

Seed Markets for Agroecology

PCD Discussion Paper on Seeds and Food Security

December 2020

1. Introduction

Why ACT Alliance EU gets involved

As a development organisation, ACT Alliance EU members engage in seed advocacy in response to partners' struggle for seed rights. ACT EU supports agroecology, the right to food and farmers' rights, which is best summarised in the 2018 adopted UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).¹

The diversity of seed systems and markets offering locally adapted quality seeds and plant genetic diversity, and the opportunities for farmers to save, use, exchange and sell their seeds are paramount to resilient agricultural systems and farmers'

sovereign choice. Therefore, the focus of this briefing is on the likely impact and relevance of the European seed policies review and legislation on marketing rules in developing countries.

Various seed campaigns are ongoing. There are campaigns against the International Union for the Protection of New Varieties of Plants (UPOV) 1991 in Swiss or EU bilateral trade deals with countries of the global South (currently with Indonesia and Malaysia). Or campaigns in Africa for farm-based seed systems rejecting the commercial exploitation of seed markets in the interest of corporations as heavily pushed for by AGRA (Alliance for a Green Revolution for Africa). Campaigns in Latin

¹ See <https://undocs.org/en/A/RES/73/165>

America fight against the criminalisation and marginalisation of smallholders' farm-based seed systems. Often, peasant seed campaigns focus on blocking breeder rights (i.e. UPOV 1991), while the issues of seed marketing and the possible impact of the new seed regime under the EU Organic Regulation (2018) have received less attention.

From a policy coherence for development (PCD) perspective, the strategic interest is to assess existing flexibilities in European seed laws that benefit local seed systems; so that any of these or equivalent flexibilities can be used in third countries or to help protect and expand their own flexibilities. New European Commission legislative proposals are subject to specific procedures under EU PCD obligations to account for likely impacts, positive or negative, of new EU policies and laws on developing countries. The forthcoming reform of EU seed law offers a timely opportunity to identify advocacy options relevant to ACT Alliance EU member agencies and their partners in the global South.

Experiences from ACT Alliance EU member agencies have shown that partners using agroecology approaches and open pollinated seeds are more resilient and better equipped to cope with the Covid-19 crisis. They are less dependent on global value chains for input and their farming practices and can afford to refrain from purchasing hybrid seeds.

The ACT Alliance support for the Call for Action to the Heads of States ahead of the UN General Assembly 75th session to halt and reverse biodiversity loss and to put nature and ecosystems on a path to recovery recognises the agency of

indigenous people, small scale food producers, and peasant farmers who act as custodians of ecosystems' health and seed diversity.²

What is the purpose of this paper?

With this briefing, ACT Alliance EU intends to share insights on the forthcoming reform in 2021 of EU seed legislation with partners in the global South. The new EU Organic Regulation and the recent adoption of the European Green Deal are expected to have far reaching impacts on EU seed legislation.

In 2019, the Council requested the European Commission to submit a study on the EU's options to update existing seed legislation. In May 2020, the Commission adopted ambitious targets in the European Green Deal, the Farm to Fork and the EU Biodiversity Strategy. For example, the Farm to Fork Strategy aims at turning 25 percent of the farming land in the EU into organic. This means that in the future the EU Organic Regulation³ and its new special regime for 'organic heterogeneous material' will guide a quarter of the operations in the European domestic seed market. With an EU seed market currently valued at 8 billion euros, a new market worth about 2 billion euro is emerging that will offer a potential to introduce seed laws that are more respectful of farmers rights.

The Organic Regulation will also impact organic food importers who are required to comply with the same set of rules as those producing in the EU.⁴ Further information on the implications for organic food exporting countries in the global South is needed.

² Development and Humanitarian Civil Society Call to Action to Heads of State and Government, supported by ACT Alliance 18 Sept 2020, initiated by the WWF Call for a New Deal for Nature and People, see <https://actalliance.eu/wp-content/uploads/2021/01/CALL-TO-ACTION-DEVELOPMENT-AND-HUMANITARIAN-CIVIL-SOCIETY-150920.pdf>

³ EU Organic Regulation (2018/848), see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0848&from=EN>

⁴ See https://ec.europa.eu/info/food-farming-fisheries/farming/organic-farming/future-organics_en

A study⁵ carried out by independent consultants for the Commission should include and cover these new developments in the options listed and considered under the EU seeds marketing reform. The study will be published and opened for public consultation in April 2021, followed by an impact assessment in December 2021, according to current expected timelines.

ACT Alliance EU argues that to meet the objectives of building resilience of poor communities and safeguarding agrobiodiversity, the upcoming EU seed reform should lead to more policy space for local and diversified seed systems, in the EU as well as abroad in countries of the global South. Therefore, ACT EU considers it strategic to identify flexibilities in European seed laws and to advocate for (at least) the same degree of flexibility to be granted to third countries.

