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**INTERLOCUTORY DECISION  
of 13 August 1998**

**Case Number:** T 0094/97 - 3.2.2

**Application Number:** 92921163.9

**Publication Number:** 0606358

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Absorbent hygienic article having flaps and of differential extensibility

**Applicant:**

The Procter & Gamble Company

**Opponent:**

-

**Headword:**

Re-establishment of rights/THE PROCTER & GAMBLE COMPANY

**Relevant legal provisions:**

EPC Art. 122(1), (2)

**Keyword:**

"Isolated breakdown"

**Decisions cited:**

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**Catchword:**

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Boards of Appeal

Chambres de recours

Case Number: T 0094/97 - 3.2.2

**INTERLOCUTORY DECISION**  
**of the Technical Board of Appeal 3.2.2**  
**of 13 August 1998**

**Appellant:** The Procter & Gamble Company  
One Procter & Gamble Plaza  
Cincinnati  
Ohio 45202 (US)

**Representative:** Hirsch, Uwe Thomas  
Procter & Gamble European Service GmbH  
Sulzbacher Strasse 40-50  
65824 Schwalbach am Taunus (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 5 June 1996  
refusing European patent application  
No. 92 921 163.9 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** W. D. Weiß  
**Members:** D. Valle  
J. C. M. De Preter

## Summary of Facts and Submissions

I. Appellant's Euro-PCT application No. 92 921 163.9 filed on 25 September 1992 was refused by a decision of the Examining Division, which was posted on 5 June 1996.

II. By letter dated 18 December 1996, received by the EPO on 24 December 1996 the appellant filed a notice of appeal against this decision, a written statement setting out the grounds for appeal and a request for re-establishment of the right to file an appeal. The appeal fee and the restitutio fee were paid on 27 December 1996.

III. In support of the request of re-establishment of rights the appellant brought forward the following arguments:

- the patent department of the appellant in Schwalbach runs a double check system for all deadlines. One deadline is noted down by a clerical person particularly trained in identifying deadlines, who checks incoming mail for deadlines in a common diary; a copy of two weeks out of this diary is provided once a week to all attorneys such that each date from that diary is notified twice to each attorney: once two weeks prior to the deadline and a second time one week prior to the deadline.

Independently and separately of this diary system each attorney maintains a docket in which all deadlines are noted. He signs off in the stamp to indicate that any deadline in the respective letter is correctly noted. The attorney does, however, also enter deadlines from the communication directly, not using the stamp.

- Although according to the entry stamp the decision under appeal was received on 7 June 1996 the usually well functioning dual system failed in this case. However, it was not possible to identify why the deadline was not recognised from the text of the decision, why therefore the entry stamp was not applied or the diary entry made and why the attorney did not enter a deadline in his docket either.
  
- The fact that the deadline for filing an appeal had been missed was realised on 7 November 1996 only, when a request for input to the equivalent case in Portugal was received from the appellant's Portuguese agent.
  
- After the receipt of the decision to refuse the application, a request to change the acting representative (Mr Hirsch instead of Mr Bottema) had been filed on 11 June 1996. This action was done following standing instructions to all support staff members to change the acting representative details upon receipt of a letter directed to an attorney who is no longer assigned to the respective case. This action also confirms that there was no intention to accept the decision without appeal.

IV. Upon the Board's communications of 27 February and 20 October 1997 the appellant added the following submissions:

- Appellant's deadline monitoring system is run with two independent deadline identification and deadline monitoring facilities. It is necessary that both facilities fail in order for a deadline to be missed.

The existence of these two deadline identification/monitoring systems, where two individuals separately identify and monitor the same deadline, should be considered to be an adequate safeguard against missing a deadline. In this respect reference is made to decisions T 309/88 and T 111/92 in both of which a deadline system run by a single person was found to be acceptable. The fact that this is the only occurrence of such an incidence within more than three years since the appellant's patent department was opened in Schwalbach is also an indication that this occurrence is an isolated breakdown in an otherwise adequate secure system.

- According to standing practice the clerical person was instructed to prepare a forward note indicating the change of representative whenever a communication arrived which was still addressed to Mr Bottema in a case that had been assigned to Mr Hirsch. Therefore, the letter of 11 June 1996 was only a formality which did not require that a letter was prepared for signature at the same time as the communication was given to the authorised representative.

