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Datasheet for the decision of 14 March 2025

Case Number: T 1874/23 - 3.3.05

Application Number: 16842707.8

Publication Number: 3341031

IPC: A61L2/04, A61L2/24, C02F1/02

Language of the proceedings: EN

Title of invention:
SYSTEM AND METHOD FOR FLUID STERILIZATION

Applicant:
Papadopoulos, Michael

Headword:
Limits to oral proceedings on request

Relevant legal provisions:
EPC Art. 86(1), 108, 111(1), 114(2), 115, 116(1), 125
EPC R. 101(1), 112(1), 127(2), 136(1)
RPBA 2020 Art. 12(4), 13, 15(4), 16(1)(c)
Vienna Convention on the Law of Treaties (1969) Art. 31 and 32
European Convention on Human Rights Art.6(1)
Charter of Fundamental Rights of the European Union Art. 47(2)

Keyword:

Re-establishment of rights - (no) - time limit for filing notice and statement of grounds - cross-check (no) - request not duly substantiated - all due care (no) - due care on the part of the professional representative and their assistants - supervision (no)
Admissibility of appeal - statement of grounds - filed within time limit (no)
Oral proceedings - before board of appeal - right to be heard in oral proceedings - request for oral proceedings

Decisions cited:

D 0011/91, G 0005/83, G 0001/90, G 0006/91, G 0001/97, G 0003/97, G 0003/98, G 0002/08, G 0002/12, G 0002/13, G 0002/19, G 0003/19, G 0001/21, G 0001/22, G 0002/23, R 0019/12, R 0008/13, J 0020/87, J 0015/89, J 0006/90, J 0027/90, J 0005/94, J 0008/95, J 0025/03, J 0016/05, J 0019/05, J 0003/08, J 0006/08, J 0011/09, J 0012/09, J 0013/09, J 0014/09, J 0015/10, J 0009/16, J 0014/16, J 0008/21, J 0014/21, J 0006/22, T 0287/84, T 0383/87, T 0125/89, T 0042/90, T 0324/90, T 0318/91, T 0494/92, T 0828/94, T 0686/97, T 0431/04, T 0777/06, T 0883/06, T 0257/07, T 1042/07, T 0585/08, T 1962/08, T 1050/09, T 0234/10, T 0479/10, T 0742/11, T 2445/11, T 1367/12, T 1727/12, T 0649/14, T 1824/15, T 1575/16, T 1787/16, T 2575/16, T 0095/17, T 0757/17, T 1897/17, T 0849/18, T 2920/18, T 0339/19, T 1066/19, T 1913/19, T 2295/19, T 2377/19, T 1214/20, T 1547/20, T 1573/20, T 1709/20, T 0732/21, T 1513/21, T 2024/21, T 1986/22, T 2542/22, T 0178/23, T 0194/23

European Court of Human Rights (ECtHR)

Axen v. Germany, no. 8273/78
Cossey v. the United Kingdom, no. 10843/84
Döry v. Sweden, no. 28394/95
Fedetova and others v. Russia, nos. 40792/10, 30538/14, 43439/14
Fejde v. Sweden, no. 12631/87
Göç v. Turkey, no. 36590/97
Helmers v. Sweden, no. 11826/85
Jussila v. Finland, no. 73053/01
Koottummel v. Austria, no. 49616/06

Kremzow v. Austria, no. 12350/86
Kress v. France, no. 39594/98
Lundevall v. Sweden, no. 38629/97
Marckx v. Belgium, no. 6833/74
Micallef v. Malta, no. 17056/06
Mutu and Pechstein v. Switzerland, nos. 40575/10 and 67474/10
Salomonsson v. Sweden, no. 38978/97
Schuler-Zgraggen v. Switzerland, no. 14518/89
Speil v. Austria, no. 42057/98
Tyrer v. the United Kingdom, no. 5856/72
Varela Assalino v. Portugal, no. 64336/01
Valová and others v. Slovakia, no. 44925/98

International Court of Justice
Advisory Opinion of 21 June 1971 on Legal Consequences for States of the continued presence of South Africa in Namibia

International Tribunal for the Law of the Sea (ITLOS)
Advisory Opinion of 21 May 2024 on Climate Change and International Law

Catchword:

1. The requirement for immediate and complete substantiation of a request for re-establishment corresponds to the principle of "Eventualmaxime/Häufungsgrundsatz/le principe de la concentration des moyens", according to which the request must state all grounds for re-establishment and means of evidence without the possibility of submitting these at a later stage.

2. Dynamic interpretation of the EPC, as derived from Articles 31(1) and 31(3) Vienna Convention on the Law of Treaties, must take account of developments in national and international procedural law, notably as regards the guarantees of fair trial before a tribunal of law (Article 6(1) ECHR).

3. There is no "absolute" right to oral proceedings upon a party's request, but it is subject to inherent restrictions by the EPC, and due to procedural principles generally recognised in the Contracting States of the EPO.

4. If oral proceedings do not serve any legitimate purpose, the requirement of legal certainty in due time prevents the Board from appointing them.

5. It is not the purpose of oral proceedings in the context of proceedings for re-establishment to give the appellant a further chance to substantiate their factual assertions or to provide evidence despite the absence of factual assertions in the request for re-establishment.

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Case Number: T 1874/23 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 14 March 2025

Appellant: (Applicant)	Papadopoulos, Michael 905 Blue Heron Seal Beach, CA 90740 (US)
Representative:	Schlee, Alexander Richard Schlee IP International Maximilianstraße 33 80539 München (DE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 4 November 2022 refusing European patent application No. 16842707.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair	E. Bendl
Members:	J. Roider
	R. Winkelhofer

Summary of Facts and Submissions

I. The applicant (appellant) is a physical person residing in the USA. The case concerns their request for re-establishment of rights into the time limit for the (notice of, and the statement of grounds of) appeal against the Examining Division's decision of 4 November 2022 to refuse their European patent application.

