

## e:EQE – Discussion Paper

### Preamble

Due to the COVID-19 pandemic, the European Qualifying Examination was held online in March 2021. Although the e:EQE in 2021 was not perfect, the EQE of 2022 and 2023 will have more or less the same structure. The format of the EQE can only be changed from 2024 at the earliest because any changes have to be written into the Regulations and the candidates must be informed well in advance. If changes are to be effected from 2024, it is now time to propose a new structure of the EQE.

In April 2020, the Supervisory Board of the EQE created an e:EQE Working Group comprising of representatives from the Examination Secretariat of the EPO, representatives from **epi**, and ICT specialists. The two main tasks of the e:EQE Working Group are:

- 1) set up and implement an online EQE in 2021, and
- 2) prepare the groundwork for the e:EQE of the future.

To support the **epi** members in the e:EQE Working Group, **epi** has set up a Digitalisation Support Group (DSG) with members of the Professional Education Committee (PEC) supplemented by experts in the field of the EQE and in online Exams. There are regular meetings between the three **epi** members in the e:EQE Working Group and the Digitalisation Support Group. A first version of the Position Paper on the future of the e:EQE was also discussed at the **epi** Council meeting held on 13-14 November 2020.

As **epi**, we are aware of the evolving role of the professional representative and according to Art. 4 of the Founding Regulations, it is an object of **epi** to “collaborate with the European Patent Organisation on matters relating to the profession of professional representatives and in particular ... on the European Qualifying Examination”.

Before presenting proposals for a new structure/format of the EQE, it is good to address some more fundamental questions.

This position paper provides a general concept of a new e:EQE, not a detailed exam setup. Where content examples are given, they are for illustration only, as there are many ways to set up a progressive modular exam.

### Is the current EQE adequately testing the “fit to practice” criterion?

The testing of the “fit to practise” criterion in the EQE is limited to testing the general practice of a European patent attorney. The EQE does not test technical knowledge and, in particular, does not test the legal knowledge pertaining to a specific technical field.

There is a strong feeling among the tutors and some qualified European patent attorneys that some Exam Papers are too remote from reality, even considering the fact that the Exam Papers have necessarily been adapted to the specific exam needs. Some Exam Papers are perceived to have become jigsaw puzzles, constructed so that all pieces fit perfectly together to have a clearly defined ‘correct’ answer, rather than testing real skills of European patent attorneys. The proposed e:EQE should be suitable to conceptually test complex scenarios in a fixed time online exam format.

The current setup of the Exam Papers allows candidates to prepare for the EQE through methodology courses, where they learn how to prepare the answer expected by the Exam Committee. The Exam papers normally have a certain structure, and the candidates learn where and how the (easy) points can be scored. A future exam structure should be more easily

adaptable to reduce reliance on methodologies (i.e. to test the fit-to-practise criterion rather than the candidate's ability to learn a methodology).

Despite all attempts to test whether candidates are "fit to practise" via the EQE, real-life experience is also a major contributor to a high base level of newly qualified professional representatives. It is felt that this point is normally not emphasized enough. The training, support and supervision of candidates must also be considered alongside the development of a new examination structure. The future e:EQE will have to safeguard that entry on the list is only possible once a minimum training period, as laid out in Art 11 REE and the provisions in the IPRE has been completed

## **General drivers and boundary values**

Updating the EQE to a new model gives the possibility to make the exam fit for the future and more effective for both students and the profession.

When updating the EQE, it is important to maintain standard and avoid lowering the bar in an unacceptable way. Accordingly, candidates will still need to spend a lot of time studying for the EQE. However, the workload can be redistributed to better fit the candidates' development by introducing a progressive learning roadmap which builds in complexity towards the final exams and subsequent qualification.

There is a strong desire amongst different stakeholders to move towards a multi-level modular approach instead of the current pre-exam followed by a 20-hour main examination condensed in one week.

It is also desired that each module does not exceed 2 hours.

On-the-job training, support and supervision by a qualified professional representative is retained as an essential element of the proposed alternative e:EQE setup. Additionally, the current minimum training period is retained but not necessarily as a requirement to sit the final exams.

