

The ECJ limit the scope of DNA patents

Background

Monsanto own a European patent, [0 546 090](#), for DNA which makes soy plants resist to a herbicide (glyphosate). It sued Cefreta, a Dutch soy meal importer, for infringement of the patent. Cefreta had imported soy meal containing Monsanto's claimed DNA from Argentina (where Monsanto do not have a patent). The imported soy meal contains the claimed DNA, but the DNA does not impart herbicide-resistance to the soy meal. The patent does not have claims directed to the soy meal *per se*.

The EU Biotechnology Directive addresses patents for products including genetic information. The Directive states that these patents protect material which incorporates the product, **in which the genetic information performs its function**.

The Dutch Courts asked the European Court of Justice (ECJ) if this protection included circumstances where the genetic information **has performed, or could still perform**, its function. The Dutch Courts asked if the presence of the claimed DNA in soy meal would infringe the patent, under the terms of the Directive.

Decision

The ECJ has now issued a [decision](#) on the questions of the Dutch Courts. The ECJ follows the earlier opinion of the Advocate General; reported previously.

The decision states that, under the Directive, patent protection for a gene sequence, and the product containing it, only extends to situations in which the genetic information **currently** performs the described function. It is irrelevant whether the genetic material has, or could still, perform its function.

The imported soy meal does not fall within the patent claims, because the DNA did not impart herbicide-resistance to the soy meal, "currently". Therefore Cefreta do not infringe Monsanto's patent.

Effect of the decision

The decision confirmed that national laws of European member states cannot provide protection broader than that defined by the Directive, and so further harmonises the law in Europe on DNA patents.

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The decision also held that the Directive applies to all patents, and so has **retroactive effect**. Accordingly, the decision will have a great impact on existing and future European patents for genetic material.

For example, until now the UK position has been that the Directive only applies to patent applications made on or after its implementation on 28 July 2000. The UK IPO will now review its practice to ensure that they are in step with this decision.