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**Datasheet for the decision
of 27 November 2013**

Case Number: J 0001/13 - 3.1.01

Application Number: 07708721.1

Publication Number: 1980141

IPC: H05B33/26

Language of the proceedings: EN

Title of invention:

FABRICATION METHOD FOR ORGANIC LIGHT EMITTING DEVICE AND
ORGANIC LIGHT EMITTING DEVICE FABRICATED BY THE SAME METHOD

Applicant:

LG Chem, Ltd.

Headword:

Relevant legal provisions:

EPC Art. 122(1), 122(2), 86(1), 111(1), 113(1)
EPC R. 51(2), 112(1), 136(1), 102(e), 103(1)(a)

Keyword:

Re-establishment of rights - (no)
Re-establishment of rights - removal of the cause of non-
compliance (yes)
Re-establishment of rights - request admissible (no)
Re-establishment of rights -
due care on the part of the applicant
Appeal decision -
remittal to the department of first instance (no)

Decisions cited:

R 0009/10, J 0007/82, J 0018/84, J 0009/86, J 0027/88,
J 0037/89, J 0027/90, J 0022/92, J 0005/94, J 0027/01,
J 0017/03, T 0191/82, T 0133/87, T 0381/93, T 0557/94,
T 0840/94, T 0704/96, T 0129/01, T 0032/04, T 1561/05,
T 1486/11, T 1985/11

Catchword:



**Beschwerdekammern
Boards of Appeal
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Case Number: J 0001/13 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 27 November 2013

Appellant: LG Chem, Ltd.
(Applicant) 20, Yoido-dong
Youngdungpo-gu, Seoul 150-721 (KR)

Representative: Cabinet Plasseraud
52, rue de la Victoire
75440 Paris Cedex 09 (FR)

Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on 30 August 2012
rejecting the request for re-establishment of
rights pursuant to Article 122 EPC**

Composition of the Board:

Chairman K. Garnett
Members: P. Guntz
P. Schmitz

Summary of Facts and Submissions

- I. The appeal lies from the Receiving Section's decision of 30 August 2012 to reject the applicant's request for re-establishment of rights pursuant to Article 122 EPC, filed on 2 April 2010

- II. International application PCT/KR2007/000570 was filed on 2 February 2007 in the name of LG Chem, Ltd (hereafter: the Appellant). The application (European application number 07708721.1) entered the European phase on 16 July 2008. The Appellant was and is represented by Cabinet Plasseraud, Paris.

- III. The renewal fee for the 3rd year fell due on 28 February 2009. As no payment of this fee had been received by the due date, a notice drawing attention to Rule 51(2) EPC, Article 2, No. 5 of the Rules relating to fees (EPO Form 2522) was issued on 2 April 2009 and sent to the Appellant's representative. With this communication the Appellant was informed that the 3rd year renewal fee had not been paid by the due date but could still be validly paid up to the last day of the sixth calendar month following the due date, provided that the additional fee (50% of the renewal fee) was paid at the same time.

- IV. On 7 October 2009, a notice of loss of rights pursuant to Rule 112(1) EPC (EPO Form 2524) was issued, informing the Appellant that the application was deemed to be withdrawn under Article 86(1) EPC due to non-payment of the 3rd year renewal fee and the additional fee within the time limit.

- V. With letters of 3 February 2010 the Appellant was informed of the refund of the examination fee and search fee.
- VI. On 2 April 2010 a request for re-establishment in respect of the period for payment of the renewal fee pursuant to Article 122 EPC was filed. A statement setting out the grounds on which the request was based and the facts on which the request relied was included. The fee for re-establishment was paid and the omitted act (payment of the third renewal fee plus additional fee) was completed on the same day. As a precautionary measure, oral proceedings were requested in the event that the EPO rejected the request for re-establishment.
- VII. As regards all due care and the cause of non-compliance, the following facts were submitted:

Cabinet Plesseraud is certified ISO 9001 and has established a normally satisfactory system regarding the pursuit of patent applications and the payment of renewal fees.

