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**Datasheet for the decision  
of 20 October 2009**

**Case Number:** T 0585/08 - 3.5.04

**Application Number:** 03700147.6

**Publication Number:** 1466486

**IPC:** H04N 13/00

**Language of the proceedings:** EN

**Title of invention:**

Apparatus for stereoscopic photography

**Patentee:**

Perisic, Zoran

**Opponent:**

-

**Headword:**

Re-establishment of rights in respect of the time limit for  
filing the notice of appeal (no)

**Relevant legal provisions:**

EPC Art. 108, 109, 110, 120, 122

EPC R. 131(4), 136(1)(2)

EPC Revision Act of 29 November 2000, Article 7

Decision of the Administrative Council of 28 June 2001 on the  
transitional provisions under Article 7 of the EPC Revision  
Act, Article 1.

Decision of the Administrative Council of 7 December 2006  
amending the Implementing Regulations to the EPC 2000,  
Article 2.

**Relevant legal provisions (EPC 1973):**

EPC Art. 111, 119

EPC R. 78(2)

**Keyword:**

"Date of removal of cause of non-compliance determined (yes)"  
"Reasoned request for re-establishment of rights in due time (no)"  
"Duty of the EPO to warn appellant about deficiency (no)"  
"Power of the board to examine appeal on its merits (no)"

**Decisions cited:**

G 0004/91, G 0012/91, G 0002/97, G 0003/03, J 0021/80,  
J 0007/82, J 0016/82, J 0006/90, J 0013/90, J 0027/90,  
J 0005/94, J 0018/98, J 0027/01, J 0010/07, T 0013/82,  
T 0287/84, T 0014/89, T 0371/92, T 0840/94, T 1026/06

**Catchword:**

The principle of good faith does not impose any obligation on the EPO to scrutinize documents on file to establish whether grounds and facts with respect to a request for re-establishment of rights are missing (points 13-19 of the Reasons).



Case Number: T 0585/08 - 3.5.04

**DECISION**  
of the Technical Board of Appeal 3.5.04  
of 20 October 2009

**Appellant:** Perisic, Zoran  
Gwynfenton,  
Whitewell,  
St. Teath  
Cornwall PL30 3LH (GB)

**Representative:** Akers, Noel James  
N.J. Akers & Co.  
7 Ferris Town  
Truro  
Cornwall TR1 3JG (GB)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 4 October 2007  
refusing European patent application  
No. 03700147.6 pursuant to Article 97(1)  
EPC 1973.

**Composition of the Board:**

**Chairman:** F. Edlinger  
**Members:** A. Dumont  
T. Karamanli

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the examining division posted on 4 October 2007 refusing European patent application No. 03 700 147.6, which was published as international publication No. WO 03/063511.
- II. In its decision (to which EPO Form 2019 07.93 was attached) the examining division found that the application did not meet the requirements of Article 52(1) EPC 1973 since the subject-matter of independent claim 1 was not new (Article 54(1) and (2) EPC 1973) and the subject-matter of claims 2 to 7 lacked novelty (Article 54(1) and (2) EPC 1973) or inventive step (Article 56 EPC 1973).

Under point 6 of the summary of facts and submissions it was stated that:

"As asked by the applicant in his letter dated 16.07.2007 a telephone conversation took place on 08.08.2007 in which the applicant has been informed that the application was due to be refused for the following reasons:

The opinion of the Examining Division was that claim 1 is not novel (Art. 54(1) and (2) EPC) since all the features defined in claim 1 are already taught in document D3 (FR 1 269 288, see for example: Fig. 3,5). The dependent claims were also neither new (Art. 54(1) and (2) EPC) nor inventive (Art. 56 EPC); see the latest official communication dated 28.09.2006. Therefore the subject-matter of the present claims 1-7 were not meeting the requirements of Article 52(1) EPC, in the sense of Article 54(1) and (2) and Article 56.

As proposed by the applicant, the applicant would try to file his observations and to correct the deficiencies mentioned above within a period of 1 month."

