

Learning path for patent administrators

European examination: EPAC – entry level

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Introduction

This publication, "European examination, 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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1. Learning objectives

Participants in this course will learn:

- what is an examination request
- which fees are due in the examination phase
- what amendments are needed before substantive examination
- different EPO actions and possible responses
- what is a third-party observation
- the consequences of a withdrawal and the corresponding refunds
- the different types of consultations with the examining division

2. Examination request, maintenance of the application

The date of publication of the search report triggers a time limit of six months in which to pay the designation, the extension and the validation fee, to pay the examination fee and to file a reply to the written opinion. Comments or corrections on any deficiencies noted by the search division need to be filed.

In the case of certain applications, the EPO will invite the applicant to confirm an early request for examination. These are files where the examination fee has already been paid, or after dispatch of EPO Form 1224/1082, a declaration of maintenance of the application must also be filed.

Should any of the above-mentioned fees not have been paid in time and/or the reply has not been filed in time, a loss of rights communication will be issued under Rule 112(1) EPC. This loss of rights can be remedied by requesting further processing within a time limit of two months from notification of this communication.

Legal references:

Art. 94 EPC; Art. 121 EPC; Art. 122(4) EPC

Rule 70 EPC; Rule 136(3) EPC

3. Fees due during the examination phase

The examination fee is due when the request for examination is filed (contained in EPO Form 1001) and the time limit for the payment is six months from the date of the mention of the publication of the European search report in the European Patent Bulletin.

Designation fee:

Designation fee(s), extension and validation fees are due on publication of the European search report (ESR) and the time limit is six months from publication of the ESR. There is also a possibility for these fees to be paid upon filing.

Grant and publication fees:

The fee for grant and publishing is due from the date of notification of the communication under Rule 71(3) EPC and the time limit is four months from notification of this communication.

Claims fee for EP applications:

When replying to a communication pursuant to Rule 69 EPC (i.e. EPO Form 1081)*, if the number of claims has increased beyond the number of claims originally filed and exceeds 15, the fees for the additional claims are only payable, if still due, upon communication of the intention to grant.

*Reminder concerning payment of the designation fees (Art. 79(2) EPC) and examination fee (Art. 94(1) EPC) – and invitation under Rule 70a(1) EPC.

Claims fee for Euro-PCT applications:

The payment of the claims fee (over 15 claims) is due within the six-month period set in the communication under Rules 161/162 EPC.

- If the applicant fails to pay the claims fee for Euro-PCT applications in due time: the EPO will invite the applicant to pay the fees with a surcharge of 50% within two months of notification of the communication (EPO Form 1066).

Renewal fees:

Renewal fees are to be paid from the 3rd year up to 20th year and are calculated from the date of filing of the application. They are due on the last day of the month containing the anniversary of the date of filing of the application.

Renewal fees for a European patent application in respect of the coming year are due on the last day of the month containing the anniversary of the date of filing of the European patent application. These fees can only be validly paid three months before the due date. Should the payment of a renewal fee be missed, an additional six-month time limit to pay with 50% surcharge of the renewal fee will ensue. A renewal fee will no longer be payable to the EPO as from publication of the granted patent.

According to Rule 51(1) as amended with effect from 1 April 2018 (OJ EPO 2018, A2), the renewal fee in respect of the third year may be paid up to six months before it falls due.

Legal references:

Art. 11(a) Rfees; Art. 11(b) Rfees

Art. 86 EPC

Rule 51(1) EPC; Rule 69 EPC; Rule 71a(6) EPC

GL A-X, 5.2

4. Filing amendments before substantive examination

Response to the search opinion:

Where no deficiencies are noted in the search opinion, the applicant is given the opportunity to file voluntary amendments within six months of publication of the European search report.

If the EPO has noted deficiencies with respect to patentability in the opinion accompanying the European search report, the applicant is invited to correct the deficiencies/file amendments or comments within six months of publication of the European search report.

