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Learning path for patent administrators

The European patent granting procedure: EPAC – entry level

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Introduction

This publication, "The European patent granting procedure, EPAC – entry level", is part of the "Learning path for patent administrators" series is edited and published by the European Patent Academy. The series is intended for patent administrators who are taking part in training and certifications organised by the European Patent Office (EPO). It is also freely available to the public for independent learning.

Topics covered include: general aspects of the patent system; the European patent system and the European patent granting procedure; the International Patent System (PCT) and the PCT procedure; European and international publications; filing a European patent application and filing an international application; the formalities during the European and during the international search; the formalities during the European examination and during the international preliminary examination; the formalities during the appeal procedure after refusal (EPC), during the opposition procedure (EPC); national validation (EPC); entry into national/regional phases and entry into the European phase (PCT).

Each chapter focuses on one topic at entry, intermediate or advanced level, as appropriate. The series will be revised annually to ensure it remains up to date.

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All references to natural persons are to be understood as applying to all genders.

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1. Learning objectives

Participants in this course will learn:

- About the maximum term of a European patent
- the timeline for a European patent application
- the outline of the European patent granting procedure
- about the role of the formalities officer and the interaction with the representative
- the definition of EPC time limits
- which are the different means of redress
- about payment methods and effective payment dates

2. Maximum term of a European patent and supplementary protection certificates (SPCs)

The maximum term of a European patent is 20 years from its filing date. The patent may lapse earlier if the annual renewal fees are not paid or if the patent is revoked by the patentee or after opposition proceedings. In certain cases (medical or plant protection product patents) it is possible to extend the period of protection (Art. 63 EPC).

Art. 63 EPC further indicated that nothing shall limit the right of a Contracting State to extend the term of a European patent, or to grant corresponding protection which follows immediately on expiry of the term of the patent, under the same conditions as those applying to national patents.

For example, supplementary protection certificates (SPCs) extend the period of effective protection for patents on human or veterinary medicinal products and plant protection products for which market authorisation is required.

With European patents with unitary effect, national patent authorities remain responsible for issuing SPCs and exchanging the data used to update the Register for unitary patent protection with the EPO.

National courts will issue SPC validity decisions for a transitional period of seven years – which may potentially be extended by a further seven years, after which the Unified Patent Court (UPC) will have exclusive jurisdiction.

Legal references:
Art. 63 EPC

3. Timeline for a euro-direct patent application and timeliness of the procedure:

- Euro-direct applications are applications filed with the EPO but without taking the international route of the PCT. For these applications, the timelines is generally a follows: If a priority is claimed (Art. 87 EPC; Art. 88 EPC): the filing of the euro-direct application (second filing in this case) should occur at the latest 12 months after the filing date of the priority application
- designation of inventor (R. 60 EPC): 16-month time limit
- publication (Art. 93 EPC): 18 months

- maximum term of patent, without supplementary protection certificate(Art. 63(1) EPC): 20 years
- renewal fees (Art. 86(1) EPC): first fee due in the third year = end of 24-month period
- prior art doc. Art. 54(3) EPC

For substantive examination phase:

- request for examination to be made in principle within 6 months of the publication of the search report or 6 months after notification of communication (R. 70(1) EPC; R. 161 EPC)
- reply to communication pursuant to R. 71(3) EPC: 4 months
- reply to communication pursuant to Art. 94(3) EPC: 4 months, extendable

Regarding the timeliness of the different procedures before the EPO, the general rules are the following:

- search reports: search reports to be delivered within 6 months of receipt
- examination period: examination times to be reduced to just 12 months on average
- opposition period: oppositions to be completed in 15 months on average, while ensuring the parties are heard

Legal references:
Art. 54(2) EPC; Art. 54(3) EPC; Art. 63(1) EPC; Art. 87(1) EPC; Art. 88 EPC; Art. 89 EPC; Art. 93 EPC
Rule 40 EPC; Rule 60 EPC
GL A-III, 6; GL V-VI

4. Procedures before the EPO; Publication of applications and of patents

Article 15 EPC governs the departments entrusted with each procedure. In order to carry out the procedures laid down in the EPC, the European Patent Office has set up a Receiving Section, search divisions, examining divisions, opposition divisions, a legal division, boards of appeal and an Enlarged Board of Appeal. All these departments are entrusted with their functions as defined by Article 15 EPC.

European patent applications and patents are published:

A patent application is published 18 months after the date of filing or the earliest priority date. With the publication of an application, the public is informed of the technical of the invention for which protection is sought. The publication also provides provisional protection to the applicant and enables third parties to submit observations.

Any granted patents are published after the examination procedure and are known as B publications. Publication of the patent informs the public of the exclusive rights that have been granted and triggers the 9-month period during which an opposition may be filed.The details of publications are handled in a separate module.