III. In a fax dated 11 January 2008 and received on the same day, the applicant's representative confirmed that he had received the EPO's "letter of the 4th October last formally refusing the above application". He further submitted that during the telephone conversation with the examiner on 8 August 2007 the examiner had agreed to allow the submission of a further amendment and/or argument within a period of one month. The representative also alleged that he had asked the examiner to confirm this, and that, therefore, his understanding had been that he would receive a written confirmation setting out the date from which this period of one month would run. He also stated that he had duly reported to his client accordingly and that he had been awaiting the receipt of the written confirmation, which he, however, had never received. Finally the representative asked that under these circumstances the decision be withdrawn and a period of one month be allowed for the filing of amendments.

IV. In a fax dated 16 January 2008 and received on the same day, the applicant submitted that regarding his representative's letter of 11 January 2008 there had been a breakdown in communication between his representative and the examiner as well as a failure in communication between the representative and himself. The applicant also stated that he had not been informed of the examining division's decision until three months after it was issued, when he received a letter dated

5 January 2008 from his representative. The applicant also indicated that his representative would write to the EPO again "explaining the personal circumstances" which had led to that delay. Finally he also asked that the decision of rejection be withdrawn and a period of one month allowed for the filing of amendments, together with appropriate supporting arguments.

V. In a fax dated 13 February 2008 and received on the same day, the representative referred to the heading of the entry on the *epoline* website for the present application, which stated at that time "*grant of the patent is intended*". He submitted that this entry had caused him some confusion and requested that an appropriate correction be made and that this be taken into account in relation to the appeal he was filing on that day.

VI. In a further fax dated 13 February 2008 and received on the same day the representative filed a notice of appeal and requested that the decision to refuse the application be set aside and the case remitted to the examining division for further prosecution. In the last paragraph of that letter it was stated: "*Instructions have been sent today to our bank for payment of the Appeal Fee plus the Fee for Reestablishment of Rights and a copy of the instructing fax to our bank follows for your information.*" On the same day said copy was received by the EPO. The EPO received the fees for appeal and for re-establishment of rights on 19 February 2008.

- VII. In a further fax, which was dated 14 February 2008 and received on the same day, the representative filed the statement setting out the grounds of appeal consisting of five pages (three pages of text and two pages of drawings). However these submissions contained neither grounds on which his request for re-establishment of rights was based nor facts to support his request.
- VIII. On 13 March 2008 the appeal was remitted to the board of appeal.
- IX. On 16 May 2008 the EPO received a fax of the same date in which the representative requested accelerated processing of the appeal because the decision of potential licensees hinged on the outcome of the appeal proceedings.
- X. In a communication dated 30 June 2008 the board set out its preliminary opinion on the case, namely that it had doubts concerning the admissibility of the appeal since the appellant had filed the notice of appeal and paid the fee for appeal after the expiry of the two-month period pursuant to Article 108, first sentence, EPC. Regarding the appellant's request for re-establishment of rights, the board indicated that this request was likely to be rejected since it had doubts whether the payment of the corresponding fee in itself constituted the filing of a written request as foreseen in Rule 136(1), first sentence, EPC and, even if this was the case, the appellant had neither stated grounds on which his request was based nor set out any facts on which his request relied.

- XI. In a letter dated 7 August 2008, with which a general authorisation was enclosed, a new representative informed the EPO that he had assumed representation. The European Patent Register was changed accordingly.
- XII. In a letter of 29 August 2008 the new representative asked for an extension of the two-month time limit for responding to the board's communication dated 30 June 2008. The registrar of the board informed the party in a communication dated 4 September 2008 that the requested extension of the time limit was granted in accordance with Rule 132(2) EPC.
- XIII. In a fax dated 6 November 2008 the new representative replied to the board's communication.
- XIV. Following a summons to oral proceedings dated 20 May 2009 a communication pursuant to Article 15(1) RPBA was issued on 20 July 2009.
- XV. In a letter of 17 September 2009 the appellant's new representative set out further submissions. For the first time written evidence was filed in the form of a Statutory Declaration of the former representative dated 17 September 2009 and a copy of a letter dated 9 August 2007 sent by the former representative to the appellant.

The following requests were submitted in particular:

"Main Requests

1. *The request for re-establishment of rights is allowed under Article 122 and Rule 136 EPC;*



2. *The rights of the Applicant are restored under Article 122 and the appeal in respect of the application admitted;*
3. *The application is remitted to the Examining Division for further consideration; and*
4. *The Appeal Fee is reimbursed to the Applicant.*

*Auxiliary Request 1*

*In the event that the Technical Board, having allowed Main Requests 1 and 2, is not minded to refer the application back to the Examining Division for further consideration, that the Applicant is provided with an opportunity to present further submissions to the Technical Board in response to the Decision under appeal."*

- XVI. Oral proceedings took place on 20 October 2009. During these proceedings the appellant filed the following requests:

*"Auxiliary Request II*

*The Technical Board of Appeal applies the Principles of Equity in view of the substantial procedural violation and remits the application to the Examining Division to resume proceedings immediately following the telephone interview.*

Auxiliary Request III

*The Statement of Grounds of Appeal be considered as including the issues of procedural violation and patentability, and that the entire statement of grounds of appeal is referred back to the Examining Division for interlocutory revision pursuant to Article 109 EPC."*

In reaction to the new auxiliary requests filed during oral proceedings the board expressed its view that these requests could only be decided upon if the appeal was admissible. However, if the request for re-establishment of rights were not granted the appeal would not be deemed to have been filed and, consequently, no appeal proceedings would be pending at all.

XVII. The appellant's arguments, in so far as relevant to the present decision, may be summarised as follows:

(a) A request for re-establishment of rights was filed in writing by way of the letter dated 13 February 2008. The final paragraph of that letter clearly referred to the payment of the fee for re-establishment of rights and therefore it was clear that re-establishment of rights was being requested.

(b) 5 January 2008 was the date of the removal of the cause of non-compliance with the time limit for filing an appeal. As set out in the filed Statutory Declaration, the former representative received the decision to refuse the application

just before he went on holiday for two weeks. Rather than reporting the matter immediately to his client, he put the application documents to one side to report later without entering dates by which action had to be taken for record purposes. This was the error the former representative committed or, in other words, that was the cause of non-compliance, which was an isolated mistake. Since the deadlines concerning the decision were not entered in the diary, there was nothing to prompt the former representative that he was going to miss a deadline, in particular, taking into account that he was a sole practitioner without administrative staff for recording any time limits. It was only during a beginning of the year check through any out-standing matters that the former representative realized on 5 January 2008 that he had mislaid the decision and that the deadline for filing an appeal against the decision of the examining division had passed. This was why he informed his client only by letter of 5 January 2008 and contacted the examiner only on 11 January 2008.

Accordingly, the two-month term provided for in Rule 136(1) EPC expired on 5 March 2008. Acting with this two-month term clearly in mind, the former representative filed the letter of 13 February 2008, initiating the appeal proceedings and requesting re-establishment of rights, and paid the respective fees a few days later.

- (c) Apart from this it was also clear from the Statutory Declaration that, in view of the telephone conversation with the examiner on 8 August 2007, the decision was a surprise for the former representative. However, it was always intended to file an appeal. Although the former representative was too busy to study the content of the appealable decision, he certainly realised, as every representative would do, that it was necessary to file an appeal. The letter of 11 January 2008 to the examining division, asking for withdrawal of the decision, was merely an attempt to minimise costs and not an action instead of filing an appeal. This attempt was also justified under the circumstances of the present case. The fact that the examining division had not issued a communication setting a one-month term for filing amendments but had sent a final decision refusing the patent constituted a substantive procedural violation. Because of this obvious procedural violation it could be expected that the letters sent to the examining division would avoid a lengthy and costly appeal procedure for the applicant. That is also why the former representative waited a few weeks and, in the absence of a reply from the examiner, filed an appeal only on 13 February 2008.
- (d) In decision T 287/84, it was held that, when considering a request for re-establishment of rights and whether it complied with the requirements of the relevant Articles and Rules, it was proper to consider not only the initially filed application, but also other documents filed

in respect of the same case before the expiry of the period for requesting re-establishment of rights. Applying the principles of this decision, it was therefore appropriate to consider not only the letter of 13 February 2008 requesting re-establishment of rights, but also all other documents filed before the expiry of said period. Hence, at the time of filing the request for re-establishment of rights the documents on file contained a significant explanation of the grounds on which the request was being based and a statement of the facts relevant to the missing of the deadline for filing an appeal and, therefore, supporting the request.

