Internal distribution code:

(A) [X] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [-] No distribution

Datasheet for the interlocutory decision of 3 February 2026

Case Number: T 0873/24 - 3.3.05

Application Number: 19185736.6

Publication Number: 3587104

IPC: B32B15/00, C21D9/46

Language of the proceedings: EN

Title of invention:
COATED STEEL STRIPS, METHOD OF MAKING THE SAME, STAMPED PRODUCTS PREPARED FROM THE SAME AND ARTICLES OF MANUFACTURE WHICH CONTAIN SUCH A STAMPED PRODUCT

Patent Proprietor:
ArcelorMittal

Opponent:
POSCO

Headword:
TITANIUM-TO-NITROGEN RATIO/ArcelorMittal

Relevant legal provisions:
EPC Art. 123(2), 112(1)

Keyword:

Amendments
Referral to the Enlarged Board of Appeal - by the board of appeal - uniform application of law - point of law of fundamental importance

Decisions cited:

G 0001/24, G 0001/15, G 0002/10, G 0002/07, G 0002/03, G 0001/03, G 0003/98, T 0235/25, T 0837/24, T 0412/24, T 0405/24, T 0072/24, T 2047/23, T 2001/23, T 1973/23, T 1164/23, T 1071/23, T 1052/23, T 0981/23, T 0873/23, T 0727/23, T 0618/23, T 2067/22, T 2048/22, T 0439/22, T 0367/20, T 1473/19, T 0116/18, T 1239/03, T 0390/90

Catchword:

Questions referred to the Enlarged Board of Appeal:

1. May a decision be considered to be "required" for the purposes of Article 112(1) EPC, if the referring Board demonstrates that the point of law in question arises out of the context of the case pending before it and, in the circumstances of the proceedings, it is reasonable for the Board to examine it and decide on it next?

2.(a) Does the fact that the claims are the starting point and the basis for assessing the patentability of an invention generally preclude a feature which is only disclosed in the description or the drawings of a patent from being read into the meaning of a granted claim, in particular if this leads to a restrictive reading of terms used in the claim?

2.(b) If the answer to question 2.(a) is no: is claim interpretation the result of both reading the claims and consulting the description and drawings as a unitary process and does the claim being the starting point and the basis for assessing the patentability rule out only those interpretations which can be derived from the patent as a whole but would clearly contradict the general technical understanding of the terms used in the claim?

3.(a) When assessing compliance with Article 123(2) EPC, must a term used in a claim be assessed against all interpretations that make technical sense to the skilled reader on the basis of the claim alone?

3.(b) If the answer to question 3.(a) is no: is it sufficient that only the interpretations of the subject-matter of the claim established against the background of the patent specification as a whole are directly and unambiguously derivable from the application as filed?

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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

Case Number: T 0873/24 - 3.3.05

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 3.3.05
of 3 February 2026

Appellant 1: (Patent Proprietor)	ArcelorMittal 24-26 Boulevard d'Avranches 1160 Luxembourg (LU)
Representative:	Lavoix 2, place d'Estienne d'Orves 75441 Paris Cedex 09 (FR)
Appellant 2: (Opponent)	POSCO (Goedong-dong) 6261, Donghaean-ro Nam-gu Pohang-si, Gyeongsangbuk-do 37859 (KR)
Representative:	Meissner Bolte Partnerschaft mbB Patentanwälte Rechtsanwälte Postfach 86 06 24 81633 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 7 May 2024 concerning maintenance of the European Patent No. 3587104 in amended form.**

Composition of the Board:

Chairman	R. Elsässer
Members:	J. Roider
	P. Guntz

Summary of Facts and Submissions

I. The appeals by the patent proprietor (appellant 1) and the opponent (appellant 2) lie from the opposition division's decision to maintain European patent EP 3 587 104 B1 on the basis of auxiliary request 56.

II. The patent in suit is based upon European patent application no. 19 185 736.6. It was filed as a divisional application within the meaning of Article 76 EPC of the earlier European patent application No. 17 192 410.3 (hereafter parent), which itself is a divisional of application no. 06 842 403.5 (hereafter grandparent).

III. Independent claim 1 as granted reads as follows (breakdown of features according to the impugned decision in the left-hand column):

(F0) *1. A pre-coated steel strip, comprising:*

(F1.1) *(a) a strip of base steel having a length, a width, a first side, and a second side;*

(F1.2) *wherein the base steel comprises the following components by weight based on total weight:*

0.15%<carbon<0.5%

0.5%<manganese<3%

0.1%<silicon<0.5%

0.01%<chromium<1%

titanium<0.2%

aluminum<0.1%

phosphorus<0.1%

sulfur ≤ 0.0020 %

0.0005%<boron<0.08%,

and further comprises iron and impurities inherent in processing,

(F1.3) wherein the ratio of titanium to nitrogen is in excess of 3.42,

(F2) (b) said length of said strip of base steel being at least 100m and said width being at least 600mm, and

(F3) (c) an aluminum or an aluminum alloy pre-coating on at least part of one of said first and second sides of said strip of base steel, wherein

(F4) (d) the thickness tp of the said pre-coating is from 20 - 33 micrometers at every location on at least one of said first and second sides.

