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**Datasheet for the decision
of 15 April 2021**

Case Number: J 0001/20 - 3.1.01

Application Number: 10826125.6

Publication Number: 2494199

IPC: F03D11/04, F03D1/00

Language of the proceedings: EN

Title of invention:

DEVICE FOR ESTABLISHING ADMITTANCE AND TRANSPORT OF CARGO TO
AND FROM A WIND TURBINE CONSTRUCTION ABOVE GROUND LEVEL

Applicant:

Liftra Aps

Headword:

Relevant legal provisions:

EPC Art. 121, 122, 133

EPC R. 112, 136

RPBA 2020 Art. 15(1)

Keyword:

"Request for re-establishment of rights"

"Removal of the cause of non-compliance - no consideration of the due-care criterion"

"Error of law: due care only relevant for allowability - Excuse of error of law (no)"

"Principle of proportionality: application if conditions of Article 122 EPC are not met - (no)"

Decisions cited:

J 0013/90, J 0022/92, J 0005/94, J 0025/96, J 0027/01,
J 0002/02, J 0011/03, J 0004/07, J 0006/07, J 0003/08,
J 0008/09, J 0021/10, J 0007/12, J 0013/13, J 0009/16,
J 0017/16, T 0166/87, T 0014/89, T 0315/90, T 0413/91,
T 0028/92, T 0469/93, T 0428/98, T 0812/04, T 1561/05,
T 1465/07, T 0493/08, T 1962/08, T 0592/11, T 1486/11,
T 1633/12, T 2251/12, T 0578/14, T 1022/14, T 1101/14,
T 1588/15, T 0198/16, T 0600/18, T 1214/20

Catchword:

1. The established approach of applying the due-care criterion to the question of removal of the cause of non-compliance under Rule 136 EPC leads to an additional admissibility requirement, by expanding the scope of the substantive due-care criterion, which has no basis in the EPC.
2. Removal of the cause of non-compliance is a question of fact which occurs on the date on which the person responsible for the application or patent actually became aware of an error (actual knowledge), rather than when this person ought to have noticed the error (presumption of knowledge).
3. Pursuant to Article 122(1) EPC, if failure to observe a time limit is due to an error of fact, the due-care criterion is to be assessed only in the context of the merits of a request for re-establishment of rights.
4. The same applies if failure to observe a time limit is based on an error of law. Thus, the due-care criterion is to be assessed only in the context of the merits of the request and removal of the cause of non-compliance occurs when the responsible person actually became aware of the error of law.



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Case Number: J 0001/20 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 15 April 2021

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Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on 14 August 2019
rejecting a request for re-establishment of
rights.**

Composition of the Board:

Chairman W. Sekretaruk
Members: A. Bacchin
B. Müller

Summary of Facts and Submissions

I. The appeal was filed by the applicant against the decision of the Receiving Section posted on 14 August 2019 and concerning European patent application No. 10 826 125.6. The Receiving Section decided to reject the request for re-establishment of rights filed on 1 June 2016 in relation to the time limit for requesting further processing to reply to a communication according to Rules 70(2) and 70a(2) EPC. As a consequence the European patent application was deemed to be withdrawn with effect from 22 January 2015.

The relevant facts underlying the impugned decision are summarised as follows:

II. By a communication under Rules 70(2) and 70a(2) EPC of 11 July 2014, the applicant, LIFTRA ApS was invited to indicate within a period of six months whether it wished to proceed further with the application and, if so, to comment on the results of the opinion accompanying the extended European search report issued on 25 June 2014. No reply was filed within the given period.

III. With a communication of loss of rights (Rule 112(1) EPC) dated 27 March 2015 the applicant was informed of the deemed withdrawal of the application due to lack of compliance with the invitation under Rules 70(2) and 70a(2) EPC. The possibility to request either a decision pursuant to Rule 112(2) EPC or further processing according to Article 121 EPC was indicated under the available means of redress.

- IV. As the applicant did not avail itself of any of those means of redress, the application was deemed to be withdrawn with effect from 22 January 2015.

- V. Consequently, the applicant was notified of the refund of the fee for examination (on 26 August 2015) and of the renewal fee for the sixth year (on 18 November 2015).

- VI. On 1 June 2016 the applicant filed a request for re-establishment of rights under Article 122 and Rule 136 EPC with regard to the time limit for requesting further processing to reply to the communication according to Rules 70(2) and 70a(2) EPC. The omitted act, i.e. the reply to the latter communication, was completed, the relevant facts and grounds on which the request was based were submitted and the outstanding fees were paid (fee for re-establishment, fee for further processing, fee for examination and renewal fee for the sixth year). As a precaution, oral proceedings before the Receiving Section were requested.

- VII. The Receiving Section issued four communications under Article 113 EPC.

