

necessarily become real technical effects. Calculated status information or physical properties concerning a physical object are information which may reflect properties possibly occurring in the real world. However, first and foremost, they are mere data which can be used in many different ways. There may exist exceptional cases in which such information has an implied technical use that can be the basis for an implied technical effect. Still, in general, data about a calculated technical effect is just data.

e) Tangible effect

The Enlarged Board in G 1/19 fully supported the view expressed in T 533/09 that a tangible effect is not a requirement under the EPC. Moreover, it was unclear to what extent the notions of "tangible effect" and "further technical effect" overlapped. A criterion based on tangibility - in addition to the requirement of technicality - thus cannot contribute to a more precise delimitation of patentable inventions.

f) Technical considerations: programming a computer

It is not specified in the EPC whether, or under which circumstances, the activity associated with creating programs for computers, i.e. programming a computer, is a technical activity which is in principle patentable, or a non-technical activity which is as such excluded from patentability.

The President of the EPO referred to the Enlarged Board of Appeal the following point of law (see G 3/08, OJ 2011, 10; Question 4 of the referral): Does the activity of programming a computer necessarily involve technical considerations? The President of the EPO cited decision T 1177/97, where the board found that "implementing a function on a computer system always involves, at least implicitly, technical considerations". The reference to 'computer routines' made it clear that this implementation consisted of programming the computer (see also T 172/03). Contrary to these decisions T 833/91, T 204/93 and T 769/92 (OJ 1995, 525) considered programming to be a mental act of the programmer.

In Opinion G 3/08 (OJ 2011, 10) the Enlarged Board of Appeal considered that the referral asserted correctly that T 1177/97 considered that programming always involved technical considerations, at least implicitly, and that T 172/03 assumed the same in that it considered the skilled person, who, it was emphasised, was a technical expert, to be a software project team, consisting of programmers. On the other hand, T 833/91, T 769/92 (OJ 1995, 525) and T 204/93, were said to consider the programmer's activity, programming, to be a mental act, falling within the exclusions of Art. 52(2) EPC.

The Enlarged Board stated that there was no contradiction between these positions, as may be seen by considering the same case in a non-controversial field, for example bicycle design. Designing a bicycle clearly involves technical considerations (it may also involve non-technical, e.g. aesthetic, considerations), but it is a process which at least initially can take place in the designer's mind, i.e. it can be a mental act and to the extent that it is a mental act would be excluded from patentability (cf. also T 833/91, T 769/92, T 204/93, T 914/02 and T 471/05). Hence the question did not satisfy the requirement for a divergence in the case law and was therefore inadmissible.