

T 1845/14 (broadness of the claim arising from lack of clarity and sufficiency) specified that the ambiguous definition of a parameter in a claim may result in the scope of the claim to be broader than the patentee might have intended. In such a case the question arises whether the teaching of the patent in suit, which was directed to the claimed subject-matter having regard to a specific meaning of that parameter (which, however, was omitted), would nevertheless have enabled the skilled person to carry out the invention outside of the scope intended by the patentee, using common general knowledge and a reasonable amount of experimentation.

8.2.1 Minority – or earlier – case law

In some decisions (for example, T 123/85, T 124/85, T 172/87, T 358/88, T 449/90, T 148/91, T 267/91, T 697/91, T 225/93, T 378/97, T 387/01, T 252/02, T 611/02, T 464/05, see recently T 626/14) the absence of information in the application on methods for measuring undetermined parameters in the application was considered a problem with respect to Art. 83 EPC.

8.2.2 Majority case law

To provide a quick overview of the law applicable at present, the currently predominant approach is set out in the first section. However, it should be borne in mind that the debate around this issue has still been ongoing in relatively recent case law (see in this chapter II.C.8.2.2c).

a) Currently predominant approach

Two decisions in particular have affirmed the applicable law, setting out the now predominant approach after summarising and analysing the case law to date: T 1811/13 (decision in English - lack of clarity vs. insufficiency of disclosure) and T 647/15 (decision in French). An example of a decision in German is T 548/13.

While these decisions were not the first (see e.g. T 2290/12) to take the approach currently applied by the majority of the boards, their findings are taken here to illustrate the point.

The approach is as follows: "today there is agreement or at least a clearly predominant opinion among the boards that the definition of the "forbidden area" of a claim should not be considered as a matter related to Art. 83 EPC." The board added that: "This is not to say that a lack of clarity cannot result in an insufficient disclosure of the invention. However, in such a case it is not sufficient to establish that a claim lacks clarity, but it is necessary to establish that the application or patent, as the case may be, does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. In other words, it is not sufficient to establish a lack of clarity of the claims for establishing lack of compliance with Art. 83 EPC 1973; it is necessary to show that the lack of clarity affects the patent **as a whole** (i.e. not only the claims) and that it is such that the skilled person – who can avail himself of the description and his common general knowledge – is hindered from carrying out the invention".