

3.2.5 Resolving the conflict in cases of clerical errors or incompatibility between the claims as granted and the description

Decision T 438/98, which concerned the correction of an obvious clerical error, followed T 271/84 (OJ 1987, 405), T 371/88 (OJ 1992, 157), T 673/89 and T 214/91, in ruling that amending a claim to remove an inconsistency did not contravene Art. 123(2) or Art. 123(3) EPC 1973 if the claim as corrected had the same meaning as the correct interpretation of the uncorrected claim in the light of the description.

However, in T 1018/02 the board held that the description could not be used to give a different meaning to a claim feature which in itself imparted a clear, credible technical teaching to the skilled reader. The feature would thus have had to be deleted to achieve consistency with the original disclosure (Art. 123(2) EPC). But this would have contravened Art. 123(3) EPC and therefore the patent was revoked. See also T 1202/07.

In T 195/09, on the conflict between Art. 123(2) and (3) EPC, the appellant referred to T 108/91 in which it had been decided that an inaccurate technical statement in a granted claim, which statement was evidently inconsistent with the totality of the disclosure of the patent and would contravene the requirements of Art. 123(2) EPC, could be replaced with an accurate statement of the technical features involved without infringing Art. 123(3) EPC. The board in T 195/09 pointed out that this decision had been clearly overruled by G 1/93 (see also T 1746/10, T 1896/11).

In T 131/15 the interpretation of the expression "opposite direction" in claim 1 as granted in a precise geometrical sense would have excluded all of the described embodiments from protection and would have resulted in amended claim 1 of the sole request contravening Art. 123(3) EPC. However, in the light of the principles set out in G 2/88 (OJ 1990, 93) with reference to Art. 69(1) EPC 1973 and its Protocol, the board came to the following conclusion: Where an expression in a granted claim, taken literally and in isolation, would have the effect of excluding all of the disclosed embodiments from the scope of protection, but where a definition of the expression may be derived from the patent itself which would locate (at least some of) the disclosed embodiments within the ambit of the claim, and provided this definition was not manifestly unreasonable, having regard to the normal meaning of the words used in the expression, then in judging compliance with the requirements of Art. 123(3) EPC, the scope of protection should normally be considered to include at least that which would fall within the terms of the claim understood according to this definition. Since the description provided a basis for interpreting the expression "opposite direction" less restrictively, the board considered that Art. 123(3) EPC was not infringed by reinstating in claim 1 of the sole request an originally disclosed part of the feature concerned, which had been omitted in the granted claim.

In T 1127/16, contrary to the appellant's (patent proprietor's) view, the board held that T 131/15 concerned a situation entirely different from the case in hand. The board observed that, irrespective of the fact that such a comprehensive and intricate test as suggested in T 131/15 could arguably place an undue burden on third parties when trying to establish the "true" (i.e. intended) scope of protection conferred by a granted patent, in T 131/15 the issue was that if the expression in question was read literally, there would be