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Revision of EU seeds laws

Introduction by RSP, Guy Kastler:

The co-evolution of the European legislative landscape and industrial strategies of appropriation of our vital resources

I - THE CONTEXT

In 2007 the European Commission began a process of simplifying its regulations for the marketing of seeds and propagating material (S & PM), also known as the "Better Regulation of seeds" process. It first gave the task of evaluation to a private consulting firm known for its biotech friendly approach. Only the seed industry, COPA-COGECA and a few players from the organic seed producers, were consulted. Based on this work, on September 29, 2009 the Committee proposed an action plan to assess the impact of the reform. This reform is presented as a technical simplification and harmonization rather than a drastic transformation of the current framework. It only concerns marketing without affecting Intellectual Property Rights (IPRs). It nevertheless appears to be an attempt to develop a new compromise between two factions of the seed industry opposed by their strategy on industrial property:
- National seed companies and traditional breeders that have developed under the protection of the compulsory catalogue and Plant Breeders' Rights (PBR)
- Multinationals using new biotechnologies in search for a wider market free of state constraints and regulated by self-certification and the patent on the gene expressed in the variety protected by a PBR.

I - 1. The legal impact of new biotechnologies in the strategy of seed appropriation

The new possibilities offered by biotechnology to manipulate one or more genes in a variety (cell fusion, mutagenesis, transgenesis, nanotechnology ...) disrupt the strategies of industrial seed companies:

- **Traditional seed companies** continue to select homogeneous and stable varieties by drawing on the pool of farmers' seeds enclosed in gene banks. The **PBR** grants them a monopoly on the marketing of their seed variety, the **catalogue** eliminates all competition from farmers' seeds that cannot be appropriated by a PBR because they are not stable and homogeneous. The F1 hybrids rid them of competition from farm-saved seed for a growing number of species. For other species, their main concern is to recover the royalties on farm-saved seed (Regulation 2100/94) that they "loose" due to their inability to identify by simple means varieties cultivated by farmers.

- **Seed companies using modern biotechnologies (referred to as "transformers" in the text)** are developing technologies to manipulate genes that can be reused in many varieties. The **patent on the gene and its function** or **on the biotechnology manipulating the gene** protects their right to industrial property from seed to harvest, whether resulting from commercial or farm-saved seed, and if necessary, including products derived therefrom. Indeed, although Directive 98/44 formally prohibits patents on plant varieties (or animal breeds), it reintroduces it in practice by extending the patent's protection on the gene to any biological complex in which the protected gene (or the technique) expresses its function. Detecting the patented gene by molecular analysis in the

farmer's field or in the food chain is simple and inexpensive[1]. The **molecular marker is the technical tool, which allows the seed company to ban or recover royalties on farm-saved seed.** The concern of multinational biotech, however, is to have a maximum number of varieties, which can host their manipulated genes, and have them on the market as quickly as possible. The variety's protection disappears behind the protection of the biotechnological transformation, which sometimes becomes a **trademark** (Round Up Ready, Clearfield, DUO System ExpressSunT...). For these processors, the patent on the gene and the trademark become the new tools to ensure their monopoly on the market[2].

In 1991, extending the protection of PBR to **essentially derived varieties** allowed UPOV[3] to pacify the coexistence of these two strategies: it provides a legal basis for the classification of farm-saved seed as "counterfeit" and the sharing of royalties between the breeder and the owner of the patent on the gene. New contradictions, however, appear today. Breeders consider themselves victims of distortion of competition vis-à-vis their patent holder colleagues because they "lost" most of royalties on farm-saved seed. However, the timeframe of **DUS[4] tests** becomes excessively long for "transformers" who simply add or manipulate a gene in an existing variety that is rapidly marketable, while it does not constitute a handicap for traditional breeders since it corresponds to the last stages of the breeding process, which is fairly long. Moreover, genetic manipulation can destabilize certain varietal characteristics in the early years of multiplication, which also weakens the homogeneity of genetically engineered varieties.

Part of the industry (the "transformers") therefore celebrates the claims of organic farmers, peasants' seeds and biodiversity advocates that seek to:
- Relax DUS and VCU[5] standards and simplifying procedures for listing in the catalogue
- Or the most liberal of them, have access to the "free" market for seeds regulated by the law of trademarks and patents on the gene.

Under the pretext of shortening the registration period, the use of molecular markers in testing required for registration in the catalogue or the filing of PBRs is the subject of considerable research. **The genetic profiling of varieties is emerging as the new tool allowing a possible compromise between the advocates of PBRs and those of patents concerning the accumulation of PBRs on the variety and the patent on the gene.**

Advantages of PBRs for the breeder

[1] Tens of euros
[2] The strategy of trademarks is already used for species without compulsory catalogue (Roses, fruits like « Granny » apples) or for finished products with dissemination of seeds only by integration contract (Jacquet de Vilmorin bread).
[3] Union for the Protection of Plant Varieties
[4] Distinct, Uniform and Stable
[5] Value for Cultivation and Use

- PBRs exempt the breeder of any information on the technology used to produce the variety, information that has become the obsession of all users of biotechnology since the "misadventure" of GMOs in Europe. Therefore “transformers” remain strongly attached to PBRs and the exclusion of all new biotechnologies other than transgenesis from the scope of EU regulations on GMOs[6]

- The requirement of describing the invention and therefore providing information on the biotechnology used only concerns the patent on the gene deposited at the Patent Office, without the obligation to indicate the varieties in which the gene will be inserted thereafter. The listing in the catalogue, the filing of a PBR at the CPVO[7] and the marketing of a variety containing a patented gene require no information on the presence of this gene or the existence of the patent that protects it[8]. This does not prevent the patent from being "activated" in order to recover any royalties on farm-saved seed,

- Molecular characterization of the variety protected by a PBR could allow to recover royalties on farm-saved seed almost as effectively as does the patent on the gene.

This compromise on industrial property is still incomplete for technical reasons, namely the need to finalise the definition of molecular criteria relevant to the characterisation of both varieties and genes. It is in order to enable its construction that the discussions around the "Better Regulation on seeds” focus on the evolution of marketing rules (catalogue and certification) that it requires, while avoiding to address directly the underlying issue of Industrial Property.

However, this compromise is the source of a new conflict between traditional seed breeders and “transformers”. With the phenomenon of "patents under dependence", a handful of multinationals have already taken a hold of huge portfolios of patents on almost all current genes of interest of major crops. Gradually their competitors find less and less interesting genetic basis, which is not already patented. They have no other choice but to accept the license fees, which mostly result in direct or disguised forms of collect. That is why the European Commission already announced that after the "Better Regulation on seeds” reform the issue of intellectual property should be reopened.

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[6] Directive 2001/18 excludes from its scope an important part of techniques producing GMOs: cell fusions of sexually compatible species and mutagenesis. However, current techniques, such as marker assisted selection associated to the use of meganucleases, which allow to choose the gene undergoing targeted mutagenic pressure make mutagenesis a technique similar to gene transfer in order to manipulate and patent genes, without diminishing the risks of unintended and uncontrollable effects

[7] Community Plant Variety Office

[8] More than 80 patents have been filed at the European Patent Office (EPO). Unfortunately we have information only on those that are subject to legal dispute: broccoli, tomato, See: www.no-patents-on-seeds.org, http://www.evb.ch / fr/p25015831.html, Decision of the Enlarged Board of Appeal, December 20, 1999

I - 2. The CBD[9] and ITPGRFA[10]: high places of influence where the legalization of biopiracy confronts the rights of peoples and farmers

Emerging issues around the **use of biomass** by the energy and chemical industry revive the debate on **biodiversity**. After taking a quarter of the world's biomass, the proportion currently being cultivated, the industry wishes to take control of the remaining three quarters of wild biomass. The patent on the gene remains the main tool of this appropriation, whether it takes the form of genes of bacteria destined to transforming it into energy or genes of industrial interest (energy, chemicals ...) present or introduced into wild or cultivated plants. The strategy of the catalogue, which only allows the introduction on the market of varieties previously selected with the aim of being appropriated and locking the rest of biodiversity in gene banks with highly regulated access, becomes counter-productive. Similarly to seed “transformers”, the opportunities of appropriation or the introduction of patented genes available to the biomass industry also reside in already existing cultivated and wild biodiversity. Unlike traditional seed breeders, they do not need to make biodiversity disappear in order to make room for "their" varieties, all they need is to introduce their patented genes in order to seize this biodiversity.

Since 1992, all patents filed on an element of biodiversity fall under the CBD, and since 2005 under the ITPGRFA for resources included in the multilateral system of access, both approved or ratified by the European states: national sovereignty, prior consent and sharing of benefits apply in return for the patent on the gene. In the absence of a binding international system, most European states have not transcribed the CBD or the ITPGRFA into national law. But the industry is now eager to capture the bulk of global biodiversity concentrated near the Equator. Therefore it encourages the finalisation of an **international regime on ABS (Access and Benefit Sharing)**, which should be adopted at the 10th Conference of Parties to the CBD (Nagoya, **October 2010**). The transcript of the CBD into national law will prevail then to any state that does not wish to see its biodiversity sacked without its prior consent or any compensation by foreign industries.

In 1998, the acceptance of a patent on the gene was made possible only after a campaign orchestrated by the pharmaceutical industry behind the slogan "patents for life" brandished by disabled people marching in wheelchairs to the Parliament. Similarly, we now see the pharmaceutical industry claiming loud and clear the implementation of the CBD in order to market new drugs derived from plants of the Amazon forests.
A transcript of the CBD into national law without a transcript of the ITPGRFA, however, requires bilateral agreements of prior consent and benefit sharing for each request of access to national resources collected after 1993. Such a constraint is unacceptable for the seed industry used to having free access to resources from national collections that they regard as their common heritage by claiming that it

[9] Convention for Biological Diversity
[10] International Treaty for Plant Genetic Resources

belongs to all humanity. This is why, after opposing any transcript of the CBD, they agree to it today, provided that part of the ITPGRFA is also transcribed into national law, namely the part that **channels national collections into the multilateral system** (proposal found in the current bill to modernize French agriculture). The multilateral system provides direct access to all resources it contains and replaces the bilateral sharing of benefits (between a transferor and transferee) by payments from a benefit-sharing fund administered by the Treaty. This compensation, however, is applied only if a patent is filed and not when the resource is protected by a PBR under the pretext that the latter remains freely available for research. Since the European seed breeders file patents only on engineered (synthetic or mutated) genes, and not on those originating from the resource itself, and they only market varieties protected by PBRs with no obligation of information on the possible presence of patented genes, they exempt themselves of any obligation to benefit-sharing through the multilateral system. **Despite the CBD, the multilateral system of the ITPGRFA allows the PBR to continue the legalization of biopiracy, including for the marketing of varieties that contain patented genes.**

This transcription, however, also puts on the agenda the national transcription of other ITPGRFA articles, especially articles 5 and 6 relating to agricultural policies promoting **on-farm conservation** and article 9 on the **rights of farmers** to save, replant, exchange and sell farm-saved seed, to protect their traditional knowledge and participate in national decision-making on biodiversity. Similarly, communication on biodiversity re-launches the debate on traditional population varieties, which require a relaxation of DUS criteria in order to be registered. Traditional seed breeders are opposed to these developments, while producers of plants manipulated by modern biotechnologies, convinced that their patents on genes will allow them to capture all the seeds, are instead likely to present them as a bargaining tool to make molecular markers and patented genes accepted.

I - 3 Hygiene, environmental and biosafety to help the interests of seed companies

Health and environmental damage as well as the risk of genetic contamination generated by industrial or modern transgenic farming create increasingly deep concern, which is reflected in the strong social demand for food safety, plant and environmental health as well as biosafety widely reported by environmental NGOs. New climate and food-related risks are amplifying this demand. UPOV recalls in all its formal meetings the importance of prohibiting the marketing of seed of poor health, stressing that quality can only be guaranteed by "professionals" (implying that farmers are not seed professionals and they produce seeds "at risk"). Laws are multiplying to force industry to become responsible and control these risks. Meanwhile, French President Sarkozy told the FNSEA (main French farmers' union) Congress in 2008 that the Community preference now shifted to health and environmental standards: the message on the instrumentalisation of these standards to purely economic aims cannot be clearer.

The EU regulation on GMOs (2001/18 and 1829/2003) delegates the responsibility of rules of coexistence to Member States. While it has not yet set a threshold for the contamination of seeds, the recent misadventures of Canadian farmers cultivating flaxseed oil already indicates the importance of new biosafety standards for the industry: to secure their supplies, farmers are forced to abandon their farm-

saved seed that could be contaminated by GMOs and buy certified commercial seeds, while it is precisely these certified seeds that are the source of contamination.

Similarly, the constraints of the "hygiene pack" and new methods of certification based on HACCP[11] methods defined in Regulation 882/2004 are gradually imposed to all agricultural products, whether vegetable or animal.

Finally, regulation 1107/2009 on pesticides requires each Member State to develop a quantitative plan for pesticide reduction. These new restrictions are needed to assess seeds introduced on the market and for compulsory biomonitoring during their use. Furthermore, the reduction of inputs, calculated during the evaluation phase of a variety based on the quantities of active ingredients applied or on the index or frequency of treatment (IFT) and never based on the toxicity of pesticides, in turn encourages the use of seeds treated with systemic products applying throughout the plant's entire life cycle (recorded as a single treatment with low dose), meaning varieties manipulated to self-produce their own pesticides (unrecorded since not "spread") and to tolerate herbicides (generating a transitory decrease of herbicide use followed by a significant increase) or to show specific resistance, easily identifiable but in many cases quickly circumvented.

At the same time, communication on the risks linked to pesticides encourages the development of peasant and organic farming. However, under the current "case by case" assessment of varieties, the peasant farmer varieties or varieties for organic farming are considered insufficiently resistant to diseases. In fact, they certainly privilege specific long-lasting genetic resistance, and particularly the adaptation to agroecosystems that allow the control of disease by stimulating the plant's overall vitality. With these varieties the "seed /farming method" (organic or peasant farming) pair rather than genetics alone enables resilience. This contradiction puts on the agenda the necessary evolution of regulation on VCU.

II - CONSERVATION VARIETIES OR VARIETIES CREATED TO RESPOND TO CULTIVATION UNDER SPECIAL CONDITIONS

The possibility for States to define specific conditions "under which seed can be marketed as regards in situ conservation and sustainable use of plant genetic resources" appears for the first time in a European directive of 1998 (98/95). It followed the global action plan for the conservation and sustainable use of plant genetic resources for food and agriculture of the Leipzig Conference, held in 1996 following the signature of the CBD. While it had already begun the Better Regulation process undertaken to reform them, the European Commission issued two new directives on the seeds of conservation varieties. These guidelines, which on the margins relax the requirements for registration in the catalogue for niche markets, are to evolve. The Commission also funded a research program

[11] Hazard Analysis Critical Control Points

(Farm Seed Opportunities) intended to make proposals for improving them. It is therefore important to make a detailed analysis in order to influence what can evolve.

The first directive 2008/62 of June 20, 2008 concerns varieties of field crops and potatoes. Novelties in the directive are the following:
- It must allow the registration of population varieties and even "group of populations or clones"
- For this purpose, States may adapt the provisions concerning the DUS criteria
- The official tests are not mandatory and can be replaced by the results of unofficial tests, knowledge gained from the cultivation of these varieties and information from authorities or organizations carrying out conservation work

However, the restrictions are important:
- Varieties must comply with the DUS requirements of the CPVO or UPOV, with up to 10% of off-types for uniformity, which, particularly in the case of cross-pollinating species, excludes any population reproduced through successive multiplications and not from a return to the basic lines
- Varieties must be "traditionally cultivated" in an identified area, precluding any recent peasant selection or any evolution of traditional varieties
- Marketing of seeds is limited to the region of origin or adoption
- Marketable quantities are limited[12]
- The cost of registration and control of seed producers are at the discretion of States that may very well turn into impassable barriers

The varieties of major agricultural crops are subject to mandatory assessment of their VCU, but the criteria for this evaluation are the responsibility of Member States alone. Directive 2008/62 does not specify anything regarding the VCU. We can conclude therefore that states are free to impose any assessment of VCU on conservation varieties, but they can also determine the specific criteria or keep the criteria of varieties registered in common catalogue.

The second Directive 2009/145 published on November 26, 2009 concerns varieties of vegetable species. It reproduces without change the rules on conservation varieties and adds a new category of varieties developed in response to particular growing conditions. This new register relaxes some restrictions imposed for conservation varieties:
- Recent varieties are accepted
- The geographic and quantitative restrictions have disappeared,

while introducing a new restriction on the size of lots traded, "the relatively high price of seeds sold in small packages leading to quantitative restrictions."

[12] For grains: 0.3% to 0.5% of the quantities of seed marketed for the same species, or the seeds required for cultivation of 100 ha for vegetables, the quantities of seeds required for cultivation of 40 acres of cabbage, 20 ha of beet, 10 acres of corn ...

The French government went all the way to try and limit this new category of "varieties created to respond to particular growing conditions" marketed only for home gardeners. This attempt may seem totally inappropriate since to date there is no requirement of registering such varieties in the catalogue. In the current European regulations, the registration requirement concerns only sale of seed "for the purposes of commercial use", which is not the case for amateur gardeners. The French government has not succeeded, but it should be monitored that it does not take advantage of rewriting the rules after the end of the European Better Regulation process in order to remove that freedom.

III - "INNOVATIVE" NATIONAL LAWS

III - 1 Farm-Saved Seed

In 1994, regulation 2100/94 makes farm-saved seed "counterfeit" subject to the payment of "just compensation" to breeders, of which are exempt "small farmers" (area equivalent to less than 92 tonnes of cereals). The farmer is legally obliged to declare the use of farm-saved to the breeder, but establishing the proof of infringement falls solely on the breeder. In fact, breeders do not indicate the presence or absence of protection by a PBR of marketed seed, farmers do not report the use of farm-saved seed to breeders and very few breeders are able to prove that it is their variety and not another one that has been reused by a farmer.

German breeders tried to force all farmers to complete a questionnaire, but the farmers' union "ABL" argued that farmers who do not use protected varieties have no obligation vis-à-vis the breeders and won with this argument before the European court.

The English breeders have signed an agreement with graders who remove for their account royalties on farm-saved seed: This agreement is limited to species that require sorting and farmers using service companies. For oats, a tax is levied on each acre planted.

The French breeders have signed an agreement with the main farmers' trade union, the FNSEA, which launched the removal of a Compulsory Voluntary Contribution (CVC) on wheat supplies. 80% of this CVC is then paid back to breeders proportionately to their seed sales and the remainder feeds a research fund for crop improvement. This mechanism is easy to implement for wheat due to the obligation to deliver the entire harvest to accredited storage agencies entrusted with deducting the payments. Without a strong constraint it would be much more difficult to apply the same mechanism to other species sold on the open market. This practice was unsuccessfully challenged by the CNDSF[13] because the deductions automatically applied to small farmers and farmers were obliged to ask themselves for the reimbursement of royalties they did not have to pay. However, farmers, who have asked to be reimbursed based on the argument that they did not use protected varieties, have been successful even though they refused to indicate the particular

[13] National Coordination for the Defense of Farm-Saved Seed (France)

variety used by referring to the German case. The CVC, which a French bill of 2006 wants to extend to all species, seems therefore legally unsound.

The varieties commercialized with patented genes present in Europe are F1 hybrids (sunflower, corn ...) leaving extremely rarely the possibility of using farm-saved seed. At a recent meeting of UPOV, Australian breeders indicated that they used molecular markers to identify their open-pollinated varieties and collect royalties on farm-saved seed.

III - 2 « Amateur » varieties

On December 26, 1997, France opened an annex to the national catalogue "for vegetable species, a list of "old varieties for amateur gardeners", in which can be included widely-known old varieties exclusively for sale in France and to gardeners, who grow only for their own consumption." The lawsuit against the Association Kokopelli gave the impression that the registration of the variety on this list was mandatory for the sales of all seeds, including for amateur use or for the purposes of "non-commercial use". This is not the case. Kokopelli never claimed to sell only for non-commercial use, and the order, which cannot be contrary to European law, stipulates that these varieties "may" rather than "must" be registered on the list.

Furthermore, it should be noted that the obligations originating from the directives on the catalogue only concern the marketing of seeds and not the use made of them, unlike, for instance, the directives on pesticides that affect both. As long as it does not concern GMOs, in fact, nothing prevents a farmer from cultivating an amateur variety or a variety that he/she has selected himself/herself and which is not included in any catalogue, and then sells the harvest on the market. The debate on the widely practiced professional use of amateur varieties will be doubtless revived in France during the transcription into national law of the recent Directive 2009/145, introducing a list of vegetable varieties "created to meet special growing conditions "which incorporates the provisions of the amateur catalogue by opening it explicitly to marketing for commercial use.

III - 3 Conservation varieties

On March 20, 2008, Italy anticipated the publication of EU directives by issuing a decree on conservation varieties. This decree was merely giving a national framework to already existing regional laws. Referring to the ITPGRFA and the relationship between biodiversity and local communities, the decree allows farmers to sell (direct sale) seeds of conservation varieties. It also prohibits the registration of genetically modified or GM contaminated varieties as conservation varieties, and the possibility of using a conservation variety to create a GMO. This last clause is an application of farmers' rights to protect their traditional knowledge stipulated by the ITPGRFA and complies with the law on patents (filed in Europe on transgenes), which imply the recognition of prior consent. On the other hand, it constitutes an interesting and narrow interpretation of UPOV, which contains no limitation on the access to plant genetic

resources for the creation of a new variety (breeder's privilege). The Italian geographic restrictions, unlike those of European directives, however, do not support any derogation. On the concept of the region of origin, the Italian text speaks of "*traditional area of cultivation of the variety [...] where the variety developed its properties"*. This is the only geographical area in which the production and sale of seed is allowed, which strengthens the protection of the use of the variety's name in the only area of traditional culture. This reference to EU law on Protected Designation of Origin in some cases may prevent a sufficiently wide dissemination in order to preserve certain varieties of the risk of extinction and thus go against the objective of conservation of agricultural biodiversity. France has taken over the entire Directive 2008/62 in two regulations published in January 2009 by subjecting seed producers to the same constraints as producers of standard vegetable seeds.

III - 4 Varieties for organic farming

Directive 98/95 also opened the opportunity for States to define specific conditions for the marketing of varieties for organic farming. In 2002 Austria set up specific VCU tests for organic farming that allowed the registration of about twenty wheat and barley varieties. The breeder chooses to register its variety for organic farming, for conventional agriculture or both. Germany also introduced organic VCU tests, but the candidate variety must also pass conventional VCU tests, which unduly increases the cost for varieties that still have low circulation. France has tried to develop "low-input" VCU tests, the variety also undergoing conventional testing. This system, however, constituted a failure for varieties destined for organic farming, not only because of the cost but also because the varieties sought for in organic farming are not adapted to the conditions of "low-input" testing, which amount to a decrease in doses of seeds sown, a removal of the first nitrogen treatments and a reduction of some fungicide treatments. France thus focuses on tests for organic farming besides trials for low-input agriculture.

However, no country defined more flexible DUS criteria for organic varieties. Population varieties reproduced by successive multiplications, however, are particularly successful in fostering adaptation to diverse and changing local conditions non-homogenized by chemical inputs. At the same time, the European seed industry is opposed to a framework where organic varieties would benefit from the same opportunity of adjusted DUS criteria like conservation varieties. It considers that if organic agriculture is expected to grow, it cannot be considered a niche market and that organic seed must meet the same "quality standards" as conventional seeds do.

III - 5 The Value for Cultivation and Use (VCU) for grass plants in major European regions and the French Environmental VCU

The tests for VCU grass plants have recently opened new avenues for development. An agreement reached between countries allowed to discard national VCU tests and define a European VCU assessed in five "major regions", each one including several countries based

on the new model of marketing authorizations (MMA) for pharmaceutical plant products. An important part of test plots is located on the premises of the most important seed companies in the sector. The protocols and monitoring plan are accredited by authorities. But the companies themselves are carrying out the controls, which are then validated by the government solely on the basis of administrative documents. Both innovations have been warmly welcomed by ESA (European Seed Association), which argues for a broadening of the market corresponding to the evaluation networks and self-certification under official control.

In Fall 2009 the French authorities have decided to add to the VCU test a new test of Environmental Value with an attempt to encourage the reduction of inputs thanks to genetics. If it is to keep the intensive cropping systems based on short rotation or monocultures, and offering only a few exclusive genetic patches to the agronomic deadlock they generate, this new criterion will be an additional headlong rush towards the environmental, economic and social disaster they already provoked. It may be, however, a factor of progress if it seeks to increase the diversity and variability of the variety pool with the aim to adapt it to a greater diversity of environments and less standardized farming systems through chemical inputs.

III - 6 Marketing and "informal" exchange of seeds of varieties not listed

Switzerland, which is not a member of the EC but it belongs to "the European Seed Area", published in 1991 an ordinance authorizing the sale of limited quantities of seeds of varieties not included in the catalogue. Recently, however, it requested the withdrawal from sale of non-registered Italian and French seed varieties sold in retail chains.

Similarly to seed producers, farmers enjoy the breeder’s privilege who allows them to select their own varieties by using the plant genetic resources available. To this end, similarly to seed companies and research centres, they need to exchange and store seeds of plant genetic resources that may belong to unregistered varieties. Many European nations tolerate this "informal" exchange between farmers who conserve or select varieties. Other States prosecute them on the pretext that this work of conservation or selection is carried out under the agricultural production activity of farmers, meaning thus "for commercial use." Recently the French Foundation for Biodiversity Research (FRB), which has the competence to manage resource conservation, recognized farmers’ networks, including the French Peasants’ Seed Network (RSP), as a conservation actor, thereby acknowledging the right of their members to exchange seeds of unregistered varieties.

IV - THE ACTION PLAN OF THE EUROPEAN COMMISSION

On September 29, 2009, the European Commission proposed a plan of action on Seeds and Propagating Material (S & PM). This plan reiterates the main proposals of the research office. It begins by reassuring traditional seed companies by recalling that the pillars of

the current legislation are good, should not be deleted but only revised and simplified. The proposed revision, however, interests primarily the “transformers”.

While the current framework is built around directives for each group of species, the Commission proposes a single legal framework that could affect the recognition of their specificities and, for example, threaten the unique case of fruit plants, which are not subject to compulsory registration in the catalogue. While we now have guidelines that allow each state a certain flexibility of interpretation in order to take into account local realities, the Commission proposes regulations of direct implementation, which threatens any possibility of taking into account the diversity of national and local realities. While the European register is now the result of the compilation of national catalogues managed by the States that retain complete freedom for implement the DUS requirements of European directives and determine their own VCU criteria, the Commission proposes to replace the national scale by combining several States, modelled on the new MMA[14] for pesticides or the new VCU for grass plants.

The stated objective is to enhance:
- The role of the Community that could alone modify the "non-essential" items of "technical or scientific" nature of the regulation
- Liaison with international standards
- Bringing closer the management of the catalogue with the management bodies of the Protection of Industrial Property. The tests required for registration in the catalogue could be the same as those carried out for obtaining a PBR, and executed by the same organisation, the CPVO.

Concentrating centres of decision-making and management at the European level distances them from local realities, those of citizens, small business working for local markets in order to bring them under the direct influence of lobbying by multinational companies that aim at increasing the market. The simplification and reduction of registration cost linked to the catalogue aim to transform the catalogue into an information tool rather than an authorisation tool for marketing (AMM). The information on the origin of varieties could be required (to allow the implementation of CBD?). This simplification, however, does not question its need of consistency with the CAP (direct agricultural production by directing the quality of seed supply) and is now a double environmental obligation and adaptation to climate change. Given the geographical level proposed, this new constraint cannot be based on the necessarily complex adaptation to the diversity of local agroecosystems, but mainly on the standardization of these ecosystems and seeds through pesticides and more targeted genetic manipulation.

The important principal of national subsidiarity, which existed in the management of European seed laws, will be replaced by the stakeholder consultation, focusing necessarily on actors organized at the European level to the expense of the diversity of local actors. It is still promised to maintain an appropriate approach, tailored to the size of the market for minor crops and emerging niches.

[14] Model of Marketing Authorization

Geographic, quantitative and packaging restrictions imposed by the recent guidelines on "conservation" varieties or varieties "created for particular growing conditions" portend the way the Commission intends to confine the right approach into narrow market niches.

This simplification is offset by tighter constraints and therefore of costs, MMAs of seed lots (certification), which will incorporate the standards of plant health, food safety and biosafety. The willingness of the Commission to reduce the administrative burden and increased flexibility leads to advocate for the organising the control of seed lots according to the standards defined in Regulation 882/2004: accredited private certifying bodies and HACCP. This echoes the scarcely hidden "self certification under official control" desired by multinational enterprises. These constraints will weigh little on widely circulated industrial varieties taking advantage of the new unified market in order to absorb the costs, but will often be an insurmountable barrier to the poorly circulated locally adapted varieties. The reversal of the burden of proof established by the HACCP system requires operators to certify their practices for risk prevention: it is certain that alternative practices such as seed treatment with natural products with no MMAs (hot water, vegetable-based liquid manure, essential oils, clay, Bordeaux mixture...) will never be certified. Seeds treated with chemical pesticides or GMOs are not only easily certified under the pretext of reducing the quantities of pesticides applied, but may even be made compulsory "to ensure risk management, including for organic and peasant farming, which do not need it because they prevent the risks with good agronomy.

The marketing authorization for a variety given by its registration in the catalogue will be managed by the same agency, which handles its industrial protection. It is unclear whether the CPVO facilitates the registration and / or the maintenance in the catalogue of varieties in the public domain. No defender of the patent has ever dared to dream openly of a market driven by the Patent Office, the defenders of PBRs are the ones doing so!

The review of CPVO criteria (DUS) to bring them closer to international standards will strengthen the shift towards the characterization of varieties by molecular markers that can be imposed directly by the Commission as an amendment of "only technical and scientific in nature". The CPVO will certainly not oppose the will of UPOV.

The action plan of the Commission, however, mentions not one word of farm-saved seeds, peasants' seeds, or the conservation of plant genetic resources.

It proposes a timetable that must be approved by the Parliament: the establishment in late 2009 of a working group under the Consultative Group of the food chain, further consultations with stakeholders and the States in 2010 and 2011, and finally in 2011 the proposal of a regulation, modification of the CPVO and extension of Regulation 882/2004to the seed sector.