

to be established whether the claimed uses and methods were excluded from patentability by virtue of the process exclusion in Art. 53(b) EPC for other reasons.

The board found that they were not. The legislator drafting Art. 53(b) EPC had not intended to exclude from patentability a whole class of inventions, i.e. horticultural or agricultural (agronomic) processes, under which the claimed use and methods undoubtedly fell. The EPC 1973 legislator (and the EPC 2000 legislator) had only wished to exclude from patentability the – then conventional – processes applied by plant breeders in connection with new plant varieties for which a special property right was available under the UPOV Convention, and processes which were fundamentally of this type.

Thus, rather than being excluded from patentability by virtue of Art. 53(b) EPC, the claimed uses and methods constituted a "technical process" and were therefore patentable pursuant to R. 27(c) EPC.

3.3.3 Product claims for plants or plant material

a) G 2/12 and G 2/13

In the consolidated cases G 2/12 and G 2/13 (OJ 2016, A28 and A29) the Enlarged Board was concerned with the question whether the exclusion of essentially biological processes for the production of plants in Art. 53(b) EPC had a negative effect on the allowability of product claims or product-by-process claims directed to plants or plant material (such as a fruit or plant parts) which are directly obtained and/or defined by an essentially biological process. It concluded that it did not.

The Enlarged Board applied the various methodical lines of interpretation set out in Art. 31 and 32 of the Vienna Convention on the Law of Treaties. None of these led the Enlarged Board to conclude that the term "essentially biological processes for the production of plants" extended beyond the processes to products defined or obtained by such processes. This result was confirmed when the preparatory work of the EPC was taken into account as a supplementary means of interpretation.

The Enlarged Board also examined whether considerations had arisen since the Convention was signed which might give reason to believe that a literal interpretation of the relevant provision would conflict with the legislator's aim. However, it could not see why the original intention of the legislator in drafting Art. 53(b) EPC was no longer justified, just because new plant breeding techniques were available today.

The Enlarged Board considered whether allowing patenting of a product claim or a product-by-process claim for a plant or plant material that is obtained by a means of an essentially biological process could be regarded as a circumvention of the process exclusion. It found that it could not, referring to the clear wording of Art. 53(b) EPC. It warned that broadening the scope of the process exclusion to the extent that it included products obtained by essentially biological processes for the production of plants would introduce an inconsistency in the system of the EPC, as plants and plant material other than plant varieties were generally eligible for patent protection.