II. In this decision, the Examining Division made reference to their own communication of 28 April 2022, where detailed reasons had been outlined why the application did not meet the requirements of the EPC, and to the appellant's submission of 6 October 2022 requesting "an appealable Decision according to the state of the file in writing".

III. In the proceedings before the Examining Division, the appellant was represented by S&P in Germany ("S&P"), on their letterhead sporting, inter alia, European Patent Attorneys S. and E. as partners, the reference "in cooperation with" law firm S.IP in the USA, and a further reference to (again) S. as being also a US patent attorney, belonging to S.IP. The submissions in the examination proceedings had been signed by E. on behalf of S&P.

IV. In a submission of 5 October 2023, E., on behalf of S&P, indicated that they no longer represented the appellant in the present case. On the letterhead, there were no longer any references to S. and to S.IP.

V. In a submission of 11 October 2023, S., (now) on behalf of S.IP, and featuring an address in Germany, indicated to have taken over the appellant's representation.

VI. On 13 October 2023, the appellant, represented by S./ S.IP, requested re-establishment of rights into the time limits for the notice of appeal and for the statement of grounds of appeal against the Examining Division's decision, including a request for oral proceedings "in case the Examining Division still leans to rejecting the application". Documentary evidence was further enclosed.

VII. In a separate submission of the same day, they filed a notice of appeal and statement of grounds of appeal, requesting to (set aside and) amend the impugned decision such as to grant a patent on the basis of a claim request submitted therewith, and, in eventu, oral proceedings to be held.

VIII. The appeal fee and the fee for re-establishment were all paid on 12 October 2023.

IX. In the request for re-establishment of rights into the time limit for the notice of, and the statement of grounds of appeal against the impugned decision, the appellant brought forward that the omitted acts had been completed now, namely by filing the notice and the grounds of appeal, and by paying the appeal fee.

The failure to appeal the decision had first been discovered in a meeting on 16 August 2023 between the appellant and S., regarding the validation strategy of a parallel European Patent. On that occasion, the appellant also enquired about the status of the present application, and was informed by S. that it had gone abandoned, due to the decision of the Examining Division which had not been appealed. The one-year time limit under R. 136(1) EPC was thus met.

In the first instance proceedings, an appealable decision had been requested, and had been received by S&P/S., as S./S.IP and S&P "work[ed] in cooperation". S.IP (through their Office Manager B.) then had reported by email of 30 November 2022 to the appellant's "US correspondence attorney firm T.Law", namely US patent attorney T., also requesting "instructions". A follow-up reminder had then also been sent by B. to T., by email on 11 January 2023. S./S.IP was having regular email correspondence with T./T.Law also in other cases, among these the parallel European patent mentioned above. Not having experienced email communication issues with T., S. reasonably assumed safe receipt of their emails reporting the appeal deadlines and the subsequent reminder. The application was never intended to go abandoned and an appeal should have been filed.

T.'s role as US correspondence attorney had been to receive correspondence from "foreign associates", communicate with the appellant as their client, receive instructions from the appellant, and convey these instructions to the foreign associates, in this case to S.

T. had founded their intellectual property law firm T.Law in 2006. The appellant therefore had handled the matter with due care by hiring the experienced US patent attorney T., for handling their US patent applications, as well as for taking on the role of the correspondence attorney for the foreign filing portfolio.

When T./T.Law received reports from foreign associates including deadlines, these were entered into T. Law's docketing system by the then paralegal V. According to the standard docketing procedures at T. Law, entries

were typically made by V. who had access to and regularly checked T.'s email account, and deadlines were brought to T.'s attention, for T. then to communicate with their clients, like the appellant in the present case. V. had been employed by T.Law for over 5 years, and could be trusted with entering deadlines in the docketing system. However, "due to an isolated error, V. has never informed T. about this deadline nor entered the deadline into the ... docketing system. Due to this isolated error by V., the appeal deadline is notably absent in the docketing system."

The appellant had acted with due care by hiring the well-established law firm T.Law, who, in turn, had acted with due care by implementing a reliable docketing system, but "due to an isolated failure in the system caused by a human error of V., was unaware of the appeal deadline and could therefore not instruct S." to have an appeal filed.

S., finally, in cooperation with S&P had acted with due care by first requesting an appealable decision and then reporting the decision and the appeal deadline, as well as sending a reminder before the deadline. The failure to observe the appeal deadline occurred therefore due to an isolated human error by V. in spite of all due care required by the circumstances having been taken.

X. The request for re-establishment of rights was complemented, in particular, by declarations of the appellant of 6 October 2023, as well as of T. of 11 October 2023, by copies of the email correspondence of 30 November 2022 and 11 January 2023, and by an excerpt from T.Law's docketing system of 13 October 2023.

In the appellant's declaration, it is said that they had standing instructions to maintain their patent applications with T. since 2016, and they had not been informed by T. about the appeal deadline. They would have expressly instructed T. to then instruct their "foreign associates in Europe" to appeal the decision. The appellant only found out about the inadvertent lapsing of the application "prior to a meeting" with S. IP on 16 August 2023. On that occasion, they enquired also about the status of the current application, learning that it had finally "lapsed" for not having filed an appeal.

In T.'s declaration, they refer to their long experience as US patent attorney. Within the firm, they used an IP docketing system, and they further docketed deadlines manually in the calendar book and updated the status of the IP docketing system. T. delegated their docketing responsibilities to paralegal V., who routinely checked their email account and docketed deadlines. After docketing, V. typically reported deadlines and required actions to clients by email, copying T.
T. had not received any information about an appeal deadline in the present case, and they also had not found entries in the IP docketing system. V. had been employed by T.Law since 2018, and had regularly followed the standard procedure including entries in the IP docketing system. T. could "not explain why V. had not made entries in our docketing system also in this case as it should have under T. standard procedures". Had T. become aware of the appeal deadline, they "would have filed an appeal and would have coordinated" with the appellant.

