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**Datasheet for the interlocutory decision
of 7 February 2019**

Case Number: T 0318/14 - 3.3.01

Application Number: 10718590.2

Publication Number: 2429542

IPC: A61K35/74, A23L1/30, A61P37/08,
A61P1/12

Language of the proceedings: EN

Title of invention:

PREVENTION AND TREATMENT OF ALLERGIC DIARRHOEA

Applicant:

Société des Produits Nestlé S.A.

Headword:

Double patenting

Relevant legal provisions:

EPC Art. 54(2), 54(3), 60(1), 63(1), 64(1), 67(1), 67(2),
76(1), 89, 97(2), 125, 139(3)
Vienna Convention on the Law of Treaties (1969) Art. 31(2)(a),
Art. 31(2)(b), Art. 31(3)(a), Art. 31(3)(b), Art. 32

Keyword:

Referral to the Enlarged Board of Appeal - (yes)

Decisions cited:

G 0001/91, G 0001/97, G 0004/98, G 0001/05, G 0001/06,
G 0002/10, G 0001/11, G 0002/12, G 0002/13, G 0001/15,
J 0005/91, J 0032/95, T 0118/91, T 0080/98, T 0587/98,
T 0998/99, T 0015/01, T 0475/02, T 0307/03, T 0411/03,
T 0425/03, T 0467/03, T 0468/03, T 0936/04, T 0005/05,
T 0579/05, T 0877/06, T 1562/06, T 1708/06, T 1391/07,
T 1423/07, T 0051/08, T 0616/08, T 2402/10, T 2461/10,
T 2563/11, T 0879/12, T 1780/12, T 0696/16, T 1252/16

Catchword:

The following questions are referred to the Enlarged Board of Appeal:

1. Can a European patent application be refused under Article 97(2) EPC if it claims the same subject-matter as a European patent which was granted to the same applicant and does not form part of the state of the art pursuant to Article 54(2) and (3) EPC?
- 2.1 If the answer to the first question is yes, what are the conditions for such a refusal, and are different conditions to be applied depending on whether the European patent application under examination was filed
 - a) on the same date as, or
 - b) as a European divisional application (Article 76(1) EPC) in respect of, or
 - c) claiming the priority (Article 88 EPC) in respect of a European patent application on the basis of which a European patent was granted to the same applicant?
- 2.2 In particular, in the last of these cases, does an applicant have a legitimate interest in the grant of a patent on the (subsequent) European patent application in view of the fact that the filing date and not the priority date is the relevant date for calculating the term of the European patent under Article 63(1) EPC?



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Case Number: T 0318/14 - 3.3.01

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.3.01
of 7 February 2019

Appellant: Société des Produits Nestlé S.A.
(Applicant) Entre-deux-Villes
1800 Vevey (CH)

Representative: Cogniat, Eric Jean Marie
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 26 September
2013 refusing European patent application No.
10718590.2 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman A. Lindner
Members: T. Sommerfeld
L. Bühler

Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division by which European patent application No 10718590.2, based on an international application published as WO 2010/130661, was refused under Article 97(2) EPC "in conjunction with Article 125 EPC".
- II. The examining division found that claim 1 of the sole claim request on file was directed to subject-matter which was "100% identical" to the subject-matter claimed in European patent No 2 251 021, which was granted on European patent application No 09159932.4, the priority document of the present application. This was held to be contrary to the principle of the prohibition on double patenting referred to in decisions G 1/05 and G 1/06.
- III. The applicant (hereinafter, the appellant) lodged an appeal against this decision, requesting that the decision be set aside and that a patent be granted according to the main claim request filed with the statement of grounds of appeal (and identical to the claims refused by the examining division). It also requested reimbursement of the appeal fee pursuant to Rule 103 EPC and, as an auxiliary request, the referral of a question to the Enlarged Board of Appeal.
- IV. On 20 June 2018, the board summoned the appellant to oral proceedings. In a communication dated 14 December 2018 it gave its preliminary opinion.
- V. By letter dated 1 February 2019, the appellant commented on the board's preliminary opinion and filed the following documents:

- N1 Minutes of the proceedings of Main Committee I of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents, document M/PR/I, No 199 to 211, 665 to 669, and 857 to 867;
Report on the results of Main Committee I's proceedings, Annex I to document M/PR/I, page 188;
Report on the meeting of the Plenary - Final Meeting, document M/PR/K/2, page 188, No 14.
- N2 Comments of 8 May 1973 by the Norwegian delegation on the preparatory documents for the Munich Diplomatic Conference, document M/28, No 4, 5 and 7.
- N3 Minutes of the 10th meeting of Working Party I, held in Luxembourg from 22 to 26 November 1971, document BR/144 e/71, No 1 to 5, and 117 to 120.
- N4 Minutes of the 6th meeting of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 19 to 30 June 1972, document BR/219 e/72, No 47 to 50.
- N5 "National law relating to the EPC", 19th edition, October 2018, Table X.
- N6 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012, L 361/1.
- N7 Ordonnance n° 2018-341 du 9 mai 2018 relative au brevet européen à effet unitaire et à la juridiction unifiée du brevet.

VI. Oral proceedings were held on 7 February 2019.

VII. The appellant's arguments may be summarised as follows:

Main request

- The prohibition on double patenting set forth in the Guidelines for Examination in the European Patent Office, Part G-IV, 5.4, which follow an obiter dictum of the Enlarged Board of Appeal in decisions G 1/05 and G 1/06, does not apply in a situation of internal priority, i.e. where a European application claims priority from an earlier European application for which a European patent was granted, the second application claims the same subject-matter as the granted patent, and there is common ownership between the second application and the patent.
- G 1/05 and G 1/06 and the *travaux préparatoires* to the EPC 1973 do not concern double patenting arising from internal priority. Decisions G 1/05 and G 1/06 were made in the context of divisional applications. In support of this argument, the appellant drew attention to the reference in the *travaux préparatoires* to European patent applications of the same applicant which have the same date of filing.
- The board in decision T 1423/07 rightly acknowledged that the longer term of protection possibly available with a later date of filing constitutes a legitimate interest in the grant of the subsequent application. A refusal based on the principle of a prohibition on double patenting is thus not justified even if the *obiter dictum* of the Enlarged Board of Appeal in G 1/05 and G 1/06 is

applied to double patenting arising from internal priority.

Referral to the Enlarged Board of Appeal

- Article 125 EPC does not provide a basis for refusing a European application on the ground of double patenting arising from internal priority. Double patenting is not a matter of procedural law only, but clearly has a substantive component. According to decision G 1/97, Article 125 EPC merely provides a means of supplementing existing procedures in case a *lacuna* becomes apparent in an EPC provision. Furthermore, there is no gap in the law since the absence of a prohibition on double patenting is deliberate.

- Point 665 of the minutes of the proceedings of Main Committee I of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents, document M/PR/I (document N1 in the present proceedings), cannot be considered as an agreement between all the parties in connection with the conclusion of the treaty within the meaning of Article 31(2) (a) of the Vienna Convention on the Law of Treaties of 23 May 1969. The statement by a majority does not equate to unanimous approval by all parties. There was, moreover, no subsequent agreement on this point of law.

- Documents BR/144 e/71 and BR/219 e/72 (documents N3 and N4 in the present proceedings), relied on in decision T 2461/10, relate to meetings preceding the Munich Diplomatic Conference. The minutes of the Munich Diplomatic Conference (document M/PR/I,

document N1 in the present proceedings) should thus have more weight since they reflect the latest position of the parties to the EPC.

- Article 139(3) EPC is the sole article in the EPC that deals with double patenting, and it gives competence to the Contracting States to legislate on this issue. In view of Article 2(2) EPC, national law under Article 139(3) EPC should apply to two identical European patents granted in a situation of internal priority. This provision leaves no room for a prohibition on double patenting under the EPC.

- A prohibition on double patenting arising from divisional applications under Article 76 EPC or in the case of several identical applications filed on the same date by the same applicant can be accepted according to the principle "*ne bis in idem*". However, such prohibition is not justified in a situation of internal priority, which does not involve the same substantive rights required for the "*ne bis in idem*" principle to apply.

VIII. The appellant requested that the decision under appeal be set aside and that a patent be granted according to the claims of the main claim request filed with the statement of grounds of appeal, and that the appeal fee be reimbursed pursuant to Rule 103 EPC.

On an auxiliary basis, the appellant requested that the following questions be referred to the Enlarged Board of Appeal:

- "1. Can a European patent application be refused under Article 97(2) EPC if it claims the same subject-

matter as a European patent granted to the same applicant which does not form part of the state of the art pursuant to Article 54(2) and (3) EPC?

- 2.1 If the answer to the first question is yes, what are the conditions for such a refusal and are different conditions to be applied where the European patent application under examination was filed
- a) on the same date as, or
 - b) as a European divisional application (Article 76(1) EPC) in respect of, or
 - c) claiming the priority (Article 88 EPC) in respect of a European patent application on the basis of which a European patent was granted to the same applicant?
- 2.2 In particular, in the latter case, does an applicant have a legitimate interest in the grant of the (subsequent) European patent application in view of the fact that the filing date and not the priority date is the relevant date for calculating the term of the European patent under Article 63(1) EPC?"

