

G3/19: amicus curiae briefs

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Nr	Submitting party	Admissibility	Proposed Answer question 1	Proposed Answer question 2
AC1	KSVR, Patentanwälte	not admissible	No	No
AC2	Portuguese Institute of Industrial Property (INPI)	not questioned	Yes (implicit)	Yes (implicit)
AC3	Dirk Peter	not questioned	Yes	Yes
AC4	Elisabeth Albrecht	not questioned	Yes	Yes
AC5	Written statements filed by 23052 natural persons via "Umweltinstitut München e.V."	not questioned	Yes	Yes
AC6	Spanish Patent and Trademark Office (OEPM)	not questioned	Yes	Yes
AC7	Bundesregierung der Bundesrepublik Deutschland	admissible	Yes	Yes
AC8	German Plant Breeders' Association (BDP)	admissible	Yes	yes
AC9	Eric Alasdair Kennington	assumed admissible	No	No
AC10	Euroseeds	not questioned	Yes	Yes
AC11	Maximilian Haedicke	not admissible	No	(No)
AC12	Roel van Woudenberg	Should be considered admissible	No	No
AC13	Industrial Property Office of the Czech Republic	admissible	Yes	Yes
AC14	L.J. Steenbeek	not argued	Question ill formulated	No
AC15	Julian Cockbain	not questioned	no suggestion	no suggestion
AC16	KSVR, Patentanwälte Opinion Rennie-Smith	not admissible	(No)	(No)
AC17	Office belge de la Propriété Intellectuelle	admissible	Yes (implicit)	Yes (implicit)
AC18	FICPI	not admissible	No	not applicable (see Q1)
AC19	Austrian Patent Office	not questioned	Yes (implicit)	Yes (implicit)
AC20	FEMIP	not admissible	No	No

Nr	Submitting party	Admissibility	Proposed Answer question 1	Proposed Answer question 1
AC21	Patent Office of the Republic of Poland	not questioned	Yes (implicit)	Yes (implicit)
AC22	The Kingdom of the Netherlands	not argued	Yes (implicit)	Yes (implicit)
AC23	IP Federation	not admissible	No	not applicable (see Q1)
AC24	VPP e.V.	not admissible	No	not applicable (see Q1)
AC25	Institut National de la Propriété Industrielle (INPI)	not questioned	Yes	Yes
AC26	No patents on seeds!	not questioned	Yes	Yes
AC27	Statement signed by 49 organizations and 2.725 individuals	not questioned	Yes	Yes
AC28	Peter de Lange	not argued	None	Not considered
AC29	The Danish Government	admissible	Yes	Yes
AC30	Axel Metzger, Herbert Zech and Charlotte Vollenberg	Should be considered admissible	Yes (implicit)	Yes (with narrow definition EBP)
AC31	Fritz Dolder	not questioned	Yes	Yes
AC32	epi	not argued	none	none
AC33	Plantum	admissible	Yes	Yes
AC34	CropLife International and the European Crop Protection Association (ECPA)	not admissible	No	No
AC35	Intellectual Property Owners Association (IPO)	admissible	Yes for earlier EBA No for earlier BOA	not applicable (see Q1)
AC36	Chartered Institute of Patent Attorneys (CIPA)	not admissible	No	No
AC37	Thomas Leconte	assumed admissible	No	not applicable (see Q1)
AC38	International Association of Horticultural Producers (AIPH)	not questioned	Yes (implicit)	Yes (implicit)
AC39	Compagnie Nationale des Conseils en Propriété Industrielle (CNCPI)	not admissible	No	No

Nr	Submitting party	Admissibility	Proposed Answer question 1	Proposed Answer question 1
AC40	<u>European Union</u>	admissible	Yes	Yes
AC41	<u>Olaf Malek</u>	not admissible	No	No

Amicus curiae letter by: KSVR, Patentanwälte	
Admissibility: Referral is not admissible <ul style="list-style-type: none"> the questions proposed do not refer to specific points of law as required by Art. 112 EPC, and (ii) the Boards of Appeal have not issued “different” decisions on the points of law referred to the EBA by the President as required by Art. 112(1)b) EPC. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> Question 1 does not result from case law that would contradict T 1063/18. It is the result of a methodically different understanding of the relationship between the judicative and the limitations of Article 164(2) EPC on the competence of the Administrative Council by the Referral, albeit, not supported by any of the cited case law. The answer to the Referral’s question raised on the distribution of powers, i.e. whether a new Rule is a priori limited by a prior decision of the EBA, is already exhaustively answered in well-established case law on the basis of Article 164(2) EPC. A positive answer to referred Question 1 would clearly contradict the limitation of legal power of the Administrative Council under Article 33c) EPC to interpret the Articles only within the boundaries of Article 164(2) EPC. The Referral is not substantiated either. In contradiction with the competence-limiting function of Article 164(2) EPC the referred Question 1 constructs an artificial distinction between “meaning and scope of an Article” on the one hand and “its interpretation” on the other hand. Such distinction is not consistent with the EPC, the Vienna Convention on the Law of Treaties or the legal principles of the member states. Such distinction is certainly not expressed in the case law cited by the Referral in support of this theory (G 9/93, reasons 6, or G 2/08, reasons 7.1.4.). The case law cited in the Referral does not concern any cases as the present one, i.e. a Rule reversing the previous interpretation provided by the EBA under the principles of the Vienna Convention. The Referral here attempts to justify the admissibility of Question 2 with the alleged admissibility of Question 1, and alternatively that it is based on an application of Article 112(1)b) EPC by analogy. There are no lacunae in the law that would allow an application of Article 112(1)b) EPC by analogy and that there are no comparable interests, either. While the Referral does not provide any arguments counter to G 2/12 and G 2/13 for justifying this assumption, we submit that it is Article 52(1) EPC that allows patentability of the subject-matter referred to in Rule 28(2) of the Implementing Regulations. We further submit that the EBA in G 2/12 and G 2/13, applying the interpretive means pursuant to the Vienna Convention, has precisely concluded that under Article 52 EPC, Article 53b) EPC does not exclude said subject matter from patentability. 	

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Amicus curiae letter by: Portuguese Institute of Industrial Property (INPI)	
Admissibility: Not questioned	
•	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
<ul style="list-style-type: none">• <i>“Boards of Appeal should not disregard the recent legal developments in this subject matter and take them into account when deciding on cases that are related to products exclusively obtained by means of an essentially biological process. These recent legal developments include the Notice from EU Commission endorsed by the EU Council and European Parliament, and EPO’s Administrative Council decision on the interpretation of on this subject-matter, all concluding that products obtained by means of an essentially biological process are excluded from patentability”</i>	

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Amicus curiae letter by: Dirk Peter	
Admissibility: Not questioned	
•	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">• The one-pager contains a number of incoherent statements and accusations• The “patent on salmon” is not new and no patentable invention• Patents that conflict with animal wellbeing and environmental protection are not compliant with Art 53(a)• Patenting knowledge in biotechnology and genetics are hampering innovation and are a treat to society• There is no separation of the different bodies in the EPO• The EBA and co-workers pay no taxes and therefore violate the German constitution.• A reorganization of the EPO is needed, whereby the EBA is replaced by an independent organization (e.g. ministry....)	

