

2. Non-inventions under Article 52(2) and (3) EPC

2.1. Introduction

Art. 52(2) EPC lists subject-matter or activities not regarded as inventions within the meaning of Art. 52(1) EPC. It states that in particular the following shall not be regarded as inventions within the meaning of paragraph 1; (a) discoveries, scientific theories and mathematical methods; (b) aesthetic creations; (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; (d) presentations of information.

Seeing as Art. 52(2), (3) EPC is a **limitation** to the general entitlement to patent protection laid down in Art. 52(1) EPC, it is not a matter of judicial discretion, but must have a clear legal basis in the EPC (cf. T 154/04, OJ 2008, 46; see also G 2/12, OJ 2016, A28).

According to T 930/05, the mere fact that the list of items not to be regarded as inventions in accordance with Art. 52(2) EPC 1973 was non-exhaustive, ("in particular"), indicated that there was a common criterion for exclusion which these items shared and which could serve as the basis for possible additions to the list. The enumeration of typical non-inventions in Art. 52(2) EPC 1973 covered subjects whose common feature was a lack of technical character. The catalogue of exclusions under Art. 52(2) EPC 1973, with its reference to Art. 52(1) EPC 1973, was to be regarded as a negative definition of the concept of invention.

The verification that claimed subject-matter is an invention within the meaning of Art. 52(1) EPC 1973 is in principle a **prerequisite** for the examination with respect to novelty, inventive step and industrial application since these latter requirements are defined only for inventions (cf. Art. 54(1), 56, and 57 EPC 1973) (see T 258/03, OJ 2004, 575; see also T 154/04, OJ 2008, 46).

Art. 52(3) EPC states that paragraph (2) shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities **as such**.

The case law clearly shows that this list of "excluded" subject-matter should not be given too broad a scope of application; Art. 52(3) EPC is a bar to a broad interpretation of Art. 52(2) EPC (G 2/12 and G 2/13, OJ 2016, A28 and A29; T 154/04).

In T 154/04 (OJ 2008, 46) the board stated that the enumeration of typical non-inventions in Art. 52(2) EPC 1973 was merely a negative, non-exhaustive list of what should not be regarded as an invention within the meaning of Art. 52(1) EPC 1973. It was the clear intention of the contracting states that this list of "excluded" subject matter should not be given too broad a scope of application. Thus Art. 52(3) EPC 1973 was introduced as a bar to such a broad interpretation of Art. 52(2) EPC 1973. By referring explicitly to the "patentability of the subject-matter or activities", paragraph 3 actually enshrined the entitlement to patent protection for the non-inventions enumerated in paragraph 2 – albeit restricting this entitlement by excluding patentability "to the extent to which the European