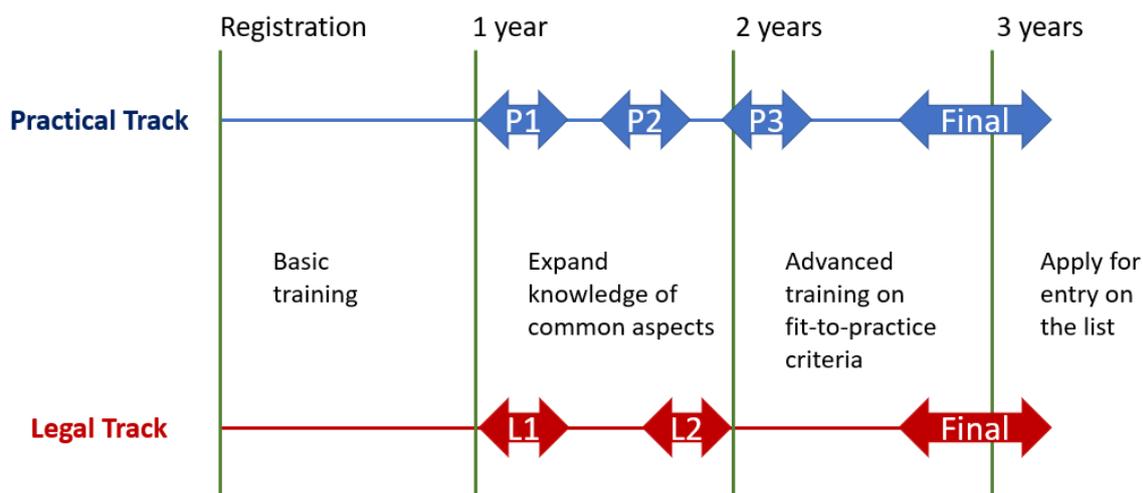
## **Proposal for a modular e:EQE setup**

The e:EQE is a sit-anywhere exam (like the 2021 EQE). It is noted that the burden of creating the exam conditions is on the candidates. However, the flexibility and the avoidance of travel appear to balance this burden.

The proposed new e:EQE is split into two main examination tracks, the Practical track and the Legal track. Each track is modular, and each track requires different training, different preparation and – to an extent – different testing. Alongside the examination tracks, training also needs to be completed under the supervision of a qualified European patent attorney.

- The Practical Track tests the day-to-day activities of a professional representative, such as drafting, amendment and opposition. As explained below, there is some but not complete overlap with the familiar Papers A, B and C but additional topics are also introduced.
- The Legal Track tests the candidates' knowledge of the relevant legal provisions as defined in the syllabus, and their ability to apply that knowledge in solving a complex legal problem.

The respective modules in both tracks are progressive in level, preparation and experience that is required to pass.



*Training and exam time schedule*

A more detailed flowchart of progression through the different modules is shown in Annex A, and a mapping which shows the overlap between the current EQE and the proposed e:EQE is shown in Annex B. The proposed resitting policy is shown in Annex C.

### Practical Track (total 12 hrs)

The practical track consists of four (4) parts, combining the conceptual aspects of the claim analysis part of the former pre-examination and former papers A, B and C, converted into a modular progressive testing setup and extended to include aspects that are not tested in the pre-2020 EQE, but which have become a relevant part of the life of a patent attorney

#### Module P1 – Basic claim analysis

Module P1 is intended to be taken after at least one (1) year of experience. It shall be designed as a smart MCQ exam (not merely true/false questions; see below), which can be taken at any time during the year, while re-sitting can only be attempted after a pause of 4 months.

*Duration:* 2 hours.

*Focus:* Claim scope and basic concepts of claim drafting.

Module P1 should test the basic understanding of the fundamental concepts of claim drafting, without requiring detailed knowledge of the EPC or PCT. There should be no requirement to know case law, but a basic knowledge of a limited number of topics in the EPO Guidelines should be required. Merely as an example, Module P1 may include a straightforward analysis of whether an embodiment of client's invention or a competitor's product falls within a scope of a given claim. It may further include testing of other formal aspects of drafting, such as correct claim terminology, correct application of the two-part form, basic novelty, etc. The level should be aimed at a trainee with about one year of experience.

