

To the attention of:
the Enlarged Board of Appeal of the
European Patent Office
85540 Haar
Germany

Bologna, 15 November 2024

re: **Referral G 1/24**

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I. THE QUESTIONS

1. The questions submitted to the Enlarged Board of Appeal are the following:

1. Is Article 69(1), second sentence EPC and Article 1 of the Protocol on the Interpretation of Article 69 EPC to be applied on the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC?

2. May the description and figures be consulted when interpreting the claims to assess patentability and, if so, may this be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation?

3. May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?

II. ADMISSIBILITY AND FORMULATION OF THE QUESTIONS

2. It will be assumed in the following that the referral is admissible; it will also be assumed that no reformulation of the questions is necessary.

III. THE PROPOSED ANSWERS

3. For the reasons presented in detail below, it is submitted that the three questions should be answered as follows:

I. **no**, Article 69(1) EPC is only applicable for the determination of the extent of protection under Article 123(3) EPC or in infringement proceedings;

II. **yes**, the description and figures may be consulted when interpreting the claims to assess patentability;

consultation of the description and figures is permitted to check that the result of the interpretation of the claims on the sole basis of their language, read in the light of the common general knowledge, is not at complete variance with the technical understanding that the skilled person objectively derives from the description and

drawings, or if the person skilled in the art finds a claim to be unclear or ambiguous, when read in isolation;

checking that the result of the interpretation of the claims is not at complete variance with the technical understanding that the skilled person objectively derives from the description and drawings is not to be understood in the sense that, if one or more of the possible technical realisations identified as a result of the interpretation of claims is not expressly disclosed in the description or the drawings, then those technical realisations should be disregarded.

3. **yes**, an explicit definition in the description of a term used in the claims may be disregarded, if the definition given in the description is incompatible with the result of the interpretation of the claims on the sole basis of their wording and of the common general knowledge.

IV. THE FIRST QUESTION

A. INTERPRETATION OF THE FIRST QUESTION

4. The first question is understood to be asking whether the organs of the European Patent Office (EPO) tasked with the assessment of patentability of an invention, namely examining divisions, opposition divisions and boards of appeal, should always - as a matter of principle - *first* construe the claims of a European patent application or a European patent according to Article 69(1) EPC, i.e., on the basis of the description and the figures and taking into account the general principles laid down in Article 1 of the Protocol, and *only then* establish whether the thus construed claims fulfil the requirements of patentability laid down in Articles 52 to 57 EPC.

5. In view of the second question referred, which is based on the assumption that *some kind of interpretation* of the claims must *always* be undertaken preliminarily, to assess their patentability under Articles 52 to 57 EPC, the first question may also be understood to be asking whether Article 69(1) EPC together with Article 1 of the Protocol provides the proper legal basis and the methodology for interpreting the claims, when their patentability is to be assessed.

B. THE ANSWER TO THE FIRST QUESTION

6. The answer to the first question must be **negative**.

7. This follows from an analysis of Article 69 EPC considered both in itself, giving the terms used in this legal provision their ordinary meaning, and upon consideration of Article 69 EPC in the wider context of the European Patent Convention, having regard to the object and purpose of the Convention itself.

8. The conclusions reached through this analysis, which is based on the principles of interpretation of legal provisions laid down in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), are confirmed by the Travaux Préparatoires to the European Patent Convention and by further historical material, both of which have been additionally considered as supplementary means of interpretation pursuant to Article 32 VCLT. It is established in the jurisprudence of the Boards of Appeal that the principles of interpretation provided for in Articles 31 and 32 VCLT are to be applied when interpreting the EPC (s., for example, **G 1/83**, reasons, nr. 5).

9. In the following, in the analysis of legal provisions of the Convention that are relevant for answering the referred questions, the text in each of the three official languages will be considered, on account of Article 177(1) EPC.

C. TEXTUAL AND SYSTEMATIC ANALYSIS OF ARTICLES 69 AND 52 TO 57 EPC

10. As apparent from the text of Article 69 EPC in English, French and German, this provision is concerned with the «**extent of protection conferred by a European patent or a European patent application**» (s. Article 69(1), first sentence EPC). In the German and French versions, the extent of protection conferred by a European patent or a European patent application is respectively referred to as «**der Schutzbereich des europäischen Patents und der europäischen Patentanmeldung**» and «**L'étendue de la protection conférée par le brevet européen ou par la demande de brevet européen**».

11. According to the first sentence of Article 69(1) EPC, the extent of protection conferred by a European patent or a European patent application is determined by the claims (cf. the German and French texts: “*wird durch die Patentansprüche bestimmt*”; “*est déterminée par les revendications*”).

12. The second sentence of Article 69(1) EPC, by using the connective «*nevertheless*» («*jedoch*», «*toutefois*»), qualifies the principle laid down in the first sentence by stating that «*the description and drawings shall be used to interpret the claims*»: in other words, the determination of the extent of protection conferred by a European patent or a European patent application has to be done on the basis of the claims but, **for the purpose of determining the extent of protection**, claims have to be interpreted by taking the description and the drawings into account (cf. the German

and French text: «Die Beschreibung und die Zeichnungen sind jedoch zur Auslegung der Patentansprüche heranzuziehen.»; «Toutefois, la description et les dessins servent à interpréter les revendications.»).

13. How the description and the drawings are to be used, when interpreting the claims for the purpose of determining the extent of protection, is specified in Article 1 of the Protocol on the Interpretation of Article 69 EPC: the extent of protection conferred cannot be understood as that defined by the literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims; nor may the claims be considered as serving only as a guideline to the effect that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated.

14. It follows from the wording of Article 69(1) EPC in the three languages that **interpretation of the claims by having recourse to the description and the drawings** in accordance with the general principles of Article 1 of the Protocol on the Interpretation of Article 69 EPC **is expressly prescribed by Article 69(1) EPC for the sole purpose of determining the extent of protection**.

15. According to Article 64(1) EPC, a European patent shall, subject to the provisions of paragraph 2, **confer** on its proprietor from the date on which the mention of its grant is published in the European Patent Bulletin, in each Contracting State in respect of which it is granted, the **same rights** as would be **conferred by a national patent** granted in that State (cf. the German and French texts: «Das europäische Patent **gewährt seinem Inhaber ... dieselben Rechte, die ihm ein in diesem Staat erteiltes nationales Patent gewähren würde.**»; «le brevet européen **confère** à son titulaire ... **es mêmes droits que lui conférerait un brevet national délivré dans cet État.**»).

16. According to Article 67(1) EPC, a European patent application shall, from the date of its publication, provisionally confer upon the applicant the **protection provided for by Article 64 EPC**, in the Contracting States designated in the application (cf. the German and French texts: «Die europäische Patentanmeldung gewährt dem Anmelder ... den **Schutz nach Artikel 64**»; «La demande de brevet européen assure ... au demandeur ... la **protection prévue à l'article 64**»).

17. It is apparent from Articles 64 and 67 EPC, which together with Article 69 EPC belong in the same part of the Convention, namely chapter III of part II defining the effects of the European patent and the European patent application, that **rights** flow from the **protection conferred** by a European patent and a European patent application, these rights essentially consisting in a so-called *ius*

excludendi alios, i.e., in the **right**, foreseen in the patent laws of all the Contracting States to the EPC, **to exclude third parties from the exploitation of the invention as defined in the claims** of a patent or a patent application, and in the right to seek remedies, in case of infringement (cf. **G 2/88**, reasons, point 3.3).

18. The **determination of the extent of protection** conferred by a European patent or a European patent application thus **serves the purpose of identifying the outer boundaries of the patent proprietor's right to exclude third parties from the exploitation of the invention** as defined in the claims of a patent or a patent application. As specified in Article 1 of the Protocol on the Interpretation of Article 69 EPC, the identification of these outer boundaries has to be done in a manner that combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

19. The ultimate purpose of **establishing the outer boundaries of the extent of protection** is determining whether the rights conferred on a patent proprietor or a patent applicant have been trespassed, i.e., whether infringement of a European patent or a European patent application has occurred. It follows that the determination of the extent of protection conferred by a European patent or a European patent application **serves the ultimate purpose of ascertaining** whether a third party is liable of **infringement** of a European patent or a European patent application.

20. According to Article 64(3) EPC, **any infringement of a European patent shall be dealt with by national law**. Stated otherwise, ascertaining whether infringement of a European patent or a European patent application has occurred is a matter for the national courts of the Contracting Member States to the EPC where a European patent is in force or which are designated in a European patent application.

21. It follows from the foregoing analysis of the language of Article 69(1) EPC, considered in itself and in the systematic context of chapter III of part II of the Convention containing Article 69 EPC, that the **interpretation of the claims by using the description and the drawings**, as laid down in Article 69(1), second sentence EPC, in accordance with the principles of Article 1 of the Protocol **is solely a matter for the national courts of the Contracting Member States** to the EPC and **serves the purpose of ascertaining** whether **infringement** of a European patent or a European patent application has occurred (s. **T 442/91**, Reasons, nr. 3: «*Darüber hinaus sind Interpretationen des Schutzbereichs eines Patents nicht Aufgabe des EPA, sondern gemäß Artikel 64 und 69 EPÜ der für Patentverletzungsverfahren zuständigen nationalen Gerichte. Das EPA hat ... keine*

zusätzlichen Interpretationen über den zukünftigen Schutzbereich des erteilten oder aufrechterhaltenen Patents zu geben, an die im übrigen auch kein nationaler Verletzungsrichter gebunden wäre.»; emphasis added)¹.

