



Referral to EPO Enlarged Board of Appeal (G2/07) – “Essentially biological processes”

Questions have been referred to the EPO Enlarged Board of Appeal relating to the patentability of plant production processes in Europe. The decision is pending as case G 2/07.

Background

The relevant legislation is set out in Article 53(b) EPC, as follows:

“European patents shall not be granted in respect of:

(a) ...

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or products thereof”

(Emphasis added)

The aim of this provision is to prevent the patenting of methods involving natural cross-breeding of animal and plant varieties, which are considered to be defined as “essentially biological processes”.

The patent that has prompted the referral to the Enlarged Board relates to the field of cross-breeding of plants, in particular broccoli. The claim in question is directed to cross-breeding of *Brassica spp.* to obtain increased levels of anticarcinogenic glucosinolates. The claim contains a number of steps, some of which cover crossing and selecting the plants (ie essentially biological steps), and others which involve additional *technical features*, such as the use of molecular markers, and the use of non-natural starting materials. Hence, the claim includes a combination of essentially biological processes and technical features, and not just steps of an essentially biological nature.

Questions referred to the Enlarged Board of Appeal

The questions to be decided by the Enlarged Board are as follows:

- 1) Does a non-microbiological process for the production of plants which contains the steps of crossing and selecting plants escape the exclusion of Article 53(b) EPC merely because it contains, as a further step or as part of any of the steps of crossing and selection, an additional feature of a technical nature?

2) If question 1 is answered in the negative, what are the relevant criteria for distinguishing non-microbiological plant production processes excluded from patent protection under Article 53(b) EPC from non-excluded ones? In particular, is it relevant where the essence of the claimed invention lies and/or whether the additional feature of a technical nature contributes something to the claimed invention beyond a trivial level?

Therefore, the case will decide the relevant criteria for distinguishing excluded “essentially biological” plant production processes from non-excluded “technical” features. The Board will also assess the relevance of the contribution that is made by the additional technical feature(s) to the claimed invention, and whether this is sufficient to avoid the exclusion set out in Article 53(b) EPC.

The referral is currently pending before the Enlarged Board, and it is likely to be some time before a decision is reached.

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