XI. Requests

The appellant requests to set the decision under appeal aside and to issue a Rule 71 (3) EPC communication based claims 1-4 submitted with the grounds of appeal, together with description pages 1,3,4,8,15,18,20 filed on 28 August 2019, original description pages 2,5-7,9-14,16,17,19, and original drawing sheets 1/18 -18/18.

As an auxiliary request, oral proceedings under Article 116 EPC are requested.

Reasons for the Decision

Re-establishment into the time limit for the notice and the statement of grounds of appeal

1. A party can be reinstated with regard to a time limit to be observed vis-à-vis the EPO (here: the time limit for the filing of the notice and for the statement of grounds of appeal) if they were unable to observe the time limit despite all due care required by the circumstances having been taken (Article 122(1) EPC).

2. The request for re-establishment must be filed within two months of the removal of the cause of non-compliance with the time limit (Rule 136(1) EPC), i.e. normally from the date on which the person responsible for the application becomes aware of the omission (Case Law of the Boards of Appeal, 10th edn. 2022 (Case Law), III.E.4, see J 27/90 OJ EPO 1993, 422). Pursuant to Article 122(2) and Rule 136(2) EPC, the request for re-establishment must set out - in a sufficiently substantiated fashion to make a conclusive case (inter alia, see J 15/10, Reasons 3.2, and T 178/23, Reasons 5.2.1) - the grounds on which it is based, the facts on

which it relies and the precise cause of non-compliance with the time limit concerned, and it must specify at what time and under which circumstances the cause occurred and when it was removed. A request which re lies on general statements only and contains no spe cific facts does not satisfy the requirements for due substantiation (Case Law, III.E.4.4, e.g. J 19/05, Reasons 4). However, it may suffice if such facts are only given in a document submitted alongside the request where both can be read together (see T 287/84, OJ EPO 1985, 333; T 585/08, Reasons 9, J 6/22, Reasons 2).

3. Exercising all due care required by the circumstances rests not only with an applicant but with all persons acting on their behalf (Case Law, III.E.5.5). The acts of all these persons are ultimately attributed to the applicant (Case Law, III.E.5.5; see e.g. T 1897/17, Reasons 2).

Notably, an applicant's professional representative is likewise under the obligation to exercise all due care, including their assistants (Case Law, III.E.5.4) comprising, in particular, paralegals (J 8/21, Reasons 5 et seq.; T 1547/20, Reasons 7; T 1513/21). All due care by the professional representative in this context includes, among other duties, the reasonable instruction and continuous supervision of assistants including paralegals (Case Law III.E.5.5.4.(a) and (b)).

Likewise under the obligation to exercise due care is any intermediary (agent) between the applicant and the representative (Case Law, III.E.5.5.2. et seq., see e.g. J 3/08, Reasons 4; T 742/11, Reasons 12 f).

4. In assessing whether all due care required was applied, the circumstances of each case must be taken into account in their entirety (see e.g. T 287/84, OJ EPO 1985, 333, Reasons 2; J 14/16, Reasons 3.2; T 1214/20, Reasons 2; J 14/21, Reasons 24).

5. All due care is considered to have been exercised if non-compliance with a time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law, III.E.5.2. and 5.4.).

6. In a law firm with regularly numerous time limits to monitor, a "normally satisfactory monitoring system" of time limits would have to contain an effective system of cross-checks, such a system being independent of the person responsible for monitoring the time limits, inter alia, but not limited to prevent misunderstandings between the representative and their assistants (Case Law III.E.5.4.4; T 1897/17, Reasons 6., T 1214/20, Reasons 2.), and to guard against the consequences of oversight in a busy office (Case Law III.E.5.4.2).

7. Someone could thus be made responsible for checking independently of the representative and the assistant if an appeal had been filed or was being prepared, and/or an (automatic) alert system could be put in place to fire if no data concerning such an appeal had been entered into the docketing system near the due date. An independent cross-check must thus necessarily include either another person or an automated system (finally) alerting another person, to provide for a "redundant" or "failsafe" system as an essential component of a normally satisfactory monitoring system (Case Law

III.E.5.4.4 a), inter alia with reference to J 9/16, T 828/94, T 686/97, T 257/07 and T 1962/08).

8. Based on the asserted facts, nothing casts doubt on the general reliability of any of the actors involved who were responsible for taking the necessary steps to process the application, including the filing of an appeal: the European Patent Attorney S. as the appellant's professional representative before the EPO, at the time when the impugned decision was handed down, their office manager B., E. as the previous professional representative before the EPO, the "US correspondence attorney" T. as (intermediate) US patent attorney, paralegal V. as their assistant, and the appellant themselves. There is also no reason to doubt that all professionals involved have provided reliable services to their clients over years.

9. However, already on the basis of the appellant's own assertions, it cannot be concluded that (at least) T.Law's system of recording and monitoring time limits was water-tight, and that an effective system of cross-checks was in place, as required to provide for a "normally satisfactory monitoring system". While the declarations filed alongside the request for re-establishment somehow add to its factual assertions (see again the jurisprudence cited above, in particular T 287/84, OJ EPO 1985, 333, according to which the reference to a declaration might suffice for the request for re-establishment to be properly substantiated, if the necessary facts and reasons are given therein), also no reasons can be found to the contrary.

10. In particular, neither from the request for re-establishment nor from any of the declarations or other documents appended to this request, it could be concluded

that any kind of supervision of paralegal V. by experienced US patent attorney T. or any other person in T. Law was in place.

