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Datasheet for the decision of 26 July 2023

Case Number: J 0006/22 - 3.1.01

Application Number: XXXXXXXX.X

Publication Number:

IPC:

Language of the proceedings: EN

Title of invention:

...

Applicant:

N.N.

Headword:

Limits to oral proceedings on request

Relevant legal provisions:

EPC Art. 86(1), 108, 111(1), 114(2), 115, 116(1), 122(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 paying renewal fee - time limit for filing statement of grounds - cross-check (no) - request not duly substantiated - all due care (no) - due care on the part of the professional representative

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:
G 0005/83, G 0001/90, G 0006/91, G 0001/97, G 0003/97, G 0003/98, G 0002/12, G 0002/13, G 0002/19, G 0003/19, G 0001/21, R 0019/12, R 0008/13, J 0020/87, J 0015/89, J 0006/90, J 0027/90, J 0041/92, J 0005/94, J 0008/95, J 0025/03, J 0016/05, J 0019/05, J 0006/08, J 0003/08, J 0011/09, J 0012/09, J 0013/09, J 0014/09, J 0015/10, J 0014/16, J 0014/21, T 0287/84, T 0383/87, T 0125/89, T 0042/90, T 0324/90, T 0494/92, T 0677/02, T 0431/04, T 0777/06, T 0883/06, T 1042/07, T 0585/08, T 1050/09, T 0234/10, T 0479/10, T 0387/11, T 0742/11, T 2445/11, T 1367/12, T 1727/12, T 0679/14, 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 1913/19, T 2295/19, T 2377/19, T 1214/20, T 1573/20, T 0732/21, D 0011/91

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
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

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 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 pro-vide evidence despite the absence of factual assertions in the request for re-establishment.

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Case Number: J 0006/22 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 26 July 2023

Appellant: N.N.
(Applicant)

Representative: N.N.

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 16 February 2022 rejecting the request for re-establishment of rights into the time limit for payment of the seventh renewal fee plus the additional fee for European patent application No. XXXXXXXX.X, pursuant to Article 122 EPC**

Composition of the Board:

Chair I. Beckedorf
Members: R. Winkelhofer
L. Basterreix

Summary of Facts and Submissions

I. The applicant (appellant) is a physical person residing in the USA. The case concerns his request for re-establishment of rights into the time limit for the statement of grounds of appeal against the Examining Division's impugned decision, which had (1.) rejected the appellant's request for re-establishment of rights into the time limit for payment of the seventh renewal fee plus the additional fee for European patent application No. 14811009.1, (2.) found that the application was deemed withdrawn as from 12 January 2021 and (3.) ordered the refund of all fees, save for the fee for re-establishment.

II. The payment deadline for the seventh renewal fee had elapsed on 30 June 2020.

The Examining Division drew the appellant's attention to Article 86(1) EPC, Rule 51(2) EPC and Article 2 No. 5 of the Rules relating to Fees, stating that the renewal fee plus the additional fee had to be paid within six months of the due date. Otherwise, the application would be deemed withdrawn.

The appellant was then represented by European professional representatives ST in T.

The Examining Division noted the loss of rights pursuant to Rule 112(1) EPC as the seventh renewal fee and the additional fee had not been paid in due time, and the application was therefore deemed withdrawn under Article 86(1) EPC. As a means of redress, *inter alia*, the request for a decision (Rule 112(2) EPC) and the request for re-establishment of rights (Article 122

EPC) were indicated.

III. The appellant requested re-establishment of rights into the time limit for payment of the seventh renewal fee the plus additional fee, enclosing a "witness statement" made by him and other documentary evidence as to the course of events from mid-2020 to December 2020. Oral proceedings were requested "in the event that rejection of the request for re-establishment of rights is contemplated without further written procedure".

These requests were made through a newly appointed European professional representative of the appellant, K, based in an office in W, with this office being part of a large international IP consulting group of professional representatives. All outstanding fees (the renewal fee for the seventh year, the additional fee and the fee for re-establishment) were paid the same day.

