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**Datasheet for the decision
of 17 February 2010**

Case Number: T 0836/09 - 3.5.04

Application Number: 05025792.2

Publication Number: 1662795

IPC: H04N 7/24

Language of the proceedings: EN

Title of invention:

Apparatus and method for combining images in a terminal device

Applicant:

LG Electronics Inc.

Opponent:

-

Headword:

Re-establishment of rights in respect of the time limit for
filing the statement of grounds of appeal (yes)

Relevant legal provisions:

EPC Art. 106(1), 107, 108, 121(4), 122

EPC R. 101(1), 126(2), 131, 136

Decision of the Administrative Council of 28 June 2001 on the
transitional provisions under Article 7 of the EPC Revision
Act, Article 1

Decision of the Administrative Council of 7 December 2006
amending the Implementing Regulations to the EPC 2000,
Article 2

Relevant legal provisions (EPC 1973):

-

Keyword:

"EPC Article 122: normally satisfactory system of processing
outbound mail (yes), isolated mistake by an assistant (yes),
all due care (yes)"

Decisions cited:

J 0005/80, J 0001/07, T 0315/90, T 0413/91, T 1561/05,
T 0335/06, T 0178/07, T 0911/07, T 1465/08

Catchword:

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Case Number: T 0836/09 - 3.5.04

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.5.04
of 17 February 2010

Appellant:

LG Electronics Inc.
20, Yoido-Dong
Youngdungpo-gu
Seoul (KR)

Representative:

Katérle, Axel et al
Wuesthoff & Wuesthoff
Patent- und Rechtsanwälte
Schweigerstraße 2
D-81541 München (DE)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 6 November 2008
refusing European application No. 05025792.2
pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: F. Edlinger
Members: B. Müller
C. Kunzelmann

Summary of Facts and Submissions

I. The subject of the proceedings

In its decision posted on 6 November 2008 the examining division refused European patent application No. 05025792.2. On 28 November 2008 an appeal was filed against that decision and the appeal fee was paid. With a letter dated 13 March 2009 and received by the European Patent Office (EPO) from the German Patent and Trade Mark Office (DPMA) on 23 March 2009 the appellant submitted a statement setting out the grounds of appeal. The appellant requested that the contested decision be set aside in its entirety and a patent be granted on the basis of certain specified application documents. In a letter of 25 May 2009 that was received by the EPO on the same day the appellant requested reinstatement of the time limit for filing the statement of grounds of appeal and, as a precaution, the consultation of its representative and, as a further precaution, oral proceedings. The grounds on which the request for re-establishment is based are summarised as follows.

II. Admissibility of the request for re-establishment

The appellant represented by the professional representative Mr S. submits that, despite all due care required by the circumstances having been taken, it was unable to observe the time limit for filing the statement of grounds of appeal, which expired on 16 March 2009. It was on 15 April 2009 that Ms P. working in the patent law firm representing the appellant became aware by an acknowledgment of receipt returned by the EPO that the statement of grounds

addressed to the EPO had not been filed with the EPO but, unintentionally, with the DPMA. Upon Ms P.'s becoming aware of this fact the cause for non-compliance with the time limit for filing the statement of grounds of appeal was removed. The two-month time limit for filing the request for re-establishment and the statement of grounds of appeal thus expired on 15 June 2009 at the earliest. The omitted act, i.e. the filing of the statement of grounds, had already been completed because that statement had been received by the EPO on 23 March 2009. The re-establishment fee was paid with the attached debit order.

III. Substance: the action taken by the appellant

It is submitted that the appellant uses a firm of patent attorneys and attorneys-at-law that files and prosecutes several hundred European patent applications with the EPO every year.

IV. Substance: the course of action taken by the appellant's representatives

The representative having signed the request for re-establishment, Mr S., claims that, in the present case, it was an isolated mistake within an otherwise well-functioning system of the patent law firm that led to the belated filing of the statement of grounds with the EPO.

