GUIDELINES FOR EXAMINATION IN THE OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET (TRADE MARKS AND DESIGNS)

PART A

GENERAL RULES

SECTION 8

RESTITUTIO IN INTEGRUM
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1 General Principles

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<th>Article 81 CTMR</th>
<th>Article 67 CDR</th>
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A party to proceedings before the Office may be reinstated in their rights (restitutio in integrum) if they were unable to observe a time limit vis-à-vis the Office, in spite of all due care having been taken as required by the circumstances, provided that the failure to observe the time limit had the direct consequence, by virtue of the provisions of the Regulations, of causing a loss of rights or means of redress (see judgment of 28/06/2012, T-314/10, ‘Cook’s’, paras 16 and 17).

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

2 Criteria for Granting restitutio

Restitutio in integrum will be granted only under exceptional circumstances which are unforeseeable and independent of the will of the party concerned. These include, for example, an error committed by a courier service in the course of delivering a communication to the Office, an error induced or committed by the Office or a general strike.

By contrast, human error during the management of renewal procedures on the part of the representative or the party itself, IT-related problems, postal delays, economic hardship, and errors in calculating deadlines or a misunderstanding of the applicable law are not considered exceptional circumstances (decision of 14/06/2012, R 2235/2011-1, ‘KA’ and judgment of 19/09/2012, T-267/11, ‘VR’).

2.1 Proceedings to which restitutio applies

Restitutio is available in all proceedings before the Office.

This includes proceedings under the CTMR, as well as 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 to revision, see the Guidelines, Part A, General Rules, Section 7, Revision.
2.2 Parties

Article 81 CTMR  
Article 67 CDR

Rexistitio is available to any party to proceedings before the Office, that is, not only to the applicant or proprietor for a Community trade mark or the applicant or holder of a registered Community design, but also to the opponent, the applicant for a declaration of revocation or invalidity, or an alleged infringer who is joined as a party to invalidity proceedings pursuant to Article 54 CDR.

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

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

Article 25(2) CTMR  
Articles 35(1) and 38(2) CDR

The time limit of one month for transmission of a CTM application or 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 filing date to the date of actual receipt of the relevant documents by the Office.

Furthermore, in the event of non-observance of the time limit under Article 25(3) CTMR for transmission of a CTM application, rather than considering the CTM application withdrawn, the Office will treat the CTM application as if it had arrived directly at the Office and not through a national Office, with the consequence that the filing date will be the date of actual receipt by OHIM.

2.4 Time limits excluded from restitutio in integrum

Article 81(5) CTMR  
Article 67(5) CDR

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

Articles 29(1) and 81(5) CTMR  
Rule 6(1) CTMIR  
Articles 41(1) and 67(5) CDR  
Article 8(1) CDIR

- The priority period, that is, the six-month time limit for filing an application claiming the priority of a previous trade mark or design application pursuant to...
Restitutio in Integrum

Article 29(1) CTMR or Article 41(1) CDR. However, *restitutio* does apply to the three-month time limit for indicating the file number of, and filing a copy of, the previous application referred to in Rule 6(1) CTMIR or Article 8(1) CDIR.

**Articles 41(1), (3) and 81(5) CTMR**

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

**Article 81(2), (5) CTMR**

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

2.5 **Loss of rights or means of redress caused directly by non-observance of time limit**

**Article 81(1) CTMR**

Failure to observe the time limit must have had the direct consequence of causing loss of rights or means of redress.

**Articles 42(2), 76(2) and 77(1) CTMR**

These are not the case where the Regulations offer procedural options of which parties to proceedings can freely avail themselves, for example, asking for an oral hearing, or requesting that the opponent provide proof of genuine use of its earlier mark, or applying for an extension of the cooling-off period pursuant to Rule 19 CTMIR. The cooling-off period itself is not subject to *restitutio* either because it is not a time limit within which a party must perform actions.

**Articles 36(1), (4) and 37 CTMR**

On the other hand, *restitutio in integrum* does apply to the late response to an examiner’s notification of refusal if the application is not rectified within the time limit specified because, in this case, there is a direct relationship between non-observance of the time limit and possible refusal.

*Restitutio* is also available in the event of 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 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. (It is general Office practice to disregard any statements filed in inter partes proceedings after expiry of the time limit set therefor.)

