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# Datasheet for the decision of 8 September 2014

**Case Number:** J 0003/14 - 3.1.01

**Application Number:** XXXXXXXX.X

**Publication Number:**

**IPC:**

**Language of the proceedings:** EN

**Title of invention:**

...

**Applicant:**

N.N.

**Headword:**

Date of notification

**Relevant legal provisions:**

EPC R. 126(2)

**Keyword:**

Notification by registered letter -
Proof of receipt of communication (no)

**Decisions cited:**

J 0009/05

**Catchword:**

Europäisches Patentamt
European Patent Office
Office européen des brevets

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

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

**Case Number: J 0003/14 - 3.1.01**

# D E C I S I O N
# of the Legal Board of Appeal 3.1.01
# of 8 September 2014

**Appellant:** N.N.
(Applicant)

**Representative:** N.N.

**Decision under appeal:** **Decision of the Receiving Section of the European Patent Office posted on 15 November 2013 refusing European patent application No. XXXXXXXX.X pursuant to Article 90(5) EPC.**

**Composition of the Board:**

**Chairwoman** C. Vallet
**Members:** S. Fernández de Córdoba
W. Sekretaruk

## Summary of Facts and Submissions

I. European patent application XXXXXXXX.X was filed on 19 December 2012. On 4 March 2013 the Receiving Section issued a communication pursuant to Rule 58 EPC in which a period of two months for correcting certain deficiencies was set. This communication was sent by registered letter. On 15 November 2013 a decision refusing the European patent application pursuant to Article 90(5) EPC was issued by the Receiving Section, the applicant not having corrected the deficiencies within the set time limit.

II. By letter of 22 November 2013, the applicant's representative submitted that she had not received the communication dated 4 March 2013 and asked for the sending of a copy of the communication in order to be able to reply, to file an appeal and to lodge a complaint with the postal authorities.

III. Notice of appeal was filed on 4 December 2013. The appeal fee was paid on the same day. The appellant requested that the decision of 15 November 2013 refusing the application be set aside. A response to the communication of 4 March 2013 was submitted in a letter filed on the same day.

IV. With the notice of appeal the appellant also submitted the grounds of appeal. The appellant reiterated that the communication of 4 March 2013 had not been handed over by the postal authorities to the representative, who was the only person authorised to receive the letter. Moreover, the letter could not have been received by the representative since she had been away from her place of residence from the period of 10 March 2013 to 21 March 2013. The representative had

only become aware of the letter of 4 March 2013 after having received the decision of 15 November 2013. The representative had then started a search. The certified letter had been collected from the Post Office on 15 March 2013 by Ms M, a person authorised by the representative to collect only her private correspondence, and the letter had then been left among that person's correspondence. Ms M did not hand the letter over to the representative until 27 November 2013. Copies of the boarding cards and of the representative's passport showing the dates of border crossing as well as a declaration by Ms M were filed as evidence.

V. By letter of 19 January 2014, the appellant furthermore filed a request for re-establishment of rights and paid the corresponding fee.

VI. The appellant's arguments can be summarised as follows:

- The letter dated 4 March 2013 was handed over by the postal authorities to an unauthorised person. The appellant's representative could therefore not meet the required deadline.

- Pursuant to the applicable law on mail delivery in Poland, mail has to be collected in a post office within 14 days from the date of notification of an advice note. The advice note stamp is dated 11 March 2013, so the final date for mail collection was 25 March 2013. Since the representative had already returned to her place of residence on 21 March 2013, she could have personally collected the letter within the period. A copy of the advice note stamp of 11 March 2013 and of the EPO's envelope with a handwritten date

of 15 March 2013 and the polish word "odebrane" (received) written below was enclosed.

VII. By letter of 3 February 2014, the appellant's representative reiterated her arguments.

VIII. On 8 April 2014 the Registrar of the Legal Board started enquiries with Deutsche Post about the delivery of the communication of 4 March 2013 and in particular about the authorisation of the recipient. However, no information could be obtained since the six-month period during which a search by the Deutsche Post may be initiated had already expired.

IX. On 4 July 2014 the Legal Board issued a communication asking for further clarification of the facts, evidence and procedural requests submitted by the appellant.

X. In a reply dated 7 August 2014 the appellant maintained that the authorisation given to Ms M was limited to the collection of private correspondence since, not being a patent attorney, Ms M could not deputise in business matters. A copy of the authorisation given to Ms M (and its translation into English) was filed. According to this authorisation Ms M was authorised to receive inter alia "all registered mail, parcels and orders, including bank orders, except for the postal matters sent by the Courts of Law, the Police, Prosecutor's Office, Patent Offices, OHIM – Alicante, WIPO – Geneva as well as State Treasury Office". A further statement by Ms M ("Explanation concerning the inadequate reception of correspondence") was submitted.

