

# European Seed Association



## ESA Comments

on

**practical provisions for a Standard MTA  
under the IT on PGRFA**

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### Introduction

For Plant Genetic Resources for Food and Agriculture (PGRFA) as listed in the Annex 1 of the FAO-IT, a Multilateral System (MS) is established that includes all PGRFA that are under the control of the Contracting Parties and in the public domain.

The MS shall facilitate access to plant genetic resources and share the benefits arising from the utilisation of these resources.

The Material Transfer Agreement (MTA) sets out the provisions under which such access can be provided to Contracting Parties and legal and natural persons under the jurisdiction of any Contracting Party (Art. 12.2)

ESA European Seed Association considers it imperative that the MTA is devised in such a way that access and exchange of genetic resources and diversity is encouraged and increased to promote the development of new and improved plant varieties. Access and use of plant genetic resources are also precondition to their conservation. It therefore is important that the provisions contained in the MTA comply with this principal goal by establishing simple, practical and feasible rules for the access to plant genetic resources.

ESA's following detailed comments on elements for inclusion in the MTA refer to the options proposed in the Terms of Reference for the Expert Group and are drawn from commercial experience.

ESA

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- **What constitutes commercialisation in terms of Article 13.2.d.ii of the Treaty?**

Art. 13.2.d.ii states that a recipient who commercialises a product that is a PGRFA and that incorporates material accessed from the MS, shall share benefits.

**ESA's comment:**

Commercialization triggering benefit sharing (BS) should be sale or licensing for sale of the propagating material of a new product incorporating part of the received PGRFA material, by the person having received that material from the MS. It should be limited to those two acts. The presence of any form of Intellectual Protection is not relevant for this purpose.

Likewise, the filing of an application in order to obtain intellectual property protection cannot be considered as commercialization, as it does not involve any commercial act and does not generate any commercial benefits.

- **Recipient and transfer of plant genetic resources**

According to Art. 12.4, facilitated access shall be provided pursuant to a standard MTA. The recipient of the plant genetic resources shall require that the conditions of the MTA apply to the transfer of plant genetic resources to another person or entity, as well as to any subsequent transfers of the PGRFA.

**ESA's comment:**

The scope of this article should be limited to the transfer of material "in the form received". This implies that only in the case of transfer of this material as such, the new recipient must sign an agreement like the one the first recipient signed with the MS.

- **Exhaustion of subsequent MTA obligations**

**ESA's comment:**

PGRFA are at the basis of the agricultural production chain; that means that many subsequent transfers take place.

Benefit sharing is only obligatory at the first step in the production chain, when a new product (variety), where the genetic potential is realised, has been developed and is commercialised. The provisions in the MTA dealing with benefit sharing apply to this product only but not to products further down the chain.

If there are no restrictions on R&D for that new product (variety), other breeders are free to develop and commercialize further varieties with that genetic material.

- **Duration**

**ESA's comment:**

The MTA has no time limitations. Benefit sharing obligations, whether monetary or not, should be limited in time, e.g. in line with Article 13.2.d taking into account the exhaustion of a respective Intellectual Property Protection.

- **What constitutes incorporation of material accessed from the Multilateral System?**

**ESA's comment:**

Incorporation of material means any transfer of genetic parts or components of material accessed under the MS pursuant to the terms of the MTA, be it through crosses or genetic engineering into a new product.

Different processes for incorporation may be taken into account when determining benefit sharing, such as

- crossing the material received with other genetic resources

- transfer of one or several traits isolated from the material received to other genetic resources

- **What should be the level, form and manner of payments in line with commercial practice?**

**ESA's comment:**

Unless otherwise agreed by the provider and the recipient, the level of benefit sharing should be defined *a priori*.

Any monetary benefit sharing must be at reasonable levels. It therefore should be based on the relative contribution of the material accessed under the multilateral system.

It should also be realized only above a certain minimum level of inclusion into the germplasm of the new product and according to common commercial practice\*.

\*The non-exhaustive parameters usually taken into account in common commercial practice are

- the cost of R&D to develop the new product using the material accessed under the MS and the degree/level of intellectual property covering the other components/research processes involved in the development of the new product
- the competitive environment.

An upfront payment at the time of signing the MTA is not recommended, as it would be difficult to account for the probability of developing a successful commercial product.

The form and manner of any payment should be based on common commercial practice, e.g. the annual declaration by the recipient of the material of its annual turnover regarding the new product or the license at stake with the possible audit on prior written notice of his/her account books by a third independent and neutral party, under a confidentiality agreement.

- **When would a product be considered to be available without restrictions to others for further research and breeding?**

**ESA's comment:**

A product would be considered to be available without restriction to others for further research and breeding when any third party, having had access to the product lawfully, may use that product to develop new products without restriction. This includes any variety irrespective to its way of reproduction as these varieties may be used as an initial source of variation for the purpose of creating other varieties (e.g. pursuant to the breeder's exception under UPOV).

