

In T.806/03 the opposition division had applied the first test of Art. 100(c) EPC to "the application as originally filed, which is the parent application" and decided that Art. 123(2) EPC had not been complied with. The board held that the reference to the wrong provision made no difference with regard to the substance of the opposition division's decision, since the descriptions of the parent application and of the divisional application as filed were identical.

In T.2233/09 the board held that Art. 100(c) EPC contained two distinct legal grounds: Art. 76(1) EPC and Art. 123(2) EPC. Since no objections with respect to Art. 76(1) EPC had been raised during the opposition proceedings, such a **new legal ground** could be introduced in the appeal proceedings only with the consent of the patent proprietor.

### 2.3.3 Ground raised against amended claims in opposition proceedings

In T.1975/09 the board held that Art. 100(c) EPC – and not Art. 76(1) EPC – would have been the correct provision to cite in the decision of the opposition division when the claims of the granted patent were considered. With respect to amendments made to the claims in the course of the opposition proceedings, Art. 101(3)(a) and (b) EPC required the opposition division to form an opinion on whether or not the patent and the invention to which it related met the requirements of the Convention. Art. 76(1) EPC related to a requirement for filing a divisional application, which was not a requirement under the Convention for an (amended) patent. Therefore, the requirement of Art. 123(2) EPC, although not explicitly referring to the content of the "earlier application(s)", was the corresponding requirement of the Convention within the meaning of Art. 101(3) EPC, to be met by the patent in relation to amendments made thereto, with respect to the content of the earlier and of the divisional application(s) as filed. See however e.g. T.2371/18, T.2490/18, T.3272/19 of 11 February 2021, which apply Art. 76(1) EPC to claims amended in opposition (appeal) proceedings.

## 2.4. Link between subject-matter of earlier application and divisional application

### 2.4.1 No abandonment of subject-matter in earlier application if divisional is filed

In T.118/91 the respondent argued that since a divisional application was filed, the subject-matter of the divisional must be considered to have been abandoned in the parent application. The board held that there was nothing in Art. 76 EPC 1973 or any other provision of the EPC to support that contention: the content of the application as filed cannot, as a matter of logic, be reduced by the subsequent filing of a divisional application.

### 2.4.2 No effect on content of divisional application if earlier application was refused

In T.441/92 the parent application was refused by a decision of the examining division (which became final after the appeal was held inadmissible) after the divisional application had been filed. The board held that the lapse of the parent application cannot have the effect of reducing the content of a previously filed divisional application.