

# Learning path for patent administrators

## European examination: EPAC – intermediate level

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## Introduction

This publication, "European examination, EPAC – intermediate 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:

- the concept of acceleration of the examination procedure
- about the next steps when a communication under Rule 71(3) EPC has been disapproved
- the legal and procedural effect of a refusal under Article 97(2) EPC
- what kind of correction can be requested and until what point in time
- what kind of correction can be submitted after grant with a particular focus on publication errors
- the legal principles of interruption/stay of proceedings and resumption thereof

## 2. Acceleration of the examination procedure

With a request for accelerated examination under the programme for accelerated prosecution of European patent applications (PACE), the applicant can speed up the proceedings at the examination stage (see notice from the EPO dated 30 November 2015, OJ EPO 2015, A93).

Accelerated examination can, in principle, be requested at any time after the examining division has assumed responsibility for the application (Rule 10(2), (3) EPC).

For PCT applications entering the European phase where the EPO also acted as (S)ISA, accelerated examination can, in principle, be requested at any time, for example:

- on entry into the European phase before the EPO, or
- together with any response to the WOISA, IPER or SISR required under Rule 161(1) EPC

When accelerated examination is requested, the EPO makes every effort to issue the next office action within three months of receipt by the examining division of the request, the applicant's response under Rule 70a EPC, the end of the period under Rule 161(1) EPC or the request for accelerated examination (whichever is later).

### Different ways of accelerating the examination procedure

1. In particular for PCT applications entering the European phase where the EPO acted as (S)ISA, accelerated examination can only start after expiry of the six-month period under Rule 161(1) EPC, even if acceleration has been requested under the PACE programme. In order for examination to start immediately, on entry into the European phase, the applicant must explicitly waive the right to receive the communication pursuant to Rule 161(1) EPC and Rule 162(2) EPC and fulfil all corresponding requirements (see notice from the EPO dated 30 November 2015, OJ EPO 2015, A94).
2. The applicant can also accelerate the processing of Euro-PCT applications by filing an explicit request for early processing of an international application by the EPO as designated/elected Office.
3. Before the applicant receives the search report, they can waive the invitation under Rule 70(2) EPC and request examination unconditionally irrespective of the results of the search. In this case, under Rule 62 EPC, the European search report is issued together with the first examining communication under Article 94(3) and Rule 71(1) EPC instead of the opinion on patentability under Rule 62 EPC. A prompt and full response from the applicant then ensures that the proceedings can continue quickly.

The PACE ("Programme for ACcelerated prosecution of European patent applications") enables applicants to have their applications processed rapidly, ideally within three months (OJ EPO 2010, 352).

The PACE request:

- must be filed online using EPO Form 1005
- must be signed by an authorised person
- must be filed separately for each application

It can only be filed once and is lost if the deadline for responding to an office action is not met.

**Legal references:**

Rule 10(2) EPC; Rule (3) EPC

### 3. Disapproval and late amendments

If the applicant submits reasoned amendments or corrections after receipt of the communication under Rule 71(3) EPC, there are two possible outcomes:

- If the examining division agrees, it issues a new communication under Rule 71(3) EPC.
- If the examining division does not agree, examination proceedings are resumed under Rule 71(6) EPC.

In the latter case, the obligation to file claims translations and pay the prescribed fees is postponed until agreement on the text has been reached.

Once agreement has been reached and no other requirements are outstanding, the decision to grant the European patent is issued.

**Legal references:**

Rule 71(3) EPC; Rule 71(6) EPC

### 4. Refusal

The decision to refuse a European patent application is issued if the application does not meet the requirements of the EPC, such as those of Article 52(1) and (2) EPC (lack of inventive step and novelty). The refusal must be based only on grounds on which the applicant has had an opportunity to comment.

With the refusal, any rights conferred by the application are deemed never to have existed (Article 67(4) EPC).

A refusal can also be pronounced during oral proceedings.

Applicants may request a decision "on the file as it stands" or "according to the state of the file", for example when all arguments have been sufficiently put forward in the proceedings and the applicant is interested in a speedy appealable decision. GL C-V, 14 and subsections describe the procedure to be followed in the case of such a request.

The decision is open to appeal.