In the letter dated 11 January 2008, the former representative referred to the decision of the examining division and to the telephone conversation of 8 August 2007 between him and the primary examiner. The letter established that confusion had arisen in the proceedings because of a procedural violation made by the examining division. It was also clear that this confusion was a major contributory factor to the missing of the deadline for filing the appeal.

By letter of 16 January 2008, the applicant himself wrote to the EPO explaining the circumstances surrounding the receipt of the decision refusing the application, in particular the problems in communication between the applicant and his former representative as well as between the former representative and the examining division. Further, the applicant clearly

identified that personal circumstances of the former representative had contributed to the delay in the filing of an appeal.

In addition, the former representative filed a further letter dated 13 February 2008 with comments concerning the relevant entry in the *epoline* system for the present application. In particular, the letter noted that the *epoline* system indicated at that time that the grant of a European patent was intended. As set out in the letter, this entry caused significant confusion in the handling of the application by the former representative.

- (e) If the board came to the conclusion that the documents on file before the expiry of the period for requesting re-establishment did not set out the grounds and facts in support of such a request, the principles of good faith as set out in decision T 14/89 and confirmed in case J 13/90 should have been applied. According to these decisions the EPO had an obligation to draw the appellant's attention to the obvious deficiencies in the present case since the deficiencies could be expected to be remedied within the relevant time limit for re-establishment. The failure of the EPO to issue such a notification should not lead to a loss of rights for an applicant, who could have been expected to be informed. In such a case a communication should be sent, setting a time limit for remedying the deficiencies.

The circumstances in the present case were identical to those of case T 14/89, in so far as if the appellant had been advised of deficiencies in the request for re-establishment, there would still have been time available to remedy the deficiencies within the two-month period. In the present case the former representative filed the request for re-establishment with letter of 13 February 2008 and paid the corresponding fee a few days later. However, it was clear from this letter that there were no reasons given for that request. Even a cursory reading of the statement of grounds of appeal showed that it did not deal with the request for re-establishment. Therefore it was obvious, even without studying the letters in detail, that there was still something missing. The time period for filing such a request expired a few weeks after the receipt of the statement of grounds. Hence, had the former representative been advised of the deficiencies in the request for re-establishment, there would have remained plenty of time to remedy them before the expiry of the time period.

- (f) In the present case the examining division issued a decision refusing the present application, rather than a further communication allowing further time for the applicant to respond to the outstanding objections of the examining division, as agreed during the telephone conversation with the primary examiner. It was reasonable for the representative to expect that a formal note would be made of the telephone conversation indicating which party had the responsibility for taking the

agreed action, as set out in the Guidelines for Examination in the EPO, Part C, Chapter VI, section 6.2. These procedural deficiencies that occurred during the proceedings of the examining division initiated a sequence of events that unfairly prejudiced the applicant, leading to a possible loss of rights. Accordingly, the principles of equity as set out in decision G 3/03 of the Enlarged Board of Appeal should be applied in this case and the appellant should be placed in the position he was in immediately before the procedural irregularities took place. Therefore, the second and third auxiliary requests had been filed.

XVIII. The appellant's final requests were as follows:

- main requests and first auxiliary request as set out in the letter dated 17 September 2009;
- second and third auxiliary requests submitted as Auxiliary Requests II and III during the oral proceedings before the board.