Reasons for the Decision

I. The contested decision

1. The present European patent application was refused under Article 97(2) EPC in conjunction with Article 125 EPC on the ground that two patents could not be granted to the same applicant for one invention, in accordance with the principle of a prohibition on double patenting as acknowledged by the Enlarged Board of Appeal in an obiter dictum in decisions G 1/05 and G 1/06 (OJ EPO 2008, 271 and 307, respectively).

2. The examining division found that there was no express provision in the EPC on "double patenting". However, it relied on the Enlarged Board's acceptance of a prohibition on double patenting, based on the notion that an applicant has no legitimate interest in proceedings leading to the grant of a second patent for the same subject-matter if he already possesses one granted patent for that subject-matter (G 1/05 and G 1/06, point 13.4). Despite this statement having been made in the context of divisional applications, the principle also extended to the situation of double patenting arising from internal priority, i.e. where a European patent application claims priority from an earlier European patent application of the same applicant and both applications proceed to grant, thereby leading to the same applicant being granted a second patent for the same subject-matter. Moreover, decision T 1423/07, which had held that a legitimate interest existed in such a situation, was not applicable since in said case the applicants of the earlier and the subsequent European patent application were different.

II. Main request

3. The appellant's main request is for the grant of a patent on the basis of claims 1 to 9 filed with the statement of grounds of appeal. These claims are identical to the claims refused by the examining division and are also identical to the claims of European patent No 2 251 021, which was granted on the basis of the appellant's priority application.
4. The decision under appeal can be set aside and the main request allowed only if
 - either the prohibition on double patenting as acknowledged in G 1/05 and G 1/06 is not applicable to the situation of double patenting arising from internal priority,
 - or a second patent can nevertheless be granted in line with the *ratio decidendi* of T 1423/07.
- a) **G 1/05 and G 1/06 not applicable to a situation of internal priority?**
5. With regard to the first of the above alternatives, the appellant argued that the Enlarged Board's statement on the principle of a prohibition on double patenting in point 13.4 of G 1/05 and G 1/06 was made in the context of divisional applications. Double patenting arising from internal priority was not encompassed by that statement. Moreover, the *travaux préparatoires* to the EPC 1973 showed that a prohibition on double patenting had been discussed only with respect to European patent applications of the same applicant having the same date of filing (minutes of the proceedings of Main Committee I of the Munich Diplomatic Conference for the setting

up of a European System for the Grant of Patents, M/PR/1 points 665 to 668 and 857 to 865).

6. The board does not dispute that the Enlarged Board made its statement on the principle of a prohibition on double patenting in point 13.4 of G 1/05 and G 1/06 in the context of answering questions on the application of Article 76 EPC. Nevertheless, the first sentence of point 13.4 of G 1/05 and G 1/06 sets out the principle in general terms, as follows:

"The Board accepts that the principle of prohibition of double patenting exists on the basis that an applicant has no legitimate interest in proceedings leading to the grant of a second patent for the same subject-matter if he already possesses one granted patent therefor."

7. There is no express wording in the Enlarged Board's statement that would confine this principle to two or more applications of the same applicant which not only claim the same subject-matter but also have the same date of filing pursuant to Article 76(1) EPC. Since even *obiter* remarks of the Enlarged Board reflect a considered opinion, the absence of a reference to divisional applications in its statement on a prohibition on double patenting was, in the board's view, intentional, rather than an inadvertent omission.

Moreover, the justification which the Enlarged Board gave for the prohibition was the requirement that a party to proceedings before the EPO must have a legitimate interest in those proceedings. This requirement is itself a principle of procedural law. The notion of "legitimate interest" requires that the result intended to be achieved by the requests

submitted in the proceedings in question is reasonable and acceptable in law. It is a broader legal principle than the prohibition on double patenting, which indeed could be regarded as a specific case of the former.

The principle requiring a legitimate interest in the proceedings is also relevant to the situation of double patenting arising from internal priority. An applicant's interest in "extending" the term of protection for an invention protected by a patent granted on the priority application was considered by the Enlarged Board to justify an exception to the prohibition on double patenting (see points 12 to 14 and 65 to 67 below). Nevertheless, the function of internal priority is not to allow for double patenting. Its purpose is rather the same as for "external priority", namely to safeguard, for a limited period, the interests of a patent applicant in his endeavour to obtain international protection for his invention (see G 1/15, OJ EPO 2017, A82, points 4.3.2 and 4.3.3; T 15/01, OJ EPO 2006, 153, point 32). Therefore, double patenting resulting from internal priority - even though rightfully claimed (T 15/01, point 26) - does not fall outside the scope of application of the prohibition as formulated by the Enlarged Board in the first sentence of point 13.4 of G 1/05 and G 1/06.

8. The remainder of point 13.4 of G 1/05 and G 1/06 reads as follows:

"Therefore, the Enlarged Board finds nothing objectionable in the established practice of the EPO that amendments to a divisional application are objected to and refused when the amended divisional application claims the same subject-matter as a pending parent application or a granted parent patent. However,

this principle could not be relied on to prevent the filing of identical applications as this would run counter to the prevailing principle that conformity of applications with the EPC is to be assessed on the final version put forward (see point 3.2 above)."

9. The appellant's contention that the prohibition on double patenting applies to divisional applications only is not supported by this passage either. The context of the Enlarged Board's reasoning was the question whether and on what basis more restrictive conditions than those provided for in Article 76 EPC could be imposed on the filing of divisional applications (see G 1/05 and G 1/06, points VIII (d), and 13.1 to 13.3). After acknowledging the existence of a prohibition on double patenting as a general principle, the Enlarged Board dealt with the question posed to it by approving the Office's practice of not allowing two or more applications of the same applicant which are directed to the same subject-matter to proceed to grant. Furthermore, in line with its previous findings, the Enlarged Board clarified that it is the final version of the application put forward by the applicant which is to be assessed for conformity with the EPC. These conclusions with respect to the legal consequences of the prohibition on double patenting for the filing of divisional applications leave no scope to argue (by way of *argumentum e contrario*) that the Enlarged Board intended to limit the application of this principle to divisional applications.

10. In support of its argument that a prohibition on double patenting is limited to divisional applications, the appellant cited the *travaux préparatoires* to the EPC 1973. The board notes that the passages of the

proceedings of Main Committee I of the Munich Diplomatic Conference cited by the appellant (M/PR/1, points 665 to 668 and 857 to 865) deal with Articles 125 and 139 EPC and, furthermore, were not referred to in G 1/05 and G 1/06. These passages were relied on, at least in part, in later decisions by technical boards of appeal when seeking to identify the legal basis for a prohibition on double patenting in the EPC. However, they are not a suitable basis for arguing that there were limitations in the Enlarged Board's statement concerning a prohibition on double patenting in G 1/05 and G 1/06.

More particularly, the appellant relied on the reference in the above-mentioned passages to applications of the same applicant and with "the same date of filing" to support its argument that the Enlarged Board's statement in G 1/05 and G 1/06 was limited to double patenting arising from the filing of divisional applications. However, that reference to "the same date of filing" in the *travaux préparatoires* was made in the context of Article 125 EPC and not Article 76 EPC. Accordingly, this reference applies not only to divisional applications but also to two or more European patent applications of the same applicant claiming the same subject-matter which are filed independently of each other on the same day. Therefore, the limitation "having the same date of filing" cannot be read into the Enlarged Board's statement in G 1/05 and G 1/06.

11. For the above reasons, the board cannot accept that the Enlarged Board's general statement concerning a prohibition on double patenting (first sentence of point 13.4 of G 1/05 and G 1/06) is to be read as being

implicitly limited to divisional applications or applications having "the same date of filing".

b) Legitimate interest in extending the available term of protection?

12. The second of the alternative conditions for allowing the main request (see point 4 above) would require acknowledging that the applicant has a legitimate interest in being granted two patents in a situation of internal priority. In this context, the appellant referred to the fact that the term pursuant to Article 63(1) EPC of a patent granted on the basis of an earlier application differs from the term of a patent granted on the basis of a subsequent application claiming priority from said earlier application. This was because the filing date, and not the priority date, was the relevant date for calculating the patent term under Article 63(1) EPC. The longer term of protection possibly available as a result of the later filing had been acknowledged by the board in T 1423/07 to constitute a legitimate interest in the grant of the subsequent application, which excluded a refusal for double patenting.

13. However, the board notes that later decision T 2461/10 raised doubts about the legal consequence of allowing double patenting in cases of internal priority. In that decision, the board pointed to the fact that double patenting would result in a maximum of 21 years of patent protection for the same subject-matter, which could hardly be reconciled with the wording and intention of Article 63(1) EPC (T 2461/10, point 14).

It is true that in T 2461/10 the question whether an applicant has a legitimate interest in double patenting

arising from internal priority was left unanswered. However, legal rulings are characterised not by their verdicts, but by their grounds (G 3/08, OJ EPO 2011, 10, point 7.3.7). In view of the comprehensive reasoning provided by the board in point 14 of the decision, it may safely be assumed that it disagreed with T 1423/07 that a legitimate interest exists in these circumstances.

