

defined in an open manner and specifying the presence of a component belonging to a class or list of compounds in a quantity defined by a range is amended by limiting the definition of the class or list of compounds. In such a case, in spite of the apparent limitation, the result of the amendment is that the deleted compounds, which according to the granted claim had to be present in an amount within a specific range, can still be present, but in an unspecified manner. The protection conferred by the amended claim then extends beyond that of the granted claim, contrary to the requirement of Art. 123(3) EPC.

In T 2017/07 the board stated that a composition which is specified in a claim to comprise a component in an amount which is defined by a numerical range of values is characterised by the feature which requires the presence of the component within that range, as well as by the **implicit proviso** which excludes the presence of that component in an amount outside of that range. Consequently, the amount of that component present in the composition must not exceed the upper limit of the numerical range indicated. An amendment restricting the breadth of that component, for instance by narrowing down a generic class or a list of chemical compounds defining that component, has the consequence of no longer requiring the presence within that numerical range of those chemical compounds no longer encompassed by the restricted definition of that component and, thus, of limiting the scope of this implicit proviso. A composition which is defined as comprising the components indicated in the claim is open to the presence of any further components, unless otherwise specified. Thus, in a claim directed to an openly defined composition, the restriction of the breadth of a component present therein may have the effect of broadening the scope of protection of that claim, with the consequence that in opposition/appeal proceedings such amended claim may extend the protection conferred by the granted patent (Art. 123(3) EPC). The considerations in T 2017/07 were confirmed in e.g. T 9/10 and T 2430/17 (in which a list of three families of polymers as defined in claim 1 as granted was limited by the deletion of two alternatives, thus removing the implicit proviso for these two alternatives).

In T 999/10 the board considered that sequential drafting (formulation "en cascade") in an open claim ("comprising"), i.e. retaining in an amended claim the broad definition of claim 1 and adding, by means of the expression "and in which ...", an additional limitation, avoided the situation contemplated in T 2017/07, where an amendment initially made with a view to limiting a claim in fact extended the scope of protection it conferred (Art. 123(3) EPC).

In T 1360/11 the board confirmed that in a case where a granted claim, directed to a composition defined in an open manner and including the presence of a component belonging to a class or list of compounds in a quantity defined by a range, was later amended by limiting the definition of the class or list of compounds, in spite of the apparent limitation, the wording of the granted and amended claims might be such that the amendment results in an extension of the protection conferred. The problem was well known in the case law, see e.g. T 172/07, T 2017/07, T 832/08, T 1312/08, T 869/10, T 287/11. The board observed that by means of inserting a **double condition** the claim may not extend the protection conferred by the patent. A possible infringement of the requirements of Art. 123(3) EPC might be avoided by including in the amended claim a **quantitative condition on the limited class or list of compounds** and an **additional**