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D E C I S I O N
of 8 April 2004

Case Number: G 0001/03

Application Number: 92116446.3

Publication Number: 0536607

IPC: C03C 17/36

Language of the proceedings: EN

Title of invention:
Heat processable metallic appearing coatings

Patentee:
PPG Industries Ohio, Inc.

Opponent:
SAINT-GOBAIN GLASS FRANCE

Headword:
Disclaimer/PPG

Relevant legal provisions:
EPC Art. 52, 53, 54(2)(3)(4), 56, 57, 60(2), 84, 87(1), 112(1), 123(2)(3), 139(2)
EPC R. 27(1)(b), 29(1)

Keyword:
"Allowability of disclaimers - delimitation against state of the art under Article 54(2) and (3)(4) - accidental anticipation - exclusion of subject-matter not eligible for patent protection"
"Drafting of disclaimers - requirements of clarity and conciseness"

Decisions cited:
G 0005/83, G 0001/93, G 0002/98, T 0013/84, T 0292/85, T 0313/86, T 0170/87, T 0301/87, T 0238/88, T 0939/92, T 0074/93, T 0608/96, T 0323/97, T 1071/97, T 0351/98, T 0451/99, T 0507/99

Headnote:

1. An amendment to a claim by the introduction of a disclaimer may not be refused under Article 123(2) EPC for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the application as filed.

2. The following criteria are to be applied for assessing the allowability of a disclaimer which is not disclosed in the application as filed:

2.1 A disclaimer may be allowable in order to:

- restore novelty by delimiting a claim against state of the art under Article 54(3) and (4) EPC;

- restore novelty by delimiting a claim against an accidental anticipation under Article 54(2) EPC; an anticipation is accidental if it is so unrelated to and remote from the claimed invention that the person skilled in the art would never have taken it into consideration when making the invention; and

- disclaim subject-matter which, under Articles 52 to 57 EPC, is excluded from patentability for non-technical reasons.

2.2 A disclaimer should not remove more than is necessary either to restore novelty or to disclaim subject-matter excluded from patentability for non-technical reasons.

2.3 A disclaimer which is or becomes relevant for the assessment of inventive step or sufficiency of disclosure adds subject-matter contrary to Article 123(2) EPC.

2.4 A claim containing a disclaimer must meet the requirements of clarity and conciseness of Article 84 EPC.

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Case Number: G 0001/03

D E C I S I O N
of the Enlarged Board of Appeal of 8 April 2004

Appellant: (Opponent)
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Representative:
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F-93300 Aubervilliers (FR)

Respondent: (Proprietor of the patent)
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Representative:
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Referring decision:
Interlocutory decision of the Technical Board of Appeal 3.3.5 dated 20 December 2002 in case T 0507/99.

Composition of the Board:

Chairman: P. Messerli
Members: R. Teschemacher
C. Andries
G. Davies
B. Jestaedt
A. Nuss
J.-C. Saisset

Summary of Facts and Submissions

I. Technical Boards of Appeal 3.3.4 and 3.3.5 have referred similar points of law to the Enlarged Board of Appeal under Article 112(1)(a) EPC.

II. In its decision T 507/99 (OJ EPO 2003, 225 - Disclaimers/PPG), Technical Board of Appeal 3.3.5 referred the following points of law to the Enlarged Board of Appeal (case number G 1/03):

1. Is an amendment to a claim by the introduction of a disclaimer unallowable under Article 123(2) EPC for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the application as filed?

2. If the answer to question 1 is no, which criteria are to be applied in order to determine whether or not a disclaimer is allowable?

(a) In particular, is it of relevance whether the claim is to be delimited against a state of the art according to Article 54(3) EPC or against a state of the art according to Article 54(2) EPC?

(b) Is it necessary that the subject-matter excluded by the disclaimer be strictly confined to that disclosed in a particular piece of prior art?

(c) Is it of relevance whether the disclaimer is needed to make the claimed subject-matter novel over the prior art?

(d) Is the criterion applicable that the disclosure must be accidental, as established by prior jurisprudence, and, if yes, when is a disclosure to be regarded as being accidental, or

(e) is the approach to be applied that a disclaimer which is confined to disclaiming the prior art and has not been disclosed in the application as filed is allowable under Article 123(2) EPC, but that the examination of the subject-matter claimed for the presence of an inventive step has then to be carried out as if the disclaimer did not exist?

In the proceedings which gave rise to the referral, the proprietor was faced with novelty objections, the first based on state of the art pursuant to Article 54(3) and (4) EPC, the second based on state of the art pursuant to Article 54(2) EPC. In order to overcome these objections, the proprietor introduced two disclaimers into some of the independent claims. The referring Board considered none of them to have been disclosed in the application as filed. Since, in a decision (T 507/99, dated 28 August 2002) preceding the referral, the Board considered the claims in suit to meet the requirements of novelty and inventive step and had no other objections to the amendments, the question of the allowability of the disclaimers under Article 123(2) EPC was held to be decisive for the outcome of the case.

Board 3.3.5 reviewed the established case law, which under certain circumstances allowed disclaimers having no basis in the application as filed. This case law had been fundamentally called into question in decision

T 323/97 (OJ EPO 2002, 476), which held that the introduction of a negative feature into a claim resulting in the exclusion of certain embodiments was, regardless of the name "disclaimer", nonetheless an amendment governed by Article 123(2) and (3) EPC. It concluded that the maintenance of the practice of the earlier decisions to admit disclaimers having no basis in the application as filed could not be justified. Whereas decision T 323/97 dealt with a case in which the disclaimer was intended to delimit the claim against state of the art under Article 54(2) EPC, its findings were not restricted to this situation. Cases in which the disclaimer was intended to delimit the claim against a prior application under Article 54(3) EPC were also covered. In view of the resulting uncertainty as to the allowability of disclaimers, Board 3.3.5 saw a need for the issue to be clarified. In addition, Board 3.3.5 found ambiguities in the established practice concerning disclaimers. As to the drafting of disclaimers, different positions had been taken in respect of the question whether a disclaimer had to be strictly confined to the subject-matter disclosed in the state of the art. As to the situation of a so-called accidental anticipation, different criteria had been applied for assessing whether a disclosure was accidental or not.

