

in accordance with general principles of law, as applied in the context of administrative law, a procedural means used to achieve a given end (e.g. a sanction following a procedural non-compliance) should be no more than that which is appropriate and necessary to achieve that end. Bearing the principle of proportionality in mind, the loss of the patent application because of the procedural irregularity which had occurred in the case at issue would be a severe result. Moreover, the interests of any third party misled within the meaning of Art. 122(6) EPC 1973 by the fact that the statement of grounds of appeal was filed two days late would be protected by Art. 122(6) EPC 1973. The board allowed thus the application for re-establishment (see also J 22/92, T 869/90 of 15 March 1991, T 635/94 of 25 April 1995, T 804/95, T 27/98 of 7 May 1999).

In J 44/92 and J 48/92 the Legal Board noted that the principle of proportionality only applied in borderline cases, **in support of other grounds** already substantiating to a certain extent the allowance of the appeal. Usually it had been applied where a time limit had been missed by one or two days due to some miscalculation (see below). The Legal Board considered that the principle of proportionality did not assist the appellant as there had been a major system fault, which could not be excused by reliance on the principle of proportionality.

In decision T 971/99 and T 1070/97 the boards stated that Art. 122(1) EPC 1973 did not leave any room for the application of the principle of proportionality, so that the number of days by which a time limit had been missed was irrelevant for deciding whether all due care was applied or not. Only the character of the conduct before the time limit expires was decisive for the consideration of the issue of due care, not the length of the ensuing delay (see also T 439/06, OJ 2007, 491; T 1561/05; T 1465/07).

In T 1465/07 the board interpreted Art. 122 EPC 1973 in the context of the right of access to a court taking into account the case law of the European Court of Human Rights and the European Court of Justice (ECJ). The board was of the opinion that the ECJ's interpretation of the general principle of proportionality could be applied to limitations of the right of access to the boards of appeal, such as rules on time limits, by legislative measures or their application. This means that those measures or their application must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice among several appropriate measures or ways of applying them recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. As for the application of Art. 108 EPC 1973 in conjunction with Art. 122 EPC 1973, the board stated that the principle of proportionality had the consequence that the interpretation of those provisions must not impose means that are inappropriate, unnecessary or disproportionate in relation to the aim to be achieved, namely legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment. Correspondingly, the **conditions for granting re-establishment**, in particular the requirement of due care, **must not be interpreted in an excessive manner** that unreasonably restricts access to the board and thus prevents the board from deciding on the merits of the case. See also T 578/14 and T 1022/14.