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Rijswijk, October 9, 2025

Your ref.	:	**G1 / 25**
Our ref.	:	ND10169NL02
Patent no.	:	EP2124521
Country	:	Europe
In the name of	:	Knauf Insulation
		"HYDROPONICS GROWING MEDIUM"

To the attention of Mr. Nicolas Michaleczek

Reference is made to the Communication from the Enlarged Board of Appeal concerning case G 1/25. The undersigned would like to make use of the opportunity to file written statements in accordance with Article 10 of the Rules of Procedure of the Enlarged Board of Appeal (OJ EPO 2015, A35).

By interlocutory decision T 697/22 of 29 July 2025 ("the Referring Decision"), Technical Board of Appeal 3.3.02 (the Referring Board") referred the following questions of law to the Enlarged Board.

Q1 If the claims of a European patent are amended during opposition proceedings or opposition-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description of the patent, is it necessary, to comply with the requirements of the EPC, to adapt the description to the amended claims so as to remove the inconsistency?
Q2 If the first question is answered in the affirmative, which requirement(s) of the EPC necessitate(s) such an adaptation?
Q3 Would the answer to questions 1 and 2 be different if the claims of a European patent application are amended during examination proceedings or examination-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description of the patent application?

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1. The points of law in Q1 and Q2 of the present G 1/25 and that of G 1/24 are very similar. Indeed, in the proceedings of G 1/24 concern was expressed by members of the public that the issue of amending a description -to ensure consistency between the claims and the description- would be decided without proper consultation.

2. G 1/24 concerns the interpretation of the claims. This point of law was decided by the introduction of a new standard:

> *"The description and drawings shall always be consulted to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC, and not only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation."*

3. G 1/25 concerns the description as granted (Questions 1 and 2). Moreover, it concerns the situation when an amendment of the claims in opposition proceedings or opposition-appeal proceedings introduces an inconsistency between the amended claims and the unamended description of the patent.

4. Q3 concerns an inconsistency between the claims and the description of a patent application. Q3 seems inadmissible as an answer to it is not necessary for the Referring Board to reach a decision in the case before it. The Referring Decision does not concern an amendment made during examination proceedings or examination-appeal proceedings, that introduces an inconsistency between the amended claims and the description of the patent application. Moreover, this issue has been considered by the Enlarged Board in G 1/24. The answer provided in G 1/24, Reasons 20 is relevant.

> *"20. The above considerations highlight the importance of the examining division carrying out a high quality examination of whether a claim fulfils the clarity requirements of Article 84 EPC. The correct response to any unclarity in a claim is amendment. This approach was emphasised in the Comments of the President of the EPO (see para 87, 109 and last sentence of para 135 of these comments)."*

5. Q1 and Q2 are considered to be admissible. The Referring Decision identifies diverging case law. In addition both questions concern a point of law of fundamental importance.

6. In order to answer Q1 and Q2 in G 1/25, the undersigned considers it relevant to reflect on its link with G 1/24. G 1/24 is a new standard which aims to harmonize the proceedings before the EPO with that of the national courts and UPC. Since the description must be consulted[1] to interpret the claims, it is essential that the description has been subjected to a high quality examination. G 1/25 should not undermine the new standard of G 1/24.

[1] The expressions "are always referred to" in Reason 19 and "shall always be consulted" in the Order of G 1/24 are different from the expression "must always be used" that has been used in Headnote 2 of the order of the UPC Court of Appeal of 26 February 2024 in NanoString Technologies -v- 10x Genomics, (as rectified by the order of 11 March 2024). This difference in wording has lead some to question the intended meaning of these expressions. It would help if the EBA reflects on this.

7. Both G 1/24 and G 1/25 concern inconsistencies. G 1/24 considered an inconsistency between the description and the claim and its effect on the interpretation of the claim, whereas G 1/25 concerns an inconsistency as the result of an amendment in opposition proceedings or opposition proceedings in appeal. Should the inconsistency be allowed to remain, then upon application of Article 69 EPC and its protocol in subsequent court proceedings, it may adversely affect the process of interpreting a claim.

8. Some courts may ignore the inconsistencies, for instance, when making use of the prosecution file history. Others may be prohibited from using the file wrapper and will rely only on the description and drawings, if any, and thus arrive at a scope that is different from what was intended by the EPO. Allowing inconsistencies to occur would therefore jeopardize the philosophy of harmonization that is the basis of the new standard set in G 1/24 and lead to legal uncertainty. Both of which are highly undesirable.

9. In G 1/24 it was deemed unattractive that the EPO deliberately adopt a contrary practice to that of the tribunals that are downstream of its patents. It would seem equally unattractive that EPO would allow a practice of maintaining patents in opposition proceedings in amended form that may be the cause of a divergence in decisions by these tribunals where some may have the freedom to apply the principle of file wrapper estoppel and others do not.

10. In the light of the above, it follows that the desired answer to Q1 is affirmative.

11. Since the first question is answered affirmative, the remaining issue concerns Q2, on the requirements of the EPC that necessitate such an adaption.

12. The description of the invention and the claims are separate components of the European patent application. See Article 78(1)(b) and (c) EPC. Article 84 EPC concerns the claims.

    "They shall be clear and concise and be supported by the description."

    This therefore raises the question whether Article 84 is directly applicable as requirement of the EPC that necessitates the adaptation set out in Question 1.

13. Article 84 appears to suggest that a claim must be amended if the requirement is not met. In practice Article 84 is equally used by EPO to amend the description, i.e., to order the removal of any inconsistencies by amending the description. See the Guidelines **F-IV, 4.3.**

14. The Enlarged Board may wish to consider that Article 84 EPC by itself is not entirely satisfactory as legal basis to require the removal of inconsistencies between the description and the amended claims in opposition proceedings. Indeed, and analogous to G 1/24, reasons 10, the Enlarged Board is invited to consider Article 84 EPC and its effect on claim interpretation under Article 69 EPC and its Protocol, and apply the general principles that these articles have in common. Such a decision would also be in line with the case law in T 1024/18 (see reasons 3.1.2 on established case law and on RPBA 2020); T3097/19 (see Headnote 3); T2685/19 (See Reason 6, 5th paragraph) and T1579/17 (See Reason 1.5).

15. In G 1/24 it has been clarified that an inconsistency between the claim and the description cannot be ignored, since the description must be consulted to interpret the claims. In G 1/24 the inconsistency was the result of an amendment of the claims during examination (introduction in the claim of the expression “gathered sheet”). In G 1/25 the inconsistency was the result of the amendment of the claims during opposition, without appropriately and timely amending the description. G 1/24 and G 1/25 are both dealing with inconsistencies between the claims and the description. A decision in G 1/25 should therefore be in agreement with the new standard set by the recent decision in G 1/24.

16. The Enlarged Board should therefore answers Question 2 as follows: “An amendment of the claim in opposition proceedings causing an inconsistency with the description does not meet the requirements of Article 84 EPC and the general principles in support of this Article, and of Article 69 EP and its protocol. The correct response to any unclarity in a claim is amendment, either of the claim or the description. The patentee must remove any inconsistencies that are introduced by amending the claims in opposition proceedings by amending the description either by deleting the inconsistent embodiments or marking them appropriately so that it is clear that they do not fall within the subject-matter for which protection is sought.”

Yours Sincerely,

Marcel C.J.A. Kortekaas
European patent attorney