Whereas in the first communication the request for re-establishment of rights was held inadmissible, in the second the Receiving Section deemed the request admissible, on account of the fact that the cause of non-compliance was actually removed when the applicant became aware that an error of law had occurred (reference was made to decisions T 0493/08 and J 0006/07). Nevertheless the request could not be granted as it was not established that due care had been taken. The subsequent communications essentially dealt with the merits of the request.

VIII. In the appealed decision of 14 August 2019 the Receiving Section refused the request for re-establishment of rights, because it considered it inadmissible, as it was filed outside the two-month time limit of Rule 136(1) EPC. The reasons for the refusal are summarised as follows:

- (a) The decisive factor for the removal of the cause of non-compliance with the period is the point in time when the person responsible for the application, in this case the applicant, taking all due care, noticed or ought to have noticed the error which led to the non-compliance with the period.
- (b) Had the applicant taken the required care, the cause of non-compliance ought to have been removed when it became aware of the loss of rights in November 2015. The applicant did not take all due care because, despite lacking the necessary knowledge of the EPC procedures, it did not choose a sufficiently competent professional representative and because it was subject to an error of law caused by the erroneous information that after receipt of the loss-of-rights communication no further means of redress was available. Acting further to an error of law is generally inconsistent with the taking of all due care.
- (c) "For the sake of completeness", the request was also regarded as non-allowable, because none of the persons responsible for the application had acted with due care. The request for oral proceedings had been refused as not expedient in the present case

and because the appellant had had extensive possibilities to present its case.

- IX. A notice of appeal was lodged on 24 October 2019, together with the payment of the appeal fee. The statement setting out the grounds of appeal was filed on 2 January 2020.

The appellant requested that the decision under appeal be set aside and that its rights into the time limit for filing further processing to reply to the communication under Rules 70(2) and 70a(2) EPC be re-established.

- X. The appellant's arguments on appeal, to the extent that they are relevant to the present decision, may be summarised as follows:

- (a) As to *admissibility* of the request, the appellant submitted that the person responsible for the application was the applicant itself, who despite being helped by a domestic patent agent, retained the final responsibility for the patent applications, by taking all decisions, signing and submitting all documents. Thus, differently from the case in which a professional representative had been appointed, the receipt of the loss-of-rights communication by the patent agent was not sufficient to remove the cause of non-compliance. Following the growth of the patent portfolio, the applicant further hired an employee to take care of the deadlines relating to patent cases. The patent agent reported the communication under Rules 70(2) and 70a(2) EPC of 11 July 2014 to said employee, but the latter did not pass it on to the applicant's management. The loss-of-rights

communication of 27 March 2015 was not reported to the applicant, apparently because the patent agent misinterpreted the previous lack of instructions as lack of interest in pursuing the case.

The deadline was missed because the loss-of-rights communication of 27 March 2015 was never reported by the patent agent to the applicant, so that the latter had no means of learning about the missed time limit (*error of fact*). When consulting the patent agent after the renewal fee had been reimbursed in November 2015, the appellant was erroneously informed that there was nothing to be done (*error of law*). The appellant who was not familiar with EPC procedures could not understand the meaning of the refund notice without having received the loss-of-rights communication. Consulting a second attorney was therefore not considered necessary. Thus the cause of non-compliance was removed only on 1 April 2016 when the newly appointed and current European professional representative became involved and reviewed the file history. The filing of the request for re-establishment of rights on 1 June 2016 was compliant with the time limit set by Rule 136 EPC.

There is no need under Rule 136 EPC to investigate whether the applicant applied the necessary due care, for instance by reviewing the file history earlier, or by consulting a second attorney, since this provision does not mention the due-care requirement.

- (b) As to *allowability* of the request, the appellant argued that the deemed withdrawal of the

application was due to an isolated mistake within an otherwise satisfactory and reliable monitoring system. The appellant, despite not being obliged to be represented, had entrusted a domestic patent agent who was not a European professional representative to support the applicant in patent-related tasks. The agent had been working in the patent field for more than 20 years and taken care of the appellant's patent portfolio for the preceding few years without any problems. The agent monitored the P.O. Box address to which the EPO's communications were sent and registered all deadlines in a paper calendar. The appellant additionally hired an employee with more than suitable educational qualifications (M.Sc. in Law), although it later discovered (in January 2015) that the person was not responsible enough for the task and was let go.

A patent portfolio of 11 families was significant for a start-up such as the appellant and a review of this case was carried out only when the new and current professional representative became involved.

The present situation amounted to exceptional circumstances, similar to those of internal reorganisations and removals (citing T 0469/93, T 0014/89 and J 0013/90), and the principle of proportionality should justify the request for re-establishment (citing J 0022/92).

XI. The appellant was summoned to oral proceedings before the Board on 24 July 2020. With a communication according to Article 15(1) RPBA 2020, annexed to the summons, the Board set out its provisional opinion that

admissibility of the request for re-establishment of rights depended on the question of whether the person responsible for the application was the patent agent or the appellant. The request was likely to be admissible if the responsible person were found to be the latter. In any case the request did not appear allowable since it had not been demonstrated that the patent agent and the appellant applied the necessary due care.

