

that can be offered commercially by a company (T.1165/97). The case law refers to the concepts of "financial (commercial) gain" (T.144/83) and of "profitable use" (T.870/04) in relation to industrial applicability (T.898/05). The need to show a "profitable use" is not to be understood in the narrow sense of an actual or potential economic profit (i.e. generating more income than expenditure) or of a commercial interest (i.e. creating a new or increased business opportunity). Rather, it must be understood in the wider sense that the invention claimed must have such a sound and concrete technical basis that the skilled person can recognise that its contribution to the art could lead to practical exploitation in industry (T.898/05). This interpretation therefore does not extend for example to inventions that merely amount to a research finding (T.870/04, T.338/00) or that are applied for exclusively private and personal purposes.

1.2.1 Methods applied in the private and personal sphere

In T.74/93 (OJ 1995, 712) the application was refused by the examining division because claim 5, which was directed to the use of a contraceptive composition (e.g. a cream) for applying to the cervix of a female capable of conception, was not susceptible of industrial application as required by Art. 57 EPC 1973 in so far as the compound was to be applied to the cervix of a human female.

The board stated that in determining the borderline between industrial activities – in which the effects of patents had to be respected – and private and personal activities, which should not be adversely affected by the exercise of these rights, the board took into consideration the fact that Art. 57 EPC 1973 might be regarded as an expression of the general idea that any natural person had the right to have his or her privacy respected. The core of this right was not to be taken away from anybody. Therefore the fact that for some women contraception was connected with professional activities did not give an act, which was in essence private and personal, an industrial character. The board noted that this did not apply to contraception in general, but to the specific type of application of a composition as claimed in claim 5.

The board was unable to ascertain any field of industrial application for the direct use defined in claim 5, for which the requirement of Art. 57 EPC 1973 had to be met. The question as to whether it would be sufficient for an industrial application to be expected in future could be left unanswered as this assertion had not been further substantiated.

In T.1165/97 the board held that a method of using a vaginal discharge collector and disposing of the collector after a single use could be considered susceptible of industrial application if it was conceivable that these steps were carried out as a paid service and were not exclusively dependent for their execution on the instructions of the woman in question. The board noted that, for the purposes of Art. 57 EPC 1973, what was relevant was the possibility that such a service might be offered by an enterprise. In that case, the board decided in the affirmative, pointing out that – in contrast to the case in T.74/93 – the service was not one satisfying only the strictly personal needs of the woman in question. Collecting a sample could be caused by external reasons, e.g. on the advice of a medical practitioner to have such a sample taken for further diagnosis.