

**IMPLEMENTATION OF THE DECISION OF THE ADMINISTRATIVE  
COUNCIL OF 28 JUNE 2001<sup>1</sup> ON THE TRANSITIONAL PROVISIONS  
UNDER ARTICLE 7 OF THE ACT REVISING THE EUROPEAN PATENT  
CONVENTION OF 29 NOVEMBER 2000**

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## **1. FILING DATE**

### **1.1. Documents for establishing a filing date - Article 80 and Rule 40 EPC 2000**

The provisions for obtaining a filing date under the EPC 2000 are set out in Article 80 and Rule 40.

These new provisions only apply to European patent applications filed on or after the **date of entry into force of the Act revising the European Patent Convention of 29 November 2000** (hereinafter: "**date of entry into force of the EPC 2000**" or "**cut-off date**").

However:

- post-dating on request is possible, if the applicant:
  - files an application one month or less before the date of entry into force of the EPC 2000, and
  - explicitly requests the application to be post-dated to that date;
- in this case the application will be post-dated to the date of entry into force of the EPC 2000 and treated under the EPC 2000, even if it satisfied the filing date requirements of the EPC 1973.

### **1.2. Filing by reference to an earlier application - Rule 40(1)(c), 40(2) and 40(3) EPC 2000**

Filing a European patent application by reference to a previously filed application under Rule 40(1)(c), 40(2) and 40(3) is only possible on or after the cut-off date.

However, it is possible to file an application by reference to a previously filed application before the date of entry into force of the EPC 2000, with the application being post-dated to that date, if:

- the application is filed one month or less before the cut-off date, and
- the applicant requests post-dating of the application to that date.

If an application is filed by reference before the date of entry into force of the EPC 2000 without a request for post-dating, and the application satisfies the filing date requirements under the EPC 2000 but not under the EPC 1973, the transitional provisions set out under 1.3.1 may apply.

### **1.3. Deficiencies preventing a filing date being accorded - Articles 80, 90(1)(2) and Rule 39 EPC 1973**

The filing requirements under the EPC 2000 are looser than under the EPC 1973 so that if a filing date can be accorded under the EPC 1973, then the requirements for according of a filing date under the EPC 2000 are always fulfilled. On the other hand, under the EPC 2000 a filing date might be accorded for an application that would not have had a filing date accorded under the EPC 1973.

**1.3.1. The European patent application is filed before the date of entry into force of the EPC 2000 and is not entitled to an EPC 1973 filing date but is entitled to an EPC 2000 filing date**

In the case where a European patent application is filed before the date of entry into force of the EPC 2000 and it is not entitled to a filing date under the EPC 1973, but is entitled to a filing date under the EPC 2000 (for example it has no claims, it is filed in Japanese or it is filed by reference), the EPO normally sends a Rule 39 communication under the EPC 1973 inviting the applicant to rectify the deficiency within a time limit of one month. The practice described below will apply only if the one-month time limit under Rule 39 EPC 1973 expires on or after the date of entry into force of the EPC 2000:

- If the one-month time limit expires on or after that cut-off date, and the applicant has not corrected the deficiency before that date, then the date of the entry into force of the EPC 2000 will become the filing date. The communication under Rule 39 EPC 1973 will contain a standard wording to that effect.
- If the applicant manages to correct the deficiency before the cut-off date, so that the application satisfies the filing date requirements of the EPC 1973, the filing date shifts to the day the correction is received.

The EPO will send communications under Rule 39 EPC 1973 (with the above mentioned standard wording) up to the date of entry into force of the EPC 2000, even if they cannot be notified anymore before that date. In these cases however, fax will be used such that the applicant becomes aware of the deficiency as soon as possible.

After the date of entry into force of the EPC 2000 the EPO will not send any communications under Rule 39 EPC 1973 for applications filed before that cut-off date and meeting the filing date requirements under the EPC 2000. In this case, the applicant will be informed about the deficiency which led to not obtaining a filing date under the EPC 1973; he will also be made aware of the fact that the application is deemed to be filed on the date of entry into force of the EPC 2000.

**1.3.2. The European patent application is filed before the date of entry into force of the EPC 2000 and is not entitled to an EPC 1973 filing date or an EPC 2000 filing date**

If a European patent application is filed before the date of entry into force of the EPC 2000 and it is entitled neither to a filing date under the EPC 1973, nor to a filing date under the EPC 2000, the EPO sends a Rule 39 communication under the EPC 1973 inviting the applicant to rectify the deficiency within a time limit of one month. The practice outlined below applies only if the expiry of this one month time limit falls on or after the date of entry into force of the EPC 2000.

If the one month time limit expires on or after the cut-off date, and

- the applicant replies before the cut-off date, satisfying the EPC 1973 filing date requirements, then the filing date of the application is the date of receipt of the correction;
- the applicant replies before the cut-off date satisfying only the EPC 2000 filing date requirements, but not those of EPC 1973, then the filing date becomes the date of entry into force of the EPC 2000
- the applicant replies on or after the cut-off date and still within the time limit set, satisfying either the requirements of EPC 1973 or the requirements of EPC 2000 then the filing date of the application is the date of receipt of the correction.

If the communication under Rule 39 EPC 1973 cannot be notified anymore by the EPO before the date of entry into force of the EPC 2000, fax will be used such that the applicant becomes aware of the deficiency as soon as possible.

#### **1.4. Late filing of parts of the description or of drawings - Rule 56 EPC 2000 and Rule 43 EPC 1973**

Rule 56 applies only to European patent applications filed on or after the date of entry into force of the EPC 2000.

However, where the applicant opts for post-dating the European patent application to the date of entry into force of the EPC 2000 (see 1.1), or is accorded a filing date on or after that cut-off date as set out in 1.3.1 or 1.3.2, the late filing of missing parts under Rule 56 becomes possible.

