

application or of the patent granted thereon? See chapter II.D.5.3. "Multiple priorities or partial priority for one claim". Question 1 was answered in the negative by G.1/15 (OJ 2017, A82). As a consequence, questions 2, 3, 4 and 5 did not need to be dealt with.

#### 2.4.3 Excluded national prior rights

In T 550/88 (OJ 1992, 117) the board made it clear that, on the proper interpretation of Art. 54(3) EPC 1973, prior national rights were not comprised in the state of the art. The effect of a prior national right upon a European patent was a matter purely for national law, whereas the effect of a prior European application upon a European patent was specifically provided for in Art. 54(3) EPC 1973 (which might also be a ground for revocation under national laws by virtue of Art. 138(1)(a) EPC 1973). In other words, the combined effect of Art. 138(1) and 139 EPC 1973 was to provide an additional possible ground for revocation under national laws based upon the existence of a prior national right, which was not available under Art. 54 EPC 1973.

In T 1698/09 the board observed that, under Art. 54(3) EPC, the state of the art comprised the content of European patent applications filed before the priority date of the patent in suit and published after that date. It held that a German utility model was not a German or a European patent application. It made no difference that Germany had been designated in the patent in suit.

#### 2.4.4 PCT applications as state of the art

Art. 153(5) EPC states that a Euro-PCT application shall be considered as comprised in the state of the art under Art. 54(3) EPC if the conditions laid down in Art. 153(3) or (4) EPC "and in the Implementing Regulations" are fulfilled.

Pursuant to R. 165 EPC a Euro-PCT application shall be considered as comprised in the state of the art under Art. 54(3) EPC if in addition to the conditions laid down in Art. 153(3) or (4) EPC (publication of the international application or its translation), the filing fee under R. 159(1)(c) EPC has been paid. Thus once the filing fee is paid for the conflicting application, it is considered to be an Art. 54(3) EPC application.

Under former Art. 158(2) EPC 1973, a Euro-PCT application was considered to be an Art. 54(3) EPC application if a translation was filed (where necessary) and the national fee paid.

In T 404/93 the European patent application was limited to the contracting states Italy (IT), Netherlands (NL) and Sweden (SE) in view of an earlier international application, published after the filing date of the former. The board noted that the earlier PCT application had mentioned several EPC contracting states, including IT, NL and SE, as being designated for a European patent. However, when the earlier application had entered the European phase, no designation fees had been paid for IT, NL and SE. Accordingly, the board found that the earlier international application was not comprised in the state of the art under Art. 54(3) EPC 1973 for IT, NL and SE (see also T 623/93).