11. Moreover and most importantly, nothing is said therein about a system of cross-checks in general, which would have worked independently from the IP docketing system, and the less so why such system would have failed in the present case.

12. While in T.'s declaration reference was (briefly) made to a "calendar book" where V. would - according to T.Law's "standard procedure(s)" - normally "docket deadlines manually", in addition to the entry in the IP docketing system, no explanations are given, at all, if such "calendar book" would generally provide for an independent system of cross-checks, thus complementing the IP docketing system, how entries therein would provide a safeguard for securing deadlines, how T. or another assistant under T.'s supervision would normally and systematically make use of the entries therein to cross-check with the entries in the IP docketing system, or how any of these systems would have sent off an (automatic) alert to T. or another assistant under their ultimate supervision, for finally making them aware that the deadlines entered into the IP docketing system are due, and to safeguard appropriate action (e.g. to file an appeal or to make sure such appeal is filed by a professional representative before the EPO) before the due date.

13. In addition, nothing is said, at all, why any such system, insofar as in place, at all, did not work in the present case, if the additional entry in the calendar book, if foreseen by their "standard procedure", was made or was not made, for whatever reasons, who might

have separately monitored deadlines/entries in the IP docketing system and/or the calendar book, or for whatever reason this has not been done yet, or that any alert would have set off, and/or why such alert had not been followed up, and/or that T. had been made aware of the deadline or not, for whatever reason, and if, or why not, they had enquired themselves about the fate of the deadline, or any other form of supervision that would have normally - and also here - kicked in. Thus, nothing is said that could explain an "isolated error" in a "normally satisfactory monitoring system". Such normally satisfactory system was apparently absent, and no submissions were made to the contrary.

14. Thus, on the basis of the appellant's own submissions and factual assertions alone, it has to be concluded that "all due care required by the circumstances" has not been taken. Against this background, it does not need to be examined whether there were further issues regarding the actions and supervision of any of the other actors involved in the present case.

15. Absent any kind of justifications to the contrary, the request for re-establishment into the time limit for the notice and grounds of appeal must fail for this reason alone.

Appeal against the impugned decision of the Examining Division

16. As a consequence, the notice and grounds of appeal were late filed on 13 October 2023. In accordance with Rule 127(2) EPC in then applicable version (with the "10-day notification rule" still in place, and the amended version only entering into force on 1 November 2023, see OJ EPO 2022, A101), the Examining Division's decision was deemed to be delivered on 14 November

2022, and the two-month time limit for the notice of appeal thus expired on 16 January 2023 (a Monday), and the time limit for the grounds of appeal (Article 108 EPC) on 14 March 2023 (a Tuesday), both regular working days of the EPO.

17. Thus, the appeal is to be rejected as inadmissible (Rule 101(1) EPC in conjunction with Article 108 EPC).

Decision in written procedure

18. This decision that the request for re-establishment and the appeal be rejected as inadmissible is to be taken right away in writing, despite oral proceedings having been requested by the appellant in their request for re-establishment, and also in their appeal (the explicit reference to oral proceedings before the Examining Division in their request for re-establishment in one of the submissions of 13 October 2023 is an obvious error, apparently addressing the board as the responsible organ to decide on the request).

19. As outlined above, a request for re-establishment must substantiate the grounds and facts within the time limit of Rule 136(1) EPC (see also Article 114(2) EPC). Thus, the factual basis for the requested decision can not be altered after the expiry of the time limit for the request (Case Law, III.E.4.4, see J 19/05, Reasons 4, 5; T 585/08, Reasons 9; T 479/10, Reasons 2.1; J 15/10, Reasons 3.2; J 6/22, Reasons 14; T 178/23, Reasons 5.2.1).

20. This requirement for immediate and complete substantiation of the request corresponds to the principle of "Eventualmaxime" or "Häufungsgrundsatz" in contracting

states with a German law tradition ("le principe de la concentration des moyens" in France), under which the request must state all grounds for re-establishment and means of evidence without the possibility of submitting these at a later stage (see e.g. *Foerste* in *Musielak/Voit*, ZPO, 21st edn. 2024, § 282 Rn. 4 f); *Deixler-Hübner* in *Fasching/Konecny*, Zivilprozessgesetze, 3rd edn. 2017, II/2 § 149 ZPO; *Gitschthaler* in *Rechberger/Klicka*, ZPO, 5th edn. 2019, §§ 148 f 2; Article 1355 du code civil, Cass. ass. plén., 7 juillet 2006, n° 04-10.672).

21. Only if this requirement for immediate and complete substantiation within the time limit has been fulfilled, might it be permissible to complement the facts and evidence in later submissions, and provided that they do not extend beyond the framework of the previous submissions (see J 5/94, Reasons 2.3; J 19/05, Reasons 5; T 585/08, Reasons 9; J 15/10, Reasons 3.1; see also J 8/95, Reasons 3; T 324/90, Reasons 5).

22. As outlined above, this is not the case here for the request for re-establishment in these proceedings. In particular, no factual assertions were made at least on the provision of supervision and/or an independent cross-check mechanism in T.Law, to make for a normally satisfactory monitoring system.

23. There was thus, within the time limit of Rule 136(1) EPC, no immediate and complete substantiation of the grounds and facts that would have been necessary for re-establishment. From the outset, the request for re-establishment into the time limit for the (notice and grounds of) appeal thus has to fail. The appellant could also not complement their factual assertions before the Board at a later point.

There is also no evidence that would have to be looked into and no (further) facts that would have to be established on the basis of the appellant's factual assertions. Even assuming, in the appellant's favour, that all their factual assertions are true, these do not suffice for re-establishment.

24. As a consequence, no further procedural steps are permissible, notably no further communication by the Board and no appointment of oral proceedings. Neither would serve any legitimate purpose.

