

Hence, the burden of proof lay with the appellant. To prove the later delivery, the appellant submitted two documents, neither of which convinced the board of appeal.

Under the EPC, the date of receipt of an item at the EPO is critical when assessing compliance with a time limit. The burden of proof that a filing has been effected falls on the filing party. The impossibility of furnishing proof of a higher probability that an item was filed than that it was not filed, must therefore count against the filing party – as found by the board in T 1200/01. In this particular case, the available evidence did not convince the board that there was a higher degree of probability that the alleged filing had taken place than that it had not. Contrary to the decision in T 1200/01, the board in T 2454/11 found that the strict allocation of the burden of proof to the sender of correspondence addressed to the EPO could not be mitigated by weighing up the probability of receipt. Such an approach to examining the issue would seriously jeopardise legal certainty and water down the standard of legal clarity required in formal procedures such as those before the EPO. The need in disputed cases to interpret the vague legal notion of probability and the judicial exercise of ascertaining whether a greater or lesser likelihood was to be presumed would result in a wide variety of possibly contradictory approaches to the issue. Such inconsistencies would run counter to the need for a transparent and straightforward procedure and therefore had to be avoided in the interests of the public and third parties involved in the proceedings. Consequently, a high probability of delivery could not be a factor in deciding whether correspondence had actually been received. Rather, it was for the sender to prove such receipt to the board's satisfaction.

In J 10/91 the board held that if a letter and attached cheque in payment of a fee, had been lost without further evidence or any high probability that it had been lost in the EPO, the risk was then borne by the sender. Even conclusive evidence that something had been posted could not be treated as sufficient to prove that a document had been received by the EPO. In this respect, the board in J 8/93 stated that if the post failed to deliver a document, the applicant would suffer the consequences for failing to file that document.

Under R. 125(4) EPC (former R. 82 EPC 1973; paragraph 4 not amended by CA/D 6/14) the burden of proof that documents have been duly notified to the parties lies with the EPO. In T 580/06 the question was raised whether the "OK" reference on the transmission sheet of a faxed document was sufficient proof of receipt. In the absence of relevant EPO case law, the board drew on procedural principles developed for notification by fax in German law, the fax transmission in question having arisen in the territory of the Federal Republic of Germany. In line with the German case law on that issue, the board recognised that an up-to-date objective assessment of the question of **receipt of a fax** by the addressee needed to take into account the technology underlying faxes. The high reliability of this technology nowadays was based amongst other things on established technical protocols, according to which modern fax machines operated. On the basis of various considerations the board reached the conclusion that the "OK" reference on the transmission sheet of a fax was to be regarded as proof of an error-free and complete transmission, through which the fax had entered into the area of responsibility of the representative. Once the fax had entered the area of responsibility of the addressee indicated by the reference "OK", then a transfer of risk took place so that the recipient bore the risks in his own sphere.