

oncogene sequence into the genome of the non-human mammal did not involve an "essentially biological process". The product claim for the genetically-manipulated animal included descendants not directly genetically manipulated themselves but produced by the essentially biological process of sexual reproduction. The board held that this was a product claim defined in terms of the process by which it was produced and that a product-by-process claim remained a product claim irrespective of the process it referred to.

In T.315/03 (OJ 2006, 15) the board held that the claimed process for producing transgenic mice, which included genetic manipulation, was not "an essentially biological process", the latter being defined in R.23b(5) EPC 1973 (R.26(5) EPC) as consisting "entirely of natural phenomena such as crossing or selection".

In T.1199/08 appellant II argued that if the technical teaching of the patent as a whole was taken into account, it became obvious that the only purpose of the claimed method was the production of an animal. The board rejected the argument that the "whole contents approach" developed in G.2/06 should be taken into consideration for a correct assessment of whether the claim in question would fall under the prohibition of Art. 53(b) EPC. It also decided that a claim to a method which allowed for the long-term preservation of sex-selected sperm did not qualify as an essentially biological process for the production of animals. Therefore, in line with the parallel reasoning developed in G.2/07 regarding processes for the production of plants (see below), it did not fall under the prohibition of Art. 53(b) EPC.

### 3.3.2 Essentially biological processes for the production of plants

#### a) G 2/07 and G 1/08

The leading cases concerning the interpretation of the exclusion from patentability of essentially biological processes for the production of plants are the consolidated cases G.2/07 (OJ 2012, 130) and G.1/08 (OJ 2012, 206) ruling on the referral in T.83/05 of 22 May 2007 (OJ 2007, 644) relating to a method of obtaining particular broccoli lines and on that in T.1242/06 of 4 April 2008 (OJ 2008, 523) relating to a method of breeding tomato plants which produce tomatoes with reduced fruit water content.

The Enlarged Board of Appeal found, first of all, that the exception applying to "essentially biological processes for the production of plants" could not be read as limited to processes for the production of plant varieties, because such an interpretation would be contrary to the wording.

After rejecting a series of possible approaches to the interpretation of the exclusion, the Enlarged Board concluded that a non-microbiological process for the production of plants which contains or consists of the steps of sexually crossing the whole genomes and of subsequently selecting plants is "essentially biological" within the meaning of Art. 53(b) EPC. Such a process does not escape the exception to patentability merely because it contains, as a further step or as part of any of the steps of crossing and selection, a step of a technical nature which serves to enable or assist performance of the