25. It is not the purpose of oral proceedings in the context of proceedings for re-establishment to give the appellant a (further) chance to substantiate their factual assertions or to provide evidence despite the absence of factual assertions (see J 11/09, J 12/09, J 13/09 and J 14/09, Reasons 3.2.3 and 3.2.6 in each). Given the inherent restrictions for factual assertions outside the time limit for the request of re-establishment in these proceedings (the principle of "Eventualmaxime", see above), the appellant is even prevented from validly submitting new factual assertions at this stage, including in oral proceedings.

26. It is undisputed that the right to oral proceedings as guaranteed by Article 116(1) EPC is a cornerstone of proceedings before the EPO. The jurisprudence of the boards generally even follows the assumption of an "absolute" right to oral proceedings upon request, as a rule, without room for discussion by the board, and without considering the speedy conduct of the proceedings, equity or procedural economy (Case Law, III.C. 2.1, e.g. T 777/06, Reasons 2). The right to oral proceedings even stands if no new arguments are to be

presented (Case Law, III.C.2.1.2, see T 383/87, Reasons 9; T 125/89, Reasons 7; T 2024/21, Reasons 1.1).

27. However, even this "absolute" right to oral proceedings upon a party's request is subject to inherent restrictions by the EPC and procedural principles generally recognised in the Contracting States of the EPO (see Article 125 EPC, and J 6/22, Reasons 21).

28. For example, in appeal proceedings against decisions of a Receiving Section, oral proceedings are generally only optional, and boards may refuse requests (Article 116(2) in conjunction with Article 111(1) EPC; see J 20/87 OJ 1989, 67, Reasons 2; J 15/89, Reasons 5).

29. Moreover, and in addition to the jurisprudence outlined above for re-establishment proceedings, further limits to the "absolute" right to oral proceedings upon a party's request have been recognised in the jurisprudence of the boards.

30. Under this jurisprudence, a statement of an intention not to attend oral proceedings is normally considered equivalent to a withdrawal of the request for oral proceedings, even if such a withdrawal had not been declared *expressis verbis* (Case Law, III.C.4.3.2; e.g. T 849/18, Reasons 1; T 194/23, Reasons 11.1).

31. Moreover, an appellant not responding to a board's communication which points to a missing statement of grounds of appeal and the resulting inadmissibility of the appeal, renders "the initial conditional request for oral proceedings to have become obsolete … equivalent to an abandonment of the request" (Case Law, III.C.4.3.3, e.g. T 1042/07, Reasons 3; T 234/10,

Reasons 2; T 1575/16, Reasons 2; T 2575/16, Reasons 2; T 95/17, Reasons 2; see also T 1573/20, Reasons 5; T 2377/19, Reasons 2.2; J 6/22, Reasons 25).

32. Likewise, in cases of a further, inadmissible appeal filed against the decision of a board, "… oral proceedings would prolong the proceedings in a way that would be difficult to reconcile with the requirement for legal certainty …", and decisions to reject those appeals can be handed down "… immediately and without further formalities …" (see e.g. G 1/97, Reasons 6, OJ EPO 2000, 322; T 431/04, Reasons 4; T 883/06, Reasons 3; T 1573/20, Reasons 2 to 5).

33. In addition, filing an appeal by a non-entitled third party within the meaning of Article 115 EPC is also a clearly inadmissible means of redress, and no oral proceedings are thus to be appointed (see G 2/19, Reasons B.II.2).

34. Equally, if an unconditional request for oral proceedings is made and the board reaches a positive conclusion in the requester's favour, oral proceedings would likewise serve no purpose. Thus, the request is treated as merely conditional and does not prevent an immediate decision (Case Law, III.C.4.6 and T 494/92, Reasons 2; T 2445/11, Reasons 2; T 1050/09, Reasons 2; T 1066/19, Reasons 6.2).

35. In the same vein, a party requesting oral proceedings is not to be considered adversely affected by the decision to remit the case for further prosecution, meaning no oral proceedings need to be appointed (Case Law, III.C.4.5; e.g. T 42/90, Reasons 5; T 1367/12, Reasons 3; T 1727/12, Reasons 3; T 1986/22, Reasons 2).

36. In G 2/19, OJ EPO 2020, A87, Reasons B.II.2 and B.II.5, limits to the right to oral proceedings have been recognised even in a more general fashion:

"Given the variety in the scope of application of Article 116(1), first sentence, EPC, its nature cannot be considered to be, as it were, absolute. The legislator clearly intended it to serve as a basic rule governing the typical cases facing the departments of the European Patent Office in their everyday practice. However, it cannot be ruled out that exceptions to this basic rule may be made where – as in the case underlying this referral – its application would make no sense in the specific circumstances of an individual case."

37. T 1573/20, Reasons 5 (on the non-submission of grounds of appeal, see above) adds:

"The situation is therefore comparable to the 'clearly inadmissible appeals' considered in decisions G 1/97 and G 2/19. These decisions are concerned with appeals by a non-party or based on non-existing remedies only. Nevertheless, the board is convinced that the Enlarged Board of Appeal did not consider these examples to be exhaustive. Rather, it acknowledged as a matter of principle that there are exceptions to the right to oral proceedings under Article 116 EPC (G 1/97, reasons, point 6, last paragraph; G 2/19, reasons, B II 2 and 8, C I). It follows from the rationale of the above decisions that the present case falls in the category of clearly inadmissible appeals and can be rejected without holding oral proceedings" (see also Case Law, III.C.4.3.3 and T 2377/19, Reasons 2.2).

38. Lastly, inherent limitations to Article 116(1) EPC have also been acknowledged in a general fashion in T 383/87, Reasons 9 and T 318/91, Reasons 12, stating that the basic right to request oral proceedings could be refused under exceptional circumstances amounting to an abuse of law.