22. As concerns a possible relationship between Article 69(1), second sentence EPC and the provisions of the EPC governing the assessment of patentability of an invention, namely Articles 52 to 57 EPC, it can be concluded, for the reasons presented in the following, that no relationship at all may be derived.

23. As explained below, an analysis of Article 69(1), second sentence EPC and of Articles 52 to 57 EPC, both having regard to their wording and in the light of the object and purpose of the Convention, leads to the conclusion that the **interpretation of the claims by using the description and the drawings as laid down in Article 69(1), second sentence EPC and Article 1 of the Protocol is not applicable to the assessment of patentability of an invention under Articles 52 to 57.** The reasons are the following.

24. The purpose of assessing the patentability of an «*invention*» under Articles 52 to 57 EPC is to delimit the «*invention*» against the relevant prior art, so as to arrive at a definition of technical matter in the claims that fulfils the requirements of patentability and thus justifies the grant of a European patent.

25. Articles 52 to 57 EPC all refer to «*inventions*» or «*an invention*» («*Erfindung(en)*», «*invention(s)*» in German and French). For example, Article 54(1) EPC stipulates that «*an invention shall be considered to be new if it does not form part of the state of the art.*»

26. According to Article 84, first sentence EPC, the claims shall define the **matter for which protection is sought** and, pursuant to Rule 43(1) EPC, which is an implementing regulation of Article 84 EPC, the claims shall define the **matter for which protection is sought in terms of the technical features of the invention.**

27. In the corresponding German and French versions of these provisions, the expression «*matter for which protection is sought*» is rendered respectively as «**Gegenstand, für den Schutz**

¹ In English: «*Furthermore, interpretations of the scope of protection of a patent are not a task of the EPO but, on the contrary, of the national courts responsible for infringement proceedings, according to Articles 64 and 69 EPC. **The EPO has not to provide any additional interpretations on the future scope of protection of the granted or maintained patent, which interpretations – by the way – would not bind any national judge dealing with infringement.***»

begehrt wird» (or «**Gegenstand des Schutzbegehrens**») and «**objet de la protection demandée**» (or «**objet de la demande pour lequel la protection est recherchée**»).

28. The Boards of Appeal have consistently interpreted the term «*invention*» used in Articles 52 to 57 as referring to the invention as claimed in terms of its technical features and, thus, as the «*matter for which protection is sought*» of Article 84 EPC (cf. **G 2/98**, reasons, nr. 9; also cf. **T 56/21**, reasons, point 13, final sentence): there can be no doubt, for example, that the requirement under Article 54(1) EPC that an invention has to be novel means that the matter for which protection is sought in terms of the technical features of a claim must not form part of the state of the art (cf. for example, **G 2/88**, reasons, nr. 7: «***A claimed invention lacks novelty unless it includes at least one essential technical feature which distinguishes it from the state of the art.***»; emphasis added).

29. It follows that the **assessment of patentability** of an invention pursuant to Articles 52 to 57 EPC is **to be done with respect to the matter for which protection is sought** («**Gegenstand des Schutzbegehrens**», «**objet de la protection demandée**») **as defined in terms of technical features in the claims.**

30. It is underlined that this conclusion applies to the assessment of patentability not only in the course of the examination procedure but **also in the opposition and appeal procedures.**

31. Article 100 EPC, defining the possible grounds for opposition, stipulates pursuant to paragraph (a) that an opposition may be filed on the ground that the **subject-matter** («***Gegenstand***», «***objet***») of the European patent is **not patentable under Articles 52 to 57**: it is therefore apparent that the opposition divisions and the boards of appeal of the EPO (cf. R 100(1) EPC) are required to assess whether the **matter** for which protection is sought as defined in terms of technical features in the claims is patentable pursuant to Articles 52 to 57 EPC.

32. As a matter of language, the «*matter for which protection is sought*» and its German and French counterparts, i.e., «*Gegenstand, für den Schutz begehrt wird*» or «*Gegenstand des Schutzbegehrens*» (in German) and «*objet de la protection demandée*» or «*objet de la demande pour lequel la protection est recherchée*» (in French) cannot be considered to have the same meaning as the «*extent of protection*» (or «*Schutzbereich*» and «*étendue de la protection*» in German and French): the expression «*matter for which protection is sought*» and its German and French counterparts are **clearly distinct** from the expression «*extent of protection*» and the corresponding German and French expressions.

33. There is thus **no basis in the text** of the provisions of the EPC governing the assessment of patentability to infer that the interpretation of the claims by using the description and the drawings as laid down in Article 69(1), second sentence EPC and Article 1 of the Protocol should be applicable in the assessment of patentability of an invention under Articles 52 to 57 EPC.

34. The same conclusion holds even if one does not understand the term «*invention*» in Articles 52 to 57 EPC in the sense of the «*matter for which protection is sought*» as defined in terms of technical features in the claims, for a very simple reason:

35. **as a matter of language, the term «*invention*» and the expression «*extent of protection*» are quite simply not synonymous.**

36. This has been acknowledged even in the decision **T 1473/19**, cited by the referring Board at point 3.2.2 of the referring decision **T 439/22** as one of the leading decisions belonging to the line of case law postulating the general applicability of Article 69 EPC and its Protocol for construing claims under the EPC. The decision **T 1473/19** states at point 3.11 of the reasons:

*«...the main rationale underlying T 1279/04, Reasons 3, seems to be that **there is a difference between the subject-matter of a patent claim**, which is determined in proceedings before the EPO and assessed under Articles 54(2), 56, 83 and 123(2) EPC, **and its extent of protection**, which is assessed under Article 123(3) EPC and in national infringement proceedings. While, as explained hereafter, **the present Board acknowledges a difference**, [...]» (emphasis added).*

37. **There is no basis whatsoever, in the text of the provisions of the EPC considered here, to equate the term «*invention*» with the expression «*extent of protection conferred*».**

38. Any attempt to extend the applicability of Article 69(1) EPC, the wording of which clearly concerns the «*extent of protection*», to Articles 52 to 57 EPC, the wording of which clearly refers to the distinct notion of «*invention*», is based on a patent disregard of the clear language of these provisions and is at complete variance with the generally accepted rules of legal interpretation.

39. **The EPC provides for a clear distinction between patentability of an invention and protective effects of European patent applications and European patents,**

40. In this respect, of particular relevance is an *obiter dictum* of the Enlarged Board of Appeal in its decision **G 2/12**, where the question of law submitted to the Board concerned the **patentability**

of claims directed to plants or plant material other than a plant variety. At point VIII.(6)(b) of the reasons, the Enlarged Board of Appeal clearly stated:

*«A distinction needs to be made between, on the one hand, the aspects of **patentability and**, on the other hand, the **(protective) effects** of European patents or patent applications. **The EPC clearly provides for such a clear division**, as the requirements for **patentability** are governed by **Articles 52 to 57, 76, 83, 84 and 123 EPC** whereas the **extent of protection** and the rights conferred by European patents or patent applications are **specified in Articles 64(2) and 69 EPC** in particular.*

[...]

As a consequence, whether a product claim or a product-by-process claim is patentable is to be examined irrespective of the extent of protection that is conferred by it after grant.» (emphasis added).

41. The final comment in the quoted *obiter dictum* in **G 2/12** also supports the understanding that the expression «*matter for which protection is sought*» refers to *matter for which **protection** is being sought* and has **not** yet been **finally conferred**, whereas the expression «*extent of protection*» is used in Article 69 EPC to refer to the **protection** that is **finally conferred** on a proprietor **once the bodies of the European Patent Office** entrusted - pursuant to Article 4(3) EPC - with carrying out the task of the European Patent Organisation of granting European patents fulfilling the requirements of patentability pursuant to Articles 52 to 57 EPC **have finally determined**, at the end of the examination procedure (and possibly after an opposition-appeal procedure), **the matter in terms of claimed technical features which fulfils said requirements of patentability pursuant to Articles 52 to 57 EPC and for which a European patent may be eventually granted.**

42. It is the matter which has been finally found by the European Patent Office to be patentable, at the conclusion of the whole grant procedure before the European Patent Office (including any opposition and appeal), that defines the extent of protection; and the determination of the extent of protection is - with the exception of issues under Article 123(3) EPC - entirely and exclusively a task for the national courts, which for that determination have to apply Article 69 EPC and its Protocol, when interpreting the matter finally found to be patentable by the European Patent Office.

43. The organs of the European Patent Office are solely responsible for the granting of European patents. It is useful, in this respect, to consider the second Recital of the Preamble to the European Patent Convention.

44. As stated in its preamble, the European Patent Convention has been concluded by the Contracting States desiring that protection of inventions «*may be obtained in those States by a **single procedure for the grant of patents** and by the **establishment of certain standard rules governing patents so granted***».

