

be obtained without having recourse to a method necessarily involving the destruction of human embryos.

2.2. Article 53(a) EPC

If an invention is not excluded from patentability because it falls under one of the four categories in R. 28 EPC (see above), it must be then examined whether it is covered by the exception to patentability under Art. 53(a) EPC.

2.2.1 Test date

Assessment of an Art. 53(a) EPC objection was to be made as of the filing or priority date of the patent or application in suit. Evidence arising thereafter might be taken into account provided it was directed to the position at that date (T 315/03).

2.2.2 Assessment of an objection according to Article 53(a) EPC

In T 19/90 (OJ 1990, 476), the board expressed the view that in cases, like the one before it, of genetic manipulation of animals by the insertion of an activated oncogene, there were compelling reasons to consider Art. 53(a) EPC 1973. As this had not been done at the level of the first instance, the board remitted the case to the examining division with the instruction to carry out a careful **weighing up** of the suffering of animals and possible risks to the environment on the one hand, and the invention's usefulness to mankind on the other, before deciding whether to grant or refuse the patent application (see also T 1262/04 of 13 July 2012).

a) Difference from test under Rule 28(d) EPC

In T 315/03 (OJ 2006, 15) the board held that, in animal manipulation cases, the test in T 19/90 (OJ 1990, 476) was appropriate. This differed in several respects from the test in R. 23d(d) EPC 1973 (R. 28(d) EPC), most importantly by allowing matters other than animal suffering and medical benefit to be taken into account. Whereas the R. 23d(d) EPC 1973 test only required a likelihood of animal suffering, however minor, and a likelihood of achieving a medical benefit, the test in T 19/90 required a "careful weighing up" of the matters to be balanced. This clearly allowed an appraisal of animal suffering, of environmental risks and of the feasibility of using non-animal alternatives.

A wider range of benefits to mankind than the substantial medical benefit found in R. 23d(d) EPC 1973 could also be considered. Since the test in T 19/90 was "mainly" the basis of assessment, further arguments as to the appropriate standard of morality or "ordre public" could additionally be considered, but all arguments had to be supported by evidence.

In T 315/03 the board found that claims directed to rodents failed the R. 23d(d) EPC 1973 test and had therefore to be refused, as the patent disclosed a likelihood of animal suffering but not a likelihood of medical benefit when applying the invention to this generic class of