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Case number: G0001/25

Communication from the Enlarged Board of Appeal

Any written submissions in response to this communication should be filed by 17 April 2026.

The Rapporteur: D. Rogers
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Annex(es):3 pages

Registered letter



Introduction

This communication is issued, in accordance with Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA), to inform the eligible parties in advance of the oral proceedings of some points which, in the Enlarged Board's view, are likely to be addressed in those proceedings. Other issues may also be discussed at the oral proceedings. The Enlarged Board is not bound in any way by any opinion herein expressed.

This case concerns the three questions referred to the Enlarged Board by Technical Board of Appeal 3.3.02 in its interlocutory decision T 0697/22 ("the Referring Board" and "the Referral Decision").

Interpretation and scope of the questions and admissibility

The Enlarged Board does not see a need for the referred questions to be re-drafted or re-arranged.

The Enlarged Board considers all questions in the referral to be admissible.

Answers to the questions

The Enlarged Board has the following observations on the referred questions:

Question 1

If the claims of a European patent are amended during opposition proceedings or opposition-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description of the patent, is it necessary, to comply with the requirements of the EPC, to adapt the description to the amended claims so as to remove the inconsistency?

The first issue that has to be dealt with here is the meaning to be given to "inconsistency".

Question 1 can be answered by the application of logic: there are only two types of inconsistencies, those that cause a non-compliance with the EPC and those that do not.

If the inconsistency does not cause a non-compliance with the EPC, (hereafter an "Inconsistency of the First Type"), then no adaptation of the description is necessary.

The only case that is relevant is the inconsistency that causes a non-compliance with the EPC (hereafter an "Inconsistency of the Second Type"). In the case of such an inconsistency the answer to Question 1 is that a further amendment of the description, and/or the claims is necessary in order to comply with the EPC.

That this logically follows from Question 1 can be seen by replacing "inconsistency" in Question 1 with "inconsistency that causes a non-compliance with the EPC", as is done below:

If the claims of a European patent are amended during opposition proceedings or opposition-appeal proceedings, and the amendment introduces an inconsistency that causes a non-compliance with the EPC between the amended claims and the

description of the patent, is it necessary, to comply with the requirements of the EPC, to adapt the description to the amended claims so as to remove the inconsistency that causes a non-compliance with the EPC?

Thus, with an Inconsistency of the Second Type, the answer to Question 1 is “Yes”.

Question 2

If the first question is answered in the affirmative, which requirement(s) of the EPC necessitate(s) such an adaptation?

As the only inconsistencies that are relevant are those that cause non-compliance with the EPC, the Articles or Rules of the EPC that necessitate such an adaptation are those Articles and Rules of the EPC that are not being complied with.

The Enlarged Board notes that although Questions 1 and 2 refer to the EPC in its entirety, the Referral Decision mainly focuses on Article 84 EPC. In particular, the Referral Decision identifies two approaches to Article 84 EPC, one of which sees Article 84 EPC as providing a basis for requiring the adaptation of the description (hereafter “the First Line of Case Law”) and one that does not (hereafter “the Second Line of Case Law”).

For a discussion of the First Line of Case Law, see para 14.2 and 14.3.1 of the Referral Decision.

For a discussion of the Second Line of Case Law, see para 15 of the Referral Decision.

As regards the Second Line of Case Law, the Referral Decision only cites 4 cases: T 1989/18, T 1444/20, T 2194/19 and T 56/21 (see para 15 of the Referral Decision).

These are all ex parte cases, none pre-date 2021. One of these decisions, T 2194/19 does not seem to diverge from, but agrees, at least in principle, with the First Line of Case Law.

Of these 4 decisions, T 56/21 deals the most exhaustively with the issues at hand.

Turning now to T 56/21, this adopts a particular interpretation of Article 84 EPC which is found at para 53, 64 and 65:

“D. Article 84 EPC - Interpretation of the requirement of support by the description

I. Title and wording

53. It follows from the title and wording of Article 84 EPC that this article states a requirement in respect of the claims and not of the description. This is confirmed by the phrase that the claims must be supported by the description. Indeed, it is the definition in the claims of the matter for which protection is sought that needs support. This means that the subject-matter of a claim must be taken from the description, and that it is not admissible to claim subject-matter which is not described. Thus, the ordinary meaning of the words does not support a requirement to bring the description into agreement with claims intended for grant by deleting or disclaiming subject-matter in the description which is not claimed.

...

E. Article 84 EPC - Interpretation of the requirement of clarity

I. Title and wording

64. According to the title and wording of Article 84 EPC, the requirements of clarity and conciseness are stated in respect of the claims and not of the description (see point 16. above regarding clarity and completeness of the description). Thus, claims must be clear per se, which means that the terms used to define the matter for which protection is sought must be intelligible and free of contradiction.

65. Rule 43(6) EPC confirms that claims should be clear in themselves. Specifically, claims may rely on references to the description or drawings only where necessary. Thus, exceptionally, an applicant may resort to references to the description to define the matter for which protection is sought. Similarly, Rule 43(7) EPC provides that reference signs in drawings may be used in the claims if the intelligibility of a claim can thereby be increased. However, these reference signs are not to be construed as limiting the claim.”

It thus seems that one of the issues, and perhaps the main issue, that the Referral Decision is concerned with is: “Is the interpretation of Article 84 EPC given in T 56/21 correct?”. The Referral Decision sets out its understanding of T 56/21 in the paragraph of para 15.1.3 on page 58 as being that:

“...the requirement of support in the description as contained in Article 84 EPC only meant that the subject-matter of a claim must be taken from the description and that it is not admissible to claim subject-matter which is not described. But this, the deciding board underlined, did not support a requirement to bring the description into agreement with claims intended for grant by deleting or disclaiming subject-matter in the description which is not claimed”.

To the extent that T 56/21 is concerned with support and Article 84 EPC, its criticisms of the First Line of Case Law referred to in the Referral Decision are concerned with policy and a particular approach to claim interpretation – see para 75 – 83 of T 56/21.

The Enlarged Board is currently of the view that many of the conclusions of T 56/21 are inconsistent with decision G 1/24 and its underlying reasoning.

The Enlarged Board is thus currently of the view that the First Line of Case Law should be followed as regards Article 84 EPC, and not the approach set out in T 56/21.

Question 3

Would the answer to questions 1 and 2 be different if the claims of a European patent application are amended during examination proceedings or examination-appeal proceedings, and the amendment introduces an inconsistency between the amended claims and the description of the patent application?

The Enlarged Board sees no reason to draw a distinction between the examination and opposition proceedings in the context of this referral. The answer to Question 3 is “No”.

Final Remarks

Any written submissions in response to this communication should be filed by **17 April 2026**.

The Rapporteur :

D. Rogers

