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May the "basic" patent be limited under Article 138.3 of the EPC when the validity of SPC is questioned?

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On 13 December 2007, the last amendment of the European Patent convention ("EPC") came into force. Among other aspects, the amendment introduced a new paragraph (paragraph 3) in Article 138 of the EPC, which reads as follows: "In proceedings before the competent court or authority relating to the validity of the European patent, the proprietor of the patent shall have the right to limit the patent by amending the claims. The patent as thus limited shall form the basis for the proceedings".

One of the topics currently discussed before Spanish Courts is whether the "basic" patent may be limited under Article 138.3 of the EPC when the validity of the SPC is questioned on the grounds that the basic patent does not explicitly protect the medicament protected by the SPC. This debate has arisen in cases where, for example, the SPC protects a combination of drugs (A+B), whilst the claims of the "basic" patent explicitly mention one of the ingredients of the combination (for example, A). In the coming months our Courts will have to resolve the first case dealing with this fact pattern, which will hopefully bring some guidance to the patent community.

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