III. In its decision T 451/99 (OJ EPO 2003, 334 - Synthetic antigens/GENETIC SYSTEMS), Technical Board of Appeal 3.3.4 referred the following point of law to the Enlarged Board of Appeal (case number G 2/03):

Is the introduction into a claim of a disclaimer not supported by the application as filed admissible, and therefore the claim allowable under Article 123(2) EPC, when the purpose of the disclaimer is to meet a lack-of-novelty objection pursuant to Article 54(3) EPC?

If yes, what are the criteria to be applied in assessing the admissibility of the disclaimer?

In the proceedings which gave rise to the referral, the proprietor was faced with a novelty objection based on state of the art pursuant to Article 54(3) and (4) EPC. In order to overcome the objection, the proprietor introduced a disclaimer into Claim 1 of the main request excluding individuals from a generically defined group. Neither the excluded individuals nor the remaining members of the group were specifically mentioned in the application as filed. Since the Board considered the claim, including the disclaimer, to meet the requirements of clarity and novelty, and had no other objections to the amendments, the question of the allowability of the disclaimers under Article 123(2) EPC was considered decisive for the outcome of the case.

Decision T 451/99 also inferred from an analysis of T 323/97 (*supra*) and a survey of the preceding case law on disclaimers that a referral under Article 112(1) EPC was necessary. For a proper consideration of the problem, it considered the points mentioned below relevant.

(i) The word "disclaimer" should be understood as defined in T 323/97, ie an amendment to an already existing claim resulting in the incorporation of a "negative" technical feature.

(ii) In view of the principles set out in G 1/93 (OJ EPO 1994, 541), an added feature was not to be considered as subject-matter extending beyond the content of the application as filed, if it merely excluded protection for part of the subject-matter of the claimed invention as covered by the application as filed without providing any technical contribution to it.

(iii) If decision T 323/97 were to be confirmed, this would invalidate under Article 123(2) EPC granted claims incorporating a disclaimer in accordance with earlier case law. In consequence of the "inescapable trap" situation, the deficiency could not be remedied by deleting the disclaimer. Since the use of disclaimers was a widespread practice, the answers to the referral would have a significant impact on quite a number of patents already granted.

(iv) With reference to Article 54(3) EPC, the particular situation of an applicant who could not draft its application in such a way as to avoid an overlap with the prior art unknown to it had to be taken into consideration.

IV. Position of the parties to the proceedings

In their written submissions and in the oral proceedings before this Board on 8 December 2003, the parties in essence submitted the following.

(1) The proprietor in G 1/03 requested that the questions in G 1/03 be answered as follows:

Question 1: no
Question 2(a): no
Question 2(b): yes, but without compromising clarity and conciseness of the claims
Question 2(c): yes
Question 2(d): no
Question 2(e): yes

In summary, it was of the opinion that a disclaimer should be allowable if the following requirements are fulfilled:

(i) an anticipatory disclosure of a prior art document is excluded in order to establish novelty over that prior art reference, or the range of a claimed subject-matter that is not workable is excluded;

(ii) the wording of the disclaimer should as closely as possible be confined to the disclosure of the prior art reference to be excluded, without contravening conciseness and clarity of the claims; and

(iii) the claimed subject-matter should be examined for the presence of an inventive step as if the disclaimer did not exist.

In its view, this approach would ensure that the applicant (in the following no distinction is made between the applicant and the proprietor) is not allowed to improve its position by adding subject-matter not disclosed in the application as filed, which would give it an unwarranted advantage and could be damaging to the legal certainty of third parties relying on the application as filed.

(2) The proprietor in G 2/03 defined its position on the basis of the more detailed questions in case G 1/03. The answers requested by it correspond to the requests of the proprietor in case G 1/03 with the exception of question 2(d). Without suggesting a specific answer to this question, it submitted that the first question to be posed regarding a disclaimer is not to know whether or not it makes the claimed subject-matter novel, but to determine whether the disclaimer aims only at excluding a portion of subject-matter of the claim and does not provide any technical contribution, which is the formal examination under Article 123(2) EPC in accordance with decision G 1/93 (*supra*).

(3) The opponent in case G 1/03 requested that the questions in this case be answered as follows:

Question 1: no
Question 2(a): for claims to be delimited against state of the art according to Article 54(3) EPC: yes,

or against state of the art according to Article 54(2) EPC: no

Question 2(b): yes

Question 2(c): yes

Question 2(d): no

Question 2(e): not applicable for prior art in accordance with Article 54(3) EPC

It submitted that, for reasons of legal certainty, third parties had to be made aware with effect from publication of the application of all elements necessary to assess the scope of the patent they had to face. The application as filed was the basis for any claim defining the extent of protection. The introduction of a disclaimer resulted in an amendment on a basis different from the application as filed, and was, therefore, contrary to Article 123(2) EPC. Hence, no disclaimers should be allowed to exclude state of the art according to Article 54(2) EPC. There should be no exception for an accidental anticipation since all state of the art was relevant. In addition, in the absence of precise criteria it was impossible for third parties to evaluate the accidental character of an anticipation. It also argued that a liberal practice in allowing disclaimers would impede the harmonization of patent law in Europe. Considering the vague limits of a concept for undisclosed disclaimers it was to be expected that not all national jurisdictions would follow the EPO and an additional element of legal insecurity would be created. An exception was only justified with respect to prior art according to Article 54(3) EPC in order to give the applicant the opportunity to exempt state of the art which he could not have been aware of when filing the application. The

disclaimer should only exclude the disclosure in the earlier application but nothing else. The prohibition of disclaimers in other cases could induce applicants to improve the quality of their applications and thereby facilitate grant proceedings.

(4) Opponent 01 in case G 2/03 requested that question 1 in this case be answered in the negative. In respect of question 2, it referred to the questions in case G 1/03 and requested they be answered as follows:

Question 1: no

Question 2(a): no

Question 2(b): the part of a claim exempted by a disclaimer must at least cover the novelty-destroying disclosure of the state of the art;

Question 2(c): a disclaimer should be allowable under the following conditions

- to restore novelty in respect of a document of the state of the art;
- to overcome objections under Article 52(4) and Article 53 EPC;
- to exclude isolated embodiments which do not solve the problem;
- the disclaimer does not contribute to the assessment of inventive step;

Question 2(d): the criterion of accidental anticipation should be applied as defined in the previous case law T 608/96, and

Question 2(e): inventive step in respect of a claim has to be assessed without considering the disclaimer.

