

Learning path for patent administrators

Filing a European patent application: EPAC – intermediate level

Version: March 2025



Introduction

This publication, "Filing a European patent application, 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 procedure for adding or correcting a priority claim
- how to file missing parts
- the definition of divisional applications
- how to file a divisional application at the EPO
- which initial fees are due
- what is the content of the divisional application

2. Adding or correcting a priority claim

Under the provisions of Rule 52(2) EPC, and Rule 52(3) EPC the applicant may add or correct the declaration of priority.

Adding a new priority claim under Rule 52(2) EPC

The declaration of priority should preferably be made on filing but can be made up to 16 months from the earliest priority date claimed. Where the priority claim is inserted after the filing date and causes a change in the earliest priority date, this 16-month period is calculated from that new earliest priority date.

Correcting an existing priority claim under Rule 52(3) EPC

A declaration of priority may be corrected within 16 months from the earliest priority date. This time limit cannot expire earlier than four months after the filing date.

If the applicant files a request for correction later than the periods in Rule 52(2) EPC and Rule (3) EPC:

- It must be made sufficiently early for a warning to be included in the publication of the application. Otherwise, correction is possible only where it is apparent on the face of the published application that a mistake has been made (Rule 139 EPC).

A priority claim cannot be added once a request for early publication under Article 93(1)(b) EPC has been filed (Rule 52(4) EPC). The applicant cannot request further processing in respect of the time limit for introducing a new priority claim under Rule 52(2) EPC, since it is excluded by Rule 135(2) EPC.

Legal references:

Rule 52(2) EPC; Rule 52(3) EPC Rule 135(2) EPC

3. Missing parts, change of date

The provisions of Rule 56 EPC provide for late filing of parts of the description and/or drawings which were missing on the date of filing of the patent application. Either the EPO may invite the applicant to file missing parts via EPO Form 1114N or the applicant may file missing parts of their own volition within two months of the date of filing.

Important note: the late filing of missing parts may have an effect on the date of filing.

There are certain conditions that must be fulfilled in order to avoid re-dating under Rule 56(3) EPC:

- missing parts filed within applicable time limit
- application claims a priority
- applicant requests that late-filed parts be based on the priority
- late-filed parts of description and/or drawings are completely contained in claimed priority application
- applicant files a copy of priority application, unless copy already available to the EPO
- if priority application is not in official language of the EPO, applicant files a translation
- applicant indicates where in the priority document (or its translation) late-filed parts of the description and/or drawings can be found

If the conditions to avoid re-dating under Rule 56(3) EPC have been met, the original date of filing will be maintained. In other circumstances, the date of receipt of the late-filed documents will become the new date of filing.

Legal references:

Rule 56 EPC

GL A-II, 5

4. Specific requirements for sequence listings and biological materials

The filing of a sequence listing is mandatory for patent applications disclosing sequences of at least ten nucleotides or at least four amino acids. These sequences need not be the subject-matter of any claim.

On the basis of Rule 30(1) EPC and in conjunction with the decision of the President of the European Patent Office dated 9 December 2021 on the filing of sequence listings, the following formal requirements must be fulfilled:

- The sequence listing must comply with WIPO Standard ST. 26 for applications filed on or after 1.7.2022. The sequence listing must be submitted in XML format.

In the case of a subsequently filed sequence listing, the applicant must file a statement that the sequence listing so filed does not include matter which goes beyond the content of the application as filed.

The applicant may also choose to file the sequence listing on paper, although this is no longer mandatory. For the further procedure, however, the sequence listing filed on paper (or in PDF format) will be disregarded. In such a case, the applicant must provide a statement that the sequence listing in electronic format is identical to the sequence listing filed on paper.

A sequence listing filed on the date of filing of the European patent application is published together with the application documents and the patent specification as part of the description (see Article 6 of the above-mentioned President's decision). If a sequence listing is filed after the date of filing, it does not form part of the description (Rule 30(2) EPC) and will not be published with the application documents or the patent specification.

If an invention involves the use of, or concerns, biological material which is not available to the public and which cannot be described in the European patent application in such a manner as to enable the invention to be carried out by a person skilled in the art, the invention can only be regarded as being disclosed as prescribed in Art. 83 EPC if the biological material has been deposited with a recognised depositary institution and the requirements pursuant to Rule 31(1) EPC have been complied with.

A sample of the biological material must have been deposited with a recognised depositary institution not later than the date of filing of the application. The application as filed must give such relevant information as is available to the applicant on the characteristics of the biological material. The depositary institution and the accession number of the deposited biological material must be stated in the application.

Where the biological material has been deposited by a person other than the applicant, the name and address of the depositor must be stated in the application and a document be submitted satisfying the EPO that the depositor has authorised the applicant to refer to the deposited biological material in the application and has given their unreserved and irrevocable consent to the deposited material being made available to the public in accordance with Rule 33 EPC.

Legal references:

Rule 30 EPC; Rule 67 EPC; Rule 68 EPC; Rule 73 EPC
OJ EPO 6/2011, 372; OJ EPO 11/2013, 542

5. What is a divisional application?

A divisional application is an independent European patent application that is derived from a pending earlier European patent application ("parent application") and must not contain any subject-matter going beyond the scope of the parent application as filed.

