

it, and if there is evidence that the intended therapeutic effect can be achieved (T.1437/07 – Botulinum toxin). The board in that case also stated that just because a patent disclosed an effect which had not in reality been achieved, there was no reason – in the absence of convincing evidence that the effect could not be achieved – for it to doubt that the effect could be achieved (point 38.1 of the Reasons).

The board in T.899/14 decided that, contrary to the view taken by the appellant (patent proprietor), it was not sufficient merely to describe an administration regimen to be followed, without any evidence of the therapeutic efficacy of the proposed treatment. The appellant had not argued that it was common general knowledge but instead **relied on the examples**. The question was thus whether the information presented in the examples could render the alleged efficacy credible, or at least establish its initial plausibility. The board also noted that while results of clinical trials or animal studies were not always necessary to establish sufficiency of disclosure, a **mere verbal statement** in the application was not enough to establish even the **initial plausibility** of an alleged therapeutic benefit.

Having reiterated the applicable principles (point 4.2 of the Reasons), the board in T.1959/15, where granted claim 1 was a second medical use claim in the format of a purpose-restricted product claim pursuant to Art. 54(5) EPC, found that the patent in this specific case, besides amounting to an invitation to perform a research programme and thus an undue burden, showed an effect (on cardiomyopathy) for only two exemplary compounds having the desired capability. Since these two compounds were structurally very similar, it was not plausible that all possible (structurally distinct) compounds having this capability would have the same effect.

b) Consequences of plausibility for whether post-published documents considered

In T.184/16 the board recalled that a precondition for taking into account post-published evidence to demonstrate a certain effect was that it was already plausible at the filing date that said effect was obtained (see T.488/16, T.1329/04 and T.433/05). Plausibility was acknowledged, and post-published evidence was taken into account, for example in cases where there were no "prima facie serious doubts" about plausibility (T.108/09, T.1760/11 of 13 November 2012, T.919/15; by contrast, in T.1329/04 there were prima facie serious doubts). In the case in hand, the application as filed did not contain any experimental evidence as regards the disputed plausibility, i.e. the plausibility of the claimed compounds being SGLT2 inhibitors. It was thus necessary to determine whether plausibility could be acknowledged in view of the common general knowledge and the prior art. The board considered it plausible that the therapeutic effect was indeed obtained. Post-published evidence D4 (comparative examples filed by the respondent/patent proprietor) could be taken into account. The fact that SGLT1 inhibition might contribute to this effect as well and was not tested in D4 was not relevant. Furthermore, the appellant (opponent) bearing the burden of proof for its assertion, the board could not conclude, in the absence of any such evidence, that compounds with large substituents were not suitable to obtain the therapeutic effect defined in claim 12. Sufficiency of disclosure was considered to be satisfied.