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Position

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Commercialised varieties in the context of the Convention on Biological Diversity

I. Introduction

The breeding of new varieties of plants is crucial for the food security of the world as sufficient nutrition for the population has to be ensured. In this the role of breeders and farmers is essential. Crops are constantly exposed to new challenges such as diseases or climate conditions which can lead to bad harvests. Such challenges have to be addressed by breeders. In order to develop a new variety, a breeder needs to start from a high genetic diversity and then to select a plant which incorporates desired traits such as better drought tolerance or higher yield. To complete this work it is therefore crucial to have easy and quick access to all plant genetic resources.

Breeders support the objectives of the Convention on Biological Diversity (CBD) and the Nagoya Protocol and acknowledge that Contracting Parties have sovereign rights over their natural resources which they may exercise. Nevertheless, in particular with regard to EU Regulation no. 511/14, it is very important to understand the extent of user-obligations provided for in the Regulation in the light of the CBD and the Nagoya Protocol. A crucial question for the plant breeding sector is if commercialized varieties are covered under the EU Regulation.

II. The scope of the CBD and the Nagoya Protocol

International Conventions, such as the CBD and the Nagoya Protocol, are to be interpreted according to the Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969. According to Article 31(1) of the Vienna Convention, the general rule of interpretation is that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Nagoya Protocol is legally attached to the CBD, and therefore exists within the scope of the CBD. In accordance with this general principle of law, Article 3 of the NP states that "This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources." To assess the scope of the Nagoya Protocol, it is therefore pertinent to revert to Article 15 of the CBD.

Article 15(1) CBD clarifies the scope of the Convention and affirms that States have sovereign rights over their natural resources. In order to interpret this provision the ordinary meaning of the term "natural resources" has to be determined. According to Wikipedia "natural resource is anything that people can use which comes from nature. People do not make natural resources, but gather them from the earth." According to Oxford English dictionary natural resources are "materials or substances occurring in nature which can be exploited for economic gain". Thus, States have sovereignty over resources occurring in nature on their territory. In order to better understand what should be considered as occurring in nature in the context of the CBD, the definition of "in situ conditions" in Article 2 of the CBD should be used. It reads as follows: "conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species in the surroundings where they have developed their distinctive properties".

In general terms, these definitions show that natural resources for the purpose of the CBD are defined in relation to the place from which they are collected and the location in which they developed. The what and the where are cumulative preconditions which define the extent of sovereignty of a Contracting Party. Genetic resources collected in the wild (ecosystems and natural habitats) are clearly under the sovereignty of the Contracting Parties. As to domesticated or cultivated species (species in which the evolutionary process has been influenced by humans to meet their needs), they are only under the sovereignty of Contracting Parties if collected in "surroundings where they have developed their distinctive properties". The wording implies that the "surroundings" (environment) are decisive in the developing of distinctive properties which leads to the conclusion that domesticated or cultivated species are primarily shaped by the specific environmental conditions in a Contracting Party. This is the case for so-called landraces. They are to be seen as domesticated species because farmers influence their development by selecting the

plants that are best adapted to their specific environment which means that their properties are primarily shaped by the environment as they are continuously re-sown in the same surroundings.

Commercialized varieties on the other hand are neither existing within ecosystems and natural habitats, nor their distinctive properties are primarily shaped by specific environmental conditions in a given country. Starting to develop a new variety a breeder crosses a great range of different plants to create high genetic diversity. He then tests the characteristics of all the different plants in different environments in different countries or greenhouses and in laboratories as well. The breeder actively creates, evaluates and selects plants and creates the distinctive properties of the final plant which becomes a variety. Even after commercialization the breeder has according to European law to ensure that the variety keeps its distinctive properties as described for variety registration. Thus, in contrast to natural resources, commercial varieties are man-made creations where the distinctive properties are created by the breeder.

To put all this in the light of the object and purpose of the CBD it should be recalled that the CBD was negotiated and adopted with the view of finding answers to and prevent the loss of biological diversity and to ensure the conservation of nature via the conservation of biological diversity and the sustainable use of its components. Thus, the CBD is clearly an instrument to address the conservation of natural resources. In conclusion, commercialized varieties are not within the scope of Article 15 of the CBD and thus, not in the scope of the Nagoya Protocol.

III. EU Regulation no. 511/14

In accordance with Article 216 (2) of the Treaty on the Functioning of the Union (TFEU), "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States." As a consequence, the Regulation implementing the obligations of the EU and its Member States has to respect the material scope of the CBD and the Nagoya Protocol. Therefore, applying the EU Regulation to commercialized varieties would disregard the legal framework set by the CBD and the Nagoya Protocol.

Further on, it would also run counter to the objectives of ensuring sustainable use and conservation of genetic resources. If commercialized varieties were included in the scope of the EU Regulation plant breeders would be forced to limit themselves to utilizing the genetic material already available in their own collections. The legal risk of unintended non-compliance with the EU regulation would be too high. Especially for hobby breeders, smaller companies and newcomers the possibilities to add novelties to their genepool might become limited. Consequently, genetic diversity would significantly decrease which would not only contradict the objectives of the CBD and the Nagoya Protocol regarding conservation and sustainable use of plant genetic resources but would also amount to an infringement of the EU's own objectives

according to which the European Union is bound to support the sustainable development of the Earth[1].

IV. Relations with the IT PGRFA

The International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) is a specialized ABS instrument dedicated to plant genetic resources. According to the provisions of the CBD, the Nagoya Protocol and the IT these international conventions should exist in harmony with each other[2]. Further on, Article 4(3) of the Nagoya Protocol specifically requires that the Protocol is implemented in a mutually supportive manner with other international ABS instruments. The EU and its Member States are Contracting Parties to both the CBD/Nagoya Protocol and the IT and thus must ensure when adopting ABS measures in EU law that these conventions are implemented in a mutually supportive manner. Besides the fact that commercialized varieties are not in the scope of the CBD (see point II above) and thus cannot be covered by the EU Regulation either; ABS measures covering commercialized varieties in their scope are also not in line with the spirit and objectives of the IT since according to the IT and its standard Material Transfer Agreement ABS measures are not required beyond the point of commercialization[3].

V. The free availability of plant genetic resources for further breeding

In plant breeding it has been the basic principle and the common practice since centuries that breeders rely on each other's' creations and use varieties bred by others and available on the market to further innovate. In a sector where responses to ever new challenges have to be found quickly, speedy innovation is key and for that reason the free availability of the full plant gene pool is indispensable. The fact that this free availability of plant genetic resources for further breeding is the basis of breeding work has been reconfirmed in several international conventions. First, it was discussed at the diplomatic conferences leading up to the adoption of the first version of the UPOV Convention where delegates unanimously decided that the plant variety protection system established by UPOV has to respect and safeguard this important principle. Therefore, it has been institutionalized in the UPOV Convention as the so-called "breeder's exemption". It is also implemented at EU level in the CPVR Regulation which states in its preamble that the breeders' exemption is a confirmation of the internationally accepted rule of free access. More recently, the need to respect and safeguard this important principle was also reconfirmed by the

[1] Article 3(5) of the Treaty on the European Union (TEU)
[2] Article 22(1) CBD; Article 4(1) Nagoya Protocol; Paragraphs 9 and 10 of the Preamble of the IT
[3] Article 13(2)(d)(ii) of the IT

inclusion of a type of breeder's exemption into the UPC Agreement[4]. And last, it has to be mentioned that the IT also recognizes the importance of free access to genetic resources for further breeding and the way how it has been confirmed via the breeder's exemption[5].

If commercialized varieties were falling under the scope of the EU Regulation the breeder of a new variety using a commercialized variety for further breeding would be obliged to request information on the commercialized variety and if certain information is not available would be blocked by the Regulation from using the variety, which would otherwise be free according to the international principle of free access (breeder's exemption). Further on, also the breeder of the commercialized variety would be obliged to submit the required information to the subsequent breeder although normally he does not know who uses his variety as the varieties are simply bought on the market and used freely. As already mentioned, according to both the CBD and the Nagoya Protocol, provisions of these conventions "*shall not affect the rights and obligations of any Party deriving from any existing international agreement*"[6]. Therefore, if commercialized varieties were included in the scope of the EU Regulation the EU would not respect its obligations under UPOV and its own plant variety protection system (the CPVR system) to ensure the free access to commercialized varieties for further breeding.

VI. The fact that commercialized varieties are not under the scope of the EU Regulation does not create loopholes

It has been suggested that not applying the EU Regulation to commercial varieties would create a loophole in the system because companies would market varieties of inferior value with the intention to circumvent the legislation. This is however an unjustified concern. Given the highly competitive nature of plant breeding, companies cannot risk having their valuable breeding material with important new traits out in the open, available for everybody, in a too early stage. Applying for variety registration (i.e. market approval) and eventually plant variety protection is costly, so companies will not be eager to file such applications for inferior varieties. But once a variety is on the market, even in case of protected varieties, the competitors will be able to use the variety for further breeding in their breeding programs. Bringing breeding material to the market before the valuable traits have been incorporated in a new high-quality variety, interesting for professional growers, would therefore mean that the breeder would lose its competitive advantage. Breeders will not take such risk merely to circumvent legislation.

[4] Article 27(c) of the Unified Patent Court Agreement
[5] Article 13(2)(d)(ii) of the IT
[6] Article 22(1) CBD; Article 4(1) Nagoya Protocol

Further on, it has been suggested that the legislation cannot exclude commercialized varieties from its scope since the MAT may state that the user cannot allow further use of a commercialized product. Such contractual provisions may indeed exist; this however cannot be and should not be the concern of the legislator. Companies are conducting their business based on contracts and they are bound by such contractual obligations regardless of whether the EU Regulation applies or not. Violating contractual obligations would make companies liable under civil law, most likely resulting in the obligation to pay damages. Therefore, if MAT have been signed breeders will always act in line with their obligations thereof even if the EU Regulation does not apply.

The need to respect contractual obligations is also valid the other way around meaning that the application of the EU Regulation should not force breeders to violate their contractual obligations. Many agreements contain for example a confidentiality provision. Requiring breeders to transfer information to subsequent users or include information in declarations to be made in accordance with the EU Regulation could mean that they would be breaching such confidentiality provision. Whichever choice they make breeders would either be breaching a contractual obligation or a legislative obligation. The EU Regulation should therefore respect the contractual obligations that users may have and leave such issues to the discretion of the provider.

Conclusion

All international legal sources that must be considered in this context indicate that commercialized varieties are not to be included in the scope of the CBD or the Nagoya Protocol and therefore fall outside the scope of the EU Regulation as well. To overcome concerns of the plant breeding sector in this regard it is nevertheless necessary to include such statement clearly in the planned guidance document from the European Commission.

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Avenue des Arts 52
1000 Brussels

www.euroseeds.eu

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