The facts surrounding the missing of the time limit

In the firm outgoing mail intended to be filed with the EPO and the DPMA is deposited in a general "Office

mailbox" in the records department. Every day between 14 hrs and 14.30 hrs Ms P. starts emptying this mailbox in order to classify the documents according to their addressees (EPO or DPMA), to check them for completeness and to draw up corresponding acknowledgments of receipt. After having entered a reference to a specific document in the respective acknowledgment of receipt, she puts that document into one of the two separate outboxes for Office mail located at her workplace (one for the EPO, one for the DPMA) and deletes the corresponding due date from the patent law firm's primary diary ("Hauptfristenbuch"). This procedure has been followed in the firm for decades and has never caused any problems.

Ms P. also performed these steps on 13 March 2009 in respect of the DPMA- and EPO-bound mail of that day. According to her recollection, on that day she received outgoing mail intended for the EPO after the internal deadline of 15.30 hrs, i.e. the statement of grounds in the present case and two other letters. After having checked these documents for completeness, she entered pertinent references as the last three items in the acknowledgment of receipt drawn up for the EPO and deleted the corresponding due dates from the primary diary. It is not uncommon that Ms P. receives documents intended for one of the two patent offices for delivery on the same day. Due to an oversight that she can no longer explain, it appears that Ms P. inadvertently did not put those last three letters into the EPO outbox, but deposited them in the DPMA outbox instead. Subsequently she printed the corresponding acknowledgments of receipt and, together with the outgoing mail of the respective boxes, put them into

two envelopes bearing the addresses of the DPMA and the EPO, respectively. She handed these two envelopes over to the patent law firm's courier who took them to the two Munich-based patent offices, one located at Zweibrückenstraße and the other at Erhardtstraße. Having arrived at those Office locations outside of opening hours, the courier dropped the envelopes in the respective night letter-boxes. When the firm's outgoing mail is received in person at the mailroom of the DPMA or the filing office at the EPO, the respective acknowledgments of receipt are stamped there. The firm's courier brings them back to the firm, where Ms P. immediately checks them. It is only on those days that the courier discovers that the DPMA's mailroom or the EPO's filing office is already closed that he drops the envelopes in the respective night letter-box. The acknowledgments of receipt included in those envelopes are then usually returned by post in the following days.

In the present case the acknowledgment of receipt intended for the EPO and bearing No. 38/2009 was not received from the EPO on 13 March 2009, but only on 15 April 2009. Ms P. checked the acknowledgment immediately. It included a notice by the filing office requesting a phone call to determine whether three letters that were marked in the acknowledgment had been received by the EPO. Further to this notice Ms P. verified the documents that had been obtained by the EPO in their online register. She found out that the statement of grounds was first date stamped by the DPMA on 13 March 2009 and only received by the EPO on 23 March 2009.

The appellant maintains that the correctness of the above indications made under the present heading "The facts surrounding the missing of the time limit" is shown credibly ("glaubhaft gemacht") by a declaration *in lieu* of oath ("eidesstattliche Versicherung") of Ms P.'s that is attached to the request for re-establishment, together with a copy of the acknowledgment of receipt No. 38/2009. In addition, some of those indications are formally affirmed by the European representative ("anwaltlich versichert"), Mr S., who signed the request for re-establishment.

The appellant argues that, given Ms P.'s flawless professional performance since having joined the patent law firm, Mr K., the patent attorney having drafted the statement of grounds of appeal, was entitled to rely on the correct handling of that statement and had no specific reason to check its processing in detail. The appellant further submits that, even taking all due care required by the circumstances, such an isolated mistake of putting the letter into the wrong outbox cannot be totally avoided. It cannot be excluded that, since the opening of the EPO, a single mistake might occur, even where the operations of a patent law firm are organised most carefully.

The reliability of the paralegal involved and of the records department

As for the employee Ms P., the appellant submits that she has worked in the records department of the patent law firm since November 2002. She passed an examination held by the German Patent Bar Association in 1998 for paralegals ("Patentanwaltsfachangestellte"). In the

records department her tasks include the screening of all of the firm's incoming mail, the recording and deleting of due dates in the primary diary and the monitoring of outgoing mail, together with the drawing up of acknowledgments of receipt for mail intended for the DPMA or the EPO. During her many years of experience Ms P. has excelled in her care and exactness in performing tasks of the most diverse nature, as well as in her reliability and correctness in carrying out her activities, not least in relation to the recording of due dates and the handling of incoming and outgoing documents. As a consequence, Mr K. could rely on Ms P.'s handling of the statement of grounds of appeal, i.e. her deleting the appeal time limit, checking the statement of grounds of appeal for completeness, making an entry in the corresponding acknowledgment of receipt, putting the statement of grounds into the respective box designated for EPO-bound mail and inserting it into the envelope addressed to the EPO. Despite all this, Mr W., the European patent representative in charge of the records department, supervised and carried out spot-checks on her activities.

The patent law firm has a well-functioning records department and mailroom. It has never happened before that a letter directed to the EPO was accidentally dispatched to the DPMA.

It was only by the acknowledgment of receipt received from the EPO on 15 April 2009 that the patent law firm became aware of the fact that, contrary to the intention to file the statement of grounds in due time with the EPO, that statement, by oversight, was first received by the DPMA and forwarded to the EPO, which,

however, happened only after expiry of the time limit. At no time had there been an intention to let the patent application lapse by filing the statement of grounds of appeal out of time. Rather, notice of appeal had formally been given on 28 November 2008.

The above indications under the present heading "The reliability of the paralegal involved and of the records department" are formally affirmed by the European representative ("anwaltlich versichert"), Mr S., who signed the request for re-establishment. In addition, some of those indications are shown credibly ("glaubhaft gemacht") by the declaration *in lieu* of oath ("eidesstattliche Versicherung") of Ms P.'s.

Reasons for the Decision

1. *The applicable version of the EPC re-establishment provisions*

Pursuant to Article 1, No. 5, of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the EPC Revision Act (see OJ EPO Special edition No. 1/2007, at pp. 197 *et seq.*), Article 122 EPC 2000 [entitled "Re-establishment of rights"] shall apply to European patent applications pending at the time of its entry into force, in so far as the time limit for requesting re-establishment of rights has not yet expired at that time. In the present case the decision under appeal was posted on 6 November 2008, i.e. after the entry into force of Article 122 EPC 2000 on 13 December 2007. Therefore the time limit for filing a request for reinstatement of the time limit for submitting a statement of grounds of appeal in relation to that decision could not have come into being or even have expired on 13 December 2007. As a consequence, the condition of Article 1, No. 5, of the above Decision has been met, so that it is Article 122 EPC 2000, together with Rule 136 EPC 2000, also entitled "Re-establishment of rights", which apply in the present case (the applicability of that rule follows from Article 2 of the Decision of the Administrative Council of 7 December 2006 amending the Implementing Regulations to the EPC 2000, OJ EPO Special edition No. 1/2007, at p. 89). Below, provisions of the EPC 2000 will generally be referred to without the reference to "2000".

Under Article 122(1) EPC an applicant for a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office shall have its rights re-established upon request if the non-observance of this time limit has the direct consequence of causing the loss of a right or means of redress.

2. *Loss of a right or means of redress*

As stated above, the decision under appeal was posted on 6 November 2008. Under Article 108, first and second sentences, EPC, notice of appeal shall be filed at the EPO within two months of notification of the decision. The notice shall not be deemed to have been filed until the fee for appeal has been paid. In the present case this time limit elapsed on 16 January 2009 (see Rule 126(2) and Rule 131(1), (2) and (4) EPC). As the appeal was filed on 28 November 2008 and the appeal fee paid on the same day, the aforementioned conditions of Article 108 EPC are met.