On July 4, 2008, Cabinet Plasseraud received a letter from Hanyang International Patent and Law (hereafter: Hanyang) requesting that a European patent application be filed on or before 8 August 2008 in the name of LG Chem, Ltd.

The person responsible for the "incoming service", Mrs Vernet, immediately transferred the case to a member of her staff, Mrs Soher, who was well qualified and well experienced in patent formalities.

In accordance with the internal procedure, Mrs Soher immediately acknowledged receipt to Hanyang, created a

physical file and entered the corresponding data in the database.

She correctly entered the priority date, the name of the applicant, and the name of the professional client (i.e. Hanyang) but, despite a double-check, she erroneously indicated in the database that the instructions for paying renewal fees had to be obtained from the Appellant and not from the professional client, Hanyang, who had sent the filing instruction. Since LG Chem, Ltd was already a known applicant in Cabinet Plasseraud's database system, the system automatically generated its headquarters' address in Seoul, South Korea, as the address where reminders of the time limits for paying the renewal fees had to be sent.

The case was allocated to one of Cabinet Plasseraud's European patent attorneys, Mrs Schreiber, who was in charge of the prosecution of European patent applications in the name of LG Chem, Ltd.

On 1 December 2008 and 14 January 2009, respectively, a first and a second reminder of the time-limit for paying the third renewal fee was automatically generated by the database system and sent - due to the wrongful entry in the database - not to the professional client, Hanyang, but to the above address of the Appellant's headquarters in Seoul.

Two further reminders were sent on 1 July 2009 and 12 August 2009, always to the same address.

On 16 September 2009, the file was dismissed and closed, by marking it "*sans suite*".

On 12 October 2009, Cabinet Plasseraud's docket service received the EPO form 2524 noting the loss of rights pursuant to Rule 112(1) EPC. This communication was transmitted to the renewal fee department and, since the file had been closed, the communication was sent to the address of the Appellant's headquarters and, so it was argued (see below), could thus not be considered as received by the Applicant.

On 5 February 2010 Cabinet Plasseraud's docket service received refund of fees communications dated 3 February 2010, informing the Appellant of the reimbursement of the search and examination fees. The communications were immediately transferred to Mrs Schreiber for further processing.

Immediately, Mrs Schreiber ordered up the physical file from the firm's archive service and checked the case on Epoline. She appreciated that the reimbursement of the search and examination fees had been made because of the non-payment of the annual fee.

It was only when Mrs. Schreiber received these communications that she became aware of the omission of the time-limit.

VIII. As regards the request for re-establishment of rights, on 30 August 2012 the Receiving Section, having sent two communications on 17 August 2011 and 25 April 2012, respectively, decided to reject this request as inadmissible, holding that with the receipt of the loss of rights notice by the docket service and the renewal department within the Appellant's representative's office the error ought to have been discovered, thus removing the cause of non-compliance. The request for oral proceedings was also rejected, with reference to

the Board of Appeal decision J 17/03 in which the Board had noted that the Receiving Section had given the appellant - as in the present case - ample opportunity to present its case, during which several letters and communications had been exchanged.

IX. On 26 October 2012 the Appellant filed a notice of appeal. In the statement of the grounds of appeal of 21 December 2012 it claimed that the appealed decision lacked adequate reasoning and the Receiving Section had not respected the Appellant's right to be heard. The Appellant claimed that the decision gave no explanation why the Applicant's submissions were not considered as convincing by the Receiving Section.