- XII. No further submissions were filed by the appellant in response to the Board's communication under Article 15(1) RPBA 2020.
- XIII. Oral proceedings, originally scheduled for 13 October 2020, had to be postponed due to the pandemic-related travel restrictions and the appellant's intention to attend in person. Following a new summons, with the appellant's agreement, oral proceedings took place on 15 April 2021 by means of a videoconference. At the end of the oral proceedings the Chairman announced the Board's decision.

Reasons for the Decision

Admissibility of the request for re-establishment

1. A request for re-establishment of rights is subject to the admissibility requirements established by Rule 136 EPC. The request must be filed: (i) in writing; (ii) 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; (iii)

the request must state the grounds on which it is based and the facts on which it relies; (iv) the omitted act must be completed; and (v) the request must not relate to a period under Rule 136(3) EPC. The request is not deemed to have been filed until the prescribed fee has been paid.

1.1 Whereas compliance with the requirements under (i) and under (iii) to (v) is not in dispute, the appellant contested the Receiving Section's findings that the requirement under (ii) was not fulfilled. In the appealed decision (see point VIII. of the Summary of Facts and Submissions) the Receiving Section held that the cause of non-compliance was removed upon receipt of the refund notice for the sixth renewal fee in November 2015. This was when the applicant ought to have noticed the error if it had taken all due care. The request for re-establishment having been filed on 1 June 2016, i.e. outside the time limit set by Rule 136 EPC, the request was regarded inadmissible.

1.2 In the Board's view, to correctly assess admissibility, it must first be established **(a)** who was the person responsible for the application and **(b)** when this person was actually made aware of the cause of non-compliance.

(a) Removal of the cause of non-compliance - responsible person

2. According to the case law of the Boards of Appeal, the cause of non-compliance with the missed time limit is removed on the date on which the person responsible for the application is made aware or ought to have become aware of the fact that a time limit has not been observed.

Removal of the cause of non-compliance is a question of fact, the answer to which thus depends on the relevant person actually becoming aware that a time limit has not been observed, e.g. actual receipt of a communication under Rule 112(1) EPC, rather than on a legal fiction of awareness, e.g. deemed notification of the communication pursuant to Rule 126(2) EPC (see e.g. T 0428/98, reasons 2.2 and T 2251/12, reasons 10).

- 2.1 Following this approach, the Board considers that in the context of re-establishment, which person is responsible for the application also depends on the factual circumstances of the case.
- 2.2 Under the EPC there is no obligation for parties having their residence or principal place of business in a Contracting State to be represented in proceedings before the EPO (Article 133(1) and (2) EPC). If a European professional representative - qualified in accordance with Article 134 EPC - is appointed, the party acts "through" them in all proceedings established by the Convention (Article 133(2) EPC) and notifications are made to them (Rule 130(1) EPC). This implies that removal of the cause of non-compliance occurs in principle when the authorised representative becomes aware of the loss of rights (see T 0812/04, reasons 2.1.1 and T 1101/14, reasons 2 and 2.4).
- 2.3 However, an applicant who is not obliged to be represented before the EPO and chooses not to be, remains responsible for the application *vis-à-vis* the EPO. It is thus the applicant's actual knowledge which is relevant to the question of removal of the cause of non-compliance.

2.4 In the present case, both the Receiving Section and the appellant have concluded that the responsible person was the applicant itself, who was neither acting through a representative nor required to be represented, and that its knowledge of the missed time limit had to be taken into account. The Board sees no reason to deviate from this conclusion.

2.5 The applicant remained the responsible person for the application *vis-à-vis* the EPO despite the applicant's arrangement to be supported by a domestic agent and to provide a P.O. Box monitored by the latter in respect of notifications from the EPO. As it was also confirmed during the oral proceedings before the Board, decisions were taken and submissions filed by the applicant's management, so that their knowledge was relevant for the purposes of Rule 136 EPC.

2.6 The next step is to establish when the applicant was actually made aware of the cause of non-compliance.

(b) Removal of the cause of non-compliance - whether the due-care requirement is relevant

3. In the appealed decision the Receiving Section followed the approach developed in a substantial body of case law of the Boards of Appeal, according to which, for determining admissibility of a request for re-establishment, the relevant date is that on which the responsible person *ought to have noticed* the error, had all due care been taken (see "Case Law of the Boards of Appeal of the European Patent Office", 9th edition 2019, hereinafter referred to as "Case Law", III.E. 4.1.1 a)).

The Receiving Section further found that the appellant's lack of knowledge as to the possibility of applying for re-establishment of rights was due to an erroneous interpretation of the law, which was incompatible with due care (point 18 of the appealed decision).

