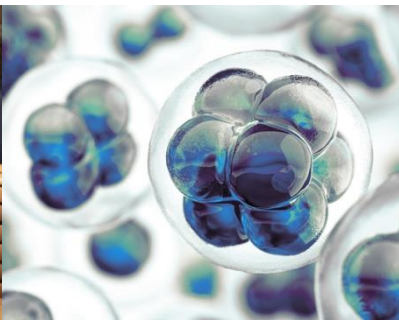




Europäisches
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des brevets

PCT at the EPO (advanced)

Restoration of the right of priority under the PCT – Update on the procedure at the EPO acting as a receiving Office



Presenter

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08. Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

09. Examples

Disruptions caused by the COVID-19 pandemic

- Disruptions caused by the COVID-19 outbreak might have resulted in a non-observance of time limits
- Remedies and further measures introduced by the EPO - the relevant information provided in the dedicated EPO Webinar "PCT at the EPO (advanced) | PD30-2020" – Course 3 – PCT Practice, held on 20.10.2020
- Dedicated EPO website: Coronavirus (COVID-19) – continually updated information:

<https://www.epo.org/news-events/covid-19.html>

Detailed information:

<https://www.epo.org/news-events/covid-19.html>

Disruptions caused by the COVID-19 pandemic

Situation with regard to international applications under the PCT:

- Rule 82*quater*.1 PCT (Excuse of delay in meeting time limits) applicable to time limits fixed in the Regulations to the PCT

HOWEVER:

- Rule 82*quater*.1 PCT not applicable to the *priority period* as the latter is provided for in the Paris Convention (Article 4 (C)(1) Paris Convention)

FAQ – Disruptions due to the COVID-19 pandemic (at <https://www.epo.org/service-support/faq/procedure-law/covid-remedies-non-observance-periods.html>)

Proposed Guidance from the Paris Union Assembly on Implementation of the Paris Convention Relating to the Right of Priority in Emergencies (at https://www.wipo.int/edocs/mdocs/govbody/en/p_a_56/p_a_56_1.pdf)

Rule 82*quater*.1 PCT

Disruptions caused by the COVID-19 pandemic

Situation with regard to international applications under the PCT:

- The only extension of the priority period: provided for in Article 4 (C)(3) Paris Convention (Rule 80.5(i) PCT) – applicable only where the receiving Office is not open for the filing of applications
- Most receiving Offices, including the RO/EP, remained open for the filing of applications: *restoration of the right of priority = a suitable remedy*

Source:

Proposed Guidance from the Paris Union Assembly (at https://www.wipo.int/edocs/mdocs/govbody/en/p_a_56/p_a_56_1.pdf)

FAQ – Disruptions due to the COVID-19 pandemic (at <https://www.epo.org/service-support/faq/procedure-law/covid-remedies-non-observance-periods.html>)

PCT Newsletter 03/2020 (March 2020), p. 6, Practical Advice

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08. Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

09. Examples

Restoration of the right of priority – a possible remedy

- In a situation when a subsequent patent application is not filed within the priority period as a result of disruptions on the side of the applicant or the agent due to the COVID-19 pandemic:

Restoration of the right of priority as provided for under Rule 26bis.3 PCT = *a suitable remedy*

FAQ – Disruptions due to the COVID-19 pandemic (at <https://www.epo.org/service-support/faq/procedure-law/covid-remedies-non-observance-periods.html>)

PCT Newsletter 03/2020 (March 2020), p. 6, Practical Advice

Rule 26bis.3 PCT

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09. Examples

Background and purpose

- Concept introduced in the **Patent Law Treaty**
- Introduced in the **PCT** on 01.04.2007
- Incompatibility with the national law:
 - To date 11 Offices acting as RO: BR, CO, CU, CZ, DE, DZ, GR, ID, IN, KR, PH
 - To date 13 Offices acting as DO: BR, CA, CN, CO, CU, CZ, DE, DZ, ID, IN, KR, MX, PH

