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**Datasheet for the decision  
of 11 January 2013**

**Case Number:** T 0642/12 - 3.2.04  
**Application Number:** 02077086.3  
**Publication Number:** 1264536  
**IPC:** A01J 5/007, A01J 5/017,  
A01K 1/12  
**Language of the proceedings:** EN

**Title of invention:**

A device for performing one or more animal related treatments on an animal

**Patent Proprietor:**

Lely Enterprises AG

**Opponents:**

WestfaliaSurge GmbH  
DeLaval International AB

**Headword:**

Reduced appeal fee/LELY ENTERPRISES AG

**Relevant legal provisions:**

EPC Art. 14(4) 108, 105a, 112(1), 122, 122(1), 122(2)  
EPC R. 6(3), 136(1), 136(2), 139  
Article 8, 14(1) Rules relating to Fees  
Article 2(1) of the Decision of the Presidium of the Boards of Appeal dated 12 November 2007 concerning the transfer of functions to the Registrars of the Boards of Appeal

**Relevant legal provisions (EPC 1973):**

EPC Art. 14(2), 14(4)  
EPC R. 6(3)

**Keyword:**

"Erroneously applied 20% fee reduction, small amount lacking (no), overlooking small amount justified (no), Principle of the protection of legitimate expectations (not applicable), request for re-establishment of rights setting out facts (no), referral to the Enlarged Board (no)"

**Decisions cited:**

T 0128/87, T 0014/89, J 0013/90, T 0290/90, T 0905/90,  
G 0006/91, J 0012/94, T 0923/95, G 0002/97, J 0015/10,  
J 0019/05

**Catchword:**

1. In case of an inter partes appeal case, completion of EPO Form 2701 by the Formalities Officer of the department of first instance does not establish the legitimate expectation that formal requirements of the appeal, such as the payment of the appeal fee, has already been checked by the EPO (point 9 of the Reasons)

2. A potential possibility of discovering the error is not sufficient to establish the legitimate expectation that a Registrar of the Boards of Appeal will warn an appellant within seven working days before the expiry of the time limit that a reduced appeal fee was relied on in error and therefore the appeal fee is deemed not to have been paid (points 6 to 8 of the Reasons)

3. "Small amounts lacking" in Art. 8 Rfees are to be read as "insignificant or negligible" amounts. The legislator presumed that a fee reduction of 20% pursuant to Rule 6(3) EPC is not merely a symbolic one, but will effectively alleviate the burden of having to prepare translations. Therefore the legislator could not have intended this fee reduction to be considered small in the sense of negligible or insignificant (point 20 of the Reasons).



Case Number: T 0642/12 - 3.2.04

**DECISION**  
of the Technical Board of Appeal 3.2.04  
of 11 January 2013

**Appellant:**  
(Patent Proprietor)

Lely Enterprises AG  
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**Respondent II:**  
(Opponent 2)

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 5 January 2012  
revoking European patent No.1264536 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** A. de Vries  
**Members:** T. Bokor  
P. Petti

## **Summary of Facts and Submissions**

- I. The present appeal proceedings concern an appeal against the decision of the Opposition Division, posted on 5 January 2012, by which European patent No. 1 264 536 was revoked. The patent proprietor, now appellant, is registered as Lely Enterprises AG, a company having an address in Switzerland. The time limit for filing an appeal and paying the appeal fee expired on 15 March 2012.
  
- II. A Dutch language document, dated 6 March 2012 and described in the Epoline transmission cover page as "Notice of appeal" was filed and received in the EPO on 7 March 2012, together with an English language document described in the Epoline transmission cover page as "Letter relating to Appeal procedure" and identified in its heading as "translation of the enclosed Notice of Appeal in Dutch". This latter was otherwise worded as a Notice of Appeal, containing application number and the decision appealed against, as well as the name and the Swiss address of the appellant. The Epoline transmission further contained a debit order for EUR 944, designated as "Fee for appeal". This amount corresponded to 80% of EUR 1180, the full appeal fee payable in the period before 1 April 2012.
  