14. The present board sees some merit in the reservations expressed by the board in point 14 of T 2461/10. Article 63(1) EPC could be regarded as posing an obstacle to double patenting when it arises from internal priority, irrespective of whether the prohibition exists as a general principle. Moreover, as noted by the board in T 2461/10, before the prohibition on double patenting comes into operation, two independent applications exist, and the applicant can choose which one he wishes to pursue to grant. Double patenting is thus not the inevitable consequence of a claim to internal priority.

In view of the divergences in the case law, the board is currently not in a position to confirm decision T 1423/07 and acknowledge that the appellant in the present case has a legitimate interest in obtaining a longer patent term by the grant of a second patent for the same subject-matter as in European patent No 2 251 021, which was granted on the basis of the appellant's priority application.

15. Hence, the main request cannot be decided on until this point of law is clarified by way of a referral to the Enlarged Board of Appeal. As a further consequence, the board has not been able either to decide on the request for reimbursement of the appeal fee.

III. Referral to the Enlarged Board of Appeal

a) Admissibility

16. As will be explained in more detail in points 32 to 77 below, the board is of the opinion that a referral of the questions set out in the order of the present decision is justified in order to ensure uniform application of the law and also because a point of law of fundamental importance needs to be answered. The referral is thus in line with Article 112(1)(a) EPC.

As regards the uniform application of the law, there are inconsistencies in the relevant case law, not just with regard to the point in issue in the present case, i.e. double patenting arising from internal priority (as to definitions and distinctions between terms, see points 17 to 23 below), but also with respect to the legal basis for and scope of a prohibition on double patenting.

On the one hand, the appellant has raised doubts as to whether the principle of a prohibition on double patenting as such exists under the EPC. On the other hand, the established practice of the Office under Article 97(2) EPC in conjunction with Article 125 EPC is to refuse to grant a second patent for the same subject-matter to the same applicant, in reliance on G 1/05 and G 1/06 (Guidelines for Examination in the European Patent Office Part G-IV 5.4). Although the board recognises that the incidence of cases in which this principle plays a decisive role is low, the clarifications now sought with regard to a prohibition on double patenting as a general principle are of fundamental importance.

b) Double patenting

17. In its broadest sense, the term "double patenting" is used to refer to the simultaneous grant of two or more patents for the same invention having effect in the same territory.

18. Under the EPC, the grant of two European patents with overlapping territorial scope for the same invention is in most cases prevented by the definition of the state of the art under Article 54(2) EPC and, more particularly, the definition of the extended state of the art under Article 54(3) EPC. There are, however, two situations which are not encompassed by these provisions. Thus, double patenting may arise, first, in cases involving a European patent application and one or more national patent applications in a Contracting State, or, secondly, in cases involving two or more European patent applications, if the respective applications are directed to the same subject-matter, overlap in their territorial scope of protection, and have the same effective date, i.e. the date of the actual filing (cf. Article 54(2) EPC), or, where priority is claimed, the priority date (cf. Article 89 EPC). Such applications do not form part of the state of the art according to Article 54(2) or (3) EPC in respect of each other and thus do not prejudice the novelty of the subject-matter claimed.

19. As far as double patenting resulting from the co-existence of European and national patent filings is concerned, Article 139(3) EPC leaves it entirely to the laws of the Contracting States whether to prohibit or allow simultaneous protection of the same subject-matter by two or more patents resulting from European

patent applications and national applications having the same effective date.

20. Where there are two or more European patent applications which are directed to the same subject-matter and have the same effective date, but which are filed by different persons who made the invention independently of each other, it follows from Article 60(2) EPC in conjunction with Article 54(3) EPC that the grant of two patents directed to the same subject-matter cannot be refused, provided that the patentability requirements are otherwise met.
21. The present referral is not concerned with any of the above cases but only with double patenting in the narrower sense, that is, with the situation in which two or more European patent applications directed to the same subject-matter and having the same effective date are filed by the same applicant. Because such applications do not form part of the state of the art according to Article 54(2) or (3) EPC, their prosecution could lead to the same applicant being granted two or more patents directed to the same subject-matter and having an identical or at least overlapping territorial scope.
22. There are three circumstances in which two or more European patent applications of the same applicant which are directed to the same subject-matter could have the same effective date:
 - a European patent application is filed on the same date as another European patent application of the same applicant (parallel filings);
 - a European patent application is filed as a European divisional application (Article 76(1) EPC)

in respect of an earlier European patent application (divisional application);

- a European patent application is filed claiming the priority (Article 88 EPC) of an earlier European patent application (internal priority).

23. In all these situations, the issue of double patenting as addressed in G 1/05 and G 1/06 arises only if the applicant pursues the two or more applications to grant, does not amend one or more of them in such a manner that the subject-matter of their respective claims is not identical, and does not withdraw overlapping designations. Where all these prerequisites are met, the grant of a second patent cannot be refused on the basis of Article 54(3) EPC, but only by relying on the principle of a prohibition on double patenting as acknowledged in G 1/05 and G 1/06.

c) Double protection

24. "Double patenting" in the narrower sense (see points 21 to 23 above) is to be distinguished from "double protection". T 307/03 (OJ EPO 2009, 422) appears to be the only board of appeal decision in which the assessment of whether the applicant was seeking protection for the same invention by two patents was made by comparing the scope of protection conferred by the claims of the application in suit with that conferred by the claims of the patent already granted to the applicant. The board held that an objection of double patenting could also be raised where the subject-matter of the granted claim was encompassed by the subject-matter of the claim later put forward (T 307/03, headnote 3 and points 5.2 to 5.4). "Double patenting" was thus equated to "double protection", at least where the subject-matter of a first patent

application was entirely encompassed by the scope of a claim of a second patent application of the same applicant.

Apart from decision T 307/03, the case law has confined the term "double patenting" to the impending grant of two patents claiming the same subject-matter (see for instance T 1391/07, points 2.5 and 2.6; T 877/06, point 5.3; T 1708/06, point 6; T 2402/10, point 8; T 1780/12, points 7 to 14; T 2461/10, points 24 and 25; T 879/12, points 7, 10, 14; T 2563/11, points 2.7 to 2.14; T 1252/16, point 4.2). This approach was also followed in decisions prior to G 1/05 and G 1/06 (see for instance T 118/91, point 2.4.1; T 80/98, point 9; T 587/98, OJ EPO 2000, 497, point 3.3; T 475/02, point 8.6; T 411/03, point 4.2; T 425/03, point 4.2; T 467/03, point 4.2; T 468/03, point 4.2; T 579/05, point 2.2).

In all these decisions, a comparison was made between the claims, defined by their categories in combination with their technical features, in the final version submitted for grant, and the claims, again defined by their categories in combination with their technical features, of a patent already granted to the same applicant (see T 1780/12, points 11 to 14). Decision T 307/03 thus appears to be an isolated case in this respect.

For the sake of completeness, the board notes that the Enlarged Board considered it to be legitimate procedural behaviour for an applicant first to seek patent protection for a preferred embodiment and then to pursue the general teaching in a divisional application (G 2/10, OJ EPO 2012, 376, point 4.5.5). As a consequence, granting the same applicant two patents

with claims of overlapping scope, as envisaged by T 307/03, cannot be refused on the basis that the applicant lacks a legitimate interest, which, according to G 1/05 and G 1/06, is the rationale for the prohibition on double patenting. Although, in the same passage of G 2/10, the Enlarged Board mentioned the "so-called prohibition on double protection", this was only with respect to a possible need for a disclaimer, which the Enlarged Board considered to be a different matter (see also the discussion of Article 139(3) EPC under points 60 to 62 below). It therefore appears that T 307/03 has been superseded by G 2/10.

In any event, the present appeal does not concern claims of overlapping scope. The claims of refused European patent application No 10718590.2 are identical to the claims of European patent No 2 251 021 granted on European patent application No 09159932.4, the priority document of the present application. Therefore, decision T 307/03 has no bearing on the outcome of the present appeal, even if it were not considered an isolated case.

d) Decisions G 1/05 and G 1/06 (OJ EPO 2008, 271 and 307)

25. Point 13.4 of the Reasons of G 1/05 and G 1/06 reads as follows:

"The Board accepts that the principle of prohibition of double patenting exists on the basis that an applicant has no legitimate interest in proceedings leading to the grant of a second patent for the same subject-matter if he already possesses one granted patent therefor. Therefore, the Enlarged Board finds nothing objectionable in the established practice of the EPO that amendments to a divisional application are

objected to and refused when the amended divisional application claims the same subject-matter as a pending parent application or a granted parent patent. However, this principle could not be relied on to prevent the filing of identical applications as this would run counter to the prevailing principle that conformity of applications with the EPC is to be assessed on the final version put forward (see point 3.2 above)."

