

B. Protection of inventions related to the production of animal-derived agricultural raw materials

Inventions related to the production of animal-derived agricultural raw materials are protected under the patent system only, as there is no *sui generis* protection system for animal breeding. Art. 53(b) EPC and Sec. 2, No. 2, of the PatG except animal varieties and essentially biological processes for animal breeding from patent protection. Animals are not excluded from patentability, as long as higher taxonomic units than varieties are claimed.⁴⁹³ The German translation of term animal varieties in Art. 53(b) EPC, as well as in former Sec. 2, No. 2, PatG read *Tierarten*, meaning animal species. Animal species is a higher taxonomical rank than animal variety. But according to the rationale of the EPC based on the Strasbourg Convention, only animal varieties are excluded from patentability. Thus, the German wording *Tierarten* is to be read as animal varieties.⁴⁹⁴ Moreover, Art. 4(1)(a) of the Biopatent Directive used the correct term of animal varieties. Meanwhile, the German Implementation Act to the Biopatent Directive introduced a new § 2a(1) PatG also reading *Tierrassen*. So, only animal varieties are excluded from patentability but not animal species.

Up to now, there is no *sui generis* protection system for animal varieties that could compensate for the exemption to patentability of animal varieties. *Straus*⁴⁹⁵ has already suggested introducing an animal variety protection system similar to the European or German plant variety protection system.⁴⁹⁶

C. Protection of inventions related to the production of processed food

The protection of inventions related to the production of processed food is considerably more favorable than that of inventions related to the production of agricultural raw materials. There are three areas particularly concerning the production of processed food. On the one hand, savor nuances comprise a field of inventions that is considered characteristic of inventions concerning processed food. Next the product-by-process claim is discussed. Finally, the protection provided by Art. 64(2) EPC for the product directly obtained by the patented process is analyzed and exemplified with three patents on food-related inventions.

493 EPO decision T19/90, Onco-mouse/Harvard II, OJ 1990, 476.

494 *Moufang*, in: *Schulte* (ed.), *Patentgesetz mit EPÜ*, München 2004, Sec. 2, No. 78, *Hansen&Hirsch*, *Protecting Inventions in Chemistry*, Weinheim et al. 1997, 273.

495 *Straus*, *Ethische, rechtliche und wirtschaftliche Probleme des Patent- und Sortenschutzes für die biotechnologische Tierzucht und Tierproduktion*, GRUR Int. 1990, 913.

496 *Von Pechmann*, *Ausschöpfung des bestehenden Patentrechts für Erfindungen auf dem Gebiet der Pflanzen- und Tierzucht*, GRUR 1987, 475, *Hansen&Hirsch*, *Protecting Inventions in Chemistry*, Weinheim et al. 1997, 275.