



DELTAPATENTS

Training for Patent Professionals

BASIC LEGAL QUESTIONS FOR PRE-EXAM AND PAPER D

Update 1 November 2023

Edition June 2023



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Introduction and acknowledgement

This document comprises an update to the Study Guide and Questions and Answers as used in our Integrated Pre-Exam Courses in 2023, and to the 'Basic legal Questions for Pre-Exam and Paper D -book ("L-book", edition June 2023, EQE 2024):

- Publications on the EQE website in relation to EQE 2024;
- Publications in OJ EPO after the Book was printed (OJ June 2023 – 31 Oct 2023);
- Publications in PCT Newsletter after the Book was printed (PCT NL June 2023 – 31 Oct 2023);
- Corrections to the questions and answers.

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,
1 November 2023

1. EQE 2024 preparation courses

DeltaPatents organizes further training sessions for candidates preparing for Pre-Exam 2024 and for the Main Exam 2024 in the period from May 2023 until February 2024. 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:

<https://www.deltapatents.com/eqe/>
<https://www.deltapatents.com/eqe-pre-exam/>
<https://www.deltapatents.com/eqe-paper-d/>
<https://www.deltapatents.com/eep-training-auf-deutsch/>
<https://www.deltapatents.com/eqe-formation-en-francais/>

or contact us via email at:

training@deltapatents.com

2. Other EQE 2024 material: Model solutions & Reference books

Pre-Exam – Cases/Exams

DeltaPatents provides **cases** in Pre-Exam format and **updated exam papers and model solutions** for most Pre-Exam papers.

Please order in our [webshop](#).

Reference books

The DeltaPatents [webshop](#) also provides:

- “Basic Legal Questions for Pre-Exam and Paper D” by DeltaPatents
- “References to the European Patent Convention” by Jelle Hoekstra
- “The Cross-Referenced Patent Cooperation Treaty” by Cees Mulder
- “Topic-Related Index to the EPC and PCT” by Roel van Woudenberg and Cees Mulder

3. Notification: special situation EQE 2024

In view of the change of R.126(2)/127(2)/131(2) per 1 November 2023, while the IPREE defines the texts as in force on 31 October 2023 to be the relevant legal texts for EQE 2024, the Supervisory Board of the EQE decided:

DECISION OF THE SUPERVISORY BOARD OF THE EQE

Whereas:

1. The syllabus cut-off date for the EQE 2024 is 31 October 2023.
2. In its decision CA/D 10/22, the Administrative Council adopted amendments to Rules 126, 127 and 131 EPC for entry into force on 1 November 2023.
3. Candidates sitting the EQE 2024 are required to apply Rules 126, 127 and 131 EPC as in force on 31 October 2023, while on the day of the exam, the new provisions as set out in CA/D 10/22 will already have been in force for several months.

The Supervisory Board has decided as follows:

1. Candidates sitting the EQE 2024 (pre-examination and main examination) can use as legal basis Rules 126, 127 and 131 EPC as in force on 31 October 2023 or Rules 126, 127 and 131 EPC as in force on 1 November 2023.
2. In the main exam papers, the default Rules 126, 127 and 131 EPC to be applied are those in force on 1 November 2023. If the candidate chooses to apply Rules 126, 127 and 131 EPC as in force on 31 October 2023, this must be clearly indicated.
3. Candidate papers will be marked accordingly.

This decision will enter into force on 1 July 2023.

Done at Munich, 26 June 2023

For the Supervisory Board of the EQE

The Chairman
Michael Liebetanz

So when calculating time limits during Paper D 2024 that run from the (fictitious) date of notification of a document, you are free to use:

- either the current "10-day rule" for deemed notification (with true date of receipt if received later) according to current Rule 126(2)/127(2) (as in force until 31/10/2023 in line with Rules 2 & 22 IPREE) - in which case **you need to indicate that you use** the version as in force in 31/10/2023; [Guidelines E-II, 2.3](#) and 2.4
- or the new PCT-like version (as in force from 1/11/2023) with deemed notification on date of dispatch/date of the document and a compensation for receipt later than 7 days ([OJ 2022, A101, article 1\(10\)-\(12\)](#); [OJ 2022, A114, section IV](#); and [OJ 2023, A29](#); also [Guidelines E-II, 2.3](#) and 2.4) - in this case, you do not need to indicate that you use the new version (despite it deviating from Rule 2 & 22 IPREE).

