

This decision is based on the **following documents**:

Main Request

Description, Paragraphs

1-91 of the patent specification

Claims, Numbers

1-7 filed in electronic form on 13-12-2016

Drawings, Figures

1-8 of the patent specification

Auxiliary Request 1

idem, but

Claims, Numbers

1-6 filed in electronic form on 13-12-2016

1 Facts and Submissions

- 1.1 The European patent EP 1 597 965 B1, Application number 05 103 316.5, entitled "Broccoli type adapted for ease of harvest" (hereinafter: the patent) was granted on 12 June 2013 with 7 claims for the designated Contracting States AT, BE, BG, CH, CY, CZ, DE, DK, EE, ES, FI, FR, GB, GR, HU, IE, IS, IT, LI, LT, LU, MC, NL, PL, PT, RO, SE, SI, SK and TR. Seminis Vegetable Seeds (US) is the Proprietor.

- 1.2 A first, joint opposition was filed with the letter of 11 March 2014. The Opponents (O1), Christoph Then et al., represented by Christoph Then (DE), opposed the patent EP 1 597 965 B1 in its whole extent under Article 100(a) EPC in conjunction with Articles 53(b) and 56 EPC. The admissibility of this joint opposition has been disputed by the Proprietor.
- 1.3 A second opposition was filed in electronic form on 12 March 2014. The Opponent (O2), Syngenta Crop Protection (CH), represented by John Slaven of Syngenta (CH), opposed the patent EP 1 597 965 B1 in its whole extent under Article 100(a) EPC in conjunction with Articles 53(b), 54 and 56 EPC, Articles 100(b) and 100(c) EPC. No objections concerning the admissibility of this opposition have been raised.
- 1.4 In response to the opposition, the Proprietor, represented by Albrecht von Menges of Uexküll & Stolberg (DE), submitted observations with the submission dated 13 December 2016. Maintenance of the patent on the basis of a new main request or on the basis of the auxiliary request, both filed 13 December 2016, was requested.
- 1.5 The present proceedings were stayed following the Notice from the European Patent Office dated 24 November 2016 concerning the staying of proceedings due to the Commission Notice on certain articles of the Directive 98/44/EC on the legal protection of biotechnological inventions (cf. Notice from the EPO dated 24 November 2016, OJ EPO 2016, A104).
- 1.6 On 1 July 2017 new Rule 28(2) EPC entered into force. According to the "Notice from the European Patent Office dated 3 July 2017" the proceedings were resumed (cf. OJ EPO 2017, A62).
- 1.7 All parties had requested oral proceedings; therefore oral proceedings were appointed. Summons to oral proceedings to take place on the 19th of September 2018 were sent out in January 2018. These summons were accompanied by the Opposition Division's preliminary and non-binding opinion. In particular, it was noted that the presently claimed subject matter falls under the exclusion from patentability pursuant to Rule 28(2) EPC and that there did not seem to be any possibility to overcome this exclusion by

amendment. Apart from a comment concerning the requirements of Rule 31(1)(d) EPC, the annex to the summons to oral proceedings was limited to the discussion of the requirements of Article 53(b) EPC.

- 1.8 Opponent 1 replied to the summons to oral proceedings with the submission dated 18 July 2018 announcing the persons attending the oral proceedings.
- 1.9 The Proprietor replied with the submissions dated 19 July 2018. The Proprietor withdrew the request for oral proceedings. The Proprietor furthermore requested that in case of a revocation of the patent the decision of the Opposition Division should "be limited to the assessment whether the subject matter claimed is in compliance with Article 53(b) EPC in view of new Rule 28(2) EPC".
- 1.10 Opponent 2 replied to the summons to oral proceedings with the submission dated 24 July 2018. Opponent 2 indicated that they will not attend the oral proceedings and requested "a decision to be taken on the file as it stands".
- 1.11 On account of (i) the Proprietor's withdrawal of the request for oral proceedings, together with (ii) the fact that oral proceedings were requested by Opponent 1 only as auxiliary request for the case the Opposition Division did not revoke the patent in its entirety and of (iii) the request by Opponent 2 that a decision be taken on the file as it stands, on 28.08.2018 oral proceedings were cancelled and proceedings were continued in writing.