Pursuant to Article 108, third sentence, EPC, "[w]ithin four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations". This time limit expired on 16 March 2009 (see the provisions of the Implementing Regulations cited above in relation to the appeal time limit). The statement of grounds was received by the EPO on 23 March 2009. In this context it should be noted that the EPO stopped applying the "Administrative Agreement dated 29 June 1981 between the German Patent Office and the European

Patent Office concerning procedure on receipt of documents and payments", as amended on 13 October 1989 (see OJ EPO 2005, 444). Under that agreement, documents received by the DPMA and intended for the EPO were to be treated by the EPO as if they had received them directly. Following the termination of that agreement, from 1 September 2005, the filing date of documents intended for the EPO but received and forwarded by the DPMA is thus the date of their actual receipt at the EPO. Hence, in the case before the board, it is the date of the actual receipt of the statement of grounds by the EPO on 23 March 2009 that is decisive. This date is after expiry of the time limit on 16 March 2009.

As a consequence, under Rule 101(1) EPC the board shall reject the appeal as inadmissible resulting in the loss of the right of appeal (Articles 106(1), 107 EPC), unless the request for reinstatement of the time limit for filing the statement of grounds is granted.

The provisions of the EPC 2000 mentioned in the present section 2 apply pursuant to Article 1, No. 1, of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the EPC Revision Act (*ibid.*, at p. 197).

3. *Inability to observe a time limit vis-à-vis the EPO*

Pursuant to paragraph 1 of Article 122 EPC, for re-establishment of rights to be possible, the applicant must have been unable to observe a time limit vis-à-vis the EPO. According to T 413/91 (at point 4), the word "unable" implies an objective fact or obstacle preventing the required action. Such an obstacle could,

for example, consist in a wrong date inadvertently being entered in a monitoring system or an outside agency influencing the observance of the time limit (for example a delay in delivery service). In the present case, according to her credible declaration *in lieu* of oath on 13 March 2009 the assistant Ms P. inadvertently put the statement of grounds into the DPMA outbox, instead of that for the EPO, and consequentially inserted it into the envelope addressed to and delivered at the DPMA. The DPMA forwarded the statement of grounds to the EPO, and it was received there only after expiry of the pertinent time limit. Ms P.'s acts therefore constitute an objective obstacle to the timely filing of the statement of grounds. Thus the appellant was unable to observe the corresponding time limit.

4. *Admissibility of the request for re-establishment*

4.1 Compliance with the two-month time limit

Pursuant to Rule 136(1), first sentence, EPC the request shall be filed within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit.

In its decision in T 315/90 (at point 6, recently affirmed by T 1465/08, point 2.1), the board held that the date of the removal was the date at which the appellants should have discovered the committed error if they had taken all due care, due care being a permanent obligation. In that case, the date of removal was not necessarily the date of receipt of the

communication notifying a loss of rights. More generally, holding that due care was an obligation extending over the whole of the proceedings, the case law of the boards of appeal recognises that the cause of non-compliance may be removed already at the point in time when a representative taking all due care would have become aware that the time limit had been missed, even though in reality he or she had become aware thereof at a later stage only (cf. T 1561/05, point 2.1.3, and the cases cited there).