26. The first sentence of this passage sets out the principle of a prohibition on double patenting in very general terms, requiring merely that in pending examination proceedings an applicant requests the grant of a patent in respect of subject-matter for which he has already been granted a patent. It is furthermore implicit in this statement that the fact that the pending patent application claims the same subject-matter as a patent already granted to that applicant is the only reason why it is not allowed to proceed to grant. Apart from that, the subject-matter claimed in the pending patent application must fulfil all the conditions for patentability. It also follows from this that the subject-matter of the other application which already led to the grant of a patent may not be part of the state of the art under Article 54(2) or (3) EPC, because otherwise the pending application with the same subject-matter would have to be refused for lack of novelty.
27. The principle set forth in the first sentence of point 13.4 of G 1/05 and G 1/06 is not expressly limited to European patent applications and patents. Nevertheless, this limitation follows from the context and from the reference to the established practice of the EPO in the second sentence. This practice is set out in the then

applicable Guidelines for Examination under the EPC 1973 of June 2005, Part C-IV, 6.4, as follows:

"Double patenting

The EPC does not deal explicitly with the case of co-pending European applications of the same effective date. However, it is an accepted principle in most patent systems that two patents cannot be granted to the same applicant for one invention. It is permissible to allow an applicant to proceed with two applications having the same description where the claims are quite distinct in scope and directed to different inventions. However, in the rare case in which there are two or more European applications from the same applicant definitively designating the same State or States (by confirming the designation through payment of the relevant designation fees) and the claims of those applications have the same filing or priority date and relate to the same invention (the claims conflicting in the manner explained in VI, 9.1.6), the applicant should be told that he must either amend one or more of the applications in such a manner that they no longer claim the same invention, or choose which one of those applications he wishes to proceed to grant. Should two applications of the same effective date be received from two different applicants, each must be allowed to proceed as though the other did not exist."

28. In the light of this practice, the prohibition on double patenting which the Enlarged Board accepted in G 1/05 and G 1/06 is to be understood as applying to European patent applications and patents of the same applicant which have the same effective date and thus do not form part of the state of the art as defined in Article 54(2) and (3) EPC with respect to each other. Accordingly, and for the reasons given in the context

of the appellant's main request (see points 5 to 15 above), the general terms in which the Enlarged Board stated this principle give no indication that it was intended to be limited to European divisional applications or applications having the same date of filing.

29. With respect to the practice of the Office, point 13.4 of G 1/05 and G 1/06 further clarified that the prohibition on double patenting could not be applied to prevent the filing of identical applications, because that would infringe the prevailing principle that an application's compliance with the requirements of the EPC is assessed on the basis of the final version put forward for grant. The Enlarged Board appears to have accepted that the Office raises an objection of double patenting in situations in which there are two or more European patent applications which have the same applicant, the same effective date and the same designated state or states, if those applications claim the same subject-matter.

However, one or more of those applications may be refused only on the basis of the final version put forward for grant. That is, a refusal is only permissible once the applicant pursues one of the applications to grant and fails to amend the other application(s) in such a manner that the subject-matter of the claims and description in the final version for grant is not identical to the subject-matter of the granted patent, or does not withdraw overlapping designations.

30. According to G 1/05 and G 1/06, the conditions for the prohibition on double patenting to apply are as follows:

- There are two or more European patent applications of the same applicant which
- have the same effective date, i.e. the date of the actual filing as referred to in Article 54(2) EPC or, where priority is claimed, the priority date as referred to in Article 89 EPC, and therefore do not form part of the state of the art according to Article 54(2) and (3) EPC in respect of each other,
- at least overlap in their territorial scope of protection, and
- claim the same subject-matter in their final version for grant.

31. Furthermore, the prohibition comes into play only once a patent has been granted to the applicant on the basis of one of said applications. It eventually leads to the refusal by the examining division of the other applications under Article 97(2) EPC if their subject-matter in the final version for grant is the same as the subject-matter of the patent granted to the applicant.

For the sake of completeness, the board notes in this context that there is nothing in G 1/05 and G 1/06 or in the Guidelines of June 2005 to imply that the prohibition on double patenting should apply in opposition or limitation proceedings before the Office. In any case, this is not a point of law which is relevant for the decision on the main request in the present case. Therefore, no specific question on this issue is referred to the Enlarged Board of Appeal (see, however, T 936/04, according to which it is within the discretion of the departments of the EPO to raise an objection of double patenting in opposition or opposition appeal proceedings against proposed amended claims).

e) Legal basis

32. As noted in point 5 of T 2461/10, the EPC only contains a provision relevant to the prohibition on double patenting in the context of European and national applications and patents (see Article 139(3) EPC). Decisions G 1/05 and G 1/06 are not concerned with double patenting in that situation (see point 19 above) but in relation to two or more European patent applications of the same applicant which have the same effective date, and they do not identify the relevant legal basis in this regard. It is furthermore not clear from its obiter dictum whether the Enlarged Board considered there to be a *lacuna*, or gap, in the EPC which had to be filled by decision of the Enlarged Board of Appeal.
33. In several decisions, technical boards of appeal have focused on Articles 60 and 125 EPC (1973) when seeking to identify the legal basis in the EPC for a prohibition of double patenting. The relevant cases will be discussed briefly below. It will become clear not only that there is divergent case law on this point but, more importantly, that doubts exist as to whether the EPC contains any provision at all which could serve as the basis for the prohibition. Therefore, the possibility of a gap in the law will also be addressed.
34. It is noted at this point that, except for Article 60(2) EPC 1973, Articles 60 and 125 EPC 1973 were not amended in 2000. Therefore, there has been no change in substance.

i) Article 60 EPC

35. The board in T 307/03 invoked Article 60(1) EPC 1973 as the legal basis for the prohibition on double patenting. It is notable that the chair of the deciding board was also the rapporteur in cases G 1/05 and G 1/06. The technical board emphasised that it could be inferred from Article 60(1) EPC 1973 that the inventor (or his successor in title) had a right to the grant of one and only one patent for a particular invention as defined in a particular claim. Once a patent had been granted, this right to a patent was exhausted and the EPO was entitled to refuse to grant a further patent to the inventor or his successor in title for the subject-matter for which he had already been granted a patent (see T 307/03, point 2.1).
36. The approach taken in T 307/03 was negated by decision T 1423/07. The board in that case held that Article 60(1) EPC (1973) provided no basis for refusing a European application for double patenting. The purpose of that provision was only to define to whom the right to a European patent belonged. Article 60(1) EPC (1973) could not be interpreted such that the inventor or his successor in title had a right to the grant of one and only one patent (see point 2.3.2). The board in T 2461/10 concurred with the analysis in T 1423/07. It held that no indication could be found in either the wording or the history of Article 60 EPC that this provision had been intended to exclude double patenting (see T 2461/10, point 6).
37. Since T 307/03 has - to the board's knowledge - not been followed in later case law, it could be regarded as an isolated ruling, in which case Article 60(1) EPC would not appear to be pertinent for the Enlarged

Board's consideration of the questions referred to it below.

38. Nevertheless, for the sake of completeness, the board wishes to address two aspects of T 307/03 which were not discussed in T 1423/07 or T 2461/10.
39. First, it is noted that the approach taken in T 307/03 resembles a so-called "statutory" or "same invention" type of double patenting rejection under U.S. patent law, which is based on 35 U.S.C. § 101. This legal provision reads:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." (Emphasis added by the board).
40. According to the U.S. case law on double patenting (originating in *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894) and restated in *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970)), 35 U.S.C. § 101 prevents two patents being issued for the same invention. The criterion of the "same invention" is understood to refer to identical subject-matter.
41. The board in T 307/03 appears to have construed the words "a European patent" in Article 60(1) EPC 1973 in the same way as the U.S. case law interpreted "a patent" in 35 U.S.C. § 101, although it did not refer to U.S. case law. Indeed, the patent practice under national legislation which is based on different legal principles from those enshrined in the EPC cannot be taken into account in the interpretation of the

latter's provisions (as to the applicable principles of interpretation, see decisions G 2/12, OJ EPO 2016, A27, and G 2/13, OJ EPO 2016, A28, point V of the Reasons).

Considering more closely the wording of Article 60(1) EPC, the present board takes the view that the reason for the use of the indefinite article "a" in the phrase "to a European patent" of the English text (and of the singular definite article in the German "auf das europäische Patent" and in the French "au brevet européen") is just that these words serve as a qualifier of the term "right". Article 60(1) EPC refers to "the inventor" in the singular as the person entitled to the right to a European patent. It is clear from the context that the singular does not exclude the plural (cf. G 1/91, OJ EPO 1992, 253, point 3.2). Apart from that, the wording of Article 60(1) EPC simply does not define the subject-matter of a patent application (see in this respect Article 82 EPC). Still less does it link an (in the sense of one) "invention" to the grant of only one patent.

42. Secondly, T 307/03 referred to the concept of the exhaustion of the right to a patent. According to this legal proposition, the right to a patent is exhausted, i.e. can no longer be invoked, in or for a particular territory after having been exercised by way of filing a patent application for which a patent is subsequently granted. It appears that the deciding board was thereby offering an alternative to the principle requiring the applicant to have a legitimate interest in the proceedings, which was relied on in G 1/05 and G 1/06.