IV. In its decision, the opposition division found that in feature F1.3, in view of the claim as a whole, the use of weight percentages for the amounts of titanium and nitrogen when calculating the ratio was the only possible interpretation. This was also confirmed in view of the description page 13, lines 11-14.

V. Appellant 1 (patent proprietor) endorsed the opposition division's conclusion in this respect. Their key arguments can be summarised as follows.

(1) The use of weight percent for the ratio in feature F1.3 was implicit in view of feature F1.2.

(2) The use of weight percent was in accordance with standard practice for drafting compositions.

(3) Page 13, lines 24-27 of the description as filed disclosed the ratio without using units.

(4) G 1/24 merely confirmed what was already evident from the claim alone. If page 13, lines 24-27 was to be read in the context of page 13, lines 11-14, then feature F1.3 of claim 1 had to be read in that context too.

VI. Appellant 2 (opponent) contested the opposition division's conclusion in this respect. They argued that

the basis of the ratio recited in feature F1.3 was not specified, in particular, it was not based on weight. Since the application as filed did not support such a generalisation, subject-matter had been added. Their key arguments can be summarised as follows.

(1) Features Fl.2 and Fl.3 were distinct from each other. The units used for the base steel composition of feature Fl.2 did not implicitly apply to feature Fl.3.

(2) Standard practice could not be relied upon to meet the requirement of direct and unambiguous disclosure.

(3) Page 13, lines 24-27 of the description as filed had to be read in context with page 13, lines 11-14, which defined the ratio to be a weight ratio.

(4) Concerning G 1/24, this decision confirmed the primacy of the claims. The gold standard criteria were decisive and restricting a clear feature in light of the description would mean abandoning them.
By deleting the reference to weight percent for calculating the ratio during the grant procedure, the patentee chose to generalise the feature.

VII. Substantive requests:

The patent proprietor/appellant 1 requests that the decision under appeal be set aside and that the opposition be rejected, or in the alternative, that the patent be maintained in amended form based on auxiliary requests 1-85, filed with the grounds of appeal, or based on one of auxiliary requests 86-103, filed by letter dated 24 July 2025, or based on one of auxiliary requests 104-107, filed by letter dated 16 January 2026.

The opponent/appellant 2 requests that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

Main request

1. Amendments, Article 100(c) with Article 123(2) EPC

In each of the originally filed sets of claims of the application, the parent and the grandparent application, the titanium to nitrogen ratio is explicitly defined by expressing their respective amounts in weight percent, as being in excess of 3.42, thus resulting in a weight ratio.

In contrast, claim 1, feature F1.3 of the patent in suit does not specify that the amounts of titanium and nitrogen must be expressed as weight percent in order to determine the ratio. In this respect, its wording is open, unlike in claim 5 of the original application and in claim 11 of the parent and grandparent applications, respectively. (Since no additional issues under Article 76(1) EPC arise, the decision focuses on Article 123(2) EPC).

1.1 Appellant 2 argued that subject-matter had been added since the application as filed (as well as the parent and grandparent applications) only disclosed a ratio based on weight but not a generalisation of the ratio by omission of the unit, as claimed.

1.2 This was refuted by appellant 1. In this regard, they submitted the following four lines of defence:

1.2.1 Implicit requirement in claim 1

The opposition division considered that the word "wherein" linked the features F1.2 and F1.3 of claim 1 such that, in the absence of any indication to the contrary, it was clear to the skilled person that the use of weight percentages for the amounts of titanium and nitrogen when calculating the ratio was the only possible interpretation.

Appellant 1 endorsed the opposition division's reasoning and further argued that since the ratio was dimensionless and titanium was expressed in weight percent in feature F1.2, nitrogen likewise had to be expressed in weight percent despite this not being mentioned in feature F1.2. It would be illogical and would not make sense to assume different units in features F1.2 and F1.3 when reading the claim with a mind willing to understand.

Appellant 2 argued that feature F1.3 was not limited to a weight ratio but was generalised by omission of the units and thus encompassed other options such as a molar ratio. The skilled person could not, based on the wording of the feature and the claim alone, determine that a weight ratio was intended.

Moreover, features F1.2 and F1.3 were separate features and the word "wherein" could not link them to the extent that it required use of the same units.

Appellant 2 further submitted that feature F1.3 was clear, and a mind willing to understand would recognise

that it constituted a generalised definition of the ratio, thereby encompassing alternatives that were not disclosed in the application as filed, such as a molar ratio.

The arguments submitted by appellant 1 are not convincing.

The word "wherein" in feature F1.3 does not link features F1.2 and F1.3 in such a way that the units used for the amounts of titanium and nitrogen when calculating the ratio of feature F1.3 must be the same as those used in feature F1.2. In particular, given that nitrogen is not one of the elements listed in feature F1.2, this conclusion is not justified.

The use of different units is not ruled out in claim 1 and makes sense technically.
The claimed ratio refers to the relative amounts of titanium and nitrogen, without defining the specific units used. It is therefore not illogical, and no contradiction within the claims would arise if the ratio was, for instance, a molar ratio, as suggested by appellant 2.

1.2.2 Use of weight percent as a standard practice in the field

Appellant 1 argued that the use of weight percent was customary in the field of metallurgy and the skilled person would not have contemplated a different unit. It was in accordance with the standard practice for drafting claims directed to compositions.

Appellant 2, by contrast, disputed that standard drafting practice could be relied upon to restrict the

technical meaning of claim 1.

Appellant 1's arguments are not convincing.

The mere fact that weight percentages are commonly used does not justify purposely interpreting the ratio of claim 1 in this specific way, unless it was proven that other ratios are not used at all in the field. No such proof is on file.

Notably, of all the documents cited in appellant 1's letter of 16 January 2026, only D27 (US 5,178,688 A; claim 1: Ti/N) discloses a ratio. However, unlike the patent in suit, it explicitly defines titanium and nitrogen in the steel composition and states that all percentages are to be expressed as weight percent. D27 therefore does not rely on the alleged customary practice. There is no evidence that customary practice excludes the use of any other possible unit with certainty.

1.2.3 Disclosure without reference to units also in the description

Appellant 1 also referred to the description as filed, page 13, lines 24-27, which in their view disclosed the ratio without using units and therefore the alleged generalisation of the ratio. It was a stand-alone disclosure and could thus be the basis for the ratio without defining the units in feature F1.3.

In contrast, appellant 2 argued that page 13, lines 24-27 of the description as filed had to be read in context with page 13, lines 11-14, (hereafter: the first passage) which defined the ratio to be a weight ratio. Page 13, lines 24-27 (hereafter: the second

passage) referenced the first passage and merely disclosed a purpose related to that ratio. Consequently, the second passage could not form a basis for a titanium-to-nitrogen ratio with undefined units.

Appellant 1's arguments are not convincing.

The first passage discloses (emphasis by the Board): *"Even more preferably, in the composition by weight of the sheet,* ***the weight ratio*** *of titanium content with respect to the nitrogen content is* ***in excess of 3.42,*** *believed to be a level at which the boron is no longer able to combine with the nitrogen.*

The second passage discloses (emphasis by the Board): *"Titanium,* ***the ratio*** *of the content* ***of which*** *with respect to the nitrogen content should be* ***in excess of 3.42,*** *is introduced for example in order to prevent combining of the boron with the nitrogen, the nitrogen being combined with titanium."*

Therefore, the first passage defines the ratio to be a weight ratio and the second passage further explains the purpose of that feature with reference to the first passage. The second passage is not an isolated, open disclosure of the ratio. Instead, it must be read in context with the first passage of page 13 and thus does not refer to just any ratio but also to a weight ratio.

The claims do not contain a similar context.

1.2.4 Therefore, the case hinges on the fourth argument, i.e. the question as to what extent the information found in the description may influence the interpretation of claim 1 and what possible interpretations of the claim need to be originally disclosed.

2. Case Law of the Boards of Appeal in view of G 1/24

G 1/24 relates to the question of the circumstances under which the description of a patent can be consulted when interpreting a patent claim in the context of Articles 52 to 57 EPC. The Enlarged Board of Appeal held:

The claims are the starting point and the basis for assessing the patentability of an invention. The description and drawings shall always be consulted to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC, and not only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation.

Since the Enlarged Board of Appeal had, in previous decisions, created "a consistent system" for assessment under Art. 54, 76(1), 87-89 and 123(2) EPC (G 1/03 point 4; G 2/10, point 4.6; G 1/15, point 6.2), most case law acknowledges that the principles of G 1/24 as to the role of the description in claim interpretation also apply to the assessment of the requirements of Art. 76(1) and 123(2) EPC (e.g. T 873/23, Reasons 1.6.1, and T 847/24, Reasons 3.4, referring to earlier decision T 1473/19, Reasons 3.11).

A few decisions question the applicability of the principles of G 1/24 in the realm of Article 123(2) EPC, only nevertheless to apply them for the sake of argument (e.g. T 72/24, Reasons 1.10.12; T 405/24, Reasons 1.2.3; T 412/24, Reasons 3.1.1).

Generally, most of the decisions have adopted a two-step approach for the assessment of added matter.

In a first step, the patent claims were interpreted from the point of view of a skilled person and (to varying degrees, see below 2.1 to 2.3) also taking account of the description, in order to determine the subject—matter they contain after the amendment (G 2/10, Reasons 4.5.2).

In a second step, it was assessed whether the subject-matter of the amended claim - established by way of interpretation - contained subject-matter extending beyond the content of the application as filed (T 873/23, Reasons 1.6.1; T 1052/23, Reasons 2.4.4; T 412/24, Reasons 3.1.1; see also T 367/20, Reasons 1.3.8–1.3.10, published prior to G 1/24). This approach was also adopted, without being explicitly described as such, in other decisions (e.g. T 2001/23, Reasons 71 and 72; and T 2067/22, Reasons 4).

Decisions that are sometimes regarded as not following a two-step approach do, on closer analysis, proceed in two logical stages: they first interpret the claims (some of them only implicitly) from the point of view of a skilled person in order to determine the subject-matter they contain after the amendment and only subsequently assess whether they contain added subject-matter in the light of the gold standard (T 618/23, Reasons 6.1 - 6.3; T 1973/23, Reasons 3: *"claim construction"*, and Reasons 4: *"added matter"*; T 837/24, Reasons 2.5.3: *"...all interpretations ... must be considered as technically meaningful interpretations, and neither of these interpretations may extend beyond the content of the application as filed..."*).

Notably, these two stages were also applied in

decisions which question the applicability of the principles of G 1/24 (T 72/24, Reasons 1.10.5; T 405/24, Reasons 1.2.1).

However, the conclusions drawn differ substantially, as summarised below. These differences stem from the way in which the claims were interpreted at the first step of the assessment in order to determine the subject-matter they contain after the amendment. The underlying reason resides in the extent to which the description was relied upon when interpreting the claims. Only a small number of decisions disregard the description entirely.

2.1 First approach: consulting the description only to define the skilled person

Some decisions state that "consulting the description" means simply identifying the technical field and thus the skilled reader on the basis of whose common general knowledge the claim has to be interpreted (T 618/23, Reasons 6.3; T 412/24, Reasons 3.1.1; T 2047/23, Reasons 2.3 and 2.5, which concern claim construction). This was also done in T 837/24, Reasons 2.4.2, without being explicitly stated.

All claim interpretations, in particular broader ones, are then taken into account, except for interpretations that are illogical or make no technical sense (T 618/23, Reasons 6.3; T 2047/23, Reasons 2.4.2 and 2.5; T 837/24, Reasons 2.5.3).

Thus, logic and common general knowledge in the field are the only factors restricting a potentially broad interpretation and the claim has to be assessed for

original disclosure of every possible interpretation.

2.2 Second approach: no broadening or limitation of claims based on the patent specification

Most decisions consult the patent specification beyond mere identification of the technical field in order to exclude interpretations of a claim which are incompatible with the technical context provided by the patent specification. However, it is not accepted that features or restrictions only present in the description can be read into the claim. Similarly, a broad interpretation of a claimed feature is not accepted where the feature, as such, imparts clear, credible technical teaching to the skilled person.

According to some decisions, the primacy of the claims precludes reading into a claim a feature that is disclosed only in the description or the drawings (T 873/23, Reasons 1.6.7; T 981/23, Reasons 2.2.3; T 1071/23, Reasons 1.2; T 2001/23, Reasons 59, 60 and 71).

Some decisions state that it is not permitted to read into the claim features (whether narrowing or broadening) taken from anywhere in the description (T 981/23, Reasons 2.2.3; T 2001/23, Reasons 60; T 2488/22, Reasons 20 and 21).

Other decisions concerned situations in which it was concluded that features taken from an embodiment could not be read into the claim (T 235/25, Reasons 2.2.3; T 1052/23, Reasons 2.4.4; T 1973/23, Reasons 3.4, 3.6 and 3.7).

Also in this approach, some decisions consider that,

where both a broad and a narrow interpretation of a claim are technically reasonable, the allowability of the claim must also be assessed against the broader one (e.g. T 981/23, Reasons 2.2.3).

In T 1164/23, Reasons 1.5.4, the Board did not accept that the patent extends to what, after examination of the description and the drawings, appears to be the subject-matter for which the patent proprietor seeks protection.

2.3 Third approach: holistic approach permitting broadening and/or narrowing of the interpretation in view of the patent specification

Other decisions do not distinguish between consulting and using the description and between limiting or broadening features but rather try to derive from the patent as a whole what meaning a person skilled in the art would attribute to the terms used in the claim. The focus then lies on the question as to whether a limitation (or broadening) to be read into the claim can really be derived from the patent specification as a whole (T 2048/22, Reasons 1.2.2, and the connected case T 727/23, Reasons 3.2.1.). Claim interpretation is accordingly seen as the result of both reading the claims and consulting the description and drawings as a unitary process, see e.g. T 439/22 of 11 December 2025 (hereafter simply referred to as T 439/22), Reasons 2.4. As the board in T 847/24, Reasons 3.2, put it: *"It goes without saying that, if the description and the drawings must always be consulted to interpret the claims, this consultation may have an impact on the result of this interpretation."*. Accordingly, the correct interpretation of a claim may not be left open and it is not permissible to adopt two mutually

exclusive interpretations of a claim simultaneously (see Reasons 3.5).

Specifically, T 2048/22, Reasons 1.2.2, concludes that in the light of the description, the claimed feature "pores or perforations" does not refer to two alternative items but, in the light of the description, indicates the same entity (the same conclusion is arrived at in the connected case T 727/23).

T 439/22, Reasons 6, states in the assessment of compliance with Art. 123(3) EPC that as long as a definition in the patent specification is technically reasonable and complies with the overall teaching expressed in the claims, description and figures, the skilled person will read the terms in the claim in the sense of the definition, taking account of both the broadening and limiting aspects found in said definition.

T 2067/22, Reasons 4, also suggests that a definition in the patent specification could be used to interpret the claim.

Earlier decision T 1239/03, which also dealt with the problem of establishing whether "%" in the claim referred to *weight* or *mol* percent, used Examples 2 and 3 of the initially filed description as a means for interpretation that rendered a reading as *mol* percent probable and, hence, did not allow the deletion of these passages under Article 123(2) EPC because, in particular without Example 3, the skilled person would interpret the claim differently, namely would lean toward weight percent, which could not be derived from the version as originally filed, see Reasons 3.3 to

3.3.5.

2.4 Underlying these differing views is the unresolved question of the extent to which the fact that the claims are the starting point and the basis for assessing the patentability of an invention limits consideration of the content of the description and figures when interpreting the claim (see questions 2a and b below) as well as, in the specific application of Article 123(2) EPC, the question of which of the conceivable interpretations of a claim need to be originally disclosed (see questions 3a and 3b below).

3. Assessment of Art. 100(c) with Article 123(2) EPC for the present case

The three approaches in the case law outlined above regarding how the description is to be consulted in the first step of the assessment of added subject-matter would lead to different outcomes when applied in the case at hand.

3.1 First approach: consulting the description only to define the skilled person

In the present case, if the description is consulted only to establish common general knowledge, the person skilled in the art is not able to determine from the wording of claim 1 which kind of ratio is referred to and would assume that a molar ratio could also be meant. According to this first approach, this possibility also needs to be assessed but has no basis in the original application(s).

Thus, under the first approach, the amendment to

claim 1 would be deemed to add subject-matter.

3.2 Second approach: no broadening or limitation of claims based on the patent specification

As argued by appellant 2, the ratio in feature F1.3 is nonspecific with regard to units and therefore includes a molar ratio as a possible alternative interpretation. While a weight ratio of titanium to nitrogen of more than 3.42 results in a molar ratio of more than 1, if the ratio were interpreted as a molar ratio, titanium would have to be added in an over 3.42 fold molar excess with respect to nitrogen.

According to this approach, it is unwarranted to interpret a feature in a purposely restricted manner in view of the description. Indeed, for the purposes of assessing the requirements of added subject-matter, considering only a weight ratio could in itself constitute a restriction of the claimed subject-matter. Notably, in the case in hand, there would be no restriction under Art. 54 and 56 EPC because, in view of the wording "more than", the molar ratio of more than 3.42 - corresponding to a weight ratio of more than 11.70 (=3.42 x 3.42) - would be encompassed, as a subrange, by the broader weight ratio of "more than" 3.42.

For this reason, appellant 2's interpretation that the ratio in feature F1.3 was generalised and may also relate to a molar ratio can be regarded as compatible with the general technical context provided by the patent specification.

Indeed, according to the description (paragraph [0062] of the patent in suit), titanium is added to the alloy

in order to prevent the boron from combining with nitrogen. In view of this purpose, expressing the ratio defined in feature F1.3 as a molar ratio cannot be excluded as an interpretation that is incompatible with the general technical context provided by the patent specification. Such an interpretation would imply that titanium is to be added in at least a 3.42-fold molar excess.

Therefore, the open ratio of claim 1 cannot be interpreted, based on paragraphs [0058] and [0062] of the application as filed, as relating to a weight ratio. Rather, the titanium-to-nitrogen ratio, without specified units, is relevant to the assessment under Art. 100(c) with Art. 123(2) EPC.

In the second step, this interpretation is compared with the application as filed, in view of the gold standard, which immediately results in the conclusion that the open definition of the titanium-to-nitrogen ratio is not disclosed in the application as filed.

The second approach would thus also lead to the conclusion that feature F1.3 violates the requirements of Art. 100(c) EPC / Art. 123(2) EPC.

3.3 Third approach: holistic approach permitting broadening and/or narrowing of the interpretation in view of the patent specification

In the present case, it is apparent that the "ratio of titanium to nitrogen" was mentioned in the patent in suit only in the context of a weight ratio, because paragraphs [0058] and [0062] exclusively relate to a weight ratio. The purpose of this value is explained in paragraph [0058], which states that the weight ratio of

titanium to nitrogen must exceed 3.42 in order to prevent boron from combining with nitrogen, and in paragraph [0062], which provides the further information that nitrogen is scavenged by titanium. The description of the patent in suit contains no other disclosure concerning the titanium to nitrogen ratio.

Furthermore, since the numerical value of the lower limit of the open range of the weight ratio of 3.42 is contained in paragraphs [0058] and [0062] of the patent in suit and also in feature F1.3, it is immediately apparent that the correct interpretation of the ratio in feature F1.3 is that it relates to a weight ratio.

This interpretation is also consistent with the purpose of this feature, namely to scavenge nitrogen by means of titanium in order to prevent boron from combining with nitrogen. Since titanium and nitrogen normally combine to form TiN, the addition of an equimolar amount of titanium to the steel alloy represents the theoretical minimum required to scavenge all of the nitrogen, that is, the stoichiometric amount. When expressed as a weight ratio relative to nitrogen, this corresponds to a value of 3.42.
Therefore, it is reasonable to assume that the patent in suit only refers to the stoichiometric amount.

The consequence is that feature F1.3 of claim 1 is interpreted more narrowly than a broad technical interpretation of the claim alone would suggest. In other words, the open ratio is only to be considered in relation to a weight ratio, with all other options, such as a molar ratio, being disregarded.

In the second step, this interpretation is compared with the application as filed, in view of the gold

standard, which immediately results in the conclusion that the definition of the ratio of titanium to nitrogen is disclosed in the application as filed.

The third approach would thus lead to the conclusion that feature F1.3 fulfils the requirements of Article 123(2) EPC.

4. Admissibility of a referral

4.1 Relevance to the case at hand

Choosing the correct approach once the underlying open questions have been answered affects not only the main request, but also all the other requests of the patent proprietor's appeal, except for auxiliary request 1. The same applies to the patent as maintained by the opposition division, and to all the requests filed in defence against the opponent's appeal, except for auxiliary requests 104 to 107.

If Article 123(2) EPC is not complied with, most of the auxiliary requests would fall for the same reason as the main request. Thus, this objection has the greatest impact on the outcome of the proceedings.

Against this background, the Board intends to assess and decide upon the question of Article 123(2) EPC first before dealing with the objections under Article 56 EPC.

4.2 Requirement for a decision of the Enlarged Board of Appeal

A decision of the Enlarged Board of Appeal is required to determine which of the approaches to consulting the

description set out above is to be followed.

With regard to the second and third approaches, it is of particular importance to know whether interpreting a claim might go so far that it leads to a broadening or limitation of features based on the description, if it is concluded that, when taking account of the patent specification as a whole, the skilled person would interpret the claim accordingly (see questions 2(a) and (b) below).

With regard to all three approaches, it is to be clarified against which of several possible interpretations the claim has to be assessed under Article 123(2) EPC (see questions 3(a) and (b) below).

The answer to these questions touches upon fundamental principles of the EPC and will become relevant in a multitude of cases before the Divisions of the European Patent Office and the Boards of Appeal. The questions thus relate to points of law of fundamental importance and are relevant not only during the grant procedure but also to any later proceedings before the courts of the member states throughout the lifetime of a patent.

To clarify these points of law and to ensure future uniform application of the law in view of the divergent case law listed above, the Board considers a decision of the Enlarged Board of Appeal within the meaning of Article 112(1)a EPC to be required.

4.3 Earlier case law on the admissibility requirement

According to Article 112(1)(a) EPC, a Board of Appeal shall refer any question to the Enlarged Board of Appeal if it considers that a decision [of the Enlarged

Board] is "required for the above purposes", namely harmonisation of the case law and clarification of fundamental points of law.

In addition, case law has read into the term "required" the further requirement that the referred questions need to be relevant to the [referring Board's] decision for a referral to be admissible.

However, some Boards have interpreted this requirement of "relevance to the decision" very strictly, meaning that, where several grounds for opposition have been raised by the opponent(s), the referral is admissible only when the Board has concluded that the patent would be maintained despite the other invoked grounds for opposition which are not the subject of the referral, see e.g. T 116/18 of 28 July 2023 (hereafter simply referred to as T 116/18), Reasons 9.4.2 with reference to G 3/98, Reasons 1.2.3, where it is stated that *"the referred question may not have a merely theoretical significance for the original proceedings ... as would be the case if the referring board were to reach the same decision on the basis of the file regardless of the answer to the referred question"*.

In the case in hand, the possibility cannot as yet be totally ruled out of each and every one of the main and 107 auxiliary requests on file failing for lack of inventive step or due to other objections, and therefore the Board might come to the same conclusion to revoke the patent irrespective of whether and how the Enlarged Board answers the questions referred to it. Thus, according to T 116/18, a referral would not yet be admissible.

