

***GUIDELINES FOR EXAMINATION OF
EUROPEAN UNION TRADE MARKS***

***EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE
(EUIPO)***

PART B

EXAMINATION

SECTION 1

PROCEEDINGS

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1 Introduction and General Overview of Examination Proceedings

This part of the Guidelines outlines the examination procedure from filing to publication of the European Union trade mark (EUTM) application.

Once the EUTM application has been filed, a provisional filing date is accorded, and the Office issues a receipt. At this early stage, the Office only checks whether certain filing date requirements of the European Union trade mark regulation (EUTMR) have been fulfilled. The filing date will only become definitive when the application fee has been paid.

The applicant should check the receipt carefully and notify the Office of any incorrect data. The applicant can only correct data that have an impact on the filing date, such as the applicant's name, the representation of the mark and the list of goods and services, if it notifies the Office on the same date as the incorrect data were submitted. After this date, any amendment is subject to the provisions of the EUTMR and European Union trade mark implementing regulation (EUTMIR), in particular, Articles 17 and 43 EUTMR. For further details, see paragraph 5 below and the Guidelines, Part B, Examination, Section 2, Examination of Formalities.

After the receipt has been issued, the Office carries out a language check of the verbal elements of the mark in all the official languages of the EU and prepares a European Union search report. This report will be sent to the applicant only if it was expressly requested when the application was filed.

Payment of the application fee and national search fee (if applicable) is validated at the latest one month after the EUTM application has been filed. If the applicant has applied for a national search and paid the relevant fee, the Office forwards the application to the offices of the Member States that perform national searches. For further information on searches, see paragraph 2 below. For further information on fees, see the Guidelines, Part A, General Rules, Section 3, Payment of Fees, Costs and Charges.

During examination proceedings, the Office examines the following: filing date, formalities, classification, priority and/or seniority, where applicable, the regulations governing use of the mark for collective marks and absolute grounds for refusal. All these examination steps can be carried out in parallel as there is no strict sequence in examination proceedings.

The applicant will be notified of any deficiency and given two months to remedy the deficiency and/or submit observations. Any decision partially or wholly refusing a EUTM application must give the grounds on which the EUTM application has been refused and inform the applicant of the right to appeal. For further details, see paragraph 3.2 and paragraph 3.2.1 below.

Applications that comply with the requirements of the regulation are accepted for publication and sent for translation into all the official languages of the EU.

The last step in the examination procedure is publication of the application in Part A of the European Union Trade Marks Bulletin (EUTM Bulletin). For further details on publication, see paragraph 4 below.

2 Searches

Articles 38 and 155 EUTMR
Rule 10 EUTMIR
Communication Nos 4/99, 5/00 and 4/01 of the President of the Office

The search report identifies earlier rights that could conflict with the EUTM application. However, even if the search report does not indicate any similar earlier rights, an opposition could still be filed against the EUTM application after its publication.

The results of the search report are for information purposes only and to give the applicant the option of withdrawing the EUTM application before it is published. Surveillance letters inform holders of earlier EUTMs about new, similar EUTM applications.

Figurative elements are classified under the Vienna Classification.

2.1 European Union search reports

The Office will prepare a European Union search report (EU search report) for each EUTM application or international registration (IR) designating the EU that it receives.

However, it will only send the EU search report to the EUTM applicant by standard letter or electronically when the applicant has expressly requested this at the time of filing the application.

Holders of IRs designating the EU that wish to receive an EU search report must send the request to the Office within one month of the date of notification of the IR by the World Intellectual Property Organization (WIPO).

The EU search report covers the following earlier rights:

1. EUTM applications with a filing date or priority date earlier than that of the application in question;
2. EUTM marks already registered; and
3. prior international registrations designating the EU.

The EU search report takes into account the filing date, the verbal elements of the trade mark, the figurative elements of the mark (if applicable) and the classes of goods and services according to the Nice Classification. The search is designed to identify similar earlier marks filed for the same classes or classes that are considered to contain similar goods and/or services by the Office.

Once the new application has been published, the Office will send a surveillance letter to the proprietors of any earlier EUTMs, EUTM applications or international registrations designating the EU cited in the EU search report, unless the proprietors have expressly requested not to receive these notifications.