Legal references:
Art. 15 EPC; Art. 16-22 EPC; Art. 143 EPC
Rule 8 to 13 EPC

5. The role of formalities officers

Regarding the allocation of duties to the departments of first instance, Rule 11(3) EPC states that "The President of the European Patent Office may entrust to employees who are not technically or legally qualified examiners the execution of duties falling to the Search, Examining or Opposition Divisions and involving no technical or legal difficulties."

The formalities staff of the EPO, whether they be in The Hague, Munich or Berlin, are directed primarily to the Receiving Section, which is specifically responsible under the EPC for ensuring that the formal requirements for European patent applications are adhered to. Their main role is to be responsible for communicating between the applicant and the EPO.

Following receipt at the EPO, the so-called "intake" process involves receiving the application (physically or electronically: in 2023, over 70% of the applications with the EPO were filed electronically), sorting the documents received, registering and acknowledging receipt of the application, preparing and converting data for uploading into the EPO legacy systems (for applications filed on paper, all documents are scanned and added to the electronic file for further treatment) and finally generating an electronic file. The previously mentioned process steps are the same regardless of whether the application was filed electronically or in paper form.

The interactions between the representative and/or the patent paralegal are numerous during the various stages of the different procedures. These include filing the application, correction of errors, amendments requested by the applicant, further processing, clarification, post-grant procedures, etc.

Legal references:
Art. 90 EPC
Rule 35(2) EPC; Rule 35(4) EPC; Rule 40(1)(a) EPC; Rule 40(1)(b) EPC

6. EPC time limits and notifications

The EPC provides for 3 types of time limit:

- time limits computed from the actual or deemed date of filing or the date of priority
- time limits computed from an event other than the date of filing or priority
- time limits laid down by the EPO (and not by the EPC or the PCT)

A time limit is deemed to have been observed if a document that was received late was posted or delivered to a delivery service recognised by the President of the EPO (Chronopost, DHL, FedEx, Flexpress, TNT Express, SkyNet, UPS or Transworld) at least 5 calendar days before the relevant period expired.

Some example of the time limits laid down by the EPC or the PCT are:

- filing of the application → within 12 months from the (earliest) priority date
- filing of the designation of inventor → within 16 months of the date of filing/priority or up to completion of technical preparations for publication
- filing of (all) priority document(s) → 16 months from the earliest priority date or 2 months from the invitation (divisional application)
- filing of the translation of the application → 2 months from the date of filing or from the invitation

Regarding the periods to be specified by the EPO on the basis of EPC provisions:

the duration of such periods is based, in principle, on the amount of work which is likely to be required to perform the operation in question (minimum of two months, maximum of four months, exceptionally six months). However, to facilitate the work of parties and the EPO, it has been decided, as a general rule, to adopt a uniform practice with respect to time limits.

Some examples of these time limits:

- if deficiencies to be corrected are merely formal or merely of a minor character: two months
- if simple acts only are requested, e.g. under Rule 83 EPC the subsequent filing of documents referred to by a party: two months
- if observations are required on amendments which are merely of a minor character: two months
- communications from an examining or opposition division raising matters of substance: four months
- communications from the Legal Division: two months

Calculation of the time limit:

Although Rule 131 EPC allows other possibilities, any period fixed by the EPO will usually be specified in full months which will be calculated from the date of notification (see GL EII, 2). Rule 131 EPC gives precise details for the determination of the day of expiry of the period, whilst Rule 134 EPC contains provisions covering certain contingencies (see GL EVIII, 1.6).

When proceedings have been interrupted because of the death of the applicant or proprietor or for any of the other reasons specified in Rule 142 EPC (see GL EVII, 1.1), time limits are subject to the provisions of Rule 142(4) EPC. The time limits for the payment of the examination fee and the renewal fees are suspended (see GL EVII, 1.5). The time limits in force at the date of the stay of proceedings under Rule 14 EPC due to national entitlement proceedings, with the exception of those for payment of the renewal fees, are interrupted. Rule 14(4) EPC applies to the calculation of time limits after the resumption of proceedings (see GL AIV, 2.2.4).

Notification by postal services:

With effect from 1 November 2023, Rule 126(2) EPC is amended to read as follows: "Where notification is effected in accordance with paragraph 1, the document shall be deemed to be delivered to the addressee on the date it bears, unless it has failed to reach the addressee. In the event of any dispute concerning the delivery of the document, it shall be incumbent on the EPO to establish that the document has reached its destination and to establish the date on which the document was delivered to the addressee. If the EPO establishes that the document was delivered to the addressee more than seven days after the date it bears, a period for which the deemed receipt of that document is the relevant event under Rule 131, paragraph 2, EPC, shall expire later by the number of days by which the seven days were exceeded."

Electronic notification:

Currently, notification can occur in electronic form to an activated Mailbox. Electronic notification comprises the decisions, summonses, notices and communications contained in a list published on the EPO website. For the Mailbox service, the date of transmission is the date indicated on the document, provided that the addressee has access to it in the Mailbox on that date.