### **Reasons for the Decision**

1. The present decision was taken after the revised European Patent Convention entered into force on 13 December 2007. Since the European patent application in suit was pending at that time, the Board applied the transitional provisions in accordance with Article 7(1), second sentence, of the Act revising the EPC of 29 November 2000 and the Decision of the Administrative



Council of 28 June 2001 on the transitional provisions under Article 7 of the EPC Revision Act (Special edition No. 1, OJ EPO 2007, 197) and the decision of the Administrative Council of 7 December 2006 amending the Implementing Regulations to the EPC 2000 (Special edition No. 1, OJ EPO 2007, 89). Articles and Rules of the revised EPC and of the EPC valid until that time are cited in accordance with the "Citation Practice" (see the 13th edition of the European Patent Convention, page 4).

2. The provisions to be applied in the present case with regard to the admissibility of the appeal are those of Articles 106 and 108 and Rules 99 and 101 EPC, since the time limits for complying with the conditions for filing an appeal expired after the revised EPC entered into force (see also J 10/07, OJ EPO, 2008, 567, Reasons, section 1). For the same reason the provisions of Article 120 and Rule 131 EPC are to be applied with regard to the calculation of the time limits. However, with regard to the notification of the contested decision, which was posted on 4 October 2007 and therefore before the revised EPC entered into force, the provisions of Article 119 and Rule 78 EPC 1973 are to be applied.
  
3. According to Article 108, first sentence, EPC, the notice of appeal has to be filed at the EPO within two months of notification of the decision. The second sentence of this provision stipulates that the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.

In the present case the decision under appeal was issued on 4 October 2007 and notified on 14 October 2007 (Rule 78(2) EPC 1973). Accordingly, the time limit specified in Article 108, first sentence, EPC expired on 14 December 2007 (Rule 131(4) EPC). On 13 February 2008 the appellant filed a notice of appeal and on 19 February 2008 he paid the appeal fee. Since the appeal fee was not paid in due time, the appeal is deemed not to have been filed (J 16/82, OJ EPO 1983, 262) unless the appellant's request for re-establishment of rights is allowed.

4. The provision to be applied in the present case with regard to the appellant's request for re-establishment of rights is Article 122 EPC since the time limit for requesting re-establishment of rights had not yet expired at the time of the entry into force of said provision (Article 1, No. 5, of the decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the EPC Revision Act (*supra*)). Accordingly, Rule 136 EPC is also to be applied (see Article 2, first sentence, of the decision of the Administrative Council of 7 December 2006 amending the Implementing Regulations to the European Patent Convention 2000 (*supra*) and J 10/07, *supra*, Reasons, point 1.3). It also follows that the provisions of Article 120 and Rule 131 EPC are to be applied with regard to the calculation of any time limit concerning the request for re-establishment.
5. A request for re-establishment of rights in respect of the period specified in Article 108, first sentence, EPC has to be filed in writing within two months of the removal of the cause of non-compliance with the period,

but at the latest within one year of expiry of the unobserved time limit (Rule 136(1), first and second sentences, EPC). The request shall not be deemed to have been filed until the prescribed fee has been paid (Rule 136(1), third sentence, EPC). The omitted act has also to be completed within said period (Rule 136(2), second sentence, EPC).

6. To make a valid request for re-establishment of rights, it is sufficient if the file contains a clearly documented statement of intent from which any third party may infer that the applicant is endeavouring to maintain the patent application (see J 6/90, OJ EPO 1993, 714). The board concurs with the appellant that the former representative did not merely pay the fee for re-establishment of rights but also referred in the final paragraph of his fax dated 13 February 2008 to corresponding instructions to the bank for such payment. Since in the same letter it was also clearly indicated that the appellant wished to proceed further with the patent application the board interprets said paragraph in the context of the whole letter as a written request for re-establishment of rights.
  
7. In the following it has to be established at what date the removal of the cause of non-compliance occurred. The removal of the cause of non-compliance has to be determined by taking account of the individual circumstances of the case (see e.g. J 27/90, OJ EPO 1993, 422). The cause of non-compliance is removed on the date on which the error or non-compliance should have been noticed (see for example T 840/94, OJ EPO 1996, 680, Reasons, point 2; J 7/82, OJ EPO 1982, 391;

J 27/90, *supra*, Reasons, point 2.4; J 5/94, Reasons, point 2.2; J 27/01, Reasons, point 3.1).