Legal references:

Rule 70a(1) EPC; Rule 70a(2) EPC; Rule 137(2) EPC; Rule 137(4) EPC; Rule 161 EPC; Rule 162 EPC

5. Prior search results

Prior search results are to be issued if the applicant is claiming priority from an earlier application.

The EPO will invite the applicant to file a copy of the prior search results or a statement of non-availability for any prior search carried out by or on behalf of the office of first filing (OFF). The time limit to file such prior search results is two months and is non-extendable. Prior search results can be submitted voluntarily before the despatch of such an invitation.

Mention of exemptions for prior search results can be found in the decision of the President of the EPO (OJ EPO 11/2010, 600, last update OJ EPO 2019, A55, A56).

Legal references:

Rule 70b EPC; Rule 141(1) EPC; Rule 141(2) EPC

OJ EPO 12/2009, 585; OJ EPO 8-9/2010, 410; OJ EPO 2013, 216; OJ EPO 2015, A3; OJ EPO 2019, A55; OJ EPO 2019, A56

6. Additional search fees in case of PCT non-unity

An invitation to pay additional search fees is issued if the EPO was ISA/SISA and where, upon entering into the examination phase, an invention is claimed which was not searched by the EPO, or the reply to the communication under Rule 161 / 162 EPC relates to non-searched invention(s). Such invitation will invite the applicant to pay a search fee for each of the non-searched invention(s) found in the application under Rule 164(2)(a) EPC. The time limit to reply to such invitation is two months and is non-extendable. Failing to reply to the invitation under amended Rule 135(2) EPC excludes further processing.

The applicant may choose to pay a search fee for each or part of the non-searched inventions found (the applicant is free to indicate which invention(s) they want to have searched). If all further search fees are paid, a search report on all non-searched inventions will be issued. If only part of the further search fees is paid, a search report on the chosen invention(s) will be issued. Should no further search fees be paid, the examining division will issue a communication under Article 94(3) and Rule 71(1) and (2) or Rule 71(3) EPC (the examining division will require deletion of, or itself delete, any non-searched subject-matter).

If a search fee is (invalidly) paid outside the time limit, it will be refunded according to Art. 7(3) RFees.

The applicant may file amended application documents with or without paying the further search fee(s).

The applicant may request to receive an additional set of copies of the documents cited.

Legal references:

Art. 94(3) EPC

Rule 71(3) EPC; Rule 135(2) EPC; Rule 164(2)(a) EPC

7. Substantive examination: office actions

A communication pursuant to Article 94(3) EPC is issued if examination reveals that the application does not satisfy the EPC requirements. This is essentially an invitation to file observations and/or submit amendments within a time limit which is normally four months, but not less than two months (Rule 132(2) EPC), and which is extendable up to six months upon request. Any request for extensions exceeding six months is only allowable under well-substantiated circumstances.

Minutes of a telephone consultation should list the participants and summarise the main results of the consultation. Documents filed by email during a consultation, such as new claims or an amended description, must be attached to the minutes. Minutes, when despatched to the applicant, may be issued for information only, to extend a pending time limit, to set a new time limit for response, to cancel a pending time limit or to reflect the decision to cancel scheduled oral proceedings.

Minutes as the first communication in examination will present the matters discussed with the same level of information and structure as an Art. 94(3) communication.

The consulted person must be a person entitled to act for the applicant before the EPO. If the applicant is a natural or legal person having either residence or place of business in a contracting state, consultations may only be conducted with the applicant, a professional representative or duly authorised employee of the applicant or a legal practitioner as defined in Art. 134(8) EPC. The outcome of the interview is the same as explained for minutes/telephone consultation.

Legal references:

Art. 94(3) EPC; Art. 113 EPC; Art. 134(8) EPC

Rule 71(1) EPC; Rule 71(2) EPC; Rule 115(1) EPC; Rule 116 EPC; Rule 132(2) EPC

8. Substantive examination: response to office actions

The reply must contain at least one concrete substantive observation directed to at least one concrete objection raised in the communication. An oral reply given over the telephone or in person may also suffice if substantively satisfactory.