39. In all these examples identified by the jurisprudence of the boards, oral proceedings would unduly prolong the proceedings, instead of bringing them to an end as quickly as possible. Thus, they would run counter to the requirement of legal certainty in due time, while serving no legitimate purpose (J 6/22, Reasons 33).

40. With regard to the above-mentioned jurisprudence, according to which the requirement of legal certainty in due time cannot, as a general rule, take precedence over the right to oral proceedings, so that oral proceedings are not to be denied *grosso modo* by the mere reference to the time they would consume (see again Case Law, III.C.2.1, e.g. T 777/06, Reasons 2), the boards' jurisprudence has also repeatedly emphasised that the requirement of timely legal certainty, in particular in the context of intellectual property rights, is also recognised as a fundamental principle of the EPC (Case Law, IV.D.2, e.g. T 757/17, Reasons 4; see also J 25/03, OJ EPO 2006, 395; T 679/14, Reasons 13; J 16/05, Reasons 2.2; J 6/90, OJ EPO 1993, 714, Reasons 2.4; J 6/08 Reasons 9.2; see again G 1/97, Reasons 6; see also G 3/97, Reasons 2.5 on the balance between the applicant's interest in obtaining a legally valid patent and the EPO's interest in concluding the examination proceedings with a decision to grant the patent).

41. This fundamental principle has also been reflected in the Rules of Procedure of the Boards of Appeal as currently in force (e.g. see Articles 12(4), 13(1) and (2), 15(4) and 16(1)(c) RPBA).

42. The parties' rights to a fair hearing within a reasonable time, in the context of the Rules of Procedure of the Boards of Appeal, has also been explicitly underlined by the boards' jurisprudence, e.g. in T 732/21, Reasons 14 (also see T 1709/20, Reasons 2.3:

"At last, the board notes that the purpose of the rules of procedure before the Boards is not, in itself, the refusal to consider late requests, but rather the defence of the parties' rights to a fair hearing within a reasonable time, and that, in view of the above, in the present case, consideration of this particular request does not impair these basic rights of either party (cf. T 339/19, reasons 1.3.4 and 1.5; T 2920/18 reasons 3.14; T 2295/19, reasons 3.4.13)."

43. In summary, where, as in the present case, oral proceedings serve no legitimate purpose, the need for legal certainty in due time trumps and even prevents a board from appointing oral proceedings (J 6/22, Reasons 37).

44. The examples provided by the boards' jurisprudence show that the language of Article 116(1) EPC is too broad as it literally also covers cases where the appointment of oral proceedings cannot be justified (see again G 2/19, Reasons B.II.2).

45. Such an understanding of the scope of Article 116(1) EPC is also in line with the established jurisprudence of the boards to apply the rules of interpretation of the Vienna Convention on the Law of Treaties (1969),

namely its Article 31 and 32, to the provisions of the EPC (see Case Law, III.H.1 to a large extent developed in G 5/83, OJ EPO 1985, 64; also see G 1/21, OJ EPO 2022, A 49, Reasons 22 et seq., notably also on Article 116(1) EPC; and G 1/22, OJ EPO 2024, A 50, Reasons 89).

46. Under Article 31(1) Vienna Convention, the starting point for the interpretation of the terms used in a treaty provision like Article 116(1) EPC is their ordinary meaning in their context in light of the provision's object and purpose (Case Law, III.H.1.1.1). However, it is necessary to go beyond the mere grammatical (literal) interpretation when a wording only superficially has a clear meaning. At any rate, a literal interpretation must not contradict the purpose of a provision (Case Law, III.H.1.2.1, G 1/90, OJ EPO 1991, 275, Reasons 4 et seq.; G 6/91, OJ EPO 1992, 491, Reasons 15; see also G 2/12 and G 2/13, with further references, OJ EPO 2016, A27 and A28).

47. The boards' jurisprudence has also reiterated the importance of a "dynamic" or "evolutive" interpretation of the EPC in light of the convention's object and purpose, as derived from Article 31(1) Vienna Convention, in connection with its Article 31(3). In particular, Article 31(3)(a) and (b) refer to subsequent developments, namely subsequent agreements and practice among the parties to a treaty, thus presupposing a forward-looking approach. Article 31(3)(c) further adds: "There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."

48. These "relevant rules of international law" in the context of dynamic interpretation are commonly understood

in international jurisprudence and legal literature as referring to the law applicable at the time of the interpretation (J 6/22, Reasons 41, with reference to *Linderfalk*, On the Interpretation of Treaties (2007), 179 et seq., including references to the travaux préparatoires to Article 31 Vienna Convention; *Polgári*, The Role of the Vienna Rules in the Interpretation of the ECHR, 82 et seq.; *Thimm-Braun*, Evolutionary Interpretation and Other Developments of the Vienna Convention on the Law of Treaties; on the dynamic/evolutive interpretation in general, see also, *inter alia,* International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, paragraph 478; *Arato*, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences, The Law and Practice of International Courts and Tribunals 9 (2010), 443 et seq.; recently, also see International Tribunal for the Law of the Sea (ITLOS) Advisory Opinion of 21 May 2024 on Climate Change and International Law, Reasons 135, with further references).

49. Dynamic interpretation comes into play "where considerations have arisen since the Convention [the EPC] was signed which might give reason to believe that a literal interpretation of the wording of the relevant provision would conflict with the legislator's aims, which might thus lead to a result which diverges from the wording of the law" (see G 2/12, G 2/13, G 3/19, OJ EPO 2020, A119, Reasons XXII; see also G 3/98, OJ EPO 2001, 62, Reasons 2.5). Such considerations may concern legal or factual circumstances, in particular the subsequent development of law (see again, albeit in a wider context, *Arato*, cited above, 467, with further

references; International Court of Justice, Advisory Opinion of 21 June 1971 on Legal Consequences for States of the continued presence of South Africa in Namibia, Reasons 53 on the Charter of the United Nations and development by way of customary law). Or, as has been reiterated in the legal literature in the context of the European Convention on Human Rights (ECHR), on the basis of considerations which are equally valid in the context of the EPC, "… the provisions of the Convention must be interpreted in accordance with the primary aims as defined in the Preamble, taking account of recent developments in society in science" (*Polgári*, cited above, 89, with further references).