- III. The Formalities Officer of the Opposition Division completed EPO Form 2701 on 8 March 2012, and forwarded the case to the Registry of the Boards of Appeal.
  
- IV. EPO Form 3204, informing the parties of the file number and the commencement of proceedings before the Boards of Appeal was posted 27 March 2012 to the appellant and

the respondents. This communication referred to the letter dated 6 March of the patent proprietor and contained an instruction that further communications should be addressed to the Boards of Appeal and should quote the indicated reference number, i.e. the file number of the appeal.

- V. With letter dated 30 March, the respondent Opponent II noted that the appellant as a Swiss company was not entitled to use Dutch language and therefore was also not entitled to a fee reduction pursuant to Rule 6(3). The 20% shortfall in the fee could also not be considered as a small amount under Article 8 of the Rules relating to Fees (RFees), so that the amount was insufficient. As a consequence, the appeal should be rejected as inadmissible. This letter of opponent II was posted to the appellant with EPO Form 3345 by the Registrar of the Board on 11 April 2012.
- VI. With letter dated 27 April 2012 the appellant made the following requests: To accept the correct amount of the appeal fee by applying the principle of good faith to the effect that the previous underpayment is remedied, to debit the full amount of the appeal fee, and to reimburse the previously paid amount of EUR 944. The letter contained a debit order for EUR 1240, designated as "fee for appeal". The applicability of the principle of good faith was supported with the argument that an easily identifiable formal error was present, so that the EPO would have been expected to discover the error and to warn the appellant, given that there was enough time to do so before the expiry of the time limit for filing the notice of appeal and to pay the appeal fee.

- VII. Grounds of appeal with reasons and claim requests were filed on 14 May 2012.
- VIII. With letter dated 22 May 2012 opponent I, now respondent I requested the rejection of the appeal as inadmissible. It was argued that the translation of the notice of appeal cannot substitute the notice of appeal, the latter being filed in a language not being an official language of the state where the appellant resides. Further, the missing 20% cannot be considered as small amount. Finally, the principle of good faith is not applicable in the present case, following decision T 41/09.
- IX. With letter dated 15 June 2012, the appellant reiterated its request that the EPO applies the principle of good faith and accepts the payment as having been made in time. As an auxiliary measure, re-establishment of rights under Article 122 EPC was requested, with the instructions that the EPO should debit the necessary fee from the debit account of the appellant, and that this fee should be refunded if the principle of good faith would be found to be applicable. The appellant also requested oral proceedings.
- X. The request for re-establishment of rights contained a brief review of the written correspondence between the appellant and the EPO, and stated that the appellant received on 18 April 2012 the letter of opponent II pointing out the deficiency of the fee payment (see point V above), so that the request was filed within the two-months time limit. As to the circumstances of the mistake causing the loss of rights, the following was stated: "The present mistake was an isolated,

unforeseeable human mistake in a normally reliable and satisfactory system in a well-run company, with well-trained staff and a well-working term monitoring system and double checks on actions by its personnel. The patentee, Lely Enterprises AG, has its patent affairs handled by Octrooibureau Van der Lely NV which has successfully handled a large number of European patent applications over the years. The exact circumstances of the mistake are still being investigated, but all due care is deemed to have been taken, so that the re-establishment of rights should be allowable."

XI. In a summons to attend oral proceedings issued on 29 October 2012 the Board indicated that the request for re-establishment of rights did not appear allowable, because the Board is unable to examine in substance whether all due care was taken. The Board pointed out that no specific details of the circumstances of the mistake were given in the request.

XII. The appellant responded to the summons with a letter dated 11 December 2012, providing the details of the circumstances surrounding the erroneous fee payment. The error was eventually explained to be due to an oversight, which could also be attributed to the fact that the staff was working under high workload caused by various circumstances. Due to changes in the personnel, responsibilities had to shift between persons. The appellant further argued that all omitted acts were properly completed, and that the request for re-establishment was also allowable, as demonstrated by the detailed explanation of the relevant events. Finally, the appellant analysed the case law and in particular decision G 2/97 *in extenso*, and concluded

that the principle of good faith is applicable. In essence, the EPO had the duty, yet failed to issue a warning to the appellant, though the error was readily identifiable and there was sufficient time to act.