2 **Reasons for the Decision**

- 2.1 Claim 1 of the main request reads as follows:

"A broccoli plant comprising an exerted head having a crown higher than the leaf canopy and having a weight of at least about 200 grams when planted at a density of 40,000 plants per hectare, characterized in that within at least 25 centimeters of the crown said plant produces no leaves or petioles having a surface area each greater than about 30 square centimeters, wherein the plant is a progeny of seed of an inbred broccoli plant designated 970195, a sample of such seed having been deposited as NCIMB 41216."

Claim 1 of the main request differs from claim 1 as granted in a correction of the depository institution (NCIMB instead of NCJMb).

2.2 Claim 1 of the auxiliary request differs only by the reference to "A *hybrid broccoli plant comprising ...*".

2.3 **Admissibility of the oppositions**

2.3.1 The Proprietor has disputed the admissibility of the joint opposition by C. Then et al. (O1). Due to the cancellation of the oral proceedings, the admissibility of this joint opposition has not been discussed in any detail. Therefore, the Opposition Division refrains from deciding on the admissibility of this joint opposition.

2.3.2 However, the admissibility of the opposition filed by Syngenta (O2) has not been questioned.

The opposition by Syngenta (O2) is admissible, since it fulfils the requirements of Article 99(1) and Rule 76 EPC. Thus, at least one admissible opposition has been filed. Syngenta has raised an objection under Article 100(a) EPC in conjunction with Article 53(b) EPC.

3 **Article 100(a) EPC and Article 53(b) EPC**

Both Opponents have raised objections under Article 53(b) EPC.

The Proprietor argued that the presently claimed plants would not fall under the exclusion of Article 53(b) EPC.

The Opposition Division had indicated in its preliminary opinion accompanying the summons to oral proceedings that it considered the claimed plants to be excluded from patentability (cf. paragraph 1.7, *supra*).

In view of the Proprietor's request (cf. paragraph 1.9, *supra*) and in order to respect the right to be heard of the Parties, the present decision is limited to assessing the compliance with Article 53(b) EPC. None of the Parties has submitted any substantive arguments concerning this issue in response to the summons.

The Administrative Council of the EPO decided on 29 June 2017 to amend Rules 27 and 28 EPC to exclude from patentability plants and animals exclusively obtained by an essentially biological breeding process. The

decision of the Administrative Council entered into force on 1 July 2017. Amended Rules 27 and 28 EPC apply to European patent applications filed on or after this date, as well as to European patent applications and European patents pending at that time (cf. OJ EPO 2017, A56, Decision of the Administrative of 29 June 2017 amending Rules 27 and 28 of the Implementing Regulations to the European Patent Convention, *CA/D 6/17*). The Examining and Opposition Divisions are bound in their assessments by the EPC legal provisions in force, including amended Implementing Regulations such as Rule 28(2) EPC.

The Opposition Division arrived at the conclusion that in the present case the claimed *Broccoli* plants can only be obtained by an essentially biological process comprising crossing and selection steps (cf. examples 1 and 2, figure 3 of the patent). Examples 1 and 2 describe in great detail the *Broccoli* lines used in the breeding scheme (cf. figure 3) leading to the presently claimed plants. Nothing more than crossing and selection steps were carried out (cf. examples 1, 2). The method did not comprise any technical steps, such as e. g. chemical mutagenesis or transformation with heterologous nucleic acids.

The method to obtain the hybrid plants of the auxiliary request does not differ from the method to obtain the plants of claim 1 of the main request. Thus, the finding that the presently claimed subject matter is excluded from patentability applies to both requests.

Since the plants according to claim 1 of both requests are exclusively obtained by means of an essentially biological process, they are excluded from patentability pursuant to Rule 28(2) and Article 53(b) EPC.

4 **Decision**

The ground for opposition according to Article 100(a) EPC in conjunction with Article 53(b) and Rule 28(2) EPC prejudices the maintenance of the patent on the basis of either the main request or the auxiliary request.

The patent EP 1 597 965 B1 is revoked pursuant to Article 101(3)(b) EPC.