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**Datasheet for the decision  
of 14 January 2013**

**Case Number:** T 1663/12 - 3.3.05

**Application Number:** 04779814.5

**Publication Number:** 1663458

**IPC:** B01D 53/94, F01N 3/20

**Language of the proceedings:** EN

**Title of invention:**  
Emission treatment system and method using a SCR filter

**Patentee:**  
BASF Corporation

**Opponents:**  
Johnson Matthey Public Limited Company  
Umicore AG & Co. KG

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 108, 122(1)  
EPC R. 126(2), 131(2)(4), 136(1)(2)  
Article 1(1)(5) of the Administrative Council's Decision of  
28 June 2001  
Article 7 of the Act revising the European Patent Convention  
of 29 November 2000

**Keyword:**  
"Re-establishment of rights (no)"  
"Proof of all due care (no)"

**Decisions cited:**  
J 0021/80, J 0003/93, T 0428/98, T 0902/05, T 0439/06,  
T 1465/07, T 0493/08, T 1726/08

**Catchword:**

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Case Number: T 1663/12 - 3.3.05

**DECISION**  
of the Technical Board of Appeal 3.3.05  
of 14 January 2013

**Appellant:** BASF Corporation  
(Patent Proprietor) 100 Campus Drive  
Florham Park, NJ 07932 (US)

**Representative:** Fisher, Adrian John  
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**Respondent II:** Umicore AG & Co. KG  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted 2 May 2012  
revoking European patent No. 1663458 pursuant  
to Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** G. Raths  
**Members:** J.-M. Schwaller  
S. Hoffmann

## **Summary of Facts and Submissions**

- I. The appeal is directed against the decision of the Opposition Division posted on 2 May 2012, revoking the present patent under Articles 54(1) and (2) and 56 EPC.
- II. On 19 July 2012, the applicant (appellant) filed a notice of appeal which it acknowledged was filed out of time. The notice of appeal bore the letterhead of the firm Carpmaels & Ransford (C&R) and contained a debit order chargeable to C&R's deposit account. Mr X, one of the appellant's professional representatives, signed the notice of appeal.
- III. With a letter faxed on 25 July 2012, the appellant requested re-establishment of rights under Article 122 EPC with regard to the time limit for filing the notice of appeal and authorised the European Patent Office to debit C&R's deposit account for the fees for re-establishment of rights and the notice of appeal. A further professional representative of the appellant signed these submissions.
- IV. On 10 September 2012 the appellant submitted its statement of grounds of appeal.
- V. With letters of 2 August, 21 September and 11 October 2012 respondent I (opponent I) and with letters of 21 and 24 September 2012 respondent II (opponent II) submitted that the appellant's request for re-establishment of rights should be refused as unfounded and the appeal dismissed as inadmissible.

VI. In response to the Board's communication dated 5 October 2012, the appellant objected to the Board's preliminary opinion and submitted with letter of 9 November 2012 two declarations of the appellant's professional representatives, one signed by Mr X on 11 November 2012 and the other one by Mr Y on 9 November 2012.

VII. With letter dated 11 December 2012, respondent I replied to the appellant's submissions and the Board's communication.

VIII. Oral proceedings before the Board took place on 14 December 2012.

IX. The appellant's submissions in writing and during the oral proceedings can be summarised as follows:

The failure to file the notice of appeal was caused by a combination of isolated mistakes although the time limit monitoring system at C&R normally worked satisfactorily.

Mr X had worked for 26 years as a patent attorney partner on a regular basis in the firm C&R but had retired from the partnership on 30 June 2011. As a number of significant cases that he was handling were still pending at the time of his retirement, he continued to be responsible for these cases, but was working for C&R on a consultancy basis.

As Mr X did not visit the offices of C&R daily but on a regularly basis, a system was put in place that ensured that a C&R partner was not only kept informed of what

was happening on a case but that all information that Mr X might need in order to deal with the case was passed to him promptly. Thus, Mr X was kept informed of relevant due dates on a daily basis. Mr X still had access to documents saved on the C&R server and to the C&R email system and, on a daily basis, got the so-called prompt list showing all due dates which had been registered in the firm's software *Inprotech*. Copies of his outgoing emails were printed and passed to a partner of C&R. All documents and due dates were electronically registered and checked by C&R Records Department.