Freedom to operate at research level does not preclude possible infringements (e.g. essential derivation in the sense of UPOV, scope of the claims of a patent) at commercialization level.

It must be noted that whether a product is available without restriction to others for further research and breeding must be analyzed on a case-by-case basis. A reasonable handling fee should not be considered as a restriction.

- **Should different levels of payment be established for various categories of recipients who commercialize such products or for different sectors and, if so, what these levels, various categories of recipients and sectors should be?**

**ESA's comment:**

Different levels of payment should not be established as a principle.

If this would be the fact, all recipients would have to pay a percentage of their turnover agreed on a case-by-case basis and related to the new product and the selling price of that new product. It would have to be adapted to the various markets, taking into account the possible differences.

The establishment of different levels of payments therefore in principle would likely

- lead to high administrative burden
- allow for a payback/subsidy scheme at national level
- create anti-competitive conditions
- be fraud sensitive

- **Should small farmers in developing countries and in countries with economies in transition *be exempted* from the payments, and if so, who qualifies as such a small farmer?**

**ESA comment:**

The question is not relevant as, in fact, it is not the farmers that would have to pay to the global fund but the seller of the product incorporating part of the PGRFA accessed under the MS to the farmers. The question is a duplication of the previous one, with an emphasis on small farmers as a specific category of "different sectors".

Exempting small farmers would imply that either the seller of the product should receive subsidies from the global fund (or government) in order to be able to sell the seed at a lower price to that category of customers or that the small farmers would receive the subsidy directly if they are paying the full market price for the seed. In any case, the system would be extremely complex, cumbersome, costly to implement and also fraud sensitive.

If the principle of exempting small farmers from the payments would be retained by the Governing Body of the Treaty, despite the obvious difficulties, the definition of small farmers should be made on a country-by-country basis, as small farmers in e.g. Latin America are not necessarily comparable to small farmers in Asia or Africa.

- **How will monetary and other benefits be defined, for the purpose of the standard MTA?**

**ESA comment:**

The question is already addressed in the question on level, form and manner of payments. The parameters listed there should allow to define the benefits for the purpose of the standard MTA.

- **By what means will the MTA ensure the application of Article 12.3?**

**ESA comment:**

By incorporating –literally- the terms of the Article 12.3(a), (d), (f) and (g)<sup>2</sup> in the MTA and to remain within the scope of that Article.

- **What terms should be included in the MTA, so that recipients are bound by it on acceptance of the material from the MS?**

**ESA comments:**

A copy of the MTA signed by an authorized representative of the recipient should be returned to the providing centre prior to the shipping of the material or the MTA should otherwise be accepted as binding in a manner recognized by relevant governing law. That is enough to have the recipient bound by the MTA, according to contractual law.

One must be aware that contractual laws are national and the MTA may have to be adapted on a country-by-country basis to avoid clauses that could be unlawful in a given country.

In any case, a sentence like the following should be inserted in all MTAs: *“Severability: if any term, condition or provision of this MTA or application thereof is judicially or otherwise determined to be invalid, unenforceable or contrary to law, the remaining terms, conditions and/or provisions of the MTA will remain in full force and effect”.*

- **Other aspects that the MTA should cover**

**- Scope: the Annex must be extended to all species for food and agriculture**

Access is provided solely for the purpose of utilisation and conservation for research, breeding and training in food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.

If those purposes arise after access took place, the recipient must reach agreement with the Country of Origin on Benefit Sharing according to Article 15 of the CBD (Bonn Guidelines).

**- Warranties and Liability:**

The authority providing PGRFA under the MS will have to provide warranties concerning the fact that the material provided has been obtained legally, that the authority has the right to enter into the MTA regarding that material and, as the case may be, warranties dealing with the adventitious presence of GM material in the PGRFA, violation of third parties IP rights.

Warranty for merchandability or fitness for any particular purpose will have to be dealt with as well.

The MTA will then have to foresee to which extend the authority will be held liable in case of breach of those warranties.

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### **ESA Mission Statement**

ESA is the voice of the European seed industry, representing the interests of those active in research, breeding, production and marketing of seeds of agricultural, horticultural and ornamental plant species.

Plants from seed are the origin of all food, provide innovative and environmentally friendly industrial products and beautify our landscape.

ESA's mission is to work for:

- ◆ effective protection of intellectual property rights relating to plants and seeds;
- ◆ fair and proportionate regulation of the European seed industry;
- ◆ freedom of choice for customers (farmers, growers, industry, consumers) in supplying seeds as a result of innovative, diverse technologies and production methods

