

# No European patents for essentially biological breeding processes

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The EPO's Enlarged Board of Appeal has now rendered its decisions in the so-called "broccoli" (G 2/07) and "tomato" (G 1/08) cases, bearing on the correct interpretation of the term "essentially biological processes for the production of plants (or animals)" used in the European Patent Convention (EPC) to exclude such processes from patentability.

The Enlarged Board of Appeal is the highest instance in the EPO's judiciary and, as all other Boards of Appeal of the EPO, acts in full independence of the Office in carrying out its duties. Its task is to ensure a uniform application of the patent law under the EPC.

In its decision the Board concludes that a process for the production of plants involving sexually crossing whole plant genomes, and the subsequent selection of plants is not patentable. The mere inclusion of a technical step which serves to enable or assist the performance of the steps of sexually crossing the whole genomes of plants or of subsequently selecting plants does not override this exclusion from patentability. While technical devices or means, such as genetic markers, may themselves be patentable inventions, their use does not make an essentially biological process patentable. The Board held finally that processes for producing plants by inserting or modifying a trait in the genome by using genetic engineering do not rely on sexual crossing of whole genomes and may therefore be patentable. However, in such a case sexual crossing and selection steps should not be in the claims, since adding further technical processing steps before or after the steps of sexual crossing and selection does not render such processes patentable either.

To reach their decision, the Board considered the arguments put forward by the respective patent owners and opponents in the cases underlying the referral decisions (T 83/05 - Broccoli and T 1242/06 - Tomatoes), the comments submitted by the President of the EPO and the vast number of submissions by the public, the so-called "amicus curiae" letters, which it had solicited in the course of procedure.

In its 70 pages long decision the Enlarged Board of the EPO also gave a very comprehensive overview of the historical development of the relevant legislation and case law referring to the question of the patentability of essentially biological processes in Europe, including the development of the so-called Biotech Directive (98/44/EC) of the European Parliament and Council.

While the present decisions have the objective of clarifying the legal meaning of the concept of "essentially biological processes" under the EPC, a first concrete application will be provided by the Technical Boards of Appeal, which had referred the questions to the Enlarged Board of Appeal and are now called to decide upon the individual cases in the light of the guidance provided by the Enlarged Board of Appeal.