

# Kluwer Patent Blog

## Short and sweet: G 1/24

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G 1/24 has now been issued, and concludes “*The description and any drawings are **always** referred to when interpreting the claims, and not just in the case of unclarity or ambiguity.*” With this simple proclamation, the Enlarged Board of Appeal (EBA) provides clear guidance on the fundamental issue of claim interpretation which has caused much controversy at the EPO in recent years. As such, G 1/24 looks set to be one of the most consequential EPO decisions of the decade. It will probably also be one of the shortest at just 12 pages!



*Patent attorney reading description to interpret claims, After Rembrandt, Public domain, via Wikimedia Commons*

For some background to the decision, see our post [here](#). We also discussed the preliminary opinion and hearing [here](#), which already pointed towards the conclusion above.

The first question was “*Is Article 69 (1), second sentence EPC and Article 1 of the Protocol on the*

*Interpretation of Article 69 EPC to be applied to the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC?”*. The EBA at reason 6 took a pragmatic approach on the question debated between the Boards as to whether Article 69 EPC or Article 84 EPC provided the relevant legal basis: *“neither are entirely satisfactory as a basis for claim interpretation when assessing patentability”*.

In doing so, they accepted the criticisms that different Boards had made of relying on each article, namely:

- *“Article 69 EPC and the Protocol are arguably only concerned with infringement actions”* (reason 7);
- Article 84 EPC *“provides no guidance on how to interpret claims. It only sets out an instruction to the drafter of what needs to be in the claims, and an instruction to the EPO to determine whether the claims meet that purpose”* (reason 8).

They then concluded at reason 9 that in fact the EPC contains *“no clear legal basis... for claim interpretation when assessing patentability”*. But critically this didn’t prevent them answering question 2: *May the description and figures be consulted when interpreting the claims to assess patentability and, if so, may this be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation??*

On this point, the EBA accepted at reason 10 that *“whether Article 69 EPC or Article 84 EPC is taken as the basis for claim interpretation does not appear to affect the principles that are applied”* and extracted the following principles from the various decisions of the boards (reason 12):

1. *The claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC.*
1. *The description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity.*

In their view 1) is a *“settled point”* while there is divergence on 2), e.g. as to whether ambiguity is necessary before the description and drawings are considered. They took the view that restricting the reliance on the description and drawings only to special situations is contrary to Article 69 EPC. Perhaps mindful that relying on Article 69 EPC isn’t entirely consistent with their position above, the EBA additionally justify their conclusion by reference to the practice of the national courts and the UPC, and therefore the *“harmonization philosophy behind the EPC”* (reason 16). As they put it: *“The Enlarged Board finds it a most unattractive proposition that the EPO deliberately adopt a contrary practice to that of the tribunals that are downstream of its patents.”* Bravo!

Reason 17 explains that the notion that ambiguity should influence claim interpretation would put the cart before the horses: *“The finding that the language of a claim is clear and unambiguous is an act of interpretation, not a preliminary stage to such an interpretative act”*.

Finally, as for question 3 “*May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?*”, this was found inadmissible essentially because it was already answered in response to question 2 (reason 1).

All in all, this seems to us to be a very reasonable and pleasantly unsurprising decision. Any other conclusion would likely have caused significant issues in harmonizing the EPO with national courts and the UPC.

That said, while there is great appeal in the simplicity of the decision and reasoning, it leaves some important questions unanswered. For example, the decision seems to take no position in the debate on adaptation of the description (see [here](#)). It also potentially opens the door to broad claims being interpreted more narrowly based on the description for validity, something which has always faced strong resistance from the EPO. It remains to be seen how the Technical Boards of Appeal will implement this decision in practice and whether they will deviate from the current principle that claims in examination should be given the broadest sensible meaning. Finally, a decision that allows and even requires interpretation of the claims in every case of course opens the door for skillful attorneys and their favorite pet, the famous [angora cat](#). It will always remain a challenge to come to consistent claim interpretations between different deciding bodies, but at least everybody will apply the same basic principles from now on.

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