- 3.1 The appellant objected to this approach, arguing that the cause of non-compliance consisted in the patent agent's failure to report to the applicant the communication under Rule 112(1) EPC, due to unknown reasons. Since the previous communication under Rules 70(2) and 70a(2) EPC had also not been reported to the applicant's management, it was unaware that due dates had been missed and had no reason to believe that an error had been committed. Likewise, removal of the cause of non-compliance did not occur upon receipt of the refund for the sixth renewal fee in November 2015 because: (i) without having knowledge of the loss-of-rights communication, the applicant was not able to understand the meaning of the refund; and (ii) despite having consulted the local patent agent at that point in time, it received the erroneous information that no means of redress was available.

As a consequence, removal occurred on 1 April 2016 when the applicant was informed for the first time by the current professional representative about the loss-of-rights communication, which appeared in the file history, and of the possibility to file a request for re-establishment of rights.

Rule 136(1) EPC does not prescribe that, in respect of the date of removal of the cause of non-compliance with the missed period, investigations would be necessary to

determine whether the applicant, applying all due care required by the circumstances, ought to have noticed the error on a date earlier than it actually did and that that latter date ought to be considered the date of removal. Instead, the due-care criterion is only mentioned in Article 122(1) EPC, which sets out the substantive requirements for a request for re-establishment of rights.

- 3.2 The Board has duly taken into account the appellant's arguments and its questioning whether the established jurisprudence (in the following referred to as "ought to have") followed by the appealed decision has a proper legal basis. The Board has come to the conclusion that this approach should rather be abandoned and that considerations of due care should be restricted to the merits of the request.

Analysis of the established jurisprudence ("ought to have")

- 3.3 The line of jurisprudence requiring that "removal" under Rule 136 EPC is assessed on account of the due care applied by the responsible person, essentially relies on the consideration that **due care is a permanent obligation**, which must be exercised not only at the moment when the time limit has not been observed, but also subsequently (see e.g. T 0315/90, point VIII and reasons 6, T 1561/05, reasons 2.1.3).

Removal of the cause of non-compliance thus follows from a *presumption of knowledge* (the date when the responsible person *ought to have* discovered the error), rather than from *actual knowledge* (when this person had *actually* acquired knowledge of the error).

3.4 The Board doubts that this approach correctly reflects the requirements for re-establishment of rights laid down in Article 122 and Rule 136 EPC.

Whereas due care may be regarded as a permanent obligation of a party to the proceedings in general, no legal basis is apparent for applying the due-care requirement in assessing the admissibility of a request for re-establishment.

Some of the concerns discussed below were already addressed by the Board in decision T 0198/16. Without having to take a final decision on the matter, it questioned the application of the due-care criterion as an additional, unwritten admissibility requirement.

This Board is only aware of one other decision, in which the responsible Technical Board applied such an approach to admissibility by limiting the application of the due-care criterion to the merits of the request and accepting removal upon actual knowledge of the appointed representative (see e.g. T 1101/14, reasons 2.4 and 6.5).

3.5 First, the established approach is not based on the wording of the EPC.

The admissibility criteria in accordance with Rule 136 EPC (see point 1. above) are of a purely formal nature and are clearly distinct from the substantive requirements established by Article 122(1) EPC for allowability: *"An applicant for or proprietor of a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent*

Office shall have his rights re-established upon request if...".

Rule 136 EPC does not contain any direct reference to "due care" as such, nor as a requirement for filing the request for re-establishment.

This conclusion is not called into question by the fact that, under the EPC 1973, the requirements for allowability and admissibility of *restitutio in integrum* were both embodied in Article 122(1) and (2) EPC, respectively, since the wording of the provisions and their distinct content remained unchanged in the corresponding current legal provisions, i.e. Article 122(1) EPC and Rule 136 EPC, respectively.

A preliminary conclusion based on the wording of these provisions is thus that the established approach in practice leads to an additional admissibility requirement, by expanding the scope of the substantive due-care criterion in a way which has no basis in the EPC.

- 3.6 Second, as a consequence of this approach, due care is assessed in the context of the circumstances related to the **removal** of the cause of non-compliance (in this case when the refund of the annual fee was notified or later when the current professional representative was appointed), rather than of those concerning the **missed time limit** (in the present case the time limit for requesting further processing for replying to the communication under Rules 70(2) and 70a(2) EPC).

However, Article 122 EPC refers to due care only in respect of missing a time limit. The removal of the cause of non-compliance is distinct from missing a time

limit vis-à-vis the EPO. This is also reflected in Rule 136(1) EPC: "*...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*".

Accordingly, the reasons for missing a time limit causing a loss of rights are in principle different from the reasons for discovering that an error was committed (see also T 0198/16, reasons 3.2.1.(c) .

- 3.6.1 This distinction was identified in some previous decisions of the Boards of Appeal.

In T 1588/15 the Board noted that the established case law ("ought to have") considers due care only in the limited context of determining when the time limit of Rule 136 EPC started and that "*It should not be confused with the due care that must be demonstrated in the observance of the time limit for paying the renewal fee for the request to be successful on its merits*" (reasons 10.9).

