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**Datasheet for the decision
of 20 May 2019**

Case Number: T 0858/18 - 3.5.02

Application Number: 10702347.5

Publication Number: 2392194

IPC: H05B37/02

Language of the proceedings: EN

Title of invention:

Lighting Control System Responsive to Ambient Lighting
Conditions

Patent Proprietor:

Koninklijke Philips N.V.

Opponent:

B.E.G. Brück Electronic GmbH

Relevant legal provisions:

EPC Art. 99(1)

EPC R. 77(1), 50(3)

Decision of the President of the European Patent Office dated
12 July 2007 concerning the filing of patent applications and
other documents by facsimile, Special edition No.3 of the OJ
EPO 2007, A.3

Vienna Convention on the Law of Treaties (1986) Art. 31

RPBA Art. 20

Keyword:

Opposition inadmissible - Statement according to Rule 76(2)(c) EPC filed after lapse of opposition period.
According a date of receipt to documents according to Rule 50(3) EPC if facsimile transmission extends beyond midnight.

Decisions cited:

T 2061/12, T 2133/10, T 0683/06, T 2317/13

Catchword:

If a facsimile transmission of a document within the meaning of Rule 50(3) EPC begins on an earlier date and extends beyond midnight to a later date, the entire document is accorded the later date as single date of receipt. There is no legal basis for according the earlier date as date of receipt to the part of the document arriving at the EPO before midnight (see in particular point 6 and for the term "document" point 4 and for the "date of receipt" point 5 of the reasons).

Deviating from decisions T 2061/12 and T 2317/13 (see points 7.3 and 7.4 of the reasons).



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Case Number: T 0858/18 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 20 May 2019

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 January 2018
revoking European patent No. 2392194 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman R. Lord
Members: F. Giesen
J. Hoppe

Summary of Facts and Submissions

- I. This appeal by the patent proprietor (in the following: appellant) lies from the decision of the Opposition Division revoking European patent No. 2 392 194 pursuant to Article 101(3)(b) EPC.
- II. Mention of the grant of the opposed patent was published in the Bulletin on 18 March 2015.
- III. The opponent (in the following: respondent) filed a notice of opposition against this patent by facsimile including 19 pages. The facsimile transmission started on 18 December 2015 at 23:53:42 and ended on 19 December 2015 on 00:01:14. The facsimile contained, in this order:
 - (a) Form 2300 "Notice of opposition to a European patent" (pages 1 to 4, which reached the EPO on 18 December 2015),
 - (b) Form 1010 "Payment of fees and expenses" (page 5, which reached the EPO on 18 December 2015), and a
 - (c) "Statement of Facts and Arguments concerning EP 2 392 194 B1" (pages 6 to 17, of which pages 6 to 16 reached the EPO on 18 December 2015 whereas page 17 reached the EPO on 19 December 2015), and
 - (d) Form 1038 (pages 18 to 19, which reached the EPO on 19 December 2015).
- IV. The Opposition Division held the opposition to be admissible following the reasoning of decision T 2061/12, according to which the earlier date of receipt could be attributed to the part of a document filed by facsimile arriving before midnight. All elements required for an admissible opposition were

therefore deemed to have been received before the lapse of the opposition period.

- V. Oral proceedings before the Board took place on 20 May 2019.
- VI. The appellant (patent proprietor) requested that the decision be set aside and that the opposition be rejected as inadmissible, or if that was not possible that the patent be maintained in amended form on the basis of one of the following auxiliary requests in the given order:
auxiliary requests I, I', II, II' as filed on 7 December 2017
or auxiliary requests III, IV or V filed with the grounds of appeal.

The respondent (opponent) requested that the appeal be dismissed.

- VII. Reference will be made to the Decision of the President of the European Patent Office dated 12 July 2007 concerning the filing of patent applications and other documents by facsimile, Special edition No. 3 of the OJ EPO 2007, A.3, referred to hereinafter simply as "Decision of the President" or as "DPFF".

