

In J. 8/09 the appellant had failed to pay a renewal fee and requested re-establishment of rights. He put forward the principle of proportionality, citing the fact that a company was already producing the system to which the application related and that the consequence of a single late payment of the renewal fee would be disproportionate. The Legal Board rejected this argument. The principle of proportionality could be defined as a duty for a court or an administration to find a balance between a party's error and the legally ensuing consequences when a margin of weighing the importance of the circumstances existed (see J. 5/97). However, when the boards of appeal referred to the principle of proportionality in the case law, it was never as a main ground but in support of other grounds already substantiating, to a certain extent, the allowability of the appeal especially when a reliable system for managing the time limits and an isolated mistake within such a system could be assessed (see J. 44/92 and J. 48/92).

In J. 13/11 the Legal Board stated that the time limits in the EPC aim to serve legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment (see also T. 1465/07, T. 592/11). The severe consequence of a loss of a patent application in the case at issue could not be considered in isolation but had to be assessed against the values of legal certainty and proper administration of justice that are embodied by the time limits appropriate to Art. 122 EPC. The application of the principle of proportionality would empty the time limits of Art. 122 EPC of any content and would make the provisions of this article uncertain. In addition the boards of appeal do not have the power to apply provisions of the EPC contra legem, that is contrary to their unambiguous meaning and purpose.

9. Reimbursement of the fee for re-establishment

9.1. Legal reason for payment of fee

In T. 46/07, the board found that, if the fee for re-establishment of rights is paid after expiry of the two-month period laid down in Art. 122(2) EPC 1973, the application for re-establishment of rights does not come into existence and therefore the fee must be refunded even without a respective request.

In T. 2454/11, the board observed that, in earlier board decisions taken in the light of G. 1/86, requests from an **appealing opponent** for re-establishment of rights had been regarded as "devoid of purpose" or "not validly filed" and the fee refunded (see e.g. T. 520/89, T. 266/97). In the case in hand the board endorsed the view taken more recently in T. 1026/06 that the fee was not refundable. It could only be reimbursed if it had been paid for no legal reason or if a refund was required by a legislative provision. Under Art. 122(3) EPC, a request for re-establishment of rights was not deemed to be filed until the fee had been paid, so payment was required for the request to have effect. There had therefore been a legal reason for its payment and there was no provision requiring a refund.