

## 1. Introduction

Art. 87 to 89 EPC govern the concept of priority under the EPC.

According to Art. 87(1) EPC, any person who has duly filed, in or for (a) any State party to the Paris Convention for the Protection of Industrial Property or (b) any Member of the World Trade Organization, an application for a patent, a utility model or a utility certificate, or his successor in title, shall enjoy, for the purpose of filing a European patent application in respect of the same invention, a right of priority during a period of twelve months from the date of filing of the first application. Art. 88 EPC regulates formal and substantive aspects of claiming priority. According to Art. 89 EPC, the effect of the priority right is that the date of priority counts as the date of filing of the European patent application for the purposes of Art. 54(2) and (3) EPC and Art. 60(2) EPC.

The right of priority is generally regarded as one of the cornerstones of the Paris Convention. Its basic purpose is to safeguard, for a limited period, the interests of a patent applicant in his endeavour to obtain international protection for his invention, thereby alleviating the negative consequences of the principle of territoriality (T 15/01, OJ 2006, 153).

Art. 87 to 89 EPC provide a complete, self-contained code of rules on claiming priority for the purpose of filing a European patent application (see J 15/80, OJ 1981, 213, confirmed in e.g. J 9/07). However, since the EPC – according to its preamble – constitutes a special agreement within the meaning of Art. 19 of the Paris Convention, it is clearly intended not to contravene the basic principles concerning priority laid down in the latter (see T 301/87, OJ 1990, 335; G 3/93, OJ 1995, 18 and G 2/98, OJ 2001, 413).

Furthermore, in view of Art. 87(1) and (2) EPC, the priority system adopted by the European legislator also recognises "internal priorities" (T 15/01, OJ 2006, 153). In this context the question of double patenting has arisen – relevant decisions, in particular G 4/19 (OJ 2022, A26) on the points of law referred to the Enlarged Board of Appeal in T 318/14 of 7 February 2019 (OJ 2020, A104), can be found in chapter II.F.5.

The EPO does not normally check the validity of a priority right during examination. A check must be made, however, if relevant prior art has been made available to the public within the meaning of Art. 54(2) EPC on or after the priority date claimed and before the date of filing (priority interval) or if the content of the European patent application is totally or partially identical with the content of another European application within the meaning of Art. 54(3) EPC, such other application claiming a priority date within the above-mentioned period (Guidelines F-VI, 2.1 – March 2022 version). In opposition proceedings this applies where prior art is invoked in connection with a ground for opposition under Art. 100(a) EPC in relation to which the priority date is of decisive importance (Guidelines D-III, 5 – March 2022 version). Failure by the respective division to check the validity of the priority right in the circumstances described has been held to be a substantial procedural violation (see T 16/89, T 737/95, T 2170/08). On publications during the priority interval, see also G 3/93 (OJ 1995, 18), summarised in chapter II.D.5.1.