

**GUIDELINES FOR EXAMINATION
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE
(EUIPO)**

PART A

GENERAL RULES

SECTION 8

RESTITUTIO IN INTEGRUM

Table of Contents

1	General Principles	3
2	Criteria for Granting <i>restitutio</i>	3
2.1	The condition of ‘all due care required by the circumstances’	3
2.2	Loss of rights or means of redress caused directly by failure to meet the time limit	5
3	Procedural aspects	5
3.1	Proceedings to which <i>restitutio</i> applies	5
3.2	Parties	6
3.3	Time limit for national offices to forward an application to the Office ...	6
3.4	Time limits excluded from <i>restitutio in integrum</i>	6
3.5	Effect of <i>restitutio in integrum</i>	7
3.6	Time limits	7
3.7	Fees	8
3.8	Languages	8
3.9	Particulars and Evidence	8
3.10	Competence.....	9
3.11	Publications.....	9
3.12	Decision, role of other parties in <i>restitutio</i> proceedings	9
4	Third-Party Proceedings	10

1 General Principles

Article 81 EUTMR Article 67 CDR

Parties to proceedings before the Office may have their rights reinstated (*restitutio in integrum*) if they were unable to meet a time limit vis-à-vis the Office despite taking all due care required by the circumstances, provided that the failure to meet the time limit had the direct consequence, by virtue of the provisions of the Regulations, of causing a loss of rights or loss of means of redress (judgment of 28/06/2012, T-314/10, Cook's, EU:T:2012:329, § 16-17).

Observing time limits is a matter of public policy, and granting *restitutio in integrum* can undermine legal certainty. Consequently, the conditions for the application of *restitutio in integrum* have to be interpreted strictly (judgment of 19/09/2012, T-267/11, VR, EU:T:2012:1249, § 35).

Restitutio in integrum is only available upon application to the Office and it is subject to the payment of a fee.

If the party is represented, the representative's failure to take all due care is attributable to the party that it represents (judgment of 19/09/2012, T-267/11, VR, EU:T:2012:1249, § 40).

2 Criteria for Granting *restitutio*

There are two requirements for *restitutio in integrum* (judgment of 25/04/2012, T-326/11, BrainLAB, EU:T:2012:202, § 36):

- a) that the party has exercised all due care required by the circumstances, and
- b) that the non-observance (of a deadline) by the party has the direct consequence of causing the loss of a right or means of redress.

2.1 The condition of 'all due care required by the circumstances'

Rights will be re-established only under exceptional circumstances that cannot be predicted from experience (judgment of 13/05/2009, T-136/08, Aurelia, EU:T:2009:155, § 26) and are therefore unforeseeable and involuntary.

a) Examples of where the 'all due care' requirement has been fulfilled

In principle, failure to deliver by the postal or delivery service does not involve any lack of due care by the party concerned (decision of 25/06/2012, R 1928/2011-4, Sun Park Holidays). However, it is up to the parties' representatives at least to find out in advance from their delivery company what the usual delivery times are (in the case of letters sent from Germany to Spain in decision of 04/05/2011, R 2138/2010-1, YELLOWLINE / Yello).

The degree of due care that the parties must demonstrate in order to have their rights re-established must be determined in the light of all the relevant circumstances. Relevant circumstances may include a relevant error made by the Office and its repercussions. Thus, even though the party concerned has failed to take all due care, a relevant error by the Office may result in the granting of *restitutio* (judgment of 25/04/2012, T-326/11, BrainLAB, EU:T:2012:202, § 57 and 59).

Circumstances such as natural disasters and general strikes are regarded as fulfilling the requirement for all due care.

b) Examples of where the ‘all due care’ requirement has NOT been fulfilled

Errors in the management of files caused by the representative’s employees or by the computerised system itself are foreseeable. Consequently, due care would require a system for monitoring and detecting any such errors (judgment of 13/05/2009, T-136/08, Aurelia, EU:T:2009:155, § 18).