If the application has a filing date before the date of entry into force of the EPC 2000, and drawings are missing, then this deficiency is dealt with in accordance with Rule 43 EPC 1973, even after the date of entry into force of the EPC 2000.

## **2. FILING FORMALITIES**

### **2.1. Translation of the application (when not filed in EN/DE/FR) - Rule 6(1) EPC 1973; Rule 6(1) EPC 2000**

Under the EPC 2000, the translation of the European patent application (when not filed in EN/DE/FR) must be filed within two months of filing the application (under Rule 6(1) for applications filed directly) or within two months of a subsequent invitation to do so under Rule 58.

For any European patent application filed before the date of entry into force of the EPC 2000, the time limit for furnishing the translation of the application is that applicable under Rule 6(1) EPC 1973, regardless of whether this time limit expires before, on or after that date.

Furthermore, if the above time limit expires before the cut-off date, the current system under the EPC 1973 applies (failure to supply the translation in time leads to the application being deemed withdrawn under Art. 90(3) EPC 1973). On the other hand, if the above time limit expires on or after the cut-off date, the new system under the EPC 2000 applies and an invitation under Rule 58 is sent, setting a new time limit for furnishing the translation.

If the European patent application is filed after the date of entry into force of the EPC 2000, the new procedure as mentioned above applies. Note that the filing of applications by reference to an earlier application under Rule 40(1)(c), (2), (3) EPC 2000, and, where necessary, of a translation of the application referred to, is possible only on or after the cut-off date.

### **2.2. Late filing of claims - Rule 57(c) and Rule 58 EPC 2000**

The filing of claims later than the filing date of the European patent application is possible only for applications having a filing date that is on or after the date of entry into force of the EPC 2000 (see also section 1.3 and sub-sections).

### **2.3. Correction of deficiencies under Rule 41(1) EPC 1973**

Under the EPC 2000, non-compliance with most formal filing requirements, leads to an invitation under Rule 58 to remedy the deficiencies within a non-extendable time limit of two months.

Under the EPC 1973, an invitation under Rule 41(1), setting an extendable time limit, was sent. Whereas further processing was available for remedying a missed time limit under Rule 41(1) EPC 1973 that led to a total loss of rights, this remedy no longer applies for Rule 58 EPC 2000 (re-establishment of rights under Article 122 is available instead).

However, where the period set in an invitation under Rule 41(1) EPC 1973 expires on or after the date of entry into force of the EPC 2000, extension of the period will be possible, if a request to this effect is presented in due time (Rule 132(2) EPC 2000).

## **2.4. Priority claim, Paris Convention and WTO - Art. 87(1) EPC 2000**

Under the EPC 2000, additionally to the Paris Convention states, a priority claim from a member of the World Trade Organisation is also accepted (e.g. Taiwan).

Priority claims from non-Paris Convention countries are accepted only for applications having a date of filing that is on or after the date of entry into force of the EPC 2000.

## **2.5. Addition and correction of priority claims - Rule 52(2)(3) EPC 2000**

Under the EPC 2000, the addition and correction of a priority claim becomes possible under Rule 52(2) and 52(3). This will however not be possible once a request for early publication under Art. 93(1)(b) has been filed (Rule 52(4)).

Where, for an application filed before the date of entry into force of the EPC 2000, the period for adding or correcting a priority claim expires on or after that date, the applicant can still add or correct a priority claim, but only up to the expiry of the applicable time limit under either Rule 52(2) or (3).

If in the above case the applicant requests the addition or correction before the cut-off date the EPO will deal with the request once EPC 2000 has entered into force.

## **2.6. Translation of the priority document - Rule 53(3) EPC 2000; Rule 51(4), Rule 38(5) and Rule 41(1) EPC 1973**

Under the EPC 2000, the translation of the priority document (if it is not in DE/EN/FR) will be required if the validity of the priority claim is relevant to the determination of the patentability of the invention concerned, either in examination or in opposition (Rule 53(3)).

There will however no longer be the need to systematically furnish a translation of the priority document (if it is not in DE/EN/FR), once the European patent application is proposed for grant, when the translation was not required in examination. As regards the translation of the priority document for a divisional application, there is no need to furnish such translation if it is already on the file of the parent application when the divisional application is filed (see Decision of the President of the EPO, Special edition No. 3, OJ EPO 2007, B.2).

Concerning the transitional provisions as regards the need for supplying the translation of the priority document for an European patent application pending at the date of entry into force of the EPC 2000 and where the time limit for supplying the translation has not yet expired at that date, the following principles apply.

### **2.6.1. Unexpired time limit for submitting the translation is the Rule 51(4) EPC 1973 time limit**

If the following conditions are satisfied:



- the application was filed before the date of entry into force of the EPC 2000,
- the priority document is not in DE/EN/FR and
- on the date of entry into force of the EPC 2000, the following conditions apply:
  - the applicant was not requested to file a translation in examination under Rule 38(5) EPC 1973, (because the priority is not relevant for the assessment of patentability), or
  - the Rule 51(4) communication has not been sent yet, or
  - the time limit under Rule 51(4) EPC 1973 - or the time limit set in the subsequent invitation under Rule 41(1) EPC 1973 - has not yet expired,

then the applicant does not have to provide a translation of the priority document.

## **2.6.2. Unexpired time limit for submitting the translation is the Rule 38(5) EPC 1973 request**

If:

- the application was filed before the date of entry into force of the EPC 2000,
- the priority is relevant for assessing patentability and is not in DE/EN/FR,
- the EPO sends the applicant a Rule 38(5) EPC 1973 communication requesting the translation before the date of entry into force of the EPC 2000, and
- the time limit for supplying the translation set in the invitation under Rule 38(5) EPC 1973 - or the subsequent invitation under Rule 41(1) - expires on or after the date of entry into force of the EPC 2000,

then the applicant must still supply the translation within the specified period.