#### Module P2 – Intermediate claim analysis

Module P2 can be taken at the earliest 4 months after passing Module P1. Like Module P1, it shall be designed as a smart MCQ exam (not merely true/false questions), can be taken at any time during the year, and re-sitting can only be attempted after a pause of 4 months.

*Duration:* 2 hours.

*Focus:* Intermediate concepts of claim validity, including inventive step.

Module P2 builds on Module P1. Thus, Module P2 should test all of the topics in Module P1, but in a more complex setting. In addition, Module P2 may test more complex aspects of claim drafting, for example inventive step, clarity, extension of subject-matter and unity of invention. This is an intermediate level examination aimed at a patent attorney trainee who has been working for approximately two years. Complex or subtle problems (e.g. problems hinging on a precise meaning of a single word in a claim, claims that are borderline inventive, i.e. the argument may be had both ways etc.) shall be avoided.

### Module P3 – Fundamentals of drafting and/or amending claims

Module P3 can be taken at the earliest 4 months after passing Module P2. It shall be designed as a (possibly machine correctable) open question exam, which is scheduled twice a year.

*Duration:* 2 hours.

*Focus:* Claim drafting and/or claim amendment; and related arguments.

Module P3 tests the core aspects of claim drafting or preparing claim amendments after an office action. Typically, the paper will also require the preparation of argumentation on patentability applying the problem-solution-approach and advising a client accordingly. In this paper, a variety of scenarios can be tested on a random basis.

For instance, the candidate:

- may be given a letter from the client and a limited set of prior art and be asked to draft appropriate claims to cover the client's invention;
- may be given a letter from the client and be asked to draft only a few (e.g. independent) claims and explain, in a letter to the client, the reasons for including (or not including) certain features;
- may be given a (first) office action citing a limited set of prior art and be asked to prepare a claim amendment and a draft response letter to the EPO;
- may be given the client's application and a limited set of prior art and be asked to prepare the independent claim(s) for a divisional application covering the client's second invention.

N.B.: the list above is not an exhaustive list.

This module should be technology specific (for example, chemical, mechanical and/or other technologies).

### Final Practical Exam – Advanced practical skills

The Final Practical Exam can be taken after passing Module P3. It shall be designed as a free text computer written e-exam. This exam will be offered twice a year. If a candidate is unsuccessful on the first attempt, there will be no restrictions on the timing of the first resitting. However, if the candidate fails on their second (and subsequent) attempt, the candidate must wait for a year before resitting. In other words, there must be a one-year gap between sitting the two exams (it is not necessary to wait one year from obtaining the results).

*Duration:* 3 parts of 2 hours each. To be decided if this will be on a single day or spread over 3 days.

The parts are randomly selected from the following exemplary subjects:

- Prepare claim amendments and a response to the EPO after an Art. 123(2) objection.
- Prepare written submissions in response to a summons to oral proceedings in examination).
- Prepare amendments after receiving a Rule 71(3) communication and the client changing their mind on claim scope.
- File Art. 115 observations against a competitor's patent application (or patent).
- Prepare grounds of opposition against a competitor's patent.
- Write a written submission in opposition as a proprietor (response to a notice of opposition or against Art. 115 observations in opposition)
- Prepare an argument responding to the proprietor's response to a notice of opposition, based on client input and/or new technical evidence and/or new prima facie relevant prior art.
- Reply to a preliminary opinion of the opposition division
- Prepare grounds of appeal against a decision of the ED or OD, based on client input and/or technical evidence and/or new prima facie relevant prior art.
- Prepare a response to an opposition appeal filed by the "other party" (proprietor or opponent, as appropriate).
- Prepare a reply to a preliminary opinion of a board of appeal (examination or opposition, as appropriate).

N.B.: the list above is not an exhaustive list. The curriculum from the previous exams may also be tested.

