



**Commissioner Janesz Potočnik**  
**European Commission**  
**Berlymont**  
**200, Rue de la Loi**  
**1049 Brussels**

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ESA\_13.0804

Subject: Proposal for a Regulation on Access to genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union

Dear Commissioner Potočnik,

ESA European Seed Association is highly concerned about the European Union's implementation of the Nagoya Protocol on Access and Benefit-Sharing (ABS). There is considerable risk that the future EU regulation could create additional complexity and onerous rules, specifically for the many micro and small and medium sized enterprises active in the seed sector. This would be a serious impediment to innovation in plant breeding upon which the competitiveness and productivity of agriculture and food security depends.

The Convention on Biological Diversity (CBD) declares that States have sovereign rights over their own genetic resources. Article 15 (4) and (5) of the CBD determine the framework for access to genetic resources and the Nagoya Protocol provides further details concerning the implementation of Articles 15 and 8j of the CBD into national laws. [ESA] supports the objective of the CBD and the Nagoya Protocol to foster the sustainable use of genetic resources. However, the implementation in the European Union must not go beyond what is foreseen by the Nagoya Protocol and the CBD. Instead, the implementing rules should be simple, pragmatic and proportionate.

The European seed industry therefore urges the participants to the triologue negotiations to take the following considerations into account:

- The due diligence obligation as foreseen in Article 4 of the draft regulation should be deemed fulfilled in case of access to plant varieties which are or have been commercially available.
- The due diligence obligation should be construed in a way that it does not mean heavy and even impossible administrative burden for users of genetic resources which make it hardly impossible for small and medium sized enterprises to survive.

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- The due diligence obligation should only apply for new accessions to genetic resources taking place after the entry into force of the EU regulation implementing the Nagoya Protocol (= no retroactive application).
- Genetic resources not covered by Annex I of the International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) but accessed with a standard Material Transfer Agreement (sMTA) as provided for under the IT PGRFA should be deemed to comply with the requirements of Article 4 of the draft EU regulation.
- Compliance to due diligence obligations should be facilitated by 'best practices' systems which can be developed by the specific sectors and be recognized by the Commission (as foreseen in Article 8 of the draft regulation).

It has to be noted that there are a number of provisions and amendments which would undermine fair access to genetic resources by public as well as private researchers and slow down – and potentially block – innovation in plant breeding (see in particular EP amendments 9, 16, 17, 19, 21, 23, 25, 26, 38, 40, 44, 47, 55, 60, 62, 63, 68, 77).

In plant breeding, both the basis and the outcome are genetic resources, with the outcome again constituting the basis for new breeds of plant varieties. This is why free access without additional obligations to all plant varieties for further research and breeding must be safeguarded as it constitutes the very basis of breeding work. This principle is clearly enshrined in the UPOV Convention to which the EU is a party and which sets up a specific IP protection system for plant varieties. Moreover, this principle also forms the very foundation of the Community Plant Variety Rights legislation and has recently been confirmed by the introduction of a respective breeders' exemption in the International Agreement on the Unified Patent Court (see Article 27 (c) of the agreement). The proposals currently discussed in the framework of the implementation of the Nagoya Protocol in the EU would undermine this crucial principle and would significantly hinder the opportunity of breeders to use commercial seed as a genetic resource for further research and breeding.

Under the proposed rules, breeders using a commercial seed variety for further breeding would be forced to investigate about the variety. This is not in line with the breeders' exemption under which access to genetic resources is free, and there are no obligations of prior informed consent or mutually agreed terms. Moreover, in case it should be studied whether genetic resources with ABS obligations were used in the creation of that variety this would lead to very complex situations and possibly obligations. If those obligations would have to be followed again and would also again be passed on to any future breeder it becomes a mission impossible, maybe not now, but at least in 10-20 years when all the different genetic resources are mixed with each other. Whilst this might seem logical, it would involve a highly complex, bureaucratic and lengthy process which most European plant breeders in the private and public sector would not be able to comply with.

The efforts and the investment required to establish systems to trace and track the use of genetic resources, and to engage in the negotiations for each prior informed consent and benefit sharing agreement, would be substantial and for many micro, small and medium sized enterprises it will be practically impossible and thus prohibitive (around 70% of the 7000 seed companies in Europe fall in the category of microenterprises with < 2 mio € turnover and < 10 employees). The proposed obligation would therefore put plant breeding innovation and the economic future of those involved in it at risk.

Food security depends on access to genetic resources to breed innovative high yielding varieties. The implementation of the Nagoya Protocol by the EU provides an important opportunity to ensure that genetic resources will indeed continue to be accessed which is precondition for the desired benefit-sharing. However, if implemented retroactively and without safeguarding the breeders' exemption, access will no longer be sought by the vast majority of private and public researchers, and here specifically by the large number of smaller companies present in the European plant breeding sector. As a consequence, plant breeding innovation required for the productivity and competitiveness of agriculture and to deliver food security will be significantly impaired.

We therefore urge you to ensure that the negotiations between the European Parliament, the Council and the European Commission produce a simple and pragmatic approach to the EU's implementation of the Nagoya Protocol.

The European seed sector has made a number of concrete proposals to this effect which were already positively taken up by the European Parliament's Committee for Agriculture as well as a number of Member States during recent Council discussions.

We remain at your disposal to further discuss these proposals at any time.

Yours sincerely,



Garlich v. Essen

Secretary General