Why is this relevant for the global South?

Seeds are a source of life and form the basis of crop farming. The diversity of crop varieties as well as its genetic diversity is vital for future food security, fulfilling the right to food and the ability of farming systems to adapt to climate change. A recent study in Mozambique and Zimbabwe confirms the great importance of farm-based seed systems as well as the necessity to strengthen them to respond to emergency situations inflicted by climate change like Cyclones IDAI and Kenneth.⁶ This is highly relevant given that the EU is an important actor when it comes to sourcing of seeds in humanitarian aid interventions on the ground.⁷

The increasing concentration and global reach of the commercial seed breeding industry has contributed to the erosion of crop diversity. The few remaining EU, US and China-based seed companies are driving market expansion and are using their power in the market to influence political and legal (seed) frameworks. The EU itself has wide ranging influence as a donor, a standard setter and as a global actor in international food and agricultural fora. In particular, the EU's trade policy continues to contribute to the loss of agrobiodiversity. Yet, despite its commercial value, the industrial food chain produces just 30 percent of global food supply. 70 percent of the world's food comes from smallholder farming and the peasant food web supplies, which rely on seed produced and distributed through farm-based seed systems.⁸ Yet, often existing seed regulation has been introduced by industrialised countries to open markets for and protect the interests of their seed companies. Seed regulation across the world tends to focus on facilitating commercial seed trade that risks undermining farmers' rights everywhere. But markets that offer locally adapted, genetically diverse quality seeds, and the opportunity to save, use, exchange and sell farmers seeds are paramount to farmers' sovereign choice and the resilience of agricultural food systems

UNDROP — a basic legal framework for peasants' seed rights

The UN Declaration on Peasants' Rights and Other People Working in Rural Areas (UNDROP) calls upon states to respect, protect and fulfil

⁵ On 8 November 2019, the Council requested the Commission to submit a study on the options to update the existing seed legislation, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019D1905>

⁶ See <http://www.fao.org/emergencies/fao-in-action/stories/stories-detail/en/c/1301895/>

⁷ See Parliamentary Question by MEP Maria Heubuch, 8 February 2018, and Response by the Commission, 19 April 2018 on Humanitarian aid: sourcing of seeds and ethical procurement, at https://www.europarl.europa.eu/doceo/document/E-8-2018-000704_EN.html, https://www.europarl.europa.eu/doceo/document/E-8-2018-000704-ASW_EN.html

⁸ ETC Group (2017) Who will feed us, see <https://www.etcgroup.org/whowillfeedus>; Swiss Academic Fact Sheets, (2019); Variety is the source of life: Agrobiodiversity benefits, challenges, and needs, see http://www.akademien-schweiz.ch/index/Publikationen/Swiss-Academies-Factsheets/mainColumnParagraphs/0115/download_website_en.pdf

the peasants' right to seeds.⁹ This includes appropriate measures to support and use peasant seeds systems to promote agrobiodiversity. It encourages the existence of a seed market from which peasants can access 'locally available seeds of their choice', and ensure they have 'enough seeds of sufficient quality and quantity'. The UNDROP highlights the importance of peasants' rights, of policy space and control mechanism. Adopted in December 2018, it has generated new attention to farmers' seed rights and has received wide support from a broad audience, including government departments. The legal nature of this UN Declaration offers clarity in the interpretation

of farmers' seed rights. Any UN Declaration is above national legislation such as plant variety protection laws drafted in line with the UPOV convention.¹⁰ UNDROP thus allows to put an end to the ambivalence persistently brought forward in sophisticated discussion on the interpretation of the Seed Treaty (i.e. International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)). Importantly, UNDROP elaborates on the peasant rights in legal UN human rights terms that are new, straightforward and far reaching. It allows for easier access, better understanding and boosts the support for peasant seed rights.

EU seed marketing rules,¹¹ which regulate access to the formal seed market, are not adequate to cater to the needs of local and diversified seed systems. To protect farmers on the identity and quality of seeds purchased, but also to enhance agricultural productivity, European seed marketing rules rely on stringent protocols ensuring the distinctiveness, uniformity and stability of plant varieties that need to be registered in an official catalogue, and on seed lot certification schemes. **They considerably restrict the human right to seeds enshrined in the Article 19 of UNDROP, and would need to be amended to enable peasants and biodiversity:**

1. **Restrictive interpretation of the notion of 'commercial exploitation of seeds' (which triggers the implementation of EU seed laws) so that the wide range of activities that occur within local seed systems are outside of the seed laws' scope (no variety registration or restrictive administrative burden for local peasant seeds exchange, save, and sell within the informal system).**
2. **More flexible approaches to derogatory regimes that allow the entry of diverse, affordable and adapted seeds developed by private entities and farmer-breeders into the formal seed market. Create an enabling policy environment for the marketing of locally adapted varieties that do not necessarily need a lot of additional agricultural inputs, and providing viable business models for farmers-breeders to develop and market their own seeds on the formal market if they wish to do so.**

9 UNDROP, Article 19, "1. Peasants and other people working in rural areas have the right to seeds, in accordance with article 28 of the present Declaration, including: [...]. The right to save, use, exchange and sell their farm-saved seed or propagating material. 2. Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge. 5. States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. 6. States shall take appropriate measures to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity. 8. States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas."