The difficulty of the Final Practical Exam should be aimed at the level of a trainee with three years of experience and should test the fit-to-practise criterion (taking into account the two-hour time limit for each part). The candidates will not know in advance which subjects from the above list they will be tested on, so they will have to prepare for all combinations. Consequently, the complexity (difficulty) of the respective parts may be lowered to fit the two-hour time limit. While this is likely to simplify preparation of the respective question papers, as well as marking of the answers, it will bring the additional challenge to adequately test the candidate (fit-to-practise criterion) without making the paper predictable.

### **Legal Track (Total 7 hours)**

In this track, the contents of the former Paper D (both part 1 and part 2) and the legal questions from the pre-exam are combined, converted into a modular progressive testing setup and extended to include aspects that are not tested in the pre-2020 EQE, but which have become a relevant part of the life of a patent attorney.

#### Module L1 – Basic legal concepts

Module L1 is intended to be taken after at least one year of experience. Like Modules P1 and P2, it shall be designed as a smart MCQ exam (not merely true/false questions), can be taken at any time during the year and re-sitting can only be attempted after pause of 4 months.

*Duration:* 2 hours.

*Focus:* Basic procedural matters relating to the EPC and PCT.

*Syllabus:* To be defined but may include for the procedural aspects: common provisions, languages, representation, basics of priority, calculation of periods, remedies, fees, the process from filing to grant, divisional applications, transfer, entitlement disputes, limitation, opposition, intervention, appeal, conversion.

Module L1 should test the basic legal concepts of the EPC and the PCT. As examples, Module L1 should test a candidates' understanding of the "life of a patent application" (EPC or PCT), understanding of the concept of priority including effective dates of claims, ability to correctly calculate simple EPC and PCT deadlines (10-day rule, 7-day rule, expiry of a time limit on a non-working day, applying an extension), etc. Module L1 should not test anything beyond the basics (for example complex issues such as the prior art effect of several 'interlocking' applications that are only partially entitled to priority or restoration of priority).

### Module L2 – Advanced legal questions

Module L2 can be taken at least 4 months after passing Module L1. It shall be designed as a hybrid MCQ exam so that the candidate is also required to indicate the legal basis for their answer. Like Module M2, it can be taken at any time during the year, and re-sitting can only be attempted after a pause of 4 months.

*Duration:* 2 hours.

*Focus:* Advanced legal questions of the EPC and PCT and basic legal concepts from the IP5.

*Syllabus:* The whole of the EPC and PCT, which may include patentability (for example inventions, exceptions to patentability, medical uses, state of the art, European prior rights, non-prejudicial disclosures, novelty, inventive step, unity of invention, disclosure, claims, right of priority), interpretation of patent claims to assess infringement, analysing a scenario and identifying solutions (for example missing a procedural step), recent and landmark case law (currently e.g. G 3/14 or G 1/15, but not e.g. G 1/84), national law to the extent covered in National Law table and the PCT Applicant's Guide, simple commercial aspects of IP rights such as consequences of (not) acquiring IP rights or licensing, etc; and aspects of IP5 patent office practice defined in the syllabus of L2. Module L2 builds on Module L1. Thus, Module L2 should test all of the topics in Module L1, but in a more complex setting. In addition, Module L2 may test more complex legal aspects of the EPC and PCT and basic legal aspects of IP5 patent office practice as defined by the syllabus. This is an examination aimed at a patent attorney trainee who has been working for approximately two years.

### Final Legal Exam – Advanced practical advice

The Final Legal Exam can be taken at least 4 months after passing Module L2. Like, the Final Practical Exam, it shall be designed as a free-text computer written e-exam and will be offered twice a year. There will be no restrictions on the timing of the first resit but subsequent resits must be spaced from the previous sitting by at least a year.

*Focus:* Analysing a scenario and preparing a legal opinion to a client based on the analysis.

*Duration:* 3 hours (alternatives may be considered in view of screen time).

*Syllabus:* The whole of the EPC and PCT. The aspects of IP5 patent office practice defined in the syllabus of L2.

