

this chapter II.A.6.3.5; as to the limits of this, see T. 2221/10, summarised in this chapter II.A.6.3.1). On this basis, the board in T. 500/01 held that, a claim, the wording of which is essentially identical to a claim as originally filed, can nevertheless contravene the requirements of Art. 123(2) EPC if it contains a feature whose definition has been amended in the description in a non-allowable way (see also chapter II.E.1.14.4). In T. 1360/13 the board held that any change in the description or drawings may have an influence on the understanding of a claimed feature, in particular when it must be considered ambiguous in view of a piece of prior art or an allegedly infringing product, and may thus lead to a broadening of the extent of the protection conferred. Any information in the description and/or drawings of a patent directly related to a feature of a claim and potentially restricting its interpretation could not be removed from the patent without infringing Art. 123(3) EPC (see also chapters II.E.2.4.2 and II.E.2.4.5).

In T. 1023/02 the invention was based on the recognition that the genes for a specific viral protein (ICP34.5) expressed in infected cells determine the ability of herpes simplex viruses to destroy central nervous system tissue. The respondent argued that a post-published document revealed the existence of an ORF-P gene coincident with but anti-sense to the ICP34.5 gene. Therefore, in view of the term "only", the claim had to be interpreted as requiring that the first method step did not interfere with the expression of this ORF-P gene. The board, however, pointed out that it was apparent from the description that the patentee had not envisaged the existence of this gene. The skilled reader would therefore, in the light of the description, not interpret the subject-matter of claim 1 in the way advocated by the respondent. Accordingly post-published knowledge of further technical details and/or complications could not justify this interpretation.

In T. 1409/16 the board considered that both "exclusive disjunctions" and "inclusive disjunctions" could be expressed by the "either (...) or" wording. The fact that another expression ("and/or") was used (in the sense of an inclusive "or") in another claim of the contested patent was not, as such, a compelling reason for concluding that the "either (...) or" wording used in the claim in question must have a different meaning, i.e. that it expressed an exclusive "or". There was no absolute obligation to use a fully coherent terminology for expressing given features if the latter could be expressed in different ways. The board held that the "either (...) or" wording could only be considered as expressing an exclusive "or" in cases where the two situations referred to were, due to their very nature, mutually exclusive, i.e. incompatible with each other.

6.3.4 Reading additional features and limitations into the claims

For the purposes of judging novelty and inventive step, Art. 69 EPC (Art. 69 EPC 1973) and its Protocol cannot be relied on to read into the claim an implicit restrictive feature not suggested by the explicit wording of the claim (T. 1208/97, T. 681/01, T. 881/01, T. 1105/04, T. 223/05, T. 1736/06, T. 299/09, T. 58/13). In proceedings before the EPO, where the patentee has the opportunity of cutting down his claims to accord with stricter limits given in the description, the scope of a claim should not be cut down by implying into it features which appear only in the description, as this would deprive claims of their intended function (T. 881/01).