

Art. 76(1) EPC 1973 and Art. 123(2) EPC 1973 enshrine the principle that before grant the legal security of third parties is sufficiently protected by the prohibition of extending the content of the application by amendment beyond what was originally disclosed (T 1387/05).

Since the underlying requirements of Art. 123(2) and 76(1) EPC are the same, there is no harm done if the examining division incorrectly refers to Art. 123(2) EPC (instead of Art. 76(1) EPC) when refusing a divisional application on the grounds that its subject-matter extended beyond the parent application (T 542/94).

#### 2.1.1 Directly and unambiguously derivable from content of earlier application as filed

The subject-matter of a divisional application must be **directly and unambiguously derivable** from the earlier application as filed (see G 1/06, OJ 2008, 307). More specifically, subject-matter of the divisional must be directly and unambiguously derivable by the skilled person from the disclosure of the earlier application as filed, as determined by the totality of its claims, description and figures when read in context (see consolidated cases T 1500/07, T 1501/07, T 1502/07; see also T 961/09).

Subject-matter claimed in the divisional application has to be compared with the content of the earlier (parent) application as filed, whereby the content of an application comprises the whole disclosure, express or implied, that is directly and unambiguously derivable from the application including information which is implicit and immediately and unambiguously apparent to a person skilled in the art reading the application (T 423/03). In other words, it has to be established whether technical information has been introduced into the divisional application which a skilled person would not have objectively and unambiguously derived from the earlier application as filed (T 402/00).

The "content" within the meaning of Art. 76 EPC is to be interpreted as the **whole technical content** of the earlier application (G 1/05, OJ 2008, 271, point 9.2 of the Reasons). Art. 76 EPC does not require that the content be disclosed in the claims of the earlier application. It only requires that the subject-matter be disclosed as such anywhere in the whole disclosure of the earlier application (T 211/95, T 1026/03, T 314/06).

The case law on the question of when subject-matter is directly and unambiguously derivable (including decisions applying Art. 76 EPC) is summarised in chapter II.E.1.

#### 2.1.2 Sequence of divisionals – derivable from each of the preceding applications as filed

In G 1/06 (OJ 2008, 307) the Enlarged Board ruled that Art. 76 EPC 1973 also applied to divisionals from divisionals, because – if not specifically provided otherwise – divisionals must be treated just like any other application. Therefore a divisional (of whatever generation) could be the "earlier application" within the meaning of Art. 76(1) EPC 1973 for a further divisional. In the case of a sequence of applications consisting of a root (originating) application followed by divisional applications, each divided from its predecessor, it was a necessary and sufficient condition for a divisional application of that sequence to comply with Art. 76(1), second sentence, EPC 1973 that anything disclosed