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**Datasheet for the decision
of 12 January 2026**

Case Number: T 0129/24 - 3.2.04

Application Number: 16715889.8

Publication Number: 3270749

IPC: A47J31/44

Language of the proceedings: EN

Title of invention:

FOAMING DEVICE AND CORRESPONDING METHOD

Patent Proprietor:

Rancilio Group S.p.A.

Opponent:

J.M. de Jong Duke Automatenfabriek B.V.

Headword:

Relevant legal provisions:

EPC Art. 99(1), 113(1), 122

EPC R. 77(1), 79(1), 112

Keyword:

General principles - protection of legitimate expectations -
erroneous information from EPO - No

Decisions cited:

G 0002/97

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0129/24 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 12 January 2026

Appellant: J.M. de Jong Duke Automatenfabriek B.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 November
2023 rejecting the opposition as inadmissible
pursuant to Rule 77(1) EPC.**

Composition of the Board:

Chairman A. Pieracci
Members: J. Wright
K. Kerber-Zubrzycka
G. Martin Gonzalez
M. Millet

Summary of Facts and Submissions

- I. The appeal was filed by the opponent against the decision of the opposition division to reject the opposition as inadmissible, on the basis of Rule 77(1) EPC.
- II. The opposition division decided that the opposition was deemed not filed for not paying the prescribed fee in time.
- III. The Board issued a summons to attend oral proceedings. With a letter of 24 September 2025, the appellant informed the Board that it did not intend to attend the oral proceedings and requested a decision based on the contents of the file. The Board cancelled the oral proceedings and has decided the case in writing.
- IV. The appellant requests that the decision under appeal be set aside and that opposition be remitted to the opposition division for further prosecution.
- The respondent-proprietor requests that the appeal be dismissed.
- V. The arguments of the parties relevant to the decision are set out in the reasons for the decision presented below.

Reasons for the Decision

1. The appeal is admissible.
2. In the appellant's letter announcing its intention not to attend the scheduled oral proceedings, it did not

explicitly withdraw its request for oral proceedings. In accordance with a large part of decisions in such cases (see Case Law of the Boards of Appeal, 11th edition, 2025 (CLBA) III.C.5.3.2 a)), the Board in this case treats the announcement of non-attendance as equivalent to a withdrawal of the request for oral proceedings. In the present case the appellant also requested a decision based on the contents of the file. The respondent-proprietor emphasised in a letter dated 17 November 2025 that it only requested oral proceedings on the condition that the Board would not confirm the impugned decision, which is not the case in this decision. Therefore, the Board is satisfied that in cancelling the oral proceedings and deciding the case in written proceedings, the right to be heard of both parties has been respected (Article 113(1) EPC).

3. Background

3.1 At different places in the file documents and the impugned decision, the appealing party has been variously referred to as the "opponent" and the "purported opponent". In this decision the Board will use the term "opponent" as a convenient label to cover both cases without implying anything as to the actual status of the appealing party in the opposition proceedings.

3.2 A notice of opposition was filed by the appellant-opponent on 20 August 2020, the last day of the nine month opposition period. No opposition fee was paid within the opposition period, as Article 99(1) EPC requires for the notice of opposition to be deemed to have been filed.

3.3 The opposition division issued a communication dated 29 September 2020 noting loss of rights under Rule 112(1) EPC which stated: "the opposition by J.M. de Jong Duke Automatenfabriek B.V. (OPPO 0001) is deemed not to have been filed pursuant to Article 99(1) EPC. The opposition fee was not paid". As means of redress a written application for a decision within two months of the communication under Rule 112(2) EPO was mentioned.

3.4 The appellant-opponent replied to this communication in a letter dated 9 October 2020, confirming that the opposition fee had indeed not been paid on time but requested that "the opponent be allowed under article 122 EPC to still pay the fee for Opposition and that his rights to have this patent re-examined in opposition be re-established". The fee for re-establishment of rights and the opposition fee were paid on 9 October 2020.

3.5 In a communication dated 21 May 2021, the opposition division informed the opponent that re-establishment of rights was not available as a means of redress for the opponent. It also informed the opponent as follows:

"Payment of the opposition fee

Opposition was filed with EPO Form 2300 on 20.08.2020. However, the method of payment was not specified on the mentioned form. Having regard to the circumstances including technical aspects, the EPO has come to the conclusion that the opposition fee is considered deemed to have been paid due in time, i.e. on 20.08.2020".

3.6 In a letter dated 27 October 2021 (see pages 1 to 10), the proprietor explained why it considered that the

opposition division should consider the opposition to be inadmissible and/or not to have been filed.