Legal references:
Art. 87 EPC; Art. 88 EPC; Art. 90 EPC; Art. 120 EPC to Art. 122 EPC
Rule 53 EPC; Rule 131 EPC; Rule 136 EPC
Rule 38 EPC; Rule 39 EPC; Rule 58 EPC; Rule 70(1), 70(2), 71(3) EPC; Rule 112(2) EPC
GL E-VIII, OJ EPO 2022, A114); OJ EPO 2022, A101,
OJ EPO 2015, A28; Supplementary publication 1, OJ EPO 2021, 124; OJ EPO 2015, A36;
OJ EPO 2022, A51; OJ EPO 2022, A52

7. EPC remedies: extension of period, request for a decision, loss of rights, further processing

A time limit set by the EPO may also be extended, provided that a request for extension is submitted before that period expires.

Should a time limit be missed, legal sanctions are applied. These legal sanctions are the refusal of an application, the application being deemed to be withdrawn, or a loss of rights (total or partial).

Rule 134(5) can be invoked by applicants/representatives when they are affected by exceptional circumstances beyond their control and are therefore unable to comply with the established time limit. It applies to late filing of documents and/or late payment of fees. Currently, sufficient explanation of how the party was prevented from complying with the time limit is needed, provided the mailing/transmission/payment took place within five days of the end of the dislocation or the exceptional circumstances.

Should the applicant affected by the loss of rights consider that the finding of the EPO is inaccurate, they may apply for a decision on the matter. This request must be made in writing within two months from notification of the loss of rights and include evidence of the inaccuracy. The request for a decision is free of charge. After careful consideration of the applicant's request, two possible scenarios are foreseen.

- The EPO informs the applicant that the loss of rights communication is set aside (positive result).
- The EPO issues a decision which can be appealed (negative result).

After expiry of a non-observed time limit, a request for further processing can be made (should this remedy be available for this particular loss of rights) according to Art. 121 EPC and Rule 135 EPC. This request for further processing must be made within two months from notification of the communication of loss of rights. Together with the request, the omitted act (payment of a fee or filing of a document) must be completed and the fee paid for the request for further processing (depending on the particular omitted act).

Legal references:
Art. 121 EPC; Art. 122 EPC
Rule 112 EPC; Rule 134(5) EPC to Rule 136 EPC

8. EPC remedies: re-establishment of rights, appeal

If the request for re-establishment of rights is granted, the applicant will be informed accordingly in writing and the legal consequences of the failure to observe the time limit are deemed not to have ensued.

If the request for re-establishment of rights is not granted, the applicant will be informed accordingly in writing pursuant to Article 113 EPC with an opportunity to reply. If no reply is received or if the reply does not remediate the EPO's finding, an appealable decision is issued.

An appeal may be filed against decisions taken by the Receiving Section, the examining divisions, the opposition divisions and the Legal Division according to Art. 106(1) EPC. In order to file an appeal, a notice of appeal must be filed in writing (either on paper or electronically) together with the payment of the appeal fee (fee code 011). Both the notice and the appeal fee must be received within two months of notification of the decision. Within four months of notification of the decision, the grounds of appeal must be filed containing reasoned arguments (the content of the grounds must be substantiated under Rule 99 EPC). The time limit for filing an appeal against a decision cannot be extended.

Example

- Refusal of an application by the examining division pursuant to Art. 97(2) EPC.

Legal references:
Art. 90(5) EPC; Art. 97(1) EPC; Art. 97(2) EPC; Art. 106(1) EPC; Art. 112(2) EPC; Art. 122 EPC
Rule 14 EPC/Rule 142 EPC; Rule 136 EPC

9. EPC fees

EPC fees are governed by the Rules relating to Fees (RFees) and the Arrangements for deposit accounts (ADA). The latest updates on the schedule of fees and expenses can be found in the Official Journal of the EPO and on the EPO website.

Fees due to the EPO can be paid by:

- deposit account held with the EPO
- credit card, or
- bank transfer

The date on which any payment shall be considered to have been made to the Office shall be the date on which the amount of the payment or of the transfer is actually entered in a bank account held by the Office.

Guidance for the payment of fees, expenses and prices applicable as from 1 April 2024.

Refunds:

An enhanced fee refund procedure is available, that has been digitalised to make the process of claiming refunds online simple and efficient. Under this procedure, users of MyEPO claim their refunds directly in Central Fee Payment without having to receive a refund code first. In addition, users can manage their access rights to delegate the task of claiming refunds.
Users are still encouraged to maintain up-to-date refund instructions for each file. This facilitates the swift processing of refunds to a deposit account held with the EPO without the need for further intervention on the user side.

Legal references:
Art. 5 and 7 RFees
OJ EPO 2024, A37; OJ EPO 2024,2; OJ EPO 2024, A23

European Patent Academy
European Patent Office
Munich
Germany
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Responsible for the content
European Patent Academy
academy@epo.org