- VIII. The appellant's arguments, in so far as they are relevant for the present decision, can be summarised as follows:

The opposition was inadmissible. The approach used by the Opposition Division and the Board which took decision T 2061/12 was applicable only to application documents, not to notices of opposition. Article 5(3) DPFF stated that dates of receipt are accorded to

"documents". It was clear from Article 3 DPF that the term "documents" used in that decision was to be understood as documents within the meaning of Rule 50 EPC. It followed from Rule 50(3) EPC that the term "documents" can only refer to full documents. This was so because Rule 50(3) EPC prescribed that documents filed after filing the application shall be signed, but it was standing practice of the EPO that not each individual page of a document needed a signature. Otherwise, the true intention of the sender could be falsified by taking into account only partial documents. If for example a power of attorney filed by facsimile contained a second page with exceptions and this page was not taken into account, then the intention of the sender would be incorrectly recorded by the partial document. Hence, since the term "documents" related only to full documents, it followed that a date of receipt was accorded only to full documents, not to each individual page. The date of receipt of the statement of grounds of opposition was therefore 19 December 2015. It was therefore filed too late.

T 2061/12 cited another decision, T 2133/10 in support of its reasoning, but according to the latter decision documents filed by facsimile were accorded a single filing date and filing documents by facsimile constituted a single filing act. The only exception to this was a fax transmission extending beyond midnight in the case of application documents. Even in that case an applicant had to request that the earlier date be accorded and had to renounce the part received after midnight.

IX. The respondent's arguments, in so far as they are relevant for the present decision, can be summarised as follows:

The opposition was admissible. The part of the facsimile that was received before midnight on 18 December 2015 contained everything which was required for validly filing an admissible opposition because the content that arrived before midnight was sufficient to support at least one ground for opposition. The pages of the statement of grounds for opposition received on the 19 December 2015 contained only short arguments against the patentability of dependent claims and a summary, and were therefore dispensable as regards admissibility. The case underlying decision T 2061/12 was comparable to the present case and the interpretation of the Decision of the President by the competent Board was reasonable and consistent with decision T 2133/10. The statement of facts and arguments supporting the notice of opposition did not need its own signature, and it was therefore irrelevant that the signature was received after midnight. Even if the facsimile transmission had stopped at exactly midnight the opposition would have clearly been validly filed. The part of the statement according to Rule 76(2)(c) EPC arriving before midnight at the EPO was to be considered a document. There was no definition in the EPC of what a document was. Also incomplete documents were nevertheless documents. The completeness of the content was not a prerequisite for the status of being a document. Since the EPC did not define what a document was, §202 StGB, i.e. of the German Penal Code, gave a definition that was applicable to the present case via Article 125 EPC. According to this German legal provision, the content of a letter was a document. There was no requirement

that the letter had to be complete. It was rather the idea of the sender, which defined what a document was. Article 6 DPFF was applicable only for documents which were altogether unintelligible, which was not the case here. A document was received when it entered the domain of access of the recipient. This was the case for the majority of pages of the statement according to Rule 76(2) (c) EPC in the present case.

Reasons for the Decision

1. The appeal is admissible.

2. *Lapse of the opposition period*

According to Article 99(1) EPC the notice of opposition has to be filed within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin.

In the present case the mention of the grant of the opposed patent was published in the Bulletin on 18 March 2015. The period for giving notice of opposition thus ended at the end of 18 December 2015 according to Article 99(1) EPC and Rule 131(4) EPC. This was not disputed by the parties.

According to Rule 76(2)c) EPC the notice of opposition needs to contain a statement of the grounds on which the opposition is based. In the present case the facsimile transmission of the statement of the grounds on which the opposition is based started on 18 March 2015 and ended on 19 March 2015. It has to be

decided whether the opposition was filed before the lapse of the opposition period.

3. *The applicable legal provisions*

- 3.1 Rule 2(1) EPC specifies that in proceedings before the European Patent Office, documents may be filed by delivery by hand, by postal services or by means of electronic communication and authorises the President to lay down the relevant details of such filing.

