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The Council of the EU wants to maintain the patentability of GMOs/NGTs

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On 19 December 2025, in a still provisional text, the Council of the European Union maintained the patentability of GMOs derived from new genetic techniques (NGT). To this end, it relied on existing law and called for voluntary, but non-binding, commitments, without taking into account the impact on farmers and small seed producers. This text still needs to be validated, amended or rejected by the European Parliament, which had voted against these patents in 2024 and will have to take a position in 2026 without being able to propose new amendments.

Ildiva - Pinocchio!

Since the European Commission proposed deregulating GMOs obtained through new genetic modification techniques (NGT) in July 2023, the problem posed by associated patents has been slowing down the adoption of a new regulation. On 19 December 2025, the Council of the European Union (EU) reached a qualified majority for the first time on a text[1] that claims to resolve

this issue[2]. While it does not include the ban on patents on deregulated GMOs requested by the European Parliament in April 2024, it is useful to understand why the measures proposed by the Council would not change anything. The Parliament is due to review this provisional text again in 2026.

A simple reminder of the law

In its position, based on the proposal resulting from the trilogue, the Council of the EU recalls that, in accordance with Directive 98/44 and Article 53(b) of the European Patent Convention, plants obtained exclusively by essentially biological processes (EBPs) are not patentable. Reference is also made to the practice of the European Patent Office (EPO) of imposing *disclaimers,* whose theoretical function – the reality is more complex[3] – is to encourage those claiming a patent on a product obtained by a patentable technical process to indicate which "*plants [notoriously known]obtained by essentially biological processes*" are not covered by this patent. Provided that those claiming are aware of the existence of such plants.

The Council could have maintained the obligation to provide methods for detecting and distinguishing patented GMOs/NGTs from plants obtained *via* EPPs. However, this provision, which had been introduced by the Parliament at the instigation of, among others, the European Coordination Via Campesina (ECVC)[4], has been removed from the provisional text. This provision would have provided explicit protection for farmers and small and medium-sized seed producers sued for infringement of a patent covering an invention based on NGTs, as they would be unable to prove that their traditional seeds and plants did not originate from the claimed invention.

A voluntary "*code of conduct*"... and therefore ineffective

The main proposal in the provisional text is the creation of a "*code of conduct*" for holders of patents relating to plant biological material (recital 46g and Article 29a). If this text is ultimately adopted, the European Commission, in cooperation with the Member States, *will* "*oversee the drawing up of a Union-level code to support transparency on patents on plant biological material [in particular for plants derived from NGTs]*, breeder's *access to such material and legal certainty for breeders and farmers*".

The development of and compliance with this code would be based on voluntary participation, in particular by patent holders and various private licensing platforms (such as the ACLP[5] or the ILP) as well as "*other civil society organisations and interested parties*". In Article 29a of the Council text, the Commission will simply have to "*aim*" that the code of conduct includes certain key commitments, which will nevertheless remain voluntary . These would include the provision of clear public information on patents, the granting of licences on "*fair and reasonable*" conditions, and the amicable settlement of disputes involving SMEs (small and medium-sized enterprises) or farmers in cases of unintentional presence of patented material, *i.e.* in cases of contamination and not in cases of abusive extension of the scope of patents as mentioned above. Similarly, for licensing platforms, the Commission should only encourage moderate fees, standard contracts and fair dispute resolution mechanisms. There is therefore no obligation for the Commission to achieve specific results in these requests.

In this approach, which can be described as "*soft law*", flexible or non-binding, the "*commitments by patent owners*" are formulated as objectives to be achieved and not as legal obligations. Although the Commission is asked to set measurable objectives (annual reporting, regular monitoring, five-yearly evaluation that may lead to legislative proposals, etc.), the effectiveness of the system would depend on the goodwill of patent owners and platforms, but also on the

Commission itself, which reserves the right to supplement this system if necessary. This would be done without any express guarantee that the commitments proposed by the Council would actually be incorporated or respected. According to the Council's text, the code should be finalised within 18 months of the entry into force of the NGT Regulation.

A draft fraught with other uncertainties

The Council's text includes other specific provisions that raise questions about their clarity, the guarantee of their implementation and/or their applicability. One thing is certain, however: none of the proposals made by the Council are in the form of obligations. All would be implemented within a non-binding, optional framework. Another major point to note is that all the proposals made concern only European seed companies. Farmers are deliberately "*forgotten*" by the Council of the EU, which, in doing so, maintains its desire to make these actors dependent on industry patents, as also shown by the ongoing revision of the PRM (plant reproductive material) Directive, known as the "*Seeds Directive*"[6].

Transparency and licences

The text appears to demonstrate a desire for transparency without really providing the means to achieve it. In particular, it does not guarantee that all relevant information relating to patents covering deregulated and commercialised GM plants would actually be accessible to small and medium-sized breeders and farmers. In particular, the creation of a mandatory public register of patents covering GMOs/NGTs is not guaranteed. Such a register could only be maintained on the basis of information voluntarily provided by patent holders. However, for example, the current list of plants covered by patents on the Pinto basis, managed by the European seed association Euroseeds, depends solely on the goodwill of patent holders and cannot therefore be exhaustive, nor does it claim to be. It is not certain that the industry can be relied upon to comply scrupulously with this voluntary information procedure.

