In **J 18/98** the examining division had refused the applicant's application for restitutio in integrum. An appeal was filed against that decision. From the established case law on Art. 122(3) EPC 1973 the Legal Board concluded that facts submitted only with the statement of grounds of appeal could not be taken into account, since the function of appeal proceedings was only to give a judicial decision upon the correctness of an earlier decision of the department of first instance (**T 34/90**, OJ 1992, 454).

In **T 257/07** the board stated that it had been only one year after the removal of the cause for non-compliance that the appellant qualified certain statements previously made and added new facts that previously went unmentioned, in particular regarding the system for managing files and deadlines. This omission could not be subsequently remedied by the addition of further facts, as case law would only allow the appellant to "submit further evidence which clarifies the facts which were set out in the application for re-establishment" (**J 2/86**, OJ 1987, 362; **T 261/07**; see also **T 742/11**, **T 2274/11**, **J 6/14**).

In **J 16/11** the Legal Board pointed out that the boards of appeal had consistently ruled that facts pleaded for the first time during the appeal proceedings should in principle not be taken into consideration (see **J 18/98**, **T 257/07**). In the case at issue, the board had, by its communication, informed the appellant that the evidence currently on file did not seem convincing enough and, exceptionally, gave the appellant an opportunity to improve its case at this late stage of the proceedings. However, the representative, instead of filing evidence, produced a "sworn statement" written by the appellant himself. Given that the new submission did not complement the already existing facts, but presented a new situation, these facts and evidence had to be disregarded.

5.2. General comments on due care

In numerous decisions the boards have ruled on whether "all due care required by the circumstances" had been taken. In considering this issue, the circumstances of each case must be looked at as a whole (**T 287/84**, OJ 1985, 333; **J 17/16**). The obligation to exercise due care must be considered in the light of the situation as it stood before the time limit expired. In other words, the steps the party took to comply with the time limit are to be assessed solely on the basis of the circumstances applying at that time (see e.g. **T 667/92** of 10 March 1994, **T 381/93** of 12 August 1994, **T 743/05**, **J 1/07**, **T 1465/07**, **J 14/16**, **T 578/14**). The requirements of re-establishment, and in particular of due care, **must not be interpreted in an excessive manner** that unreasonably restricts access to the board and thus prevents the board from deciding on the merits of the case (**T 1465/07**).

In **T 30/90** the board held that the allowability of applications for re-establishment hinged on whether the conduct of the appellant and/or his representative, during the entire period after the relevant decision, was indicative of "all due care required by the circumstances". In this connection, "all due care" meant all appropriate care, i.e. as much as would be taken under the circumstances by the **average reasonably competent patentee/representative** (see also **J 11/09**). The board in **T 1289/10** held that as a general rule, a representative acting reasonably would at least take account of known problems and apply known solutions to avoid them.