

# EPO: Plants which are not patentable

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Peter Koefoed July 09, 2020



The Enlarged Board of Appeal of the EPO (EBA) has recently issued opinion G 3/19, which concludes that plants and animals exclusively obtained by “essentially biological processes” are exempt from patentability. This finding only affects patents derived from patent applications filed after July 1 2017.

## Summary

Article 53(b) of the European Patent Convention (EPC) exempts 1) plant and animal varieties and 2) essentially biological processes for the production of plants and animals from patentability. In 2015,

the EBA concluded in its consolidated decisions G 2/12 and G 2/13 that this exemption did not extend to products of such methods. Since July 1 2017, **Rule 28(2) EPC** has provided that under Article 53(b) of the EPC, plants obtained exclusively from an essentially biological process are also exempt from patentability. However, in 2018, a Technical Board of Appeal held in its controversial decision T 1063/18 that new Rule 28(2) EPC conflicted with Art. 53(b).

The president of the EPO in 2019 referred a point of law to the EBA concerning the interpretation of Article 53(b) of the EPC.

The EBA initially endorsed its earlier decisions on the matter. But in contrast to the Board deciding T 1063/18, the EBA found that in the time after Decisions G2/12 and G2/13 the meaning of Article 53(b) could change. Consequently, the EBA now holds that introduction of Rule 28(2) EPC and its implementation throughout Europe is a development that provides for a new interpretation of Art. 53(b), namely that plants obtained from essentially biological processes are exempted. Somewhat uniquely, the EBA set a cutoff date for the new interpretation of July 1 2017, meaning that any European patent application pending on that date and seeking protection for plants obtained from essentially biological processed is not affected by the new interpretation.

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