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Datasheet for the decision of 19 July 2024

Case Number: J 0002/22 - 3.1.01

Application Number: XXX

Publication Number:

IPC: B67D3/00, F16K31/58

Language of the proceedings: EN

Title of invention:

...

Applicant:

N.N.

Headword:

Relevant legal provisions:
EPC Art. 20, 21(1)
EPC R. 11(2), 142(1)(a), 142(2), 143(1)(t)

UK Mental Capacity Act 2005 Part 1 Sections 1(2) and 2(1), Part 2 Sections 50 and 57, Part 3 Section 63
UK Civil Procedure Rules (CPR) Part 21

Articles 425, 430, 431, 440, 467, 468, 473 and 475 French Civil Code (FCC)
Articles 117, 120, 370 and 374 French Code of Civil Procedure (FCCP)

§§ 50 ff, 56(1), 57, 170, 170a and 241 German Code of Civil Procedure (ZPO)
§§ 1814 ff German Civil Code (BGB)

§§ 1(1), 4, 6(1), 6a, 7, 190 Austrian Code of Civil Procedure (ZPO)
§§ 5, 17 Austrian Non-Contentious Proceedings Act (AußStrG)
§ 271 Austrian Civil Code (ABGB)

Article 6(1) European Convention on Human Rights (ECHR)

Article 47(2) Charter of Fundamental Rights of the European Union (CFR)

Articles 1, 13 UN Convention on the Rights of Persons with Disabilities

Article 5(1) Convention on the International Protection of Adults

Keyword:

Decisions cited:
G 0001/13, G 0001/22, G 0002/22, J 0900/85, J 0902/87, J 0903/87, J 0049/92, J 0023/96, J 0002/98, J 0005/99, J 0007/99, J 0007/16, J 0010/19, J 0007/20, J 0009/21, J 0006/22, T 0015/01, T 0854/12, T 1680/13, T 0054/17

Case law:

Baker Tilly v Makar [2013] EWHC 759 (QB)

German BGH – IX ZB 257/05
German BGH - VI ZR 283/21
German LG Dortmund 1 S 33/15

Austrian OGH 3 Ob 183/99d and RIS-Justiz RS0006948, RS0122203, RS0083724, RS0117395, RS0035456, RS0035270 T3, T7, RS0037720, RS0035234, RS0035228, RS0110082, RS0107438, RS0110082

Catchword:

1. The notification of a communication or decision on a person who does not possess legal capacity and who is not properly represented is null and void, as are procedural acts involving or performed by such person.

2. Legal incapacity of a person means that they are suffering from a disturbance of their mind which makes them unable to act on their own in proceedings before the EPO. Legal (in-)capacity is to be assessed ex officio, and it requires a reliable medical opinion.

3. There is a general presumption in favour of legal capacity of a natural person appearing as party or representative before the EPO, but this presumption no longer holds if there are indications to the contrary, in particular from this person's conduct in the proceedings.

4. The standards of assessing legal capacity regarding natural persons are the same as those regarding professional representatives, as only unified standards according to the autonomous law of the EPC can guarantee equal treatment of the parties.

5. Proceedings before the EPO are to be interrupted in the event of legal incapacity of an applicant or proprietor, and are to be resumed with the person authorised to continue.

6. From the mere fact that the Legal Division is responsible for entries in the European Patent Register, with the *dates of* interruption or resumption of proceedings being among the entries to be made in the register, it cannot be derived that the Legal Division would also be responsible for the *decision to interrupt* themselves.

7. The allocation of tasks among the first-instance departments of the EPO by a decision of the President of the EPO presupposes the competence of the first instance, and cannot in itself establish a continuing competence of the Legal Division with regard to interruption during appeal proceedings, where the boards have exclusive competence.

8. When the first-instance proceedings are declared null and void by the board, they are to be resumed and continued with a representative to appoint, and with further notifications to make on that representative.

9. The concept of the appointment of a representative for legal proceedings is inherent in the system of the EPC, and can, as a matter of principle, be applied to any case where a representative is essential to guarantee the participation of a legally incapable person as party and thus a fair trial.

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European Patent Office
Office européen des brevets

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Case Number: J 0002/22 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 19 July 2024

Appellant: N.N.
(Applicant)

Representative: N.N.

Decision under appeal: **Decision of the Receiving Section of the European Patent Office of 14 December 2021 pursuant to Article 121(2) and Rule 135(3) EPC that no request for further processing has been filed and that European patent application No. XXXXXXXX.X is deemed to be withdrawn**

Composition of the Board:

Chair I. Beckedorf
Members: R. Winkelhofer
L. Basterreix

Summary of Facts and Submissions

I. The appeal concerns a decision of the Receiving Section of 14 December 2021, in essence holding that no request for further processing had been filed in the case before them, as fees had not been paid and omitted acts had not been completed in due time, that the patent application was thus deemed withdrawn and that fees were to be refunded.

II. The inventor, applicant and appellant is a private individual, habitually residing in London. His invention concerns XXX.

III. On 27 December 2017, he filed European patent application No. XX XXX XXX.X with the International Bureau of WIPO as international application PCT/GBXXXX/XXXXXX, claiming priority from national application GB XXXXXXX.X of 23 December 2016. He was at that time represented by a professional representative, according to Article 134 EPC, in London.

IV. On 6 May 2019, by EPO Form 1201, the Receiving Section of the European Patent Office (EPO) as designated Office informed the appellant of the requirements for entering into the European phase, in particular that a request for examination under Rule 159(1)(f) EPC (in conjunction with Article 22(3) PCT) had to be filed with the EPO within 31 months of the priority date (i.e. by 23 July 2019), and that corresponding fees had to be paid, otherwise the European patent application would be deemed withdrawn under Rule 160(1) EPC.

V. The appellant did not react within the time limit under Rule 159(1) EPC.

VI. On 6 August 2019, the Receiving Section communicated to him under Rule 112(1) EPC that a loss of rights had occurred, because no request for examination had been submitted and no fees had been paid within the time limit of Rule 159(1) EPC. He was also informed, inter alia, of the possibility to request further processing under Article 121 EPC in conjunction with Rule 135(1) EPC by paying the fees for further processing under Article 2(1)12 Rules relating to Fees (RFees), and completion of the omitted acts, within two months (i.e. by 16 October 2019).

VII. On 16 October 2019, the appellant, no longer being represented by a professional representative, filed a request via EPO Form 1200 with EPO Online Filing for entry into the European phase and for examination of the application by the EPO as designated Office.

VIII. In a telephone consultation with a Formalities Officer on the same day, the appellant was reminded that for a valid entry into the European phase also fee payments had to be made on that day, in particular payment of the fee for further processing.

IX. On 18 October 2019, the fees due were received by the EPO.

X. With communication of 21 November 2019 the Receiving Section pointed the appellant to the late fee payment, and that the fees would be considered as paid in time if evidence was provided that the payment had been effected before the deadline in an EPC Contracting State, and a surcharge of EUR 150 was paid, pursuant to Article 7(3) and (4) RFees, within two months (i.e. by 3 February 2020, with 1 February 2020 being Saturday).

His attention was further drawn to the possibility of re-establishment of rights, and he was advised to consult a professional representative in case he wanted to avail himself of that option.

XI. With e-mails of 2 January 2020 and 24 January 2020 the appellant was reminded of the deadline to reply to the communication of 21 November 2019 concerning fee payment.

XII. In a telephone consultation with a Formalities Officer on 6 March 2020, the appellant stated to have opened the e-mail of 24 January 2020 on that day only and that he was not aware of having received the communication of 21 November 2019. He announced that he would file evidence that the fee payments had, in fact, been made on 16 October 2019.

XIII. There were further e-mail exchanges with the appellant on 11, 13 and 18 March 2020, where the results of the phone conversation were summarised, and where he was invited to confirm non-receipt of the communication of 21 November 2019 such as to initiate a postal investigation.

XIV. On 23 April 2020, the appellant submitted a written confirmation by his bank XXX of 11 March 2020 that the payment of fees had effectively been requested on 16 October 2019, but had only been sent two days later.

XV. With a further communication of 18 June 2020 the Receiving Section informed the appellant that, based on the current state of the file, the time limit for replying to the communication of 21 November 2019 had expired on 3 February 2020, and his submission of 23 April 2020 would thus have reached the EPO too late.

