



**DELTA**PATENTS

Training for Patent Professionals

**MAIN-EXAM  
QUESTIONS  
FOR PAPER D**

Update 18 December 2018

Edition May 2018

**D**

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## Introduction and acknowledgement

This document comprises an update to the Study Guide and Questions and Answers as used in our LEGAL Main Exam Courses in 2018, and “D-book” (edition May 2018, EQE 2019):

- Publications in OJ EPO after the Book was printed (OJ May 2018 – 31 October 2018);
- Publications in PCT Newsletter after the Book was printed (PCT NL May 2018 – 31 October 2018);
- New Euro-PCT Guide (11<sup>th</sup> edition, issued 18 May 2018, up to date until 1 Jan 2018);
- Corrections to the questions and answers;
- Correction to the calendars.

We thank all who provided any comments and all candidates who participated in our legal training courses, as well as those that gave feedback on our material via email, for useful feedback. Any further comments are highly appreciated.

The latest version of this document is available on our website.

Roel van Woudenberg,  
18 December 2018

## EQE 2019 preparation courses

DeltaPatents organizes further training sessions for candidates preparing for Pre-Exam 2019 and for the Main Exam 2019 in the period from April 2018 until February 2019. Also, our Correction Papers programme for the EQE Main Exam papers will start after the summer and be active until late January.

Please check our website for course details, further announcements and enrolment:

<http://www.deltapatents.com/eqe.html>

<http://www.deltapatents.com/eqe-pre-exam.html>

<http://www.deltapatents.com/eqe-main-exam-paper-d.html>

<http://www.deltapatents.com/registration--cancellation.html>

or contact us via email at:

[training@deltapatents.com](mailto:training@deltapatents.com).

# 1. Update of Study Guide

## Training Material and Sources - Law +Regulations

### Guide for Applicants: How to get a European patent

A new, 18th edition of "How to get a European patent, Guide for applicants (June 2018)", based on the information available on 1 April 2018, was published on 22/6/2018.

The paragraph numbering was largely unchanged.

Major updates were made to paragraphs 122, 125, 160, 161, 162, 215, 220 and 228.

A new paragraph 198a was inserted (reduction of appeal fee)

A new chapter XI with new paragraphs 229-239 was added (How to register transfers of rights, licences and other rights).

### Euro-PCT Guide

A new, 11<sup>th</sup>, edition of the Euro-PCT Guide (up to date until 1/1/2018; published 18 May 2018) was published shortly after the finalization of the April/May 2018 edition of the L-book for EQE 2019, which refers to the 10<sup>th</sup> edition (up to date until 1/1/2017).

In the new version Euro-PCT Guide, some paragraphs were deleted and quite some new paragraphs added. Moreover, the part about par. 40 to about par. 90 was restructured. As a consequence, the paragraph numbering has changed.

A concordance table is given in chapter 2 of this document, and can be used to navigate from the old paragraph numbers as provided in the Study Guide, modules L1-L4, and in the Answers to the Questions to the new edition of the Euro-PCT Guide.

## Training Material and Sources - Guidelines (EPC & EPO-PCT)

### C2, Law + Regulations:

Add:

- OJ 2018, A44 (April issue), par. II.1.2 "International exhibitions as referred to in Art.55 EPC"
  - (Beijing CN 29.04-07.10.2019, Dubai AE 20.10.2020-10.04.2021, Almere 28.04-23.10.2022)

F:

Add:

#### How to get...

- HTG (2018) "D.XI How to register transfers of rights, licences and other rights"
  - HTG (2018) "D.XI 229-234 – Transfer of rights"
  - HTG (2018) "D.XI 235-239 – Licences and other rights"

### G1 and G2, Law + Regulations:

Correct:

- OJ 2016 – Special Edition No.4:
  - p.278                      OJ2007-SE3-J.2 "Online and paper file inspection"  
                                   → *partially superseded by OJ 2018, A14; Art. 1(2), (3) and (5) and 2 of*  
                                   *OJ2007-SE3-J.2 continue to apply*



