

claim in the subsequent application, was common practice in the EPO and among practitioners of the European patent system and as such should not pose any additional difficulty. Nor did it create uncertainty for third parties. The decisions reached in T 665/00, T 135/01, T 571/10 and T 1222/11 showed that it could be carried out without any need for additional tests or steps.

5.3.3 Application of G 1/15 in the jurisprudence of the boards

In case T 260/14 the opposition division had denied priority and found that claim 1 lacked novelty pursuant to Art. 54(3) EPC in view of a working example disclosed in the priority document (D5) itself, which example was also disclosed in the description of the patent in suit. (D5 had been dealt with as a case of "toxic priority".) In accordance with G 1/15 (OJ 2017, A82), the board first identified the working example as being relevant subject-matter disclosed in the priority document (cf. G 2/98, OJ 2001, 413). It then analysed whether claim 1 encompassed the working example, and whether that example was alternative subject-matter by virtue of a generic "OR" claim, by comparing the ambit of the claim with the content of the priority document. The claim was to a dental impression material comprising a base paste and a catalyst paste. Both pastes were described using generic features such as "polyethers" and "copolyether of ethyleneoxide". The working example was one specific embodiment of the claim. Multiple alternative working examples would be possible, with different variants falling within the generic features of the claim. The example was thus alternative subject-matter by virtue of a generic "OR" claim which fell within the ambit of claim 1. Hence, the part of claim 1 concerning that example was entitled to partial priority.

Further decisions applying the approach of G 1/15 are T 1526/12 (hair care composition), T 557/13 of 28 July 2017 (use of a cold flow improver), T 2466/13 (insulation panel), T 1399/13 (polymerisation process), T 88/14 (low-fat confectionary product), T 1519/15 (sensing circuit comprising sensing capacitors), T 1728/16 (solid pharmaceutical dosage form), T 401/19 (chromatographic purification method).

In T 282/12 the board held that, for reasons of consistency, the rationale of decision G 1/15 (OJ 2017, A82) must also apply in the context of deciding whether an application from which priority is claimed is the **first application** within the meaning of Art. 87(1) EPC (see more detailed summary of this aspect of the decision in chapter II.D.4.1. above). The board also cautioned in this context against assessing priority by performing a test under Art. 123(2) EPC, which approach had led the opposition division to find that D1 was the first application. The assessment of priority and of the requirement of Art. 123(2) EPC were both based on the concept of disclosure. However, applying a test under Art. 123(2) EPC could lead to wrong conclusions in certain circumstances because the concept of "partial" validity of an amendment does not exist, whereas "partial priority" does. Relating this to the facts of the case (gap width of coated tablet), the board agreed that amending a range from 5% to 33% (i.e. the range in claim 1 and in the priority document D1) to 3% to 33% (i.e. the range in the proprietor's earlier application D22) would result in the addition of subject-matter. However, both of these encompassed an identical part, i.e. the sub-range 5% to 33%, which defined alternative dosage forms that did not change their identity, whether they were claimed as such or as part of a broader group of compositions,