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**Datasheet for the decision
of 9 May 2008**

Case Number: T 1465/07 - 3.4.02

Application Number: 00935973.8

Publication Number: 1185860

IPC: G01N 27/64

Language of the proceedings: EN

Title of invention:

Ion mobility and mass spectrometer

Applicant:

Indiana University Research and Technology Corporation

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 112a, 113, 122

EPC Revision Act Art. 7

Decision of the Administrative Council on the transitional provisions under Article 7 of the EPC Revision Act Art. 1, 2

ECHR Art. 6 § 1

TRIPS Agreement Art. 62

Relevant legal provisions (EPC 1973):

EPC Art. 21, 106, 107, 108, 113, 122

Rules 78, 83

Keyword:

"EPC 1973 Article 122: independence of cross check (no), reasonable supervision of the assistant (no), principle of proportionality respected (yes), all due care (no)"

Decisions cited:

G 0001/86, G 0001/97, G 0003/98, G 0001/05;
J 0005/80, J 0002/86, J 0009/86, J 0027/88, J 0031/90,
J 0032/90, J 0033/90, J 0044/92, J 0048/92, J 0015/04;
T 0166/87, T 0869/90, T 0111/92, T 0635/94, T 0828/94,
T 0377/95, T 0635/94, T 0036/97, T 0686/97, T 1070/97,
T 0027/98, T 0428/98, T 0971/99, T 1172/00, T 0622/01,
T 0785/01, T 0190/03, T 1401/05, T 1561/05, T 0439/06

ECHR

Case 46/1994/493/575
Application no. 44584/98
Application no. 23436/03

ECJ

C-368/96
C-406/01
C-96/03 and C-97/03
C-171/03

Headnote:

1. The principle of proportionality applies to limitations of the right of access to the boards of appeal, such as rules on time limits, by legislative measures or their application. This means that those measures or their application must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures or ways of applying them recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (See point 13 of the reasons.)

2. As for the application of Article 108 EPC 1973 in conjunction with Article 122 EPC 1973 the principle of proportionality has the consequence that the interpretation of those provisions must not impose means that are not appropriate, necessary or disproportionate in relation to the aim sought to be achieved, namely legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment. Correspondingly, the conditions for granting restoration, in particular the requirement of due care, must not be interpreted in an excessive manner that unreasonably restricts access to the board and thus prevents the board from deciding on the merits of the case. This is the balance between legal certainty and proper administration of justice on one hand and substantive justice on the other, which has been struck under the EPC in this context. It follows that the principle of proportionality must always be applied in connection with the interpretation

of those conditions, which determine whether or not an application for re-establishment can be allowed. It is not permissible to consider the result of a procedural irregularity, such as the loss of a patent or patent application, separately in relation to the kind of procedural irregularity and allow the application because of the severity of the result and a minor degree of irregularity, even though the conditions of Article 122 EPC are not met, no matter whether a case is "borderline" or not. (See point 15 of the reasons.)

3. The number of days by which a time limit had been missed is irrelevant for deciding whether all due care within the meaning of Article 122(1) EPC 1973 was applied or not as that provision does not leave any room for the application of the principle of proportionality in this respect. (See point 16 of the reasons.)

4. The effective cross check required in a large firm where a large number of dates have to be monitored at any given time must be independent, i.e. redundant or failsafe. (See point 19 of the reasons.)



Case Number: T 1465/07 - 3.4.02

D E C I S I O N
of the Technical Board of Appeal 3.4.02
of 9 May 2008

Appellant: Indiana University Research and Technology
Corporation
351 West 10th Street
Indianapolis IN 46202 (US)

Representative: Wright, Howard Hugh Burnby
Withers & Rogers LLP
Goldings House
2 Hays Lane
London SE1 2HW (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 3 April 2007
refusing European patent application
No. 00935973.8 pursuant to Article 97(1) EPC
1973.

Composition of the Board:

Chairman: A. Klein
Members: B. Müller
M. Rayner

Summary of Facts and Submissions

- I. On 9 August 2007 the applicant filed a request for re-establishment of rights in respect of the non-observance of the deadline for appealing a decision of the Examining Division dated 3 April 2007 by which European patent application No. 00935973.8 was refused. In the event that re-establishment of rights was not permitted, the applicant requested oral proceedings. On the same date it filed a Notice of Appeal and also paid the corresponding fees. A statement of grounds of appeal was submitted on 13 August 2007.
- II. The applicant's representative maintains that it was the applicant's intention to appeal the decision, and he received instructions to file an appeal, instructions which were confirmed to him in further correspondence. While the deadline for filing the appeal expired on 13 June 2007, it was only on 19 June 2007 that he became aware that the deadline was missed. The representative contends that re-establishment of rights should be permitted because the non-observance of the time limit in question occurred in spite of all due care required by the circumstances having been taken. The grounds and facts on which the application for restoration is based are summarised below.
- III. The representative operates two diary systems, a primary diary and a backup diary which he contends is administered independently of the primary diary. Due dates were entered and monitored using those two diaries in the following way.

- Entry of due dates

Official letters received from the EPO start by being processed by his firm's Records Department. Any deadlines will be entered on the backup diary, and the letters will then be distributed. When the representative's secretary receives an official action from the Records Department, she will enter any deadlines in the primary diary immediately before passing the letter to him to report to his client. As a checking step, once an official letter has been reported to a client, his files get put to one side for a further check to ensure that a diary date has been entered that is appropriate. The representative personally reviews those files, and if a diary date has not been entered or has been entered incorrectly, he will instruct his secretary to correct the date before the file is put away in the cupboard. His secretary is suitably trained and experienced to operate the primary diary. Both diaries operate "extremely reliably" with respect to the entry of deadline dates and he cannot recall a failure of either system in this regard.

- Monitoring of due dates

The representative also believes that the system of monitoring due dates is sufficiently rigorous. Once each week, his secretary generates a list of cases with deadline dates or review dates in the primary diary for the subsequent eight days. She then retrieves all of those files and he reviews them. A cross check is to take place with the backup diary to ensure that nothing is missed. The cross check is delegated to his secretary.

IV. In the present case, the impugned decision did not get processed correctly:

The representative received the decision and the file relating to the patent application from his secretary without the appeal deadline having been entered in the primary diary.

