

While the referral did not actually identify a divergence in the case law, the Enlarged Board of Appeal considered that there was at least the potential for confusion, arising from the assumption that **any technical considerations** were sufficient to confer technical character on claimed subject-matter, a position which was apparently adopted in some cases (e.g. T.769/92). T.769/92 (OJ 1995, 525) was an example of an invention which concerned the internal functioning of a computer caused by the programs running on it. According to this decision the fact that technical considerations were required in order to arrive at the invention was considered to lend sufficient technical character to the invention as claimed for it to avoid exclusion from patentability under Art. 52(2)(c) and (3) EPC 1973, whereas no importance was attributed to the specific use of the system as a whole.

However, T.1173/97 set the barrier higher in the case of computer programs. It argued that all computer programs have **technical effects**, since for example when different programs are executed, they cause different electrical currents to circulate in the computer they run on. However, such technical effects are **not sufficient** to confer "technical character" on the programs; they must cause **further technical effects**. In the same way, it seemed to this board, that although it may be said that all computer programming involves technical considerations since it is concerned with defining a method which can be carried out by a machine, that in itself is not enough to demonstrate that the program which results from the programming has technical character; the programmer must have had technical considerations beyond "merely" finding a computer algorithm to carry out some procedure.

The board in T.1173/97 concentrated on the effect of carrying out an algorithm on a computer, noting that there were always technical effects, which led the board, since it recognised the position held by the framers of the EPC, to formulate its requirement for a "further" technical effect. Only if a computer program, when run, produced **further technical effects**, was the program to be considered to have a technical character. In the same way, it would appear that the fact that fundamentally the formulation of every computer program requires technical considerations in the sense that the programmer has to construct a procedure that a machine can carry out, is not enough to guarantee that the program has a technical character (or that it constitutes "technical means" as that expression is used in e.g. T.258/03). By analogy one would say that this is only guaranteed if writing the program requires "further technical considerations".

In T.598/14 the application related to a method for generating, from an input set of documents, a word replaceability matrix defining semantic similarity between words occurring in the input document set. The board considered that the translation, with the aim of enabling the linguistic analysis to be done automatically by a computer, could be seen as involving, at least implicitly, technical considerations. This was also in line with decision T.1177/97 or opinion G.3/08 (OJ 2011, 10). However, according to G.3/08, point 13.5 of the Reasons, this is not enough to guarantee the technical character of subject-matter otherwise excluded from patentability under Art. 52(2) and (3) EPC. The technical character would have to be established on the basis that those considerations constituted "further technical considerations". The board concluded that the subject-matter of independent claim 1 lacked an inventive step (Art. 52(1) EPC and 56 EPC).