‘The exceptional workload and organisational strains to which the applicants claim they were subject as a result of the entry into force of Regulation No 40/94 are irrelevant in that connection’ (judgment of 20/06/2001, T-146/00, Dakota, EU:T:2001:168, § 62.)

An erroneous calculation of the time limit does not constitute an exceptional event that cannot be predicted from experience (decision of 05/07/2013, R 194/2011-4, PayEngine / SP Engine).

An error by the Renewals Department Manager, who monitors staff performance daily, does not constitute an exceptional event (decision of 24/04/2013, R 1728/2012-3, Lifting devices, part of).

The absence of a key member of the Accounts Department cannot be regarded as an exceptional or unforeseeable event (decision of 10/04/2013, R 2071/2012-5, STARFORCE).

A clerical error in entering a deadline cannot be regarded as an exceptional or unforeseeable event (decision of 31/01/2013, R 265/2012-1, KANSI / Kanz).

A misunderstanding of the applicable law may not, as a matter of principle, be regarded as an ‘obstacle’ to compliance with a time limit (decision of 14/06/2012, R 2235/2011-1, KA).

Delay by the owner in providing instructions is not an exceptional event (decision of 15/04/2011, R 1439/2010-4, SUBSTRAL NUTRI + MAX (fig.) / NUTRIMIX et al.).

Financial problems at the proprietor’s business, its closure and the loss of jobs cannot be accepted as a reason for the proprietor not to be able to observe the time limit to renew its European Union trade mark (decision of 31/03/2013, R 1397/2010-1, CAPTAIN).

Legal errors by a professional representative do not warrant *restitutio* (decision of 16/11/2010, R 1498/2010-4, Regine’s). The deletion of a deadline by an assistant is not unforeseeable (decision of 28/06/2010, R 268/2010-2, ORION).

2.2 Loss of rights or means of redress caused directly by failure to meet the time limit

Article 81(1) EUTMR

Failure to meet the time limit must have had the direct consequence of causing the loss of rights or means of redress (judgment of 15/09/2011, T-271/09, Romuald Prinz Sobieski zu Schwarzenberg, EU:T:2011:478, § 53).

Articles 42(2), 76(2) and 77(1) EUTMR
Rule 19, Rules 20(1) to (5) and 40(1) to (3) EUTMIR

This is not the case where the Regulations offer procedural options that parties to proceedings are free to use, such as requesting an oral hearing, requesting that the opponent prove genuine use of its earlier mark, or applying for an extension of the cooling-off period, pursuant to Rule 19 EUTMIR. The cooling-off period itself is not subject to *restitutio* either because it is not a time limit within which a party must perform an action.

Article 36(1) and (4), and Article 37 EUTMR
Rule 9(3) and (4), Rule 10 and Rule 11(1) and (3) EUTMIR

However, *restitutio in integrum* does apply to the late response to an examiner's notification of provisional refusal if the application is not rectified by the time limit specified because in this case there is a direct relationship between failure to meet the time limit and possible refusal.

Restitutio is also available for the late submission of facts and arguments and late filing of observations on the other party's statements in *inter partes* proceedings if and when the Office refuses to take them into account as being filed too late. The loss of rights in this case involves the exclusion of these submissions and observations from the facts and arguments on which the Office bases its decision. (In principle, the Office will disregard any statements filed in *inter partes* proceedings after the deadline has passed.)

3 Procedural aspects

Article 81(2) EUTMR
Rule 83(1)(h) EUTMIR
Article 67(2) CDR
Article 68(1)(g) CDIR

3.1 Proceedings to which *restitutio* applies

Restitutio is available in all proceedings before the Office.

This includes proceedings under the EUTMR and proceedings concerning registered Community designs under the CDR. The respective provisions do not differ materially.

Restitutio is available in *ex parte* proceedings, *inter partes* proceedings and appeal proceedings.

