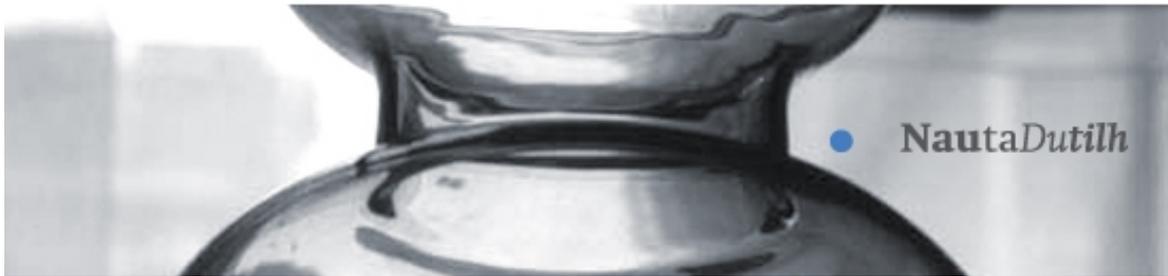


# Newsflash

## Intellectual Property



**Dutch Court Rounds-up the case, Ready® for the ECJ: the scope of protection of DNA patents**

**7 April 2008**

*This newsletter is sent from our Amsterdam office*

NautaDutilh represents several soy meal importers in the Dutch chapter of the pan-European litigation brought by Monsanto in an effort to stop imports of soy meal from Argentina. In its 19 March 2008 decision, the District Court of The Hague refers several questions to the European Court of Justice. At stake is whether the Biotech Directive determines the scope of DNA patents, or whether there is room for a more absolute protection conferred by national patent laws.

### **Background**

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Monsanto is the proprietor of European patent EP 0 546 090 relating to glyphosate-tolerant 5-enolpyruvylshikimate-3 phosphate synthesis, an invention causing glyphosate (a herbicide) tolerance in soy plants. Argentina is one of the few places in the world where no IP protection for this invention exists, and farmers in Argentina have adopted this technology. Argentina is one of the largest exporters of soy products.

Monsanto's invention results in genetically modified plants and produces benefits at the crop growth stage of the production. A large part of the soy beans from these plants are used for the extraction of oil. After oil extraction, the residual parts of the soy beans are then further processed into soy meal, which is used as cattle feed. Monsanto argues that intact DNA molecules are residually present in soy meal imported into Europe and that its patent is therefore infringed under national patent laws in Europe.

The soy meal importers, on the other hand, argue *inter alia* on the basis of Article 9 of the Biotech Directive that the scope of protection of Monsanto's patent does not extend to situations where the DNA molecules, if present at all, are residually present and are incapable of performing any function whatever, least of all the function for which the patent was granted: creating glyphosate tolerance.

### **The Dutch case**

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In the third decision in this pan-European litigation (in which Monsanto has so far been unsuccessful in the UK and in Spain), this debate has prompted the District Court of the Hague to refer several draft questions, subject to the parties' comments, to the ECJ.

The District Court decided that it cannot clearly ascertain whether "classic", absolute product protection would apply for DNA molecules on the basis of national patent laws and that their scope of protection is unrelated to any function or expression of characteristics within the meaning of the Biotech Directive. It will effectively ask the ECJ whether, under the present circumstances of the case, the scope of protection of DNA patents is governed exclusively by the Biotech Directive.

NautaDutilh will refrain from commenting on this decision as it is involved in this litigation, but will keep you informed of the progress in this case. It will be the first time that the ECJ reviews the important issue of the scope of protection in the context of DNA patents.

### **Contact**

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