To the knowledge of the present board, the concept of exhaustion of rights has been addressed in the case law of the boards of appeal only in the context of priority

rights (see T 998/99, point 3.1, which was not followed in subsequent decisions: T 15/01, points 27 to 41; T 5/05, point 4.4; T 1562/06, point 2.1; T 696/16, point 5.5). Indeed, it is notable that case T 998/99 concerned two parallel applications of the same applicant, both claiming the priority of the same earlier application and differing from each other only in the number of claims. T 998/99 thus concerned a case of double patenting arising from parallel filings claiming the same effective date, and the concept of exhaustion invoked by the board in that case served the function of preventing double patenting.

Leaving aside the question whether a principle of exhaustion of the right to a patent can be recognised under Article 125 EPC, the board doubts that such a principle is an appropriate legal instrument for achieving the purpose of preventing double patenting. To the extent that the right to a patent pursuant to Article 60 EPC relates to an invention which might also be a group of inventions so linked as to form a single general inventive concept (Article 82 EPC), the concept of exhaustion of the right to a patent might be detrimental to patent applicants even in situations where no risk of double patenting exists, for example when an applicant first seeks patent protection for a preferred embodiment and later pursues a different embodiment or even the general teaching in a divisional application. Indeed, Article 76(1), second sentence, EPC prevents the application of the concept of exhaustion of the right to a patent.

ii) Article 125 EPC - principle requiring a legitimate interest in the proceedings

43. Although not expressly referred to there, the first suggestion of Article 125 EPC as a legal basis for a prohibition on double patenting figured in the Guidelines for Examination. This was recognised by the board in T 587/98 (cf. T 587/98, points 3.1, 3.2, and 3.5), a case concerning the refusal of a divisional application the subject-matter of which overlapped with that of the patent granted on the parent application. The board held that Article 125 EPC 1973 was not applicable to the case in issue since this article required "the absence of procedural provisions in the Convention", whereas the provisions governing divisional applications were self-contained and complete. In addition, a prohibition on "conflicting claims" as applied by the examining division would be a matter of substantive law rather than a matter of procedure, and Article 125 EPC 1973 was not applicable to substantive law.
44. In T 307/03, the board relied on Article 60(1) EPC as a legal basis for the prohibition on double patenting and did not consider it necessary to deal with the reasoning on Article 125 EPC set out in decision T 587/98 (T 307/03, point 2.7).
45. In T 1423/07, the board disagreed with the finding in T 587/98 that the prohibition on double patenting was a matter of substantive law rather than of procedure. According to T 1423/07, the refusal of a European patent application for double patenting comprised both procedural aspects and matters of substantive law, so that Article 125 EPC was applicable (see Reasons, point 2.2.1). The board examined whether there was such a

principle of procedural law generally recognised in the Contracting States within the meaning of Article 125 EPC. Its analysis of the respective national laws revealed that a majority of the Contracting States did not allow double patenting in a situation where there was both a granted national patent and a granted European patent claiming the same subject-matter and designating the same Contracting State.

However, this exclusion of double patenting concerned the situation of two already granted patents, i.e. post-grant procedures, and not the situation in which a pending patent application conflicted with a patent already granted. In the board's opinion, a refusal of a European patent application based on Article 125 EPC required the existence of a principle of law which referred to the pre-grant procedure and allowed the refusal of a national patent application for double patenting. Only three Contracting States provided for such a principle. Article 125 EPC was therefore not regarded by the board as a proper legal basis for refusing a European patent application under Article 97(2) EPC or Article 97(1) EPC 1973 on the ground of double patenting.

46. In T 2461/10, Article 125 EPC was accepted as a proper legal basis for the principle of a legitimate interest in the proceedings, from which the Enlarged Board had inferred the prohibition on double patenting (T 2461/10, point 7). In the deciding board's opinion, the legislative history confirmed the Enlarged Board's decisions G 1/05 and G 1/06.

The board referred to the minutes of the 10th meeting of Working Party I of the Inter-Governmental Conference for the setting up of a European System for the Grant

of Patents, held in Luxembourg from 22 to 26 November 1971 (BR/144 e/71 of 16 December 1971, document N3 in the present proceedings, points 117 and 118), the minutes of the 6th meeting of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 19 to 30 June 1972 (BR/219 e/72 of 26 September 1972, document N4 in the present proceedings, point 49), and the minutes of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents (M/PR/I, document N1 in the present proceedings, point 665; see T 2461/10, points 8 to 10). From these preparatory documents the deciding board concluded that in 1973 the legislator did not see a need for an express provision on double patenting since the prohibition already followed from established principles of procedural law (T 2461/10, point 11).

The board disagreed with the conclusions drawn in T 1423/07 from the analysis there of the national laws of the Contracting States. In its view, the fact that almost all Contracting States prohibited double patenting as between a granted national patent and a granted European patent of the same applicant or his successor in title which claimed the same subject-matter was regarded as a strong indication that double patenting was generally considered undesirable by the national legislators. The fact that the national prohibitions applied to the post-grant situation was attributable to considerable practical difficulties which resulted from different patent authorities being involved in the pre-grant procedure. The few national provisions prohibiting double patenting with respect to national patent applications were no indication of a lack of recognition generally of such a prohibition. Rather, it was reasonable to assume that the national

patent legislators, like the legislator of the EPC, considered an express legal provision unnecessary since the prohibition on double patenting already followed from general principles of procedural law (T 2461/10, points 12 and 13).

The finding in decision T 2461/10 that the prohibition on double patenting derives from the generally recognised principle, within the meaning of Article 125 EPC, which requires there to be a legitimate interest in the proceedings was followed in T 2563/11 (see T 2563/11, points 2.4. and 2.5).

There is thus conflicting case law in this regard.

47. Moreover, the Guidelines for Examination in the European Patent Office of November 2018 (Part G-IV 5.4) follow the findings of T 2461/10.
48. On the other hand, the appellant has raised doubts as to whether the *travaux préparatoires* to the EPC 1973, which, in the absence of an express provision in the EPC, were given considerable weight in decisions T 2461/10 and T 2563/11, do demonstrate that the legislator intended to rule out double patenting with respect to two European patent applications by the same applicant.
49. The relevant passages (M/PR/I; document N1 in the present proceedings) on Article 125 EPC (page 62) read as follows:

"Article 125 - Reference to general principles

665. In connection with Article 125, it was established at the request of the United Kingdom delegation that

there was majority agreement in the Main Committee on the following: that it was a generally recognised principle of procedural law in the Contracting States that a person can be granted only one European patent for the same invention in respect of which there are several applications with the same date of filing.

666. The Norwegian delegation stated that it could not agree to this principle in its present general form since under Scandinavian law it was possible in theory to grant two patents to an applicant for the same invention.

667. The FICPI delegation wondered what was meant in this instance by the same application or the same patent; did it mean that the content was substantially the same or that the patent claims were substantially the same?

668. The United Kingdom delegation interpreted it as meaning that the patent claims were the same.

669. It was furthermore established, at the request of the United Kingdom delegation, that it was the unanimous opinion of the Main Committee that the European Patent Office had the right to correct any inadvertent errors on its part."

50. The appellant argued that it was evident from the reference to a "majority agreement" in point 665 that there was no unanimous opinion on this point at the Munich Diplomatic Conference. This was corroborated by the explicit statement of disagreement by the Norwegian delegation recorded in point 666 of the minutes and by point 669, which showed that the minutes distinguished between majority and unanimous opinions.

51. The appellant also referred to point 11 of the comments of 8 May 1973 by the Norwegian delegation on the preparatory documents for the Munich Diplomatic Conference (M/28, document N2 in the present proceedings), which reads as follows:

"In connection with Art. 125 the sixth meeting of the Inter-Governmental Conference 'established that the European Patent Office may not grant more than one European patent to the same person for the same invention being the subject of applications filed on the same date' (Minutes par. 49). However, in the Norwegian opinion, it follows from Art. 52(3) that applications filed on the same day do not at all constitute novelty hindrance against each other and that an applicant may thus without detriment to himself file several applications on the same day. Under the circumstances, a possible restriction as established at the sixth meeting should be expressly stated in the Convention."

52. According to the appellant, the preparatory work for the EPC showed that there was no unanimity with respect to a prohibition on double patenting. The majority opinion in the Main Committee referred to in point 665 of document M/PR/I (document N1 in the present proceedings) did not constitute an "agreement relating to the treaty" within the meaning of Article 31(2) (a) of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter: Vienna Convention) requiring such agreement to be made between all the parties. Therefore, this majority agreement could not be taken into account for the purpose of interpreting the EPC.

53. In view of the legislative history of Article 125 EPC, the board shares the appellant's doubts that a prohibition on double patenting can be acknowledged to exist under this provision.
54. It is indisputable that a prohibition on double patenting was discussed in 1971 by Working Party I of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents. It appears that the discussion started in the context of divisional applications with respect to a proposal by the German and British delegations to merge the contents of then Articles 81 and 94 in a new Article 137a (see the minutes of the 9th meeting of Working Party I of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 12 to 22 October 1971, BR/135 e/71, point 154):

"154. The Working Party agreed that it should be laid down [...] (paragraph 2) that the claims of the original application could not refer to subject-matter for which protection was sought in one of the other applications. This provision appeared necessary in order to avoid the granting of two patents for the same subject-matter, as the various applications would in theory benefit from the same priority.

...