During the procedures for verifying the status of plants genetically modified by NGT, a company requesting such status for one of its products would be asked to submit information on published patents or patent applications including one or more claims on the biological material of the plant. It may declare that it has no knowledge of such rights. As this submission is made "*to the best of its [the NGT1 status applicant] knowledge*", questions arise as to the guarantees of completeness, transparency and legal certainty offered by such a provision in the draft agreement.

Similarly, the so-called "*fair and reasonable*" licences " (Articles 6 and 7) are not precisely defined[7] and would not be accompanied by any control mechanism to verify that the patent holder is actually willing to grant such a licence, or even entitled to grant it if their invention is also covered by other patents that they do not hold themselves. The patent holder could, of course, attach a written statement expressing their willingness to grant licences on "*fair and reasonable*" terms, but this would remain optional and would have no binding legal effect. It would therefore be more of a tool for declarative transparency than a genuine means of regulation. Furthermore, the Council's text does not address the issue of patent stacking or the cumulative royalties that may be charged for licences, even though this phenomenon has been identified as a major obstacle to access to genetic material and innovation in plant breeding.

Impact assessments and expert group

The Council proposes the creation of an "*NGT plant patent expert goup and the assessment of the impact of NGT plant patenting*" (Article 30a). This panel would assist the Commission in "*patent*

enforcement practices on farmer's access to modified genetic resources [GMOs/NGTs], transparency of the patent landscape and innovation in the field of NGT plants". The text further proposes that this group collaborate with the Commission on "*surveying the patent licensing practices for thebreeding and marketing of NGT plants protected by a patent, ongoing patent application procedures on NGT plants and patent enforcement practices vis-à-vis farmers and, if available, case-examples thereof*".

This provision therefore recognises the existence of certain structural risks created by patents on GMOs/NGTs. However, it ignores the risks of creating dependency among operators downstream in the food chain (processors, distributors) and of undermining the diversity of food supply and consumer choice. It does, however, provide for an assessment of these risks just one year after the implementation of this new regulation, even though they will not yet be truly visible. Measures would then only be taken in the event of negative findings in the future, after several years of implementation. But how can the neutrality of the experts be guaranteed? Other European institutions have had no qualms about calling on industry experts or representatives, raising questions of conflicts of interest[8].

Breeder exemption

The text agreed by the Council does not include a breeder's exemption. Nor does it explicitly refer to Article 27(c) of the Agreement on a Unified Patent Court (UPC)[9], which is often cited as the basis for a *'breeder's exemption*'.

This exemption allows the breeder to develop a new variety based on a plant covered by a PVR (plant variety right). However, this new variety cannot be marketed without the consent of the holder of a patent covering an element or information contained therein. However, the UPC only applies to countries that are signatories to it[10], and not to all EU countries. Only national provisions would allow breeders to benefit from such an exemption, which would, however, only be applicable in the national jurisdiction concerned. Furthermore, they do not prohibit the claiming of "*classic*" patents not subject to the AUPC (Agreement on a Unified Patent Court), patents that will be chosen by all seed producers who do not want to be forced to grant licence rights for their patents.

It should be noted that the Council has therefore focused solely on seed companies. Farmers have been completely overlooked by the Member States, which voted by a qualified majority on 19 December. This political oversight is in line with the ongoing work on the revision of the legislation on PRM, or the "*seeds*" regulation. If adopted, this revision could facilitate the dissemination of GMOs/NGTs1 without any information on the patents covering them.

Industry interests before the public interest

Ultimately, the "*patents*" section of the text resulting from the trilogue, on which the Council of the EU reached a qualified majority, is based mainly on reminders of existing law, promises of voluntary commitments and future assessments. It provides no legal guarantees against the risks that patents pose to small and medium-sized breeders, farmers and non-GMO producers. On the contrary, it encourages the privatisation of rights within "*clubs*" reserved exclusively for patent holders, where the largest companies, with the most extensive portfolios and the most important patents, will impose their rules on the entire sector. The main causes of imbalance in the current patent system remain virtually untouched.

Once again, it is primarily the interests of the seed industry that seem to have been favoured, to the detriment of essential issues: the preservation of cultivated biodiversity, the survival of small and medium-sized breeders and farmers, and, ultimately, consumer information and freedom of choice

regarding their food. Do the proposed "*transparency*" measures, which lack any real obligations or control mechanisms, not amount to a form of invisibility, a subtle form of opacity? These issues seem to have been relegated to the background in order to facilitate the commercialisation of GMOs and secure industrial investment. But what about the public interest?

- + Council of the European Union, "Proposal for a Regulation of the European Parliament and of the Council on plants obtained by certain new genomic techniques and their food and feed, and amending Regulation (EU) 2017/625 – Analysis of the final compromise text with a view to agreement", 11 December 2025.
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- + Denis Meshaka, "GMO patents: is it possible to break the deadlock?", *Inf'OGM*, 30 January 2025.
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- + "Agreement on a unified patent court,"*Official Journal of the European Union*, 20 June 2013.
- + Germany, Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Sweden and, since September 2024, Romania.
  The Member States of the European Union that are not signatories to the UPC Agreement are Cyprus, Croatia, the Czech Republic, Greece, Hungary, Ireland, Poland, Slovakia and Spain.