With a separate letter dated 7 August 2014 the appellant withdrew the request for re-establishment of rights.

## Reasons for the Decision

1. The appeal satisfies the requirements of Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

2. The main issue raised by the appeal is that of the proof of receipt of a communication from the European Patent Office with regard to the requirements specified in Rule 126(2) EPC.

3. According to Rule 126(2) EPC the communication is deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter failed to reach the addressee or reached her or him at a later date. In the event of any dispute, it is incumbent on the European Patent Office to establish that the letter reached its destination or to establish the date on which the letter was delivered to the addressee. Thus in a situation where the representative submits that he has not received a communication, the European Patent Office bears the burden of proof.

4. In the present case the Receiving Section's communication in which a period of two months was set for correcting certain deficiencies bears the date of 4 March 2013. This communication was sent by registered letter. However, no evidence of delivery from the postal authorities is available. The Board's attempt to start a postal investigation by the Deutsche Post failed since the period on which such a search would

have been possible had already expired when the notice of appeal was filed.

The only evidence on which the Board may rely has been provided by the appellant. By letter of 19 January 2014, the appellant submitted a copy of a European Patent Office envelope bearing on one side an advice note stamp dated 11 March 2013 and on the other side the handwritten date of 15 March 2013 and the word "received" in Polish written below.
The envelope does not indicate to whom it was delivered, nor was the signature of the person who received the letter provided. On that basis the appellant did not dispute that the letter has been handed out on 15 March 2013, but did dispute that the communication had reached its addressee. In this respect, declarations by Ms M have been submitted according to which the communication was handed over to her by the postal authorities on 15 March 2013 and was not transmitted to the representative until 27 November 2013. Ms M has further acknowledged that the receipt of the letter exceeded the limits of her authorisation.

5. This evidence supports the appellant's submissions according to which the letter was received on 15 March 2013 by a person who was not authorised to collect business mail during her absence but only private post.

This is in particular confirmed by the authorisation filed with the letter dated 7 August 2014. Although this authorisation generally allows the collection of "all registered mail", it contains an explicit list of several exceptions. These exceptions comprise the collection of mail items which typically relate to the business of a professional representative. The

collection of letters from patent offices, such as the communication from the EPO at issue, was specifically excluded from the authorisation given.

In the Board's opinion the restriction of an authorisation to collect only some post received at the correspondence address may increase the risk of errors in the handling of the post. It seems that such an error occurred when Ms M collected the communication from the EPO. At least it has been made plausible that the postal authorities erroneously delivered the letter to an unauthorised person in view of an authorisation which seemed to allow the collection of "all registered mail".

The appellant also brought evidence as to the absence of its representative from her place of business from 10 to 21 March 2013, which leads to the conclusion that the representative could not have received the contested letter before that latter date.
As regards the date at which Ms M transmitted the letter to the addressee, the European Patent Office can only rely on the affidavit written by Ms M herself.

6. In cases where the European Patent Office bears the burden of proof, the applicant has to be given the benefit of the doubt. If doubts remain about what really happened, this cannot be to the detriment of the applicant. This applies all the more in a situation like the present one where the refusal of the application is the immediate consequence for the applicant (see J 9/05, reasons 7 and 8).

7. Therefore, the Board concludes that it has not been sufficiently proven that the communication of 4 March 2013 was received by the representative prior to

27 November 2013. It follows that the decision of 15 November 2013 incorrectly assumed that the appellant had not complied with the time limit set in the communication. Therefore, the decision has to be set aside.

8. Reimbursement of the appeal fee has not been explicitly requested. Nevertheless, as the Board allows the appeal, it should also consider ex officio whether this fee should be reimbursed under Rule 103(1)(a) EPC. The issuing of the decision of 15 November 2013 to refuse the application amounted to a substantial procedural violation, since the appellant had no opportunity to present its comments before the refusal decision was issued, which is an objective fact even if the Receiving Section made no mistake. This violation of the appellant's right to be heard has been the only cause for the need to file an appeal. Therefore, it is equitable to reimburse the appeal fee.

9. The request for re-establishment of rights has been withdrawn. Since the appellant did not fail to observe a time limit vis-à-vis the European Patent Office the appellant did not need to be re-established in its rights. Therefore, there was no basis for the request for re-establishment and the fee for re-establishment of rights has to be reimbursed as well.

## Order

## For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution.

3. The appeal fee and the fee for re-establishment of rights are to be reimbursed.

The Registrar: The Chairwoman:

C. Eickhoff C. Vallet

Decision electronically authenticated