50. In the current context, several such considerations have arisen since the signing of the EPC.

51. First, the instrument of re-establishment of rights anchored in Article 122 and Rule 136 EPC has evolved over the years and has been gradually refined by the evolving jurisprudence of the boards. In particular, the principle of the "Eventualmaxime", as outlined above, has been gradually adopted and refined in order to effectively balance the right to be heard with procedural economy and with the interest of (all) other parties in the fair conduct of (appeal) proceedings.

52. Second, the circumstances in which the boards operate have been subject to far-reaching changes over the years, with a rising importance of the European patent system, particularly evident at a time of the introduction of the Unitary Patent and the Unified Patent Court having started to operate in full swing, which has also resulted in a significant number of appeals being filed with an increasing focus on their timely adjudication. Such timely adjudication of cases has

also become a matter of increasing interest to stakeholders in the system, while it remains a challenge for the boards to continue to fulfil their function of providing effective justice to all parties within a reasonable timeframe.

53. Thirdly, and arguably most importantly, the concepts and principles of national and international procedural law have themselves undergone tremendous development over the years, particularly in international and European human rights law, and with particular regard to the guarantees of a fair trial before a tribunal of law.

54. A pivotal factor is also the development of the case law of the European Court of Human Rights on Article 6(1) ECHR and Article 47(2) Charter of Fundamental Rights of the European Union, recognised as binding standards and general yardsticks for fair pro ceedings before the boards, and as both expressing fair trial principles of procedural law generally recognised in the Contracting States of the EPO (see Article 125 EPC and Case Law, III.H.3, e.g. D 11/91 of 14 September 1994, Reasons 3.3; G 2/08 of 15 June 2009, Reasons 3; R 19/12 of 25 April 2014, Reasons 8 to 10; R 8/13 of 20 March 2015, Reasons 2; T 1824/15, Reasons 2.3.5; T 1787/16, Reasons 18; J 6/22, Reasons 47).

55. In the case law of the European Court of Human Rights, the (routine) holding of court hearings/oral proceedings in public is, as is the case with the system of the EPC, as outlined above, recognised as a fundamental principle of procedural law which protects litigants against the administration of justice in secret and without public scrutiny, and which is therefore an essential means by which confidence in the courts can

be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is a fundamental principle of any democratic society (see e.g. Axen v. Germany, no. 8273/78, paragraph 26; Speil v. Austria, no. 42057/98, paragraph 2).

56. However, over the years, the European Court of Human Rights has also identified occasions where oral proceedings could or even should be dispensed with in pursuit of a party's right to a fair trial, while thus taking account of the entirety of proceedings (Axen v. Germany, paragraphs 27, 29). When a case has been heard in public in a first-instance tribunal that fully meets the requirements of Article 6 ECHR (for these requirements see, e.g. Axen v. Germany, paragraph 28; Jussila v. Finland, no. 73053/01, paragraph 41; Helmers v. Sweden, no. 11826/85, paragraph 32; Lundevall v. Sweden, no. 38629/97, paragraph 36), a further hearing at a second or third level of judicial proceedings might not be appropriate or required. The same goes for the absence of issues of credibility or contested facts, which might otherwise have necessitated a hearing, where a court - even if being the only tribunal in the course of the proceedings (see Schuler-Zgraggen v. Switzerland, no. 14518/89, paragraphs 8 to 23; Döry v. Sweden, no. 28394/95, paragraph 8 to 16; Speil v. Austria; Koottummel v. Austria, no. 49616/06, paragraphs 6 to 11; Jussila v. Finland, paragraphs 10 to 13) - may also fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, for example, Döry v. Sweden, paragraph 37; Jussila v. Finland, paragraphs 41, 47; see also Lundevall v. Sweden, paragraph 39; Salomonsson v. Swe den, no. 38978/97, paragraph 39; Göç v. Turkey, no. 36590/97, paragraph 51; Đurić v. Serbia,

no. 24989/17, paragraph 75). Furthermore, no oral proceedings are required if a party has been given ample opportunity to put their case forward in writing (Jussila v. Finland, paragraph 48); where the issue at stake is of a minor nature (Jussila v. Finland, paragraph 48); where the dispute does not raise issues of public interest (Döry v. Sweden, paragraph 37; Lundevall v. Sweden, paragraph 34; Schuler-Zgraggen v. Switzerland, paragraph 58; Varela Assalino v. Portugal, no. 64336/01); where only questions of admissibility or other points of law are at issue (Axen v. Germany, paragraph 28; Schuler-Zgraggen v. Switzerland, paragraph 58), notably, points of procedural law (Kremzow v. Austria, no. 12350/86, paragraph 63) and questions of law of no particular complexity (Varela Assalino v. Portugal, Valová and others v. Slovakia, no. 44925/98, paragraph 64; Speil v. Austria, paragraph 2); or where the proceedings concern rather technical questions (Koottummel v. Austria, paragraph 20; Schuler-Zgraggen v. Switzerland, paragraph 58; Döry v. Sweden, paragraph 37; Salomonsson v. Sweden, no. 38978/97, paragraph 38; Varela Assalino v. Portugal; Speil v. Austria, paragraph 2; Đurić v. Serbia, paragraph 76). The more recent case law of the European Court of Human Rights also increasingly emphasises the demands of procedural efficiency and economy, against the backdrop of an increasing recurrence to courts, national or international; tight resources in many justice systems; and increasing demand for the timely adjudication of cases. In the court's more recent view - in explicitly departing from its earlier case law favouring a rather "absolute" obligation to hold oral proceedings (see Jussila v. Finland, paragraph 42) - the routine holding of hearings is perceived as a likely obstacle to the compliance with the reasonable-time requirement of Article 6(1) ECHR and the related need for the