Add:

- OJ 2018, A14 “Decision of the President dd 14 February 2018 concerning online file inspection of documents contained in the file held by the EPO as rO, ISA or SISA”

### **H3, H11 and L1, Law + Regulations, and Annex:**

OJ 2018, A45 superseded OJ 2015, A91 (OLF), OJ 2015, A27 (CMS) and OJ 2014, A98 (web-form filing) per 1/6/2018

Add:

- OJ 2018, A45 “Decision of the President dated 9 May 2018 concerning the electronic filing of documents” (supersedes and consolidates OJ 2015, A91, OJ 2015, A27 & OJ 2014, A98 per 1/6/2018)
- OJ 2018, A46 “Notice from the EPO dated 9 May 2018 concerning the electronic filing of documents”

### **H10, Case Law:**

Add:

- Referral G1/18 (by President): “If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?”

### **H12, Law and Regulations**

Add:

- OJ 2018, A82 “Notice situation in the USA, the Philippines, Hong Kong SAR, China, Indonesia and Japan after the hurricanes and the earthquake between 15 Sep and 1 Oct 2018” (R.134(5) EPC and R.82<sup>quater</sup> PCT)

### **H14, Law + Regulations & Annex, M, item at p.488:**

OJ 2018, A37 superseded OJ 2007 – SE3 – M.3: insignificant amount changed from € 10 to € 15 per 1/7/2018

### **L4, PCT Newsletter:**

Add:

- PCT NL Sep 2018: With effect from 1 April 2005, Uganda withdraws its notification of incompatibility of PCT Art.22(1) as modified with effect from 1 April 2002.
  - So the 30m time limit under Art.22(1) PCT for entry into national phase of Uganda as dO applies as from 1/4/2015 in respect of IAs for which the earlier 21m time limit expired on or after that date and in respect of which the acts referred to in Art.22(1) PCT have not yet been performed by the applicant.

## 2. Euro-PCT Guide

This chapter lists the major differences of the Euro-PCT Guide 11th edition (up to date until 1 January 2018; released 18 May 2018) w.r.t. the previous, 10th edition (up to date until 1 January 2017; released 10 April 2017)

**Concordance table paragraph numbering (left column: EPG (2017); right column: EPG (2018)):**

### A. General overview

OLD	NEW
- 1-9:	unchanged
- 10:	deleted
- 11-12:	-1 (10-11)
- New:	13 new (former second part of 12)
- 14-15:	14-15 - contents redistributed over the two pars.
- 16-22:	unchanged
- 23:	renumbered to 26
- 24-25:	renumbered to 23-24 (-1)
- 26:	old 26 deleted, replaced by former 23
- 27-41:	unchanged
- New:	42-44 (external complaints)

### B. EPO as rO

- 42-45:	+3 (renumbered to 45-48)
- 46-51:	49-78 methods of filing, loss in the mail, ...: info from former paragraphs
- 46-51 and 64-89	redistributed
	E.g., pre-conversion archive was 89, now in 57
- 54-57:	+27 (renumbered to 79-84)
- New:	85 (new, negative finding missing parts as IA already complete)
- 58-63	+28 (renumbered to 86-91)
- 64-89:	moved to 49-78 block
- 90-159	+2 (92-161)
	E.g. closure of national route was 120, now 122
- New:	162
- 160	deleted
- 161-189	+2 (163 -191)

### C. EPO as ISA

- 190-227	+2 (192-229)
- New	230
- 228-233	+3 (231-236)
- New	237
- 234-270)	+4 (238-274)

### C. EPO as SISA

- 271-290	+4 (275-294)
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### D. EPO as IPEA

- 291-404	+4 (295-408)
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## E. EPO as dO/eO

