

According to Art. 76(1), second sentence, EPC, the divisional application may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed. The divisional application is accorded the same filing date as the parent (earlier) application and benefits from any right of priority of the parent (earlier) application in respect of the subject-matter contained in the divisional application. When determining whether the subject matter of a divisional application extends beyond the content of the earlier application as filed (Art. 76(1), second sentence, EPC) exactly the same principles are to be applied as for extension of subject-matter under Art. 123(2) EPC (G 1/05; see in this chapter II.F.2.1.).

Divisional applications may be amended like any other application. If a divisional application is amended, it must meet the requirements of both Art. 76(1) EPC and Art. 123(2) EPC, so as to preclude the introduction of new subject-matter into the proceedings (see in this chapter II.F.2.2.).

A divisional application (of whatever generation) can be the "earlier application" within the meaning of Art. 76(1) EPC for a further divisional (G 1/06, OJ 2008, 307). According to R. 36(1) EPC the earlier application must still be pending (see in this chapter II.F.3.5.).

It is a ground of opposition and a ground of revocation if the subject-matter of a patent granted on a divisional application extends beyond the content of the earlier application as filed, see Art. 100(c), 138(1)(c) EPC.

The question whether a European divisional application may anticipate its parent ("poisonous divisional") is treated in the context of partial priority in T 557/13 (OJ 2016, A87; referral G 1/15). For a summary of G 1/15 (OJ 2017, A82), see in chapter II.D.5.3. "Multiple priorities or partial priority for one claim".

## 2. Subject-matter of a divisional application

### 2.1. Subject-matter extending beyond content of the earlier application

The wording of Art. 76(1) EPC and the wording of Art. 123(2) EPC is so similar (in all three languages) that it is clear that **exactly the same principles** are to be applied for both types of cases when determining what extends beyond the content of the earlier application (G 1/05, OJ 2008, 271). The mere fact that the wording of the French version differs (Art. 76(1), second sentence, EPC: "éléments"; Art. 123(2) EPC: "objet") does not justify a different interpretation (T 276/97). The case law on added subject-matter is summarised in chapter II.E.1.

Art. 76(1) and Art. 123(2) EPC have the **same purpose**, i.e. to create a fair balance between the interests of applicants and patentees, on the one hand, and competitors and other third parties on the other. The idea underlying these provisions is that an applicant should not be allowed to improve his position by adding subject-matter not disclosed in the application as filed, which would give him an unwarranted advantage and could be damaging to the legal security of third parties relying on the content of the original application (G 1/93, OJ 1994, 541; T 873/94, OJ 1997, 456; T 276/97, T 701/97). Both