Filing by facsimile is a specific instance of a means of electronic communication. The President laid down details of filing by facsimile in the Decision of the President dated 12 July 2007, Special edition No. 3 of the OJ EPO 2007, A.3 (DPFF).

Articles 1 and 2 DPFF prescribe that European and international applications, respectively, may be filed by facsimile. Article 3 DPFF prescribes that other documents within the meaning of Rule 50 EPC may be filed by facsimile.

- 3.2 Article 5, paragraphs (1) to (3) DPFF read

"(1) The date of filing accorded to a European patent application or international patent application filed by facsimile shall be the date on which the application documents filed by facsimile were received in full at a filing office of the European Patent Office in Munich, The Hague or Berlin, provided these documents satisfy the requirements of Article 80 EPC and Rule 40 EPC or of Article 11(1) PCT.

(2) If the filing process extends beyond midnight and the documents received on the earlier day satisfy these requirements, the date of filing accorded to the application shall be the earlier day, provided the applicant so requests and at the same time renounces those parts of the application received after midnight.

(3) The date of receipt accorded to other documents filed by facsimile with the filing offices of the European Patent Office in Munich, The Hague and Berlin shall be the date on which they were received at the said filing offices."

It is apparent from the wording ("application documents" vs. "other documents" and "date of filing" vs. "date of receipt") and the structure of the Decision of the President that it is necessary to distinguish between application documents and other documents.

Article 78(1) and Rule 49(4) EPC specify that the application documents are the request, description, claims, drawings and abstract. Rule 50(3) EPC refers to documents filed after filing the application. Examples of such documents would be a notice of appeal, a debit order or a statement of grounds according to Rule 76(2) (c) EPC. In particular the statement of grounds on which the opposition is based within the meaning of Rule 76(2) (c) EPC is manifestly not an application document but a document within the meaning of Rule 50(3) EPC. It follows that it is also a document within the meaning of Article 3 DPF.

From this it follows that for the decision as to whether the opposition was filed before the lapse of

the opposition period, it is Article 5(3) DPFF which is applicable, and not Articles 5(1) and (2) DPFF. The latter deal with facsimile transmissions of application documents extending beyond midnight, but not with other documents.

The clear wording and structure of the DPFF does not leave any room for an analogous application of Article 5(2) DPFF to other documents as regards their date of receipt. The analogous application of a legal provision is normally only allowed where the legislator has left an unintentional regulatory gap. This is clearly not the case here, because the legislator has laid down a specifically applicable provision, namely Article 5(3) DPFF. There is no indication that the absence of any provision analogous to Article 5(2) DPFF for other documents was unintentional. Hence any analogous application of Article 5(2) DPFF to documents according to Rule 50(3) EPC would go against the intention of the legislator. Furthermore, the Board's interpretation shows both that this provision is to be applied to documents filed by facsimile extending beyond midnight, and how this provision is to be applied in the specific circumstances of this case. There is thus no unintentional gap and hence no room for the analogous application of a legal provision in a different context (diverging opinion: *Teschemacher in Singer/Stauder EPÜ*, 7. Auflage, Art 78, Rdn 18, Rdn 79).

- 3.3 In order to correctly apply Article 5(3) DPFF to the present case it is necessary to determine what is meant by the term "documents" in that Article. Furthermore, since in the present case, due to its finite duration, the facsimile reception started on an earlier day and extended beyond midnight to a later day, it has to be

determined what, under these circumstances, "the date on which they were received" means.

4. *The meaning of the term "document" in Article 5(3) DPF*

4.1 The respondent argues that the part of the statement according to Rule 76(2)(c) EPC received before midnight was a document within the meaning of Article 5(3) DPF.

4.2 Rule 50(1) EPC refers to documents making up the application. Rule 49(4) EPC specifies these documents to be request, description, claims, drawings and abstract.

Rule 50(3) EPC refers to "documents filed after filing the application". Instances of such documents would be for example letters of reply, notices of opposition or statements of grounds of appeal.

