

4.1.1 Two-month time limit from the removal of the cause of non-compliance

The one-year period is not an alternative to the two-month period; a request has to be filed within two months of the removal of the cause of non-compliance, and no request can be filed more than one year after expiry of the unobserved time limit (J 11/17).

The two-month time limit also applies if the time limits under Art. 102(4) and (5) EPC 1973 have been missed, even if no decision has yet been handed down concerning revocation (G 1/90, OJ 1991, 275). The omitted act must be completed within the same period. The fee for re-establishment of rights is also payable within the same time limit as that stipulated by Art. 122(2) EPC 1973 for the filing of an application for re-establishment (J 18/03).

a) Removal of the cause of non-compliance

In most cases the "cause of non-compliance with the time limit" involves some error in the carrying-out of the party's intention to comply with the time limit (J 29/86, OJ 1988, 84; regarding other possible causes of non-compliance see also in this chapter III.E.4.2. "Inability to observe a time limit").

The removal of the cause of non-compliance occurs on the date on which the person responsible for the application (the patent applicant or his professional representative) is made aware of the fact that a time limit has not been observed (see T 191/82, OJ 1985, 189; T 287/84, OJ 1985, 333; J 29/86, OJ 1988, 84; J 27/88, J 27/90, OJ 1993, 422).

(i) Date of the removal of the cause of non-compliance

In J 1/20 the Legal Board set out that, in its view, to correctly assess admissibility of a request for re-establishment of rights, it must first be established: (i) who was the person responsible for the application; and (ii) when this person was actually made aware of the cause of non-compliance. Removal of the cause of non-compliance is a question of fact, the answer to which thus depends on the relevant person actually becoming aware that a time limit has not been observed, e.g. actual receipt of a communication under R. 112(1) EPC, rather than on a legal fiction of awareness, e.g. deemed notification of the communication pursuant to R. 126(2) EPC. Removal occurs on the date on which the person responsible for the application/patent (normally the authorised representative) becomes aware of an error.

According to earlier decisions, the decisive factor was the time when the person concerned ought to have noticed the error if they had taken all due care (see e.g. J 27/88, J 5/94, T 315/90, T 840/94, J 24/97, J 27/01, T 1026/06, T 493/08, J 1/13, T 1588/15). In J 1/20 the Legal Board considered that this approach did not lead to a correct determination of the date of removal of the cause of non-compliance. In J 27/90 (OJ 1993, 422), the Legal Board stated that the removal of the cause of non-compliance was a matter of fact which had to be determined in the individual circumstances of each case (see also J 7/82, OJ 1982, 391; J 16/93; T 900/90; T 832/99; J 21/10; T 387/11; T 1588/15). In the case of