

steps of sexually crossing the whole genomes of plants or of subsequently selecting plants.

This outcome was largely based on the Enlarged Board's findings with regard to the legislative history of the Strasbourg Patent Convention and the EPC 1973. The legislator's intention, it found, had been to exclude from patentability those plant breeding processes which were the conventional methods of plant-variety breeding at the time. These conventional methods included, in particular, those based on the sexual crossing of plants (i.e. of their whole genomes) deemed suitable for the purpose pursued and on the subsequent selection of the plants having the desired trait(s). It could also be gathered from the legislative history that the mere use of a technical device in a breeding process was not to be considered sufficient to lend the process itself a technical character.

The Enlarged Board distinguished such processes from those which left the realm of plant breeding. It cited R. 27(c) EPC, which expressly provides that biotechnological inventions are also patentable if they concern a microbiological or other technical process, so that the excluded essentially biological processes are juxtaposed with the patentable technical processes. The exception to patentability under Art. 53(b) EPC does not exclude a process of sexual crossing and selection which includes within it an additional step of a technical nature, which step by itself introduces a trait into the genome or modifies a trait in the genome of the plant produced, so that the introduction or modification of that trait is not the result of the mixing of the genes of the plants chosen for sexual crossing. In the context of examining whether such a process is excluded from patentability as being "essentially biological" within the meaning of Art. 53(b) EPC, it is not relevant whether a step of a technical nature is a new or known measure, whether it is trivial or a fundamental alteration of a known process, whether it does or could occur in nature or whether the essence of the invention lies in it.

Ultimately, this means that, while the presence in a claim of one feature which could be characterised as biological does not necessarily result in exclusion of the claimed process as a whole under Art. 53(b) EPC, the same does not apply where the process includes sexual crossing and selection.

In T. 2323/11 the invention concerned the removal of unwanted sequences from the genome of transgenic plants which comprise an introduced gene for an agronomically valuable trait. In G 2/07 and G 1/08 the Enlarged Board considered that, under Art. 53(b) EPC, excluded processes were characterised by the fact that the traits of the plants resulting from the crossing were determined by the underlying natural phenomenon of meiosis. The board held – contrary to the appellant's argument – that the trait of the excision of the target gene is the result of the crossing of the parent plants and is determined by the underlying natural phenomenon of meiosis, as the latter determines the genetic make-up of the plants produced. The claimed method therefore did not fall under the exception made in G 2/07 and G 1/08 for those processes which contain an additional step of technical nature.

In T. 2435/13 the board dealt with the interpretation of the term "essentially biological process for the production of plants" in the light of G 2/07 and G 1/08. The claimed subject-