The appellant alleged in the letter dated 17 September 2009 and during the oral proceedings that the appellant's former representative had the intention to file an appeal but that due to an isolated mistake he had only become aware of the mislaid decision of the examining division and the expiry of the period for filing an appeal on 5 January 2008. In view of the comprehensive and detailed submissions made during the oral proceedings and the Statutory Declaration filed with the letter dated 17 September 2009 the board is satisfied that the cause of non-compliance with the time limit for filing an appeal involved an error in the carrying out of the party's intention to file an appeal within the time limit and that the removal of the cause of non-compliance occurred on 5 January 2008, the date on which the error was noted by the representative during a beginning of the year check. The board has no reason to conclude that it should have been noted earlier.

8. Consequently, the two-month period for filing a request for re-establishment of rights and for performing the omitted act expired on 5 March 2008 (Rule 131(4) EPC). The appellant observed this time limit to the extent that the request for re-establishment of rights and the notice of appeal were filed on 13 January 2008 and the respective fees were paid on 19 February 2008. This request was also filed within one year of expiry of the unobserved time limit for filing an appeal.

9. However, according to Rule 136(2), first sentence, EPC, the request for re-establishment of rights must also state the grounds on which it is based and set out the facts on which it relies. According to the established jurisprudence of the boards of appeal, such a statement of grounds, containing at least the core facts on which the request relies, has to be filed within the time limit for filing the request (see for example J 18/98). The facts must also plausibly explain that the events stated were the cause of the failure to observe the time limit (T 13/82, OJ EPO 1983, 411).

As pointed out by the appellant it is admissible to present facts in another document provided this document is filed before expiry of the time limit for filing the request for re-establishment of rights (T 287/84, OJ EPO 1985, 333). It is also possible to supplement the facts on condition that the supplementary submissions do not extend beyond the framework of the previous submissions (J 5/94, Reasons, point 2.3).

10. The appellant argues that in the present case the letters filed before 5 March 2008, the date of expiry of the two-month time limit pursuant to Rule 136(1) EPC, indicate grounds on which the request for re-establishment is based and set out facts on which this request relies.

11. However, the board does not concur with the appellant for the reasons that follow.

It is clear that neither the fax of 13 February 2008, by which the request for re-establishment was filed,

nor the fax of 14 February 2008 contain any grounds on which the request is based or any core facts which would support it. Moreover, this finding has not been contested by the appellant.

Nor do the submissions made by the former representative in the fax dated 11 January 2008 assist in discerning the grounds or at least the core facts on which the request for re-establishment of rights relies. In this letter the former representative set out what, from his point of view, happened during the proceedings before the examining division and in particular during the telephone conversation on 8 August 2007. He also stated that, due to said telephone conversation, he was expecting a communication from the examining division setting out the date from which the one-month period for submitting further amendments and/or arguments would run, but that he had never received such a communication. The board takes the view that these submissions put forward facts and grounds in support of a procedural violation which possibly occurred in first instance proceedings and the misunderstanding resulting therefrom. However, these submissions do not explain why the time limit for filing an appeal was missed. Rather they indicate why the contested decision could possibly be set aside or why the appeal fee could possibly be reimbursed, in the event that the present appeal was admissible and allowable. Thus these submissions do not assist the appellant's case.

The board considers that the appellant's fax dated 16 January 2008 does not explain either why the notice of appeal was not filed in due time. What the text of the

letter indicates is that there was a failure in communication between the former representative Mr B. and the examiner as well as between the former representative Mr. B. and his client. However, it is not explained what the circumstances for this breakdown of communication were. Moreover it is stated in this letter: "I was not informed of the examiner's decision until three months later when I received a letter from Mr B. dated January 5th 2008. I have now had the opportunity to discuss the response to the French Specification No. 1 269 288 with Mr B.. He will write to you again explaining the personal circumstances which have led to this delay." The Board considers that it could reasonably be understood from this statement that there was a delay with regard to a reaction to the decision of the examining division and that a letter of the former representative with explanations on the personal circumstances causing the delay would follow. This, however, was a mere announcement of submissions, which is not sufficient for a substantiated request for re-establishment of rights.