The difficulty of the Final Legal Exam should be aimed at the level of a trainee with three years of experience and should test the fit-to-practise criterion. A candidate may be asked to analyse a complex situation which includes a variety of topics, for example multiple missed deadlines or procedural steps, priority issues, multiple applications (both client and competitor), depending patent rights, and freedom to operate issues. The candidate must advise the client on the situation and provide suggestions for improving the client's position (e.g. considering licence agreements and other commercial aspects) In particular, the ability to provide clear advice to the client is considered key to being fit to practise as a European patent attorney.

## Passing the new e:EQE

Varying pass-rates may be defined for each module and for the different tracks, in particular depending on the choice of MCQ setup. To encourage candidates to adequately prepare, it may be considered to raise the pass rate for resitters (e.g. requiring 75% to pass a resit instead of 70% for the first sitting).

### Practical Track – Modules P1, P2 and P3

For the Modules P1 and P2, a progressive pass rate based on the type and setup of the Modules can be chosen, e.g. 70% for P1 and 80% for P2. The Pass mark for the free text Module P3 can be between 50-70%.

### Legal Track – Modules L1 and L2

For the Modules L1 and L2, a similar approach can be taken, aiming for 70% for L1 and 80% for L2.

### Final Exams

To pass the Final Practical and Legal Exam a Pass mark of 50 out of 100 has to be obtained for each of the four parts: i.e. the three parts of the Final Practical Exam and the Final Legal Exam.

It is proposed to abolish the current compensation scheme.

Transitional provisions are required for resitters in the current system. One suggestion is set out below.

Passed in current system	Exemptions	Required to sit
None	None	All modules
Pre-Exam (or pre-exam + any one of A, B or C)	P1, P2, L1	P3, L2 & Final Practical & Legal exams
Pre-exam & Paper D	L1, L2, Final Legal Exam, P1 & P2	P3 & Final Practical Exam
Pre-exam & Papers A & B	L1, P1, P2 & P3	L2, Final Legal and Practical Exams
Pre-exam & Papers A, B & C	L1, P1, P2, P3 & Final Practical Exam	L2 and Final Legal Exam

Although there are additional elements in each of the legal and practical tracks, there is a need to be fair to candidates who are part way through the qualification process. Accordingly, a pass (over 49%) in paper D will be considered equivalent to the successful completion of the Legal Track. Similarly, passes (over 49%) in each of the papers A, B and C will be considered equivalent to the successful completion of the Practical Track.

## Further aspects and considerations

The above proposal may raise a number of questions, some of which are addressed herein below.

### MCQ and auto-correction

Advice should be sought on a more sophisticated manner of posing multichoice questions and options for machine or AI correction of answers should be investigated (e.g. employing A.I.). By Smart MCQ is meant an advanced MCQ level that tests more than just true/false, such as “combined lists” to choose from (e.g. one for answers and one for relevance of legal basis; or multiple correct answers from a list) or the requirement to not only give an answer, but also indicate how certain the candidate is that the answer is correct, and weigh that into the number of marks that can be obtained. By hybrid MCQ is meant an exam containing both (smart) MCQ questions and auto-correctable free text. It will have to be decided how the question pool shall be maintained and updated.

### On the job training

While the exam is a central assessment for testing candidates on the various aspects of being fit-to-practise, it is noted that the modular system may enable some candidates to pass before completion the 3-year period that is currently set by Art. 11(2)(a) REE. It is therefore recommended that a period of at least 3-years is maintained before entry on the list can be requested, even if the candidate has passed the Final Exams before the 3 years have been completed.

### Level playing field

While the sit-anywhere approach creates a level playing field for those who would otherwise have to travel against those who live near a former exam centre, the level playing field in tutoring, variety of work and experience of candidates amongst all member states is not resolved. The above modular approach would enable a (distant) mentoring program for the EPC-area, including aspects currently covered by the EPO Academy and epi students, as well as new initiatives, such as an internship program (at least) for candidates across EPC Contracting States.