- XIII. Oral proceedings were held on 11 January 2013 which were attended by the professional representatives of appellant and respondent opponent II. Respondent opponent I informed the Board in advance that it would not attend the oral proceedings.
- XIV. During the oral proceedings the professional representatives of the appellant maintained the arguments concerning the applicability of the principle of good faith. The EPO had a duty to organise its inner procedures efficiently, and a warning could have been expected in all good faith. There was evidence in the file that the appeal was processed promptly, and a file inspection at that time would have confirmed for the appellant that all formal requirements were in order. Thus the appellant had the legitimate expectation that the appeal was validly filed and nothing needs to be done. As a further line of argument, it was submitted that contrary to the previous statements made by respondents, Art. 8 RFees, last sentence was applicable in the sense that the missing 20% could be regarded as a "small amount" and therefore could be overlooked without causing any loss of rights. This would be justified in the present case, given that the appellant was in principle entitled to the fee reduction, and it only would have had to file the notice of appeal in Italian. If this argument were not accepted by the Board, a referral to the Enlarged Board was requested on this issue, together with another question on the



possibility of correcting the wrong language as a linguistic error under Rule 139 EPC. The request for re-establishment of rights into the time limit for paying the appeal fee was also maintained. It was submitted that the establishment of the exact circumstances took some time, but it was normally possible to complement the factual background of such a request also beyond the time limit for filing the request itself. In addition, the reconstruction of the events brought some up some personal issues which the appellant did not wish to become public.

- XV. The representative of respondent opponent II contested the arguments of the appellant, and requested rejection of the appeal. It submitted that the error was not at all obvious, given that parties regularly and frequently use languages which entitle them to a fee reduction. The very first action of the EPO on 8 March 2012 (see point III above) did in no way imply that the file was perfectly in order. A referral to the Enlarged Board would not be appropriate.

### **Reasons for the decision**

1. The admissibility of the appeal and indeed its existence turns on the questions whether the appeal fee was paid in time, and whether there was a valid notice of appeal in an admissible language. As explained below, the Board found that the appeal fee was not paid in time, so that there was no need to decide on the issue of the language of the notice of appeal and whether its use would lead to the appeal being deemed not to have been filed.

2. Pursuant to Article 108 EPC, second sentence, the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Article 8 RFees, first sentence stipulates that the time limit for payment shall in principle be deemed to have been observed only if the full amount of the fee has been paid in due time. In the present case, the time limit for filing the notice of appeal and thereby the time limit for paying the appeal fee expired on 15 March 2012. A reduced appeal fee pursuant to Rule 6(3) EPC was paid on 7 March 2012, and a full appeal fee was paid on 27 April 2012 (see points II and VI above). The appellant does not dispute that the filing of the notice of appeal in Dutch language did not entitle it to benefit from the fee reduction. Instead it is contended that the EPO must accept the late payment of the full appeal fee, either through the application of the principle of the protection of legitimate expectations or through a re-establishment of rights under Article 122 EPC, or to accept the partial payment and to overlook the missing 20% through the application of Article 8 RFees, last sentence. The Board examines these three lines of argument in turn.

*Protection of legitimate expectations*

3. The Board concurs with the appellant that this principle, also referred to as principle of good faith, is applicable in the proceedings before the EPO, and also in appeal proceedings. Its application requires the EPO to warn the relevant party of any loss of rights if such a warning can be expected in all good faith (G 2/97 of 12 November 1998, OJ EPO 1999, 123, point 4.1 of the Reasons). In the present case it has

to be examined if there existed a legitimate expectation of the appellant that it would be warned in time by the EPO of the deficiency, the only partially paid appeal fee.

