

## Patents on life: EU directive on collision course with European Patent Convention

### A short chronology of events leading to patents on life in Europe

In **1973**, the European Patent Convention (EPC), was concluded to create a common system for granting patents in Europe. Currently there are 20 Member States.<sup>1</sup> The European Patent Office (EPO) is the administrative body of the treaty, responsible for granting patents. The EPC and EPO are completely separate from the EU institutions.

The EPC prohibits the patenting of discoveries, and explicitly the patenting of plant varieties and animals (Art.53b EPC). But despite these provisions, the EPO started granting patents on plants and animals in the early 1990s

In **1995** Greenpeace brought a case against a patent on GM plants granted to PGS. The EPO's Court of Appeal confirmed in its ruling that plant varieties could not be patented. Consequently, patents on animals and plants were no longer granted.

In **1998**, in response to pressure from the biotech industry, the European Union enacted a Directive which explicitly allows the patenting of living organisms, such as plants and animals (Directive 98/44/EC on the legal protection of biotechnological inventions). The provisions of the EU-directive on the patenting of living organisms are thus in direct conflict with those of the EPC. The EU-directive is in no way binding for the EPO.

In **1999** the Administrative Council of the EPO decided to incorporate the provisions of the EU Directive into their Implementing Regulations. These Regulations are designed to interpret the treaty and guide patent examiners as to when and how to grant patents. Since the Implementing Regulations copy the EU Directive concerning patents on living organisms, they now stand in conflict with the text of the EPC concerning the patenting of plant varieties and animals.

The legal basis for this decision is unfounded. There is a clear provision in the EPC which says that the treaty language of the EPC takes precedence over the Implementing Provisions (Art 164(2)EPC). In addition, the Administrative Council has no legal mandate to adopt substantive changes of patent law.

Despite this, as of 1 September 2000 and following these Implementing Regulation, the EPO has again started to grant patents on living organisms .

In **2000**, EPC Diplomatic Conference of the Governments who are members to the EPC takes place in Munich, from 20-29 November. It is the highest legislative body of the EPC. It alone can change the text of the treaty. It can also overrule the decision of the Administrative Council as illegal, and thus re-establish clear measures to stop the patenting of living organisms in accordance with the text of the EPC.

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<sup>1</sup> The 15 EU countries plus Switzerland, Liechtenstein, Monaco and Turkey