

Explanatory note

Brussels, May 2025

Euroseeds view on the scope of the “limited” breeder’s exemption in EU patent laws

In the Euroseeds view on Intellectual Property 2024, Euroseeds takes the position of “Extending the implementation of the limited breeder’s exemption”, which includes a call for a geographical extension of this exemption as well as a clarification of the acts that Euroseeds would consider covered by such exemption. This document aims at clarifying these aspects of the position.

With the advancement of new technologies in the breeding sector, like genetic markers, transgenesis, or now gene editing, patents are being used to protect certain inventions that cannot be protected by plant breeder’s rights. For this reason, the seed sector has considered it necessary to have a breeder’s exemption introduced into patent legislations of the EU. The main patent legislation of the EU is the Directive 98/44/EC, but this legislation does not contain a breeder’s exemption. In the meantime, several EU member states have introduced a breeder’s exemption in their national patent laws, for example, France, Germany or the Netherlands. In 2023 has also come into force the Unified Patent Court Agreement (with the Unitary Patent), which contains a breeder’s exemption (Art. 27(c)). The Unified Patent Court Agreement has been ratified by 18 EU member states, who should also have implemented the legal provisions of this agreement in their national patent laws, including the breeder’s exemption. As of January 2025, a breeder’s exemption exists in the patent laws of at least 10 EU member states (see list in Annex). According to its position, Euroseeds “calls upon all countries where such limited breeders’ exemption is not yet enshrined in national patent law to proceed with the necessary legislative initiatives as soon as possible”.

In most patent laws, and in the Unified Patent Court Agreement, the breeder’s exemption reads as follows:

“The rights conferred by a patent shall not extend to:

the use of biological material for the purpose of breeding, or discovering and developing other plant varieties”

The breeder’s exemption in patent laws is understood in the seed sector as enabling any breeder to make use of a legally-available plant variety, e.g. a commercial one, containing a patented element like a patented trait, in its breeding programs for the purpose of developing other

varieties. Any newly-developed variety under the patent breeder's exemption requires a license from the patent holder for its commercial exploitation if the patented element is still present in the new variety and the patent still in force, but the new variety can be exploited freely if either the patented element has been discarded during the breeding process or the patent has expired.

The question has arisen about the boundaries of the breeder's exemption with regard to certain acts performed by breeders and certain type of patents covering inventions that are only used in the breeding phase. Such patents are for example patents covering molecular and sequence-based genetic markers and/or their use in a selection process of a given trait. Breeders are using molecular markers exactly during the breeding stages either to trace a trait of interest if they intend to have it in the new variety they breed, or to make sure that it no longer present in case they want to carve it out.

For the reason that these uses are exactly *"for the purpose of breeding, or discovering and developing other plant varieties"*, Euroseeds is of the opinion that the most logical interpretation of the breeder's exemption in patent laws, such as the one of Art. 27(c) of the Unified Patent Court Agreement, is that the use of genetic markers for the purpose of selecting or discarding a trait in the process of breeding a new variety is also covered by this exemption. As a consequence, breeders should not be held liable for patent infringement for such uses in case the genetic markers or their use for selecting a trait would be patented.

Euroseeds is also of the opinion that this exemption only applies to the breeding process, and that any use of patented genetic markers beyond the creation of a new variety shall not be covered by the breeder's exemption. For example, once a new variety is developed, its seeds need to be multiplied in large quantities and seed quality needs to be ensured with processes that also use the same genetic markers. Euroseeds is of the opinion that such uses are pre-commercial activities that shall not be covered by the breeder's exemption when the new variety contains a patented trait and, as explained above for commercialization, a license may be required for carrying them out. The breeder shall however not be held liable of patent infringement for the multiplication of a new variety that does no longer contain a patented trait, neither for the use of genetic markers to verify the absence of such trait.

Annex: Breeder's exemptions in selected European countries

> based on patent laws in WIPO-Lex, and some confirmations by local patent law firms

Green color code indicates a confirmed breeder's exemption in national patent law.

Orange color code indicates an uncertain breeder's exemption in national patent law, that remains to be confirmed.

Red color code indicates a confirmed absence of breeder's exemption in national patent law.

UPC Member States having ratified

Austria (UPC)

Patent amendment RV 1955 (2023) :

§ 22.(1a).The effect of the patent does not extend to the use of biological material for the purpose of breeding, discovering and developing a new plant variety.

Belgium (UPC)

Art. XI.34 §1: Les droits conférés par un brevet ne s'étendent à aucun des actes suivants :

c) l'utilisation de matériel biologique en vue de créer ou de découvrir et de développer d'autres variétés végétales ;

Bulgaria (UPC)

> Not found in patent law amended in 2002, despite provisions on UPC

Denmark (UPC)

> Adoption of the UPCA "as is" in 2014, but no integration into national patent act, except for few articles articulating the competent courts. Therefore unclear if the breeder's exemption would apply to patents that would come under the competency of the Danish national courts.

Estonia (UPC)

> Not found in patent law amended in 2023, despite provisions on UPC

Finland (UPC)

Section 3. Exclusivity does not apply to:

6) use of biological material for breeding or finding and developing other plant varieties;

France (UPC)

Law No. 2004-1338 of 2004

Art. L.613-5-3: The rights conferred by *articles L. 613-2-2 et L. 613-2-3* do not extend to acts done for the creation or discovery and development of other plant varieties.

Germany (UPC)

Section 11 – 2a PatG

The effect of a patent does not extend to:

2a. the use of biological material for the purpose of breeding, discovering and developing a new plant variety;

Italy (UPC)

Art. 68.1.a-bis: The exclusive power attributed by the patent right does not extend, whatever the object of the invention:

- to acts carried out on an experimental basis relating to the object of the patented invention, or the use of biological material for *cultivation* (?) purposes, or the discovery and development of other plant varieties;

Netherlands (UPC)

Art. 54c

The rights conferred by a patent do not apply to:

c. the use of biological material for breeding, or discovering and developing of other plant varieties;

Portugal (UPC)

Art. 103.1.d. The rights conferred by the patent do not cover:

d) The use of biological material for the purposes of *cultivation* (?) or discovery and development of new plant varieties;

Romania

> Not found in patent law (Art 33(1)), and also no UPC provisions ??

Sweden

Text of UPC attached to Sweden patent law

NOT UPC

Hungary (UPC signed only, not yet ratified)

Not found in patent law (Art. 19(6))

Poland (Not UPC)

Art. 69.1. A patent shall not be infringed by:

- 6) the use of biological material for the purposes of breeding or discovering and deriving new varieties of plants.

Spain (Not UPC)

Not found in patent law (Art. 61)

Not EU

Turkey

Not found in patent law

United Kingdom

Art. 60(5): An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not do so if—

- (j) it consists of a use referred to in Article 27(c) of the Agreement on a Unified Patent Court;