2.2 National search reports

At the time of filing an application, an EUTM applicant may also request national search reports. These reports list any earlier national trade marks, national trade mark applications or trade marks registered under international agreements having effect in the Member State(s) concerned that have been discovered and that may be invoked under Article 8 EUTMR against the registration of the EUTM applied for, or state that the search has revealed no such rights. These reports are subject to the payment of the corresponding search fees.

Holders of IRs designating the EU that wish to apply for national searches must send the request and pay the relevant fee to the Office within one month of the date of notification of the IR by WIPO.

EUTM applications and IR designations that include a valid request for national searches are sent to the participating national offices. A request is valid if it is made at the time of filing and the relevant fee has been paid.

National search reports are prepared by offices that participate in the search system.

A request for national searches implies that all participating national offices will carry out the search. This all-or-nothing approach means that the applicant cannot select the particular participating offices that it wishes to carry out the search.

The national offices are responsible for the content of the national search report.

3 General Principles Concerning Examination Proceedings

This section describes only the **procedural** aspects of examining absolute grounds (AG) for refusal. For substantive aspects of examining absolute grounds for refusal, see the Guidelines, Part B, Examination, Section 4, Absolute Grounds for Refusal and European Union Collective Marks.

The EUTMR is intended to enable proprietors to register a right that is valid throughout the European Union provided it does not impinge on the rights of others. Although rights can only be conferred in accordance with the provisions of the EUTMR, the Office's function is to facilitate applications, not obstruct them.

During the examination of each application, the trade mark **and** the goods or services of the application must be taken into account. The Office has to bear in mind the nature of the trade concerned, the manner in which the goods or services are provided and the relevant public, for example, whether it consists of specialists or the general public.

3.1 Procedural aspects concerning third-party observations and review of absolute grounds

Article 40 EUTMR Communication No 2/09 of the President of the Office
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Observations on the existence of an absolute ground for refusal can be made by third parties. Third-party observations received before an EUTM application has been

published are dealt with during the examination of absolute grounds for refusal. The Office accepts observations received within the opposition period (three months from the date of publication) or — in cases where an opposition has been filed — observations filed before the final decision on the opposition has been taken. The observations must be filed in one of the Office's languages: English, French, German, Italian or Spanish.

The Office issues a receipt to the party that submitted the observations (the observer), confirming that the observations have been received and have been forwarded to the applicant. The observer does not become a party to the proceedings before the Office but can consult the online search tools to check the status of the relevant EUTM application. The Office does not inform the observer of any action taken, or whether or not the observations have given rise to an objection.

All observations are forwarded to the applicant, who is invited to submit comments, where appropriate. The Office considers whether the observations are well founded, that is, whether an absolute ground for refusal exists. If so, the Office issues an objection and may refuse the EUTM application if the objection is not overcome by the applicant's comments or by a restriction of the list of goods and services.

If an issue raised in observations has already been considered during the examination of an application, it is unlikely to give rise to serious doubts after publication.

The Office may also reopen the examination on absolute grounds on any other ground and at any time prior to registration, for example when third-party observations are filed before the application has been published or when the Office itself finds that a ground for refusal has been overlooked. After the application is published, this option should be exercised only in clear-cut cases.

For more information, see the Guidelines, Part B, Examination, Section 4, Absolute Grounds for Refusal and European Union Collective Marks.

3.2 Decisions

In all cases where the Office issues decisions against applicants, it must give the grounds for the decision. These must address any arguments raised by the applicant in its observations if they are pertinent. Decisions must not only refer to the appropriate parts of the EUTMR and EUTMIR but also give explicit reasons, except in the most obvious cases (for example, where a document is missing or a fee has not been paid).

Where, for example, a decision is given on the basis of internet searches, the Office must provide the applicant with proof of those searches.

3.2.1 Appeals

Articles 58 and 65 EUTMR
Decision 2009-1 of 16/06/2009 of the Presidium of the Boards of Appeal

Applicants have a right to appeal against a decision that terminates proceedings and that adversely affects them. For practical purposes, any decision issued by the Office that terminates proceedings and is not accepted by the applicant falls into this

category. Any written communication of such a decision must also inform the applicant that the decision can be appealed within two months.

Appeals have suspensive effect. Within the period in which an appeal can be lodged, the Office should not take any steps that cannot easily be reversed (e.g. publication or entry in the Register). The same goes for the period up until a final decision is taken where a case is brought before the General Court (GC) or Court of Justice of the European Union (CJEU) by an action under Article 65 EUTMR.

3.3 International registrations designating the European Union

Details about the examination of an EUTM application as a result of the transformation of an international registration designating the European Union are given in the Guidelines, Part M, International Marks.

4 Publication

Article 39 EUTMR
Rules 12, 14 and 46 EUTMIR

Publication takes place if the application fulfils all the acceptance conditions.

Applications are published in all the official languages of the EU.

The examiner must ensure that the following details are available, where applicable:

- (a) application file number
- (b) filing date
- (c) reproduction of the trade mark
- (d) indication of the collective mark
- (e) indication of the mark type other than word marks, for example figurative marks, three-dimensional marks, holograms, sound marks, colour per se marks and other marks
- (f) description of the mark
- (g) colour indication(s)
- (h) figurative elements under the Vienna Classification
- (i) acquisition of distinctive character through use
- (j) applicant's name, address and nationality
- (k) representative's name and address
- (l) first and second language
- (m) goods and services under the Nice Classification
- (n) priority data, if applicable
- (o) exhibition priority data
- (p) seniority data
- (q) transformation data.

Once the examiner has checked that all these elements are correct and the Office has received the translation in all the official languages of the EU, the application is dispatched to the publication team.

5 Amendments to an EUTM Application

This part of the Guidelines only covers issues that are relevant to EUTM application amendments.

For amendments to registered European Union trade marks, see the Guidelines, Part E, Register Operations, Section 1, Changes in a Registration.

5.1 Withdrawal of an EUTM application

Article 43, Articles 58(1), 64(3) and 65(5) and Article 119 EUTMR
 Article 101 and Article 102(2) Rules of Procedure of the General Court (RPGC)
 Article 51 Rules of Procedure of the Court of Justice (RPCJ)

5.1.1 Declaration of withdrawal

An EUTM application can be withdrawn at any time up until a final decision is taken on its subject matter.

After the Office's first-instance decision, an application can be withdrawn at appeal level within the two-month appeal period, even if no appeal was actually filed or up until the appeal is decided by the Boards of Appeal; this applies both to *ex parte* and *inter partes* proceedings (decisions of 27/09/2006, R 331/2006-G – Optima; 23/04/2014, R 451/2014-1 – 'SUPERLITE', para. 18).

At the level of the General Court (GC), an application can be withdrawn within the two-month appeal period extended by a period of ten days (on account of distance) pursuant to Article 102(2) RPGC. At the level of the Court of Justice of the European Union (CJEU), the prescribed time limit of two months to bring an action before the CJEU against a decision by the Boards of Appeal will be extended on account of distance by a single period of 10 days (order of 19/07/2003, T-15/03, Blue). The Boards of Appeal decision cannot be considered final within this period. The application can also be withdrawn up until completion of the appeal process before the GC.

At CJEU level, an application can be withdrawn within the two-month period for filing an appeal before the CJEU extended by a period of 10 days (on account of distance) pursuant to Article 51 RPCJ or before the CJEU has issued a final and binding decision (order of 18/09/2012, C-588/11 P, Omnicare).

When the case is pending before the GC or the CJEU, the applicant must ask the Office (not the GC or CJEU) to withdraw it. The Office then informs the GC or CJEU whether or not it finds the withdrawal acceptable and valid, but the withdrawal will not take place until the GC or the CJEU has delivered a final decision on the issue (by analogy, see judgment of 16/05/2013, T-104/12, 'Vortex').

Any declaration of withdrawal filed after the expiry of the appeal period is inadmissible.

There is no charge for a declaration of withdrawal but the declaration must be made in writing. No special form is provided by the Office.