3.7 At oral proceedings before the opposition division on 27 June 2023 (see minutes page 1) the topic of whether or not the opposition had been filed was discussed. At the end of the oral proceedings the opposition division came to the conclusion that the opposition was deemed not to have been filed.

4. Impugned decision (section 18), question as to whether the opposition should be deemed to have been filed

4.1 In its decision, the opposition division considered the opponent's three lines of argument as to why the opposition should be deemed to have been filed. These were that:

- the opponent had received no warning on filing that the payment method had not been specified,
- The opponent's representative held a deposit account with the EPO which should have been debited and
- The opposition division's communication of 21 May 2021 had created legitimate expectations that the opposition was deemed filed.

The opposition division further stated that the request for re-establishment of rights filed on 9 October 2020 was inadmissible.

4.1.1 To the first of the above three lines of argument (decision, reasons, 18.5 to 18.8), the division explained (as summarised by the Board) that all procedures before the EPO were governed by the general principle of the protection of legitimate expectations (see G2/97), thus parties should not suffer a

disadvantage because of erroneous information or a misleading communication from the EPO. Additionally the EPO should warn applicants of any loss of right if such warning could be expected in good faith. However, the division noted that the principle of good faith did not impose an obligation on the EPO to warn a party of deficiencies lying within the area of the party's own responsibility. In this context the EPO did not provide any misleading information [on filing of the opposition] and the payment of the opposition fee is entirely the responsibility of the opponent. Moreover, since the opposition was filed on the last day of the opposition period, the EPO could not have detected the non-payment of the opposition fee in time to warn the opponent (see Case Law of the Boards of Appeal, 11th edition July 2025 (CLB), III.A.4.1.1).

- 4.1.2 With regard to the second line of argument (deposit accounts), in essence the division explained that it did not find it convincing because fees can only be debited if an electronic debit order is filed, which had not happened in the present case, nor was any intention to pay in this way evident from the opposition grounds.
- 4.1.3 The division explained that the request for re-establishment under Article 122 EPC was inadmissible, because according to the wording of Article 122(1) EPC re-establishment was only open to applicants and proprietors and the exceptional situation in case G1/86 was not comparable to the present case.
- 4.2 These aspects of the decision have not been challenged by the opponent in appeal. Nor does the Board see any reason as to why they might be wrong.

4.3 The opposition division explained (reasons, point 18.4) the opponent's third line of argument as follows:

"In a third line of arguments presented primarily in the submissions of April and June 2023 the purported opponent argued that with the communication of the EPO dated 21 May 2021 a legitimate expectation was created that the opposition was deemed filed. According to the purported opponent, the findings in this communication had the character of an irrevocable decision of the office, so no contradictory decision could be taken at a later stage. BoA decisions J 14/94 and T 0595/11 were cited in support. Furthermore, the patentee did not file an appeal against said communication under Rule 112(2) EPC, i.e. appeared to agree to the findings in said communication."

4.4 The opposition division did not find this line of argument to be convincing (see decision, reasons, points 18.11 to 18.13). The division's position is summarised by the Board as follows:

4.4.1 The opposition had already been deemed not filed in the Rule 112(1) EPC (loss of rights) communication of 29 September 2020, prior to the 21 May 2021 communication. The proprietor contested the division's position in the latter communication with regard to the opposition being deemed to have been filed in their letter of 27 October 2021, i.e. in their first submission after receiving the communication of the notice of opposition.

4.4.2 The division was of the opinion that no legitimate expectations were created because the issue of whether the opposition was deemed filed had been raised by the division and the proprietor at the earliest

opportunities, which was different from the situations in the cited decisions.

- 4.4.3 The communication of 21 May 2021 was not an interlocutory separately appealable decision but merely information on the case which neither terminated the proceedings nor allowed a separate appeal. It also noted that admissibility of an opposition may be re-assessed at any stage of the opposition proceedings. The division concluded that it was not convinced by the [opponent's] third line of arguments.
- 4.5 In its appeal grounds (pages 2 to 5 - "Arguments") the appellant-opponent took issue with this aspect of the decision as follows (as summarised by the Board):
- 4.5.1 In its 21 May 2021 communication, the opposition division shared the opinion of the opponent by coming to the conclusion that "the opposition fee was in fact paid in due time, i.e. on 20 August 2020". It also refused the request for re-establishment.
- 4.5.2 This [fee paid] finding superseded the earlier loss of rights finding and became a legally binding legal fact that was not open to later reconsideration, unlike a decision which can be challenged in appeal. Any other interpretation of the communication of 21 May 2021 would deprive the opponent of filing an appeal against a decision to the opposite, including challenging the division's finding on re-establishment. The division's finding that the fee was paid on time was not "a preliminary view", nor conditional or provisional so it must be considered to be a final and irrevocable legal fact.

