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**Datasheet for the decision
of 25 October 2023**

Case Number: J 0004/23 - 3.1.01

Language of the proceedings: EN

Relevant legal provisions:

EPC Art. 112, 134(2), 134(2)(c), 134(3), 134(7)
RPBA 2020 Art. 21
EPC R. 103(1)(a)

Keyword:

Request that appellant be entered on the list of
representatives (not allowed)
Principle of legitimate expectation - expectation relied on by
appellant not legitimate
Referral to the Enlarged Board of Appeal - (no)
Reimbursement of appeal fee - (no) - request for reimbursement
must be justified with reasons relating to a substantial
procedural violation

Decisions cited:

G 0005/88, G 0003/91, G 0005/93, G 0002/97, J 0027/92,
J 0010/20, T 0460/95, T 0152/95, T 1063/18



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Case Number: J 0004/23 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 25 October 2023

Appellant: N. Uth

Decision under appeal: Decision of the Legal Division of 4 March 2023
rejecting the request dated 11 November 2022
according to which the appellant sought to be
entered on the list of professional
representatives before the EPO

Composition of the Board:

Chairman I. Beckedorf
Members: F. Bostedt
N. Obrovski

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Legal Division of 4 March 2023 rejecting the request dated 11 November 2022 according to which the appellant sought to be entered on the list of professional representatives before the EPO.

II. The appellant requested (as the main request) that:

- the decision under appeal be set aside, and
- he be entered on the list of representatives before the EPO.

As an auxiliary measure, he requested that:
the case be referred to the Enlarged Board of Appeal.

In addition, he requested
the reimbursement of the appeal fee.

III. The requestor (the appellant) asked to be entered on the list of professional representatives before the EPO. He addressed the Vice-President in charge of the Directorate-General for Legal and International Affairs (VP5) and requested an exemption from the requirement of passing the European Qualifying Examination (EQE) as set out under Article 134(2)(c) EPC. For his request, he relied on the following information published on the EPO's website at the time of the request (emphasis added):

*"... in accordance with Article 134(7) EPC, the Vice-President in charge of DG5 is entitled to grant exemption from requirements (a) **and (c)** of Article 134(2) EPC (see Decision of the President of*

the EPO dated 1 December 2011 delegating his powers to decide on requests for exemption from requirements for entry on the list of professional representatives, OJ EPO 2012, 13)".

- IV. In reply, VP5 informed the requestor that the erroneous information on the website had been rectified but that the request for an exemption could not be granted since there was no possibility of being exempted from having to pass the EQE other than the so-called grandfather clause under Article 134(3) EPC, which was not applicable to the requestor's case.

- V. Further letters between the requestor and VP5 as well as the Legal Division were exchanged.

- VI. The Legal Division stated in the decision under appeal that VP5 had decided not to grant the requested exemption and confirmed this decision. This had been justified on the grounds that there was no legal basis for granting an exemption from Article 134(2)(c) EPC, other than the grandfather clause under Article 134(3) EPC, which did not apply in the requestor's case. VP5 had also decided that an exemption could not be granted based on the principle of good faith for having followed erroneous instructions published on the EPO's website. This was so because such a reliance was explicitly excluded by the terms and conditions of the use of the EPO's website. The information on the website could also have easily been verified by checking the legal text itself. Moreover, neither the EPC provisions on good faith the requestor had referred to nor the decision cited by him applied directly or by analogy to the case at hand. In addition, the Legal Division held that it could also not enter the requestor on the list of professional representatives

itself based on the principle of good faith, referring to the same reasoning as the one provided by VP5 set out in the preceding paragraph.

VII. On appeal, the appellant submitted that the EPO was bound by its own announcements. The appellant referred to case J 10/20 and essentially argued that in that case, even if there had been no legal basis for the extension under Rule 134(2) EPC, the Legal Board had decided that the EPO was still bound by its own announcements. According to the appellant, a user of the EPO should not be penalised without good reason for relying on notices published by the EPO. The appellant was also entitled to expect that the EPO should apply the interpretation published on the EPO's website (to which he had referred in the request) up to the date on which the website was corrected. He referred to G 5/93, where the Enlarged Board had held that the EPO was bound by its own published interpretation and that applicants were entitled to expect that the EPO should apply this interpretation up to the date on which decision G 3/91 was made available to the public.