10 International Union for the Protection of New Varieties of Plants; for further information see <https://www.apbrebes.org/content/upov-convention>

11 Extract from Batur Fulya, Kybele (2019) Scoping paper on EU seed laws and their relevance for third countries, provided for ACT Alliance EU. Unpublished. Available upon request.

2. Overview on EU seed policies and legislation — and its impact on the global South

Back in 2013, in a rare move the European Parliament rejected the Commission legislative proposal on seed marketing rules. The complex and inconsistent mix of existing and somehow outdated seed laws¹² concerns two major features of interest in this paper, seed marketing and seed variety protection (intellectual property rights (IPR) on seeds).

The present paper comes at an early stage and allows for a comprehensive assessment of what is at stake. Importantly, matters concerning breeders' rights (IPR/UPOV) and seed marketing rules need critical analysis, in particular how they interact and why neither cannot be looked at in isolation. Also, a better understanding is required of how and by which avenues EU seed marketing rules may impact on countries in the global South.

What is at stake?

EU seed marketing rules regulate access to the formal seed market. These rules rely on stringent protocols ensuring the distinctiveness, uniformity, and stability (DUS criteria) of plant varieties that need to be registered in an official catalogue. This includes production rules ensuring the quality of seeds through seed certification schemes.

European seed marketing rules only apply to so-called regulated species, which are chosen for their

commercial value. In each European Seed Directive, a specific Annex lists the crop species to which the Directive applies. **Although most commercially relevant species are listed and regulated, some remain outside the scope of seed laws, and can be marketed without prior variety registration, like lentils, quinoa, rocket, or basil. This is an important exception that the EU has established here. Countries in the global South should be made aware of this EU procedure. Third parties could refer to the EU example of exempting sensitive crops or crops of high traditional importance from the scope of seed laws in any negotiations, as a means to fulfil farmers' seed rights.**

It is argued that intellectual property rights (i.e. patents and plant variety rights) are adopted to provide incentives for innovation, which is an ever more disputed premise. Evidence suggests that increasingly tight IPR rights are stifling rather than fostering innovation while leading to unprecedented and oligopolistic market concentration.¹³ In the EU, DUS protocols are enacted by the Community Plant Variety Office (CPVO), which grants plant variety protection titles. Yet not only are intellectual property rights on seeds in direct conflict with farmers' rights to seeds, but they also fail to deliver on suggested incentives of the availability of improved

¹² The EU has different EU Directives and specific EU Regulations relevant to seed markets, such as Plant Variety Protection (IPR DUS), Value for Cultivation and Use protocols, Variety Registration or Listing (seed market access), Seed Lot Production (basic, certified, standard seed), Packaging and Labelling (requirements), etc.

¹³ APBEBES (2020) Focus on Plant Variety Protection. A Compilation of Selected Literature on the Impact of the UPOV Convention, Alternative sui generis PVP Laws and the Effect on Farmers' Rights. The paper argues that while IPRs may foster investment in research and development (R&D) and innovation, robust seed sectors have often thrived in the absence of IPRs (Louwaars et al., 2005). Further, IPR protection can restrict access to knowledge, which might hinder future innovation, production and productivity (Campi and Nuvolari, 2020).

varieties.¹⁴ **For that reason the interlinkages of UPOV and seed marketing rules need to be better understood, assessing whether structural changes need to be introduced in upcoming EU seed legislation reform.**

What is the likely impact on the global South?

Complying with PCD obligations, EU marketing and trade interests must take account of UPOV 91 impacts on seed marketing and access to seeds, the right to food and agrobiodiversity in third countries and the EU itself.¹⁵ There are several cases where UPOV 91 legislation already impacts negatively on seed use by European farmers. For example, a number of court cases related to UPOV 91 legislation have been filed in Germany on the right of farmers to replant their seeds.¹⁶ The EU seed reform should lead to shielding local seed systems from the reach of stringent laws (i.e. interpretation of the notion of ‘commercial exploitation’). **Seed laws should promote proportionate and suitable ways of interaction of the informal seed systems with the formal seed market concerning varieties adapted for small-scale farm-breeders.**

It is vital to understand and acknowledge the dynamic interactions between the formal and informal seed markets occurring following farmers’ practices in their markets of proximity. The continuous exchange of seeds among farmers is essential to farm-based seed systems, including the swap of seeds purchased or obtained from the commercial seed market. And vice-versa, formal breeding by public or private actors also depends on seeds and their genetic traits from farm-based seed systems. Acknowledging this should lead to improved legal protection of farm-based seed systems in the seed reform based on UNDROP article 19 on peasant rights to seeds.

