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Patentability of pharmaceutical inventions improved

The European Patent Office (EPO) published in the April 2007 issue of the Official Journal Board of Appeal decision T1020/03 in which a more liberal view of so-called Swiss-type claims (second medical use claims) is expressed.

Swiss-type claims may be relevant in countries such as the EPC contracting states where therapeutic treatment of humans or animals is excluded from patentability. A commonly accepted format for Swiss-type claims reads for example: “Use of substance X for the manufacture of a medicament for the treatment of disease Y.” This type of claim was introduced into European practice with the EPO’s Enlarged Board of Appeal decision G 5/83 which held that – despite the exclusion of medical treatments from patentability – “claims directed to the use of a substance or composition for the manufacture of a medicament for a specified new and inventive therapeutic application” are admissible.

In T1020/03 the Board now holds the view that the expression “specified new and inventive therapeutic application” should not be construed in a narrow sense being limited to a new treatment of a special disease or the treatment of a new group of subjects. Rather, the Board says that Swiss-type claims can be directed to a novel and inventive second medical use, irrespective of how much detail of that use is specified. According to the Board’s view, the expression “specified new and inventive therapeutic application” is used in G 5/83 merely by way of contrast to an unspecified therapy allowable in the case of a first medical indication and does not impose any limitations on which features can or cannot characterize a second medical use. Most remarkably, in the case underlying the decision, the Board held allowable a claim relating to a special dosage regimen (intermittent treatment) for treating a chronic disease in general, without specifying a particular disease to be treated.

Following this broad interpretation of Swiss-type claims, it may now be possible to obtain patent protection in the pharmaceutical field for subject matter that previously was considered inadmissible in EPO practice.