X. On 16 September 2013 the Board summoned the Appellant to oral proceedings to take place on 27 November 2013. On 1 October 2013 the Board sent a communication (transmitted via fax on the same day) pointing out, *inter alia*, that the cause of non-compliance was removed either when the representative or when the Appellant itself should have noticed the non-observance of the time limit. This might have been the case when the loss of rights notice was received but not submitted to the responsible patent attorney. As to the question whether the Appellant itself ought to have discovered the error the Board indicated that the questions to be considered in this context included:

- Whether an organisational fault did not exist if four reminders and - probably - a notice according to Rule 51 EPC regarding a specific patent application had not been forwarded by the receiving department of the Appellant to the competent unit within the Appellant's organization;

- Whether the Appellant's internal organization should at least have ensured that a letter stating the loss of rights in respect of a specific patent application was forwarded to a competent person;
- Whether letters should at least have been sent back to the EPO if a competent person within the organisation could not be determined.

XI. By letter of 25 October 2013 the Appellant pointed out that Cabinet Plasseraud had to handle the prosecution and renewal of thousands of patents and patent applications (900 renewal fees per month) and that decisions to abandon a particular application by not paying the renewal fees without actually informing or instructing the relevant representative were not unusual in practice. An error "should have been discovered" in the terms of the case law of the Boards of Appeal only if the relevant representative was faced with facts that clearly indicated the occurrence of an error. Merely because an error could potentially have been detected was not sufficient. The Appellant itself could fulfil the requirement of due care by relying on an outside patent firm. It could bona fide believe that communications from the EPO were sent to its representative. In J 22/92 the Board had held that due care in the latter case was not that which was to be expected from a professional representative but that which was to be expected from an applicant unaware of the proceedings, and who generally assumed that documents received from one of the various patent offices were copies of those already sent to the appointed representatives. In the present case the Appellant had carefully selected and appointed Hanyang and Cabinet Plasseraud as representatives. It could

rightly assume that the documents received by it had already been sent to said appointed representatives. Therefore, there was no lack of due care even if the loss of rights notice was not forwarded to a competent person within the organisation.

XII. With a letter dated 6 November 2013 the Appellant filed a declaration of Mr Soo Hee Jung, a manager in the Patent Management Team of LG Chemcial Ltd.

XIII. During oral proceedings that took place on 27 November 2013 the Appellant's representatives explained that a significant percentage of the cases handled in its manual system were abandoned by Cabinet Plasseraud's clients by simply stopping the payment of the renewal fees without explicitly informing Cabinet Plasseraud of such decision. Within the grace period, as in the present case, two reminders were sent to the client by registered letter. When receiving a loss of rights notice in cases marked "*sans suite*" the data in the computer system were checked to see whether reminders had been "returned to sender". If, as in the present case, there were no such returns, a decision to let the patent lapse was assumed. There was no further need to check the file since the loss of rights notice was to be expected. The patent attorney responsible for the file was only informed if a loss of rights notice was received for some other reason, but not in a case where renewal fees had not been paid. Anyway, even if she would have been informed of the loss of rights notice, Mrs Schreiber would not have detected the error since she would not have had reason to open the file. Only when the receipt of the refund arrived had there been a need to refund the client and, thus, to open the paper file. It was only then that she appreciated the difference between the person to be reimbursed

(Hanyang) and the person giving instructions (erroneously: LG Chem, Ltd). Before that point in time (which marked the removal of the cause of non-compliance) there had not been any reason to check the system to see whether all entries had been correct.

XIV. As to the Appellant itself, it was to be noted that it never dealt directly with the EPO but always employed local firms who worked together with foreign firms to handle their patent applications. Thus, it was fair to expect mail regarding patents to arrive only through those channels which, in the case at hand, was the appointed representative Hanyang. It was not known to the Appellant's representatives what exactly had happened to the letters sent to the Appellant. But it did not amount to a lack of due care if letters not arriving via the correct channel (i.e., via Hanyang) were disregarded. This could be seen as a way of dealing with junk mail that arrived in the Appellant's mail room. In the decision J 22/92 the Board had decided "*in dubio pro reo*" that incoming letters had been taken for copies of letters already received by the appointed representative. Therefore, with regard to the Appellant itself, the cause of non-compliance had never been removed at any relevant time.

