

the board considered one re-establishment fee to be sufficient. See also T 315/87 of 14 February 1989; T 832/99.

4.6. Correction of deficiencies in the request for re-establishment

If the request for re-establishment is deficient, the principle of legitimate expectation may oblige the EPO to draw attention to the deficiency if it is readily identifiable by the EPO and the party can still correct it within the absolute time limit under R 136(1) EPC (Art. 122(2) EPC 1973) – see chapter III.A.4. "Obligation to draw attention to easily remediable deficiencies"; see e.g. T 14/89, OJ 1990, 432; J 13/90, OJ 1994, 456; J 2/94; see also T 585/08). If a warning can be expected but is not issued to the applicant within the relevant time limit, the EPO must set a period within which the applicant can correct the deficiency and perform the procedural act in due time (J 13/90, OJ 1994, 456). However, this obligation to set a new time limit does not apply to absolute time limits (such as the one year time limit under R 136(1) EPC, Art. 122(2), third sentence, EPC 1973), which by definition are non-extendable (J 34/92).

5. Merit of request for re-establishment of rights

Under Art. 122(1) EPC, for re-establishment to be allowed the requester must show that he missed the time limit despite taking all the due care required by the circumstances.

5.1. Submissions to be taken into account

In J 5/94 it was decided that the grounds on which a request for re-establishment of rights was based could be elaborated on, provided this completed the submission that had been filed in due time and thus did not alter the basis on which the original request for re-establishment had been filed (see also J 19/05, T 585/08, J 15/10, T 592/11).

In T 324/90 (OJ 1993, 33) the board held that evidence proving the facts set out in the application could be filed after expiry of the two-month time limit laid down in Art. 122(2) EPC 1973. Only the grounds and a statement of the facts had to be filed within the two-month period. Likewise in T 261/07 the board allowed the patentee, who had initially given an account of all the relevant facts to the best of its knowledge, to subsequently adduce further clarifying evidence supporting the case.

In J 5/11 the Legal Board held that the applicant for re-establishment of rights who failed to substantiate his request adequately in the first instance proceedings, in particular after being expressly invited to do so, could not normally make good that failure by submitting additional evidence with the grounds of appeal. While it was true that the primary function of the boards was to give a judicial decision on the correctness of a first-instance decision of the Office (see J 18/98), that does not necessarily mean that new evidence submitted for the first time on appeal was automatically inadmissible. A rigid rule excluding all new evidence on appeal might lead to injustice and unfairness in some cases and would not be compatible with the principles of procedural law generally recognised in the contracting states (cf. Art. 125 EPC).