He was again invited to confirm in writing that the communication of 21 November 2019 had not reached him.

XVI. On 10 July 2020, the appellant complained via e-mail that "every time I provide the requested evidence, I am being told that my evidence is out of time after not being informed in time about this in a way that is helpful to me", that he had "received a letter yesterday telling me that a Fax from 24/04/2020 [his submission of 23 April 2020, see point XIII.] was out of time limit" and that he believed "that there is a failure to reply to me in a timely fashion to communicate with me in a helpful fashion since I am not an attorney".

XVII. In a telephone consultation on 13 July 2020 with a Formalities Officer, the appellant announced that he had meanwhile "found" the communication of 21 November 2019.

XVIII. He confirmed this finding by fax on 12 August 2020, further adding that in 2019 he had tried to raise funds with a number of companies to support entrepreneurs, as he had been short of funds, but his efforts had been to no avail. "At the same time", he "was battling with 3 different health conditions which have been a struggle". The nature of those had led him "being incapacitated sometimes for several days". His health circumstances had severely affected his organisation at times, and as a result he "could not find nor recall ever receiving the letter" (of 21 November 2019). He particularly also suffered from the COVID-19 pandemic and received help with deliveries for food shopping. The invention was a project based on an idea he had designed as a youth, and setbacks and health issues had slowed progress and it had been shelved for several years, but he was now getting some health support and

he would like to pursue the application further. He attached a medical certificate of the N.N. Medical Centre of 3 April 2020, where it was confirmed that he had been diagnosed with recurrent depression, post-traumatic stress disorder and dissociated seizures. It was further stated that the appellant was under the care of the local community mental health team. He was living alone, and his mental health and well-being had benefited since before the COVID 19 outbreak from home shopping deliveries. The appellant also appended a "COVID 19 Timeline" to his e-mail, to explain in detail how he suffered from the pandemic.

XIX. Upon an internal investigation, receipts of 25 November 2019 were unearthed, signed by the appellant, confirming handover of the communications of 21 November 2019 to him.

XX. With a further communication of 20 October 2020, the Receiving Section informed the appellant that notification of the communication of 21 November 2019 had thus been duly effected, and the time limit for replying thereto had expired on 3 February 2020, so that his response of 23 April 2020 had (finally) been too late. The Receiving Section announced their intention to issue a decision rejecting the request for further processing, and gave the appellant the opportunity to respond within two months. There was no reference made to the appellant's health conditions.

XXI. By fax of 4 January 2021, the appellant responded, inter alia stating that he had made the necessary payment on the due date of 16 October 2019, but it had been delayed for two days by his bank, for reasons outside his control. He had been diagnosed with a serious medical condition which had the effect that he

could enter fairly suddenly and without warning into periods of diminished cognitive capacity, making management of day-to-day correspondence difficult. One such episode occurred late 2019 and into early 2020. It was during this time that the communication of 21 November 2019 was sent but due to his health difficulties at that time he was not aware of its arrival and the deadline set therein. As soon as he became aware of the overlooked communication, he immediately took action in good faith to remedy the situation. He hoped that in view of his health conditions, and the due care and attention he had given to seeking to remedy the oversights caused by his health condition, his request for further processing be allowed and his patent application be continued. If there was any remedy which could be taken due to incapacity related to his health issues at the time of failing to respond, he was willing to take this route and his General Practitioner could lend support to the extensive ongoing nature of that matter. He pointed at Rule 142 EPC, according to which the proceedings should be interrupted in case of legal incapacity.

XXII. A letter of the City of Westminster of 13 November 2020 was attached to the response of 4 January 2021, where the appellant was informed that he had been identified as a potentially vulnerable resident and that they had established an automated call system to check in with him for daily support. Likewise, a further medical certificate of 26 October 2020 by the N.N. Medical Centre was provided, again stating that the appellant had a known diagnosis of recurrent depression, and post-traumatic stress disorder, and he was suffering from dissociated seizures. He had previously been under the care of the Community Mental Health team. This diagnosis should be taken into consideration by the EPO

as this might have had an impact on the appellant's ability to respond in a timely manner "to a recent EPO application".

XXIII. In a communication of 22 January 2021, the Legal Division informed the appellant that proceedings would be interrupted in case of his legal incapacity, but that he had not produced necessary evidence thereto. In particular, the provided medical certificate did not indicate such legal incapacity. Until further evidence was provided within two months, the proceedings would not be interrupted.

XXIV. In a fax responding to this communication on 1 April 2021, the appellant stated that he was legally incapable and requested that the proceedings be interrupted. The nature of his medical condition was long-term, and as a result he had received a government subsidy called incapacity benefit. Because of the long-term debilitating nature that his condition has had, his state of health was legally recognised, and it had been of long duration. The evidence he provided supported this conclusion. He had already explained that a particular episode impairing his mental health had occurred from late 2019 into early 2020, which had been persistent. Due to his health difficulties at the time, he had not been aware of the arrival of the communication of 21 November 2019, and that it required response. Likewise, during the notification of the communication of 13 January 2020 he had been indisposed to respond because of the nature of his condition being overwhelming, and he was at that time seeking treatment. He fulfilled the definition of the UK Equality Act 2010 of being disabled. He had to act on his own behalf, as he could not afford an attorney.

XXV. In a further communication of 12 July 2021, the Legal Division again stated that the medical certificate of 3 April 2020 as provided by the appellant was not sufficient to establish incapacity. He was invited to submit a more detailed certificate within 2 months, and to explain, in particular, "how your condition renders you unable to validly enter into undertakings and perform legal acts."

XXVI. On 22 September 2021, the appellant provided a further medical certificate of 13 September 2021 from the N.N. Medical Centre. Therein, it was stated that he suffered from a number of medical conditions, specifically recurrent depression, post-traumatic stress disorder and dissociative seizures. He had been diagnosed with these conditions in his early teens, and had been suffering with them since. They were long-term, chronic conditions of which he had been suffering for his entire adult life. His recurrent depression was poorly controlled and affected his life in a number of ways. He had a tendency to experience several months long episodes where he was in a major depressive state. During this time, he was often unable to leave bed, spending all of his time alone, confined to his home. The appellant's mental state was severely affected during these episodes and his ability to make decisions, weigh up consequences and prioritise daily tasks was significantly impacted. The appellant had been seeking help appropriately for his recurrent depression and post-traumatic stress disorder through the use of a therapist, which was slowly starting to help. Unfortunately, the appellant has been suffering with an episode during the time he had been required to respond to the EPO to pay "the penalty fee", and he subsequently missed the deadline.

XXVII. No decision on the request for interruption of the proceedings was taken by the Legal Division.

XXVIII. There was also a number of further e-mail and telephone conversations with the appellant throughout the proceedings, as well as a number of internal notes and correspondence between the Legal Division and the Receiving Section.

XXIX. With decision of 14 December 2021, the Receiving Section held that (1.) No request for further processing had been filed, as the fees therefor had not been paid in due time; that (2.) The application was deemed to be withdrawn with effect from 24 July 2019; and that (3.) All fees paid on or after that date would be refunded once the decision had become final. In the reasoning, the Receiving Section basically held that the payment of the, inter alia, fee for further processing had only been received on 18 October 2019, i.e. two days after expiry of the time limit. The appellant had replied to the communication of 21 November 2019, which had stated that the fee payment would be considered in time if evidence was provided that the payment had been affected before, only outside the two-month time limit set therein. Note had been taken of the appellant's persistent health difficulties, but the Receiving Section had "no discretion to excuse the late filing of the applicant's request under Article 7(3) and (4) Rules relating to fees". As a consequence, no request for further processing had been filed as the fees therefor had not been paid in due time.

XXX. On 21 February 2022, the appellant filed a notice of appeal and paid the appeal fee for a natural person on 23 February 2022. On 25 April 2022, a Monday, he filed a statement of grounds of appeal.