(5) Opponent 02 in case G 2/03 summarized its position as follows.

(i) Whenever possible, the claimed subject-matter should be delimited against the cited state of the art by positive technical features in accordance with the provisions of the EPC, in particular Article 84 and Rule 29(1).

(ii) Disclaimers should be allowed only in exceptional cases and after careful consideration of the individual case, if clarity and conciseness cannot be achieved satisfactorily without a disclaimer and provided that safeguards prevent the applicant from obtaining an unjustified advantage.

(iii) A disclaimer should not be allowed if it excludes a teaching from the specification which the person skilled in the art cannot derive immediately and unambiguously from the state of the art. Moreover, for reasons of legal certainty, as a rule, a multiplicity of disclaimers should not be allowed.

V. The comments of the President of the European Patent Office

The President of the EPO was invited to comment in accordance with Article 11a of the Rules of Procedure of the Enlarged Board of Appeal. He explained, referring to the Guidelines for Examination in the EPO C-III, 4.12 and C-VI, 5.8b, that the practice of the first instance departments was in line with the

established case law. In view of the referrals of Boards 3.3.4 and 3.3.5, proceedings before the first instance in cases whose outcome depended entirely on the answers to the referred questions of law would be adjourned pending the Enlarged Board of Appeal's ruling. Dealing with the objections to that case law put forward in T 323/97, he took the position that the right approach to assessing the allowability of disclaimers not based on the original disclosure should be taken from the principles set out in G 1/93 (*supra*). The categorical view taken in T 323/97 that Article 123(2) EPC ruled out any unsupported disclaimer was not justified. Delimiting a claim by the introduction of such a disclaimer should, under certain circumstances, be allowable under Article 123(2) EPC, provided that the disclaimer merely excluded protection for part of the subject-matter as claimed and did not impart inventive step to a teaching which was obvious. Allowing unsupported disclaimers in exceptional cases would maintain the existing balance between the practical needs of applicants and the interests of third parties in legal certainty. The introduction of a disclaimer was legitimate, if the applicant encountered a situation which he could not have anticipated when he originally drafted his application; for example, the cases of state of the art under Article 54(3) EPC or of an accidental anticipation. In addition, it should be possible to take account of exclusions from patentability by introducing a disclaimer, as foreseen in the Guidelines for Examination in the EPO, C-II, 4.12 and 6, and especially C-IV, 2a, 3 and 4.6.

VI. Statements by third parties

(1) Organisations representing interested circles

Statements were filed by the Institute of Professional Representatives before the EPO (epi), the Fédération Internationale des Conseils en Propriété Industrielle (FICPI), the Chartered Institute of Patent Agents (CIPA, UK), the Chemical Industries Association (CIA, UK) and the Intellectual Property Advisory Committee of the BioIndustry Association (BIA, UK).

All statements favoured allowing disclaimers to overcome state of the art objections under Article 54(2), as well as under Article 54(3) EPC. This position was largely based on the understanding that a disclaimer is a partial waiver of the right to the patent, does not provide a technical contribution to the subject-matter of the claimed invention within the meaning of decision G 1/93 (*supra*, Reasons, point 16) and should not be considered as a technical feature. Some statements argued that an acknowledgement of prior art is not added matter under Article 123(2) EPC, since it is not part of the subject-matter of the invention, and deduced therefrom that an amendment limiting the claim accordingly is based on the description but not on new matter. A further complication was seen to arise if the priority is not acknowledged in opposition and the disclaimer becomes unallowable for this reason. This was considered very hard on the proprietor.

All organisations took the view that it should not be necessary for a piece of prior art under Article 54(2) EPC to be accidental for it to be disclaimed. It was

submitted that such a distinction is not derivable from the EPC and that different criteria had been applied in the case law for the assessment of whether or not a piece of prior art was to be considered as an "accidental anticipation".

Since all organisations started from the premise that the disclaimer cannot provide a technical contribution, they agreed that the disclaimer should be ignored when examining inventive step and could not be used to strengthen arguments on inventive step.

The statements emphasized that disclaimers are necessary to enable applicants to cope with situations which could not be foreseen when drafting the application. If no possibility was available to delimit a claim, all theoretically possible fall-back positions would have to be included in the description. This would considerably increase the cost of drafting and translating patent specifications.

(2) Individual statements

A number of statements was received from authorised representatives and from industry. Most of them were basically in line with the statements from organisations. An exception was one of the statements from industry which took the most restrictive position concerning the allowability of disclaimers. It started from the premise that a disclaimer contains information not contained in the original application and that this conflicts with Article 123(2) EPC, even if it restricts the scope of the patent. The legal ground for allowing disclaimers was based on equitable principles rather

than on a provision in the EPC. Therefore, on a case-by-case basis all relevant facts and circumstances had to be taken into account. In T 351/98 of 15 January 2002 (not published in OJ EPO), the disclaimer had been seen as justified by the fact that the state of the art to be excluded was a third-party prior application, so that the later applicant could not know of its contents and could not formulate the originally filed claims to avoid its contents. This reasoning implied two prerequisites for the allowability of disclaimers in Article 54(3) EPC cases: there should be no alternative amendment possible in order to avoid an unreasonably extensive restriction and the applicant could not have known of the relevant document. With respect to the latter prerequisite, a disclaimer should neither be allowed when the prior application was published between the priority date and the filing date of the application in question nor when the prior application originated from the applicant itself (self-collision).

(3) Disregarded statements

One statement was filed anonymously and another one was received after the oral proceedings at the end of which the debate had been closed. Neither has been taken into account by the Enlarged Board.

VII. Both referring decisions describe in detail the previous case law as well as decision T 323/97, which prompted the referrals. Further information can be found in Case Law of the Boards of Appeal of the EPO, 4th ed. 2001, Sections I.D.6.15, II.B.1.2.1 and, in particular, III.A.1.6.3. In view of this complete and readily available information, the Enlarged Board

refrains from giving a further review of the previous case law.

It appears, however, worth mentioning that between the decision T 323/97 of 17 September 2001, which deviated from the established practice, and the first referral in decision T 507/99 of 20 December 2002, no further decision followed the approach taken in T 323/97.

Reasons for the Decision

1. Both referrals are admissible.

1.1 This is evident in case G 1/03 in which the final decision of the referring Board is directly dependent on the admissibility of the disclaimer (see point II above).