Building ‘Global Europe’¹⁷ is driving the expansion of the EU’s commercial seed breeding industry to the detriment of genetic diversity and agrobiodiversity, and contrasts with EU commitments under the Convention on Biological Diversity. The inherent bias in EU (and global) antitrust laws and jurisdiction neglects sustainability criteria and fails to prevent mergers that result in oligopolistic market concentration. **The seed reform is an opportunity to provide stronger incentives to improve and sharpen EU antitrust laws.**

14 For more details see Lieberherr, Silva & Meienberg, François (2014) UPOV report on the impact of plant variety protection - A critique, Berne Declaration, June 2014, at https://www.publiceye.ch/fileadmin/doc/_migration/Saatgut/2014_07_Critique_UPOV_report_final.pdf

Derek J.F. Eaton (2013) Trade and Intellectual Property Rights in the Agricultural Seed Sector, Centre for International Environmental Studies Research Paper, no. 20/2013, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323595

APBREBES (2019) Access to Seed Index Shows: Implementation of UPOV 1991 Unnecessary For the Development of a Strong Seed Market. A Policy Brief by the Association for Plant Breeding for the Benefit of Society, at https://www.apbrebes.org/files/seeds/Article%20UPOV_Access%20to%20Seed%20Index_Final_0.pdf

15 For more details see, The Berne Declaration (2014) Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines, at www.publiceye.ch/fileadmin/doc/Saatgut/2014_Public_Eye_Owning_Seed_-_Accessing_Food_Report.pdf

Sebastian R. Oberth et al. (2012) Intellectual Property Rights on Genetic Resources and the Fight against Poverty. Study for the European Parliament, at www.researchgate.net/publication/323019212_Intellectual_property_rights_on_genetic_resources_and_the_fight_against_poverty_Study_for_the_European_Parliament

16 See http://www.ig-nachbau.de/spezielseiten/ig-nachbau-artikel/details/?tx_ttnews%5Btt_news%5D=2769&cHash=403dafc877edb87c905728de26fc4e75

17 ‘Global Europe: Competing in the World. A contribution to the EU’s Growth and Job Strategy’, introduced under the renewed Lisbon strategy back in 2006, see COM (2006) 567 final, Brussels 4.10.2006.

What are the options?

The suggestion of this paper is to develop a legal framework in support of peasant rights as defined and acknowledged in the UNDROP, of seed as a common good, and farmers' rights to free exchange, selling and using of farm saved seeds.

Advocacy strategies should look at the legal and the operational framework of both seed marketing rules and seed variety protection (IPR). Some guiding principles based on food sovereignty and agrobiodiversity may help to assess the policy options:

- ▶ **Respect, protect and fulfil the peasants' rights to seed as defined in the UNDROP.**
- ▶ **Improve participative breeding and seed exchange, and protect and promote seed markets for farmers varieties and in situ breeding.**¹⁸
- ▶ **Ensure smallholders participation in the formal market systems to market their own seeds, and/or to purchase seeds that respond to their specific local needs.**
- ▶ **Enhance public institutional capacity in support of access to formal seed marketing.**¹⁹
- ▶ **Ensure quality of certified organic seeds in Europe and in developing countries.**

2.1 Seed marketing laws

Traditional varieties

Traditional, local or peasant varieties are the result of selection and improvement of seeds done by gardeners, (women) farmers and indigenous communities over the centuries. Indigenous seed-saving women are the stewards of biodiversity, they combine traditional knowledge and innovation to protect local seed systems.²⁰ Their work has resulted in an immense range of plant varieties. At genetic level, these varieties show a broad diversity.

Seed marketing laws need to allow traditional, local and peasant seed varieties to enter formal markets. Any laws needed to regulate formal seed markets should not endanger the highly dynamic informal, local farm-based seed systems. The same general steps or processes take place in the local system as in the formal sector (variety choice, variety testing, introduction, seed multiplication, selection, dissemination and storage) but they take place as integral parts of farmers' production systems rather than as discrete activities. By contrast, the formal seed

¹⁸ Local markets, markets of proximity or territorial markets should in no way justify any limitations with regards to the provenance and marketing of landrace seeds. Seen from a climate change adaptation angle, marketing of certain locally adapted varieties should not be limited to a specific territory. All these boundaries are artificially established to a certain extent and bound to become irrelevant in time with the effect of climate change. See also AFSA (2020) Agroecology and Markets — Stories from the Field.