45. As already recalled above, the task of carrying out said single procedure for the grant of patents has been entrusted - pursuant to Article 4(3) EPC - to the examining divisions, opposition divisions and boards of appeal of the European Patent Office, whose duty is thus to examine whether an invention as claimed is patentable pursuant to Articles 52 to 57 EPC and to finally determine, at the end of said single, i.e., centralised procedure for the grant of patents (possibly including opposition and appeal proceedings), claims defining matter fulfilling the requirements of patentability pursuant to Articles 52 to 57 EPC.

46. The task of the examining divisions, opposition divisions and boards of appeal of the European Patent Office is thus solely to carry out the single, centralised procedure for the grant of patents mentioned in second Recital of the Preamble to the Convention, so as to arrive at a final determination of the subject matter of claims that fulfil the requirements of granting a European patent.

47. **Article 69 EPC and the Protocol** of Interpretation instead **belong to the standard rules**, likewise mentioned in the second Recital of the Preamble to the Convention, governing **patents after grant**, i.e., **at the conclusion of the single, centralised grant procedure** that is **entrusted to** the examining divisions, opposition divisions and boards of appeal of the **European Patent Office**. Since the standard rules mentioned in the second Recital of the Preamble are expressly said to govern patents granted at the conclusion of the centralised grant procedure entrusted to the European Patent Office, they are not meant to be applied by the examining divisions, opposition divisions and boards of appeal of the Office, except in cases where, as expressly foreseen under Article 123(3) EPC, the organs of the Office have to determine whether an amendment has extended the extent of protection of a European patent.

48. As shown in the following, a clear confirmation of the results of the textual and systematic analysis of Article 69 EPC and Articles 52 to 57 EPC presented thus far and, in particular, of the conclusions reached at the preceding point 47, is provided by having recourse - pursuant to Article 32 VCLT - to the preparatory work to the Convention. i.e., the Travaux Préparatoires to the EPC 1973, and to further historical material, detailed below.

D. EVIDENCE FROM THE TRAVAUX PRÉPARATOIRES AND FURTHER MATERIAL

49. As apparent from the Travaux Préparatoires to the EPC 1973 and from the analysis of further historical material, Article 69 EPC and the Protocol were included in the Convention as part of the so-called «*maximum solution*» which had been strongly advocated by interested circles and which was agreed upon by the Inter-Governmental Conference that was set up in 1969 and that, eventually, worked out a complete draft for the European Patent Convention in 1972.

50. The **purpose of the inclusion of Article 69 EPC and the Protocol in the Convention** was, in particular, to establish a standard rule, common to all the Contracting Member States and to be applied by national courts in infringement proceedings, for the determination of the extent of protection of patents granted by the European Patent Office: in other words, Article 69 EPC and the Protocol were included in the Convention **to define a standard interpretation rule to be applied by the courts of the Contracting Member States having the task, pursuant to Article 64(3) EPC, to decide matters of infringement of European patents.**

51. It is instructive, in this connection, to read the comments on this point in the first commentary to the Convention, namely the well-known book «*The Granting of European Patents*» by Martin van Empel.

52. At point 58 of his commentary, van Empel writes, with regard to the standard rules mentioned in the second Recital of the Preamble:

«The Convention contains also “certain standard rules governing patents so granted”, In effect this means that the European patent is something more than just a bundle of applications all the same. There is a set of rules which is thus common to all Contracting States [...] These “standard rules” concern in the first place the term of the European patent [...] In the second place Article 138 contains an exhaustive enumeration of grounds for revocation of the European patent [...] Finally, certain common standards for protection provided by the European patent are set out in Article 64(2) and 69”. This “maximum solution [...] was agreed upon by the Inter-Governmental Conference.» (emphasis added).

53. Subsequently, at point 661 of his book van Empel makes the following remarks, after having discussed at point 660 paragraphs (1) and (3) of Article 64 EPC:

«The fact that thus the European patent will confer different protection from one State to another has, therefore, been accepted as a matter of principle. Nevertheless certain bounds are set to this divergence by Article 69(1) which reads:

“The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims.”

In fact, this is another element of the “maximum approach” [...] As such, the insertion of this provision in the present Convention may be justified on its own account. Inevitably, the way in which a patent may be expected to be construed by infringement courts has a decisive influence on the drafting of the patent application. Thus, the more uniform interpretation and construction may be expected to be for European patents in the various Contracting States, the more uniform and the more coherent the drafting of European application will also be.» (emphasis added).

54. It is apparent from these comments that Article 69 EPC and the Protocol were clearly understood, at the time when the Convention came into force, as being part of the so-called «maximum solution» and, as such, as having the sole purpose of providing guidance to national courts - *after* the conclusion of the single, centralised grant procedure carried out by the European Patent Office - in the interpretation of claims in infringement proceedings.

55. This is also the conclusion that may be drawn from the Travaux Préparatoires to the EPC 1973.

56. Document **BR/7/69** contains the minutes of the first meeting of Working Party I, held in Luxembourg from 8 to 11 July 1969 under the chairmanship of Dr. Kurt Haertel. It is recalled that the Working Party I was tasked with the preparation of a preliminary draft of provisions of substantive and procedural patent law (s. **BR/7/69**, point 4, end of p. 2: «[...] *Articles of the preliminary draft which relate to patent law and procedure for grant*») on the basis of a previous draft, the so-called “1965 Draft” (s. **BR/7/69**, point 6). The text of the preliminary draft prepared by Working Party I (which is known as the first preliminary draft or “1970 Draft”) is contained in document **BR/6/69** (cf. **BR/7/69**, point 5); Article 21(1) of this draft corresponds to Article 69(1) EPC.

57. Point 45 of document **BR/7/69** contains the following comment on Article 21 of the 1970 Draft:

«The question arose of whether, in accordance with the general aim of the Convention, this Article, which applied to the European patent after grant, should not be deleted. The Working Party nevertheless considered that it was necessary to insert this Article into the Convention, since an applicant can only draw up his claims for a European patent application if he knows exactly what the principles for their interpretation are.» (emphasis added).

58. The parts highlighted in boldface indicate that **Article 21(1) of the 1970 Draft, the precursor of Article 69(1) EPC, was clearly understood to be applicable to post-grant proceedings only**, i.e., after the conclusion of the single, centralised grant procedure carried out by the European Patent Office. **This conclusion is reinforced by the introductory comment** of point 45 of **BR/7/69**, where it is made unmistakably clear that Article 21(1) was not related to **the general aim pursued by the Convention, the scope of which - as expressly stated at point 8 of BR/7/69 - «relates only to the grant of patents»** (emphasis added).

59. It is added, for the sake of completeness, that the final comment at point 45 of document **BR/7/69**, where reference is made, first, to the drafting of claims of European patent applications and, then, to the principles of interpretation of claims does by no means suggest that Article 21(1) of the 1970 Draft was to be applied in grant proceedings: the passage clearly says that the Article was to be applied after grant. The final comment is to be understood in the historical context in which it was formulated, i.e., at a time when very different national traditions and styles of claim drafting existed in Europe, and merely says that applicants, by being aware in advance of the rules according to which the claims of European patents would then be interpreted after grant, would take the effects of those rules into due account, when drafting claims for European patent applications, and would consequently adjust their drafting styles.

60. A further confirmation that the precursor of Article 69(1) EPC was clearly understood to be applicable to post-grant proceedings only is offered by document **BR/169/72**, which contains the minutes of a hearing of non-governmental international organisations on the so-called «Second Preliminary Draft» of the Convention. In the text of this draft, known as the “1971 Draft”, Article 21 of the 1970 Draft had been renumbered to Article 20 (s. document **BR/88/71** for the complete text of Article 20 of the 1971 Draft).

61. Point 35 of **BR/169/72** contains observations made by several organisations such as FICPI, CNIPA and ICC (the International Chamber of Commerce) on Article 20 of the Second Preliminary

Draft. According to point 35, p. 18 of **BR/169/72**, the ICC «*drew attention to the utility of a **rule of interpretation**, given that **in the national context** it was advisable for the judge to have a certain margin of discretion, because what may be evident **at the time of an action for infringement** may not have been evident at the moment the patent was granted.*» (emphasis added).

62. This comment makes it clear that, for the interested circles that were heard, Article 20 of the Second Preliminary Draft was solely understood as laying down a rule for interpretation to be applied at national level («*in the national context*») by courts «*at the time of an action for infringement*» and not as a rule for interpretation for the grant procedure.

63. Similar conclusions are arrived at on the basis of the Travaux Préparatoires to the Munich Diplomatic Conference, the so-called **M documents**.

64. Particularly revealing are the comments in document **M/18**, point 7 and **M/20**, point 13, both containing comments to the 1972 Draft to be submitted to the national governments at the Munich Diplomatic Conference. In the 1972 Draft, the provision concerning the extent of protection was Article 67, whose text is identical to the text of Article 69 EPC 1973; the text of the 1972 Draft is contained in document **M/1**.

65. Document **M/20** contains the comments presented by CNIPA, the Committee of Institutes of National Patent Agents. At point 13 of **M/20**, the following comment was submitted by CNIPA with regard to Article 67 of the 1972 Draft, i.e., the precursor of Article 69 EPC:

«The declaration, **to be used by National Courts** as a guideline and recommended for adoption by the Conference, is welcomed».

66. The comment again shows that the precursor of Article 69 EPC was solely understood by the interested circles as a provision **to be used by national courts only**; there is not the slightest hint that the provision was ever understood to be applicable by the organs of the European Patent Office.