Article 13 PLT

Rule 26*bis*.3 PCT
Rule 49*ter*.2 PCT

Background and purpose

- Objectives: **Maintain the right of priority** even if the international application is filed after the expiry of the priority year, for a period of up to 2 months from the 12-month time limit under Paris Convention
- When deciding on requests for restoration, RO or DO apply at least one of the following criteria:
 - unintentionality
 - due care

Article 13 PLT

Rule 26*bis*.3 (a) PCT

Rule 49*ter*.2 (a) PCT

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08. Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

09. Examples

New developments at the RO/EP

- Requests for restoration of the priority right claiming the **COVID-19 disruptions** as a reason for missing the priority period: decisions on a *case-by-case basis*
- New edition of Guidelines for Search and Examination at the EPO as PCT Authority ("PCT-EPO Guidelines"): information dedicated to the formal requirements for priority claims and to requests for restoration of the right of priority
- Implementation of Rule 26*bis*.3(h-*bis*) PCT

Information concerning the publication of the next edition of the EPO Guidelines, OJ EPO 2020, A108.

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09. Examples

Procedure at the RO/EP – Request for restoration

- Request for restoration of the right of priority can be filed:
 - as a part of the PCT request (Box No. VI)
 - by way of a letter to the RO/EP:
 - on applicant's own initiative
 - upon a notification by the RO/EP via PCT/RO/110 (Box No. 2 and Annex B)

Rule 4.1(c)(v) PCT
Rule 4.10 PCT
Rule 26bis.1(a) PCT
Rule 26bis.2(a) PCT
Rule 26bis.3 PCT

PCT/GL/RO, 166C, 167
PCT Applicant's Guide I 5.064,
6.042

Procedure at the RO/EP – Request for restoration

- PCT request
(Form
PCT/RO/101,
first sheet)

PCT		For receiving Office use only	
REQUEST		International Application No.	
The undersigned requests that the present international application be processed according to the Patent Cooperation Treaty.		International Filing Date	
		Name of receiving Office and "PCT International Application"	
		Applicant's or agent's file reference (if desired) (25 characters maximum)	
Box No. I TITLE OF INVENTION			
Box No. II APPLICANT		<input type="checkbox"/> This person is also inventor	
Name and address: (Family name followed by given name; for a legal entity, full official designation. The address must include postal code and name of country. The country of the address indicated in this Box is the applicant's State (that is, country) of residence if no State of residence is indicated below.)		Telephone No.	
		Facsimile No.	
		Applicant's registration No. with the Office	
<p>E-mail authorization: Marking one of the check-boxes below authorizes the receiving Office, the International Searching Authority, the International Bureau and the International Preliminary Examining Authority to use the e-mail address indicated in this Box to send notifications issued in respect of this international application to that e-mail address if those offices are willing to do so.</p> <p><input type="checkbox"/> as advance copies followed by paper notifications; or <input type="checkbox"/> exclusively in electronic form (no paper notifications will be sent).</p> <p>E-mail address:</p>			
State (that is, country) of nationality:		State (that is, country) of residence:	
This person is applicant for the purposes of:		<input type="checkbox"/> all designated States <input type="checkbox"/> the States indicated in the Supplemental Box	
Box No. III FURTHER APPLICANT(S) AND/OR (FURTHER) INVENTOR(S)			
<input type="checkbox"/> Further applicants and/or (further) inventors are indicated on a continuation sheet.			

Procedure at the RO/EP – Request for restoration

- PCT request
(Form PCT/RO/101, Box No. VI, fourth section)

Box No. VI PRIORITY CLAIM AND DOCUMENT				
The priority of the following earlier application(s) is hereby claimed:				
Filing date of earlier application <i>(day/month/year)</i>	Number of earlier application	Where earlier application is:		
		national application: country or Member of WTO	regional application: regional Office	international application: receiving Office
item (1)				
item (2)				
item (3)				

Further priority claims are indicated in the Supplemental Box.

