

Council's power to lay down provisions concerning substantive law in the Implementing Regulations.

Thus the Enlarged Board of Appeal held that the legislator is entitled to provide for issues of substantive law in the Rules of the Implementing Regulations. However, a Rule, not having a legal history of its own, must be clear enough to indicate to those applying it in what way the legislator intended the Article to be interpreted by means of that Rule. This, however, was not the case for R. 26(5) EPC. R. 26(5) EPC did not give any useful guidance on how to interpret the term "essentially biological process for the production of plants" in Art. 53(b) EPC and therefore that term had to be interpreted on its own authority. This was for the Enlarged Board to do.

In T. 1063/18, the board considered that new R. 28(2) EPC was in conflict with Art. 53(b) EPC as interpreted by the EBA in decisions G 2/12 and G 2/13. In accordance with Art. 164(2) EPC, the provisions of the Convention prevailed. The Administrative Council was not, in the light of Art. 33(1)(b) and 35(3) EPC, competent to amend the Convention, here Art. 53(b) EPC, by amendment of the Implementing Regulations, here R. 28(2) 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. For the Enlarged Board in G 3/19 (OJ 2020, A119) there was ultimately no conflict between R. 28(2) EPC and the new interpretation of Art. 53(b) EPC. Hence, contrary to the board's view in T. 1063/18, Art. 164(2) EPC was not relevant. The interpretation of Art. 53(b) EPC arrived at in G 2/12 was not set in stone either; it could indeed change, and it was inappropriate to disregard the introduction of R. 28(2) EPC, which reflected the contracting states' intention and called for a dynamic interpretation of Art. 53(b) EPC.

7. Changes in relation to an established practice and interpretation

In G 2/07 (OJ 2012, 130) the Enlarged Board of Appeal stated that there can be no "legitimate expectation" that an interpretation of a substantive provision governing patentability given in a decision of the boards of appeal will not be overruled in the future by the Enlarged Board, since recognising such an expectation as legitimate would undermine the function of the Enlarged Board of Appeal. This holds particularly true for issues on which there is no solid body of decisions all to the same effect but where instead the relevant jurisprudence consists only of a very limited number of individual decisions, as is presently the case. In the past, the Enlarged Board has granted a transitional period in cases in which the Enlarged Board's decision has brought about a change in relation to an established procedural practice which the parties could not be expected to foresee. By contrast, for the reasons given above, the existence of "legitimate expectations" has never been acknowledged for issues before the Enlarged Board concerning the correct application, i.e. interpretation, of substantive patent law.

In opinion G 3/19, the Enlarged Board abandoned the interpretation of Art. 53(b) EPC previously arrived at in G 2/12 but held that its new interpretation (in G 3/19) was not retroactive.