

Letter



Time-lapse microscopy patent upheld in Europe: response to Sterckx et al

To the Editor

In commentaries published in this issue of *RBM Online*, [Sterckx et al. \(2016a, 2016b\)](#) state that, for a diagnostic method to be excluded, the condition being diagnosed must be a disease. G 1/04 does not, however, require this, and the word 'disease' is not even present in the test (see also 6.2.1 of the reasons of G 1/04). The authors further argue that curability of a diagnosed condition is required, referring to diagnosis for Ebola. This example was, however, dismissed by the EPO Opposition Division (OD), which considered that diagnosing an Ebola infection could not be equated to a decision not to implant an embryo (see 4.2.8.4 of the OD's decision). The EPO case law indicates that a condition does not need to be curable for a diagnostic method to be excluded (e.g. T 143/04, finding a method for diagnosing Alzheimer's to be excluded). The authors' assertion (with no examples provided) that diagnostic methods are patentable at the EPO if the condition is not a disease or is incurable is therefore wrong. Based on the existing case law, the proposed questions A and B in [Sterckx et al., 2016a](#) can be answered with a clear 'no'. Question C might be relevant to

some cases where a course of action is unclear, but in the present case the course of action is whether to transfer an embryo, which is clearly set out in the patent. In summary, Sterckx et al. set out a flawed case that is likely to be rejected by the Board of Appeal, and no referral to the Enlarged Board seems necessary or likely.

REFERENCES

- Sterckx, S., Cockbain, J., Pennings, G., 2016a. Patenting medical diagnosis methods in Europe – Stanford University and time-lapse microscopy. *Reprod. Biomed. Online* 34, 166–168.
- Sterckx, S., Cockbain, J., Pennings, G., 2016b. Time-lapse microscopy patent upheld in Europe: response to pearce. *Reprod. Biomed. Online* 34, 172–173.

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