In the present case, the appellant's representative, Mr K., was unable to observe the deadline for filing the statement of grounds of appeal, which expired on 16 March 2009. As set out above, non-compliance with that period was the consequence of the fact that his assistant, Ms P., inadvertently put the statement of grounds into the DPMA outbox, which, as evidenced by the indications on that statement, ultimately led to its being delivered at the DPMA on 13 March 2009 and at the EPO on 23 March 2009. According to the credible statement by Ms P., the error was discovered in the appellant's patent law firm on 15 April 2009, when the acknowledgment of receipt returned by the EPO was received. That date of receipt is also evidenced by the "Received" stamp of the law firm on that document. The question arises whether 15 April 2009 is also the date when the cause for non-compliance with the time limit for filing the statement of grounds was removed or whether the representative or Ms P. should have become aware of the error earlier on. The representative submitted that, where an acknowledgment of receipt could not be stamped by the EPO's filing office because it was delivered after office hours, such

acknowledgment would usually be returned by post in the following days. In the present case however it was more than one month after delivery of the statement of grounds intended for the EPO that the acknowledgment was received by the patent law firm. The question therefore is whether, under the principle of due care, the representative was under an affirmative duty to inquire with the EPO whether they had received the statement of grounds, as no acknowledgment had yet been received, or to check receipt in the EPO's online register, and within which maximum time frame such an inquiry or check would have had to be made. Should it have had to be made within a matter of days from 13 March 2009 (the date when the statement of grounds was dispatched) and in any case in less than 12 days from that date, i.e. before 25 March 2009, then the appellant, in filing the request for re-establishment on 25 May 2009, would not have respected the two-month time limit.

In the board's view it was not necessary for the representative to make an inquiry about the whereabouts of the statement of grounds with the EPO, nor even to check in the EPO's online register whether it had been added to their electronic file. The board considers that the due care requirement, if it applies in the context of compliance with the time limit of two months of the removal of the cause of non-compliance following the case law cited above (in the second paragraph of the present section 4.1), does not include an obligation to seek confirmation by the EPO in whatever way of the receipt of documents directed to them. An acknowledgment of receipt enclosed with the documents sent and returned with a confirmation by the EPO makes

it easier for the sender to prove the filing of those documents with the EPO should a document go astray. An acknowledgment of receipt stamped by the EPO is however not the only way to prove receipt. Evidence to that effect can be furnished by any appropriate means; see, for instance, the decisions of the boards of appeal cited in the EPO publication "Case Law of the Boards of Appeal of the EPO", 5th ed. 2006 (hereinafter referred to as "Case Law"), at VI.K.4.3.6. Therefore taking all due care does not require a party to attach to documents intended for the EPO an acknowledgment of receipt for return by the EPO nor to make an online inspection of the file. As a consequence, any failure to monitor timely return of an acknowledgment or check the contents of the electronic file in the EPO's register cannot amount to a failure to take all due care either. Thus, in the case before the board, the representative was under no duty to take such steps.

As there is no suggestion from the documents on file that the appellant or anyone in its patent law firm could have become aware of the error before receipt of the acknowledgment on 15 April 2009, the cause of non-compliance with the time limit was removed on that date. Consequently the period of two months from the removal of that cause was complied with by the request for re-establishment of rights received on 25 May 2009. This request was also filed within one year of expiry of the unobserved appeal time limit of 16 March 2009.

4.2 Further admissibility requirements and conclusion

The request for re-establishment complies with the further formal requirements of Rule 136(1),(2) EPC. It

states the grounds and facts on which it is based. The omitted act, i.e. the filing of the statement of grounds of appeal, had already been completed on 23 March 2009, i.e. before the request was received by the EPO. The appellant paid the fee together with the request for re-establishment filed on 25 May 2009.

Moreover the time limit for filing a statement of grounds of appeal is not excluded from re-establishment of rights (Article 122(4) and Rule 136(3) in conjunction with Article 121(4) referring to Article 108 EPC).

The request for re-establishment is consequently admissible.

5. *Merits of the request for re-establishment*

5.1 Due care required by both the applicant and its representative

Whether or not the request for re-establishment of rights can be acceded to depends on whether the substantive requirements of Article 122 EPC are also met. Under paragraph 1 of that provision the applicant for a European patent making the request must show that it has taken "all due care required by the circumstances". The request for re-establishment of rights of an applicant with a professional representative acting on its behalf is only allowable if both the applicant itself and its representative have met the necessary standard of care (see J 1/07, point 4.1). When an applicant is represented by a professional representative, a request for re-

establishment of rights cannot be acceded to unless the representative himself or herself can show that he or she has taken the due care required of an applicant by Article 122(1) EPC (*cf.* J 5/80, OJ EPO 1981, 343, headnote I).

