



Europäisches
Patentamt
European
Patent Office
Office européen
des brevets

The European Patent Office, its Boards of Appeal and Plant patentability



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The European Patent Office – mission and status

As the patent office for Europe, we support innovation, competitiveness and economic growth across Europe through a commitment to high quality and efficient services delivered under the European Patent Convention.

The European Patent Organisation is the second-largest intergovernmental institution in Europe



Structure of the European Patent Organisation

European Patent Organisation

Administrative Council

The legislative body

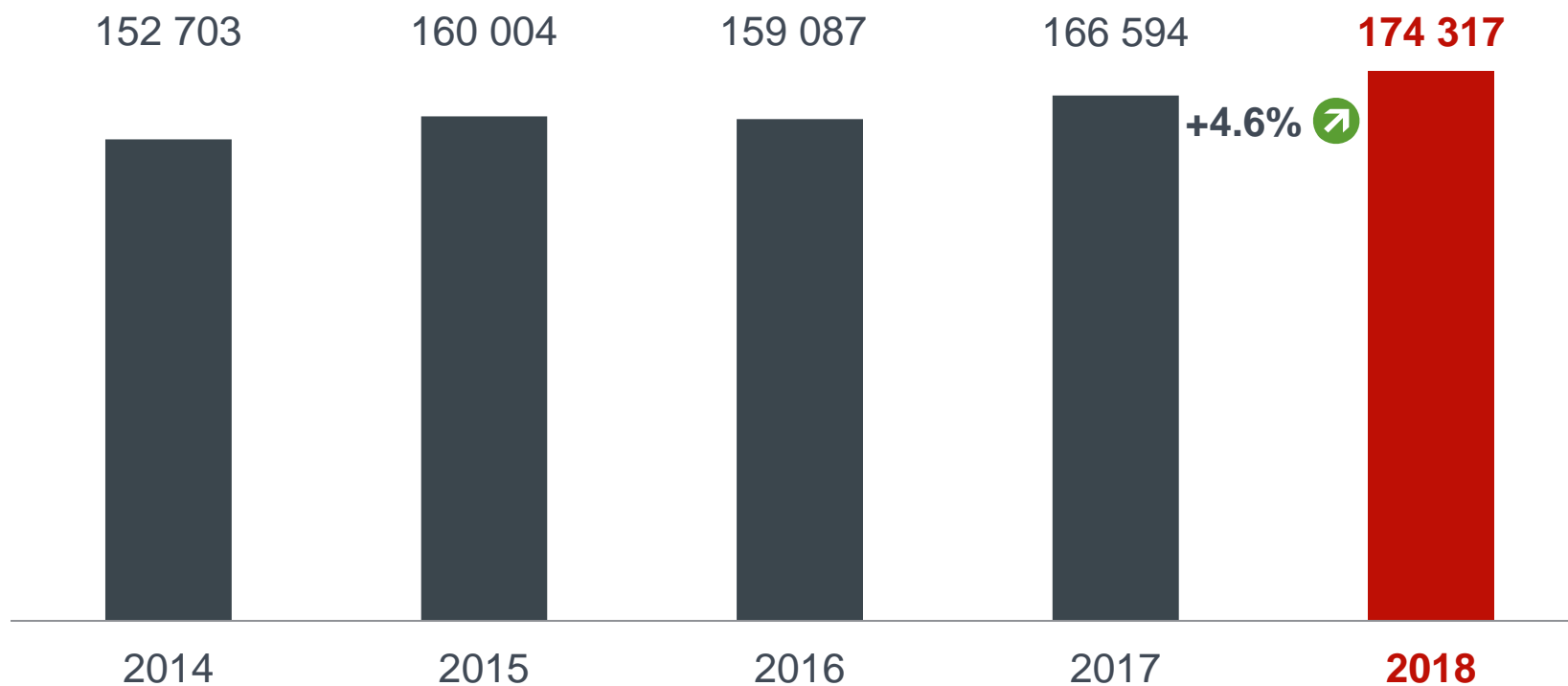
- is made up of representatives of the 38 member states
- supervises the activities of the Office
- appoints the President
- votes on the Office's budget
- supervises the activities of the Boards of Appeal Unit

European Patent Office

The executive body

- is responsible for searching, examining and publishing patent applications
- is responsible for holding opposition proceedings
- **appeal proceedings are the responsibility of the Boards of Appeal Unit**
- **the members of the Boards of Appeal are independent in their decision-making**

