

**ADDENDUM I****Strengthening the competitiveness of Europe's seed sector -  
ESA's Terms of Reference for assessing the EU's seed legislation****• Safeguarding and promoting the innovation capacity of the seed industry**

The single most important precondition for continued high-level investment of the industry is a sufficient protection of intellectual property rights related to plants and seeds at sustainable costs and with the possibility of effective and efficient enforcement.

While Europe's respective legislation generally provides for such a legal framework, its factual implementation in Member States varies greatly and increasingly, new technological possibilities of reproduction of protected material hamper the industry's ability to effectively control and enforce their IP rights.

This development will increasingly lead to a concentration of future breeding activities on crops less vulnerable to the infringement of IP rights and is specifically damaging to smaller and medium sized companies active in specific and quite often very regional markets.

It is important to realise that providing for the possibility of intellectual property rights as such is not sufficient but that policy and administration should also accept an obligation to facilitate and where necessary support their enforcement together with the industry.

The seed industry is a highly innovative industry. With a R&D ratio of around 15% of its annual turnover, it is a particularly research intensive business.

To continue this high level of research and development, an effective and affordable protection of its intellectual property is a precondition for assuring a fair return on these high investments.

The specific Community protection system established in line with the UPOV 91 Convention provides a good base for a highly effective system for the protection of innovations in plants and seeds. In connection with an aligned protection system for biotechnological inventions, it should encourage investment in R&D, promote innovation and safeguard a fair return on these inputs for the industry. At the same time, account is taken of a balance of rights of the owners and the users of intellectual property (breeders as well as farmers privilege under specific conditions supposed to safeguard the legitimate interest of the holder of the right).

Today, there are growing problems in enforcing plant breeders' rights both in field crops (farm saved seed) as well as –due to advances in technology- in other areas that did not encounter such problems before (illegal reproduction of seeds and illegal vegetative reproduction in vegetables and ornamentals). The aspired balance of rights is severely distorted to the detriment of the innovator resulting in reduced investment and thus future innovation in the most vulnerable crops already today.

It is of utmost importance that the EU considers all possibilities for promoting and where necessary assisting the enforcement of intellectual property rights of plant breeders in order to maintain a broad base of investment into research and development of new plant varieties in all crops and in particular in those, where current practices threaten the industry's capacity to continue its current efforts.

As regards the needed alignment of the legal systems provided for the protection of plant varieties on the one hand and biotechnological inventions on the other, the limited take up of the latter due to the restriction of the technology in the EU limits the experience of the industry. Still, further legal certainty should be provided that safeguards the principle of the breeders' exemption as well as its uniform EU wide interpretation in those cases where Plant Breeders' Rights and patented biotechnological inventions interact.

|   |
|---|
| <ul style="list-style-type: none"><li>• <b>A true Common Market for seed in line with international standards</b></li></ul> |
|---|

The seed industry is one of the most influential factors improving the competitiveness of Europe's farming sector. This influence is based on high quality requirements and their strict enforcement by quality assurance of companies and control in cooperation with official bodies.

These requirements have allowed the establishment of a common market and free trade of seed within the European Union in compliance with international (OECD) standards facilitating the international exchange of seed beyond Europe's borders. Today's export share of approx. 20% of all commercial seed shows the importance of common and internationally integrated requirements for the trade of seed. Lately, the problem of AP of GMOs in seed has led to significant disruptions in the international exchange of seed in a number of crops (e.g. maize, oilseed rape, cotton etc.). There is also a growing tendency to (ab)use phytosanitary regulations as barriers to trade. Furthermore, ESA sees an increasing erosion of the EU's common market for seed due to misinterpretation or abuse of national implementing measures, in particular as regards the invoking of safeguard clauses or setting of additional requirements that prohibit the free movement and use of properly registered varieties.

With that, the industry faces growing challenges to its well established breeding, production and trade patterns, despite the general commitment of EU and Member States to a common market and facilitation of international exchange of seed. The European seed industry strongly supports a true common market for seed that assures access to varieties for all European farmers at defined minimum quality levels. Safeguarding and where required re-establishing this common market is instrumental in maintaining and promoting the international competitiveness of Europe's farmers and agri-food chain in an increasingly open world market.

Again, ESA points out the inbuilt need for a proper identification of plant varieties and their basic qualities that are precondition for acquiring and enforcing intellectual property rights, for consumer protection (product quality assurance for farmers and industries) and in particular for the exchange with Europe's trade partners. The compliance with such international requirements and the acceptance of international standards such as the OECD seed schemes are therefore crucial for the practical value and use of EU legislation by the European seed companies.

Still, while safeguarding the principles of a common market and compliance with international standards, numerous improvements may be envisaged as regards the practical implementation of the seed (marketing) legislation.

These improvements mainly relate to costs, speed, involvement of private bodies and a proper repartition of work and responsibilities between breeders and official bodies in the areas of variety testing, seed certification, phytosanitary testing and inspections and seed quality control. Overall aim of a repartition must be to increase the international competitiveness of the European system.