XV. The Appellant made the following requests (the Board has slightly rephrased some of the requests, but not so as to alter their meaning):

- that the decision under appeal be set aside;
- that the request for re-establishment be found admissible,

in particular:

- that the Board confirm that they had ruled verbally in the oral proceedings that the request for re-establishment was filed within two months of the removal of cause of non-compliance so far as concerned its representative (Cabinet Plasseraud),
- that the Board hold that the request for re-establishment was filed within two months of the removal of cause of non-compliance so far as concerned the Applicant itself;
- in the event that the Board would be minded to find the request for re-establishment inadmissible, that the case be remitted to the Receiving Section for examination of the admissibility issue, notably if the Board was of the opinion that the request for re-establishment was not filed within two months of the removal of the cause of non-compliance so far as concerns the Applicant itself;
- reimbursement of the appeal fee, at least in as far as the Board had recognized during the oral proceedings that the request for re-establishment was filed within two months of the removal of cause of non-compliance so far as concerned the Appellant's representative (contrary to the finding of the decision under appeal);
- that the case be remitted to the Receiving Section for examination of the allowability of the request for re-establishment;

- in any event, that the page containing its requests be annexed to the Board decision and the minutes of the oral proceedings.

XVI. Regarding the request for remittal to the department of first instance the Appellant said that this request was formulated so as to preclude any fundamental violation of Art 113 EPC and/or any substantial procedural violation, notably in view of (1) the refusal of oral proceedings before the Receiving Section and the apparent deficiencies of the decision under appeal and (2) the lateness of some of the arguments brought forward by the Board, namely about 6 weeks prior to the oral proceedings of 27 November 2013, which had jeopardized the Appellant's right to be heard and the possibility to benefit from two levels of jurisdiction.

Reasons for the Decision

1. The notice of appeal and the statement of grounds fulfilled the requirements of Articles 106 to 108 EPC and the appeal is thus admissible.
2. To be admissible, a request for re-establishment of rights has to be filed and the omitted act has to be completed within two months of the date of the removal of the cause of non-compliance with the missed time limit (Rule 136(1) EPC).
3. The renewal fee for the third year fell due on 28 February 2009 (Article 86(1), Rule 51(1) EPC). The period for paying the additional fee according to Rule 51(2) EPC thus expired on 31 August 2009.

4. The cause of non-compliance with this time limit was twofold. The first cause was the fact that the Appellant's representatives in Europe, Cabinet Plasseraud, were of the opinion, when not paying the renewal fee and the additional fee, that they were executing their client's wish to let the patent application lapse. The second cause was the fact that the Appellant thought its wish to pursue the patent application was being carried out by its Korean and European authorised representatives, Hanyang and Cabinet Plasseraud, respectively.
5. These errors were caused by the mistake which had happened at the beginning of the procedure, when the relevant data were entered into Cabinet Plasseraud's data base: at that time Mrs Soher erroneously entered the information that instructions for payment of the renewal fees had to be obtained from the Appellant (LG Chem, Ltd) instead of the professional client (Hanyang). This resulted in sending the renewal fee reminders to the Appellant, which reminders remained unanswered and thus lead to the erroneous assumption by Cabinet Plesseraud that the fee was intended not to have been paid.
6. The cause of non-compliance with a time limit is not just removed when the underlying error is actually discovered by the person concerned but when he or she ought to have noticed the error, taking all due care (J 27/88, point 2.7 of the Reasons). This line of argument has been followed in many cases, e.g. J 5/94, J 27/01 and T 1486/11.
7. So far as concerns Cabinet Plesseraud's knowledge, is it well recognised that within a law or patent

attorney's firm the relevant person to discover the error is the representative and not his or her employee:

"It must be his responsibility to decide whether an application for re-establishment of rights should be made and, if it is to be made, to determine the grounds and supporting facts to be presented to the European Patent Office"

See T 191/82 of 16 April 1985 (OJ EPO 1985, 189), point 1 of the Reasons. See also J 7/82 (OJ EPO 1982, 391), J 9/86 and T 381/93. On the other hand it is not up to the representative to extend the time period of Rule 136(1) EPC at will by keeping him- or herself intentionally uninformed, as set out in T 1985/11, point 6 of the Reasons, where the board found it irrelevant that the representative had not read the letter when acknowledging its receipt.

8. It needs to be considered, therefore, whether all due care required that Mrs Schreiber, the representative in charge of the application, should have taken steps such that she was informed of an incoming loss of rights notice, especially in cases where her firm's employees had inferred the client's wish to let the application lapse only from the fact that all reminders concerning the due time of the fee had remained unanswered. As to this, the Appellant argued that even if Cabinet Plesseraud's systems had been set up in this way it is not the case that Mrs Schreiber would have discovered the error. Whereas, when confronted with the communications dated 3 February 2010 informing her of the reimbursement of the search and examination fees, Mrs Schreiber had to consult the physical file to determine who had paid those fees and was to be

- reimbursed, such need to check the paper file would not have arisen on receipt of a loss of rights notice following the deliberate non-payment of annual fees. This being a common way to abandon an application, a loss of rights notice following the non-payment of annual fees where none of the reminders were returned undelivered would have been considered consistent with the entries in the database and would not have given rise to a need to consult the paper file.
9. The fact that the decision whether or not to pursue a patent application is up to the applicant and not to the representative - who is dependent on instructions received from the client - has to be taken into account. Assuming that even professional clients such as Hanyang not infrequently choose the way of not giving any express instructions when they intend to let an application lapse, the Board can accept that the - here foreseeable - receipt of a loss of rights notice only gave reason to check the database system for inconsistencies (such as forgotten reminders or returned mail) but was not to be seen as the same red alert as the - non expected - receipt of such a notice under other circumstances.
 10. It cannot therefore be assumed that the error would have been discovered if the notice of loss of rights had been forwarded to Mrs Schreiber.
 11. The loss of rights notice received by the representative's office is therefore considered by the Board not to have constituted the removal of the cause of non-compliance so far as concerns the representative.

12. Although most cases regarding the removal of the cause of non-compliance deal with the point in time when a representative discovered (or ought to have discovered) the error, it is recognised that the person whose knowledge is relevant may also be the applicant itself (see e.g. J 27/88, point 2.3 of the Reasons, J 27/90 (OJ EPO, 1993, 422), point 2.4 of the Reasons; T 840/94, OJ EPO 1996, 680, point 2 of the Reasons; and T 32/04, point 2 of the Reasons).

13. Therefore, it has to be decided whether, and if so when, the cause of non-compliance was removed as regards the Appellant itself, taking all due care. On the one hand, an applicant employing a professional representative to pursue a patent application may rely upon his agent to act diligently and according to its will (J 22/92, T 381/93). On the other hand, even if a representative has acted correctly this does not exempt his client from suffering the consequences of his own mistakes. See J 3/93, point 2.1 of the Reasons, where the board noted that accepting the opposite would mean conceding more rights to a represented applicant than to an applicant acting on its own.

14. This issue concerning the Appellant itself was clearly raised by the Board in its communication sent on 1 October 2013 (see point X, above). In reply it was said on behalf of the Appellant that an applicant itself could fulfil the requirement of due care by relying on an outside patent firm and that it could bona fide believe that communications from the EPO were sent to its representative, referring to J 22/92. It was said that in the present case the Appellant had carefully selected and appointed Hanyang and Cabinet Plasseraud as representatives. It could rightly assume that the documents received by it had already been sent to these

appointed representatives. In his declaration which was filed with the letter of 6 November 2013 Mr Jung said that to the best of his knowledge:

- a) LG Chem, Ltd uses several Korean patent firms.
- b) Regarding prosecutions and maintenance of patent applications, LG Chem IP services never deal directly with foreign patents agents or with foreign offices, but always through their Korean patent firms.
- c) LG Chem, Ltd had filed about 1500 or more European applications up to 2012. It had filed more than 2,000 PCT applications up to 2012 and it filed about 400 PCT applications in 2012. It usually files PCT applications with 2 to 6 countries' Patent Offices, including the EPO.

