



TEXTS ADOPTED

P9_TA(2019)0020

Patentability of plants and essentially biological processes

European Parliament resolution of 19 September 2019 on the patentability of plants and essentially biological processes (2019/2800(RSP))

The European Parliament,

- having regard to its resolution of 10 May 2012 on the patenting of essential biological processes¹,
- having regard to its resolution of 17 December 2015 on patents and plant breeders' rights²,
- 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 inventions³, 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 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 Commission Notice of 8 November 2016 on certain articles of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions⁴,
- having regard to the Council Conclusions of 1 March 2017 on the Commission Notice on certain Articles of Directive 98/44/EC of the European Parliament and of the Council

¹ OJ C 261 E, 10.9.2013, p. 31.

² OJ C 399, 24.11.2017, p. 188.

³ OJ L 213, 30.7.1998, p. 13.

⁴ OJ C 411, 8.11.2016, p. 3.

- on the legal protection of biotechnological inventions¹,
- having regard to the decision of the Administrative Council of the European Patent Organisation of 29 June 2017 amending Rules 27 and 28 of the Implementing Regulations to the EPC (CA/D 6/17)²,
 - having regard to the referral of several questions pertaining to decision T 1063/18 of Technical Board of Appeal 3.3.04 of the European Patent Office (EPO) of 5 December 2018 to the Enlarged Board of Appeal of the EPO by the President of the EPO³,
 - having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights⁴ (hereinafter referred to as ‘Council Regulation (EC) No 2100/94’), in particular Article 15(c) thereof, providing for the breeders’ exemption,
 - 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,
 - having regard to Rules 136(5) and 132(4) of its Rules of Procedure,
- A. whereas free access to plant material (including plant traits) is absolutely essential for the innovative capacity of the European plant-breeding and farming sectors, their competitiveness and the development of new plant 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 and farmers;
 - B. whereas any restriction or attempt to hamper access to genetic resources may lead to an excessive market concentration in the field of plant breeding, to the detriment of market competition, consumers and the European internal market and food security;
 - C. whereas patents on products derived from essentially biological processes or on genetic material necessary for conventional breeding undermine the exclusion established in Article 53(b) of the EPC and in Article 4 of Directive 98/44/EC;
 - D. whereas products emanating from essentially biological processes, such as plants, seeds, native traits and genes, must be excluded from patentability;
 - E. whereas plant and animal breeding is a process that has been practised by farmers and farming communities since the birth of agriculture, and whereas the unrestricted use of varieties and breeding methods is important for genetic diversity;
 - F. whereas Directive 98/44/EC legislates for biotechnological inventions, in particular genetic engineering;
 - G. whereas in its Notice of 8 November 2016, the Commission concludes that the EU legislator’s intention when adopting Directive 98/44/EC was to exclude from patentability products obtained through essentially biological processes;

¹ OJ C 65, 1.3.2017, p. 2.

² Official Journal of the EPO, A56, 31.7.2017.

³ Official Journal of the EPO, A52, 31.5.2019.

⁴ OJ L 227, 1.9.1994, p. 1.

- H. whereas the Council in its conclusions of 3 February 2017 welcomes the Commission Notice; whereas all EU legislators involved have made explicitly clear that the EU legislator's intention when adopting Directive 98/44/EC was to exclude from patentability products derived from essentially biological processes;
- I. whereas on 29 June 2017 the Administrative Council of the EPO amended Rules 27 and 28 of the Implementing Regulations to the EPC¹, and determined that patents on plants and animals resulting from essentially biological processes are prohibited;
- J. whereas the 38 contracting states to the EPC have confirmed that their national law and practice are aligned to effectively exclude products obtained from essentially biological processes from patentability;
- K. whereas the contracting states to the EPC have expressed their concerns with regard to the legal uncertainty caused by decision T 1063/18² of 5 December 2018 of the Technical Board of Appeal 3.3.04;
- L. whereas this decision was referred to the Enlarged Board of Appeal of the EPO by the President of the EPO during the 159th meeting of the Administrative Council in March 2019;
- M. whereas numerous applications concerning products obtained from essentially biological processes are awaiting a decision by the EPO, leaving applicants, as well as all those who will be affected by these patents, in dire need of legal certainty regarding the validity of Rule 28(2);
- N. whereas it is a fundamental principle of the international system of plant variety rights based on the 1991 UPOV Convention, 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 variety for further breeding activities;
1. Expresses its profound concerns regarding the decision of the Technical Board of Appeal 3.3.04 of the EPO of 5 December 2018 (T 1063/18), which creates a situation of legal uncertainty;
 2. Reiterates that plant and animal varieties, including parts and traits, essentially biological processes as well as products emanating from such processes, shall not in any way be patentable, pursuant to Directive 98/44/EC and the EU legislator's intention;
 3. Considers that internal decision-making rules of the EPO must not undermine democratic political control of European patent law and its interpretation and the legislator's intent as clarified by the Commission Notice of 8 November 2016 on certain articles of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions;
 4. Considers that any attempt to patent products derived from conventional breeding, including crossing and selection, or on genetic material necessary for conventional breeding undermines the exclusion established in Article 53(b) of the EPC and in Article 4 of Directive 98/44/EC;

¹ Official Journal of the EPO, A56, 31.7.2017 (CA/D 6/17).

² <https://www.epo.org/news-issues/news/2019/20190329.html>

5. Calls on the Commission and the Member States to do everything in their power to obtain legal clarity regarding the prohibition of the patentability of products obtained from essentially biological processes by the EPO;
6. Welcomes the Commission Notice of 8 November 2016 clarifying that the EU legislator's intention when adopting Directive 98/44/EC was to exclude from patentability products that are obtained through essentially biological processes; welcomes the alignment by contracting states of the EPC of their law and practice, and the decision of the Administrative Council of the EPO to clarify the scope and meaning of Article 53(b) EPC regarding exceptions to patentability;
7. Calls on the Commission and the Member States to protect the innovative capacity of the European plant-breeding and farming sectors and the general public interest and to ensure that the Union will effectively 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 farmers' rights and the breeders' exemption;
8. Urges the Commission, therefore, to submit an *amicus curiae* before 1 October 2019 with the Enlarged Board of Appeal of the EPO, reinforcing the conclusions laid down in its Notice of 2016 that the EU legislator's intention when adopting Directive 98/44/EC was to exclude from patentability products that are obtained through essentially biological processes, and to attach this resolution to its statement;
9. Calls on the Enlarged Board of Appeal of the EPO to restore, without delay, legal certainty by affirmatively answering the questions that have been referred to it by the President of the EPO in the interest of breeders, farmers and the public;
10. Calls on the Commission to engage actively with third countries when negotiating trade and partnership agreements with a view to ensuring the exclusion of essentially biological processes and the products thereof from patentability;
11. Calls on the Commission to pursue the exclusion from patentability of essentially biological processes and their products in the context of discussions on the harmonisation of multilateral patent law;
12. Calls on the Commission to report on the development and the implications of patent law in the field of biotechnology and genetic engineering, as required under Article 16(c) of Directive 98/44/EC and as requested by Parliament in its resolution of 17 December 2015 on patents and plant breeders' rights, and to further analyse issues related to the scope of protection of patents;
13. Instructs its President to forward this resolution to the Commission for its inclusion in a written statement to the Enlarged Board of Appeal of the EPO by 1 October 2019, and to the Council.