- The representative should certainly have known from signing the letter of 11 June 1996 that a communication had arrived from the EPO. However, on the basis of the existing twofold deadline monitoring system, he should also have reasonably assumed that a possible deadline contained in the communication had been entered in the deadline monitoring system. To check this on a routine basis would have meant requiring a third deadline monitoring system. Moreover, there are official communications which do not contain deadlines and are hence not entered in such a system at all.

- Appellant's representative can neither deny nor confirm that the communication of the decision under appeal had been presented to him because no records exist on such events.
  
- The continuation of the application in Portugal is an indication that there was no intention to accept the decision to refuse the application without filing an appeal.

V. Oral proceedings were held on 15 August 1998.

### **Reasons for the Decision**

1. Taking into account the appellant's explanations and the provided evidence, in particular the telecopy of 6 November 1996 from appellant's Portuguese agent, the Board finds that the request for re-establishment of rights has been filed within two months from the removal of the cause of non-compliance with the time limit. As all the omitted acts have also been completed within that time limit, the request for re-establishment of rights is admissible.
  
2. It is evident that the clerical person in charge failed to fill in the entry stamp with the deadline and hence did not enter the deadline in the diary. At the time when the communication of the decision addressed to Mr Bottema arrived at the appellant's patent department, Mr Bottema had already retired and this case had been reassigned to Mr Hirsch. At that time apparently attention was paid only to the standing instructions to send a request for change of the representative to the EPO upon receipt of the communication of the decision under appeal on 7 June 1996. This request was signed by Mr Hirsch on 11 June

1996. The change of representative being only a formality, the Board finds the explanation of the appellant acceptable that it was not required that such request be prepared for signature and presented to the authorised representative together with the communication of the EPO. The Board also accepts the argument that there was no particular reason to draw Mr Hirsch's attention to the EPO letter of 27 June 1996 confirming the registration of the new representative.

It is true that Mr Hirsch should have concluded from signing the letter of 11 June 1996 that a communication from the EPO had been received, but it was justified to believe that any deadline set in the communication had been correctly entered in the deadline monitoring system, because the clerical person in charge was particularly trained in identifying deadlines. In that respect it is acceptable that noting the time limits is a task with which assistants may be entrusted. Moreover, there is no reason to doubt that the clerical person in charge was a suitable person properly instructed in the routine task to be performed.

However, the question arises why Mr Hirsch did not enter any deadline in his docket. He could neither deny nor confirm that the communication of the decision had been forwarded to him, but he admitted at the oral proceedings that the handwritten capital letters U.H. on the communication seemed to indicate that this communication must have been sent to him. He did, however, not remember having seen the decision and observed that the way said capital letters had been crossed was not his usual way of acknowledging the receipt of a communication. This statement is confirmed by some copies of other letters in the file. Therefore, it cannot be excluded that for some unknown reason he was personally unable to take note of the negative decision of 5 June 1996 in due time.

In response to the Examining Division's communication, the appellant had submitted amended claims and also a further amended claim 1 as auxiliary request on 15 April 1996 and had, on this occasion, expressed its intention to appeal in case of a negative decision in respect of the main claim. Therefore, there is no reasonable doubt that an appeal was envisaged.

Furthermore, it is indisputable that the existing double check system - in itself - constituted an adequate safeguard against missing a deadline which normally warranted the acting representative to supervise the clerical person in charge. Finally it appears that this failure to notice a deadline occurred for the first time in more than three years since appellant's patent department had been operative in Schwalbach. Considering the adequacy and the usually well functioning dual monitoring system of the appellant, the Board accepts that this occurrence was clearly an isolated breakdown in an otherwise satisfactory system. Therefore in this particular case, the request for re-establishment of the right to file an appeal is allowable.



**Order**

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

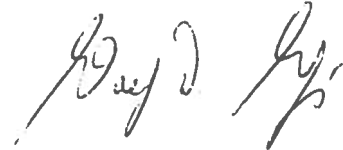
1. The request for re-establishment in the time limit to file an appeal is allowed.
2. The appeal is deemed to be filed.

The Registrar:



S. Fabiani

The Chairman:



W. D. Weiß