Note that no invitations under Rule 41(1) EPC 1973 requesting the translation of the priority document are sent anymore after the date of entry into force of the EPC 2000. Therefore,

- the period referred to above is the time limit under Rule 38(5) EPC 1973, if this period expires on or after the date of entry into force of the EPC 2000;
- the period referred to above is the time limit under Rule 41(1) EPC 1973, where such a communication was issued before the date of entry into force of the EPC 2000.

## **2.7. Re-establishment of the priority period - Art. 87(1) and Rule 136(1) EPC 2000**

If the twelve month priority period set out in Art. 87(1) is missed, the EPC 2000 offers the possibility of re-establishment of rights as legal remedy, provided that the conditions laid down in Rule 136 are met.

Re-establishment of the priority period will be available for European patent applications filed as of the date of entry into force of the EPC 2000, and to

European patent applications pending at the cut-off date, provided that the two month time limit set out in Rule 136(1) has not yet expired on that date.

The request for re-establishment (and the application itself) can be filed up to one month before the date of entry into force of the EPC 2000, if it is requested that the request be post-dated to that date.

## **2.8. Designation of inventor (EP, divisional and Art. 61 applications) - Art. 81, Rule 19 and Rule 60 EPC 2000; Rule 42 EPC 1973**

The two-tiered procedure applicable under EPC 1973 (major vs. minor deficiencies) has been cancelled.

Under the EPC 2000, if the designation of the inventor has not been made in accordance with Rule 19, this is requested by the EPO within the specified periods under Rule 60(1) for European patent applications and under Rule 60(2) for divisional applications or applications under Art. 61(1). Under the EPC 2000 failure to furnish the designation of the inventor in time leads to the refusal of the application (Art. 90(5)). As legal remedy, further processing is available.

Where the application was filed before the date of entry into force of the EPC 2000 and the period for furnishing the identification of the inventor under Rule 42(1) or (2) EPC 1973 expires before that date, without the identification being furnished in time, the application is deemed withdrawn under Art. 91(5) EPC 1973. This is notified with a communication under Rule 69(1) EPC 1973. If despatched not earlier than two month and ten days before the date of entry into force of the EPC 2000 but still before that cut-off date, such a communication will comprise an explanatory annex indicating that further processing will be available under the EPC 2000 (further processing being available as from the date of entry into force of EPC 2000, but not under EPC 1973; see section 12.1.2).

Where the application was filed before the date of entry into force of the EPC 2000 and the period for furnishing the identification of the inventor of inventor under Rule 42(1) or Rule 42(2) EPC 1973 expires on or after that cut-off date, and no designation is filed before the end of the technical preparations for publication, the application is refused under Art. 90(5) EPC 2000. Further processing is possible as legal remedy.

## **2.9. Filing / Search fees - Art. 78(2), Rule 38 EPC 2000; Rule 85a(1) EPC 1973**

Under the EPC 2000, the filing and search fees have to be paid within a period of one month from filing (Art. 78(2) and Rule 38). Failure to pay in time leads to the application being deemed withdrawn, which loss of rights is notified under Rule 112(1). As legal remedy, further processing is available. (The grace period under Rule 85a(1) EPC 1973 for paying these fees has been abolished.)

As regards the transitional provisions concerning the payment of the filing and search fees, see section 12.1.1 (arrangements regarding Rule 85a and 85b EPC 1973).

## **2.10. Nucleotide and/or amino acid sequence listings in European and Euro-PCT applications - Rule 30 EPC 2000**

### **2.10.1. Procedure under the EPC 2000**

Under the EPC 2000, if an application discloses amino acid or nucleotide sequences, the description must contain a sequence listing in conformity with the required standardised format (Rule 30(1)). For European patent applications this sequence listing must be present on filing (Rule 30), for Euro-PCT applications it must be filed within the thirty-one month period for entering the European regional phase (Rule 163(3)).

If the prescribed sequence listing is not supplied in due time, the applicant is invited under Rule 30(3) to furnish such a sequence listing and pay the late-furnishing fee within a non-extendable period of two months. If the prescribed sequence listing is not furnished and/or the prescribed fee not paid within this time limit, the application will be refused. As legal remedy, further processing is available.

If, before the date of entry into force of the EPC 2000, the EPO dispatches a communication under Rule 41(1) EPC 1973 (for European applications) or under Rule 111(3) EPC 1973 (for Euro-PCT applications) inviting the applicant to correct deficiencies concerning the physical requirements of sequence listings and the two months period set by the EPO for correcting said deficiencies expires on or after the cut-off date, the applicant is still given the possibility to apply for an extension of the time limit to a total of four months under Rule 84 EPC 1973 (even if a request to this effect is made on or after the cut-off date). If the applicant does not make use of the possibility to extend the time limit to four months, he may still apply for further processing under Rule 135(1) EPC 2000, within the required period.

As from the date of entry into force of the EPC 2000 any invitation to correct deficiencies concerning the physical requirements of sequence listings will be in accordance with Rule 30 and the applicant will be requested to pay the late furnishing fee. This is irrespective of the filing date and the date of entry into the European phase of the application.

## **2.11. Payment of claims fees - Rule 45 EPC 2000; Rule 31 EPC 1973**

Under the EPC 2000, claims fees due for the 11th and subsequent claims (Rule 45(1)) may be paid within one month of filing the claims (Rule 45(2)). This date can be the filing date (where claims are present on filing) or after the filing date (e.g. within two months from a Rule 58 communication). If the claims fees are not paid within this period, they may still be paid within one month of a communication concerning the failure to observe the time limit. If the claims fees are still not paid within this additional period, the concerned claims are deemed abandoned. Further processing is available as legal remedy.