XXXI. In his appeal, the appellant requests that the decision be set aside and amended such as to hold the application not deemed withdrawn and that it was "brought into a pending state again". Therein he states, inter alia, that he had been unable to pay "a penalty fee" (the fee for further processing) in time, as he was having relapse of some medical conditions the overwhelm of these had let him be unaware of the fees due. In addition, he had provided evidence that his bank had held back the transaction for fee payment as a security measure, due to the unusual size of that transaction, to protect him. In early 2020, a "notice of another penalty" had been sent to him of which he had no awareness of receiving because of the extensive distracting nature of the health matters which he had been contending with, also at that time. He had always been honest and transparent, but he had been overwhelmed by his health conditions and the distraction of these leading to him being incapacitated, of which he had also informed the Legal Division. He had also provided evidence about his medical conditions. All his actions that had been too late were due to his health conditions. He had taken all due care, and he did not deserve to be subject to a "penalty fee". The result had been disproportionate and infringed him on a number of rights as provided by the UN Universal Declaration of Human Rights.

XXXII. In the board's communication of 11 July 2023 to the appellant, his interest in continuing with the proceedings and his efforts to that end, including several fee payments, were acknowledged, as well as the documentation he provided as to when payments had been made.

Note was also taken of his request for an interruption

of the proceedings in the light of his persistent health problems, and the extensive medical documentation he had filed, which casted doubts on his legal capacity.

Reference was made to the provisions of the EPC and the Boards of Appeal's jurisprudence regarding legal incapacity, including those as to interruption of the proceedings, and the further consequences of a party lacking legal capacity.

To this end, a full assessment of his mental health was envisaged, on the basis of an in-depth examination by a qualified professional.

The board further outlined possible options to continue with the proceedings in case the appellant was indeed found legally incapable, namely the appointment of a "deputy" by the competent Court of Protection in London, which would require the filing of an application with the Court, on the basis of a professional assessment of mental capacity form, with the assistance of a medical professional. Further details as to the procedure before the court were provided. The appellant was further informed that the law of England and Wales also foresaw, alternatively, the appointment of a "litigation friend" to support people in a situation as him, for example a carer or social worker, or a friend or family member, and he was encouraged to identify such person who could possibly represent him, including his former professional representative.

Finally, he was invited to inform the board of steps taken, in order to achieve the common goal of seeing the proceedings continue in a swift and just fashion.

XXXIII. Following this communication, the appellant on 7/8 December 2023 submitted a medical certificate of the N.N. Medical Centre of 12 September 2023. Therein, it is stated that he had a long standing history of mental health illness which he had been struggling with for many years, and certainly his whole adult life. He had been diagnosed with complex post-traumatic stress disorder (PTSD), recurrent depression and dissociative seizures. His symptoms could manifest in many ways, and he could enter periods of depression for many months where he would effectively switch off from the outside world and isolate, cutting himself off from all forms of communication. This could be further compounded if he additionally entered a dissociative state. During such periods it would be very difficult for him to take in new information, weigh up the importance of such information and proceed with an appropriate response in a timely and adequate manner. In other words, he would lack the capacity at that time to respond as needed. Unfortunately, the appellant was suffering from such an episode „at the time of the missed deadlines for payment in 2019”.

XXXIV. In the submission of 7/8 December 2023, the appellant further provided an (undated) statement of N.N., MNCPS (Accred) on behalf of N.N. Counselling, where she explains that she was a qualified counsellor working in private practice, and a member of the (UK) National Counselling and Psychotherapy Society, and that she had been working regularly with the appellant since October 2022. In her view, he had complex PTSD and depression which could affect his ability to function.

XXXV. N.N. was contacted by the board if she would be prepared to serve as “litigation friend" (representative) of the appellant, if need be,

which she declined with reference to her no longer working as a counsellor with him.

Prior to that, and prior to the communication to the appellant, several attempts had been made by the board to get in contact with the Court of Protection's principal office in London, with a view to having a deputy/representative appointed and for an in-depth assessment of the appellant's state of health, and the Office of the Public Guardian, as well as the N.N. Medical Centre, to further explore the options of identifying a person to act as litigation friend, or to provide guidance of assistance thereto (as to the role of the Court of Protection see below). All these efforts were to no avail.

Intense contact was also made, via the International Hague Network of Judges in Family Matters and the Office of International Family Justice in London, with the High Court of England and Wales, and the board received very constructive input as a result, including in particular guidance to the Equal Treatment Bench Book as used by the High Court.

XXXVI. In a further fax submission of 25 March 2024, the appellant confirmed that his collaboration with N.N. had come to an end, and that no further correspondence with her should be undertaken. However, his General Practitioner (GP) might be contacted, for "some insight into the evidence" that might be required.

In addition, the appellant iterated that he had finally managed to retrieve the appropriate application forms from the Court of Protection, and that he was in the process of filing an application (for the appointment of a deputy) with the court.

XXXVII. From March 2024, discussions were also held with the Institute of Professional Representatives before the European Patent Office (epi) to explore the possibility of them appointing a professional representative to act pro bono on behalf of the appellant. These discussions were well advanced and concrete proposals were on the table.

XXXVIII. Finally, by fax of 28 May 2024, N.N. N.N. and N.N. of N.N. LLP in London identified themselves as having been instructed by the appellant as their client to act on his behalf before the board, and requested that further communications be directed to them. They referred to the appellant's long-standing history of mental health issues and the documentation already provided, and asked for a decision to be taken on the matter, or to indicate whether further information was required.

XXXIX. No request for oral proceedings before the board was made.

Reasons for the Decision

The concept of legal capacity before the Boards of Appeal

1. A decisive question in this case is whether, inter alia, the fee for further processing has been paid in time, i.e. by 16 October 2019. As payment has only been received by the EPO on 18 October 2019, the appellant was given the opportunity, by communication of 21 November 2019, to provide evidence that the payment had been effected before the deadline in an EPC Contracting State, and to pay a surcharge of EUR 150 within two months (i.e. by 3 February 2020). If so, the fees would be considered to have been paid in due time. This was based on Article 7(3) RFees, according to which the period for payment was considered to be observed if evidence was provided that the payment had been effected through a banking establishment or if an order to such banking establishment to transfer the amount of the payment had been duly given. According to Article 7(4), first sentence, RFees, the EPO may request the person who made the payment to produce such evidence within a period to be specified; if they fail to comply with this request, the period for payment shall be considered not to have been observed.

2. On the face of it, such evidence was provided only on 23 April 2020, thus after the deadline set according to Article 7(4) RFees, with the appellant then submitting a written confirmation by XXX that the payment of fees due on 16 October 2019 had effectively been requested on that day, but had only been sent two days later. This led the Receiving Section to the conclusion that the fee payment for further processing should (finally) be considered as made too late (Article 7(4), second

sentence, RFees), and no valid request for further processing had thus been filed.

3. However, any such conclusion can only be drawn if the communication of 21 November 2019 had been validly notified on the appellant, thus triggering the time limit as set therein, for producing evidence for timely fee payment, pursuant to Article 7(4) RFees. The same goes for the notification of the communication of a loss of rights of 6 August 2019, and for any other notification on the appellant throughout the proceedings.

4. In particular, the valid notification on a natural person as party to the proceedings presupposes their legal capacity (cf. Rule 142(1)(a) EPC; as to the term and the conditions see below). The notification on a legally incapable person who is not properly represented is null and void, as are other procedural acts involving or regarding them (cf. Articles 467, 468, 473 and 475 French Civil Code (FCC); § 170 German Code of Civil Procedure (ZPO), §§ 1(1), 6 Austrian Code of Civil Procedure (ZPO); cf. Austrian jurisprudence, see Legal Information System of the Republic of Austria „RIS-Justiz" RS0006948, RS0122203, RS0083724).

   The same goes for the notification on a representative being themselves legally incapable (cf. Rule 142(1)(c) EPC).

5. In the event of legal incapacity of an applicant or proprietor, or their representative, proceedings before the EPO are interrupted (see Rule 142(1)(a) and (c) EPC and below). When, in such event, the EPO has been informed of the identity of the person authorised to continue the proceedings, they shall notify such person that the proceedings will be resumed as from a speci-

fied date (Rule 142(2) EPC). Likewise, Rule 142(3) EPC foresees resumption of the proceedings in case of legal incapacity of a representative upon appointment of a new representative.

