

an error of facts the removal occurred on the date on which any person responsible for a patent application should have discovered the error made. This was not necessarily the date of receipt of the communication under R. 112(1) EPC (R. 69(1) EPC 1973) (see T 315/90, J 21/10). If, however, such a communication had duly been served, it may, in the absence of circumstances to the contrary, be assumed that the removal was effected by this communication (see also J 7/82, OJ 1982, 391; J 29/86, OJ 1988, 84; T 900/90; J 27/90; J 16/93; T 428/98, OJ 2001, 494; T 832/99; J 11/03).

In T 261/07, relying on T 949/94 of 24 March 1995, the patentee argued that it had only become aware of an oversight once it was established that the decision of the opposition division had indeed been received. The board however took the view that the cause of non-compliance was removed as soon as the patentee noticed via a file inspection "that something was amiss" (see J 9/86, J 17/89, T 191/82).

In T 198/16 the board stated that the practice of applying the due-care requirement in the context of removal of the cause of non-compliance with a period within the meaning of R. 136(1) EPC could well be seen as extending the meaning of the due-care requirement in a way that enlarges the scope of the essentially substantive criterion by adding to it the function of an extraordinary preliminary admissibility/applicability hurdle. The board stated that this approach to the "removal" criterion, which could not be based on the letter of the law, was therefore doubtful. The board left open the question as to the approach to be followed.

(ii) Presumption as to date of the removal of the cause of non-compliance

If a loss-of-rights communication (R. 112(1) EPC) is served there is: (i) a presumption that removal occurs on the date of receipt of such communication; and (ii) an obligation for the recipient not to ignore it, and to take action. This presumption is, however, rebuttable, in the sense that it is valid unless, due to exceptional circumstances, the cause for non-compliance persisted (J 1/20, T 1588/15). In J 29/86 (OJ 1988, 84) the Legal Board assumed a later date in view of the special circumstances of the case. In T 900/90 the board emphasised that in all cases in which the receipt of the notification under R. 69(1) EPC 1973 (R. 112(1) EPC) could be regarded as the removal of the cause of non-compliance it had to be clearly established that neither the representative nor the applicant was aware that the application had been deemed to be withdrawn before the receipt of that notification. Other cases in which the boards agreed to a date different from that of the receipt of the communication under R. 69(1) EPC 1973 (R. 112(1) EPC) include J 16/93, J 22/97, J 7/99, J 19/04, T 24/04 and T 170/04.

In T 1570/20, the cause of non-compliance was removed on the date the European professional representative became aware of the loss of rights, i.e. upon receipt of the loss-of-rights communication. Removal of the cause of non-compliance did not require any additional knowledge by the professional representative about possible reasons for the loss of rights, such as whether the non-payment of fees was intentional or not. Rather, it was sufficient that the professional representative became aware of the fact that a time limit, with regard to which re-establishment of rights was requested later on, had not been