Furnishing the priority document(s):

The **receiving Office** is requested to prepare and transmit to the International Bureau a certified copy of the earlier application(s) *(only if the earlier application(s) was filed with the receiving Office which, for the purposes of this international application, is the receiving Office)* identified above as:

all items item (1) item (2) item (3) other, see Supplemental Box

The **International Bureau** is requested to obtain from a digital library a certified copy of the earlier application(s) identified above, using, where applicable, the access code(s) indicated below *(if the earlier application(s) is available to it from a digital library)*:

item (1) item (2) item (3) other, see Supplemental Box
 access code _____ access code _____ access code _____

Restore the right of priority: the receiving Office is requested to restore the right of priority for the earlier application(s) identified above or in the Supplemental Box as item(s) (_____). *(See also the Notes to Box No. VI, further information must be provided to support a request to restore the right of priority.)*

Incorporation by reference: where an element of the international application referred to in Article 11(1)(iii)(d) or (e) or a part of the description, claims or drawings referred to in Rule 20.5(a), or an element or part of the description, claims or drawings referred to in Rule 20.5bis(a) is not otherwise contained in this international application but is completely contained in an earlier application whose priority is claimed on the date on which one or more elements referred to in Article 11(1)(iii) were first received by the receiving Office, that element or part is, subject to confirmation under Rule 20.6, incorporated by reference in this international application for the purposes of Rule 20.6.

Procedure at the RO/EP – Request for restoration

- Invitation to correct priority claim and/or notification of possibility to request restoration of the right of priority (Form PCT/RO/110, Boxes No. 1 and 2)

Rule 4.10 PCT
Rule 26bis.1 PCT
Rule 26bis.2(a) (b) PCT
Rule 26bis.3 PCT

1. The applicant is hereby **invited** to correct, by a notice submitted to the receiving Office, within the time limit indicated below, defects in the priority claim as indicated in Annex A.

Time limit to respond to this Invitation (Rule 26bis.1(a)):

- within 16 months from the (earliest) priority date; or
 - if the (earliest) priority date is changed as a result of the correction or addition of the (earliest) priority claim, within 16 months from that (earliest) priority date so changed,
- whichever expires first, provided that such a notice may, in any event, be submitted until the expiration of four months from the international filing date.

Failure to respond to this Invitation within the prescribed time limit may result in the priority claim concerned to be considered void for the purposes of the procedure under the PCT (Rule 26bis.2(b)).

2. The international filing date of the international application is later than the date on which the priority period (Rule 2.4) expired but is within two months from that date. The applicant is hereby **notified** of the possibility of submitting to the receiving Office, within the time limit indicated below, a request to restore the right of priority as indicated in Annex B.

Time limit to request the restoration of the right of priority (Rule 26bis.3(e)):

- within two months from the date on which the priority period expired.

Procedure at the RO/EP – Request for restoration

- Invitation to correct priority claim and/or notification of possibility to request restoration of the right of priority (Form PCT/RO/110, Annex B)

ANNEX B TO FORM PCT/RO/110	International application No.
<p data-bbox="620 248 1238 281">NOTIFICATION OF POSSIBILITY TO REQUEST RESTORATION OF THE RIGHT OF PRIORITY (Rule 26bis.3)</p> <p data-bbox="620 295 1354 361">The international filing date of the international application is later than the date on which the priority period (Rule 2.4) expired but is within two months from that date. If the filing date of the earlier application has been indicated correctly and no request for correction of that filing date is submitted under Rule 26bis.1(a), the applicant may submit to the receiving Office, within the time limit indicated below, a request to restore the right of priority.</p> <p data-bbox="620 410 958 423">REQUEST TO RESTORE THE RIGHT OF PRIORITY</p> <p data-bbox="620 443 1354 489">The request to restore the right of priority must be filed within two months from the date on which the priority period expired provided that, where the applicant makes a request for early publication under Article 21(2)(b), the request must be submitted before technical preparations for international publication have been completed (Rule 26bis.3(e)).</p> <p data-bbox="620 508 1354 554">The request to restore the right of priority must state the reasons for the failure to file the international application within the priority period. This receiving Office will restore the right of priority if it finds that the following criterion or one of the following criteria for restoration is satisfied, namely that the failure to file the international application within the priority period:</p> <ul data-bbox="658 568 1354 729" style="list-style-type: none"><input type="checkbox"/> occurred in spite of due care required by the circumstances having been taken and/or<input type="checkbox"/> was unintentional<input type="checkbox"/> This receiving Office may invite the applicant to furnish a declaration or other evidence in support of the statement of reasons (Rule 26bis.3(f)). Preferably, such declaration or other evidence should already be furnished together with the request for restoration of the right of priority. <p data-bbox="620 778 726 791">FEE PAYMENT</p> <ul data-bbox="620 805 1354 983" style="list-style-type: none"><input type="checkbox"/> The submission of the request to restore the right of priority is subject to the payment of a fee, payable within two months³ from the date on which the priority period expired, in the amount of:<ul data-bbox="658 858 1209 940" style="list-style-type: none"><input type="checkbox"/> _____ (amount/currency) for restoration based on the criterion of due care;or<input type="checkbox"/> _____ (amount/currency) for restoration based on the criterion of unintentional.<input type="checkbox"/> No fee payment is required.	