The United Kingdom delegation wondered whether a similar solution might not be envisaged for the case of an application being filed with the European Patent Office and claiming the priority of another European application already filed, in order to exclude the possibility of the claims of the two applications overlapping, even partially, as a result of containing the same matter.

The Working Party deferred examination of this question to a later stage."

The relevant paragraph 2 of proposed Article 137a read as follows (BR/134 e/71, p. 63):

"The claims of the earlier application and any divisional application shall exclude the matter for which protection is sought by any of the other applications. Where possible, the description and drawings of each application shall relate only to the matter for which protection is sought by that application. However, when it is necessary for an application to describe the matter for which protection is sought by another application, it shall include a cross-reference to that other application."

55. The matter was again discussed at the 10th meeting of Working Party I, held in Luxembourg from 22 to 26 November 1971 (BR/144 e/71 of 16 December 1971, document N3 in the present proceedings). The British delegation reiterated the question whether the considerations underlying Article 137a, paragraph 2, which provided that in the special case of a divisional application the claims of the divisional application should not contain any subject-matter for which protection was sought in the original application and vice versa, ought not to be extended to all cases in which a person with several European applications claimed protection for the same invention. This would prevent an applicant from being able to apply for several patents for one and the same invention (BR/144 e/71, point 117). The relevant conclusions of Working Party I in the ensuing discussion were cited in T 2461/10 in support of the Enlarged Board's *obiter dictum* with respect to the existence of a prohibition

on double patenting (G 1/05 and G 1/06, point 13.4). Indeed, while not relying on the principle of a legitimate interest in the proceedings, the minutes of the 10th meeting of Working Party I show that there was agreement on a prohibition on double patenting not only in the context of divisional applications but also in relation to double patenting arising from internal priority or from parallel filings. The pertinent passages of the minutes are as follows (BR/144 e/71, points 117 to 119):

"117. ...

In the course of the discussion, the Working Party agreed that an applicant wishing to protect the same invention by means of several applications filed at the same time, could only be granted a single patent. It was of the opinion, that this was a generally recognised, if unwritten, legal principle and that a specific provision in the Convention was therefore not necessary.

118. ...

The Working Party came to the conclusion that even when an applicant claimed the priority of an earlier European patent application, he should not be able to obtain the same patent twice for the same invention in the same designated States. It was not necessary, however, to provide a rule to this effect in the Convention. ...

119. *The Working Party finally decided that the minutes of the Diplomatic Conference would have to contain a declaration explaining that it was not possible for an inventor to obtain two patents for the same invention."*

56. At the 6th meeting of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 19 to 30 June 1972, it was reiterated in the context of Article 125 EPC that "the European Patent Office may not grant more than one European patent to the same person for the same invention being the subject of applications filed on the same date" (cf. minutes of 26 September 1972, BR/219 e/72, document N4 in the present proceedings, point 49). Although the reference in the above statement to patent applications "filed on the same date" does not refer specifically to double patenting arising from internal priority, it can be argued in the light of the discussion at the 10th meeting of Working Party I that this might have been an inadvertent inaccuracy in the drafting of the minutes.
57. In view of the above, it can be acknowledged that, up to the Diplomatic Conference, it was common ground that double patenting arising from two or more European patent applications by the same applicant should not be possible and that a specific provision to this effect was not needed. A declaration at the Diplomatic Conference to this effect was nevertheless regarded as being warranted.
58. The documents of the Munich Diplomatic Conference, however, fail to demonstrate that there was still agreement on the principle that the European Patent Office should not grant more than one European patent to the same person for the same invention which is the subject of multiple European patent applications having the same effective date. Points 665 and 666 of the minutes of Main Committee I (M/PR/I, document N1 in the present proceedings) show that there was at least one voice of dissent. Whether there was only one dissenting

opinion cannot be deduced from the *travaux préparatoires*. It is also notable that the rapporteur of Main Committee I did not mention the issue of double patenting in his report on the work of Main Committee I to the Committee of the Whole (see point 10 on pages 186 and 187 of Annex I to document M/PR/I, document N1 in the present proceedings).

59. In any case, as correctly pointed out by the appellant, the majority opinion at the Munich Diplomatic Conference does not constitute either an agreement pursuant to Article 31(2)(a) Vienna Convention or an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (Article 31(2)(b) Vienna Convention).

Thus, point 665 of document M/PR/I (document N1 in the present proceedings), which was relied on in decisions T 2461/10 and T 2563/11, does not supplement the text of the Convention and, accordingly, does not establish the principle of a prohibition on double patenting in lieu of an express provision in the Convention.

The majority opinion set out in point 665 of document M/PR/I cannot be relied on either as a supplementary means of interpretation. Pursuant to Article 32 Vienna Convention, recourse to such supplementary means of interpretation is provided for in order to confirm the meaning arrived at by application of Article 31 Vienna Convention or to determine the meaning when the interpretation according to Article 31 Vienna Convention either (a) leaves the meaning ambiguous or obscure, or (b) produces a meaning which is obviously nonsensical or unreasonable (see G 2/12 and G 2/13, points V.(2) to (5) and VII.5.(1) of the Reasons).

However, neither of these alternatives applies to the point of law under consideration. In fact, the *travaux préparatoires* were relied on in T 2461/10 and T 2563/11 not as a means of interpreting the Convention, namely Article 125 EPC, but in order to establish that there was an agreed statement by the Munich Diplomatic Conference, which happened to be made in the context of Article 125 EPC, but which was intended to complement the text of the Convention and serve as basis for prohibiting double patenting without recourse to an express provision.

60. Apart from these considerations, the question whether Article 125 EPC can be relied on as a basis for prohibiting double patenting is debatable from a systematic point of view. The reference in Article 125 EPC to principles of procedural law generally recognised in the Contracting States stands in contrast to the powers of the Contracting States under Article 139(3) EPC. Article 139(3) EPC includes within its scope the grant to the same applicant of more than one patent for the same subject-matter with effect for the same Contracting State due to the co-existence of European and national patent filings. It would thus appear paradoxical for the legislator to have left it to the national laws of the Contracting States to either rule out or allow double patenting in relation to European and national applications and patents, while at the same time relying on the legal situation in the Contracting States to justify imposing a prohibition on double patenting where only European patent applications are concerned.

Indeed, Article 6 of the 1965 draft (which was prepared before the Convention was opened to accession by non-

EEC countries and which eventually became paragraph 3 of Article 139 EPC) prohibited simultaneous protection of a given invention by a national and a European patent and thus provided for harmonisation in this respect. However, in 1971 the majority of the then 21 States involved in the negotiations were in favour of leaving the matter to national law (see minutes of the 4th meeting of Working Party I of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 20 to 28 April 1971, BR/125 e/71, point 15; Report 1971 of the British Delegation on Articles 1 to 29 of the second preliminary Draft of a Convention establishing a European System for the Grant of Patents, point 21). This compromise solution was maintained at the Munich Diplomatic Conference (see the minutes of the proceedings of Main Committee I of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents, document M/PR/I, points 857 to 867, document N1 in the present proceedings).

Of course, the national legislation of the Contracting States could have converged on a principle of prohibiting double patenting following the adoption of Article 139(3) EPC in 1973, and could have replaced the initial intention of the legislator by agreement or practice (see Article 31(3) (a) and (b) Vienna Convention). However, as is evident from Table X of the EPO's publication "National law relating to the EPC" (19th edition, October 2018; document N5 in the present proceedings), the national laws continue to diverge. The requirement under Article 125 EPC that the principle relied on must be generally recognised is currently still not met (see, however, the caveat to this approach in point 61 below), even if this

requirement is interpreted to mean that the principles referred to need not necessarily be recognised in all the Contracting States (see minutes of the 8th meeting of Working Party I of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held in Luxembourg from 14 to 17 September 1971, BR/132/71, point 56).

61. In addition, Article 139(3) EPC is not confined to the issue of double patenting, but relates more broadly to simultaneous protection resulting from the filing of European and national patent applications for the same invention. This provision is concerned with the question whether and on what terms the protection conferred for an invention by a European patent application or patent under Articles 64 and 67 EPC, on the one hand, and the protection provided for the same invention by a national patent application or patent of the same applicant, on the other hand, may be enjoyed simultaneously. National legislation based on Article 139(3) EPC thus deals specifically with the co-existence of parallel filing routes with effect for a single national territory, while the principle of the prohibition of double patenting as formulated in G 1/05 and G 1/06 addresses multiple filings in respect of the same invention within a single filing system.

Moreover, it is clear from the wording of Article 139(3) EPC that the co-existence of two identical patents is not to be prevented at the pre-grant stage, but only after the grant of a European patent. The board thus concurs with the conclusion in T 1423/07 that the frame of reference for establishing a prohibition on double patenting under Article 125 EPC should be the existence of a principle in the national laws which allows the refusal of a national patent

application for double patenting at the pre-grant stage (see T 1423/07, point 2.2.2), which will occur, for example, where internal priority is involved.

