

OJ 1990, 93). The claims in question were of different categories: **Swiss-type claims** were purpose-limited process claims (Use of X for the manufacture of a medicament for the treatment of Y) and **claims formulated in accordance with Art. 54(5) EPC** were purpose-limited product claims (X for use in the treatment of Y). As regards the technical features, the board concluded that both sets of claims defined the same compound and the same therapeutic use, but that the Swiss-type claims comprised in addition the feature of manufacturing a medicament whereas the claim in accordance with Art. 54(5) EPC did not. The claimed subject-matter was thus different. The board also considered that the scope of protection was noticeably different. It was generally accepted as a principle underlying the EPC that a claim to a particular physical activity (e.g. method, process, use) conferred less protection than a claim to the physical entity per se (see decision **G 2/88**). It followed that a purpose-limited process claim also conferred less protection than a purpose-limited product claim. (See also **T 879/12**, **T 13/14** and **T 15/14** agreeing with the conclusions in **T 1780/12**.)

In **T 2563/11**, the appellants had contended that the prohibition on double patenting did not apply because, despite their identically worded independent claims, the parent patent and the divisional application had **different descriptions** and so each conferred a different extent of protection under Art. 69 EPC. The board observed, however, that the important point for the purposes of the prohibition on double patenting was whether the "same subject-matter" was claimed. A claim's subject-matter was defined by its category and technical features (Art. 84 EPC and R. 43(1) EPC), so the description was irrelevant in establishing whether the same subject-matter was claimed, especially if the claims in question were anyway clear and understandable in themselves (see **T 197/10**). By contrast, while the claims were likewise the basis for determining the extent of protection conferred by a European patent, Art. 69(1) EPC provided that the description and drawings were to be used to interpret them for this purpose. This meant that the extent of protection conferred by the patent might be broader than the subject-matter claimed. In the case in hand, the board rejected the appellants' contention that, owing to the considerable differences between the descriptions, the subject-matter of claim 1 of the divisional application was broader than its equivalent in the parent application.

5.4. Double patenting objection in opposition

According to the board in **T 936/04**, "double patenting" is not a ground of opposition. It is, however, within the discretion of the departments of the EPO to raise the objection in opposition or opposition appeal proceedings against proposed amended claims, but this should be done **only in clear cases**. The purpose behind the principle of the prohibition of double patenting was to avoid unnecessary duplication of effort, and not to impose on the departments of the EPO an obligation to make a complex comparison between the case before them and the claims that may have been granted in some other proceedings. In the case at issue, at the time of the decision by the opposition division, a patent had not yet been granted on the divisional application. For this reason alone the opposition division was correct to disregard the objections of double patenting raised before it. At that stage it would only be a matter for the examining division, in the proceedings on the divisional application before it, to avoid double patenting by again allowing claims already granted in the parent patent.