Total European patent applications in 2018

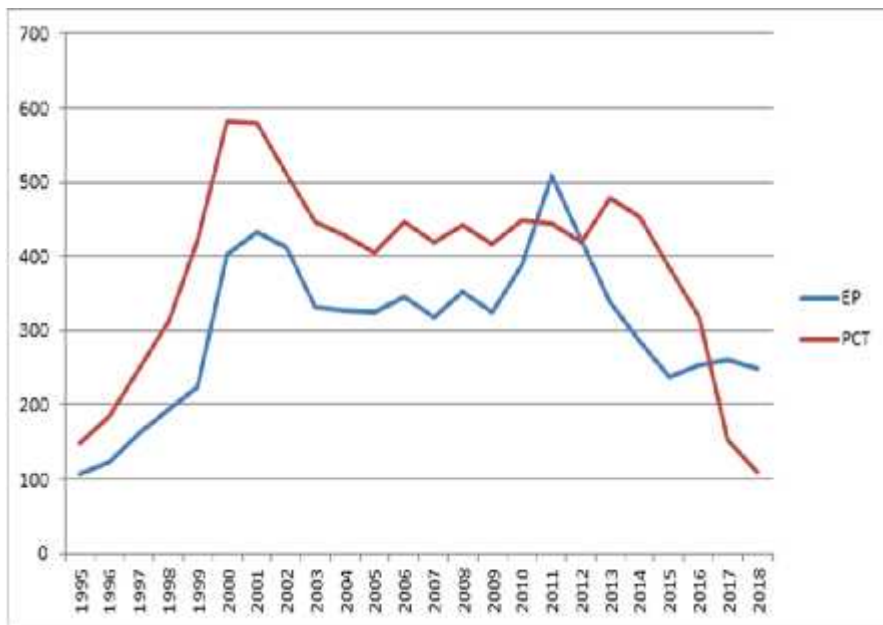


Source: EPO. Status: 21.1.2019.

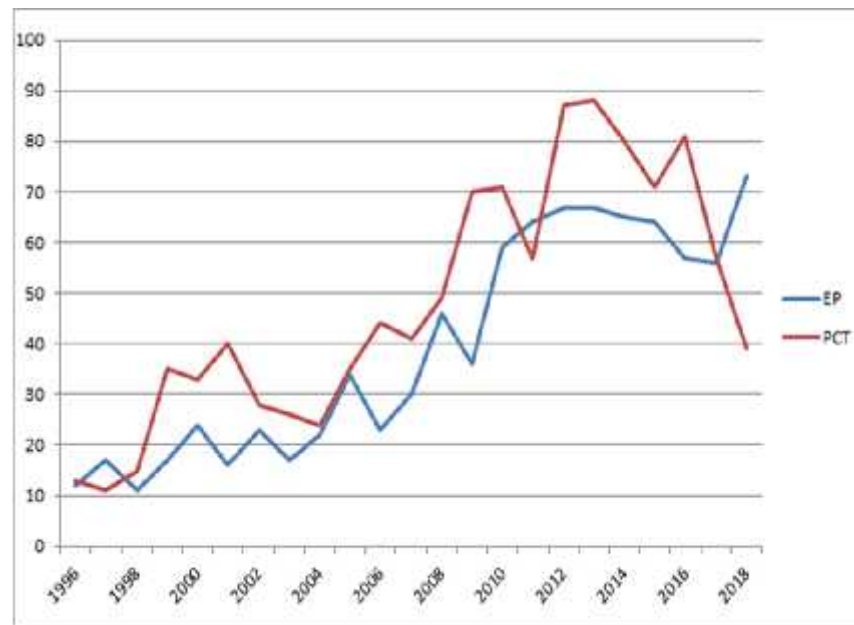
European patent applications include direct European applications and international (PCT) applications that entered the European phase during the reporting period.