67. Document **M/18** contains the comments presented by the Standing Conference of the Chambers of Commerce and Industry of the European Economic Community (CPCCI) on the 1972 Draft. With regard to Article 67 of that draft, relating to the extent of protection, the Standing Conference of CPCCI submitted under point 7 the following remark:

«*Since **national courts will be responsible for the interpretation of the European patent**, there is a danger that, even if they observe the letter of Article 67, they will persist in the previous habits. This would mean that one and the same activity of a competitor*

of a patent proprietor may or may be not deemed to constitute an **infringement** depending on the country since the courts have different definitions of what is meant by the extent of the claims. This is a situation which might conceivably arise. **It is however contrary to the “maximum” approach, applied since the drafting of the First Preliminary Draft** with the support of the STANDING CONFERENCE, which was important on some important points.» (emphasis added).

68. This comment and, in particular, the parts highlighted in boldface again provide evidence that Article 67 of the 1972 Draft and, by implication, Article 69 EPC 1973 were included in each respective version of the Convention in view of the «**maximum solution**» or «maximum approach» discussed above, **with the sole purpose of giving the national courts of the Contracting States a common interpretation rule for construing claims in infringement proceedings**. Again, there is not the slightest hint that the provision was ever understood or meant to provide an interpretation rule to be applied in grant proceedings before the European Patent Office.

69. It is also considered useful to consider the “**Studie Haertel**” worked out in 1960 by Dr. Kurt Haertel, chairman of the working group entrusted in 1959 by the government of the Six (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) with the preparation of a draft convention relating to patents for the Common Market and of the founding fathers, so to say, of the European Patent Office.

70. In the latter respect, it is underlined that, as rightly observed by van Empel at point 31 of his commentary «*The Granting of European Patents*»,

*«taking into account the influence which Haertel – who later on became President of the German Patent Office – has had on all deliberations on the European Patent ever since, **this document** [i.e., the «Studie Haertel»; author’s note] **is of considerable importance**. As a matter of fact **nearly all problems which have afterwards dominated discussions on the subsequent drafts are already recognised and alternative solutions set out.**»* (emphasis added).

71. In part I.A.VI of the «*Studie Haertel*», Dr. Haertel discusses on pages 30 to 32 - within the frame of problems arising with the creation of a European patent as a unitary and autonomous right - the issue of the substantive scope of protection («*sachlicher Schutzbereich*», in the original German text).

72. On page 32, Dr. Haertel makes the following remarks respectively at the end of point 2 and under point 3:

«2. [...] **Der sachliche Schutzbereich des Patents im konkreten einzelnen Fall wird daher endgültig von dem obersten zuständigen Gericht festgestellt.**

3. Daraus folgt, daß eine abschließende Regelung des sachlichen Schutzbereichs durch das europäische Patentrecht nicht möglich ist. **Das europäische Patentrecht kann nur Bestimmungen treffen, die sich mittelbar auf die Feststellung des sachlichen Schutzbereichs auswirken.** Solche Bestimmungen würden sein:

[...]

b) Das Erfordernis der Aufstellung von Patentansprüchen für das europäische Patent. In diesem Falle könnte bestimmt werden, daß den Patentansprüchen für die Auslegung des Patents eine vorrangige Bedeutung zukommt.

c) Die Ausgestaltung des Patentverletzungsverfahrens dergestalt, daß **letztinstanzlich die nationalen Gerichte oder ein europäisches Patentgericht über die Auslegung des europäischen Patents entscheiden.**» (emphasis added)².

73. Already from this passage it becomes clear that, in the «*Studie Haertel*», the issue of interpretation was considered solely in connection with the determination of the extent of protection and that the task of interpreting was considered as being a matter for the national courts or a European court only.

74. This is confirmed by Part I.D.I of the «*Studie Haertel*» from page 60 to page 72, entitled «*Verfahren bei Patentverletzungen*», where problems arising in connection with the infringement of European patents and possible solutions for the infringement procedure are discussed.

75. After having preliminarily observed, in the first paragraph of page 61, that the only practicable solution for regulating infringement in the future European patent law would be to leave it to the national courts to decide on the infringement of European patents (as in fact later foreseen in paragraph 3 of Article 64 EPC), Dr. Haertel subsequently observes that this solution would lead to legal insecurity because of the different interpretation of the future European patent by the courts of

² Partial English translation: «2. *The substantive extent of protection conferred by the patent in a concrete, individual case will therefore be determined by the highest competent court.* 3. *It follows from this that a provision of patent law conclusively governing the substantive extent of protection is not possible. European patent law can only lay down provisions which indirectly affect the determination of the substantive extent of protection.*».

the Six (s. the last sentence of page 61: «wegen der Verschiedenheit in der Auslegung des europäischen Patents»).

76. To overcome this difficulty, the «Studie Haertel» suggests on page 67 to include a provision, in the future European law, according to which only the claims should be considered for the purpose of interpreting a European patent:

«Man könnte ferner denken, eine Bestimmung in das europäische Patentrecht aufzunehmen, wonach **zur Auslegung eines europäischen Patents nur seine Ansprüche herangezogen werden können.**» (emphasis added).

77. The inclusion of this provision is subsequently recommended on page 71, under point 5.c), where Dr. Haertel summarised his final recommendations.

78. The issue of interpretation is thus dealt with, in the «Studie Haertel», solely in connection with infringement and in relation to the problem of whether and how the future European patent law should regulate the question of infringement of European patents. **There is not the slightest hint that, in the «Studie Haertel», the issue of interpretation was ever considered in relation to the assessment of patentability of a European patent or a European patent application:** as a matter of fact, part I.B.I of the document, devoted to problems of a European grant procedure, never mentions the issue of interpretation of the claims.

79. It is of particular significance that on page 66 the «Studie Haertel», in the discussion of a solution whereby, similarly to a procedure foreseen at the time in the Austrian patent law (s. page 65 of the «Studie»), the future European Patent Office might be called upon to determine the extent of protection of a European patent and would, to this end, set up a special division (s. page 65, letter aa: «... eine besondere Abteilung des europäischen Patentamts»), Dr. Haertel makes the following enlightening remark:

«Das erstgenannte Verfahren würde eine nicht unerheblich und auch **nicht ganz folgerichtige Ausweitung der Zuständigkeit des europäischen Patentamts über das Erteilungsverfahren hinaus** auch auf den Verletzungsprozeß mit sich bringen und würde das europäische Patentamt mit einer seinem Wesen als Erteilungsbehörde fremden Aufgabe belasten.»³ (emphasis added).

³ In English: «The first mentioned procedure would entail a non-negligible and also **not entirely consistent broadening of the competence of the European Patent Office beyond the grant procedure** also to the infringement trial and **would burden the European Patent Office with a task extraneous to its nature of granting authority.**»

80. This remark is a further confirmation that **the founders of the EPC never envisaged that the European Patent Office, as a granting authority, should concern itself with the determination of the extent of protection** (with the exception of the application of Article 123(3) EPC, as discussed below). Since the only provision of the EPC relating to the determination of the extent of protection is Article 69 EPC, **it may be concluded that the founders of the EPC never envisaged that the European Patent Office, as a granting authority, should be concerned with the application of Article 69 EPC.**

81. Recourse - pursuant to Article 32 VCLT - to the historical documentation discussed above, including the preparatory work to the Convention, the first commentary by van Empel and the «*Studie Haertel*», thus provides confirmation of the result of the analysis of Article 69 EPC and of the provisions of the EPC governing patentability, namely Articles 52 to 57 EPC, on the basis of the text of Articles 69 and 52-57 EPC, read by giving words the ordinary meaning they have in the context of those provisions, and upon consideration of said Articles in the light of the object and purpose of the Convention: Article 69(1) EPC and Article 1 of the Protocol on Interpretation of Article 69 are not applicable in the assessment of patentability pursuant to Articles 52 to 57 EPC, as recognised in a significant number of decisions of the Boards of Appeal (s., *ex multis*, **T 442/91**, reasons, nr. 3, and **T 56/21**, reasons, nr. 31).

E. THE DECISIONS G 2/88 AND G 6/88

82. As noted above, there is one provision in the EPC, namely Article 123(3) EPC, which relates to the extent of protection conferred by a European patent and for the application of which the European Patent Office, as explained for instance in the decision **G 2/88**, reasons, nr. 4, is bound to apply Article 69(1) EPC.

83. The decision **G 2/88** does not, however, prescribe or suggest that Article 69 EPC and its Protocol should be applied in the assessment of patentability pursuant to Articles 52 to 57 EPC. The decision states, at the end of the second paragraph of point 3.3. of the reasons:

«Article 69 EPC and its Protocol are to be applied, in proceedings before the EPO and in proceedings within the Contracting States, whenever it is necessary to determine the extent of protection».

84. The statement is quite clear: in proceedings before the European Patent Office, according to **G 2/88**, Article 69 EPC and its Protocol are to be applied only when it is necessary to determine the extent of protection which is conferred and the Enlarged Board did so, in that decision **G 2/88**, for

the sole purpose of applying Article 123(3) EPC, as expressly indicated at the end of point 4 of the reasons: «**This approach to interpretation of claims** [i.e., in accordance with Article 69 EPC and its Protocol; author's remark] **must be adopted by the EPO when determining the protection conferred for the purpose of Article 123(3) EPC.**» (emphasis added).