1.2 In case G 2/03 not all substantive requirements have been examined so far by the referring Board. 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.

1.3 In his comments, the President of the EPO raised a problem not addressed in the referring decisions, although comprised in the rather general introductory part of question 2 in decision T 507/99. He submitted

that, in addition to overlaps between the claimed invention and the prior art, conflicts with Article 52(4) EPC and Article 53(a) or (b) EPC might be equally unforeseeable for applicants, who could only be expected to take account of existing EPC provisions and EPO case law and practice on exclusions from patentability. Although this problem does not arise in the cases in question in the referring decisions, the Board considers it appropriate to deal with it in its answers. The problem is of considerable practical relevance and the other questions which result directly from the cases giving rise to the referrals require a general statement of the principles applying to the allowability of disclaimers.

2. *Allowability of disclaimers*

In accordance with consistent practice, the term "disclaimer" is used hereafter as meaning an amendment to a claim resulting in the incorporation therein of a "negative" technical feature, typically excluding from a general feature specific embodiments or areas. More specifically, the Enlarged Board of Appeal has to deal with the allowability of disclaimers which have not been disclosed in the application as filed. In this context, the term "unsupported" disclaimer is used in T 451/99, the President's comments and third parties' observations. The expression "unsupported" is avoided in the following reasons, since the term "support" in Article 84 EPC has a different meaning. Instead, the expression undisclosed is used.

The most far-reaching argument put forward in favour of disclaimers is that a disclaimer is a mere voluntary

restriction by which the applicant abandons part of the claimed subject-matter, and that, therefore, a disclaimer *per se* is not a technical feature of the claim, cannot violate Article 123(2) EPC and should always be allowed. The Board cannot agree with this conclusion. Any amendment to a claim is presumed to have a technical meaning, otherwise it would be useless to have it in the claim. In any event, a feature without a technical meaning would not restrict the scope of a claim.

A related but more limited question is whether a feature with a technical meaning contributes to the technical teaching in the application or to the subject-matter of the claimed invention, a question dealt with in decisions G 1/93 and G 2/98 (*supra*). G 1/93, concerned with the relation between paras. (2) and (3) of Article 123 EPC, makes a distinction between features providing or not providing a technical contribution to the subject-matter of the claimed invention. According to the decision, the latter features, which merely limit the protection, are not to be considered as subject-matter which extends beyond the application as filed (Order, point 2). G 2/98, dealing with the requirement of "the same invention" in Article 87(1) EPC, held that no distinction should be made between technical features which were related to the function and effect of the invention and technical features which were not (Reasons, point 8.3). Decision T 323/97 concluded that the considerations in G 2/98 were also applicable to the introduction of a disclaimer since it was not possible to assess with certainty whether or not the limitation achieved by the negative feature involved a technical contribution to

the claimed invention. For example, additional state of the art might necessitate a redefinition of the technical problem, which might make a document relevant to the invention which originally appeared remote from it.

The question answered in T 323/97 in the negative is examined below in relation to the different situations arising in the present proceedings.

2.1 State of the art under Article 54(3) and (4) EPC Conflicting applications

Both referring decisions pose the question whether an undisclosed disclaimer may be allowable when its purpose is to meet a lack-of-novelty objection pursuant to Article 54(3) EPC.

2.1.1 For a proper interpretation of the law, the purpose of Article 54(3) EPC has to be taken into account. The problem of how a later application should be affected by an earlier application which had not been published at the filing or priority date of the later application arises in all patent systems. Traditionally, there existed two solutions to this problem in Europe. According to the "whole contents" approach, the prior application was included into the state of the art. For subject-matter already disclosed to the patent office, no patent should be granted. Before the harmonization of substantive patent law in Europe, this was the position in the non-examining countries Belgium and France. According to the "prior claim" approach, the claims of the later application had to be compared with the claims of the earlier application in the granted

version. The purpose of this approach was to avoid double patenting. This was the situation in examining systems such as those in Austria, Germany, the Netherlands and in the United Kingdom, and remains so in Switzerland (*Reimer*, Europäisierung des Patentrechts, München 1955, S. 19 ff; *Banks*, The British Patent System, London 1970, Chapter 10). In Article 4(3) and Article 6 of the Strasbourg Convention of 1963 on the Unification of Certain Points of Substantive Law on Patents for Invention, both approaches were allowed. The fact that it was not possible to reach agreement on a single solution shows that this was one of the most controversial questions dealt with in the Strasbourg Convention (see in detail *Pfanner*, Vereinheitlichung des materiellen Patentrechts im Rahmen des Europarats, GRUR Int. 1964, 247, at p. 249, et seq.).

Similar discussions took place in the preparatory work to the EPC (see *van Empel*, The Granting of European Patents, Leyden 1975, notes 98, et seq.). In particular, interested circles almost unanimously preferred the prior claim approach. In the end a compromise was reached: although eventually the whole contents approach was accepted, at least in principle, it was qualified in important respects. Unpublished applications were included in the state of the art to be considered by the EPO only for the purpose of examining novelty (Article 54(3) in conjunction with Article 56, 2nd sentence, EPC). National applications, even for the same territory, were not included (Article 54(3) in conjunction with Article 139(2) EPC) and the novelty-destroying effect applied only to the countries designated in both applications (Article 54(4) EPC). Although the difference between

the approaches may be said to originate from different patent philosophies, evaluating the interests of the earlier and the later applicant, his competitors and the public differently (*van Empel*, *supra*, point 100), the final decision opting for the whole contents approach as described above was based on two practical considerations. First, the prior claim approach entails a substantial delay in the examination of the later application, because it can only be applied after the decision giving the final drafting of the claims of the prior application. This was considered to imply an intolerable period of uncertainty, in particular in a system of deferred examination, which was under discussion at the Luxembourg Inter-Governmental Conference (*Pfanner*, *supra*, at p. 251). Second, the EPO was not a competent body to assess the scope of protection of the patent, since this had to be determined for the comparison with the later application under the prior claim approach pursuant to the applicable national law. For these reasons, the prior claim approach was not considered to fit into the European patent system. On the other hand, the whole contents approach in its traditional form was considered to be too strict and was qualified as outlined above. In particular, Article 56, 2nd sentence, EPC, restricting the effect of conflicting applications to the assessment of novelty, served the purpose of finding an acceptable solution for the problem of self-collision, since the legislator did not want to make a distinction between the cases of third-party collision and self-collision (*van Empel*, *supra*, note 105 f).

