

3.1.1 Requirement of pendency when filing divisional application is not a time limit

According to the established case law (see J 19/10) of the boards of appeal, R 36(1) EPC (and R 25(1) EPC 1973 in its version since 2002) sets a condition, not a time limit, for filing a divisional application to any pending earlier European application, namely that the earlier European patent application is pending. In procedural law, the fact that a conditional act can only be accomplished before a particular set of circumstances foreseen by legal provisions occurs (condition), is conceptually different from a set period of time imposed for doing an act (time limit) (J 24/03, OJ 2004, 544; J 3/04; see also J 10/01; J 18/04, OJ 2006, 560; G 1/09, OJ 2011, 336; J 19/10; J 10/12). R 25(1) EPC 1973 in its version prior to 2002 also did not contain a time limit but identified a point in the grant procedure after which a divisional application could no longer be filed, namely the approval of the text according to R 51(4) EPC 1973 (J 21/96, J 4/02).

3.1.2 Designation of States

In J 3/83 the Legal Board explained that the concept of a time limit within Art. 122 EPC 1973 involved a period of time of a certain duration. In the case of designation of states, there was no such period. States had to be designated at a particular time, see Art. 79(1) EPC 1973. With the EPC 2000 this is no longer an issue, as under the current Art. 79(1) EPC all contracting states party to the EPC at the time when the application is filed are deemed to be designated in the request for grant of a European patent.

3.1.3 "Time limitation" condition for requests for correction

In J 7/90 (OJ 1993, 133) the Legal Board found that the "time limitation" condition imposed under board of appeal case law, which required that, in general, a request for correction of the designation of a state or priority data had to be refused in the public interest if it was not made early enough to enable publication of a warning together with the European patent application, was not a "time limit" within the meaning of Art. 122(1) EPC 1973.

3.2. Time limits excluded from re-establishment under Article 122(4) EPC and Rule 136(3) EPC

Under Art. 122(4) EPC in conjunction with R 136(3) EPC, re-establishment is ruled out in respect of time limits for which further processing is available under Art. 121 EPC, such as the time limits for paying the filing fee, search fee, designation fees and examination fee, and for the time limit for filing the request for examination, as well as any time limit set by the EPO (see also OJ SE 4/2007; for the situation under the EPC 1973, see J 11/86). See also III.E.1. in this chapter.

Re-establishment is also excluded in respect of the time limit for requesting re-establishment (R 136(3) EPC; this was also the case under the EPC 1973, see T 900/90), but is possible for the time limit for requesting further processing (see Art. 121(4) EPC; this was also the case under the EPC 1973, see J 12/92; J ..87 (idem J 902/87), OJ 1988, 323; J 29/94, OJ 1998, 147).