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**Datasheet for the decision  
of 15 February 2017**

**Case Number:** T 1588/15 - 3.2.04

**Application Number:** 07734414.1

**Publication Number:** 2010775

**IPC:** F02D9/10, F16K11/052,  
F16K31/04, F16K11/22

**Language of the proceedings:** EN

**Title of invention:**

A TWO-SHUTTER VALVE

**Applicant:**

Valeo Systèmes de Contrôle Moteur

**Headword:**

**Relevant legal provisions:**

EPC Art. 86(1), 122

EPC R. 51(2), 112(2), 130, 136(1)

Code of Conduct of the EPI, points 1, par. (c), 4. par. (a)

**Keyword:**

Re-establishment of rights - request not filed in due time

**Decisions cited:**

J 0027/88, J 0016/93, J 0001/07, J 0001/13, J 0005/13

**Catchword:**

Reasons 9, 10



**Beschwerdekammern**  
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Case Number: T 1588/15 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 15 February 2017**

**Appellant:** Valeo Systèmes de Contrôle Moteur  
(Patent Proprietor) 14 Avenue des Béguines  
95800 Cergy (FR)

**Representative:** Santarelli  
49, avenue des Champs-Élysées  
75008 Paris (FR)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted on 20 February  
2015 refusing European patent application No.  
07734414.1 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** S. Oechsner de Coninck  
T. Bokor  
J. Wright  
C. Schmidt

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the Examining Division dated 20 February 2015 refusing the request for re-establishment of rights into the time limit for paying the 5th renewal fee with the additional fee pursuant to Rule 51(2) EPC for the European patent application No 07734414.1.
- II. The appellant was represented before the EPO by a qualified professional representative. The 5th renewal fee, due on 30 April 2011, was not paid, and on 7 June 2011 the EPO sent a notice drawing attention to Rule 51(2) EPC (EPO Form 1222). This notice was forwarded by the representative to the appellant on 4 July 2011, but was apparently not received for unexplained reasons.
- III. The time limit in question expired on 31 October 2011, after the expiry of the six-month grace period pursuant to Rule 51(2) EPC. The EPO sent a noting of the loss of rights pursuant to Rule 112(1) and Article 86(1) EPC (EPO Form 2524) to the professional representative, on 5 December 2011. This was notified on 7 December 2011.
- IV. The representative forwarded the noting of loss of rights to the IP department of the appellant on 12 January 2012. The request for re-establishment of rights was filed on 12 March 2012.
- V. The request explained that due to various circumstances, the representative was not responsible for the fee payment, this should have been arranged through other channels, but was omitted by error. This error was excusable in view of the circumstances. No particular circumstances were indicated in the original request concerning the activities of the representative between

December 2011 and January 2012 in general, or specifically relating to the forwarding of the noting of loss of rights (see point IV.) from the representative to the appellant. During the proceedings before the Examining Division, the applicant further argued that the request was also filed in time, and as such it was admissible. Given that the representative was not supposed to look after the fee payment, the time limit for submitting the request ought to have been calculated from the point of time when the applicant itself (more precisely its in-house IP department) became aware of the loss of rights, i.e. 12 January 2012. In a letter dated 19 April 2013 and at the oral proceedings before the Examining Division it was also explained that the representative had to handle an increased number of cases in December 2011, due to a surge of office actions issued by the French Patent Office, which explained the delayed forwarding to the appellant of the noting of loss of rights.

- VI. The Examining Division refused the request, with the reasoning that the request was filed out of time and therefore was not admissible. The Division held that the relevant time limit of Rule 136(1) EPC started when the representative was deemed to have received the notification of the loss of rights, i.e. on 15 December 2011. Thus the request ought to have been filed on 15 February 2012 at the latest. The decision under appeal did not discuss other aspects of the request, in particular the allowability of the request, i.e. whether or not the representative or the applicant exercised all due care in light of the circumstances.
- VII. The notice of appeal was filed on 9 April 2015, and the appeal fee paid on the same day. Grounds of appeal were filed on 30 June 2015.