Any time limits, other than those for requesting examination and paying renewal fees, in force at the date of interruption of the proceedings shall begin again as from the day on which the proceedings are resumed (Rule 142(4) EPC; T 54/17).

6. Thus, if legal incapacity is invoked when a decision based on such time limit is appealed, the matter must be referred back to the department of first instance for a fresh decision that takes account of the new circumstances (J 902/87, OJ 1988, 323).

7. Legal incapacity of a person means that they are suffering from a disturbance of their mind which makes them unable to form the necessary voluntary intention to carry out legal transactions binding upon them, e.g. to make valid contracts (Case Law of the Boards of Appeal, 10th ed. 2022, III.D.4.3; J 900/85, OJ 1985, 159). In the context of the procedural system of the EPC, which does not distinguish between civil and procedural legal capacity (see below), this also means that they cannot act on their own in proceedings before the EPO.

8. This definition of legal (in-)capacity in the jurisprudence of the Boards of Appeal essentially corresponds to the definition of Part 1 Section 2(1) of the UK Mental Capacity Act 2005 that "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a distur-

bance in the functioning of, the mind or brain", and to definitions along the same lines in other EPO Contracting States (e.g. see Article 425 FCC; German BGH – IX ZB 257/05; Legal Information System of the Republic of Austria „RIS-Justiz" RS0117395; cf. also §§ 50 ff German ZPO and § 1(1) Austrian ZPO further distinguishing between „Geschäftsfähigkeit" (civil capacity) and „Prozessfähigkeit" (procedural capacity)).

9. The Boards' jurisprudence in this context tells the standards regarding (private) natural persons (i.e. based on the relevant national law) apart from those regarding professional representatives (i.e. a uniform standard based on the autonomous law of the EPC, see Case Law III.D.3.2 and III.D.3.4); J 900/85; J 903/87, OJ 1998, 177).

However, there is no stringent reason for making such a distinction, at all, and as to why the principles laid out in J 900/85 for professional representatives should not equally apply to natural persons, i.e. the assessment be made on the basis of the autonomous law of the EPC (see J 900/85, reasons 10 f: "… there should be a uniform standard of judging legal incapacity, in order to avoid differences in the application of [now Rule 142(1)(c) EPC] depending on the nationality or domicile … the question of determining the legal incapacity [of a representative] is one for the European Patent Office, applying its own standards, developed in the light of experience and taking into consideration principles applied in the national laws of Contracting States"; cf. also G 1/13, reasons 5.3, and T 15/01, OJ EPO 2006, 153, reasons 9).

The further reasoning in J 900/85, reasons 9, "that the

capacity of the applicant or proprietor to carry out legal transactions relating to his application or patent must be determined according to a national system of law, since his interest in the application or patent is an interest in property (cf. Articles 74 and 2(2) EPC)" is barely persuasive, and the unspecific "interest in property" of a natural person as applicant or proprietor cannot be the decisive criterion for the determination of the law applicable to legal capacity because of mental health issues, and does not speak in favour of the application of (whichever) national law.

To the contrary, only unified standards according to the autonomous law of the EPC can guarantee equal treatment of the parties in proceedings before the EPO, as an essential element of fair trial (see Article 6(1) European Convention on Human Rights (ECHR), and Article 47(2) Charter of Fundamental Rights of the European Union (CFR), both recognised as binding standards and general yardsticks for fair proceedings before the Boards, and as expressing fair trial principles of procedural law generally recognised in the EPC Contracting States; cf. Article 125 EPC and Case Law III.H.3, e.g. J 6/22, reasons 47).

G 1/22 and G 2/22 - as recently handed down, albeit in a different context - reaffirm the general approach of applying the autonomous law of the EPC, being inspired and supplemented by the national laws of the EPC Contracting States, to arrive at uniform standards for all parties before the EPO (cf. reasons 99: "… the autonomous law of the EPC should not establish higher formal requirements than those established under national laws that may be relevant in the context of a European application" and reasons 133 "it cannot be excluded, however, that … national laws need to be

considered as well … the existence of legal entities … may be relevant and may need an assessment under national laws".

The autonomous (procedural) law of the EPC is also to be applied for the question of legal capacity of the appellant as a natural person suffering from mental health issues, and the implications for the proceedings before the EPO. However, national laws might need to be considered, as well, e.g. as to ensuring legal protection and legal representation for legally incapable persons in line with their national systems.

10. As outlined above with reference to the jurisprudence of the Boards of Appeal, a legal incapacity of the appellant would mean that the "disturbance of … mind" because of his state of health makes him "unable to form the necessary voluntary intention to carry out legal transactions which will be binding upon him, e.g. to make valid contracts", and thus also unable to act on his own in the present case.

Assessment of legal capacity in the proceedings before the Boards of Appeal

11. Legal (in-)capacity is to be assessed ex officio, at any time during the proceedings (J 902/87; J 49/92; T 854/12; T 1680/13; J 7/16; cf also Articles 117 and 120 French Code of Civil Procedure (FCCP); § 56(1) German ZPO, § 6(1) Austrian ZPO).

12. Such ex-officio assessment of legal capacity requires a reliable medical opinion (J 900/85; J 7/16; J 7/20) that should address all relevant facts (J 5/99).

13. The ex-officio assessment of the legal capacity of an applicant, proprietor or representative has been dealt with on various occasions by the Boards' jurisprudence.

14. In J 903/87, a case similar to the present, the appellant had provided a medical document that was considered insufficient to show their legal incapacity. No further steps were taken ex officio, and the appellant was treated as possessing legal capacity.

15. In J 902/87, the question of legal incapacity had only arisen in the appeal against a decision which had held the time limit for re-establishment of rights not having been met, supported by a medical certificate and sworn statements of witnesses. The case was remitted to the first instance to establish whether there was legal incapacity.

16. In J 49/92, while reiterating the principle of ex-officio assessment of legal capacity, the board concluded from the absence of a medical certificate or other documentary evidence, and from the fact that the appellant had managed to transfer fees for the application, that she possessed legal capacity.

17. In T 1680/13, the medical certificate as provided by the appellant in that case was not considered sufficient to prove his legal incapacity. Moreover, during a personal interrogation by the board at the oral proceedings, the appellant had made the impression to be fully aware of what was happening. Absent any matters that would have put the legal capacity of the appellant in doubt, he was treated as possessing legal capacity.

18. In J 5/99, a case regarding legal capacity of a professional representative, the board's decision was based

on a detailed report of a medical expert, together with further medical evidence. In addition, the board made own investigations into the behaviour of the representative which confirmed the factual findings that he was no longer legally capable, and that this condition had occurred at a precise moment during the proceedings. In J 2/98, regarding the same representative, though, it was concluded that the medical evidence on file did not prove legal incapacity.

19. In J 7/99, likewise a case regarding legal capacity of a professional representative, a letter of a Consultant Psychiatrist had been provided, which came to the conclusion that the person was suffering from a major depressive disorder, coming with cognitive impairment that affected his ability to concentrate, and his short-term memory and recall, and that it was unlikely that he would have been able to function normally for 4 to 6 months. The board did not consider this sufficient evidence to assume legal incapacity, as it affected only one single case of a missed deadline.

20. In J 7/16, concerning legal capacity of a former professional representative, the board requested his successor to provide a medical certificate, but which could not be obtained. It was underlined that a declaration of legal capacity of a professional representative had serious consequences for their professional life, and thus had to be based on a reliable medical opinion. The medical documents on file could not be regarded as satisfactory evidence of a serious mental illness of the former representative. Further investigations ex officio were not undertaken.

21. In the present case, there is no need to take a final stand on the requirements, framework and limits of the

ex-officio assessment of legal capacity, as set out in the boards' jurisprudence. While this jurisprudence time and again reiterates that a decision on legal capacity has to be based on a reliable medical opinion that should address all relevant facts, it seems that the boards on occasion either considered the evidence already on file sufficient or insufficient to draw an immediate conclusion on legal incapacity, or requested evidence only from the party or professional representative affected. There is apparently no case where an in-depth medical assessment has been undertaken ex officio by a board, neither by appointing a medical expert nor by referring the case to national authorities for such assessment, or in any other way. Likewise, there is apparently no case where representation in the proceedings before the EPO of a natural person lacking legal capacity was ensured by the appointment of a representative, in one or another way.