In summary, the final result cannot be said to implement the "philosophical" basis of the whole contents approach, ie that nothing be patented that had been disclosed before to the patent office. On the contrary, Article 54(4) EPC, restricting the effect of an earlier application to the commonly designated states, makes it clear that the provision intends to avoid double patenting. This is confirmed by the explanatory remarks concerning the EPC prepared by the Netherlands as model arguments to be used by governments for the purposes of the ratification of the EPC (Council Doc. R/1181/74 (ECO 146)(BC 32)). These explain that the fictitious extension of the prior art to cover earlier applications in Article 54(3) EPC serves the purpose of avoiding simultaneous protection. This has to be taken into account when assessing how the conflict between two co-pending applications can be solved in practice.

Article 54(3) EPC has the effect that, if two applications have been filed for the same invention, the right to the patent belongs to the first applicant. It is an implementation of the first-to-file principle laid down in Article 60(2) EPC. The situation is clear if both applications are identical. However, if there is an overlap and the second application contains subject-matter not covered by the disclosure of the first application, the novelty-destroying effect of the earlier application does not apply to the whole of the second application. The question then arises whether or not it is justified to give the first application an effect which goes beyond the effect prescribed in Articles 54(3)(4) and 56, 2nd sentence, EPC. From the legal history outlined above, it is clear that the

intention was to restrict the effect of the earlier application as far as possible in order to avoid unfairness resulting from the concept of a fictional publication. Delimitation against an earlier application was a traditional and well-known exercise under the prior claim approach (Banks Report, *supra*, note 308). The result of the examination of the prior application was decisive for the question of what was left for the later application and, for the purpose of defining this remaining portion, it was permissible to add a disclaimer to the original claims in the later application for the subject-matter protected in the prior application (DPA, 9. Beschwerdesenat, Mitteilungen der deutschen Patentanwälte 1956, 237, referring to the consistent practice of the Reichspatentamt). It may be assumed that the highly controversial whole contents approach, as described above, would never have been accepted in the preparatory work to the EPC, if it had been suggested not only to extend the state of the art to be considered for novelty by a legal fiction but also to do away with the practice of delimitation against earlier applications. Probably, the fact that *van Empel* speaks of delimitation between conflicting applications based on the novelty criterion (*supra*, note 108) reflects general thinking at the time the EPC was drafted.

2.1.2 In G 1/93 a difference was made between features providing a technical contribution and features merely limiting the protection conferred by the patent by excluding protection for part of the subject-matter (*supra*, Reasons, point 16). T 323/97 (*supra*, Reasons, point 2.3) seeks to infer from G 2/98 that such a

distinction is no longer possible. This conclusion is, however, in clear contrast to what has been said by the Enlarged Board of Appeal in that decision, where it is expressly stated that the mere exclusion of protection addressed in G 1/93 is a different legal situation from the question of whether or not the specific combination of all technical features present in a claim has to be considered when assessing whether there is identity of invention between the previous application and the application in which the priority is claimed (*supra*, Reasons, point 10). Therefore G 2/98 cannot be invoked as an authority against allowing a disclaimer limiting the claimed subject-matter without affecting the technical teaching in the application.

2.1.3 For the interpretation of Article 123(2) EPC, it may be concluded from the foregoing (point 2.1.1) that the purpose of a disclaimer excluding a conflicting application is merely to take account of the fact that different applicants are entitled to patents in respect of different aspects of inventive subject-matter and not to change the given technical teaching. The disclaimer splits the invention as a whole in two parts: in respect of the identical part, it preserves the rights of the first applicant; for the rest, disclosed for the first time in the later application, it attributes the right to the second applicant. This approach restricts the effects of Article 54(3) EPC to resolving the problem of double patenting.

Such a disclaimer, only excluding subject-matter for legal reasons, is required to give effect to Article 54(3) EPC and has no bearing on the technical information in the application. It is, therefore, not

in contradiction to Article 123(2) EPC. Applied in this sense, the term disclaimer is justified also in its literal meaning. An invention comprising different specific embodiments or groups thereof has been disclosed in the application as filed, a part of which is excluded from the requested protection, ie no longer claimed. The remaining subject-matter is not modified by the disclaimer.

2.2 State of the art under Article 54(2) EPC
Accidental anticipation

Question 2(d) in referring decision T 507/99 raises the further problem whether a disclaimer may be allowable in cases of accidental anticipation.

2.2.1 The concept of accidental anticipation is akin to the situation of conflicting applications already discussed, starting from the premise that only novelty is at stake. In the case of an accidental anticipation, the exclusion of the unrelated state of the art is likewise not intended to contribute to the inventive merit of the technical teaching given. Accidental anticipation mostly occurs in the fields of chemistry and biotechnology but is not restricted thereto. A typical situation is the following: the claimed invention concerns a large group of chemical compounds with certain properties which are advantageous for a specific use. One single compound falling within the group turns out to be known for a completely different use and, therefore, only properties irrelevant to the new use are known. In such situations it is felt to be unfair if, in the absence of a basis in the application as filed for a limiting amendment excluding the known

compound, that single compound may represent a bar to patenting the entire group. Quite often a use claim may be a fall-back position. Use claims, however, are a more limited form of protection compared to product claims, and in the field of pharmaceuticals they may be excluded under Article 52(4) EPC.

