

Latest News

Decision in Broccoli and Tomato cases: No European patents for essentially biological breeding processes

The Enlarged Board of Appeal of the European Patent Office (EPO) has now taken its decision in the "Broccoli" (G 2/07) and "Tomato" (G 1/08) cases. In both cases patents on breeding methods – granted by the EPO – were opposed raising the question what the correct interpretation of “essentially biological processes for the production of plants (or animals)” is. According to Article 53(b) of the European Patent Convention (EPC) such processes are excluded from patentability however the interpretation of this exclusion waited for the Enlarged Board of Appeal, which is the highest instance in the EPO's judiciary and is charged with ensuring uniform application of patent law under the EPC.

With this decision, it is clarified that *“a process for the production of plants involving sexually crossing whole plant genomes, and the subsequent selection of plants is excluded from patentability. 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 also came to the conclusion that processes for producing plants by inserting or modifying a trait in the genome with the use of genetic engineering may be patentable because they do not rely on sexual crossing of whole genomes. *“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.”*

Now that the Enlarged Board of Appeal has provided guidance and clarification on the application of Article 53(b) EPC it is for the referring Technical Boards of Appeal to apply this guidance to the concrete cases at stake.

For more information on the decision of the Enlarged Board of Appeal please click here:

<http://www.epo.org/topics/news/2010/20101209a.html>