Internal distribution code:

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

Datasheet for the decision of 30 January 2023

Case Number: T 3085/19 - 3.5.02

Application Number: 14190946.5

Publication Number: 2869410

IPC: H01R24/68, H01R35/04, H01R31/06, H01R13/71, H01R12/72, H01R12/71

Language of the proceedings: EN

Title of invention:
A plug-in device having a foldable plug

Applicant:
Velvetwire LLC

Relevant legal provisions:
EPC Art. 108, 111(1), 122
EPC R. 99(2), 111, 113, 136
RPBA 2020 Art. 11, 13(2), 12(3)

Keyword:
Admissibility of appeal - (yes)
Fundamental procedural defect - (yes)
Remittal - (no)
Re-establishment of rights - (no) - all due care (no)
Amendment after summons - taken into account (no)

Decisions cited:

J 0010/11, T 0573/09, J 0016/17, T 1635/19, T 0390/86, G 0012/91, T 0371/92, T 0989/19, J 0005/94, J 0015/10, J 0005/18, J 0025/96, J 0009/16, J 0003/88, J 0007/16, T 0014/89, T 0447/00

Europäisches Patentamt
European Patent Office
Office européen des brevets

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 3085/19 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 30 January 2023

Appellant: (Patent Proprietor)	Velvetwire LLC 1200 Pacific Avenue Suite 350 Santa Cruz, CA 95060 (US)
Representative:	Barker Brettell LLP 100 Hagley Road Edgbaston Birmingham B16 8QQ (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 1 July 2019 refusing the applicant's request for re-establishment.**

Composition of the Board:

Chairman	R. Lord
Members:	G. Flyng
	J. Hoppe
	C.D. Vassoille
	R. Cramer

Summary of Facts and Submissions

I. The appeal of the applicant (appellant) lies from the decision of the examining division posted on 1 July 2019 wherein the applicant's request for re-establishment of rights was refused.

The examining division concluded that the request for re-establishment of rights was admissible but not allowable so that the application was deemed to be withdrawn with effect as of 1 May 2017, and all fees paid after 30 April 2017 except for the fee for re-establishment were to be refunded.

II. In the first instance proceedings, the applicant requested re-establishment into the time limit for paying the renewal fee for the third year plus additional fee.

III. The applicant was represented by a European representative in the first instance proceedings. Moreover, a US law firm was instructed by the applicant to pay all fees as they fell due. At the US law firm, Ms S. was the person responsible for the present application. The US law firm had a contract with a fee payment agency for paying the annuities based on instructions for payment or non-payment by the US law firm. In January 2016 one partner announced their intention to leave the US law firm. On 15 July 2016 two partners and one administrator left the US law firm.

IV. The renewal fee for the third year fell due on 31 October 2016. With a communication dated 5 December 2016, the applicant was informed accordingly

and it was set out that the fee could still be validly paid within an additional period of six months provided that an additional fee was paid.

V. The period for paying the fee plus the additional fee ended on 30 April 2017 without any fees being paid. Therefore, a notice of loss of rights was dispatched on 2 June 2017, setting out that the application was deemed to be withdrawn under Article 86(1) EPC.

VI. With letter of 1 August 2017, the applicant requested re-establishment of rights in respect of the deadline for payment of the renewal fee. It reasoned its request and provided a statement of Ms S., which was not signed.

VII. With communication dated 16 January 2018, the examining division gave its preliminary opinion on the request. In response to this, the applicant provided further reasons and a second statement of Ms S. with letter dated 23 May 2018, which was also not signed.

VIII. In response to the applicant's letter, the examining division issued a second communication dated 29 June 2018.

IX. Oral proceedings before the examining division were held on 24 May 2019. The examining division was composed by the chairman, two technically qualified members and one legally qualified member. At the end of the oral proceedings the division announced its decision to refuse the request for re-establishment of rights.

X. With Form 2901AK dated 1 July 2019, the examining division provided the order and with Form 2906 the

written decision. The Form 2906 was signed by the chairman and the two technically qualified members but not by the legally qualified member of the examining division. The minutes of the oral proceedings were also dispatched on 1 July 2019, with two versions of page 2 of Form 2009.2, one version bearing the handwritten signatures of the chairman and of the two technically qualified members, but not of the legally qualified member.

