



Closing in on our seeds

For the first time in their history, European institutions will reform the entire package of legislation related to seed marketing using the so-called 'Better regulation framework', a strategic approach used by the European Commission to “simplify” existing EU legislation.¹ Since seeds are the starting point for the whole human food chain, the EU's attempt to consolidate the seed industry is hugely significant. From the very start of the process in 2008, this policy initiative has been an unique opportunity for large seed companies to reinforce their control over a commercial seed supply system that they already largely dominate.²

The EU proposal, published last May 6th, “on the production and making available on the market of plant reproductive material”³ will be discussed between the European Parliament and the Council (Member States). The Commission has merged and updated the 12 existing directives on the subject in a single text.⁴ Participating in the 5-year preparatory process within the Commission have been the Directorate Generals (DGs) of Health and Consumers (SANCO, leading on this dossier), Agriculture (AGRI) and Environment (ENVI). It has been a long process to reach final agreement between these three departments, primarily because AGRI and SANCO appeared to differ on certain key points such as biodiversity protection.

Inevitably, for a market area so dominated by agribusiness, corporate lobbying to influence the legislation has been intense, particularly from the seed industry and its main Brussels-based lobby group, the European Seeds Association (ESA). As is often the case with lobbying, the earlier the pressure the “better” the outcome. It is unclear to what extent the drafting process itself was protected from excessive

¹ This “simplification” approach was also influenced by corporate lobbying including from the tobacco industry, see *The Origin of EU Better Regulation – The Disturbing Truth*, the SmokeFree Partnership, 2010, http://www.smokefreepartnership.eu/IMG/pdf/Report_version_27012010_-2.pdf

² Nowadays 64% of the global seed market is controlled by 10 companies only, with the first 4 companies alone controlling 58% of this market: *Who will control the Green Economy*, ETC Group, December 2011, http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/pdf_file/ETC_wwctge_4web_Dec2011.pdf

³ *Proposal for a Regulation of the European Parliament and the Council on the production and making available on the market of plant reproductive material*, COM(2013) 262 final, http://ec.europa.eu/dgs/health_consumer/pressroom/docs/proposal_aphp_en.pdf

⁴ The proposals for a regulation of the seed marketing was presented by the Commission on 6th May within a broader package of measures concerning also plant health, animal health and official controls: http://ec.europa.eu/dgs/health_consumer/pressroom/animal-plant-health_en.htm

influence: CEO wrote an open letter⁵ to SANCO pointing out the conflict of interest of a key expert in this department with the seeds industry. Other agribusiness lobby groups were also present at a very early stage, including the industrial farmers' lobby Copa-Cogeca and Brussels' umbrella organisation of big food multinationals, FoodDrinkEurope.

Defending the seed status quo

The total commercial value of the Seed Market amounts to around EUR 6.8 billion per year.⁶ Increasingly in the modern era, industrialized corporate seed production has competed with and largely dominated over other more traditional and ecological approaches such as farmers' in-situ seed selection, the development of open-pollinated farmer varieties⁷ not protected by intellectual property rights (IPRs) and the defence of conservation varieties. This domination has been consolidated by the EU's legal framework, which only allows the farming of market seed varieties that match the "distinctness, uniformity and stability" (DUS) criteria that, de facto, favour industrially-produced and monoculture-friendly seeds. But these alternative agricultural practices, marginalised during the golden era of industrial agriculture, are enjoying renewed social and political interest for their ecological relevance. Currently in Europe a thriving civil society movement is rediscovering and spreading old plant varieties as well as local, ecosystem-specific breeding practices. This movement's growth is a challenge to corporate control of the seed market, making it increasingly economically relevant too, to the extent that it is seen as a threat by the mainstream seed industry that is built around high entry barriers to the market (IPRs, high registration costs etc). With reference to the ESA's position it appears that one of its key objectives is to use the policy opportunity to strangle this movement before it becomes too strong, or at least prevent its excessive development.⁸

