The assessment of whether the failure to file the international application within the priority period resulted from an isolated mistake within a normally satisfactory monitoring system depends, among other things, on the size of the company of the applicant or agent. The same standard of care as is required of the patent department of a large firm cannot be expected of an individual or a small applicant. In addition, a different standard of due care is required depending on whether the mistake can be ascribed to an applicant, an agent in charge or an assistant.

The EPO as RO considers the facts and circumstances of each particular case, applying the principles summarised in GL/RO 166J-166M. The case law established by the EPO boards of appeal (developed with respect to the re-establishment of rights under Art. 122 EPC) is also taken into consideration when assessing whether due care has been exercised in the respective case. See also GL/EPO E-VIII, 3.2.

R. 26bis.3(f), (g)
GL/RO 166R
GL/RO 166S

If the RO intends to refuse the request for restoration of the right of priority, as it finds that the statement of reasons is insufficient to determine whether the applicant has satisfied the due care criteria or that the due care criteria appear not to have been met, it invites the applicant to submit further evidence and/or observations on the intended refusal within a two-month time limit (Form PCT/RO/158). The RO explains in detail, in the Annex to Form PCT/RO/158, why it intends to refuse the request. After expiry of the two-month time limit, and taking into account the information available to it at this stage, the RO issues a decision to either restore the right of priority or refuse the request for restoration of the right of priority (Form PCT/RO/159).

R. 26bis.3(h-bis)
AI 315
GL/RO 166N
GL/RO 166S
GL/RO 166T

The RO transmits a copy of all related documents received from the applicant to the IB (including a copy of the restoration request, the statement of reasons and any declaration or other evidence), except if it decides, either upon a reasoned request by the applicant or on its own motion, that (parts of) certain documents are not to be transmitted. In the latter case, the RO notifies the IB accordingly. If the RO receives a reasoned request from the applicant not to transmit (a part of) a document to the IB, but nevertheless decides to transmit that (part of a) document to the IB, it also notifies the applicant of this decision (relevant box in Form PCT/RO/159).

The RO takes the decision not to transmit documents to the IB if it finds that a document or part thereof meets the requirements of Rule 26*bis*.3(h-*bis*), namely that:

(i) a document or part thereof does not obviously serve the purpose of informing the public about the international application;

(ii) publication or public access to any such document or part thereof would clearly prejudice the personal or economic interests of any person; and

(iii) there is no prevailing public interest to have access to that document or part thereof.