XI. With its grounds of appeal, the appellant requested that the decision be set aside and the request for re-establishment of rights be allowed.

It argued that when assessing whether all due care required by the circumstances had been taken, the circumstances of the case must be looked at as a whole.

It submitted that in the present case all due care was taken considering the exceptional circumstances in the US law firm that suffered a severe and unexpected staffing shortage that could not have been expected or planned for. The firm lost most of the relevant staff: two out of three full-time partners and the only full-time administrator, so that Ms S. was the only full-time partner left. In this unexpected and unplanned situation it was not possible for Ms S. to pay the third year renewal fee either in time or in the surcharge period, despite the various reminders having been sent to her.

The appellant further stated that the situation could be seen as an isolated mistake in an otherwise well-functioning system, particularly in the context of the staffing issues at the US law firm. The system used was that all pending European patent applications were

loaded onto the US law firm's account with the fee payment agency. For the present case, the standing instructions to pay all fees "would" be passed to the fee payment agency. As a fallback, overdue renewal reminders "would" be received from the European representatives. The present case was erroneously loaded onto the system as a US patent application, for which no renewal fees are due pre-grant. Whilst the effect of that error would normally have been picked up through the reminders received from the European representative, the US law firm was prevented from dealing with that point by the staffing issues. This should be seen as an error in the normally well-working system, caused by the exceptional circumstances of the staffing shortage in the US law firm.

XII. With a communication under Article 15 RPBA 2020, the board provided its preliminary opinion and issued the summons to oral proceedings. The board commented on the admissibility of the appeal and also on the admissibility and allowability of the request for re-establishment of rights. Moreover, the board noted that the requirement of Rule 113(1) EPC did not seem to have been fulfilled, as the signature of the legally qualified member was not given in the written decision of the examining division.

XIII. With letter dated 27 January 2023 the appellant resubmitted the statement of Ms S., as presented before with letter of 23 May 2018, supplemented by her signature. Moreover, the appellant submitted a supplemental statement of Ms S. dated 25 January 2023, and stated that this was intended to answer some of the questions that were posed in the board's communication regarding the attempts of the US law firm to recruit more staff.

XIV. During the oral proceedings, which were held on 30 January 2023, the appellant argued that the appeal was admissible because the decision and the grounds of appeal needed to be assessed together. If the grounds of appeal were considered in conjunction with the reasoning in the impugned decision, it would become clear that the severe and unexpected staffing shortage in the US law firm as such was sufficient to be qualified as an exceptional circumstance. The appellant also referred to the decision J 22/86 of the Legal Board of Appeal, arguing that in a case where one could tell from the impugned decision itself that a procedural mistake had occurred, the appeal was admissible even if the deficiency was not mentioned in the grounds of the appeal.

At the oral proceedings, the appellant requested for the first time that the case be remitted to the examining division in view of the procedural violation caused by the omission of the signature of the legally qualified member of the examining division at the end of the written decision. The appellant also requested reimbursement of the appeal fee, clarifying that this was only requested if the case were to be remitted. The appellant explained that the request for remittal was only filed at this late stage of the proceedings because they had only become aware of the missing signature by virtue of the board's communication under Article 15 RPBA 2020. With reference to decisions T 989/19, T 390/86 and J 16/17, the appellant argued that the missing signature was a fundamental deficiency that rendered the decision void. Without the signature it was not clear whether the legally qualified member of the examining division had agreed to the impugned decision or not.

The appellant also elaborated on its written arguments as to why the staffing shortage in the US law firm should be qualified as exceptional. In this context the appellant also referred to decision J 7/16.

The appellant further submitted that the submissions filed with the letter dated 27 January 2023 should be admitted into the proceedings, because they were filed in response to the board's communication to demonstrate what attempts were made in the US law firm in order to overcome the staffing shortage and to remedy the lack of signature in the statements of Ms S..

In the oral proceedings the appellant also elaborated on the e-mail correspondence between the European representative and the US law firm that had been submitted with letter of 23 May 2018.

XV. At the end of the oral proceedings the appellant requested that the decision under appeal be set aside and the case be remitted to the examining division. A reimbursement of the appeal fee was requested if the case were to be remitted. As an auxiliary measure it was requested that the request for re-establishment of rights be granted.

Reasons for the Decision

1. Admissibility of the appeal

1.1 The notice of appeal and the statement setting out the grounds of appeal were filed in due time.

1.2 With regard to the requirements of Article 108, 3rd sentence, EPC and Rule 99(2) EPC, the statement setting out the grounds of appeal must enable the board to understand immediately why the decision is alleged to be incorrect and on what facts the appellant bases its arguments, without first having to make investigations of its own (J 10/11, reasons 2.1, T 573/09, reasons 1.1). The specific grounds of appeal need to be presented within the time limit of four months as set out in Article 108, 3rd sentence EPC for filing the statement setting out the grounds of appeal.

Contrary to the appellant's allegation, a procedural deficiency which was not addressed by the appellant within the time limit for filing the statement setting out the grounds of appeal cannot substitute for the prerequisite of substantiated grounds of appeal according to Article 108 EPC and Rule 99(2) EPC.

1.3 Moreover, as regards the appellant's substantiation of exceptional circumstances for reasoning the request for re-establishment of rights in the grounds of appeal, it needs to be noted that it is not sufficient if the arguments as set out in the first instance proceedings are merely repeated in the grounds of appeal, without taking into account the reasoning in the decision under

appeal. Such an approach would mistake the function of the appeal proceedings as they are not a second round of examination, but are meant to review decisions made by the department of first instance, based on the objections raised against the decision in the grounds of appeal, which must therefore relate to the reasons on which the decision under appeal is based (Case Law of the Boards of Appeal, 10th edition, V.A.2.6.3 c)).

However, in the present case the appellant's argument was that the staffing shortage as such had been so severe that this aspect alone was apt to be qualified as exceptional, which argument was rejected by the examining division. In view of this general approach the appellant did not address the temporal context and the further aspects which had been considered in the impugned decision for assessing whether exceptional circumstances applied. Under these specific circumstances the appellant's reasoning might be seen as being adequate to satisfy the need for substantiation in the grounds of appeal. Insofar it needs to be considered that for assessing the admissibility of an appeal, it is not to be examined whether the reasoning provided is convincing.

2. Remittal to the Examining Division

The board exercised its discretion under Article 11 RPBA 2020 (applicable under Article 25(1) RPBA 2020) and Article 111(1) EPC not to remit the case to the examining division despite the occurrence of a procedural mistake.

2.1 Substantial procedural violation

In the case on file, the missing signature of the legally qualified member at the end of Form 2906 is to be regarded as a substantial procedural violation.

2.1.1 A decision may be given orally if oral proceedings were held, but any decision announced orally must subsequently be put in writing and must be reasoned (Rule 111 EPC) on behalf of the members who were present in the oral proceedings. To ensure that all the members have taken responsibility for the decision, the respective members need to sign the written decision according to Rule 113(1) EPC. Where the decision is provided by the employee responsible using a computer, a seal may replace the signature according to Rule 113(2) EPC.

2.1.2 In the present case the examining division provided the written order of its decision - corresponding to the decision announced orally at the end of the oral proceedings - with Form 2901AK dated 1 July 2019. This form contains the names and functions of the members who participated in the oral proceedings and a seal of the EPO at the end of the form. With Form 2906, the examining division provided the reasoned decision. At the end of this form, the names of the chairman, the two technically qualified members and the legally qualified member who participated in the oral proceedings are indicated. All members except for the legally qualified member provided their handwritten signature, i.e. only the space above the legally qualified member's name is empty.

2.1.3 When a decision taken at oral proceedings is subsequently put in writing, the authenticity of the

written decision from an examining division consisting of several members is usually verified by an accompanying form which contains the order, the handwritten signatures of the members who were present in the oral proceedings, their names and an explicit reference to the reasoned decision.

