

to amend a divisional application to bring it in line with the requirements of Art. 76(1) EPC (G 1/05, OJ 2008, 271).

If a divisional application is amended, it must meet **both the requirements of Art. 76(1) EPC and those of Art. 123(2) EPC**, so as to preclude the introduction of new subject-matter into the examination proceedings (see, among many others, G 1/05, OJ 2008, 271; T 284/85; T 441/92; T 873/94, OJ 1997, 456; T 1221/97; T 1008/99; T 561/00; T 402/00; T 423/03).

In T 2327/18 the board rejected the argument made by the respondent (patent proprietor) that, in accordance with G 1/05 and G 1/06 (OJ 2008, 271 and 307), bringing the application into line with the requirements of Art. 76(1) EPC had to be given priority over compliance with Art. 123(2) EPC. What those decisions had in fact made clear was that Art. 123(2) EPC was equally applicable to amendments to a divisional application as to amendments to any other application. In the case at issue, this meant that deleting a disclaimer which was not in the parent application as originally filed but was in the divisional application as originally filed was not allowable (because it was incompatible with Art. 123(2) EPC; see chapter II.E.1.).

2.3. Subject-matter of a patent granted on a divisional application

2.3.1 Findings of G 1/05 and G 1/06 also applicable to granted patents

The findings of the Enlarged Board of Appeal in G 1/05 (OJ 2008, 271) and G 1/06 (OJ 2008, 307), although made in regard to patent applications, are also valid for granted patents. This can be derived from the fact that the Enlarged Board of Appeal relied on a direct correspondence between Art. 76(1) and 123(2) EPC, both articles enshrining the same principles, and that Art. 123(2) EPC applied to both patent applications and patents (T 265/05). Thus, in order to meet the requirements of Art. 100(c) EPC 1973, it was a necessary and sufficient condition that anything disclosed in the granted patent had to be directly and unambiguously derivable not only from the application on which the patent had been granted, but also from what was disclosed in each of the preceding applications as filed (T 687/05, T 549/09, T 2175/09, T 1283/12).

2.3.2 Ground for opposition under Article 100(c) EPC

In T 475/02 the board had to decide whether the patent fulfilled the requirements of Art. 100(c) EPC. Since the opposed patent was granted on a divisional application, for the subject-matter of any claim as granted to be allowable, it had to pass both of the **two tests** of this provision: (i) the subject-matter must not extend beyond the content of the divisional application as filed; and, (ii) it must not extend beyond the content of the earlier application as filed. Whether the first test was passed depended only on the particular claim and on the content of the divisional application as filed. That the subject-matter of a claim passed the second test did not necessarily mean that it passed the first, and vice-versa. The two tests needed separate consideration, in particular where the divisional application as filed did not include the complete text (both description and claims) of the parent application.