For European patent applications filed before the date of entry into force of the EPC 2000 claims need to be present on filing in order to be assigned a filing date. Therefore the procedures for claims fees for applications filed before the

date of entry into force of the EPC 2000 are the same as the EPC 1973 procedures.

However, for applications filed before the date of entry into force of the EPC 2000, where the two month period running from the notification of the communication under Rule 69(1) EPC 1973, concerning the deemed abandonment of the relevant claims for non-payment of claims fees, expires on or after the cut-off date (i.e. where this communication is despatched in the period from two months and ten days before, and up to, the date of entry into force of the EPC 2000), the applicant can request further processing for failing to observe the time limit for paying the claims fees. In this case the communication will contain a statement to the effect that further processing can be requested (see also section 12.1.2). Any such request filed before the date of entry into force of the EPC 2000 will however be treated only after that date.

For applications filed before the date of entry into force of the EPC 2000, instead a request for restitutio in integrum for failure to timely pay the claims fees will still be possible, but only if such a request is filed before the date of entry into force of the EPC 2000.

The above applies also for divisional applications filed with the EPO before the date of entry into force of EPC 2000.

### **3. DESIGNATION OF CONTRACTING STATES**

#### **3.1. Designation of contracting states (EP-files only) / designation fees - Art. 79, Rule 39 EPC 2000; Rule 85a(1) and (2) EPC 1973**

While the grace periods under Rule 85a(1) and (2) EPC 1973 for paying designation fees are abolished under the EPC 2000, further processing will be available as legal remedy.

Under the EPC 2000, the request for grant automatically constitutes the designation of all EPC states (Art. 79(1)). The Request for grant form (Form 1001) still contains boxes for indicating intended payment of 7 fees (for designation of all states) or of up to 6 fees for specifically indicated states.

Validation of the designations is made by paying the designation fees within the period under Rule 39(1).

- The payment of seven designation fees will lead to the valid designation of all EPC contracting states, except for any designations previously withdrawn.
- If the applicant intends to pay fewer than seven designation fees when filing the application, he should indicate the relevant Contracting States in the appropriate Section of the Request for Grant form (Form 1001). For this latter case, the Form 1001 contains a (not pre-crossed) box which the applicant can cross to waive his rights to a notice of loss of rights and to further processing with regard to any contracting state not expressly indicated by him on the form.

If the designation fees are not paid within this period, the respective designations are deemed withdrawn, or, if no designation fees are paid, the application is deemed withdrawn (Rule 39(2) and (3)). This is notified with a communication under Rule 112(1). In response to that communication the applicant may request further processing in respect of the lost designation(s). However, if the applicant indicated his intention to pay fewer than seven designation fees and, by crossing the appropriate box on Form 1001, has waived the rights to a notice of loss of rights and further processing for any contracting state not expressly indicated by him, no such communication will be sent and no further processing can be requested.

As regards the transitional arrangements concerning Rule 85a and 85b EPC 1973, see section 12.1.1.

## **4. EXTENSION STATES**

### **4.1. Extension states (EP-files only) - Rule 39(1) EPC 2000; Art. 79(2) EPC 1973 and Rule 85a(2) EPC 1973**

Under the EPC 2000, if extension fees are not paid within the Rule 39(1) time limit and one or more designation fees were not paid within that time limit and a notice of loss of rights (Rule 112(1)) is issued for the missing designation fees (see section 3.1), then this communication will mention that also missing extension fees may still be paid with surcharge within the time limit for further processing regarding the missing designation fees.

On the other hand, if one or more extension fees are not paid within the Rule 39(1) time limit, but all designation fees were paid in due time, then no notice of loss of rights is issued and there is no legal remedy for the non-payment of the extension fees.

The new system described above applies to applications for which the six months time limit triggered by the publication of the search report (Art. 79(2) EPC 1973 / Rule 39(1) EPC 2000 expires on or after the date of entry into force of the EPC 2000.

Where the application was filed before the date of entry into force of the EPC 2000 and the period under Rule 85a(2) EPC 1973 expires on or after the cut-off date, the applicant can still pay extension fees plus surcharge according to the current system until the expiry of the Rule 85a(2) period, even if this period expires on or after the date of entry into force of the EPC 2000.

## **5. DIVISIONAL APPLICATIONS**

### **5.1. Filing of a divisional application**

A European divisional patent application filed on or after the date of the entry into force of the EPC 2000 must comply with the requirements of Article 80, Rule 40 EPC 2000; additionally, the following is to be taken into account:

First, the indication that a patent is sought must indicate that the application is a divisional application of a specified parent application (if this is not the case the application will be treated as a normal application). Second, if the divisional application is filed by reference to an earlier application, this reference to an earlier application can only be to the parent application (see Guidelines, A-IV, 1.3.1).

Post-dating of the date of receipt of the divisional application is possible on request, if the applicant files a divisional application no more than one month before the date of entry into force of the EPC 2000, and explicitly requests the filing of the application to be post-dated to that cut-off date. In this case, the date of receipt of the divisional application will be post-dated to the date of the entry into force of the EPC 2000 and it will be treated under the EPC 2000. Care should be taken however, that the parent application is still pending on that date (Rule 36(1)).

Note that for a divisional application received at the EPO on or after the date of entry into force of the EPC 2000, the provisions of the EPC 2000 apply, regardless of whether the parent application was filed under the EPC 1973 or the EPC 2000.

## **6. REQUEST FOR EXAMINATION**

### **6.1. Request for examination - Art. 94(2) and Rule 70(1) EPC 2000; Rule 85b EPC 1973**

Also under the EPC 2000 the examination of the European patent application must be requested; a pre-crossed box to this effect is present on the Request for grant form (Form 1001). This request must be validated by paying the examination fee within six months of the mention of the publication of the European Search Report in the European Patent Bulletin (Art. 94(2) and Rule 70(1)).

