

could not be imposed if there was reasonable doubt as to whether the infringement had occurred.

4.3.7 Receipt of formal documents

See chapter III.S.4. "Spheres of risk and apportioning the burden of proof" and Administrative Council decision CA/D 6/14 dated 15 October 2014 (entry into force: 1 April 2015) amending R. 2, 124, 125, 126, 127, 129, 133 and 134 EPC (OJ 2015, A17; explanatory notice: OJ 2015, A36), discussed in the chapter on notification (R. 126(1) EPC was further amended by Administrative Council decision CA/D 2/19). With respect to the burden of proving receipt, see also chapter III.G.5.1.2 f) below.

The respondent (opponent) in T 1/12 argued that the boards' case law on the applicable standard of proof for proving receipt of documents by the EPO was contradictory. In that context, it cited T 1200/01, which suggested a balance of probabilities, and T 2454/11, which held that a stricter standard of proof was needed to convince the board. This prompted the opponent to draft points of law for referral. The board, however, refused its request for a referral, in particular because according to the principle of free evaluation of the evidence, that evaluation had to be done on a case-specific basis. The standard of proof that the balance of probabilities needed to reach to convince the board was thus left to the discretion of the board itself. The board found no clear contraction between T 1200/01 and T 2454/11. It dealt with the matter of the standard of proof in combination with, in particular, the principle established in the case law of free evaluation of the evidence.

The issue under appeal in T 1200/01 was whether an opposition of the appellant against the patent could be deemed to have been filed. According to Art. 99(1), last sentence, EPC, this was only the case if the opposition fee had been paid within the opposition period. However, in the case at issue no trace of a notice of opposition nor of a voucher for payment of the opposition fee allegedly filed by the appellant had been found within the EPO. The board noted that, concerning the standard of proof to be applied for establishing the receipt of documents not found within the EPO, it was the established case law of the boards of appeal that, even if proof to this effect could seldom lead to absolute certainty, it at least had to show to a **high degree of probability** that the alleged filing had taken place (see also T 128/87, OJ 1989, 406, cited by the board). It also noted that in some previous cases (see T 243/86 and T 69/86, cited by the board) it had been accepted that this standard was met if there were concrete traces of the item sought which, even if they did not show it for certain, indicated a high probability of the lost document having once been in the EPO. Nevertheless, any other means of giving evidence, such as witness testimony, could equally be considered in this context.

The communication noting the loss of rights under R. 112(1) EPC (former R. 69(1) EPC 1973) is deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter failed to reach the addressee or reached him at a later date. In the event of any dispute, it is incumbent on the EPO to establish that the letter reached its destination (R. 126(2) EPC; CA/D 6/14 for the revised wording; former R. 78(2) EPC 1973). In J 9/05 and J 18/05, the only evidence provided by the examining division was a letter from the Deutsche Post referring to the information received from the