

Report of the Committee on Biotechnological Inventions

A. De Clercq (BE), Chair

Patentability of plants and animals – G 3/19

Enlarged Board of Appeal Opinion **G3/19** was issued on 14 May 2020 with Press release. The opinion¹ explicitly abandoned earlier decisions in cases G 2/12 (Tomatoes II) and G 2/13 (Broccoli II), it held that plants and animal products exclusively obtained by essentially biological processes are not patentable.

The referral was made by the President of the EPO after the decision of 5 December 2018 by Technical Board of Appeal 3.3.04 in case T-1063/18². The Technical Board of Appeal had found the new Rule 28(2) EPC, excluding plants or animals exclusively obtained by means of an essentially biological process from patentability, to contradict Art 53(b) EPC and its interpretation thereof by the Enlarged Board of Appeal in cases G 2/12 and G 2/13.

The Enlarged Board considered the referral admissible and advanced a new interpretation of Art 53(b) EPC in line with the amended Rule 28(2) EPC and related develop-



Ann De Clercq

ments. It noted in this regard that a particular interpretation which has been given to a legal provision can never be taken as carved in stone. Applying a dynamic method of interpretation, having regard to the wording of the new Rule 28(2) EPC and the *travaux préparatoires* for that Rule, the Enlarged Board

accepted that it was the EPC legislator's intention to establish a particular interpretation of Article 53(b) EPC, which is that plants or animals exclusively obtained by means of an essentially biological process are excluded from patentability.

The **epi** had suggested in its amicus curiae brief³ to establish transitional measures to protect the legitimate expectations established by the Enlarged Board's earlier decisions. The Enlarged Board noted that its new interpretation of Article 53(b) EPC has no retroactive effect on European

patents containing such claims which were granted before 1 July 2017, when Rule 28(2) EPC entered into force, or on pending European patent applications seeking protection for such claims which were filed (or have a priority filing date) before that date.

This decision has a high impact and has been commented on by many practitioners. The **epi** Biotech Committee will continue to discuss the full impact of this opinion.

Upcoming Amended Guidelines for Examination Biotechnology – SACEPO WPG meeting on Biotech Guidelines 9 June 2020

The Biotech Committee has been represented in a discussion of a proposed draft for amendment of the Guidelines for Examination at the SACEPO Working Party on Guidelines special meeting on Biotech on 9 June 2020, Ann De Clercq (Chair **epi** Biotech) and Heike Vogelsang-Wenke (**epi** Vice-President), Anette Hegner and Martin Wilming (both appointed SACEPO WPG members) attended for **epi**.

Extensive amendments to the Guidelines relating to biotechnology were proposed by the EPO to **epi**. The topics mainly relate to:

- Plant biotech: G3/19 and disclaimers
- Antibodies
- Diagnostic methods
- Exclusions (stem cells)
- Interpretation of terms such as identity and similarity in relation to amino or nucleic acid sequences

epi filed their comments in June and discussed at the meeting. The EPO took account of a major amount of the comments by **epi** and thanked for the constructive work in a short time frame. **epi** biotech appreciates the mutual discussion.

User consultation: The minutes of the recent SACEPO WPG meetings reflecting the consultation results will be published on the EPO website.

Guidelines: The draft Guidelines will be sent to the members of the SACEPO WPG by the beginning of August at the latest. The members are expected to send their comments on the draft Guidelines by **15 September 2020**.

¹ <https://patentepi.org/r/info-2003-06>
² <https://patentepi.org/r/info-2003-07>
³ <https://patentepi.org/r/info-2003-08>

epi Biotech Committee will discuss the new draft document when it arrives and schedule a digital meeting.

The comments including any particular Biotech-related issues will be discussed in the regular SACEPO WPG meeting on **27 October 2020**.

The EPO thanked **epi** for their proposals and comments and all participants for their support in all aspects, including evaluating the user comments. The good collaboration has eased the EPO's work to a great extent and ensured that the meeting could be conducted in an efficient manner.

Meetings

The Committee will hold digital meetings to discuss the further the amended Guidelines for Examination proposal of the EPO by end August and the yearly committee meeting will be scheduled.

The Chair Ann De Clercq also joined the digital EPO VP1 meeting on 10 July 2020. It was announced that meetings will take place again with DG1 concerning biotech and other topics.

Report of the Online Communications Committee (OCC)

J. Gray (GB), Chair

1. Introduction

OCC remains very busy across several fronts, particularly with new topics arising as a result of the Covid-19 crisis. On 8 April 2020, OCC conducted its own meeting successfully by StarLeaf video conference.

2. Covid-19, ViCo and Council

As OCC chair, I found myself volunteering to help the Board and secretariat organise an **electronic Council meeting** under the constraints of the **coronavirus crisis**. This involved a lot of detailed work with the Presidium, with the Bylaws Committee (BLC) and the secretariat staff, as well as external suppliers such as eVoting.biz.

Another additional burden from the Covid-19 crisis was the sudden prominence of **videoconference** in the eyes of the EPO (see below). Cancellation of the **EQE** has led to a program to create a digital version of EQE. OCC members stand by to assist **epi** colleagues in the Supervisory Board as this project develops.

3. SACEPO-EPP, TOSC, SACEPO Meetings

As a bonus from the Covid crisis, attendance at EPO meetings such as TOSC, SACEPO etc. becomes much more practical in the online world, and ad hoc meetings become practical. This is a very welcome development.

OCC representations continue to be guided by the positions confirmed by Council in Helsinki, November 2018, and which formed part of **epi**'s submission to the EPO Strategic Plan consultation.

The SACEPO-EPP group grows into a well-functioning feedback forum, albeit focused on future developments. We get

to know well the new IT leadership at the EPO. We get to share experience and input from those **epi** members who attend as representatives of different bodies, and representatives of the growing EP paralegal network.

The SACEPO-EPP meeting reviewed and applauded developments to manage better planned **interruptions of the EPO online systems**. This is still evolving but already 2019 was far better managed than 2018. The timing of outages has already been improved, and the communication and information will be subject to further developments. OCC offers to act as a channel for urgent communication to users, and this has been heard by EPO.

Improvements in information systems including **Register Plus** and **Espacenet** were also noted and applauded. Links between My Files and the register now work properly. Prior art documents within opposition files will now



John Gray