

Art. 123(2) EPC and Art. 123(3) EPC are mutually independent of each other (G 1/93, OJ 1994, 541); the same is true for Art. 76(1) EPC and Art. 123(3) EPC (T 1736/09).

2.1. Purpose of Article 123(3) EPC

Art. 123(3) EPC is directly aimed at protecting the interests of third parties by prohibiting any broadening of the claims of a granted patent, even if there should be a basis for such broadening in the application as filed (G 1/93, OJ 1994, 541). In accordance with the general intention of Art. 123(3) EPC, there should be legal certainty for the activities of third parties trusting that the protection conferred by a patent can only be restricted, but not extended (T 1149/97).

The object of Art. 123(3) EPC is to prevent any procedural situation where an act which does not infringe the patent as granted becomes an infringing act as a result of an amendment after grant (see T 1149/97, T 1898/07 referring to T 59/87, OJ 1988, 347 and T 604/01).

2.2. Totality of claims

In accordance with the established case law of the boards of appeal, the legal notion "protection conferred" in Art. 123(3) EPC refers to the **totality** of protection established by the claims as granted and not necessarily to the scope of protection within the wording of each single claim as granted (T 579/01, T 1456/06, T 1544/07, see also T 49/89, T 402/89). According to G 2/88 (OJ 1990, 93), it is the totality of the claims before amendment in comparison with the totality of the claims after the proposed amendment that has to be considered.

Under Art. 123(3) EPC, the patentee is generally allowed to redraft, amend or delete the features of some or all claims and is not bound to specific terms used in the claims as granted as long as the new wording of the claims does not extend the scope of protection conferred as a whole by the patent as granted. Thus, in order to assess any amendment under Art. 123(3) EPC after grant, it is necessary to decide whether or not the totality of the claims before amendment in comparison with the totality of the claims after amendment extends the protection conferred (see e.g. T 579/01, T 1898/07, T 1830/14).

2.3. Extent of protection

2.3.1 Article 123(3) EPC and Article 69 EPC

a) Principles

Art. 69 EPC and its Protocol are to be applied in proceedings before the EPO whenever it is necessary to determine the protection conferred. In this context, the national laws of the contracting states relating to infringement should not be considered. Rather the protection conferred by a patent is determined by the terms of the claims, and in particular by the categories of the claims and their technical features, in accordance with Art. 69(1) EPC.