In this request for re-establishment of rights, the appellant merely brought forward that all due care had been taken "by all parties involved in the case", and that he "had at all times intended to pay the renewal fee and at no stage had there been any intention to allow the application to lapse". In the "witness statement" enclosed, he essentially outlines that upon entering the European phase, he had entrusted a "US agent, F Law Group" (F), "to supervise the procedure and communicate with the agent empowered to act before the EPO". F had neither reminded the appellant of any deadlines for fee payment nor responded in due time to requests and communications from the appellant's then European professional representatives ST. Moreover, "by the end of grace period for payment of the fees

relating to this patent me and my family suffered from an illness… starting November through January end 2021". As a person with limited understanding of IP law, he had relied on F, who had been solely responsible "for communicating cross border associates for different matters"”, and whom he had sent multiple requests on the application which had been left unanswered.

IV. In a communication, the Examining Division informed the appellant of their preliminary opinion that the grounds brought forward had not been sufficiently substantiated to show that he had done his utmost to meet the time limit for fee payment, in particular as F's "official involvement" remained unclear, as did the role of the European professional representatives and the reasons for his own non-action. They invited the appellant to submit further clarifying evidence within two months, underlining that no further facts or grounds could be added.

No response was received from the appellant.

V. In the impugned decision, the Examining Division essentially held that no reply to their communication had been received, the lack of clarity outlined remained, and the appellant had thus not convincingly shown that all due care as required by the circumstances had been taken.

VI. The appellant filed a notice of appeal against this decision, requesting its amendment such as to grant re-establishment of rights into the missed time limit; in the alternative, oral proceedings were requested "via video-conference in case that the decision cannot be set aside". He was then still represented by European

professional representative K.

The appeal fee was paid the same day. No statement of grounds of appeal was subsequently submitted.

VII. With the Board's communication of 15 July 2022, the appellant was informed that the appeal was therefore expected to be rejected as inadmissible, pursuant to Article 108 and Rule 101(1) EPC, and that observations would have to be filed within two months. Moreover, the Board underlined that it was thus assumed that the request for oral proceedings did not apply to the inadmissibility of the appeal, unless the appellant stated this within the specified period.

VIII. In his request for re-establishment of rights into the time limit for the statement of grounds of appeal against the impugned decision (2nd request for re-establishment), the appellant merely brought forward that "the all due care ground for the non-timely filing of the grounds of appeal is as follows: [a medical condition] of K". The fee for re-establishment was paid the same day. He also requested oral proceedings "in case the EPO would envisage to reject our request for Re-establishment of rights". A declaration of K was appended, as well as further documentary evidence including a sick leave certificate of K confirming their inability to work from 24 August to 28 September 2022.

The appellant was then, and still is, represented by a European professional representative from W's sister office in M within the same IP consulting group that K was working for.

IX. In K's declaration, they essentially outline that the deadline for filing the statement of grounds of appeal expired on 26 June 2022, and "in the period from April 27, 2022 to end of June 2022 I [European professional representative K] began to suffer from [a medical condition] which grew weeks after weeks and I was the sole attorney in my office in W empowered to act before the EPO. I was nevertheless erroneously convinced that I could continue to handle myself the filing of the grounds of appeal for this matter, despite the growing [medical condition]. Due to the growing [medical condition], I failed to inform the applicant about the obligation to file grounds of appeal and I involuntarily disregarded the automatic reminders that I received concerning the deadline of June 26, 2022 for filing the grounds of appeal". Only from the Board's communication of 15 July 2022 did they learn that the deadline had expired. The time limit for the grounds of appeal had been missed due to "an isolated event, being suffering from a growing [medical condition]".

X. A statement of grounds of appeal was filed together with the request for re-establishment on 12 September 2022, requesting the amendment of the impugned decision such that the (1st) request for re-establishment of rights into the time limit for fee payment before the Examining Division be granted. The appellant essentially argues that ST, his then European professional representatives, had contacted US agent F about the payment of the seventh renewal fee, including the request for a down payment of the fee, but "never received from F any timely instructions and the requested down payment". They tried to contact F numerous times by email but never received an answer. It was finally found out that the former Head Paralegal of F, who had been the appellant's main contact, had

left the firm, and that the owner might have retired. All due care had been taken by the appellant and his (then) European professional representatives who "did what ever they could to enter into communication with the small office of F", with whom he had built "an excellent working relationship and mutual trust", and he had confidence in F and believed that the seventh annuity fee would be paid on time. F had also never reported a problem to him. Due to [the medical condition], the appellant could also not make any enquiry on the outstanding fee. Thus, the appellant had created a reliable system for managing renewals, and these circumstances were an "abnormal, unforeseeable and exceptional event" beyond his control. All due care had been taken.