Our Q&A books "[Basic Legal Questions for Pre-Exam and Paper D](#)" and "[Main Exam Questions for Paper D](#)" provide time limit calculations for **both versions** of R.126(2)/127(2) for (almost) all questions involving time limits calculated from the notification of a document.

Rules 126(2), 127(2) and 131(2) EPC as in force until and on 31/10/2023

Rule 126(2) EPC as in force **until and on** 31/10/2023:

(2) Where notification is effected in accordance with paragraph 1, **the letter shall be deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider**, unless it has failed to reach the addressee or has reached him at a later date; in the event of any dispute, it shall be incumbent on the European Patent Office to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be.

Rule 127(2) EPC as in force **until and on** 31/10/2023:

(2) Where notification is effected by means of electronic communication, **the electronic document shall be deemed to be delivered to the addressee on the tenth day following its transmission**, unless it has failed to reach its destination or has reached its destination at a later date; in the event of any dispute, it shall be incumbent on the European Patent Office to establish that the electronic document has reached its destination or to establish the date on which it reached its destination, as the case may be.

Rule 131(2) EPC as in force **until and on** 31/10/2023:

(2) Computation shall start on the day following the day on which the relevant event occurred, the event being either a procedural step or the expiry of another period. **Where the procedural step is a notification, the relevant event shall be the receipt of the document notified, unless otherwise provided.**

Amended Rules 126(2), 127(2) and 131(2) EPC as in force as of 1/11/2023

Amended Rule 126(2) EPC as in force **as of** 1/11/2023:

(2) Where notification is effected in accordance with paragraph 1, **the document shall be deemed to be delivered to the addressee on the date it bears**, unless it has failed to reach the addressee. In the event of any dispute concerning the delivery of the document, it shall be incumbent on the European Patent Office to establish that the document has reached its destination and to establish the date on which the document was delivered to the addressee. If the European Patent Office establishes that the document was delivered to the addressee **more than seven days after the date it bears**, a period for which the deemed receipt of that document is the relevant event under Rule 131, paragraph 2, shall expire later by the number of days by which the seven days were exceeded.

Amended Rule 127(2) EPC as in force **as of** 1/11/2023:

(2) Where notification is effected by means of electronic communication, **the electronic document shall be deemed to be delivered to the addressee on the date it bears**, unless it has failed to reach its destination. In the event of any dispute concerning the delivery of the electronic document, it shall be incumbent on the European Patent Office to establish that the document has reached its destination and to establish the date on which it reached its destination. If the European Patent Office establishes that the electronic document has reached its destination **more than seven days after the date it bears**, a period for which the deemed receipt of that document is the relevant event under Rule 131, paragraph 2, shall expire later by the number of days by which the seven days were exceeded.

Amended Rule 131(2) EPC as in force **as of** 1/11/2023:

(2) Computation shall start on the day following the day on which the relevant event occurred, the event being either a procedural step or the expiry of another period. **Where the procedural step is a notification, the relevant event shall be the deemed receipt of the document notified**

4. Update of Study Guide

Training Material and Sources – Law + Regulations

1. European Patent Convention (EPC2000) from www.epo.org

- “National Law relating to the EPC”
 - The latest edition is July 2023 (22th edition), published on 3 August 2023. The pdf version reflects the status of July 2023

4. Fee payments to the EPO from www.epo.org

- “Arrangements for deposit accounts” [OJ Suppl 3/2022, per 10 September 2022; superseded OJ Suppl 4/2019] Amended by:
 - OJ Suppl 3/2023, 10 “Decision of the President dd 24 April 2023 concerning the revision of the ADA and their annexes in view of the entry into force of the Unitary Patent system”.
 - OJ Suppl 3/2023, 20: “Notice from the EPO dd 24 April 2023 concerning the revision of the ADA their annexes in view of the entry into force of the Unitary Patent system”
 - OJ 2023, A58 “Decision of the President dd 13 June 2023 concerning the revision of the Arrangements for deposit accounts (ADA)”: MyEPO Portfolio added to ADA 7.1.2 per 1/7/2023

