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No. 08 - December 02, 2020

TO PLANT OR NOT TO PLANT? THE EUROPEAN PATENT OFFICE ANSWERS

In a decision published in October 2020, the Enlarged Board of Appeal (EBoA) of the European Patent Office (EPO), i.e. the EPO's highest instance, held that European patents can be granted for plants, with one notable exception.

The European Patent Convention (EPC) establishes that European patents can be granted for plants, provided that the claims are not limited to a specific plant variety. In fact, specific plant varieties can be protected according to the provisions of the International Convention for the Protection of New Varieties of Plants.

The EPC also establishes that European patents can be granted for microbiological processes for manufacturing plants, and for the resulting plants.

By contrast, under the EPC European patents cannot be granted for essentially biological processes for the production of plants.

In a previous decision of 2015, the EBoA held that the non-patentability of essentially biological processes for the production of plants does not preclude the patentability of plants or plant material (such as a fruit).

In its new decision, the EBoA held that:

“...the exception to patentability of essentially biological processes for the production of plants ... has a negative effect on the allowability of product claims and product-by-process claims directed to plants [and] plant material ..., if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process.”

This is in line with the contents of Rule 28(2) of the EPC implementing regulation, according to which European patents cannot be granted in respect of plants or animals exclusively obtained by means of an essentially biological process.

Thus, the EPO's approach is that a European patent should be denied solely when the patent claims a plant which can be obtained only by an essentially biological process (i.e. a non-industrial or non-technical process, such as a conventional breeding method based on crossing and selection) or which can be defined only by process features that define an essentially biological process.

The new EBoA decision is important as it clarifies a point of law that has become highly relevant in recent years following groundbreaking technological developments in the field of genetically modified plants.