For *restitutio* in relation to the missed time limit for lodging an appeal and in relation to revision, see the Guidelines, Part A, General Rules, Section 7, Revision.

3.2 Parties

Article 81 EUTMR
Article 67 CDR

Restitutio is available to any party to proceedings before the Office.

The time limit must have been missed by the party concerned or their representative.

3.3 Time limit for national offices to forward an application to the Office

Articles 35(1) and 38(2) CDR

The time limit of two months for transmission of a Community design application filed at a national office has to be observed by the national office and not by the applicant and is consequently not open to *restitutio in integrum*.

Under Article 38(2) CDR, late transmission of a Community design application has the effect of postponing the date of filing to the date the Office actually receives the relevant documents.

3.4 Time limits excluded from *restitutio in integrum*

Article 81(5) EUTMR
Article 67(5) CDR

In the interests of legal certainty, *restitutio in integrum* is not applicable to the following time limits.

Articles 41(1) and 67(5) CDR
Article 8(1) CDIR

- The priority period, which is the six-month time limit for filing an application claiming the priority of a previous design or utility model application pursuant to Article 41(1) CDR. However, *restitutio* does apply to the three-month time limit for providing the file number of the previous application and filing a copy of it, as specified in Article 8(1) CDIR.

Articles 41(1) and (3) and 81(5) EUTMR

- The time limit for filing an opposition pursuant to Article 41(1) EUTMR, including the time limit for paying the opposition fee referred to in Article 41(3) EUTMR.

Article 81(2) and (5) EUTMR
Article 67(2) and (5) CDR

- The time limits for *restitutio* itself, namely:
 - a time limit of two months for filing the application for *restitutio in integrum* as from the removal of the cause of non-compliance
 - a time limit of two months from the date for completing the act that was omitted
 - a time limit of one year for filing the application for *restitutio in integrum* as from expiry of the missed time limit.

Article 82 EUTMR

- The time limit for requesting continuation of proceedings pursuant to Article 82 EUTMR, including the time limit for paying the fee referred to in Article 82(1) EUTMR.

3.5 Effect of *restitutio in integrum*

Granting *restitutio in integrum* has the retroactive legal effect that the time limit that was not met will be considered to have been met, and that any loss of rights in the interim will be deemed never to have occurred. If the Office takes a decision in the interim based on failure to meet the time limit, that decision will become void, with the consequence that, once *restitutio* is granted, there is no longer any need to lodge an appeal against such a decision of the Office in order to have it removed. Effectively, *restitutio* will re-establish all the rights of the party concerned.

3.6 Time limits

Articles 47(3) and 81(2) EUTMR
Articles 13(3) and 67(2) CDR

Applicants must apply for *restitutio in integrum* in writing and send the application to the Office.

The applicant must make the application within two months of the removal of the cause of non-compliance and no later than one year after expiry of the missed time limit. Within the same period, the act that was omitted must be completed. The date when the cause of non-compliance is removed is the first date on which the party knew or should have known about the facts that led to the non-observance. If the ground for non-compliance was the absence or illness of the professional representative dealing with the case, the date on which the cause of non-compliance is removed is the date on which the representative returns to work. If the applicant fails to submit a request for

renewal or to pay the renewal fee, the one-year time limit starts on the day on which the protection ends, and not on the date the further six-month time limit expires.

3.7 Fees

Article 81(3) EUTMR
Annex I (22) EUTMR
Article 67(3) CDR
Annex, point 15 CDFR

The applicant must also pay the fee for *restitutio in integrum* within the same time limit (see paragraph 3.6). If the applicant does not pay the fee by expiry of the time limit, the application for *restitutio in integrum* will be deemed not to have been filed.

