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**Datasheet for the decision  
of 24 July 2013**

**Case Number:** J 0009/13 - 3.1.01

**Application Number:** XXXXXXXX.X

**Publication Number:** -

**IPC:** -

**Language of the proceedings:** EN

**Title of invention:**

...

**Applicant:**

N.N.

**Headword:**

Appointment of a profesional representative

**Relevant legal provisions:**

EPC Art. 133(2), 134

EPC R. 152(6) by analogy

**Keyword:**

"Appointment of a professional representative"

"Appeal deemed not to have been filed"

**Decisions cited:**

G 0002/02, G 0003/02, T 1700/11

**Catchword:**

The fact that the Russian Federation is a party or a member of the "Partnership and Cooperation Agreement (PCA) between the EU countries and the Russian Federation" and the WTO/TRIPS Agreement, does not relieve a resident of the Russian Federation from the obligation pursuant to Article 133(2) EPC to be represented by a professional representative in proceedings before the European Patent Office.



Case Number: J 0009/13 - 3.1.01

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.01  
of 24 July 2013

**Appellant:** N.N.  
(Applicant)

**Decision under appeal:** Decision of the Receiving Section of the  
European Patent Office posted 14 December 2012  
refusing European patent application  
No. XXXXXXXX.X pursuant to Article 90(5) EPC.

**Composition of the Board:**

**Chairwoman:** B. Günzel  
**Members:** C.-P. Brandt  
W. Ungler

## **Summary of Facts and Submissions**

- I. The appeal of 13 February 2013 lies from the decision of the Receiving Section dated 14 December 2012 refusing European patent application No. XXXXXXXXX pursuant to Article 90(5) EPC, because the applicant - Mr. N.N., resident in Moscow - had not appointed a professional representative as required by Article 133(2) EPC. Both the notice of appeal and the statement setting out the grounds of appeal filed on 13 February 2013 were signed by the applicant and Mr. D. P. (designated as "Filer"). The appeal fee was also paid on 13 February 2013.
- II. The appellant requested the European Patent Office (EPO) to withdraw the decision requesting the appointment of a professional representative and to continue the examination proceedings.
- III. The appellant contended that Article 133(2) EPC did not apply to residents of the Russian Federation. The Russian Federation was a party to the "Partnership and Cooperation Agreement (PCA) between the EU countries and the Russian Federation" and the WTO/TRIPS Agreement. In view of these international agreements, as a resident of the Russian Federation the applicant was entitled to treatment no less favourable than that enjoyed by EU countries' nationals with regard to patenting under the EPC.
- IV. By communication of the Registrar of the Legal Board of Appeal of 11 March 2013 the appellant was requested to give notice of appointment of a professional representative (Article 133(2) EPC) within three months

of notification of that communication, otherwise the appeal would be deemed not to have been filed (Rule 152(6) EPC by analogy).

- V. By communication dated 10 May 2013 the Board summoned the appellant to oral proceedings on 24 July 2013. In an annex to the summons it set out its preliminary opinion that the international agreements relied on by the appellant were not pertinent in this case and did not relieve the appellant of its obligation to be represented by a professional representative pursuant to Articles 133(2) and 134 EPC in proceedings under the European Patent Convention (EPC), including the present appeal.

The Board also stated that, since Article 133(2) EPC is a mandatory provision also in appeal proceedings, the appeal would be deemed not to have been filed if it was not filed or would not be approved by a professional representative within the three-month time limit set in the Registrar's communication of 11 March 2013.

- VI. The appellant did not reply to the Board's communication nor was the European Patent Office notified of the appointment of a professional representative.
- VII. Oral proceedings before the Legal Board of Appeal were held on 24 July 2013. Neither the appellant nor any representative attended them.

## **Reasons for the Decision**

1. The Legal Board is competent to hear the case pursuant to Article 21(2) EPC.
2. The appellant did not attend the oral proceedings. According to Article 15(3) RPBA the Board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case. In the present case, the Board was therefore in a position to take a decision at the end of the oral proceedings.

### *Validity of the appeal*

3. Both the notice of appeal and the statement setting out the grounds of appeal were co-signed by Mr. D. P., who appears to have drafted these texts, but who has not been shown to be an authorised representative, and by Mr. N. N. himself, who is the applicant and appellant in this case.
4. Under these circumstances the existence of a valid appeal could only be recognised, if the appellant's contention that he is not obliged under Articles 133(2) and 134 EPC to be represented by a professional representative in proceedings under the EPC, is correct. Otherwise the appeal must be deemed not to have been filed, since it was neither filed nor approved by a professional representative within the three-month time limit set in the Registrar's communication of 11 March 2013. This time limit expired on 21 June 2013.

