



30 September 2019

## LETTER TO THE ENLARGED BOARD OF APPEAL ON G3/19

Dear Chairman and Members of the Enlarged Board of Appeal,

### Re: Amicus Curiae Brief submitted by epi in the Case of G 3/19

**epi**, the Institute of Professional Representatives before the European Patent Office, is highly interested in the questions presented to the Enlarged Board of Appeal (EBA) in the case of G 3/19 and therefore respectfully submits the following observations.

1. **epi** refrains from presenting substantive arguments supporting either side of the debate. However, **epi** would like to present the following observations for consideration of the EBA.
  - 1.1. **epi** notes that various amicus briefs raise the question of admissibility. We leave it to the EBA to decide on the admissibility of the present Referral. Nevertheless, **epi** suggests the EBA, if the Referral is considered inadmissible, to provide a detailed reasoning and an overview of the legal situation, including the decisions they endorse, as the EBA did in G3/08, so that the legal situation is further clarified for all stakeholders.
  - 1.2. **epi** further notes that the EC Notice played a pivotal role in the introduction of Rule 28(2) EPC and in the Referral by the President, and that it could have a role in potential further proceedings beyond the decision of the EBA. **epi** therefore suggests the EBA to provide its view, independent from the decision of the EBA on admissibility, on whether the EC Notice could be viewed as "*an international treaty relating to patents or European Community legislation relating to patents*" in the sense of Article 33(1)(b) EPC; and whether or not it could be relied upon to justify an amendment of Article 53 EPC by the Administrative Council (AC).
  - 1.3. In case the EBA should come to the conclusion that Rule 28(2) EPC was validly introduced and does not conflict with Art 53 EPC, **epi** would like to point to the difference between the narrow definition of "essentially biological processes" in Art 2(2) of Directive 98/44/EC (as must have been used by the Commission in drafting its notice on the interpretation of the Directive) and the broader definition emanating from EBA decisions G2/07 and G1/08, particularly in view of the impact the choice of definition may have had on the current practice of the Office, i.e. to impose a mandatory disclaimer based on the wording of Rule 28(2) in patent applications relating to truly technical processes (such as mutagenesis) and the plant products obtained thereby. **epi** would welcome any clarification the EBA might provide on this issue.

- 1.4. Furthermore, in the case mentioned in 1.3 above, **epi** suggests the EBA to consider establishing transitional measures to protect the legitimate expectations established by its earlier decisions.
- 1.5. Finally, **epi** suggests the EBA to treat the current Referral with special dispatch so as not to further delay the processing of applications presently in suspension or decisions on the validity of patents which were deemed consistent with the interpretation of Article 53(b) EPC set out in G 2/12 and G 2/13.

A handwritten signature in blue ink, appearing to read 'H. Vogelsang-Wenke', is written over the typed name and title.

Heike Vogelsang-Wenke  
Vice President