4.4 Uniform application of the law: fundamental importance of admissibility requirements

4.4.1 The referring Board sees a need to diverge from this view and its reasons are given below under point 4.4.4.

4.4.2 The requirements under which divergent case law may be clarified by referring questions to the Enlarged Board constitute a point of law of fundamental importance.

In a system with only one judicial stage, where many Boards operate in parallel and collectively fulfil the role of a court of last instance, a coherent and harmonised body of case law is particularly important. A key mechanism to support this - common to other such courts composed of multiple adjudicating panels - is the possibility of referring matters to a central body whose members are drawn from across the entire court and sometimes beyond, as in the case of the Boards of Appeal.

There may be good reasons to limit access to the Enlarged Board of Appeal, such as excluding referrals that raise purely theoretical issues. At the same time, it remains important for Boards to be able to obtain clarification on questions that genuinely arise in the normal and reasonable handling of their cases. An excessively formalistic approach could otherwise lead Boards to structure their proceedings in an impractical and inefficient manner - examining every other issue before addressing the most straightforward one - and could, in many situations, unnecessarily reduce the system's ability to make effective use of one of its key instruments for achieving harmonisation.

Reporting of the approach laid out in T 116/18 in the

"Case Law of the Boards of Appeal", which corresponds to a widely-held belief among the members of the Boards, shows that this risk is not merely theoretical.

The question of under what circumstances divergent case law may be clarified by referring questions to the Enlarged Board is therefore central to the effective functioning of the whole system. This is particularly true at present, as a second transnational Court applying the European Patent Convention entails new challenges for achieving a harmonised pan-European interpretation of the Articles and Rules of the Convention. Hence, in this context not only the questions of substantive law referred to above but also the admissibility issue itself concerns a point of law of fundamental importance.

4.4.3 Requirement for a decision of the Enlarged Board

Since it does not appear to be reasonable to deal firstly with all the other objections, many of which have not been dealt with at first instance, the Board sees a need to refer a question in this respect to the Enlarged Board in order to obtain clarification as to whether T 116/18 is indeed the relevant test for the admissibility of a referral.

Such a referral would be mandatory, see Article 21 RPBA, if T 116/18 were indeed correct in its interpretation of G 3/98, since the Board in this event would need to deviate from a decision of the Enlarged Board of Appeal. However, even if G 3/98 were to be interpreted less strictly, as seems to be indicated with regard to the overall content of this decision and other decisions of the Enlarged Board of Appeal, see below, a decision of the Enlarged Board would still be

required under Article 112(1)a) EPC, since the existence of these decisions apparently did not prevent the development of the notion that a referral is only admissible where it is first established that all an opponent's other objections are unsuccessful.

4.4.4 Reasons not to follow T 116/18.

(a) The Board in T 116/18 drew a conclusion from G 3/98 which cannot be derived from that decision in such general terms.

In fact, the Enlarged Board, on the basis of Article 112(1)a) and (3) EPC and Article 17(2) [now 22(2)], second sentence of the RPBA, established a less stringent test, see G 3/98, Reasons 1.2 and 1.2.3: questions need *"to originate in the context of the cases which led to the referral"* and they must *"not have a merely theoretical significance for the original proceedings"*. However, the following passage *"as would be the case if the referring board were to reach the same decision ..."*, full quote as in T 116/18 (see point 4.3 above), cannot be reduced to the mere order of the decision finally reached but rather includes the question of how such a decision may adequately and reasonably be reached, as is apparent from the question raised in G 3/98, Reasons 1.2.3 *"how different answers to the referred question would influence subsequent proceedings"* and from the considerations under Reasons 1.2.4 which are summed up in the last lines of this point: *"In these circumstances, it also seems justified in the interest of procedural economy to address the referred question first"*.

The Enlarged Board entrusts the selection of the appropriate way to come to a decision to the referring Board, under the sole proviso that the selection appear reasonable and not arbitrary, see G 3/98, Reasons 1.2.3: *"Whereas it is the view of the referring Board which is decisive for assessing whether a referral is required, such assessment should be made on objective criteria and should be plausible".*

In this context it is worth noting the Enlarged Board's remark in G 3/98, Reasons 1.2.2: *In finding that a provision is not applicable, the deciding body may select one unfulfilled criterion, leaving aside consideration of other criteria. For reasons of procedural economy, the criterion may be chosen which is the easiest to examine.* The same consideration applies to the choice of one of several objections for reaching the finding that a claim request or a series of claim requests is not allowable.

That the outcome of the assessment may still be open has been inherently acknowledged by the Enlarged Board when it concludes, see G 3/98, Reasons 1.2.4, that the interests of procedural economy may warrant addressing the referred question first even where it cannot be excluded that this question might prove irrelevant once all the other arguments of the parties have been dealt with.

(b) This is in line with other decisions of the Enlarged Board of Appeal, some of which are even less strict.

Decision G 1/24 did not require the referring Board to assess the case first against Art. 56 EPC on the basis of all conceivable answers to the questions on claim interpretation which were referred to the Enlarged Board with regard to an objection under Art. 54(1) and (2) EPC.

Decision G 2/07, Reasons 1, accepted that the question of a possible exclusion from patentability under Article 53(b) EPC 1973 was decisive and that none of the remaining opposition grounds had been dealt with by the opposition division, and therefore the case would have to be remitted to it, should the subject matter of the main request turn out not to be excluded from patentability.

In the case underlying decision G 2/03, not all substantive requirements had yet been examined by the Board referring a question on the validity of a disclaimer. The Enlarged Board stated, see Reasons 1.2: *"In the end, the allowability of the disclaimer may turn out to be irrelevant, should the requirement of inventive step not be fulfilled. Nevertheless the point of law arises out of the context of the case pending before the referring Board and the formal allowability of the claimed subject-matter is normally examined before the substantive requirements. Therefore, the referral was justified."*

(c) As set out above under point 4.4.2, the European Patent Organisation has a strong need for an effective instrument to help harmonize the case law of its supreme judicial bodies. Raising high hurdles of admissibility runs counter to this need.

(d) For the purpose of preventing Boards from referring questions which are not linked to their particular case, a lower hurdle would appear to be sufficient and adequate based on the principles underlying the case law of the Enlarged Board of Appeal, namely that:

- it is the view of the referring Board which is decisive for assessing whether a referral is required

- the referring Board has to demonstrate that the questions referred originate in the context of the case before it and that an answer to this question is required when dealing with the case in a procedurally reasonable way

- the Enlarged Board has to be satisfied that this reasoning is plausible.

In order to demonstrate that it is procedurally reasonable to decide the case on the legal basis of the referred question, it seems sensible not to take account of the fact that referring a question to the Enlarged Board is in itself laborious. Otherwise, important questions might remain open for a long time and Boards would in the meanwhile always be obliged to adopt a less efficient approach when dealing with their cases.

These requirements would go along with the approach taken in G 2/07, Reasons 1, where the Enlarged Board explicitly did not insist on having all the remaining opposition grounds assessed beforehand and concluded: *"The referrals are therefore admissible, irrespective of whether an answer is*

actually required on all aspects which the referred questions might in theory be seen as embracing."

(e) This approach, moreover, does not change the generally accepted principle that referring a question under Article 112(1)(a) EPC lies within the discretion of each Board, see T 390/90, Reasons 2.1. It is often reasonable to deal with a case in more than one way.

Any Board preferring to decide a case on an alternative basis is free to choose another, even more cumbersome route and refrain from referring questions that would first need to be clarified when taking the procedurally more efficient approach.

(f) The questions referred to the Enlarged Board originate in the context of the present case. It is reasonable to deal first with the objection under Art. 100(c) together with Article 123(2) EPC not only because the formal allowability of the claimed subject-matter is normally examined before the substantive requirements, as stated by the Enlarged Board of Appeal in G 2/03, Reasons 1.2, but also for the reason that it is much more efficient to deal first with an objection that is relevant not only to the main request but also to almost any one of the 103 auxiliary requests filed with the patent proprietor's statement of grounds of appeal and its letter dated 24 July 2025. As stated above, this is especially true since none of the objections against any of the requests beyond auxiliary request 56, which has been found allowable by the impugned decision, have as yet been assessed by the opposition division.

Order

For these reasons it is decided that:

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

1. May a decision be considered to be "required" for the purposes of Article 112(1) EPC, if the referring Board demonstrates that the point of law in question arises out of the context of the case pending before it and, in the circumstances of the proceedings, it is reasonable for the Board to examine it and decide on it next?

2.(a) Does the fact that the claims are the starting point and the basis for assessing the patentability of an invention generally preclude a feature which is only disclosed in the description or the drawings of a patent from being read into the meaning of a granted claim, in particular if this leads to a restrictive reading of terms used in the claim?

2.(b) If the answer to question 2.(a) is no: is claim interpretation the result of both reading the claims and consulting the description and drawings as a unitary process and does the claim being the starting point and the basis for assessing the patentability rule out only those interpretations which can be derived from the patent as a whole but would clearly contradict the general technical understanding of the terms used in the claim?

3.(a) When assessing compliance with Article 123(2) EPC, must a term used in a claim be assessed against all interpretations that make technical sense to the skilled reader on the basis of the claim alone?

3.(b) If the answer to question 3.(a) is no: is it sufficient that only the interpretations of the subject-matter of the claim established against the background of the patent specification as a whole are directly and unambiguously derivable from the application as filed?

The Registrar: The Chairman:

C. Vodz R. Elsässer

Decision electronically authenticated