

6. Legitimate expectation and case law

There might be cases in which the public has a legitimate expectation that the department of first instance will not deviate from the **established case law** which has become enshrined in the consistent practice of the department of first instance (see J 27/94, OJ 1995, 831). A **single decision** of a board of appeal cannot, however, create a legitimate expectation that it will be followed in future (J 25/95, T 500/00). The users' confidence in the continuity of a practice based on a decision of the Enlarged Board might be considered particularly legitimate since all boards of appeal were expected to follow the Enlarged Board's interpretation of the EPC (J 25/95).

6.1. Case law deviating from or overruling the practice

In J 27/94 (OJ 1995, 831) the board stated that there might be cases in which the public had a legitimate expectation that the department of first instance would not deviate from the established case law. This might apply if the relevant case law had become enshrined in the consistent practice of the department of first instance, and in particular if this had been made known to the public in published Guidelines, legal advice or notices from the EPO. In such a situation, an applicant might legitimately expect that a practice allowing or even recommending a particular way of proceeding would not be changed without appropriate advance information. In the case in hand, the board held that the department of first instance was therefore not obliged by the principle of the protection of legitimate expectations, on the basis of decision J 11/91 (OJ 1994, 28), to allow the filing of a divisional application after the approval of the text intended for grant until opinion G 10/92 (OJ 1994, 633) was made available to the public.

In J 25/95 the board stressed that the publication of J 11/91 in the Official Journal of the EPO (OJ 1994, 28) as well as in the publication "Case Law of the Boards of Appeal of the EPO" did not create a legitimate and reasonable expectation that a divisional application could be filed up until the decision to grant. If there was any doubt whether the established practice in this respect existed, it was up to the appellants to seek clarification by means of an enquiry to the EPO which would have revealed quickly that the department of first instance did not apply J 11/91.

In T 740/98 the appellant submitted that the disclaimer had been allowed by the examining division in conformity with the Guidelines for Examination (1994 version) and the then established case law of the boards of appeal. Consequently the standards set out in the subsequent decision G 1/03 (OJ 2004, 413) could not be applied, since this would offend against the principle of good faith and the protection of the legitimate expectations of the users of the EPO. The board noted that the legal system established under the EPC did not treat either the Guidelines or established case law as binding. Thus, any principle of protection of legitimate expectations could not be based on earlier Guidelines or case law. The board held that the standards set out in G 1/03 were applicable to the case. In T 500/00 the board added that what counted was not whether the opposition division had acted in accordance with the Guidelines, but whether it had acted in accordance with the EPC. The principle of good faith could not be invoked against the application of principles concerning the allowability of disclaimers laid down in G 1/03 to pending cases.