5.2 Due care on the part of the representative himself

As stated above, under Article 122(1) EPC the request for re-establishment of rights can only be allowed if the person applying for it shows that he or she has taken "all due care required by the circumstances". In considering it, the boards have ruled in numerous decisions that the circumstances of each case must be looked at as a whole. The obligation to exercise due care must be assessed in the light of the situation as it stood before the time limit expired.

For cases where the cause of non-compliance with a time limit involves some error in the carrying out of the party's intention to comply with the time limit, the case law has established the criterion that due care is considered to have been taken if non-compliance with the time limit results either from (1) exceptional circumstances or (2) from an **isolated mistake** within a normally satisfactory system for **monitoring time limits** (see Case Law, *ibid.*, at VI.E.6.2). An isolated mistake in a normally satisfactory system, in particular one committed by an assistant, is excusable; the appellant or its representative must plausibly show that a normally effective system for monitoring time limits prescribed by the EPC was established at the relevant time in the office in question. The fact that this system operated efficiently for many years was considered to be evidence that it was normally

satisfactory (cf. Case Law, VI.E.6.2.2(a)). In a large firm where a large number of dates have to be monitored at any given time, it is normally to be expected that at least one effective cross check is built into the system (see Case Law, VI.E.6.2.2(c)).

These legal principles apply where a time limit was not complied with because of a mistake in the monitoring of time limits, e.g. because the time limit expired unnoticed. There may be different reasons for missing a deadline: the responsible person may indeed have been aware of the deadline and have taken the appropriate action to comply with it, usually by drafting a pertinent document in good time before expiry of the period. The deadline may however still be missed after the document has been completed, in particular if it was not processed and, as a consequence, not dispatched correctly so that it could not reach the addressee in time. Due care will then be considered to have been taken if non-compliance with the time limit results from an **isolated mistake** within a normally satisfactory system of **processing outbound mail**. Irrespective of whether or not a large firm is concerned, the duty of at least one effective cross check built into that system is dispensed with in this situation. This applies even to important letters such as those whose improper treatment may entail the loss of a right or means of redress. The reason is that, different from the monitoring of time limits, the risk of an error in the processing of outbound mail is low because such processing generally involves the execution of straightforward steps. (See T 178/07, point 1.1.3.)

In the present case, the statement of grounds had been signed by the representative, Mr K., before expiry of the time limit on 16 March 2009, as it was received by the DPMA on 13 March 2009. Hence the reason for its late delivery at the EPO only on 23 March 2009 was not a mistake in the monitoring of the time limit. Therefore the question of whether a normally satisfactory system for monitoring time limits was in place in the appellant's patent law firm need not be dealt with. The mistake rather arose in the processing of the statement of grounds intended for the EPO, because it was put into the DPMA outbox and consequentially inserted into the envelope intended for the DPMA and delivered there, instead of being put into the EPO outbox and eventually dispatched to that Office. The question therefore is whether or not a normally satisfactory system of processing outbound mail existed in the firm.

The system in place has been summarised from the appellant's submissions under point IV above. These submissions are credible as they are corroborated by Ms P.'s declaration and formally affirmed by the representative having signed the request for re-establishment, Mr S. Briefly, outgoing documents intended to be filed with the EPO and DPMA are deposited in a general "Office mailbox", classified according to their addressees (EPO or DPMA) and checked for completeness. Pertinent references are then entered in the respective acknowledgment of receipt, and the documents are subsequently put into one of the two separate outboxes for the EPO and the DPMA respectively (to be inserted into envelopes). Thereafter the

corresponding due date will be deleted from the primary diary.