62. A further argument put forward by the appellant in this context is that, in view of Article 2(2) EPC and Article 139(3) EPC, double patenting was not entirely left to national law (see VII, penultimate paragraph). Article 139(3) EPC might be understood as giving the Contracting States the competence to legislate on the effect to be given to two European patents of the same applicant directed to the same subject-matter, in case the grant of a second European patent to the same applicant for the same invention cannot be refused in examination proceedings before the EPO. According to this interpretation, there would be no legal vacuum and the boards of appeal would possibly be interfering with national legislation by adopting the principle of a prohibition on double patenting.

However, the board does not accept this argument. There can be no such interference because Article 139(3) EPC operates at the post-grant stage and is furthermore not aimed at preventing the grant of more than one European patent for the same subject-matter (see point 61 above).

63. Finally, it is noted that Article 125 EPC merely provides a means of supplementing existing procedures where a *lacuna*, or gap, becomes apparent in an EPC provision (see G 1/97, OJ EPO 2000, 322, point 3(a)). The board agrees with T 1423/07 that the prohibition on double patenting comprises both procedural aspects and matters of substantive law. Nevertheless, it is questionable whether Article 125 EPC can serve as a legal basis for this prohibition.

A prohibition on double patenting amounts to a ground for refusal separate from and additional to the requirements of the EPC referred to in Article 97(2) EPC (see the doubts of the board in T 587/98, point 3.6, regarding a case of double protection which involved encompassing claims). Introducing a further requirement for patenting (or a ground for refusal) on the basis of Article 125 EPC would exceed this provision's purpose of supplementing existing procedures.

On the other hand, these considerations may not be decisive given the power of the boards of appeal to fill a gap in the law without being constrained by Article 125 EPC (see the discussion in points 72 to 75 below).

64. In view of the above, therefore, it is doubtful that Article 125 EPC is an appropriate legal basis for prohibiting double patenting.

iii) Article 63(1) EPC

65. As discussed in the context of the main request (see point 13 above), the board in case T 2461/10 disagreed with T 1423/07 in that it denied that the longer term of protection possibly available from the later filing in cases in which internal priority is claimed constituted a legitimate interest. In T 2461/10, the board pointed out that double patenting would result in a maximum of 21 years of patent protection for the same subject-matter, and that this could hardly be reconciled with the wording and intention of Article 63(1) EPC (T 2461/10, point 14).

It is true that decision T 2461/10 did not suggest Article 63(1) EPC as a legal basis for not allowing double patenting, but relied rather on Article 125 EPC. However, for the purposes of this referral, the present board has examined whether Article 63(1) EPC does limit double patenting in cases of internal priority, irrespective of whether the principle of a prohibition on double patenting exists as such.

66. In the discussion on double patenting at the 10th meeting of Working Party I, held in Luxembourg from 22 to 26 November 1971, the delegations raised a similar concern with regard to extension of protection (see BR/144 e/71 of 16 December 1971, document N3 in the present proceedings, point 118). On the question whether an applicant for a European patent should be allowed to claim the priority of an earlier European patent application and, if so, to designate one or more States which were already designated in the earlier application, it was argued that "this could lead to the term of the patent being extended by the time between the filing of the two applications in the case of the earlier application being withdrawn during that time". The extension of the term of a European patent was thus dealt with as part of the question whether to allow internal priority in general.

What is relevant to this question is the fact that provisional protection under Article 67(1) and (2) EPC is triggered by the publication of the European patent application, and that patent protection in accordance with Article 64(1) EPC requires the grant of a European patent. Thus, where internal priority has been claimed, the protection conferred on the invention will exceed 20 years (corresponding to the maximum term of a European patent pursuant to Article 63(1) EPC) in those

rare instances in which it starts before the filing of the later European patent application claiming priority. This requires either that the earlier European patent application is published early at the applicant's request (Article 93(1)(b) EPC; see however Rule 52(4) EPC), or that a patent is granted on it before the filing of the European patent application claiming priority from it. Under normal circumstances, however, patent protection for the invention first disclosed in the earlier European patent application will not exceed 20 years, because the date of publication of both the earlier and the subsequent European patent application claiming priority from it is the same (Article 93(1)(a) EPC). It is more exact to say that the date on which patent protection for the invention ends is deferred by up to 12 months if a patent is granted on the subsequently filed application, because the term of a European patent is calculated from the application's own date of filing (Article 63(1) EPC), and not the priority date.

The deferment by up to 12 months of the term of the patent for the subsequent European patent application and consequently also of the end of patent protection is inherent in claiming priority. Since claiming priority from an earlier European patent application designating the same Contracting States is permitted under Article 88 EPC (T 15/01, point 26), the deferment of the termination of patent protection has to be accepted as the legal consequence of a claim to (internal) priority.

67. These considerations speak against Article 63(1) EPC having a limiting effect on double patenting arising from internal priority. It is even more doubtful whether Article 63(1) EPC can provide a specific legal

basis for a prohibition on double patenting arising from internal priority.

On the other hand, the fact that the patent term available to the subsequent European patent application has a later starting point is hardly sufficient justification for allowing double patenting of the same invention. For the earlier as for the subsequent European patent application, the applicant has the choice whether, and, if so, in what form, it should be prosecuted to grant (T 2461/10, point 14). As the subsequent application derives benefit from both the later filing date and from the priority date (if validly claimed), there is no evident reason why an applicant should pursue the earlier application as well as the subsequent one to grant in order to obtain protection for the same subject-matter.

However, unless there is a principle of law requiring a legitimate interest in the proceedings, as set forth in G 1/05 and G 1/06, the absence of an interest in the grant of more than one patent for the same subject-matter is not a sufficient ground for a refusal.

iv) Article 76(1) EPC

68. Double patenting is most likely to arise in the context of European divisional applications, because a divisional application not extending beyond the content of the earlier application is deemed to have been filed on the filing date of the earlier application, and also enjoys its priority date where applicable (Article 76(1) EPC). Nevertheless, Article 76(1) EPC does not limit double patenting (in line with the derogations permitted by Article 4G, paragraph 2, of the Paris

Convention for the Protection of Industrial Property, of which the EPC is a special agreement).

69. The *travaux préparatoires* analysed above in the context of Article 125 EPC confirm this absence of any limitation on double patenting in Article 76(1) EPC. The first sentence of Article 137a, paragraph 2, of the 1971 draft provided that the claims of a divisional application should not contain any subject-matter for which protection was sought in the original application and vice versa. However, the sentence was deleted at the 10th meeting of Working Party I as it risked being interpreted to mean that - with the exception of divisional applications - the claims of later applications would be permitted to contain the same subject-matter as the claims of earlier applications (see minutes of the 10th meeting of Working Party I, held in Luxembourg from 22 to 26 November 1971, BR/144 e/71 of 16 December 1971, document N3 in the present proceedings, point 120). Including a prohibition on double patenting in the context of divisional applications was thus regarded as susceptible to the unintended consequence of being interpreted (in the sense of an *argumentum e contrario*) as inapplicable to situations not involving divisional applications. A specific provision was not considered necessary, but rather a declaration explaining that it was not possible for an inventor to obtain two patents for the same invention.

70. These points corroborate the board's findings with respect to the appellant's main request that in G 1/05 and G 1/06 the Enlarged Board of Appeal did not derive the prohibition on double patenting from Article 76(1) EPC - either from a literal reading or by interpretation of its wording - and, furthermore, that

it did not limit the prohibition to double patenting involving parent and divisional applications (see the discussion in points 5 to 11 above).

71. It may thus be concluded that Article 76(1) EPC cannot serve as a legal basis for a prohibition on double patenting.

v) Filling a gap in the law

72. The boards of appeal can be called upon to fill a *lacuna*, or gap, in the law without being bound by the conditions laid down in Article 125 EPC (see, by way of illustration, G 1/11, OJ EPO 2014, A122, point 13; J 5/91, OJ EPO 1993, 657, points 5.4 and 5.5; J 32/95, OJ EPO 1999, 713, point 2.4; T 616/08, point 12). The limits to filling a gap in the law by board of appeal decision, or, as expressed by the Enlarged Board in G 1/97, "in a praetorian way", were set out in point 3 b) of that decision as follows:

"In a codified legal system such as the EPC, the judge cannot simply decide, as the need arises, to substitute himself for the legislator, who remains the primary source of law. He may certainly find occasion to fill lacunae in the law, in particular where situations arise for which the legislator has omitted to provide. He may even contribute to the development of the law, beyond the filling of lacunae. In principle, however, statute law should provide him with reference points, even if these are incomplete (...)."

73. The main issue in the present case is whether there is a(n unintended) gap in the provisions of the EPC and thus a legal vacuum with respect to double patenting. The *travaux préparatoires* show that there was an

intention to adopt an agreed statement on a prohibition on double patenting at the Munich Diplomatic Conference. However, the Conference failed to come to a unanimous agreement on such a statement. The silence of the Convention with respect to double patenting is thus due to lack of agreement rather than to an omission. However, it cannot be concluded from this that the absence of a prohibition on double patenting was intentional.

It is also noted that no such prohibition was introduced at the Diplomatic Conference for the revision of the EPC in 2000. Article 139(3) EPC, which allows the Contracting States complete discretion in how they legislate on double protection, remained unchanged. There is no clear evidence of an intention to harmonise double patenting with respect to European patent applications.

