

demonstrated). See also T.2371/13 (inventive step – **plausibility** of an effect alleged in the patent application – admissibility of comparative-test results filed after the filing date to demonstrate that effect).

The board in T.578/06, noting that the EPC does not require experimental proof for patentability, considered that the disclosure of experimental data or results in the application as filed and/or post-published evidence was not always required to establish that the claimed subject-matter solved the objective technical problem. This was particularly true where no substantiated doubt had been raised. In T.488/16 the board agreed with the appellant that it is not always required to include experimental data or results in an application (see T.578/06). It is, however, a *conditio sine qua non* that it is shown that the technical problem underlying the invention was at least plausibly solved at the filing date. If, as in the present case, the nature of the invention was such that it relied on a technical effect which was neither self-evident nor predictable nor based on a conclusive theoretical concept at least some technical evidence was required to show that a technical problem had indeed been solved (for a case where there was no need to file experimental evidence in relation to Art. 83 EPC, see for example T.416/14).

The Enlarged Board stated in R.9/14 that the petitioner was mistaken in believing that the deciding board had committed a serious procedural violation by not informing it of the correct sequence to be followed in the problem-solution approach and in the way it had applied the substantive law. The submission of comparative-test results to prove an effect or improvement was part of the problem-solution approach when establishing the problem over the closest prior art that is effectively solved by the claimed subject-matter. The petitioner's specialist knowledge of patent law should have told it that. There could thus be no question of a "surprise" or infringement of the right to be heard.

In R.16/13 the board – *ex officio* – questioned the probative value of comparative examples relied upon by the patent proprietor although their conclusiveness for demonstrating a technical effect of the claimed invention had not been disputed by the opponent. The decision of the board under review was set aside.

c) Evaluation – other tests

In *ex parte* case T.2340/12 the application related to a space energy implosion unit. In relation to sufficiency of disclosure, the appellant (applicant) claimed without citing a specific internet citation that over 40 000 internet citations could be found concerning "Space Energy", and it only referred to "indirect" measurements carried out on white rats or patients, but did not elaborate on the nature of these experiments or on their relevance for the claimed invention, despite having been invited to do so in the provisional opinion issued by the board. The criticisms raised by the examining division regarding the absence of a control group for the patients treated, the doubts regarding the statistical relevance of the experiments carried out, the absence of details as to the circumstances and the way the experiments were controlled, were justified.

In T.453/04 the board found the **experimental evidence** advanced by the appellant (opponent) to be defective for two reasons. Firstly, the teachings of the patent in suit were