EQE

1. EQE Regulation

- “Information on the schedule for the EQE 2024 examination papers” dd 27 July 2023 (Supervisory Board) – available on EQE website
- Decision of the Supervisory Board dd 26 June 2023 “EQE 2024: Notification and time limit calculation”:
 1. Candidates sitting the EQE 2024 (pre-exam and main examination) can use as legal basis Rules 126, 127 and 131 EPC as in force on 31 Oct 2023 or Rules 126, 127 and 131 EPC as in force on 1 Nov 2023.
 2. In the main exam papers, the default Rules 126, 127 and 131 EPC to be applied are those in force on 1 November 2023. If the candidate chooses to apply Rules 126, 127 and 131 EPC as in force on 31 October 2023, this must be clearly indicated.
- “Instructions to candidates concerning the conduct of the European qualifying examination” dated December 2022 – EQE online webpage on EQE website
- **Check EQE website for updates!:**
<https://www.epo.org/learning/eqe.html>

B3, Institutional provisions – Law and regulations

Update:

- OJ 2023, A57 “Decision of the President of the EPO dd 11 May 2023 amending the decision of 17 November 2022”: UPC added to list of entities considered to ensure adequate protection

C2, Law + Regulations:

Add:

- OJ 2023, A79 (August issue) “Synopsis of the territorial field of application of international patent treaties - (situation on 1 July 2023” (lists 02.10.2023 - 28.03.2024, Doha (QA) “Expo 2023 – Green Desert, Better Environment”; 13.04. - 13.10.2025, Osaka (JP) “Expo 2025 – Designing Future Society for Our Lives” ; and 19.03.2027 - 26.09.2027 Yokohama(JP) “Expo 2027 – Scenery of the Future for Happiness”)

C2 Case Law – Headnotes / Reasons

Add:

- Referral G 1/23 by T 438/19: Technical Board of Appeal 3.3.03 has by interlocutory decision T 438/19 referred the following questions to the Enlarged Board of Appeal (referral pending under G 1/23 "solar cell"):
- 1. Is a product put on the market before the date of filing of a European patent application to be excluded from the state of the art within the meaning of Article 54(2) EPC for the sole reason that its composition or internal structure could not be analysed and reproduced without undue burden by the skilled person before that date?
- 2. If the answer to question 1 is no, is technical information about said product which was made available to the public before the filing date (e.g. by publication of technical brochure, non-patent or patent literature) state of the art within the meaning of Article 54(2) EPC, irrespective of whether the composition or internal structure of the product could be analysed and reproduced without undue burden by the skilled person before that date?
- 3. If the answer to question 1 is yes or the answer to question 2 is no, which criteria are to be applied in order to determine whether or not the composition or internal structure of the product could be analysed and reproduced without undue burden within the meaning of opinion G 1/92? In particular, is it required that the composition and internal structure of the product be fully analysable and identically reproducible?

H8, Guidelines

Please delete the reference to C-V, 4.11 "Rule 71(3) waiver", as it is no longer from the Guidelines (because this waiver has been abolished).

H8, Decision to grant – Guidelines

Please delete

- ~~C-V, 4.11 "Rule 71(3) waiver"~~

H10, Appeal – Case Law

Please correct a strange correction made by Word's Autocorrect (2x)

Reformatio in peius

- G9/92 hn. "Prohibition of reformatio in peius"
- G1/99 hn. r.1-12 "Reformatio in peius allowed if patent as maintained in amended form would have to be revoked due to inadmissible amendment held allowable by the Opposition Division"
- T 1843/09 (OJ 2013, 508) "Exceptions from the prohibition of reformatio in peius"

H11, Common provisions – Law + Regulations

Please add after OJ 2023, A50:

