

In J 11/03, however, the Legal Board agreed with the appellant that the removal of the cause of non-compliance had not taken place before deemed notification in accordance with R 78(2) EPC 1973, since there was no indication that the communication concerning loss of rights had already been received before that date (see also J 10/99).

4.1.2 One-year time limit following the expiry of the unobserved time limit

A request for re-establishment of rights is only admissible within the year immediately following the expiry of the unobserved time limit (R 136(1), first sentence, EPC; Art. 122(2), third sentence, EPC 1973). Under R 136(1), third sentence, EPC, the request for re-establishment of rights is not deemed to have been filed until the prescribed fee has been paid.

In J 16/86 the Legal Board ruled that a request for re-establishment filed over a year after expiry of the non-observed time limit was inadmissible whatever the reasons for its late submission (see also J 2/87, OJ 1988, 330; J 34/92). In J 12/98 the Legal Board held that the words "within the year immediately following the expiry of the unobserved time limit" in Art. 122(2), third sentence, EPC 1973 could not be construed to mean "within one year of the applicant having knowledge of the unobserved time limit". This interpretation would make the starting point for calculating the two-month period referred to in Art. 122(2), first and second sentence, EPC 1973 the same as that for calculating the one-year time limit referred to in Art. 122(2), third sentence, EPC 1973, which would thus deprive Art. 122(2), third sentence, EPC 1973 of any function.

In J 6/90 (OJ 1993, 714) the statement of grounds was not submitted until shortly after the end of the period of one year stipulated in Art. 122(2), first sentence, EPC 1973 but within the period of two months specified in Art. 122(2) EPC 1973, which in the case at issue expired later. The Legal Board of Appeal pointed out that the one-year period served to provide legal certainty. If this period had elapsed, any party could confidently assume that a patent application or patent which had been rendered invalid by the non-observance of a time limit would not be revived. However, if on inspecting the file a third party noted that an application for re-establishment had been made within the one-year time limit, he would have adequate notice. Therefore, to make a valid request for re-establishment of rights within the year immediately following the expiry of the unobserved time limit, it was sufficient if the files contained a clearly documented statement of intent from which any third party could infer that the applicant was endeavouring to maintain the patent application. See also T 270/91, T 493/95, J 6/98.

In J 6/08 the fee for re-establishment of rights was not paid until after the one-year period had expired. The Legal Board referred to the case law (J 16/86, J 34/92, J 26/95, OJ 1999, 668; J 6/98, J 35/03), under which the one-year period fulfils the function of a deadline whose purpose is to ensure legal certainty for the public and the completion of proceedings before the EPO within a sensible and appropriate period of time. In view of the particular circumstances of the case, however, the Legal Board considered that re-establishment was not ruled out since the fact that the conditions for re-establishment had not been met in due time – i.e. payment of the fee for re-establishment within the one-year period – was largely to be laid at the door of the Office itself. Where the Office has failed