

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 8 December 2021**

**Case Number:** T 1995/19 - 3.2.05

**Application Number:** 13005683.1

**Publication Number:** 2875941

**IPC:** B29D35/04, A43B3/02, A43B1/04

**Language of the proceedings:** EN

**Title of invention:**  
Injection and inner lining of polyurethane

**Applicant:**  
Dehora - Industria de Calçado, LDA

**Relevant legal provisions:**  
EPC Art. 108, 122, 134(8)  
EPC R. 112(1), 126(2), 136

**Keyword:**  
Re-establishment of rights - date of removal of the cause of non-compliance

**Decisions cited:**  
G 0001/18, J 0001/20, J 0011/17, J 0019/16, J 0016/93,  
J 0027/90, T 1588/15, T 0247/98, T 0799/97



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1995/19 - 3.2.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.05**  
**of 8 December 2021**

**Appellant:** Dehora - Industria de Calçado, LDA  
(Applicant) Vale do Horto Azoia  
2400-828 Leiria (PT)

**Representative:** Monteiro Alves, Inês  
Alameda Dos Oceanos, N° 41K-21  
Parque das Nações  
1990-207 Lisboa (PT)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 28 March 2019  
refusing European patent application No.  
13005683.1 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** P. Lanz  
**Members:** T. Vermeulen  
A. Bacchin

## **Summary of Facts and Submissions**

- I. The appeal lies from the decision of an examining division of the EPO dated 28 March 2019, refusing the European patent application EP 13005683.1. The decision was duly notified on 8 April 2019 (date of receipt of the decision according to the acknowledgement of receipt, Form 2936).
- II. The appeal fee was paid on 6 June 2019 and a notice of appeal was received on 2 July 2019. The statement setting out the grounds of appeal was filed on 1 August 2019.
- III. On 28 November 2019 the board issued a communication noting of loss of rights pursuant to Rule 112(1) EPC and Article 108, second sentence, EPC indicating that the appeal was deemed not to have been filed. A time limit of two months from notification of the communication was set, with the indication that the communication would become final in case of no reply.
- IV. On 11 June 2020 a request was filed according to Article 122(1) EPC for re-establishment of rights in respect of the time limit for filing an appeal under Article 108 EPC. The fee for re-establishment of rights was paid on the same day and an appeal against the above mentioned decision of the examining division was filed in case the appeal filed on 2 July 2019 were not taken into consideration.
- V. With a communication dated 24 June 2021, the board summoned the appellant to oral proceedings. In an annex to the summons, the board expressed its preliminary opinion that the request for re-establishment of rights

did not appear to be admissible. As a consequence, the appeal was likely to be deemed not to have been filed. For efficiency reasons, the board also made provisional comments on the merits of the request.

VI. Oral proceedings before the board were held by videoconference on 8 December 2021.

VII. The appellant's arguments relevant to the present decision may be summarised as follows:

The request for re-establishment of rights was admissible since it was filed within one year of expiry of the unobserved time limit, the latter being 11 June 2019 (Whit Tuesday). The "second" time limit of within two months of the removal of the cause of non-compliance with the period had not been triggered at that time. The entry in the European Patent Register referring to the application underlying the impugned decision suggested that the "process was active". No official termination of the appeal proceedings had been issued. The significant date for the question of when non-compliance with a time limit had been removed was the date of actual receipt of the notification of loss of rights by the appellant. Yet the receipt of the notification was never confirmed. The appellant's letter dated 11 June 2020 merely referred to the loss of rights notification. Nor did the EPO draw the appellant's attention to the missing advice of delivery despite having done so with regard to the notification of the impugned decision on 14 May 2019. The legal fiction of deemed notification had no effect on this date.

VIII. The appellant (applicant) requested that the decision under appeal be set aside and that a patent be granted

on the basis of the main request or of the auxiliary request, both filed with the statement setting out the grounds of appeal. The appellant further requested that re-establishment of rights under Article 122 EPC and Rule 136 EPC with respect to the time limit for filing an appeal under Article 108 EPC be granted and that the appeal be therefore considered as deemed to be filed.

### **Reasons for the Decision**

#### Appeal deemed filed

1. The present appeal is deemed not to have been filed because the notice of appeal was filed outside the time limit under Article 108 EPC.
2. Pursuant to Article 108, first sentence, EPC a notice of appeal must be filed within two months of notification of the decision. The notice of appeal is not deemed to have been filed until the fee for appeal has been paid.
3. According to the interpretation of this provision given by the Enlarged Board of Appeal in opinion G 1/18 (OJ EPO 2020, A26) an appeal is deemed not to have been filed "... (c) where the appeal fee was paid within the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND notice of appeal was filed after expiry of that two-month time limit". In such a case, reimbursement of the appeal fee is to be ordered *ex officio*.
4. In the present case, since the decision of the examining division was notified on 8 April 2019, the two-month period for filing the notice of appeal

expired on 11 June 2019 (in application of the extension of periods under Rule 134(1) EPC, due to Whit Monday). The filing of the notice of appeal on 2 July 2019 was thus outside said time limit with the consequence that the appeal was deemed not to have been filed. The timely payment of the relevant fee on 6 June 2019 does not change this conclusion (G 1/18, *supra*, Headnote 1. (c)). The appellant did not dispute these facts.

Admissibility of the request for re-establishment of rights

5. The request for re-establishment of rights with respect to the time limit for filing an appeal was not filed within two months of the removal of the cause of non-compliance, so that it must be considered inadmissible.

Re-establishment of rights is an available remedy to an appellant who, in spite of all due care required by the circumstances, missed the time limit for filing an appeal. According to Article 122 EPC, in conjunction with Rule 136 EPC, the corresponding request must 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. The request is deemed not to have been filed until the prescribed fee has been paid.

6. According to the case law of the Boards of Appeal, the cause of non-compliance is removed on the date on which the person responsible for the application is made aware of the fact that a time limit has not been observed (e.g. J 27/90, point 2.3 of the reasons). Removal is a question of fact, which occurs with the actual becoming aware of the fact that a time limit has not been observed. It is established jurisprudence of

the Boards of Appeal that if a notification of the noting of the loss of rights under Rule 112(1) EPC is issued to a duly appointed professional representative, removal in principle occurs with the actual receipt of such communication (see "Case Law of the Boards of Appeal of the European Patent Office", 9<sup>th</sup> edition, 2019, in the following "Case Law", III.E. 4.1.1.a)). In the event of exceptional circumstances, which cannot be blamed on either the applicant or the representative, the cause of non-compliance may persist even though the applicant's representative was informed of the loss of rights (e.g. J 16/93, points 4.3.2 and 4.3.3 of the reasons, also referred to in T 1588/15, point 5 of the reasons).

7. In the present case the applicant had appointed Ms Monteiro Alves, a legal practitioner qualified in Portugal, who was thus authorised to act before the EPO in the same way as a professional representative (Article 134(8) EPC). It follows that upon receipt of the communication of loss of rights issued on 28 November 2019 by the appointed representative, the cause of non-compliance, i.e. the previous unawareness of the missed time limit, was removed.
8. Pursuant to Rule 126(2) EPC, the communication of loss of rights is deemed to have been delivered on 8 December 2019. The board has no reason not to rely on the deemed notification of said communication, since there is no indication that it had failed to reach the appellant or reached them at a later date. Nor did the appellant maintain that this had been the case. Instead, they merely invoked, for the first time during the oral proceedings, the absence of an acknowledgement of receipt, further arguing that the EPO did not enquire whether the communication pursuant to Rule

112(1) EPC had actually been delivered. However, the board is not convinced that this is in itself sufficient to question the actual receipt and to give rise to a dispute within the meaning of Rule 126(2) EPC (T 247/98, point 2.6 of the reasons). On the contrary, by expressly referring to the communication in point 3.3.2 of the request for re-establishment of rights dated 11 June 2020, the appellant implicitly acknowledged that the delivery had actually taken place. A late receipt of the communication of loss of rights was not alleged.

The appellant has also not alleged and demonstrated the presence of exceptional circumstances referred to above (point 6.), such that the cause of non-compliance persisted despite actual receipt of the loss of rights communication by the representative. As a consequence, the presumption that the cause of non-compliance was actually removed with receipt of the loss of rights communication by the representative has not been rebutted (see also J 1/20, point 3.7.1 of the reasons).

9. Further, the board is unable to see how an assumption based on an indication in the European Patent Register "that the process is active" could have had any bearing on the fact that the relevant time limit for requesting re-establishment had already been triggered and was actually also expired. It is noted that entries in the European Patent Register are not constitutive of rights, but have merely declaratory effect. The commencement, existence and cessation of a right depends only on their substantive requirements, not on their entry (or the lack of one) in the Register. Thus a party cannot derive any rights from entries (or the lack of one) in the European Patent Register (cf. T 799/97, point 3.2 of the reasons and J 19/16, point



3, last paragraph, of the reasons). Accordingly in the present case the appellant could not legitimately derive from the absence in the Register of an entry about the termination of appeal proceedings, especially in the presence of a communication noting of loss of rights pursuant to Rule 112(1) EPC and Article 108, second sentence, EPC, the right that appeal proceedings were still effectively pending.

10. The appellant further submitted that the request was filed within one year of expiry of the unobserved time limit and was therefore admissible.
11. However, the board cannot follow the appellant's construction of Rule 136(1) EPC, which has no basis in the ordinary wording of this provision. The one-year period under this rule is not an alternative to the two-month period. Instead, the provision refers to "but at the latest". According to the rule, the request has to be filed within two months of the removal of the cause of non-compliance, and no request can be filed more than one year after expiry of the unobserved time limit (see also J 11/17, point 3 of the reasons).

### Conclusions

12. On account of these considerations, the board concludes that the request for re-establishment in respect of the time limit for filing the notice of appeal was filed outside the two-month time limit from the removal of the cause of non-compliance set by Rule 136(1) EPC. Consequently, the request for re-establishment of rights is inadmissible. The question whether the requirements for allowability of the request for re-establishment are fulfilled does not need to be addressed.

13. The request for re-establishment of rights with respect to the time limit for filing the appeal being inadmissible, the appeal is deemed not to have been filed. In accordance with opinion G 1/18 (*supra*), the reimbursement of the appeal fee is ordered *ex officio*.

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairman:



N. Schneider

P. Lanz

Decision electronically authenticated