- OJ 2023, A59 "Notice from the EPO dd 31 May 2023 concerning the introduction of a shared area in MyEPO Portfolio": for use during personal consultation; changes are informal; changes made by examiners are merely suggestions made to assist users - responsibility for amendments remains with the applicants (Art 113(2)); Copy of uploaded document/ relevant parts thereof will be attached to the minutes of the consultation

H12, Periods – Law + Regulations

Please add:

- OJ 2023, A80 "Notice 11 September 2023 concerning the days on which EPO filing offices are closed in 2024"



L3, International search and publication; preliminary examination – Law + Regulations

Update: please add the underlined:

- OJ 2020, A4 (Decision) & OJ 2020, A18 (Notice) “Reduction in the fees for international search and international preliminary examination carried out on international applications filed by nationals of certain states”
 - Notice updated by OJ 2022, A72 “Notice from the EPO dd 6 July 2022” per 1/7/2022
 - Notice updated by OJ 2023, A “Notice from the EPO dd 10 July 2023” per 1/7/2023

5. Update of Basic Legal Questions

Questions dealing with legal changes of 2023 (UNTIL 31 OCTOBER 2023)

Please update:

- Amendments to ADA2022/AAD2022
OJ Suppl 3/2023, 10 & 25 (per 1/6/2023): in view of UP
OJ 2023, A58 (per 1/7/2023): in view of MyEPO Portfolio

H9-02, H9-13, H10-05, H11-07,
H14-11, H14-12, H14-11 - H14-17,
L3-26, L4-26, L4-40

Please add:

- Referral G 1/23 “solar cell”
To what extent is an insufficiently disclosed product prior art

C2-16 (new in EQE 2024 update)

Questions dealing with future legal changes (AFTER 31 OCTOBER 2023)

Please expand with the second paragraph, citing part of the decision of the SB:

Legal changes entering into force after 31 October of the year before the exam are not to be considered when answering exam papers – Rules 2 and 22 IPREE.

However, for EQE 2024, note the Decision of the Supervisory Board dd 26 June 2023 “EQE 2024: Notification and time limit calculation”:

- Candidates sitting the EQE 2024 (pre-exam and main examination) can use as legal basis Rules 126, 127 and 131 EPC as in force on 31 October 2023 or Rules 126, 127 and 131 EPC as in force on 1 November 2023.
- In the main exam papers, the default Rules 126, 127 and 131 EPC to be applied are those in force on 1 November 2023. If the candidate chooses to apply Rules 126, 127 and 131 EPC as in force on 31 October 2023, this must be clearly indicated.

C2-16 (New question)

Add a new question at the end of C2:

C2-16

A product was put on the market before the date of filing of a European patent application. However, its composition or internal structure could not be analysed and reproduced without undue burden by the skilled person before that date.

Does this insufficiency of disclosure lead to the exclusion from the state of the art within the meaning of Art. 54(2) EPC of

- (a) the product itself (including its chemical composition/internal structure) or
(b) only of its chemical composition/internal structure?

H12-01

To align with the wording from the decision of the SB on the notification rules for EQE 2024, in (b) and (d):
amend 1 November 2024 to “1 November 2023 (as in force on the day of the D 2024 exam)”



I/J-03

Expand the legal basis to the one-but-last bullet to:

G 4/19; GL (2023) G-IV, 5.4; Art. 97(2) jo Art.125

6. Update of Calendars

2017 calendar

- OJ 2017, A97 did not include the usual 31.05 and 15.08 as closure dates for 2018. We did however include these in the calendars as 31.05.2018 and 15.08.2018 were included in the 2018 calendars provided with the 2018 and 2019 D papers.

2024 calendar

- Please be informed that the 2024 closure dates from the EPO were published in the September 2023 issue in OJ 2023, A80. The closure dates in our provisional calendar are the same as those in OJ 2023, A80.

7. Update of Answers to Basic Legal Questions

C1-02

In the comments, replace G-I, 2 by G-I, 1.