XI. The appellant requests that

- re-establishment into the time limit for the statement of grounds of appeal be granted

- the impugned decision be set aside and amended such that re-establishment into the time limit for payment of the seventh renewal fee the plus additional fee be granted.

Reasons for the Decision

Re-establishment into the time limit for 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 limits for filing a statement of grounds of appeal and paying a renewal fee plus the additional fee before the

Examining Division) 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 (see J 15/10, Reasons 3.2) - 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 relies on general statements only and contains no specific 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).

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). An applicant's professional representative is likewise under the obligation to exercise all due care, as is any intermediary (agent) between an applicant and a representative (Case Law, III.E.5.5.2. et seq., see e.g. J 3/08, Reasons 4; T 742/11, Reasons 12 f). 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).

4. In assessing whether all due care required was taken, the circumstances of each case must be considered as a whole (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). 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.).

5. Sudden, serious illness and severe psychological distress may, under certain circumstances, count for exceptional circumstances (Case Law, III.E.5.3.5). However, it also requires all due care in making provisions for cases of such illnesses and other staff absences (Case Law, III.E.5.4.5; J 14/21, Reasons 26). J 41/92, OJ EPO 1995, 93, Reasons 4.4, for example, held that if there was no substitute or assistant at a representative's office, observance of time limits might, for example, be sought through co-operation with colleagues. In T 387/11, the representative, who ran a one-person office, had taken precautions to ensure that another representative could cover for absences owing to illness so that deadlines would normally be met. In T 677/02, a large enterprise was found to have not exercised all due care required by the circumstances because no deputy had been designated to cross-check the input of time limits into the system for monitoring time limits when the representative actually responsible was on short-time working.

6. In the case at hand, the appellant merely brought forward that "the all due care ground for the non-timely filing of the grounds of appeal is as follows: "[medical condition] of K", his professional European representative. This was complemented by K's declaration, essentially outlining that "in the period from April 27, 2022 to end of June 2022 [they] began to suffer from a [medical condition] which grew weeks after weeks and [they were] the sole attorney in [their] office in W empowered to act before the EPO. … [they] failed to inform the applicant about the obligation to file grounds of appeal and [they] involuntarily disregarded the automatic reminders that [they] received concerning the deadline of June 26, 2022 for filing the grounds of appeal". Sick leave certificates for K were also submitted, merely stating their inability to work from 24 August to 28 September 2022, without giving any further details.

7. In line with the jurisprudence of the boards, as cited above (see, in particular, T 287/84, OJ EPO 1985, 333), the reference to a declaration like K's might suffice for the request for re-establishment to be properly substantiated if the necessary facts and reasons are given in that declaration. However, in the current declaration – as well as in the request for re-establishment itself - no reasons can be found as to why K would not have been in a position throughout the whole two-month time limit for the subsequent filing of the grounds of appeal to take any action, despite their own submission that their medical condition was growing (only) "weeks after weeks". No reasons are further given on how far-reaching this condition was or what actions might have become impossible for K and when. The medical certificates also lay out no conclusive details as to what had become impossible for K and

when. Moreover, they cover a period completely different (August to September 2022) from the one in question (April to June 2022).

8. Lastly and most importantly, nothing is said about a system of staff substitution that should have kicked in in case of K's inability to act. If K was the only European patent attorney in the W office entitled to act on the appellant's behalf, provisions would have had to be made to provide for substitution from outside the office. Notably, the W office where K was based is part of a large IP consulting group operating worldwide, and they should have provided a backup for their W office. The current request for re-establishment now being pursued by their colleagues in the sister office in M at least shows that such a substitution would have been feasible, and no reasons to the contrary are given.

