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**Datasheet for the decision
of 21 May 2026**

Case Number: T 0216/26 - 3.2.04

Application Number: 22706565.3

Publication Number: 4291779

IPC: F03G7/06

Language of the proceedings: EN

Title of invention:

ENGINE OPERATING USING A COMPRESSION SMA MATERIAL

Applicant:

Exergyn Ltd.

Headword:

Relevant legal provisions:

EPC R. 71(3), 71(5), 103(1)(a)
EPC Art. 113(2)

Keyword:

Examination procedure - approval of the text by the applicant
Basis of decision - text submitted or agreed by applicant (no)
Reimbursement of appeal fee - (no)

Decisions cited:

T 0387/25, T 1823/23, T 0408/21, T 1003/19, J 0004/09

Catchword:



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 0216/26 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 21 May 2026

Appellant:

(Patent Proprietor)

Exergyn Ltd.
DCU Cleantech Innovation Campus
Old Finglas Road
Glasnevin
Dublin 11 (IE)

Representative:

Purdylucey Intellectual Property
23 Ely Place
Dublin 2 D02 N285 (IE)

Decision under appeal:

Composition of the Board:

Chairman

A. Pieracci

Members:

G. Martin Gonzalez

S. Ruhwinkel

Summary of Facts and Submissions

I. The applicant appeals the examining division's decision dated 21 August 2025 to grant a patent on the basis of the documents indicated in the communication under Rule 71(3) EPC of 25 April 2025.

II. Section 1.1 "Text intended for grant" of the examining division's Rule 71(3) EPC communication indicated only one drawing sheet: "1/1 as published". The Annex containing the actual text intended for grant also contained only 1 drawing sheet numbered 1/7 with one figure. The examining division granted a patent with decision of 21 August 2025 containing only said drawing sheet.

III. The appellant requests that the decision to grant be set aside and that the patent be corrected to include the complete set of filed drawings: Figures 1, 2A, 2B, 3A, 3B, 4, 5A, 5B, 5C, and 5D as contained on drawings pages 1/7 to 7/7 in the file and in the international publication.

They further request reimbursement of the appeal fee in accordance with Rule 103(1) (a) EPC.

They also request oral proceedings, formulated as follows (last sentence of the grounds of appeal):
"Should the Board of Appeal intend to reject this appeal, oral proceedings are hereby requested pursuant to Article 116 EPC."

IV. The following facts and procedural history are relevant for the present decision:

Entry into the European phase was requested on 10 August 2023. In section 6 of the request, it was specified that the proceedings before the EPO were to be based on the application documents as published by the International Bureau (WO 2022/171843 A1, published on 18 August 2022), which included drawing sheets 1/7 to 7/7. Moreover, the table on the last page of the request for entry into the European phase (Table for section 6 of Form 1200.3) expressly confirmed that drawing sheets 1 to 7 were intended to form part of the documents on which the European proceedings were to be based.

In response to the communication dated 19 September 2023 under Rules 161(1) and 162 EPC (Invitation for correction of deficiencies noted in the PCT written opinion and for amendment of the application), the appellant filed amended claims 1 to 11 on 8 March 2024. The response contained no indication that any drawing sheets were to be deleted or replaced.

At no stage during the examination proceedings did the examining division suggest any amendment to the drawing sheets, nor did the appellant request or propose any such amendment.

The examining division thereafter issued the communication under Rule 71(3) EPC, in which only a single drawing sheet was included.

By letter dated 7 August 2025, the appellant (then the applicant) replied to that communication, submitting the French and German translations of the claims as approved by the examining division and paying the prescribed grant and printing fees. No objection was

raised at that stage to any possible error or omission concerning the drawings or drawing sheets.

On 21 August 2025, the examining division issued the decision to grant a patent on the basis of the documents indicated in the communication of 25 April 2025, i.e. including only a single drawing sheet.

V. In its statement of grounds of appeal of 15 October 2025, the appellant submits that the communication under Rule 71(3) EPC contained no reference to any amendment of the drawings. It identified the drawings as "as published", while the patent description refers throughout to Figures 1 to 5D, consistent with the originally published version.

It is standard EPO practice to detail all proposed amendments in the Rule 71(3) communication. This includes the "With the following amendments to the above-mentioned documents proposed by the division" field of Form 2004C on the communication under Rule 71(3) EPC, which lists the amendments. In the present case, only amendments to Description pages 2-5, 7, 8, and 11 and Claims 2 and 11 were indicated. Notably, no mention was made of any deletion of drawing sheets.

It is evident that it was not the examining division's intention to grant a patent containing only a single drawing sheet. The intended version clearly included all 7 drawing sheets. Therefore, the examining division did not communicate the text intended for grant, as required under Rule 71(3) EPC. Following the reasoning in **T 1003/19** (pt. 2.4.5), **T 408/21** (pt. 1.12), **T 1823/23** (pt. 1.9.5), and **T 0387/25** (pt. 1.4), Rule 71(5) EPC does not apply in the present case.

While the Appellant received a Rule 71(3) communication, the documents cited therein did not reflect the examining division's actual intention, and hence the decision to grant was based on a text not approved by the appellant.

The omission of the drawings in the Rule 71(3) communication results in the appellant being adversely affected, justifying both the appeal and the request for reimbursement.

Reasons for the Decision

1. Admissibility

The appeal is admissible according to Articles 106 to 108 EPC and Rule 99 EPC; in particular, the appellant is adversely affected by the decision under appeal within the meaning of Article 107 EPC. The patent as granted does not correspond to the application documents filed with the request for entry into the European phase on 10 August 2023, which were never amended as regards the drawings.

