

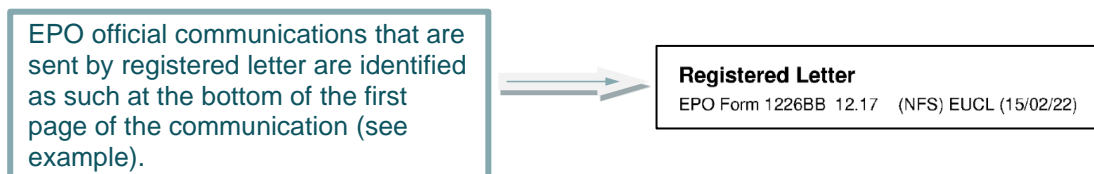


The European Patent Office (EPO) ‘10-day rule’

By the Decision of the Administrative Council of 13 October 2022, a number of Rules of the Implementing Regulations to the European Patent Convention have been amended. These include Rule 126 (Notification by postal services), Rule 127 (Notification by means of electronic communication), and Rule 131 (Calculation of periods). According to the amendments, the so-called “10-day rule” at the European Patent Office (EPO) will no longer apply from 1 November 2023. This means that the way many EPO deadlines are calculated will be changing.

What is the EPO 10-day rule?

In accordance with the European Patent Convention, where notification of an official communication is sent by registered letter, currently, the letter is deemed to be delivered to the addressee on the tenth day following its posting (Rule 126(2) EPC).



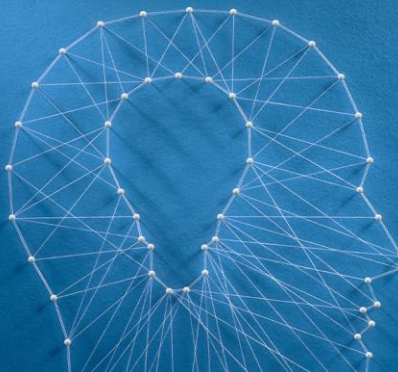
In practice, this means that, for such a notification which sets a deadline, it is necessary:

1. to **calculate the date on which the notification is deemed to have been received; and then**
2. **add on the period for meeting the deadline** to work out what is the due date for a response.

An example is set out below.

Extract from a communication pursuant to Rules 161(1) and 162 EPC:

	Date 22.02.2022
Reference	Application No./Patent No.
Applicant/Proprietor	
Communication pursuant to Rules 161(1) and 162 EPC	
1. Comments on the written opinion and amendment of the application (R. 161(1) EPC)	
The above-mentioned international (Euro-PCT) application has entered the European phase.	
The EPO as International Searching Authority and, where a demand under Article 31 PCT was filed, also as International Preliminary Examining Authority has drawn up a written opinion on this application or the EPO as Supplementary International Searching Authority has issued explanations pursuant to Rule 45 <i>bis</i> .7(e) PCT to the supplementary international search report.	
In accordance with Rule 161(1) EPC, you may comment on the written opinion or on the explanations to the supplementary international search report within a non-extendable period of six months after notification of the present communication.	



February 2022							March 2022							September 2022							
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	
		1	2	3	4	5			1	2	3	4	5						1	2	3
6	7	8	9	10	11	12	6	7	8	9	10	11	12	4	5	6	7	8	9	10	
13	14	15	16	17	18	19	13	14	15	16	17	18	19	11	12	13	14	15	16	17	
20	21	22	23	24	25	26	20	21	22	23	24	25	26	18	19	20	21	22	23	24	
27	28						27	28	29	30	31			25	26	27	28	29	30		

In this example, the R161 EPC communication is dated **22 February 2022**.

Thus, the addition of 10 days takes it to **4 March 2022**.

The communication is therefore deemed to have been delivered to the addressee on **4 March 2022**.

The 6-month period for response starts on 4 March 2022 and the deadline (including the EPO's 10-day mailing period) for responding to the communication is thus 6 months from 4 March 2022, i.e.

4 September 2022.

Since this deadline falls on a Sunday, the response may in fact be filed on the next working day i.e. Monday, 5 September 2022 (Rule 134(1) EPC).

What is changing?

The '10-day rule' was introduced when notifications were sent by postal mail. However, the EPO has indicated that it will abolish this rule from 1 November 2023 in view of the increased use of electronic communications.

Therefore, the amended rules now provide that a document to be notified by the European Patent Office shall be deemed to be delivered to the addressee on the date it bears.

Rule 126(2) relating to Notification by postal services will now read:

“(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.”

Similarly, Rule 127(2) relating to Notification by means of electronic communication will now read:

“(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.”

Rule 131(2) relating to Calculation of time periods will now read:

“(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**, unless otherwise provided.”

Therefore, under the new rules, for any EPO Official Communication where the 10-day rule would previously have applied, the date on the Official Communication will trigger the start of the period for response.

When does this change apply?

This change applies to documents to be notified by the European Patent Office on or after 1 November 2023. Accordingly, the key date is the date on the EPO Official Communication.

Therefore, for relevant EPO Official Communication that are dated before 1 November 2023, but where the deadline falls after 1 November 2023, the EPO 10-day rule will still apply.

What happens if a document has not been received?

The new rules introduce a 7-day rule which applies if the EPO establishes that the electronic document has reached its destination but that this occurred more than 7 days after the date it bears. This new 7-day rule therefore differs to the current 10-day rule since it only applies in certain circumstances.

Importantly, in the event of a document not being received, the onus is on the EPO in the first instance to establish that the document has reached its destination.

If the EPO cannot establish that the document has reached its destination, then it will be reissued.

However, if the EPO establishes that the electronic document has reached its destination but that this occurred more than 7 days after the date on the EPO Official Communication, then the period for response that is triggered by receipt of that document will be extended by the number of days by which the 7 days were exceeded. Accordingly, the additional days are added to the end of the period for response.

This differs to the current 10-day rule where the 10 days are added at the start of the calculation because they relate to the date that the communication is deemed to have received.