(In the current, 2023 edition of the GL, former section G-I, 1 and G-I, 2 were merged into G-I, 1)

C1-03

In the answer and in the comments, replace G-I, 3 by G-I, 2 (In the 2023 edition of the GL, former section G-I, 1 and G-I, 2 were merged into G-I, 1 and G-I, 3 was renumbered into G-I, 2)

C2-16 (New question)

Answer and comments to this new question:

Answer

This depends on the answers by the Enlarged Board in referral G 1/23

- I.e., it depends in the interpretation of "available to the public" in Art.54(2)

Comment

(a) Referral G 1/23 "solar cell" by T 438/19 is currently pending:

- 1. Is a product put on the market before the date of filing of a EP patent application to be excluded from the state of the art within the meaning of Article 54(2) EPC for the sole reason that its composition or internal structure could not be analysed and reproduced without undue burden by the skilled person before that date?*
 - 2. If the answer to question 1 is no, is technical information about said product which was made available to the public before the filing date (e.g. by publication of technical brochure, non-patent or patent literature) state of the art within the meaning of Article 54(2) EPC, irrespective of whether the composition or internal structure of the product could be analysed and reproduced without undue burden by the skilled person before that date?*
 - 3. If the answer to question 1 is yes or the answer to question 2 is no, which criteria are to be applied in order to determine whether or not the composition or internal structure of the product could be analysed and reproduced without undue burden within the meaning of opinion G 1/92? In particular, is it required that the composition and internal structure of the product be fully analysable and identically reproducible?*
- Reasons in interlocutory decision of referring Board T 439/19:*
- 11. In the case law of the Boards of Appeal, diverging approaches have been adopted in applying opinion G 1/92. The present Board has identified divergent decisions with regard to the following aspects:*
 - (i) interpretation of "available to the public" leading to the exclusion from the state of the art within the meaning of Article 54(2) EPC of the product itself (including its chemical composition/internal structure) or only of its chemical composition/internal structure,*
 - (ii) the degree of detail required for the analysis of said product and*
 - (iii) the requirements for its reproducibility.*

- *Relevance of the distinction:*

If the product itself would be excluded, it cannot serve any role in novelty nor in inventive step, e.g., not as closest prior art. If the product is prior art, but not only its composition or internal structure, it can be the closest prior art, and the objective technical problem could e.g. be "how to make this -so far insufficiently disclosed- product?"

H11-18

Please add a last bullet to the answer.

- If claim maintained, EP1-DIV will be refused – Art.97(2) jo Art.125; G 4/19

H11-19

Please add a last bullet to the answer to a):

- If claim maintained, EP2-DIV will be refused – Art.97(2) jo Art.125; G 4/19

Annex: Schedule EQE 2024 (Pre-Exam)

The document "Information on the schedule for the EQE 2024 examination papers" dd 27 July 2023 provides:



Munich, 27 July 2023

Information on the schedule for the EQE 2024 examination papers

General

The EQE 2024 will take place online using the examination software Wiseflow.

On examination days, candidates are advised to log on to the online examination system's internet platform at least 20 minutes before the start of the relevant paper. Candidates will be informed in due course about their personal access to the online examination system.

The pre-examination and both papers C and D are split into parts. This means that candidates will not be free to allocate their time as they see fit across the different parts of the papers. To compensate for this restriction, the total duration of the relevant papers has been extended. Once the time allowed for a part has elapsed, it will not be possible to go back to that part.

Pre-examination - 15 March 2024

The pre-examination is split into four parts. Each part must be completed before the start of the next break, with the next set of questions only becoming available after the break. The pre-examination lasts four hours and forty minutes.

Candidates will be allowed to print the description of the invention as well as the prior-art documents for the claim analysis parts before the start of the appropriate part. The documents allowed for printing will be made available during the break preceding the relevant claim analysis part.

No calendars will be provided.

Part	Content	Duration	CET time
Part 1	5 x 4 legal questions	70 min	9:30 - 10:40
	Break	20 min	10:40 - 11:00
Part 2	5 x 4 legal questions	70 min	11:00 - 12:10
	Break	80 min	12:10 - 13:30
Part 3	5 x 4 claim analysis, case 1	70 min	13:30 - 14:40
	Break	20 min	14:40 - 15:00
Part 4	5 x 4 claim analysis, case 2	70 min	15:00 - 16:10

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