¹⁹ For example, MST Brazil is setting up its own seed agency for formal seed marketing; see <https://mstbrazil.org/?q=seeds>

²⁰ Swiderska, Krystyna (2018) Why indigenous seed-saving women are the stewards of biodiversity, IIED principal researcher, see <https://www.iied.org/qa-why-indigenous-seed-saving-women-are-stewards-biodiversity>

system is characterised by clear products: certified seed of verified varieties.²¹

The EU has differentiated and regulated the interactions between formal and informal seed markets. The EU makes no distinction with regards to who sells or purchases seed varieties. The only criteria used is that of ‘commercial or non-commercial exploitation of the variety’. Some argue that the sale of seeds to non-professional final users, who will not engage in any commercial exploitation of the variety, is outside the scope of EU seed marketing rules. But the European Commission and most of the EU Member States argue that it is the scale of the activities of the seed provider that need to be considered when assessing whether it is regarded as a commercial exploitation and hence falls under the scope of the marketing rules, or not.

The distinction clearly made in EU Directives relate to the different types of seed and plant material that are marketed: landraces, amateur varieties, or conservation varieties. Depending on the crop species, there are some rules facilitating the labelling of seeds sold to final users or through ‘local distribution’. For example, marketing of seeds from landraces is restricted to their ‘region of origin’. For some crops, significant quantitative restrictions apply. Conservation varieties can only be marketed as certified seeds in their ‘region of origin’, which in turn cancels any of the existing incentives to engage in informal seed marketing due to a negative cost-benefit analysis.

In conclusion, **developing countries should claim the policy space they need to design laws in support of their traditional varieties, and they should be exempted from any constraining rules stipulated in EU trade deals or under UPOV 91.**

DUS — criteria

In many countries of the global South, DUS — distinct, uniform, stable — marketing and registration criteria smack of a colonial past. DUS criteria have been developed to meet the needs of mechanised and industrial agricultural food systems based on monocropping and relying on seeds that produce plants that ripen all at the same time and have all the same size for easy machine harvesting. The pressure exerted on many countries in the global South to use DUS marketing and join UPOV 91 has cemented this experience, even though their agricultural and food systems are of a completely different nature. In many of these countries farm-based seed systems are the backbone of food security with their traditional and local varieties, using farm-based varieties that do not and cannot meet the DUS criteria.

While some countries may consider the procedures established for DUS testing useful or appropriate, this must not lead to undermining any of the farmers’ seed rights.

²¹ See <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/compendium/tools-guidelines/what-are-seed-systems/en/#c84913>

Gene editing

In 2018, the European Court of Justice ruled that existing EU GMO safety law is applicable to organisms derived from genome editing techniques as well. Consequently, the EU should not reverse the ECJ ruling and accordingly keep the new generation gene-edited GMO regulated under EU law. **The EU must support the call for regulating gene edition at the proceedings of the Cartagena Protocol to the Convention of Biological Diversity, and uphold and apply the precautionary principle.** Gene editing poses a major threat to farm-based seed systems. The intrinsic, ethical and commercial core values of farmer and agroecological seeds is based on seed breeding that is done with nature, not against it or via (genetic) manipulation. If genome editing stays strictly regulated and if whatever kind of gene manipulation took place is made transparent, only then can farmers and agroecological seed systems remain viable. Any weakening of the GMO regulation poses a threat of contamination and loss of farm-based seed systems' core asset, which is farmers' authority over seed breeding with nature, in situ and within a biodiverse ecosystem; contrasted by industrial ex-situ breeding techniques done in a laboratory. **Moreover, it is imperative that the EU not only complies with the ECJ ruling but also creates testing facilities in the EU and abroad, ensuring gene edited seeds do not end up un-notified on markets in developing countries.** Some food industry and NGO actors did prove that testing for genome editing is possible.²² Consequently, the EU needs to develop these new testing methods further and provide a robust testing system for genome-edited GMOs in order to guarantee citizens' right to choose which food to eat as well as the right of farmers and breeders to choose which seeds to grow and breed with. **To ensure this freedom of choice, the EU should also support the call for an international database of genome-edited organisms.**²³ The knowledge acquired on this matter must be made available and shared with third countries. This can be done by supporting the development and implementation of new biosafety protocols directed at genome-editing.

EU Organic Regulation

Significantly, DUS criteria have been dismantled in the new organic seed regime that followed the 2018 review of the EU Organic Regulation. Indeed, low input cultivation does not rely solely on the uniformity of plant varieties to foster agricultural productivity, but rather on the combination of a wider array of factors. That is why the new EU Organic Regulation allows for the marketing of so-called 'organic heterogenous material', i.e. diverse populations which are important when seeking long-term resilience rather than short-

term productivity in each production model. Furthermore, organic breeders tend to breed primarily for disease resistance traits due to the prohibition of the use of pesticides and other chemical inputs in organic farming. However, such traits are rarely assessed and considered in DUS protocols developed within an industrial plant breeding context. **The new regulation has become an important experiment as it reconsiders the DUS protocols for 'organic varieties', amending them to the needs of more diverse plant varieties.**