The appellant explained that the failure to file the notice of appeal had been caused by a docketing mistake in C&R's office during sorting of the incoming mail. In this regard, the appellant submitted in its letter of 25 July 2012 the following (the names of the persons involved are anonymised by the Board):

*"Incoming mail is typically received between 11 am and 1 pm.*

*All incoming mail is sorted initially by a senior member of the C&R Records Department, with the assistance of another such senior member of Department when there is a particularly large amount of mail to be sorted. The purpose of this initial sorting is to receipt-stamp the mail, identify and separate out any mail involving a "drop-dead" deadline and put all other mail into the relevant mail baskets for the appropriate section of the Records Department.*

*The person responsible for the initial sorting of mail*

*is Mr D.H. who is one of the most senior and experienced members of the Records Department. He has worked in the Department for 15 years. When the volume of mail is too great for him to handle, he is assisted by Mr A.S., who is the head of the patents section of the Records Department and is also one of the most senior and experienced members of the Department. He has worked in the Department for 14 years and has been the head of the patent team for 6 years. Both of them are familiar with the appearance of revocation decisions and with the applicable deadlines.*

*A "drop-dead" EPO communication is a communication where there is a final deadline for action to be taken for which further processing is not available. Revocation decisions fall into the category of communications having a "drop-dead" deadline.*

*As explained, all EPO "drop-dead" communications (with any accompanying correspondence) are sorted into a separate pile from the rest of the incoming mail. Any delivery card and acknowledgment sheet would be detached and pinned to the back of the communication. The communication would then be stamped with the dated receipt stamp.*

*Once all the mail has been sorted, the front page of all the "drop-dead" communications that have been separated out from the rest of the incoming mail is photocopied and the copies are given to the Manager of the Records Department, Ms T.L.. This ensures that she is kept informed of all the "drop-dead" communications. She goes through these on the next working day, after the communications have been processed by the Records*

*Department, and checks that the deadlines have been correctly docketed in Inprotech.*

*After the copy of the first page of the "drop-dead" communication has been made, a tick is placed on the bottom left hand corner of the original communication to confirm that the copy of the front page has been given to Ms T. L.. The original "drop-dead" communication is then put into the mail basket of sorted incoming post for the appropriate section of the Records Department. "Drop-dead" communications will therefore always be on top of the rest of the mail in the relevant mail basket.*

*The basket of sorted mail is then given to the head of the relevant Records section (i.e. the team leader). In the case of European patent applications and patent opposition cases, the team leader is Mr A.S..*

*The team leader then reviews all the mail to check for anything requiring immediate processing because of an immediate deadline e.g. filing instructions where there is an imminent deadline. Such urgent mail is processed first (involving entry of details into the database and passing urgently to a partner for action). Revocation decisions do not fall into the category of urgent mail requiring immediate attention.*

*After urgent mail has been separated by the team leader, the remaining mail is passed to one of the experienced clerks in the relevant section to be processed on the following working day.*

*The first step in the processing involves checking that*



*our reference is correct and, if not, marking it up with the correct reference. This is done on each item of mail. The responsible clerks in relation to EPO communications are R.W. and E.G., both of whom are very experienced and familiar with revocation communications. Having completed their checks, they then pass the mail to another clerk, Ms G.B., who is responsible for retrieving the relevant file. The file with the mail attached to it is then passed to another experienced clerk, Ms M.N., for further processing, including input of any due dates into Inprotech.*

*If the file is not in the central filing system in the Records Department (e.g. it is in the room of one of the attorneys or trainee attorneys), the mail is passed back to Mr R.W. and Mr E.G. without the file. They are responsible for the further processing of mail where the file is not in the Records Department. They share this work between them. Their involvement in further processing of revocation decisions in these circumstances is limited to the actions described below.*

*When Mr R.W. or Mr E.G. is processing a revocation decision, they need to arrange for the physical file to be retrieved from the relevant attorney so that the revocation decision can be processed appropriately (including applying a sticker to the front of the file indicating that the case is in appeal proceedings). In order for the file to be retrieved, either Mr R.W. or Mr E.G. will mark the top right hand corner of the decision with a tick and the initials of the person who has the file and then pass the communication to Ms G.B. so that she can retrieve the file from the person who has it. Once Ms G.B. has retrieved the file, it is*

*passed to Ms M.N. for processing of the revocation decision. Ms M.N. is very familiar with such communications and is aware that it is necessary to docket the deadlines for filing the notice of appeal and the statement of grounds. Inprotech automatically calculates these dates (plus the 10 days for deemed receipt) when the date of the revocation decision is entered.*

*Ms M.N. will then mark up the front of the communication in red with any relevant due date so that it is immediately apparent to the relevant partner/attorney. Where the communication is a revocation decision, Ms M.N. will also place a sticker on the front of the physical file indicating that the case is in appeal proceedings.*

