



ESA NEWSLETTER

July 2010

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ESA Meetings (selected)

- 25.08.2010
WGPH Meeting
- 26.08.2010
STAT Meeting
- 30.08.2010
CIPR Meeting
- 31.08.2010
WGBR Meeting
- 01.09.2010
CRLA Meeting
- 02.09.2010
SFG WG
Monitoring
Meeting
- 07.09.2010
SVOwic Lead
Persons
Conference Call
- 08.09.2010
WGB Meeting
- 09.09.2010
Board Meeting

Dear Members,

The ESA Quality Assurance Project for Seed Treatment is under way! As you have been informed earlier, following the call for tender for the project and the receipt of a number of concrete project proposals, the ESA Working Group STAT set up a Steering Group to interview a number of candidates and made a recommendation to the full STAT group and the Executive Committee. Following principle approval, the project was fine-tuned in view of the most recent development on national and EU legislative and political level and re-focused in view of the most imminent needs of the industry. With Ruud Scheffer of Ruud Scheffer B.V. Consultancy (The Netherlands), we are convinced that we have found the right expert to help us push forward the idea and implementation of an ESA Quality Assurance Scheme for Seed Treatment that shall secure the common market for treated seed for all treatments and species. Ruud is well known in the seed industry due to his former employment in the industry, his long standing involvement with ISHI, but also his many concrete assignments with companies on concrete projects. Specifically here, Ruud developed specific experience and expertise on project management and project implementation, skills we as ESA were particularly interested in view of our concrete Seed Treatment project. We are looking forward to working with him. May I also make use of this opportunity to ask all Members that will be approached by him in the course of the project to be supportive – in the end, it is our common goal and we can only be successful together. Some defined Members have already supplied detailed technical information to Ruud on the respective national approaches on seed treatment quality assurance. Also data elaborated by the technical STAT Working Group on Dust was made available. In addition, a limited number of direct contacts and visits have been agreed and are already carried out.





An important part of the first phase of the project is to 'brand' it properly in order to allow for external communication and lobbying activities. A respective communication was sent to Members of ESA STAT and ESA Members in general to obtain suggestions and provide a number of concrete proposals for the next meeting of the WG STAT. We hope to decide quickly (preferably at the next ESA STAT meeting end of August) and all ESA Members will receive regular updates on the state of implementation of the project and our related activities towards decision makers (specifically EU Commission and Member States).

With best regards, yours

Garlich v. Essen, Secretary General

External meetings (selected)

- **18.08.2010**
General Meeting of
Seed Association
of Ukraine
Kiev (UA)
- **08.09.2010**
up-dating Meeting
FEDIOL
Brussels (BE)
- **09.09.2010**
EUROPATAT
Brussels (BE)
- **23.09.2010**
SANCO
Stakeholder
Dialogue Group
Meeting tbc
Brussels (BE)

Mustard trials - Slupia Wielka (Poland)



CPVO Working Group on FSS – 3rd meeting

On July 7 the 3rd meeting took place of the CPVO Working Group on FSS. The ESA delegation in this meeting consisted of Mrs. Szonja Csörgő, Nigel Moore and Bert Scholte. The WG first addressed the collection of information and agreed that an initiative from the EU legislator is needed. It was also agreed that all farmers should be obliged to declare (yes/no) whether or not they have used FSS, independent if there is prior indication of such use. Countries which have a satisfactory collection system in place (f.e. UK) should be able to continue their activities. It was agreed that in other countries the Single farm Payment Scheme (SPS) should be used for this purpose. In case countries would not be willing to make use of the SPS scheme the contact details of farmers should be made available to breeders.

The Working Group could not agree on changes in the definition of own holding. Therefore it was agreed that the WG would remain silent on this definition.

Regarding the notion of small farmer it was agreed that there are no technical arguments to exclude a group of farmers from the payment of a royalty on FSS. Nevertheless for political reasons COPA insisted that small farmers should be exempted. However the definition of small farmer should be based on the area and no longer on the harvest while taking into account the organisation of agricultural production in different parts of Europe.

