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**Datasheet for the decision
of 24 October 2023**

Case Number: J 0003/23 - 3.1.01

Application Number: XXXXXXXX.X

Publication Number:

IPC:

Language of the proceedings: EN

Title of invention:

ESTIMATING A MOVEMENT OF A HYBRID-BEHAVIOR VEHICLE

Applicant:

N.N.

Headword:

Relevant legal provisions:

EPC Art. 90(5), 108, 113, 116, 122

EPC R. 46(1), 58, 99(2)

RPBA 2020 Art. 12(8)

Keyword:

Admissibility of appeal - (no)

Re-establishment of rights - (no) - all due care (no)

Decisions cited:

Catchword:



Juristische Beschwerdekammer
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Case Number: J 0003/23 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 24 October 2023

Appellant: N.N.
(Applicant)

Representative: N.N.

Decision under appeal: **Decision of the Receiving Section of the European Patent Office posted on 24 October 2022 rejecting the request for re-establishment of rights**

Composition of the Board:

Chairman I. Beckedorf
Members: K. Kerber-Zubrzycka
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appellant (applicant) contested the decision of the Receiving Section to reject its request for re-establishment of rights pursuant to Article 122 EPC.
- II. European patent application No. XXXXXXXXX.X was filed on 26 March 2021. By communication of 24 August 2021 under Rule 58 EPC, the applicant was invited to remedy deficiencies as to the form of (ten of) the drawings within two months of notification of the communication.
- III. On 15 December 2021, the appellant (applicant) submitted ten pages with the corrected ten drawings considered to be deficient in ANNEX C of the above communication.
- IV. By decision of 21 December 2021 (which was handed over to the EPO postal service on 14 December 2021), the Receiving Section refused the application pursuant to Article 90(5) EPC because the deficiencies had not been corrected in due time.
- V. By letter of 14 January 2022, the appellant (applicant) requested re-establishment of rights under Article 122 EPC. It argued that the communication under Rule 58 EPC had been received by its legal representative during the first week or so of September 2021. The legal representative had informed the applicant (through his domiciled legal representative residing in XX), via email, of the deadline for filing the requested corrected documents. Communication between the applicant and legal representative had been extremely difficult between 5 September and 30 September and into the beginning of October due to several XX holidays.

Once the holidays were over, the applicant had had a significant backlog and overlooked the deadline. The situation was exacerbated by various Covid restrictions causing unusual delays and changes in protocol. After several reminders of the upcoming deadline had been sent from the legal representative to the applicant via email, the requested corrected documents reached the representative in the first week of December 2021. The delay in providing the requested corrected drawings by the established deadline was due to an unfortunate human error. The legal representative had duly reminded the client, which, however, had been unreachable.

- VI. By communication of 29 June 2022 under Article 113(1) EPC, the Receiving Section expressed its preliminary opinion that the request for re-establishment of rights was admissible but currently not allowable. The appellant was given the opportunity to present comments and evidence within two months of notification of said communication.
- VII. The appellant did not reply to this communication.
- VIII. By decision of 24 October 2022, the Receiving Section rejected the request for re-establishment of rights and declared the application to be deemed to be withdrawn as of 4 November 2021. This is the decision under appeal.

IX. With its notice of appeal the appellant requested,

as main request,
that the decision rejecting its request of re-establishment of rights according to Article 122 EPC be set aside, and,

as an auxiliary request,
that the decision to withdraw the present EP application in its entirety be set aside (and that the application be maintained in amended form).

X. In its statement setting out the grounds of appeal, the appellant summarised the proceedings and then stated:
"Therefore, the undersigned timely filed a Request for the re-establishment of rights under Art. 122 EPC on 14 January 2022. The arguments for such a re-establishment of rights are set in the request".

The appellant further stated that the grounds of appeal consisted in the following: "The decision of refuse the whole application as a whole should be set aside since the present application still has 29 figures (or 29 pages of drawings) of the all listed figures in the description as filed which satisfy the requirements of former R.46(1) EPC (now deleted). Therefore, the present application cannot be considered as lacking of the prescribed requirements of Art. 90 EPC as a whole. More precisely, the present application should have as legal consequence the maintain of the same in an amended form (i.e., with only the drawings satisfying the requirements of R.46(1) EPC - now deleted!)".