The declaration of withdrawal can be made in the first or second language indicated by the applicant in its EUTM application. The same applies during opposition proceedings. However, for the procedure in cases where a restriction is made in a language other than the language of the opposition procedure, see the Guidelines, Part C, Opposition, Section 1, Procedural Matters.

For details of restrictions see paragraph 5.2 below.

Although Article 43(1) EUTMR refers only to withdrawal of a European Union trade mark application, the Court has held that oppositions can also be withdrawn in the same way as described above (decision of 07/07/2014, R 1878/2013-1 – ‘HOT CHILLYS / CHILLI BEANS (fig.)’, para. 15).

5.1.2 Unconditional and binding character of the declaration

A declaration of withdrawal becomes effective upon receipt by the Office, provided that the Office does not receive a withdrawal of the declaration on the same day.

This means that if a declaration of withdrawal and a letter withdrawing that declaration both reach the Office on the same day (regardless of the actual time of receipt), the latter annuls the former.

Once a declaration becomes effective, it cannot be withdrawn.

A declaration of withdrawal is void where it contains conditions or time limitations. For example, it must not require the Office to take a particular decision or, in opposition proceedings, require the other party to make a procedural declaration. Such a requirement is simply viewed as a suggestion for resolving the case; the Office informs the opponent accordingly and may invite the parties to come to an amicable settlement. Furthermore, a declaration does not become effective if it is made for some goods and/or services (partial withdrawal) on condition that the Office accepts the application for the remaining goods and/or services. Such a declaration is simply viewed as a suggestion to enable the Office to arrive at an acceptable list of goods and services.

Where an applicant responds to an official action by filing a restricted list of goods and services (partial withdrawal), the Office checks whether the applicant is declaring the unequivocal withdrawal of the remaining goods and services or whether the amended list of goods and services is a proposal or counterproposal by the applicant, subject to the Office’s agreement.

5.1.3 Action to be taken

The Office will process a declaration of withdrawal, ensure publication of the full or partial withdrawal in the EUTM Bulletin, if the EUTM application has already been published and in the event of a full withdrawal, it will close the EUTM application file.

For the consequences of full or partial withdrawal on the opposition procedure, see the Guidelines, Part C, Opposition, Section 1, Procedural Matters.

Detailed information on the refund of application fees can be found in the Guidelines, Part A, General Rules, Section 3, Payment of Fees, Costs and Charges.

5.2 Restriction of the list of goods and services in an EUTM application

Articles 43 and 119 EUTMR

The applicant may restrict the list of goods and services of its EUTM application at any time, either of its own volition, in response to an objection regarding classification or absolute grounds, or in the course of opposition proceedings.

In principle, declarations of restrictions follow the same rules as declarations of withdrawals; see paragraph 5.1 above.

Where the case is pending before the GC or the CJEU, the restriction must be filed with the Office, not with the GC or the CJEU. The Office then informs the GC or the CJEU whether or not it finds the restriction acceptable and valid; however, the restriction is not applied until the GC or the CJEU has delivered a final decision on the issue (by analogy, see judgment of 16/05/2013, T-104/12, Vortex).

5.2.1 Procedural admissibility of a restriction

The restriction must be procedurally admissible; see paragraph 5.1.2 above.

As a matter of principle, a restriction becomes effective on the date on which the Office receives it. The restriction can only be withdrawn if the withdrawal is received on the same date as the restriction itself.

Two requirements must be met in order for a restriction to be acceptable:

1. The new wording must not constitute an extension of the list of goods and services.
2. The restriction must constitute a valid description of goods and services and apply only to acceptable goods or services that appear in the original EUTM application. For further details on restrictions of an EUTM application, see the Guidelines, Part B, Examination, Section 3, Classification.

If these requirements are not met, the Office must refuse the proposed restriction and the list of goods and services will remain unchanged (decision of 14/10/2013 R 1502/2013-4 – DARSTELLUNG EINES KREISES (fig.), paras 12-16).

5.3 Other amendments

Article 43(2) EUTMR
Rules 13 and 26 EUTMIR

This paragraph and the legal provisions cited above solely concern amendments to the EUTM application requested by the applicant on its own initiative and not amendments or restrictions made following an examination, opposition or appeal procedure as a result of a decision by an examiner, Opposition Division or Boards of Appeal.