## **Conclusion**

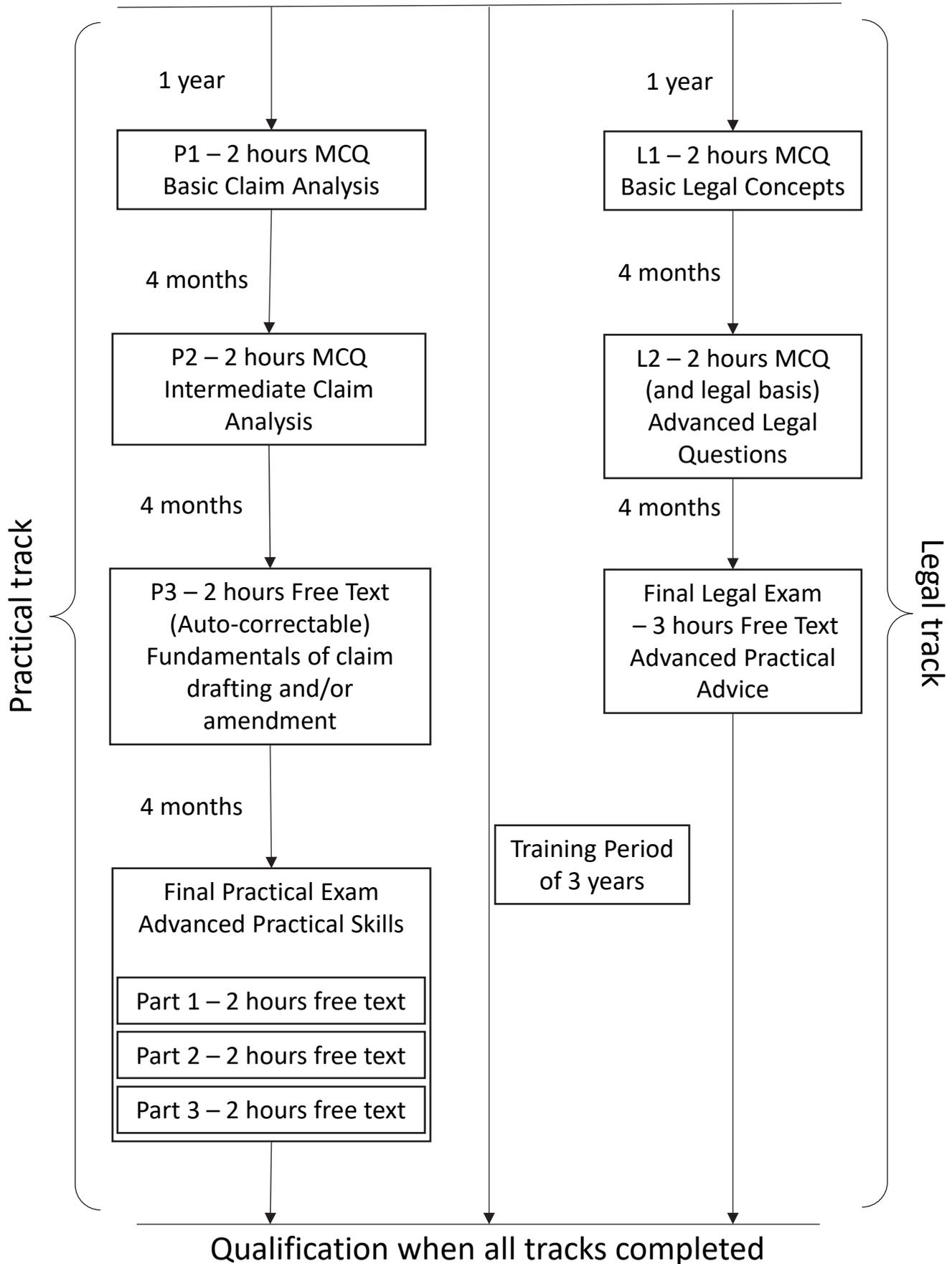
In view of the digitalisation of the European Qualifying Examination, we have an opportunity to reconsider the structure and content of the Exam.

In this position Paper, **epi** presents a new e:EQE with a modular structure that safeguards the high quality of the current EQE. In the proposal, both the restrictions (e.g. maximum screen time) and the benefits of an electronic examination (e.g. MCQ and autocorrection) are combined to provide a proposal which lowers the burden of time-consuming correction work and spreads the workload for the candidates.

