

The combination of the two provisions (Art. 52(2) and (3) EPC 1973) demonstrated that the legislators did not want to exclude from patentability all programs for computers. In other words, the fact that only patent applications relating to programs for computers as such were excluded from patentability (see T 208/84, OJ 1987, 14 and T 115/85, OJ 1990, 30) meant that patentability could be allowed for patent applications relating to programs for computers where the latter were not considered to be programs for computers as such.

#### 2.4.6 Establishing technical character

##### a) Further effects of programs for computers

In T 1173/97 (OJ 1999, 609) and T 935/97 the board found that a computer program must be considered to be patentable when it has technical character. For the purpose of interpreting the exclusion from patentability of programs for computers under Art. 52(2) and (3) EPC 1973, the board assumed that **programs for computers** could not be considered as having a technical character for the very reason that they are programs for computers. This means that physical modifications of the hardware (causing, for instance, electrical currents) deriving from the execution of the instructions given by programs for computers cannot per se constitute the technical character required for avoiding the exclusion of those programs. Although such modifications may be considered to be technical, they are a common feature of all those programs for computers which have been made suitable for being run on a computer, and therefore cannot be used to distinguish programs for computers with a technical character from programs for computers as such. It was thus necessary to look elsewhere for technical character in the above sense: It could be found in the **further effects** deriving from the execution (by the hardware) of the instructions given by the computer program. The board stated that every computer program product produced an effect when the program concerned was made to run on a computer. The effect only showed in physical reality when the program was being run. Thus the computer program product itself did not directly disclose the said effect in physical reality. It only disclosed the effect when being run and consequently only possessed the "potential" to produce said effect. This effect might also be technical in the sense explained in reason 6 of the decision, in which case it constituted the "further technical effect" mentioned there. This meant that a computer program product might possess the potential to produce a "further" technical effect.

The board concluded that on condition they were able to produce a technical effect in the above sense, all computer programs had to be considered as inventions within the meaning of Art. 52(1) EPC 1973, and might be the subject-matter of a patent if the other requirements provided for by the EPC were satisfied.

##### b) Direct link to physical reality

The President of the EPO referred the following point of law to the Enlarged Board of Appeal (G 3/08, OJ 2011, 10; Question 3(a) of the referral): must a claimed feature cause a **technical effect on a physical entity** in the real world in order to contribute to the technical character of the claim? It was noted in the referral that according to decisions