Finally, the fax of the former representative dated 13 February 2008 indicates that there seemed to be a wrong entry on the *epoline* website which caused some confusion, and that this should be corrected and taken into account in relation to an appeal that was being filed by a further fax on the same day. However it contains no reference to the payment of the fee for re-establishment of rights mentioned in said further fax or to a delay of filing the appeal. Moreover, the board does not gather from this letter any facts or grounds which could be considered as a plausible explanation

for the cause of the failure to observe the time limit for filing the notice of appeal.

12. In view of the above the board comes to the conclusion that the documents on file before the expiry of the period for requesting re-establishment of rights neither state grounds nor set out facts in support of such a request as required by Rule 136(2) EPC, even if all these documents are read together and considered as a whole.
13. Turning now to the appellant's argument that the principles of good faith as set out in decision T 14/89 (OJ EPO 1990, 432) and confirmed in case J 13/90 (OJ EPO 1994, 456) should be applied in the present case if the board finds that the facts to substantiate the request for re-establishment were not filed in due time.
14. T 14/89 concerns an appeal by a patent proprietor who filed a request for re-establishment of rights well within the time limit for doing so. This request had two deficiencies: the fee for re-establishment had not been paid and the facts to substantiate the request had not been filed. The Board found (point 5 of the Reasons) that under the principle of good faith, "...the European Patent Office should not fail to draw the appellant's attention to obvious deficiencies in his acts. This obligation certainly exists if, as in the present case, the obvious deficiencies can be expected to be remedied within the time limit for re-establishment". It is to be noted that in case T 14/89 the EPO had ample time, about 6 weeks before the expiry of the time limit for requesting re-establishment, in



which to inform the proprietor of the deficiencies of his request.

In its decision G 2/97 (OJ EPO 1999, 123) the Enlarged Board of Appeal commented upon decision T 14/89 and found that this decision "... related to the particular facts of that case and that there is no generally applicable principle to be derived therefrom" (Reasons, point 3.4).

15. Decision T 14/89 was followed in decision J 13/90, where in another case of re-establishment of rights the Board found that the principle of good faith requires the EPO to warn the applicant of any impending loss of rights, if such a warning can be expected in all good faith, and that such a warning may be expected if the deficiency is readily identifiable for the EPO and the applicant can still correct it within the time limit. In that case, it was clear from a letter addressed to the EPO by the appellant that the latter was in error with regard to the need to make payment of a renewal fee within the two-month period for re-establishment of rights. The Board found that the EPO must not omit any acts which the party to the proceedings could legitimately have expected and which might well have helped avoid a loss of rights (point 5 of the Reasons). However, the Board also found that: "It would be taking the principle of good faith too far to expect the Office to warn the applicant of deficiencies in every case - even when the deficiency is not readily identifiable...".

16. The appellant argues that, in view of the above mentioned decisions, the EPO should have advised the

- former representative of the missing grounds and facts regarding his request for re-establishment of rights since the deficiencies were obvious and could be expected to be remedied within the relevant time limit for requesting re-establishment.
17. As set out above, according to the jurisprudence of the boards of appeal, the duties of the EPO under the principle of good faith are limited in that the EPO can only be expected to warn a party of a deficiency if the deficiency is readily identifiable by the EPO and the party can still correct it within the relevant time limit.
18. In the present case, however, the deficiency was not readily identifiable. Firstly, a number of letters were filed. Secondly, it would only have been possible to detect the deficiency if these letters had been studied carefully. This is also evident from the explanations above (see point 11). However, in the board's view, the principle of good faith does not impose any obligation on the EPO to scrutinize several letters on file to establish whether grounds and facts with respect to a request for re-establishment are missing. Moreover, in his letter dated 16 January 2008 the appellant had announced that the former representative would file explanations as to the personal circumstances having caused the delay. Hence, there was an indication on file that the appellant and his former representative were aware of what had to be done in the present case.
19. The appellant's argument that a cursory reading of the letter setting out the statement of grounds of appeal would have shown that it did not deal with the request for re-establishment of rights is not convincing.