Filing Trends – Plant technology

Transgenic plants

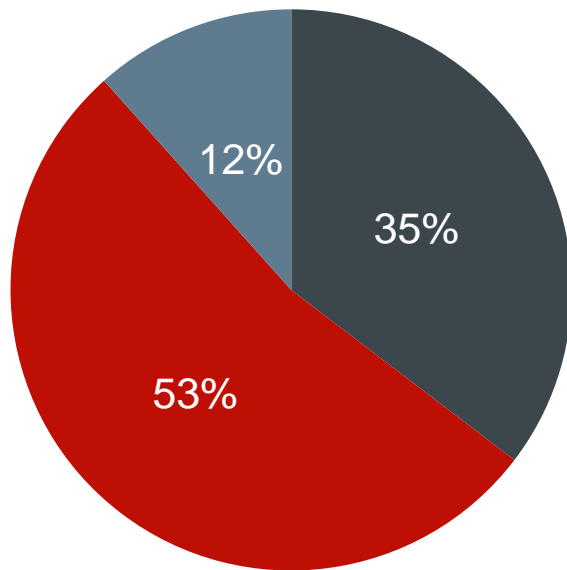


Conventional Plants and Plant Breeding technology



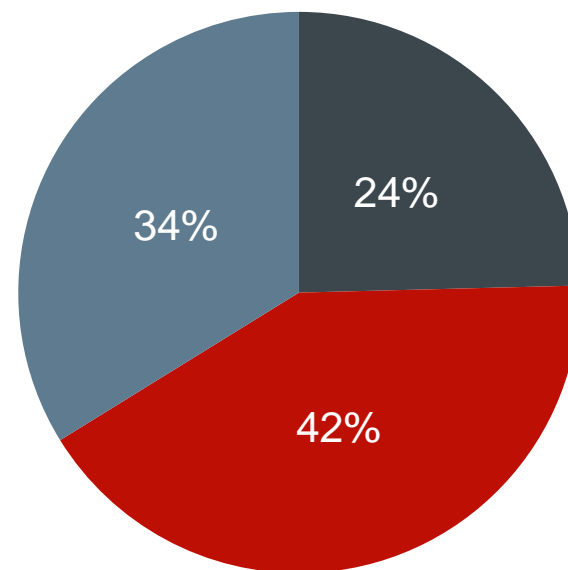
Outcome of the EP applications published 1995-2017

Transgenic plants



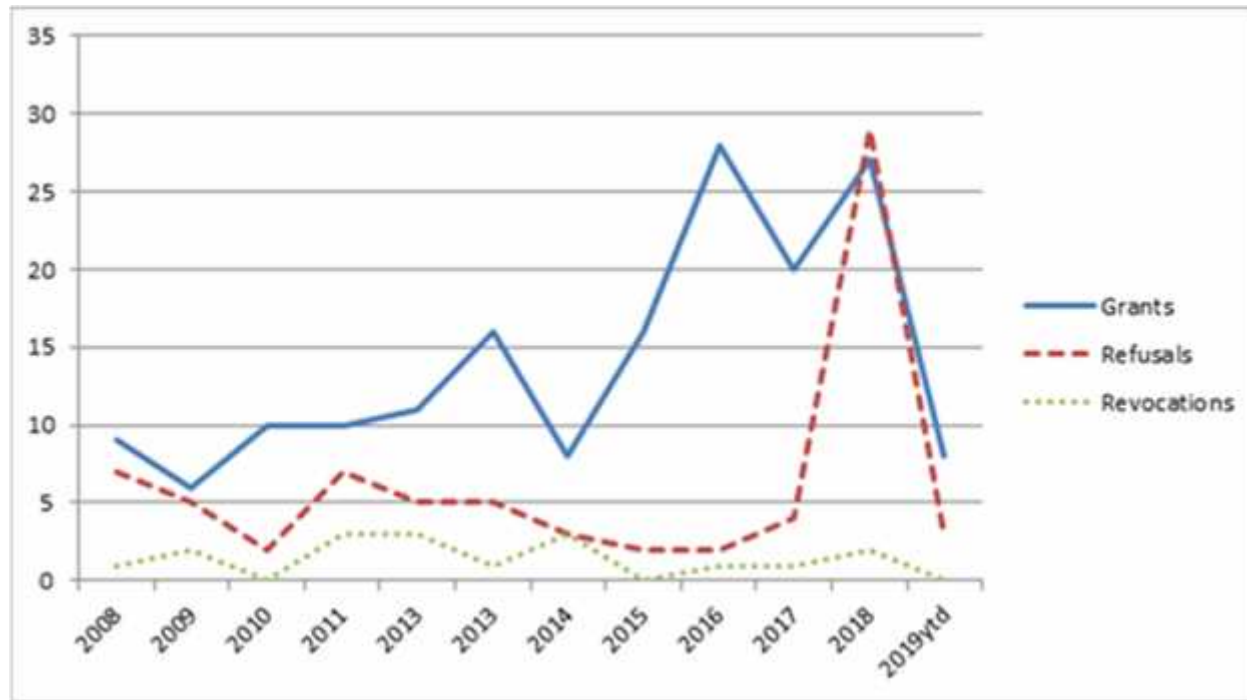
- Granted (amended or unamended)
- Withdrawn, refused or revoked
- Pending

Conventional plants and Plant Breeding technology



- Granted (amended or unamended)
- Withdrawn, refused or revoked
- Pending

Outcomes of the published patent applications Conventional plants



European Patent Convention

- Article 53(b) EPC:

“European patents shall not be granted in respect of [...] essentially biological processes for the production of plants or animals; [...].”