After having reported the decision to his client, the file did not get put aside for him to review the diary dates, but was filed away without him seeing it. In the representative's belief, this was an oversight on the part of his secretary, which might have been caused by the fact that the file had been worked on both by him and his trainee, and she might have assumed that they had checked the diary by themselves. In addition, the primary diary included a future date (20 June 2007), which would have caused the file to be got out only a few weeks later. She might have assumed that this was the diary date which he wished to be entered in the primary diary in response to the decision to refuse the patent. He does not recall such a situation having occurred previously.

Moreover, the cross check with the backup diary did not take place to cause the file to be retrieved from the representative's filing cabinet in time. The representative believes that this is the result of his secretary only joining him in April 2007, having worked for a former partner of his. When she worked for his former partner, she always carried out the cross check of the cases of his former partner with the backup diary, as the representative's former secretary had done with his cases. On finding that this deadline had not been observed, he discovered that his new secretary had not been carrying out the cross check since she had become

his secretary. The representative added: "This is a situation which I have now rectified but submit that failure to carry out the cross check is an administrative mistake ...".

- V. In support of his request for restoration the representative filed a declaration of his setting out the facts. It provides, in particular, details of his diarying system and procedure followed by a description of the events which caused the deadline in question to be missed. Those facts are supported by two exhibits, a letter confirming his client's earlier instructions to file an appeal, and a copy of the diary from the case management system for the time at issue.
- VI. In the annex to the summons to oral proceedings appointed on 5 March 2008, the Board expressed its provisional opinion that the application for restoration could not be allowed. In a written submission in reply the representative maintained this application. He commented on his two-step approach followed for the entry of deadlines. The checking step where a file was put to one side for him to make sure that a deadline had been entered properly was a cross check within the meaning of the decision of the Legal Board of Appeal J 9/86. As this two-step procedure was unique in his firm, the representative's secretary was fully trained in this procedure when she joined him at the beginning of April 2007. The representative also expanded on the process which was followed when due dates were monitored. Regarding the weekly list of cases generated from the *primary* diary the files relating to those cases were retrieved from his cupboard. He went through the files so that the correct action was taken. The list of cases

was placed on top of the files so that he could see that the correct files had been retrieved. Therefore, he was in a position to ensure that his secretary correctly carried out this operation and retrieved the correct files. With respect to the monitoring of due dates and the retrieval of files his procedures were identical to those of the partner his secretary had previously worked for. She consequently carried out these tasks in accordance with his own practice without requiring any extensive retraining.

With regards to the firm's central *backup* diary, the representative submitted that, each week, the Records Department sent a list of the deadlines which were approaching to the representative's secretary. It was her job to ensure that the files relating to the listed cases had already been retrieved from his cupboard during the retrieval of files for the primary diary. He had asked his secretary to continue to do this in the same way as she had done with the previous partner she had worked for. The representative was aware that, in this respect, the former partner had worked in the same way that he works, and that his secretary would not need extensive training in carrying out that operation.

So far as he understood it, the restoration requirement that all due care is taken required that a suitable monitoring system was in place. It was additionally required that, if the firm was a large one, where a large number of dates were being monitored at any given time, there had to be at least one cross check built into it. Having explained his monitoring system, the representative said that he would be surprised if the

Board considered it to be unsatisfactory. It was not clear to him how it could be significantly improved.

Applying the aforementioned requirements for restoration, in the case of a large firm for a date to be missed there had to be two separate mistakes. The requirement of due care could not be interpreted in the sense that if there were two separate mistakes the mistake would not be isolated. Otherwise it would be impossible for any large firm to obtain restoration. Instead, when considering whether or not a mistake was isolated, it was necessary to look at the system as a whole, rather than an individual case. In this context, isolated meant exceptional. The representative maintained that, in the present case, the omission was the result of an isolated mistake. The mistake could be considered isolated in that the combination of failure to insert the deadline date into the primary diary and the failure to sufficiently monitor the deadline date had never previously occurred. In the alternative, the individual omissions of failing to enter the deadline in the primary diary and the failure to sufficiently monitor the deadline date in the backup diary were individually and separately isolated omissions.

Furthermore, relying on T 869/90, the representative argued that if the Board should still find that all due care had not been taken, the principle of proportionality should be applied. In the present case, the result of not observing the deadline would be extremely severe in the circumstances.

VII. In the oral proceedings the representative pointed out that the Board was the first and last instance in this

matter, this being a fact that raised doubts as to its compliance with natural justice and the TRIPS Agreement and increased the pressure on the Board to decide favourably for the appellant in case of doubt. The representative also doubted that the case law of the Boards of Appeal fully reflected the reality of the day-to-day work in law firms and that it brought out the reality on the duties of representatives and their assistants as many administrative staff were sometimes better suited for performing structured tasks.

The representative indicated that, in a typical year, his firm had to deal with 17,000 due dates. He explained that the primary and the backup diarying systems were independent overall, but that his secretary dealt with both the primary and the backup diary. She was supposed to retrieve every Tuesday those files that were indicated on a list created on that day and she should make a double check with the list generated and distributed by the Records Department every Monday. The Board drew the representative's attention to the case law according to which in a large firm where a large number of dates had to be monitored at any given time the required cross check had to be **independent**, i.e. carried out by a person different from the one in charge of the primary check. In this respect, the Board specifically mentioned the decisions in cases T 828/94, T 428/98, T 36/97, T 1561/05 and quoted the pertinent passages from those decisions. The representative acknowledged that somebody other than his secretary could have checked the files retrieved, but that there were practical difficulties in involving a different person for doing the cross check. The secretary got the files out because she knew where they were. Involving

somebody else would go beyond what could be required from a reasonably organised representative. It may be true that he himself could have done the cross check but even then he would still have had to rely on his secretary to retrieve the relevant files from his cabinet.

As for the supervision of his secretary regarding the cross check with the backup diary, he was under the impression that she had got out a small number of files (between one and three) on the basis of the backup diary but he could not remember exactly. He acknowledged though that she did not check the backup diary systematically. He considered that the main issue was whether the secretary was not supervised from the start of her working with him at the beginning of April 2007 up until 19 June 2007, when the omission to file an appeal was discovered. In this context he referred to J 31/90, related with J 32/90 and J 33/90, dealing with the failure to furnish a translation of the international application upon entering the European regional phase. This was a systematic omission with three identical mistakes having occurred over a period of five weeks; the omission was excused as a single error.