22. There is a general presumption in favour of legal capacity of a natural person appearing as party or representative before the EPO, in line with generally recognised principles of procedural law in the Contracting States of the EPO (see Part 1, Section 1(2), of the Mental Capacity Act 2005; see also Equal Treatment Bench Book 147). However, this presumption no longer holds if there are indications to the contrary, in particular from this person's conduct in the proceedings.

23. In such a case, a person cannot be simply further treated as legally capable, despite indications to the contrary, by putting the burden (only) on them to provide evidence to prove their own legal incapacity. If they were indeed legally incapable, they might not have been able to understand what the proceedings, and

the request to provide evidence, were about, and the consequences of their action or non-action.

24. In addition, depending on the individual case, it may be questionable to finally conclude upon legal capacity, in the absence of further evidence, where only medical experts might be in a position to so do, e.g. based on isolated behaviour at oral proceedings (cf. Equal Treatment Bench Book, February 2021 ed., April 2023 revision, Judicial College, p 150, "judges should be slow to form a view as to capacity without the benefit of any external expertise, because of the seriousness of the consequences for the person", with reference to Baker Tilly v Makar [2013] EWHC 759 (QB); cf also BGH - VI ZR 283/21 as to undue assumption of medical expertise).

Assessment of the appellant's legal capacity in the present case

25. In the present case, the appellant himself – to support the request for interruption of the proceedings – had put his health issues on the table, together with medical documentation: the medical certificates of 3 April 2020, of 26 October 2020, and of 13 September 2021, all from the N.N. Medical Centre. Already according to them, the appellant suffered from a number of medical conditions, specifically recurrent depression, PTSD and dissociative seizures, and he had a tendency to experience several months long episodes where he was in a major depressive state, leaving him often unable to leave bed; his mental state had been severely affected during these episodes and his ability to make decisions, weigh up consequences and prioritise daily tasks was significantly impacted. These certificates also describe a particular episode that might have co-

incided with the time of the notifications in question, namely late 2019 into early 2020.

26. In the first instance, before the Receiving Section and the Legal Division, no decision was taken on the request for interruption of the proceedings, and the appellant continued to be treated as legally capable, after he had been asked to prove his own legal capacity and after the medical evidence on file had been found insufficient to this end. The appellant's health problems were acknowledged in the appealed decision, but were not considered decisive in any way. There were no further ex-officio investigations into his state of health.

27. However, as outlined above, and while recognising that the EPO has limited procedural means for ex-officio investigations into a natural person’s state of health, unlike a national court or administrative authority, it cannot be made exclusively dependent on this person to prove their own legal incapacity, as such approach would exactly presuppose their capacity to understand what was at stake, in particular the ability to receive, understand and respond to communications, and thus legal capacity to participate as party to the proceedings on their own.

28. Given the circumstances of the case and the evidence already on file at first instance, the appellant's legal capacity could no longer simply be presumed without further investigation and, in the absence of further medical evidence to the contrary, he could no longer be treated like any other party presumed to be able to act validly in the proceedings on their own, and without proper representation.

29. Against this backdrop, the board made several attempts to investigate ex officio into the appellant's state of health, also with a view to explore possible options for protective measures in favour of the appellant, and his representation in the proceedings if he were indeed found legally incapable (to the latter issue, see below).

30. As the appellant is domiciled in London, the board approached the Court of Protection, in particular, which has a main office in London and regional hubs and is responsible for a range of decisions in financial and welfare matters for people in England and Wales who lack mental capacity.

Pursuant to Article 5(1) of the Convention of 13 January 2000 on the International Protection of Adults (cf. also Article 5 of the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, 2023/0169 (COD)), the court with jurisdiction to take measures for the protection of the person or property of an adult is generally determined by their habitual residence. Although this Convention formally applies only to Scotland within the United Kingdom of Great Britain and Northern Ireland (the UK), it has been given effect also in England and Wales (see Part 3, Section 63, of the Mental Capacity Act 2005).

31. Reaching out to the Court of Protection, and the Office of the Public Guardian (an administrative and supervisory body to the Court of Protection, see Part 2, Section 57, of the Mental Capacity Act 2005), did not return any responses.

32. With the board's communication of 11 July 2023, the appellant was, inter alia, invited and encouraged to have a further medical assessment made, and to provide additional documents. Preparations were also made for an ex-officio medical assessment in case these efforts did not bear fruition.

33. In response, the appellant submitted further documents: A further medical certificate of the N.N. Medical Centre, of 12 September 2023, and the statement of the appellant's former counsellor.

34. These further documents, atop the medical documentation already on file, and in the light of the appellant's behaviour and submissions in the proceedings, finally provide sufficient evidence to conclude that the appellant did not possess legal capacity during a substantial part of the proceedings, and that this problem persists to date. In view thereof, further investigations into the appellant's state of health, or even an ex-officio medical examination, could be dispensed with, at least for the time being.

35. In particular, it can be assumed that the appellant entered into a state of legal incapacity when the Receiving Section undertook to notify him of their communication of 21 November 2019 (concerning the provision of evidence that fee payment for the valid filing of the request for further processing was made in time, namely on 16 October 2019, and setting a two-month time limit for providing such evidence).

36. Several reminders to the appellant of this communication and the deadline set in it by the Formality Officer in late 2019 and early 2020 were unsuccessful, with the appellant himself stating that he was unaware

that he had received such a communication, only to later state that he had "found" it. The appellant's confusion about the notification of the communication and its later reappearance was further underlined by a postal investigation, which revealed a receipt for the communication dated 25 November 2019, signed by him, and the intense correspondence with him about the impact of the procedural steps taken by the first instance.

The appellant himself explicitly and repeatedly pointed out that he was "battling with 3 different health conditions" which had left him incapacitated, sometimes for several days, in particular during an "episode" from late 2019 to early 2020.

The medical evidence on file, in line with the appellant's conduct, confirm this picture: The (first) medical certificate of the N.N. Medical Centre of 3 April 2020, containing the diagnose of recurrent depression, PTSD and disassociated seizures; the letter of the City of Westminster of 13 November 2020, identifying the appellant as a potentially vulnerable resident; the second certificate of the N.N. Medical Centre of 26 October 2020 confirming the findings of the first, adding that his condition might have had an impact on his ability to timely respond "to a recent EPO application"; the appellant's detailed submission of 1 April 2021; and the third certificate of the N.N. Medical Centre of 13 September 2021, specifically confirming an "episode … during the time he had been required to respond to the EPO to pay the penalty fee", arguably referring to the fees addressed in the communication of 21 November 2019 (this is also in line with the appellant's submissions in the grounds of appeal, not the least also referring to a "penalty").

The (fourth) certificate of the N.N. Medical Centre of 12 September 2023 further underlines that in periods of depression the appellant would effectively switch off from the outside world for many months and isolate, cutting himself off from all forms of communication, and that this could be further compounded if he additionally entered a dissociative state, making him lack the capacity at that time to respond as needed, as it was then very difficult for him to take in new information, weigh up the importance of such information and proceed with an appropriate response in a timely and adequate manner. Such episode occurred, in particular „at the time of the missed deadlines for payment in 2019".

37. Prior to the notification of the communication of 21 November 2019, the appellant's behaviour did not show any peculiarities to draw the conclusion that legal incapacity occurred even earlier, apart from him not having filed a request for examination under Rule 159(1)(f) EPC, in conjunction with Art. 22(3) PCT, within 31 months of the priority date (i.e. by 23 July 2019). Notably, after having received the communication of a loss of rights of 6 August 2019, he apparently correctly calculated that he had to react thereto, inter alia, by requesting entry into the European phase by 16 October 2019, and fee payment by the same date. Such request was then made exactly on this last day of the deadline, and he further managed to make the necessary fee payments by the same date (see below).

Annulment of proceedings from the date of the appellant's entry into a state of legal incapacity

38. Procedural acts involving or performed by a person lacking legal capacity, without representation or (later) approval by a properly appointed representative, are null and void. Thus, the appellant as a person who no longer possesses legal capacity, could not and cannot validly act on his own in the proceedings before the EPO, neither at first nor second instance (see below on how to ensure his proper representation in the continued proceedings).