If examination is requested (i.e. the examination fee paid) before transmission of the search report, the EPO sends an invitation to confirm the request (Rule 70(2)), unless the right to this invitation has been waived. Failure to pay the prescribed fee within the Rule 70(1) time limit, or to confirm the request within the Rule 70(2) time limit, leads to the application being deemed withdrawn. This is notified with a communication under Rule 112(1) and can be remedied by requesting further processing.

The grace period for the request for examination under Rule 85b EPC 1973 is abolished under the EPC 2000. See section 12.1.1 as regards the transitional arrangements concerning the payment of the examination fee under Rule 85b EPC 1973.



## **7. EURO-PCT AND PCT APPLICATIONS**

### **7.1. Euro-PCT filing requirements - Rule 159, Rule 160(3), Rule 112(1) EPC 2000; Rule 108(3) EPC 1973**

Under the EPC 2000, the acts to be performed for an international application to validly enter the EP phase as well as the time limits for paying fees remain essentially the same. However, the two month grace period under Rule 108(3) EPC 1973 has been replaced by the possibility of further processing.

Consequently, if one of the acts necessary under Rule 159(1)(a) and (c)-(f) to enter the European phase is not performed within the required thirty-one months, then a communication under Rule 160(3) and Rule 112(1) is issued, notifying the relevant loss of rights. Further processing applies as legal remedy.

The EPO intends to withdraw the reservation filed under Rule 49.6 PCT. This means that after the entry into force of EPC 2000 reinstatement (= re-establishment) of rights can be requested for payment of the national fee (= filing fee) and filing of a translation of the international application.

Note that (as under the EPC 1973) for the designation fees (Rule 159(1)(d)) and the request for examination (Rule 159(1)(f)) a time limit later than the thirty-one months might apply if the search report was published late.

As regards the transitional arrangements concerning Rule 85a and 85b EPC 1973 and the acts required to enter the European phase, see section 12.1.1.

### **7.2. Priority claim for Euro-PCT applications - Rule 163(2) EPC 2000; Rule 111(2) EPC 1973**

If, under the EPC 2000, the requirements for a priority claim according to Rule 163(2) are not fulfilled, an invitation to remedy the deficiencies under Rule 163(2) is issued with a time limit of two months. Failure to remedy the deficiencies in time leads to the priority right being lost for the application. As legal remedy, further processing applies.

If the applicant is invited to file the priority document or the file number under Rule 111(2) EPC 1973, and this communication is sent before the date of entry into force of the EPC 2000 with a time limit set by the EPO expiring before that date, and the applicant does not reply in time, then a communication on the loss of the priority right is sent. Where this communication is sent not earlier than two months and ten days before the date of entry into force of the EPC 2000, the two month period for requesting further processing (under the EPC 2000) expires on or after that cut-off date and further processing is possible. The EPO will handle such requests for further processing once the EPC 2000 comes into force.

### **7.3. Priority: restoration done in the PCT phase - Rule 26bis.3, Rule 49ter.1(a) PCT**

Restoration of the priority right is possible under the PCT as from 01.04.2007 under Rule 26bis.3 PCT by the competent Receiving Office. The EPO has however filed a reservation on this, but intends to withdraw it as from the date of entry into force of the EPC 2000 with the following consequences.

The Receiving Office (RO) may use as criterion for the restoration either "unintentional" or "due care". However, the EPO as Receiving or Designated Office will accept only the "due care" criterion when verifying a restoration of the priority rights for an international application (Rule 26bis.3 and Rule 49ter.1(a) and (c) PCT).

In any case, the claimed or retained priority date will be taken as basis for establishing the thirty-one month time limit for entry into the European phase, even if the restored priority cannot be acknowledged.

Rule 26bis.3 PCT will apply to international applications filed with RO/EP on or after the date of entry into force of the EPC 2000 and to international applications filed before that date if the time limit of two months after expiry of the priority period has not expired on that date.

Rule 49ter.1 PCT will apply, where the EPO is Designated Office, to international applications entering the European phase on or after the date of entry into force of the EPC 2000 if the time limit of two months after expiry of the priority period has not expired on that date.

### **7.4. Priority: restoration done by EPO as Designated Office - Rule 49ter.2 PCT**

Restoration of the priority right is possible under the PCT as from 01.04.2007 under Rule 49ter.2 PCT by a Designated Office (the EPO has filed a reservation, the same applies as is stated under 7.3). Hence the applicant can request restoration of priority, in accordance with the PCT provisions upon entry into the European regional phase but only under the criterion of "due care".

As from the date of entry into force of the EPC 2000 Rule 49ter.2(a)-(g) PCT will be applied by the EPO as designated/elected Office to international applications filed on or after the date of entry into force of the EPC 2000 and to pending international applications, if the time limit of two months after expiry of the priority year has not yet expired on that date.

### **7.5. Designation of inventor - Rule 163(1) EPC 2000**

Under the EPC 2000, if at the expiry of the thirty-one month period (Rule 159(1)) the designation of the inventor under Rule 19(1) has not been made, or has not been made in full, then the applicant is invited in a communication under Rule 163(1) to make the designation or supply the missing data within two months. Failure to do so leads to the refusal of the application under Rule 163(6). The decision to refuse is notified to the applicant. Further processing

applies as legal remedy. This will apply fully to international applications that enter the European regional phase on or after the date of entry into force of the EPC 2000.

The legal consequence for failing to correctly designate the inventor changes from deemed withdrawal of the application under the EPC 1973 to refusal under the EPC 2000. Moreover, whereas further processing does not apply under the EPC 1973, it is the legal remedy available under the EPC 2000.

