

consequence. Hence, a divisional application should be filed before the sanction takes effect.

- Where a designation fee is not paid, the corresponding designation is deemed withdrawn at expiry of the normal six-month period under **R.39(1)** (applies to applications filed before 01.04.2009). The deemed withdrawal of the application when no designation fees are paid also takes effect at expiry of the six-month period. (A-III,11.2.3)
- Failure to pay the filing or search fee results in the application being deemed withdrawn on expiry of the one-month period of **R.38**. (A-III,16.2)
- Non-observance of the two-month period of **R.58** for correction of deficiencies in the application leads to the application being refused under **Art.90(5)**. It must be assumed that the refusal takes effect at expiry of the two-month period, although this is not stated explicitly in the Guidelines.

Art. 91 (deleted)

Art. 92 Drawing up of the European search report

The European Patent Office shall, in accordance with the Implementing Regulations, draw up and publish a European search report in respect of the European patent application on the basis of the claims, with due regard to the description and any drawings.

See for the implementation:

R.61 Content of the European search report

R.62 Extended European search report

R.62a Plurality of independent claims

R.63 Incomplete search

R.64 Search report where the invention lacks unity

R.65 Transmittal of the search report to the applicant

R.66 Definitive content of the abstract

R.68 Form of the publication of the search report

1 General

The provision obliges the EPO to draw up a search report in respect of a European patent application. The search is an important element of the grant procedure, determining the state of the art for the application. The assessment of the patentability of the invention by the EPO is based on the documents mentioned in the search report (see **R.61(1)**).

The reference in **Art.92** to 'the European patent application' implies that a search is only performed on an application which has a filing date (otherwise it is not a European patent application, see **Art.90(2)**) and is pending when the search is performed (Spec. Ed. 4 of OJ 2007).

2 Start of the search

The search is carried out in parallel with the formalities examination under **Art.90(3)** (B-IV,1.2). Since the EPO usually renders a service only after payment of the corresponding fee, the search will start only after payment of the filing fee and search fee. Where the application is not filed in an official EPO language, the search will not start before receipt of a translation into one of those languages (see **R.6(1)**).

Since the search must be based on the claims according to **Art.92**, the search can only start after the claims have been filed (see notes to **R.57(c)**). It should be noted that in certain cases the filing of the translation may be made up to about one month before publication of the application, making it difficult to publish the search report together with the application.

3 Drawing up of the European search report and the opinion

The search report for a European patent application will be drawn up by a search division (**Art.17**). A search division consists normally of one search examiner; for inventions covering several fields a Division may consist of two or three search examiners (**B-I,2**).

At the same time the search division draws up the search report, it also determines the definitive content of the abstract according to **R.66** and **B-IV,1.4**.

Under **BEST** the search examiner will also be the primary examiner in the substantive examination of the patent application (see the notes to **Art.15**). For increased efficiency the examiner prepares, already at the search stage, an opinion on whether the application and the invention to which it relates seem to meet the requirements of the EPC, also called the opinion on patentability. The search report and the opinion are issued together to the applicant in the form of an Extended European search Report. The content of the search report is specified in **R.61**. Details of the opinion are given in **R.62**.

4 Basis and extent of search

The search will be based on the claims with due regard to the description and any drawings (**Art.92**). Hence, the search is not restricted by the literal wording of the claims (**B-III,3.2**). The search division has the discretionary power to make a complete search of the invention, even if essential features are not defined in the claims but only in the description or drawings (**T708/00 r.4**). The searcher must also anticipate amendments and should cover subject-matter to which claims might reasonably be amended during prosecution (**B-III,3.6, R.137(5)**).

If the application contains a plurality of independent claims not complying with **R.43(2)**, the search division will ask the applicant to indicate the independent claims to be searched (**R.62a**).

If the search division considers that a complete search is not possible because the application does not comply with the EPC or relates to subject-matter excluded from patentability, it will ask the applicant to indicate the subject-matter to be searched; in such a case the search division may make a partial search or no search at all (see **R.63**).

If the search division considers that the application lacks unity, it invites the applicant to pay further search fees to search the further inventions and informs him that only the part of the application that relates to the inventions for which search fees have been paid will be searched (see **R.64**). Any unsearched subject-matter may not be used for amendment of claims during prosecution of the application (**R.137(5)**).

Claims above the number of fifteen for which no claims fees have been paid will not be searched (**R.45(3)** and **B-III,3.4**).

The extent of the search in terms of publication dates is given in the notes to **R.61(3)**.

Since the applicant is not allowed under **R.137(1)** to amend the claims before receiving the search report, the search is on the claims as filed on the date of filing or filed later of the applicant's own volition or as correction under **R.57(c)** and **R.58 (B-III,3.3)**. See **R.63(1)** for an exception. Claims aban-