A request for a decision "according to the state of the file" constitutes a reply to a communication under Article 94(3) EPC.

A mere request for oral proceedings does NOT constitute a valid reply.

Legal references:

Art. 94(3) EPC

Rule 71(1) EPC; Rule 71(2) EPC

9. Substantive examination: amendments

In general any amendment must comply with Rule 137(4) EPC. An invitation to indicate the basis for amendments is issued if a deficiency is found when filing amendments. The applicant has to identify the amendments and indicate the basis for them in the application as filed. This invitation to provide the indication of the basis for the amendments in the application as filed has a (non-extendable) time limit of one month.

Legal references:

Art. 123(2) EPC

Rule 137(4) EPC

10. Third-party observations

In proceedings before the EPO, after publication of the European patent application, any third party may present observations concerning the patentability of the invention. The third party does not become a party to the proceedings. They can file additional observations but have no further rights.

Third-party observations must be filed in writing, are free of charge and can be filed anonymously if preferred. They can only be considered in pending proceedings before the EPO, must concern the patentability of the application and must state the grounds on which they are based.

Third-party observations can only be filed after international or European publication of an application and must be filed in one of the official languages of the EPO.

Third-party observations are forwarded to the applicant/representative, who may comment on them. The examining division will provide feedback on the third-party observations in its next communication.

Legal references:

Art. 115 EPC

Rule 114 EPC

11. Withdrawals

In case of a withdrawal, the European patent application is deemed never to have had the effects set out in paragraphs 1 and 2 of Article 67 EPC when it has been withdrawn, deemed to be withdrawn or finally refused.

Provisional protection under Article 67 EPC conferred to the application as an object of property ceases to apply retroactively.

The European Patent Register will publish the date of withdrawal on the Friday or Monday after the weekly publication run (Rule 143(1)(n) EPC). And it will be published in the European Patent Bulletin (Article 129(a) EPC) five weeks after that.

The applicant may withdraw their application at any time as long as the application is pending before the EPO. The application may be withdrawn by means of a signed declaration which should be

unqualified (e.g. not limited), absolute and unambiguous (not of doubtful meaning). If the declaration of withdrawal satisfies all requirements, it has immediate effect.

Legal references:

Art. 67(4) EPC

Rule 15 EPC; Rule 67(2) EPC; Rule 129(1) EPC; Rule 143(1)(n) EPC

GL A-IV, 1.1.1; GL A-VI, 1.2; GL C-V, 11

OJ EPO 2013, 153

12. Refund of fees in case of withdrawal

Refund of the examination fee:

Article 11(a) RFees states that as of 01.07.2016, the examination fee will be refunded at a rate of 100% should the application be withdrawn before examination has started.

Article 11(b) RFees states that as of 01.11.2016 the examination fee will be refunded at a rate of 50% should the application be withdrawn after examination has started and before expiry of the time limit for replying to a first communication issued by the examining division. This first communication could be a communication under Art. 94(3) EPC, an invitation pursuant to Rule 137(4) EPC (to indicate the basis for amendments), minutes of interviews or telephone conversations sent together with an invitation to correct deficiencies within a time limit (under Art. 94(4) EPC) or summons to oral proceedings as first action.

In the event that no communication under Art. 94(3) EPC is issued, but instead a communication under Rule 71(3) EPC, Art. 11 RFees provides that the examination fee will be refunded at a rate of 50% if the application is actively withdrawn before the date of issuance of the communication under Rule 71(3) EPC.

If the application is withdrawn prior to notification of the decision on the grant of a European patent or, at that time, deemed to be withdrawn, the fee for grant and publishing will be refunded at 100%.

Refund of additional claims fee:

In principle there is no refund for the additional claims fee except when paid although not falling due (e.g. with filing a disapproval to communication pursuant to Rule 71(3) EPC).

If the renewal fee is paid on/after the withdrawal date or paid before but is not due up to the withdrawal date, the renewal fee will be refunded at 100%.

Legal references:

Art. 11(a) RFees; Art. 11(b) RFees

13. Oral proceedings

Oral proceedings can be scheduled at the volition of the examining division if no agreement can be reached in writing (Rules 115(1), 116 EPC) or at the request of the applicant or their representative ("right to be heard" according to Art. 113 EPC) before a negative decision is reached.

The summons must contain the date and time of oral proceedings, a summary of the issues to be discussed and the last day for filing written submissions or amendments.

In exceptional cases, the examining division may issue a summons to oral proceedings as the first action in examination. The division may decide to do so only if, despite the applicant's reply to the search opinion, no possibility of a grant can be envisaged, if the content of the claims on file is not different in substance from that of the claims which served as a basis for the search or if one or more of the objections raised in the search opinion which are crucial to the outcome of the examination procedure still apply.

Different kinds of submissions are possible prior to oral proceedings. The most common are:

- submission with a conditional request to cancel oral proceedings upon acceptance of newly-filed documents
- submission with comments and/or amended pages only
- no-show
- request to allow oral submissions by accompanying persons
- withdrawal of the application
- email address information for videoconference connection details

During the oral proceedings, minutes of the oral proceedings must be drawn up.

After oral proceedings are held, minutes of the oral proceedings must be drafted by a second member of the division, must contain the essence of the oral proceedings and will be communicated to the applicant as soon as possible.

Oral proceedings can be terminated orally by the announcement of a decision (refusal); otherwise, the applicant will be informed of a subsequent procedure (either further communication or intention to grant).

Legal references:

Art. 94(3) EPC; Art. 113 EPC; Art. 134(8) EPC

Rule 115(1) EPC; Rule 116(1) EPC; Rule 124(1) EPC

14. Intention to grant

Before a European patent is granted, a communication pursuant to Rule 71(3) EPC is issued informing the applicant of the text intended for grant and the bibliographic data for the application intended for grant.

The purpose of this communication is to invite the applicant to either approve the text/bibliographic data by filing a claims translation and paying the prescribed fees or to request amendments/corrections within a non-extendable time limit of four months.

The consequence of a late reply or no reply to a communication pursuant to Rule 71(3) EPC will be that the application will be deemed to be withdrawn.

Legal references:

Rule 71(3) EPC; Rule 71a(4) EPC; Rule 71a(5) EPC

If the applicant pays the fees for grant and publishing and files the translations of the claims within the four month period, without filing a request for correction or amendments to the text proposed for grant, the applicant will be deemed to have approved the text intended for grant (Rule 71(5) EPC).

The translations of the claims are to be filed in the two official languages of the EPO other than the language of the proceedings.

Please note that for European patent applications filed before 1 April 2009 and international applications entering the regional phase before that date, the fee for grant and printing may include a separate element which depends on the number of pages, but for applications filed or entering the regional phase on or after that date, this additional element is payable as part of the filing fee.

Legal references:

Rule 71(3) EPC; Rule 71a(4) EPC; Rule 71a(5) EPC

15. Decision to grant and its publication

The decision to grant a European patent pursuant to Article 97(1) EPC (EPO Form 2006A) is despatched to the applicant.

This decision will take effect on the date on which the mention of the grant is published in the European Patent Bulletin (Art. 97(3) EPC).

The effects of the date of grant are as follows:

- effects of a national patent in the contracting states for which it is granted
- full patent protection against infringement
- the patentee has the right to limit or revoke the patent

Legal references:

Art. 97(1) EPC; Art. 97(3) EPC

Rule 71(3) EPC; Rule 71a(4) EPC

OJ EPO 3/1997, 115; OJ EPO 2013, 418

16. Types of publications for EP granted patents

After the date of grant, the EPO sends the applicant a certificate of grant and publishes the patent specification (B1).

Any mistakes in the specification of a European patent arising in the course of its production have no effect on the content of the patent granted. A correction is to be made public as soon as any mistake in a specification is discovered. This is done by means of a note in the European Patent Bulletin and publication of a corrigendum (B8 for bibliographical data or B9 for errors in the specification).

Legal references:

Art. 14(6) EPC; Art. 98 EPC

Rule 73 EPC

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