

EU Commission
DG Sante

13 July 2021

Feed back on the Inception Impact Assessment regarding the revision of the plant and forest reproductive material legislation

Dear Madam, dear Sir,

herewith we wish to feed back on the Inception Impact Assessment regarding the revision of the plant and forest reproductive material legislation. Thank you for this opportunity which we gladly seize since our organisation does not have a representation in Brussels and is not eligible to personally present its views to the EU Commission.

Our organisation is an umbrella association of 25 on farm-conservation organisations in four German speaking countries (Germany, Austria, Switzerland and Luxembourg). On farm-conservation includes conservation of agricultural diversity in gardens.

We work on not for profit basis without any employees since 2009 and have contributed to the PRM and PH legislation reform discussions starting a decade ago.

1. Scope of the impact assessment

- Impact on market concentration

The recent consolidation of the seed market leaders has been overseen by competition authorities all over the world, where they exist. Bayer, for example, was not allowed to take over Monsanto's vegetable seed business. Concentration is at it limits in many parts of the seed sector, including major crops in the EU. See for example http://marita-wiggerthale.de/mediapool/16/163463/data/Marktkonzentration_Saatgut_Pestizide_D_ngemittel_Landt_echnik_April_2020.pdf A market power analysis would be useless if it only had a count of all actors in the EU PRM business.

The power of seed market leaders is not only visible in the seed market. They are leading actors influencing food related laws and policies, while they are not the leading actors producing the world's food (see www.globalagriculture.org/original-reports.html). The impact assessment should present an analysis which parts of which Option are supported by which interest groups.

- Impact on agricultural biodiversity

We understand that the EU Commission intends to support on farm-conservation on grounds of international agreements such as the ITPGRFA and the CBD. This reconciles us with the fact that the inception report refers to relevant European strategies that are in the making but not yet accomplished. There are international binding agreements to rely on. In the impact assessment we are expecting concrete contributions of each of the four options towards the goals of these international agreements and all subsidiary actions such as the Global Plan of Action on PGRFA.

In particular, it should be assessed which Option would put stipulations on more than some 250 species that are currently regulated. It should furthermore be assessed quantitatively which Option would require administrative activities from on farm-conservation actors, including coherence requirements from other legislation that the Option intends to be coherent with.

1/8

- Impact on peasants and other people working in rural areas

We have noted the UN Human Rights Charter and UNDROP that specifies the rights of peasants and other people working in rural areas. We have learned that international human rights instruments take precedence in the hierarchy of norms over other international instruments such as those protecting intellectual property rights. We expect the impact assessment to check the different impacts of the four options, on peasant rights as spelt out in UNDROP. The [Practical Manual on the Right to Seeds in Europe](#) could help assessing impacts of the seed legislation options and contribute to redressing distortions of laws and policies that have negatively affected European peasants and non-industrial farming systems as well as the rural environment and seed diversity.

EU Member States have divergent positions on the rights of peasants. The Impact Assessment should make transparent which Option would help Member States to implement their positions.

- Impact on developing countries

The European seed related legislation, not only PRM, plays a role far beyond the borders of the EU. Particularly in developing countries, EU seed law is used as a model and actively promoted by EU based organisations, including as condition in free trade agreements. Environmental and climate impacts can be made where certain seed is used that is connected to certain agronomic practices with certain impacts, including outside of the EU. The globally largest actor in the seed sector is a chemical industry giant based in the EU, but even if it were not: The dominating part of the seed industry is globally active with rather similar business models.

We therefore expect results regarding a possible impact on developing countries as well, not only on impacts within EU territories and on EU citizens.

We refer to the environment and development work, analysis and documentation, of ActAlliance, AFSA, APBEBES, Bread for the World, ETCGroup, GRAIN, LIBIRD, MASIPAG, Misereor, Norwegian Development Fund, PELUM, Public Eye, SEARICE, Third World Network, and hundreds of other civil society organisations in North and South to underpin our submission with valid data.

- Impact on ecology

We also refer to the IAASTD (www.globalagriculture.org/original-reports.html), a joint analysis of around 400 international experts of a decade ago of global agriculture, pleading for ecological agriculture and against genetic modification, not for both. IAASTD experts were working with a view on the dramatic heating of the planet and loss of biodiversity. Their assessment is still valid today. GMOs are not likely to tackle climate and biodiversity crises, in contrary, they may exacerbate the crises.