On the application of the principle of proportionality the Board advised the representative that, in the same composition, it had held that the number of days by which a time limit had been missed played no role in the determination of whether all due care had been applied (see T 1401/05 of 20 September 2006, at point 14) and that this view had subsequently been affirmed by another board (see T 439/06 of 31 January 2007, OJ 2007, 491,

point 15). After that the representative went on to argue that the principle of proportionality should be applied in relation to the events having taken place *before* expiry of the appeal time limit. Two points should be considered in the present case: first, the fact that the patent application was ready for grant bar minor issues. In this regard, he acknowledged that the boundary between an application that was close to grant and one, which was a long way from being patentable, was difficult to draw. The second point to be taken into account was the fact that it was the appellant's intention to file an appeal even before the application was actually refused by the Examining Division.

The representative also relied on certain events having occurred in his private life during the relevant period, which should be treated as mitigating circumstances.

VIII. In the oral proceedings he requested that the appellant's rights in relation to the filing of an appeal within the time-limit of two months prescribed by Article 108 EPC 1973 be re-established.

IX. At the end of the oral proceedings, the Chairman declared the debate closed and announced that a decision would be given in writing.

Reasons for the Decision

The applicable version of the relevant provisions of the EPC

1. The revised text of the European Patent Convention (hereinafter referred to as "EPC 2000") entered into

force on 13 December 2007. Article 7(1) of the Act revising the EPC of 29 November 2000 (hereinafter referred to as "the Act") entitled "Transitional provisions" (Special edition No. 1 OJ EPO, at page 196) states:

"The revised version of the Convention shall apply to all European patent applications filed after its entry into force, as well as to all patents granted in respect of such applications. It shall not apply to European patents already granted at the time of its entry into force, or to European patent applications pending at that time, unless otherwise decided by the Administrative Council of the European Patent Organisation."

The Administrative Council did decide otherwise in respect of a number of provisions of the EPC, including in particular Article 108, in Article 1 of its Decision of 28 June 2001 on the transitional provisions under Article 7 of the EPC Revision Act (hereinafter referred to as "the Decision"; see *ibid.*, at pp. 197 *et seq.*), which equally entered into force upon the entry into force of the revised text of the Convention, i.e. on 13 December 2007 (see Article 2 of that Decision). That means that a literal reading of Article 7(1) of the Act and of Article 1 of the Decision would mean that those EPC provisions would have to be applied from 13 December 2007 in particular to European patent applications pending at that date. It does not mean, however, that any of those provisions of the EPC 2000 would have had to be applied *before* 13 December 2007. Before that date only the Articles of the EPC 1973 could be valid.

2. The decision of the Examining Division under appeal was handed down on 3 March 2007, i.e. well before 13 December 2007. According to Article 108, first sentence, EPC 1973, Notice of Appeal has to be filed in writing at the Office within two months after the date of notification of the decision appealed from. Under its second sentence notice shall not be deemed to have been filed until after the fee for appeal has been paid. In the present case this time limit elapsed on 13 June 2007 (Rule 78(2), Rule 83(1), (2) and (4) EPC 1973).

This latter date is also before the entry into force of the EPC 2000. Therefore, it is the time limit of Article 108 EPC 1973 that was missed and whose restoration is applied for. That provision will be referred to below as "Article 108 EPC" only.

3. As for the re-establishment provision, Article 1(5) of the Decision says that Article 122 EPC 2000 shall apply, *inter alia*, to European patent applications pending at the time of its entry into force, in so far as the time limits for requesting re-establishment of rights has not yet expired at that time. In the present case it was on 19 June 2007 that the representative discovered that the time limit was missed. According to his declaration, the file was taken out of his cabinet on that day, which is one day in advance of a review date entered in the primary diary. The review date had not been deleted and replaced with the deadline for filing an appeal. The pertinent extract of the diary showing that date had been furnished as an exhibit to the representative's declaration mentioned above (under point V). Thus, on 19 June 2007 the cause of non-compliance with the time limit was removed. According to Article 122(2) EPC 1973

the time limit for requesting re-establishment of rights expired two months later, i.e. on 19 August 2007. As the EPC 2000 entered into force on 13 December 2007, the time limit for requesting restoration had expired at that time. Therefore, the condition of Article 1(5) of the Decision not having been met, it is Article 122 EPC 1973, which applies in the present case. Below this provision will generally be referred to without the addition "1973".

4. Similarly, all those other provisions of the EPC cited below will be those of the EPC 1973 because they are either related to the missed appeal time limit or to the interpretation of the re-establishment provision.

Applicability of Article 122 EPC

5. As no Notice of Appeal was given nor was the fee paid before expiry of the time limit on 13 June 2007, the appeal should be deemed not to have been filed resulting in the loss of the right of appeal (Article 122(1), 106(1), 107 EPC), unless the application for re-establishment of rights that the appellant submitted on 9 August 2007 is granted.

Admissibility of the request for re-establishment

6. The application for re-establishment complies with the formal requirements of Article 122(2) EPC. The cause of non-compliance with the time limit having been removed on 19 June 2007, the time limit of two months from the removal of that cause was observed with the letter received on 9 August 2007 containing the application for re-establishment of rights. The omitted act, i.e. the filing of a Notice of Appeal, together with the payment

of the corresponding fee, was also completed on that day. Furthermore, the application is in accordance with Article 122(3) EPC as the grounds and facts on which the application was based, as well as the payment of the fee for re-establishment, were submitted together with the application for re-establishment. This application is, therefore, admissible.

Interpretation of Article 122 EPC in the context of the right of access to a court

7. Whether or not the application for restoration can be acceded to depends on whether the substantive requirements of Article 122 EPC are also met. Under paragraph 1 of that provision the person making the request must show that it has taken "all due care required by the circumstances". The representative argued that the principle of proportionality should be applied in a number of respects in assessing the substance of the request for re-establishment of rights. He also doubted that the case law of the boards brought out the reality on the duties of representatives and their assistants. To address these submissions the board considers it appropriate to analyse re-establishment of appeal time limits in the wider context of the right of access to a court taking into account, in particular any impact of the principle of proportionality. To this end, first, the situation under the European Convention of Human Rights and subsequently that under the EPC will be considered.
8. Time limits for appeals and the right of access to a court pursuant to the European Convention of Human Rights

While the European Convention on Human Rights cannot be applied directly to the European Patent Office because the European Patent Organisation is not a signatory, the Convention has been recognised in the case law of the boards of appeal as relevant for the purposes of the EPC; see referral T 377/95 (OJ 1999, 11, at point 33 and the references cited there). The Enlarged Board of Appeal, in dealing with that referral in G 3/98 (OJ 2001, 62, at point 2.5.3), addressed the right to a fair hearing within the meaning of Article 6 § 1 of that Convention; it also relied on that provision in G 1/05 (of 7 December 2006, OJ 2007, 362). Similarly, Article 6 § 1 of the Convention was considered in T 190/03 (at point 10) and in J 15/04 (at point 4).

