

## The EPO's patenting practice related to "Abstract patents"

The term "abstract patents" is understood in this context to relate mainly to patents filed in the area of computer programs ("software patents") and computer-implemented business methods.

All patent applications are examined on the basis of the European Patent Conventions and the substantive patent law laid down therein. All patent applications are examined on a case by case-basis in which the provisions of the EPC are applied. It should be noted that there is no such category as "abstract" or "trivial" patents, as they do not apply to the legal system by which the EPO is bound, but are ideologically loaded terms.

In general,

- The EPO only grants patents for inventions that have a technical character, are new and involve an inventive step in that they include an inventive contribution to the prior art.
- The EPO does not grant patents for inventions of any kind that make no such contribution. This is also the case for inventions related to computer programs or computer-implemented business methods.

In particular,

- Inventions involving computer programs that implement business, mathematical or similar methods and do not produce technical effects - because they solve a business problem rather than a technical one - are not patentable, and no such patents will be granted by the EPO.
- As a consequence, the grant rate for applications in the field of business methods is very low: Only **7%** of all applications are proceeding to grant, while a negative outcome of the patent grant procedure before the EPO (refusal of the application by the Office, withdrawal of the application following a negative communication by the EPO's patent examiners) is "the rule".
- This should be compared to the overall grant rate for patents at the EPO in all technical fields, which is slightly more than 50%.
- It should be noted that almost all of these grants are delivered only after substantial changes to the patent application as filed have been made, following the examination process. The EPO applies strict patentability criteria which can lead to far-reaching modifications in the patent applications.

## **Referral to the Enlarged Board of Appeal of the EPO**

In October 2008 the President of the EPO, Alison Brimelow, has referred a number of questions to the EBoA in relation to the patentability of programs for computers under the EPC. The referral was made under the consideration that diverging decisions of the EPO's instance judiciary, the boards of appeal, have created uncertainty. The answers to these questions are believed to be necessary to enable further harmonious development of case law in this field, as the Enlarged Board of Appeal is in charge of ensuring a uniform application of the European Patent Convention.

While the referral does not call into question the provisions of the applicable law, it seeks guidance on of the aspects of exclusion from patentability, notably on the provision that programs for computers as such are not to be regarded as inventions and are therefore excluded from patentability (Art. 52(2) and (3) EPC).

The questions address different aspects of patentability. They seek clarification not only when a patent claim as whole falls under the exclusion, but also on the circumstances under which individual features relating to programs for computers can contribute to the technical character of a patent claim. The hope is that the answers o these questions will lead to greater clarity concerning the limits of patentability, which will facilitate the application of the EPC for the EPO's patent examiners.

The Enlarged Board of Appeal has invited the interested public to file opinions to these questions. A date for the decision has not been set.