

European Seed Association



**Additional Comments
on
the text of the standard Material Transfer Agreement of the
International Treaty on Plant Genetic Resources for Food
and Agriculture (IT PGRFA)**

ESA_06.0181

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ESA proposes additional changes in the articles dealing with the payment structure of the sMTA for more clarity.

The issue considered is how to structure licensing out for commercialization as well as for products in development.

ESA proposes two guiding principles:

- No direct Benefit Sharing on Products under Development (definition needed) even if there are financial transactions taking place around it.

It only seems like the developer escapes paying BS since he must transfer the obligation of BS on the PuD to a licensee and this will have a negative effect on the payment in this phase.

The real value (benefit) is in the end product which in our view is always a plant variety sold to a farmer; BS should be based on the Net Value of these sales.

- Benefit Sharing payments should never be more than x% of Net Sales; no double payment. But it could be that payment comes in two parts from two sources; the licensor and the licensee.

The financial arrangements in the Appendix 2 should reflect this; the Recipient pays over his total Net Income of the Product. But for the part of the Net Income which is licence fee, additional payment is necessary since the licence fee is much lower as the Net Sales of the Product.

That part of the payment could be done directly by the Recipient or he has to oblige the licensee to do it. In the last cases both pay part of the Benefit Sharing. The definition of Net Sales (minus licence fee) ensures that the licensee does not have to pay over the licence fee; that is always up to the licensor/Recipient.

That also implies there is only one percentage "x" of Net Sales; sometimes an alternative percentage of y was proposed but in our view it can only be one value that applies to licence fees as well as sales.

Below, ESA proposes amendments on the basis of EU discussions focusing on options for article 7.7, 7.10 and Appendix 2:

STANDARD MATERIAL TRANSFER AGREEMENT

“*Product*” means:

a plant genetic resource for food and agriculture derived from the Material, as defined in Article 4.1, through research and breeding that incorporates by pedigree, at least twenty-five percent (25%) of the Material or that contains an identifiable trait of value or essential characteristic of the Material accessed from the Multilateral System and that has undergone development and is to be commercialized in the form of a variety for the first time.

“Product under Development” means:

A Product that is not yet commercialised in the form of a variety.

“*Trait of value*” means:

any characteristic, identified by the Provider or Recipient in the Material transferred to Recipients through the Multilateral System, expected to add value when Incorporated into a Product of the Recipient.

“*Net Income*” is:

Net Sales of the Product or licence fees received for licensing out the Product.

“*Net Sales*” means:

the gross sales of Product(s) by the Recipient, its affiliates, contractors, licensees and lessees, to an independent third party less the sum of the following: (a) discounts, in amounts customary in the trade, for quantity purchases, cash payments, or given to wholesalers and distributors; (b) amounts repaid or credited by reason of rejection or returns; (c) any freight or other transportation costs, insurance, duties, tariffs and sales and excise taxes based directly on sales or turnover or delivery of Product(s); and (d) any licence fees(!).

7.7 In the case that the Recipient transfers the Material and the related information referred to in Article 5.1b supplied under this Agreement, or a Product under Development to another person or entity for research and breeding, the Recipient shall do so under the Standard Material Transfer Agreement. The Recipient shall have no further obligations regarding the actions of any third party transferee except those specified in the Standard Material Transfer Agreement.

Gelöscht: p

Gelöscht: d

Gelöscht: obtained from such material

7.10 In the case that the Recipient commercialises a Product that is a plant genetic resource for food and agriculture and that incorporates material as referred to in Article 4.1 of this Agreement, and where such a product is not available without restriction to others for further research and breeding, the Recipient shall pay a percentage of the Net Income resulting from commercialisation of the Product into the mechanism established by the Governing Body for this purpose in accordance with the conditions set out in Appendix 2 to this Agreement.

APPENDIX 2

PAYMENT OF BENEFIT-SHARING

1. In accordance with article 7.10 the Recipient shall pay 'x' percent ('x' %) of the Net Income to the Mechanism established by the Governing Body for this purpose. As far as the Net Income of the Recipient is related to licence fees received, the Recipient shall additionally:

- i. Either pay 'x' % of the Net Sales of the licensee / the lessee; or
- ii. Transfer the obligation as referred to in sentence i of this article to the licensee / lessee and inform the Multilateral System accordingly.

2. The Recipient shall submit to the Governing Body, within sixty (60) days after each calendar year ending December 31st, an annual report setting forth the Net Income and in case of paragraph 1, i) the Net Sales reported by the licensee / lessee for the twelve (12) month period ending on December 31st, and the amount of the payment due.

3. Payment shall be due and payable upon submission of each annual report. All payments due to the Governing Body shall be payable to the Trust Account or other mechanism established by the Governing Body in accordance with Article 19.3f of the Treaty.

Gelöscht: fund

Gelöscht: If the Net Income of the Recipient is restricted to license fees received, the Recipient shall:

Gelöscht: additionally

Gelöscht: y

Gelöscht: 1

Gelöscht: sentence 2

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.