4. The appellant submits that this legitimate expectation existed, because the error was easily identifiable and there was also enough time to warn the appellant sufficiently early for the appellant to have been able correct the error still within the time limit. This legitimate expectation was further corroborated by the file history, showing that the EPO indeed processed the appeal sufficiently swiftly, and it could also be inferred that the error ought to have been discovered already at that time. Form 2701 processed on 8 March 2012 clearly showed that the payment of the appeal fee was to be examined immediately.
  
5. The Board concurs with the appellant that the error was not very difficult to discover. Nevertheless the error was a deficiency of a formality the examination of which is entrusted to the Registrar of the competent Board of Appeal, see Article 2(1) of the Decision of the Presidium of the Boards of Appeal dated 12 November 2007 concerning the transfer of functions to the Registrars of the Boards of Appeal, Supplement to OJ EPO 1/2013, pp. 65-67. Furthermore, even if it can be accepted that the error would not have been difficult to discover for an experienced Registrar in the course of checking the notice of appeal for the necessary legal preconditions, it is not the type of error which he or she could be expected to discover at first glance at the notice of appeal. Even if it might be a simple error, it is not so apparent or glaring that it would

have been highly improbable to overlook it. The Board therefore needs to examine if the appellant had a realistic expectation almost beyond doubt that the Registrar of the Boards on proper examination of the appeal would have found the error before the expiry of the time limit of Article 108 EPC.

6. The Board concurs with the appellant to the extent that there was indeed a potential possibility to discover the error in good time. The file shows that the appeal was received in the morning hours on 7 March 2012, and the applicable time limit of Article 108 EPC, first sentence, expired on 15 March 2012. This means that seven working days were available to warn the appellant and to pay the appeal fee. Given that the appellant regularly used its debit account with the EPO, in theory it could have been sufficient if he received the warning on the very last day.
  
7. However, the Board does not accept that this potential possibility automatically translates into a legitimate expectation of the appellant. First of all, there was no **formal** legal obligation on the Office to issue a warning within this time, and therefore there could also not be a **legitimate** expectation, i.e. a justified belief of the appellant that the absence of a warning confirmed the valid filing of an appeal to such a degree of certainty which is equal to the certainty of an acquired right, here the acquired legal position as appellant. As the Enlarged Board put it "To take the principle of good faith that far would imply, in practice, that the Boards of Appeal would have to systematically assume the responsibilities of the parties to proceedings before them, a proposition for

which there is no legal justification in the EPC or in general principles of law", see G 2/97 *supra*, point 4.2 of the Reasons. In other words, the fact that no warning was issued by the Office before 15 March 2012 could not be construed as a positive and legally binding recognition of a valid appeal. On the other hand, if a warning could be expected merely as a courtesy service from the EPO, its omission again does not create legitimate expectations, see G 2/97 *supra*, point 5.1 of the Reasons.

8. As stated above, an overlooking of the error by the Registrar could also not be realistically excluded. This means that there could be no serious expectation, whether legitimate or not, that a warning will be issued under any circumstances. Therefore it can also not be stated that the high probability of the discovery of the error in combination with the expectation of a warning as a courtesy service could have justified the firm belief of the appellant that without such a warning the file was in order. Given all the facts of this case, such a presumption contradicts common experience.
  
9. Contrary to the belief of the appellant, it could also not base any legitimate expectation concerning the validity of the appeal on the fact that the appeal had been received and processed in the EPO, as may be inferred from EPO Form 2701, see point III above. A notice of appeal is forwarded as a matter of standard procedure first to the Formalities Officer of the department of first instance concerned (a directorate within Directorate General 1) for a first peremptory examination of the notice of appeal. This standard