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Amicus curiae letter by: Elisabeth Albrecht	
Admissibility: Not questioned	
•	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">• <i>“A democratically legitimized political control of the correct interpretation of the European Patent law must not be undermined by a decision of the EPO”.</i>• <i>“The power of the Administrative Council which is based on the support of all 38 contracting states cannot simply be overruled by decisions of a technical body of the EPO”</i>• <i>“If patents are granted for genetic engineering procedures, these must be clearly limited to technical and targeted procedures”</i>• Access to genetic material as well as plants and animals from conventional breeding shall not be hindered by patents.• Random induced mutagenesis is included in conventional breeding	

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<p>Amicus curiae letter by: Written statements filed by 23052 natural persons via "Umweltinstitut München e.V."</p>	
<p>Admissibility: not questioned</p> <ul style="list-style-type: none"> • 	
<p>Proposed Answer Question 1</p>	<p>Proposed Answer Question 2</p>
<p>YES</p>	<p>YES</p>
<p>Remarks</p> <ul style="list-style-type: none"> • <i>"A democratically legitimized political control of the correct interpretation of the European Patent law must not be undermined by a decision of the EPO".</i> • <i>"The power of the Administrative Council which is based on the support of all 38 contracting states cannot simply be overruled by decisions of a technical body of the EPO"</i> • <i>"If patents are granted for genetic engineering procedures, these must be clearly limited to technical and targeted procedures"</i> • Access to genetic material as well as plants and animals from conventional breeding shall not be hindered by patents. • Random induced mutagenesis is included in conventional breeding 	

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Spanish Patent and Trademark Office (OEPM)

Amicus curiae letter by: Spanish Patent and Trademark Office (OEPM)	
Admissibility: Not questioned	
•	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">• <i>“in Decisions G 1/08(Tomato I) and G 2/07 (Broccoli I) it was clearly stated by the EBoA that, if the rules of the Implementing Regulations are amended and this amendment is in conflict with an interpretation given to an article of the CPE by any case law before entry into force of the amended rule, this does not necessarily mean that there is a conflict between a provision of the Convention and its implementing regulation, in the sense of the art. 164.2 EPC”</i>• <i>“Thus, taking into account that the practice followed by the National Patent Offices, including the OEPM, and national courts decisions, Article 53(b) of the EPC should be interpreted as that the products obtained exclusively from essentially biological processes are not considered patentable. As a consequence, new Rule 28(2) of the EPC is not in conflict with the Convention”.</i>• The notice by the EU commission does have a certain value as it reflects the EU legislator's authentic intention, which must be adequately taken into consideration• Reference is made to a ruling of April 11 2014 the Barcelona Commercial Court 4 wherein <i>“it was considered that a product claimed in a patent as a product-by-process claim cannot be independent of the process by which such a product has been obtained; that is, that product-by-process claims are admitted only in cases in which a product can be defined in no other way than by describing its manufacturing process”</i>. It is not entirely clear what this has to do with Rule 28(2).• Reference is also made to the narrow definition of essentially biological processes (consisting entirely of natural phenomena such as crossing and selection.	

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Amicus curiae letter by: Bundesregierung der Bundesrepublik Deutschland	
Admissibility: Referral is admissible	
<ul style="list-style-type: none"> The Federal Government shares the view of the President of the EPO that the Referral is admissible 	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> Question 1 The Federal Government analysed G2/12 and G2/13 and comes to the conclusion that the Enlarged Board had ultimately decided in favor of a narrow reading of the exception to patentability only because it found no clear indications, after applying various manner of interpretation that Art 53b) is to be interpreted broadly. According to the brief <i>“Given the lack of clarity in the provision of Article 53 b) EPC, the Enlarged Board of Appeal finds that it is a matter for the legislator to decide how this provision is to be interpreted. The legislator has made this decision by amending the Implementing Regulations in the Administrative Council. The rulings of the Enlarged Board of Appeal therefore do not pose an obstacle to the amended provisions of the Implementing Regulations based on a dynamic interpretation either”</i> The Federal Government also believes that the Administrative Council is competent to clarify details of the EPC by amending the Implementing Regulations pursuant to Art 33 para. 1c EPC. Question 2 <i>“The Federal Government believes that the exception to patentability for plants and animals exclusively obtained by means of an essentially biological process enshrined in Rule 28(2) of the Implementing Regulations reflects the (correct) interpretation of the Biopatent Directive by the European Parliament, the European Commission and the Member States of the European Union. It is the intention of the Member States of the European Patent Organisation that this interpretation be used as a supplementary means of interpretation pursuant to Rule 26(1) of the Implementing Regulations in interpreting Article 53 b) EPC. The clarification undertaken by the Administrative Council by way of its amendment of Rule 28(2) of the Implementing Regulations also complies with the basic principle that the patent law of the Member States of the European Patent Organisation and the EPC are to be interpreted and applied in harmony (cf. OJ EPO 1985, 60, decision of 5 December 1984, G 1/83, §6). Therefore, the Federal Government believes that the exception to patentability for plants and animals exclusively obtained by means of an essentially biological process, as enshrined in Rule 28(2) of the Implementing Regulations, is compatible with Article 53 b) EPC.”</i> 	

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Amicus curiae letter by: German Plant Breeders' Association (BDP)	
<ul style="list-style-type: none"> • Admissibility: Referral is admissible • BDP (wrongly) thinks that in the field of biotechnological inventions it is always the same Technical Board of Appeal that decides on the cases, therefore technically the condition of "two Boards of Appeal" can never be fulfilled. • BDP also thinks it could not have been the intention of the legislator to exclude the field of biotechnological inventions from the Presidential right of referring a question of law to the Enlarged Board of Appeal • BDP also believes T1208/12 (Hybrid Oilseeds/Pioneer) is a "different decision" deviating T1063/18. According to BDP "The application of one line of argumentation in case T 1208/12 (referring to G1/98 in a non-GM case) and another one in T 1063/18 (not referring to G1/98) leads to different decisions from the same Board of Appeal touching upon the same fundamental question of law: the extent of the exclusions under Article 53(b) EPC 	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<p>Question 1</p> <ul style="list-style-type: none"> • BDP strongly holds that the free access to all genetic resources for further breeding and the freedom to operate in crossing and selection must be safeguarded • BDP is of the opinion that the AC acted within its limits when implementing Rule 28(2). • BDP is further of the opinion that the interpretation of Article 53(b) EPC is not a priori limited by the interpretation given in an earlier decision of the Board of Appeal or the Enlarged Board of Appeal. The Enlarged Board of Appeal interpreted Article 53(b) EPC under evaluation of all possible aspects known and available in 2015. EBA could not take into account the EU commission Notice, but would not be obliged to consider it. • Rule 28(2) EPC must be seen as such a subsequent agreement and practice • These circumstances lead to new factual findings which require a new legal analysis. Therefore, earlier decisions of the Boards of Appeal or the Enlarged Board of Appeal cannot preclude a clarification of Article 53(b) EPC via the Implementing Regulation by the Administrative Council <p>Question 2</p> <ul style="list-style-type: none"> • In G2/12 and G2/13, the Board of Appeal stated that Article 53 (b) can be interpreted in different manners and is "not sufficiently obvious" whether a wide or narrow interpretation has to be applied. According to BDP there is room for interpretation via the Implementing Regulation to the EPC • Only the interpretation in Rule 28(2) EPC leads to a reasonable application of Article 53(b) EPC. If claims directed to products obtained by a non-patentable essentially biological process were still allowable, this would make the exclusion of Article 53(b) EPC meaningless 	

Amicus curiae letter by: Eric Alisdair Kennington	
Admissibility: No comments provided. Assumption that the reference is admissible	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none">• The purpose of the Implementing Regulations must be to implement the EPC and this does not immediately imply that the Implementing Regulations can “clarify” the meaning and scope of an article of the EPC.• There may be circumstances warranting use of the Implementing Regulations to purport to provide clarification or an interpretation of such an Article of the EPC• However, such a clarification or interpretation must always be subject to Article 164(2) EPC and therefore it can only be a “purported” clarification or interpretation. It must always be subject to the possibility that it is found to be in conflict with the correct meaning of the relevant Article in which case the provision of the Implementing Regulations must be ultra vires and ineffective.• Where the Enlarged Board has given a ruling, that establishes (to the extent that the ruling covers it) the meaning and scope of the Article. It is not possible to alter or challenge a ruling by the Enlarged Board except by amendment of the EPC or, exceptionally, by a later ruling from the Enlarged Board.	