The European Convention on Human Rights, in Article 6 § 1, the part of which is relevant to the instant case, provides: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...". In *British-American Tobacco Company Ltd v The Netherlands*, judgment of 20 November 1995 in Case 46/1994/493/575, the European Court of Human Rights (ECHR) considered that the patent application proceedings in question concerned "the determination of civil rights and obligations" within the meaning of Article 6 § 1 of the Convention (see paragraph 67).

It is established case law of the Court "that the right to a court, of which the right of access is one aspect ... is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal.

However, these limitations must not restrict the exercise of the right in such a way or to such an extent that its very essence is impaired. They must pursue a legitimate aim and there must be a reasonable degree of proportionality between the means employed and the aim sought to be achieved ...". See, e.g., *Melnyk v. Ukraine*, judgment of 28 March 2006, Application no. 23436/03, at paragraph 22, and the references cited there.

As for the rules on time limits for appeals the Court held that they "are undoubtedly designed to ensure the proper administration of justice and legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy ... The Court underlines that, since the issue concerns the principle of legal certainty, it raises not only a problem of the interpretation of a legal provision in the usual way, but of an unreasonable construction of a procedural requirement which may prevent a claim being examined on the merits, thereby entailing a breach of the right to the effective protection of the courts ... (see *ibid.*, at paragraph 23.)

In the special circumstances of another case, the European Court of Human Rights recognised a problem with the principle of proportionality and a violation of Article 6 § 1 where, due to a strict interpretation of a legal provision, an appeal was held to be inadmissible for failure to meet the deadline (see *Tsironis v. Greece*, judgment of 6 December 2001, Application no. 44584/98, at paragraphs 27 *et seq.*). This may be seen as a

recognition of the need to re-establish the right to appeal in that case.

9. Time limits for appeals and the right of access to the EPO boards of appeal pursuant to the European Patent Convention

The right of access to the EPO boards of appeal is embodied in the EPC. Article 106 EPC entitled "Decisions subject to appeal" provides in its first paragraph that "[a]n appeal shall lie from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and the Legal Division." According to Article 21(1) EPC, the Boards of Appeal shall be responsible for the examination of appeals from the decisions of the Receiving Section, Examining Divisions, Opposition Divisions and of the Legal Division. The boards of appeal may be seen as having the status of judicial authorities, see G 1/97, OJ 2000, 322, at point 5(c).

Regarding this right of access and the role of re-establishment in connection therewith the Enlarged Board held in G 1/86 (OJ 1987, 447):

"1. The European Patent Convention provides for a number of procedural steps to be taken within time limits laid down either in the Convention itself or by the European Patent Office. Failure to observe these time limits frequently involves the person concerned in an irrevocable loss of rights. This is particularly harsh when that person was not actually at fault and the failure was attributable to an oversight which occurred in spite of all due care required by the circumstances having been taken.

2. Restitutio in integrum was instituted to mitigate this hardship (Article 122 EPC)."

One of the procedural steps required to get access to the boards of appeal is the filing of a Notice of Appeal within the two-month time limit laid down in Article 108, first sentence, EPC. This is one of those deadlines that, if missed, can be reinstated under the conditions laid down in Article 122 EPC.

10. The Board concurs with the principles enunciated in the above case law of the ECHR holding that limitations of the right of access to the boards of appeal, such as rules on time limits, must pursue a legitimate aim. Such limitations must also meet the requirements of the principle of proportionality. In this respect the Board refers to T 869/90 (of 15 March 1991) cited by the appellant. In that decision the board held: "In accordance with general principles of law, as applied in the context of administrative law, a procedural means used to achieve a given end (e.g. a sanction following a procedural non-compliance) should be no more than that which is appropriate and necessary to achieve that end; this is commonly referred to as the principle of proportionality." This statement was affirmed in T 111/92, T 635/94 and T 27/98. In the case law of the boards the principle of proportionality was examined in particular where a time limit had been missed by one or two days due to some miscalculation.
11. The requirements of the principle of proportionality were established in greater detail by the European Court of Justice (ECJ). The ECJ has in particular given the following interpretation of the *general* principle of

proportionality as it applies *inter alia* in the relationship between the European Union and its Member States. It held that "the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." See judgment of the Court of 11 November 2004 in Case C-171/03, *Maatschap Toeters, M.C. Verberk, trading as 'Verberk-Voeten', v Productschap Vee en Vlees* [2004] ECR I-10964, paragraph 51, and the case law cited there. The judgment was given in a case, where a national court had asked a question in relation to the validity of a certain provision of a Commission Regulation. The Court determined whether the Community legislature had made an error of assessment. It carried out that review in the light of the principle of proportionality. The same definition was used where certain protective measures adopted by the Member States were in question. See judgment of the Court of 10 March 2005 in Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 47.

12. The Board notes that the requirements of the general principle of proportionality as enunciated by the ECJ seem to correspond fully to the conditions for proportionality that the ECJ set up in the context of the examination of fundamental rights. See, e.g., judgment of the Court of 3 December 1998 in Case C-368/96 *Generics (UK) and Others* [1998] ECR I-7967, at

paragraph 83, where, in assessing infringement of the principle of proportionality in relation to the right to property, the Court referred to the assessment of infringement of the *general* principle of proportionality.

