

EPO must act in good faith, and have the responsibility to take all necessary procedural actions to avoid a loss of rights (G. 2/97, R. 4/09).

a) Filing of valid appeal

The Enlarged Board of Appeal held in G. 2/97 that the appellant's responsibility for fulfilling the conditions of an admissible appeal could not be devolved to the board. There can be no legitimate expectation on the part of users of the European patent system that a board will issue warnings with respect to deficiencies in meeting such responsibilities. To take the principle of good faith that far would imply that the boards would have to systematically assume the responsibilities of the parties to proceedings before them, a proposition for which there was no legal justification in the EPC or in general principles of law.

In T. 703/19 the board held that, although it was the appellant's own responsibility actually to pay the appeal fee, the same did not necessarily go for all related aspects of the process. Were that so, the Enlarged Board would not have concluded in G. 2/97 that, in the hypothetical example given there, the board ought to have drawn the appellant's attention to a missing cheque. In the board's view, the point of that example had instead been to illustrate a situation where a clearly identifiable intention to perform a procedural act on filing notice of appeal (payment of the appeal fee) was at odds with what had actually been done and this discrepancy was readily identifiable.

In T. 267/08 the board made it clear that it was under no obligation to warn a party of deficiencies in the filing of an authorisation; rather, the party itself had the responsibility to take all necessary steps to avoid a loss of rights. Responsibility for filing a valid authorisation could not be devolved to the board.

b) Filing of divisional application

In J. 2/08 (OJ 2010, 100), the appellant (applicant) contended that the EPO had violated the principle of good faith on several occasions (omission to inform in respect of filing a divisional application; publication of the divisional application; late noting of loss of right). In his view, by taking no action the EPO induced the appellant into believing that everything was in good order with the divisional application, until it became too late to file an appeal against the decision refusing the parent application. In the board's view it was exclusively the responsibility of the applicant and his representative to decide on the factually and legally most appropriate filing actions to be taken. Furthermore no legitimate expectations concerning the validity of an application may be based on the fact that an application has been published. Finally, the communication under R. 69 EPC 1973 (R. 112 EPC), which is not just a warning but a procedural act, had to be sent after the end of the appeal period.

c) Bank account information

The board in T. 1029/00 decided that the appellant could hardly cite the lack of bank account information on EPO correspondence as the reason for making an incorrect cash payment. Applicants had to ascertain such bank account information for themselves.