- Rule 28(2) EPC (since 1 July 2017 – CA/D 6/17):

“Under Article 53(b), European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process.”

- Guidelines for Examination at the EPO amended accordingly 2017 and 2018.

EU Law and National Patent Acts

- Article 4(1)(b) EU Biotechnology Directive (98/44/EC)

- Commission Notice of 8 November 2016 (2016/C 411/03):
“[...] the EU legislator’s intention [...] was to exclude from patentability products (plants/animals and plant/animal parts) that are obtained by means of essentially biological processes.”

- National Patent Acts:
 - Explicitly in line with COM Notice: AT (2016), DE (2013), FR (2016), IT (2005), NL (1995), RS (2018)
 - Legislative review ongoing: BE, PL, PT, HR
 - No explicit provision: Other Contracting States.

Board of Appeal decision T 1063/18

Conclusions of the Technical Board of Appeal on Rule 28(2) EPC:

- Rule 28(2) EPC is in conflict with Article 53(b) EPC as interpreted by the Enlarged Board of Appeal in decisions G 2/12 and G 2/13
- In view of Article 164(2) EPC, Article 53(b) EPC prevails over Rule 28(2) EPC
- Decision of the examining division based on Rule 28(2) EPC is set aside (r. 47) and case remitted for examination of other requirements.

Board of Appeal decision T 1063/18

Main reasoning of the Technical Board of Appeal:

- Amendment of Rule 28(2) EPC by the Administrative Council in 2017 has had no impact on Article 53(b) EPC
- Commission Notice has no legal authority
- No reason to diverge from decisions G 2/12 – G 2/13 and thus not justified to refer the question on the interpretation of Article 53(b) EPC to the Enlarged Board of Appeal.

Pending appeals

19 further appeals against decisions based on Rule 28(2) EPC currently pending:

<u>Appl. no.</u>	<u>Case no.</u>	<u>Board</u>
EP13708833.2	T 2734/18	3.3.04
EP05764293.6	T 2774/18	3.3.04
EP14702508.4	T 2796/18	3.3.04
EP05103316.5	T 2840/18	3.3.04
EP10770643.4	T 0281/19	3.3.04
EP13184376.5	T 0452/19	3.3.04
EP11186853.5	T 0959/19	3.3.04
EP10793168.5	Not yet assigned	Not yet assigned
EP06787541.9	T 0958/19	3.3.04
EP08849594.0	Not yet assigned	Not yet assigned
EP09771493.5	T 420/19	3.3.04
EP09801148.9	T 564/19	3.3.04
EP08425721.1	Not yet assigned	Not yet assigned
EP10010808.3	T 0838/19	3.3.04
EP03078990.3	T 819/16	3.3.04
EP05077885.1	T 112/19	3.3.04
EP09703613.1	T 1032/16	3.3.04
EP13757745	T 0972/19	3.3.04

Next steps

- The President of the European Patent Office has filed a referral to the Enlarged Board of Appeal
- The pending cases will be stayed (ca 250 patent applications and 4 oppositions) until the decision of the Enlarged Board of Appeal
- Additional action in the other pending appeal cases:
 - Any third party can file observations on the patentability explaining the interest of the public in a new referral to the Enlarged Board.
 - The President can file submissions on the importance of a decision of the Enlarged Board of Appeal in order to create legal certainty for the Office, its users and the public in general.
- The EPO endeavours to restore legal certainty in the interest of the users of the European patent system and the general public.

EPO Contracting States discuss next steps regarding the patentability of plants obtained by essentially biological processes

29 March 2019

In the 159th meeting of the Administrative Council, the representatives of the 38 EPO Contracting States together with the European Patent Office discussed the need to find a solution in the short term following the decision T 1063/18.

The Contracting States expressed their concerns with regard to the legal uncertainty caused by decision T 1063/18. The President of the EPO expressed his view that a President's referral of the case to the Enlarged Board of Appeal is justified and necessary. The aim is to obtain an opinion from the Enlarged Board of Appeal on the patentability of plants exclusively obtained by essentially biological processes, hereby considering recent legal developments (interpretations and statements of the European Commission, the EU Council, European Parliament and EPO's Administrative Council on the interpretation of the European Patent Convention and the EU Bio-Directive, all of them concluding that there should be no patentability in these cases).

The President's proposal received broad and overwhelming support from almost all Contracting States. President António Campinos announced that the EPO will proceed swiftly to submit the referral. The EPO endeavours to restore legal certainty fully and speedily in the interest of the users of the European patent system and the general public.

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