VIII. In a communication issued on 23 June 2016 the Board indicated that the request for re-establishment of rights did not appear admissible, as the time limit of Rule 136(1) EPC was apparently triggered on the notification of the noting of loss of rights to the representative, and no special circumstances were apparent which would permit a different conclusion. In this manner the appeal did not appear to be allowable.

IX. With letter dated 2 September 2016 the appellant commented on the observations of the Board and clarified its requests.

X. The relevant arguments of the appellant can be summarised as follows:

The payment of annual fees through other channels, instead of instructing the representing professional representative to do so, is a common and widespread arrangement. Under such circumstances, the representative cannot be expected to have any or can only have a very small or residual responsibility for the fee payment. The common practice of the EPO and of the Boards of Appeal to consider that the removal of the cause of non-compliance pursuant to Rule 136(1) EPC occurs upon the notification of the loss of rights to the representative does not reflect the reality, and needs to be revised. The legislator could not have foreseen the developments ("drastic changes") several decades after the birth of the EPC and the definition of the conditions of Article 122 EPC. Applicants and representatives must work under permanent and ever increasing cost pressure, which means that the same amount of work must be done with ever smaller teams. There is simply no overhead for the timely handling of unexpected increases in the workload. The handling of annuities have suffered in particular, and is now

almost exclusively handled by specialised firms, and not by the appointed representatives. This latter factor also made it impossible to quickly identify the genuine causes for the error in the present case. Accordingly, the criteria in the application of Article 122 EPC need to be reviewed. A comparison with or the application of the requirements of Article 121 is not appropriate. The suggested approach would not prevent the EPO from considering the particular circumstances of each case. Specifically, the removal of the cause of non-compliance should be considered as the date when the person genuinely responsible for deciding on the maintenance or lapse of the application becomes aware of the error. This would not constitute a genuine detriment or disadvantage for third parties. In the present case, the removal of the cause of non-compliance happened when the representative forwarded the notification of the loss of rights to the appellant on 12 January 2012. Furthermore, there were good reasons why the representative forwarded this notification to the applicant more than one month after its receipt. Among others, high workload of a representative may well be considered as an exceptional circumstance and as such a legitimate excuse for not complying with a time limit. In the present case, the reminder sent by the EPO still within the grace period and forwarded by the professional representative also did not reach the applicant, possibly contributing to the non-payment of the annual fee.

- XI. The appellant requests that the decision of the Examining Division Section dated 20 February 2015 should be set aside, and that the request for re-establishment of rights be allowed. As an additional point, a referral of certain questions to the Enlarged Board was suggested, but not formally and explicitly requested. The appellant argued

that it might be considered as an important point of law to decide the following questions:

"what is the legal consequence of the ever increasing practice of applicants to have the prosecution (i.e. acts that can only be made by registered European representatives) and the annuities (which can be handled without any condition of qualification) handled through different channels [?]"

"in view of the already generalized manner in which applicants have their annuities handled through a channel different from the representative in charge of the prosecution, is it compatible to the needed balance between the interests of applicants and third parties to accept that, unless an obvious lack of due care can be determined by the EPO, when the European representative is only in charge of the prosecution, this European representative may not be the responsible person to be determined when determining the date of removal of the cause of non-compliance for the application of Article 122 EPC [?]"

### **Reasons for the Decision**

1. The appeal is admissible.
2. The decision under appeal found that the request for re-establishment of rights was inadmissible as it failed to meet the formal requirements of Rule 136(1) EPC, and refused the request on this basis. As a consequence of the refusal of the request the application was deemed to be withdrawn (Article 86(1) EPC, last sentence). In deciding this appeal it is incumbent on the Board to review the contested decision's finding in this regard.

Admissibility of the request for re-establishment of rights.



