

## Human Embryonic Stem Cells – A Decision at Last

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On 25 November 2008, the Enlarged Board of Appeal (EBA) clarified the European law relating to the patentability of human embryonic stem cells.

The European Patent Convention (EPC) states that inventions concerning the uses of human embryos for industrial or commercial purposes are excluded from patentability.

Therefore, the EPO will not grant patents for processes of obtaining stem cells from human embryos. However, the question remained as to how far this exclusion is to be applied.

The most important question that the EBA considered was whether claims to products (in this case, human ES cell cultures), which at the filing date could only be prepared by necessarily destroying human embryos, were patentable, even if that method is not part of the claims.

The EBA held that such products are not patentable.

Another question that the EBA considered was whether it is of relevance that the same products could be obtained after the filing date without destroying human embryos.

The EBA decided that this made no difference, and that the products remained unpatentable.

Finally, the EBA confirmed that this part of the EPC applies to all pending applications, whether filed before or after the introduction of the relevant law in 1999.

Whilst the EBA answered the specific questions referred to them, to the disappointment of many practitioners, they did not give more general guidance concerning the patentability of inventions relating to human ES cells or human ES cell cultures.

### **UK perspective**

The UK approach to the patentability of human ES cells differs from the EPO approach.

As with the EPO, the UK Intellectual Property Office (UK-IPO) will not grant patents for processes of obtaining stem cells from human embryos. The UK-IPO will also not allow patents for human totipotent ES cells, which are

commonly defined as cells that have the ability to form an entire human body.

However, the UK-IPO will allow patents for human pluripotent ES cells, which are commonly defined as cells that do not have the ability to form an entire human body. The EPO will not allow patents to human pluripotent ES cells.

The full EBA decision (G2/06) can be found at:

[http://documents.epo.org/projects/babylon/eponet.nsf/0/428862B3DA9649A9C125750E002E8E94/\\$FILE/G0002\\_06\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/428862B3DA9649A9C125750E002E8E94/$FILE/G0002_06_en.pdf)

The UK-IPO Practice Note on the patentability of human pluripotent ES cells can be found at:

<http://www.ipo.gov.uk/patent/p-decisionmaking/p-law/p-law-notice/p-law-notice-stemcells.htm>

*Forresters have wide experience in the field of UK and European stem cell patents. Please do not hesitate to contact Jon Gowshall ([jgowshall@forresters.co.uk](mailto:jgowshall@forresters.co.uk)) or Ross Walker ([rwalker@forresters.co.uk](mailto:rwalker@forresters.co.uk)) if you have any questions concerning the impact of this decision or on stem cell issues in general.*