



THE EPO REJECTS THE PATENTABILITY OF PLANTS AND ANIMALS PRODUCED BY ESSENTIALLY BIOLOGICAL PROCESSES BUT ARE THE DOORS OPEN TO THE PATENTABILITY OF PRODUCTS (PLANT VARIETIES) OBTAINED BY PROCESSES OTHER THAN ESSENTIALLY BIOLOGICAL?

The Enlarged Board of Appeal of the European Patent Office issued Opinion G 3/19 (Pepper) on May the 14th, 2020 (<https://www.epo.org/law-practice/case-law-appeals/pdf/g190003ex1.pdf>) which talks about the patentability of plants or animals produced by essentially biological processes, considered in Pepper case that, after the Tomato II (<https://www.epo.org/law-practice/case-law-appeals/pdf/g120002ex1.pdf>) and Broccoli II (<https://www.epo.org/law-practice/case-law-appeals/pdf/g130002ex1.pdf>) cases, plants and animals exclusively obtained by essentially biological processes are not patentable.

Under article 53(b) EPC, European patents shall not be granted in respect of plant or animal varieties or essentially biological processes for the production of plants or animals. Rule 28(2) EPC provides that under Article 53(b) EPC, European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process. Rule 28(2) EPC was introduced by decision of the Administrative Council of the European Patent Organisation and came into force on July the 1st, 2017.

In 2015, the Enlarged Board had concluded in its decisions G 2/12 and G 2/13 within the then applicable legal framework, i.e. before the introduction of Rule 28(2) EPC, that the non-patentability of essentially biological processes for the production of plants or animals under Article 53(b) EPC did not extend to products that are exclusively obtained by means of an essentially biological process.

In 2018, a Technical Board of Appeal held in decision T 1063/18 that new Rule 28(2) EPC had no impact on the interpretation of Article 53(b) EPC, and followed the Enlarged Board's earlier decisions G 2/12 and G 2/13.

In the interpretation of the article 53 (b) EPC, the Decision considers that none of the methods of interpretation established in the paragraph 1 of Article 31 of the Vienna Convention leads to the conclusion that "essentially biological processes for the production from plants " extends to products obtained by such processes.

In our opinion the doors are open to the patentability of products (plant varieties) obtained by processes other than essentially biological. Gene editing techniques make it possible to follow processes that are not essentially biological?