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Amicus curiae letter by: Euroseeds	
Admissibility: Not questioned	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<p>Question 1</p> <ul style="list-style-type: none"> • Euroseeds strongly holds that the free access to all genetic resources for further breeding and the freedom to operate in crossing and selection must be safeguarded • Euroseeds supported the proposal of the Administrative Council of the EPO to include the exclusion of plants obtained by an essentially biological process in the Implementing Rules of the EPC. We therefore always have been and still are of the opinion that the interpretation of article 53(b) is not a priori limited by the interpretation given in an earlier decision of the Boards of Appeal or the Enlarged Board of Appeal <p>Question 2</p> <ul style="list-style-type: none"> • if claims directed to products obtained by a non-patentable essentially biological process would still be allowable, this would make the exclusion of Article 53 (b) EPC meaningless 	

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Amicus curiae letter by: Prof. Dr. Maximilian Haedicke	
<p>Admissibility: Not admissible</p> <ul style="list-style-type: none"> • no divergent case-law • Also not admissible under the “analogy argumentation” <ul style="list-style-type: none"> - No lacunae in the law - The right of the President to a referral is an exception to constitutional organisations and needs to be narrowly interpreted. It could offer the President the possibility to influence the development of case-law by Boards of Appeal. - Adoption of the President’ referral under the circumstances in question would weaken the binding effect of judgments and call into question the equality of legal rights. - 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	(NO)
Remarks	
<ul style="list-style-type: none"> • Distinguishing between norm and norm interpretation is methodologically wrong and would lead to arbitrariness in application of the norm. • Pursuant to Art. 164 (2) EPC, the provisions of the Convention prevail over the Implementing Regulations prevail. The powers of the Administrative Council to adopt amendments to the EPC intended to harmonize with EU law are limited in terms of content and procedural law. The AC is bound by the interpretation of the EPC by the Boards of Appeal. This precedence is normatively secured by the fact that the powers of the Administrative Council amending the EPC to comply with EU law are linked to strict requirements which also apply to the executive order and which have not been complied with here. Moreover, a binding determination of the content of EU law by the ECJ is missing. • The principles of the separation of powers and the loyalty of the powers must also be fully applied in the European Patent Organization. Therefore, case law should be given priority in the interpretation of the EPC. The fundamental principles of equal treatment of persons seeking justice, orderly case law development, legal certainty and legal peace, which follow the principle of the rule of law, also preclude annulling decisions of the Board of Appeal by simple change of rules without serious reasons. • If the EPC Member States wish to achieve a change in the interpretation of the patenting provisions contrary to the interpretation of the Enlarged Board of Appeal, they are always free to open the way for the amendment of the EPC by consensus of the contracting states, be it under Art 172 EPC or Art 33 (1)(b) and Art 35 EPC. • Care has to be taken that the current question of interpretation of Article 52, 53 (b) EPC is not used as an occasion to shift the relative weighting within the European Patent Organization to the detriment of the judiciary. This would increase the discussion on the rule of law principle and the separation of powers within the European Patent Organization with the possibility of damage to the whole system. The Boards of Appeal should not be involved in harmful discussions that undermine the confidence of the person seeking justice and, last but not least, the reliability of the case-law itself. However, the current conflict also gives the European Patent Organization the opportunity to sustainably strengthen the rule of law principles and the independence of the Boards of Appeal. This opportunity to further strengthen the European Patent Organization should not be left unused. 	

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Amicus curiae letter by: Roel van Woudenberg	
Admissibility: Referral should be considered admissible	
<ul style="list-style-type: none"> The Enlarged Board is therefore suggested to consider the referral admissible in view of the mutatis mutandis / by analogy argumentation given in the President’s referral If the Enlarged Board considers the referral inadmissible, it is suggested that the Enlarged Board explains in detail why and, as the Enlarged Board did in G 3/08, give an overview of the legal situation such that the legal situation is clear to all stakeholders 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> It is suggested to answer to the first question as follows: <i>No, having regard to Article 164(2) EPC, the meaning and scope of Article 53 EPC cannot be clarified in the Implementing Regulations to the EPC without this clarification being a priori limited by the interpretation of said article given in an earlier decision of the boards of appeal or the Enlarged Board of Appeal, where the clarification is provided by an amendment to or an introduction of a Rule that does not get explicit competence from the related Article (type ii) – and Article 53(b) does not provide for that. The Implementing Regulations to the EPC can only clarify an Article of the EPC (within the scope and meaning of the Article), and only within the interpretation of said Article as given in the earlier decision of the Enlarged Board of Appeal</i> It is suggested to answer the second question as: <i>No, the exclusion from patentability of plants and animals exclusively obtained by means of an essentially biological process pursuant to Rule 28(2) EPC is not in conformity with Article 53(b) EPC. The meaning and scope of Article 53(b) is unambiguously clear in itself and Art.53 and established case law leave no room for interpreting it differently, in particular to extend the scope of exclusions (to plants and animals exclusively obtained by means of an essentially biological process). Further, Article 53(b) allows said subject-matter (as is also acknowledged by the Commission Notice, T 1063/18 and the President’s Referral) and does not provide for the Implementing Regulations to exclude what is allowed by the Article itself</i> On the definition of essentially biological processes” the brief states the following: <i>The Commission does not seem to have taken the specific interpretation of “essentially biological” as being “any non-microbiological process for the production of plants which contains or consists of the steps of sexually crossing the whole genomes of plants and of subsequently selecting plants”, even if “it contains, as a further step or as part of any of the steps of crossing and selection, a step of a technical nature which serves to enable or assist the performance of the steps of sexually crossing the whole genomes of plants or of subsequently selecting plants.” Into account when drafting the Notice. <u>It is not excluded that the Commission has a more narrow interpretation in mind when drafting the Notice, i.e. one where the inclusion of a technical step results in the process not being essentially biological and for that reason not excluded from patentability. The Commission’s interpretation may thus have resulted in a wider exclusion than intended</u></i> 	

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Amicus curiae letter by: Industrial Property Office of the Czech Republic	
Admissibility: Referral is admissible	
<ul style="list-style-type: none"> IPO CZ is of the view that the points of law in referral G 3/19 are admissible. The referred points of law are of fundamental importance and the answers to them provided by the EBoA will bring the clarity in this issue and restore legal certainty in the interest of users of the European patent system and the general public in the field of biotechnology 	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> Question 1 <i>Article 164(2) EPC makes no mention of BoA decisions. Decisions (including interpretation) of the BoAs do not form an integral part of the EPC. Furthermore, it is not true that the only possible interpretation of the EPC is that by a BoA. Firstly, different BoAs may come to different interpretations (see Article 112(1)(b) EPC); secondly, national courts in the Member States may also have different interpretations, for example in proceedings for the revocation of a European patent. Thus, the interpretation by one of the BoAs is not something to be carved into stone. Clarification of the EPC Articles in Implementing Regulations cannot therefore be limited by the interpretation by one of the BoAs.</i> Question 2 <i>Since Article 53(b) EPC does not contain a clear provision, it allows for a double interpretation. One way to eliminate this ambiguity is to clarify it in the Implementing Regulations. Rule 28(2) EPC is in line with one of the potential interpretations of the EPC, i.e. the one that corresponds to the interpretation applied in the EU. By its decision, AC EPO enabled Article 53(b) of the EPC to be interpreted in the same way as Article 4 of the Biotech Directive is interpreted in the EU. Indeed, it is obvious from Article 33(1)(b) EPC that the legislator considered it crucial for the EPC to be kept consistent with the EU law</i> 	

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Amicus curiae letter by: L.J. Steenbeek	
Admissibility: not argued	
Proposed Answer Question 1	Proposed Answer Question 2
Question ill formulated-not relevant	NO
Remarks	
<ul style="list-style-type: none"> • It is the task of the judiciary, and thus of the Enlarged Board of Appeal, to apply the law as it is. It is the task of the legislator to align the law with what is politically desirable. • The view of the European Parliament that Article 4 of the EU biotech directive states that products obtained from essentially biological processes shall not be patentable, is simply not based on the text of the EU biotech directive. <u>If EU Institutions are no longer happy with the text of the EU biotech directive, they should change it in accordance with the applicable TFEU provisions; merely adopting resolutions, non-binding reports, and Council statements supporting such non-binding reports, does not result in a change of EU law.</u> • Article 53(b) EPC does <u>not contain a similar not precisely defined concept [as Art 53(a) EPC] that can be interpreted.</u> Article 53(b) EPC simply lists 3 distinct items that are excepted from patentability, viz. <ul style="list-style-type: none"> - plant or - animal varieties or - essentially biological <i>processes</i> for the production of plants or animals. <p>This means that <u>whatever is not listed as an exception in Article 53(b) EPC, must be patent-eligible as soon as the conditions for patentability of Article 52(1) EPC have been met.</u></p> • The EPC legislator was well aware of the difference between methods and products of such methods, so that if the EPC legislator had desired to also exclude the <i>products</i> of essentially biological <i>processes</i> for the production of plants or animals from patentability, the legislator would have said so. • Rule 28(2) EPC not only conflicts with Article 52(1) EPC, but also with Article 3(1) of the EU biotech directive. • Thus, the EPC legislator cannot re-legislate the content of Rule 28(2) EPC by using the procedure of Article 33(1)(b) EPC. • Also a diplomatic conference cannot be used to re-legislate the content of Rule 28(2) EPC, as the 28 (or 27) EU Member States among the 38 EPC Contracting States cannot support an EPC amendment that would conflict with EU law, as doing so would be a direct violation of their Union loyalty obligations under Article 4(3) EU Treaty. The 75% majority of Article 172(2) EPC thus cannot be lawfully met. 	