²² See https://www.ohnegentechnik.org/fileadmin/ohne-gentechnik/presse/p_200907__VLOG-PM_Weltweit_erstes_Open-Source-Nachweisverfahren_fuer_Pflanze_aus_neuer_Gentechnik_entwickelt.pdf

²³ A database provides necessary information to ensure respect of the EU precautionary principle, increases transparency and facilitates traceability of gene-edited material. See submission by Beate Jessel, president of the BUND to the hearing in the German parliament on 4/11/2019; see https://www.bfn.de/fileadmin/BfN/presse/2019/Dokumente/Stellungnahme_BFN_Jessel_AnhoerungBT_am_04_11_2019_bf_1.pdf

This is a precedent that must be used to support alternatives to non-DUS testing in third countries, where the EU or a Member State intervenes as a global player and donor. DUS must no longer be a holy grail, not even for the EU. This is also an invitation to question the relevance of UPOV 91 compliance and to explore options for agroecological seed markets circumventing UPOV 91 rules.

As a result, peasant seed systems should be entitled to define their uncertified seed markets as an ambition to contribute building agrobiodiversity. They should be exempted from discriminative obligations of variety registration and seed certification under seed laws as well as from plant variety protection laws.

While plant health and quality obligations for traditional seed laws remain applicable, the most important barriers for market access of more diverse populations and plant varieties are now eliminated under the new EU Organic Regulation.²⁴ In conclusion, seed markets are already subject to restructuring and new policy orientations adopted in the European Green Deal will further this.

Seed testing and control mechanism

It is important to maintain or to build on and improve domestic testing capacities. This is key to ensuring seed quality, location-specific requirements and germination rates,²⁵ because industrial seeds produced by and for industrial moderate climate zones are often unfit for the Sub-Saharan African climate and farming context.

Seed testing is needed to detecting fake seeds, unsuitable seed, or industrial hybrid seed that fail to germinate. Testing is also important to allow context-specific climate situations or environment-specific agronomic practices to be considered. For this purpose, adequately tested and properly controlled (certified) seeds is key.²⁶ Testing should also allow for identifying any new technology used, or to differentiate between actors (different quality criteria will need to apply for breeding companies such as Syngenta compared to breeders in local communities). However, so far testing has mainly privileged the seed industry because testing facilities, regulations and protocols did not take account of the needs and prospects of many seed-breeding farmers. The EU should address this problem domestically and externally. The EU should appreciate more the value and work of testing facilities and its personnel. This should include the option to market certain types of plant material and more specifically landraces as ‘standard seed’ — with quality controls not done by field inspections prior to the marketing of seeds but rather by ex-post marketing controls, relying on existing internal procedures in the seed sector; as proposed during the last EU seed reform.

Of specific concern are various agro-dealer networks set up over recent years by the industry that reach out to rural areas selling brand-specific company products and providing biased advice to farming communities in rural areas; as done for example by the Alliance for a Green Revolution in Africa (AGRA) financed by the Gates Foundation. The inherent bias in specific industry-outreach programmes becomes obvious when hybrid industrialised seed as well as GMOs — developed, bred, and produced for different climate and farming environments — fail to be subject to

²⁴ The derogation concerns variety registration and seed lot certification requirements, allowing to sell standard seeds of ‘listed’ heterogenous material, instead of registered ones.

²⁵ Seed certification schemes mostly control purity and identity of the variety, as well as germination rates.

²⁶ This includes testing and control mechanisms for farm-based seed systems unless it is organised by the farming and indigenous communities themselves or those organisations representing them.

any independent accountability mechanism that provides for control, testing and clearing seed imports or seed sales. The situation is aggravated by the absence of public investment in extension services that promote agro-ecological farming practices.

For peasant markets and their (uncertified) seeds, domestic testing capacities may be relevant as well. But other mechanisms are also in place such as community approved Participatory Guarantee Systems, or Quality Declared Seed Systems.²⁷ These participative control systems are based on socio-cultural practices and are built on trust created at the level of personal interactions. They are also best suited to recognizing and strengthening the role of women and their specific knowledge in relation to seed breeding. As mentioned above, different seed systems are not operating in isolation but interact. And a better understanding of the patterns of interaction between certified and uncertified seed markets is important.

In any event, whatever the agency or institution responsible for testing and controlling, they need to be accountable to public interests not to private companies' benefits. **Wherever public development finance or ODA is used in support of testing facilities in a developing country, it must favour public interest, support rural development and agroecological approaches. And it must demonstrate the absence of conflicts of interest or bias towards generating private profits.**

Testing must take place under supervision and official observation. Any testing capacity, whether private or public, or any joint undertaking must be subject to accountability, transparency, and participatory decision-making from smallholders or agroecological farming constituencies.

