HGF PRESENTS

Patentability of AI Inventions at the EPO

How are AI inventions assessed at the EPO?

The EPO assess AI inventions using a two-hurdle approach:

1. Does the claimed AI invention as a whole fall within a category of excluded subject matter?
2. Assessment of inventive step. Only "technical" features can contribute to an inventive step

How can we satisfy the two hurdles?

THE FIRST HURDLE

AI algorithms, claimed in isolation, are treated as a mathematical method and will therefore be excluded from patentability.

To avoid being excluded, an algorithm should be claimed as being implemented using technical means. For example, an AI algorithm should be claimed as being implemented on a computing device. This will be sufficient to overcome the first hurdle.

To satisfy the first hurdle – claim an AI invention as being computer-implemented.

THE SECOND HURDLE

To satisfy the second hurdle – consider the purpose of the invention. Does the AI algorithm help to improve a technical process?

Assessment of inventive step is performed using the "problem-solution" approach which starts by determining the technical effect achieved over the closest single piece of prior art.

Features of AI algorithms are by default considered as mathematical and cannot establish an inventive step in isolation.

However, if the features of the AI algorithm interact with other features to contribute to achieving an overall technical effect, then these features can establish an inventive step.

Other considerations

- Applications of AI to solve purely business or administrative problems, and to process natural language may not be considered to solve a technical problem and thus may face objections at the EPO.
- The EPO apply very strict criteria when assessing basis for amendments made after filing. It is therefore important to consider the EPO's examination at the drafting stage, and include support for amendments which may be needed to overcome both hurdles of the two hurdle approach.