85. The decision **G 2/88** thus offers no support for arguing that Article 69(1) EPC and its Protocol should be applied in the assessment of patentability pursuant to Articles 52 to 57 EPC.

86. However, as correctly pointed out under point 3.2.3 of the referring decision **T 439/22**, in the decision **G 6/88** delivered on the same day as the decision **G 2/88**, the Enlarged Board prescribed the application of Article 69(1) EPC and its Protocol to the determination of the novelty of a claim concerning the use of a known substance for achieving a new technical effect.

87. The decision **G 6/88** thus prescribed that a claim be construed on the basis of Article 69(1) EPC and its Protocol for the purpose of assessing its patentability under Article 54 EPC.

88. **As explained in the following, it appears that recourse to Article 69 EPC for assessing novelty as suggested in G 6/88 is unjustified** not only in view of the analysis presented above, which excludes the applicability of Article 69 EPC on textual, systematic and teleological grounds, but also because, as explained below, the result at which the Enlarged Board arrived in **G 6/88** (s. the headnote of the decision) may be reached by applying Articles 54, 83 and possibly 84 EPC only, without having to invoke Article 69 EPC.

89. According to **G 6/88**, a claim to the use of a substance A (known from the prior art) for a hitherto unknown and thus new purpose B which is based on a new technical effect described in the patent is to be interpreted as claiming not only the substance A and the means to achieve the purpose B but, implicitly, also a functional technical feature consisting in the achievement of the new purpose B (s. **G 6/88**, reasons 7.1: «*sie müssen (in bestimmten Fällen) so ausgelegt werden, daß sie als technisches Merkmal auch **die Funktion der Erzielung des Zwecks B** enthalten*»⁴) or, as indicated in **G 6/88**, reasons, nr. 9, in the achievement of the new technical effect that underlies the claimed purpose **in a predetermined context** («*Die Erreichung [...] in einem bestimmten Zusammenhang*»). As apparent from the decision **T 1385/15**, reasons, nr. 2.4.2, where the principles of **G 6/88** were applied to a concrete case, the context in which the new technical effect is achieved must be defined in the claim, in order for novelty of a claim use to be acknowledged.

⁴ According to the official English translation: «*they* [i.e., claims to the use of a substance A for purpose B; author's remark] *should be interpreted (in appropriate cases) as also including as a technical feature the function of achieving purpose B.*».

90. To arrive at the result that a claim to the use of a known substance A for a new purpose B which is based on a new technical effect described in the patent should be interpreted as claiming not only the substance A and the means to achieve the purpose B but, implicitly, also a functional technical feature consisting in the achievement of the new purpose B, the Enlarged Board of Appeal relied in **G 6/88** on Article 69 EPC and its Protocol of Interpretation (s., for instance, point 7 of the reasons of **G 6/88**).

91. It is recalled that the question of law submitted to the Enlarged Board of Appeal in the referral **G 6/88** was whether a claim to the use of a chemical compound for a predetermined non-medical purpose is novel pursuant to Article 54 EPC with respect to an item of the prior art that discloses the use of the chemical compound, when the technical implementation of both technical teachings is identical and **the only new feature of the claim is the purpose of the use** (s. **G 6/88**, summary of facts and submissions, point I: *«Is a claim to the use of a chemical compound or class of compounds for a particular non-medical purpose novel within the meaning of Article 54 EPC, having regard to prior art which discloses the use of that compound (class of compounds) for a different non-medical purpose, if the two teachings are carried out by identical technical means and the only novel feature in the claim is the use itself?»*; emphasis added).

92. While it is acknowledged that the Enlarged Board deemed it necessary to invoke the application of Article 69 EPC and its Protocol to construe the claim for the purpose of subsequently assessing its novelty pursuant to Article 54 EPC, it is not clear at all why the application of Article 69 EPC and its Protocol should be necessary to assess the novelty of a use claim whose formulation, as expressly indicated by the Enlarged Board, does include a **novel technical feature** consisting in the **achievement of a purpose** of the claimed use that is **not known from the prior art**.

93. As apparent from the explanations under point 8.1 of **G 6/88**, it follows from Article 54(2) EPC that novelty under the EPC is to be assessed having regard to what has been made available to the public and not to what might be inherently contained in a prior disclosure:

«Die Große Beschwerdekammer möchte hierzu feststellen, daß es im Zusammenhang mit Artikel 54 (2) EPÜ darum geht zu entscheiden, was der Öffentlichkeit "zugänglich gemacht" worden ist, und nicht darum, was in dem [...] zugänglich Gemachten "inhärent" enthalten gewesen sein mag»⁵.

⁵ In English: *«The Enlarged Board would emphasise that under Article 54(2) EPC the question to be decided is what has been "made available" to the public: the question is not what may have been "inherent" in what was made available»*

94. If the purpose of the claimed use, as indicated under point I of the summary of facts of **G 6/88**, is not disclosed in the prior art in the context of the claimed use, then this fact alone should suffice to conclude that the claim is novel, without having to consider the description of the patent, as instead required by the Enlarged Board through the requirement that the claims be first construed according to Article 69 EPC and its Protocol.

95. The question whether a novel technical effect underlying the novel feature of the claimed purpose is described in the patent, as required by **G 6/88**, seems to be a matter of sufficiency of disclosure under Article 83 EPC or, possibly, of support in the description under Article 84 EPC, rather than a matter of novelty.

96. Support for this understanding is provided by the decision **T 1099/16**, where the Board had to decide on the novelty of a use claim under application of the principle of claim construction laid down in **G 2/88** and **G 6/88**. Although the deciding board in **T 1099/16** presented its considerations with reference to the principle laid down under point III of the headnote of **G 2/88**, those considerations are wholly applicable to **G 6/88**, since the principle laid down under point III of the headnote of **G 2/88** is **identical** to the principle laid down in the headnote of **G 6/88**.

97. In **T 1099/16**, reasons, nr. 13, the board made the following comment with reference to the conclusion summarised at point III of the headnote of **G 2/88**:

«The Board considers that this conclusion establishes two conditions for interpreting a claimed new purpose (reflecting a new technical effect) as a functional technical feature of the claim which may serve to distinguish the subject-matter over the prior art. Besides the condition that the technical effect has not been made available to the public before the relevant priority date of the application at issue, it is also required that the technical effect in which the claimed use resides, is "described" in the patent (see also T 208/88 OJ EPO 1992, 22, Reasons 1).» (emphasis added).

98. The board went on in **T 1099/16** by stating, at point nr. 15, that the second condition, namely that the new technical effect underlying the new purpose be described in the patent, appeared to encompass two options:

«Option i) would correspond in essence to the requirement of sufficient disclosure as set out in Article 83 EPC or as analogously formulated in the ground for opposition

under Article 100(b) EPC. **Option ii) resembles the condition of support of the claims by the description** according to Article 84 EPC.» (emphasis added)

99. Although the board in **T 1099/16** concluded that neither a clear definition nor the precise limits of the expression «*described in the patent*» in the context of claim interpretation could be derived from the reasons of **G 2/88**, it seems that **the Enlarged Board of Appeal**, by requiring in **G 2/88** and **G 6/88** that the claims be interpreted according to Article 69 EPC and its Protocol, **did as a matter of fact require that, before assessing its patentability, the claimed subject matter and, in particular, the technical feature (related to the claimed purpose) that might confer novelty on that subject matter should also be examined for compliance with the requirements of sufficiency of disclosure according to Article 83 EPC and/or support in the description according to Article 84 EPC.**

100. It appears that the Enlarged Board, by requiring in **G 6/88** that the new technical effect underlying the new purpose be described in the patent, implicitly took into account the **general principle of patent law that the extent of monopoly conferred by a patent should correspond to, and be justified by, the technical contribution to the art**: hence, if a claim of a patent application is in principle novel by virtue of a technical feature which has been hitherto never disclosed in the prior art, but the application does not describe that novel technical feature in the sense that the description provides no support or fails to teach the skilled person how to concretely realise that feature, then no patent monopoly should be granted.

101. It stands to reason that technical features potentially distinguishing the subject matter of a claim from the prior art and thus, in principle, justifying the grant of a European patent should be taken into account, for the purpose of assessing the patentability of said subject matter, if - and only if - they have a fair basis in the application, in the sense that they are disclosed in a manner that is enabling for the skilled person.

102. Ascertaining whether said technical features potentially distinguishing the subject matter of a claim from the prior art have a fair basis in the application or, to use the language of **G 2/88** and **G 6/88**, whether they are «*described in the patent*», may be considered to require a kind of interpretation of the claims on the basis of the description, insofar as examination of the requirements of sufficiency of disclosure under Article 83 EPC and support in the description under Article 84 EPC involves consideration of the claims vis-à-vis the description.

