

amendment to a claim resulting in the incorporation therein of a "negative" technical feature, typically excluding from a general feature specific embodiments or areas.

Furthermore G. 1/16 concurred with decision T. 1870/08, that a disclaimer is only a proper disclaimer if the remaining legal subject-matter is **less** than that of the unamended claim. If any subject-matter can be identified which falls within the scope of the claim after amendment by the proposed disclaimer, but which did not do so before the amendment, the disclaimer is improper and, as a consequence of this, unallowable under Art. 123(2) EPC.

The board in T. 1870/08 provided the example of a negative formulation removing a restricting feature: While this formulation may look like a disclaimer, it may in fact extend the legal scope of protection.

The term "**undisclosed disclaimer**" relates to the situation in which neither the disclaimer itself nor the subject-matter excluded by it have been disclosed in the application as filed. The term "**disclosed disclaimer**" relates to the situation in which the disclaimer itself might not have been disclosed in the application as filed, but the subject-matter excluded by it has a basis in the application as filed, e.g. in an embodiment. Thus, undisclosed disclaimers and disclosed disclaimers can be distinguished according to whether the subject-matter on which the respective disclaimer is based is explicitly or implicitly, directly and unambiguously, disclosed to the skilled person using common general knowledge, in the application as filed (G. 1/16).

1.7.2 Standards for examining disclosed and undisclosed disclaimers

In G. 1/16 (OJ 2018, A70) the Enlarged Board considered that the choice of the proper test for assessing the allowability of any disclaimer is determined by the fundamental distinction, in terms of their legal nature, between disclosed disclaimers and undisclosed disclaimers. That distinction necessitates providing **for each of the two classes of disclaimer a single specific test** for assessing whether the introduction of a given disclaimer is in compliance with Art. 123(2) EPC. Therefore, for undisclosed disclaimers the proper test is whether the criteria of G. 1/03 (OJ 2004, 413) are fulfilled, and for disclosed disclaimers the proper test is the gold standard disclosure test of G. 2/10 (OJ 2012, 376).

With regard to the admissibility of disclaimers, reference should also be made to chapter II.D.3.1.2.

a) Principles established in G 1/03 and G 2/03 for undisclosed disclaimers

The Enlarged Board of Appeal held in G. 1/03 and G. 2/03 (OJ 2004, 413 and 448) concerning **undisclosed** disclaimers that an amendment to a claim by the introduction of a disclaimer may not be refused under Art. 123(2) EPC 1973 for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the application as filed. It considered that the following criteria were to be