Similarly, in J 0021/10 the Board distinguished the relevant question under Rule 136 EPC, i.e. whether the representative should have discovered the error, from the question, properly pertaining to the merits of the request for re-establishment, of whether all due care was exercised in closing the relevant file (with the annotation "erledigt" ("done")) and an isolated mistake was committed by a well-trained and supervised employee (reasons 6).

- 3.6.2 However, despite having acknowledged this distinction, the boards, in those cases, ultimately **applied** to the question of removal (in order to establish

admissibility) **the principles on due care developed** in the jurisprudence **in the context of the merits.**

Consequently, when determining the date of removal, a lack of due care was found with respect to obligations (such as relating to proper delegation of tasks to assistants, their training and supervision, accurate organisation and monitoring of time limits within the law firm), which actually pertain to the merits of the request.

- 3.6.3 By the same token, the Board in case T 0315/90, relying on the assumption that due care is a permanent obligation, decided that the appellant's attorney should have noticed the late filing of the grounds of appeal prepared by the external collaborator upon signing them, rather than at the (later) date of receipt of the loss-of-rights communication, had he consulted the file (reasons 10). In reaching this conclusion, the Board considered obligations relating to the proper delegation of tasks to an assistant, when these actually belong to the assessment of the merits of the request, i.e. the reasons why the failure to comply with the time limit could or could not have been avoided ("*...If he delegates such tasks to an employee, and if due to this fact an error is committed which would not otherwise have occurred, the representative cannot establish that he took all due care required by the circumstances...*", see reasons 8).

A similar approach was applied in T 1486/11 where the Board considered that the late payment of the appeal fee (paid with the filing of the statement of grounds of appeal) should have been noticed upon payment of the fee, rather than with the later receipt of the loss-of-rights communication.

By analogy, in J 0021/10 (cited above under point 3.6.1, last paragraph), the Board eventually assessed the question of whether the appointed representative should have noticed the error before expiry of the missed time limit (this being the time limit for requesting further processing with regard to the period for replying to the communication under Rule 71(3) EPC, which had been set by the loss-of-rights communication) on account of the due care required for organising workflows within a law firm, particularly with regard to closing a file ("erledigt" ("done")).

In all these cases it is difficult to see which separate facts and responsibilities would still have to be taken into account in a subsequent substantive analysis of due care if the request for re-establishment of rights was found to be admissible.

- 3.7 Based on this analysis the Legal Board considers that the established approach does not lead to a correct determination of the date of removal.

Instead the Legal Board deems that, for the purposes of establishing the admissibility of a request for re-establishment of rights under Rule 136 EPC, the **legal** due-care criterion must not be relied on when determining "removal".

- 3.7.1 In the Board's view, removal of the cause of non-compliance with the period is a purely **factual** criterion. Removal occurs on the date on which the person responsible for the application/patent (normally the authorised representative) becomes aware of an error. If a loss-of-rights communication is served there is **(i)** a presumption that removal occurs on the

date of receipt of such communication and **(ii)** an obligation for the recipient not to ignore it, and to take action. This presumption is, however, rebuttable, in the sense that it is valid unless, due to exceptional circumstances, the cause for non-compliance persisted. Taking into account this exception and although it substitutes real facts, such a presumption is not unfair to the parties (see also T 1588/15, reasons 11.1).

- 3.7.2 On the contrary, involving due care considerations in the context of removal may lead to unacceptable results as it creates a presumption of knowledge, which is almost impossible to rebut. Such a result would be contrary to the principle that removal is a question of fact.

In the present case, as a matter of fact, when the renewal fee was refunded (in November 2015) the applicant was not aware of the error because the loss-of-rights communication was never reported to it. The presumption that the applicant should have become aware of the error at that point in time, irrespective of the fact that it was not familiar with the EPC and had not appointed a professional representative, can *de facto* not be refuted in the context of admissibility. Indeed, these obligations, including adequate knowledge of the EPC, pertain to the merits of re-establishment (see point 3.10 below).

These considerations speak clearly in favour of accepting that removal is about *actual knowledge*, rather than about a *presumption of knowledge*.

- 3.7.3 A significant argument for preferring the presumption-of-knowledge criterion to that of actual knowledge was

that, if removal of the cause of non-compliance were exclusively assessed on account of the actual knowledge of the responsible person, it would be in the hands of a party to determine itself the date of removal, despite its carelessness, or on the basis of irrefutable allegations. This would extend the scope of Article 122 EPC, which limits legal certainty only under strict conditions in order to deem a missed time limit to have been met (cf. T 1561/05, reasons 2.1.4).

- 3.7.4 The Board nevertheless does not see the risk that, by abandoning the application of due care for the determination of the date of removal, a party would be in a position to arbitrarily determine this date. Indeed, it remains the burden of a party to demonstrate with appropriate facts and evidence that, due to special circumstances, notification of a loss-of-rights communication was not sufficient to remove the cause of non-compliance. On the other hand, if the responsible person, despite having knowledge of the missed time limit, did not take action (contrary to condition **(ii)** cited above in point 3.7.1), the two-month period under Rule 136 EPC would start running. This is the approach taken by the established jurisprudence in cases of a "deliberate choice not to act" (see T 0413/91, Catchwords). The same applies where the lack of information was the consequence of the applicant's deliberate decision not to take notice of the loss-of-rights communication (see T 0840/94, reasons 3 and 6 and J 0027/01, reasons 3.3.3). Considering that removal took place earlier than on the actual date of receipt of the loss-of-rights communication can only be based on actual knowledge, rather than on a presumption of knowledge.

An omission, which is currently imputed under the presumption of knowledge through due care, would fall under the analysis of the merits of a request for re-establishment and would hardly fulfil the due-care criterion. Taking one of the cases analysed above, in which the presumption of removal upon signature of the late statement of grounds of appeal determined the start of the time limit under Rule 136 EPC (see e.g. T 0315/90 and T 1561/05), the representative's (lack of) due care would anyway be assessed in the context of the merits when dealing with the required monitoring mechanism of the delegated tasks (in those cases, calculation of time limits), which is expected to also cover the signature of the relevant document (statement of grounds of appeal). Thus, even accepting that removal occurred when the representative acquired actual knowledge, i.e. upon notification of the loss-of-rights communication, the due care required in the delegation of tasks and the establishment of a proper monitoring mechanism would not have been considered fulfilled when evaluating the substance of the request.

Conclusions

- 3.8 In summary, the established approach of applying the due-care criterion to the question of removal of the cause of non-compliance under Rule 136 EPC leads to an additional admissibility requirement, by expanding the scope of the due-care criterion from its application to the merits of a request for re-establishment under Article 122(1) EPC to the admissibility criterion of removal. There is no basis for this in the EPC. Applying to the question of removal the principles developed in the jurisprudence in the context of the merits of re-establishment, may result in an improper

determination of the removal date if it creates a presumption of knowledge which is almost impossible to rebut. The date of removal of the cause of non-compliance is a question of fact and the legal requirement of due care should only be assessed in the context of the merits of a request for re-establishment.

In the present case, the Board does not need to decide if the legal criterion of due care should also be used in determining whether there was "inability to observe a time limit". This issue, which had also been questioned by the Board in T 0198/16 (cf. reasons 3.2.1 (c)), is not relevant for the present decision. In fact, even arguing that due care would have required the appellant to recognise that the application was deemed to be withdrawn in November 2015, the appellant was already "unable to observe" the time limit for filing the request for further processing, given that the time limit had expired in April 2015.

c) Removal of the cause of non-compliance - present case

3.9 Having regard to the present case, the above findings mean that the removal of the cause of non-compliance occurred neither upon receipt of the loss-of-rights communication by the patent agent, nor upon notification of the refund of the annual fee. Due to the lack of transmission of the relevant communication and the erroneous information about the lack of legal remedies (error of law), the cause of non-compliance objectively persisted until the error of law was corrected. There was nothing deliberate in the appellant's behaviour which would have led to the

missing of the time limit in the present case. Whether the appellant should have appointed a professional representative or whether it should have known that file inspection was possible are all circumstances to be assessed under the due-care requirement of Article 122 EPC and are not specific to the question of removal of the cause of non-compliance.

The same holds true with regard to the error of law consisting in the lack of knowledge of the existence of the possibility of requesting re-establishment of rights pursuant to Article 122(1) EPC in case of a missed time limit for acting in response to a loss-of-rights communication.

- 3.10 The Legal Board concurs with the opinion expressed in T 0493/08 (reasons 3.1.1) and also endorsed by other decisions (J 0006/07, reasons 2.4, J 0008/09, reasons 4.2, J 0013/13, reasons 3.3 and T 0600/18, reasons 2.6): if failure to observe a time limit is based on an error of law, the due-care requirement is only assessed in the context of the merits of the request (see T 493/08, reasons 3.1.1.). Thus, the removal of the cause of non-compliance occurs when the applicant actually became aware of the error of law, rather than when the applicant should have discovered the error.

It is therefore compliant with a proper reading of Article 122 and Rule 136 EPC, as outlined above (points 3.7 to 3.7.4), to consider an error of law only when assessing the merits of a request. As correctly held by the Receiving Section, an error of law is inconsistent with and rather the antithesis of due care.

- 3.11 In view of the above, the Board is satisfied that the responsible person, i.e. the applicant, was not aware

until 1 April 2016 of the fact that the time limit for requesting further processing with regard to the time limit for replying to the communication under Rules 70(2) and 70a(2) EPC had not been observed. The request for re-establishment having been filed on 1 June 2016, the two-month period from the removal of the cause of non-compliance specified in Rule 136(1) EPC has been complied with.

