

biotechnological inventions intended to exclude products 'exclusively obtained by means of an essentially biological process', the Administrative Council amended R. 27 EPC and R. 28 EPC in 2017 (OJ 2017, A56) to exclude from patentability plants exclusively obtained by means of an essentially biological process.

In T 1063/18, the board, in an enlarged composition consisting of three technically and two legally qualified members, held that R. 28(2) EPC (see OJ 2017, A56) is in conflict with Art. 53(b) EPC as interpreted by the Enlarged Board of Appeal in decisions G 2/12 and G 2/13. The board referred to Art. 164(2) EPC, according to which the provisions of the Convention prevail in case of conflict with the Implementing Regulations, and decided to set the decision under appeal aside and to remit the case to the examining division for further prosecution.

The board did not see any reason to deviate from G 2/12 and G 2/13. The interpretation of the Biotech Directive as put forward in the notice of the European Commission on certain articles of Directive 98/44/EC was not seen as a relevant development because it had not been confirmed in a legally binding way. Considering whether an interpretation of Art. 53(b) EPC, different from that given in decisions G 2/12 and G 2/13, was necessary in view of Art. 31(3)(a) of the Vienna Convention on the Law of Treaties, the board concluded that neither the decision of the Administrative Council to adopt R. 28(2) EPC nor the notice of the European Commission could be regarded as a subsequent agreement between the parties in the sense of the Vienna Convention.

b) G 3/19 – dynamic interpretation of Article 53(b) EPC

On 4 April 2019 the President of the European Patent Office referred to the Enlarged Board of Appeal points of law on the interpretation of Art. 164(2) EPC and the assessment of R. 28(2) EPC under said provision.

In its opinion G 3/19, the Enlarged Board began by analysing the scope and focus of the referral and held that the two issues underlying it were interlinked and could be combined in the following single question:

"Taking into account developments that occurred after a decision by the Enlarged Board of Appeal giving an interpretation of the scope of the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC, could this exception have a negative effect on the allowability of product claims or product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process feature define an essentially biological process?"

Interpretation of Art. 53(b) EPC and subsequent agreement or practice

Considering Art. 53(b) EPC on its own, i.e. without reference to R. 28(2) EPC, the Enlarged Board confirmed its earlier decisions in cases G 1/98, G 2/07 and G 1/08, and G 2/12 and G 2/13. Furthermore, the Enlarged Board did not find any subsequent