2.2.2 Different definitions of accidental anticipation have been put forward (see referring decisions T 507/99, Reasons, point 7.3 and T 451/99, Reasons, point 11, et seq.). Often cited are decisions T 608/96 of 11 July 2000 and T 1071/97 of 17 August 2000 (both in Case Law, *supra*, I.C.2.11 and III.A.1.6.3). These say in similar terms that a disclosure is accidentally novelty-destroying, if it was disregarded by the skilled person faced with the problem underlying the application, either because it belonged to a remote technical field or because its subject-matter suggested it would not help to solve the problem. Thus, according to these decisions, the disclosure has to be completely irrelevant for assessing inventive step. The individual elements of these and other attempts to find an adequate definition cannot be taken in isolation. The fact that the technical field is remote or non-related may be important but is not decisive because there are situations in which the skilled person would also consult documents in a remote field. Even less decisive, as an isolated element, is the lack of a common problem, since the more advanced a technology is, the more the problem may be formulated specifically for an invention in the field. Indeed, one and the same product may have to fulfil many requirements in order to have balanced properties which make it an industrially interesting product. Correspondingly, many problems related to

different properties of the product may be defined for its further development. When looking specifically at improving one property, the person skilled in the art cannot ignore other well-known requirements. Therefore, a "different problem" may not yet be a problem in a different technical field. What counts is that from a technical point of view, the disclosure in question must be so unrelated and remote that the person skilled in the art would never have taken it into consideration when working on the invention (In this direction see T 608/96, *supra*, Reasons, point 6, cited in the referring decision T 507/99, Reasons, point 7.3.1). This should be ascertained without looking at the available further state of the art because a related document does not become an accidental anticipation merely because there are other disclosures which are even more closely related. In particular, the fact that a document is not considered to be the closest prior art is not sufficient to accept an accidental anticipation (see however T 170/87, OJ EPO 1989, 441, Reasons, point 8.4.2).

Accidental anticipation understood in the sense outlined above not only corresponds to the literal meaning of the term, but also limits disclaimers to situations in which there is a justification comparable to the case of conflicting applications for which the allowability of disclaimers has been accepted above. There is an apparent need for disclaimers in cases of accidental anticipation, a need which in the past led to a consistent practice which had never been contested before T 323/97. Furthermore, Article 52(1) EPC expresses the general principle that inventions in all technical fields, which fulfil the substantive

requirements, are patentable (G 5/83, OJ EPO 1985, 64, Reasons, point 21). This has to be taken into account when interpreting formal requirements, at least as far as the purpose of the respective requirement is not impaired.

One reason for the problems which arise when assessing the allowability of limitations in claims are the rules for determining what is disclosed, applied to general concepts. According to the established case law of the Boards of Appeal, the description of a general concept does not disclose specific embodiments falling within the generally described area. This principle is derived from the premise that a specific teaching is not directly and unambiguously derivable from a general teaching. It also applies to chemical formulae and the individual compounds comprised therein as well as to ranges of values and individual values between the defined limits. This approach allows the protection of selection inventions based on valuable technical contributions within a known area. On the other hand, this approach does not allow undisclosed specific embodiments, as covered by the general concept in the application as filed, to be considered as a basis for a limiting amendment.

It is true that the European patent system must be consistent and the concept of disclosure must be the same for the purposes of Articles 54, 87 and 123 EPC. However, this does not prejudice the question of what is to be considered as technical information disclosing the invention. In the case of an accidental anticipation, its definition (see above) makes clear that it has nothing to do with the teaching of the

claimed invention, since it cannot be relevant for examining inventive step. Therefore, a mere disclaimer excluding the subject-matter of an accidental anticipation may be assumed not to change the technical information in the application as filed and, for this reason, also not to change the subject-matter of the application as filed, within the meaning of Article 123(2) EPC.

2.3 State of the art under Article 54(2) EPC
Anticipations which are not accidental

2.3.1 Most third-party observations submit that as regards the allowability of a disclaimer no distinction should be made between different types of state of the art to be disclaimed. Not only conflicting applications and accidental anticipations but also "normal" novelty objections under Article 54(2) EPC should justify a disclaimer. In order to avoid the applicant obtaining an unjustified advantage from the disclaimer, it is considered sufficient that the disclaimer should be ignored when examining inventive step.

2.3.2 This approach means that two different inventions have to be examined: the narrower invention including the disclaimer for novelty and the broader invention without the disclaimer for inventive step. Such an approach is unfamiliar to the EPC. What is to be examined is the invention as claimed. If the claimed subject-matter meets the requirements of the EPC, the patent should be granted.

2.3.3 The unrestricted admission of disclaimers could have undesirable effects on the behaviour of applicants and change the way in which applications are normally drafted. At present, applicants deal with the state of the art of which they are aware (see Rule 27(1)(b) EPC) and try to delimit the invention against it. For any further state of the art of which they are not aware, they draft fall-back positions for preferred (and more preferred) embodiments. In this way the invention as set out in the specification may appear like the skins of an onion and it becomes clear where the core of the invention is. The function and interaction of the technical features also may be elucidated by comparison with the state of the art. If applicants were allowed to wait for the state of the art to emerge from search and examination and to draw any necessary consequences therefrom during examination, they could tailor the patent around the state of the art revealed in proceedings before the EPO. The need for a detailed description of the invention from the outset as a precautionary measure would become less important and the relevance of the novelty requirement for establishing a certain difference between the known and the patentable would be weakened. The latter argument would be even more important if an advantageous effect obtained by a new chemical substance were not considered as a part of the invention but might be shown after the filing date at any stage of the proceedings (BGH GRUR 1972, 541 - "Imidazoline"; *Schulte*, 6th ed. 2001, § 1 PatG, note 282 referring to the German practice and note 283 referring to the different EPO practice requiring that the technical problem can be deduced from the application as filed (T 13/84, OJ EPO 1986, 253, Reasons, point 11)). In

this case the applicant would be allowed to claim a broad class of compounds with yet unknown properties, disclaim those which turn out to be known and test the rest for advantageous properties in order to base its arguments on inventive step on them.

2.3.4 There may be some point in the argument that the results in practice are not so different whether the concept of accidental anticipation is applied or whether the disclaimer is ignored when examining inventive step. In any case, the starting point is different. When an anticipation is taken as accidental, this means that it appears from the outset that the anticipation has nothing to do with the invention. Only if this is established, can the disclaimer be allowable.

2.4 Exceptions to patentability

2.4.1 The provisions on patentable inventions contain several exceptions to patentability. Examples are methods for medical treatment under Article 52(4) EPC and inventions the exploitation of which is contrary to "ordre public" or morality under Article 53(a) EPC. In such cases, it may happen that a general claim comprises embodiments which fall under the exception, whereas the rest is patentable. Practical examples under Article 53(a) EPC arise from the fact that not everything can be done to human beings which can be done to other living beings. For example, the avoidance of offspring which are unwanted, due to certain properties (sex, colour, health), for economic reasons, may be quite legitimate for domestic animals whereas when applied to human beings it would be contrary to "ordre public" or morality. Suppose the application

contains a broad teaching applicable to mammals in general and mentions cattle as specific embodiments and the claims are directed to the treatment of mammals, a disclaimer necessary to exclude human beings in order to satisfy Article 53(a) EPC could not be based on the original text of the application which would only cover a broader limitation to cattle. The disclaimer "non-human" in respect of living beings has, however, nothing to do with the technical teaching in the application, it merely excludes beings to which this teaching, although theoretically workable, should never have been applied anyway. Similar situations arise in applications directed to the killing of animals.

2.4.2 Article 57 EPC may exclude also subject-matter from patentability for non-technical reasons. If a method for contraception is claimed, this may be considered not to be susceptible of industrial application when applicable to human beings only in the private sphere (T 74/93, OJ EPO 1995, 712), whereas the application to domestic animals, eg for breeding purposes, is patentable. The President of the EPO in his comments also referred to Article 53(b) EPC and the EU Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions (OJ EPO 1999, 101) and emphasized the need for an applicant to be able to draw the appropriate consequences when faced with a change of substantive law during the pendency of the application.

2.4.3 Even more important is the fact that the requirements of sufficient disclosure cannot be seen in isolation within one single patent system. An applicant wanting to obtain protection abroad has to fulfil the

requirements of sufficient disclosure when drafting the first application from which he enjoys a right of priority for later applications in other countries (see point 4 below). It would hardly be possible for him to realize at that stage which exclusions from patentability may be applicable in all states in which the priority may be claimed. The same situation exists if an international application under the PCT is filed which has the same effect as a national filing in more than 120 Contracting States. In both situations, the applicant cannot be expected to check the substantive patent law of all possible states before filing the application and to introduce appropriate limitations in order to cope with any exclusions which he might later face in the respective states. Extending the requirement of sufficient disclosure to limitations merely disclaiming subject-matter not eligible for patent protection would seriously impede the long-established systems of obtaining patent protection in an international framework.

2.5 Non-working embodiments

2.5.1 In some submissions, starting from the premise that a disclaimer is always a mere waiver of part of the invention, the consistent position is taken that a disclaimer may be used for any purpose, ie also for excluding non-working embodiments. Reference is made to T 170/87 (*supra*, cf. Reasons, point 8.4, referring to T 313/86 of 12 January 1988, not published in OJ EPO).

2.5.2 Disclaimers are, however, not to be allowed in this situation. If a claim comprises non-working embodiments, this may have different consequences, depending on the circumstances.

Either there is a large number of conceivable alternatives and the specification contains sufficient information on the relevant criteria for finding appropriate alternatives over the claimed range with reasonable effort. If this is the case, the inclusion of non-working embodiments is of no harm (T 238/88, OJ EPO 1992, 709; T 292/85, OJ EPO 1989, 275; T 301/87, OJ EPO 1990, 335). Therefore, a disclaimer is neither necessary nor appropriate.

If this is not the case and there is lack of reproducibility of the claimed invention, this may become relevant under the requirements of inventive step or sufficiency of disclosure. If an effect is expressed in a claim, there is lack of sufficient disclosure. Otherwise, ie if the effect is not expressed in a claim but is part of the problem to be solved, there is a problem of inventive step (T 939/92, OJ EPO 1996, 309). In the latter case, all of the third-party observations agree that the disclaimer cannot help in supporting inventive step.

2.5.3 The same must apply if sufficiency of disclosure is at stake. When an application for a patent is filed, the process of making the invention has to be completed. The requirement of sufficiency of disclosure ensures that a patent is only granted if there is a corresponding contribution to the state of the art. Such a contribution is not present as long as the

person skilled in the art is not able to carry out the invention. Therefore, the decisive date for fulfilling the requirement has to be the date of filing or priority, as the case may be. Deficiencies in this respect cannot be remedied during the proceedings before the EPO. Hence, the isolated decisions T 170/87 and T 313/86 (*supra*) are not to be followed.

2.6 Disclaimers making a technical contribution

In defining the situations in which a disclaimer may be allowed in order to overcome an objection as indicated in points 2.1, 2.2 and 2.4, care has been taken to make sure that the reason justifying a disclaimer is not related to the teaching of the invention.

2.6.1 In particular, this applies to the definition of accidental anticipation. Nevertheless, it cannot be excluded with absolute certainty that a limitation effected by a disclaimer later on turns out to be of technical relevance (T 323/97, *supra*, Reasons, point 3). For any limitation introduced into a claim it may become apparent when putting the invention into practice that, contrary to what the skilled person would have expected on the basis of the information in the application, the restriction is critical for the effect aimed at and is relevant for accepting inventive step or sufficiency of disclosure. Such a coincidence (described by *Gehring*, Welche Zukunft hat der Disclaimer, Mitteilungen der deutschen Patentanwälte 2003, 197, at p. 202, as "a rather theoretical case") might lead to the conclusion that the disclaimer is not a mere disclaimer within the meaning of the present decision but contributes to the technical teaching and

adds subject-matter within the meaning of Article 123(2) EPC. Hence, the disclaimer would have to be considered *ex post* as inadmissible.

It has to be concluded from the foregoing that the approaches put forward in questions 2(d) and (e) in the referring decision T 507/99 cannot be seen as alternatives for assessing the allowability of disclaimers in cases of accidental anticipation as suggested by the referring Board. Rather, in the first place, the accidental character of the anticipation has to be ascertained. If this requirement has been accepted, the allowability of the disclaimer may be called into question, if it becomes apparent that the limitation is relevant for assessing inventive step or sufficiency of disclosure. In the alternative approach, not distinguishing between accidental anticipation and other novelty objections, the rule would be the other way around: the disclaimer would always be considered admissible and only if the EPO or a competitor in opposition or revocation proceedings established that the disclaimed part is not inventive, would the application be refused or the patent revoked. Only the approach restricting disclaimers to limitations not contributing to the invention and thereby taking the decisive criterion from Article 123(2) EPC rather than from Article 56 EPC complies with the Convention.

2.6.2 The principle that an undisclosed limitation has to be a mere disclaimer in the above sense to be allowable, also provides the solution in the case where there are two anticipations, one piece of prior art under Article 54(3) as well as another one under Article 54(2) EPC. The privileged situation in the relation between

conflicting applications does not exist in relation to pre-published state of the art. The claimed invention as originally disclosed must meet the requirements of Article 54(2) EPC and a disclaimer which would be allowable on the basis of the conflicting application alone cannot render the invention novel or inventive over the prior art under Article 54(2) EPC unless the latter is an accidental anticipation and only novelty is at stake. Analogously, it is not possible that a disclaimer based on a conflicting application removes a deficiency under Article 83 EPC which would be justified without the limitation.