He further submitted that the principle of legitimate expectation was essential in the dealings of the EPO with its users (reference was made to G 2/97, G 5/88, G 5/93 and J 10/20; he also made reference to T 1063/18 and T 152/95). In further support of his core argument on the principle of legitimate expectation, the appellant referred to general legal principles, such as legal certainty, the rule of law and the right to be heard. Parties must be able to rely on the EPO complying with the relevant provisions of the EPC. It was decisive for the current case that the information on the website had been there for over five years without anyone realising that it might not be in

accordance with the legal norms. Since this information had been available for such a long time, users could assume that it was correct. He should not suffer any disadvantage from relying on the EPO's information on its website. Whether or not there was actually a legal basis for the requested exemption was irrelevant. Common sense alone dictated that he was entitled to be given an exemption. If there was no legal basis for his request to be granted an exception, this was the EPO's problem, not his. In any case, if there were a rule permitting the grant of the exception he requested, he would qualify. The appellant further submitted that it was he who had found this "crack" in the system and that he should therefore be able to benefit from it. The "crack" had also been closed since as the EPO had removed the information from its website, so there was no danger for the EPO that anybody else could claim an exemption in the future. But in his case, he could rely on what had been stated on the website when he had filed his request for an exemption.

He further submitted that there should be a two-step procedure according to which, first, it should be made clear that an exemption was possible and that he was entitled to request this exemption and, second, VP5 should be tasked with evaluating whether he was entitled to the requested exemption. He made reference to the fact that he was qualified as a patent attorney in Germany and Denmark and to his other qualifications and experience, from which it could only be concluded that he was indeed entitled to the exemption.

Reasons for the Decision

1. The facts of the case are not disputed. The appellant has not passed the European qualifying examination (EQE). He also confirmed during the oral proceedings that there was no legal basis in the EPC under which the EPO could grant an exemption from the requirement under Article 134(2)(c) EPC to pass the EQE for being entered on the list of professional representatives. Indeed, no such legal basis exists.

The appellant also confirmed at the oral proceedings before the Board that he relied solely on the principle of legitimate expectations, also called the principle good faith, for his main request.

The principle of the protection of legitimate expectations

2. The principle of the protection of legitimate expectations is well established in proceedings before the EPO. This is also made clear in the decisions referred to by the appellant (see above point VII., in particular the decisions of the Enlarged Board of Appeal G 2/97, G 5/88 and G 5/93). It is thus not necessary to invoke, as the appellant did, further legal principles, such as legal certainty or the rule of law, in support of the principle's existence.

However, the principle of the protection of legitimate expectations does not give a *carte blanche* to the person relying on it. Rather, it is subject to several limitations (see in general Case Law of the Boards of Appeal, 10th edition 2022, III.A.2.2). First and foremost, not any expectation held by a person is automatically a legitimate one within the meaning of

this principle. Whether an expectation is legitimate must be assessed by applying the principle to the facts of the case and, depending on the circumstances of the case, the relief sought may or may not be granted.

It is therefore inherent in the principle of the protection of legitimate expectations that a person can only successfully invoke an expectation on which they could, on an objective basis, legitimately rely. As put by the Enlarged Board in G 2/97, the erroneous information from the EPO must objectively justify their conduct (G 2/97, Reasons 4.1, citing T 460/95). Therefore, it must be established that, on an objective basis, it was reasonable for the appellant to have been misled by the information on which he relied (see also J 27/92, Reasons 3.2; on the requirement to know the relevant legal provisions, see J 10/17, Reasons 3.3).