Rule 4.10 PCT
Rule 26bis.2(a) PCT
Rule 26bis.3 PCT

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08. Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

09. Examples

Procedure at the RO/EP – Admissibility

- International filing date **within 2 months from the date on which the priority period expired**
- Within a two-month period under Rule 26*bis*.3(e):
 - Filing request for restoration
 - Paying fee for restoration (RO/EP: 640 EUR); time limit for payment may be extended by 2 months (exceptionally)
 - Furnishing statement of reasons; may be supported by declarations or other evidence

Rule 26*bis*.3(a) PCT

Rule 26*bis*.3(b)(d) and (e) PCT

Procedure at the RO/EP – Admissibility

Question 1

Is it possible to request restoration of the right of priority later if the two-month period expires on a day on which the RO/EP is not open to the public for receipt of documents?

yes no

Procedure at the RO/EP – Admissibility

Question 1

Is it possible to request restoration of the right of priority later if the two-month period expires on a day on which the RO/EP is not open to the public for receipt of documents?

The correct answer is: yes

Provided the request for restoration is filed on the next subsequent day on which the RO/EP is open to the public again.

Rule 80.5 (iii) PCT
Rule 134(1) EPC

Procedure at the RO/EP – Admissibility

Question 2

If a priority claim is not contained in the PCT request, may the applicant subsequently add the priority claim after requesting restoration of the right of priority?

yes no

Procedure at the RO/EP – Admissibility

Question 2

If a priority claim is not contained in the PCT request, may the applicant subsequently add the priority claim after requesting restoration of the right of priority?

The correct answer is: **yes**

Provided the notice adding the priority claim is submitted within 2 months from the expiry of the priority period

Rule 26bis.3(c) PCT
Rule 26bis.3(e) PCT
Rule 26bis.1(a) PCT

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08. Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

09. Examples

Procedure at the RO/EP – Decision on the merits of the case

- Any RO applies at least one of these two criteria:
 - ‘failure to file within the priority period occurred *in spite of due care* required by the circumstances having been taken’
 - ‘failure to file within the priority period was *unintentional*’

PCT/GL/RO 166H-166J

Procedure at the RO/EP – Decision on the merits of the case

- RO/EP applies the generally stricter **criterion of “due care”**
- RO/EP applies the **“due care” criterion taking into account the EPO’s practice in applying Art. 122 EPC and the respective case law of the Boards of Appeal**
- Non-compliance with the priority period must result either from:
 - an **exceptional circumstance**, or
 - an **isolated mistake** within a normally satisfactory system for monitoring time limits

Rule 26bis.3(a)(i) PCT
PCT/GL/RO 166J

J 2/86

Procedure at the RO/EP – Decision on the merits of the case

- Assessment as to whether the non-compliance with the priority period was a result of an **exceptional circumstance** in the context of the disruptions due to the COVID-19 outbreak:
 - Decision on the request for restoration taken by the RO/EP on a *case-by-case* basis
 - The more complete reasoned statement, the better - in order to avoid an eventual review by a designated Office
 - In principle, COVID-19 outbreak declared on 11 March 2020 by WHO as a pandemic qualifies as an exceptional circumstance as it is unforeseeable and unavoidable

