

1. Introduction

Re-establishment of rights constitutes a legal remedy for curing a loss of rights in proceedings before the EPO. If the requirements of Art. 122 EPC and R. 136 EPC are fulfilled and the request for re-establishment is granted, the requester will be treated as if the loss of rights had not occurred (see Art. 122(3) EPC). After the revision of the EPC, further processing has become the standard legal remedy in cases of failure to observe time limits in the European patent grant procedure (see also chapter III.D.2. "Further processing under Article 121 EPC") and thus in some cases has replaced re-establishment (for a synopsis of the changes see "Case Law of the Boards of Appeal", 6th edition 2010, VI.E.1, and OJ SE 4/2007).

The main requirements for a re-establishment of rights are that the requester has the right to file the request (see in this chapter III.E.2.), he was unable to observe a time limit within the meaning of Art. 122(1) EPC (which is not excluded under Art. 122(4) and R. 136(3) EPC) and this failure had the direct consequence of causing a loss of rights (chapter III.E.3.), the request was filed in time and in due form and the omitted act was made good within the time limit (chapter III.E.4.), and the substantive conditions were met, in particular all due care required by the circumstances had been taken (chapter III.E.5.).

2. Right to file request for re-establishment of rights

Under Art. 122(1) EPC re-establishment of rights may be granted to both the applicant and the proprietor of a European patent. Accordingly, it is a legal remedy that is, in general, not available to opponents.

2.1. Exception for opponent – time limit for filing statement of grounds of appeal

Opponents are not entitled to request re-establishment of rights in respect of the two-month time limit for filing an **appeal** under Art. 108, first sentence, EPC (see T 210/89, OJ 1991, 433; see also T 323/87, OJ 1989, 343; T 128/87, OJ 1989, 406; T 314/01; T 2454/11; T 1946/15); nor in respect of the nine-month time limit under Art. 99(1) EPC for filing the **notice of opposition** and paying the appropriate fee (T 702/89, OJ 1994, 472; T 748/93; T 2254/11).

In G 1/86 (OJ 1987, 447) the Enlarged Board of Appeal held, however, that an **opponent as appellant** might have his rights re-established under Art. 122 EPC if he had failed to observe the time limit for filing the statement of grounds of appeal under Art. 108, third sentence, EPC (established case law, see T 335/06, T 1545/16). The reasons justifying the exclusion of opponents from re-establishment of rights in respect of the time limit for appeal – in particular the patent proprietor's interest in no longer being left uncertain as to whether an appeal had been lodged once this time limit had expired – could not be extended to the time limit for filing the statement of grounds of appeal, because this uncertainty no longer existed. The Enlarged Board applied the general legal principle recognised in the contracting states of the EPC that all parties to proceedings before a court must be accorded the same procedural rights, as a principle deriving from the general principle of equality before the law. Under this principle an opponent must not be