- 405-453 +4 (409-457)
- New: 458 payment by credit card
- 454-516 +5 (459-521)
- New 522
- 517-548 +6 (523-554)
- New 555
- 549-555 +7 (556-562)
- New 563
- 556-571 +8 (564-579)
- New 580
- 572-576 +9 (581-585)
- New 586
- 577-586 +10 (578-596)
- New 597-598
- 587-598 +12 (599-610)
- New 611-612
- 599- +14 (613-)

## Major changes (new paragraphs)

- 6: email for contact added ([international\\_pct\\_affairs@epo.org](mailto:international_pct_affairs@epo.org))
- 42-44: new: external complaints
- 85: new, negative finding missing parts as IA already complete
- 237: new: Taking earlier search and classification results into account (R4.12; R.23bis.2a/(c))
- 265: provisional opinion on patentability of first invention mentioned in non-unity invitation
- 357: refund of fee for IPE updated
- 432: early entry check-box in entry form
- 436: automatic debiting on early entry possible since 1/11/2017
- 457: online-only debit orders per 1/12/17
- 458: credit-card per 1/12/17
- 522: RE in respect of missed FP period for translation added
- 555: RE in respect of missed FP period for filing fee added
- 563: RE in respect of missed FP period for designation fee added
- 577: added "Information on search strategy" annexed to all suppl ESRs per 1/1/2018
- 580: EPO uses third party observations from intern phase for suppl. ESR if ...
- 586: EPO uses third party observations from intern phase for first IA if ...
- 597-598: RE in respect of missed FP period for search fee added
- 611-612: RE in respect of missed FP period for request for examination added
- 664: provisional opinion on patentability of first invention mentioned in non-unity invitation

## Cut-off date

Note that EPG (2018) is up to date until 1/1/2018, such that the following are not yet included:

- OJ 2018, A17: not anymore possible to file with BE=rO since 1/4/2018
- OJ 2018, A24 "EPO-WIPO Agreement: Amended Annex A(ii) – search-in-Dutch not anymore for BE"
- OJ 2018, A35 "EPO-WIPO Agreement - Amended Annex D, Part I – fees per 1/4/2018"

## 4. Update of Main-Exam Questions

### “QUESTIONS DEALING WITH LEGAL CHANGES OF 2018”

Add:

- Referral G 1/18 (late appeal fee) – OJ 2018, A71      B2-01 (comment), H10-04 (comment)
- Insignificant amount – OJ 2018, A37      H14-21
- Electronic filing (consolidated) – OJ 2018, A45      H2-01, H2-04, H3-01, H3-04, H12-08, L1-13

#### C1-08

Amend question to read:

A month ago, an applicant filed a European patent application EP1 for a gene sequence, describing the nucleic acid sequence and a method for isolating it, but not its function. Two weeks ago, the inventor presented the content of the application at a conference together with a medical application of the gene sequence.

- (a) Can EP1 be granted?
- (b) Is it possible to file the text of EP1 as a new application EP2, validly invoking priority of the first application and additionally indicating the medical application?

#### C3-08

Correct year in first line of the question to:

A European patent application EP1 designating all Contracting States was filed in January 2012

#### C5-16

Add “the prior art cited in” to (a)(1) and (b) such that they read:

- (a) Technical field:
  - (1) What is the technical field in which the solution is to be sought taking the prior art cited in EP1 as the closest prior art?
  - (2) What is the more general field?
  - (3) Mention some neighbouring fields.
- (b) What is the objective technical problem taking the prior art cited in EP1 as the closest prior art?

#### H3-11

Amend the opening paragraph to read:

A European patent application EP-X was filed ~~as a filing~~ on 12 February 2019 without claiming priority. Today, 26 February 2019, the applicant finds out that two embodiments are missing in the description. The applicant has another, national patent application NL-X filed ~~10 months ago~~ on 15 February 2018 which contains these embodiments.