Reasons for the Decision

1. The case is ready for decision, which is to be taken in written proceedings on the basis of the contested decision to be reviewed and on the basis of the appellant's written submissions, without holding oral proceedings, pursuant to Article 12(8) RPBA 2020 and Articles 113 and 116 EPC. The appellant did not request oral proceedings and the Board does not consider it expedient to hold oral proceedings of its own motion.
2. The appeal is inadmissible for lack of substantiation, in the statement of grounds of appeal, of the reasons for setting aside the impugned decision (Rule 99(2) EPC). According to established case law, a statement of grounds referring generally to the submissions made at first instance cannot be considered sufficient for the purposes of Article 108, third sentence, in conjunction with Rule 99(2) EPC.
3. Yet even if the appellant's submissions before the Receiving Section were to be taken into account, the appellant's main request that the decision of the Receiving Section to refuse the request for re-establishment be set aside is not allowable.
4. The decision of the Receiving Section to refuse the request for re-establishment is correct.
5. The Board agrees with the Receiving Section that the conditions under Article 122 EPC for re-establishment of rights, namely that in spite of all due care required by the circumstances having been taken, the applicant was unable to observe the time-limit, were

not fulfilled (for general comments on due care, see Case Law of the Boards of Appeal (CLB), 10th edition, 2022, III.E.5.2). The appellant has not demonstrated that the non-compliance was the result of exceptional circumstances (see CLB, III.E.5.3), nor has it shown that it was the result of an isolated mistake within a normally satisfactory monitoring system (see CLB, III.E.5.4).

6. The Receiving Section largely dealt with the appellant's arguments in Reasons 8 to 11 of the decision under appeal. In point 8, it correctly pointed out that no evidence had been provided for the fact that the European representative had sent reminders and contacted the applicant before the scheduled deadline. The Board agrees with the explanations in point 9 of the decision that the reference to the holidays in XX is not an acceptable reason for justifying overlooking the time limit. The Board notes, in particular, the appellant's argument that the cited holidays made communication difficult in the period between 5 September and 30 September. This cannot explain why the two-month time limit was missed. Furthermore, the Board agrees with the evaluation of the Receiving Section in point 10 of the decision that the appellant's statement that the main reason why the deadline was overlooked was an unfortunate human error was too unspecific to be taken into consideration. This also applies to its reference to the Covid pandemic as cited in point 11 of the decision.
7. Moreover, the appellant's auxiliary request, i.e. that the application be upheld in part, namely without the deficient pages, is not allowable.

8. The appellant argued in its statement setting out the grounds of appeal that the application still had 29 figures which satisfied the requirements of former Rule 46(1) EPC ("now deleted"). Therefore, the present application could not be considered to have failed to satisfy the requirements of Article 90 EPC in its entirety.
9. Article 90(5) EPC stipulates that a European patent application shall be refused if a deficiency noted in the examination of formal requirements is not corrected, unless a different legal consequence is provided for by the Convention. The maintenance of the application in part (without the deficient drawings) is not provided for by the EPC.
10. As a side remark, the Board notes that former Rule 46(1) EPC, on minimum margins on sheets containing drawings, was replaced by new Rule 49(2) EPC and the decision on presentation requirements for drawings, without substantive amendments (see Decision of the President of the EPO dated 25 November 2022 on the presentation of applications and other documents, OJ EPO 2022, A113, in particular Article 1, Form and content of the drawings).
11. The Board further notes that according to point 2 of the order of the decision under appeal, the application was deemed to be withdrawn. This declaration is not decisive and does not have a binding effect. The legal effect of rejecting the request for re-establishment is that the decision to refuse the application (which was not appealed) remains in legal force.
12. As a result, the appeal is unallowable and has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Eickhoff

I. Beckedorf

Decision electronically authenticated