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Learning path for patent examiners

Drafting the written opinion: Intermediate level

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Introduction

This publication, "Drafting the written opinion, Intermediate level", is part of the "Learning path for patent examiners" series edited and published by the European Patent Academy. The series is intended for patent examiners at national patent offices who are taking part in training organised by the European Patent Office (EPO). It is also freely available to the public for independent learning.

Topics covered include novelty, inventive step, clarity, unity of invention, sufficiency of disclosure, amendments and search. Also addressed are patenting issues specific to certain technical fields:

- patentability exceptions and exclusions in biotechnology
- assessment of novelty, inventive step, clarity, sufficiency of disclosure and unity of invention for chemical inventions
- the patentability of computer-implemented inventions, business methods, game rules, mathematics and its applications, presentations of information, graphical user interfaces and programs for computers
- claim formulation for computer-implemented inventions

Each publication focuses on one topic at entry, intermediate or advanced level. The explanations and examples are based on the European Patent Convention, the Guidelines for Examination in the EPO and selected decisions of the EPO's boards of appeal. References are made to the Patent Cooperation Treaty and its Regulations whenever appropriate.

The series will be revised annually to ensure it remains up to date.

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Legal references

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1. Learning objectives

Participants to this course will learn:

- The legal basis for written opinions provided with EPO (European Patent Office) search reports
- The structure used when writing a written opinion (EESR)
- Strategies applicable to the drafting of written opinions

2. Legal basis

Article 92 EPC:

"The European Patent Office shall, in accordance with the Implementing Regulations, draw up and publish a European search report in respect of the European patent application based on the claims, with due regard to the description and any drawings."

Rule 61(1) EPC:

"The European search report shall mention those documents, available to the European Patent Office at the time of drawing up the report, which may be taken into consideration in deciding whether the invention to which the European patent application relates is new and involves an inventive step."

Rule 62 EPC:

Extended European search report (EESR): "The European search report shall be accompanied by an opinion on whether the application and the invention to which it relates seem to meet the requirements of this Convention."

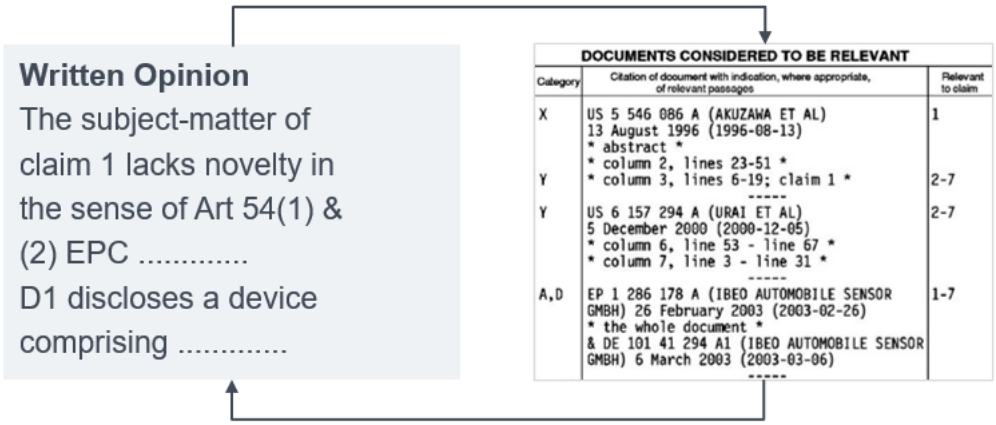
The EESR is made up of two components:

1. the European search report or the supplementary European search report (see the Guidelines (GL) B-X)
2. the search opinion

Legal references:

