

including other compositions with a gap width outside the range 5% to 33%. Thus, in the present case, the mere application of an assessment pursuant to Art. 123(2) EPC to the assessment of the validity of the priority claim did not allow the conclusion that D1 and D22 related in part to the same invention and therefore that the priority was not valid over the whole scope of claim 1.

T 437/14 of 12 March 2019 was the board's final decision following its referral of questions on undisclosed disclaimers to the Enlarged Board of Appeal in case G 1/16 (OJ 2018, A70; the board's findings on the admissibility of the undisclosed disclaimers are summarised in chapter II.E.1.7.2). In view of the added disclaimers, opponent 3 had argued that claim 1 did not validly claim a priority right and that its subject-matter lacked novelty over D57 and D58, two divisional applications of the application on which the patent was based. According to the board, for this, two conditions would have to be fulfilled: that at least one embodiment of the divisional application/s was encompassed by claim 1, and that claim 1 did not enjoy a priority right or at least a partial priority right for the part/s relating to those embodiment/s. Citing G 1/03 (OJ 2004, 413), the board was satisfied that the two disclaimers did not provide a technical contribution and fulfilled the requirements of Art. 123(2) EPC. Therefore the subject-matter of claim 1 enjoyed priority from the earlier application. As far as D57 and D58 disclosed specific compounds falling within claim 1 and validly claimed priority from the earlier application, claim 1 validly claimed a corresponding partial priority right from the earlier application for those compounds. Claim 1 was a generic "OR" claim encompassing alternative subject-matter directly and unambiguously disclosed in the priority document and was thus entitled to a partial priority for that alternative subject-matter within the meaning of G 1/15 (OJ 2017, A82). Thus, D57 and D58 did not form part of the state of the art under Art. 54(3) EPC for the purpose of assessing novelty.