39. In particular, as outlined above, the notification of the Receiving Section’s communication of 21 November 2019 is null and void, since the appellant was in a state of legal incapacity at that time, and is therefore without effect. The same applies to the entire subsequent proceedings, i.e. the procedural steps taken by the departments of first instance and the appellant since then. This includes, in particular, the contested decision and its notification.

40. These proceedings are thus (to be declared) null and void, with the consequence that the impugned decision is deemed to have never become legally effective.

Interruption of the proceedings from the date of the appellant's entry into a state of legal incapacity

41. Moreover, as outlined above, proceedings before the EPO are to be interrupted in the event of legal incapacity of an applicant or proprietor, and are to be resumed with the person authorised to continue (see Rule 142(1)(a) and (2) EPC; cf. Articles 370 and 374 FCCP, § 241 German ZPO, §§ 6a, 190 Austrian ZPO, § 5 Austrian Non-

Contentious Proceedings Act (AußStrG)).

The dates of interruption and resumption of proceedings are to be entered in the European Patent Register (Rule 143(1)(t) EPC).

42. Interruption occurs ex lege when the conditions for it are met, which must be examined ex officio. The decision on, and the registration of such interruption is only declaratory (e.g. see T 854/12 with further references to the Boards' jurisprudence, and T 54/17).

43. The appellant explicitly requested such declaratory decision on interruption during the first-instance proceedings. However, no decision was taken.

44. Based on the above findings on legal incapacity, and in line with the declaration of the proceedings as null and void, the proceedings are (to be) interrupted, from the same moment in time (e.g. see J 5/99): From the appellant's entry into a state of legal incapacity, thus from, and including, the notification of the communication of 21 November 2019.

45. The declaratory decision on interruption is to be taken by the board, and there is no room to involve the Legal Division at this stage (see Case Law III.D.4.1, and T 854/12 with a substantial number of further references; *Keussen* in *Benkard* EPÜ 4th ed. 2023, Article 110 Rn. 141 f).

46. In particular, in T 854/12 (reasons 1.2), the jurisprudence of the boards was analysed in detail, also taking into account a submission of the President of the EPO of 9 September 2015, on the question of whether it was for a board to interrupt (and resume), pursuant

to Rule 142 EPC, proceedings pending before them or whether it was the (exclusive) competence of the Legal Division to do so. Reference was made in T 854/12 to jurisprudence of the Legal Board and Technical Boards, according to which the boards had always decided on interruption themselves (reasons 1.2.1). It was further held that on a number of other occasions, the boards had used the alternative option of leaving such decisions to the Legal Division. While being responsible and competent for decisions concerning entries in the European Patent Register under Article 20(1) EPC, the Legal Division had held the view that they were also responsible and competent for the decision to be registered itself, hence the question of whether there was an interruption and when it might end (reasons 1.2.2). Reference was also made in T 854/12 to jurisprudence where the boards had denied any further competence of the Legal Division in such cases (reasons 1.2.3). The competence of the boards under Article 21(1) EPC for appeal proceedings, including decisions on the merits and ancillary procedural matters, was not affected by the competence of the Legal Division for decisions as to entries in the European Patent Register under Art. 20 EPC. The Decision of the President of the EPO concerning the responsibilities of the Legal Division of 21 November 2013, OJ 2013, 600, did not transfer any powers and competences from the Boards of Appeal to the Legal Division on the basis of Rule 11 EPC ("allocation of duties to the departments of first instance"), but only concerned the allocation of functions between these first-instance departments. Nor was a board's competence affected by provisions such as Rule 142 EPC, which required certain elements of the proceedings to be entered into the Register in order to inform the public, including during appeal proceedings (reasons 1.2.4). The same was true of other

decisions concerning entries in the Register, in particular as to the party status of the applicant or proprietor. There was no binding effect of the entries in the Register (reasons 1.2.5). In the absence of such binding effect, there was no point in giving priority to decisions of the Legal Division concerning interruption of the proceedings, with the possibility of a subsequent appeal to the Legal Board. Giving priority to decisions of the Legal Division could thus not – contrary to what had been advocated by the President of the EPO – ensure a uniform decision in all cases pending at first or second instance which might be affected by the same possible ground for interruption (reasons 1.2.6). Nor was there any compelling legal principle that decisions on procedural issues should always be subject to an appeal before the boards (reasons 1.2.7). The power and competence of a board to direct proceedings before them included the competence to decide whether or not the conditions for interruption were met (reasons 1.2.8). Extensive reference was finally also made in T 854/12 to legal literature being in favour of an exclusive competence of the boards to declare interruption of proceedings (reasons 1.2.10).

47. These conclusions of T 854/12, and its reasoning, are still fully valid, and have not been put in doubt by subsequent jurisprudence. T 54/17 (reasons 1.3 f) explicitly endorsed T 854/12, regarding the generic competence of the boards to decide on interruption, and that the Legal Division had thus, insofar, no exclusive competence, while leaving open if there was a remaining, competing or parallel, competence of the Legal Division at all.

48. In J 9/21 (reasons 1.3 to 1.7), unlike the present case, appeal proceedings before a Technical Board where pending, upon the appeal against the final decision of the Opposition Division to revoke the patent. However, during the opposition period, the proprietor – a company under Australian law – had already been put under external administration by the Australian authorities. The Legal Division then, having become aware thereof, interrupted the opposition proceedings as from their outset. This decision, taken while the appeal proceedings before the Technical Board where pending, was then appealed before the Legal Board.

Upon making further references to J 10/19 (reasons 6) and T 1389/18 (reasons 4 f), the Legal Board in J 9/21 concluded that an applicant or proprietor might be involved in a multitude of proceedings before the EPO were the question of legal status might pose, to be determined on a set of facts being usually identical in all proceedings affected. The EPOrg as an international organisation governed by the rule of law required predictability of jurisdiction and a certain degree of uniformity in the application of the law. Although it might not always be possible to achieve that, due to a lack of binding effect (with reference to T 854/12, reasons 1.2.6, underlining that there it had only been concluded that the Legal Division's power in that regard was not exclusive), the EPO should endeavour to avoid conflicting decisions on interruption of proceedings concerning the same applicant or proprietor in multiple proceedings. In view thereof, and to avoid that the Technical Board in the parallel proceedings might come to a different conclusion on interruption, the Legal Board concluded that the Legal Division had had the power to determine interruption of the proceedings. Lastly, they agreed with the Legal Division that

the conditions for interruption in that case were fulfilled.

49. The case of J 9/21 differs from the one present at least in that a decision on interruption had indeed been taken by the Legal Division, while parallel appeal proceedings before a Technical Board were pending, and the decision on interruption was then appealed before the Legal Board. In such situation, it was concluded that there should only be one board (the Legal Board) to rule on the legal status of the proprietor and thus on interruption. The Technical Board in the parallel appeal proceedings had been, moreover, aware of the proceedings before the Legal Board. As a consequence, under those specific circumstances the risk of conflicting board decisions was considered best countered by the Legal Board in J 9/21 effectively ruling on interruption themselves.

50. T 1389/18 (reasons 4 f), also referred to in J 9/21, concerned a case where the decision of the Opposition Division to uphold the patent in amended form had been announced in oral proceedings, while insolvency proceedings regarding the proprietors had already been opened, and the Legal Division thereafter interrupted the proceedings "retroactively". The Opposition Division's decision was then appealed before a Technical Board. Under the specific circumstances of the case, the Technical Board in T 1389/18 concluded that the decision on interruption had been validly handed down prior to the opening of the appeal proceedings, and that the Legal Division was, in principle, competent for any such decision.

The proprietor in the case underlying T 1389/18 had then requested the reversal of the decision on inter-

ruption, which was rejected by the Legal Division. This decision of the Legal Division was then appealed before the Legal Board in J 10/19, where (reasons 6) the result of T 1389/18, i.e. the Legal Division being competent under the specific circumstances of the case, was confirmed.