Art. 92 EPC, Art. 93(1) EPC, R. 61 EPC, R. 62 EPC, GL B-XI

3. Structure of a written opinion



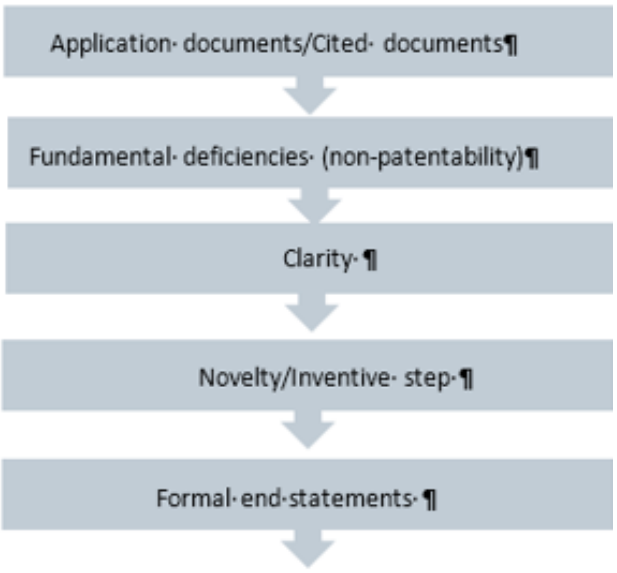
For each objection in the EESR, the search opinion indicates the part of the application which is deficient and the EPC requirement that is not met, usually by referring to specific articles or rules. The search opinion will also give the reason for any objection when this is not immediately apparent.

For example, where prior art has been cited and only part of a cited document is relevant, the search opinion will specify the pertinent passage. If the cited prior art demonstrates a lack of novelty or inventive step in the independent claim(s), and if, consequently, there is lack of unity between dependent claims (see GL F-V, 4), the applicant will be informed accordingly (see GL B-VII, 1.1).

Substantive matters are normally set out first. The search opinion is drafted in such a manner as to facilitate the later examination of the amended application and to avoid the need for extensive re-reading (see GL B-XI, 3).

In general, all claims are mentioned, and all documents cited as "X" or "Y" against certain claims are referred to in the search opinion with a corresponding objection.

For dependent claims, detailed reasoning may not always be necessary in the search opinion but the reason for the objection needs to be apparent.



Legal references:
GL B-XI; GL B-XI, 3.2.1; GL B-XI, 3.6

4. Reasoning

Although the search division must consider all the requirements of the EPC, the requirements which are most likely to require attention are sufficiency of disclosure (GL F-III), clarity and support in the description (especially of the independent claims; GL F-IV, 4 and 6), novelty (GL G-VI) and inventive step (GL G-VII).

Legal references:
GL B-XI, 3.2

5. Strategic drafting

The written opinion (EESR) has three objectives:
1. to inform the applicant of the defects in the application
2. to inform the public of the division's assessment
3. to help the division steer the later examination procedure

The written opinion should be consistent with the search report, complete in the sense that an opinion is given on all the claims and all the necessary objections are noted, and reasoned in the sense that a logical chain of arguments is given.

The search division should not require or suggest amendments merely because it thinks they will improve the wording of the description or claims; a pedantic approach should not be taken. What is important is that the meaning of the description and claims is clear, but any serious inconsistencies between the claims and the description as filed must be objected to (see GL F-IV, 4.3).

The search division's role does not involve requiring the applicant to amend the application in a particular way to overcome an objection since draft the application is down to the applicant. Applicants are free to amend in any way they choose provided that the amendment removes the deficiency and otherwise satisfies the requirements of the EPC.

The search division should ideally combine the following three approaches:
1. In the **objective** approach, examiners should concentrate on the facts of the case, minimising personal interpretation.
2. In the **structured** approach, examiners keep a clear structure and mention the most important objections first.
3. Lastly, in the **pragmatic** approach, examiners limit objections to what can be directly anticipated as being the applicant's response.

It may sometimes be useful if the search division suggests an acceptable form of amendment. However, if it does so, it has to make it clear that the suggestion is merely to assist the applicant and that other forms of amendment will be considered in examination proceedings.

If there is a straightforward amendment that the applicant could make to overcome the objections raised, the search division should tell the applicant what it is; however, the division is not obliged to do so.

When suggesting an acceptable form of amendment to the claims, the search division will also invite the applicant to adapt the description to bring it into line with the amended claims (see GL F-IV, 4.3). Responsibility for determining the text of the application and for defining the subject-matter for which protection is sought remains with the applicant (Article 113(2) EPC).

Legal references:
GL B-XI, 3.7; GL B-XI, 3.8

6. Beyond the course

You can deepen what you have learned during this course with the following further readings:

- Guidelines for Examination in the European Patent Office, Part B: Guidelines for Search
- WIPO, PCT International Search and Preliminary Examination Guidelines

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