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Julian COCKBAIN

Amicus curiae letter by : Julian COCKBAIN (Bioethics Institute Ghent)	
Admissibility: No opinion provided	
Proposed Answer Question 1	Proposed Answer Question 2
No suggestion made	No suggestion made
Remarks	
<ul style="list-style-type: none">• According to Cockbain, the case law on patentability of plants went wrong when G1/98 allowed patents on plants.• The EBA needs to revisit <i>“its earlier and its most egregious mistake”</i>• <i>“Art 53(b) made clear that true-breeding plants simply were not patentable and could not be encompassed by valid claims, and that, accordingly, Rule 28(2) EPC is valid”</i>	

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Amicus curiae letter by: KSVR, Patentanwälte- Rennie-Smith opinion	
Admissibility: Referral is not admissible	
Proposed Answer Question 1	Proposed Answer Question 2
NONE	NONE
Remarks	
<ul style="list-style-type: none"> • This letter focuses on T315/03 and the incorrect/misleading use of quotes thereof in the Referral. • “as is clear from the decision in T 315/03, the Board was not faced with deciding whether or not the new Rules were valid. The respondent did argue that the Rules might be invalid (or, as it was incorrectly argued, ultra vires) but that argument was not upheld (and even not entirely maintained by the respondent). Again as the decision itself shows, the Rules, or at least Rule 23d(d), was held to have made only a limited addition to the existing law. • In T 315/03 the Board was not making any assessment under Article 164(2) EPC • It is in my opinion unjustified to state, as paragraph 9 of the Referral does, that the Board in T 315/03 “...fully acknowledged the Administrative Council’s competence to interpret Article 53(a) EPC by amendment to the Implementing Regulations based on Article 33(1)(c) EPC without being limited in this regard by an interpretation of the Article set forth in earlier case law”. While the words I have emphasised might suggest that the Board was considering and decided upon an interpretation of Article 53(a) EPC1973 in the light of Rule 23d(d) which might have been different if earlier case law had been taken into account, that was not the case. Instead, the Board was considering an argument of inconsistency between a new provision and an earlier decision and decided there was no inconsistency. The new provision was an addition to the previous law and the earlier decision was an interpretation of the previous law. • The abridged version of point 7.3 of T 315/03 should be compared with the entire point 7.3 which I set out in paragraph 7.10 above. That comparison shows that the complete text explains why the respondent was using the concept of ultra vires incorrectly. The sentence which the Referral emphasises, for reasons one can understand, namely “one cannot combine a legislative provision with case-law interpretation to construct an artificial vires by which to judge an action or rule as ultra vires” referred to the proprietor’s suggestion that T 19/90 was a measure which could be used to judge the new legislative provision, i.e. the new Rule. That was refuted in the final sentence of point 7.3 which has been omitted in the abridged version in the Referral: • “Ultra vires requires an inconsistency but there is none - Article 53(a) EPC as previously interpreted by T 19/90 remains unaffected by Rule 23d(d) EPC save that, as already indicated (see paragraph 6.1 above), the Rule deems four limited categories of inventions to fall within Article 53(a) EPC. That has been <i>achieved in a perfectly valid - i.e. intra vires - manner.</i>” 	

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Amicus curiae letter by: Office belge de la Propriété Intellectuelle	
Admissibility: Referral is admissible	
<ul style="list-style-type: none"> Referral is conform Art 112 (1) b) (no further substantiation) 	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
<ul style="list-style-type: none"> The Administrative Council of the European Patent Organization is competent to implement Rule 53 (b) of the EPC by Rule 28 (2) of the Rules of Procedure implementation of the EPC. In view of the different interpretations which Article 53b can have, this implementation does not entail an application of Article 164 (2) EPC Without prejudice to the foregoing, Rule 28 (2) of the EPC Regulations is not contrary to Article 53 (b) EPC in the light of Rule 26 (1) of the Rules, the intention of the EU legislator as regards the scope of Directive 98/44 / EC, as specified in the opinion of the European Commission of 8 November 2016 and intention of the EPC legislator as stated in the statement of reasons for the decision amending Rules 27 and 28 of the Regulations Without prejudice to the foregoing, Rule 28 (2) of the EPC Implementing Regulations is not contrary to Article 53 (b) EPC on the basis of a dynamic interpretation of this Article, the intention of the EPC legislator to amend Rules 27 and 28 of the Implementing Regulations, as specified in the statement of reasons for the decision to amend Since the publication of the opinion of the European Commission on 8 November 2016, a subsequent practice exists between all Contracting Parties to the EPC that plants and animals obtained through essentially biological processes are excluded from patent protection. Belgium therefore considers that Rule 28 (2) of the EPC Regulations is not contrary to the EPC, including Article 53 (b). 	

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Amicus curiae letter by: FICPI	
Admissibility: Referral is not admissible	
<ul style="list-style-type: none"> • There are no diverging opinions from Boards of Appeal • All cases cited in the Referral have consistently applied the provisions of Art 164(2). • Applying Art 112(1)b) by analogy cannot work, as neither the Administrative Council (implementing Rule 28(2)) nor the European Commission (issuing Notice) have the power to deliver decisions under the EPC or to interpret the EPC 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NOT APPLICABLE (see answer question 1)
Remarks	
<ul style="list-style-type: none"> • G2/12 and G 2/13 have already clarified that this Article does not exclude the patentability of products obtained by means of essentially biological processes, so that no further “clarification” is possible in this respect • Rule 28(2) EPC, by excluding the grant of European patents “<i>in respect of plants or animals exclusively obtained by means of an essentially biological process</i>”, adds another exception to patentability <i>a posteriori</i> • While it is true that “<i>Article 53(b) EPC itself does not explicitly allow the patentability of plants (or animals) exclusively obtained by essentially biological processes</i>” it is remarked that Article 53 EPC specifically provides a list of “exceptions to patentability”. Thus, if not present in this list of exceptions, any invention is patentable under Article 52(1) EPC and does not need to be “explicitly allowed” by Article 53 EPC 	

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Amicus curiae letter by: Austrian Patent Office	
Admissibility: Not questioned	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
<ul style="list-style-type: none">• The Austrian patent Office recalls that Austria was the only Contracting State to vote against the Rule change, even though they acknowledge it was a step in the right direction, because they were afraid that a simple rule change would not lead to the desired result, and called for the amendment of the EPC, in particular 53(b) EPC.• It is their considered opinion that the Boards of Appeal must take into account the recent developments including the Notice of the EU commission and the national laws and/or practice of all 38 Contracting states excluding patentability of products of essentially biological processes.	

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Amicus curiae letter by : FEMIPi	
Admissibility: Referral is not admissible	
<ul style="list-style-type: none"> • There are no different decisions of two Boards of Appeal on the question whether Rule 28(2) in its relation with Art 53(b) complies with Art 164(2) EPC. • None of the other decisions mentioned in the Referral deals with the same point of law. • None of the other decisions concerns the issue that a new Rule is in direct contradiction with an Art of the EPC as interpreted by the Enlarged Board of Appeal. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> • FEMIPi expresses its concerns regarding the distribution of powers with the EPO, the role of the Administrative Council and the wider ramifications thereof. • The Commission Notice is not binding EU law in the sense of Art 33 (1) (b) but rather a non-binding opinion. Accordingly, the proposed amendment could only be introduced by the Contracting States at a Diplomatic Conference. • The Administrative Council is empowered to amend the Implementing Regulations without restrictions, but in case of conflict, the empowerment is limited by Art 164(2). In the current case, rule 28(2) is in conflict with Art 53(b) as interpreted by the EBA. • The amendment is not a mere “clarification” of Art 53(b) but in direct contradiction. • The current course of action would lead to a lack of judicial control over the actions of the Administrative Council. Any concerns about this new tendency in the EPO would not be limited to the present case but extend to other technological areas. • The trust in the EPO could be severely eroded, potentially extending to the patents granted by the EPO, including future Unitary Patents. 	

