

In the specific case the board held that, although the documents submitted by the appellant (opponent) provided evidence of possible hazards from the application of genetic engineering techniques to plants, they did not lead to the definite conclusion that the exploitation of any of the claimed subject-matter would seriously prejudice the environment.

Regarding the compatibility with Art. 53(a) EPC 1973 of an invention involving genetically modified, herbicide-resistant plants, see also T.475/01.

In T.866/01 the invention related to euthanasia compositions which were used for producing humane death in "lower animals". The proprietor argued that the avowed use of the invention's teaching indicated in the patent ("bestimmungsgemäßer Gebrauch der erfindungsgemäßen Lehre") was the use of the claimed composition for mercy killing of lower animals and that this particular intended use did not infringe "ordre public" or morality. It was, in the proprietor's opinion not sufficient for an objection under Art. 100(a) and 53(a) EPC that the invention could also be exploited in a way that would infringe principles of morality or "ordre public". The board noted that no evidence had been provided that euthanasia of lower animals under the particular conditions described in the application would obviate any ethically based constitutional or other rules. The board therefore held that in the circumstances of the present case, Art. 53(a) EPC provided no legal basis for denying absolute substance protection for the claimed composition per se on the grounds that, with the exception of the intended use or exploitation, one or more of several or even all conceivable other exploitations or uses of the claimed composition (falling within the scope of protection) would be or could be regarded as breach of the principles of "ordre public" or morality, even if such conceivable exploitation might constitute a serious breach of the principle of "ordre public", such as a criminal offence including the killing of humans. The board noted that the mere possibility of abuse of the invention was not sufficient to deny patent protection pursuant to Art. 53(a) EPC.

c) Donor consent

The invention in T.1213/05 related to the human BRCA1 gene isolated from the genome, mutant forms of that gene and its use in the diagnosis of predisposition to breast and ovarian cancer. Appellant II submitted that the lack of proof that the donors of the cells had given previous informed consent to the commercial exploitation of the research results by patents as well as a benefit sharing agreement meant that the initial obtaining of these research results involved a violation of ordre public or morality as referred to in Art. 53(a) EPC.

The board disagreed. The EPC contained no provision establishing a requirement for applicants to submit evidence of previous informed consent of the donor of the cells or a benefit sharing agreement. That the legislator had not provided for a procedure of verifying such informed consent could also be deduced from the Biotech Directive, which had to be used as supplementary means of interpretation (R. 23b(1) EPC 1973, R. 26(1) EPC).

In addition, the board referred to ECJ judgment C-377/98 concerning the application for annulment of the Directive, where the Court had rejected the plea of the Kingdom of the