

"invention" was distinct from the requirement (defined in Art. 57 EPC 1973) of the claimed invention being "susceptible of industrial application". Even though the former requirement might, *cum grano salis*, be equated with a requirement for a "technical" contribution, this was not the same as a requirement for "industrial" applicability; at least in this context, the terms "technical" and "industrial" were not synonyms. In Art. 57 EPC 1973, the meaning of "industrial" was evidently intended to cover commercial applications; this was made clear, for instance, by the German version ("gewerblich"). In the context of Art. 52(2) EPC 1973, this was clearly not the case for the meaning of "technical". This was because, in the context of "controlling a [...] process", the adjective "industrial" should, other than in the context of Art. 57 EPC 1973, be understood to relate only to technical processes usually occurring in "industry" (this latter term in its present context being understood in the narrower sense of what in German would be called "Industrie") and thus not as including "commercial", or even "financial", applications (see also T 208/84, OJ 1987, 14 and T 854/90, OJ 1993, 669).

In T 533/09 the board found that the claimed pulse train was of a tangible nature in that it was the result of modulating an electrical signal (derived from a capacitor discharge for defibrillation purposes) and its intensity was measurable at any time. Such a signal thus clearly came under the definition of "physical entity" within the meaning of G 2/88 (OJ 1990, 93), in its original version. The board concluded that the nature of the subject-matter of claim 1 of the main request was no obstacle to its patentability; moreover, as there could be no doubt that such a signal could be produced and used for defibrillation purposes, that subject-matter clearly was susceptible of industrial application and thus met the conditions of Art. 57 EPC 1973. The board concluded that the wording chosen by the legislator for Art. 52 to 57 EPC on patentability does not in any way link the notion of patentable invention with any condition requiring such an invention to be of a tangible, viz. material, nature (see point 7.2 of the Reasons).

In T 204/93 the board held that commercial use excluded from patentability under Art. 52(2)(c) and (3) EPC 1973 (in so far as it was not construed as a method for doing business) was a feature which might be understood to fall within the requirement that an invention had to be susceptible of industrial application (Art. 52(1) EPC 1973), i.e. that it could be made or used in any kind of industry (Art. 57 EPC 1973); reference was made in particular to the German word "gewerblich" in that provision of the Convention. The board noted that it was not disputed that computer programs could be exploited commercially. The exclusions from patentability defined in Art. 52(2) and (3) EPC 1973 did not in any way refer to the requirement in Art. 52(1) EPC 1973 of "industrial application" but to the requirement in that Article that the subject-matter claimed had to be an "invention". The exclusions in Art. 52(2) and (3) EPC 1973 were generally understood to share the common feature that the excluded matters lacked technicality but not that they could not be made or used, e.g. traded. In this case the board denied patentability for lack of technical effect.

## 1.2. Any kind of industry

Industry is subject to broad interpretation in this context (T 74/93) and extends to any activity that is carried out continuously, independently and for financial gain (T 144/83) or