

## Patentability of plants: EPO refers decision T1063/18 to Enlarged Board of Appeal

Kluwer Patent Blog  
March 29, 2019

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Please refer to this post as: *Kluwer Patent blogger, 'Patentability of plants: EPO refers decision T1063/18 to Enlarged Board of Appeal', Kluwer Patent Blog, March 29 2019, <http://patentblog.kluweriplaw.com/2019/03/29/patentability-of-plants-epo-refers-decision-t106318-to-enlarged-board-of-appeal/>*

The high-profile issue whether plants obtained by essentially biological processes can be patented will be referred to the Enlarged Board of Appeal (EBA) of the EPO.

This has been decided during the 159<sup>th</sup> meeting of the Administrative Council earlier this week. According to an [EPO press release](#), contracting states expressed their concerns with regard to the legal uncertainty caused by decision [T\\_1063/18](#) (analysis [here](#)) during the meeting and president António Campinos received 'broad and overwhelming support' for his proposal to refer the case to the EBA.



'The aim is to obtain an opinion (...) on the patentability of plants exclusively obtained by essentially biological processes, hereby considering recent legal developments (interpretations and statements of the European Commission, the EU Council, European Parliament and EPO's Administrative Council on the interpretation of the European Patent Convention and the EU Bio-Directive, all of them concluding that there should be no patentability in these cases).'

According to the press release, Campinos announced that the EPO 'will proceed swiftly' to submit the referral. The EPO endeavours to restore legal certainty fully and speedily in the interest of the users of the European patent system and the general public.'

As reported earlier on this blog, an EPO Board of Appeal decided on 5 December 2018 that plants which are produced according to essentially biological processes need to be held patentable, despite EPO Guidelines which were introduced in 2017 to exclude them from patentability.

In the so-called Broccoli-II and Tomato-II cases ([G 2/12](#) and [G 2/13](#)) of 2015, the EPO Enlarged Board of Appeal had also ruled that 'plant products such as fruits, seeds and parts of plants are patentable even if they are obtained through essentially biological breeding methods involving crossing and selection.'



But in 2016, the European Commission issued a **Notice**, indicating that the **Biotech Directive 98/44** should have been interpreted as that plants obtained by essentially biological processes are *not* patentable. Taking into account this notice, the EPO Administrative Council **amended its Regulations** in 2017, in vain however, according to decision T 1063/18.