## H10-11

In view of the last amendments to the ADA, please amend the question to:

An appeal was validly lodged by the sole appellant (opponent) against the decision of the Opposition Division to maintain the patent in amended form. On a certain day, at 16:09 hrs, a fax was received by the EPO from the sole appellant withdrawing his appeal. On the same day, at 20:12 hrs, the EPO received ~~a fax from a third party~~ filing a notice of intervention according to Article 105 EPC, filed by a third party using EPO Online Filing together an electronic debit order in the appropriate machine-readable format for debiting the opposition and the appeal fees from their deposit account.

- (a) Will the notice of intervention be deemed filed?
- (b) Would your answer have been different if the sequence of the fax with the withdrawal and the electronically filed notice of intervention was reversed?

## L2-09

Correct question b) to :

- (b) Would your answer have been different if the applicant had filed a European patent application on 13 January 2018 rather than an international application?

## 5. Update of Answers to Main-Exam Questions

### B2-01

Add to comments:

- *G1/18 asked substantially the same questions as G1/14 and G2/14 again, as the earlier questions were not answered: “If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?”*

### B3-03

Add after “Mere facts ...”

- E.g., 21 months between leaving company and starting at EPO may be sufficient time for any residual bias as a former employee to fade – T 261/88

### B4-02

Add after “By filing application electronically, filing fee is reduced further - RFees 2(1).1”:

- and file its translation online in character-coded format to benefit most from the reduction – RFees 2(1),1 and RFees 2(3) per 1/4/2018; OJ 2018, A4

Add to comments:

- *Art.53(b): “European patents shall not be granted in respect of: [...] plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof;”*
- *Rule 28(2) was introduced per 1 July 2017 to extend the scope of the exclusion of Art.53(b): “(2) Under Article 53(b), European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process.” – OJ 2017, A56*

### C4-12

Correct legal basis in (a) and (b) to

- [Art.53\(b\)](#), [R.28\(2\)](#) excludes plants obtained from essentially biological processes

### H2-01, H2-04, H3-01, H3-03, H12-08, L1-13

Update the references for electronic filing to OJ 2018, A45, which superseded OJ 2015, A91 (OLF), OJ 2015, A27 (CMS) and OJ 2014, A98 (web-form filing) per 1/6/2018 – also see OJ 2018, A46.

### H3-11

Add to (a)

- EP-X was filed within 12m from NL-X, as 15/2/18 + 12m [Art.87(1), R.131(4)] => 15/2/19 (Fri), so in time for priority from it
- Today is within 16m from NL-X, as 15/2/18 + 16m [R.52(2), R.131(4)] => 15/6/19 (Sat) [R.134(1)] => 17/6/19, so in time to add a priority claim to NL-X

#### H4-03

Correct legal basis in the 13<sup>th</sup> bullet to:

- It will not be possible to reintroduce claim to C during examination because it was originally claimed but has not been searched - R.64(1); G 2/92 (see also GL (2017) H-II, 7.2).

Add to comments:

- *If independent claim was originally claimed but not searched, legal basis is R.64(1) & G 2/92; see GL (2017) H-II, 7.2.*
- *Legal basis is different if the invention would not have been claimed originally, then R.137(5). See GL (2017) H-II, 6.2.*

#### H5-04

Add legal basis to comments:

- (b) GL (2017) A-I, 2: Once the application is transferred to the Examining Division, the latter accepts responsibility for the formalities of the application – R.10(2)-(4).*

#### H6-08

Add to comments:

- *“The 50% refund possibility [of RFees 11(b)] exists until the day **before** the date on which the examining division issues the communication under Rule 71(3) EPC, that date being the one printed on it. Thus, if the Office receives the declaration of withdrawal **on** the date of the communication pursuant to Rule 71(3) EPC, the applicant will not get the 50% refund.” – OJ 2016, A49*

#### H8-06

Add to end of answer:

- Option could be to limit just a dependent claim, such that scope of protection of patent as a whole does not change - GL (2017) D-X, 4.3