2.6 Effect of *restitutio in integrum*

Granting *restitutio in integrum* has the retroactive legal effect that the unobserved time limit will be considered to have been observed, and that any loss of rights in the interim will be deemed never to have occurred. Any decision taken by the Office in the interim based on non-observance of the time limit 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 the applicant in all its rights.

3 Procedure

| Article 81(2) CTMR |
| Rule 83(1)(h) CTMIR |
| Article 67(2) CDR |
| Article 68(1)(g) CDIR |

*Restitutio in integrum* must be applied for in writing. The application must be sent to the Office.

3.1 Time limit

| Articles 47(3) and 81(2) CTMR |
| Articles 13(3) and 67(2) CDR |

The application must be made within two months of the removal of the cause of non-compliance and not later than one year after expiry of the unobserved time limit. Within the same period, the unobserved act must be completed. The date of removal of the cause of non-compliance is the first date on which the party knew or should have known about the facts which led to the non-observance. If the ground for non-compliance was absence or illness of the professional representative dealing with the case, the date of removal of the cause of non-compliance is the date on which the representative returns to work. In the event of failure 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 of expiry of the further six-month period s.
3.2 Fee

| Article 81(3) CTMR  |
| Article 2(19) CTMFR |
| Article 67(3) CDR  |
| Annex, point 15 CFR |

Within the same time limit, the fee for *restitutio in integrum* must also be paid. If the fee is not paid within the time limit, the application for *restitutio in integrum* will be deemed not to have been filed.

3.3 Languages

| Article 119 CTMR  |
| Rule 95 CTMIR  |
| Article 98 CDR  |
| Article 80 CDIR |

The application for *restitutio in integrum* must be submitted in the language of, or in one of the languages available for, the proceedings in which non-observance of the time limit occurred. For example, in the registration procedure, this is the first 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 five languages of the Office.

3.4 Particulars and Evidence

| Articles 78 and 81 CTMR  |
| Articles 65 and 67 CDR |

The application for *restitutio* must state the grounds on which it is based and must set out the facts on which it relies. As granting *restitution* is essentially a question of facts, it is advisable for the requesting party to adduce evidence by means of sworn or affirmed statements.

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

3.5 Competence

| Article 81 CTMR  |
| Article 67 CDR |

Competence for dealing with applications for *restitutio* lies with the division or department competent to decide on the omitted act, that is, competent for the procedure within which non-observance of the time limit occurred.
3.6 Publications

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<tr>
<th>Article 81(7) CTMR</th>
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<tr>
<td>Rules 30(4), (5), 84(3)(k), (l) and 85(2) CTMIR</td>
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<td>Article 67 CDR</td>
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<tr>
<td>Articles 22(4), (5), 69(3)(m), (n) and 70(2) CDIR</td>
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The CTMR and CDR provide for a mention of the re-establishment of rights to be published in the Bulletin. Such a mention will be published only if the unobserved time limit which gave rise to the application for *restitutio* has actually led to publication of the change of status of the CTM or CD application or registration, because only in such a case can third parties have taken advantage of the absence of such rights. For example, mention of the granting of *restitutio* will be published if the Office published a mention of expiry of the registration due to non-observance of the time limit for paying the renewal fee.

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

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

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

| Articles 58 and 59 CTMR |

The applicant for *restitutio in integrum* is the sole party to the *restitutio* proceedings, even where non-observance of the time limit occurred in *inter partes* proceedings.

A decision to refuse *restitutio* will be motivated on the non-observance of the time limit and, if possible, be taken in the decision terminating the proceedings. If, for specific reasons, an interim decision on the application for *restitutio* is taken, a separate appeal will generally not be allowed. The applicant for *restitutio* can appeal the refusal of its request for *restitutio* together with the decision terminating the proceedings.

The decision to grant *restitutio* cannot be appealed.

The other party to the *inter partes* proceedings will be informed that *restitutio* has been requested, as well as of 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

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A third party who, in the course of the interim from the request for *restitutio* up until 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 which is identical or similar to the CTM, 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 CTM or RCD.

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

- where publication has taken place, on the date of that publication

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

The Regulations do not contain any provisions governing such a procedure. Competence for third-party proceedings lies with the department or unit which took the decision to re-establish the rights. The Office will conduct adversarial *inter partes* proceedings.