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**Datasheet for the decision  
of 18 January 2018**

**Case Number:** J 0011/17 - 3.1.01

**Application Number:** 13854046.3

**Publication Number:**

**IPC:** F02C7/143

**Language of the proceedings:** EN

**Title of invention:**

REDUCING THE LOAD CONSUMED BY GAS TURBINE COMPRESSOR AND  
MAXIMIZING TURBINE MASS FLOW

**Applicant:**

Al Mahmood, Fuad

**Headword:**

Re-establishment of rights

**Relevant legal provisions:**

EPC Art. 122(1), 121(1)  
EPC R. 136(1), 136(2), 135(1)

**Keyword:**

Re-establishment of rights (no) - request admissible (no)

**Decisions cited:**

**Catchword:**



**Juristische Beschwerdekammer**  
**Legal Board of Appeal**  
**Chambre de recours juridique**

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Case Number: J 0011/17 - 3.1.01

**D E C I S I O N**  
**of the Legal Board of Appeal 3.1.01**  
**of 18 January 2018**

**Appellant:** Al Mahmood, Fuad  
(Applicant) 206 Ahmad Bin Majed Ave.  
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Al Hidd (BH)

**Representative:** Antevski, Zlatko  
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**Decision under appeal:** **Decision of the Receiving Section of the European Patent Office posted on 6 March 2017 refusing the request for re-establishment of rights under Article 122 relating to European patent application No. 13854046.3.**

**Composition of the Board:**

**Chairwoman** C. Vallet  
**Members:** Y. Podbielski  
D. Prietzel-Funk

## **Summary of Facts and Submissions**

- I. The appeal is directed against the decision of the Receiving Section dated 6 March 2017, in which the applicant's request dated 12 May 2016 for re-establishment into the time limit for further processing of International application PCT/IB 2013/054 458 was refused. The Receiving Section decided that the request for re-establishment was inadmissible for failure to pay the fee for further processing within the prescribed time limit.
- II. The appellant lodged an appeal against this decision. The appellant requests that the decision of the Receiving Section be set aside and the request for re-establishment of rights be granted. No request for oral proceedings has been submitted.
- III. With its communication dated 15 November 2017 the Board informed the appellant of its preliminary opinion that the appeal was admissible but not allowable. The Board regarded the request for re-establishment of rights to be inadmissible. The appellant replied by letter dated 27 November 2017.
- IV. The appellant's first line of argument can be summarised as follows:
  - (a) The 31-month time limit for entry of the international application into the European phase expired on 8 June 2015. The time limit for requesting further processing expired on 24 September 2015.
  - (b) The removal of the cause of non-compliance with the latter time limit was the financial ability of the

applicant to pay the EPO fees which it did not have until the filing of the request for re-establishment of rights on 12 May 2016. The only condition which was necessary to be fulfilled for filing a valid request for re-establishment of rights was that the applicant pays the fee for the request for re-establishment of rights at the moment of filing that request. That he had done.

(c) There is a distinction between the two-month period and the one year period referred to in Rule 136(1), first sentence, EPC. The former relates to the removal of the cause of non-compliance and is thus "subjective"; and it concerns one procedural action only. The latter is "objective" and concerns the plurality of payment obligations (in the present case payment of the EPO fees) deriving from the procedural action. Hence, the fee for further processing has to be paid only within one year of the expiry of the unobserved time limit.

(d) The fee for further processing was paid on 8 September 2016 and thus prior to the expiry, on 24 September 2016, of the period which the appellant regards as the relevant one, namely the period of one year from the unobserved time limit. The request for re-establishment of rights was thus admissible.

V. The appellant's second line of argument can be summarised as follows: The EPO had informed the appellant in its communication dated 14 July 2015 concerning the appointment of a professional representative that if the applicant did not appoint a European professional representative within two months of notification of the communication, the application

would be refused. Of the three acts which the applicant had omitted (failure to pay the fees on entry into the European phase, non-appointment of a professional representative, failure to request further processing) it would be the earliest which would lead to a refusal of the application. If the EPO had correctly applied its own regulations it would have refused the application immediately after 24 September 2015 for failure to appoint a professional representative. There was thus no "space at all for bringing the EPO Decision dated 06.03.2017," and this decision of the Receiving Section should be set aside.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Rule 136(1), first sentence, EPC, provides that *"Any request for re-establishment of rights under Article 122, paragraph 1, shall be filed in writing within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit."*
3. The period of one year is not an alternative to the two-month period as construed by the appellant. Instead, the provision refers to "but at the latest". According to the rule the request has to be filed within two months of the removal of the cause of non-compliance, and no request can be filed more than one year after expiry of the unobserved time limit.
4. The omitted act under Rule 136(2) EPC was to request further processing. Pursuant to Rule 135(1) EPC, further processing is requested by paying the fee for

further processing; in addition, the omitted act under Rule 135(1) EPC (here payment of fees due on entry into the European phase) must be completed within the period of two months for making the request for re-establishment of rights (see Rule 136(2), second sentence, EPC). In the present case, the request for re-establishment was filed on 12 May 2016, but the fee for further processing was only paid on 8 September 2016. Thus, the requirement of Rule 136(2), second sentence, EPC is not fulfilled. The Receiving Section was thus correct in rejecting the request for re-establishment of rights as inadmissible.

5. The Board cannot see any basis for the appellant's argument that the one-year period referred to in Rule 136(1), first sentence, EPC relates, *inter alia*, to the payment of the fee for further processing and that this payment was thus made in due time. The ordinary meaning of Rule 136(1), first sentence, EPC in its context is clear, and is as set out in point 3 above.
6. The Board considers that this outcome is not changed by the appellant's arguments concerning its failure to appoint a professional representative. The appellant's failure to appoint a professional representative did not have the effect that the Receiving Section had to refrain from issuing a decision on the request for re-establishment of rights. Article 90(5) EPC provides that the European patent application "shall be refused" unless the deficiencies noted are remedied (or a different remedy is foreseen in the Convention). Thus, the act of refusing the application is a positive one by the EPO. This can be distinguished from the legal effect of deemed withdrawal, where no such act is required. As the EPO did not refuse the application at hand, but the application was deemed withdrawn due to

the non-payment of the required fees, the request for re-establishment into the period for further processing was as such permissible, and the Receiving Section was able to decide on it.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated