

As part of the 2000 revision of the EPC, former Art. 54(4) EPC 1973 was deleted, so that any European application falling under Art. 54(3) EPC constitutes prior art with effect for all the EPC contracting states at the time of its publication. The revised Art. 54(3) EPC is applicable to European patent applications filed on or after the time the EPC 2000 entered into force. The deleted Art. 54(4) EPC 1973 is still applicable to European patents already granted and applications pending at the time the EPC 2000 entered into force.

In T 1926/08, in order to establish novelty with respect to document D1, the patent proprietors had filed two sets of claims for different contracting states. The patent at issue was granted before the date of entry into force of the EPC 2000. The point of dispute was whether or not R. 87 EPC 1973 was a rule implementing Art. 54(4) EPC 1973, or whether the situation was covered by Art. 123 and R. 138 EPC. R. 87 EPC 1973 allowed different claims, description and drawings for different states both in the case of an earlier European patent application which was part of the state of the art under Art. 54(3) and (4) EPC 1973 and when a prior national right existed, while R. 138 EPC 2000 only provided for the latter case. The board held that R. 87 EPC 1973 applied to European patents granted before the entry into force of EPC 2000 because it is an implementing regulation to Art. 54(4) EPC 1973 and admitted a separate set of claims.

In J 5/81 (OJ 1982, 155) the board held that a published European patent application became part of the state of the art under Art. 54(3) EPC 1973, with retroactive effect as from its filing date or priority date, for assessing applications filed after that filing date or priority date but prior to its publication, but that this should only apply if such a "prior application" was still in existence at the time of publication.

In T 447/92 the whole contents of an earlier document within the meaning of Art. 54(3) and (4) EPC 1973 had to be considered as forming part of the state of the art as far as novelty was concerned. The board pointed out that the boards of appeal had consistently applied a very restrictive interpretation of disclosure in order to reduce the risk of self-collision. To do otherwise would, in the board's view, undesirably undermine the exclusion from consideration of documents within the meaning of Art. 54(3) EPC 1973 when deciding whether there had been an inventive step.

#### 2.4.2 Applicability of Article 54(3) EPC in cases of potentially colliding European parent and divisional applications

In T 557/13 of 17 July 2015 several questions concerning partial priorities were referred to the Enlarged Board of Appeal (G 1/15, OJ 2017, A82), see in particular question 1 and 5: 1. Where a claim of a European patent application or patent encompasses alternative subject-matters by virtue of one or more generic expressions or otherwise (generic "OR"-claim), may entitlement to partial priority be refused under the EPC for that claim in respect of alternative subject-matter disclosed (in an enabling manner) for the first time, directly, or at least implicitly, and unambiguously, in the priority document? 5. If an affirmative answer is given to question 1, may subject-matter disclosed in a parent or divisional application of a European patent application be cited as state of the art under Art. 54(3) EPC against subject-matter disclosed in the priority document and encompassed as an alternative in a generic "OR"-claim of the said European patent