

The background is a dark blue European Union flag with twelve gold stars arranged in a circle. A red outline, resembling a stylized house or a shield, is superimposed over the flag, framing the central text.

**Re-establishment of  
the right of priority  
for a Euro-PCT.**

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PLEASE NOTE:

**This summary is provided for information only and cannot be relied upon as legal advice.**

**If you require advice on your particular circumstances, then contact the re-establishment and restorations team at Potter Clarkson.**



If an international patent application was filed after the expiry of the priority year, the right to claim priority will only be recognised by the EPO if a request for re-establishment of the right of priority is allowed under the “*all due care*” criteria.

A successful restoration of the right to priority in the international phase under the “*unintentional*” criteria (e.g. by the USPTO as receiving office) is **not effective in proceedings before the EPO**. Therefore, even if the right of priority has been restored by the receiving office, in many cases it is necessary to file a new request for re-establishment of that the EPO on regional phase entry.

The EPO applies a strict procedure to re-establishment matters and typically do not allow new facts to be relied upon once the request for re-establishment has been filed. Typically, detailed evidence regarding the circumstances of the late filing must be submitted at the outset to establish that the all due care criteria has been met.

Depending on the circumstances, the deadline for requesting re-establishment and submitting evidence expires on or shortly after entering the European regional phase. If it is intended to proceed in Europe and re-establish the priority right, action should be taken as soon as possible to make sure the deadline can be met.

# Summary.





This brochure provides a summary of the procedure for restoring the priority right of a Euro-PCT application before the EPO.

- 1 ● **Deadline For Submitting Request.**
- 2 ● **Content Of Grounds Of Request.**
- 3 ● **All Due Care.**
- 4 ● **Case Law Defining All Due Care.**
- 5 ● **Timeline.**
- 6 ● **Costs.**

# Contents.





## SECTION 1

# Deadline for Submitting Request.

A request for re-establishment of the priority right may be **admissible** provided:

- » The filing date of the application is within **two months** of expiry of the priority year of the claimed priority; and
- » The request is filed in writing and the re-establishment fee is paid within **one month** from expiry of the 31-month deadline for entering the European regional phase or of the effective date of early entry into the European phase, which may be earlier. If further processing is used to enter late, then the request must be submitted with the request for further processing and a request for re-establishment of the further processing period if necessary.

The deadline before the EPO is complicated and we recommend that you seek advice as early as possible from the European representative on the deadline that applies to ensure that it can be met.

## SECTION 2

# Content of Grounds of Request.

The written request must state the grounds on which it is based and the facts relied upon. This includes:

- » The cause of non-compliance (reasons for filing the PCT application outside of the priority year) and the time and circumstances of its removal (e.g. when and how it was realized that the application was not filed in due time).
- » Facts and supporting evidence/arguments establishing that the priority deadline was missed despite all due care required by the circumstances having been taken.

Typically, **the factual basis cannot be altered** once the deadline for filing the request has expired. After expiry of the deadline, it may be possible to clarify the facts and present further supporting evidence.





SECTION 3

# All Due Care.



The EPO will only allow a request for re-establishment if it is demonstrated that an applicant was unable to observe a time limit in spite of **all due care** required by the circumstances having been taken.



The “*all due care*” requirement is much stricter than the “*unintentional*” requirement used by patent offices such as the USPTO and UKIPO.



The definition of all due care in various circumstances is shaped by case law. Therefore, detailed understanding of this niche area of EPO case law is critical in drafting successful grounds for re-establishment





SECTION 4

# Case Law.

## Decisions regarding “All due care”.

There is a body of case law describing the application of the "all due care" test.

Notable decisions and rationales include:

- » In the international phase, a restoration by another receiving office under the “unintentional” criterion is not effective in proceedings before the EPO acting as designation office (regional phase) since the EPO applies the “all due care” criterion (J 13/16, J 10/17).
- » All due care must have been taken by both the applicant and their representative (J 3/93, J1/07). The obligations of each are distinct (J 19/04).
- » Typically, all due care means a standard of care which a reasonably competent applicant or representative would employ in all relevant circumstances (T 30/90).
- » All due care is judged in view of the situation existing before the time limit expired (T 667/92, T381/93).
- » If the cause of non-compliance involves an error in carrying out an intention to comply with a time limit, all due care will be considered to have been taken if the error resulted from exceptional circumstances or an isolated mistake within a normally satisfactory monitoring system.
- » The all due care standard depends on the role of the person who made said mistake (T 1477/17). However, in certain circumstances the ultimate responsibility of the representative will be overriding (CLR-III-E, 5.5.4e).





SECTION 5

# Timeline.





SECTION 6

# Costs.

The cost for filing a request for re-establishment includes:

- » The EPO's official fee of approximately \$750 for requesting re-establishment for each late priority claim.
- » Professional fees based on the time it takes to prepare the statement of grounds for re-establishment. This will depend on the complexity of the situation, the amount and type of evidence to be prepared, and how closely the actions of the representative and applicant reflect the EPO's established definitions of all due care having taken place.

Therefore, to obtain a meaningful cost estimate, please contact your usual contact at Potter Clarkson or send an email outlining your specific circumstances to [info@potterclarkson.com](mailto:info@potterclarkson.com)



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