Access to markets

In Europe, testing is done by public authorities and includes testing of varieties for registration (DUS test), a precondition for testing of seed lots for quality (certification).²⁸ However, testing is expensive. A clear risk of the EU seed reform is that (organic seed) testing capacities will be privatised. Any mandatory testing conducted according to DUS criteria that will fall under privatised agencies would diminish the chances of traditional varieties and farmers seeds to access the formal market as they are genetically diverse and therefore do not fulfil the DUS criteria.

Ongoing research²⁹ into Quality Declared Seed Systems seeks to provide alternatives to the EU's push for formalising marketing rules in Africa and Asia. For seed legislation, this would mean to provide specific protocols for each seed variety, this way preventing counterfeit. Rather than pursuing operations based on private seed producers that need to be registered with the government, public services should provide for all breeders including small farm breeders to ensure traditional varieties can access seed markets.

27 See FAO (2006) Quality Declared Seed System. Or see MAELA in the Andean region, the Latin American Agroecology network introduced in 2000.

28 For further information, DUS tests are done completely by the public authorities, they receive important lots of seeds that they multiply and compare to their reference varieties. Whereas for seed certification, in most cases public authorities take small samples of seeds at different production stages, and seed multiplication is done by the operator mostly.

29 See research in Vietnam, Laos and Uganda on Farm Field Schools by Oxfam Novib, in: FAO (2019) Views Experiences and Best Practices as an example of possible options for the national implementation of Article 9 in the International Treaty, at <http://www.fao.org/3/ca4163en/ca4163en.pdf>. Or see Golay, C. and Bessa, A. (2019) The rights to seeds in Europe, Geneva Academy Briefing no15.

Another option is to explore the ‘Seed to Fork’ approach in the EU’s Farm to Fork Strategy, allowing for trading of ‘small seed packages groups’. An approach that would need to be translated and transposed into EU seed marketing and trade rules, whether for domestic European markets or in trade with third countries.

Seed harmonisation and regional markets

The COMESA³⁰ seed market uses a one size fits all approach. This means that countries like Malawi and Zimbabwe are dealt with the same way despite their considerable different economic and climate conditions. The harmonisation of seed rules privileges industrial seed producers whilst putting farmers and farm-based seed systems at a disadvantage. Harmonization allows seed companies to register in only one country to access the COMESA market with potentially all of its 21 countries. Reaching from Egypt to the island of Mauritius, from the desert to the Ocean, it will be difficult for farmers to trust officially marketed seeds that fail to account for any of the huge environmental and climate differences. Furthermore, COMESA follows DUS-criteria, thus preventing farm-based seeds from entering the market in spite of producing seeds that are better suited and more locally adapted than DUS-tested varieties. The current situation discriminates against farm-based seed systems and disregards UNDROP’s peasants’ rights to seeds. In response, some work has been initiated in Southern Africa and the SADC markets that looks at a context-specific sui generis seed marketing system.³¹

The EU as a regional single market has important offensive seed trade interests and, together with the US, is a major global seed exporter. Enhancing the emergence of regional harmonised (seed) markets in the global South is part of the EU’s global agenda, pursued in its cooperation with African Regional Economic Communities such as the COMESA market. To illustrate what is at stake, the value of the EU seed market (field crops and vegetable seed) is estimated at about 8 billion euro. In 2017, the EU’s global exports amounted to an estimated 7.8 billion euro, presenting a 10 percent increase and a trade surplus of 2.2 billion euro equal to the value of its domestic market.³² The drive for global competitiveness in trade comes to the detriment of the EU’s biodiversity commitments. **The call is for EU trade deals to refrain from impeding the prospects of farm-based seed systems, or any sui generis seed legislation that uphold peasant rights as defined in UNDROP and protect seed varieties used by agroecological communities of smallholders.**

30 COMESA, the Common Market for Eastern and Southern Africa comprises 21 African member states (Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, Zimbabwe).

31 Greenberg, Stephen (2018) Towards national and regional seed policies in Africa that recognise and support farmer seed systems (ACB discussion document).

32 See <https://european-seed.com/2019/09/the-eu-must-remain-a-key-actor-in-the-area-of-seeds-and-new-technologies-in-plants/> (last accessed 22/12/2020).

2.2 Intellectual Property Rights and UPOV 91

Compliance and enforcement of IPR in free trade agreements are a real and permanent threat to countries in the global South. Avoiding or pushing back these risks remain a high priority for advocacy to enhance peasants' rights as defined in UNDROF. Many advocates completely reject the adoption of UPOV standards. Companies use IPR regimes to pressure governments to pay royalties, as for example happened in Argentina. Thus, the suggestion for countries that have already signed UPOV 91 is to exploit the flexibilities and cracks in UPOV 91 as seen above.³³ The EU itself has demonstrated how to extensively use exceptions to UPOV 91 to defend its own policy space. This is also the

case for Switzerland. **If this is possible for the EU, developing countries should and must be granted enhanced flexibilities for the implementation of plant variety protection laws.**

Others argue in favour of using the IP systems to protect traditional and open pollinated varieties, and to strengthen and consolidate their market position and ensure fair revenues. However, it remains highly questionable and unclear whether a system made by and for industrial hybrid seeds can provide the kind of recognition and compensation in remedies that on-farm seed systems would need to thrive in the long run.

