

did not rule out the possibility that this did not hold in all circumstances. The feature taken by itself might not seem to reveal any technical aspect, but its technical or non-technical character could be decided by **the effect it brought about after being added to an object** which did not comprise the feature before (see e.g. T 336/14). In considering whether the subject-matter of a claim is excluded from patentability under Art. 52(2) and (3) EPC 1973, i.e. whether it is non-technical or technical, that claim has to be considered in its entirety. This is in line with decisions T 38/86 and T 65/86, in which Art. 52(3) EPC 1973 was interpreted to mean that the subject-matter of a claim is not excluded from patentability under Art. 52(2)(c) EPC 1973 if the said subject-matter contributes anything to the prior art in a field that is not excluded from patentability. In these decisions this interpretation was only applied with regard to Art. 52(2)(c) EPC 1973. However, once applied to Art. 52(2)(c) EPC 1973 it must hold for all the paragraphs of Art. 52(2) EPC 1973, since Art. 52(3) EPC 1973 refers to all the items summed up in Art. 52(2) EPC 1973. The board stated that it had to be investigated whether the effects implied by the sole feature of possessing a specific colour, could make that feature into a feature not excluded from patentability the known object or device provided with that colour. The board concluded that the alleged resistance to fingerprints was a purely aesthetic effect which contributed nothing technical to the invention concerned (Art. 52(2)(b) EPC 1973) and the advantage of easy classification by colour represented a non-technical effect in the form of a presentation of information. As such it was excluded from patentability under Art. 52(2)(d) and (3) EPC 1973 (see also T 962/91).

In T 617/11 the appellant I (opponent I) considered that there was no objective technical problem to be solved since the alleged obtained effects related to aesthetic effects. It argued that features could not be regarded as technical and justify patentability if their effects related to the subjective senses of the viewer (T 119/88, OJ 1990, 395) and concluded that, since all the features of claim 1 related to non-technical effects of colours and shapes, the claimed container could not be regarded as a patentable invention (Art. 52(2)(b) and (d) EPC). The board noted that the case law of the boards of appeal in relation to the technicality of inventions and the exclusions from patentability as provided in Art. 52(2) EPC was summarised in T 154/04 (OJ 2008, 46) for inventions which have a mix of technical and non-technical features. The fact that the non-technical features provide the only contribution over the known prior art and thus lead to the conclusion of non-patentability under Art. 52(2) EPC, as held in T 119/88 (supra), had clearly been overruled by the large body of jurisprudence on this issue, as summarised in T 154/04 and established by the decisions citing T 154/04 for this aspect. Hence, the board could not find fault with the reasoning and the findings of the opposition division.

For more information on the inventive-step analysis in connection with features relating to subject-matter excluded under Art. 52(2) EPC, see chapter I.D.9.2.2 "Excluded subject-matter".