3. It appears undisputed that in the present case the admissibility turns on the question of the removal of the cause of non-compliance. The decisive single issue is whether this occurred on the receipt of the noting of loss of rights by the representative, or rather when this was forwarded to the appellant.
4. According to well-established case law of the Boards of Appeal, the removal of the cause of non-compliance is a question of fact, which needs to be examined and decided in every case.
5. There is a substantial body of case law, according to which the notification of the noting of the loss of rights under Rule 112 EPC to the registered representative must be considered as the removal of the cause of non-compliance, where an erroneously omitted act (typically non-payment of fees) causes the loss of rights, and the error is only recognised from the notification of the loss of rights. There are also decisions which held that under special circumstances the triggering date is the date when the responsible person becomes aware of the error, but where the responsible person is not necessarily the registered representative (e.g. J 16/93, see also Case Law of the Boards of Appeal of the EPO, 8th Edition 2016 (CLBA hereafter), Chapter III.E.4.1.a, third paragraph).
6. The appellant submitted in the grounds of appeal that the present case involved such special circumstances. He further submitted that in those cases where the registered representative is explicitly instructed that annuities will be paid through another channel, the acts of such a registered representative should generally not be taken into account when establishing

the removal of the cause of non-compliance, i.e. also in the absence of special circumstances. Though it was not formulated in such unequivocal terms by the appellant, the Board considers that such an argument is in fact implied in the suggested referral to the Enlarged Board of Appeal, and also implied by the totality of the arguments of the appellant, in particular through the suggested "lowering of the standards".

7. This previous point was already raised in the communication of the Board (see points 8 and 18 of the communication), and the appellant explicitly stated that it did not intend to go that far, as presumably suggested by the Board. As the applicant put it by referring to point 18 of the Board's communication: "We did not submit that the facts between the reception by the representative and the reception by the applicant should never be taken into consideration" (see point 4 of the letter dated 2 September 2016). This is further confirmed in point 6, where the appellant states "Our request is not intended to result in preventing the EPO bodies from taking the particular circumstances of a case into consideration...".
8. Accordingly, the Board understands this latest submission as an argument that the circumstances of each case should still be taken into account. If this is so, the question arises how the individual circumstances of the present case are to be evaluated and how this will influence the removal of the cause of non-compliance.
  - 8.1 If it is only under special circumstances that the receipt of the noting of the loss of rights by a registered representative will not remove the cause of

non-compliance (hereinafter briefly "non-removal on receipt"), then there is no need for the Board to deviate from the settled case law, but rather it has to be examined if the allegedly special circumstances would indeed justify a finding that the cause of non-compliance was not yet removed on 7th December 2011 when the representative received the noting of the loss of rights. In this regard the Board can only identify one submitted fact which had a direct influence on the delay between the representative and the appellant, and which can be qualified as "special circumstance" according to the submissions of the appellant, namely the unexpected workload in December 2011, caused by the action of the French Intellectual Property Institute (i.e. the French Patent and Trademark Office, INPI).

8.2 On the other hand, if the argument goes that "non-removal on receipt" should also be the case under certain, but otherwise "normal" (because not special) circumstances, the question would then be what may possibly constitute such certain, but nevertheless more or less normal circumstances. In that respect, the appellant only emphasised two relevant and crucial circumstances which are apparently normal. One of these is the situation where a registered representative is not responsible for the fee payment, and therefore he cannot be expected to recognise upon receipt of a noting of a loss of rights from the EPO that the loss of rights was unintended. The other allegedly decisive circumstance is the fact that IP teams of applicants and professional representatives must operate with streamlined and efficient teams (briefly the "efficiency argument"), which do not have an overhead for a sudden increase of work. Here the question would than arise if the existing practice as derivable from the case law of the Boards of Appeal should be changed,

with respect to the decisive issue, i.e. the determination of time when error was or ought to have been discovered.

8.3 In the following, the Board will examine these lines of argument.

#### Special circumstances

9. First of all, it is one of the core arguments of the appellant that the fee payment arrangement used in the present case is common and widespread, both generally in the European patent practice and specifically at the offices of the representative. It is also perfectly normal that an IP-team of a large enterprise has an experience comparable to that of a professional representative, so that it is experienced and knowledgeable about proceedings before the EPO. There was no disruption of the communications between them and the representative (at the time of sending the noting of the loss of rights in January 2012), nor any lack of trust, nor any other external factor which would have prevented them from communicating with each other. On the contrary, even the personal contacts were good. Thus there were no special circumstances in this respect.

9.1 The Board takes note of the submission that the representative had to face an unusually high workload in December 2011. However, a high workload in itself does not even justify a regular extension of a time limit (see Guidelines, Part E Chapter VIII, 1.6, version April 2010), thus this seems to justify even less so a different assessment of the triggering of the time limits for a re-establishment under Article 122 EPC. This opinion of the Board was also communicated to

the appellant. In his response the appellant argues that this assessment of the Board was neither equitable nor reasonable, and it cannot be expected from private firms to cope with any workload anytime. In the response the appellant reiterated its argument that the representative was under increased work pressure, which resulted from the action of the INPI.

9.2 The appellant submitted that presently IP teams are under pressure to increase efficiency and to minimise costs and therefore only sized for the average workload. From this it follows, in the opinion of the Board, that inevitable bottlenecks in an organisation, even if small, and random distribution of the incoming work will inevitably result in surges in workload from time to time, and if something goes wrong, finding the error of course adds to the workload. From this it also follows that increased workload *per se* cannot be a special circumstance, given that it is to be expected any time. Of course, it is still conceivable and the Board also accepts it that under very exceptional circumstances even a sudden and unexpected workload may cause such a serious disruption of the normal workflow that it can and must be taken into account for the purposes of Article 122 EPC and may excuse a delay.

9.3 However, on a closer inspection of the file, it is not apparent to the Board that this is the situation here. No tangible evidence has been presented either to the Examining Division or to the Board that the action of INPI was of such a nature or dimension that serious delays in the forwarding of official notices were unavoidable, in particular in December 2011. Firstly, this allegedly exceptional or special circumstance was not even mentioned in the original request for re-establishment of rights. Only after two communications

from the Examining Division, on 19 April 2013, i.e. more than two years later, was this fact presented, when the Examining Division pointed out that the delay between the representative and the appellant appeared excessively long. No documents are available in the file from which the actual amount of the additional work falling on the representative would transpire. The sample office actions issued by INPI and addressed to the representative are from February and June 2011, apparently demonstrating that the additional work caused by INPI must have been spread over the whole year of 2011. Neither these two office actions, nor any other official document on file mentions the December 2011 deadline of INPI (see the attachments to the letter dated 19 April 2013). The number of the affected files at INPI were obviously a figure affecting the whole of the French patent profession, but it does not permit any conclusion concerning the direct effect on the workload of the representative. An increase of the notifications of loss of rights received by the representative from an average of 1700 p.a. to about 2500 in 2011 was submitted, but without any explanation or proof why this resulted in excessive additional work specifically in December 2011, beyond the mere statement that INPI would maintain an (undefined) temporary regime until the end of December 2011. On the other hand, the fee reminder from the EPO on 7 June 2011 was also forwarded from the representative to the appellant with an arguably significant delay, namely on 4 July 2011, suggesting that the forwarding of mail with several week's delay was not an extraordinary occurrence at the representative.

9.4 In summary, the Board considers that it has not been proven that the circumstances of the present case as explained by the appellant would be special or

extraordinary to an extent so as to justify the assertion of the appellant, namely that the receipt of the noting of the loss of rights under Rule 112(1) EPC to the representative should not trigger the two-months' time limit of Rule 136(1) EPC in the present case. In light of this finding of the Board, it remains to be examined if the general circumstances under which the representative and professional representatives in general are required to work, would dictate a change in the applicable case law in the sense as submitted by the appellant.

#### Suggested change of the case law

10. This second line of argument is based on two key assertions or premises of the appellant. The first one is that fee payment over specialised third party firms is widespread (as part of the efficiency argument), and in such cases the registered representative cannot be expected to know if the loss of rights was intended or not. The second one is that the legislator could not have foreseen the developments in the patent world forty years later, so that the legal framework, including the way Rule 136(1) EPC is applied, is no longer adequate for the present situation of those IP teams which handle large patent portfolios, whether as their own or on the basis of a contractual relationship, as done by a firm of professional representatives. This is another aspect of the efficiency argument. As the appellant put it, the criteria in the application of Article 122 EPC and by implication, of Rule 136(1) EPC need to be "updated".
- 10.1 The Board is unconvinced that the present case law and the criteria developed created an unfair situation for applicants. The Board holds that certain conclusions

drawn by the appellant do not hold water on closer examination.

10.2 The Board cannot accept that under the circumstances submitted the representative could not have been expected to know upon receipt of the noting of loss of rights whether this was intentional or rather caused by an error. As a question of principle, the Board holds that an applicant cannot be considered to act with all due care if it regularly does not inform a representative if and when applications are abandoned. Even when a representative is explicitly exempted from looking after a fee payment, at least he can be expected to be informed at all times about the intention whether or not the application is to be maintained, as a minimum. Only in this manner is a professional representative capable of acting in the best interests of its client, which is his professional duty. He has a particular duty to know the status of the cases handled by him, which is derivable from his duty to be able to inform his client in this respect, see Point 1, paragraph (c), further Point 4, paragraph (a) of the Code of Conduct of the EPI, last published in the Supplementary publication to OJ EPO 1/2016, page 120). An applicant may of course decide to keep his representative uninformed, but must then be prepared to bear the consequences. In short, if the representative was indeed regularly uninformed of any possible withdrawal or abandonment of the appellant's applications, this establishes a lack of due care on the part of the appellant.

10.3 In the present case, the submission is that the appellant did not intend to abandon the application. From this it also follows that no explicit or implicit instruction could have reached the representative that



there was an intention to abandon. Against this background, the submission that the representative "could assume" that the application is to be abandoned, can only be interpreted by the Board as the concession that the appellant regularly proceeded in this manner and non-payment without additional information indeed meant abandonment, at least in most cases. On this basis, it has not been proven to the satisfaction of the Board that the appellant acted with all due care, a finding in itself sufficient to dismiss the appeal.

10.4 The Board notes that this duty of the applicant to inform his representative as discussed above is completely separate from other possible mutual obligations of the representative and the appellant, such as a residual obligation of the representative, if any, to send its own reminders or to forward the reminders from the EPO, or the following of similar routine procedures to inform the applicant about the status of their application. These need not be examined in the present case.

10.5 As to the issue of all due care being expected from the representative, the appellant submits that the representative did not take action because it knew that the staff of the appellant were experienced and knowledgeable, and therefore the representative "could have reasonably assumed in this case that the appellant might have decided to drop the case without having informed us" (letter of 2 September 2016, point 22.). Even if the Board were to accept, *arguendo*, that the representative could not have been expected to know if the non-payment of the fee was intended, it still does not permit to conclude that the representative was not at all expected to forward the noting of the loss of rights to the appellant more or less immediately. On

the contrary, exactly because of the lack of information, it could not be excluded that the loss of rights was unintended, even if this did not seem probable. Therefore it should have been a matter of course to forward the corresponding notice from the EPO immediately to the appellant, so that a check could take place and action be taken as necessary. In short, the Board sees no acceptable excuse for the delay, merely because the representative was uninformed. The Board considers that this finding is in line with the case law, which does recognise that various obligations of a professional representative are not necessarily absolute but may depend on the mutual arrangements between him and his client, see e.g. J 0001/07, Reasons 4.4, or more recently J 0005/13, Reasons 3.3.2 and the decision cited therein.