9. Thus, on the basis of the appellant's own submissions and factual assertions alone, it cannot be said that all due care had been taken as required by the circumstances.

10. Absent any kind of provisions for K's substitution, the request for re-establishment into the time limit for the grounds of appeal must fail for this reason alone. Thus, there is neither room nor need to look further into the appellant's behaviour, while also no reasons have been given as to why his illness had prevented him from taking action to compensate for the lack of due care taken by his representative.

Appeal against the impugned decision of the Examining Division

11. As a consequence, the grounds of appeal were late filed on 12 September 2022. In accordance with Rule 127(2) EPC in the currently applicable version (with the "10-day notification rule" still in place), the Examining Division's decision was deemed to be delivered on 26 February 2022, and the four-month time limit for the grounds of appeal (Article 108 EPC) expired on 27 June 2022, a Monday and regular working day of the EPO.

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

12. For the sake of completeness, the appeal – as directed against the Examining Division's decision to reject, *inter alia*, the request for re-establishment into the time limit for the seventh renewal fee plus the additional fee – would also not have been successful on the merits. In his argument, the appellant, in some detail, only deals with his own and his European professional representatives' behaviour, claiming that all parties had exercised all due care for the payment of the fees in question. Thus, he overlooks that all acts of his "US agent" F, as an intermediary between him and the European professional representatives, tasked "to supervise the procedure and communicate with the agent empowered to act before the EPO", are also fully attributed to him (see again T 742/11, Reasons 12 f). No reasons have been given to conclude that F had exercised all due care. To the contrary, from the appellant's own arguments, it is apparent that F – by not monitoring the time limits properly, not proactively reaching out to the appellant, not responding to a large number of emails and not making provisions for staff losses – did not exercise all due

care. For these reasons alone, there would also have been no need to look further into the appellant's own or his European professional representatives' behaviour.

Decision in written procedure

13. The decision that the request for re-establishment and the appeal be rejected as inadmissible is handed down without the oral proceedings requested by the appellant in his 2nd request for re-establishment.

14. 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 is not 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).

15. 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. *Anders/Gehle,* ZPO, 81st edn. 2023, Grdz. II vor § 253 4.; *Deixler-Hübner* in *Fasching/Konecny*, Zivilprozessgesetze, 3rd edn. 2017, II/2 § 149 ZPO; *Gitschthaler* in *Rechberger*, ZPO, 5th edn., §§ 148 f 2; Article 1355 du code civil, Cass. ass. plén., 7 juillet 2006, n° 04-10.672).

16. 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, 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).

17. As outlined above, this is not the case here for either of the two requests for re-establishment in these proceedings. In particular, in the 2nd request for re-establishment into the time limit for the grounds of appeal, no factual assertions were made at least on the provision of staff-substitution measures in the case of illnesses such as K's.

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 grounds of appeal thus had to fail. The appellant could also not complement his 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 all factual assertions are true, they do not suffice for re-establishment.

18. 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.

19. 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 the "Eventualmaxime", see above), the appellant is even prevented from validly submitting new factual assertions at this stage, including in oral pro ceedings.

20. 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 "ab solute" 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).

21. 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).

22. 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).

23. 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.

24. 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).

25. Furthermore, 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 and T 2377/19, Reasons 2.2).

26. 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).

27. Furthermore, 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).

28. Furthermore, 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).

29. 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).

30. 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."

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

32. 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.

33. 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.

34. With the due account of the jurisprudence set out above, under which the requirement of legal certainty in due time cannot generally take precedence over the right to oral proceedings, meaning that oral proceedings are not to be denied *grosso modo* by the mere reference to the time they consume (see again Case Law, III.C.2.1, e.g. T 777/06, Reasons 2), the jurisprudence of the boards repeatedly also underlines that the requirement of legal certainty in due time, notably as regards intellectual property rights, is likewise recognised as a fundamental principle enshrined in 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 balancing an applicant's interest in obtaining a legally valid patent and the EPO's interest in bringing the examination procedure to a close by a decision to grant the patent).

35. This fundamental principle has also been reflected in the Rules of Procedure of the Boards of Appeal currently in force (e.g. see Articles 12(4), 13(1) and (2), 15(4) and 16(1)(c) RPBA 2020).