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Amicus curiae letter by: Patent Office of the Republic of Poland	
Admissibility: Not questioned	
•	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
Conclusions of the letter: <ul style="list-style-type: none">• Given the current legal situation that has arisen from the decision in G3/19 case, it seems justified to call for resolving the conflict in a manner that is lawful and that preserves legal certainty. Inconsistency in interpretation of provisions of law between the EPC and the Bio Directive compromises European case law harmonisation.• It is in the interest of all EU Member States to avoid legal disharmony and the probability of risk that European patents on products obtained through essentially biological methods will have to be revoked by respective national authority of the Member States. Such a situation not only endangers stability of the internal market but also may hinder access to plant breeding material and use of innovative solutions in the field of bio technology.• The fact that all 28 EU Member States and the 10 Contracting States to the EPO voted in favour of the introduction of Rule 28(2) also serves to show the will of the latter to interpret the Rule in line with the EC Notice.• It is therefore necessary to frame an unequivocal, conclusive and, if feasible, speedy solution of the issue for the benefit of all users of the patent system in Europe, and the general public.	

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Amicus curiae letter by: The Kingdom of the Netherlands	
Admissibility: Explicit statement that procedural issues related to the case are not addressed	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
<ul style="list-style-type: none">• A Rule clarifying the meaning and scope of a provision of the Convention adopted by the Administrative Council in accordance with article 33, paragraph 1 (c) is not a priori limited by earlier case law of the BoAs or the EBoA as long as the legislator remains within the ambit of that provision.• In the Netherlands' view, the assessment of the interpretation to be given to the terms of article 53 (b) should not be limited by earlier decisions of the EBoA, as was done in the T 1063/18 case, as this would lead to a static interpretation of the EPC which leaves no room to respond to relevant legal developments or clarifications. It is within the competence of the EBoA to establish the authentic interpretation of a provision, which should be done by taking into account all elements relevant to the interpretation of that provision, including developments qualifying as a subsequent agreement or subsequent practice in accordance with the established rules regarding the interpretation of treaties under international law	

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Amicus curiae letter by: IP Federation	
Admissibility: Referral is not admissible	
<ul style="list-style-type: none"> • For question 1: there are earlier decisions that have considered the relationship between the Convention and the Implementing regulations. Those decisions have taken different approaches and but did not come to different conclusions. • For question 2: there is only one case on point so there cannot be any conflict with any other case. • The reference to “in order to ensure uniform application of the law, or if a point of law of fundamental importance arises (preamble Art 112(1)) does not create any wider basis for a valid referral. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NOT ADRESSED as question 1 is answered with no
Remarks	
<ul style="list-style-type: none"> • Article 53(b) is quite clear in the relevant respects, namely regarding the patentability of plants or animals produced by essentially biological processes. It requires no clarification in this respect. • In fact, Rule 28(2) attempts to change, not clarify, the meaning of Article 53(b). It is a very well established principle of law that legal hierarchies cannot be inverted, such that a procedural rule can amend a statute, unless there is specific provision explicitly granting the power to do so. • In the context of this referral, IP Federation wishes to emphasise the need for legal certainty, and the proper application of the law and interpretative instruments. It is of fundamental importance that the EPC, including its Implementing Regulations and Protocols, is applied reliably, predictably and rigorously at all times. In the interests of legal certainty across all technical fields, the EPO should apply the Convention consistently and in accordance with the decisions of the Enlarged Board – as it has in the past. • Any changes to the Articles of the EPC, for example to take account of changes in policy, should be made through the legislative procedures laid down in the Convention for that purpose, not through procedural devices lacking proper vires. 	

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Amicus curiae letter by: VPP e.V.	
Admissibility: Referral is not admissible <ul style="list-style-type: none"> • No different decisions within the meaning of Art 112(1) (b) • None of the cited decisions concern the question of a Rule conflicting with an Article. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NOT APPLICABLE in view of answer to question 1
Remarks	
<ul style="list-style-type: none"> • It is not legally possible for a rule to overrule an article and reverse its meaning to the contrary. It is only possible to amend the article itself (and thus the EPC), either through a conference of the contracting states or, under the special circumstances mentioned, through the Administrative Council. • Any attempt to otherwise change the meaning of an article seems pragmatic at first glance, but it is inadmissible because it would deprive Article 164 (2) of its legal effect and undermine the rule of law of the separation of powers , As a result, otherwise - for example - the Administrative Council could simply circumvent the limitations of Article 164 (2) and simply make (profound) amendments to the EPC, i.e. without a Conference of the Contracting States and the majorities required therein. 	

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Amicus curiae letter by: Institut National de la Propriété Industrielle (INPI)	
Admissibility: Not questioned	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">• Although Article 164(2) EPC provides that the provisions of the EPC shall prevail over those of the Implementing Regulations in case of divergence, it does not provide a means of examining the conflict between a Rule of the Implementing Regulations and the prior case law of the Boards of Appeal or of the Enlarged Board of Appeal.• Such legal reasoning which amounts to extending application of Article 164 EPC to the interpretation of an Article given by the Enlarged Board of Appeal cannot be accepted.	

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Amicus curiae letter by : NO PATENTS ON SEEDS	
Admissibility: Implicitly assumed admissible – no argumentation	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> • The EPC defines the role of the Council and therefore it has the responsibility to act as a political control on behalf of the democratically legitimated institutions of the contracting states of the EPO. <u>There is no doubt that the Enlarged Board of Appeal and the Technical Board of Appeal as well as the examination and opposition division are bound by the decision of the Council in future decision-making.</u> • The brief makes a difference between conventional breeding, which includes classical mutagenesis, and genetic engineering which uses technical and targeted intervention to establish new traits (including transgenesis but also CRISPR/CAS). • <i>“The wording – as well as the negotiating history of the Directive – clearly shows that patents should only be granted on modern biotechnology and genetic engineering processes and products, and should not be extended to conventional breeding by any backdoor decision making.”</i> • According to the brief <i>“A patent covering a process provides the patent holder with protection for process. Furthermore, a patented process covers all products manufactured with the process. Conversely, a patent covering a product only affords the patent holder protection for the product. From this it follows that if Article 53 (b) EPC excludes a process for the breeding of plants and animals from patentability, then this encompasses product protection for products manufactured with this process. To then grant a patent on a product which was derived from the process and which is excluded from patentability according Article 53 (b) EPC, undermines the intention of the legislator and provides protection for something that would have been already within the scope of the (excluded) patent on the process, which, according to Article 53 (b) EPC, cannot be granted”</i> 	

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Amicus curiae letter by: 49 organizations and 2725 individuals signed by Christophe Then	
Admissibility: Implicitly assumed admissible – no argumentation	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">• Democratically legitimized political control of the correct interpretation of European patent law should not be undermined by EPO decision-making. In this case, <u>the power of the Administrative Council, based on the support of all 38 contracting states, cannot simply be overruled by decisions taken by a technical body at the EPO.</u>• Genetic diversity as used in conventional breeding may be derived from native traits, existing plant varieties or from induced random mutations. If patents are granted on processes of genetic engineering, such patents clearly have to be restricted to technical and targeted processes. Access to genetic material as well as plants and animals derived from conventional breeding should not be hampered by patents.	