Main request - appellant be entered on the list of representatives before the EPO

3. The appellant seeks with his main request to be entered on the list of professional representatives before the EPO.

The wording of the request is clear and unambiguous. It must fail for the simple reason that the information on the website relied upon by the appellant does not give him a legitimate expectation for such a request. The EPO's website at the time of the request provided the following information: "... in accordance with Article 134(7) EPC, the Vice-President in charge of DG5 is entitled to grant exemption from requirements (a) and (c) of Article 134(2) EPC", referring to the Decision of the President of the EPO dated 1 December 2011 delegating his powers to decide on requests for

exemption from requirements for entry on the list of professional representatives (OJ EPO 2012, 13).

This information, taken from the letter on which the appellant in fact relies for his main request, merely states that a power has been delegated by the President of the Office to VP5. Therefore, a person may at most have an expectation that this power is exercised by VP5, and not by someone else. However, from this information on the website, the appellant cannot deduce that he will be entered on the list of professional representatives before the EPO, as requested by him in the current proceedings.

However, the appellant made it clear during oral proceedings that he also sought to establish with his main request that he was entitled to request this exemption (and in a second step, that VP5 would evaluate whether the appellant was entitled to this exemption). The Board considers that if the appellant sought this to be encompassed in his main request, he should have made this explicit in his request.

Nonetheless, in the appellant's favour, the Board will address all his arguments, taking into account this understanding of the main request. However, as set out below, the Board finds the appellant's arguments unconvincing.

4. As set out above under point 2., the principle of legitimate expectation is not unrestricted, and it is inherent in the principle that a person can only successfully invoke an expectation on which they could, on an objective basis, legitimately rely. It must be established that, on an objective basis, it was reasonable for a requestor to have been misled by the

information on which they relied, here the information of the EPO's website.

The appellant has not sufficiently and convincingly demonstrated in his favour that this is the case.

4.1 The Board notes that the appellant was immediately informed by the EPO that the information on the website was erroneous. In addition, the appellant could not simply rely on any information provided by the EPO's website. As alluded to by the Legal Division in its decision, the terms and conditions of use of the EPO's website indicate the following disclaimer: "5. Information on the website 5.1. Unless otherwise stated, the information is purely general in nature and is not to be construed as addressing the specific circumstances of any particular case, individual or entity. Unless otherwise stated in a specific case, the EPO does not guarantee that the information is exhaustive, accurate or up to date."

4.2 This does not mean that the EPO's website is excluded per se as a source of information which may lead to the application of the principle of legitimate expectation. It may indeed be seen as constituting such a source (see J 10/20, Reasons 1.13). But such information on a website must not be taken at face value.

It is a general legal principle that, as a rule, a person cannot successfully invoke ignorance of the law. Hence, the appellant cannot rely on not having been aware of the contents of Article 134 EPC either. This is particularly true as the information on the website relied upon by the appellant contained an explicit reference to the relevant legal norms of the EPC framework. It is expected from persons who read this

information on the website to act in a reasonable manner and also to read these legal norms. In the case at hand, the information on the website referred to Article 134(2) and (7) EPC and the Decision of the President delegating the power of exemption to VP5. It even specifically stated that the information given on the possibility of exemption was based on Article 134(7) EPC.

A person reading these provisions, acting in a reasonable manner, would have immediately realised that the information on the website was erroneous since the wording of paragraphs 2 and 7 of Article 134 EPC are unambiguous and leave no room for any doubt: exemption from the requirements of Article 134(2) EPC is expressly provided - see Article 134(7)(a) EPC - only for the requirement set out in lit. (a), but not the one in lit. (c).

Hence, even if the appellant had the expectation that an exemption for the requirement set out in lit. (c) of Article 134(2) EPC could be granted, this expectation was not legitimate.