In the present case however, page 2 of Form 2009.2 only bears the signatures of the chairman and the two technically qualified members. Form 2901AK only shows a seal without an explicit reference to the reasoned decision which was provided with form 2906. Further considering that form 2901AK does not indicate who provided the seal and does not indicate by authentication that the decision had been authorised by each member of the examining division, the missing signature of the legally qualified member on page 2 of Form 2009.2 and on Form 2906 gives the impression that the decision was not consented to by all the members responsible for the decision. Therefore, it cannot be concluded that all members who participated in the oral proceedings have authorised the decision.

This is to be qualified as a substantial procedural violation because the signature is not a mere formality, but serves to identify the decision's authors and expresses that they unconditionally assume responsibility for its content (J 16/17, reasons 2.3).

2.2 Article 11 RPBA 2020, Article 111(1) EPC

2.2.1 Under Article 111(1) EPC, the boards, having examined the allowability of an appeal, decide on it either by exercising any power within the competence of the department which was responsible for the decision appealed or by remitting the case to that department

for further prosecution. Which of these two options the board chooses depends on the specific facts of the case before it and is a matter which is at its discretion. Article 11 RPBA 2020 stipulates that as a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons. The wording "as a rule" ("in der Regel", "en règle générale") is mirrored as meaning "normally" ("normalement", "in der Regel") in the explanatory remarks on Article 11 RPBA 2020 (Supplementary publication 2, OJ 2020). This correctly reflects that Article 11 RPBA 2020 is not aimed at depriving the boards of the discretion conferred on them by Article 111(1) EPC. Hence, even if a fundamental deficiency is apparent, the board still has discretion not to remit the case to the examining division but to deal with the substance of the case itself (T 1635/19, reasons 2.2).

2.2.2 Considering the specific circumstances of the present case, the board finds it appropriate to refrain from a remittal.

First of all, the appeal was not based on this deficiency. Rather, the appellant did not invoke the procedural deficiency in the appealed decision before the board drew attention to it. Furthermore, no connection between the deficiency and the appellant's request for re-establishment of rights is apparent. Rather, the mistake occurred after the decision of the examining division had been orally announced and thus, after the conclusions had been reached within the decision-making process. The appellant did not contest that the legally qualified member was present at the oral proceedings and the chairman announced the order of the decision on behalf of all members of the

examining division. Hence, the situation is not comparable to other procedural mistakes that could indeed have an impact on the outcome of the decision-making process, as for example a violation of the right to be heard. Moreover, the deficiency did not hinder the appellant in preparing its grounds of appeal.

The appellant's allegation that the impugned decision was null and void in the sense that it never had any legal effect due to the missing signature at the end of the reasoned decision, is not correct and thus can not be a reason for remitting the case. This view is not supported by the decisions cited by the appellant.

In decision T 390/86, the board did not conclude that the decision as orally announced in the first instance proceedings was invalid, but stated rather that the written decision, which was signed by members who did not participate in the oral proceedings, was invalid (T 390/86, reasons 8). Contrary to the appellant's view, a decision that is announced at the end of the oral proceedings becomes effective at this point (G 12/91, OJ 1994, 285, reasons 2). As a consequence, rather then being void, a flawed decision enters into force and exists until it is set aside in appeal proceedings (G 12/91, OJ 1994, 285, reasons 2; T 371/92, OJ 1995, 324, reasons 1.4). Thus, the decision of the examining division is existent despite the missing signature of one member on the decision as subsequently put in writing.

The board acknowledges that, as pointed out by the appellant, it cannot be established whether the legally qualified member had seen the reasoned decision or not. However, as the impugned decision was announced at the end of the oral proceedings before the examining

division, it is clear to the board that the legally qualified member participated in the oral proceedings and in the process leading to the examining division's conclusions. Hence, the present case is not comparable to written proceedings, where a missing signature could raise doubts as to whether the member whose signature was missing had participated in the decision-making process at all (see T 989/19, reasons 4). Thus, for this reason alone, decision T 989/19, which concerned written proceedings, is not comparable to the case on file, so that the reasoning of the appellant in this respect is not convincing.

In view of the above findings, remitting the case to the examining division would cause an unnecessary delay in the proceedings. The board therefore acknowledged special reasons not to remit the case and exercised its discretion to decide itself on the merits of the appeal.

2.3 Reimbursement of the appeal fee

In view of this outcome, the appellant's request for reimbursement of the appeal fee, which was conditional on the remittal, needs not be decided upon.

3. Allowability of the appeal

3.1 Admissibility of the request for re-establishment of rights

3.1.1 The formal requirements of Article 122 EPC in conjunction with Rule 136 EPC for the request for re-establishment to be admissible are met.

3.1.2 If the cause of non-compliance involved an error in carrying out the party's intention to comply with the time limit, the removal occurs when the person responsible is made aware of the fact that the time limit had not been observed. Thus, in the present case, the removal occurred when the person responsible was aware of the notice of loss of rights (dispatched on 2 June 2017). The request for re-establishment was submitted on 1 August 2017 so that the two-month period for re-establishment of rights under Rule 136(1) EPC has been observed.

3.1.3 The appellant had also substantiated its request for re-establishment, at least as regards exceptional circumstances, within the relevant time limit of two months according to Rule 136(1) and (2), first sentence, EPC by stating the grounds on which the request was based with its letter dated 1 August 2017. The appellant's later submissions in the letter dated 23 May 2018 were not provided within the time limit and thus can merely amplify but not alter the basis of the grounds provided in the request for re-establishment (see J 5/94, reasons 2.3; J 15/10, reasons 3.2).

3.1.4 The appellant also completed the omitted act by paying the relevant fees within the period for filing the request for re-establishment according to Rule 136(1) and (2), second sentence EPC.

3.2 Allowability of the request for re-establishment of rights

3.2.1 With the possibility of re-establishment under Article 122 EPC, the legislator did not intend to provide a remedy for all cases in which there was an intention to

perform an act due by a certain time limit, but an unintentional failure to perform that act prevented the observation of that time limit. Rather, the legislator provided for re-establishment only for those cases where the applicant, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit.

3.2.2 From this it is clear that in the first place it is the applicant who must observe all due care. The applicant cannot free itself of its responsibilities by appointing a representative. Rather, the right to act on behalf of the applicant includes the assumption of the applicant's responsibilities. Therefore, if a professional representative is appointed, the duty of all due care applies both to the applicant itself and to its professional representative. All due care must also be taken by a third person who is not a professional European representative, but is entrusted by an applicant with acts pertaining to a patent application. This is justified because this person is then acting for the applicant and performs the necessary steps in the procedure in the applicant's place. Thus, also a non-European representative can be held responsible for meeting the obligations of any representative whose duty it is to care for its client's interests, irrespective of whether such a representative is entitled to represent before the EPO or any other patent office (J 5/18, reasons 1.2.2; J 25/96 reasons 3.2; J 9/16, reasons 30; J 3/88, reasons 3.). Thus, a non-European representative must also establish a reliable monitoring system for such time limits (see J 9/16, reasons 30).

Consequently, in the present case not only the applicant but also the European representative, the US

law firm and the fee payment agency are required to have acted with all due care in order for re-establishment to be granted.

3.2.3 The examining division has correctly concluded that in the present case the time limit was not missed despite all due care required by the circumstances having been taken.

The non-compliance with the time limit resulted neither from exceptional circumstances nor from an isolated mistake within a normally satisfactory monitoring system. Rather, it follows from the appellant's submissions that the US law firm did not act with all due care, even if the statements of Ms S. as filed in the first instance proceedings are considered. Thus, it does not need to be decided whether the resubmission of the former statement of Ms S.(filed originally with letter dated 23 May 2018) supplemented by the signature of Ms S. with letter dated 27 January 2023 was justified under Article 13(2) RPBA 2020.

3.2.4 Exceptional circumstances

(a) The examining division was right not to qualify the staffing shortage in the US law firm as an exceptional circumstance.

The examining division reasoned that considering the time interval of more than 15 months between the indication by one of the partners that they would leave the US law firm already in January 2016 and the end of the time limit decisive for the present case (30 April 2017), the tense staffing situation neither came as a surprise for the US representative, nor was it so close to the end of

the final time limit that no countermeasures could have been taken. Moreover, except for the mere redirection of foreign notifications to a dedicated e-mail folder (which was not regularly checked), the appellant had not indicated whether any attempts were made to overcome the loss of staff.

(b) The board agrees with these findings and notes that the appellant did not address the latter aspect in its grounds of appeal. Rather, it was addressed for the first time in the supplemental statement of Ms S. submitted with letter dated 27 January 2023, but without any explanation given by the appellant.

The board exercised its discretion not to take the additional facts presented in the new supplemental statement dated 25 January 2023 of Ms S., into account under Article 13(2) RPBA 2020 (applicable according to Article 25(1), (3) RPBA 2020).

Article 13(2) RPBA 2020 stipulates that any amendments to a party's appeal case made after notification of the summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The supplemental statement, which was submitted after notification of the summons to oral proceedings, is to be qualified as an amendment of the appellant's appeal case because it is a new document of evidence.

Irrespective of the fact that the submission of evidence alone, i.e. without further explanations

by the party, does not fulfil the requirements of substantiation (Article 12(3) RPBA 2020, previously Article 12(2) RPBA 2007), the board did not take the document into account because its late submission is not justified by exceptional circumstances according to Article 13(2) RPBA 2020.

In the oral proceedings the appellant argued that the supplemental statement was filed in response to the board's communication to demonstrate what attempts were made in the US law firm in order to overcome the staffing shortage.

This argument is not convincing because the examining division had already mentioned in its communication of 29 June 2018 under point 19 that "...one of the partners of the US law firm already indicated her intention to leave the firm in January 2016. Nevertheless, the partner only left the firm on 15 July 2016 leaving more than half a year to take appropriate measures to reallocate resources or to find replacement personal *[sic]*." Moreover, under point 17. of the impugned decision the examining division set out that for the assessment of exceptional circumstances it needed to be considered, whether the reduction in workforce "... was in close timely proximity to the time limit being missed, whether it was unexpected for the representative and whether measures were taken to compensate for the absence of staff". The examining division concluded that except for the mere redirection of foreign notifications to a dedicated e-mail folder, the appellant had not indicated whether any attempts were made to overcome the loss in staff, e.g. through the recruitment of new attorneys or administrators.

Thus, the appellant was aware that further explanations were required in order to establish exceptional circumstances so that it could and should have provided further reasoning and evidence already before receiving the board's communication.

Moreover, the board notes that even if the appellant had indicated in time that certain attempts had been made to overcome the staff shortage, this would not have been apt to justify exceptional circumstances in view of the fact that the US law firm was working together with the European representatives as regards the application on file. The US law firm could and should have informed the European representatives about the staff shortage and asked for support. In the e-mail sent by the European representatives to the US law firm on 9 December 2016 (attached to the appellant's letter dated 23 May 2018) the following was written:

"Please find attached a table showing the cases we have for you where annuities are payable along with the deadlines by which they became due. All four cases are currently within the six month grace period as the renewals are overdue. Please confirm whether you would like us to take care of these payments for you."

Even if this e-mail did not relate to the application on file, as was explained by the appellant in the oral proceedings, it nevertheless demonstrates that the European representatives were willing to provide support for the US law firm in order to meet the existing timelines for payments. The US law firm, by not taking this opportunity to

prevent deadlines being missed, did not act with all due care.

(c) The reasons as set out above do – as required by the appellant with its grounds of appeal - take the whole circumstances of the specific case into account. In assessing whether exceptional circumstances applied, the staff shortage needed to be evaluated in view of the fact that it was not unexpected and lasted for a long period of time without adequate measures being taken to avoid the resultant occurrence of mistakes due to the overload of work. Rather, even after realising that the fees for annuities had not been paid in several cases (see the e-mails of the European representative and of the US law firm dated 7 December 2016, attached to the appellant's letter of 23 May 2018) the e-mail folder for reminders was not reviewed and checked by the US law firm.

(d) Decision T 14/89, cited by the appellant, does not lead to any other conclusion, as it relates to a completely different situation where the party was prevented from observing the time limit because a communication from the EPO was unintentionally put in a wrong removals box in the course of an internal reorganisation. This situation cannot be compared with the case on file where correspondence was deliberately stored in an e-mail folder that was not checked regularly.