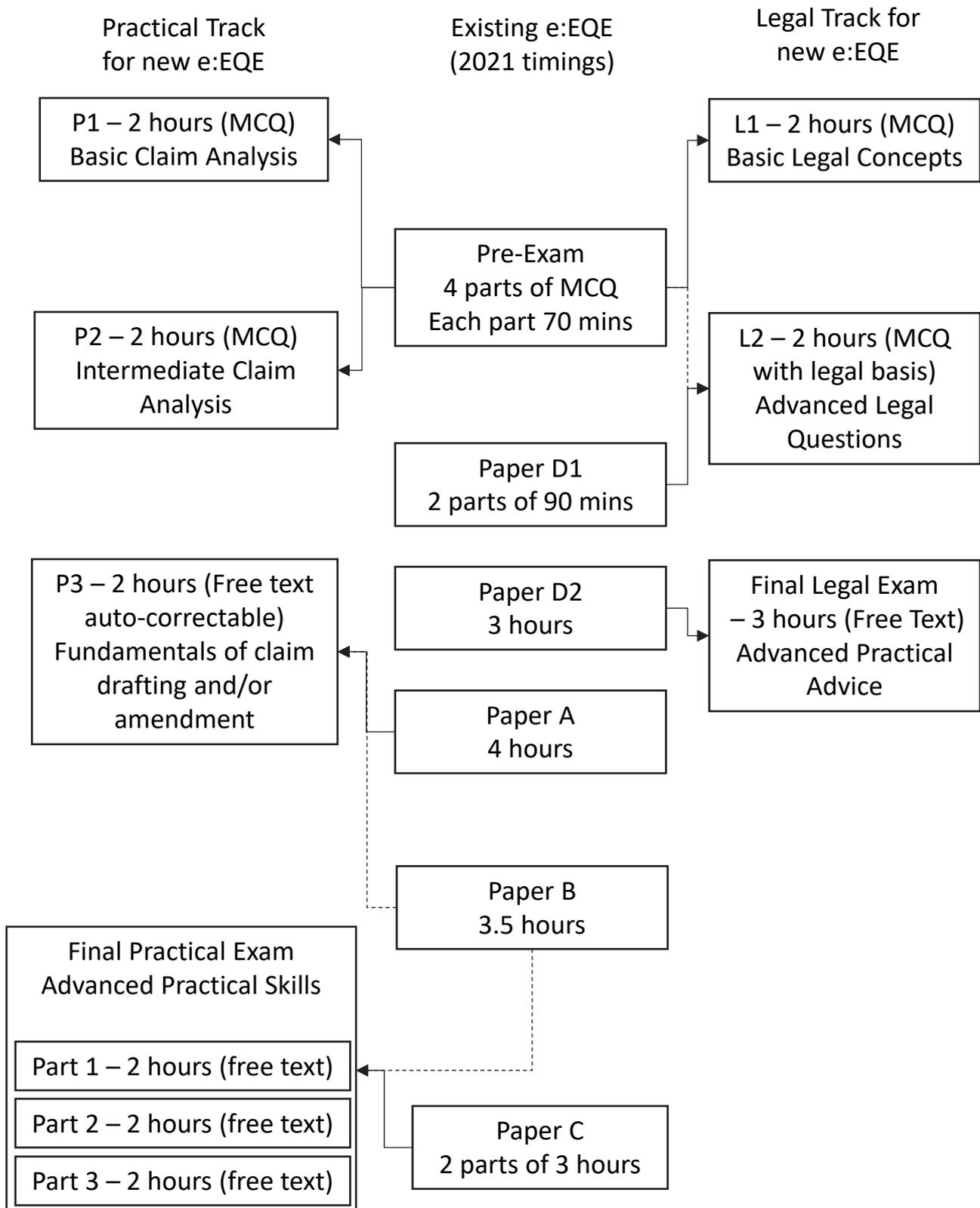
Although this position paper presents a lot of detail related to the format of the EQE, a lot of other things are presently not considered, as they depend on the choice of testing. For many of these aspects professional advice needs to be sought, such smart MCQ setup and auto-marking of free text, the choice of open vs closed book, exam fees, or the frequency and timing of the exam modules.

# Annex A – Overview of New e:EQE (assuming no resits)

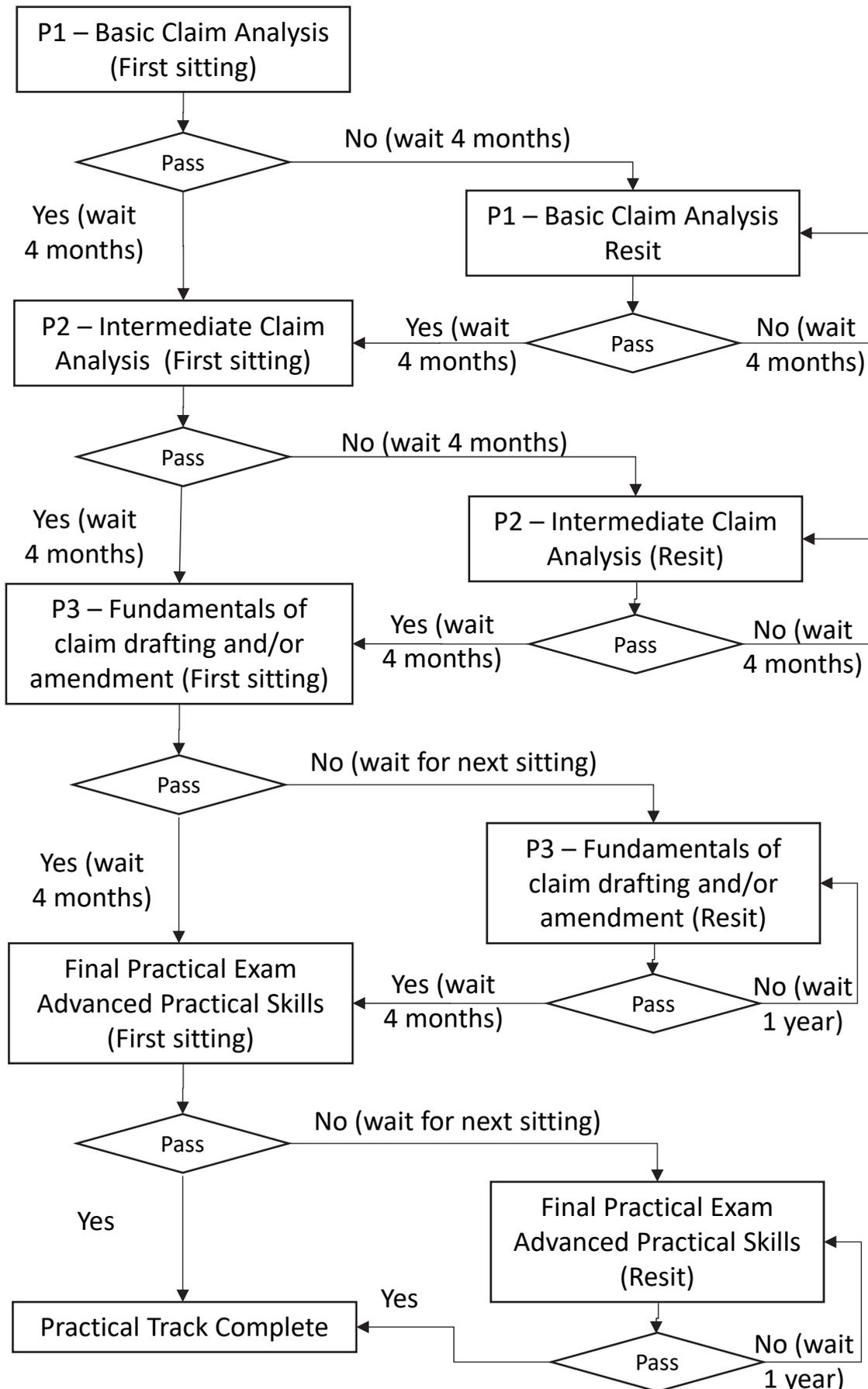
Start Date in Profession



## Annex B – Mapping between new & old e:EQE



## Annex C – Resitting Policy for New e:EQE



## Annex C – Resitting Policy for New e:EQE