procedure was also observed in the present case. The Form 2701 completed on 8 March 2012 was thus not processed by the Registry of the Boards of Appeal, but by the Formalities Officer of the Opposition Division, and it merely contained an indication that the case was to be referred to the Registry of the Boards of Appeal. Though the form includes a check-box for appeal fee payment, the form itself states that this check is to be performed only in ex parte cases (where interlocutory revision by the Examining Division under Article 109 EPC is possible, see point I.2.1 of the form). If the Formalities Officer finds that the appeal involves several parties, such as in opposition proceedings, the case must be referred to the Boards of Appeal without delay (see point I.1 of the form). Thus the only information that can be derived from this document was the fact that the Formalities Officer forwarded the case to the Boards of Appeal on 8 March 2012. In no way can it be seen to objectively establish a basis for the firm belief of the appellant that the appeal was already thoroughly examined for compliance with all the usual formal requirements.

10. The Board adds that not even the communication of the file number to the appellant on 27 April 2012 (see point IV above) could have potentially established the legitimate expectation that everything was in order with the appeal, see also G 2/97 *supra*, point 5.2 of the Reasons.
11. The appellant submitted that the case law also supports its position on the applicability of the principle of good faith. However, this is not accepted by the Board. Most of the case law cited by the appellant (T 128/87

OJ EPO 1989, 406, T 14/89 of OJ EPO 1990, 432, J 13/90 OJ EPO 1994, 456) is also discussed in G 2/97 (*supra*). From this it becomes clear that the Enlarged Board took note of the case law at that time but in fact did not approve of an unlimited application of this principle, but rather followed the *ratio decidendi* of J 12/94 of 16 February 1996, see G 2/97 *supra*, No. 4.2 of the Reasons. Concerning T 14/89 *supra*, the Enlarged Board expressly stated that no generally applicable principles are derivable from that decision (see G 2/97 *supra*, No. 3.4 of the Reasons). Decision T 923/95 of 12 November 1996, though preceding the decision G 2/97 of the Enlarged Board, is not mentioned specifically. This decision found the principle of good faith to be applicable in circumstances not completely dissimilar to the present case, in effect putting a strict obligation on the European Patent Office to examine the correctness of fee payments immediately. Yet, this Board holds that the approach endorsed by T 923/95 is no longer tenable because it plainly contradicts the findings of G 2/97. The Board is also not aware of any decision which have followed T 923/95.

12. For the reasons above, the Board holds that timely payment of the appeal fee can not be recognised on the basis of the principle of the protection of legitimate expectations.

*Re-establishment of rights*

13. Pursuant to Article 122(2) EPC, the EPO shall grant the request for re-establishment of rights, provided that the requirements laid down in the Implementing Regulations are met. The appellant filed the request

for re-instatement under Article 122 EPC and paid the necessary fee within the time limit stipulated by Rule 136(1) EPC. Rule 136(2) EPC specifies that the request shall state the grounds on which it is based and shall set out the facts on which it relies. This normally means that the requester must plausibly demonstrate in the request that the loss of rights occurred in spite of all due care required by the circumstances having been taken, as stipulated by Article 122(1) EPC.

14. This again normally requires that the request contains at least a cursory description of the concrete events and circumstances leading to the loss of rights. If the EPO requires evidence to support the submissions or more detailed explanations, these may also be submitted later.
  
15. However, in the present case there is practically no useful information in the request beyond that which is also evident from the previous correspondence between the EPO and the appellant, as available in the file. There is only one specific fact mentioned, namely that the error occurred in the offices of the representative of the appellant. Otherwise, practically nothing can be derived from the request from which the Board would be able to conclude that all due care was taken. On the contrary, it appears that at the time of filing the request, even for the representatives of the appellant it was not quite clear under what circumstances the error occurred, as illustrated by the statement that "The exact circumstances of the mistake are still being investigated..."