13. The Board is of the opinion that the definition given by the ECJ can be applied in particular to limitations of the right of access to the boards of appeal, such as rules on time limits, by legislative measures or their application. Those measures or their application must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures or ways of applying them recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

14. As for the *legislative* level, the appellant has not contested that the appeal time limit of Article 108 EPC in conjunction with the provisions of Article 122 EPC, is a measure that has a legitimate aim and meets the proportionality test, and the board has no doubts in this regard either. The Board considers that the legitimate aim is legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment (cf. ECHR in *Melnyk*, point 9 above, and ECJ, Case C-406/01, *Federal Republic of Germany v. European Parliament*, order of 17 May 2002, paragraph 20). The Board also has no reason to believe that the limitations imposed by Articles 108 EPC, as mitigated by Article 122 EPC, are not in compliance with the principle of proportionality, and the appellant has made no objection in this regard.

15. As for the *application* of Article 108 EPC in conjunction with Article 122 EPC the principle of proportionality has the consequence that the interpretation of those provisions must not impose means that are not appropriate, necessary or disproportionate in relation to the aim sought to be achieved, namely legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment. Correspondingly, the conditions for granting restoration, in particular the requirement of due care, must not be interpreted in an excessive manner that unreasonably restricts access to the board and thus prevents the board from deciding on the merits of the case. This is the balance between legal certainty and proper administration of justice on one hand and substantive justice on the other, which has been struck under the EPC in this context.

It follows that the principle of proportionality must always be applied in connection with the interpretation of those conditions, which determine whether or not an application for re-establishment can be allowed. It is not permissible to consider the result of a procedural irregularity, such as the loss of a patent or patent application, separately in relation to the kind of procedural irregularity and allow the application because of the severity of the result and a minor degree of irregularity, even though the conditions of Article 122 EPC are not met. The Board therefore disagrees with the statement in J 44/92 and J 48/92 (see point 9 of both decisions), according to which "it must be borne in mind concerning the principle of proportionality that it only applies in borderline cases, in support of other grounds already substantiating to a

certain extent the allowance of the appeal". In the Board's view, if those "other" grounds do not, by themselves, constitute a basis for allowing the request for restoration, then it will be imperative to refuse that request.

16. The fact that the principle of proportionality must be taken into account in interpreting Article 108 in conjunction with Article 122 EPC does not mean that any circumstances related to the proceedings are of relevance. The Board holds the view that the number of days by which a time limit had been missed, as well as the points specifically relied on by the appellant, namely whether or not a patent application is close to grant and whether there was an intent to appeal already before the actual refusal of the application by the Examining Division, are all irrelevant. The reasons for this view are given individually below.

- The number of days by which a time limit had been missed

In the present case the time limit of 13 June 2007 for filing a Notice of Appeal had been missed by six days when the mistake was discovered on 19 June 2007. In T 869/90 cited by the appellant the statement of grounds of appeal was filed only one day late. The board stated that it "was not specifically applying" the principle of proportionality to that case but considered it reasonable "to have this principle in mind" in a case like the one before it. The board then drew the attention to the fact that any person who was misled in the sense of Article 122(6) EPC would be protected by that provision. In contrast, the loss of the patent

application because of such a procedural irregularity would be a severe result. It went on to say that "[i]n assessing the question of 'all due care [required by the circumstances]' in the present case, the Board has in mind the fact that if there was any lack of due care, 'the circumstances' include the fact that the result of any such lack of due care was that the time limit was only missed by one day " (see second but last paragraph of the reasons). Based on this and other considerations (see below, at point 19) the board was satisfied that the appellant had taken all due care and therefore allowed the application for re-establishment of rights.

The present Board expressly disagrees with this approach (that was followed also in T 635/94; see point 3 *in fine*). The present Board believes that this approach is not in line with the wording of Article 122(1) EPC according to which "[t]he applicant for ... a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit ... shall ... have his rights re-established ...". From the fact that the "in spite" clause is in past tense, the Board concludes that the inability to observe a time limit must have been the consequence of all due care required by the circumstances having been taken *before* the expiry of the time limit and the number of days by which it was missed can therefore not qualify as a "circumstance" defining the scope of due care.

More importantly, following the approach taken in T 869/90 would jeopardise the aim of time limits. The Board recalls that this aim is legal certainty and the proper administration of justice by avoiding any

discrimination or arbitrary treatment (see point 15 above).

The unacceptable consequences of this approach may be elucidated by applying it to the present case. One might then have to consider the delay of six days as a "circumstance" (independently of the fact that a Notice of Appeal was filed nearly two months after expiry of the corresponding time limit only) and ponder whether, together with the other circumstances of the case at hand, due care could still be considered to have been taken. As the loss of the patent application would still be a severe result and persons misled in the meaning of Article 122(6) EPC would still enjoy protection by that provision, the public might have the impression that arriving at such a conclusion might not *a priori* be excluded. More generally speaking, the public would no longer be sure whether there was a specific number of days of delay at which the line would be drawn. The Board acknowledges that the provisions of Article 122 EPC do entail some degree of uncertainty as to whether an allowable application for restoration will be filed and this uncertainty may last for a period of up to one year, i.e. the year immediately following the expiry of the unobserved time limit (see Article 122(2), third sentence, EPC). The present Board is of the firm belief, however, that it is not for the boards of appeal to extend the scope of this uncertainty by relying on Article 122(6) EPC and considering the duration of the delay a "circumstance" within the meaning of Article 122(1) EPC. This would distort the balance between legal certainty and proper administration of justice on one hand and substantive justice on the other, which has been struck under the EPC in this context.

The loss of a patent application because of a procedural irregularity may be a severe result. However, such severe result is imperative when the conditions of Article 122 EPC, properly interpreted in the context of the right of access to the boards of appeal, as set out above, are not met. Then the respect of the legitimate aim also spelt out above will prevail over justice in substance that could otherwise be brought about by a decision on the merits of the case. Accepting an application for reinstatement by applying or "having in mind" the principle of proportionality in the sense of T 869/90 to overcome the absence of the conditions of Article 122 EPC would be a more severe result.

The present Board has already expressed the opinion according to which only circumstances *before* expiry of the time limit missed can play a role in T 1401/05 (at point 14). It held that the number of days by which a time limit had been missed was irrelevant for deciding whether all due care was applied or not as Article 122(1) EPC did not leave any room for the application of the principle of proportionality in this respect. Only the character of the conduct before the time limit expired was decisive for the consideration of the due care issue, not the length of the ensuing delay. The Board cited T 1070/97 and T 971/99 as authorities in this regard. Shortly after T 1401/05 had been handed down, as stated, T 439/06 (at point 15) arrived at the same result.