⁵ *Open letter on the conflicts of interest with the seed industry of a national expert seconded to DG SANCO*, Corporate Europe Observatory, April 25th 2013, <http://corporateeurope.org/open-letter-conflicts-interest-seed-industry-national-expert-seconded-dg-sanco>

⁶ *Commission staff working document, executive summary of the impact assessment accompanying the document Proposal for a Regulation of the European Parliament and the Council on the production and making available on the market of plant reproductive material (plant reproductive material law)*, SWD(2013) 163 final, http://ec.europa.eu/dgs/health_consumer/pressroom/docs/proposal_aphp_es_ia_en.pdf

⁷ "Farmer varieties are regularly multiplied, selectively bred and resown over a given area. This does not prevent them from travelling between different regions or countries. Farmer varieties are created in the field or garden from a base of existing varieties and in conditions adapted for production methods within farmers' reach (thus excluding biotechnology). Varieties are reproduced through selection and adaptation to local evolution, new environments and methods of cultivation, often through simple mass selection. Plants are created sometimes through a series of manual cross-breedings, sometimes through selection of new characteristics which appear spontaneously in the population. This process of renewal is associated with "informal" seed exchanges, "local" or "traditional" social structures and systems of knowledge which can in fact be very modern (in agro-ecological terms, for instance)" (extract from De la Perrière R. A. B. & Kastler G., *Seeds and Farmers' Rights. How international regulations affect farmer seeds*, RSP & BEDE 2011, France. P. 4)

⁸ "ESA considers the existing deregulations as sufficient and does not support establishment of further exceptions for 'niche markets' or 'small producers' as these would endanger the level playing field for breeders and would require costly official supervision to assure enforcement"

What isn't registered doesn't exist: a particular idea of biodiversity

One of the most striking features of the ESA's lobbying activities is its remarkably narrow definition of biodiversity. A landmark case at the European Court of Justice (ECJ) in 2012⁹ between the French seed-saver association Kokopelli and a French seed company (Baumaux) over the validity of existing EU seed marketing legislation was an opportunity for the ESA to – successfully – lobby for its understanding of the concept of biodiversity.

Initially sued in France by a private seed company for unfair competition under the EU's seed marketing rules, Kokopelli had complained to the ECJ that the compulsory standardized registration of seeds in order to sell them was, on top of being an unjustified restriction to free trade, a major threat to cultivated biodiversity.¹⁰ This position was supported by the ECJ's Advocate General in her conclusion which highlighted the stakes involved: *“the present case demonstrates that the restriction of biodiversity in European agriculture results, at least in part, from rules of European Union (‘EU’) law”*. She concluded by stating that *“the prohibition against the sale of seed of varieties that are not demonstrably distinct, stable and sufficiently uniform and, where appropriate, of satisfactory value for cultivation and use, established in Article 3(1) of the Vegetable Seed Directive, is invalid as it breaches the principle of proportionality, the freedom to conduct a business within the meaning of Article 16 of the Charter of Fundamental Rights, the free movement of goods established in Article 34 TFEU and the principle of equal treatment within the meaning of Article 20 of the Charter.”*¹¹

This analysis is echoed by the Food and Agriculture Organisation of the United Nations (FAO), who explained in 2012 that while the *“development of the formal seed system based upon science and regulation has brought significant benefits to many farmers in the form of more productive varieties and better seed quality”*, *“however two important criticisms of this strategy have been raised: benefits have largely accrued to commercially oriented farmers in favourable production areas; and the system is leading to a dangerous increase in the erosion and vulnerability of crop genetic resources”*.¹²

(extract from *ESA Position on the Reflection document on the problem definition and options for review of the EU legislation on the marketing of Seed and propagating material (S&PM)*, European Seed Association May 2010, p. 6, http://www.euroseeds.org/publications/position-papers/seed-marketing/esa_10.0433/view)

⁹ Court of Justice of the European Union, PRESS RELEASE No 97/12, Luxembourg, 12 July 2012, Judgment in Case C-59/11 - Association Kokopelli v Graines Baumaux SAS, http://curia.europa.eu/jcms/jcms/P_89305/

¹⁰ https://kokopelli-semences.fr/juridique/proces_perdu#1.3.2

¹¹ Opinion of Advocate General Kokott delivered on 19 January 2012, Case C-59/11 Association Kokopelli v Graines Baumaux SAS, 2012 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=118143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=66802>

¹² L. Lipper, C. Leigh Anderson and T. J. Dalton, *Seed trade in rural markets*, FAO and Earthscan, 2012, London, p. XIII.

The ECJ's conclusions prompted the ESA to express its concerns with a very detailed legal letter to the Court¹³ that strongly criticised the Advocate General's remarks for being "*both factually and legally incorrect*". The ESA pointed out that the "*identity and the quality of the seed and propagating material available in the EU were indeed the core objectives of the European legislator upon enactment of the contested Directives*" and that the increasing number of varieties present in the Common catalogue showed that farmers today had the "*widest possible choice*": therefore according to their definition cultivated biodiversity, far from diminishing, was actually increasing. This was remarkably misleading as the varieties being destroyed in Europe are precisely those that couldn't be registered in the official catalogue!

This market/catalogue-based idea of biodiversity is in opposition to farmers and growers' rights to choose, exchange, select and multiply their seeds locally, as the varieties they produce are not generally suitable for the admission system and do not correspond to any IPR framework. The ESA's vision of agricultural biodiversity seems to be that cultivated varieties that are not registered simply do not exist. The problem is that not only is agricultural biodiversity not merely a genetic reservoir for the seed industry or a measurement of the size of a legal register: as Philippe Feldmann, Biodiversity Adviser at CIRAD (a French agronomy research centre) put it, biodiversity is nothing less than a "*life insurance policy for humanity*".¹⁴

Nevertheless the ECJ published a final ruling contradicting its Advocate-General's points (an unusual move) and supporting the ESA's arguments, stating that "*the validity of the two directives is not affected by certain principles of EU law or by the EU's commitments arising from the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)*". The Court's interpretation that "*the primary objective of the rules relating to the acceptance of vegetable seed is to improve productivity in vegetable cultivation in the EU*" probably explains this decision and indicates that the Court prioritised the agro-food industry's competitiveness over economic freedoms and – genuine – biodiversity.

ESA's vision of cultivated biodiversity was echoed by the cabinet of Borg, the new Health & Consumer Protection Commissioner who, writing last March to a coalition of seed savers, consumers, environmental and farmers' groups, argued along the lines of industry that "*the available data do not support the claim that legislation on plant reproductive material is largely responsible for the loss of cultivated biodiversity. In the past 15 years the number of registered varieties has in fact increased significantly. For example, the number of vegetable varieties has increased from 10400 to 18400 between 1999 and 2012*".¹⁵

¹³ Court of Justice of the European Union, Case C-59 / 11, Baumaux vs. Kokopelli, *ESA European Seed Association Amicus Curiae statement* <http://www.kokopelli-semences.fr/medias/Letter-ESA.pdf>

¹⁴ Feldmann P., *Biodiversity is a life insurance policy for humanity*, CIRAD 2010, <http://www.cirad.fr/en/news/all-news-items/articles/2010/questions-a/philippe-feldmann>

¹⁵ Letter from the Cabinet of Commissioner Tonio Borg to the Seed For All coalition, 14.03.2013.

“Innovation”: more of the same please!

