

no compatibility at all between the description and the claim as granted. This was not comparable to the case in hand because the feature at issue, as interpreted by the board – although undisclosed – provided a clear and credible technical teaching compatible with both, the claim as granted and the described embodiment, which was therefore not entirely excluded from the scope of protection. Consequently, claim 1 of the 2nd auxiliary request did not comply with Art. 123(3) EPC, which led to an inescapable trap.

#### 4. Correction of errors in the description, claims and drawings – Rule 139 EPC

According to R. 139 EPC, linguistic errors, errors of transcription and mistakes in any document filed with the EPO may be corrected on request; however, if the request for such correction concerns the description, claims or drawings, the correction must be obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction. This wording does not differ in substance from the former R. 88 EPC 1973; only some editorial changes have been made in the three languages. Hence, the jurisprudence with regard to R. 88 EPC 1973 is applicable to R. 139 EPC (T. 1460/10).

Relevant for the present chapter on amendments is R. 139, second sentence, EPC, which concerns corrections to the parts of a European patent application or of a European patent relating to the disclosure (the description, claims and drawings). Other aspects related to corrections can be found under chapters II.F.4.3. "Correction of errors in a divisional application"; IV.A.5.2.2 "Correction of designation of applicant (Rule 139 EPC)"; IV.A.5.5. "Corrections under Rule 139 EPC"; IV.A.7.3. "Correction of designation of states (Rule 139 EPC)"; IV.B.3.8.4 "Correction of the withdrawal of the application under Rule 139 EPC". As to the corrections under the **first sentence** of R. 139 EPC, the boards of appeal, in particular the Legal Board of Appeal, have developed a large body of case law on corrections, namely that the correction must introduce what was originally intended, the error to be remedied may be an incorrect statement or an omission, and the request for correction must be filed without delay (see G. 1/12, point 37 of the Reasons).

##### 4.1. Relationship of Rule 139 EPC with Article 123(2) and (3) EPC

In opinion G. 3/89 (OJ 1993, 117) and decision G. 11/91 (OJ 1993, 125) the Enlarged Board held that corrections under R. 88, second sentence, EPC 1973 (now R. 139, second sentence, EPC) were special cases of an amendment within the meaning of Art. 123 EPC and fell under the prohibition of extension laid down in Art. 123(2) EPC.

The parts of a European application or patent relating to the disclosure (description, claims and drawings) can be corrected only within the limits of what the skilled person would derive directly and unambiguously, using common knowledge and seen objectively and relative to the date of filing, from the whole of these documents as originally filed. Such a correction was **of a strictly declaratory nature** and thus did not infringe the prohibition of extension under Art. 123(2) EPC 1973.

For case law on these issues prior to G. 3/89 and G. 11/91, see the summary of facts and submissions of those decisions, and "Case Law of the Boards of Appeal", 7<sup>th</sup> ed. 2013,