A divisional application may be one of a sequence of divisional applications from the same parent application. The decision to divide a European patent application is voluntary.

A divisional application must be filed in the language of the earlier application and can be filed by reference to the earlier application. A related certified copy is to be filed. It must have the same applicant(s) as the earlier application and must claim the same priority (priorities) as the earlier application, unless an explicit withdrawal of the remaining priorities is present. It also has to be filed in the language of the parent application and all formal requirements according to Art. 90(3) EPC must be met.

Legal references:

Art. 63 EPC; Art. 76 EPC; Art. 90(3) EPC
Rule 36 EPC
GL A-IV, 1.3; GL C-IX, 1

6. Who can file a divisional application?

On the date of receipt of a divisional application, the applicant must be identical to the applicant for the parent application.

The right to divide an application can only be exercised by the same person(s) who has/have the right to the patent as a whole, namely the applicant(s) of the earlier application.

The requirements of representation are the same as for any other non-divisional European patent application.

The representative in a divisional application does not have to be identical to the representative in the parent application.

Legal references:

Art. 58 EPC

Rule 36(1) EPC

7. Where to file a divisional patent application?

A new European divisional application may be filed in electronic form. In the case of a paper filing, a new European divisional application must be filed directly with the EPO in Munich, The Hague or Berlin.

A divisional application must be filed directly with the EPO. If filed with a national authority and forwarded to the EPO as a courtesy service, the date of receipt at the EPO will be regarded as the date of receipt of the divisional application.

A divisional application which meets all filing requirements will be accorded the same date of filing as the earlier application from which it is derived.

Legal references:

Art. 76 EPC

Rule 36 EPC

8. The content of a divisional patent application

The technical application documents must contain a description of the invention, one or more claims, any drawing(s) referred to in the description and an abstract.

A divisional application must clearly and completely describe the invention.

A divisional application must fulfil the same formal requirements as any new European patent application.

An applicant may subsequently file parts of the description or drawings which were missing on the date of receipt of the divisional application.

Legal references:

Rule 40(3) EPC

9. Time limit for filing a divisional patent application

When a divisional application is filed, the parent application must be pending. It is not possible to validly file a divisional application when the parent application is deemed to be withdrawn.

If a legal remedy in respect of the deemed withdrawal is filed and granted, the application is pending again and a division is possible.

The parent application can be divided until and including the date of its unconditional and unambiguous withdrawal by the applicant.

The application can be divided until the end of the period for filing an appeal, i.e. two months after notification of the written decision. If an appeal is validly filed, it has suspensive effect, and a divisional application may be filed until termination of appeal proceedings.

Legal references:

Rule 36 EPC; Rule 38 EPC

OJ EPO 11/2013, 501; OJ EPO 2014, A19

10. Fees due when filing a divisional application

A basic filing fee is due (fee code 001). This is EUR 135.00 when filing online and EUR 285.00 when not online.

An additional fee is due when filing divisional applications of second and subsequent generations (fee codes 552, 553, 554 etc.).

The following additional fees are also payable:

- EUR 17.00 for 36 pages or more (fee code 501)
- EUR 1 520.00 search fee (fee code 002)
- EUR 275.00 claims fees (with a fee of EUR 685.00 for the 51st and each subsequent claim)

All fees must be fully paid within one month of the date of receipt of the divisional application.

For a divisional application, as for any other European patent application, renewal fees are payable to the EPO up to grant. These renewal fees may be paid within four months of the date of receipt of the application without an additional fee.

Since a divisional application is accorded the same date of filing as the parent application, the renewal fees that had fallen due with respect to the parent application up to the date of receipt of the divisional application must also be paid for the divisional application.

In a sequence of divisional applications, a first-generation divisional application is a divisional application based on an application which is not itself a divisional application. First-generation divisional applications are not subject to the payment of an additional fee. A second-generation divisional application is a divisional application based on a first-generation divisional application, and so on. From the second to the fifth generation the amount grows progressively. For the fifth and subsequent generation it becomes a flat fee.

The basic time limit for paying the designation fee and examination fee in a divisional application is calculated in the same way as for any standard European patent application, i.e. six months from the date on which the European Patent Bulletin mentions the publication of the European search report.

Legal references:

Art. 14 EPC

Rule 6 EPC; Rule 36(3) EPC; Rule 38(4) EPC

Art. 2 Rrf.

11. Designation of states, extension states, validation states for divisional applications

A divisional application may only designate contracting states which were designated in the parent application. The contracting states must still be designated in the parent application when the divisional application is filed. The same applies by analogy to the extension and validation states.

When the divisional application has been filed in the name of multiple applicants, it is possible for each of them to designate different contracting states from among the ones present in the parent application provided that the distributed states do not extend beyond the territorial scope of the earlier application.

Legal references:

Art. 76(2) EPC

12. Language requirements for divisional applications

A divisional application must be filed in the procedural language of the parent application.

If the parent application was filed in a non-EPO language, the divisional application may be filed in the same language.

Legal references:

Art. 14 EPC

Rule 6 EPC; Rule 36 EPC

GL A-IV, 1.3.3

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