

partial priority to the extent that the use of the product of example 1 as disclosed in D16 was encompassed by the more generic definition of claim 1, rather than being spelt out in it. In view of the differing approaches in previous board decisions, the board decided to seek clarification from the Enlarged Board of Appeal of the law on partial priority for generic "OR" claims and on the proper interpretation of the proviso of G 2/98 (point 6.7 of the Reasons).

In G 1/15 (OJ 2017, A82) the Enlarged Board of Appeal ruled that under the EPC, entitlement to partial priority may not be refused for a claim encompassing alternative subject-matter by virtue of one or more generic expressions or otherwise (generic "OR" claim) provided that said alternative subject-matter has been disclosed for the first time, directly, or at least implicitly, unambiguously and in an enabling manner in the priority document. No other substantive conditions or limitations apply in this respect. The Enlarged Board set out its interpretation of Art. 88(2) and (3) EPC. If a claim in the later application was broader than an element disclosed in the priority document, then priority could be claimed for such element. It did not matter whether partial priority was claimed for one element in one priority document only, for a plurality of elements disclosed in one priority document (first situation addressed in Art. 88(3) EPC), for a plurality of elements disclosed in more than one priority document (second situation addressed in Art. 88(3) EPC) or for a plurality of elements disclosed in a plurality of priority documents (situation addressed in Art. 88(2), second sentence, EPC). It was also of no relevance whether one claim encompassed only one element disclosed in a priority document or a plurality of elements disclosed in one or more priority documents. The Enlarged Board considered this interpretation to be confirmed by FICPI Memorandum C (M/48/I) of the *travaux préparatoires* to the EPC 1973, which could be said to express its intent (G 2/98, point 6.4 of the Reasons; see also Minutes of the Munich Diplomatic Conference of 1973, M/PR/I, "Article 86 (88) Claiming Priority", points 308 to 317), and by the Paris Convention. Thus, the EPC did not contain other requirements for recognising the right of priority beyond the same invention, whether for simple, multiple or partial priority, the last being regarded as a sub-group of multiple priorities. As a consequence, the proviso of G 2/98 could not be construed as implying a further limitation of the right of priority.

In assessing whether a subject-matter within a generic "OR" claim could enjoy partial priority, the first step was to determine the subject-matter disclosed in the priority document that was relevant, i.e. relevant in respect of prior art disclosed in the priority interval. This was to be done in accordance with the disclosure test laid down in the conclusion of G 2/98 and on the basis of explanations put forward by the applicant or patent proprietor to support his claim to priority, in order to show what the skilled person would have been able to derive from the priority document. The next step was to examine whether this subject-matter was encompassed by the claim of the application or patent claiming said priority. If the answer was yes, the claim was de facto conceptually divided into two parts, the first corresponding to the invention disclosed directly and unambiguously in the priority document, the second being the remaining part of the subsequent generic "OR"-claim not enjoying this priority but itself giving rise to a right to priority, as laid down in Art. 88(3) EPC. This also corresponded to the scheme described in the Memorandum. The task of determining the relevant disclosure of the priority document taken as a whole, and whether that subject-matter was encompassed by the