#### **Legal references:**

Art. 52(1) EPC; Art. 52(2) EPC; Art. 67(4) EPC; Art. 97(2) EPC; Art. 113(2) EPC  
Rule 111(1) EPC; Rule 111(2) EPC; Rule 113 EPC

## **5. Corrections after grant: general**

The EPO is bound by its decision to grant, therefore any corrections or changes of bibliographic data and of the patent specification are handled in a clearly defined way.

Formalities officers of the EPO will be responsible for:

- corrections/changes of bibliographic data (with the exception of IPC classes)
- the correction of spelling mistakes in titles
- the correction of publication errors in patent documents
- the correction of bibliographic data included in the decision to grant

EPO examiners will be responsible for corrections of the description/claims/drawings other than publication errors.

Some errors can be corrected at any time:

- errors in bibliographic data due to a mistake by the EPO
- publication (printing) errors occurring during the publication process
- formatting/editing errors in patent documents

Changes or corrections of bibliographic data are possible up to the last day before the publication date. The EPO updates the European Patent Register, informs national offices, and republishes if needed (B8 publication).

According to decision G 1/10, OJ EPO 2013, 194, the correction of the description, claims and drawings in a decision is inadmissible.

#### **Legal references:**

Rule 21 EPC; Rule 22 EPC; Rule 85 EPC; Rule 137 EPC; Rule 139 EPC; Rule 140 EPC  
GL H-V, 8; GL H-VI, 3  
Decision J 16/99  
OJ EPO 2013, 194 (G 1/10)

## **6. Correction and change of bibliographic data after grant**

Requests for changes and corrections of bibliographic data received after the publication run require special handling.

If a request for the correction of bibliographic data is received, how the request is dealt with differs depending on whether it concerns a correction or a change.

The correction of bibliographic data will only be considered if the correct data was already on file before the publication run, i.e. a request has either not been dealt with (yet) or has been dealt with incorrectly.

The EPO refers to a change of bibliographic data when a request for a change of bibliographic data is received on the date of or after the publication run, i.e. new data is provided which was not on file before the publication run.

The following can be corrected or changed in the bibliographic data by the EPO after publication/mention of the publication:

- correction or change of the applicant
- correction or change of the representative
- correction or change of the inventor(s)
- rectification of the (original) designation of inventor
- correction of extension/validation states
- withdrawal of designated states
- correction of titles (spelling mistakes only)
- correction of errors made by the EPO/WIPO
- the priority claim(s)
- the date of filing
- the designated states (except withdrawal of designation states)
- a change of extension/validation states
- correction of bibliographic data under Rule 139/140 EPC
- class(es)
- substantive errors in titles

The legal bases for the correction of bibliographic data are listed below.

R. 21 EPC (rectification of inventor)

R. 22 EPC (registration of transfers)

R. 85 EPC (transfer of patent)

R. 73 EPC (patent specification)

R. 74 EPC (patent certificate)

R. 137(3) EPC (amendment of application)

R. 139 EPC (correction of documents filed with the EPO)

R. 140 EPC (correction of decisions)

A **request for correction** of the bibliographic data can be considered without any time restriction. The same applies for a request for rectification of the (original) designation of inventor (R. 21 EPC).

A **request for change** of the bibliographic data can be considered by the EPO up to the last day before the publication date (on the publication date, the application becomes a bundle of national patents for which the EPO is no longer responsible).

However, a **request for change of the applicant data** will be considered by the EPO until the end of the opposition period or as long as opposition proceedings are pending (Rules 22 and 85 EPC). By analogy, changes to the representative and inventor data are also registered in this period.

#### **Legal references:**

Rule 21 EPC; Rule 22 EPC; Rule 73 EPC; Rule 74 EPC; Rule 85 EPC



## 7. Substantive correction after grant and correction of publication errors

If the patent proprietor would like a corrected specification for validation of the patent in the designated contracting states, a request for correction of the description/claims/drawings may be filed after the publication run.

Once the publication run has taken place, the EPO is bound by the decision to grant and any corrections of the description, claims or drawings have to be dealt with in a special way.

The examining division will decide, irrespective of which rule the applicant/proprietor of the patent has cited, whether the request is under Rule 137(3) EPC, Rule 139 EPC or Rule 140 EPC or whether it concerns printing errors and whether it can be allowed.

Printing errors can always be corrected.

Formatting/editing errors in the electronic Druckexemplar (eDREX) which are not indicated by standard marks or not mentioned on EPO Form 2004C can always be corrected.

Other errors concerning the text of the patent may only be corrected by the examiner in exceptional cases under Rule 140 EPC.

With decision G 1/10, OJ EPO 2013, 194 of 23 July 2012, the Enlarged Board of Appeal ruled that a patent proprietor's request to correct the text of a patent under Rule 140 EPC is inadmissible whenever made, including after the initiation of opposition proceedings.

### Legal references:

Rule 137(3) EPC; Rule 139 EPC; Rule 140 EPC

## 8. Stay of proceedings

A third party that is of the opinion that the applicant is not entitled to the grant of the patent (Rule 14 EPC) or that the patent proprietor is not entitled to the grant of the patent (Rule 78 EPC) may request a stay of proceedings under Rule 14/78 EPC.

The third party must provide evidence to the EPO that they have instituted proceedings against the applicant/patent proprietor seeking a decision within the meaning of Article 61(1) EPC.

The EPO will then stay the proceedings for grant, but after publication of the application.

The stay will take place at any phase of the prosecution, in particular during:

- the Receiving Section phase
- entry into the European phase
- the grant procedure
- the opposition procedure
- the appeal procedure
- the limitation procedure



In such a case, the date of the stay will be either the date on which the third party provided evidence to the EPO or the date of entry into the European phase if the proceedings against the applicant started when the application was still in the PCT phase.

The last day for requesting a stay of the proceedings is:

- the day before publication of the mention of the grant, if the application is granted
- the date of the decision taken by the examining division, if the application is refused
- the date of the decision taken by the opposition division, if the patent is in opposition
- the date of the decision taken by the board of appeal, if the patent is in appeal

A stay of proceedings will have various legal consequences.

- It will not be possible to withdraw the European patent application or the designation of any contracting state.
- A divisional application cannot be accepted if a request is filed during the stay of proceedings of the parent application. A communication of noting of loss of rights is to be sent informing the applicant that the application cannot be dealt with as a divisional.
- A transfer of rights cannot be recorded. Such a request will be immediately forwarded to the Legal Division of the EPO for decision.
- The EPO will not take any procedural steps with the exception of sending reminders for late payment of renewal fees.

Due to the last point, all time limits in force are interrupted by the stay of proceedings except for the payment of renewal fees.

The publication of the search report is also not impacted by the stay of proceedings.

When the proceedings are resumed, the interrupted time limits start again as from the day of resumption for the non-elapsed period only, but with a minimum of two months.

The resumption of proceedings after having been stayed will take place:

- with the consent of the third party in writing (such consent is irrevocable)
- with the consent of the third party or of the applicant/proprietor (depending on the decision), on reception at the EPO of a copy of the national decision
- with the consent of the applicant/proprietor if a final decision is not taken.

#### **Legal references:**

Art. 61(1) EPC

Rule 14(1) EPC; Rule 14(2) EPC; Rule 14(3) EPC and Rule 14(4) EPC; Rule 15 EPC; Rule 16 EPC

Decision J 0013/12

## **9. Interruption of proceedings**

Pending proceedings before the EPO are interrupted in the event of:

- death of the applicant, proprietor or representative
- incapacity (in the sense that the applicant/proprietor/representative is not in a position to take reasonable decisions due to a state of mental disturbance/illness)
- legal prevention (bankruptcy, insolvency, receivership, liquidation) of the applicant/proprietor and/or the representative

The interruption of proceedings will have the following consequences:

- all running time limits are interrupted (including the time limit pursuant to Rule 36(1)(a) and (b) EPC)
- non-observance of time limits is deemed not to have occurred
- if proceedings are interrupted retroactively, any communications falling in the interruption period must be cancelled
- all legal actions must be stayed and neither the EPO nor the parties may validly perform any legal acts (e.g. no transfer of rights)
- if a divisional has been filed during the interruption, the date of filing is postponed to the date of resumption

When proceedings are resumed, the time limits in force when proceedings were interrupted start again completely as from the day of resumption with only two exceptions.

- The time limit to request examination begins to run for the non-elapsed period or for at least two months.
- Payment of renewal fees is deferred until the date on which proceedings are resumed.

**Legal references:**

Rule 36(1)(a) EPC; Rule 36(1)(b) EPC; Rule 142(1)(a) EPC; Rule 142(1)(b) EPC; Rule 142(1)(c) EPC; Rule 142(4) EPC

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