When speaking of documents, Rules 49(4) and 50 EPC thus relate to records of units of information.

Rules 49(3) and (4) EPC state that the documents making up the application shall be on A4 paper, and that each of the documents making up the application shall commence on a new sheet, respectively. Furthermore Rule 2(1) EPC provides for filing of documents by delivery by hand, by postal services or by means of electronic communication. According to the further decisions of the President authorised by this provision, filing of documents is possible using the EPO case management system (OJ EPO 2015, A27) or the EPO web-form filing service (OJ EPO 2014, A98). Depending on the means of filing the medium for recording the unit of information

will be different, e.g. sheets of paper or records in an electronic memory.

Even if a document is recorded on more than one sheet of paper, it can readily be recognised as being a unit of information mainly by virtue of the information content itself, but also by other indicators, such as formatting or page numbering or a signature at the end.

These considerations show, that the term "document" refers to the record of a unit of information and must be distinguished from the medium on which it is recorded.

4.3 This definition is consistent with Article 6 first sentence DPF, which prescribes that:

"Where a document filed by facsimile is illegible or incomplete, or where an attempt to file a document by facsimile has failed, the facsimile shall be deemed not to have been received."

Where the term "document" refers to a complete unit of recorded information, it is clear that a document is incomplete whenever the information is not completely recorded. If a record of only a part of a unit of information, for example only the information recorded on one out of several sheets of paper, were to be regarded as a document in its own right, the definition of what would be an incomplete document would be arbitrary.

4.4 If part of a document were to be regarded as a document in its own right, it could not be relied upon as a correct reproduction of the information its author intended to record. To give an example, a statement of

grounds on which the opposition is based could state on one page that the device claims 1 to 10 are opposed. On the last page it could state that the method claims 11 to 20 were not opposed. In this case, the true intention of the author determines the extent of opposition to be limited to the device claims. If the last page instead stated that the method claims were opposed for analogous reasons as the device claims, then the true intention would be to oppose the patent in its entirety. Thus, the true will of the author only becomes apparent when the entirety of the information is taken into account. Consequently, incomplete sub-parts of a document cannot be considered a document in their own right.

4.5 The definition of a document as a record of a unit of information is consistent with the standing practice of the EPO in applying Rule 50(3) EPC, according to which documents filed after filing the application shall be signed, with the exception of annexed documents. According to the standing practice only complete documents require a signature, rather than each individual sheet of paper on which they are recorded. The signature usually affirms that the contents recorded in the document correspond to what the author of the document intended to express, as explained in the preceding paragraph. The Board considers it evident that those sheets without signature pertaining to a document cannot be considered as "annexed documents" but rather belong to the document as such.

4.6 The respondent further argued that an incomplete document was nevertheless a document.

It is to be noted that in the present case only complete documents were received. The respondent

therefore argues in effect that a complete document should hypothetically be split into two incomplete parts (the one that reached the EPO before midnight and the remainder) but that the hypothetical earlier incomplete part of the document should not be subject to Article 6 DPFF, i.e. should not be considered incomplete.

To explain this, during the oral proceedings the respondent's representative presented to the Board a sheet of paper which had certain random areas, covering in total a large part of the page, which were left unprinted. They argued that Article 6 DPFF referred only to "such" documents. The respondent thus appears to argue that documents containing unintelligible parts or sheets which are partly unintelligible were to be considered incomplete. In contrast a subset of the sheets on which part of a document is recorded arriving before midnight and which had intelligible information recorded on it was to be considered to be a complete document.

Concerning the first part of the argument, the respondent failed to show a legal basis allowing a hypothetical splitting of a complete document into parts. Concerning the second part, the respondent's explanation as to why a hypothetical incomplete document should not be subject to Article 6 DPFF is based on an arbitrary definition of an incomplete document. The Board cannot see that it is relevant whether the information recorded on entire sheets was missing from a document or whether unconnected parts of it were not legible. Whenever a document does not contain the complete information the author wished to record, it should be considered as an incomplete document.