74. On the other hand, according to G 1/05 and G 1/06, the prohibition on double patenting is a specific expression of the general principle that a party must have a legitimate interest in the proceedings. Although not expressly stated in the Convention, this general principle underlies several of its provisions. For example, Rules 75 and 84 EPC permit the filing of notices of opposition and the continuation of opposition proceedings, respectively, even if a European patent has been surrendered or has lapsed in all the designated Contracting States. Provision is thus made for an assumed infringer's legitimate interest in the patent being revoked retroactively. Furthermore, the requirement that an appellant has to be adversely affected by the appealed decision (Article 107 EPC) can be seen as reflecting the principle of a legitimate interest in the appeal

proceedings, thereby excluding appeals that are frivolous or vexatious.

The refusal of a European patent application on the ground that the applicant has already been granted a European patent for the same subject-matter is without doubt an example of the application of the principle of a legitimate interest in the proceedings. As a consequence, the disagreement about double patenting voiced at the Munich Diplomatic Conference conflicts with the tacit acceptance by the Contracting States of the aforesaid procedural principle which underlies the Convention. Whereas the implicit general principle speaks in favour of the case law supplementing the Convention with a prohibition on double patenting, the lack of agreement on harmonisation during the legislative process militates against it.

75. As is clear from the above, reasonable doubts exist as to the legislator's intention in respect of double patenting. Therefore there is no guiding principle for the boards of appeal to follow. It may be that, in this situation, the boards of appeal must refrain from filling a perceived gap in the law lest they substitute themselves for the legislator (even though they might not be directly interfering in a Contracting State's sovereignty under Article 139(3) EPC, as argued by the appellant, see point 62 above).

The choice of prohibiting double patenting or allowing it involves questions of policy. A prohibition on double patenting implies a deviation from the definition of the state of the art pursuant to Article 54(2) and (3) EPC and would therefore create a further patentability requirement. This was also of concern to the Norwegian delegation (see the comments of 8 May

1973 by the Norwegian delegation on the preparatory documents for the Munich Diplomatic Conference, M/28 (document N2 in the present proceedings), point 11, cited by the appellant; point 50 above).

One justification for such a further patentability requirement could be to avoid patent thickets. However, a prohibition on double patenting which is limited to preventing the same subject-matter being claimed twice in a European patent granted to the same person would contribute little to achieving the aim of avoiding undue restrictions on competition caused by multiple patents. Such a prohibition would also be easy to circumvent by way of minor amendments to the claims. Preventing double protection, on the other hand, is a matter of national law, and Article 139(3) EPC allows the Contracting States complete discretion in this regard.

Without a prohibition on double patenting being introduced under the EPC via the case law, the same patentability requirements will continue to apply to all European patent applications, namely the "whole day" principle adopted in Article 54 EPC. In this case, double patenting has to be accepted as being a consequence of the definition of the state of the art pursuant to Article 52(2) and (3) EPC, in the same way as for two European patent applications which are directed to the same subject-matter and have the same effective date but are filed by different persons. At the same time, accepting double patenting does not exclude double protection being addressed by means of national legislation. Therefore, it appears that a proper legislative procedure would offer the more favourable context in which to make the choice to

prohibit or to allow double patenting in respect of European patent applications.

vi) *Res judicata / ne bis in idem*

76. For the sake of completeness, the board notes that the prohibition on double patenting is to be distinguished from the principle of *res judicata (ne bis in idem)*, which was invoked in T 51/08. This was a case in which subject-matter on which a final decision had been taken by a board of appeal in the parent application was pursued in a divisional application. As the board in T 51/08 rightly pointed out, the principle of *res judicata* aims to avoid duplicated or contradictory judgements, whereas a prohibition on double patenting aims to avoid multiplication of patents for the same subject-matter (T 51/08, point 3.2).

77. It should also be borne in mind that it is a generally accepted principle of patent law that once a divisional application has been validly filed it becomes separate and independent from the parent application and is to be treated in the same manner as ordinary applications and subject to the same requirements, unless specific provisions of the EPC require something different (G 1/05 and G 1/06, points 3.1 and 8.1; G 4/98, OJ EPO 2001, 131, point 5). The same is true of a European patent application claiming the priority of an earlier European patent application, or a European patent application filed on the same day as another European patent application claiming the same subject-matter.

e) *Summary of findings*

78. The main conclusions by the board can be summarised as follows:

- There is no express provision in the EPC which prohibits double patenting.
- It is not clear whether such a prohibition became an implicit part of the Convention by way of an agreed statement or similar instrument adopted at the Munich Diplomatic Conference.
- The legislator did not introduce an express prohibition on double patenting at the Diplomatic Conference for the revision of the EPC in 2000. Article 139(3) EPC remained unchanged.
- A prohibition on double patenting cannot be based on Article 60(1) EPC.
- Neither Article 63(1) EPC nor Article 76(1) EPC offers scope for the idea of a prohibition on double patenting.
- It is questionable whether Article 125 EPC is appropriate as a legal basis for a prohibition on double patenting. This provision cannot serve to introduce a new condition for patentability (or a ground for refusal).
- Article 139(3) EPC deals with double protection resulting from parallel filing routes for the same territory. This matter is left entirely to national law.
- If a prohibition on double patenting with respect to European patent applications may be introduced at all, this could be by way of case law filling an unintended gap in the law. However, in view of the policy considerations involved, it appears that a proper legislative procedure would offer a more favourable context for establishing a sound legal basis for a prohibition on double patenting.

III. The questions referred to the Enlarged Board of Appeal

79. The first question seeks an answer on whether a principle of a prohibition on double patenting exists with respect to European patent applications of the same applicant. The main issue is whether there is a basis for the boards of appeal (or other departments of the EPO) to restrict the grant of patents in a manner not warranted by any specific provision of the EPC. The reference in the first question to the "state of the art pursuant to Article 54(2) and (3) EPC" is directed to the three situations in which double patenting can arise (see point 22 above). Alternatively, it could be stated that the question is aimed at situations in which the European patent application under consideration has the same effective date (be it the priority date or the date of filing) as a European patent application for which the applicant has already been granted a European patent.
80. If the Enlarged Board affirms the principle of a prohibition on double patenting, the second question seeks clarification of the conditions for refusing a European patent application on the ground of double patenting, taking into account point 13.4 of G 1/05 and G 1/06 (see points 25 to 31 above). More specifically, if the existence of the principle is affirmed, the conditions of "legitimate interest" and "the same invention" should be clarified. In this context, consideration will need to be given to the issue, raised by the appellant, of whether the different situations in which double patenting can arise might justify different conditions. Question 2.2 deals with the specific legal issue relevant to the decision to be taken on the present appeal.

Order

For these reasons it is decided that:

The following questions are referred to the Enlarged Board of Appeal:

1. Can a European patent application be refused under Article 97(2) EPC if it claims the same subject-matter as a European patent which was granted to the same applicant and does not form part of the state of the art pursuant to Article 54(2) and (3) EPC?
- 2.1 If the answer to the first question is yes, what are the conditions for such a refusal, and are different conditions to be applied depending on whether the European patent application under examination was filed
 - a) on the same date as, or
 - b) as a European divisional application (Article 76(1) EPC) in respect of, or
 - c) claiming the priority (Article 88 EPC) in respect of a European patent application on the basis of which a European patent was granted to the same applicant?
- 2.2 In particular, in the last of these cases, does an applicant have a legitimate interest in the grant of a patent on the (subsequent) European patent application in view of the fact that the filing date and not the priority date is the relevant date for calculating the term of the European patent under Article 63(1) EPC?

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated



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Case Number: T 0318/14 - 3.3.01

D E C I S I O N
of the Technical Board of Appeal 3.3.01
of 22 July 2020
correcting an error in the interlocutory decision
of 7 February 2019

Appellant: Société des Produits Nestlé S.A.
(Applicant) Entre-deux-Villes
1800 Vevey (CH)

Representative: Cogniat, Eric Jean Marie
Société des Produits Nestlé S.A.
Avenue Nestlé 55
1800 Vevey (CH)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 26 September
2013 refusing European patent application No.
10718590.2 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: A. Lindner
Members: T. Sommerfeld
L. Bühler

In application of Rule 140 EPC, the interlocutory decision dated 7 February 2019 is corrected as follows:

In point 7 of the Reasons, the sentence on page 10, lines 8 to 14,

"An applicant's interest in "extending" the term of protection for an invention protected by a patent granted on the priority application was considered by the Enlarged Board to justify an exception to the prohibition on double patenting (see points 12 to 14 and 65 to 67 below)."

is replaced by

"An applicant's interest in "extending" the term of protection for an invention protected by a patent granted on the priority application was considered to justify an exception to the prohibition on double patenting (see points 12 to 14 and 65 to 67 below)."

In point 62 of the Reasons, the sentence on page 44, lines 5 to 8,

"A further argument put forward by the appellant in this context is that, in view of Article 2(2) EPC and Article 139(3) EPC, double patenting was not entirely left to national law (see VII, penultimate paragraph)."

is replaced by

"A further argument put forward by the appellant in this context is that, in view of Article 2(2) EPC and

Article 139(3) EPC, double patenting was entirely left to national law (see VII, penultimate paragraph)."

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated