

ILLEGAL IMPLEMENTING REGULATION “BIOTECHNOLOGICAL INVENTIONS” (Rules 23 b - e EPC)

The Administrative Council’s Decision to implement EU-directive 98/44/EC must be overturned.

On 16 June 1999 the Administrative Council adopted a new chapter “Biotechnological Inventions”, implementing the EU-directive 98/44/EC as part of the Implementing Regulations Part II. (Rules 23 b-e EPC)

This decision must be considered illegal for the following reasons:

- The provisions of the directive are contradictory to the text of the Convention, in particular Article 53(b). Therefore Article 164(2) EPC applies.
- This decision fundamentally changes patent practices and amounts to a legislative measure. Such legislative measures cannot be taken by the Administrative Council, which is an executive organ, but only by a Diplomatic Conference.

The decision is also highly controversial because of the way it was conceived. At the time the Enlarged Board of Appeal (EBA) was considering questions on the interpretation of Art. 53(b) EPC (Case G1/98). The decision by the Administrative Council prejudged the EBA ruling.

We therefore call on the Diplomatic Conference in Munich, 20–29 November 2000, to reverse said decision by deleting Chapter VI in Part II of the Implementing Regulations.

Article 164 EPC - Implementing Regulations and Protocols

(2) In the case of conflict between the provisions of this Convention and those of the Implementing Regulations, the provisions of this Convention shall prevail.

Article 53 EPC - Exceptions to patentability

European patents shall not be granted in respect of:

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

Implementing Rule 23c EPC - Patentable biotechnological inventions (Article 4(1)2 – 98/44/EC)

Biotechnological inventions shall also be patentable if they concern:

(b) plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety.