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NOTE

From:	General Secretariat of the Council
To:	Council
Subject:	The impact of a recent decision of the European Patent office (EPO) concerning the patentability of plant traits on the plant breeders' rights regime

With a view to the lunchtime discussion on “The impact of a recent decision of the European Patent office (EPO) concerning the patentability of plant traits on the plant breeders' rights regime” that will take place on the occasion of the Council (Agriculture and Fisheries) on 22 October 2015, delegations will find in Annex a note prepared by the Presidency.

The impact of a recent decision of the European Patent office (EPO) concerning the patentability of plant traits on the plant breeders' rights regime

The decisions of the enlarged board of appeal of the European Patent Office of March 25 2015 in case N° G0002/12 on tomatoes (method for breeding tomatoes having reduced water content and product of the method) and case N° G0002/13 on broccoli (method for selective increase of the anticarcinogenic glucosinolates in Brassica species) show that under the European Patent Convention and the EU Biotech Directive it is possible to patent plants, and not only plants obtained through genetic modification, but those that result from conventional breeding.

In a seminar organized by the Community Plant Variety Office in June 2015 on the interface between patents and plant variety rights, the existing intellectual property protection for varieties, it also became obvious that we need to restore a balance between plant variety rights and patents on plants, particularly since breeding activity is fundamental for a sustainable agriculture and horticulture sector as well as for food security and for adaptation to climate change.

Under current EU and national legislation for the protection of plant variety rights, as well as in the framework of the International UPOV Convention, the “breeders' exemption”, gives any breeder, be it a small or a big company, the ability to use protected varieties in its breeding programme in order to create new varieties, without any obligation to the parties holding the plant variety protection titles of those protected varieties.

However the patent regime, where there is no extensive “breeders' exemption”, is restricting free access to patented plant materials and consequently hampering breeding activities. The above decision of the enlarged board of appeal of the European Patent Office enlarges the scope for patents to plant material obtained through classical breeding methods as well.

During the Agriculture Council in July, the Netherlands requested a debate on the fundamental impact of patents on breeding activities and thus on food production, food security and adaptation to climate change. Several member states clearly underlined that innovation in plant breeding should not be restricted by patents.

Given the crucial role that plant breeding will have to play in future sustainable agricultural production systems and given the possible impact of the recent decision of the European Patent Office on the innovation capacity of the plant breeding sector, in particular, the Presidency wishes to continue the debate initiated by the Netherlands in July.

Following the debate, the Presidency considers to send a letter to the current President of the Competitiveness Council, the body responsible for the so called “biotech directive (directive 98/44 EC on the legal protection of biotechnological inventions)” and other patent related issues, in order to raise awareness and initiate a debate on the consequences of plant patenting on breeding activities at that level.

In this context the Presidency would like to invite delegations to reflect on the following questions:

What are the Member States' views on the recent decision of the enlarged board of appeal of the European Patent Office (case N° G0002/12 and case N° G0002/13) to grant patents on plant material obtained through classical breeding methods and its possible consequences?

Do Member States consider that access to plant diversity, as a source of innovation for the breeding of new varieties, is fundamental for sustainable agriculture, food security and adaptation to climate change?

Could the recent decision of the enlarged board of appeal of the European Patent Office (tomato and broccoli case) restrict this access?
