

3. Further processing under Article 121 EPC

Under Art. 121(1) EPC, the applicant can apply for the further processing of his application if he fails to observe a time limit vis-à-vis the Office. However, Art. 121(4) and R. 135(2) EPC lay down exceptions to this general rule, especially with regard to the time limits for priority, remedies and the request for further processing and re-establishment of rights, and with regard to the non-observance of certain time limits for which a special remedy provision exists in the Implementing Regulations (e.g. R. 58 and 59 EPC). Hence, in contrast to the provisions under the EPC 1973, further processing can be applied to the time limits for the payment of filing, search and designation fees, the national basic fees and the examination fees, and to the time limit for filing the request for examination (OJ SE 4/2007; MR/2/00, 157). The request is made simply by payment of the prescribed fee (OJ SE 5/2007).

In J 37/89 (OJ 1993, 201) the Legal Board pointed out that the applicants could overcome a loss of rights under Art. 96(3) EPC 1973 (which corresponds to Art. 94(4) EPC) resulting from the **refusal of a request for a time-limit extension** by requesting further processing in accordance with Art. 121 EPC 1973. At the same time, they could request reimbursement of the fee for further processing. This secondary request had to be decided on in connection with the final decision. Under Art. 106(3) EPC 1973 (Art. 106(2) EPC), the decision on the secondary request could be appealed together with the final decision. The appeal could also be confined to contesting the decision on the secondary request (see also J 29/10).

In J 47/92 (OJ 1995, 180) the Legal Board stated that further processing under Art. 121 EPC 1973 was available only in respect of those time limits the duration of which was to be determined or set by the EPO. This question has been overtaken by the new version of Art. 121 EPC which applies irrespective of whether the time limits are set by the EPO or are specified in the Convention or Implementing Regulations (MR/2/00, p. 157).

In J 16/92 the Legal Board held that the omitted act within the meaning of Art. 121(2) EPC 1973 (R. 135(1) EPC) consisted in filing a reply in substance to a first communication. It was not completed by filing a request for an extension of time for submitting that reply, since a request for a time limit was not equivalent to the act the party in question had proposed performing within the time limit requested.

In J 8/18 the appellant argued that further processing under Art. 121 EPC should be available in respect of missing the time limit in R. 49ter.2(b)(i) PCT. The Legal Board pointed out that Art. 121(4) EPC expressly ruled out further processing inter alia in respect of the time limit for requesting re-establishment of rights. A request for restoration of rights as specified in R. 49ter.2 PCT was equivalent, and identical in legal nature, to a request for re-establishment of rights under the EPC. The EPO was not entitled to grant further processing under Art. 121(4) EPC.

In T 646/20 the examining division had issued a decision to grant based on the applicant's explicit approval. Following the decision to grant, the appellant voiced its disapproval together with a request for further processing. The board held that in the case of grant an