NO PATENTS ON SEEDS!

The background

In March 2019, the President of the European Patent Office (EPO) raised two questions at the Enlarged Board of Appeal of the EPO. The questions concerned patents on plants and animals derived from conventional breeding, and were a response to an absurd and ongoing situation created several years ago:

(1) In 2015, the Enlarged Board of Appeal took a decision to allow patents on plants and animals derived from processes of "essentially biological" breeding. This decision was taken even though patents on such conventional breeding processes were prohibited according to Art 53 (b) of the European Patent Convention (EPC). Consequently, there was a danger that the existing legal prohibition would be completely undermined.

(2) The decision of the Enlarged Board of Appeal triggered a strong response from the wider political arena: after public protests, the EU Parliament, the EU Commission and the EU Member States all declared that this decision went against the intention of the legislator. Consequently, the Administrative Council, which represents the 38 contracting states of the EPO and has responsibility for the correct interpretation of the EPC, made a further decision: in 2017, a new Rule 28 (2) for the interpretation of the EPC was agreed. This says that patents on plants and animals derived from conventional breeding are prohibited.

(3) However, in 2018, a technical board at the EPO declared that the new rule was not binding because the Enlarged Board of Appeal's decision would overrule the power of the Administrative Council. In effect, this statement calls into question the power of the democratically legitimized power of the 38 European governments that are, according to the EPC, entitled to take decisions on the interpretation of patent law.

The demand from *No Patents on Seeds!*

All this has led to a situation of legal and institutional confusion. Therefore, the organizations supporting the *No Patents on Seeds!* coalition are demanding the EPO halt all further patent applications concerning plants and animals; in addition, the European governments need to take further initiatives to close the current loopholes in patent law. Any patents on the breeding of plants and animals not derived from methods of genetic engineering should be completely prohibited. This demand is based on the position of the EU institutions which states that the insertion of genetic material into the cells might be considered a technical process, while other more conventional methods are not patentable.

The current situation: Two questions to be answered

Many of the pending patent applications on plants and animals were halted by a decision taken by the President of the EPO in 2019. However, no further political action was taken. Instead, the President of the EPO asked the Enlarged Board of Appeal for its opinion. In essence, the President asked the Enlarged Board whether the Administrative Council had the power to take a decision on the interpretation of patent law. Secondly, the president asked whether the interpretation of existing patent law as decided by the Administrative Council is in line with current law.

No Patents on Seeds! will file a detailed legal argumentation on these questions. In short, we came to the conclusion that both questions should be answered with YES. We also said that the decision taken by the Administrative Council should be clarified to be fully in line with the intention of the legislator. In particular, mutations resulting from random processes and used by conventional breeders since the mid-twentieth century should not be considered technical inventions in the sense of European patent law.

We are also asking the interested public to take a position. For this purpose, we have drafted a short letter that can be signed online or sent via post to *No Patents on Seeds!* before 25 September. We will hand all these over to the EPO until 1 October 2019, which is the deadline for public comments to be made.

The questions asked by the president of the EPO

- Having regard to Article 164 (2) EPC, can the meaning and scope of Article 53 EPC be clarified in the Implementing Regulations to the EPC without this clarification being a priori limited by the interpretation of said Article given in an earlier decision of the Boards of Appeal or the Enlarged Board of Appeal?
- If the answer to question 1 is yes, is the exclusion from patentability of plants and animals exclusively obtained by means of an essentially biological process pursuant to Rule 28 (2) EPC in conformity with Article 53(b) EPC which neither explicitly excludes nor explicitly allows said subject-matter?

Link to the document on EPO website

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