

In T. 56/04 the board pointed out that a claim containing an unclear technical feature prevented its subject-matter from being identified beyond doubt. That was particularly the case if the unclear feature was meant to delimit the claimed subject-matter from the state of the art. The board therefore took the view that a vague or unclear term which was used in the claim and a precise definition which was to be found only in the description could be allowed only in exceptional cases to delimit the claimed subject-matter from the state of the art. Such an exception pursuant – *mutatis mutandis* – to R. 29(6) EPC 1973 exists if the precise definition – for whatever reason – cannot be incorporated into the claim, and the precise definition of the vague or unclear term is unambiguously and directly identifiable by a skilled person from the description. In T. 56/04 the board said that an exception was not involved. The specific value of "approximately 1 mm" disclosed in the description could have been incorporated into the claim itself instead of "slightly less than [...]". See also T. 623/13.

On the extent to which it must be clear from the claim itself how parameters are to be determined when a product is characterised by parameters, see in this chapter II.A.3.5. In a number of decisions it is stressed that the claims must be clear in themselves when read with the normal skills but without any knowledge derived from the description (see e.g. T. 412/02 and T. 908/04). In T. 992/02 however the board deemed it justified in the case in point for the claim not to include the procedure for measuring the parameter.

6.3.6 Definition of the scope of protection with regard to infringement not within the EPO's competences

In T. 442/91 the respondents wanted the board to rule on the extent of the protection conferred by what they considered to be broad claims. The board observed that the EPO concerned itself in opposition appeal proceedings with the extent of protection conferred by a patent only for the purposes of examining compliance with Art. 123(3) EPC 1973. Beyond that, interpreting the extent of protection was a matter for national courts dealing with infringement cases. Whilst the EPO made it clear how terms of art used in the claims should be understood, it should not proffer any further interpretation of the patent's future scope beyond that (see also T. 740/96). In line with this thinking, the board in T. 439/92 and T. 62/92 interpreted the claims with a view to identifying their subject-matter.

7. Product-by-process claims

7.1. Introduction

Under Art. 64(2) EPC (1973 and 2000) the protection conferred by a process patent extends to the products obtained directly by the process, even if they are not patentable *per se*. Certain applicants tried to acquire protection for known products by using process claims to define them, arguing that it follows from Art. 64(2) EPC 1973, that a product is rendered novel by the fact that it is produced by means of a new process.

The boards of appeal did not accept this line of argument and made a distinction between claims to a new and inventive product defined by its method of manufacture and claims to