

to meet its obligation to provide clarifications or advice, a request for re-establishment filed within the period of one year can, when the principle of the protection of legitimate expectations is taken into account, be treated as valid even though the fee for re-establishment was not paid until after the period of one year had expired. In the case in hand, the requester's right to be treated as though the non-observance had not occurred took precedence over third parties' interest in legal certainty, which the one-year period in Art. 122(2), third sentence, EPC 1973 is intended to ensure.

4.2. Inability to observe a time limit

The word "unable" in Art. 122(1) EPC implies an objective fact or obstacle preventing the required action, e.g. a wrong date inadvertently being entered into a monitoring system (T 413/91, see also T 1054/03, T 1026/06, T 493/08, T 1962/08, T 836/09 of 17 February 2010, T 592/11, T 578/14). Unawareness of the expiry of the time limit must be distinguished from a deliberate act on the part of the applicant (representative) which is, for example, attributable to tactical considerations (see in this chapter III.E.4.2.1). Persistent financial difficulties incurred by the persons concerned through no fault of their own have also been recognised as such an obstacle (see in this chapter III.E.4.2.2).

4.2.1 Deliberate act missing a time limit; tactical considerations

In T 413/91 the appellant's reasons for not filing any statement of grounds were that he had expected an agreement with the proprietor, which, however, did not come about. The board stated that such a reason did not justify re-establishment of rights, pointing out that it was an extraordinary means of judicial remedy. A party who had deliberately chosen not to file a statement of grounds for the appeal could not achieve an appellate review through the back door of a request for re-establishment. See also T 2331/14, T 578/14.

In J 2/02 the Legal Board stated that Art. 122 EPC 1973 did not imply for an applicant any right to have the final effect of an intentional action cancelled. Holding back the payment of the fee for a reason other than being unable to comply with the legal provisions – particularly as a matter of strategy in the circumstances and for tactical considerations – is outside the scope of Art. 122 EPC 1973, and deprives the applicant of the possibility to invoke this article.

In T 1026/06 the board distinguished its case from the situation in T 413/91 and J 2/02, in which the boards had not recognised the act of intentionally allowing a time limit to expire as an obstacle. These two cases differed from the current case, in so far as the parties concerned had deliberately refrained, for motives extraneous to the proceedings, from performing the required actions, whereas the appellant in the current case had been unable to file an appeal because of a mistake of law.

In J 11/09 the representative omitted to make payment of the third renewal fee because he was unwilling to advance the renewal fee on account of unpaid invoices. Accordingly, the renewal fee remained unpaid not inadvertently, but on purpose. Given that payment had been refused on purpose, it was not possible to say that a one-off error had occurred in an otherwise well functioning system in the professional representative's office.