Consequently, if an applicant does not furnish the required inventor data, two different situations occur in the transitional period with regard to Euro-PCT-applications:

- First, the period set by the EPO under Rule 111(1) EPC 1973 for furnishing the inventor data expires before the date of entry into force of the EPC 2000.

Note that in this case the communication under Rule 111(1) EPC 1973 will have been sent more than two months and ten days before the cut-off date. Then the loss of rights occurs immediately on expiry of the specified time limit: The application is deemed withdrawn under Art. 91(5) EPC 1973; the loss of rights is notified under Rule 69(1) EPC 1973.

However, if this communication on loss of rights is despatched in the period from two months and ten days before, and up to, the date of entry into force of the EPC 2000, that communication will comprise an annex indicating that further processing under the EPC 2000 is available as the two-months period under Rule 135(1) expires on or after the cut-off date (see section 12.1.2).

- Second, the period for furnishing the inventor data expires on or after the date of entry into force of EPC 2000.

Note that in this case the communication under Rule 111(1) EPC 1973 will have been sent as of two months and ten days before that cut-off date. Such a communication will include a mention that, if the deficiency is not corrected in due time, the European patent application will be refused under Rule 163(6) EPC 2000. Consequently the application is refused under Art. 90(5) EPC 2000. As legal remedy further processing applies.

## **7.6. Identification of the applicant or the representative - Rule 163(4) and (5) EPC 2000**

The request to furnish missing applicant data or to appoint a professional representative either within the thirty-one month period of Rule 159(1) or within a period of two months from a subsequent invitation is a new procedure that was not foreseen under the EPC 1973.

It will apply for all international applications that enter into the European regional phase on or after the date of entry into force of the EPC 2000. Note that it is the

actual date of entry into the regional phase that matters here and not the date of expiry of the thirty-one month period.

### **7.7. Claims fees - Rule 162(2) and Rule 162(4) EPC 2000**

Under the EPC 2000, if for an international application the claims fees are not paid within the one month time limit under Rule 162(2), a communication under Rule 162(4) and Rule 112(1) is issued noting that the concerned claims are deemed abandoned. Further processing applies as legal remedy.

For applications entering the European regional phase before the date of entry into force of the EPC 2000 the applicant can request further processing for failing to observe the time limit for paying the claims fees already in a transitional phase, namely when the communication under Rule 110(4) and Rule 69(1) EPC 1973 is despatched in the period from two months and ten days before, and up to, the date of entry into force of EPC 2000: In this case the two month period running from the notification of that communication on the deemed abandonment of claims for non-payment of claims fees, expires on or after the cut-off date. In these cases the communications will contain a statement to the effect that further processing can be requested (see also section 12.1.1). Any such request filed before the date of entry into force of the EPC 2000 will however be treated only as of that date.

A request for restitutio in integrum for failure to pay the claims fees in time will be possible if filed before the date of entry into force of the EPC 2000.

### **7.8. Temporary reservations**

Besides the reservations concerning the restoration of priority rights (Rule 26bis.3 and Rule 49ter.1 and 2 PCT) and the reinstatement of rights upon entry into the European regional phase (Rule 49.6 PCT) which are dealt in sections 7.3, 7.4 and 7.1 above, the EPO has a number of other reservations in force which the EPO intends to lift on the date of entry into force of the EPC 2000. They concern:

1. Rule 4.10(d) PCT - right of priority for WTO members.
2. Rule 51bis.1(e) PCT: the furnishing of the translation of the priority document is necessary only if the validity of the priority claim is relevant; this provision concerns the Designated Office so that it is applicable to international applications that have entered the European regional phase.
3. Rule 20.6 PCT: incorporation of missing elements and parts. The PCT allows for this possibility only as from 01.04.2007.

For the transitional provisions concerning the lifting of these reservations, the following is foreseen:

1. A WTO priority will be accepted for Euro-PCT applications having an international filing date that is on or after the date of entry into force of the EPC 2000.
2. Rule 51bis.1(e) PCT will apply to Euro-PCT applications that were filed on or after the date of entry into force of the EPC 2000 and to Euro-PCT

applications that were filed before that date, if the time limit for filing a translation has not expired under the EPC 1973 (i.e. before the date of entry into force of the EPC 2000; see also nr. 2.6).

3. Rule 20 PCT will fully apply (i.e. including Rule 20.6 PCT) to:
- international applications filed with RO/EP on or after the date of entry into force of the EPC 2000
  - international applications entering the European regional phase on or after the date of entry into force of the EPC 2000, even if the international filing date was before that date.

#### **7.9. Non-unity PCT protest procedure before the EPO - Rule 40.2(c) and (d) PCT, Rule 68.3(c) and (d) PCT**

Under the EPC 2000, the one-step protest procedure in force under the PCT (Rule 40.2(c) and (d) and Rule 68.3(c) and (d)) since 01.04.2005 will become applicable for cases where the EPO is ISA or IPEA (the interim procedure applied in the meantime, see OJ EPO 2005, 226, will be terminated). Thereby the payment of the protest fee becomes necessary upon filing the protest, because otherwise there will be no examination by the review panel. Moreover, the examination of the protest will be carried out by the review panel only; the Boards of Appeal are no longer responsible for these protests.

The new procedure applies to all international applications filed on or after the date of entry into force of the EPC 2000. For international applications already pending on that date (i.e. filed before that date), the existing procedure (OJ, EPO 1992, 547 and OJ, EPO 2005, 226) will continue to apply.

Note that the protest fee (Rules 40.2(e) and 68.3(e) PCT) is not the same for international applications pending on the date of entry into force of the EPC 2000 and for international applications filed on or after the date of entry into force of the EPC 2000, the first being higher than the second (Art. 2, item 21, RFees).