15. The Board accepts that an applicant may quite properly rely primarily on an outside patent firm to see that its interests are being looked after. Circumstances may also show that an applicant who receives a notice from the EPO may bona fide and reasonably believe that it has also been sent to its representative, who is dealing with it. The Board also does not doubt that the Appellant had carefully selected and appointed Hanyang and Cabinet Plasseraud as its representatives.

16. However these considerations do not address the critical points so far as concerns the Appellant in the present case, namely what happened to the loss of rights notice dated 7 October 2009 which was forwarded to the Appellant by Cabinet Plasseraud, and/or why the Appellant did not react to it. No doubt there could be many plausible accounts for the Appellant's apparent inaction but if a party wishes to establish that it did

not notice, or for some reason did not react to an omission notified to it by a loss of rights notice despite taking all due care it must produce some evidence dealing with the issue and not merely rely on assertions.

17. The Board notes that it was originally said on behalf of the Appellant (see request for re-establishment dated 2 April 2010, pages 4 and 5):

“LG Chemical Co. Ltd. is the largest Korean chemical company and is headquartered in Seoul, South Korea. It has eight domestic factories and direct marketing branches established around the world LG Chemical Co Ltd employs around 13,000 employees, among whom about 8,000 are working in Korea In view of such a huge company, a letter which is sent only to the address of the headquarters with no further indication (no service, no recipient's name) would certainly never reach the concerned person and would be lost”,

This argument was not pursued in such bald terms by the Appellant before the Board (the representative said that she did not know what exactly had happened to the letters forwarded by Cabinet Plasseraud). The reality is that the Appellant is a large organisation with worldwide activities. Presumably it has some system whereby incoming post at its head office is sorted and directed to the relevant departments, even when such mail is in the English language. No evidence was provided as to what this system was and therefore what might have happened to the loss of rights notice (and indeed the previous renewal-fee reminders which Cabinet Plasseraud had forwarded). This was despite the fact

that the Board in its communication had raised very specific questions about the Appellant's systems. Rather, the answer of the Appellant to this communication was not to provide evidence of what did or might have happened to the loss of rights notice or what was decided to be done about it but largely to rely on general observations and assertions (see Point 14, above).

18. Reliance was also placed on the decision in J 22/92. There, however, the Board appears to have accepted as a fact that the applicant had assumed that documents it received were copies of those already sent to its attorneys and that the applicant was entitled to think in all good faith that the attorneys had already dealt with the problem (see point 3.3.2 of the Reasons). If there had been evidence in the present case that someone within the Appellant's organisation, having considered the loss of rights notice, had for good reason made a similar assumption, then the Board might well have been prepared to accept this. In the absence of such evidence, however, what the consequences of such an assumption might have been do not need to be considered.
19. As to Mr Jung's evidence, the Board accepts everything he says but it does not go to the critical issue in the case.
20. In the submissions at the oral proceedings before the Board it was asserted in effect that the Appellant had perfectly reasonably chosen to receive mail only via specific channels, i.e. in patent cases via the appointed main representative in Korea (Hanyang). While it was not known to the Appellant's representatives what exactly had happened to the letters forwarded by

Cabinet Plasseraud, it did not amount to a lack of due care if letters not arriving from Hanyang were not forwarded to the competent person or were disregarded. This could be regarded as a way of sorting out potential junk mail that arrived in the Appellant's mail room. Quite why an official-appearing letter, even in the English language, should be regarded as junk mail was not explained. In any event, however, before a decision to disregard a formal letter of this kind can be taken, it has to land on the desk of a relevant and responsible person who can then take such a decision. It cannot amount to the taking of due care if someone in the post room takes it upon themselves to do so. Again, however, no evidence was provided about how the loss of rights notice was or might plausibly have been disregarded in this way.