36. Of relevance in this context is also T 732/21, Reasons 14: "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)."

37. In summary, if oral proceedings do not serve any legitimate purpose, as in the current case, the requirement of legal certainty in due time trumps and even prevents a board from appointing oral proceedings.

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

39. Such a conclusion on the scope of Article 116(1) EPC is also well in line with the established jurisprudence of the boards, which applies the rules of interpretation of the Vienna Convention on the Law of Treaties (1969), namely its Article 31 and 32 (see Case Law, III.H.1 to a large extent developed in G 5/83, OJ EPO 1985, 64; recently, G 1/21, OJ EPO 2022, A 49).

40. 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).

41. The jurisprudence of the boards has also reiterated the importance of a "dynamic" or "evolutive" interpretation

of the EPC in light of its object and purpose, as de rived from Article 31(1), in connection with Article 31(3) Vienna Convention. 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) adds: "There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."

These "relevant rules of international law" are commonly understood in the legal literature as referring to the law applicable at the time of interpretation (*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 In ternational 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.).

42. This 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, 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).

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

44. Firstly, the instrument of re-establishment of rights anchored in Article 122 and Rule 136 EPC has evolved over the years and has seen gradual refinement by the evolving jurisprudence of the boards. Notably, the principle of the "Eventualmaxime", as outlined above, has been gradually developed and refined 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.

45. Secondly, the circumstances under which the boards operate have been subject to far-reaching changes over the years, with the rising importance of the European patent system, this being particularly apparent *at the time* of the introduction of the Unitary Patent and when the Unified Patent Court recently opened its doors, and which has also translated into a substantial yearly number of appeals being filed and a considerable workload for the boards. Furthermore, the timely adjudication of cases has become a matter of increased interest to the stakeholders in the system, while it remains a challenge for the boards to carry out their function of effectively bringing justice to all parties within a reasonable time frame.

46. Thirdly and arguably most importantly, the concepts and principles of national and international procedural law have themselves seen tremendous evolution over the years, in particular in international and European human rights law, notably on the guarantees of a fair trial before a tribunal of law.

47. A pivotal factor is 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 proceedings 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).

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 (see 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 admi nistration of justice transparent, publicity contri butes 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).

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, paragraph 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 even 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, paragraph 8 to 23; Döry v. Sweden, no. 28394/95,

paragraph 8 to 16; Speil v. Austria; Koottummel v. Austria, no. 49616/06, paragraph 6 to 11; Jussila v. Finland, paragraph 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, paragraph 41, 47; see also Lundevall v. Sweden, paragraph 39; Salomonsson v. Sweden, no. 38978/97, paragraph 39; Göç v. Turkey, no. 36590/97, paragraph 51). 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 highly 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).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). 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).

48. In this context, the European Court of Human Rights reiterates the principle 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).

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).

49. 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.

50. All these considerations support the conclusion that a literal interpretation of Article 116(1) EPC conflicts with the legislature's 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 narrow 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.

51. The very purpose of Article 116(1) EPC, with a view to the procedural principles outlined above, can be seen 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

requirement of legal certainty in due time as a further essential element of a fair trial for all parties.

52. In a case like the current one, legal certainty in due time, just as procedural economy, as a further essential cornerstone of a fair trial, has to prevail.

53. 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.

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

55. 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 or where the request for re-establishment was 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.

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

57. The boards are, as the judicial body under the EPC, a public service provider with limited resources. They are obliged to carefully and fairly allocate these resources to where they can be used most appropriately, in line with the procedural principles enshrined in the EPC and beyond and their duty to serve parties in an equal and non-discriminatory manner. Any procedural step undertaken in appeal proceedings that is not required by the applicable rules is to the detriment of other parties as their cases are postponed, and this thus runs counter to the boards' duty and function to equally bring justice to all.

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

59. The request for re-establishment of rights is to be refused. The same goes for the appeal which is thus likewise to be rejected as inadmissible. The initial request for oral proceedings in the notice of appeal has thus 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)

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:

A. Voyé I. Beckedorf

Decision electronically authenticated