- Whether or not a patent application is close to grant

Second, the subject-matter of the proceedings is irrelevant, in particular whether the patent application

is seen as being close to grant. The EPC treats procedural requirements, such as the appeal time limit of Article 108 EPC, and substantive requirements for filing a successful appeal as two separate and distinct categories. Whether or not an appeal is admissible does not depend on the likelihood of its success.

- The intent to appeal

Third, a mere intent to appeal is equally irrelevant, as long as it has not matured into a declaration to file an appeal, directed to and received by the EPO in the form and time limit prescribed by the EPC. An applicant originally intending to appeal even before an application was actually refused by the Examining Division may, before the end of the appeal period, change its mind and, for whatever reasons, prefer not to appeal a decision, even in a case where it reckons to have a good chance of success. On the other hand, where an applicant is absolutely sure that it wants to appeal an expected adverse decision, one would have to wonder why it should benefit from the presence of such an intent as it would have been in a position to file a Notice of Appeal right after reception of that decision.

As a consequence of the above, the appellant's submissions in relation to the principle of proportionality are without merit and must therefore be dismissed.

Application of the principle of proportionality in relation to Articles 108 and 122 EPC

17. To assess what taking into account the principle of proportionality in interpreting Article 108 in conjunction with Article 122 EPC calls for, general principles of interpretation of the "due care" requirement in the case law of the boards of appeal, pertinent to the present case, will first be set out. The question as to whether the application for restoration can be accepted hinges on the "due care" requirement. Second, it will be analysed whether the interpretation of that requirement in two categories, namely that of the existence of an independent cross check and of a reasonable supervision of assistants, in the case law of the boards in general meets the principle of proportionality. The Board recalls that that principle prohibits an excessive interpretation of the due care requirement that unreasonably restricts access to the boards. In the affirmative, the principle of proportionality will be applied to the facts of the present case.

18. The interpretation of "due care" within the meaning of Article 122 EPC

As stated, under Article 122(1) EPC the request for re-establishment of rights can be allowed only if the person applying for it shows that it has taken "all due care required by the circumstances". In considering it, the boards have ruled in numerous decisions that the circumstances of each case must be looked at as a whole. The obligation to exercise due care must be assessed in the light of the situation as it stood before the time

limit expired. For cases where the cause of non-compliance with a time limit involves some error in the carrying out of the party's intention to comply with the time limit, the case law has established the criterion that due care is considered to have been taken if non-compliance with the time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (see the EPO publication "Case Law of the Boards of Appeal of the European Patent Office", 5th edition 2006 (hereinafter referred to as "Case Law", at VI.E.6.2.)).

An isolated mistake in a normally satisfactory system is excusable; the appellant or his representative must plausibly show that a normally effective system for monitoring time limits prescribed by the EPC was established at the relevant time in the office in question. The fact that this system operated efficiently for many years was considered to be evidence that it was normally satisfactory (see Case Law, VI.E.6.2.2(a)). In a large firm where a large number of dates have to be monitored at any given time, it is normally to be expected that at least one effective cross check is built into the system (see Case Law, VI.E.6.2.2(c)).

When an applicant is represented by a professional representative, a request for re-establishment cannot be acceded to unless the representative himself can show that he has taken the due care required of an applicant or proprietor by Article 122(1) EPC (cf. J 5/80, headnote I, OJ 1981, 343). If the representative has entrusted to an assistant the performance of routine tasks such as noting time limits the same strict standards of care are not expected of the assistant as

are expected of the applicant or his representative. (See *ibid.*, headnote II.) A culpable error on the part of the assistant made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has himself shown that he exercised the necessary due care in dealing with his assistant. In this respect, it is incumbent upon the representative to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision over the work. (See *ibid.*, headnote III.)

If the representative has not complied with these requirements, and if the assistant commits a culpable error which results in the failure to observe a time limit, then the representative cannot establish that he took all due care required by the circumstances (see, by analogy, J 5/80, point 8). In this context it must be observed that non-compliance with *either* the condition of an independent cross check *or* the duties in relation to assistants (selection, training, supervision) will lead to a finding of non-existence of a normally satisfactory system (and, in case of a mistake leading to the missing of a time limit, to a finding of lack of due care).

19. Due care: independent cross check

- Case law: the need for an independent cross check

The boards have consistently held that the effective cross check required in a large firm where a large number of dates have to be monitored at any given time must be independent, i.e. redundant or failsafe. Such

was the case in the decisions cited in the oral proceedings (see point VII. above) and also in T 686/97, T 1172/00, T 785/01 and T 622/01. Lack of independence of the two monitoring systems in place was one, if not the most important, ground for rejecting an application in T 902/05, at point 6. There it was held that "[i]n a firm as large as the representative's, the provision of suitable redundant or failsafe systems, with an element of dual control, will usually be an essential component of a normally satisfactory reminder system ... The following things can be said about the systems in place in the representative's office at the relevant time: First, the time management systems in place did not in reality consist of a dual control system at all. The evidence shows that although two entries were made of relevant time limits, only the supervisor had the responsibility to check and instigate the appropriate action as they drew near. There is no evidence of any mechanism to provide a cross-check or control over his actions."

The appellant has drawn the Board's attention to T 869/90 already addressed above (under point 16) where the board had accepted that all due care had been taken despite the fact that there was no cross check in place during the final ten-day period. The mistake in question was made by a representative rather than by an assistant. The Board considered that the system for observing time limits could be said to have been normally satisfactory because, before that case, it appeared to have worked without problems. The decision says that the representative himself appears to have been entirely responsible, during the final ten-day period, for meeting the time limit for the statement of grounds. The

board however also held that, especially in the context of an inextensible time limit, the provision within an office system of a cross check by an independent person seemed a reasonable precaution "(at least with hindsight)". Its absence in similar future cases might well lead to a finding of lack of due care. Until that case had occurred, the possibility of such an error seemed extremely remote. The board was therefore prepared to accept, "with some degree of doubt", that the requirement of all due care had been satisfied. The board however still went on to say that it had had some doubts as to whether "all due care" had been exercised during the final ten-day period. It explained that the worst that could normally result from any lack of due care in the calculation of the final ten-day time limit was the missing of the time limit by one day, as happened in that case. The board considered that, if there was any lack of due care, "the circumstances" included the fact that the result of any such lack of due care was that the time limit was only missed by one day.

As discussed extensively above, under paragraph 16, the present Board disagrees on this latter point. Moreover, the Board also disagrees with the view that a monitoring system of time limits can be held to have been normally satisfactory because it worked without previous problems and consequently accept that all due care had been taken even though doubts exist. Evidence that such a monitoring system operated efficiently for many years will weigh in favour of a finding of a normally satisfactory character but will be counterbalanced by evidence that main features of such a character, such as an independent cross check, go missing. In that case a

satisfactory character will be excluded. As the present Board therefore disagrees with T 869/90 on those core points, the appellant cannot derive any related benefit from relying on it.

In the light of the foregoing the Board considers the established case law referred to in the first paragraph of this point to be decisive.

- Whether the requirement of an independent cross check is proportionate in general

At the outset it should be recalled that the representative has not specifically contested the need for a cross check in a large firm where a large number of dates have to be monitored at any given time.

The Board notes that observance of time limits is important as non-respect thereof may have the consequence of the loss of a patent application or patent, such as in the case of the appeal deadline at issue. In a large firm where a large number of dates have to be monitored at any given time the risk of mistakes is substantial. A cross check is therefore not only appropriate but also necessary to minimise this risk. The additional burden is not disproportionate for a large firm, where the cross check can be organised more economically than in a smaller one. For smaller firms the boards have not imposed this requirement; see, e.g., T 166/87, where it was held that in a relatively small patent department consisting of 7 full-time staff, normally working in an efficient and personal manner, employing normally reliable personnel, a cross check mechanism for monitoring time limits may be dispensed

with without offending against the duty of all due care. As a consequence, the requirement of a cross check is in line with the requirements of the principle of proportionality and does not unreasonably restrict access to the boards.

The representative, however, contests the need for two **independent** systems, i.e. of an independent cross check. On the other hand he also said that humans are not infallible. Assistants may, for instance, suffer from stress or illness or be distracted from work by personal problems. They may also be subject to an error in the dealing with daily tasks and may be unable to correct it by themselves. That means that, if one and the same person plays a necessary role for the functioning of two monitoring systems, his or her failure during a specific period of time to properly carry out the assigned tasks may affect both systems and thus deprive the backup system of its usefulness. Therefore, the Board is of the opinion that independence of the two systems is both appropriate and necessary. This conclusion cannot be called into question because, as the representative put it, the greater focus is on the primary diary and the lesser focus on the backup diary. Even if this suggestion could be accepted, it would still be appropriate and necessary that the backup system is redundant or failsafe.

The Board also holds the view that the requirement of an independent cross check is not disproportionate. Independent monitoring need not entail much additional effort but is mainly a matter of a corresponding organisation of the work. Work will be shifted away from a person dealing with the primary diary to another

person whose duty it will be to make a cross check with the backup diary.

As a consequence of the foregoing, the requirement of an *independent* cross check in the case law of the boards of appeal is also in line with the principle of proportionality and does not unreasonably restrict access to the boards.

- Whether the requirement of an independent cross check is proportionate in the case at hand

The representative's firm is a large one, where a large number of dates have to be monitored at any given time. The representative acknowledged that his firm had to deal with roughly 17,000 due dates in a typical year. (See above, at point VII.) Thus, under the case law referred to in the present decision, an independent cross check had to take place in his firm. In his case, the due dates were entered first in the backup diary managed centrally by the Records Department. Thereafter, his secretary was supposed to enter them in the primary diary. Thus, the systems of entering time limits were independent of each other. However, his secretary played a necessary role in the monitoring of the deadlines in both systems. She generated the "Tuesday list" of due dates from the primary diary and was in charge of cross checking it with the "Monday list" distributed by the Records Department. Therefore, the cross check was not independent.

The check that the representative exerted on the primary diary dealt with the entry of time limits only and therefore does not change this finding. Apart from that

this check required that his secretary put the respective file to one side for him. Thus, not even in relation to the entry of time limits can it be considered to be an independent check, as the representative claimed.

The requirement of an independent cross check is not disproportionate in this case. If practical difficulties discouraged involving a different person for doing the cross check, as the representative asserts, he could have carried out the cross check himself. By comparing the Tuesday and Monday lists he could have spotted any missing files and could have had them retrieved from the cupboard by his secretary, where appropriate. Carrying out this task would not have required much time and would not have been extraneous to his organisation of the work given that he exerted a check of the entry of deadlines in the primary diary. The Board thus does believe that the representative's system could be improved in this sense to meet the requirement of an independent cross check.

Therefore, the requirement of an *independent* cross check in the present case is also in line with the principle of proportionality and does not unreasonably restrict access to the board.

- Conclusion

As explained above, the representative's secretary not only monitored the due dates in the primary diary but was also in charge of the cross check of the primary diary with the backup diary. Therefore, the cross check cannot be considered to have been independent and, as a

further consequence, the monitoring system cannot be held to have been normally satisfactory. Against this backdrop, the culpable errors of the secretary in the present case, even if they could be looked at as a single one, rule out that the representative has taken all due care required by the circumstances.

20. Due care: supervision of the secretary

In the Board's view the monitoring system is not "normally satisfactory" also because the secretary was not supervised as to her carrying out of the cross check with the backup diary during the period from the beginning of April 2007 through 19 June 2007, i.e. during a period of more than two and a half months. It is also for this reason that the secretary's errors exclude a finding of due care.

The Board recalls that, under the established case law of the boards, the representative may entrust to an assistant the performance of routine tasks such as noting time limits. The same strict standards of care are not expected of the assistant as are expected of his representative. However, such delegation brings about certain obligations in dealing with the assistant. In this regard, the representative must exercise the necessary due care by choosing for the work a suitable person, properly instructed in the tasks to be performed, and by exercising reasonable supervision over the work (see above, at point 18). The Board considers these obligations to be fully compatible with the conditions of the principle of proportionality, and the appellant has made no challenge in this respect. The secretary deals with duties of the representative for whose proper

performance the representative is held responsible by his client and non-compliance of which may have severe results, such as in the case of missed time limits.