Nor does this paragraph apply to the correction of errors in the Office's publications, which is carried out *ex officio* pursuant to Rule 14 EUTMIR.

Amendments require a written request in accordance with the language regime (for more information, see the Guidelines, Part B, Examination, Section 2, Examination of Formalities). There is no charge for this.

The following elements of an EUTM application may be amended:

- the name and address of the applicant or representative (see paragraph 5.3.1 below);
- errors of wording or of copying, or obvious mistakes, provided that the correction does not substantially change the trade mark (for further details on such amendments, see the Guidelines, Part B, Examination, Section 2, Examination of Formalities);
- the list of goods and services (see paragraph 5.2 above).

5.3.1 Name, address and nationality of applicant or representative

Article 87 EUTMR Rule 1(1)(b) and (e) and Rule 26 EUTMIR Article 1(1)(b), Article 19(7) and Article 69(2)(d) CDIR

The name and address of an applicant or its appointed representative may be amended freely, provided that

- any change in the applicant's name is not the consequence of a transfer,
- and
- as regards the name of a representative, the representative is not being substituted by another representative.

The indication of a legal person's nationality may also be amended freely, provided that it is not the consequence of a transfer.

A change in an applicant's name that does not affect the applicant's identity is an acceptable change, whereas a change in the applicant's identity is a transfer. For details and the applicable procedure in the event of doubt as to whether the change is considered to be a transfer, see the Guidelines, Part E, Register Operations, Section 3, EUTMs as Objects of Property, Chapter 1, Transfer.

Changes to a representative's name are also limited to those that do not affect the identity of the appointed representative, for example where there is a change in the name (through marriage/divorce) of a representative or the name of an association of representatives. Such changes of name must be distinguished from the substitution of one representative by another, which is subject to the rules governing the appointment of representatives. For details concerning representatives, see the Guidelines, Part A, General Rules, Section 5, Professional Representation.

Changes of name, address or nationality may be the result of changed circumstances or of an error made at the time of filing.

The applicant or its representative must request a change of name and address and this request must contain the EUTM application number and the name and address of the applicant or representative, both as recorded on the file and as amended.

No proof or evidence of the change is necessary. There is no charge for change of name or address requests.

The applicant must use a specific format in its application to indicate its name and official address in accordance with the above legal provisions, and may change it later using the same format. Both the name and address will be registered.

Legal persons can have only one official address. In case of any doubts, the Office may ask for evidence of the legal form, the state of incorporation and/or address. The official name and address are taken as the address for service by default. Ideally, an applicant should have only one address for service. Changes to the applicant's official designation or official address will be registered for all EUTM applications, registered EUTMs and registered Community designs and, unlike the address for service, cannot be recorded only for specific portfolios of rights. In principle, these rules also apply, by analogy, to representatives.

5.3.2 Other elements of an application

Other elements of an EUTM application may also be changed, such as the representation, type of mark, and the description of the mark.

For example, in priority claims, obvious mistakes in the indication of the country in which, and the date on which, the earlier mark was filed may be corrected, since the priority document will obviously show the correct version.

For further details on these changes, see the Guidelines, Part B, Examination, Section 2, Examination of Formalities.

5.3.3 Recording and publication of amendments

Article 41(2) EUTMR

If an amendment is allowed, it will be recorded in the file.

Where the EUTM application has not yet been published, it is published in the EUTM Bulletin in the amended form.

Where the EUTM application has already been published and (only) if the amendment concerns the list of goods and services or the representation of the mark, the EUTM application is published in its amended form in the EUTM Bulletin. The publication of the amended application may open a new opposition period of three months.

Any other amendments are not published separately but appear in the publication of the registration.

5.4 Division of an EUTM application

Article 44 EUTMR
Rule 13a EUTMIR

An EUTM application can be divided into different parts not only as a result of a partial transfer (see the Guidelines, Part E, Register Operations, Section 3, EUTMs as Objects of Property, Chapter 1, Transfer), but also on the EUTM applicant's own initiative. Division is particularly useful for isolating a disputed EUTM application for certain goods or services while maintaining the original application for the remainder. For information on the division of EUTMs, see the Guidelines, Part E, Register Operations, Section 1, Changes in a Registration.