4.3 The appellant's further arguments are also not convincing.

4.3.1 The appellant argued that it was irrelevant whether there was a legal basis for the exemption as "common sense" dictated that he was entitled to be given an exemption. The Board disagrees. If, as in this case, no exemption for a specific requirement is provided for under the law (and in addition, there is an express exemption provided for a different requirement), the lack of a legal basis for the requested exemption cannot simply be overcome by referring to "common

sense". In addition, the rationale underlying the requirement under lit. (c) of Article 134(2) EPC to pass the EQE is to ensure that professional representatives who are entitled to act in all proceedings before the EPO have a certain minimum competence which can be established in an objective manner. This is not only in the interest of the parties they represent but also of the general public. Ignoring a legal provision and its rationale cannot be regarded as "common sense".

- 4.3.2 The appellant also argued that parties had to be able to rely on the EPO complying with the relevant provisions of the EPC. The Board agrees, but this argument does not help the appellant's case. The legal provisions provide for exemptions to certain requirements but not for others (see Article 134(2), (3) and (7) EPC). If the EPO opened a further possibility of exemption not provided for in law, it would not be complying with the relevant legal provisions.
- 4.3.3 The appellant also argued that it was decisive in his case that the information on the website had been there for over five years without anyone realising that it might not be in accordance with the legal norms. So in his view, users could assume that the information was correct. This is also not convincing. The extent of time the erroneous information was on the website does not change that no-one, including the appellant, could legitimately rely on the erroneous information for the relief sought by the appellant.
- 4.4 The Board concludes that the appellant failed to establish that, on an objective basis, it was reasonable for him or any other person acting in a

reasonable manner to have been misled by the information on the EPO's website. Therefore, the appellant has not demonstrated that the expectation on which he relied was legitimate.

5. In a further albeit related line of argument, the appellant posited that he should not suffer any disadvantage from relying on the EPO's incorrect information on its website. The Board considers that, indeed, the protection of the legitimate expectations of users of the European patent system requires that such a user not suffer a disadvantage as a result of, for example, having relied on erroneous information received from the EPO or in a misleading communication (see G 2/97, Reasons 4.1 and 5.1).

- 5.1 However, the appellant seeks to create, by way of the principle of legitimate expectation, a non-existing right under the EPC according to which VP5 may consider and ultimately grant an exemption from the requirement of Article 134(2)(c) EPC. In contrast, the principle of legitimate expectations usually applies where a loss of rights occurred, for example due to a missed time limit, where this loss may be remedied by applying this principle. In any case, for a successful reliance on the principle of legitimate expectation, the appellant must demonstrate that there was a disadvantage he has suffered from the erroneous information given by the EPO.

- 5.2 The appellant has not specified what kind of disadvantage he suffered from the EPO's erroneous information on its website. Yet again, it is relevant that he never had the right to be exempted from the requirement to pass the EQE, nor did he have a right that VP5 evaluate whether he was entitled to the

requested exemption based on his qualifications and experience. Since there were no such rights *in the first place*, he could also never have lost this right. As a consequence, the fact that he was not given an exemption from the requirement to pass the EQE cannot be seen as a disadvantage in line with the case law established under the principle of the protection of legitimate expectation. The appellant did not put forward any other disadvantage he allegedly had suffered.

- 5.3 Therefore, in addition to the fact that the appellant has not demonstrated that the expectation on which he relied was legitimate (see point 4.), he has also failed to demonstrate that he suffered any disadvantage.
6. The appellant's lines of argument in which he relied on J 10/20 and G 5/93 are not convincing, either.
- 6.1 The appellant relied on J 10/20 and argued that the "EPO is bound by its own announcement". The Board agrees to the extent that an "announcement" of the EPO, for example on its website, may be a source of legitimate expectation. However, this does not mean that a person relying on any such "announcement" necessarily benefits from the principle of legitimate expectations for any result sought. As pointed out above, the principle does not give a *carte blanche*. This was also recognised in J 10/20, in which it was stated that a statement issued by the EPO on how to act in a given area had to be honoured "unless there is good reason not to do so". As the appellant can in this case not legitimately rely on the expectation which he invoked, there is - in the words of J 10/20 - "good reason" not to honour the incorrect statement given on

the EPO's website.