The ESA frequently reinforces its demand for “*an effective and affordable protection of its intellectual property*” by emphasizing that the European seed industry spends on average 15% of its annual turnover on R&D.¹⁶ But the idea of innovation they promote merely consists of looking at improving the plant's genetics in isolation, rather than within an ecosystem or society, viewing the plant as an ever-improvable processing machine. This vision is the basis of an outdated, linear industrial agriculture model – primarily based on monoculture – that has done so much to increase food production at the expense of the environment and public health; that is to say, our future. This vision of agricultural and biodiversity is a mechanistic, 1950s vision whose limitations have now become obvious to most and there is nothing innovative about it. The real challenge, as Dr. Annette Freibauer, a German climate and agriculture scientist who chaired a panel responsible for a report on the future of EU agriculture research, put it, is a paradigm shift “*from technology to knowledge*”, leaving a standardized, industrial approach behind, and moving towards a more ecosystem-specific approach.¹⁷ The International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD), an intergovernmental effort involving 900 participants and 110 countries under the co-sponsorship of the FAO, GEF, UNDP, UNEP, UNESCO, the World Bank and WHO, sometimes nicknamed the “IPCC of agriculture”, made exactly the same point when it explained that we had so far fed the world mainly by depleting natural capital, and needed to look beyond business as usual (i.e. a mere productivity approach) if we really wanted to address hunger and poverty. Wider issues such as food quality, sustainability, water use, land tenure and energy use were crucially important ingredients for any solution.

Unfortunately, however, the European Seeds Association is mainly concerned with selling more seed at increasing prices. It therefore pushes an idea of innovation largely based on the myth that only highly complex and cost-intensive technologies can create sustainability, employment and well-being. This idea of innovation, with its necessary counterpart of protection of intellectual property rights, is today undermining evolution of the seed sector toward open source/participatory in-situ selection methods, which are nevertheless demanded by increasingly numerous scientists, citizens and farmers.

Intellectual Property Rights (IPRs): one idea, but conflicting interests

However, while the ESA appears to present an united front for the idea that the seed sector needs to be based on IPRs and industry-friendly systems of certification, research, breeding and treatment, this does not mean that every member shares the same perspective on intellectual property. The European plant breeders' rights system has been traditionally based on UPOV, a sector-tailored IP regime that

¹⁶ *Strengthening the competitiveness of Europe's seed sector, Esa's terms of reference for assessing the EU's seed legislation*, European Seed Association, June 2007
http://www.euroseeds.org/publications/position-papers/seed-marketing/esa_07.0243.5a1/view

¹⁷ *Agribusiness CAPturing EU research money? Industrial farming lobby fights shift to more sustainable agriculture* – Corporate Europe Observatory, July 2012
<http://corporateeurope.org/publications/agribusiness-capturing-eu-research-money>

grants special rights and privileges to farmers and breeders. But the major biotech players such as Monsanto, Syngenta and Dupont that have entered the seed market since the mid-1970s in Europe come from the chemical sector, and have brought with them their own stricter IPR vision and interests, based on the patent system. Concretely, this history accounts for some differences of approach, meaning that the Dutch seed industry association Plantum for instance has published an official position¹⁸ against the societal risks created by patents on plants, saying they're "*afraid that this will lead to a situation whereby only the plant breeding companies with the largest patent portfolio will be able to survive, which in turn will mean that, in the future, the decisions regarding which varieties are introduced onto the market will be in the hands of just a few companies on plant breeders rights and then on the possibility to develop new varieties*". This contradicts the position of ESA's big biotech members such as Monsanto¹⁹, pushing for the use of patents on seeds and more generally plants and plants' genetic sequences.

One euro, one vote?

This article has so far portrayed a seed industry united in its defence of the status quo. This is however not entirely fair. Some seed breeders are also realistic enough to see the shifts in ecosystems knowledge and societal demands back towards biodiversity and conservation varieties as an interesting commercial opportunity: after all, local quality seed production is also a delicate undertaking for which demand has always existed, and many of these companies have a unique and crucial know-how. This is for instance the case of the member organizations of the European Consortium for Organic Plant Breeding (ECO-PB)²⁰, which provides varieties for organic agriculture bred by farmer breeders, not IP protected, and open-pollinated. So, why is the ESA taking such a conservative stance towards these developments?

Part of the answer might come from the ESA's governance and composition. The ESA is a lobby group which gathers various companies working on seed research, breeding, production and marketing: it is composed of 30 national seed associations and more than 60 company members, including big names such as Monsanto, Syngenta, Bayer, BASF, Pioneer, and Limagrain.²¹ This lobby group says it is the

¹⁸ *Plantum NL position on patent- and plant breeders' rights*, Plantum 2009, <http://www.plantum.nl/Content/Files/file/Standpunten/Plantum%20Position%20on%20patent-%20and%20plant%20breeders%20rights.pdf>

¹⁹ Letter by Monsanto to the Dutch government retrieved on http://vorige.nrc.nl/multimedia/archive/00242/Patentrecht_09-07-0_242612a.pdf on June 1st 2013

²⁰ Despite the ESA's aim to define them self as the single voice of the seed sector for sure there are different breeders in Europe who do not feel represented by the ESA and for that reason they have created other groups. This is the case with The European Consortium for Organic Plant Breeding (ECO-PB) founded in 2001. More info available online: <http://www.eco-pb.org/>

²¹ It's important to report that EU is also the biggest seed exporter on a global scale and Netherlands and France are the two biggest exporting countries: *Rapport annuel du GNIS*, GNIS 2012, <http://www.gnis.fr/files/rapport/RA%20GNIS%202011%202012.pdf>

“SINGLE voice of the European Seed Industry”,²² as its members are multinationals as well as small and medium sized enterprises involved in different sectors of the seed supply system. But as with many such umbrella organisations, the agenda and official positions of this lobby group tend to reflect primarily its wealthiest members' interests, those with the capacity to send lobbyists to Brussels – an observation confirmed by sources within ESA's membership. After all, it is not illogical for an industry association to have positions reflecting its various members' respective market weight. But another possible reason for its conservative position is that such a heterogeneous membership typically leads to defending the lowest common denominator, in this case the current legal framework.

This creates a peculiar geography of interests within this lobby group, where smaller and bigger, UPOV-based and patents-based members have to unite and present a consistent front for tactical reasons. The situation raises the issue of the actual capacity of the group to genuinely represent all its members' interests in a period of aggressive market concentration²³ when the seed sector is being targeted by the largest agrobiotech companies for its strategic upstream position in the food chain and the so-called “bioeconomy”.²⁴

In any case, the ESA is entering into the upcoming debate on the future of the seed legislation in the European Parliament in a powerful position: the Commission proposal seems largely to reflect the lobby group's demands, and it has already secured a key victory in having a conservative MEP from the Agriculture Committee becoming the rapporteur on the dossier (the alternative was the Environment Committee). This committee has just demonstrated over the course of last year how close it was to the agro-food industry, destroying most meaningful elements of the Commission's greening proposals in the Common Agricultural Policy debate – perhaps the worst defeat of the European environmental movement in the past two decades.

This show of strength by the European seed lobby is a warning about what to expect. Rather than the 'simplification' of the rules over seed marketing, what we are seeing is the potential consolidation of yet more corporate control over the agricultural seed market – even as more and more people are beginning to grasp the crucial importance of agricultural biodiversity.

²² http://www.euroseeds.org/about-esa/copy3_of_ESA_12.0485.5.pdf

²³ In the case of the vegetable seeds, Monsanto, with its acquisition of the Dutch company Seminis, controls in Europe around of the 24% of the market: Philip H. Howard, *Visualizing Consolidation in the Global Seed Industry: 1996–2008*, Sustainability journal, 2009, 1, 1266-1287, Basel, p. 1276, <http://www.mdpi.com/2071-1050/1/4/1266>

²⁴ *Who will control the Green Economy*, ETC Group, December 2011, http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/pdf_file/ETC_wwctge_4web_Dec_2011.pdf