(e) Furthermore, the board's findings are not put in doubt by decision J 7/16, cited by the appellant. In that decision the legal board came to the conclusion that "... due to his state of health the former representative was neither capable of

prosecuting the present application properly nor of recognising that he was no longer in a position to perform his duties and needed to withdraw from representation. For reasons beyond his control, he was not capable to run this case in a proper way although he took every effort to fulfil his duties" (J 7/16, reasons 3.6).

In the present case it is neither discernible, nor was it argued, that the state of health of Ms S. prevented her from prosecuting her duties or of recognising that she was no longer in a position to perform her duties. Thus, the present case is not comparable with the facts underlying decision J 7/16.

3.2.5 Isolated mistake

(a) The board agrees with the findings of the examining division that identified three mistakes leading to the time limit for payment of the renewal fee plus additional fee being missed. These findings are not altered by the appellant's further arguments in the grounds of appeal.

(b) The examining division concluded that it was not an isolated mistake which led to the time limit for the payment of the renewal fee plus additional fee being missed, but rather three consecutive mistakes.

Some decisions of the Boards of Appeal have indicated that in certain circumstances, a chain of errors could nevertheless be qualified as an isolated mistake within a normally satisfactory system (see T 447/00, reasons 3.2).

However, in the circumstances of the present case, it needs to be noted that almost all of the mistakes are related to the inadequate organisation and reaction after the loss of staff in the US law firm, resulting in a heavy workload that could not be handled properly by the person responsible. The mistakes which are related to this situation thus cannot be qualified as isolated mistakes in an otherwise well-functioning system. This applies in particular to the mistakes that were made when the dedicated folder, set up for processing all incoming notifications as regards annuities, was not checked, as stated by Ms S. under point 7 of the first statement (filed with letter dated 1 August 2017). As set out before, this omission could not be justified by the high workload as it concerned a period of 9 months after the loss of staff and 15 months after one partner had announced their intention to leave the firm.

(c) In its grounds of appeal, the appellant did not address the different mistakes mentioned in the impugned decision. Rather it merely stressed that the error occurred in a well-working system and would normally have been picked up by the overdue renewal reminders received from the European representatives.

This line of argument is not persuasive. The appellant must plausibly show that a normally effective system for monitoring time limits prescribed by the EPC was established at the relevant time in the office in question. In a well-functioning system it needs to be guaranteed that reminders, which are intended to act as fallback

reminders for the observation of time limits, are brought to the attention of a person responsible, i.e. checked regularly. In the US law firm however not only one, but several reminders (dated: 15 July 2016, 9 September 2016, 18 October 2016, 7 December 2016, 25 January 2017) sent by the European representative, remained unnoticed or at least without adequate measures being taken. This demonstrates that it was not an isolated mistake, but rather the consequence of a system that was not established and observed properly. The failure to check the e-mail address provided for reminders over a longer period of time is incompatible with the duty to maintain a reliable system to monitor time limits.

(d) Additionally, it appears from the e-mail sent by Ms S. to the European representative on 7 December 2016 that she indeed took notice of the e-mail sent by the European representative on 7 December 2016 and thus was aware of the non-payment of the renewal fee in several other cases. Even if the correspondence of 7 and 9 December 2016 did not relate to the application on file, as explained by the appellant in the oral proceedings, the e-mail from Ms S. sent on 7 December 2016 demonstrates that the US law firm was aware that several annuities were overdue, but nevertheless did not check the e-mail folder that had been set up. If that had been done, the US law firm would have become aware of the reminders sent by the European representatives with regard to the application on file and could have reacted in a timely manner.

3.3 Conclusion

The request for re-establishment is admissible but not allowable.

As a consequence, as set out in the notice of loss of rights dated 2 June 2017, the application is deemed to be withdrawn. This is with effect as of 1 May 2017.

Moreover, all fees paid after 30 April 2017 are to be refunded except for the fee for re-establishment and the appeal fee.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

U. Bultmann R. Lord

Decision electronically authenticated