51. As also referred to in T 854/12, already early on in the EPO's history the Legal Division had been entrusted, by Decision(s) of the President(s) of the EPO, with reference to Article 20 and Rule 9(2)/Rule 11(2) EPC, inter alia, with "(b) Interruption and resumption of proceedings (Rule 142 EPC)" (see Decisions of the President of the European Patent Office concerning the responsibilities of the Legal Division of 10 March 1989, OJ 1989, 177, and of 21 November 2013, OJ 2013, 600; the latter was also published in OJ 2014, 109, OJ 2015, 113, OJ 2016, 112, OJ 2016, 286, OJ 2017, 113, OJ 2018, 112, OJ 2019, 105, OJ 2020, 121, OJ 2021, 126, OJ 2022, 128, OJ 2023, 132).

52. Article 20 EPC is, indeed, the only EPC provision that directly deals with the Legal Division's competences, namely as to decisions in respect of entries in the European Patent Register and in the list of professional representatives. According to Article 127(1) and Rule 143(1) EPC, the European Patent Register shall contain, inter alia, entries on (t) dates of interruption and resumption of proceedings in the case referred to in Rule 142 EPC.

Article 20 EPC does not go beyond the competence for registering the dates of (decisions of) interruption or resumption of the proceedings, and it does not further comprise the competence for decisions to interrupt or resume proceedings, as has traditionally been assumed

by the decisions of the Presidents of the EPO as out lined above. However, such competence can neither be derived from any of the provisions cited above.

From the mere fact that the Legal Division is responsible for entries in the European Patent Register, with the *dates of* interruption or resumption of proceedings pursuant to Rule 142 EPC being among the entries to be made in the register (see again Rule 143(1)(t) EPC), it cannot be derived that the Legal Division would also be responsible for the *decision to interrupt* themselves.

In addition, the list of entries in the register in Rule 143(1) EPC further contains, inter alia, (n) the date on which the application is refused, withdrawn or deemed to be withdrawn, (r) the date and purport of the decision on opposition, (u) the date of re-establish ment of rights where an entry has been made under sub-paragraphs (n) or (r), (x) the date and purport of the decision on the request for limitation or revocation of the European patent, and (y) the date and purport of the decision of the Enlarged Board of Appeal on the petition for review.

In all these cases alike, the underlying decision is clearly not to be taken by the Legal Division.

53. Lastly, in a consistent and coherent legal system, competing competences are to be avoided, at least, even if they concern decisions of a mere declaratory nature like on interruption. Neither the approach of "igno-ring" Legal Division decisions while appeal proceedings are pending, nor "accepting" them, is in line with the legal system of the EPC, in particular as a continued first-instance competence of the Legal Division would

need a particular legal basis for offsetting the devolutive effect of an appeal that comes with the exclusive competence of the boards, according to Article 21(1) EPC, until the appeal proceedings are terminated.

The mere allocation of tasks among the first-instance departments by a decision of the President under Rule 11(2) EPC presupposes the competence of the first instance, irrespective of which department is to exercise it, and thus cannot in itself establish a continuing first-instance competence with regard to interruption where the boards have exclusive, and unlimited, competence under Article 21(1) EPC (*Keussen* in *Benkard* EPÜ 4th ed. 2023, Article 110 Rn. 141 f, referring to the separation of powers in the EPOrg).

54. Against this background, the conclusions in T 854/12 are fully shared by the board, and they are also in line with the legal literature cited therein, which advocates an exclusive competence of the board during appeal proceedings (see again, in particular, *Keussen* in *Benkard* EPÜ 4th ed. 2023, Article 110 Rn. 141 f; see also *Meinders/Lanz/Weiss*, Overview of the appeal proceedings according to the EPC, 3rd ed. 2020, 16.8.1 fn. 228; *Moser* in Münchner Kommentar, 20th supplement 1997, Article 110 Rn. 69, fn. 91; with a different view, without further justification, *Haugg* in *Singer/Stauder/Luginbühl*, EPÜ, 9th ed. 2023, Article 20 Rn 16).

This includes, in particular, the observation that there is no binding effect of interruption entries in the Register, which also applies to decisions by the Legal Division or the Legal Board on interruption. Thus, even if *de lege ferenda* exclusive competence to

decide on interruption were to be conferred on the Legal Division, thus effectively giving such decisions "priority", with the possibility of a subsequent appeal to the Legal Board, a unified decision could not be ensured in all pending cases which might be affected by the same possible ground for interruption. Their (final) decision would still not be binding on the Technical Boards.

55. Rather, as a matter of procedural principle, each board, as the deciding body, can and must - ex officio - examine the legal status of the parties in the appeal cases pending before them, i.e. the question of legal capacity, and consequently also decide on the interruption of the proceedings in the case of legal incapacity. There is no room for any further involvement of the Legal Division on interruption at the appeal stage.

Remittal to the first instance and continued/renewed proceedings

56. Before finally turning to the question of the appellant's representation, as regards the consequences of the proceedings being declared null and void, and the remittal to the first instance:

57. When proceedings are declared null and void (and interrupted) by a board, because of legal incapacity of an appellant, the case is to be remitted to the first instance, for the first-instance proceedings to be resumed and continued/renewed with a representative to (appoint and) act on the appellant's behalf, and with further notifications also to make on that representative (see below).

58. As to the background of the communication of 21 November 2019, and the consequences of its notification being null and void, it is recalled that the Receiving Section on 6 August 2019 communicated a loss of rights to the appellant, as he had not filed, inter alia, a request for examination under Rule 159(1) EPC. In the communication of a loss of rights he has been informed that a request for further processing could be made by paying the respective fees, and by completing the omitted acts, within two months (i.e. by 16 October 2019).

As the fees were received by the EPO only on 18 October 2019, he was invited, according to Article 7(4) RFees, with the communication of 21 November 2019 to provide evidence that the payment had been effected before the 16 October 2019 deadline, likewise within two months (i.e. by 3 February 2020). Such evidence was indeed provided, if only on 23 April 2020, by a written confirmation of XXX of 11 March 2020 that the payment of fees had effectively been requested on 16 October 2019, and that it had been sent only two days later, i.e. on 18 October 2019 (notably because of initial doubts on the bank’s side that such payment has indeed been the appellant’s intention).

59. In view of XXX's confirmation, it can be concluded that the payment of the fees for further processing was made, and that the omitted acts were also completed, in due time. There is no harm in the fact that this confirmation was only submitted on 23 April 2020, outside the two-month deadline set out in the communication of 21 November 2019, since the notification of that communication being null and void could not have triggered such deadline.

60. Consequently, the request for further processing was validly made and further processing will have to be granted in the continued proceedings before the first instance. The legal consequences of Article 121(3) EPC will then apply and the proceedings at first instance will have to be further continued by dealing with the appellant's requests for entry into the European phase and for examination by the EPO as designated Office, which were validly filed on 16 November 2019, together with the request for further processing.

61. Upon notification of the appointment of a representative by a national authority, or upon appointment of a representative by the EPO, the proceedings will then have to be resumed and continued/renewed in the fashion described (cf. Rule 142(2) EPC; again see below).

Representation of the appellant in the continued proceedings

62. The UN Convention on the Rights of Persons with Disabilities, having been ratified by the Contracting States of the EPC, and the EPOrg Extension and Validation States, provides:

"Article 1
Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and

effective participation in society on an equal basis with others.

…

Article 13
Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

…"

63. Accordingly, national legal systems sport a variety of safeguards that persons protected by the Convention can enjoy equal access to justice. Notably, there are various mechanisms to ensure that persons lacking legal capacity can participate in legal proceedings through the appointment of (legal) representatives.

64. By way of example, under Austrian law (§§ 4, 6, 6a, 7 ZPO, §§ 5, 17 Non-Contentious Proceedings Act (AußStrG), § 271 Austrian Civil Code (ABGB)) a party's lack of legal capacity has to be taken into account ex officio at every stage of the (civil) proceedings, in particular also before the court of second or third instance (RIS-Justiz RS0035456, RS0035270 T3, T7). The proceedings must be interrupted as soon as doubts arise as to the full mental capacity of a party to the proceedings (RIS-Justiz RS0037720, RS0035234), with the consequence that all time limits are likewise inter-

rupted. The court then notifies the local Guardianship Court at the person's place of residence ("Pflegschaftsgericht") of the circumstances, which then decides – after a full medical examination - whether a legal representative (guardian) needs to be appointed to ensure the party's future representation in court (RIS-Justiz RS0035270). On this basis, it is formally up to the court themselves to assess whether the party lacked legal capacity in their proceedings (RIS-Justiz RS0037720, RS0035228, RS0110082)), if they regularly also take the medical evidence collected by the Guardianship Court into account. Depending on the outcome of this assessment, the proceedings will be resumed and continued with a guardian, if appointed by the Guardianship Court. The guardian will be served with previous notifications from the court and time limits start to run again from the date of notification. In addition, the guardian is regularly requested to approve (all) procedural acts of the party who was found to be incapable in the previous proceedings, if they deem it appropriate, within a specified period (RIS-Justiz RS0107438). In the event of disapproval, or if there is no room for approval, the proceedings are declared null and void from the moment in time when legal incapacity arose (RIS-Justiz RS0110082), and are continued at that stage or even restarted with the guardian as representative, when legal incapacity already arose at the outset of or affected the whole proceedings.