Moreover, the case underlying J 10/20 is different to the situation in the current case. J 10/20 concerned the possible irrevocable loss of rights as a result of having relied on erroneous information by the EPO on the extension of time limits. In the case at hand, such a loss of rights is not at issue because the appellant never had any right to be exempted from the requirement under Article 134(2)(c) EPC in the first place.

In addition, the Board in J 10/20 relied in its reasoning on the fact that users and representatives could not be expected to question, without any apparent reason, statements on the extension of time limits made in publications under Rule 134(4) EPC, nor could they be expected to engage in individual investigations on whether and during which exact period a dislocation occurred in one of the contracting states, which might not even be their own (see Reasons 1.16; see also Catchword). These statements confirm that it is decisive whether users can be expected to question the information given to them and, if so, whether they would then come to a conclusion different from the one provided in the EPO's information. This further distinguishes the current situation from the one in J 10/20. In the current case, the appellant could be expected to read the - easily accessible - legal provisions, which were expressly mentioned in the information on the website on which the appellant relies.

6.2 The appellant also relied for his case on G 5/93. The Board understands the appellant's argument to be that the Enlarged Board had found that the EPO was bound "by its own interpretation" until contrary information was

published. According to the appellant, this would lead to the conclusion that he was entitled to expect that the EPO applied the interpretation published on the EPO's website up to the date on which the correction was made available to the public.

This is not convincing for the following reasons.

- 6.2.1 The Enlarged Board found in G 5/93 that Euro-PCT applicants could rely on specific information for PCT applicants published in the EPO Official Journal (see EPO OJ 06/1991, page 328, referring, *inter alia*, to the decision of the Legal Board of Appeal in J 6/79) and thus were entitled to expect that the EPO should apply its own interpretation up to the date on which decision G 3/91 of the Enlarged Board of Appeal, which had established that this interpretation and the corresponding practice had not been the proper interpretation of the relevant provisions of the EPC, was made available to the public (see G 5/93, Reasons 2.1 to 2.3).

However, this situation is not comparable to that in the case at hand. The situation in G 5/93 concerned a change in the case law of the Boards of Appeal and - due to the findings of the Enlarged Board in G 3/91 - a subsequent change of practice of the EPO. It concerned the question of whether applicants could rely on information provided by the EPO (regarding the possibility for Euro-PCT applicants to be re-established in the time limits for paying specific fees) up to the time G 3/91, which had found that the previous interpretation and the corresponding practice was not the proper one, was published. In contrast, no such change of case law or practice has occurred in the current case. For this reason alone, the appellant's

arguments relying on G 5/93 must fail.

6.2.2 In addition, in the case at hand, the information on the website cannot - in contrast to the information referred to in G 5/93 - be said to constitute an "interpretation" of Article 134(2) or (7) EPC. The reference to the exemption from the requirement set out in lit. (c) of Article 134(2) EPC was simply an error which was immediately recognisable for a reasonable person reading the legal provisions. Indeed, there can be no doubt about the interpretation of the relevant provisions in Article 134 EPC and, as considered above, for a reasonable person there is no doubt about the question of which requirement of Article 134(2) EPC is open to an exemption made by the President of the Office or, by delegation, VP5.

7. Lastly, the appellant reminded the Board that his case was a one-time issue in that since the EPO had removed the information from its website, no-one could claim an exemption in the future. He added that his case was different since he had found the "crack" in the system and could rely on what had been written on the website when he filed his request.

The consideration that in future, for other persons, the exemption could no longer be requested, has no bearing on the outcome of this case and must be disregarded as irrelevant.

Referral to the Enlarged Board of Appeal

8. The appellant requested that the case be referred to the Enlarged Board of Appeal if the decision is not set aside. He referred to Article 21 RPBA 2020 and argued

that if the Legal Board did not put aside the decision under appeal, it would deviate from the earlier opinion of the Enlarged Board of Appeal in G 5/93, where - according to the appellant - the Enlarged Board had held that the EPO was "bound by its own published interpretation". In his written submissions, the appellant did not propose any specific question. During the oral proceedings, the appellant proposed that the following question be referred to the Enlarged Board:

"What kind of information can the EPO publish and later amend without this having any consequences for the users?"