21. In the absence of any such evidence the Board concludes that the loss of rights notice should have landed on the desk of someone within the Appellant's organisation (presumably someone within the Patent Management Team referred to by Mr Jung) and alerted them to the omission to pay the renewal fee, which in turn should have caused that person at least to contact Hanyang and thus Cabinet Plasseraud. In this way the omission to pay the renewal fee should have come to light. Therefore the Board can only conclude that the cause of non-compliance in the person of the Appellant was removed in the days or weeks after its European representative, Cabinet Plasseraud, had forwarded the loss of rights notice to the Appellant on 12 October 2009. It does not have to be decided on what precise day the error ought to have been noticed, since the request for re-establishment was not filed until 2 April 2010. There is no evidence suggesting that in a properly run organisation such as the Appellant it

would have taken at least until after 2 February 2010 (ie two months before the request was filed) for the error to have been revealed.

22. Thus, the cause of non-compliance was removed more than two months before the request of 2 April 2010 was filed. In consequence, not having met the time period of Rule 136(1) EPC, the request is inadmissible and the Receiving Section's decision to reject it was correct.

23. As regards the request to remit the case in the event of the Board being minded to come to this last conclusion (see point XV, above), it is true that the Receiving Section's decision was based only on the conclusion that Cabinet Plasseraud was made aware of the omission more than two months before the request for re-establishment was filed. Nothing was said in the first instance proceedings about the position of the Appellant itself. It was only in the Board's communication of 1 October 2013 that this issue was first raised. While it certainly lies within the Board's discretion to remit a case to the department of first instance the Board decided not to do this but to decide the case itself (Article 111(1) EPC) when this request was made at the oral proceedings, for the following reasons:

a) There is no legal right to have every aspect of a case decided at both first instance and on appeal (see e.g. R 9/10, T 133/87 and T 557/94).

b) After the Board had issued its communication of 1 October 2014 raising this issue, the Appellant neither asked for more time to deal with the issue nor requested remittal. Instead it responded with arguments

on the point and, to an extent (see Mr Jung's statement), filed further evidence.

c) It was only after the Board, at an advanced stage of the oral proceedings and after the point had been argued, had given an indication of its negative conclusion on it that the Appellant for the first time formulated the request for remittal.

d) The request was therefore made very late and without sufficient regard to the efficient conduct of the proceedings.

24. As to the request to annex the page containing the Appellant's requests to the minutes of the oral proceedings (see point XV, above), this is a matter of course and has been done. On the other hand, it is neither the practice nor is it appropriate to annex such a document to the decision. In this context it is both required and sufficient that the decision contains the requests (Rule 102(e) EPC).
25. As to the request for reimbursement of the appeal fee, this must be rejected since the appeal has been found not to be allowable (Rule 103(1)(a) EPC and J 37/89, OJ EPO 1993, 201, point 6 of the Reasons). The fact that the Board has found that the cause of non-compliance was removed before the relevant date only in the person of the Appellant itself does nothing to change the result (T 1111/09, point 6 of the Reasons). Therefore, contrary to these cases where the appeal was at least partially successful and the appealed decision was changed in parts (J 18/84, OJ EPO 1987, 215, point 2.8 of the Reasons; T 704/96, point 6.1 of the Reasons; and T 129/01, point 6.1 of the Reasons), one precondition for the reimbursement of the appeal fee has not been

met. The question whether a fundamental procedural violation occurred before the Receiving Section does not need to be decided.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is rejected.

The Registrar:

The Chairman:



C. Eickhoff

K. Garnett

Decision electronically authenticated