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Plantum NL position on patents - and plant breeders' rights

On 6 May 2009, Plantum NL adopted a new position as regards the relation between patent- and plant breeders' rights. This position is as follows:

1. Biological material protected by patent rights should be freely available for the development of new varieties.
2. The use and exploitation of these new varieties should be free, in line with the 'breeders' exemption' of the UPOV Convention.
3. The aforementioned free availability, use and exploitation should not be allowed to be obstructed in any way, either directly or indirectly, by patent rights.

Explanation

Plant breeders' rights, as laid down in the UPOV Convention, have made an important contribution to the success of plant breeding in the past few decades. Also thanks to plant breeders' rights, significantly profitable breeding companies have developed, which are able to continue to invest in new and improved plant varieties.

Developing a new plant variety requires investments. In order to recoup these investments, a form of intellectual property right has been created, especially tailored to plant breeding: plant breeders' rights. Plant breeders' rights give the developer of a new variety the possibility to prohibit others from producing or selling propagating material of that variety and, that being the case, it affords the breeder temporary exclusivity. At the same time, plant breeders' rights – through the so-called *breeders' exemption* – give other breeders the possibility to use the protected variety for the development of new varieties, and to use and exploit those new varieties. So plant breeders' rights protect a combination of genetic building blocks created by the breeder, but those building blocks, as such, can be used freely in creating new combinations.

In this way, plant breeders' rights have found a balance between rewarding the breeder for his efforts in developing a new variety on the one hand and, on the other hand, creating the possibility for the continual improvement of varieties by other breeders, for the benefit of other links in the chain of production and consumers. This makes plant breeders' rights, in effect, a form of open innovation and reflects the two main aims of intellectual property rights: it provides a financial-economic stimulus for inventiveness *and* it serves a social interest. In this case, social interest consists of ever further improved plant varieties becoming available, coupled with a wide choice of varieties with traits the market demands.

Alongside plant breeders' rights, patent rights have entered the plant-breeding domain in the last two decades. Traits built into plant varieties, for instance, are often protected by patents. Patents are also granted on processes. Patent rights are different from plant breeders' rights in that patent rights do not have a *breeders' exemption*. As a consequence, varieties containing patented traits are not freely available for further breeding¹ and newly-developed varieties which still come under patent protection, are not allowed to be used and exploited freely. The same applies to varieties which have been developed using a patented process. This gives the patent holder an exclusive claim to genetic material and he can protect certain genetic building blocks from use by others. The patent holder can, of course, grant licences. However, there is no guarantee whatsoever that each breeder would obtain a licence or would obtain a licence on acceptable terms and conditions. Moreover, often, in practice, not just one but several licences will be needed, making a difficult situation even more difficult. It will be clear that open, continued innovation, which has been so characteristic of plant breeding until now, is hampered by this. This is not in the interest of the breeding sector itself, the grower or the consumer, and neither is it in the interest of society at large.

In addition, plant breeders' rights, compared with patent rights, are an easily accessible intellectual property right. Applications for plant breeders' rights are actually assessed by independent and expert authorities and granting plant breeders' rights does not depend on techno-legal descriptions. Moreover, plant breeders' rights are granted relatively quickly and, compared with patent applications, are hardly ever challenged (this is undoubtedly connected with the *breeders' exemption*). The consequence of all this is that applying for and preserving plant breeders' rights is, in practice, very much cheaper than applying for and maintaining a patent.

Plantum NL still sees a role for patent rights in the plant propagating material sector, though, e.g. to protect innovative processes or techniques. However, varieties developed with either of these should not come under the scope of such patents.

Based on the above argumentation, Plantum NL is of the opinion that adoption of its position best guarantees continuity and diversity of companies in the sector.

¹ In most countries, that is. As far as the EU is concerned, the right to be allowed to develop new varieties has been explicitly included in patent law in France and Germany.