

Observations

In view of the COREPER discussions on the Commission proposal for a Community Patent

ESA_03.0296.1

Brussels, November 2003

Following the adoption of a common political approach by the Council on 03.March 2003, the Working Party on Intellectual Property (Patents) has worked intensively on the text of the proposal for a Regulation on the Community Patent.

The Permanent Representatives Committee will continue its examination with a view of enabling the Council to reach political agreement on the Regulation in November 2003.

This situation leads ESA, the representative professional association of the European seed industry, to address the following points for further consideration.

Plant breeding is a highly innovative activity and therefore intellectual property is of utmost interest to the Members of ESA. This is specifically valid for all those EU regulatory and legislative texts dealing with the protection of plants and plant varieties, e.g. the Regulation on Community Plant Variety Protection, the Directive on the Protection of Biotechnological Inventions and the proposed Community Patent.

In order to achieve consistency between these different legislative texts covering ESA's field of activities, ESA is particularly concerned about two areas - that of the Breeders' Exception and that of the Compulsory Cross Licences.

Article 9: Limitations as to the effects of the Community Patent

ESA notes with great sympathy the footnote Nr.11 in Council Document 12219/03, i.e. the request of the Netherlands for an exception corresponding to Art.15(c) of Regulation 2100/94.

ESA supports this request and points another time the respective Position Paper ESA_03.0182.3.

For clarification and consistency, the wording of Art.9 (g), second line, English version: "reproductive vegetable material" needs to be changed to "reproductive plant material".

Article 21: Grant of Compulsory Licences

Article 21(2) provides for the legal base to grant compulsory licences to patent holders or to holders of plant variety rights, who cannot use their respective right without infringing a Community Patent.

Prerequisite for this is, that the invention or the new plant variety involves "an important technical advance of considerable economic significance" in relation to the first invention claimed.

ESA understands that this provision is provided with the same intention that has led to the respective formulation "significant technical progress of considerable economic interest" in Article 12 of the Directive 98/44/EC on the legal protection of biotechnological inventions.

It is of utmost importance that consistency between the two texts is assured.

ESA therefore urges the Council to avoid a situation, where different preconditions are set out covering the same case by using the exact same formulation in the Community Patent as in Directive 98/44/EC.

This would not only assure legal certainty where the transposition of the Community Directive 98/44/EC in national law already has taken place but also where this transposition still has to be accomplished, i.e. in the case of the Community Plant Variety Regulation.

In this respect, ESA points out the contradiction between Article 21(2) of the Proposal for a Community Patent as concerns the designation of the Community Patent Court to grant the compulsory licence in the case of the cross licence, and Article 12(4) of Directive 98/44/EC and Article 2(d) of Regulation 2100/94/EC, where for the granting of a compulsory licence in the case of a plant variety right the exclusive responsibility of the Community Plant Variety Office is stated.

ESA strongly requests the Council to take these consideration in due account when finalizing the important proposal for a Community Patent.