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Amicus curiae letter by: Peter de Lange	
Admissibility: not considered	
Proposed Answer Question 1	Proposed Answer Question 2
NONE	Not considered
Remarks	
<ul style="list-style-type: none"> • The brief provides a number of <u>considerations on the competence of the AC</u> to provide authentic interpretation. • It is noted that <u>Art 53 does not contain express delegation provisions</u> (“the requirements laid down in the Implementing Regulations”) as do other Articles and it is questioned whether these references to the Implementing Regulations merely illustrative, or are they in some way a constitutive act for the laying down of the corresponding provisions in the Implementing Regulations. • If Rule 28 EPC is not based on a specific delegation provision in an EPC Article, and this would somehow be required is there still legal basis based on <u>some general principle</u> that the Administrative Council has a competence to give authentic interpretations? • It is submitted that the EPC contains <u>no provision expressly giving the Administrative Council such competence.</u> Article 33(1)(c) EPC only indicates <u>the addressee</u> of the competence to amend the Implementing Regulations, without prescribing what can be laid down therein. • If the competence to give authentic interpretations is to be based on <u>unwritten general principle</u>, it becomes relevant that <u>substantive patent law is outside the scope of Article 125 EPC</u> • The Vienna Convention on the Law of Treaties <u>does not identify decisions of administrative treaty bodies as a means of interpretation</u> of treaty provisions • The <i>travaux préparatoires</i> contain a highly pertinent statement on this specific issue, namely that the <u>possibility of the Administrative Council “adding new conditions relating to patentability” was something that “nobody wanted”</u> (M/PR/I p.28, para.33). • Article 112(1) EPC appears to indicate that ensuring uniform application of the law is the competence of the Enlarged Board. In view thereof, can the Administrative Council also have a competence to prescribe a certain uniform application of the law to the Boards in the Implementing Regulations? • Article 33(1)(c) EPC as such does not indicate that the Administrative Council can amend beyond the content of the Implementing Regulations <u>as adopted at the 1973</u> Diplomatic Conference. 	

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Amicus curiae letter by: The Danish Government	
Admissibility: Referral is admissible	
<ul style="list-style-type: none">The Danish Government shares the assessment of the President of the EPO that the referral is admissible under Article 112(1) EPC, and that there is a substantial need for clarification of the potential impact of the subsequent legal developments for the interpretation of Article 53(6) EPC following Enlarged Board of Appeal's decisions in G 2/12 and G2/13 in 2015.	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none">Due to the wording of Article 164(2), the power of the EPC legislator is (only) limited to the extent that an administrative Rule will conflict with the provisions of the Convention. Thus, it follows from Article 164(2) read in conjunction with Article 33(1) that the competence of the EPC legislator is limited only by the Convention and thus not by case law.In a situation as the present, where there has been an important new development in law - European Community legislation as referred to in Article 33(1)(b) - it would not make sense, if the Administrative Council which, as a legislator has been assigned competence to amend, inter alia, Articles stated in parts II to VII of the Convention, was deprived of this Convention-protected right as a result of earlier case law (in the present situation the Tomatoes II and Broccoli II cases). It would de facto shift the balance between legislative and judicial power and per se preclude a development in the law or its interpretation	

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<p>Amicus curiae letter by: Prof. Dr. Axel Metzger, Prof. Dr. Herbert Zech and Charlotte Vollenberg. (Humboldt Universität zu Berlin)</p>	
<p>Admissibility: Referral should be considered admissible</p> <ul style="list-style-type: none"> Regarding the importance of the substantive law issues involved in re case no. G 3/19, there are good reasons to hold the referral admissible by broadly interpreting Art 112(1)(b) EPC with functional considerations. The EBA is the highest interpretative authority within the EPC system and therefore should address the related questions of patentability 	
<p>Proposed Answer Question 1</p> <p>(Implicitly) YES</p>	<p>Proposed Answer Question 2</p> <p>YES (but with narrow definition of essentially biological processes).</p>
<p>Remarks</p> <ul style="list-style-type: none"> It is considered appropriate that the EBA takes into account the <u>subsequent agreement and practice of EPC member states</u> in the interpretation of Art 53(b) EPC, especially those incidents that occurred after the decisions G 2/12 and G 2/13 and which reflect the position of the majority of EPC member states with regard to the patenting of plants obtained by essentially biological processes. The EBA should take the opportunity given by these different layers of subsequent practice <u>to reconsider its decision to grant patents on plants obtained by essentially biological processes.</u> The legal situation in October 2019 differs from the situation in March 2015 when the cases G 2/12 and G 2/13 were decided. Rule 28(2) EPC should be upheld but combined. This would create a coherent system of protection for plant innovations where <u>with a narrower interpretation of essentially biological processes as set out in Rule 26(5) EPC</u> plant varieties are excluded from protection even if they would fulfil the general patentability criteria but where other technical processes and products (like plants not restricted to a single variety, cf. G 1/98) are, in principle, patentable subject to a clear claim drafting limiting the scope of the claims to technical processes or to products of such technical processing. A narrow definition of essentially biological processes as non-technical processes would also be <u>in line with the assessment of software-implemented inventions.</u> A mix of technical and non-technical elements is not excluded per se but examined. When assessing the inventive step of such a mixed-type invention, only those features which contribute to the technical character of the invention are taken into account. Applying these principles would find not only genetic engineering and new breeding techniques manipulating the plant genome directly but also smart breeding patentable in principle, regardless of whether processes or products are claimed. However, due to the general patentability requirements, <u>innovations in plants as products may only be patentable if new and inventive traits are not only claimed by mere phenotypical description but also by explicitly stating the underlying genetic sequence.</u> 	

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Amicus curiae letter by : Prof Dr. Fritz DOLDER	
Admissibility: Implicitly assumed admissible – no argumentation	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> • In a “remark” a reference is made to the fact that Mr. I.Beckedorf is Rapporteur in G3/19 and participated in the EBA deciding G2/12 and G2/13. It is suggested that Mr Beckedorf does not participate in the current decision. • The Administrative council in its law-making capacity is only bound by the hierarchy of the Articles over the Rules, but not by earlier case law. • Even if a Rule and an earlier decision would be equal in hierarchy, Rule 28(2) has to be considered lex posterior, and should be considered valid and binding. • Art 53(b) does not explicitly allow patentability of plants obtained by essentially biological processes. Accordingly, there is room for additional clarification of the Article by a Rule. Rule 28(2) is a clarification, and not in conflict with Art 53(b). • The history of Art 53(b) makes clear that in the view of the legislator products of essentially biological processes should not be patented. Rule 28(2) is a clarification, and should be retro-active. • Theological interpretation of Art 53(b) makes clear that allowing patents on products of essentially biological processes frustrates the goal of Art 53(b) excluding patentability of such processes. • Also using “common sense” it is not possible to make a difference between the exclusion of the process and the exclusion of the product. Using the G2/12 reasoning producing fake money would be prohibited, but the produced money could be freely used in payment transactions. • Furthermore, it is regretted that there is possibility for patent applicants to circumvent the exclusion by skillful drafting of claims. Reference is made to claims on “selection of plants” using primers or markers. • The EPO should use the “whole content” approach in deciding on exclusion of patentability according to Art 53(b), and not base such exclusion only on claims. 	

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Amicus curiae letter by: epi	
Admissibility: epi refrained from commenting on the admissibility but suggested to provide a detailed reasoning if the EBA considered the referral inadmissible as in G3/08	
Proposed Answer Question 1	Proposed Answer Question 2
Not provided	Not provided
Remarks	
<ul style="list-style-type: none"> • epi suggests the EBA to provide its view whether or not the EC Notice could be relied upon to justify an amendment of Article 53 EPC by the Administrative Council in the sense of Art 33(1) (b) EPC. • 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 suggested the EBA to provide its view on the definition of essentially biological processes to be used, and the impact thereof on patenting of truly technical processes and the products thereof • epi suggests the EBA to in such case consider establishing transitional measures to protect the legitimate expectations established by its earlier decisions • epi suggests the EBA to treat the current Referral with special dispatch so as not to further delay the processing of applications or decisions presently in suspension 	

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Amicus curiae letter by: Plantum	
Admissibility: Referral is admissible “as the Technical Board deciding in matter regarding biotechnology acts always in the same composition” (note: this is incorrect) and would otherwise be in a position to prevent any question regarding validity of Rule 28(2) EPC to ever reach the EBA.	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> • The Commission Notice is a subsequent agreement between the parties of the EPC and needs to be taken into account for the interpretation of the agreement. These circumstances lead to new factual findings which require a new legal analysis. Therefore, earlier Boards of Appeal or the Enlarged Board of Appeal cannot preclude a clarification of Article 53 (b) EPC via the Implementing Regulation by the Administrative Council. • Article 53 (b) EPC implicitly excludes plants and animals obtained by means of an essentially biological process. Rule 28 (2) EPC has now made this extension explicit. Question 2 should be answered positively. • The Dutch explanatory memorandum regarding the approval of the European Patent Convention contains a clear explanation stating that the exclusion on essentially biological processes extends to the products of such processes (<i>“Furthermore, no patent can be obtained for plant and animal varieties as well as for essentially biological processes for the production of plants and animals; in fact, therefore, the products of those processes will also not be patentable”</i>). • Plantum is of the opinion that patents on products of essentially biological processes granted by the EPO would not be enforceable before a national court in a number of EPC member states, since these countries have brought or are about to bring their national patent legislation in line with Rule 28(2) EPC. 	

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Amicus curiae letter by: CROPLIFE and ECPA	
Admissibility: Referral is not admissible	
<ul style="list-style-type: none"> • There are no different decisions of two Boards of Appeal on the question whether Rule 28(2) in its relation with Art 53(b) complies with Art 164(2) EPC. • None of the other decisions mentioned in the Referral deals with the same point of law. • None of the other decisions concerns the issue that a new Rule is in direct contradiction with an Art of the EPC as interpreted by the Enlarged Board of Appeal. • In order to leave no doubt on the patentability of products [not] exclusively obtained by essentially biological processes and to avoid any future legal uncertainty, the organizations favor the EBA to answer the question raised by the President of the EPO. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> • It is without doubt that sometimes the articles of the EPC need to be interpreted and clarified. This interpretative role is however accorded to the Enlarged Board of Appeal. • In decision G6/95, the principle that a rule taken for the implementation/clarification of the European Patent Convention, cannot be regarded as valid if it contradicts an article of the EPC as interpreted by the Enlarged Board of Appeal, was unambiguously reaffirmed by the latter. Therefore, any Rule taken for the implementation or clarification of Article 53(b) EPC is necessarily limited by the interpretations of that Article already made by the Enlarged Board of Appeal. • The current interpretation of Article 53(b) EPC by the Enlarged Board of Appeal in G 2/12 and G 2/13 should be maintained and Rule 28(2) EPC or any other rule or practice having the same effect should be considered not applicable. • Croplife and ECPA also point out that the introduction of Rule 28 (2) EPC resulted from a legally non-binding Commission Notice (2016/0 411/03) which in turn was a response to a dissatisfaction expressed by certain stakeholders in the breeding community with patents on products obtained by essentially biological processes, but also with the possible vague scope of patents initially granted in that field and urges the EPO to improve its application of the requirements of the EPC to determine whether the patentability of claims directed to plants carrying a novel characteristic, irrespective of the way these plants have been produced, is met. • Croplife and ECPA note that the Commission Notice was based on the different definition of essentially biological processes for the production of plants and animals contained in the Directive 98/44 which links the technical character of an invention to its reproducibility and should prevail compared to the broader definition of essentially biological processes resulting from the interpretation of Article 53 (b) by the decision G2/07 	

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Amicus curiae letter by: Intellectual Property Owners Association	
Admissibility: Yes	
<ul style="list-style-type: none"> Given the importance of the issue, IPO would suggest that the Enlarged Board of Appeal take the case, or if it sees admissibility problems, provide guidance as it did in G 3/08. The Enlarged Board of Appeal should use this referral as a possibility to “fill lacunae in the law, in particular where situations arise for which the legislator has omitted to provide.” 	
Proposed Answer Question 1	Proposed Answer Question 2
YES with regard to earlier EBA decisions NO with regard to earlier BOA decisions	Obsolete in view of the answer to Q1
Remarks	
<ul style="list-style-type: none"> Question 1 should not be limited to Art 53, but should apply to <u>all Articles and Rules per se</u>. The question concerning the hierarchy of Rules of the Implementing Regulations and jurisdiction of the different bodies of the European Patent Office are <u>not clearly codified</u> in the European Patent Convention, nor the <i>travaux préparatoires</i>. When looking at the caselaw, <u>very few decisions</u> have dealt with the relation between the legal text building up the European Patent Systems and the EPO’s jurisdiction. <ul style="list-style-type: none"> G2/08: a change in the EPC overrules jurisdiction of the EBA T39/93: the meaning of an article of the EPC on its true interpretation as established by a ruling of the EBA cannot be overturned by a newly drafted Rule. But G6/95, which finally ruled on this issue, did not cite T39/93. In G2/07, the EBA has not taken a position on T39/93, as alleged by the President. Rather, the EBA does not follow the initial assumptions on Rule 23b(5). The obiter dictum in T315/03 on Art 164(2) again does not provide efficient clarity. Question 1 must thus be answered by using analogies to other jurisdictions and policy considerations. IPO suggests that decisions of the Enlarged Board of Appeals—the highest decision-making body within the European juridical system—should be given the most weight. Decisions by the EBA can be overturned by an amendment of the EPC, but not by an amendment of the Implementing Regulations. The latter would give the Administrative Council the unfettered ability to overturn any case that it does not like. The situation is different for decisions of the Boards of Appeal. Because the legal framework of the European Patent Convention allows <u>different Boards to issue inconsistent decisions</u>, decisions of the Boards <u>should not block</u> Implementing Regulations. That should be a privilege only of the Enlarged Board of Appeal. 	

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Amicus curiae letter by: Chartered Institute of Patent Attorneys (CIPA)	
Admissibility: Referral is not admissible	
<ul style="list-style-type: none"> • Question 1 is seeking to obtain a “second opinion” from the EBA upon the basis of views expressed by bodies that are not law-making bodies for the EPC (i.e. the European Commission, the EU Council and the European Parliament) or, in the case of the EPO’s Administrative Council, that do not have the necessary authority to amend Article 53 EPC in circumstances where neither the requirements of Article 33(1)(b) nor of Article 35(3) EPC have been satisfied)1. • The Referral is inadmissible because each of Questions 1 and 2 fails the test for admissibility under Article 112(1)(b) EPC. • Questions 1 and 2 both relate to points of law for which: <ul style="list-style-type: none"> - there are no “different” decisions in the sense of Article 112(1)(b) EPC; and - there is already legal certainty and uniformity by virtue of the decisions of the EBA in G 2/ 12 and G 2/ 13 as followed in T1063/ 18. • Further answers from the EBA are not required to establish legal certainty or uniformity. • The EC Notice is not a relevant “legal development” because it has no legal authority. That Notice therefore does not cure the inadmissibility of Question 2. • The interpretative supremacy afforded to the Boards of Appeal means that the interpretation afforded to an Article of the EPC by the Boards of Appeal shall prevail in the event of any divergence in views between the AC and the Boards of Appeal. There is therefore no basis in the EPC for application of Article 112(1)(b) EPC “by analogy”. • Even if the EBA agrees that the Referral is inadmissible, CIPA is of the view that there is a pressing need for the EBA to make a clear statement to the effect that the EC Notice is not “an international treaty relating to patents or European Community legislation relating to patents” in the sense of Article 33(1)(b) EPC and therefore cannot be relied upon to justify an amendment of Article 53 EPC by the AC. 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> • A “conflict” in the sense of Article 164(2) EPC automatically arises for any Implementing Regulation amended by the AC under Article 33(1)(c) EPC that purports to override the prevailing interpretation of an Article of the EPC, as established in the case law of the Boards of Appeal. • This conclusion is based upon principles established in the case law of the EPC. The interpretative supremacy afforded to the Boards of Appeal and/or the separation of powers principle prohibit the AC from replacing a Board of Appeal, let alone an EBA, interpretation of the EPC with a different interpretation. Such replacement is also contrary to the principle of protection of legitimate expectations. • The AC is empowered to amend Articles of the EPC only when the requirements of both of Articles 33(1)(b) and 35(3) EPC have been satisfied. • There are no reasons to depart from the interpretation of Article 53 EPC in G 2/12 and G 2/13, as followed in T1063/ 18. 	