Whereas a partial transfer is free of charge and involves a change of ownership, there is a charge for a request for the division of an EUTM application, and the EUTM application remains in the hands of the same applicant. If the fee is not paid, the request is deemed not to have been filed. The request can be made in the first or second language indicated by the applicant in its EUTM application.

Division is not available under the Madrid Protocol for international registrations designating the EU. The international register is kept at WIPO, and the Office does not have the authority to divide an international registration designating the EU.

5.4.1 Requirements

A request for division must contain the following information:

- the file number of the EUTM application to be divided;
- the name and address or name and ID number of the applicant;
- the list of goods and services for the divisional application or, if more than one new application will be created, the list of goods and services for each divisional application;
- the list of the goods and services that will remain in the original EUTM application.

Furthermore, the goods and services of the divisional application must not overlap with the list of goods and services of the original application.

The Office will notify the applicant of any deficiency in this regard and give it two months to remedy the deficiency. If it is not remedied within this period, the request for division will be refused.

There are certain periods during which, for procedural economy or to safeguard third-party rights, division is not admissible. These periods are outlined below.

1. While an opposition is pending, only the non-contested goods and services may be hived off. The same applies if the case is pending before the Boards of Appeal or the Courts. The Office interprets the legal provisions cited above as preventing the applicant from hiving off some or all of the contested goods to form a new

application causing the opposition proceedings to be split. If such a request for division is made, the applicant is given the opportunity to amend it by hiving off the non-contested goods and services.

2. Division is not admissible during the three-month opposition period following publication of the application. Allowing a division during this time would counteract the aim of not splitting an opposition procedure and frustrate third parties, who have to rely on the EUTM Bulletin to know what to oppose.
3. Division is not admissible during the period before a filing date has been issued either. This does not necessarily coincide with the first month following filing. For further details on the filing date, see the Guidelines, Part B, Examination, Section 2, Examination of Formalities.

For all practical purposes, in the period following publication of the application, division is only admissible if an opposition has been entered against the application and only for the non-contested part. The aim of the provisions cited is to allow the applicant to register its mark for the non-contested goods quickly, without having to wait for the outcome of a lengthy opposition procedure.

5.4.2 Acceptance

Article 44(6) EUTMR

If the Office accepts the declaration of division, a new application is created as of the date of acceptance and not retroactively as of the date of the declaration.

The new application keeps the filing date and any priority and seniority dates. The seniority effect will then become partial.

All requests and applications submitted and all fees paid prior to the date on which the Office receives the declaration of division are also deemed to have been made or paid for the divisional application. However, fees duly paid for the original application are not refunded.

The practical effects of this provision are as follows:

- where an application for the registration of a licence was made and payment of the registration fee was received by the Office prior to the declaration of division, the licence will be registered against the original registration and recorded in the file of the new registration. No further fees need be paid.
- where an EUTM application claiming six classes is to be divided into two applications of three classes each, no class fees are payable as of the date the Office receives the declaration of division. However, fees paid prior to that date cannot be refunded.

Where the division is not accepted, the old application remains unchanged. It does not matter whether:

- the declaration of division was deemed not to have been filed because no fee had been paid;

- the declaration was refused because it failed to comply with the formal requirements;
- the declaration was found inadmissible because it was filed during one of the periods in which division is not admissible.

The worst-case scenario for the applicant is that the declaration of division is not accepted, but this never affects the original application. The applicant can repeat the declaration of division later, on payment of a new fee.

5.4.3 New files and their publication

A new file has to be created for the divisional application, to contain all the documents that were on file for the original application, all the correspondence relating to the declaration of division and all future correspondence for the new application. Inspection of this file will be unrestricted under the general rules.

If the declaration of division concerns an EUTM application that has not yet been published, both the divisional and the original application are published separately and in the normal way, without any express reference to each other.

If the declaration of division concerns an EUTM application that has already been published, the fact that there has been a division is published with reference to the original application. The new application must also be published with all the usual particulars; however, no new opposition period will be opened. Division is admissible only for goods for which an opposition period has already started but not been made use of.