

## Client Alert

---

April 1, 2015

# European Patent Office Finds Plants and Plant Products Patent-Eligible

By Matthew A. Chivvis and Michael R. Ward

On March 25, the Enlarged Board of Appeal (EBA) of the European Patent Office (EPO) handed a victory to those seeking to protect plant inventions in Europe. The EBA found that the essentially biological processes exclusion of Article 53(b) of the European Patent Convention (EPC) does not negatively affect the allowability of claims directed to plants or plant products.

The appeal concerned patents directed to the products of tomato and broccoli plants (i.e., tomato fruit and broccoli florets). At issue was whether the claims were patent-eligible given Article 53(b) EPC's exclusion from patentability of "essentially biological processes for the production of plants." The EPO's Technical Board of Appeal referred the issue to the EBA, so it could resolve the important legal question. In its analysis, the EBA found that — like other patent-eligibility exclusions — the language of Article 53(b) should be construed narrowly.

Accordingly, the EBA concluded that:

[C]onsidering its wording, context, original legislative purpose and legislative history, the process exclusion of Article 53(b) EPC does not extend directly to a product claim or a product-by-process claim directed to plants or plant material such as a fruit, or to plant parts other than a plant variety.

The EBA found this would be the case even if the only method available for generating the claimed subject matter were an essentially biological process. Its interpretation effectively limits the essentially biological processes exclusion to *process* (or *method*) claims for the production of plants, as opposed to claims directed to the end product of the process.

Although patent claims directed to individual plant varieties are still not patent-eligible in Europe, such new varieties can be protected using Plant Breeders' Rights under the UPOV Convention. However, the EBA's decision is likely to clear the way for plant "trait" patent claims: that is, claims directed to novel plant traits — such as heat/drought tolerance, resistance to bruising, and disease resistance, to name a few — in plants and plant products.

# Client Alert

---

**Contact:**

**Matthew A. Chivvis**

(415) 268-7307

[mchivvis@mofo.com](mailto:mchivvis@mofo.com)

**Michael R. Ward**

(415) 268-6237

[mward@mofo.com](mailto:mward@mofo.com)

**About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*