

(Art. 76(1) EPC) in respect of; or c) claims the same priority (Art. 88 EPC) as the European patent application leading to the European patent already granted.

Giving its interpretation of the referred questions, the Enlarged Board explained that the essence of Question 1 was as follows: is there any legal basis under the EPC for refusing an application on the ground of double patenting? In this context the Enlarged Board endorsed the narrow reading of the term "double patenting" given by the referring board (T 318/14, points 17 to 23 of the Reasons, summarised above in chapter II.F.5.1). The essence of Question 2.1 was as follows: if there is a legal basis in the EPC for the prohibition on double patenting, are all three possible constellations in which double patenting may arise (i.e. constellations in which the granted patent and the application both have the same effective date, see above in chapter II.F.5.1) to be treated in the same manner? The Enlarged Board first examined Art. 125 EPC as a possible legal basis for prohibiting double patenting. Drawing on the rules of treaty interpretation pursuant to Art. 31(1) and (2) VCLT, it analysed the term "procedural provision" in Art. 125 EPC in the context of the provisions of Chapter I of Part VII of the EPC. The Enlarged Board observed that this chapter also contained Art. 123(2) and (3) EPC. It concluded that a provision falling under Art. 125 EPC may cover issues which touch upon substantive matters. The Enlarged Board then addressed the question of whether the prohibition on double patenting was a generally recognised principle of procedural law in the practice of the contracting states. It held that there were no data available to it which would allow it to safely establish the practice in all or at least the majority of the contracting states. In a next step, the Enlarged Board considered the implications of the obiter dictum in G 1/05 and G 1/06 (OJ 2008, 271 and 307). Given that the Enlarged Board in G 1/05 and G 1/06 did not state that it regarded a legitimate interest in the proceedings to be a generally recognised principle of procedural law, and the specific context of the statement on double patenting in these decisions, the Enlarged Board (in G 4/19) held that it would be inappropriate to base the double patenting prohibition on the obiter dictum in these earlier decisions.

The Enlarged Board found that it was necessary to have recourse to the preparatory documents of the EPC – as supplementary means of interpretation within the meaning of Art. 32 VCLT – in order to determine the meaning of Art. 125 EPC with regard to double patenting. The Enlarged Board derived from the preparatory documents that the majority agreement recorded in the minutes of the Diplomatic Conference in connection with Art. 125 EPC could be taken as the expression of the legislator's final and unchanged intention on the question of double patenting. In view of the wording of Art. 125 EPC, and the fact that the agreement was explicitly linked to this provision in the minutes, the straightforward interpretation of the recorded agreement was that the (potential) contracting states agreed that the prohibition on double patenting was a generally recognised principle of procedural law in the contracting states and as such applicable under Art. 125 EPC. In view of these findings, the Enlarged Board considered it unnecessary to examine the other provisions proposed as legal basis for the prohibition on double patenting. Regarding Questions 2.1 and 2.2 the Enlarged Board derived from the preparatory documents that all three possible constellations in which double patenting may arise have to be treated in the same manner.