ESA realizes and accepts specific regulations for specific markets and issues, e.g. for organic seed, for the conservation of plant genetic resources by marketing of seed or for closed industrial production circles. At the same time, the European seed industry is of the opinion that any specific provisions must not lead to an undermining of the general principles (re-) establishing a common market for high quality seed.

Today's practice of exemptions from the compulsory use of organic seed for organic farming granted by Member States is a prominent example how non-implementation, different interpretation by Member States and legislative uncertainty over a long period of time has led to a distortion of the level playing field for companies and to a significant underachievement of the original policy objective. Contrary to the promotion of organic seed production, the current situation is consistently punishing those investing in research and breeding for this market and has actually led to a decline of respective activities of Europe's seed companies.

- **Efficient and cost-effective administration of the *acquis communautaire* – Better Administration**

An efficient and cost-effective administration of the *acquis communautaire* for seed and plant varieties is of utmost importance to Europe's plant breeders. It is also a precondition for a well-functioning common market for seed that effectively promotes innovation by facilitating access to market, that assures freedom to operate and the enforcement of intellectual property rights and that establishes a reliable framework for the economic activities of the industry and its relation to its customers.

ESA is of the opinion that a far-reaching harmonisation of rules is instrumental in achieving these aims. At the same time, we are of the opinion that the practical administration may be designed in a way that is closest to both seed companies and customers.

It is in the area of administration that ESA sees numerous possibilities for achieving practical improvements with sometimes quite limited changes and adaptations.

In general, we are of the opinion that e.g. accreditation systems should not be limited to official but must also include private bodies (as for instance in the areas of seed certification and seed testing).

Wherever possible and more efficient while maintaining quality levels and customer assurance, possibilities for companies to become more involved in all processes should be envisaged.

- **Public-private partnership in decision making – Better Governance**

The current framework for marketing, protection and quality assurance of seed and plant varieties in the EU rests largely on the base of a classical governmental or public authority responsibility for many stages of these economic activities which seems increasingly outdated.

In view of an increasing culture of responsibility and liability, seed companies are interested in strengthening their individual control on production, marketing and follow-up of their business. As a consequence, more and more seed businesses have become truly integrated companies.

The European seed industry envisages a policy concept that takes more account of modern governance concepts based on participation, consultation, coordination and where final decision making and implementation are shared between official authorities and private companies rather than exclusively the task of governments or administrations.

- **Healthy seed as the base for healthy crops – the phytosanitary dimension**

Healthy seed is a precondition for assuring that the genetic potential of varieties can be fully enjoyed by farmers. It is also a precondition for allowing an undisrupted international exchange of seed beyond the borders of the European Union as well as within the Union itself.

The European seed industry sees more and more examples where third countries abuse phytosanitary measures as non-tariff trade barriers hindering or even prohibiting the international trade of seed and planting material, even where respective trade agreements exist. In addition, the non-harmonised implementation of the existing respective (EU) legislation still causes significant disruptions in the free flow of seed even within the Common Market.

In this context, the still unresolved problem of free movement of treated seed and the non-harmonised authorisation of plant protection products for their use as seed treatments and minor uses is a growing concern for seed companies throughout Europe.

- **Assuring access to plant genetic resources for improving plant varieties**

Access to plant genetic resources for food and agriculture is a precondition for seed companies on conducting their business and the base for all plant genetic innovation.

Plant genetic innovation depends on this genetic variability that, following multiple steps of selection and breeding, results in ever better, more sophisticated and specific crop varieties for multiple uses in food, feed and industrial production.

Legal certainty for and of the practical access and its implementation in Europe and worldwide is of utmost importance for a globalised industry such as the seed business.

The non-implementation of the CBD in general and in particular the absence of a workable system for access and benefit sharing on the one hand and the successful, yet non-comprehensive (limitation in scope and species) discussion within the FAO's IT for PGRFA and its SMTA show that further improvements in this area are required.

- **GM seed and GM varieties – taking account of the international development and providing practical solutions**

ESA takes note of the growing use of modern biotechnology in general and genetic modification in particular in both plant breeding and commercial, large scale agricultural production. While this development is still much more limited in the European Union than in many other parts of the world, still numerous problems arise for European seed companies in view of their international exchange of genetic material, breeding programmes and seed production.

The current problems are caused by lack of, non-harmonised or abuse (e.g. national 'safeguard' measures or de-listing of supposedly unsuitable GM varieties) of implementing measures of existing EU legislation as well as by the sheer lack of legislation as such, as e.g. in the case of thresholds for adventitious presence of GMOs in non-GM plant varieties. Both are increasingly leading to de-facto trade barriers for European seed companies and thus threaten the competitiveness of Europe's seed industry and farmers. They also lead to a discontinuation and outsourcing of research and development activities and thus undermine Europe's seed industry's future innovation and competitive capacity.