16. In fact, the circumstances were only presented in the letter dated 11 December 2012 (see point XII above), i.e. almost six months after the expiry of the time limit for filing the request for re-establishment of rights, accepting that the cause of non-compliance was removed upon receipt of the letter of respondent opponent II on 18 April 2012. However, it is established case law of the Boards of Appeal that a request for re-establishment of rights which relies on general statements only and contains no specific facts, does not satisfy the requirement for a duly substantiated request under Rule 136(2) EPC, first sentence (J 15/10 of 8 November 2010, see Catchword and point 3.2 of the Reasons, see also J 19/05 of 24 November 2006, cited in the Case Law of the Boards of Appeal, Sixth Edition 2010, Chapter VI.E.3.4, pages 501-502). The circumstances presented in the request are not sufficiently individualised and precise if almost any arbitrary set of circumstances can be later adduced to the originally presented facts (J 19/05 *supra*, Catchword and No. 4 of the Reasons).
17. The representatives of the appellant were also not able to provide a convincing explanation why they were unable to submit the required substantiation at the time of filing the request for re-establishment. The Board is unable to accept that the sensitivity of certain personal issues and the complexity of the events presented problems of such a magnitude that not even a rough (and possibly anonymized) description of the relevant events was possible more than three months after the occurrence of the error in question.

18. As a result, the Board must reject the request for re-establishment of rights as inadmissible for not fulfilling the requirements of Rule 136(2) EPC.

*Small amount*

19. Pursuant to Article 8 RFees, last sentence, the European Patent Office may, where this is considered justified, overlook any small amounts lacking without prejudice to the rights of the person making the payment. The appellant contends that in the present case, it would be justified to overlook the missing 20% of the appeal fee, and to accept the effective payment of the 80% as a valid payment of the full appeal fee. This would be justified under the circumstances, given the fact that the appellant actually was entitled to a fee reduction. It only would have had to file the notice of appeal in Italian, and it indeed intended to do so.
20. The Board is not persuaded by this argument. First of all, the Board considers that the 20% fee reduction set by Article 14(1) RFees can not be considered as small for the purposes of Article 8 RFees. This latter foresees that lacking small amounts can be overlooked, i.e. ignored (unberücksichtigt bleiben, ne pas tenu compte), implying that they also need not be paid later. This would dictate that "small amounts lacking" (geringfügige Fehlbeträge, parties minimales non encore payées) are rather to be read as "insignificant or negligible amounts", e.g. differences caused by unexpected bank transfer costs, currency exchange rates or the like, see also T 905/90 of 13 November 1992 (OJ EPO 1994, 306), point 10 of the Reasons. This does not

seem to apply to the difference corresponding to a fee reduction as foreseen by Rule 6(3) EPC. This rule is an implementing rule of Article 14(4) EPC. This latter provides for the possibility of filing documents **which have to be filed within a time limit** in an admissible non-EPO language, nevertheless with the obligation of filing a translation within a time limit. The presumption underlying Rule 6(3) EPC is that the appellant in fact **needs** to file the document in an admissible non-EPO language because of the upcoming time limit and as a consequence, is forced to prepare a translation as well. Rule 6(3) EPC of course also extends to certain acts not necessarily tied to time limits, such as filing of patent applications and requests under Article 105(a) EPC, but in fact these acts are also regularly done under time pressure. Put differently, the fee reduction foreseen by Rule 6(3) EPC intends to alleviate the burden on those applicants who are themselves unable to communicate with the European Patent Office in an official language, and therefore **must** resort to the use of translations. Thus the legislator presumed that a fee reduction of 20% is not merely a symbolic one, but will effectively alleviate the burden of having to prepare translations, and therefore it appears to the Board that the legislator could not have intended this fee reduction to be considered small (*geringfügig*, *minime*) in the sense of negligible or insignificant. Therefore, the Board holds that Article 8 RFees, last sentence is not applicable in the present case for this reason alone.