9. This request had to be refused.

9.1 Under Article 112(1)(a) EPC, a Board may refer a question to the Enlarged Board of Appeal if it considers that a decision is required to ensure the uniform application of the law or because a point of law of fundamental importance arises. A Board can refer questions either of its own motion or following a request from a party. Under Article 21 RPBA 2020, "[s]hould a Board consider it necessary to deviate from an interpretation or explanation of the Convention contained in an earlier decision or opinion of the Enlarged Board of Appeal according to Article 112(1) EPC, the question shall be referred to the Enlarged Board of Appeal".

9.2 The Board considers that it does not deviate from any interpretation or explanation of the Convention (within the meaning of Article 21 RPBA 2020) set out by the Enlarged Board in G 5/93. G 5/93 was not concerned with the "interpretation or explanation" of the here relevant article of the Convention, i.e. Article 134(2)

and (7) EPC. Instead, the Enlarged Board was concerned with a different and specific case. It did not hold that the EPO was generally bound by its own published interpretation as suggested by the appellant, but instead it applied the principle of legitimate expectation to the facts of the case and came to a specific conclusion (see G 5/93, Reasons 2.1 to 2.3).

9.3 Moreover, as explained in point 6.2.1 above, the case at issue is not comparable to the one underlying G 5/93 in that the information on the website in the current case cannot even be seen as providing an "interpretation" of Article 134(2) and (7).

9.4 As to the question proposed and discussed at the oral proceedings, the Board considers that the proposed question is not a *question of law* within the meaning of Article 112 EPC that can or should be referred to the Enlarged Board. The proposed question is also very wide and generic and not linked to the particular factual and legal circumstances relevant to the case at hand. At the same time, the abstract manner in which the proposed question has been formulated does not mean that it can be answered such that it would be relevant for a large number of similar cases. Rather, any answer would have to take account of the type and content of the information published. Hence, the answer to the proposed question necessarily depends on the circumstances of each individual case.

Furthermore, to the extent to which the proposed question may concern the *application* of the principle of the protection of legitimate expectations to the facts of the current case, it can be answered by the current Board without doubt. As set out above, the Board has found that the relief sought by the appellant

cannot be granted as the expectation relied on was not legitimate. Thus, even if the proposed question was reformulated and directed to the circumstances of the case at hand, a decision of the Enlarged Board would not be required within the meaning of Article 112(1)(a) EPC.

- 9.5 Therefore, the Board does not consider that a decision of the Enlarged Board is required to ensure uniform application of the law or because a point of law of fundamental importance needs clarification. Exercising its discretion (see Case Law of the Boards of Appeal, 10th edition 2022, V.B.2.3.2), the Board decides not to refer a question of law to the Enlarged Board of Appeal.

Reimbursement of the appeal fee

10. The appellant further requested the reimbursement of the appeal fee. The appellant did not make any submissions on this request and merely stated at the oral proceedings that this was a "standard request" for reimbursement, for which no specific reasons were required.
11. However, contrary to the appellant's assertion, a request for reimbursement of the appeal fee is not a "standard request" which does not require any substantiation. A Board may on its own motion reimburse the appeal fee if the relevant requirements, for example as set out in Rule 103(1)(a) EPC, are fulfilled. However, if an appellant *requests* reimbursement of the appeal fee, they must justify their request, and the reasons must be related to whether a substantial procedural violation within the meaning of this provision occurred. In this case, the

appellant has not done this. He has not even alleged that a substantial procedural violation occurred. For this reason alone, his request is to be refused.

In addition, the appeal is not found allowable.

Therefore, none of the requirements of Rule 103(1) (a) EPC is fulfilled.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for referral to the Enlarged Board of Appeal is refused.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



C. Eickhoff

I. Beckedorf

Decision electronically authenticated