

R. 88 EPC 1973, the error had to be **apparent from the divisional application itself**, and the parent application could not be used to demonstrate that the error was obvious. Even if it was apparent from the filed description, claims and drawings that they did not belong together, it was not immediately clear from the divisional application itself which of these parts was incorrect.

4.4. Search fee for a divisional application

It was confirmed in J.7/13 that the relevant provisions for determining the amount of the search fee to be paid for a European divisional application are R. 36(3) EPC and Art. 2(1), item 2, RFees. The time limit for payment in R. 36(3) EPC can only refer to the actual date on which the divisional application documents were received at the EPO. The amount payable does not depend, as contended by the appellant, on the fictitious date of filing accorded to the application under Art. 76(1) EPC, which is conditional on the fulfilment of substantive requirements and likewise has substantive effects.

5. Prohibition of double patenting

5.1. Introduction

This chapter primarily deals with double patenting arising from the filing of a divisional application, but also treats the matter as it may arise in other procedural situations.

In G.4/19 (OJ 2022, A24) the Enlarged Board of Appeal endorsed the **narrow reading of the term "double patenting"** given by the referring board (T.318/14, OJ 2020, A104, points 17 to 23 of the Reasons). Double patenting in this narrow sense may arise in situations in which two or more European patent applications with **overlapping territorial scope**, directed to the **same subject-matter** and having the **same effective date** are filed by the **same applicant**. Because such applications do not form part of the state of the art according to Art. 54(2) or (3) EPC, their prosecution could lead to the same applicant being granted two or more patents directed to the same subject-matter and having an identical or at least overlapping territorial scope. There are three situations in which such European patent applications could have the same effective date: (i) a European patent application is filed on the same date as another European patent application of the same applicant (parallel filings); (ii) a European patent application is filed as a European divisional application (Art. 76(1) EPC) in respect of an earlier European patent application (divisional application); (iii) a European patent application is filed claiming the priority (Art. 88 EPC) of an earlier European patent application (internal priority) or both claim priority from the same national application (see G.4/19, point 9 of the Reasons).

In view of divergent case law on the **legal basis** for the prohibition of double patenting and the doubts raised as to whether the EPC contained any provision at all which could serve as legal basis, in T.318/14 the board referred points of law regarding the legal basis for the prohibition of double patenting, and the corresponding conditions for a refusal on this basis, to the Enlarged Board of Appeal in accordance with Art. 112(1)(a) EPC.