

In T 1173/97 the board stated that although TRIPS may not be applied directly to the EPC, the board found it appropriate to take it into consideration, since it is aimed at setting common standards and principles concerning the availability, scope and use of trade-related intellectual property rights, and therefore of patent rights. Thus TRIPS gives a clear indication of current trends.

In G 2/02 and G 3/02 the Enlarged Board of Appeal noted that TRIPS provisions, like decisions of the European and International Courts of Justice and national decisions, are elements to be taken into consideration by the boards of appeal but are not binding on them. Whereas it is legitimate for the boards of appeal to use the TRIPS Agreement as a means to interpret provisions of the EPC 1973 which allow different interpretations, specific provisions of TRIPS cannot justify ignoring express and unambiguous provisions of the EPC 1973. To do so would usurp the role of the legislator. This was confirmed by the fact that the legislator of EPC 2000 found it necessary to revise Art. 87 EPC 1973 in order to implement the TRIPS Agreement. The law to be applied by the boards of appeal was governed by the provisions of the EPC only.

In T 1173/97 (OJ 1999, 609) the board decided that, although TRIPS could not be applied directly to the EPC 1973, it was appropriate to take it into consideration in connection with the patentability of computer program products, for TRIPS was aimed at setting common standards and principles concerning the availability, scope and use of trade-related intellectual property rights. It thus gave a clear indication of current trends. The appellant's reference to current practice at the US and Japanese patent offices caused the board to emphasise that the situation under these two legal systems (US, JP) differed greatly from that under the EPC 1973; only the EPC 1973 contained an exclusion such as that in Art. 52(2) and (3) EPC 1973. These developments nevertheless represented a useful indication of modern trends and, in the board's view, could contribute to the highly desirable further (worldwide) harmonisation of patent law.

3. The European Convention on Human Rights

In R 19/12 of 25 April 2014 the Enlarged Board of Appeal observed that Article 6 ECHR had been recognised in G 1/05 (OJ 2007, 362) and G 2/08 of 15 June 2009 as a binding standard for proceedings before the boards of appeal because it relied on principles of law common to all member states of the European Patent Organisation and applying to all its departments (see also D 11/91 of 14 September 1994 and chapter III.J.1.3. "The European Convention on Human Rights"). That justified applying both national case law and that of the European Court of Human Rights as a supplementary means of interpreting the EPC.

The board in T 1243/17 stated that the boards of appeal had deemed Art. 6(1) ECHR relevant for decisions taken under the EPC (particularly in the context of Art. 125 EPC) as a yardstick for the procedural law principles that are generally recognised in the contracting states (see T 261/88, OJ 1992, 627; G 1/05, OJ 2007, 362; G 2/08). Therefore, when Art. 6(1) ECHR was applied in EPO proceedings, it had to be interpreted by the EPO and its boards of appeal. Specifically, they had to decide whether or not the "reasonable time" stipulated in Art. 6(1) ECHR had been adhered to. The board analysed the case law of the