- 10.6 On the other hand, if the appellant positively knew of the practice that official mail from the EPO would suffer significant delay due to the processing at the representative, but was generally satisfied with this arrangement, it cannot claim later that it had too little time available for collecting the facts for the purposes of a request under Article 122 EPC. That the appellant must have known the usual procedures at the representative is also supported by the statement of the appellant that it was generally satisfied with the forwarding of mail from the representative (see the minutes of the oral proceedings before the Examining Division).
- 10.7 Summing up, the Board holds that the representative ought to have realised upon receipt of the noting of loss of rights that abandonment was not intended and therefore an error must have occurred. The Board sees no good reasons for the representative being uninformed

and not taking immediate action in the knowledge (or merely belief) of being uninformed. In this respect, the present finding of the Board differs from the line taken by decision J 0001/13, where the deciding Board accepted that the cause of non-compliance was not removed when the noting of loss of rights was received in the offices of the representative, because she had good reasons to believe that the applicant wanted to abandon the application, in light of the fact that presumably received reminders were not reacted upon, and simply by not instructing the representative was a usual way of abandoning applications (see Reasons 7-11). In this case the deciding board appears to have tacitly accepted that such a belief of the representative would be compatible with the due care expected from her. However, in case J 0001/13 the appeal was not allowed on the basis that the applicant itself did not show all due care, by not forwarding incoming mail to a competent person within its own organisation. A specific duty of an applicant to positively inform its representative about an intended abandonment of an application was not examined in J 0001/13. Furthermore, there the question of timely forwarding to the applicant the noting of loss of rights did not arise.

10.8 Accordingly, the Board confirms the decision's finding that the request was filed late, namely more than two months after removal of the the cause of non-compliance, because at least the appellant, but possibly also the representative did not show all due care in respect of sending instructions and forwarding official mail, respectively, in relation to renewal fees. Even the appellant appears to accept in the second referral question (see point XI) that the desired change in the law becomes a decisive issue

"unless an obvious lack of due care can be determined" in view of the circumstances under examination.

- 10.9 The Board notes that this finding on the lack of due care in relation to the removal of the cause of non-compliance concerns only the question of who in the present fee monitoring arrangement should have first noticed (through the loss or rights) that the renewal fee had not been paid in time. It is settled case law that the cause of non-compliance is considered as removed already when the person concerned **ought to have noticed** the error if he had taken all due care (see J 27/88 of 5 July 1989 and following decisions, CLBA, 8th Edition 2016, Chapter III.E.4.1.a), first paragraph, page 607 in the English language version). This case law considers due care only in this limited context so as to establish as a matter of fact when the two month period of Rule 136(1) EPC started, to so determine whether the re-establishment request was filed on time and is formally admissible. It should not be confused with the due care that must be demonstrated in the observance of the time limit for paying the renewal fee for the request to be successful on its merits.
11. On this basis, the examination of the other aspect of the efficiency argument becomes a merely theoretical exercise for the present case. As such, the Board need not discuss it in any great detail. The argument goes that the settled case law is inherently unfair on (at least) two counts. Firstly, it ignores the time lost between the formal notification of a document and the time until the significance of its content is realised, i.e. the underlying error is discovered. Secondly, it does not take into account the worsening of the working conditions and the demand for efficiency, and thus does not correspond to reality.