While some countries accept GMOs, others don't. For example, South Africa in 2019 rejected GM maize, because it did not keep the promise of being drought tolerant (www.acbio.org.za/sites/default/files/documents/Minister's_final_decision_on_Monsanto_appeal.pdf).

In Mexico, GM maize is banned and in Peru a moratorium on all GMOs is extended until 2035. EU member states have diverging positions on old and new GMOs.

In contrast, organic agriculture is not banned in any country and thriving almost everywhere (see www.ifoam.bio/news/global-organic-area-continues-grow).

- Impact on innovation

Organic agriculture is thriving in spite of a strong bias of funds invested in GMO research (including Crispr Cas and other gene scissor technologies), while conventional and organic breeding are largely left to small ill-funded initiatives. In Germany it is estimated that less than two percent of agricultural research is invested in organic agriculture, see www.biopress.de/de/inhalte/details/7887/bio-bilanz-daumen-runter.html

We encourage the impact assessment to compare research investments made in genetically modified, hybrid and open pollinated varieties and populations. Such data will help to understand background behind the variety registration and use of the different types of seeds as well as their impact on climate and nature, soil and water.

2. Regarding the Problem Analysis

We are surprised that the Inception Impact Assessment report does hardly specify environmental problems. Given the importance of seed in agriculture (if not seen purely as an input cost factor), the impact assessment should look into major environmental problems connected to agriculture and assess how the options would make a difference and reduce those problems which are currently discussed by concerned citizens almost everywhere on the Planet.

But the Planet is at its limits, and agriculture plays a huge role in both mitigating and adapting to global warming, with seeds at the start. Thus, there is not only “room for improvement”, there is a vital need for further improvement of the EU PRM legislation. Examples for useful improvements made under the existing legislation concern admission to the market of organic heterogeneous material and, soon to come, organic varieties.

The Inception Impact Assessment report, however, narrows its focus on some of the problems that the Seed Legislation aimed at addressing in the first place. They remain purely within the agricultural sector, even narrower, focused on a few chosen properties of PRMs, their “Identity, performance, quality and health”. One could choose a scale of measurement small enough to state that “the current legislation has proven its success.”

The focus on rather internal problems leads to a rather narrow approach to options for the exercise, which in its current form does not deserve to be named reform and is rightly named update. The PRM sector can't be saved from thorough changes, if everyone else is expected to give up habits and thoroughly change businesses in order to save the Planet.

3. Regarding Options

Conservation issues nevertheless take some space in the report. The so-called conservation and amateur variety registrations are available since around a decade. In Germany, they were mainly used by organic breeders, and in Austria by one conservation organization, the largest in Europe, that aims at increasing its seed sales to commercial agriculture. In other Member States, these registration windows were so far hardly used. In future, they may be even less interesting, because other new registration opportunities have been opened for the products of organic breeding.

Hobby gardeners who are buying diversity varieties, are not interested in official variety registration that may provide trust to professional growers. Seed savers sell unregistered conservation varieties,

3/8

because it means too much administration effort compared to the small seed quantities of each variety sold. Selling seeds is important to diversity conservation; The young generation and other beginners do not have seeds for an exchange. Seed marketing control is not interested in seed savers who sell unregistered varieties. If variety registration would be an obligation for individual seed savers, many of them would stop their conservation activity, or not even start collecting experience. It takes many years of learning before a very basic living can be made, if at all, and often activities include knowledge sharing and education, along with the sale of seeds and plantlets. A deterring hurdle for on farm-conservation would be set up with administrative requirements. A cost recovery scheme would only add to the hurdle.

The Impact Assessment should clarify exactly, what kind and size of damage on farm-conservation is afflicting to the seed market by selling unregistered varieties. Otherwise, the claim could look rather theoretical.

