



Registry of the Enlarged Board of Appeal
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Third party statement according to Art. 10(1) of the Rules of Procedure of the Enlarged Board of Appeal regarding G 1/24

Dear Mr Michaleczek

I am sending you enclosed our statement in accordance with Article 10 of the Rules of Procedure of the Enlarged Board of Appeal.

Yours sincerely,

Bayer AG

Dr. Jörg Thomaier
Global Head of IP Bayer Group

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November 14, 2024

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Amicus Curiae Brief to G 1/24

Referral to the Enlarged Board of Appeal – G 1/24 ("Heated aerosol")

This amicus curiae brief is submitted by Bayer Intellectual Property GmbH, which is an affiliate of Bayer AG. Bayer AG is a global enterprise with core competencies in the life science fields of healthcare and agriculture.

With decision T0439/22 the referring Board has submitted three questions to the Enlarged Board of Appeal due to diverging case law regarding to what extent the description should be taken into account when interpreting the claims during EPO proceedings.

Specifically, the questions submitted are:

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?

With this amicus curiae brief we wish to express the position of Bayer on these questions.

In summary, we believe the three questions should be answered as follows:

- Question 1 is to be answered with "no".
- Question 2 is to be answered with "yes".
- Question 3 is to be answered with "no".

Below is a short account of our reasoning for suggesting the above answers.



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The referral is admissible

First, briefly touching on the issue of admissibility, the referring board has cited numerous examples in the case law relating to the application of Art 69(1) EPC and Art 1 of the Protocol on its interpretation and has elaborated that there are indeed diverging decisions on this matter. We also believe that the questions raised are of general interest, as they potentially will have deciding influence in many cases. We therefore consider the referral to be admissible.

Question 1 is to be answered with “no”.

Art. 69 EPC refers to the extent of the protection conferred by (the claims of) a European patent or a European patent application. Art. 1 of the Protocol on the Interpretation of Article 69 EPC does not change this. Thus, there is no legal provision that links Art. 69 EPC with the assessment of patentability, which criteria are clearly defined in Part II, Chapter I of the EPC (Articles 52-57 EPC).

Further, as the recent decision T56/21 clearly pointed out, “Article 69 EPC and the Protocol are concerned with the assessment of the extent of protection conferred by a European patent in case of infringement.” ([26] (a) in the decision). In this decision, the Board delved deeply into the matter over the relevance of Article 69 EPC in grant proceedings and concluded that “Article 69 EPC and the Protocol are not concerned with the “interpretation” of claims in the sense of claim construction, i.e., determining the meaning of the terms of a claim and its subject-matter for the purpose of assessing patentability.” ([52] (d) in the decision).

Subsequently, the Board was clear in stating that “(a) Article 69 EPC and its Protocol are not concerned with the assessment of patentability in examination before the EPO but with the extent of protection in the context of national proceedings of a European patent following such examination. Article 69 EPC and its Protocol are hence not applicable in grant proceedings before the EPO.”

Question 2 is to be answered with “yes”.

There are numerous decisions from the Boards of Appeal which confirm the use of the description and drawings when interpreting the claims to assess patentability. It is established case law that “the



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patent document may be its own dictionary” (White Book, Case Law of the Boards of Appeal, II-A-6.3.3). In this context, in T1321/04 the Board stated that “Terms used in patent documents should be given their normal meaning in the relevant art, unless the description gives the terms a special meaning.” and that “[...] if a special meaning can be derived from the patent document, only this meaning is ultimately decisive.”

In addition, according to the Board in T458/96, “when the technical content of the claims and the description clearly establish how an invention operates, these features cannot be disregarded for the purposes of assessing patentability by interpreting them merely as defining an intended use.”

There is no reason to deviate from the established case law on the use of the description and drawings when interpreting the claims. The case law of the Boards of Appeal is consistent in confirming that the description and drawings be used when interpreting the claims, especially when certain terms are given a special meaning.

The Description and the drawings should thus always be used to interpret the claims. A specific use of a term becomes often apparent only in the light of the description, unless the term itself is completely unclear. Using the description only in the case of a term being unclear would therefore probably lead to the misinterpretation of otherwise clear terms that are used in a specific way that context as is defined in the description.

Question 3 is to be answered with “no”.

For the same reasons as put forth regarding question 2, question 3 is to be answered with “no”.