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Datasheet for the decision of 18 June 2025

Case Number: G 0001/24

Appeal Number: T 0439/22-3.2.01

Application Number: 14806330.8

Publication Number: 3076804

IPC: A24D1/00, A24F47/00

Language of the proceedings: EN

Title of invention:

HEATED AEROSOL GENERATING ARTICLE WITH THERMAL SPREADING WRAP

Patent Proprietor:

Philip Morris Products S.A.

Opponent:

Yunnan Tobacco International Co., Ltd.

Headword:

The description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity.

Relevant legal provisions:

EPC Art. 52, 53, 54, 55, 56, 57, 69, 69(1), 84

Protocol on the Interpretation of Article 69 EPC Art. 1

Keyword:

"referral is admissible" (yes)

"diverging lines of case law" (yes)

"The description and any drawings are always referred to when interpreting the claims" (yes)

Decisions cited:

G 0005/83, G 0002/88, G 0006/88, G 0003/08, G 0002/12,
T 1871/09, T 2684/17, T 1473/19, T 0439/22

Decision of the Unified Patent Court cited:

Order of the Court of Appeal of the Unified Patent Court (CoA UPC): *NanoString Technologies -v- 10x Genomics*,
UPC_CoA_335/2023, App_576355/2023 of 26 February 2024, as
rectified by the order of 11 March 2024

Headnote:

The claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC. 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.



Große Beschwerdeкаммер Enlarged Board of Appeal Grande Chambre de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: G 0001/24

D E C I S I O N of the Enlarged Board of Appeal of 18 June 2025

Appellant: Yunnan Tobacco International Co., Ltd.
(Opponent)
345 Panjing Street
Pan Long District
Kunming
Yunnan 650225 (CN)

Representative: EP&C
P.O. Box 3241
2280 GE Rijswijk (NL)

Respondent: Philip Morris Products S.A.
(Patent Proprietor)
Quai Jeanrenaud 3
2000 Neuchâtel (CH)

Representative: HGF
HGF Limited
1 City Walk
Leeds LS11 9DX (GB)

Referring decision: Interlocutory decision T 0439/22 of the
Technical Board of Appeal 3.2.01 of the
European Patent Office of 24 June 2024

Composition of the Board:

Chairman: C. Josefsson
Members:
I. Beckedorf
D. Rogers
A. Dimitrova
Y. Kythreotou Theodorou
P. Gryczka
W. Chandler

Summary of Facts and Submissions

I. By interlocutory decision T 0439/22 of 24 June 2024 ("the Referring Decision"), Technical Board of Appeal 3.2.01 ("the Referring Board") referred the following questions of law to the Enlarged Board:

Question 1

Is Article 69(1), second sentence, EPC and Article 1 of the Protocol on the Interpretation of Article 69 EPC to be applied to the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC?

Question 2

May the description and figures be consulted when interpreting the claims to assess patentability and, if so, may this be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation?

Question 3

May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?

Summary of the Appeal Proceedings / the Referring Decision

- II. The Referring Decision is an appeal against a finding of the opposition division rejecting the opposition. The patent in suit concerns an article for a vaping device, which contains an aerosol forming material (tobacco). A key issue in the appeal was whether claim 1 of the patent as granted was novel.
- III. Claim 1 as granted contains the feature that the material is a "gathered sheet". The patent proprietor-respondent on appeal argued that if this term is assigned its usual meaning in the art, claim 1 is to be regarded as novel. The appellant-opponent argued that if "gathered sheet" is interpreted in the light of the description, then it would have a broader, although still technically sensible meaning. This interpretation of "gathered sheet" would lead to a lack of novelty.
- IV. The Referring Board issued a communication in the pending appeal case in which it took the view that there was diverging case law on the issue of how patent claims should be interpreted.
- V. At the oral proceedings held before the Referring Board, the referral of questions to the Enlarged Board was discussed. In its interlocutory decision, the Referring Board considered that the conditions for a referral were met.
- VI. As regards Question 1, the Referring Board identified diverging lines of case law. One line of case law took Article 69 EPC and Article 1 of the Protocol as the legal basis for interpretation of patent claims when assessing the patentability of an invention under

Articles 52 to 57 EPC, another line of case law took Article 84 EPC as the basis. The Referring Board also identified a further line of case law which was not explicit as to which article of the EPC was the legal basis for interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC.

- VII. As regards Question 2, the Referring Board also identified diverging lines of case law. One line of case law was that a board only consulted the description and drawings when interpreting the claims to assess patentability if the person skilled in the art found a claim to be unclear or ambiguous when read in isolation. A further line of case law was that a board always consulted the description and drawings when interpreting the claims to assess patentability.
- VIII. As the Enlarged Board finds Question 3 to be inadmissible (see below in Reasons), no discussion of this question is necessary.

Course of proceedings before the Enlarged Board

- IX. The patent proprietor, the opponent and the President of the EPO have made submissions on the referred questions. In addition the Enlarged Board has received over 30 amicus curiae briefs.
- X. Oral proceedings were held before the Enlarged Board on 28 March 2025 in the presence of the patent proprietor, the opponent and the representatives of the President of the EPO.

XI. At the end of the oral proceedings the Chairman of the Enlarged Board of Appeal announced that the Enlarged Board would issue a decision in writing in due course.

Arguments presented during the proceedings

XII. The relevant submissions shall be referred to where necessary in the Reasons for the decision. For ease of reading this will be done without attribution.

