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NOTE

From: Presidency
To: Council

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Subject: Patents and Plant Breeders' Rights
- Information from the Presidency

This issue will be treated under Any Other Business at the meeting of the Competitiveness Council on 29 February 2016.

On 9 November 2015, the President of the "Agriculture and Fisheries" (AGRIFISH) Council sent a letter to the President of the "Competitiveness" (COMPET) Council about the outcome of an exchange of views held at the AGRIFISH Council on 22 October 2015, regarding the impact on breeder's rights of a recent decision of the Enlarged Board of Appeal of the European Patent Office on the patentability of plant traits¹. In his letter, the President of the AGRIFISH Council asked the President of the COMPET Council to inform the COMPET Council of the conclusions of the lunch debate held in the AGRIFISH Council on 22 October 2015, and to address this topic in the COMPET Council.

¹ Document 14661/15.

In its decision of 25 March 2015, the Enlarged Board of Appeal (EBoA) of the European Patent Office (case G0002/12 on tomatoes and G0002/13 on broccoli) decided that under the European Patent Convention and the EU Biotech Directive 98/44/EU, it is possible to patent plants and plant traits, not only resulting from genetic modification (which was already the case), but also from essentially biological processes such as conventional breeding. During the lunch discussion of the AGRIFISH Council, ministers expressed serious concerns about this decision and expressed their worries about the possible consequence, not only for the plant variety rights system and the creation of new plant varieties, but also for food production in general.

The European Parliament has also expressed its concerns regarding the decision of the Enlarged Board of Appeal of the European Patent Office in a resolution adopted on 17 December 2015 (see Annex to this Note). In this resolution, the European Parliament calls on the European Commission and the Member States to safeguard guaranteed access to and the use of material obtained from essentially biological processes for plant breeding. The European Parliament also calls on the European Commission to clarify the scope and interpretation of Directive 98/44/EC on biotechnological inventions, in order to ensure legal clarity regarding the prohibition of the patentability of products obtained from essentially biological processes.

The Presidency would like to follow-up on the request made by the AGRIFISH Council and the European Parliament to address this issue in the COMPET Council. Therefore, the Presidency will, as an Any Other Business Point, 1. sketch the current situation of the interplay between patents and plant breeders' rights and the effects of the recent decision by the Enlarged Board of Appeal of the European Patent Office, and 2. announce the symposium that the Presidency together with the Commission will organise this spring to discuss the balance between patents and plant breeders' rights and to explore possible ways forward.



TEXTS ADOPTED

Provisional edition

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Patents and plant breeders' rights

European Parliament resolution of 17 December 2015 on patents and plant breeders' rights (2015/2981(RSP))

The European Parliament,

- having regard to its resolution of 10 May 2012 on the patenting of essential biological processes¹,
- having regard to Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions², in particular Article 4 thereof, which states that products obtained from essentially biological processes shall not be patentable,
- having regard to the European Patent Convention (EPC) of 5 October 1973, in particular Article 53(b) thereof,
- having regard to the decision of the Enlarged Board of Appeal of the European Patent Office (EPO) of 25 March 2015 in Cases G2/12 (on tomatoes) and G2/13 (on broccoli),
- having regard to the Implementing Regulations to the EPC, in particular Rule 26 thereof, which states that for European patent applications and patents concerning biotechnological inventions Directive 98/44/EC is to be used as a supplementary means of interpretation,
- having regard to the International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised at Geneva on 10 November 1972, 23 October 1978 and 19 March 1991 (hereinafter referred to as the 'UPOV Convention 1991'),
- having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights³ (hereinafter referred to as 'Council Regulation (EC) No 2100/94'), in particular Article 15(c) and (d) thereof,

¹ OJ C 261 E, 10.9.2013, p. 31.

² OJ L 213, 30.7.1998, p. 13.

³ OJ L 227, 1.9.1994, p. 1.