21. Secondly, quite apart from the issue of the "small amount" discussed above, the Board is of the opinion that overlooking the missing amount would also not be

justified in the circumstances of the case, because it is not at all apparent that the appellant would have been entitled to the fee reduction under Rule 6(3) EPC. This entitlement arises only if a person referred to in Article 14(4) EPC, i.e. a person who is either resident or national of a contracting state using an non-EPO language, effectively **uses** the admissible non-EPO language, even if minimally. This intention may not jump out at the reader from the present wording of Rule 6(3) EPC, but was quite clear in the wording of Rule 6(3) EPC 1973: "A reduction ... shall be allowed ... a [party] ... who avails himself of the options provided in Article 14, paragraphs 2 and 4 [EPC 1973]". The option mentioned here is of course the possibility of the filing of the relevant documents in an admissible non-EPO language, and the subsequent filing of a translation, see also G 6/91 of 6 March 1992 (OJ EPO 1992, 491), point 21 of the Reasons.

22. In the present case, it is not apparent that the appellant ever intended to file the notice of appeal in Italian. This possibility was not put forward by the appellant until the oral proceedings. On the contrary, when the appellant was informed of the insufficiency of the payment, it immediately proceeded to pay the full amount, and apparently relied on the English translation of the notice of appeal. A notice of appeal in Italian has never been filed, not even in the oral proceedings. This does not demonstrate to the Board any intent, much less a need on the part of the appellant to use Italian when corresponding with the Office. The fact that it might in theory have been able to avail itself of the possibility of filing in Italian is immaterial, as he did not do so nor showed any serious

intent of doing so and was therefore not entitled to a fee reduction.

23. The Board is well aware of the widespread practice of filing documents with the EPO in admissible non-EPO languages simultaneously with their translation merely for the sake of obtaining a fee reduction, but actually without any pressing need to proceed in this manner. This practice has in fact been upheld by the findings of G 6/91 (*supra*), which established the minimum requirements for this procedure. However, as the present case also illustrates, this practice should be pursued with caution, because the possibility of a fatal error is not negligible. To this extent the Board concurs with the argument of the appellant that in this manner the regular practice of claiming a fee reduction may prove to be a double-edged sword. On the other hand, it appears to the Board that such fatal errors would be less likely to occur if parties would only resort to using a non-EPO language, i.e. typically their own working language, when there are indeed serious grounds to do so. This again confirms the Board in its view that relying on Article 8 RFees, last sentence is not justified (*der Billigkeit entspricht, paraît justifié*), i.e. not equitable in cases as the present one.

24. The Board is also aware of decision T 290/90 dated 9 October 1990 (OJ EPO 1992, 368) also cited in the Case Law of the Boards of Appeal, Sixth Edition 2010, Chapter VI.F.4, page 537. This decision held that the overlooking of the missing 20% (there of the opposition fee) was justified having regard to the fact, *inter alia*, that this missing amount was in fact paid shortly after the expiry of the time limit. To this extent the

present case is similar, as the missing fraction of the fee was paid immediately when the appellant realised the error, see point VI above. However, the present Board does not follow T 290/90. Firstly, while T 290/90 discussed criteria for a justification of overlooking a missing amount, and held that the applicability of Article 9(1) RFees - corresponding to the presently applicable Article 8 RFees - must be decided on an objective basis having regard to all the relevant circumstances of the case, in fact it did not give any specific reasons why it considered 20% to be small, see point 4 of the Reasons, paragraph (b). Secondly, the reasons given for overlooking the missing small amount appears to concentrate solely on the issue of justification, irrespective of the amount missing and whether it is small or not. Following this line of reasoning it would not matter how large the shortfall is, as long as the full amount is paid soon after expiry of the time limit. The Board does not believe that this is what was intended when the legislator decided to limit justifiably overlooked missing amounts to small amounts. Similarly, the further criteria considered by T 290/90, such as the desirability of the opponent being able to pursue his case given the fact that all other requirements apart from the fee payment were complied with (see point 4 of the Reasons, paragraph (a)), also appear unsuitable for explaining why Article 8 RFees foresees a different legal treatment of small missing amounts as compared with "significant" (in the sense of **not** small) missing amounts. Following the criteria considered by T 290/90, the determination whether an amount is "small" would in the end depend on the criteria used for determining whether the circumstances could justify the overlooking.

