

Learning path for patent administrators

Appeal after opposition: EPAC – intermediate level

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Introduction

This publication, "Appeal after opposition: EPAC – intermediate level", is part of the "Learning path for patent administrators" series 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 under the Patent Cooperation Treaty (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) and during the opposition procedure (EPC); national validation (EPC); entry into national/regional phases and entry into the European phase (PCT).

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

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

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1. Learning objectives

By taking this course you will learn about:

- what can be appealed
- the effect of an appeal
- who may file an appeal
- time limits and formal requirements for filing an appeal
- the fee for appeal
- referral to BoA and remittal from BoA

2. What can be appealed?

The EPC contains provisions allowing a party to appeal against a decision issued by a first instance department. In opposition proceedings before the EPO, certain decisions can be appealed, while others cannot be appealed separately. Decisions which are open to appeal must be accompanied by EPO Form 2019 (Information about possibility of an appeal and the respective legal provisions).

Decisions relating to procedural aspects and not concluding the proceedings on substantive grounds, such as decisions on requests for extensions of time limits or decisions refusing a request for oral proceedings on the premises of the EPO, are not separately appealable. These types of decisions can only be appealed together with the final decision that decides on the fate of a patent.

Examples:

Appealable decisions of an opposition division that decide the fate of the patent.

- revocation of the patent: Art. 101(2) EPC or Art. 101(3)(b) EPC
→ European patent is revoked with retroactive effect
- interlocutory decision: Art. 101(3) EPC
→ European patent is maintained in amended form
- rejection of opposition: Art. 101(2) EPC
→ European patent is maintained unamended

Decisions on behalf of the opposition division taken by formalities officers to whom this work is entrusted are also appealable.

Examples:

- revocation of the patent at the proprietor's request
- revocation of the patent under Rule 82(2) and (3) EPC
- rejection of the only opposition as deemed not to have been filed
- rejection of the only opposition as inadmissible
- discontinuation after withdrawal of the only or last opponent
- discontinuation after lapse of all national patents

Legal references:

Art. 106(2) EPC; Art. 101 EPC

GL E-III. 1.3; GL E-X. 1.1; GL E-X. 5

OJ EPO 2014 A6; OJ EPO 2015, A104

3. Effect of an appeal

An appeal has a suspensive effect.

This means that an appealed decision does not yet become final and all its effects are suspended until the Board of Appeal has taken a decision.

Legal references:

Art. 106(1) EPC

GL E-XII.1

4. Who may file an appeal?

Any party to the opposition proceedings adversely affected by the opposition division's decision can file an appeal.

Examples:

- decision: "Revocation of the patent"
→ proprietor may file an appeal
- decision: "Rejection of the opposition"
→ opponent(s) may file an appeal
- decision: "Patent maintained in amended form"
→ proprietor and opponent(s) may file an appeal

Parties to the opposition proceedings who do not file an appeal are parties to the appeal proceedings as of right. This means that non-appellants remain parties to the proceedings and can respond and argue against the appellant. However, unless they also file an appeal, they will not receive a more favourable outcome than the original decision.

For instance, if the opposition division has decided to maintain the patent in amended form and the opponent files an appeal while the proprietor refrains from doing so, the Board of Appeal cannot decide to reject the opposition.

Legal references:

Art. 107 EPC

GL E-XII.5

5. Time limits and formal requirements

Two-month time limit

Notice of appeal must be filed at the EPO within two months of notification of the decision.

The notice of appeal must contain the following information:

- name and address of appellant

- decision impugned
- subject of appeal

Furthermore, the appeal fee must be paid within two months of notification of the decision.

Failure to comply with the two-month time limit will result in the appeal being deemed not to have been filed.

Four-month time limit

The grounds of appeal must be filed within four months of notification of the decision.

The grounds of appeal must indicate the following:

- reasons for setting aside the appealed decision
- extent to which the decision is to be amended
- facts and evidence on which the appeal is based

Legal references:

Art. 108 EPC

Rule 99 EPC

GL E-XII.6

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6. Fee for appeal

The amount of the appeal fee is specified in the EPC Rules relating to Fees.

Amount at the current date (April 2025):

- for natural persons or entities referred to in Rule 7a(2)(a)-(d) EPC → 2015 euros
- for any other entity → 2925 euros

The two-month time limit for payment of the appeal fee is in principle only deemed to have been observed if the full amount of the fee has been paid in due time.

However, the EPO may, where this is considered justified, overlook minor underpayments.

Depending on what stage the appeal is at when a withdrawal of appeal is filed, 75%, 50% or 25% of the appeal fee will be refunded.

In exceptional cases, the appeal fee can be refunded in full. For example, if the appeal is allowed and substantial procedure violation occurred before the opposition division.

Moreover, the appeal fee, if paid, will be refunded in full in the event of an appeal being deemed not to have been filed.

Legal references:

Art. 2 Rules relating to Fees; Art. 8 Rules relating to Fees

Rule 7a EPC; Rule 103 EPC

OJ EPO 2018, A5

7. Referral to the BoA

The EPC contains provisions on interlocutory revision. This means that the department whose decision is appealed must rectify its decision if it considers the appeal to be admissible and well-

founded. In general, however, the possibility of interlocutory revision does not apply to multiparty proceedings. Opposition divisions can therefore only rectify their decisions in the very exceptional case where all oppositions have been withdrawn and the patent proprietor has filed an appeal. In all other cases, an appeal in opposition proceedings is immediately forwarded to the Board of Appeal.

The Board of Appeal may either take a final decision or remit the case to the opposition division.

In the event of the Board of Appeal taking a final decision, it can either confirm the decision of the opposition division or set the opposition division's decision aside and deliver a new decision.

In the event of the Board of Appeal remitting the case to the opposition division, it can either deliver a decision on the claims and remit the case for adaption of the description to those claims or remit the case for further prosecution.

In any event, the order of the Board of Appeal is legally binding on the opposition division.

Legal references:

Art. 109 EPC; Art. 111 EPC

GL E-XII. 7.1; GL E-XII. 9

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