#### H7-04

Change second but last bullet of answer to:

- If Exam. Div. does not admit amendments - R.71a(2) – examination will be ~~continued~~ resumed

#### H10-04

Add to comments:

- *It appeared that the conclusions from the Board in T 1325/15 were not always followed, and in June 2018, the President referred the following question for an opinion by the EBoA:*
  - *Referral G1/18 (by the President): “If notice of appeal is filed and/or the appeal fee [ 1 ] is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?”*

## H12-01

Please correct the typo in the time limit calculation in a) to let it expire on 9/9/19 (Mon)

## H13-07

Correct legal basis the 4<sup>th</sup> bullet to:

- Later, during substantive examination, Exam. Div. will review non-unity finding. If examiner agrees, examination will only continue for searched subject-matter and inventor may have to remove all unsearched subject-matter - R.64 & G2/92; GL (2017) H-II, 7.2

Add to comments:

- *If independent claim was originally claimed but not searched, legal basis is R.64(1) & G 2/92; see GL (2017) H-II, 7.2.*
- *Legal basis is different if the invention would not have been claimed originally, then R.137(5). See GL (2017) H-II, 6.2.*

## H14-13

Correct the following comment:

- *Note that since 1 Dec 2018 ~~2017~~, debit orders can only be filed online in an electronically processable format via one of an exhaustive list of forms or EPO Online Fee Payment, such payment of a wrong amount is very unlikely nowadays.*

## H14-21

Update answer for new Decision of the President:

- OJ 2018, A37 superseded OJ 2007 – SE3 – M.3:
- insignificant amount changed from € 10 to € 15 per 1/7/2018

## L1-13

Add to comments:

- *See also EPG (2018) 77 “Filing further documents”*

## L2-07

Correct in the answer:

- *Where, following invitation under R.20.3(a), element referred to in Art.11(1)(iii)(d) - claims description - or Art.11(1)(iii)(e) - ~~description~~ claims – is ...*

## L2-09

Correct last numbered item from “c)” to “d)”

## L2-25

Correct the answer to b)-d) to:



(b)

- Yes, it is possible to enter national phases and request each dO to review the JPO's negative decision under Art.25, if there are grounds for demonstrating that the refusal of the R.82quater request was unjustified.
- Each dO can also be requested to excuse the missed time limit under Art. 48(2) using a remedy available under national law.
- If Review is requested, it is advisable to additionally request Excuse.
  
- To request Review, applicant needs to – AG-NP 6.019-6.020
  - Request IB to transmit copies of relevant documents on file to each dO – Art. 25(1)(a) ; time limit: within 2m of “deemed withdrawn” communication - R. 51.1
  - Pay national fee, furnish translation and request each dO to review the decision, providing facts and evidence as to why JPO made a mistake – Art. 25(2)(a) time limit: within same 2m period – R. 51.3
  - If dO finds that decision was unjustified, it treats the IA as if the late provision of the missing signature had been excused under R 82.quater.
  
  - If negative decision of JPO was justified, each dO must be requested to excuse the missed time limit
  - Each dO will apply national law to see if it would have excused under a comparable situation - AG-IP 6.056
  - If successful, dO maintains effect of IA as national application - Art.24(2).
  
- To request excuse, applicant needs to - AG-NP 6.024-6.025:
  - Complete all steps for national entry before each desired dO separately:
  - Request dO to excuse missed time limit, providing necessary facts and evidence, based on the available remedy and in accordance with the corresponding national procedural requirements and time limit – Art. 48(2), R. 82bis.2
  - Applicants can usually be sure of meeting the time limit when the request to excuse is made and the acts for entering the national phase are performed within 2m from the date of the “deemed withdrawn” communication.