Reasons for the Decision

Admissibility of the Referral

1. Question 3 is considered by the Enlarged Board to be encompassed within Question 2. As the Enlarged Board is going to give an answer to Question 2, the Enlarged Board considers that Question 3 is inadmissible as an answer to it is not necessary for the Referring Board to reach a decision in the case before it.
2. The Referring Decision identifies diverging case law as regards Questions 1 and 2. In addition both questions concern a point of law of fundamental importance. The answers to these questions will have an impact beyond the specific case at hand and will be relevant for a large number of similar cases before the Boards of Appeal, and before the examining and opposition divisions. A decision of the Enlarged Board on Questions 1 and 2 will serve to bring about a uniform application of the law.

3. The Enlarged Board thus considers that the referral is admissible as far as it is concerned with Questions 1 and 2.

Questions 1 and 2

4. It is not a matter of dispute that the departments of the EPO, in the course of their duties, are required to interpret patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC.
5. Question 1 concerns the legal basis in the EPC for carrying out this interpretation. The two positions on this question are that the legal basis in the EPC is either Article 69 EPC and Article 1 of the Protocol on the interpretation of Article 69 EPC ("the Protocol"), or Article 84 EPC.

The issue of legal basis in the EPC has been addressed in several decisions of the Enlarged Board, for example in G 2/88, G 6/88 (these cases identified Article 69 EPC and the Protocol as the legal basis) and G 2/12 (this case identified Article 84 EPC as the legal basis). The legal basis was not the decisive issue in any of these cases.

6. The Enlarged Board considers that neither Article 69 EPC and Article 1 of the Protocol, nor Article 84 EPC are entirely satisfactory as a basis for claim interpretation when assessing patentability.
7. Article 69 EPC and the Protocol are arguably only concerned with infringement actions before national courts and the UPC. Such a conclusion can be drawn from

the wording of Article 69 EPC and the Protocol, the drafting history of these provisions, and from their position in the EPC, (Article 69 EPC is found in Chapter III, "Effects of the European patent and the European patent application").

8. Using Article 84 EPC as an alternative basis for interpretation of the claims can also be criticised. Article 84 EPC addresses the content of the patent application and is formal in nature, does not mention the invention and provides no guidance on how to interpret claims. It only sets out an instruction to the drafter of what needs to be in the claims, and an instruction to the EPO to determine whether the claims meet that purpose (see T 1473/19 Reasons 3.8).
9. The Enlarged Board thus considers that there is no clear legal basis, in terms of an article of the EPC, for claim interpretation when assessing patentability. Given the above, the strictly formal answer to Question 1 would be "No". The Enlarged Board will, however, give some further guidance on this issue.
10. The above conclusion does not mean that it is necessary to invent from scratch new principles of claim interpretation. The Enlarged Board notes that, from the case law of the Boards of Appeal (see the case law described in Reasons 3.2 of the Referring Decision), whether Article 69 EPC or Article 84 EPC is taken as the basis for claim interpretation does not appear to affect the principles that are applied. In general terms, what the Boards of Appeal have done is apply the wording of these articles in an analogous way to the examination of patentability under Articles 52 to 57 EPC. There is thus an existing body of case law from

which the applicable principles of claim interpretation can be extracted.

11. The Referring Decision contains an extensive discussion of how the Boards of Appeal have interpreted patent claims when assessing patentability {see the Board of Appeals case law discussed in the Referring Decision, Reason 3.3.2(b), (in particular T 2684/17 Reasons 2.1.4 and T 1871/09 Reason 3.1), Reason 3.3.3, (in particular T 1473/19 Reasons 3.1 to 3.15 and 3.16 to 3.16.2), and Reason 3.3.4}.
12. From this case law the following principles of claim interpretation can be extracted:
 - 1) The claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC.
 - 2) The description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity.
13. Point 1) above can be considered to be a settled point in the case law of the Boards of Appeal, and indeed the Referring Decision does not suggest otherwise. As regards point 2), this has given rise to diverging case law.
14. The Enlarged Board, in adopting the above position, is thus rejecting the case law of the Boards that sees no need to refer to the descriptions and drawings when interpreting a claim, unless the claim is unclear or ambiguous. This is the issue raised in Question 2.

15. The diverging case law under para 12, point 2) above, where the description is referred to only in cases of unclarity or ambiguity, is contrary to the wording, and hence the principles, of Article 69 EPC. It is also contrary to the practice of the national courts of the EPC states and to the practice of the UPC (see Reasons 4.3 and 4.4.4 of the Referring Decision for a discussion of this national and UPC case law).
16. The Enlarged Board finds it a most unattractive proposition that the EPO deliberately adopt a contrary practice to that of the tribunals that are downstream of its patents. On this point, the Enlarged Board agrees with the harmonisation philosophy behind the EPC (see G 5/83, Reasons 6, and G 3/08, Reasons 7.2.2).
17. A further reason for rejecting this line of Board of Appeal case law is a logical one. The finding that the language of a claim is clear and unambiguous is an act of interpretation, not a preliminary stage to such an interpretative act.
18. The Enlarged Board thus answers Question 2 as follows: the description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity.
19. The Enlarged Board notes that the current case law of the UPC, as exemplified 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), appears to be consistent with the above conclusions.

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).
21. In the light of the above, the Enlarged Board finds itself in a position to answer the referred Questions 1 and 2 as set out in the Order below.

Order

The claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC. 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.

The Registrar:

N. Michaleczek

The Chairman:

C. Josefsson

