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**Datasheet for the decision  
of 30 March 2022**

**Case Number:** T 0112/19 - 3.3.04

**Application Number:** 05077885.1

**Publication Number:** 1671536

**IPC:** A01H5/02

**Language of the proceedings:** EN

**Title of invention:**

Double-type kalanchoe interspecific hybrids

**Patent Proprietor:**

Knud Jepsen A/S

**Opponent:**

Slijkerman Breeding B.V./KP Holland Licensing B.V.  
/V.O.F. Topcolor Breeding/ AB Breeding B.V.

**Headword:**

Kalanchoe hybrids/SLEIKERMAN BREEDING et al.

**Relevant legal provisions:**

EPC Art. 53(b), 111(1)

EPC R. 28(2)

RPBA 2020 Art. 11

**Keyword:**

Exceptions to patentability - (no)  
Remittal - special reasons for remittal

**Decisions cited:**

G 0002/12, G 0002/13, G 0003/19

**Catchword:**

-



**Beschwerdekammern**

**Boards of Appeal**

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Case Number: T 0112/19 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 30 March 2022**

**Appellant:** Knud Jepsen A/S  
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**Respondent:** Slijkerman Breeding B.V./KP Holland Licensing  
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**Representative:** van Someren, Petronella F. H. M.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 12 November  
2018 revoking European patent No. 1671536  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairwoman** G. Alt  
**Members:** B. Claes  
P. de Heij  
A. Chakravarty  
L. Bühler

## **Summary of Facts and Submissions**

- I. The patent proprietor (appellant) filed an appeal against the opposition division's decision to revoke European patent 1 671 536 ("the patent") having the title "*Double-type kalanchoe interspecific hybrids*".
  
- II. The opposition division held that the ground for opposition in Article 100(a) EPC, pertaining to Article 53(b) EPC and Rule 28(2) EPC, was prejudicial to maintaining the patent, claim 1 of which was for a plant (main request). Claim 1 of an auxiliary request was held not to comply with the requirements of clarity (Article 84 EPC) and the claimed invention was held as not being disclosed in the patent in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC).
  
- III. The board issued a communication pursuant to Rule 100(2) EPC and informed the parties of its preliminary opinion on the appeal. The new understanding/interpretation of Article 53(b) EPC given in opinion G 3/19 of the Enlarged Board of Appeal of 14 May 2020 had no retroactive negative effect and therefore did not apply to the patent. The board thus intended to set the decision under appeal aside and remit the case to the opposition division for further prosecution, since the reason for revoking the patent did not apply. The board was furthermore inclined to reject the request for reimbursement of the appeal fee. The appellant was given a period of two months in which to inform the board whether their request for oral proceedings also applied to their request for reimbursement of the appeal fee.

IV. The appellant replied to the board's communication as follows:

*"The patentee withdraws her request for reimbursement of the appeal fee.*

*Although this withdrawal comes late, it is believed that oral proceedings in Appeal can be avoided and that the case can be remitted to the Opposition Division, as the Opponent has not filed any objections there against".*

V. The appellant's request as understood by the board is that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution.

The joint opponents (respondent) made no requests in the appeal proceedings which appear of relevance to the decision after the Enlarged Board of Appeal has issued opinion G 3/19 of 14 Mai 2020.

## **Reasons for the Decision**

1. The appeal is admissible.

*Claims as granted (main request) - exceptions to patentability (Article 53(b) EPC)*

2. In view of the provisions made by the Enlarged Board of Appeal for European patents granted before (and applications pending on) 1 July 2017 (see opinion G 3/19, points XXVIII and XXIX), the new interpretation of Article 53(b) EPC given in

opinion G 3/19 of 14 May 2020, being a consequence of the introduction of new Rule 28(2) EPC on 1 July 2017, has no retroactive negative effect on the patent, which was granted on 24 September 2015. As the board understands, Rule 28(2) EPC can therefore not be applied to exclude the claimed subject-matter from patentability in the present case.

3. Accordingly, the claimed subject-matter is not excluded from patentability under the new interpretation of Article 53(b) EPC in conjunction with Rule 28(2) EPC.
4. Furthermore, the board considers that the provisions applicable before 1 July 2017, i.e. Article 53(b) EPC as interpreted by decisions G 2/12 and G 2/13 (OJ EPO, 2016, A27 and A28), do not exclude the claimed subject-matter from patentability either.
5. The appeal is thus allowable.

*Remittal (Article 111(1) EPC)*

6. Pursuant to Article 111(1) EPC the board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.
7. The sole reason given by the opposition division for holding the patent as granted (main request) not to comply with the requirements of the EPC was that the subject-matter of claim 1 was a plant, exclusively obtained by means of an essentially biological process and therefore excluded from patentability pursuant to Rule 28(2) and Article 53(b) EPC.

8. It is the primary function of appeal proceedings to give a judicial decision upon the correctness of the decision under appeal (see Case Law of the Boards of Appeal, 9th edition 2019, section V.A.1.1, second paragraph and decisions referred to there).
  
9. As the opposition division did not deal with any other requirement for patentability other than that pursuant to Article 53(b) EPC, there are special reasons to remit the case to the opposition division for further prosecution, in accordance with the appellant's request (Article 11 RPBA).

## Order

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
  
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chair:



I. Aperribay

G. Alt

Decision electronically authenticated