103. **However, there is no need to resort to Article 69 EPC and its Protocol to arrive at the principle expressed in the headnote of G 6/88 or under point III of the headnote of G 2/88:** the two conditions underlying that principle are nothing more than the expression of the requirements enshrined in Article 54(1)-(2) EPC and in Articles 83 and 84 (support in the description) EPC. Stated otherwise: **the two conditions underlying the principle laid down in G 2/88 and G 6/88 directly flow from the application of Articles 54, 83 and 84 EPC in the examination of claims and it is not necessary at all to invoke Article 69 EPC, to arrive at the two conditions laid down in G 2/88 and G 6/88.**

104. Since the application of Article 69 EPC and its Protocol in the assessment of patentability pursuant to Articles 52 to 57 must be excluded, in view of the analysis – presented above - of Article 69 EPC and Articles 52 to 57 EPC on the basis of their text and in the light of the object and purpose of the Convention, and taking into account the conclusions of the preceding point, namely that the conditions underlying the principle laid down in **G 2/88** and **G 6/88** directly flow from the application of Articles 54, 83 and 84 EPC in the examination of claims, it may be concluded that, **for the purpose of determining the technical subject matter of a claim to be compared with the prior art in the assessment of patentability pursuant to Articles 52 to 57 EPC, only Article 83 EPC and Article 84 EPC** (at least in examination proceedings; in opposition and appeal proceedings the applicability of Article 84 is subject to the conditions laid down in **G 3/14**) **have to be considered; Article 69 EPC and its Protocol are not to be considered and the decision G 6/88 cannot be held to provide a legally sound basis for applying Article 69 EPC and its Protocol in the assessment of patentability of a claim under Articles 52 to 57 EPC.**

105. How Article 83 EPC and Article 84 EPC, to the extent that the latter is applicable in examination (always) and in opposition and appeal proceedings (subject to the conditions laid down in **G 3/14**), should be considered for the purpose of construing claims to determine their technical subject matter and compare the thus determined matter to the prior art, will be presented below, in the answer to the second question referred to the Enlarged board of Appeal.

106. In summary, the **answer to the first question** referred must be **negative**: Article 69(1), second sentence EPC and Article 1 of the Protocol on the Interpretation of Article 69 EPC are **not to be applied** on the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC.

V. THE SECOND QUESTION

107. The second question referred asks whether the description and figures may be consulted when interpreting the claims to assess patentability and, if so, whether this may be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous, when read in isolation.

A. INTERPRETATION OF THE SECOND QUESTION

108. The second question has no apparent link to the first question. The second question is understood to be based on the assumption that, regardless of whether Article 69 EPC and its Protocol of Interpretation are applicable to the interpretation of claims in the assessment of their patentability under Article 52 to 57 EPC, claims always have to be construed for the purpose of assessing their patentability, in order to identify the technical subject matter to be compared with the state of the art in the assessment of patentability (cf. **G 2/88**, reasons, nr. 7 and **G 6/88**, reasons, nr. 6).

109. The second question is therefore understood to ask, first, whether the description and the figures may be consulted for the purpose of interpreting the claims so as to identify the technical subject matter to be compared with the state of the art and, secondly, whether the description and the figures may be generally used to this end or only if the person skilled in the art finds a claim in itself, i.e., read without considering the description and the figures, to be unclear or ambiguous.

110. Although the second question does not expressly ask under which alternative provision of the EPC the description and the figures might possibly be consulted for the purpose of interpreting the claims when assessing their patentability, in the event that Article 69 EPC is found to be inapplicable for that purpose, it is considered important to identify such an alternative provision of the EPC.

111. As explained below, Article 83 EPC is considered to be the legal provision of the EPC under which the description and the figures might be consulted - **to a limited extent**, as detailed below - for the purpose of interpreting the claims when assessing their patentability.

B. THE ANSWER TO THE SECOND QUESTION

1. ADDRESSEE OF THE CLAIMS

112. It is undisputed that the claims of a European patent or a European patent application are addressed to a person skilled in the art.

113. The assessment of their **patentability** under the EPC is likewise to be undertaken from the perspective of the person skilled in the art: this is particularly apparent, for example, from the wording of Article 56 EPC, according to which an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a **person skilled in the art**.

114. It follows that the identification of the technical subject matter of a claim to be compared with the state of the art and thus **the interpretation of the claims in view of the assessment of their patentability under the EPC has to be undertaken from the perspective of the person skilled in the art**.

115. The **person skilled in the art is a notional person** that has been elaborated by the jurisprudence of the boards of appeal in order **to serve as an objective reference** when deciding on various issues under the EPC, as explained for example in the decision **T 1462/14**, reasons, nr. 14.

116. According to the case law of the boards of appeal, the person skilled in the art should be presumed to be an experienced practitioner who has average knowledge and abilities and is aware of what was common general knowledge in the relevant art concerned at a particular time (average skilled person). The skilled person should also be presumed to have had access to everything in the state of the art, in particular the documents cited in the search report, and to have had at his disposal the normal means and capacity for routine work and experimentation.

117. It follows that, under the EPC, **the interpretation of the claims in view of the assessment of their patentability is to be carried out from the point of view of the skilled person**, i.e., **objectively**, and not from a subjective point of view such, for example, that of the draftsman of a European patent application: this entails that **the skilled person should consider all technically meaningful interpretations that would objectively occur to him on the basis of the language used in the claims, taking into account his common general knowledge for the purpose of understanding that language**.

118. In the following, the interpretation of the claims of a European patent application or a European patent according to the principle established at point 117 will be referred to as the «objective interpretation».

2. PRIMACY OF THE CLAIMS

119. The principle that it is **the language used in the claims** which must form the **basis for objectively determining the claimed subject matter, when assessing the patentability of claims**, has been clearly laid down by the Enlarged Board of Appeal at point 6.2 of the reasons of the decision **G 1/04**, where the Enlarged Board dealt with the **patentability** of claims relating to diagnostic methods:

*«It is further to be considered that Article 84 EPC requires that the claims define the subject-matter for which patent protection is sought, and that they must be clear. It signifies that **an independent claim within the meaning of Rule 29 EPC should explicitly specify all of the essential features needed to define the invention, and that the meaning of these features should be clear for the person skilled in the art from the wording of the claim alone.**» (emphasis added).*

120. It is added that, according to Article 113(2) EPC, **the European Patent Office shall examine**, and decide upon, the European patent application or the European patent **only in the text submitted to it**, or agreed, by the applicant or the proprietor of the patent.

121. It follows from this fundamental provision that the **assessment of patentability of claims** under Articles 52 to 57 EPC by the organs of the European Patent Office **must be based on the text of the claims** submitted with a European patent application or a European patent.

3. FUNCTION OF THE DESCRIPTION AND FIGURES UNDER ARTICLE 83 EPC

122. There is, however, a further element that needs to be taken into account in the discussion of the interpretation of the claims in connection with the assessment of their patentability.

123. According to Article 83 EPC, the European patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The same legal requirement applies to a European patent, in view of Article 100(b) EPC.

124. As explained by the Enlarged Board of Appeal in its decision **G 2/93**,

*«In order to meet the requirements of Article 83 EPC, a European patent application must therefore contain sufficient information **to allow a person skilled in the art, using his common general knowledge, to perceive the technical teaching inherent in the claimed invention and to put it into effect accordingly.**» (s. **G 2/93**, reasons, nr. 4; emphasis added).*

125. Since a European patent application pursuant to Article 78(1), letters b) and d) EPC must comprise, in addition to the claims (as per Article 78(1) c) EPC), a description of the invention and any drawings referred to in the description or the claims, it follows from Article 83 EPC and the explanatory remarks of the Enlarged Board in **G 2/93** on Article 83 EPC that a **fundamental purpose of the description and drawings** of a European patent application or a European patent is to allow the person skilled in the art, using his common general knowledge, «*to perceive the technical teaching inherent in the claimed invention*», i.e., **to allow the person skilled in the art to understand the technical teaching underlying the subject matter for which protection is sought as defined by the technical features in the claims.**

126. It is undisputed that the ultimate purpose of allowing the skilled person to understand the technical teaching underlying the claimed subject matter is to enable the person skilled in the art to put the claimed invention into effect, i.e., to reduce it to practice; however, the prerequisite for this purpose to be achieved is that the description and the drawings have to enable the skilled person, using his common general knowledge, to **understand the technical teaching underlying the invention as claimed.**

127. This function of the description is confirmed by Rule 42 EPC, which is an implementing regulation of Article 83 EPC: letters a) and c) of Rule 42(1) EPC stipulate that the description shall «*specify the technical field to which the invention relates*» and «***disclose the invention, as claimed, in such terms that the technical problem, even if not expressly stated as such, and its solution can be understood***» (emphasis added).

128. It therefore follows from a consideration of Article 83 EPC in itself and of the systematics of Part II, Chapter I of the EPC, relating to the requirements of a European patent application, that the description and the drawings represent elements of a European patent application and a European patent having the function to enable the person skilled in the art to understand the technical teaching underlying the claimed subject matter.

129. **Understanding the technical teaching underlying the claimed subject matter on the basis of the description and the drawings is, however, not to be equated with the objective interpretation of the claims as defined above** (s. point 118).

130. **As explained in more detail below, an understanding of the technical teaching underlying the claimed subject matter on the basis of the description and the drawings only**

serves an **ancillary purpose** with respect to the objective interpretation of the claims as defined above (s. point 118).

131. Understanding the technical teaching underlying the claimed subject matter on the basis of the description and the drawings means, *inter alia*, understanding to which technical field(s) the claimed invention pertains and, for example on the basis of the described embodiments, how the technical features of a claim may be **concretely realised** from a technical point of view.

132. Interpreting the claim instead means, first and foremost, determining whether the claimed subject matter relates to a physical entity or a physical activity (cf. **G 6/88**, reasons, nr. 2.2), identifying the technical field(s) in which the claimed physical entity or activity is put to use and assessing the **general technical nature and significance of each claimed feature**, having regard to the identified technical field(s), **from the objective point of view of the skilled person**.

133. The objective assessment of the general technical nature and significance of each claimed feature requires a **determination of all possible technical realisations of each claimed feature which a person skilled in the identified technical field(s) would in general consider to be technically meaningful on the basis of his common general knowledge of those technical field(s)**.

134. **Understanding the technical teaching** underlying the claimed subject matter on the basis of the description and the drawings and **objectively interpreting the claims** thus have **different scopes**, although there is a certain overlap between both activities.

135. **Interpreting the claims has a farther-reaching scope**, since it is **not limited to a consideration of the specific examples provided in the description** to illustrate how a technical feature might be concretely realised: claim interpretation instead aims at determining all possible technical realisations of each claimed feature which are encompassed, **in general**, by the language of the claim, read in the light of the common general knowledge of the skilled person.

136. If claim interpretation and understanding the technical teaching on the basis of the description were considered as being coextensive in scope or equivalent, the result would be that the language of the claims would no longer be binding and its meaning would also encompass matter that is only described but not covered by the language used in the claim. This would be in striking contrast with Article 113(2) EPC, according to which the European Patent Office shall examine, and decide upon, the European patent application or the European patent **only in the text submitted to it**, or agreed, by the applicant or the proprietor of the patent.

137. It follows from a consideration of Article 83 EPC in the systematics of Part II, Chapter I of the EPC - to which Article 84 EPC also belongs - that **Article 83 EPC serves an ancillary purpose with respect to the interpretation of the subject matter of claim, which matter is determined according to Article 84 EPC - by the claims only.**

138. To be more precise: the requirement of Article 83 EPC that the application and, more specifically, the description (possibly with the drawings) should allow the skilled person to understand the technical teaching underlying the claimed subject matter serves a **twofold ancillary purpose** with respect to the interpretation of the claimed subject matter: first, the description and the drawings may **provide confirmation** that the **technical realisations** that would objectively occur to the skilled person on the basis of the language used in the claims, read in the light of his common general knowledge, are **technically meaningful** and are not at complete variance with the technical teaching that the skilled person would objectively derive from the description and the drawings; and secondly, the description and the drawings may help **disambiguating the meaning** of the language of the claims in those cases in which the claims employ **expressions not having a generally acknowledged meaning** in the identified technical field(s).

139. It is pointed out that **the first of the aforementioned purposes**, namely providing confirmation of the **technical meaningfulness** of the technical realisations that would objectively occur to the skilled person on the basis of the language used in the claims, read in the light of his common general knowledge, is **not to be understood in the sense that, if one or more of the identified technical realisations identified as a result of the interpretation of the claims is not expressly disclosed in the description or the drawings, then those technical realisations should be disregarded**: what has to be checked is whether one or more of the possible technical realisations identified on the basis of the claim language, read through the eyes of the skilled person, would be at complete variance, from a technical point of view, with the technical understanding objectively derivable by the skilled person from the description and the drawings.

140. In view of the foregoing remarks, the **proposed answer to the second question** is the following: **yes**, the description and figures may be consulted when interpreting the claims to assess patentability; consultation of the description and figures is permitted to check that the result of the objective interpretation of the claims on the sole basis of their language, read in the light of the common general knowledge, is not at complete variance with the technical understanding that the skilled person objectively derives from the description and drawings; or if the person skilled in the art finds a claim to be unclear or ambiguous, when read in isolation.

141. Checking that the result of the objective interpretation of the claims is not at complete variance with the technical understanding derivable from the description and drawings is not to be understood in the sense that, if one or more of the identified technical realisations is not expressly disclosed in the description or the drawings, then those technical realisations should be disregarded.

VI. THE THIRD QUESTION

142. The answer to the third question is **positive** and follows in a straightforward manner from the principles laid down above in the discussion of the second question, as detailed in the following.

VII. THE ANSWER TO THE THIRD QUESTION

143. As explained above, under the EPC claims are to be interpreted solely on the basis of the language used in the claims to define the technical features of the claimed subject matter, wherein the language is to be read and understood through the eyes of a person skilled in the technical field of the claimed matter, i.e., on the basis of the common general knowledge of the person skilled in that technical field. This follows from Article 84, first sentence EPC, which establishes the primacy of the claims for the purpose of defining the subject matter for which protection is sought, and from the fact that European patent applications and European patents are addressed to the skilled person.

144. The result of claim interpretation according to these principles (the «*objective interpretation*»: cf. point 118 above) is the objective identification of all the possible technically meaningful realisations of the features that define the claimed subject matter.

145. If a definition given in the description is not encompassed by the result of the objective interpretation of the claims, then this means that the definition does not belong to the common general knowledge in the technical field of the claim, for example because it represents a deviation from the generally accepted meaning of a term in the technical field of the claim.

146. This situation is exemplified by the case dealt with in the decision **T 177/08**, where the claims used the term «*alkyl*», whose generally accepted meaning in the field of chemistry is understood to designate an organic group having the formula C_nH_{2n+1} and thus excludes the presence of substituents, whereas the description indicated that the term was used in the patent to designate both unsubstituted and substituted alkyls (s. **T 177/08**, reasons, nr. 3.1 and 3.3). The definition given in the description of the patent in the case dealt with in the decision **T 177/08** was thus at variance with the meaning of the term «*alkyl*» which a skilled person would have ordinarily assumed, on the basis of his common technical knowledge in the field of organic chemistry.

147. It is noted in passing that the board which decided the case in **T 177/08**, although in principle open to the application of Article 69 EPC for the purpose of interpreting claims (cf. point 3.4 of the reasons of **T 177/08**), firmly refused to consider the special definition of the term «alkyl» used in the description of the patent dealt with in the decision on the ground that «**third parties cannot be expected to check every single term of the claims for a potentially different meaning that might be hidden somewhere in the description**» (s. **T 177/08**, reasons, point 3.3, second paragraph, penultimate sentence; emphasis added).

148. As explained above in the discussion of the second question, it follows from a consideration of Article 83 EPC in the systematics of Part II, Chapter I of the EPC that the technical understanding of the claimed subject matter which the skilled person should gain from the description and the drawings serves a twofold ancillary purpose with respect to the interpretation of the subject matter of a claim: checking the technical meaningfulness of the technical realisations identified on the basis of the sole language of the claims, read in the light of the common general knowledge, to exclude technical realisations which would be at complete variance with the technical understanding that the skilled person would objectively derive from the description and the drawings; and disambiguating a term of a claim which, upon an objective interpretation of the language of the claim in the light of the common general knowledge, still has an unclear or ambiguous meaning.

149. **It is, however, not the purpose of the technical understanding obtained from a consideration of the description and figures to supplement a claim with features or definitions that cannot be objectively identified upon reading the claims through the eyes of the skilled reader and that are not expressly contained in the claims.**

150. Assessing the patentability of a claim by reading, in that claim, a definition which is only given in the description and which is incompatible with the result of an objective interpretation of the claim would be tantamount to violating the already mentioned principle enshrined in Article 113(2) EPC, namely that the European Patent Office shall examine, and decide upon, the European patent application or the European patent **only in the text submitted to it**, or agreed, by the applicant or the proprietor of the patent.

151. Hence, the **answer to the third question** must be **positive**: a definition given in the description may be disregarded, if that definition is incompatible with the result of the interpretation of the claims on the basis of the sole language of the claims, read in the light of the common general knowledge.

VIII. APPENDIX

AN EXAMPLE OF PRACTICAL APPLICATION OF THE PRINCIPLES OF OBJECTIVE CLAIM INTERPRETATION

152. A practical example based on the patent (EP 3 076 804) dealt with in the referring decision **T 439/22** may be used to illustrate the approach to claim construction which has been designated as «*objective interpretation*» (cf. point 118 above) and to show, concretely, how and under what conditions the understanding of the technical teaching underlying the claimed subject matter obtained on the basis of the description and the drawings is to be taken into account for the purpose of objectively interpreting a claim.

153. Claim 1 of the patent claims a heated aerosol-generating article comprising, *inter alia*, an aerosol-forming substrate; the aerosol-forming substrate comprises a «*gathered sheet of aerosol-forming material*» circumscribed by a wrapper which is a sheet of thermally-conductive material acting as a thermally-conducting flame barrier for spreading heat and mitigating against the risk of a user igniting the aerosol-forming substrate by applying a flame to the aerosol-generating article.

154. A skilled person reading claim 1 and considering the entire claim set objectively understands, on the basis of the used language, that the claims and, in particular, claim 1 relate to electronic smoking articles of the type where an aerosol-forming substrate is heated rather than combusted; such articles are commonly known as *heat-not-burn devices*.

155. The skilled person thus objectively understands that claim 1 relates to the technical field of electronic smoking articles of the type where an aerosol-forming substrate is heated rather than combusted and that, more generally, the claim set relates to the technical field of the tobacco industry (cf. claims 2 and 3, where «*cigarette paper*» is mentioned). The skilled person thus identifies the technical fields of heat-not-burn smoking devices and of the tobacco industry as the relevant technical fields.

156. On the basis of his common general knowledge of these technical fields, the skilled person knows that aerosol-forming substrates for the claimed kind of smoking article are usually in the form of paper-like sheets of tobacco or other appropriate vegetal substances such as cellulose: in other words, the skilled person in the identified technical field knows on the basis of his common general knowledge that the «*aerosol-forming material*» is usually tobacco (or a vegetal substance) and that the «*aerosol-forming substrate*» usually takes the form of a paper-like sheet of tobacco (or a vegetal substance).

157. The claim recites an aerosol-forming substrate comprising a «gathered sheet of aerosol-forming material». To interpret the expression «gathered sheet of aerosol-forming material», the skilled person would, in accordance with the principles of objective interpretation of the claims laid down above, consider whether the expression «gathered sheet» has a well-recognised meaning in the identified technical field.

158. **There is no evidence that the expression «gathered sheet» has a generally accepted meaning in the technical field of heat-not-burn devices or in the broader technical field of the tobacco industry.**

159. In fact, although the referring decision **T 439/22** states under point 1.1 of the reasons, in the penultimate paragraph of page 8, that it agrees with the impugned decision where, as explained under point V of the facts and submissions of **T 439/22**, the opposition division considered the expression «gathered sheet» to have a clear and widely agreed meaning in the tobacco industry, the Board appears to have doubts that this is indeed the case: s. point 1.2 of the reasons of **T 439/22**.

160. At any rate, it is a fact that there is **no documentary evidence on file**, for example from a standard reference work in the field of the tobacco industry such as the *Tobacco Encyclopedia*, that the expression «gathered sheet» indeed has a generally accepted meaning in the technical field of heat-not-burn devices or, more generally, in the field of the tobacco industry.

161. According to the principles of objective interpretation of the claims laid down above, even in the absence of a generally accepted meaning of the expression «gathered sheet» specifically valid in the field of heat-not-burn devices, the skilled person would nevertheless consider the language used in the claim to determine all the possible meanings that the expression «gathered sheet» may have, when the words «gathered» and «sheet» are understood in their ordinary sense, i.e., according to everyday language usage, and he would then consider all the possible technical realisations that would objectively occur to him on the basis of the thus identified possible meanings, **taking into account his common general knowledge.**

162. Taking into account his common general knowledge at this stage means that the skilled person would not identify the possible meanings of the expression «gathered sheet» in a purely philological manner: amongst all the potential meanings, he would only consider those possible meanings which, based on his knowledge of the identified technical fields, would be technically meaningful. In other words, when considering all the potential meanings of the expression on the basis of the meaning that the words making up the expression have in ordinary language usage, the

skilled person would try to make technical sense of the expression on the basis of what he knows to be technically meaningful in the identified technical fields.

163. Applied to the concrete example of the referring decision, the skilled person understands that the word «gathered» in its broadest sense ordinarily means «brought together», «caused to come together»⁶ and that the word «sheet» designates a flat piece of material⁷; the skilled person would also be aware that, in ordinary language usage, «gathered» may also have the narrower meaning of «drawn into folds», «contracted and wrinkled».

164. Based on his common general knowledge of the identified technical fields, the skilled person would not base his objective interpretation of the claim language by resorting to analogies to the field of fabrics, even if the primary meaning of the word «sheet» in everyday usage is that of «cloth» or «fabric», because he generally knows that a «sheet of aerosol-forming material» in the identified technical field, being typically made of tobacco and having a paper-like consistence, is very different in nature from a piece of fabric.

165. On the basis of the language used in claim 1, according to which the «aerosol-forming material» is «radially encircled» and «circumscribed by a wrapper», and on account of his common general knowledge of the typical rod-like shape of heat-not-burn devices (an understanding which is confirmed by claim 4), the skilled person understands that, in the claimed device, the aerosol-forming substrate which comprises the «gathered sheet of aerosol-forming material» is rod-shaped.

166. The skilled person would therefore come to the conclusion that the language of the claims, considered in the light of his common general knowledge of the identified technical fields, objectively supports an understanding of the expression «gathered sheet of aerosol-forming material» in the broad sense of a sheet of such a material (which is typically paper-like) that has been subjected to any mechanical treatment ordinarily used in the identified technical fields and capable of bringing the sheet together in a form that is compatible with its subsequent wrapping, so as to form a rod-shaped substrate.

167. The person skilled in the identified technical fields knows **several mechanical treatments** routinely employed in the field of the tobacco industry and applicable to the kind of claimed sheet, so as to bring it together in a form that is compatible with a subsequent wrapping of the sheet to form a rod-shaped substrate.

⁶ s. for example <https://www.merriam-webster.com/dictionary/gathered> and <https://www.ahdictionary.com/word/search.html?q=gather>.

⁷ s. for example <https://www.merriam-webster.com/dictionary/sheet> and <https://www.ahdictionary.com/word/search.html?q=sheet>.

168. A first generally known treatment in the tobacco industry consists in the feeding of the sheet through a conical, funnel-shaped inlet (a so-called *finger inlet*) of a garniture, which is a device ordinarily used in the tobacco industry to form rods. The sheet subjected to this treatment is given a rod-like shape; the converging form of the conical finger inlet produces a constriction of the sheet transversally to the cylindrical axis of the resulting rod. The treatment is often preceded in the art by a *crimping* treatment of the sheet, whereby the sheet becomes lightly wrinkled and exhibits *folds* which facilitate the subsequent deformation of the sheet into a rod by means of the funnel-shaped finger inlet.

169. A second generally known treatment in the tobacco industry consists in convoluting the sheet on itself, i.e., winding it into spirals. This treatment, which is for example common in the manufacture of cigars, also results in a constriction of the sheet transversally to the cylindrical axis of the resulting rod.

170. A third generally known treatment in the tobacco industry consists in folding or rolling the sheet on itself. This treatment also results in a constriction of the sheet transversally to the cylindrical axis of the resulting rod.

171. The skilled person would thus come to the conclusion that, although the expression «*gathered sheet*» has no generally accepted meaning in the identified technical fields, that expression - taking into account the ordinary meaning of the words «*gathered*» and «*sheet*» and applying the common general knowledge of the identified technical fields, does in general designate a sheet which has been shaped into a rod either by means of a garniture conical finger inlet or by convoluting or folding the sheet. Common to all these known treatments is the fact that the sheet is brought together and shaped into a rod by constricting the sheet transversally to direction of the cylindrical axis of the resulting rod. The skilled person has, however, no reason to understand the term «*gathered*» in the narrower sense of «*drawn into folds*».

172. In accordance with the principles of objective interpretation laid down above, in a case where no generally accepted meaning of a term or expression used in a claim is known in the technical field of the claim, recourse to the description and the drawings of a European patent application or a European patent is allowable, on account of the fact that the description and the drawings have the function of enabling the skilled person to understand the technical teaching underlying the claimed subject matter, for the purpose of checking the technical meaningfulness of the possible technical realisations of the claim identified on the basis of the sole language of the claims and on

account of the common general knowledge or for the purpose of understanding an unclear or ambiguous term.

173. In the case of the patent dealt with in the referring decision **T 439/22**, the description and the drawing provide confirmation that the result of the objective interpretation of claims on the sole basis of the claim language and taking into account the common general knowledge is technically meaningful.

174. In the embodiment of figure 1, described in paragraph [0065] of the patent, it is explained that the converging funnel 10 «*gathers*» the continuous sheet of homogenised tobacco 8 transversely relative to its longitudinal axis, whereby the sheet of material 8 assumes a substantially cylindrical configuration. The term «*gathers*» is clearly used in the passage to refer to the first commonly known type of treatment mentioned above and there is no indication, in accordance with what the skilled person would understand to happen when a sheet of homogenised tobacco is passed through a converging funnel, to conclude that the sheet would necessarily be provided with folds as a result of its «*gathering*».

175. The skilled person conversant with the technical field of heat-not-burn devices would understand that folds would be the result of the distinct crimping step described in the foregoing paragraph [0064].

176. Paragraph [0035] provides a further confirmation that the result of the objective interpretation of the claims on the sole basis of their language and taking into account the common general knowledge is indeed technically meaningful, since it states that the term «*gathered*» denotes that the sheet of tobacco material is «*convoluted, folded, or otherwise compressed or constricted substantially transversally to the cylindrical axis of the rod*»: in other words, the technical meaning of «*gathered sheet*» and the possible technical realisations of a «*gathered sheet*» determined on the sole basis of the language and of the common general knowledge of the skilled person are in agreement with the technical understanding of the claimed subject matter that the skilled person could objectively derive from the description and the drawings.

177. It is important to underline that **interpretation of the claims** of a European patent application or a European patent **must start from a consideration of the language of the claims** in the light of the common general knowledge and **not from the description**.

178. The description (possibly with the drawings) may only provide the skilled person with a technical understanding of the invention, in the sense that it may provide confirmation that the result

of the objective interpretation of the claims on the sole basis of their language, considered in the light of the common general knowledge, is technically meaningful. **The description (possibly with the drawings) cannot override or supplement the meaning of the claims established on the basis of the claim language, read in the light of the common general knowledge.**