The request for re-establishment is thus admissible.

Allowability of the request for re-establishment

4. Article 122 EPC is intended to ensure that in appropriate cases the loss of substantive rights does not result from either exceptional circumstances (see Case Law, III.E.5.3), or from an isolated procedural mistake within a normally satisfactory monitoring system (see Case Law, III.E.5.4).
- 4.1 In the present case the time limit which was missed was for requesting further processing due to the missed time limit for replying to the communication under Rules 70(2) and 70a(2) EPC. Due care to be assessed in this case thus relates to the time limit for requesting further processing.
- 4.2 Having regard to the monitoring system in place, the following workflow was described by the appellant: EPO notifications were received at the P.O. Box address monitored by the patent agent and forwarded to the appellant with a comment. The appellant's relevant employee was responsible for passing the so-commented communications to the applicant's management, and for

monitoring time limits. Whereas the communication under Rules 70(2) and 70a(2) EPC was forwarded by the patent agent to the applicant - albeit not passed on to the management by the appellant's relevant employee - the loss-of-rights communication was not even forwarded by the patent agent, due to unknown reasons. When the applicant's management found out that the appellant's relevant employee was not doing their job properly, management itself took over the handling of documents and the employee was let go with a three-month severance period (ending on 30 April 2015).

Due care on the part of the patent agent

5. Concerning the due care of the patent agent, it is observed as a preliminary matter that according to established case law of the Boards of Appeal if a domestic patent agent is appointed, who is not also a professional representative pursuant to Article 133 EPC, that agent also has to observe all due care and if they do not act accordingly this failure will be imputed to the applicant. Indeed, the monitoring of specific time limits does not depend on knowledge of EPC law (see J 0025/96, reasons 3.2; J 0004/07, reasons 4.2; J 0003/08, reasons 8; J 0009/16, reasons 5). However, the appellant has provided very little details in this regard. During the oral proceedings before the Board it was clarified that the patent agent was keeping a paper calendar, in which deadlines were annotated and monitored. For unclear reasons, when the current professional representative became involved and received all files from the patent agent (who in the meantime had retired), no deadline was found for this particular file, so that it was not possible to identify what the error was. Possibly, the agent had

got rid of the EP folder after having received the loss-of-rights communication, wrongly assuming that there was nothing more to do. However, the appellant provided no information as to whether special arrangements were in place between the appellant and the patent agent, particularly for the case of application abandonment. It has not been established whether the agent investigated the true intention of his client (e.g. at least by sending reminders after the communication under Rules 70(2) and 70a(2) EPC had remained unanswered) and whether he autonomously decided not to forward the loss-of-rights communication, or whether he did so in accordance with the appellant's instructions. Even accepting the appellant's arguments that the patent agent was not very experienced and that the present one was one of the first applications the appellant had filed, the Board finds that not submitting to the appellant such an important communication, which explicitly states that the application "is deemed to be withdrawn", to the appellant is not compliant with the due-care requirement, especially where the previous communication had remained unanswered.

Due care on the part of the appellant

6. Concerning the appellant's own responsibility, independent of the patent agent, the appellant submitted that it was a small, growing company, not very familiar with patent matters. Since the communication under Rules 70(2) and 70a(2) EPC, and later also the loss-of-rights communication, were not reported to it, there was no reason for management to believe that there was a flaw in the system of monitoring time limits. When the appellant discovered

the loss of rights, it was given the erroneous information that no legal remedy was available.

- 6.1 The Board does not dispute that a lower standard of care applies to a small applicant (see J 0006/07, reasons 2.5; J 0002/02, reasons 8) and that, for the same reason, an established cross-checking mechanism is considered superfluous (see T 0166/87, reasons 2; J 0011/03, reasons 7). It is also accepted that representation through a professional representative was not mandatory in this case (Article 133(1) EPC). However, the appellant has not put forward any convincing argument or evidence, e.g. a declaration from its management or the patent agent, or other equivalent evidence, explaining why at least two official EPO communications were not reported to the appellant's management despite an allegedly functioning monitoring system. To the contrary, the Board finds it incompatible with diligent conduct not to contact the appointed patent agent when the appellant discovered that the relevant employee was not doing the job properly, in the period between January and April 2015. At that time the loss-of-rights communication must have been received by the patent agent and even the period for requesting further processing was still running (i.e. until 6 June 2015). The Board also observes that, even accepting the appellant's argument that an unexperienced and small, growing company had no capacity to review the file history of 11 patent families, consulting the patent agent would have exempted the appellant from reviewing the case on its own. It would also not have required familiarity with the EPC, since further processing was a means of redress specifically mentioned in the bottom part of the loss-of-rights communication.