As a result, the "small" qualifier would not be determined on the basis of objective, but subjective criteria, in fact also contrary to the apparent intentions of T 290/90, see also Headnote, point IV. To that extent, the "small" qualifier would lose its meaning, seemingly against the intent and purpose of the final sentence Article 8 RFees, which expressly singles out "small amounts" for special treatment.

*Referral to the Enlarged Board of Appeal*

25. During the oral proceedings, the appellant requested that the following questions be referred to the Enlarged Board of Appeal:
1. When a party, who is entitled to a fee reduction under Art[icle] 14(4) EPC and Rule 6(3) EPC by use of a given non-official language for filing of the essential item, mistakenly uses another non-official language that does not give this entitlement and pays only 80% of the relevant fee, is the 20% shortfall to be considered a justified small amount lacking in the sense of RFees 8 EPC.
  2. If the answer to the first question is in the negative, can the party request correction of the essential item under Rule 139 EPC as being a linguistic error.
26. Though not expressly stated, the Board takes it that the request for referral is based on Article 112(1)a EPC. This article stipulates that the competent Board shall refer any question to the Enlarged Board of Appeal if it considers that a decision of the Enlarged Board of Appeal is required in order to ensure uniform application of the law, or if a point of law of

fundamental importance arises. A decision of the Enlarged Board of Appeal is required only if the Board either establishes that the application of the law is non-uniform or that it agrees that the point raised is a point of law of fundamental importance, and it is unable to decide itself.

27. The appellant has not put forward that the application of law should be non-uniform and the Board is also not aware of any conflicting decisions, at least none where the justification to overlook the missing 20% resided in the fact that the affected party met certain formal preconditions to the fee reduction, but used a wrong language. The Board does not consider the question to be a point of law of fundamental importance: no doubt the potential legal effect (loss of an application, patent or opponent status) is serious, but this in itself does not raise the issue to the level of fundamental importance. On the contrary, the legal situation before the Board arose as a result of an undisputedly erroneous action of a party, and as such, it is expected to relate to an exceptional and rarely occurring situation. Finally, as explained above, the Board was able to decide on the first question itself.
  
28. The second question was not put forward by the appellant as a legal argument until the oral proceedings, and even there it has not been argued in depth. Hence the Board considers this question only to be ancillary to the first question, which needs not be answered on its own by the Enlarged Board of Appeal. Nevertheless, the Board is of the opinion that choosing a "wrong" language for a document to be filed with the European Patent Office cannot be equated with a



"linguistic error" for the purposes of Rule 139 EPC. Linguistic errors arise when a person is not sufficiently familiar with a given language, so that he or she uses grammatically or linguistically incorrect expressions, which are recognised as such by all those persons who master the given language on a sufficiently high level. In the present case, the choice of Dutch instead of Italian was apparently not caused by the insufficient knowledge of the Italian language of the persons concerned, but by an oversight concerning a legal requirement, namely the choice of the admissible language for an appellant resident in Switzerland.

29. Therefore, the request for a referral of the submitted questions to the Enlarged Board must be rejected.
  
30. Article 8 RFees, second sentence stipulates that if the fee is not paid in full, the amount which has been paid shall be refunded after the period for payment has expired. From this it follows that the partial payment does not achieve any legal effect on its own. The appellant paid the full appeal fee later under the presumption that its payment shall be considered to have been made within the prescribed time limit, by applying the principle of the protection of the legitimate expectations or through re-establishment of rights under Article 122 EPC. There was no intention to pay the appeal fee later if its legal effect could not be achieved. Given that the Board could not recognise this intended legal effect, the appeal is deemed not to have been filed (Article 108 EPC, second sentence). Therefore, the partial fee paid on 7 March 2012 and the full appeal fee paid on 27 April 2012 shall be reimbursed.

**Order**

**For these reasons it is decided that:**

1. The request for a referral to the Enlarged Board of Appeal is rejected.
2. The request for re-establishment of rights is rejected.
3. The appeal is deemed not to have been filed.

The Registrar:

The Chairman:

G. Magouliotis

A. de Vries