- 4.5.3 The subsequent steps taken by the division, treating the [appellant] as a legitimate party and inviting the proprietor to file observations confirmed that the opposition was to be treated as having been filed.
- 4.5.4 The proprietor's argument that the opposition fee would not have been paid in due time had already been decided [in favour of the opponent] and so should no longer have been debated. The opposition division should have treated the proprietor's objections as concerning what had already been decided and thus late and not a matter which should have been discussed inter-partes involving the proprietor. By reopening this (late payment of the opposition fee) issue, the opposition division made a procedural error, justifying the decision being overturned.
- 4.5.5 Relevant to the case is T595/11 in which legitimate expectations arose because the EPO had given no warning but remained silent for years about an appeal fee that had not been paid. The present case is stronger because the opposition division confirmed the appeal fee had been timely filed.
- J14/95 is also relevant because it found that an applicant cannot suffer a disadvantage because it relied on a misleading communication and the EPO cannot later reverse its position without violating good faith.
- 4.6 The Board does not find the appellant's arguments as to why the impugned decision should be revised convincing.
- 4.6.1 The principle of the protection of legitimate expectations is a general principle well established in EU law and generally recognised in the EPC contracting

states and boards of appeal case law (see CLB III.A.1). The protection of the legitimate expectations of users of the European patent system has two main principles. It requires that the user must not suffer a disadvantage as a result of having relied on erroneous information or a misleading communication received from the EPO. It also requires the EPO to warn the applicant of any loss of right if such a warning can be expected in good faith. This presupposes that the deficiency can be readily identified by the EPO (see CLB, *ibid*).

4.6.2 In the present case no legitimate expectations were created because the above conditions were not fulfilled as will be explained in the following paragraphs.

4.6.3 Regarding point 4.5.1 above, contrary to how the appellant has argued, the opposition division did not conclude (communication of 21 May 2021) that the opposition fee was "in fact paid on time". Rather it concluded that the "opposition fee is considered deemed to have been paid due in time, i.e. on 20 August 2020". In other words the opposition division merely treated the fee as *if* it had been paid on 20 August 2020 which was the last day of the 9 month opposition period.

The appellant does not otherwise dispute the opposition division's statement of fact in its decision (facts and submissions, 5) that the opposition fee was paid on 9 October 2020 together with a fee for re-establishment of rights under Article 122 EPC. Indeed the appellant confirmed this in its appeal grounds (page 1, second bullet point), thus it appears indisputable that *in fact* the opposition fee was paid late, several weeks after the end of the nine month opposition period.

As to the appellant's request for re-establishment, the communication of 21 May 2021 was not a decision *refusing* re-establishment, it merely contained a statement to the effect that re-establishment was not available to an opponent.

- 4.6.4 With regard to the appellant's arguments summarised above in 4.5.2, the information in the opposition division's communication of 21 May 2021 deeming the opposition fee to have been timely paid, revised its previous position (loss of rights communication of 29 September 2020).

Nevertheless, contrary to how the appellant has argued, the Board does not consider this information (opposition fee deemed timely paid) to have been "a legal fact", nor final and irrevocable.

Rule 112(2) EPC, reads as follows: "If the party concerned considers that the finding of the European Patent Office is inaccurate, it may, within two months of the communication under paragraph 1, apply for a decision on the matter. The European Patent Office shall take such decision only if it does not share the opinion of the party requesting it; otherwise, it shall inform that party".

Whatever the rights or wrongs of the information in the division's communication of 21 May 2021, it appears not to be disputed that it was not an appealable decision under Rule 112(2) EPC second sentence. Rather, as the opposition division noted in its decision (reasons 18.13) its context and content "you are informed as follows..." point to its merely being a communication of information.

The Board is not aware of any provisions in the EPC which might render the division's communication of 21 May 2021 a legal fact which was irrevocable and final, in other words a final decision on any matter. Nor has the appellant explained what these might be.

Rather, since the communication deemed the opposition fee to have been timely paid, it did not terminate the opposition proceedings with a decision adversely affecting the opponent at that stage, but allowed them to continue. In this regard, the Board notes that their continuation at that stage did not deprive the appellant of the possibility of filing appeal as it has argued. On the contrary, the opposition division went on to issue an appealable final decision on the case, which dealt with both the issue of timely payment of the opposition fee (reasons 18 and decision 20) and the issue of re-establishment (reasons, 19 and decision 20). Indeed, the appellant has appealed the decision, so the communication of 21 May 2021 has manifestly not deprived the opponent of the possibility of filing an appeal. Its argument to the contrary is therefore moot.

In the light of this, the Board sees no "procedural abuse" or procedural violation having been caused by the opposition division's issuing its communication of 21 May 2021 informing in favour of the appellant with regard to the opposition fee being deemed to have been paid and later revising its position on that issue. This is all the more true since it is established jurisprudence (see CLBA, IV.C.2.3.1) that the admissibility of the opposition is to be checked ex officio at every stage of the opposition proceedings.

4.6.5 Moreover, the Board does not consider that, after issuing its communication of 21 May 2021, the

opposition division's having treated the opponent as a legitimate party to the proceedings means that the information in that communication could not be reconsidered at a later stage of the proceedings. The opposition division's treating the opponent as a legitimate party is merely consistent with its having revised its position at that time with regard to the opposition fee (deemed paid).

- 4.6.6 Regarding the appellant's arguments summarised above in point 4.5.4, the opposition division issued a communication according to Rule 79(1) EPC, dated 18 June 2021 requesting the proprietor to comment on the notice of opposition. The proprietor filed its observations in a timely manner on 27 October 2021 including with regard to the issue as to whether the opposition fee had been timely paid.

Therefore, the proprietor's comments were not late but rather filed at the first opportunity. Nor, as the Board has already explained, had the "opposition fee issue" already been irrevocably decided upon with the division's communication of 21 May 2021. Therefore, the Board is not convinced that the proprietor's comments on the issue should have been rejected by the opposition division as late filed.

Moreover, although the admissibility of the opposition must be checked ex-officio throughout the opposition proceedings, this does not mean that the proprietor is excluded from commenting on it, including the question as to whether the opposition fee had been timely paid. A finding to the contrary in this case would not be possible because it would infringe the proprietor's right to be heard under Article 113 EPC.

4.6.7 Furthermore, in the annex to the summons for oral proceedings of 9 December 2022, the opposition division already communicated to the appellant its preliminary opinion that the payment of the opposition fee could not be accepted as having been received in due time and that the request for re-establishment was inadmissible. As a consequence, the opposition division did not deem it expedient to give a preliminary opinion on the grounds for opposition.

4.6.8 With regard to the appellant's arguments summarised by the Board in point 4.5.5, the Board takes the view that T595/11 is not relevant to the present case. In that case, a formal check that the correct appeal fee had been paid had not been carried out four years after the filing of the appeal (see reasons point 1.7 and 1.8), and the board in that case considered that after such a long time, since the issue had not already been raised, a legitimate expectation that the fee had been correctly paid was created.

The present case is not comparable in that the formal check that the opposition fee had been paid was not delayed but timely carried out at the start of the opposition proceedings and the opponent correctly notified of the result that it had not been paid (see communication noting loss of rights of 29 September 2020). The Board also does not see that any legitimate expectations comparable to those considered in T595/11 were created by the opposition division's communication of 21 May 2021, informing the opponent that the opposition fee was deemed to have been paid. This is because the issue had already been raised and the opponent was aware that the proprietor had not commented on the matter at that stage of the proceedings. Indeed, the proprietor questioned the

correctness of the information in the communication of 21 May 2021 at its earliest opportunity (27 October 2021) about five months after the communication. This position was taken up by the opposition division in its annex to the summons of 9 December 2022. Consequently, in the present case the question as to whether or not the opposition fee had been timely paid was not hidden from the parties for several years such that they might have had a legitimate expectation that it had been paid. On the contrary, the opposition division's revising its position on the issue at the beginning of the proceedings and the proprietor's taking issue with that revised position drew attention to it as a controversial issue at the earliest opportunity in the proceedings. Therefore, the present case is not comparable to that of T595/11 with regard to the question of legitimate expectations.

By the same token, the present case is not similar to J14/94 where, during a long period of time the EPO, by its conduct led the parties and the public to the legitimate belief that no loss of rights had taken place through the non-payment of a renewal fee. The board in that case found (see headnote I) that: "If, during a long period of time, the EPO by its conduct leads the parties and the public to the legitimate belief that no loss of rights has taken place, the EPO cannot later refer to a loss of rights which occurred several years previously without offending against the prohibition of "venire contra factum proprium" and therefore contravening the principle of good faith.

In the present case, this Board considers that the opposition division's diverging statements about payment of the opposition fee and the controversial discussion of the matter by the proprietor around the start of the opposition proceedings meant that the parties could not, in good faith, have been led to a legitimate belief that the only possibility was that the opposition fee should be deemed to have been timely paid.

5. For all these reasons, the appellant's arguments have not convinced the Board that the opposition division erred in finding that the opposition is deemed not filed for not paying the prescribed fee in time (impugned decision, reasons 20). Therefore the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. Pieracci

Decision electronically authenticated