expeditious handling of a court's case load, even where - as is the case with the boards - a court of appeal has jurisdiction to review the case both as to facts and as to law (Varela Assalino v. Portugal, Mutu and Pechstein v. Switzerland, nos. 40575/10 and 67474/10, paragraph 177; Fejde v. Sweden, no. 12631/87, paragraph 9; Jussila v. Finland, paragraph 41; Lundevall v. Sweden, paragraph 38; Salomonsson v. Sweden, paragraph 38; Schuler-Zgraggen v. Switzerland, paragraph 58 and the cases cited there; see also Đurić v. Serbia, paragraph 76). The European Court of Human Rights further underlines that proceedings at the appeal stage may often be more efficiently dealt with in writing than in oral argument (Jussila v. Finland, paragraph 47; Lundevall v. Sweden, paragraph 38).

57. In this context, the European Court of Human Rights regularly reiterates the use of dynamic interpretation in their own case law in referring to the ECHR as "a living instrument which … must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today" (Kress v. France, no. 39594/98, paragraph 70; Marckx v. Belgium, no. 6833/74, paragraph 41; Tyrer v. the United Kingdom, no. 5856/72, paragraph 31; Fedetova and others v. Russia, nos. 40792/10, 30538/14, 43439/14, paragraphs 167, 209).

58. In Micallef v. Malta, no. 17056/06, paragraphs 78 to 81, the court conceded that "… many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings", concluding that in view of these circumstances, having evolved over time, "… a change in the case-law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that

the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement …" (see also Cossey v. the United Kingdom, no. 10843/84, paragraph 35).

59. The same can be said for the EPC as the backbone of the European patent system, which, due to its very nature and purpose, operates in a highly dynamic and innovative area, and which requires a correspondingly dynamic and evolutive approach. The boards must guarantee that the EPC is applied in a way that lives up to these standards, to best deal with the dynamic and evolutive environment, in the fairest fashion.

60. All these considerations further support the conclusion that a literal interpretation of Article 116(1) EPC conflicts with the legislators' aims (see again G 2/12; G 2/13; G 3/19, Reasons XXII; G 3/98, Reasons 2.5) when oral proceedings serve no purpose and would thus only prolong proceedings to no one's avail. A literal interpretation of Article 116(1) EPC thus has to make way for a dynamic and evolutive understanding instead, in light of the provision's object and purpose.

61. The very purpose of Article 116(1) EPC, with a view to the procedural principles outlined above, can be summarised as providing for the essential right to be heard in oral proceedings only in so far as these serve a legitimate purpose and thus do not run counter to the need for legal certainty in due time, as a further essential element of a fair trial for all parties.

62. At least under the specific circumstances of a case like the present, i.e. in proceedings for re-

establishment of rights where the principle of "Even tualmaxime" applies, and where a party is thus prevented from going beyond their written submissions, legal certainty in due time, just as procedural economy, as further essential cornerstones of a fair trial, have to prevail (for essentially the same circumstances see J 6/22, Reasons 52; cf. also T 2542/22, Reasons 1.1).

63. In light of the principles of a fair trial and legal certainty in due time, there is no absolute right to oral proceedings under all circumstances (J 6/22, Reasons 53).

64. No oral proceedings have to be appointed in re-establishment proceedings where the "Eventualmaxime" principle will - like in the present case - deprive oral proceedings of its very function as a further cornerstone of a fair trial, and even run counter to it.

65. In particular, it is not the purpose of oral proceedings in re-establishment proceedings to give a party a (further) chance to substantiate or amend their factual assertions, or to provide evidence where there is an absence of factual assertions, and where the request for re-establishment was thus not sufficiently substantiated (see J 11/09, J 12/09, J 13/09 and J 14/09, Reasons 3.2.3 and 3.2.6 in each; see also T 1913/19, Reasons 16). On the contrary, in view of the restrictions for factual assertions outside the time limit for such a request, a party would even be prevented from validly submitting new factual assertions at this stage, in particular in oral proceedings.

66. This conclusion can be seen as a logical step in the further development of the jurisprudence on the "Eventualmaxime" principle in re-establishment proceedings.

67. As an essential judicial body under the EPC, the boards are a public service provider with limited resources. They are obliged to allocate these resources carefully and fairly to where they can be best used, in accordance with the procedural principles of the EPC and beyond, and their duty to serve the parties in an equal and non-discriminatory manner. Any procedural step taken in (appeal) proceedings that is not required by the applicable rules is to the detriment of other parties by delaying their cases, and this is therefore contrary to the boards' duty and function to do justice equally to all.

68. Also against this backdrop, oral proceedings could not be appointed.

69. The request for re-establishment of rights is to be refused, and, as a consequence, the appeal is to be rejected as inadmissible. The initial request for oral proceedings in the (notice and grounds) of appeal has also become obsolete (see again Case Law, III.C.4.3.3, e.g. T 1042/07, Reasons 3; T 234/10, Reasons 2; T 1575/16, Reasons 2; T 2575/16, Reasons 2; T 95/17, Reasons 2; see also T 1573/20, Reasons 5; J 6/22, Reasons 59).

Order

For these reasons it is decided that:

1. **The request for re-establishment of rights is refused.**

2. **The appeal is rejected as inadmissible.**

The Registrar: The Chair:

C. Vodz E. Bendl

Decision electronically authenticated