

4.3.2 No obligation to scrutinise submissions for deficiencies

J 7/97 concerned an application filed with the EPO by fax. One page of the description was missing, whilst another was transmitted twice. The board took the view that a single page missing from a lengthy description was not an "obvious error" under the case law, at least in the circumstances of this particular case. The applicant could not in good faith expect the EPO to check application documents for completeness on the very day it received them. Nor could any such obligation be inferred from the President's decision on fax transmissions (OJ 1992, 299), in which Art. 3 (now Art. 6, decision of the President of the EPO of 20 February 2019, OJ 2019, A18) required the filing office to notify the sender as soon as possible "where a document transmitted ... is illegible or incomplete"; the latter adjective clearly referred to the transmission rather than the actual document.

In T 585/08 the board found that the deficiency in the request for re-establishment (insufficient statement of grounds and facts, R 136(2) EPC) had not been readily identifiable. First, a number of letters had been filed, and second, it would only have been possible to detect the deficiency if these letters had been studied carefully. In the board's view, the principle of good faith did not impose any obligation on the EPO to scrutinise several letters on file to establish whether grounds and facts with respect to a request for re-establishment were missing. The board distinguished this case from T 14/89 (OJ 1990, 432) in which the lack of substantiation of the request for re-establishment had been readily identifiable.

5. Obligation to enquire in case of unclear nature of request

In J 15/92 the Legal Board held that in the case of a request whose true nature was uncertain (here it was unclear whether it was a request for re-establishment or a request for a decision), the EPO should clarify the matter by asking the requester. It would have been sufficient in the case in hand for the EPO to invite the applicant to define his request more precisely. For the EPO to interpret the request arbitrarily constituted an error rendering the impugned decision null and void (see also J 25/92, J 17/04).

In J 6/08 the board added that a request (for a decision or re-establishment) filed with a view to obtaining the redressal of a loss of rights within the meaning of R 69(1) EPC 1973 (R 112(1) EPC) had to be interpreted by the EPO in the light of the requester's objectively discernible will and taking account of the particular circumstances of the case. In case of doubt the Office is obliged to establish what the requester really wanted and may also be obliged to point out any still outstanding procedural steps in connection with this request (in this case, observance of the period of one year under Art. 122(2) EPC 1973, now R 136(1) EPC).

Though not expressly relying on the principle of legitimate expectation, the Enlarged Board of Appeal held in R 14/10 that in cases where a request of a party during oral proceedings was considered unclear, it was the duty of the deciding body to ask for clarification before deliberation. However, if the requests as read out before the debate was declared closed did not correspond to the petitioner's intention, it was the petitioner's duty to intervene at that point.