

## 5.5. Persons required to exercise due care; requirements regarding due care

Primarily it is up to the applicant (patent proprietor) to show due care. The applicant has to accept the actions of his representative, including the actions of the attorney's assistants and employees, on his behalf (J 5/13 with reference to J 5/80, OJ 1981, 343; J 1/07). The "due-care" obligation is assessed differently, depending on whether an applicant, his representative or an assistant is involved.

### 5.5.1 Due care on the part of the applicant

In J 3/93 the Legal Board ruled that the duty to exercise all due care stipulated by Art. 122 EPC 1973 applied first and foremost to the applicant and then, by virtue of the delegation implicit in his appointment, to the professional representative authorised to represent the applicant before the EPO. The fact that the representative had acted correctly did not exempt his client from suffering the consequences of his own mistakes, or even negligence (see also J 16/93, J 17/03, J 1/07, J 1/13).

#### a) Due care standard

In T 1477/17 the board held that, in principle, a layperson was not expected to show the same attention to detail as was expected of a professional representative when dealing with correspondence in patent matters, since a layperson could not be expected to have the same level of knowledge. Depending on the circumstances, an error on the part of a layperson might therefore be excusable whereas the same error by a professional representative may not. Nevertheless, even a layperson is obliged to exercise all due care in matters for which they have taken responsibility, and must take all steps that can be reasonably expected of a diligent person.

In J 22/92 the Legal Board held that the applicant, who had appointed US attorneys for the purpose of the PCT application, was entitled to believe that a copy of a communication had been sent to the US attorneys as well. The board referred to the principle of proportionality and stated that the loss of the patent application as a result of what may be considered at most a minor procedural irregularity would otherwise appear an extremely severe result. The board held that, in the case in point, the due care to be considered was in fact not that which was expected from a professional representative but that which was expected from an applicant unaware of the proceedings.

In T 2120/14 the board found the examining division's finding of lack of due care by the applicant to be justified in the circumstances, in which the observance of a time limit depended entirely on a single person who, in view of his impending extensive workload and travel, did not take the necessary precautions to ensure that the time limit could be met in case he was prevented from giving timely instructions. The board held that it was clear from the travaux préparatoires to Art. 122 EPC that the possibility of excusing the negligence of an employee who normally carries out his work in a satisfactory manner was not intended to be extended to the applicant or its professional representative (see R 18/13). In the case in hand it was an executive of the company who had failed to exercise all due care, who the board found was acting on behalf of the appellant.