2.6.3 Similar considerations apply if a lack-of-novelty objection raised under Article 54(3) EPC becomes an anticipation under Article 54(2) EPC because the application-in-suit turns out not to enjoy the claimed right of priority, either because it was not valid from the outset, or because it was lost following a further amendment, additional to the disclaimer, not disclosed in the priority application. In this situation the disclaimer is no longer justified, once it becomes apparent that the application lacks the right of priority.

2.6.4 For the avoidance of doubt, it is stated that also a disclaimer excluding subject-matter not eligible for patent protection must not contribute to the invention, although it is difficult to imagine a situation in which this could happen.

2.6.5 It results from the foregoing that a disclaimer may serve exclusively the purpose for which it is intended and nothing more. In the case of a disclaimer

concerning conflicting applications, its purpose is to establish novelty with respect to a prior application in the sense of Article 54(3) EPC. In the case of a disclaimer concerning state of the art under Article 54(2) EPC, its purpose is to establish novelty *vis-à-vis* an accidental anticipation as defined in this decision. Finally, a disclaimer excluding subject-matter not eligible for patent protection may only serve the purpose of removing such specific legal obstacle. If a disclaimer has effects which go beyond its purpose as stated above, it is or becomes inadmissible.

3. *The drafting of disclaimers*

Having established the situations in which a disclaimer may be allowable, question 2(b) in case T 507/99 remains to be answered, ie how a disclaimer occasioned by state of the art should be drafted. Concerning this point, different positions have been taken in the submissions. These ranged widely. At one extreme, the opinion was that there should be no restrictions on drafting a disclaimer. This is consistent with the argument that a disclaimer is a mere waiver of part of the invention and that, therefore, Article 123(2) EPC is irrelevant to disclaimers. At the other extreme, the opinion was that the disclaimer must be directly and unambiguously derivable from the anticipation. This is consistent with the argument that a disclaimer needs a basis which, however, may not only be found in the original disclosure but also in the acknowledgement of prior art.

When addressing the question of the proper drafting of an undisclosed disclaimer excluding an anticipation, it has to be borne in mind that, according to the preceding assessment, such disclaimers are restricted to factual situations in which they do not contribute to the technical teaching of the claimed subject-matter. This means that an allowable disclaimer merely restricts the required protection and is outside the scope of Article 123(2) EPC, which does not allow the subject-matter of an application to be extended beyond the content of the application as filed. However, the only justification for the disclaimer is to exclude a novelty-destroying disclosure or subject-matter not eligible for patent protection. The necessity for a disclaimer is not an opportunity for the applicant to reshape his claims arbitrarily. Therefore, the disclaimer should not remove more than is necessary to restore novelty or to disclaim subject-matter excluded from patentability for non-technical reasons.

In any case, the requirements of conciseness and clarity of Article 84 EPC are also applicable to claims containing disclaimers. On the one hand, this means that a disclaimer is not allowable if the necessary limitation can be expressed in simpler terms in positive, originally disclosed features in accordance with Rule 29(1), 1st sentence, EPC. In addition, a plurality of disclaimers may lead to a claim drafting which puts an unreasonable burden on the public to find out what is protected and what is not protected. As in respect of other problems of clarity, a balance has to be struck between the interest of the applicant in obtaining adequate protection and the interest of the public in determining the scope of protection with

reasonable effort. If a claim containing one or more disclaimers does not meet the latter interest it cannot be allowed. On the other hand, the understanding of a claim may be considerably complicated if the terminology of the application-in-suit and of the anticipation differ and different, incompatible terms are used in the claim. Here, Article 84 EPC may require that the terminology be adapted in order to exclude what is necessary to restore novelty.

In the interest of transparency of the patent, it should be clear from the specification that there is an undisclosed disclaimer and why it has been introduced. The disclaimer should not be hidden by using undisclosed positive features defining the difference between the original claim and the anticipation. The excluded prior art should be indicated in the description in accordance with Rule 27(1)(b) EPC and the relation between the prior art and the disclaimer should be shown.

4. *Disclaimer and priority*

As has been stated in decision G 2/98 (for its relation to G 1/93 see Reasons, points 2 and 2.1.2 above), the extent of the right to priority is determined by, and at the same time limited to, what is disclosed in the priority application. In order to avoid any inconsistencies, the disclosure as the basis for the right to priority under Article 87(1) EPC and as the basis for amendments in an application under Article 123(2) EPC has to be interpreted in the same way. This means that a disclaimer, not providing a technical contribution as outlined above, which is

allowable during the prosecution of a European patent application does not change the identity of the invention within the meaning of Article 87(1) EPC. Therefore, its introduction is allowable also when drafting and filing the European patent application without affecting the right to priority from the first application, which does not contain the disclaimer.

5. The order answers the questions referred in case T 507/99 as well as those in case T 451/99.

Order

For these reasons, it is decided that:

The questions referred to the Enlarged Board of Appeal are answered as follows:

1. An amendment to a claim by the introduction of a disclaimer may not be refused under Article 123(2) EPC for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the application as filed.

2. The following criteria are to be applied for assessing the allowability of a disclaimer which is not disclosed in the application as filed:

2.1 A disclaimer may be allowable in order to:

– restore novelty by delimiting a claim against state of the art under Article 54(3) and (4) EPC;

– restore novelty by delimiting a claim against an accidental anticipation under Article 54(2) EPC; an anticipation is accidental if it is so unrelated to and remote from the claimed invention that the person skilled in the art would never have taken it into consideration when making the invention; and

– disclaim subject-matter which, under Articles 52 to 57 EPC, is excluded from patentability for non-technical reasons.

2.2 A disclaimer should not remove more than is necessary either to restore novelty or to disclaim subject-matter excluded from patentability for non-technical reasons.

2.3 A disclaimer which is or becomes relevant for the assessment of inventive step or sufficiency of disclosure adds subject-matter contrary to Article 123(2) EPC.

2.4 A claim containing a disclaimer must meet the requirements of clarity and conciseness of Article 84 EPC.

The Registrar: The Chairman:

W. Roepstorff P. Messerli