

**Plants and animals produced by methods involving sexual crossing can be protected by European patents. This might offer the possibility of a further layer of protection in addition to plant variety registration**

According to previous decisions of the Enlarged Board of Appeal of the European Patent Office (G 1/08 and G 2/07, the "Broccoli" and "Tomatoes" cases), a **process** for the production of plants or animals which is based on the **sexual crossing** of whole genomes and on the subsequent selection of plants or animals is **excluded from patentability** pursuant to Article 53(b) EPC as being "essentially biological", even if other technical steps relating to the preparation of the plant or animal or its further treatment are present in the claim before or after the crossing and selection steps.

The question was whether this patentability exclusion extends to the **products** of such crossing, i.e. the corresponding plants or animals.

The Enlarged Board of Appeal has now answered this question in recent decisions of 25 March 2015 (G 2/13 and G 2/12, "Broccoli II" and "Tomatoes II") as follows:

- The exclusion of essentially biological processes for the **production** of plants in Article 53(b) EPC **does not have a negative effect** on the allowability of a **product claim** directed to plants or plant material such as plant parts.
- The fact that the **process features** of a product-by-process claim directed to plants or plant material other than a plant variety **define an essentially biological process** for the production of plants **does not render the claim unallowable**.
- The fact that the **only method available** at the filing date for generating the claimed subject-matter **is an essentially biological process** for the production of plants disclosed in the patent application **does not render a claim** directed to plants or plant material other than a plant variety **unallowable**.
- In the circumstances, it is of no relevance that the protection conferred by the product claim encompasses the generation of the claimed product by means of an essentially biological process for the production of plants excluded as such under Article 53(b) EPC.

Applying the various methodical lines of interpretation applicable, the Enlarged Board of Appeal comes to the conclusion that Article 53(b) EPC has to be interpreted narrowly. Consequently, as this Article mentions "processes", it does not extend to the products of such

processes.

Please note that, however, a corresponding claim may still not claim a specific plant or animal **variety** and that, if a plant is claimed in form of a product-by-process claim, further requirements have to be met. Claims for products defined in terms of a process of manufacture are allowable only if the **products as such** fulfil the requirements for patentability, i.e. *inter alia* that they are new and inventive. A product is **not** rendered novel merely by the fact that it is **produced by means of a new process**.

The Technical Boards of Appeal concerned with the cases will now take a decision on the basis of G 2/13 and G 2/12. There are several claim sets pending for decision in form of main and auxiliary requests, examples of which are given below. The recent decisions *per se* do, of course, not mean that these claims are allowable, further modifications might be necessary.

1. An edible *Brassica* plant produced according to a method for the production of *Brassica oleracea* with elevated levels of 4-methylsulfinylbutyl glucosinolates, or 3-methylsulfinylpropyl glucosinolates, or both, which comprises: a) crossing wild *Brassica oleracea* species selected from the group consisting of *Brassica villosa* and *Brassica drepanensis* with broccoli double haploid breeding lines; b) selecting hybrids with levels of 4-methylsulfinylbutyl glucosinolates, or 3-methylsulfinylpropyl glucosinolates, or both, elevated above that initially found in broccoli double haploid breeding lines; c) backcrossing and selecting plants with the genetic combination encoding the expression of elevated levels of 4-methylsulfinylbutyl glucosinolates, or 3-methylsulfinylpropyl glucosinolates, or both; and d) selecting a broccoli line with elevated levels of 4-methylsulfinylbutyl glucosinolates, or 3-methylsulfinylpropyl glucosinolates, or both, capable of causing a strong induction of phase II enzymes, wherein molecular markers are used in steps (b) and (c) to select hybrids with genetic combination encoding expression of elevated levels of 4-methylsulfinylbutyl glucosinolates, or 3-methylsulfinylpropyl glucosinolates, or both, capable of causing a strong induction of phase II enzymes.
1. A tomato fruit of the species *Lycopersicon esculentum* which is naturally dehydrated, wherein natural dehydration defined as wrinkling of skin of the tomato fruit when the fruit is allowed to remain on the plant after a normal ripe harvest stage, said natural dehydration being generally unaccompanied by microbial spoilage.

## Contact

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