



Registry of the Enlarged Board of Appeal
To the attention of
Mr Nicolas Michaleczek (EBAamicuscuriae@epo.org).

November 15, 2024

Amicus Curiae Brief of EPLIT concerning case G 1/24

Summary

At the occasion of case G 1/24, EPLIT has organized a poll among EPLIT's members. The detailed results can be found below.

In summary a strong majority (more than 90 %) of respondents favor use of the description and drawings to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC, both in ex parte and inter partes proceedings.

Respondents were unanimous in that consulting the description and drawings should not be limited to the case of a perceived lack of clarity of the claim when read in isolation.

A strong majority (almost 90%) of respondents consider that explicit definitions given in the description may not be disregarded when assessing patentability.

The basis for respondents positions on the various issues is Article 69(1) EPC, which stipulates that the description and drawings shall be used to interpret the claims.

A definition provided in the description is part of the description, which, also according to Article 69(1) EPC, shall be used to interpret the claims. Hence, it cannot be disregarded.

About EPLIT

1. EPLIT was founded in 2013 as the association of European Patent Attorneys who represent and advise clients in patent disputes before the European Patent Office and national patent offices, and in patent litigation before national courts and before the Unified Patent Court (UPC).

EPLIT's main objectives are to promote user-friendly, fair, efficient and cost-effective patent disputes in Europe and to promote any measures for improving patent disputes and in particular litigation.

For EPLIT, it is of fundamental importance to strike a balance between, on the one hand, procedural efficiency and predictability and, on the other, the right of the parties to be heard.

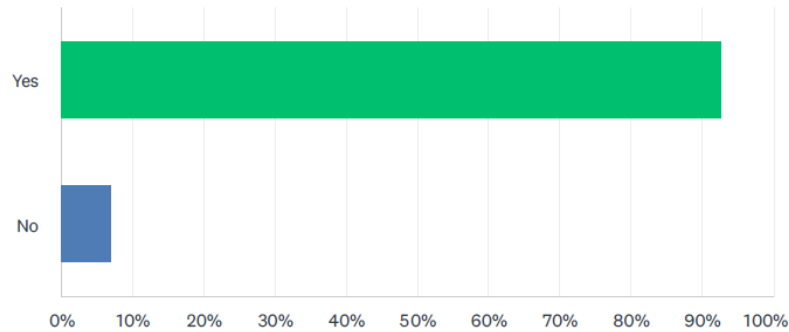
A further aim of EPLIT is to strengthen the relationship between practitioners entitled to represent parties in patent disputes in Europe.

Member Survey

2. EPLIT is an association with a diverse membership and several Working Groups (WG). We therefore conducted a member survey in light of this amicus curiae brief, the results of which are now available. A very short time was left for the members to respond, limiting the number of responses - nonetheless strong majorities resulted from most of the questions. The results presented herein therefore represent the (sometimes differing) opinions of EPLIT members who responded to the survey.

Assessing patentability in proceedings

3. Question: *In your opinion, should it be mandatory, during ex parte proceedings, to use the description and drawings to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC?*

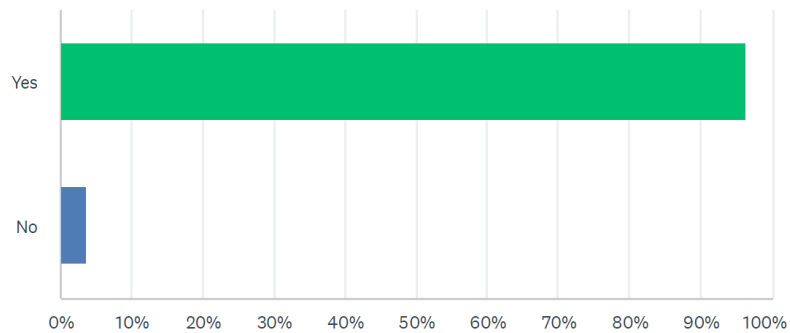


ANSWER CHOICES	RESPONSES	
Yes	92.86%	26
No	7.14%	2
TOTAL		28

Some respondents commented that their answer was based on Article 69 and its Protocol. The importance of homogeneity between patentability and infringement, before and after grant proceedings, European Patent Office and Courts, was stressed. It was al

One comment indicated that the use of the description and drawings to interpret the claims risks over-ruling Article 84 EPC, while this article was the one ensuring clarity.

4. Question: *In your opinion, should it be mandatory, during inter partes proceedings, to use the description and drawings to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC?*

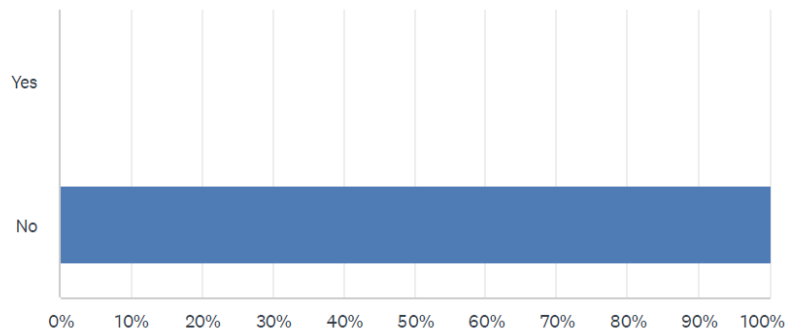


ANSWER CHOICES	RESPONSES	
Yes	96.43%	27
No	3.57%	1
TOTAL		28

In general comments for this question were close the comments relating to the previous one. One comment warned against the risks of the “broadest possible interpretation” in this respect.

Clarity

5. Question: *In your opinion, should the description and drawings be consulted only when a claim is unclear or ambiguous when read in isolation?*

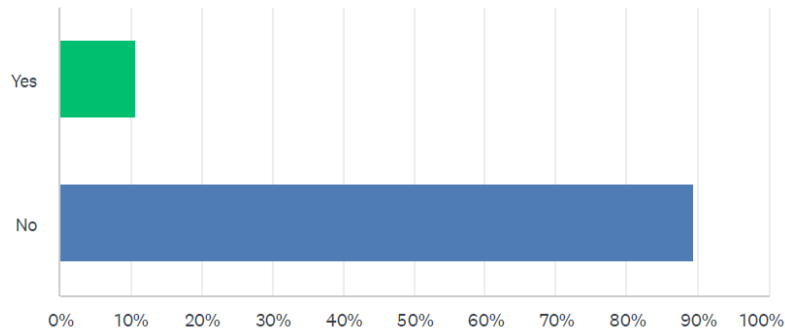


ANSWER CHOICES	RESPONSES	
Yes	0.00%	0
No	100.00%	28
TOTAL		28

Most of the comments stressed that due to the use of language, perfect clarity per se does not exist: there is need to interpret the claims, through construction of the whole patent.

Definitions in the description

6. Question: *In your opinion, 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 claim to assess patentability?*



ANSWER CHOICES	RESPONSES	
Yes	10.71%	3
No	89.29%	25
TOTAL		28

Comments stressed the importance of compulsory definitions provided in the description, but also the fact that in many occurrences, the description relates to non-exhaustive examples which do not aim at providing an exclusive interpretation of the claims.

Yours sincerely,

Ole Bokinge
Chair of EPLIT WG "Substantive Law"

Henri Bourgeois
President, EPLIT