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**Datasheet for the decision
of 15 January 2009**

Case Number: T 2056/08 - 3.2.04

Application Number: 04743709.0

Publication Number: 1651854

IPC: F02M 27/04

Language of the proceedings: EN

Title of invention:
Electronic fuel amplifier

Patentee:
KALIS, Emmanouel

Opponent:

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Headword:
Calculation of period for filing an appeal

Relevant legal provisions:
EPC Art. 108, 119
EPC R. 126(2), 131(4)

Relevant legal provisions (EPC 1973):

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Keyword:
"Ten day rule for postal delivery"
"Appeal period"
"Time period expressed in months"

Decisions cited:

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Catchword:
Calculation of period for filing an appeal when combined with
ten day period for postal delivery



Case Number: T 2056/08 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 15 January 2009

Appellant: KALIS, Emanouel
31, Botsari Straße
GR-185 38 Piraeus (GR)

Representative: Sakellarides, Vasiliki-Vali
Sakellarides Law Office
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GR-105 56 Athens (GR)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 21 July 2008
refusing European patent application
No. 04743709.0 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: A. de Vries
Members: C. Heath
M. Poock

Summary of Facts and Submissions

- I. European Patent Application 04743709.0 with the title "Electronic Fuel Amplifier" was refused by decision of 21 July 2008. The decision was sent to the applicant's representative by registered letter and was received on 29 July 2008. The advice of delivery was duly sent back to the European Patent Office and received there on 31 July 2008.
- II. A notice of appeal against the above decision was filed on 1 October 2008, and the corresponding appeal fee was paid on the same day.
- III. On 31 October 2008, the board's registrar sent a letter to the applicant's representative indicating that it appeared that the notice of appeal was not filed in due time.
- IV. In a letter of 30 December 2008, the applicant's representative stated that in his view, the appeal had been filed in good time. If two months were added to the date of the decision (21 July 2008), one would arrive at the date of 21st September 2008. By adding a further ten days according to Rule 126(2) EPC, one would arrive at the 1st October 2008, the very day when the appeal was filed and the appeal fee was paid. Accordingly, the applicant's representative requested the Board to find the appeal admissible, or, in the alternative, to refund the appeal fee.

Reasons for the decision

1. According to Article 108 EPC, "[n]otice of appeal shall be filed ... within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for the appeal has been paid". In accordance with Article 119 EPC, the Implementing Regulations (Rules) to the EPC further specify the issue of notification. In particular, Rule 126 EPC lays down detailed rules on the notification by post. Where, as was the case here, notification is effected by registered letter, "such letter shall be deemed to be delivered to the addressee on the tenth day following its posting, unless it has failed to reach the addressee". The advice of delivery signed and dated by the addressee shows that the letter did in fact reach its addressee on 29 July 2008, that is, within the ten day period as specified in Rule 126(2) EPC. This being the case, the two months period from notification as specified in Article 108 EPC in the case at issue started to run from the 31st of July 2008.

2. Where a period of time is expressed in a certain number of months, calculation of this period has to be made in accordance with Rule 131(4) EPC, namely, that "it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred." In the case at issue, the expiry date of the appeal period would therefore have been the 31st of September 2008, a day that does not exist. In such case, and "if the relevant subsequent month has no day with the same number, the period shall expire on the last day of that month", Rule 131(4) second sentence. In other words, there being no 31st

- September 2008, the appeal period at issue ended on 30 September 2008.
3. 30 September 2008 was an ordinary working day of the office, and therefore the rules for extension under Rule 134 EPC do not apply. Thus, the notice of appeal filed on the 1st of October 2008 was not filed in due time, and the appeal fee paid on that day was paid late.
 4. Although it has become customary to refer to the appeal period as "two months plus ten days", this case shows that this is an inexact formula. The ten days are not added on after the two months period, or are calculated arbitrarily from the date of the decision or from a date two months thereafter. Rather, the ten days specify a period after which delivery and therefore notification is presumed, and the two months period stipulated in Article 108 EPC starts from the day of the presumed (if delivery has taken place within the ten days period) or actual (if delivery has been effected after the ten days period) notification. Thus, if any rule of thumb could be suggested to calculate the appeal period, it should be "ten days plus two months" rather than, as was argued by the applicant, "two months plus ten days".
 5. The consequence of late filing of the notice of appeal and late payment of the appeal fee is that the appeal is not deemed to have been filed, Article 108 EPC, second sentence. As an appeal has not been validly filed, no legal reason exists for the payment of an appeal fee that therefore has to be refunded.

6. In case the appeal period has been missed and/or the appeal fee has been paid late, a request for re-establishment of rights under Article 122 EPC can be made. In the case at issue, no such request was made, nor is it apparent to the Board on which grounds such request could have been made.

Order

For these reasons it is decided that:

1. The appeal is deemed not to have been filed.
2. The appeal fee is to be refunded.

The registrar:

The Chairman:

G. Magouliotis

A. de Vries