3.8 Languages

Article 119 EUTMR
Rule 95 EUTMIR
Article 98 CDR
Article 80 CDIR

The applicant must submit the application for *restitutio in integrum* in the language, or in one of the languages, of the proceedings in which the failure to meet the time limit occurred. For example, in the registration procedure, this is the correspondence language indicated in the application; in the opposition procedure, it is the language of the opposition procedure; and in the renewal procedure, it is any of the Office's five languages.

3.9 Particulars and Evidence

Articles 78 and 81 EUTMR
Articles 65 and 67 CDR

In its application for *restitutio* the applicant must state the grounds on which it is based and set out the facts on which it relies. As granting *restitutio* is essentially based on facts, it is advisable for the requesting party to submit evidence by means of sworn or affirmed statements. Statements drawn up by the interested parties themselves or their employees are generally given less weight than independent evidence (judgment of 16/06/2015, T-586/13, Gauff THE ENGINEERS WITH THE BROADER VIEW (fig.) / Gauff *et al.*, EU:T:2015:385, § 29)

Moreover, the act that was omitted must be completed, together with the application for *restitutio*, at the latest by the time limit for submitting the application for *restitutio*.

3.10 Competence

Article 81 EUTMR
Article 67 CDR

The division or department competent to decide on the act that was omitted (i.e. responsible for the procedure in which failure to meet the deadline occurred) is responsible for dealing with applications for *restitutio*.

3.11 Publications

Articles 47(5), (7) and (8), and 81(7), Article 87(3)(k) and (l) EUTMR
Rule 85(2) EUTMIR
Article 67 CDR
Article 22(4) and (5), Article 69(3)(m) and (n) and Article 70(2) CDIR

The EUTMR and CDR provide for a mention of the re-establishment of rights to be published in the Bulletin. This mention will be published only if the failure to meet the time limit that gave rise to the application for *restitutio* has actually led to publication of a change of status of the EUTM or CD application or registration, because only in such a case would third parties be able to take advantage of the absence of such rights. For example, the Office will publish a mention that *restitutio* has been granted if it published a mention that registration had expired due to failure to meet the time limit for paying the renewal fee.

In the event of such a publication, a corresponding entry will also be made in the Register.

No mention of receipt of an application for *restitutio* will be published.

3.12 Decision, role of other parties in *restitutio* proceedings

Articles 58 and 59 EUTMR

The applicant for *restitutio in integrum* is the sole party to the *restitutio* proceedings, even where failure to meet the time limit occurred in *inter partes* proceedings.

The decision on *restitutio* will be taken, if possible, in the decision terminating the proceedings. If, for specific reasons, the Office makes an interim decision on the application for *restitutio*, it will generally not allow a separate appeal. The applicant for *restitutio* can appeal the refusal of its request for *restitutio* together with an appeal against the decision terminating the proceedings.

The decision to grant *restitutio* cannot be appealed.

The other party to *inter partes* proceedings will be informed both that *restitutio* has been requested and about the outcome of the proceedings. If *restitutio* is actually granted, the other party's only means of redress is to initiate third-party proceedings (see below, paragraph 4).

4 Third-Party Proceedings

Article 81(6) and (7) EUTMR
Article 67 CDR

A third party who, in the period between the loss of rights and publication of the mention of the re-establishment of rights,

- has, in good faith, put goods on the market or supplied services under a sign that is identical or similar to the EUTM, or
- in the case of a Community design, has, in good faith, put on the market products in which a design included within the scope of protection of the RCD is incorporated or to which it is applied,

may bring third-party proceedings against the decision re-establishing the rights of the applicant, proprietor or holder of the EUTM or RCD.

This request is subject to a two-month time limit, which starts:

- on the date of publication, where publication has taken place;
- on the date on which the decision to grant *restitutio* took effect, where publication has not taken place.

The Regulations do not contain any provisions governing this procedure. The department or unit that took the decision to re-establish the rights is responsible for third-party proceedings. The Office will conduct adversarial *inter partes* proceedings, which means that it will hear both parties before taking a decision.