In the case at hand, the Board does not cast doubt on the appropriateness of the selection of the secretary taking into account the appellant's submissions on her track record. However, the Board must point out that the instructions given in relation to the backup check consisted in little more than the order to continue to perform that check in the same way as she had done with the previous partner she had worked for. Since the representative knew that in this respect the previous partner worked in the same way as he did, in his view, no substantial instructions were required. The Board considers that, if exceptionally training can be dispensed with, then it will be appropriate and necessary to supervise the person in shorter intervals during the period immediately following her taking up of the new job to safeguard that she carries out her tasks correctly. Doing so for the first time only more than 2 1/2 months later is in any case not sufficient. The representative must make sure himself that his personal duties as representative are respected and cannot completely rely on the secretary's compliance with her duties when she worked with the former partner, even if that partner followed the same working methods. The representative himself said that "[w]ith respect to the cross check of files, I believe that this [non-observance of the appeal time limit] is the result of my secretary only joining me in April 2007, having worked for a former partner of mine" (see application for restoration, page 3, second but last paragraph, and point IV above). Requiring such supervision is thus not

only appropriate and necessary but also not disproportionate, as supervision does not require a substantial amount of time. As a consequence, the obligation to supervise the secretary, as applied in the present case, also meets the proportionality test and does not unreasonably restrict access to the board.

The representative admitted that his secretary did not perform a systematic double check with the backup diary. But he submitted that he was under the "impression" that some files were got out on the basis of the backup diary. This statement is unsubstantiated as he said that he could not remember exactly. It also runs counter to the explanations that he supplied in the application for restoration: on finding that the deadline had not been observed, he "discovered" that his new secretary had not been carrying out the cross check since she had become his secretary (see above, point IV *in fine*). Apart from that, if his "impression" were still taken at face value *arguendo*, that would mean no more than that the secretary performed the cross check occasionally but not that it was being done systematically. The "impression" could therefore not replace a reasonable supervision.

Consequently, as set out at the beginning of this point, the monitoring system is not "normally satisfactory" also because of a lack of supervision of the secretary's work.

21. Due care: further considerations

- Lower standard of care in the case law of the boards

In the hearing the representative also referred to J 2/86 and J 27/88 where, in his view, the boards applied a lower standard of care. The present Board observes that none of those cases deals with the requirement of an independent cross check or the reasonable supervision of assistants, and the Board is unable to draw conclusions from these cases that would affect the above assessment. The representative did not elaborate in this regard.

- Certain circumstances in the representative's private life

As mitigating circumstances the representative referred to certain events having occurred in his private life during the relevant period. He failed to explain, however, how these circumstances could have specifically affected his duty to have a normally satisfactory monitoring system in place providing for an independent cross check of time limits and a reasonable supervision of his secretary. He did not submit that those circumstances in his private life had affected his work in general, especially his handling of cases. Thus, this claim must be dismissed as unsubstantiated.

- The secretary joining the representative in April 2007 only

Nor can the representative derive benefit from the fact that the secretary joined him at the beginning of April 2007, i.e. around the date of the decision delivered on 3 April 2007. On the contrary, this fact had an impact on his duty to exercise reasonable supervision, in particular as to her performance of the cross check with

the backup diary, which he failed to comply with. Apart from that, the date when she took up her tasks as the representative's secretary had no impact on the question as to whether the two monitoring systems were independent.

22. Due care: isolated mistake

In the light of the foregoing, the question of whether non-observance of the appeal time limit was caused by an "isolated" mistake plays no role. As the monitoring system was not satisfactory given the lack of an independent cross check and of a reasonable supervision of the secretary, any mistake leading to the missing of a time limit will exclude due care on the part of the representative. Therefore, no consideration need be given to the theories advanced by the appellant on how to examine this criterion in the framework of a two-tier monitoring system. It is not necessary either to address J 31/90 and the two related cases which recognised a systematic omission including three mistakes over a period of five weeks as one single error. (Independent thereof, at the time the secretary made the mistakes in those cases, there was evidence that she was suffering from severe stress as a result of her husband's illness and was herself suffering from ill-health. No such facts have been submitted in the present case.)

Overall conclusion

23. According to Article 122 EPC an application for re-establishment of rights can only be allowed if the person making the request has shown that it has taken "all due care required by the circumstances". The Board

is convinced that the case law of the boards on the "due care" aspects relevant to the present case does bring out the reality on the duties of representatives and their assistants, in particular that that case law is in line with the principle of proportionality. The Board however found that an independent cross-check and a reasonable supervision of the secretary were absent. The representative therefore cannot safely claim that his monitoring system was satisfactory. Nor have any circumstances surfaced that would qualify as "exceptional" within the meaning of the case law (see above, at point 18). Therefore, as the secretary's culpable errors have led to the missing of the appeal time limit, an exercise of due care cannot be found in the present case. As a consequence the application for re-establishment of that time limit must be refused and therefore the appeal must be rejected as inadmissible .

24. In having arrived at this decision, the Board has been fully aware of the fact that the decision is not subject to appeal. The Board is unable to recognise why this fact should contravene natural justice. In this regard, the Board considers it sufficient to refer to the text of Article 6 § 1 of the European Convention on Human Rights, which, in pertinent part, reads: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...". It is clear from this provision that it requires a fair hearing by one and not by several tribunals. The Board is further unable to see why the fact that the present decision is final should contravene the TRIPS Agreement to which the EPO, incidentally, is not a party. According to Article 62(5) of that Agreement, final administrative

decisions in procedures concerning the acquisition or maintenance of intellectual property rights shall be subject to review by a judicial or quasi-judicial authority. There is nothing in this provision saying that a review by two or several judicial or quasi-judicial authorities is required. (Cf. in this context G 1/97, point 5.) The Board notes that, under the EPC 2000, Article 112a has introduced a petition for review by the Enlarged Board of Appeal of a decision of a board of appeal. This petition may, however, only be filed on certain specific grounds, such as a fundamental violation of Article 113 EPC or certain other fundamental procedural defects occurred in the appeal proceedings.

In the light of the foregoing the Board has no reason to cast doubt on the appropriateness of the fact that it is acting as both the first and the last judicial instance in the present proceedings. Consequently, the Board sees no logic in the representative's claim that this fact increased the pressure on the Board to decide favourably for the appellant in case of doubt. Independently thereof, the Board has tried to make it clear in the above assessment that it has no doubts that the conditions for granting the application for re-establishment of rights are not met in the present case.

Order

For these reasons it is decided that:

1. The application for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

M. Kiehl

A. G. Klein