*No entries are made in Inprotech for correspondence for which there is no due date, such as Minutes of oral proceedings.*

*Once Ms M.N. has completed her processing work, she initials the receipt stamp that the mail sorters had placed on the communication and it is then passed to the responsible partner with the file, clipped to the front of the file or bound to the front of the file with an elastic band. In the case of revocation decisions, the delivery card and acknowledgment sheet are clipped to the top of the communication so that the responsible partner can immediately sign, date and return these to the Records Department for sending back to the EPO.*

*After the mail has been processed and due dates*

docketed in Inprotech, Ms T.L. goes through the copies she has been given of the "drop-dead" communications and checks for each case that deadlines have been correctly docketed.

Inprotech generates daily prompt lists for all attorneys and trainees (i.e. fee earners), showing the due dates for the cases for which that attorney is responsible. The due date will start to appear on the prompt list from a specific date before the due date, depending on the nature of the action required. In the case of due dates for filing notice of appeal from a revocation decision, the due date will start to appear on the prompt list from the day after the decision is entered into Inprotech (i.e. about two months in advance of the due date). The prompt lists are emailed to the fee earners every morning. For my cases, they are also emailed to all the partners every Monday.

The communications were received on 8 May 2012, which was the first working day after a public holiday in the UK (which was on Monday 7 May). There was therefore a particularly large volume of mail on that day and as a result Mr A.S. assisted Mr D.H. with sorting the mail. It is not possible to know which of them was responsible for sorting the Minutes and the Revocation Decision for the present case. However, as previously stated, they are both highly experienced and reliable senior clerks in the Records Department who are very familiar with sorting the mail to identify "drop-dead" communications and with the appearance of Revocation Decisions. They are also aware that the EPO may clip or staple separate communications together and therefore

*are extremely careful to check for this when sorting the incoming mail.*

*The Minutes were received on 8 May 2012 and have been duly stamped with the receipt stamp when it was processed as incoming mail. The reference on it has been corrected by Mr E.G. to show the correct opposition file reference, the receipt stamp has been initialled by R.W. and Mr Y's initials have been marked at the top right hand corner of the page, by Mr R.W., to indicate that Mr Y is the responsible partner. Thus it underwent all the normal procedures for sorting and processing of incoming mail. The fact that the receipt stamp was initialled by Mr R.W., rather than by Ms M.N., indicates that the file was not in the Records Department when the Minutes were being processed. (As explained above, where the file is not in the central filing system, the processing work is done by Mr R.W. or Mr E.G.). Our file tracking system in fact shows that the file was with Mr Y. No due date is marked on the front of the Minutes in red, or was docketed in Inprotech, as no due date is associated with the Minutes. There is also no tick marked anywhere on the front page of the Minutes as would have been the case if it had been a "drop-dead" communication: both to show that the page had been copied for Ms T.L. and that the file needed to be retrieved for Records to put an appeal sticker on it.*

*No markings at all appear on the Revocation Decision, indicating that it has not been seen during the mail sorting or by the Records Department and has not been processed at all. In consequence, no due date was docketed in Inprotech. [.....]*

*It appears that the Revocation Decision must have been stapled to the back of the Minutes, instead of vice versa in the usual way. It also appears that the stapling was done in such a way that it was not readily apparent that there were two separate communications and that the second of these was a "drop-dead" communication. Had the Revocation Decision been stapled instead to the front of the Minutes, it would immediately have been recognised. Both D.H. and A.S. are known to be meticulous in their work and it is therefore surprising that they missed seeing the Revocation Decision. Whether this oversight was caused by the way in which the Decision was stapled to the back of the Minutes is not known. However, to the best of my knowledge and belief, and theirs, a "drop-dead" communication has not been missed before, notwithstanding large volumes of incoming email to sort.*

*Thus it seems that the Revocation Decision must have remained stapled to the back of the Minutes when the Minutes were subsequently processed by Mr R.W.. He also would have checked the mail he was processing but he also did not see that there was a Revocation Decision attached to the end of the Minutes.*

*If Mr D.H. or Mr A.S. or Mr R.W. had seen the Revocation Decision, the following would have happened:*

*(i) the Revocation Decision would have been separated from the Minutes, but kept with and on top of the Minutes, using an elastic band or clip to keep the documents together but applied in such a way as to show clearly that there were 2 separate documents,*

(ii) the Revocation Decision would have been receipt stamped, in the same way as the Minutes,  
(iii) the Revocation Decision would have been immediately recognised by Mr D.H./Mr A.S. as a "drop-dead" communication and therefore sorted into a separate pile of "drop-dead mail", keeping the Minutes with but behind the Revocation Decision,

(iv) after all mail had been sorted, the front page of the Revocation Decision would have been copied by Mr D.H./Mr A.S. and given to Ms T.L. and the front page of the original would have been ticked by them to confirm that this had been done,

(v) the correct opposition file reference would have been written on the Revocation Decision either by Mr R.W. or by Mr E.G.,

(vi) given that the file was with Mr Y, the Revocation Decision would have been ticked to show that the file needed to be retrieved for processing of the mail and to apply the appeal label to the file,

(vii) the communication would have been passed to Ms G.B. to retrieve the file from Mr Y,

(viii) the date of the Revocation Decision would have been entered into Inprotech by Ms M.N., generating the due dates for filing the notice of appeal and statement of grounds, and these dates would have been marked in red on the front of the Decision,

(ix) Ms M.N. would then have initialled the receipt stamp on the Revocation Decision and would have placed

*a sticker on the front of the file indicating that the case is in appeal proceedings,*

*(x) Ms T.L. would have checked that the correct due dates had been docketed in Inprotech,*

*(xi) the due dates would have appeared in the daily prompt lists.*

*As the Revocation Decision was not seen when the mail was sorted by Mr D.H. and Mr A.S., or when the mail was processed by Mr R.W., none of these steps was taken.*

*The communications, with the acknowledgment page and delivery card both pinned to them, would have been passed to Mr Y as responsible partner on the day following receipt of the communications, namely on 9 May 2012."*

*As regards the involvement of the two attorneys in processing the case, Mr. X further submitted:*

*"For the present opposition proceedings, I am the representative and the responsible partner is Mr Y. Mr Y is handling the prosecution work for the divisional patent application of the parent that is the subject of these opposition proceedings and is therefore familiar with the opposition proceedings and the importance of co-ordinating work on the parent and the divisional. In dealing with issues relevant to the divisional, he refers to the files on the parent and the opposition. It was for this reason that the opposition file was with him when the Minutes and Revocation Decision were received.*

*Mr Y does not recall whether he noticed the Revocation Decision. He signed and dated the delivery card and acknowledgment letter with the date that was stamped on the Minutes, i.e. 8 May 2012, but without reviewing the documents that were being acknowledged. He then arranged for the delivery card and acknowledgment letter to be sent to the EPO.*

*As he was not himself dealing with the opposition, but knowing that the outcome of the oral proceedings was awaited by me, his principal concern was that any communications concerning the opposition proceedings should be communicated to me as soon as possible.*

*After dealing with the acknowledgments, he passed the file to Ms S.W. with instructions to email the EPO communication to me. Ms S.W. provides me with secretarial assistance and support and is one of C&R's most senior secretaries.*

*In order to email me the communication, Ms S.W. needed to scan it. She therefore had to remove any staples so that the document could go through the paper feed tray. Prior to putting the document through the feeder tray, she would have flicked through the pages in order to free them from any effect of the stapling. In doing this she would have seen there were two documents and so they were scanned separately and sent to me as two separate, named attachments. [...]*

*I did not look at the attachments to the email at the time. Unfortunately, I cannot recall exactly why not. However, I would not normally report an adverse decision of the EPO to a client without studying it*



*first, and it is therefore most likely that I decided to review it at a later, more convenient time.*

*On 16 May, I received an email from Ms M.B. of BASF Corporation informing me that she had found the Decision on-line and seeking confirmation of the due dates. She attached a copy of the Decision and other papers down-loaded from the EPO website. I remember feeling somewhat embarrassed that the client had learnt of the Decision before I had had a chance to report it myself. I have always strived for excellence in my approach to work for clients and to the level of service which I provide to them.*

*I make a point of checking due dates marked on EPO communications by C&R's Records Department. This almost invariably happens in the context of reporting the communication to the client. In the present case, I did check the deadlines for appeal, but I did so in the context of responding to Ms M.B.'s email. I therefore had in front of me the copy of the Decision which she had provided, rather than the copy attached to Ms S.W.'s email. That meant that I did not see the absence of due date markings by C&R's Records Department on the Decision.*

*I responded to Ms M.B. on 17 May, apologizing for not having reported the Decision following receipt the previous week, explaining the deadlines of 12 July and 12 September for the notice of appeal and statement of grounds, respectively, saying that I would file the notice of appeal shortly and that I would endeavour to get a draft statement of grounds to her by the end of July.*

*Ms M.B. responded that it would be too late to receive the draft statement by the end of July. The client's and my attention therefore immediately focused on issues relevant to the statement of grounds, rather than on the filing of the notice of appeal.*

*With attention focused on matters relevant to the statement of grounds, I did not immediately prepare the notice of appeal for filing as originally intended, as this was not a priority. I was aware of the due date and also believed that it was being monitored by the C&R Records Department. I did not notice that it was not on my prompt list. I do not check my prompt list on a daily basis because I am no longer responsible for a large number of cases and I am therefore generally aware of what actions need to be taken and when. In any event, I know that the responsible partner will have access to both my prompt list and the file and can contact me if any concerns arise. In addition, the final safeguard is that the Records Department monitor all due dates and will always check with a relevant attorney on the morning of a due date if it is not apparent to them that the requisite action has been taken.*

*I see from my diary that I was away travelling on various dates during the period in which the notice of appeal could have been filed: 28 May-5 June; 13-14 June (oral proceedings in The Hague); 20-21 June (oral proceedings in Munich) and 9-16 July.*

*As a result of the focus on work related to the statement of grounds, work on the other cases for which I was involved in oral proceedings in The Hague and*

*Munich, and also other commitments, the deadline for filing the notice of appeal was unusually overlooked by me. This would not have been a problem if the due date had been docketed in Inprotech but, as explained above, this was not done. As a result, neither I nor any of the partners received warning of the due date by the normal prompt list or, on the due date itself, by a call from the Records Department checking that requisite action was being taken.*

*Mr Y, as the responsible partner, was copied on my emails to the client and saw the email responses and therefore knew that I was working on the case and that I was aware of the deadlines. He did not himself notice that the deadlines were not appearing on the weekly copy of my prompt list that he received.*

*In consequence, I did not prepare the notice of appeal and arrange for it to be filed by the deadline. This oversight was certainly unintentional as I was aware that BASF Corporation's intentions were and are to appeal the Revocation Decision."*

Furthermore, as regards the removal of the cause of non-compliance with the period for filing an appeal, Mr X stated:

*"In the course of email exchanges with the client on 16 July (following my return) to try to fix a time for discussion of the EPO appeal, I suddenly realised, in the evening of 16 July, that I had not arranged for the notice of appeal to be filed. I contacted Mr Y to ascertain how the due date could have been missed in view of C&R's rigorous procedures for monitoring such*

*due dates. Following investigation of what had happened, Mr Y contacted BASF on 17 July and explained that the deadline had been missed as a result of a docketing error."*

The appellant confirmed that the Revocation Decision had not been spotted by anyone in the Records Department or by Mr Y when he signed the delivery card and the acknowledgment letter, although all concerned were very experienced and familiar with EPO communications, and that Mr X did not check whether the correct deadlines had been recorded properly on the front sheet of the decision.

The appellant argued in letters dated 25 July and 9 November 2012 that the failure to identify the EPO's decision was probably caused by the fact that the decision was stapled to the back of the minutes. This could be concluded from the missing receipt stamp on the front page of the decision whereas the minutes were duly date-stamped. If the deadline for filing the notice of appeal had been docketed, it would have been filed in due time because either Mr Y or Mr X would have been alerted to the due day by the appearance of the due day on the prompt list. Therefore, the appellant claimed that the failure to file the notice of appeal in due time was caused by a combination of isolated circumstances in an otherwise normally satisfactory time limit monitoring system. This system included a cross-check by third persons as submitted by letter dated 25 July 2012. The final safeguard was that the Records Department monitored all due dates and checked with a relevant attorney on the morning of a due day if it was not apparent to them that the

requisite action had been taken. Inprotech, a commonly used software system for docketing patent activity, was the primary monitoring system at C&R. The check performed by Ms T.L could not be effective if a critical communication was not received in the Records Department because it had not been identified as such by Mr D.H or A.S. However, despite the fact that no critical communication from the European Patent Office had previously been missed by the Records Department, C&R's procedure nonetheless involved a further safeguard because the attorneys themselves checked that the relevant deadlines had been correctly entered on any critical communication, such as decisions of an Opposition Division. Mr X did indeed carefully review the Minutes and the decision, but not the copy that was emailed to him by Ms M.B.. Instead, he reviewed the copy that was emailed to him by the client. He was therefore unaware that the decision had not been recognised as such by the Records Department. It was believed that it was an isolated mistake that led to Inprotech not being updated in the first place, and it was an isolated mistake that Mr X reviewed the document received from the client, rather than that received from Ms S.W.. The fact that Mr X did not have the original paper file in front of him did not change that, because Mr X's normal practice would have been to work from the scanned pdf copy of the paper original.

During the oral proceedings, the appellant, confronted with the respondents' argument that a cross-check was missing as regards the initial sorting of the incoming mail by Mr D.H. or Mr A.S., referred to Mr Y's declaration, point 15, last sentence, where it is stated:

*"The file with the mail attached to it is then passed to another experienced clerk Ms M.N. for further processing including input of any due dates into Inprotech."*

The appellant further argued that if the request for re-establishment were allowed this would not have any unfair repercussions for the public because the general public must have already been well aware that an appeal could be filed when the time limit for filing an appeal expired.

X. Respondents I and II argued essentially as follows:

It was the established jurisprudence of the Boards of Appeal that *"all due care"* is only considered to have been fulfilled if non-compliance with the time limit results from an isolated mistake within a normally satisfactory monitoring system and that in a large firm where a number of dates have to be monitored at any given time, it is normally to be expected that at least one effective independent cross-check is built into the system. When considering the evidence and arguments provided by the appellant, it was found that neither a normally satisfactory monitoring system could be acknowledged nor had the representatives taken all due care under the circumstances of the present case. The initial step in any system of noting and monitoring time limits is the identification of documents received from the patent office which trigger a time limit. The time monitoring system in the office of the appellant's representative failed because the sorting of the incoming mail carried out by the clerks D.H. and A.S.

had not been cross-checked and their failure to identify the Revocation Decision led to the result that this document did not undergo the standard procedure for "drop-dead" EPO communications and no time limit was entered in the electronic system Inprotech.

In addition, the appellant had not furnished any proof that during the relevant time period any of the persons working in the Records Department was regularly supervised by a patent attorney or superior in the relevant sections.

Furthermore, neither the named representative nor the "relevant C&R partner" had taken all due care under the circumstances described in order to comply with the time limit for filing the appeal because none of them had realised or tried to verify the time limits to be calculated.

XI. The Appellant requested that the decision under appeal be set aside, that its request for re-establishment of the right to file notice of appeal against the decision of the Opposition Division dated 2 May 2012 be allowed and that the appeal be considered admissible.

Respondents I and II requested that the appellant's request for re-establishment of rights be rejected and that the appeal be dismissed as inadmissible.

At the end of these proceedings the chairman of the Board closed the debate and announced that the decision would be given in writing.

## Reasons for the Decision

### *Applicable provisions*

1. According to Article 1(1) of the Administrative Council's decision of 28 June 2001 on the transitional provisions under Article 7 of the Act revising the European Patent Convention of 29 November 2000, Article 108 EPC is to be applied to the present case.
  
2. Pursuant to Article 1(5) of said decision, "*Articles 121 and 122 [EPC 2000] shall apply to European patent applications pending at the time of their entry into force and to European patents already granted at that time, in so far as the time limits for requesting further processing or re-establishment of rights have not yet expired at that time*". As the time limit for the requested re-establishment was triggered by events occurring in July 2012 (i.e. after the date of entry into force of the EPC 2000 in December 2007), Article 122 EPC 2000 is applicable to the re-establishment issues in the present case.

### *Admissibility of the appeal*

3. Pursuant to Article 108, first sentence, EPC, a notice of appeal must be filed within two months after the date of notification of the decision appealed, and pursuant to the second sentence of this provision no appeal is deemed to have been filed until the fee for appeal has been paid. In the present case, the time limit for filing a notice of appeal and paying the appeal fee expired on 12 July 2012 (Rules 126(2) and 131(2) and (4) EPC). The notice of appeal together with



the debit order for the appeal fee were indisputably received on 19 July 2012. Therefore, the appeal should be deemed not to have been filed according to Article 108, second sentence, EPC, unless the appellant's application for re-establishment can be allowed.

*Appellant's request for re-establishment of rights*

4. The request for re-establishment of rights complies with the formal requirements of Article 122(1) in conjunction with Rule 136(1) and (2) EPC. The cause of non-compliance was removed in the evening of 16 July 2012 when the appellant's representative realised that he had not arranged for the notice of appeal to be filed. The request for re-establishment together with the debit order for the required fees was filed on 25 July 2012 and, therefore, within the prescribed two-month time limit.

*Jurisprudence on the requirement of "all due care"*

5. In accordance with Article 122(1) EPC, an applicant has his rights re-established upon request if he was unable to observe a time limit vis-à-vis the EPO "in spite of all due care required by the circumstances having been taken". Where the applicant has authorised a professional representative to represent it before the EPO, the "all due care" requirement applies to the professional representative (see e.g. decision J 3/93 of 22 February 1994, reasons, points 2 and 2.1). It is the established case law of the Boards of Appeal that in a large firm this "all due care" requirement is only fulfilled if the non-compliance with the time limit

results from an isolated mistake within a normally satisfactory system for monitoring time limits (see e.g. decision T 428/98, OJ EPO 2001, 494, reasons, point 3.3) and if at least one independent cross-check is built into the system (decision T 1726/08 of 6 October 2009, reasons, point 13). The systems used for the monitoring of time limits may include the use of specialised computer systems or software. However, whether any system fulfils the requirement of "all due care" depends on the individual circumstances of each case (see e.g. decision T 902/05 of 27 March 2006, reasons, point 6).

If the representative has entrusted to an assistant the performance of routine tasks such as noting time limits, the same strict standards of all due care are not expected of the assistant as are expected of the applicant or his representative. 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 shown that he exercised the necessary due care in dealing with his 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 e.g. decision T 1465/07 of 9 May 2008, reasons, point 18).

*"All due care" under the circumstances of the present case*

6. Applying the foregoing principles to the present case, the Board is not satisfied that the appellant's monitoring system was sufficient to meet the

- requirement of "*all due care*" under Article 122(1) EPC as applied by the Boards of Appeal. In particular, the Board does not share the appellant's opinion that a combination of exceptional circumstances led to the result that the time monitoring system of its large firm failed in an excusable way. Rather, the Board assesses these "exceptional" circumstances as an indication that C&R's time monitoring system lacked reliability under the circumstances of the present case.
7. Although there is no proof that the Revocation Decision had been stapled to the back of the minutes, the Board accepts in favour of the appellant that this indeed happened at the EPO. However, this may be undesirable but it is not a faulty handling of the outgoing mail because it is common practice to staple items of outgoing mail together and any recipient of an official letter must be aware of this practice and is not freed from his duty to read all the sheets of a document.
  8. In the following the Board will discuss and assess the decisive processing steps as described by the appellant with regard to the requirement of "*all due care*".
  9. The fact that the Revocation Decision passed through so many hands without being identified as such indicates that these persons were not sufficiently instructed that mail must be read completely and thoroughly, or that no effective cross-check was performed.
  10. In the present case, the first mistake happened when the clerk A.S. assisted Mr D.H. with sorting the incoming mail and neither of them identified the Revocation Decision possibly stapled to the back of the

Minutes.

11. Consequently, Mr A.S. was not able to carry out an independent cross-check of this first sorting when acting as team leader of the Records Department, because the Board cannot exclude the possibility that it was he who made the first mistake.
12. Ms T.L. could not perform any cross-check because she did not get the copy of the cover sheet of the Revocation Decision.
13. Even if the experienced clerks Mr R.W. and Mr E.G. were only concerned with checking the correct reference numbers of the documents, they should have flicked through all the pages to do their job properly and could then have identified the Revocation Decision.
14. The appellant claimed that Ms M.N. would have been entrusted with crosschecking the first mail sorting, and referred to the statement in Mr Y's declaration that:

*"The file with the mail attached to it is then passed to another experienced clerk, Ms M.N., for further processing, including input of any due dates into Inprotech".*

The Board is not convinced that Ms M.N. receipted the file in the present case because Mr R.W. initialled the receipt stamp on the minutes instead of Ms M.N. But even if Ms M.N. did indeed perform this cross-check, that would be a further clerk who failed to read the documents completely and thoroughly. The failing of

several clerks is an indication that they were not sufficiently instructed in performing their tasks, and not regularly supervised. In this regard the Board agrees with the respondents that Mr X's and Mr Y's declarations are not properly substantiated. It is not sufficient to declare that a clerk is one of the most senior and experienced clerks, or familiar with Revocation Decision, without showing in detail how his day-to-day work is supervised.

15. In the Board's view the series of failures continued when Mr Y, one of the appellant's representatives, got the paper file and signed the delivery card and acknowledgment letter with the date that was stamped on the Minutes, but without reviewing the documents that were being acknowledged.

The appellant explained this failure by the fact that the documents had to be communicated as soon as possible to Mr X, the attorney responsible for managing this case. The Board does not agree with this view. The signing of an acknowledgment letter is a highly important legal action in the patent application procedure and must not be performed without reviewing the documents received. That was the reason why this task was correctly allocated by C&R to an attorney and not to an experienced clerk. The appellant rejected the Board's preliminary opinion that the cause of the mishandling of the Revocation Decision also had to be seen in the shared responsibility between Mr Y and Mr X because of Mr X's pre-agreed overall responsibility to manage the case. However, signing the acknowledgment letter and reviewing the documents to identify their nature cannot be separated. A correct processing of the

documents would have required that either Mr Y or Mr X both signed and identified the documents.

16. A further failure happened when Mr X got Ms S.W.'s email indicating that C&R had received two documents, the Minutes and the Revocation Decision of the present case, and did not open and read the attached documents and did not carry out his own checks to ensure that the dates had been properly docketed. It is undisputable that Mr X would have noticed the missing ticks and due date markers on the cover sheet of the Revocation Decision if he had read the scanned documents. In his declaration Mr X stated inter alia that:

*"I make a point of checking due dates on EPO communications by C&R's Records Department. This almost invariably happens in the context of reporting the communication to the client. In the present case, I did check the deadline for appeal, but I did so in the context of responding to Ms M.B.'s email. I therefore had in front of me the copy of the Decision, which she had provided, rather than the copy attached to Ms S.W.'s email. That meant that I did not see the absence of due date markings by C&R's Records Department on the Decision."*

The Board holds that it is a serious mistake not to work on the basis of C&R's own documents and it is not in accordance with the proper discharge of a professional representative's duty to make decisions without proofreading one's own documents. In addition, Mr X was not entitled to rely on Ms S.W.'s statement in the email of 25 July 2012 that the Minutes and the Revocation Decision were attached to the email without

checking the documents and at least verifying the correct receipt stamp date, because this date could have triggered a later time limit for filing an appeal (Rule 126(2) EPC). This handling of incoming mail is not a mere isolated error but a systematically flawed way of processing a case.

17. Furthermore, on 16 May 2012, Mr X was explicitly instructed by his client to file an appeal but he delayed the preparation of the notice of appeal due to other tasks, without checking whether the due date had been properly recorded either by consulting up in *Inprotech* or at least by reviewing the electronic documents of C&R. Filing an appeal is a highly critical legal act, and it does not correspond to "*all due care*" for the responsible attorney only to rely on a normally satisfactory functioning of a system, without making sure that he would be reminded of the date if necessary (see similar decision T 439/06 of 31 January 2007, reasons, points 8 and 10).
18. Lastly, the Respondents were right to point out that the appellant cannot argue that the time monitoring system of C&R worked reliably for many years, because Mr X left the C&R partnership in June 2011 and no longer visited its offices on a daily basis. Contrary to the appellant's submissions, the Board holds that this organisational change weakened the existing time monitoring system in such a way that it failed in the present case (see point 15 above).
19. The appellant further argued that in assessing the requirement of "*all due care*" under Article 122(1) EPC it should be borne in mind that the notice of appeal

was filed only a short time after the due date and that the public should have been aware that an appeal would be filed.

The present Board does not share the appellant's opinion that the principle of proportionality can be applied when assessing the requirement of "all due care" under Article 122(1) EPC. Rather, it takes the view that the requirement of "all due care" means that only circumstances which happened before the time limit expired can be considered or, in other words, the obligation to exercise "all due care" must be assessed in the light of the situation as it stood before the time limit expired (see decisions T 1465/07 of 9 May 2008, reasons, point 16, and T 439/06 of 31 January 2007, reasons, point 15).

20. In considering the requirement of "all due care" under Article 122(1) EPC, the Boards have ruled in numerous decisions that the circumstances of each case must be looked at as a whole (see e.g. decision T 1465/07 of 8 May 2008, reasons, point 18). In the present case, looking at the whole series of failures and mistakes which took place, the Board sees no basis to argue that the failure to meet the appeal time limit could be considered an isolated mistake in a well functioning time monitoring system.

*Final conclusions*

21. As, therefore, the circumstances of the present case do not satisfy the requirement of "all due care" pursuant to Article 122(1) EPC, the request for re-establishment must be refused.



Consequently, both the notice of appeal and the payment of the appeal fee were belated and the appeal is deemed not to have been filed pursuant to Article 108, first sentence, EPC. Furthermore, as there is no appeal in existence, the appeal fee must be reimbursed (decision J 21/80 of 26 February 1981, reasons, point 4, OJ 1981, 101, decision T 493/08 of 29 September 2009, reasons, point 7).

## **Order**

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

1. The appellant's request for re-establishment of rights is refused.
2. The appeal is deemed not to have been filed.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

C. Vodz

G. Raths