PCT/GL/RO 166M(j)

Procedure at the RO/EP – Decision on the merits of the case

- Primary responsibility lies with the **applicant**:
 - proper instructions to the agent
 - in particular cases, a selection of a “qualified agent”
- **Agent** has to show due care by virtue of the delegation:
 - expertise entails higher standard
- Applicant or agent is expected to set up an **efficient and reliable reminder, supervision and back-up system** which corresponds to best practices in the field
- A corporate applicant or agent: **higher** standard expected

J 2/86

PCT/GL/RO 166K

PCT/GL/RO 166L

Procedure at the RO/EP – Decision on the merits of the case

PCT/GL/RO 166L

- ‘Due care’ of the applicant or agent in dealing with an **assistant**: isolated mistake by an assistant entrusted with a routine task, if:
 - suitable person selected for the task
 - properly instructed
 - adequately trained
 - reasonably supervised
 - not having made mistakes of this nature in the past

Procedure at the RO/EP – Decision on the merits of the case

Question 3

May the right of priority be restored by the RO/EP if the failure to file the international application within the priority period was due to the lack of knowledge on the part of the applicant of the duration of that period?

yes no

Procedure at the RO/EP – Decision on the merits of the case

Question 3

May the right of priority be restored by the RO/EP if the failure to file the international application within the priority period was due to the lack of knowledge on the part of the applicant of the duration of that period?

The correct answer is: no

From a prudent applicant it is expected that they acquire the requisite knowledge of the PCT system and concerning the twelve-month priority period as set out in Article 4(C) of the Paris Convention or appoint a competent agent to file on their behalf.

PCT/GL/RO 166M(a)

Procedure at the RO/EP – Decision on the merits of the case

Question 4

May the right of priority be restored by the RO/EP if the failure to file the international application within the priority period was due to a mistake by an assistant who was properly selected for the work, sufficiently instructed, trained and supervised by the agent ?

yes no

Procedure at the RO/EP – Decision on the merits of the case

Question 4

May the right of priority be restored by the RO/EP if the failure to file the international application within the priority period was due to a mistake by an assistant who was properly selected for the work, sufficiently instructed, trained and supervised by the agent ?

The correct answer is: **yes**

A human error by an assistant is not attributed to the agent if the agent can show that “due care” was exercised in the management of the assistant and a normally satisfactory system for monitoring time limits was established.

The same human error by an **agent: higher level** of “due care”

PCT/GL/RO 166M(f)
PCT/GL/RO 166M(c)

Procedure at the RO/EP – Decision on the merits of the case

- Decision communicated to the applicant or agent: Form PCT/RO/159
- Notification on an intended refusal of the request and an invitation to make observations and/or to submit further evidence: Form PCT/RO/158

Rule 26*bis*.3(f)-(h)

PCT/GL/RO 166R-166S

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08. **Procedure at the RO/EP – Rule 26bis.3(h-bis)**

09. Examples

Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

- In general, RO/EP will transmit all documents received from the applicant or agent relating to a restoration request to the IB.
- Rule 26*bis*.3(h-*bis*) PCT provided for a mechanism under which certain documents or parts thereof will not be transmitted to the IB.
- RO/EP will refrain from the transmission:
 - upon a reasoned request by the applicant or agent
 - on its own decision.

Rule 26*bis*.3(h)(iv)

AI, Section 315
PCT/GL/RO 166N-166Q

Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

- RO/EP refrains from transmitting a document or part thereof to the IB if it finds that:
 - this document or part thereof does not obviously serve the purpose of informing the public about the international application;
 - publication or public access to any such document or part thereof would clearly prejudice the personal or economic interests of any person; and
 - there is no prevailing public interest to have access to that document or part thereof.

Rule 26*bis*.3(h-*bis*)
PCT/GL/RO 166N

Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

Question 5

In order to support the request for restoration of the right of priority by evidence, an agent submitted a medical certificate indicating the nature of the illness. May such certificate be omitted from the transmission to the IB?

yes no

Procedure at the RO/EP – Rule 26*bis*.3(h-*bis*)

Question 5

In order to support the request for restoration of the right of priority by evidence, an agent submitted a medical certificate indicating the nature of the illness. May such certificate be omitted from the transmission to the IB?

