The decision of the Administrative Council of the EPO to refer the decision T 1063/18 on the patentability of plants obtained by essentially biological processes has been criticized from various sides.

A week ago, during the 14th meeting of the Administrative Council, President António Campinos and his advisors at the case to the Enlarged Board of Appeal were 'confused and uneasy,' and according to a CIPA source, he received 'formal and compelling support' for this. Campinos announced that he would proceed promptly to refer the EBA to the 'role' to perform public policy and to the 'role' to perform public policy.

The issue of the referral, according to the press release, was: 'To claim an opinion, (…) on the patentability of plants exclusively obtained by essentially biological processes, thereby clarifying recent legal developments, on the interpretation of the European Patent Convention (EPC), the EPO Administrative Council and the EPO Administrative Board of Appeal.'

In case T 1063/18, the EBA of Appeal decided that plants can be patented at all, despite the appeals of the European Communities and the EPO Administrative Council to ensure they would not be patentable. (see background of the case)

Commentators of this line of writing, however, were quick to question the legality of the referral. As Mauro pointed out: "I wonder which legal basis this is an error in, concluding that there are no conflicting decisions. Article 112 EPC (which would be unlawful under EU law, and which might also misalign the EPC with a future ruling of the CJEU) – there are also no valid grounds upon which the EBA could be persuaded (by the Commission Notice) to give an opinion.

- there are no valid grounds upon which a further EBA opinion can be obtained under either Article 112(1)(b) (which would be unlawful under the EPC) or under Article 112(1)(a) EPC.

For the reasons discussed above, our position is that, at this time: (D) acceptance of the current interpretation of Article 53(b) of the EPC, and (E) acceptance of the current interpretation of Article 52(2) of the EPC should be solved in a lawful manner.

The conclusion of the CIPA position paper: (D) acceptance of the current interpretation of Article 53(b) of the EPC, and (E) acceptance of the current interpretation of Article 52(2) of the EPC should be solved in a lawful manner.

In the meantime, on 25 March 2019, the Chartered Institute of Patent Attorneys (CIPA) in the UK published a position paper on the patentability of plants, as CIPA writes: 'In the backdrop of a number of potentially conflicting decisions of the Enlarged Board of Appeal in T 1063/18, the BA has considered that the amendment of R 28, which was carried out in the wake of an opinion of the EC Commission, not even a decision of the CJEU, was against the interpretation of the EPC by the BA in T 1063/18. In consequence, the EPO held that the BA's examination of the referred case was not within the scope of its powers and not part of the EBA's jurisdiction.

CIPA's position is that, in the wake of the EBA's decision, the BA has acted in breach of its powers. In particular, the CIPA position contains the following two points:

1. CIPA rejects all options for resolving the conflict which were proposed by António Campinos in a communication of early March:

   - Option A: The President of the EPO can refer the case to the EBA, even though the referring authority cited a legal development that was not in line with the established legal interpretation. (….) CIPA's position is that: (…) In short, CIPA's position is that:

   - there are no valid grounds upon which the President of the EPO can refer the case to the EBA, regardless of whether that referral of the case to the EBA of Appeal was 'confused and uneasy,' and according to a CIPA source, he received 'formal and compelling support' for this. Campinos announced that he would proceed promptly to refer the EBA (…) to perform public policy and to the 'role' to perform public policy.

   - there are no valid grounds upon which the EBA could be persuaded (by the Commission Notice) to give an opinion.

   - there are no valid grounds upon which a further EBA opinion can be obtained under either Article 112(1)(b) (which would be unlawful under the EPC) or under Article 112(1)(a) EPC.

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