

Implementing Regulations pursuant to Art. 33(1)(c) EPC, this competence did not extend to amending an Article of the Convention, here Art. 53(b) EPC.

6. Implementing Regulations

In T 39/93 (OJ 1997, 134) the board held that, in view of Art. 164(2) EPC 1973, the meaning of an Article of the EPC on its true interpretation as established by a ruling of the Enlarged Board of Appeal could not, in the board's view, be overturned by a newly drafted Rule of the Implementing Regulations, the effect of which would be to conflict with this interpretation. This is because, according to Art. 164(2) EPC 1973, in the case of conflict between the provisions of this Convention (the EPC Article) and those of the Implementing Regulations, the provisions of this Convention shall prevail (see also T 885/93; T 83/05, OJ 2007, 644; G 2/07, OJ 2012, 130).

In T 991/04 of 22 November 2005 the board stated that the Munich Diplomatic Conference (1973) as the legislator of the European patent system drafted the first versions of the EPC 1973 and the Implementing Rules as a legal unity which should be read in a consistent way. In this regard the Implementing Regulations had the function of an **authentic interpretation** of the EPC 1973.

In G 2/07 (OJ 2012, 130) the Enlarged Board of Appeal noted that the provisions of the Biotech Directive 98/44/EC, which were not yet contained in the Convention and related to substantive patentability requirements, were incorporated in the interest of uniformity in harmonised European patent law into the Implementing Regulations as they stood (see the notice dated 1 July 1999 concerning the amendment of the Implementing Regulations to the EPC (OJ 1999, 573, point 19 of the Reasons, explanatory notes to R. 23b(5) EPC 1973)). The referring board (cf. T 83/05, OJ 2007, 644) had argued that the competence of the Administrative Council to amend the Implementing Regulations according to Art. 33(1)(b) EPC did not extend to core issues of substantive patent law, so that the introduction of provisions determining the boundaries of patentable subject-matter was ultra vires. Decisions J 11/91 and J 16/91 (OJ 1994, 28, point 2.3.4 of the Reasons) of the Legal Board of Appeal, cited in the referring decision, contained a sentence stating that the Regulations may deal only with procedural questions and not with matters of substantive law. No reason was given in these decisions as to why this should be so.

The Enlarged Board of Appeal in G 2/07 stated that it is the function of the Implementing Regulations to determine in more detail how the Articles should be applied and there is nothing in the Convention allowing the conclusion that this would not also apply in the case of Articles governing issues of substantive patent law. The limits to the Administrative Council's law-making powers by means of the Implementing Regulations could be inferred from Art. 164(2) EPC. According to that Article, in case of conflict between the provisions of the Convention and those of the Implementing Regulations, the provisions of the Convention shall prevail. In decision G 2/93 (OJ 1995, 275), the Enlarged Board of Appeal accepted that R. 28 EPC 1973 implemented Art. 83 EPC 1973 and was, at least in part, substantive in nature. Furthermore, in its more recent decision G 2/06 (OJ 2009, 306, points 12 and 13 of the Reasons), too, the Enlarged Board did not doubt the Administrative