(c)

- EPO applies “Excuse Procedure” as dO - OJ1984, 565; EPG (2018) 654
- So even if JPO decision was justified, the missed time limit can be remedied
- Situation is analogous to omitting to sign RFG form for directly filed EP applications:
  - EPO would invite applicant to correct deficiency - Art.90(4), R.57(b) and R.58 EPC
  - If applicant had not replied, application would have been refused - Art.90(5)
  - 2m period of R.58 is excluded from FP - Art.121(4), R.135(2)
  - But RE would be possible if all due care can be proven - Art.122(1), R.136(1)
  - So, if all due care can be proven, revival should be successful
  
- EPO requires the following acts:
  - Applicant must request the IB under Art. 25(1)(a) to submit copies of the documents on file - OJ1984, 565; EPG (2018) 654
  - File translation of IA into EN, FR or DE - Art.26 PCT; Art.153(4), R.159(1)(a) EPC
  - Pay national fee = all required fees on entry acc. AG-IP National Chapter, EP; R.159(1)(c), RFees 2(1).1.
  - Request RE, complete omitted act (signing request), prove all due care (unforeseeable circumstances) and pay RE fee to EPO - Art.48(2) and R.82bis PCT; Art.122(1), R.136(1) EPC
  - Time limits of Art.122, R.136 EPC must be complied with; in this case, 2m from becoming aware of “deemed withdrawn” communication.

- (d) No, it not possible to request EPO remedies during the international phase and there are no grounds for assuming that EPO would be more likely than JPO to allow a request under R. 82quater.

Add to the comments:

- *EPG (2018) E-XIV "Review by the EPO as designated/elected Office and rectification of errors made by the receiving Office or by the IB"*
  - *EPG (2018) 651: The EPO as designated or elected Office may review or rectify certain acts of the receiving Office or the IB in the international phase. As regards review of the grant of a request for restoration of the right of priority by the receiving Office, see points 644 ff"*
  - *EPG (2018) 652-653: Review by the EPO as designated Office under Article 25 PCT*
  - *EPG (2018) 654: Review by the EPO as designated Office under Article 24 PCT*

### L3-01

Correct "OJ 2018, A27 (updated Annex A(ii), Belgium)" to "OJ 2018, A24 (updated Annex A(ii), Belgium)" in answer

### L4-11

Correct in answer:

~~○ However, Moldova was a PCT state since 25/12/91, and has a 31m time limit for direct entry into its national phase—AG NP Annex MD.~~  
~~○ So, we cannot get MD via the EP route, but we can enter directly today.~~

### L4-18

The answer to b) may be made more complete:

- b)
- EPO was not ISA nor SISA, so supplementary ESR will be drawn up - Art.153(7), OJ 2009, 594 or OJ 2018, A26.
  - So search fee must also be paid on entry - R.159(1)(e)
  - Applicant can
    - either delete claim 1 immediately on entry – R.159(1)(b)-, or
    - delete claim 1 in response to the R.161(2) communication.
  - This new claim set will form basis for supplementary EP search – R.161(2)
  - If applicant does not amend, two independent, unitary claims are present in the documents for suppl EP search.
  - But EPO will not search more than one independent product claim – R.62a(1)
  - So they will invite applicant to choose – R.62a(1)
  - Only the chosen claim will be searched – R.62a(2)
  - If EPO however considers claim to lack unity,
  - EPO will issue partial search report directed to first invention -R.164(1)(a), together with invitation to pay further search fee – R.164(1)(b)
  - Suppl. EP search report is then based on the claims paid for.
  - To make EPO check unity without the need to pay an additional search fee in case the EPO considers the claims to lack unity, applicant can
    - either swap the order of claims 1 and 2 immediately on entry – R.159(1)(b)-, or
    - swap the order of claims 1 and 2 in response to the R.161(2) communication, such that original claim 2 is the first claim for search.





**L4-28**

Correct legal basis for designation fee to “R.159(1)(d), R.39” in the answer

## 6. Update of calendars

### 2020

In the table of closure dates of 2020, replace 31.05.2020 with 01.06.2020 for Whit Monday.