

On the question whether it was of relevance that the protection conferred by the product claim encompassed the generation of the claimed product by means of an essentially biological process for the production of plants excluded as such under Art. 53(b) EPC, the Enlarged Board highlighted the distinction between the requirements for patentability and the extent of protection. Whether a product claim or a product-by-process claim was patentable was to be examined irrespective of the extent of protection that is conferred by it after grant.

The Enlarged Board emphasised that its judicial decision-making powers did not extend to the ethical, social and economic aspects raised in the general debate, as it had no mandate to engage in legislative policy.

The questions of law referred to the Enlarged Board of Appeal were answered as follows:

1. The exclusion of essentially biological processes for the production of plants in Art. 53(b) EPC does not have a negative effect on the allowability of a product claim directed to plants or plant material such as a fruit (G 2/12) or plant parts (G 2/13).
2. The fact that the process features of a product-by-process claim directed to plants or plant material other than a plant variety define an essentially biological process for the production of plants does not render the claim unallowable (G 2/13). The fact that the only method available at the filing date for generating the claimed subject-matter is an essentially biological process for the production of plants disclosed in the patent application does not render a claim directed to plants or plant material other than a plant variety unallowable (G 2/12, G 2/13).
3. In the circumstances, it is of no relevance that the protection conferred by the product claim encompasses the generation of the claimed product by means of an essentially biological process for the production of plants excluded as such under Art. 53(b) EPC (G 2/12, G 2/13).

In its decision T 83/05 of 10 September 2015 the board applied G 2/13. Claim 1 of the main request was directed to an edible Brassica plant produced according to a method of crossing and selecting. Claims 2 and 3 were directed to an edible portion and to the seed of a broccoli plant produced by a method defined in the same manner as in claim 1. Claims 4 and 5 were directed to a broccoli plant and a broccoli inflorescence. The board remitted the case to the department of first instance with an order to maintain the patent on the basis of claims 1 to 5 of the main request.

In T 1242/06 of 8 December 2015 the board applied G 2/12. The newly submitted claims were restricted to claims for products and related to a (naturally) dehydrated tomato fruit of the species *L. esculentum*. The board held that the subject-matter in question was not excluded from patentability pursuant to Art. 53(b) EPC. The board remitted the case to the opposition division with the order to maintain the patent on the basis of these claims.

Following a notice of the European Commission, clarifying that Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of