

above condition referred to the ability to conceptually identify, by comparison of the claimed subject-matter of the "OR" claim with the disclosure of the multiple priority documents, a limited number of clearly defined alternative subject-matters to which the multiple rights of priority claimed could be attributed or not (cf. examples in the Memorandum drawn up by FICPI (M/48/I, Section C) for the Munich Diplomatic Conference in 1973, as cited in G 2/98).

T 571/10 expressly applied the approach of T 1222/11. The application in suit, which concerned a pharmaceutical composition, and D9, also a European application, shared the same filing date and claimed priority from the same earlier national application. By comparing the generic subject-matter of claim 1 in issue with the priority document, the board identified two clearly defined alternative subject-matters (a) and (b) as being encompassed by the claim, but not spelt out in it. Only alternative (a) was fully disclosed in the priority document and therefore enjoyed the claimed priority. D9 could belong to the state of the art under Art. 54(3) EPC only in so far as the priority of the application in suit was not validly claimed while the priority of D9 was. For alternative (a) of claim 1, this was not the case, since D9 had no valid earlier effective date. For alternative (b) of claim 1, D9 was state of the art under Art. 54(3) EPC only for the subject-matter for which the priority claimed for D9 was valid, which was that of alternative (a). This subject-matter was not novelty-destroying for the subject-matter of alternative (b) of claim 1, as it had no overlap with the latter.

The decision headnote states: "In a case in which a single priority is claimed for a given application and a number of features of a claim of said application are generalisations of specific features disclosed in the priority document, a partial priority is to be acknowledged, as long as it is possible to conceptually identify, by a comparison of the claimed subject-matter with the disclosure of the priority document, a limited number of clearly defined alternative subject-matters, including among the alternatives the specific embodiments which are directly and unambiguously derivable from the priority document. In order for this condition to be met, it is not necessary that the clearly defined alternative subject-matters are spelt out as such in the application, nor that the word "or" actually occurs. This condition extends to the case of multiple priorities. In that case, a comparison with the disclosure of each of the priority documents is necessary and for each of the clearly defined alternative subject-matters the earliest priority from which the alternative subject-matter is directly and unambiguously derivable is acknowledged."

5.3.2 Referral case G 1/15 ("Partial priority")

The patent in suit in case T 557/13 of 17 July 2015 (OJ 2016, A87) had been granted on a divisional application. The opposition division concluded that an intermediate generalisation in granted claim 1 with respect to the disclosure of priority document D16 did not give rise to the claiming of a limited number of clearly defined alternative subject-matters (cf. G 2/98, OJ 2001, 413). Hence, although the patent met the requirements of Art. 76(1) EPC, the subject-matter of claim 1 did not enjoy the priority date of parent application D1. D1 was thus considered to be state of the art under Art. 54(3) EPC, and claim 1 to lack novelty in view of the use of the product of example 1 disclosed identically in D16 and D1. For the board, the question to be resolved was whether claim 1 enjoyed