

Plantum-20073874

Registry of the Enlarged Board of Appeal
European Patent Office
Erhardtstrasse 27
80298 München
GERMANY

EPO - Munich
22
28. Dez. 2007

Gouda, 21 December 2007

Re: Case number G 2/07

Dear Sir, Madam,

Plantum NL would like to express its opinion in regard to the questions that the Technical Board of Appeal has addressed to the enlarged Board of Appeal with interlocutory decision of 22 May 2007 in case T 83/05.

Plantum NL is the Dutch association for breeding, tissue culture, production and trade of seeds and young plants. Plantum NL represents the Dutch breeding companies in vegetable seeds, agricultural seeds, potatoes, ornamental seeds, asexually reproduced ornamental and fruit varieties and flower bulbs, thus covering the whole plant breeding spectrum. The Netherlands are one of the most important players worldwide in regard to plant breeding. For example, Dutch breeding companies are responsible for 37% of all plant breeders right applications at the European Plant Variety Right Office (the CPVO). The interpretation of the exclusion of Article 53 (b) EPC is therefore of great importance to our members.

Plantum NL is of the opinion that the answer to the first question should be answered by "no". A non-microbiological process for the production of plants which contains the steps of crossing and selecting plants does not escape the exclusion of Article 53(b) merely because it contains, as a further step or as part of any of the steps of crossing and selection, an additional feature of a technical nature.

As to the second question, Plantum NL would like to make the following comments: a non-microbiological process for the production of plants containing the steps of crossing and selecting constitutes a breeding process. The results of the breeding process, plant varieties, can be protected by plant breeder's rights. For Plantum NL the UPOV 1991 Convention is the most suitable existing sui general intellectual property system for the protection of plant varieties per se. It is a balanced system providing for the effective protection of plant varieties of all species on the one hand and access to genetic variability by the free use of protected commercialized plant varieties for further breeding work (the so-called "breeders' exception") on the other hand. For Plantum NL this breeders' exemption within the plant breeders right system is crucial for the ongoing development of the breeding industry. As a consequence, Plantum NL fully supports the exception to patentability for plant varieties and essentially biological processes for the production of plants as described in Article 53(b) of the EPC. In this respect Plantum NL is of the opinion that the use of technical features for crossing or selection purposes does not change the essentially biological nature of the process as the process still consists of crossing and / or selection. As set out by the Board of Appeal in the

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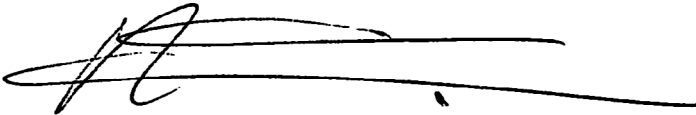
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referring decision T83/05 in paragraphs 40 - 42 the addition of a technical feature in a process based on selection and crossing does not bring this process out of the scope of the exclusion of article 53 (b) EPC. For instance the use of a microscope or a set of molecular markers as a tool for the selection process does not alter the fact that in both cases the fundamental basis of the process is selecting plants. Therefore the relevant criterion for distinguishing non-microbiological plant production processes excluded from patent protection under Article 53(b) EPC from non-excluded ones is whether a process consists comprises the steps of crossing or selection, regardless of the use of any technical features in such a process: A process of crossing or selection, whether technical features are added or not, does not escape the exclusion of article 53 (b) EPC. The technical features itself are of course patentable provided all patent requirements are met.

Plantum NL hopes that when interpreting the exclusion of Article 53 (b) EPC, the relation with the plant breeders right system in Europe will be taken into account.

Yours sincerely,



Aad van Elsen
managing director