2. Allowability of the appeal

2.1 Decision **T 0387/25** reviews the relevant case law and summarises its conclusions in the catchword (points 1 and 2). The Board endorses these conclusions and the legal reasoning on which they are based (see also Case Law of the Boards of Appeal, 11th edition, July 2025, IV.B.3.2.3b)). The catchword (points 1 and 2) of the decision T 0387/25 reads as follows:

1. It is not sufficient that an applicant, having received a communication formally referring to Rule 71(3) EPC, paid the required fee and filed the required translations. The legal consequence of Rule 71(5) EPC, i.e. the deemed approval of the notified text, only arises if the communication sent also complies with the substantive requirements of Rule 71(3) EPC, i.e. if it actually contains the text in which the examining division intended to grant the patent, on the basis of the documents filed by the applicant, possibly supplemented by individual marked amendments (see points 1.4 and 1.5 of the Reasons).

2. It has been established case law since **T 1003/19** that an examining division's error in compiling the documents intended for grant in a communication under Rule 71(3) EPC that makes a clearly unintentional omission of part of the documents proposed by the applicant for grant as indicated in the applicant's last request can still be corrected if the applicant files an appeal against the subsequent grant of the patent within the time limit under Article 108 EPC, at least if the applicant did not explicitly consent to the incorrect compilation.

2.2 In the present case, the Board is satisfied, on the basis of the facts set out above, that the appellant's (then applicant's) sole request as regards the drawings was that all drawing sheets be included, as filed with the request for entry into the European phase and as reflected in pages 1/7 to 7/7 of PCT application WO 2022/171843 A1, published on 18 August 2022. At no point during the examination proceedings did the examining division propose, nor did the applicant

request, any amendment to the drawings. The description consistently refers to all figures shown on pages 1/7 to 7/7 and was maintained unamended in this respect throughout the proceedings, including in the granted version, without objection from the examining division.

Furthermore, the section "With the following amendments to the above-mentioned documents proposed by the division" in Form 2004C of the communication under Rule 71(3) EPC contains no indication of any deletion or modification of drawing sheets.

In these circumstances, the Board is also satisfied that the text notified under Rule 71(3) EPC does not reflect the true intention of the examining division as regards the documents on which the patent was to be granted. Rather, the omission of drawing pages 2/7-7/7 represents a clear and unintentional omission from the text proposed for grant, in line with the considerations set out in decision **T 0387/25** (see Reasons points 1.4 and 1.5) and the cases analysed therein (see also Case Law of the Boards of Appeal, 11th edition, July 2025, IV.B.3.2.3b)).

2.3 Thus, in accordance with the principles set out in **T 0387/25**, the legal fiction of deemed approval under Rule 71(5) EPC does not apply in the present case. The examining division's clearly unintentional error can therefore still be remedied in the context of the present appeal.

2.4 Pursuant to Article 113(2) EPC, the EPO shall examine, and decide upon, the European patent application only in the text submitted to it, or agreed, by the applicant. It follows from the above assessment that the decision to grant the patent pursuant to Article

97(1) EPC was based on an application in a text which was neither submitted nor agreed by the applicant and that the requirements of Article 113(2) EPC were therefore not met.

2.5 The decision under appeal is therefore to be set aside.

3. Reimbursement of the appeal fee.

3.1 The Board adopts the reasoning set out in decision **T 1823/23** (Reasons, point 3), which applies mutatis mutandis to the present case:

3.2 Rule 103(1) (a) EPC provides for a refund of the appeal fee where an appeal is allowable and the reimbursement is equitable by reason of a substantial procedural violation.

3.3 In the case at issue the reimbursement of the appeal fee is not held equitable since the applicant made no use of opportunities to participate in the initial proceedings (**J 4/09**, Reasons 4), as the error made by the examining division was introduced already in April 2025 into the communication under Rule 71(3) EPC, and the applicant could and should have noticed it when checking the text of the communication under Rule 71(3) EPC, because the fact that part of the published drawing were omitted should have alerted it and should have prompted a double check.

3.4 The fact that a narrow interpretation of Rule 71(3) and (5) EPC allows for an appeal to be treated as admissible and allowable should however not be misinterpreted as an invitation to neglect the applicant's duty to carefully check the documents submitted in the text intended for grant sent with the

communication under Rule 71(3) EPC. The request for reimbursement of the appeal fee is therefore rejected.

4. Request for oral proceedings

The appellant requested oral proceedings only conditionally, namely in the event that the Board intended to reject the appeal (see the last sentence of the statement of grounds of appeal), but not with regard to the ancillary request for reimbursement of the appeal fee. Since the Board allows the appellant's main request and thus does not reject the appeal, the condition under which oral proceedings were requested is not fulfilled.

The present decision is therefore issued in written proceedings pursuant to Article 12(8) RPBA and Articles 113 and 116 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent on the basis of the following documents:
 - Description and claims according to the text intended for grant submitted with the communication under Rule 71(3) EPC of 25 April 2025.
 - Drawings: Figures 1, 2A, 2B, 3A, 3B, 4, 5A, 5B, 5C, and 5D as contained on drawings pages 1/7 to 7/7 in the international publication WO 2022/171843 A1, published on 18 August 2022.
3. The request for reimbursement of the appeal fee is rejected.

The Registrar:

The Chairman:



G. Magouliotis

A. Pieracci

Decision electronically authenticated