## **8. LANGUAGES**

### **8.1. Languages of filing - Art. 14(2) EPC 2000**

A filing date (Art. 90(1) and Rule 40) for a European patent application can be obtained under the EPC 2000 for an application filed in any language (Art. 14(2)). This is however applicable only if the European patent application has a filing date that is on or after the date of entry into force of the EPC 2000.

## **9. SEARCH**

### **9.1. Supplementary Search for Euro-PCT applications: case of non-unity**

If for Euro-PCT applications a supplementary search is to be carried out under Rule 164(1) EPC 2000, and if the application lacks unity, then a search is carried out only on the invention (or group of inventions within the meaning of Art. 82) first mentioned in the claims. There will be no invitation anymore for the payment of additional search fees. A supplementary search report and, if the international filing date of the application is on or after 01.07.2005, a search opinion is drawn up on this basis and issued as the EESR.

This procedure will apply to all such searches carried out (date of completion) as of the date of entry into force of the EPC 2000, independently of the international filing date or of the date of entry into the regional phase of the Euro-PCT application. In other words, this means that in a case of non-unity, if:

- the supplementary search is carried out before the date of entry into force of the EPC 2000, then the EPC 1973 applies and there will be an invitation to pay further fees, with the possibility to have other inventions searched;
- the supplementary search is carried on or after that date, then the EPC 2000 applies and there will be no invitation to pay further fees, with the first invention in the claims only being searched.

## 10. EXAMINATION

### 10.1. Conflicting prior art - Art. 54(3)

The requirement of having validly designated states in common for prior art under Art. 54(3) to be relevant has been abolished (deletion of Art. 54(4) EPC 1973 and Rule 23a EPC 1973). For European patent applications this means also that the possibility of having different texts for different states on the basis of Art 54(3) is no longer open (see EPC 2000 Guidelines, C-III, 8.1).

Therefore, the following applications constitute state of the art for applications filed on or after the date of entry into force of the EPC 2000:

- earlier filed, but later published European patent application within the meaning of Article 54(3) EPC
- earlier filed Euro-PCT applications if the conditions set out in Rule 165 are met, i.e.
  - the filing fee for the application must have been paid according to Rule 159(1)(c) and
  - the international application must have been published
    - § in one of the official languages of the EPO (Art. 153(3)) or
    - § its translation in one of said languages must have been filed with the EPO and published (Art. 154(4))

It does not matter whether or not the application under examination and the earlier application have designations of EPC contracting states in common.

However, for applications pending at the time of entry into force of the EPC 2000 and for patents granted before that time, Art. 54(4) EPC 1973 in conjunction with Rule 23a EPC 1973 still applies, i.e. there need to be commonly designated states with payment of corresponding fees as regards the application under examination and the conflicting application.

Note that it depends solely on the filing date of the application or granted patent under examination whether old Art. 54(4) EPC 1973 is still relevant or whether the novelty criterion of the EPC 2000 applies; the priority date of the application or granted patent under examination is not relevant.

In conclusion, European patent applications may be conflicting state of the art

- which is not limited to those states commonly designated, if the European patent application or European patent under consideration has a filing date on or after the date of the entry into force of the EPC 2000;
- which is limited to the states commonly designated (old Art. 54(4) EPC 1973 applies), if the European patent application or the European patent under consideration has a filing date before the entry into force of the EPC 2000.

It follows from these principles that, e.g., a European patent application EP1 filed on or after the date of entry into force of the EPC 2000 but claiming a priority from before that cut-off date is state of the art within the meaning of Article 54(3)(4) EPC 1973 for a European patent application EP2 filed, without a priority claim, after the priority date of EP1 but before entry into force of the EPC



2000, i.e. when assessing the novelty of EP2 Article 54(4) EPC 1973 remains relevant.

Note in this context, that for European divisional applications the relevant date, for Art. 54(4) and Rule 23a EPC 1973 to apply or not, is the date of receipt of the divisional application at the EPO and not the attributed filing date of the parent application. This means that under the EPC 2000, parent and divisional applications may be treated differently as regards the application of Art. 54(3) EPC.

## **10.2. Further medical use - Art. 54(5) EPC 2000**

Under Art. 54(5) EPC 2000 a claim directed to a further medical use of a known compound or composition, for which one or more medical uses are already known need no longer be worded in the Swiss-type second medical use claim formulation. It may be formulated as a purpose-related product claim like a first medical use claim ("Product X for use as a medicament") but directed to a more specific medical indication (e.g. "Product X for the treatment of cancer, "Product X for the treatment of hypertension"); cf. Draft EPC 2000 Guidelines for examination, C-IV, 4.8.

The provisions of Art. 54(5) EPC 2000 apply to:

- European patent applications that are filed on or after the date of entry into force of the EPC 2000
- European patent applications that are pending at that date, insofar as a decision on the grant of the patent has not yet been taken (the relevant date being the date of handing over to the EPO postal service of the decision to grant under Art. 97(2) EPC 1973 or Art. 97(1) EPC 2000).

## **10.3. Unity of Euro-PCT applications - Rule 164(2) EPC 2000, deletion of Rule 112 EPC 1973**

The cancelling of the Rule 112 EPC 1973 procedure under the EPC 2000 results in applicants for Euro-PCT applications for which the EPO was ISA no longer being invited to pay and have a search report drawn up for other non-unitary inventions for which no search fee was paid in the international phase.

There will instead be an invitation to restrict the application to one of the inventions searched in the international phase (Rule 164(1)) and to file divisional applications for the other inventions.

The EPO will not send invitations under Rule 112 EPC 1973 anymore after the date of entry into force of the EPC 2000. This applies also for Euro-PCT applications already pending on the cut-off date.

However, for any Euro-PCT application for which an invitation under Rule 112 EPC 1973 has been sent out before the date of entry into force of the EPC 2000, the payment of additional fees will be accepted. This is irrespective

of whether the time limit set under the Rule 112 invitation expires before, on or after the cut-off date and irrespective of whether the fees are paid before, on or after that date. Where in such a case additional fees are paid, a search report under Rule 112 EPC 1973 will be still be drawn up, even if this happens after entry into force of the EPC 2000.

## **11. LIMITATION AND REVOCATION**

### **11.1. Limitation and Revocation - Articles 105a - 105c EPC 2000**

Limitation and revocation are new post-grant procedures enabling a patent proprietor to have his patent centrally limited or revoked at the EPO. A request to this effect can be filed at any time during the life of the European patent. Whereas revocation is a purely formal procedure, the limitation procedure involves a reduced substantive examination by an examining division (see Rule 91).

As of the date of entry into force of the EPC 2000, a request for limitation or revocation can be filed for any granted European patent.

## **12. GENERAL PROCEDURAL MATTERS**

### **12.1. Further processing - Art. 121, Rule 135 EPC 2000**

Under the EPC 2000, further processing becomes the standard legal remedy for missing a time limit. Further processing is thus generally available for any non-observed time limit, with the exception of those time limits that are excluded by Art. 121(4) and Rule 135(2).

No written request is needed any longer for further processing; completing the omitted act and paying the prescribed fee within the required time limit will suffice.

Where for a certain provision under the EPC 1973 further processing was not available, but becomes so under the EPC 2000, the general principles below will be applied by the EPO as transitional arrangements for the application of the old rules in the period immediately preceding the date of entry into force of the EPC 2000. Some more specific cases have already been detailed in the previous sections, but practice in the transitional phase will be based on the general principles set out below

#### **12.1.1. Time limits covered by Rule 85a and 85b EPC 1973**

The periods of grace under Rule 85a and Rule 85b EPC 1973 for the payment of the filing and search fee and for filing the request for examination disappear under the EPC 2000, since further processing will be available as a remedy in all of these cases.

#### **Euro-Direct Applications**

This section concerns European direct applications in which:

- the filing fee, search fee and/or designation fees have not been paid in due time or the request for examination (including fee payment) has not been filed in due time and
- the missed basic time limit expired before the date of entry into force of the EPC 2000.

If a communication under Rule 85a/85b was sent earlier than two months and ten days before the date of entry into force of the EPC 2000 and the applicant does not pay with surcharge in due time, then a communication of loss of rights will be sent according to the following scheme:

1. Before two months and ten days before the date of entry into force of the EPC 2000, a communication of loss of rights under Rule 69(1) EPC 1973 is sent under the current procedure. No time limit is set for requesting further processing, since this is not available under Art. 121 EPC 1973.
2. As of two months and ten days before the date of entry into force of the EPC 2000 and until the day before that cut-off date, a communication of loss of rights under Rule 112(1) is sent under the EPC 2000. It will comprise an explanatory annex indicating that further processing is available in these cases since the time limit for further processing expires

on or after entry into force of the EPC 2000. The prescribed further processing fee is that applicable under the EPC 2000, which is in the present case 50% of the basic fee. Such a request will be dealt with under the EPC 2000.

3. From the date of entry into force of the EPC 2000, a communication of loss of rights under Rule 112(1) EPC 2000 is sent indicating that further processing applies.

If two months and ten days before the entry into force of the EPC 2000 no communication under Rule 85a/85b has been sent, then a communication of loss of rights as described above, no. 2 or 3, will be sent. This is to the advantage of the applicant, since he/she profits from a two month period for requesting further processing instead of a one month grace period.

### **Euro-PCT Applications**

This section concerns Euro-PCT applications in which:

- the filing fee, supplementary search fee and/or designation fees have not been paid in due time, or the request for examination (including fee payment) has not been filed in due time and
- the missed time limit expired before the date of entry into force of the EPC 2000.

The combined Rule 108(3) / Rule 69(1) EPC 1973 communication is sent if this can be done earlier than two months and ten days before the cut-off date. In these cases the two-months time limit for further processing will expire before the date of entry into force of the EPC 2000, and the missed time limit will be deemed to be met only if the applicant pays with surcharge within the two-months time limit of Rule 108(3) EPC 1973. Further processing will not be available if the two-months time limit is missed. The current Rule 108(4) EPC 1973 will apply for the designation fees.

If a communication is sent in the time between two months and ten days before the entry into force of the EPC 2000 and the day before that cut-off date, a Rule 160(3) / Rule 112(1) EPC 2000 communication, with the same annex as for Euro-direct applications and indicating the possibility for further processing, will be sent.

#### **12.1.2. Time limits in which further processing was not available under the EPC 1973, but is available under the EPC 2000**

For the cases in which further processing was not available under the EPC 1973, but is available under the EPC 2000, the following general provisions apply.

If the time limit which was not observed expired before the date of entry into force of the EPC 2000, then the decision refusing the application or the communication of loss of rights will be sent according to the following scheme:

1. Before two months and ten days before the date of entry into force of the EPC 2000, a decision or a communication of loss of rights under Rule

69(1) EPC 1973 is sent under the current procedure. No time limit is set for requesting further processing, since this is not available under Art. 121 EPC 1973.

2. In the time between two months and ten days before the date of entry into force of the EPC 2000 and the day before that cut-off date, a decision or a communication of loss of rights under Rule 112(1) EPC 2000 is sent. It will comprise an explanatory annex indicating that further processing is available. The prescribed fee is that applicable under the EPC 2000. The request for further processing be dealt with under the EPC 2000.
3. As of the date of entry into force of the EPC 2000, a decision or a communication of loss of rights under Rule 112(1) EPC 2000 will be sent, indicating that further processing is available.