

1.4.7 Elimination of inconsistencies and unclear features

a) Amendment allowed

In T. 271/84 (OJ 1987, 405) it was stated that an amendment to a claim to clarify an inconsistency did not contravene Art. 123(2) or Art. 123(3) EPC 1973 if the amended claim had the same meaning as the unamended claim, on its true construction in the context of the specification.

In T. 758/92 the board allowed the deletion of a feature because it was clearly inconsistent with the teaching disclosed in the application as filed, and there was a clear basis in the original disclosure for its deletion. A skilled reader of the original application documents would have realised that the feature to be deleted was erroneously introduced in the claim because the resulting definition was contradictory to the functioning of the described embodiment of the invention.

In T. 609/95 the board took the position that where a drafting defect or inconsistency in an application would be evident to a reader skilled in the art, the person to whom the application is addressed, it is reasonable to suppose that he would, in the light of the content of the application, attempt to formulate a notional amendment which would enable him to make sense of what he reads, and to the extent that the amendment might be said to leap to the mind of the reader, although perhaps only after close study of the document, it can be regarded as implicit in the application and would not contravene Art. 123(2) EPC 1973, if effected in practice (see also T. 887/97 for such amendment during opposition appeal proceedings).

b) Amendment not allowed

In T. 1464/05, however, the board said that the attempt of the respondent (patent proprietor) to see in the upper ends of range values a removable inconsistency in the application as filed could not, in the context of a wholly consistent and clear disclosure of the application, be accepted.

c) Art. 84 and 123(2) EPC – inescapable trap

In T. 81/13 the board refused claim 1 of the main request as it contained a viscosity feature which the board considered not clear (Art. 84 EPC). In claim 1 of the auxiliary request the appellant deleted this viscosity feature and argued that an unclear and unmeasurable viscosity value was not essential and could be omitted for this reason from the claim; this omission should also be possible to escape the Art. 84 and 123(2) EPC "squeeze", which would lead to an "inescapable trap". The board held that this parameter was revealed to be unclear but remained an essential feature since, even unclear, it conferred on the composition a particular aspect and reflected a composition having specific and essential properties. Also, the presence of an unclear essential feature in a claim did not inevitably lead to an "inescapable trap". If the omission of such feature reflecting essential properties of a claimed product was not possible, its replacement by an equivalent feature providing inevitably the same essential property could be considered as normally feasible. This was