- having regard to the Council Agreement on a Unified Patent Court of 19 February 2013¹ (hereinafter referred to as ‘the UPC Agreement’), in particular Article 27(c) thereof,
 - having regard to the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS), in particular Article 27(3) thereof, which states that members may exclude essentially biological processes from patentability,
 - having regard to Rules 128(5) and 123(4) of its Rules of Procedure,
- A. whereas access to biological plant material encompassing plant traits is absolutely necessary for boosting innovation and the development of new varieties in order to guarantee global food security, tackle climate change and prevent monopolies within the breeding sector, while at the same time providing more opportunities for SMEs;
 - B. whereas intellectual property rights are important in order to safeguard economic incentives for developing new plant products and to deliver competitiveness;
 - C. whereas patents on products derived from conventional breeding or on genetic material necessary for conventional breeding may undermine the exclusion established in Article 53(b) of the European Patent Convention and in Article 4 of Directive 98/44/EC;
 - D. whereas products obtained from essentially biological processes, such as plants, seeds, native traits and genes, should be excluded from patentability;
 - E. whereas plant breeding is an innovative process that has been practised by farmers and farming communities since the birth of agriculture, and whereas unpatented varieties and breeding methods are important for genetic diversity;
 - F. whereas Directive 98/44/EC legislates for biotechnological inventions, in particular genetic engineering, but whereas – as indicated in recitals 52 and 53 thereof – it was not the legislator’s intention to allow the patentability of products obtained from essentially biological processes within the scope of the directive;
 - G. whereas numerous applications concerning products obtained from essentially biological processes are currently awaiting a decision by the European Patent Office (EPO), and whereas there is therefore an urgent need to clarify the scope and interpretation of Directive 98/44/EC, in particular Article 4 thereof;
 - H. whereas Directive 98/44/EC implicitly acknowledges the freedom to use material falling within the scope of a patent for experimental purposes, as follows from Articles 12(3)(b) and 13(3)(b);
 - I. whereas the exemption for breeders provided for in Article 27(c) of the UPC Agreement will only be applicable to patents granted under the unitary patent system and will not automatically apply to national patents within the EU, which will result in a non-harmonised situation as regards the possibility of breeding with material obtained from essentially biological processes falling under the scope of a patent;

¹ OJ C 175, 20.6.2013, p. 1.

- J. whereas it is a fundamental principle of the international system of plant variety rights based on the UPOV Convention 1991, and of the EU system based on Council Regulation (EC) No 2100/94, that the holder of a plant variety right cannot prevent others from using the protected plant for further breeding activities;
1. Expresses its concern that the recent decision of the Enlarged Board of Appeal of the EPO on Cases G2/12 (tomatoes) and G2/13 (broccoli) could lead to more patents being granted by the EPO in respect of natural traits introduced into new varieties by means of essentially biological processes such as crossing and selection;
 2. Calls on the Commission, as a matter of urgency, to clarify the scope and interpretation of Directive 98/44/EC, and in particular Articles 4, 12(3)(b) and 13(3)(b) thereof, in order to ensure legal clarity regarding the prohibition of the patentability of products obtained from essentially biological processes, and to clarify that breeding with biological material falling under the scope of a patent is permitted;
 3. Calls on the Commission to communicate its forthcoming clarification regarding the patentability of products obtained from essentially biological processes to the EPO so that it can be used as a supplementary means of interpretation;
 4. Calls on the Commission and the Member States to ensure that the Union will safeguard guaranteed access to, and use of, material obtained from essentially biological processes for plant breeding, in order – where applicable – not to interfere with practices guaranteeing breeders' exemption;
 5. Calls on the Commission to pursue the exclusion from patentability of essentially biological processes in the context of multilateral patent law harmonisation discussions;
 6. Calls on the Commission to report on the development and implications of patent law in the field of biotechnology and genetic engineering, as required in Article 16(c) of Directive 98/44/EC and as requested by Parliament in its resolution of 10 May 2012 on the patenting of essential biological processes;
 7. Instructs its President to forward this resolution to the Council, the Commission and the European Patent Office.
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