

In T.1908/09 the board observed that if there was more than one applicant the co-applicants had to name a common representative (Art. 133(4) and R. 151(1) EPC). If they failed to do so and one of the applicants was obliged to appoint a professional representative under Art. 133(2) EPC, this representative was deemed to be the common representative. In the case at issue, with the notification of the loss of rights (R. 126(2) EPC) to their common representative (Rule 130(3) EPC) both applicants were made aware of the fact that the time limit had expired.

In J.16/93 the Legal Board held that in the event of exceptional circumstances the cause of non-compliance with a time limit may persist even though the applicant's representatives were duly informed of the loss of rights resulting therefrom. This is the case when a combination of circumstances, which cannot be blamed on either the applicant or its representatives, and which arose in particular from the fact that they had both moved to new addresses and from the illness of a director of the company applying for a European patent, made it impossible for the professional representatives to contact the applicant in due time. This combination of circumstances prevented the representatives from performing the omitted act – i.e. paying the renewal fee for the third year – since they had not received any advance. A representative whose authorisation is silent in this respect and who has not received any funds for this purpose is not expected to advance moneys on behalf of his client out of his own pocket.

c) Legal fiction of deemed notification

In J.7/82 (OJ 1982, 391) the Legal Board held that in a case in which the receipt of a notification was relevant to the question of when the cause of non-compliance with a time limit had been removed, the significant date was the **date of actual receipt** by the applicant. In J.22/92 the Legal Board emphasised that the removal of the cause of non-compliance was a matter of fact and therefore had to be established beyond any reasonable doubt. This was not the case where under R. 78(2) EPC 1973 (in the version in force until 31 December 1998) the notification was only deemed to have been made when despatch had taken place and when the receipt of the letter could not be proved. Thus, the Legal Board considered the date on which the responsible representative of the appellant first became aware of the missed time limit to be the date on which the removal of the cause of non-compliance with the time limit had occurred (see T.191/82, OJ 1985, 189).

In T.428/98 (OJ 2001, 485) it was stated that where a communication from the EPO notified an applicant that he had missed a time limit, the cause of failure to complete the omitted act within the meaning of Art. 122(2), first sentence, EPC 1973 was as a rule removed on the date when the applicant actually received the communication, provided that failure to complete the act was purely due to previous unawareness that the act had not been completed. The legal fiction of deemed notification under R. 78(3) EPC 1973 (in the version in force until 31 December 1998, now R. 126(2) EPC) had no effect on the date of removal of the cause of non-compliance, even if this worked against the applicant because the actual date of receipt of the communication preceded the date calculated according to R. 78(3) EPC 1973 (see also T.1063/03).