal questions as was evident in the present case.

3.4 Although this submission constituted a complete change of the appellants' case at oral proceedings, the board, exercising its discretion pursuant to Article 13(1) RPBA, admitted this late filed submission. The appellants' argument nevertheless fails for the following reasons:

3.5 Rule 11(3) EPC together with Article 1, point 21, of the decision of the President of the European Patent Office dated 12 July 2007 (Special edition No. 3, OJ EPO 2007, 106) entrusts formalities officers with the duty to decide on requests for refund of fees, with the exception of the European search fee, the fee for appeal and the fee for petitions for review. The formalities officer was acting within the area of competence assigned to him by this decision. Contrary to the appellants' assertion, decisions on requests for reimbursement of the examination fee pursuant to Article 10b(b) RFees do not concern matter that involves technical and legal difficulties. Assessing the conditions for a refund of the examination fee according to Article 10b(b) RFees requires first and foremost the appreciation of facts, since the beginning of "substantive examination" referred to in Article 10b(b) RFees must be interpreted as referring to a concrete and verifiable act of the examining division in view of examination after having assumed responsibility for the examination of the application (point 2.5 above). Neither the appellants' disagreement with the interpretation by the formalities officer of Article 10b(b) RFees, nor issues regarding the interpretation of the legal provisions arising in an individual case are tantamount to difficult legal considerations being involved as such in the matter

entrusted to formalities officers. Therefore, the delegation complies with the requirements set forth in the opinion of the Enlarged Board of Appeal G 1/02 (OJ EPO 2003, 165). The formalities officer was thus competent to take the decision under appeal. This finding is in conformity with the decision J 25/10 of 21 July 2011 in which the power of formalities officers to decide on requests for a refund was implicitly acknowledged even though the interpretation of Article 11(b) RFees was contested in the cases under consideration. This finding is also in line with comparable decisions of the Legal Board of Appeal (J 14/07 of 2 April 2009; J 9/83 of 13 February 1985).

- 3.6 For the considerations given above, the appellant's request for reimbursement of appeal fees is refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to refund the examination fee at a rate of 75%.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairwoman:

C. Eickhoff

B. Günzel