Error of law

7. With regard to the error of law, i.e. the lack of knowledge of the existence of the possibility of requesting re-establishment of right pursuant to Article 122(1) EPC in case of a missed time limit for acting in response to a loss-of-rights communication, the Board agrees with the case law considering that an error of law is not a ground for re-establishment of rights, irrespective of the legal qualification of the responsible person. Even when a lesser degree of due care may be expected, as for instance from an individual or unrepresented applicant (see for instance J 0005/94, Headnote I), ignorance of the law cannot be accepted as an excuse (see J 0005/94, reasons 3.1; J 0027/01, reasons 3.3.1; J 0002/02, reasons 8; J 0006/07, reasons 2.4; J 0008/09, reasons 4.2; J 0007/12, reasons 5; T 0578/14, reasons 8.3.2; J 0017/16, reasons 2.2). An applicant should familiarise itself with the relevant EPC provisions, or seek advice from a sufficiently competent professional representative (J 0023/87, reasons 4; J 0006/07, reasons 2.4 and 2.5; T 1465/07, reasons 13 and 15; J 0008/09, reasons 4.2).

7.1 As an exception to these principles, a misinterpretation of the law can be excused only under strict criteria, if genuine doubts and differences of opinion existed as to the meaning of the relevant legal provisions (T 0028/92, reasons 5; T 0493/08, reasons 6.1; J 0013/13 point 3.3). However the presence of these conditions has neither been relied on, nor would such doubts or differences exist in this case, since the error of law pertains to the very availability of the remedy of re-establishment of

rights, governed by Article 122 and Rule 136 EPC. The lack of knowledge of the appropriate legal remedy is generally not excusable.

Exceptional circumstances: internal reorganisation

8. The appellant has argued that the present case involved exceptional circumstances, namely internal reorganisation and removals due to the relevant employee's unsatisfactory performance. The Board does not dispute that the removal of the relevant employee might have caused some disruptions. However, these events are not comparable to a complex transfer of company ownership, internal reorganisations or company takeovers, as in the cases cited by the appellant (T 0469/93, T 0014/89 and J 0013/90). Indeed, the Board cannot judge which substantial impact within the appellant company the removal of the appellant's relevant employee could have had on the system of monitoring time limits established by the patent agent. Except for the vague explanation that following removal of the in-house employee there was some confusion within the company and on the part of the patent agent, no information or evidence was provided concerning a clear definition of responsibilities within the appellant or whether any safeguarding measures were adopted, apart from the appellant's management taking over of the handling of documents during the employee's severance period and after their departure. Evidence is also lacking as to whether the patent agent was informed about the removal of the in-house employee and whether he inquired what the appellant's intention in respect of the application in issue was. This would have been expected from a diligent attorney.

Principle of proportionality

9. The appellant also relied on the principle of proportionality. It referred to decision J 0022/92 to argue that the loss of the patent application due to a minor procedural mistake was rather severe. In the present case, the "minor" procedural mistake was that the patent agent did not forward the notice of loss of rights of 27 March 2015 to the appellant.

9.1 In this respect the Legal Board concurs with the recent jurisprudence holding that the principle of proportionality prohibits an excessive interpretation of the conditions for granting re-establishment of rights - in particular the requirement of due care - which would impose means that are not appropriate, necessary or are disproportionate in relation to the aim sought to be achieved, in this case, by the period specified according to Rules 70(2) and 70a(2) EPC in conjunction with Article 122 EPC. In particular the principle of proportionality *"must always be applied in connection with the interpretation of ... [the] conditions, which determine whether or not an application for re-establishment can be allowed."* (cf. T 1465/07, Headnote 2). It would not be permissible to apply the principle of proportionality even though the conditions of Article 122 EPC are not met and thus to the effect that application of Article 122 EPC was rendered uncertain (T 1465/07, reasons 15, see also T 1962/08, reasons 5.2.4b)ii, T 0592/11, reasons 5.2.4, T 1633/12, reasons 19 and 20 and T 0578/14, reasons 8.4, T 1022/14, reasons 12 and T 1214/20, reasons 12).

9.2 In view of these considerations the Legal Board cannot agree with the decision cited by the appellant,

i.e. J 0022/92, especially with the finding that re-establishment of rights could be allowed in the presence of a "minor" procedural irregularity, even if the conditions of Article 122 EPC are not met (see in J 0022/92, reasons 3.4.2).

9.3 As to the present case, the Legal Board is of the opinion that the conditions for granting re-establishment of rights are not interpreted in an excessive manner if the failure to forward the loss-of-rights communication of 27 March 2015 is considered not to be excusable. It was the domestic patent agent who made that mistake. A domestic patent agent, like an authorised professional representative before the EPO, can be presumed to know that this communication was important and needed to be forwarded to the appellant (see Case Law, III.E.5.5.3).

9.4 Since it was not demonstrated that the appellant and the patent agent acted with the necessary due care, the appellant cannot be reinstated in the time limit for requesting further processing to reply to the communication according to Rules 70(2) and 70a(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Voyé

W. Sekretaruk

Decision electronically authenticated