

Enlarged Board of Appeal: plants and animals cannot be patented after all

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Plants and animals exclusively obtained by essentially biological processes are not patentable. That is the opinion (G 3/19) of the Enlarged Board of Appeal of the European Patent Office (EPO).

According to an [EPO press communiqué of 14 May 2020](#), the “Enlarged Board of Appeal of the European Patent Office adopted a dynamic interpretation of the exception to patentability under Article 53(b) of the European Patent Convention (EPC) and held that the non-patentability of essentially biological processes for the production of plants or animals also extends to plant or animal products that are exclusively obtained by means of an essentially biological process.”



The decision, triggered by a referral from EPO president António Campino in April 2019, is the latest and not unlikely the final one in a debate which has been running for years about the issue.

It is contrary to earlier decisions in the so-called Broccoli-II and Tomato-II cases (G 2/12 and G 2/13) of 2015. In these, Enlarged Board of Appeal 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.’

After this decision, the European Commission issued a **Notice** in 2016, 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, it seemed: on 5 December 2018, the BoA decided in case [T 1063/18](#) that EPC Rule 28 (2) which was introduced by the EPO Administrative Council in 2017 to exclude plants or animals from patentability, was in conflict with 53(b) of the European Patent Convention and therefore to be considered void.

This created a lot of legal uncertainty and a few months later, the EPO president referred the decision to the EBA. According to a [press release](#), the aim was ‘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).’

As is explained in the EPO’s press communiqué, “the Enlarged Board endorsed its earlier findings on the scope of Article 53(b) EPC, which were based on the classical (i.e. the grammatical, systematic, teleological and historical) methods of interpretation. However, the Enlarged Board found that a particular interpretation which has been given to a legal provision can never be taken as carved in stone, because the meaning of the provision may change or evolve over time. This meant that decisions G 2/12 and G 2/13 did not settle the meaning of Article 53(b) EPC once and for all.

Taking account of the Administrative Council’s decision to introduce Rule 28(2) EPC, the preparatory work on this provision and the circumstances of its adoption, as well as legislative developments in the EPC contracting states, the Enlarged Board concluded that new Rule 28(2) EPC allowed and indeed called for a dynamic interpretation of Article 53(b) EPC.

In adopting this dynamic interpretation, the Enlarged Board abandoned its earlier interpretation of Article 53(b) EPC in decisions G 2/12 and G 2/13. It held that, after the introduction of new Rule 28(2) EPC, Article 53(b) EPC was to be interpreted to exclude from patentability plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process.”



António Campino has welcomed the opinion of the Enlarged Board of Appeal. “It will bring greater legal certainty for patent applicants, and the general public, on what is a sensitive and complex issue that has legal, societal and economic implications.” Proceedings in examination and opposition which were stayed while the referral was pending will be gradually resumed.

“In order to ensure legal certainty and to protect the legitimate interests of patent proprietors and applicants, the Enlarged Board ruled that the new interpretation of Article 53(b) EPC given in G 3/19 had no retroactive effect on European patents containing such claims which were granted before 1 July 2017, or on pending European patent applications seeking protection for such claims which were filed before that date.”