The CPVO will now draft more detailed conclusions to be sent for consideration to the different stakeholders after the summer break. A final meeting is planned on December 16 to finalise the conclusions and recommendations of the Working Group which will be made available to the Evaluator of the Community Plant Variety Rights system. (SzCs/BS)

Towards a harmonised classification scheme for seed potatoes in the EU

On July 19 a meeting was organised between ESA and Henk van der Haar (NAK – NL). The ESA delegation consisted of F. van der Werff, P. Oldenkamp, H. van der Woude and B. Scholte. During the meeting the ESA SPO majority proposal for a harmonised classification scheme for seed potatoes in the EU was presented. Mr. van



der Haar is member of the Working Group under the Standing Committee on Seeds which is preparing a discussion paper for the SCS regarding possible changes in the classification system to be discussed by the Commission in September. The timing of the ESA proposal therefore fits nicely with the working program of the Commission. Additional meetings with Copa-Cogeca and Europatat are being organised to get support for the ESA proposal. (BS)

Ruling of the European Court of Justice (ECJ) in case C-428/08: Monsanto vs. Cefetra

In a case pending before the Court of the Hague (Rechtbank's-Gravenhage) opposing Monsanto Technology to Cefetra BV and Others the court referred four questions for preliminary ruling to the ECJ regarding the interpretation of Article 9 of the EU Biotech Directive (98/44/EC). The dispute in the main proceedings concerned European Patent EP 0 546 090, protecting a DNA sequence encoding for glyphosate resistance, held by Monsanto which the patentee wished to enforce regarding a soy meal imported into Europe from Argentina in which traces of the protected DNA sequence were present which indicated that it was made from soybean plants in which the resistance gene, object of the patent, was inserted. The question in the main dispute therefore was turning around the issue whether the scope of Monsanto's patent extended to the soy meal. ESA did not send any *amicus curiae* briefs to the ECJ in this case in the lack of a legal base for doing so.

The ECJ observed that according to the Directive the protection conferred by a European patent is subject to the condition that the genetic information contained in the patented product performs its function in the material in which that information is contained. The ECJ noted that the function of Monsanto's invention is being performed when the genetic information protects the soybean plant against the effect of the herbicide glyphosate. However, that function of the protected DNA sequence can no longer be performed when it is in a residual state in the soy meal, which is a dead material obtained after the soy has undergone several treatment processes. As a result, the protection conferred on European patents is not available when the genetic information has ceased to perform the function it performed in the initial material from which the material in question is derived.

In addition, the ECJ also ruled that the provisions of the Directive providing for a requirement of actual performance of the function must be regarded as constituting an exhaustive harmonisation of the matter in the European Union and therefore preclude national law from granting absolute patent protection regardless of whether the function is performed in the material in which the DNA sequence is contained. (SzCs)

For the whole text of the ruling please click here: [C-428/08](#)

Oral hearing in Broccoli (G2/07) and Tomato (G1/08) cases

Munich, July 20, 2010

On July 20, 2010 the Enlarged Board of Appeal of the European Patent Office held an oral hearing in the consolidated cases "Broccoli" and "Tomato".

Amongst many other third parties, ESA sent *amicus curiae* briefs in both cases to the EPO and Sz. Csörgő attended the hearing as part of the public.

In the Broccoli case the European Patent Office granted a patent on marker-assisted selection which it considered to be technical processes and therefore patentable while in the Tomato case a patent was granted on a method for breeding tomatoes with reduced water content and products of that method. Both cases concern the exclusion from patentability of essentially biological processes for the production of plants under Article 53 (b) of the European Patent Convention (EPC). A Technical Board of Appeal has referred questions to the Enlarged Board of Appeal relating to the degree and nature of human technical intervention, which is necessary for a breeding process to escape the exclusion.

