

in that divisional application be directly and unambiguously derivable from what is disclosed in **each of the preceding applications as filed** (see G 1/06).

The subject matter has to be still present (i.e. it was not unequivocally and definitively abandoned by that time, see J 2/01, OJ 2005, 88; J 15/85, OJ 1986, 395) in each earlier predecessor application at the time the – further – divisional application was filed so that it was thereby existing at all times throughout after its disclosure in the root application as filed up to and including the date of filing the divisional application under consideration. Content which had been omitted on filing a member higher up the sequence could not be re-introduced into that member or in divisional applications lower down the sequence from it. Conversely, content which has been added on filing of a divisional application a sequence higher up could not be claimed in a divisional application down the sequence because according to Art. 76(1) EPC such added matter did not benefit from the filing date of the root application in which it was not disclosed (see G 1/06).

In T 2175/09 the appellant argued that an infringement of Art. 76(1) EPC 1973 in the case of an intermediate higher-generation divisional application (here the grandparent application) did not constitute a ground for opposition under Art. 100(c) EPC 1973. The board held that Art. 100(c) EPC 1973 gave the public the possibility of opposing a patent on the ground that its subject-matter extended beyond the content of the earlier application as filed if an infringement of Art. 76(1) EPC 1973 had been overlooked in examination proceedings. This also applied in the particular case of an infringement of Art. 76(1) EPC 1973 in an intermediate higher-generation divisional application. The grandparent application too is "the earlier application" within the meaning of Art. 100(c) EPC.

2.1.3 Language issues

In T 1076/12 the board held that it was the text of the application as originally filed, even if the text was not in an official language of the EPO, that had to be used, together with any other non-text portions of the application as filed, in order to determine the "content of the earlier application as filed" as referred to in Art. 76(1) EPC. See also chapter II.E.1.2.3.

2.2. Amendments to divisional applications

Divisional applications are new applications which are separate and independent from the earlier applications. Amendments to a divisional application are thus allowed under Art. 123(2) EPC to the **same extent as amendments of any other non-divisional application** (G 1/05, OJ 2008, 271).

Amendments may be allowed even if the divisional application as filed contains – contrary to Art. 76(1), second sentence, first half sentence, EPC – subject-matter extending beyond the earlier application as filed. Such a divisional application is **not** to be considered "invalid" (G 1/05, OJ 2008, 271). It may still be amended during examination proceedings so that it complies with the requirements of Art. 76(1) EPC, provided always, however, that the amendment complies with the other requirements of the EPC (see G 1/05, OJ 2008, 271). Even if the **earlier application is no longer pending**, it remains possible