

## 8. The relationship between Article 83 and Article 84 EPC

### 8.1. Article 83 EPC and support from the description

The patent claims must clearly define the subject-matter for which protection is sought under Art. 84 EPC. In T 94/82 (OJ 1984, 75) it was held that this requirement was fulfilled in a claim to a product when the characteristics of the product were specified by parameters relating to the physical structure of the product, provided that those parameters could be clearly and reliably determined by objective procedures which were usual in the art. In such a product claim, it sufficed to state the physical properties of the product in terms of parameters, since it was not mandatory to give instructions in the claim itself as to how the product was to be obtained. The description, however, had to fulfil the requirements of Art. 83 EPC 1973 and thus enable the person skilled in the art to obtain the claimed product described in it (see also T 487/89, T 297/90, T 541/97). Nor should this be understood as also referring to those variants falling under the literal wording of the claim but which the skilled person would immediately exclude as being clearly outside the scope of practical application of the claimed subject matter, for example, claims including an open ended range for a parameter where it was clear for a skilled person that the open-ended range was limited in practice. Values of the parameter not obtainable in practice would not be regarded by the skilled person as being covered by the claims and thus could not justify an objection of insufficiency of disclosure (T 1018/05). See also T 1943/15 ("open-ended range").

It is of relevance whether a problem falls within Art. 83 or Art. 84 EPC when taking into consideration that examination in respect of the requirements of Art. 83 EPC is still permitted during opposition proceedings, whereas in respect of Art. 84 EPC it is limited during opposition proceedings to those cases where there has been an amendment (see T 127/85, OJ 1989, 271; see also T 301/87, OJ 1990, 335; T 1055/98; T 5/99). With regard to the examination in respect of Art. 84 EPC during opposition proceedings see also chapter II.A.1.4.; and recent decision G 3/14, confirming the jurisprudence exemplified by T 301/87).

In T 292/85 (OJ 1989, 275) the stated grounds for the refusal were that the disclosure was not sufficient under Art. 83 EPC 1973 and there was consequently a lack of proper support under Art. 84 EPC 1973. The board pointed out that in appropriate cases it is only possible to define the invention (the matter for which protection was sought, Art. 84 EPC 1973), in a way which gives fair protection having regard to the nature of the invention which had been described by using functional terminology in the claims. The need for fair protection governs both the considerations concerning the scope of claims and the requirements for sufficient disclosure. The board found that an invention is sufficiently disclosed if **at least one way** is clearly indicated enabling the skilled person to carry out the invention.

In T 409/91 (OJ 1994, 653; ex parte) and T 435/91 (OJ 1995, 188; inter partes) it was pointed out that the protection conferred by a patent should correspond to the technical contribution to the art made by the disclosure of the invention described therein, which excludes the patent monopoly being extended to subject-matter which, after reading the patent specification, would still not be at the disposal of the skilled person. The available