At the oral hearing all parties to both procedures provided their submissions underpinned by a series of interesting arguments. The discussion did not have the technical aspects of plant breeding in its centre but rather the interpretation of the legal texts. The main questions focused on the interpretation of the text of the exclusion in Article 53(b) EPC and the definition of ‘essentially biological processes’ as provided in the implementing rules of the EPC. For the interpretation of those provisions the Enlarged Board of Appeal wished to understand how the words “consists entirely of natural phenomena such as crossing and selection” should be interpreted; whether the differences in the wording of Article 53(b) EPC in the English version talking about ‘essentially biological processes for the production of plants’ and the German and French versions referring to ‘essentially biological processes for the breeding of plants’ are relevant; and how the exclusion should be interpreted in the light of the provisions and the legislative history of the EU Biotech Directive (98/44/EC). In addition, parties also wished to understand the reasons behind the existence of the exclusion in Article 53(b) EPC and provided extensive arguments thereof.

Following the oral hearing the Enlarged Board of Appeal will provide its decision in these landmark cases in writing probably towards the end of the year or in the beginning of 2011. (SzCs)

Revision of the ESA IP position

The ESA Committee on Intellectual Property Rights (CIPR) met on July 1 and held a phone conference on July 15 to continue its work on the revision of the ESA IP position to be presented to the ESA Board in September 2010.

As it was already essentially presented to the ESA membership at the IP seminar at the end of April the CIPR has completed the revision of a large part of the current IP position. The reviewed topics include the following:

The role of the CPVO where the CIPR follows the ESA position in the Better regulation exercise and suggests a widening of the role of the CPVO in DUS testing (one key several doors principle), regarding variety denominations as well as in the management of the Common catalogues.

The use of DNA-based markers in DUS testing where the CIPR considers that the basing of DUS decisions on the use of DNA-based markers alone is not

yet acceptable however sees a role for the use of such markers in the improvement of handling reference collections as well as in organising the DUS trials in the field. The use of DNA-based markers in areas such as assessment of essential derivation or variety identification is also supported.

The duration of plant breeder's rights where the CIPR would support a CPVO initiative for a general term extension to 30 years.

The extension of the scope of PVP to harvested material and directly obtained products whereby the CIPR gives its interpretation of the conditions under which such a scope extension can be relied upon by the holder of the right and pleads for the extension of the scope to directly obtained products on EU level.

Essentially derived varieties where the CIPR emphasizes the importance of the EDV provision; pleads for a harmonization of the wording as regards the definition of EDV and gives the cornerstones it considers should be followed in court cases regarding EDVs.

The protection of hybrids whereby the CIPR expresses that it considers PBR protection of a hybrid via its parental lines to extend not only to importation, marketing or sales of the hybrid but also to its vegetative multiplication. As regards the issue of access to seeds of parental lines accidentally present in a bag of hybrid seeds the CIPR confirms that as there is no disclosure obligation under UPOV there is no positive right that would provide for access to protected parental lines of the marketed hybrid. Since this topic is of primary importance for maize this issue is referred back to the ESA maize section for further consideration.

Farm saved seed where in collaboration with the ESA working group FSS the CIPR confirms its claim that, in principle, the FSS exemption should be deleted. Nevertheless several proposals for improvement of the legal text of the exemption are provided in the position paper should the legislator consider that the exemption needs to be maintained.

Biodiversity related issues where the CIPR focuses mainly on the question if and how an obligation of disclosure of origin of the biological material in IP applications could be accepted and is of the view that only an obligation on the disclosure of source could be accepted and only in case if it does not have any pertinence on the validity of the title.

The remaining elements which are still under discussion within the CIPR are related to patentability of plant-related inventions and to finding a potential solution to the interface between patents and plant breeders' rights.

In that respect the ESA IP seminar in April provided a fruitful discussion with the ESA membership and based on the outcomes of that seminar the CIPR is continuing its work on the basis of the principle that free access to commercially available material for further breeding should be safeguarded. On July 1 several proposals (elaborated by members of the Committee) for



possible frameworks to work with patented material in the future were discussed and the problematic points and concerns regarding each of them were identified. It was concluded that the CIPR needs more time to be able to consider all possibilities sufficiently carefully and to come to a sound conclusion. In order to continue the discussions and to elaborate a proposal for the consideration of the ESA Board an extra meeting of the CIPR has been scheduled for August 30, 2010. (SzCs)



Next ESA Newsletter to be published on 01.09.2010

