

EPO Enlarged Board of Appeal addresses the notion of plausibility

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EUROPEAN PATENT ATTORNEYS

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Jakob Pade Frederiksen of Inspicos explains a ruling on the acceptance of evidence that is made public after the filing of an application to prove a technical effect

In its most recent decision, G 2/21 of March 23 2023, the Enlarged Board of Appeal of the EPO considered fundamental questions in relation to the assessment of non-obviousness, notably on the principle of free evaluation of evidence and the notion of plausibility.

For the assessment of non-obviousness, the EPO generally applies the so-called problem-solution approach, in the context of which the technical effect brought about by the decisive novel feature(s) of the claim in question is to be defined. Often, when arguing in support of an inventive step, applicants for, or proprietors of, European patents attempt to rely on a technical effect which is not disclosed in the application as filed, but which may be apparent on the basis of post-published evidence; i.e., evidence published after the filing date.

According to the Enlarged Board of Appeal, such evidence may not be disregarded for the sole reason that it was not available to the public before the filing date. However, the Enlarged Board of Appeal expressed in its decision that it is decisive what the skilled person would understand at the filing date from the application as being the technical teaching of the claimed invention. Furthermore, the technical effect relied upon in relation to non-obviousness must be encompassed by that technical teaching.

Thus, according to the Enlarged Board of Appeal, evidence filed to prove a technical effect of the claimed subject matter may not be disregarded solely on the ground that such evidence had not been public before the filing date and was filed after that date. Also, a patent applicant or proprietor may rely upon a technical effect for an inventive step if the skilled person, having the common general knowledge in mind and based on the application as originally filed, would derive said effect as being encompassed by the technical teaching and embodied by the same originally disclosed invention.

G 2/21 underlines the necessity for applicants to include a discussion of the technical effects of the invention, and possibly data supporting such effects, in their applications from the outset.

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