3.a Only Option 2 has a partly useful diversity conservation approach

It is disappointing in view of the societal value of the on-farm conservation work that just one out of the four options, Option 2, foresees to exempt seed conservation from the scope of the PRM legislation. All other options would not allow on-farm conservation in the EU any more, as it worked for the past four decades. Individual seed savers have, with their sales of unregistered PRM, saved what was still available in the EU, after in 1979 the United Nations had published their alarming information that three quarters of varieties were lost, 90 percent in industrialised countries. Organisations were founded at that time in several Member States to secure access to knowledge, to experience, and to PRM. In spite of adverse legal conditions, they were successful.

Necessary clarifications on Option 2

Option 2 mentions “seed conservation networks” which the inception report defines as “operators exchanging and marketing PRM in limited amounts with the main non-profit purpose of conserving plant and forest genetic resources.” (footnote 3 of the inception report)

- It is paramount to **exempt individuals, not just organisations, from the scope of the PRM legislation**, in particular from any obligation to register as operator or register varieties. In Germany, the oldest and largest seed saving organization VEN does not produce or market seeds and would therefore not fall under the PRM legislation anyway. But PRM are sold by those individuals who produce seeds, whether they are VEN members or not. Our own umbrella association is a network that does not sell PRM either. But it covers several thousand individual seed producers and sellers. They usually work without employees, and many are engaged in diversity education and sharing information. Their work is endangered if burdened with registering operators and varieties, and further obligations attached to these registrations.
- A limitation of the scope to the “professional sector” would be good but not clear enough, if individual actors who produce and sell seeds of a large diversity only to hobby gardeners, even as a profession, would be considered “professional”. They should not fall within the scope. These actors, having activities exclusively outside of the legislation scope as defined above, should NOT be obliged to register as “professional operators”. Such an operator register was foreseen already by the former PRM reform proposal (COM/2013) dated 6.5.2013 under Article 5 Registers of Professional Operators, referring to the then planned Plant Health Regulation which is now in force (Regulation 2016/2031/EU, Article 65 Official register of professional operators).

4/8

- We do not support the intention to limit the amount of diversity conservation varieties that can be sold outside of the scope of the PRM regulation. **Any set limit would trigger official control and administrative issues.** Quantity limitations, turnover limitations and the like and the subsequent reporting were extensively and fruitlessly discussed during the precedent failed reform attempt. This “market” is small and self-regulating, in spite of distance sales.

Necessary deletions from Option 2

Option 2 also has three strings that should NOT be attached:

- Unregulated sales of hybrids, GMOs and intellectual property to hobby gardeners: Option 2 also would exempt any other – non-conservation - PRM sales to hobby gardeners from the scope of the legislation. Seed sales to hobby gardeners can be any seeds also meant for commercial agriculture, including hybrid seeds, packed in hobby garden amounts. The exemption, however, has to clearly aim at the conservation of open pollinated varieties and not cover hybrid or molecular breeding techniques or intellectual property rights. If anything can be sold to hobby gardeners buying e.g. from supermarkets, they would not even know whether they are buying hybrids, GMOs or invasive species. The self-control that works in the market for diversity varieties, where communication and education is an objective along with seed, does not work among customers of supermarkets and the like. They need mandatory information on technical and legal restrictions to seed multiplication, as well as on breeding techniques, without those details that would infringe intellectual property titles.
- Farmers are not allowed to exchange seed if they do not belong to an association/network. The ITPGRFA and the UNDROF would be violated. Moreover, farmers can perfectly exchange seeds without approval, certificate or membership of any association or network.
- Sustainability criteria in variety testing make little sense for DUS varieties. If a DUS variety has specific features, such as resistances, it will be tested and explained to farmers anyway. The above mentioned GMO maize that was not drought tolerant as promised and therefore not admitted in South Africa, may have not been allowed to test locally if it had passed a sustainability test in the EU and this was part of trade agreements. A test such as “climate-smart” or “sustainable” is currently useless given the divergent views and given the envisaged privatization of tests. Greenwashing doubts can’t be avoided and do not help anyone. This feature should be deleted.

The problematic Option 1 base of Option 2

If Option 2 is discussed, the points made in Option 1 need to be discussed as well. Option 1 is a basic version, on which Options 2 is building. Included are issues adverse to diversity:

- Uniformity of definitions „operator“ and “marketing”, these yet unknown definitions are central to seed savers. The existing space can be widened or restricted, depending what the new uniform definition would be. An attempt failed in 2015 after three versions were tabled. The impact assessment should list which definition in combination with which legal provision would have what consequences.

- There is openness for Member States to set their own requirements with regard to technical and scientific developments, which may impact their legislation with regard to GMOs. It is paramount that all GMOs including gene scissors, cisgenesis and directed mutagenesis, are regulated by the GMO directive. All possibilities to contaminate seeds need to be excluded, and monitoring must be intensified. The impact assessment should address this risk.
- The two points above both concern the level playing field paradigm. The definition case seems to concern mainly seed sales for on-farm conservation purpose. The innovation case seems to concern mainly molecular technology. It would be very useful to assess benefits and damages of both deviations from the level playing field ideal, and compare with deviations in other EU legislations.
- Coherence with plant health: Individual seed savers are not able to comply with plant health regulations concerning distance sale. They need to be exempted from the scope of the plant health legislation as well, not only from PRM legislation. The impact assessment should address this issue. A well meant exemption of variety registration would fail if Plant Health operator registers are made compulsory for individual seed savers. Small seed lots pose far less risk than large lots, in particular when large amounts are produced in certain non EU countries.
- In the planned register for diversity conservation varieties for the purpose of selling PRM to commercial growers, registration should not be mandatory but optional. That way, they would remain useful to professional growers but not hinder amateurs. The Impact assessment should look into positive and negative impacts. How much abuse has there been so far of the current conservation and amateur variety registers as assumed by the background study?
- Privatisation of so far official tasks: Seed certification; variety test before their admission; privatization of control is part of Option 3 and could become part of Option 2 as well. The Impact Assessment should question whether this would indeed reduce cost and improve service as claimed by the inception report, since there is negative experience with privatization and in consequence, regret, in many other sectors. And: What impact privatization could have on the actors able to take over services and those who are not. Especially, timing of service delivery to competitors, and misuse of data belonging to competitors could be issues. Already powerful companies could increase their market domination. The Impact Assessment should address this problem.

3.b Option 0 is better than its name

One of the options (Option 0) is named „Do nothing“, which is an understatement. The existing legislation will be adjusted to the Green Deal and to the Farm to Fork Strategy. „Do nothing“ would allow to introduce further improvements into existing law. Four innovative registration windows have been opened in the past decade, a fact that questions the problem analysis with regard to Problem 2 (Legislation prevents innovation and use of new technologies and adaptation to policy developments).

The four innovative directives include

- seed mixtures for nature conservation 2010/60/EU
- Conservation varieties 2008/63/EC
- Amateur varieties 2009/145/EC
- Organic heterogeneous material in the Organic Regulation 2018/848

A fifth opening, for organic varieties, is planned to enter into force beginning 2022. Thus, much innovation has been achieved within the existing legislation. The Impact Assessment should explore whether other innovations such as true potato seed technology (mentioned as example of blocked innovation in the background study), could be accommodated within the existing legal framework.

For diversity conservation, a few Member States have used the national legal space in order to define the marketing “for commercial purposes” that determines the mandatory variety registration. Their definition of “commercial purposes” does not mean the sale of seed but the use of the seed in commercial agriculture. The sale of unregistered varieties to hobby gardeners is therefore allowed.

The Impact Assessment should especially look into these cases and assess their success or failure. Unfortunately, the problem analysis by the EU Commission perceives this solution as problem, and underlines the aspect of inequality between Member States as an important reason for a seed law reform. This perspective is not readily understandable: How can a de facto derogation for an existing niche necessary for diversity conservation, have derailed the level playing field of the EU seed sector?

The Impact Assessment should assess benefits and damage involved, in particular in France, The Netherlands and Denmark, including but not only the legal aspects regarding level playing field, and of shared competence in the Lisbon Treaty. Also, it should look into how seed savers have achieved to conserve unregistered varieties in the EU since four decades, including unregistered PRM sales.

The Option „Do nothing“ is in any case not as bad as the name suggests; it offers many opportunities for developing the existing law. In our view, Option 0 is definitely better than Option 1 or Option 3, and whether it will be better than Option 2, will depend on the detailed result of the proposal negotiations.

3.c A further Option to consider

The EU seed legislation harms biodiversity, is disproportionate and restricts the freedom to conduct a business, the freedom to move goods, and the principle of equal treatment, according to the plea of the Advocate General at the European Court of Justice (ECJ) Juliane Kokott in the so-called preliminary ruling before the ECJ on the dispute "Association Kokopelli vs. Graines Beaumaux SAS" on 19 January 2012.

She called for the lifting of the prohibitions entailed by the seed marketing legislation: "*I therefore propose that the Court rule as follows: The prohibition laid down in Article 3(1) of Directive 2002/55/EC on the sale of seed of varieties which are not shown to be distinct, stable and sufficiently uniform and, where appropriate, to have a satisfactory agronomic value, is invalid on account of infringement of the principle of proportionality, the freedom to conduct a business (...), the freedom of movement of goods (...) and the principle of equal treatment under Article 20 of the Charter of Fundamental Rights.*"

(Case C-59/11, opinion of advocate general Kokott

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=118143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=66802>)

The ECJ, however, decided otherwise on 12 July 2012. It considered the so-called conservation directives (2008/63/EC and 2009/145/EC) to be a sufficient opening of market access. In the meantime, it has become evident that the two directives are better than nothing but inefficient in offering market access to diversity varieties. All over the EU, not even one thousand varieties have been registered, in some Member States nil. This invalidates the central reasoning of the ECJ in the July 2012 ruling on the maintenance of EU seed marketing legislation. The requirement of the two directives to officially evaluate by 2013 their effectiveness for biodiversity is until today ignored.

7/8

The Impact Assessment should therefore include a further option, to lift the ban on PRM that are not admitted or notified to the various official catalogues. Is continuous and reliable performance limited to DUS varieties? Would vegetable, fruit, or field crop farmers prefer unregistered varieties? Would there be alternative possibilities to provide valuable VCU data for field crops to farmers?

Dear Madam, dear Sir,

We thank you again for the opportunity to provide information on the possible impact of the proposed Options, and on our suggestions to improve them. When forty years ago the United Nations alarmed the World that most of agricultural diversity was lost, on farm-conservation organisations were founded in several EU countries and saved the remaining diversity in spite of adverse legal conditions. We continue to sell non-registered PRM until this day.

Our work is today not only tolerated but valued by society. The benefits are priceless, while proof of any harm is rare. The conditions of our work may not have been known very well in the past, but nowadays we may have hopefully well communicated the situation most actors in on farm-conservation are dealing with. Registering individual actors and subsequent obligations, such as required by plant health in case of distance sale, would deter them, many of them would stop or not even start growing diversity.

We are looking forward to receive the result of the Impact Assessment. We are ready to provide further details on the points mentioned in our feedback or any other questions you may have.

Sincerely,



Dr. Susanne Gura

Board Member, Dachverband Kulturpflanzen- und Nutztiervielfalt e.V.

Members of the Dachverband Kulturpflanzen- und Nutztiervielfalt e.V.

Agrar Koordination - Aktion Agrar - Arbeitsgemeinschaft bäuerliche Landwirtschaft (AbL e.V.) -
Arbeitsgemeinschaft Streuobst - Arche Noah - Baumschule Walsetal u. Regionalgarten - Freie-
Saaten.org - LWL Freilichtmuseum Detmold - Genbänkle - Hortus Officinarum -
Kraizschouschteschgaart - Kulturpflanzen Alb e.V. - LebensGut-Cobstädt e. V. - NABU
Bundesfachausschuss Streuobst - Obst- und Gartenbauverein Bengel e.V. - Pomologen-Verein e. V. -
ProSpecieRara Deutschland - Region der Vielfalt (Thüringen) - Samenbau Nordost Kooperative GbR -
Som fir d'Erhalen an d' Entwécklung vun der Diversitéit (SEED) - Slow Food Deutschland - Stiftung
Kaiserstühler Garten - Streuobst Arche e.V. – Umweltbildungshaus Johannishöhe - Verein zur
Erhaltung der Nutzpflanzenvielfalt e. V. - Verein zur Förderung der Saatgutforschung im biologisch-
dynamischen Landbau e. V.

8/8