5. The appellant contended that, being a resident of the Russian Federation, Article 133(2) EPC did not apply and that he was therefore not obliged to appoint and be represented by a professional representative in the present grant proceedings. The basis for this contention is seen in the fact that the Russian Federation is a party to / member of the "Partnership and Cooperation Agreement (PCA) between the EU countries and the Russian Federation" and the WTO/TRIPS Agreement. In view of these international agreements the applicant as a resident of the Russian Federation was entitled to treatment not less favourable than that of the EU countries' nationals with regard to patenting under the EPC.
  
6. The PCA is an agreement between the EU countries and the Russian Federation. However, it is clear and beyond question that neither the European Patent Organisation nor the European Patent Office is part or member of the European Union. This has inter alia been confirmed by the Enlarged Board of Appeal (EBA) in decision R 1/10 of 22 February 2011 (point 2 of the reasons, not published in the OJ EPO). Therefore, neither the European Patent Organisation nor the European Patent Office are bound by the provisions of the PCA, neither of them is a "party" or "other party" pursuant to Article 98 of the PCA. For this reason alone, this international agreement cannot serve as a legal basis for according to the appellant the same treatment as that which is accorded to residents of EPC-countries with regard to proceedings established by the EPC.
  
7. The corresponding reasoning applies with respect to the WTO / TRIPS Agreement relied on by the appellant.

Neither the European Patent Organisation nor the European Patent Office is a member of the WTO / TRIPS Agreement. General multilateral treaties, such as the TRIPS Agreement, are a source of international law for the contracting parties and for no one else. This has been confirmed by the EBA in decision G 2/02 and G 3/02 (OJ EPO 2004, 483, point 5 of the reasons). The EBA explained that a treaty does not create either obligations or rights for a non-member state without its consent and this general rule was applicable *mutatis mutandis* to the case of an international organisation (like the European Patent Organisation) which is a third party to a treaty between States ..." (G 2/02 and G 3/02 OJ EPO 2004, 483 point 5.4 of the reasons).

8. The fact that many of the EPC contracting states are also members of the European Union and the TRIPS Agreement and that, like in the present case, EPC contracting states, which are also EU countries are often designated in European patent applications does not imply that the European Patent Organisation is also bound by the "PCA" and the TRIPS Agreement. The European Patent Organisation as an international organisation has an internal legal system of its own. In legal terms neither the legislation of the contracting states nor the international conventions signed by them are part of this autonomous EPC system. The EBA in G 2/02 and 3/02 (G 2/02 and G 3/02 OJ EPO 2004, 483 point 8.3 of the reasons) stated that the obligations deriving from the TRIPS Agreement do not bind the European Patent Organisation but only such contracting states of the EPC as are members of the WTO and the TRIPS Agreement. This ruling of the EBA in

respect of the TRIPS Agreement equally applies with regard to the "PCA" insofar as EU countries are also EPC contracting states.

9. Thus the appellant is obliged to be represented by a professional representative pursuant to Articles 133(2), 134 EPC in proceedings established by the EPC. Since Article 133(2) EPC is a mandatory provision also in appeal proceedings and since no appointment of a professional representative was notified to the European Patent Office within the three-month time limit set in the Registrar's communication of 11 March 2013, the present appeal is deemed not to have been filed (Rule 152(6) EPC by analogy).
  
10. The Board holds that in the present case a reasoned decision by the Board on the matter - as opposed to a mere unreasoned noting of loss of rights by the Registrar - is appropriate even without a request by the applicant for a decision under Rule 112(2) EPC (see T 1700/11 of 15 November 2012, point 4 of the Reasons). The Board's legal view that the appellant is obliged to appoint a professional representative underlay the communication issued by the Registrar (see IV above). Otherwise it could not and would not have been issued.

Since the heart of the appellant's claims and arguments was that he denied being obliged to appoint a professional representative, it would amount to a denial of justice to terminate the case by a formal action without giving any reasons as to why the appellant's view is not justified. Furthermore, even if the result is that the appeal is deemed not to have been filed a decision on the matter by the Board serves



to clarify the legal issue on which the appeal has been based.

11. As the appeal is deemed not to have been filed the appeal fee has been paid without legal basis and is therefore to be refunded.

## **Order**

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

1. The appeal is deemed not to have been filed.
2. Reimbursement of the appeal fee is ordered.

The Registrar:

The Chairwoman:

C. Eickhoff

B. Günzel