4.7 Finally, the respondent argued that, based on Article 125 EPC, a definition of the term "document" taken from §202 of the German Penal Code, the Strafgesetzbuch (StGB), should be adopted because the EPC provided no definition. This does not convince the Board for the following reasons.

Article 125 EPC states that in the absence of procedural provisions in the Convention, the EPO shall take into account the principles of procedural law generally recognised in the Contracting States.

Firstly, it is not apparent to the Board that there is an absence of a procedural provision, as required by Article 125 EPC because it is possible to deduce the meaning of the expression "document" from the various provisions of the EPC itself, as has been done in the preceding paragraphs.

Secondly, it is neither apparent, nor did the respondent argue, why a specific provision taken from the penal code of a single contracting state should be considered to be a "generally recognised principle of procedural law in the Contracting States".

Even if one were to apply the provisions of §202 of the German Penal Code, despite the above reservations, this would not be enlightening for the determination of the meaning of "document".

The beginning of the provision reads as follows:

"(1) Wer unbefugt
1. einen Brief oder ein anderes verschlossenes
Schriftstück, die nicht zu seiner Kenntnis bestimmt

sind, öffnet [...] wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft [...]"

which is officially translated by the German Ministry of Justice as:

"(1) Whosoever unlawfully
1. opens a sealed letter or another sealed document not intended for him; [...] shall be liable to imprisonment not exceeding one year or a fine [...]"

Thus this provision has a completely different context from the provisions regarding the receipt of documents in the EPC. In particular, the respondent did not explain how it followed from this provision that a subset of the pages of a facsimile or even individual pages had to be considered a document.

4.8 Applying these findings to the present case leads to the following intermediate conclusions:

The facsimile transmission in the present case contained four separate documents within the meaning given to the term "document" in the EPC and the Decision of the President:

- (a) pages 1 to 4 belonging to Form 2300 "Notice of opposition to a European patent",
- (b) page 5 belonging to Form 1010 "Payment of fees and expenses",
- (c) pages 6 to 17 belonging to a "Statement of Facts and Arguments concerning EP 2 392 194 B1", which is the statement according to Rule 76(2)(c) EPC, and
- (d) pages 18 and 19 belonging to Form 1038 "Acknowledgement of receipt".

Pieces of a unit of information recorded on an individual page of the facsimile cannot be considered as documents in their own right.

In particular, it can be recognised that pages 6 to 17 of the facsimile transmission carry the recorded information of a single document, namely the statement of the grounds on which the opposition is based within the meaning of Rule 76(2)(c) EPC. This becomes apparent from its information content, the heading ("Statement of Facts and Arguments concerning EP 2 392 194 B1"), the continuous page numbering (pages 1 to 12) and the section headed "Summary" on page 12, as well as the signature indicating the end of the document.

To summarise: The statement of the grounds on which the opposition is based, i.e. pages 6 to 17 of the facsimile transmission, represents a single document. The transmission of this document (c) extended beyond midnight, the information recorded on the last page reaching the EPO only after midnight.

5. *The date of receipt accorded to document (c) according to Article 5(3) DPF*

5.1 Article 5(3) DPF prescribes that:

"[t]he date of receipt accorded to other documents filed by facsimile [...] shall be the date on which they were received [...]."

5.2 If a document filed by facsimile is received on a single date, according a date of receipt poses no

difficulty. The date of receipt will simply be the same date as the date on which the document was received.

In the present case, however, different parts of document (c) were received on two consecutive dates. It therefore has to be decided which date of receipt is to be accorded to it.

- 5.3 Firstly, according to Article 5(3) DPFF dates of receipts are accorded to documents, not parts of documents. Secondly, since "the date of receipt" accorded to a document is used in the singular in Article 5(3) DPFF it follows that only one date of receipt is accorded to a document. A single document can therefore not be accorded more than one date of receipt.

It also follows from this that the Decision of the President does not provide a legal basis for according different dates of receipt to different parts of a document.

- 5.4 It is apparent from the wording of Article 5(3) DPFF that it is necessary to distinguish between the actual date on which a document reaches the EPO and the date of receipt it is accorded, because "according a document a date" means giving, granting or assigning a date to a document. The expression "according a date" therefore refers to an act performed by the EPO which is in principle different from the act of receiving a document. This becomes further apparent when looking at Article 6 DPFF, from which it follows that even though an incomplete document may have reached the EPO, such a document is not accorded any date of receipt because it is deemed not to have been received. Consequently, the date of receipt accorded to document (c) can be

different from the actual date on which parts of it reached the EPO.

- 5.5 This approach provides for a consistent treatment of the date of filing for application documents and the date of receipt for other documents. As regards according a date of filing to application documents filed by a facsimile transmission extending beyond midnight, Article 5(2) DPFF assures that the application will only have a single legally effective filing date, which is either the date when the application documents are received in full or the earlier date if the applicant so requests and renounces those parts received after midnight. Thus, Article 5 DPFF, paragraphs (2) and (3) ensure that a single legally effective date of filing or receipt is accorded to an application or a document, respectively.
- 5.6 It remains to be determined whether the earlier or the later date is the date on which document (c) was received and which must therefore be accorded as date of receipt within the meaning of Article 5(3) DPFF.
- 5.7 Since the Decision of the President does not explicitly define when a document is "received" ("eingegangen", "reçus") the wording of Article 5(3) DPFF "the date on which they were received at the filing offices" has to be interpreted in accordance with the general rules of interpretation as laid out in Article 31(1) of the Vienna Convention on the Law of Treaties, in particular with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty.
- 5.8 Regarding the ordinary meaning of the expression, every transmission has a start point and an end point.

For delivery by hand or filing by a postal service the term "receive" refers to the end point of the transmission. A letter which is handed to the postal service clearly has not yet been received according to the normal use of the language. The wording "received at the filing office", i.e. due to the mention of the destination of the transmission in Article 5(3) DPFF, makes it clear that the term "receive" refers to the end point of the transmission process also for facsimile transmissions. The distinction between start point and end point is also highlighted by Rule 133 EPC which prescribes that a "document received late at the European Patent Office shall be deemed to have been received in due time if it was delivered to a recognised postal service provider in due time before the expiry of the period [...]".

The distinction between the start point and the end point of a transmission process and the identification of the end point with the receipt of the document is thus consistent with the ordinary meaning as well as the wording used in the EPC.

- 5.9 Facsimile transmissions are special in that they do not have a clearly defined end "point". Rather parts of a transmitted document may reach the destination over a certain duration while other parts may not have been dispatched yet. This means, the reception is a process of finite duration, rather than a point in time and may overlap with the transmission process.

Article 5(3) DPFF uses the passive form in the past tense ("were received", "eingegangen sind", "ont été reçus"). The Board concludes from this choice of tense in the three language versions that a receipt process,

even if of finite duration, has to have finished before a document is received within the meaning of this provision.

- 5.10 As regards the interpretation in the light of the object and purpose (teleologic interpretation), filing a document serves the purpose of communicating its content to the recipient. This implies that a document can only be regarded as received when it has entered the recipient's domain of access in such a way that the recipient is able to gain knowledge of its content.

The Board considers it evident that the content of a document must also have been received completely, otherwise the content might be altered as explained above. It follows from this that when the reception is of finite duration, a document can only be received within the meaning of the EPC at the end of the reception process. These considerations are in line with the object and purpose of Article 6 DPF, which clarifies that the EPO does not deal with incomplete documents, but rather treats them as not having been received.

- 5.11 The Board is aware that Article 5(1) DPF uses the wording "were received in full" whereas Article 5(3) DPF uses the wording "were received" without the addendum "in full". Taking into account that the two provisions refer to different situations, the difference in wording cannot be taken to mean that documents within the meaning of Rule 50(3) EPC could be considered received before they have been received completely.

An application consists of a set of distinct application documents (request, description, claims,

drawings and abstract, see for example Rule 49(4) EPC). If the set of application documents is filed together in a facsimile extending beyond midnight, the wording of Article 5(1) DPFF ensures that each of the application documents is accorded the same filing date, namely the later date, which is the date on which the application documents were received in full. This is so even if some of the application documents may have been received completely on the earlier date, the only exception to this being defined in Article 5(2) DPFF. On the contrary, two documents according to Rule 50(3) EPC filed together in a single facsimile extending beyond midnight can be accorded different dates of receipt where the first document was received completely on the earlier date, and the second document on the later date.

The difference in wording between paragraphs (1) and (3) of Article 5 DFPP can thus not be interpreted as allowing a date of receipt to be accorded to parts of documents according Rule 50(3) EPC or allowing them to be considered to have been received before they have been received completely, but rather as only allowing different dates of receipts to be accorded to different (complete) documents according to Rule 50(3) EPC filed in a single facsimile.

5.12 It follows that if the facsimile transmission of a document extends beyond midnight, the date on which such a document is received within the meaning of Article 5(3) DPFF is the later of the two consecutive dates.

5.13 The Board concedes that a delay of only a few minutes is minimal and the consequence can be harsh, as the present case clearly illustrates. But such a

consequence is inherent whenever time limits have to be respected. If a document is delivered by hand or by postal service and reaches the EPO only minutes after midnight, such a document will receive the later date as the date of receipt. There is no apparent reason why facsimile transmissions should be treated differently in this respect.

The Board observes that even for a minimal delay the procedural law of the EPC foresees no discretion with regard to compliance with time limits, even if the delay is minimal. The only remedies provided if time limits are not met are further processing or re-establishment of rights.

6. *Application to the present case*

It follows from the foregoing analysis that:

- only a single date of receipt is accorded to a document,
- a date of receipt can only be accorded to the document as a whole, not to parts of documents, and
- if the transmission of a document extends beyond midnight, that document receives the date after midnight as the date of receipt.

Documents (a) and (b) of the facsimile referred to in point III. of the Summary of the Facts and Submissions were received completely and legibly on 18 December 2015.

Document (c), i.e. the statement of the grounds on which the opposition is based within the meaning of Rule 76(2)(c) EPC, was received completely and legibly on 19 December 2015, although parts of it, namely those recorded on pages 1 to 11 reached the EPO on 18 December 2015. Document (d) was received legibly and completely on 19 December 2015.

It follows that documents (a) and (b) are accorded 18 December 2015 as date of receipt.

Document (c), i.e. the statement of grounds on which the opposition is based and document (d) are accorded the 19 December 2015 as date of receipt.

7. *The alternative approach*

7.1 In decisions T 2061/12 and T 2317/13, both unpublished, an alternative approach was adopted. This approach foresees according the earlier date of receipt to the part of a document according to Rule 50(3) EPC reaching the EPO before midnight.

7.2 The present Board does not agree with this approach. Firstly, the Board notes that neither decision applies the correct applicable legal provision for "other documents", nor is any reasoning for this, or for an analogous application of Article 5(2) DPFF, provided. Secondly, the alternative approach amounts to hypothetically splitting a complete and legible document into two parts. Neither decision identifies a legal basis for such a hypothetical splitting. Thirdly, neither decision offers an explanation as to why the hypothetically split parts could be considered documents in their own right and why such documents

would not be subject to Article 6 DPFF, i.e. why they would not be deemed not to have been received. The detailed reasons for these conclusions are as follows.

7.3 The competent Board in decision T 2061/12, reasons 1.4.1 held that:

"[s]elon la jurisprudence il convient de différencier lors de la réception d'un téléfax les éléments de ce téléfax reçus avant minuit de ceux reçus après minuit. Une date de réception leur est en effet attribuée à chacun (T 683/06, point 6 des motifs et T 2133/10, deuxième paragraphe du point 1.2 des motifs [...])",

which this Board translates as

"according to case law it is appropriate to distinguish, regarding the receipt of a facsimile, between the elements of this facsimile received before midnight and those received after midnight. A date of receipt is in effect accorded to each one [...]"

Decision T 2061/12 does not contain an analysis of the Decision of the President justifying their approach. Instead it relies on the general reference to case law and two other decisions, which cannot support their conclusion.

The first of the cited decisions, T 683/06, dealt with a case where the facsimile transmission of application documents, and thus not documents within the meaning of Rule 50(3) EPC, extended beyond midnight. As explained above, a different legal provision, namely Article 5(2) DPFF, applies for that case. Decision T 2061/12 does

not offer any justification for an analogous application of Article 5(2) DPFF to notices of opposition. Therefore T 683/06 cannot support the approach of T 2061/12.

The second of the cited decisions, T 2133/10, dealt with a case where a notice of appeal in a non-official language and its translation, *viz.* documents within the meaning of Rule 50(3) EPC, were filed together by facsimile and were received at the EPO on a single date, see reasons 1.2.

The competent Board decided that according to Article 5(3) DPFF "documents filed by facsimile are accorded a single date of filing", see point 1.2 of the reasons, 2nd paragraph.

In point 1.2 of the reasons, 2nd paragraph, T 2133/10 elaborates:

"With one exception (a fax transmission extending beyond midnight), all documents received in a single fax transmission are thus considered to have been filed together on the same date and form part of a single filing."

The conclusion that the Board in T 2061/12 appears to have drawn from this passage is that the word "exception" referred to the principle that a single document is accorded a single date of receipt. The above sentence, however, is rather to be understood such that the word "exception" refers to the statement "all documents received in a single fax transmission are thus considered to have been filed together on the same date". Normally all documents according to Rule 50(3) EPC contained in a facsimile are received on the

same date. In this case, each of the documents is accorded the same date of receipt. In the exceptional case of a facsimile extending beyond midnight the documents received completely on the earlier date are accorded the earlier date of receipt, whereas the documents received on the later date receive the later date as date of receipt. The exception lies in the fact that different documents of the same facsimile transmission are accorded different dates of receipt, but not in that a single document is accorded more than one date of receipt.

Such an interpretation of the passage in question is consistent with other passages of T 2133/10 and with this Board's analysis whereas, the interpretation by the Board in T 2061/12 contradicts other passages of T 2133/10.

Therefore, neither of the cited decision supports the conclusions of the Board in T 2061/12.

- 7.4 The Board in T 2317/13 held that the part of a statement of grounds of appeal filed by facsimile arriving before midnight had been received in time. This means the Board accorded a date of receipt to the part of the statement of grounds of appeal that had arrived before midnight. They concluded that the appeal was thus admissible and that the remainder of the statement of grounds could be treated in the same manner as a late-filed submission. This amounts to the Board in T 2317/13 according a second date of receipt to the remainder of the statement of grounds of appeal, which arrived after midnight.

The Board in T 2317/13 did not indicate any legal basis for not applying Article 5(3) DPFF, or for

hypothetically splitting a complete document into two parts, or for not applying Article 6 DPF to the incomplete split parts.

The present Board therefore deviates from T 2317/13 for the same reasons as from T 2061/12.

7.5 For these reasons, the Board comes to the conclusion that this alternative approach has no legal basis.

8. *Conclusion*

It follows from the foregoing that the statement of grounds according to Rule 76(2)(c) EPC is accorded 19 December 2015 as date of receipt. Since the opposition period ended at the end of 18 December 2015, the opposition does not comply with the requirements of Article 99(1) EPC.

According to Rule 77(1) EPC, last sentence, this deficiency cannot be remedied after the lapse of the opposition period.

The Board, exercising the power within the competence of the Opposition Division according to Article 111(1) EPC, therefore rejects the opposition as inadmissible according to Rule 77(1) EPC.

It follows that the Board has to accede to the appellant's request and to reject the respondent's request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The opposition is rejected as inadmissible.

The Registrar:

The Chairman:



C. Eickhoff

R. Lord

Decision electronically authenticated