The correct answer is: **yes**

Medical certificates stating the nature of the illness qualify as information referred to under Rule 26*bis*.3(h-*bis*) PCT.

PCT/GL/RO 1660

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09. **Examples**

Examples – COVID-19 outbreak vs. filing software issues

Example 1: COVID-19 outbreak	Example 2: Missing filing software update
<ul style="list-style-type: none">• Due to the COVID-19 outbreak, agent had to work in home office but the filing session could not be created using the home PC• Second attempt on the company premises failed• Due to COVID-19 measures no access to the only working fax machine in another sector of the building• The international application was filed past the priority period	<ul style="list-style-type: none">• Agent tried to file online• The filing failed due to a missing software up-date on the company's PCs• Agent did not attempt to file by fax• The international application was filed past the priority period

Examples - Postal services

Example 3: Postal service difficulties/errors	Example 4: Force majeure
<ul style="list-style-type: none">• Agent selected a well-known postal delivery service• Proper instructions were delivered• The package was wrongly stored by the delivery service• The international application was filed past the priority period	<ul style="list-style-type: none">• Agent selected a well-known postal delivery service• Proper instructions were delivered• The postal delivery service went on strike• The international application was filed past the priority period

Examples - Unrepresented individual applicant

Example 5: Ignorance of the law	Example 6: Wrong entry in diary
<ul style="list-style-type: none">• Individual applicant• Not familiar with the PCT• Invoked ignorance of the consequences of missing the priority period	<ul style="list-style-type: none">• Individual applicant• Aware of the importance of filing prior to the expiry of the priority period• Monitored time limits using a computer diary• Miscalculated the 12-month time limit

Examples - Represented applicant

Example 7: Wrong instructions	Example 8: Alternative means of communication
<ul style="list-style-type: none">• Agent requests applicant to instruct whether an international application should be filed• Applicant replies in the affirmative, but indicates the wrong file number• Agent requests clarification twice• Applicant calls agent on the last day of the priority period to confirm the instruction to file• The application is only transmitted past midnight	<ul style="list-style-type: none">• Agent receives an instruction to file with amendments on the last day of priority period• The online filing system delivers an error message after each attempt to file online• Agent attempts to file by fax• Fax machine delivers an error message• The application is only transmitted past midnight

Examples – Illness

Example 9: Sudden illness	Example 10: Not so sudden illness
<ul style="list-style-type: none">• Individual agent• Fell suddenly ill and was hospitalised• Due to an urgent surgery, communication with other persons was not possible• International application filed upon return of the agent	<ul style="list-style-type: none">• Large company• Agent absent through illness on the date of expiry of the priority period• No deputy appointed• International application filed upon return of the agent

Examples - Cross-check mechanism

Example 11: Small company	Example 12: Large company
<ul style="list-style-type: none">• Two agents and one assistant• The assistant monitors time limits• Time limits are docketed in an electronic calendar• The wrong time limit was inadvertently entered• This was only noticed after expiry of the time limit, during a weekly review of open files	<ul style="list-style-type: none">• Several agents and assistants, numerous files• One assistant monitors time limits for one agent• Time limits are docketed in an electronic calendar• The wrong time limit was inadvertently entered• This was only noticed after expiry of the time limit, during a weekly review of open files

Examples - Agent with assistant

Example 13: Supervision	Example 14: Foreseeable absence
<ul style="list-style-type: none">• Assistant miscalculates priority date• Wrong date entered in the state of the art electronic tool for monitoring time limits• Experienced assistant without formal training• Written instructions by email• Periodical checks by the agent of the work carried out by the assistant	<ul style="list-style-type: none">• Main assistant on maternity leave• New temporary replacement hired• Instructed to continue monitoring time limits in the same way as the assistant had done in the former position• No further measures taken• Time limit inadvertently missed

- Thank you for your attention
- Any questions?
- Questions later on?
 - Veronika: vsadlonova@epo.org
 - Tobias: tlueddemann@epo.org