65. A similar system exists in Germany, where the local Guardianship Court at the person's place of residence ("Betreuungsgericht") plays a role similar to that of the Austrian Guardianship Court, appointing a legal or other representative ex officio where necessary, follo-

wing similar procedures (see §§ 51(1), 56, 57, 170a, 241 German ZPO, §§ 1814 ff German Civil Code (BGB).

66. In France, a party's lack of legal capacity is a substantial ground for invalidity of procedural acts, which the court may raise of its own motion (Article 120 FCCP). Only the person affected, their parents and close relatives and the Public Prosecutor may request the guardianship judge to implement a protective measure (Article 430 FCC). Consequently, the court that has ex officio raised the lack of legal capacity of one party to the proceedings may inform the Public Prosecutor. The request to the guardianship judge must include a medical certificate stating that the person is unable to look after their own interests due to medically certified impairment of either mental or physical faculties such as to prevent them from expressing their wishes (Articles 425 and 431 FCC). Depending on the degree to which the person's legal capacity has been impaired, different protection schemes may be put in place, under which the person is either assisted or represented in participating in legal proceedings (Article 440 FCC). Consequently, the proceedings, which are interrupted by notification to the parties of the legal incapacity of one of them (Article 370 FCCP), can only be validly resumed as they stand if the person deprived of their legal capacity is assisted or represented (Articles 468 and 475 FCC). The guardian must be served with all procedural acts (summons, parties' submissions), otherwise the proceedings will be null and void. The interruption of the proceedings due to the lack of legal capacity has the effect of interrupting the time limits for carrying out the procedural acts. Those time limits run again, and for the remaining time, from the resumption of the proceedings which takes place after the appointment of

the person who assists or represents the party deprived of legal capacity.

67. The appellant is in fact habitually resident in London. The system for dealing with legal incapacity in England and Wales revolves around the Court of Protection, based on the Mental Capacity Act 2005, which can, inter alia, appoint a "deputy" (for property and financial affairs or for personal welfare) to make decisions on behalf of a person who has lost legal capacity ("protected party"), and to also represent them as their "litigation friend" in any proceedings to which the deputy's power extends (Civil Procedure Rules (CPR) Part 21, in particular Rule 21.4(2) CPR). A protected party must have a litigation friend to conduct proceedings on their behalf (Rules 21.2(1) and 21.3(3) and (4) CPR).

68. At the heart of the system is an application for the appointment of a litigation friend to conduct proceedings on behalf of the protected person, made by the protected person themselves, their guardian, their solicitor or a person nominated in a court order. Such an application to the court requires, inter alia, a completed professional assessment of mental capacity form from a general practitioner or other professional.

However, this system does not appear to provide for an easily accessible procedure for the appointment of a representative at the request of other persons or institutions, or even authorities such as the EPO, without specific permission from the court (see Part 2, Section 50, of the Mental Capacity Act 2005), which would then also include an ex-officio assessment of the appellant's state of health by a medical expert.

69. The appointment of a deputy as the appellant's litigation friend/legal representative in accordance with the national procedures of the Court of Protection and with a view to representing him in the present proceedings before the EPO would have been the preferred option under the EPC (cf. Rule 142(1)(a) EPC "... or the person authorised by national law to act on [their] behalf").

70. However, the board's efforts in this regard have been successful only to the extent that the appellant himself may (will) apply to the Court of Protection for the appointment of a representative. If such a deputy is appointed at a later date, they may also be able to represent the appellant in the present case, if that is within the deputy's powers, but it is not an immediately available option for the speedy resumption and continuation of the proceedings.

71. The law in England and Wales also foresees the appointment of a(nother) litigation friend who is distinct from a deputy as appointed by the Court of Protection, by a civil court of (specific) proceedings before them (see Civil Procedure Rules (CPR) Part 21), or by other tribunals as part of their general case management powers (see Equal Treatment Bench Book, pp 157 ff). Such litigation friend could, for example, be a solicitor, family member, a carer or social worker as the case may be. The appointment of a litigation friend may either be on application, or on the court’s own initiative (Rule 21.6 CPR).

72. No appointment for such litigation friend by a court different from the Court of Protection, which could also have served as representative in the present case, has been made either.

73. While the autonomous law of the EPC applies to the question of the appellant's legal capacity, and the implications for the present proceedings, as outlined above, national laws might also be considered to ensure adequate protection and, in the present case, a litigation-friend type representation in line with, and at the same protection level as, the national system of England and Wales where the appellant is domiciled.

However, the appellant's and the board's efforts to find a suitable person (also physically) close to him, who could possibly act as his representative before the EPO in a convenient and practical way, and in accordance with the national rules on the ground, did not bear fruit for quite some time.

74. Finally, the appellant himself has brought forward the names of two solicitors of his choice whom he considers suitable to represent him in the proceedings before the EPO.

75. Since the appellant is in a state of legal incapacity, as outlined in detail above, he could not validly authorise them directly as his representatives of choice (see national jurisprudence, e.g. LG Dortmund 1 S 33/15, OGH 3 Ob 183/99d). Moreover, there does not appear to be any court or other authority under the law of England and Wales available which could appoint them to act as representative before the EPO in reasonable time.

76. For the time being, therefore, there is thus no alternative to the EPO themselves appointing a representative, in particular the competent department of first

instance, and thus resuming and continuing the proceedings before them.

77. Preferably, this could be (one of) the representatives of the appellant's choice, as suggested by the appellant, and/or the assistance of a professional representative nominated by epi.

78. Rule 151(2) EPC provides for the appointment of a common representative for a multitude of applicants, in certain circumstances. The concept of the appointment of a representative for legal proceedings is thus inherent in the system of the EPC, and can, as a matter of principle, be applied to any case such as the present one, where a representative is essential to guarantee the participation of a legally incapable person as party and thus a fair trial. Such an appointment by the administrative or judicial authority of the proceedings is also in accordance with the principles of procedural law generally recognised in the Contracting States to the EPC (see Article 125 EPC).

79. On this basis, the competent department of first instance will have to appoint a representative and continue the proceedings.

Reimbursement of the appeal fee

80. Although there were clear indications to the contrary, no ex officio assessment of the appellant's state of health was carried out in first instance, and, as a result, the proceedings were continued despite the fact that the appellant had entered a state of legal incapacity, rendering those proceedings null and void. Moreover, no decision on interruption of the proceedings was taken, despite the appellant's request to

that effect (cf. Case Law V.A.11.6.1 c)(ii) and J 23/96).

81. Finally, the appeal leads - inter alia - to remittal of the case to the first instance for further prosecution, and thus – as a consequence – to the "granting" of the relief sought by the appellant (Case Law V.A.11.5). In the light of the foregoing, reimbursement of the appeal fee, which is also to be examined ex officio (Case Law V.A.11.2), is equitable (Rule 103(1)(a) EPC; cf. again T 854/12, Case Law V.A.11.7).

Order

For these reasons it is decided that:

1. The impugned decision is null and void, with the consequence that it is deemed to have never become legally effective. The proceedings before the Receiving Section are null and void as from the date of notification of the communication of the Receiving Section of 21 November 2019.
2. The proceedings have been interrupted from the notification of the communication of the Receiving Section of 21 November 2019.
3. The appeal fee is reimbursed.
4. The case is remitted to the Receiving Section for further prosecution.

The Registrar: The Chair:

N. Michaleczek I. Beckedorf

Decision electronically authenticated