Amicus curiae letter by: Thomas Leconte	
Admissibility: Not considered. The brief starts from the hypothesis that the referral is admissible.	
Proposed Answer Question 1	Proposed Answer Question 2
NO	Obsolete in view of the answer to Q1
Remarks	
<ul style="list-style-type: none"> • The EPC limits the legislative competence of the AC in Art 33 EPC. In other circumstances, the legislative power is reserved for the Diplomatic conference laid down in Art 172 EPC. • If the AC would be in a position to modify the implementing regulations for Art 53 EPC despite earlier decisions to the contrary, this would also be applicable to any article of the EPC. • A positive answer to the first question would deprive Art 164(2) of any judicial effect. • Rule 28(2) is conflicts with the dispositions of the EPC, but Art 52(1) EPC in conjunction with Art 53 (b) EPC, and not with Art 53(b) in isolation. • The contracting States of the EPC may have interest in excluding plants or animals from patentability. Nevertheless, the judicial tools to arrive at that result are not within the competence of the AC, applying Art 33 (1)(c) but only in Art 33(1)(b) or Art 172 EPC. 	

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Amicus curiae letter by: International Association of Horticultural Producers (AIPH)	
Admissibility: Not considered.	
Proposed Answer Question 1	Proposed Answer Question 2
YES (implicit)	YES (implicit)
Remarks	
<ul style="list-style-type: none"> • Unrestricted access for breeders (and growers) to existing genetic resources and the freedom to operate in crossing and selection must be safeguarded. This is achieved e.g. by the breeders exemption principle under UPOV. • AIPH agrees that Rule 28(2) EPC and subsequent disclaimer practice are of key importance in safeguarding the above mentioned unrestricted access. 	

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Amicus curiae letter by: <i>Compagnie Nationale des Conseils and Propriété Industrielle (CNCPI)</i>	
Admissibility: Referral is not admissible <ul style="list-style-type: none"> • See G3/08 : there are no different decisions for the proposed issue. • In addition, the Enlarged Board of Appeal recalled on grounds 7.2.7 of ref. G3 / 08 that the right of referral conferred on the President does not go so far as to authorize him, whatever the reason, to Enlarged Board of Appeal to substitute the decision of an authority of a degree allegedly superior to the decisions of the Boards of Appeal, the interpretation of the EPC falling under their competence as a matter of priority, their decisions being subject to review only under strictly defined in Articles 112 (1) and 112a (2) EPC 	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> • the Boards of Appeal and the Enlarged Board of Appeal are the only bodies established by the Convention to interpret the Convention, and thus to propose an interpretation of Article 53 (b) EPC • Our view is therefore that Rule 28 (2) EPC cannot come to interpret Article 53 (b) EPC as it currently stands, even in the silence of the article concerning the protection of animals and plants derived from a process essentially biological • Therefore, to consider that the exclusion of patent protection from essentially biological processes also covers the exclusion of animals and plants resulting from such processes would have the effect of prohibiting the protection of almost all innovations in the field of living organisms. , which could have a detrimental effect on innovation in the field of agriculture • It should be concluded that this situation is not fixed and that it could evolve in the direction desired by the Administrative council, if a new consensus were to emerge on this subject among the Contracting States to the EPC and that it resulted in an amendment to Article 53 EPC, within the proper framework of a Diplomatic Conference 	

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Amicus curiae letter by: European Union	
Admissibility: Yes	
<ul style="list-style-type: none"> It is submitted that when a rule (such as the rule allowing referrals to the EBoA only on concrete points of law of practical import) is complemented by a condition or safeguard (such as that requiring diverging decisions of two Boards of Appeal), <u>that condition or safeguard should not be implemented in a restrictive way which would conflict with the genuine intent of the rule.</u> A teleological interpretation is to be favoured here, one that is as broad as necessary to ensure that the provision is capable of serving its purpose to the fullest possible extent. 	
Proposed Answer Question 1	Proposed Answer Question 2
YES	YES
Remarks	
<ul style="list-style-type: none"> RULE 28(2) DOES NOT “REVERSE” OR “CONFLICT WITH” ART. 53B EPC The Biotech Directive excludes the patentability of plants obtained by essentially biological processes. In particular, recital 32 of the Directive implicitly but unambiguously takes as its premise that a plant which is the result of an essentially biological process is excluded from patentability: “Whereas, however, if an invention consists only in genetically modifying a particular plant variety, and if a new plant variety is bred, it will still be excluded from patentability even if the genetic modification is the result not of an essentially biological process but of a biotechnological process” (emphasis added) This recital clearly shows the legislator’s basic concept - <u>so basic as not to require codification</u> - that the products of essentially biological processes can never be patented. The recital provides that “even” plant varieties resulting “not [from] an essentially biological process but [from] a biotechnological process” cannot be patentable. Finally, though not mentioned in the Commission Notice, recitals 52 and 53 of the Directive - related to Article 12 on compulsory cross-licensing - specify the cases where a license may be granted to a patent owner or to a breeder when either the plant variety or the patent depends on a previous patent or plant variety. These recitals only refer to the exploitation of new plant characteristics resulting from genetic engineering and clearly exclude plants obtained by essentially biological processes. It is obvious, in light of these recitals, that the EU legislature did not intend to allow patents for plants obtained by essentially biological processes; <u>had it intended to allow such patents, it would have provided for similar cross-licensing between plant varieties and inventions based on plants obtained by essentially biological processes.</u> 	

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Amicus curiae letter by: Olaf Malek	
Admissibility: Referral is not admissible (referring to the numerous submissions in this regard).	
Proposed Answer Question 1	Proposed Answer Question 2
NO	NO
Remarks	
<ul style="list-style-type: none"> The letter refers to the previous submissions in this connection in an agreeing manner, without repetition and adding the following arguments. As a first line of argument, referring to G3/08, the letter indicates that the conduct of the AC and the President of the EPO is not in line with the rule of law-principles to which the EPO is bound. <i>In the present case, the referral is defective regarding the compliance with the above outlined basic principles, (i) because the referral is beyond the limits set to the President by Article 112(1)(b)EPC; and (ii) because of the Administrative Council's attempt to dominate the Enlarged Board's power to interpret the provisions of the EPC by creating a Rule counteracting the Enlarged Board's interpretation of Article 53(b) EPC..... Thus, should the Administrative Council and the President prevail with their coordinated activities to implement the new Rule and let the Enlarged Board confirm its applicability,....., the functionality and reliability of the European patent system could be severely damaged. This system necessarily requires a separation of the powers, in particular including an independent control by the Boards of Appeal, particularly by the Enlarged Board, of the Administrative Council's "limited legislative powers restricted to lower-ranking rules" (cf. G 3/08 point 7.2.1 of the Reasons cited above) to ensure uniform application of the law as codified in the EPC. The Enlarged Board is urgently requested to faithfully carry out this control in view of the present referral.</i> A second line of arguments concerns the concept of the so-called "clarification" of Art 53(b) EPC and Art 4 Biotech directive. The letter draws the attention that none of the documents submitted to support Rule 28(2) EPC (e.g., the President referral or the amicus curiae briefs filed by the EU Commission or the EPC member states or their respective patent offices) spell out the wording of Article 4 BD. According to the letter, this is not surprising as it is actually difficult, if not impossible, to convincingly demonstrate that the wording of Article 4 BD could anyhow support the exclusion of "plants or animals exclusively obtained by means of an essentially biological process.". Moreover, the letter refers to CJEU ruling C-377/98 already providing an interpretation of Art 4 BD. The letters also refers to report of May 17, 2016 of an Expert Group that had specifically been established by the EU Commission in November 2012 to evaluate the legal situation of patents directed to plants, wherein the Expert Group agreed in a majority vote with the Enlarged Board's interpretation of Article 4 BD. According to the letter this Report is mentioned in the EU Commission Notice only in passing (Introduction, 5th paragraph) and was completely ignored in the considerations provided. Finally; the letter indicates that the Members of the EU Parliament were presented an incorrect summary of the content of Article 4 BD as a basis for their conclusions; see: "having regard to Directive 98/44/EC [...], in particular Article 4 thereof, which states that products obtained from essentially biological processes shall not be patentable" (Resolution (Annex 2), second item of the list of legal sources to be considered; emphasis added). According to the letter, the opinion making was actually manipulated by those who drafted the resolution text. The mindset of the Members of the Parliament was guided to the belief that, by its decision to allow the patenting of EBP-produced plants in G 2/I 2 and G 2/13, the Enlarged Board must have violated the Directive. The average Member will hardly have 	

had the resources for checking the correctness of the facts noted in the resolution draft.

- A third line of arguments concerns the legal uncertainty caused by Rule 28(2) EPC, in view of the existence of **two definitions** for the term “essentially biological processes” and in view of the **product by process definition** of the exemption.

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