3. Summary and recommendations

The recommendation is to develop a legal framework in support of UNDROF peasant rights to freely exchange, sell and use farm-saved seeds. UNDROF provides a common ground that could guide ACT Alliance EU agencies' and partners' seed advocacy strategies.

The existing campaign by La Via Campesina 'Seeds as the heritage of people in the service of humanity'³⁴ outlines the right to seeds as a common and calls for farmers and gardeners' rights to be protected against misappropriation. They reject dependence on industry-based IPR systems or reliance on marketing rules that only allow for DUS-certified seeds to enter the market. For this context specific frameworks need to be

developed in order to protect, support, or enhance the commons.

Support could and should be given in international cooperation for legal support and legal expertise to design and develop legal frameworks that incorporate meaningful participation of farmers groups, especially women farmers, and civil society actors in support of farm-based seed systems.

The simple and best way forward to achieve this is to support smallholders' own organisations to negotiate seed legislation that enhances their strategic interests, their market and negotiation power. While this is nothing new, it has proven to be the most evidenced, effective people-centred and empowerment approach.

³³ See section 'What is at stake?'

³⁴ See <https://viacampesina.org/en/16-october-la-via-campesina-relaunches-global-campaign-for-seeds-a-heritage-of-peoples-in-the-service-of-humanity/>

Recommendations

As a global standard setter, the EU is keen to increase and shape regulatory coordination of international standards. This paper shows how the EU is appropriating a range of different exemptions to make those standards fit its own EU use. A commitment to policy coherence for development must translate into these flexibilities be made available to partner countries in the global South.

The EU must refrain from demanding UPOV aligned legislation or UPOV membership from third countries in any ongoing or future negotiations of free trade agreements.

The suggestion is to make best use of EU's own seed legislation in terms of flexibilities granted from UPOV 91 and positive elements of its seed marketing legislation in favour of landraces or traditional varieties, and the right to save, to use, exchange and sell peasants' farmers seeds.

Enhancing flexibilities and policy space

- ▶ Developing countries should have more or at least the same kind of policy space the EU enjoys when drafting regulations for their seed markets. Increased harmonisation of seed marketing risks undermining or overriding existing flexibilities and hampering the attainment of sustainable development objectives in developing countries, and therefore must be corrected.
- ▶ The wide range of activities that occur within the farm-based seed systems should be considered as outside the realm of 'commercial exploitation of seeds', allowing for less, or less strict, regulation to apply and for policy space

to safeguard or expand diverse local farm-based seed systems.

- ▶ Developing countries should claim the policy space to design laws in support of their traditional varieties and should be exempted from any constraining rules whether they are stipulated under EU trade deals or UPOV 91.
- ▶ The Agreement on Trade Related Intellectual Property Rights of the WTO (TRIPS) grants policy space that should be maintained.

Development finance for public interests

- ▶ Wherever ODA or public development finance is used in support of testing facilities in a developing country, it must favour public interest, support rural development, agroecological approaches and demonstrate that there is no conflict of interest or bias towards generating private profits.
- ▶ The EU should refrain from spending ODA to provide technical assistance in support of UPOV (often delivered by UPOV staff).³⁵
- ▶ The EU should support registration and validation of farmers seeds and provide financial support.
- ▶ The EU should support the Seed Treaty with 16 million euro over 8 years to develop implementation measures or 'transpositions' in support of farmers rights as defined in UNDROP.

Transposing UNDROP

- ▶ UNDROP has to become a central part of the EU's reformed seed legislation.

³⁵ See ACT Alliance EU (2014) PCD Discussion Paper, Seed and Food Security: The impact of EU seed laws on food security in Africa, at https://actalliance.eu/wp-content/uploads/2016/04/aprodev_pcd_seed_paper_final_18122014.pdf

- ▶ The European Commission should set up a working group that advises the EU and governments in partner countries in drafting a sui generis legislation in line with UNDROP. Such a working group should be consulted on any EU trade deal.
- ▶ UNDROP should be guiding all international cooperation in terms of seed issues.

Gene editing

- ▶ The EU must support the call for regulating gene editing at the proceedings of the Cartagena Protocol to the Convention of Biological Diversity; uphold and apply the precautionary principle.
- ▶ It is imperative that the EU not only complies with the ECJ ruling but also creates testing facilities in the EU and abroad, ensuring gene edited seeds do not end up un-notified on markets in developing countries.
- ▶ To ensure freedom of choice, the EU should support the call for an international database of genome-edited organisms.