The board is of the opinion that this system is realistic and suitable for processing the large number of documents of the patent law firm which, as it was submitted, files and prosecutes several hundreds of European patent applications every year with the EPO alone. The board therefore considers that a normally satisfactory system of processing outbound mail was in place in the appellant's patent law firm before expiry of the term for filing the statement of grounds of appeal in question.

As it was Ms P. to whom the performing of the various steps of the system of processing outbound mail was entrusted, the next question is whether these duties could properly be delegated to her and, if so, whether her mistake was an isolated one and is excusable.

According to the case law, when an applicant is represented by a professional representative, a request for re-establishment cannot be acceded to unless the representative himself or herself can show that he or she has taken the due care required of an applicant by Article 122(1) EPC (*cf.* J 5/80, *ibid.*, headnote I). If the representative has entrusted to an assistant the performance of routine tasks such as typing dictated documents, posting letters and parcels and noting time limits the same strict standards of care are not expected of the assistant as are expected of the applicant or its representative. (See *ibid.*, headnote II.) A culpable error on the part of the assistant made in the course of carrying out routine

tasks is not to be imputed to the representative if the latter has himself or herself shown that he or she exercised the necessary due care in dealing with the assistant. In this respect, it is incumbent upon the representative to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision over the work. (See *ibid.*, headnote III.)

In the present case, the tasks entrusted to Ms P. in handling outgoing mail, as detailed above, were all of a routine nature and could thus be delegated to her. This finding is also in line with the decision in case T 178/07 where it was held (at point 1.1.3 *in fine*) that (in the patent department of a company) it is not usually the author of a letter that deals with its posting. Handling outbound mail is a subordinate activity that can be entrusted to assistants. Likewise in the decision in case T 911/07 it was held (see point 8) that "[a]s a rule, the representative is not obliged to monitor that the outgoing mail is made ready for posting and delivered to the postal service. Such a task can be entrusted to an assistant because the issuance of a letter causes no difficulties." (See, in the same vein, T 335/06, point 1.3.)

According to Ms P.'s credible statement *in lieu* of oath and the credible formal affirmation of the attorney signing the request for re-establishment, i.e. Mr S., Ms P. passed an examination held by the German Patent Bar Association in 1998 for paralegals ("Patentanwaltspfachangestellte"), which means that she clearly is a person suitable for the routine tasks at issue. Having worked in the records department of the

patent law firm for more than six years at the time the error occurred (since November 2002) and having carried out her tasks excellently, as formally affirmed by Mr S., the board considers that, in any case, she had reached an adequate state of proficiency in her tasks at that time. Therefore it can be concluded that she had benefitted from sufficient training. Furthermore Ms P.'s activities were supervised and subjected to spot-checks by the representative Mr W. According to Ms P.'s credible statement, it had never happened to her before that a letter directed to the EPO was accidentally dispatched to the DPMA. Against this background, her mistake can be considered an isolated one.

As a consequence, Ms P.'s error made in the course of carrying out the routine task of processing the statement of grounds is not to be imputed to the representative in charge of the file, i.e. Mr K. It follows that he has taken the due care required of an applicant.

5.3 *Due care on the part of the applicant itself*

The applicant itself, in selecting a patent law firm experienced with the filing and prosecution of European patent applications, has also taken the required due care.

5.4 The board therefore considers that the substantive conditions of Article 122(1) EPC are met.

6. *Conclusion*

The request for re-establishment of rights in connection with the filing of the statement of grounds of appeal within the four-month time limit prescribed by Article 108 EPC meets the formal and substantive requirements of the EPC. The board therefore grants this request.

Order

For these reasons it is decided that:

The appellant is re-established in its rights in relation to the filing of a statement of grounds of appeal within the missed time-limit of four months prescribed by Article 108 EPC.

The Registrar:

The Chairman:

L. Fernández Gómez

F. Edlinger