First of all, the deficiency would not have been readily identifiable by a cursory reading of said letter alone since said letter comprised three pages of reasoning which did not refer to the request for re-establishment at all. As already set out above, the preceding submissions dated 13 February 2008 and 16 January 2008 gave the impression that the representative was aware of what had to be done in the present case. Therefore, it was not obvious that a particular reasoning in respect of the request for re-establishment of rights was missing, in the sense that it had been omitted here in error.

In addition, even if the EPO had been in a position to notice this deficiency at the time of receipt of the statement of grounds (14 February 2008), it was not evident that there would still have been enough time for the EPO to warn the appellant about the deficiency in respect of the request for re-establishment of rights. In the documents then on file there was no explanation whatsoever about the circumstances in respect of missing the time limit for filing an appeal. Hence, there was no submission as to what the cause of non-compliance was or when the removal of the cause of non-compliance occurred. In fact, it was only possible to establish the date of the removal of the cause of non-compliance during the oral proceedings before the board after a discussion in great detail and on the basis of the written submissions and the Statutory Declaration, both filed after oral proceedings had been arranged.

In the absence of any indication or submission as to the cause of non-compliance, from the point of view of the EPO, the date of removal could just as well have been the next day (or only a few days) after expiry of the time limit for filing an appeal on 14 December 2007. In such a case the time limit for filing a request for re-establishment could have already expired on 15 February 2008 and not on 5 March 2008 as it eventually turned out. Accordingly, there was no indication that there was enough time for the EPO to warn the appellant about any deficiency. The board arrives at the same conclusions in respect of the notice of appeal and the request for re-establishment of rights, since they were effectively filed a few days later on 19 February 2008 when the respective fees were paid.

20. In view of the above, neither T 14/89 nor J 13/90 can assist the appellant. The deficiency in question was not readily identifiable, and hence, under the principle of protection of legitimate expectations, the EPO had no duty to warn the appellant. Since a warning could not be expected, the EPO was not obliged to set a period in which the appellant could correct the deficiency.
  
21. The board concludes that, taking into account the circumstances of the present case, the request for re-establishment of rights is not sufficiently reasoned and therefore the requirements of Rule 136(2), first sentence EPC are not fulfilled. Consequently, the request is to be rejected (Article 122(2), second sentence, EPC). Hence, requests 1 to 3 of the main request and the first auxiliary request must fail.

22. As far as the second and third auxiliary requests are concerned, the board concludes the following.

Since the request for re-establishment of rights is rejected, the appeal is to be deemed not to have been filed pursuant to Article 108, second sentence, EPC (see also J 16/82, *supra*). Consequently, there is no appeal procedure pending, let alone an admissible appeal. However, pursuant to Article 110, first sentence, EPC, before an appeal can be examined on its merits, it must have been found admissible. Therefore the board has no power to examine whether a procedural violation occurred in first instance proceedings or whether a remittal to the first instance would be justified pursuant to Article 111 EPC 1973 as requested by the appellant in his second and third auxiliary requests. This clearly also excludes a remittal for interlocutory revision pursuant to Article 109 EPC.

23. Finally, the board would like to note that it is established jurisprudence that an examining division is bound by its final decision, which can be set aside only following an admissible and allowable appeal (see G 4/91, OJ EPO 1993, 707, Reasons, point 7; G 12/91, OJ EPO 1994, 285, Reasons, point 2; T 371/92, OJ EPO 1995, 324, Reasons, points 1.4 and 1.5).

24. Since the present appeal is deemed not to have been filed in due time, the appeal fee must be reimbursed (J 21/80, OJ EPO 1981, 101). However, there will be no reimbursement of the fee for re-establishment of rights (see for example T 1026/06, Reasons, point 7).

**Order**

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

1. The request for re-establishment of rights is rejected.
2. The appeal is not deemed to have been filed.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

L. Fernández Gómez

F. Edlinger