- 11.1 By way of *obiter dicta*, the Board only briefly notes that the presumption of the removal of the cause of non-compliance based on the notification as established in the case law at present does not appear to be unfair to parties as a whole. While it is true that this presumption substitutes real facts with a presumption, this presumption is still rebuttable. Furthermore, in the majority of the cases the application of the presumption appears justified, in view of the fact that otherwise the possible timing (and indirectly the final outcome) of a request for re-establishment would have to be based on facts that were hardly ever possible to verify through reliable evidence, beyond mere statements. Overall, the Board is of the opinion that the advantages of relying on this presumption outweighs its possible disadvantages.
- 11.2 The loss of effective time between the factual receipt of a document and the time until it is read by someone who is indeed in the position to discover the error may also be perceived as unfair. In the opinion of the Board, such inevitable instances of time loss are included in the available time limits of the EPC, as a general rule. The same holds for the time loss caused partly by the various communication channels between a party and its representative, and partly by the additional processing of an official communication from the EPO at the offices of the representative. Such time losses are a practical necessity which are inherently present whenever a party is not acting itself before the EPO but through an appointed representative.
- 11.3 As the Board already pointed out in its communication, it has to be assumed that the time limits of the EPC, including the time limit of Rule 136(1) EPC were

determined so that these possible additional processing times were taken into account. In this manner these processing times were not taken away from parties, but rather granted to them globally as an average value, instead of assessing the required times individually and granting them on this basis.

11.4 The appellant argues that more than 40 years have passed since the signing of the EPC, and the legislator could not have foreseen the drastic changes of the working conditions in the IP profession. As a result of these drastic changes now it takes a longer time to discover an error. The appellant appears to argue that this is a genuine disadvantage, which ought to be compensated by allowing more time for parties to prepare their requests for re-establishment of rights. Obviously, more time would be available in situations as in the present case if the processing by the representative would not remove the cause of non-compliance, but only when the genuinely responsible person at the applicant learns of the error.

11.5 It appears to the Board that the genuine problem of the applicant is not that the established presumption is unfair, but that parties in general have too little time on their hands to file requests for re-establishment of rights. However, this is not caused by the objected case law, but quite obviously by other factors. In most of the cases, if the Board would follow the proposition of the appellant, only a few additional days would be gained (assuming diligent practices of applicants and their representatives). The Board is not convinced that this would significantly improve the position of the parties who must resort to requests for re-establishment rights. A few more days would not have saved the present case either. If the

problem as presented by the appellant were a genuine one, it should be solved first and foremost by providing (significantly) more time to applicants through a change of the law, e.g. by way of changing the time limits, but not through the change in the application of the law as suggested.

11.6 While it may be true that the legislator could not have foreseen the situation at present, this does not necessarily mean that the original legislative intent is no longer applicable. The legislator also could not have foreseen the developments in communications and information technology, all of which arguably made client-representative communication and file handling easier, including the handling of renewal fees. Furthermore, had the legislator so intended, it did have the possibility to change every applicable legal provision, last time in the course of the revision of the EPC and with the adoption of the EPC 2000. In fact, the change of the time limit of Rule 136(1) would also be possible at any time through an act of the Administrative Council.

12. In summary, the arguments in the appeal must fail. The Board has no reason to doubt that the described arrangement of fee payment through third parties is indeed widespread. Nor does the Board consider that this practice is not compatible *per se* with the standards of due care expected either of a professional representative or of an applicant. However, a party resorting to this arrangement must also be prepared for the eventuality that it has to share the available processing time for a re-establishment with the representative. Similarly, as long as a representative agrees to receive and forward mail for his client in his capacity as a professional representative, he

inevitably retains at least so much responsibility so as to forward such mail in good time, so that his client still has sufficient time to act.

13. The Board takes notes of the suggested referral to the Enlarged Board of Appeal, but holds that the conditions for a referral are not given. As explained in the preliminary opinion of the Board, the question cannot be qualified as a fundamental point of law, but rather the legal evaluation of facts within the normal application of the law. A referral on the issue might be justified if the Board were aware of a non-uniform application of the law, but this is not the case. The Board takes note of the fact that the proposed referral questions were slightly reformulated in the response to the Board's communication, but this does not change the substantive issues for the referral, and therefore also does not change the Board's assessment of the need for a referral. Thus the Board does not refer any of the questions to the Enlarged Board of Appeal.



**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated