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ESA COMMENTS
on

'Draft working paper of the Commission services Nr 8, 9, 10 and 11 for consultation of experts of Working Party on legislation on Seeds and Plant Propagating Material – Review of legislation on marketing seed and plant propagating material, 11 April 2011'

I. Comments on working paper Nr 8: "Scope and definitions of Regulation on plant reproductive material":

- Point 2 (Article 2(3)(d)) close systems: It is proposed to take varieties in 'close system' production out of the scope of the future regulation (see also Article 1(3)(d) in the Annex). This possibility already exists today but this proposal has the risk of opening this possibility for a much broader use. The proposal takes no account of potential complexity. Sugar beet grown for fodder use or biogas, starch potato, the final use is not known at the time of planting. For this idea to work without opening loopholes for uncontrolled trade would mean that you could not exempt a whole species under all circumstances, only under circumstances when there was a closed loop contract in place. This is much more complex than they appear to think it is.Also for example in Vegetables some companies market 'branded' varieties in an exclusive closed system with a limited number of selected producers. Would that also be considered a 'close system' and be excluded of the new legislation?

- Point 4 (Article 2(h)): The concept of "material not belonging to varieties" is a new concept that this proposal would introduce into the new Regulation. Therefore it needs careful definition to avoid legal uncertainty.

- Point 5 (Article 2(i-l)): This proposal appears to end the possibility for C2 seed and appears to allow 'standard' seeds for all species.

Annex:

- Article 1(2) Purpose of the Regulation: In point a) the text mentions the quality of the material which is positive. In point b) information to the user is also mentioned which is also positive however from the rest of the proposals it is not yet entirely clear how this is envisaged to be done. There is one element that should be added to this paragraph as a purpose of the Regulation which is "enhance the competitiveness of European agriculture (including farmers and breeders).

- Article 1(3)(b): generations prior to pre-basic material are not included in the scope of the Regulation which seems to be a good step towards simplification and reduction of 'red tape'.

- Article 1(3)(d): see comment in respect of point 2. This needs to be better defined and further clarified.

- Article 2 Definitions: On several occasions it is proposed to harmonize definitions with the definitions in the plant health legislation and the food and feed control regulation. This again seems to be a good step towards simplification a more harmonization.

- Article 2(d): The definition of 'placing on the market' does not seem to include imports. Although elsewhere in the documents the Commission argues that it is included in their opinion. However, in any case it should be made very clear in the definition itself.

- Article 2(e): The definition of supplier states that it is 'any natural or legal person carrying out professionally at least one of the activities' listed. However there is no definition of what 'professionally' means. In theory it could happen that a group of farmers establish a 'not for profit' seed consortium and under this provision that could be allowed to market seed or swap/barter farm saved seeds. Would such a "construction" escape being 'professional'?

- Article 2(k): This definition appears to stop C2 generation.

- Article 2(l): This definition seems to allow standard seed for all species. Surely this should be species specific.

- Article 2 (p-q): The simple proposal to have definitions for "official description" of a variety and "officially recognized description" seem to go clearly into a totally new direction which seems at least problematic. As registration of non- DUS material is envisaged it might put onus on breeders to use PVP for species for which they currently don't do so. Will that increase costs?
Also, as 'officially recognized descriptions' seem to be left to the competence of national competent authorities, this may again lead to a non-harmonized approach, with the risk of accepting 'look-alikes' by some Member States; a possible loophole for 'me-too' or copy varieties in some markets.
Furthermore, Article 2(p) also suggests that the Commission does not follow the 'one key several doors' principle.

- Although the proposal mentions 'processing' on several occasions, in particular, in respect of the 'close systems' there is no definition for 'processing'. Such a definition would be necessary.

II. Comments on working paper Nr 9: "General requirements and requirements for non-listed species":

- Article 3 – The criteria for adding a species to Annex I are defined in the proposal as follows: cultivated and traded in at least two Member States. In practice this will lead to inclusion of all species which seems to be disproportionate – what is the policy need to regulate more? The ESA "definition" proposing active breeding for professional use in at least one Member State as inclusion criteria would be better. The inclusion criteria should also take into account the importance of the species for export.

- Article 6: 'Non-listed' species as a concept raises some general concerns. According to the text of the proposal there appears to be a zero tolerance of 'any' symptoms of anything that impairs them. This could be helpful to prevent the marketing of low quality 'non-listed' seeds. The proposal in Article 6(1)(a) referring to "substantially free from harmful organisms" needs to be aligned with the new Plant Health regulations and should refer to regulated harmful organisms.

- Article 8(1)(a): This statement should end with "or". Otherwise it looks as if only protected varieties could be marketed with reference to a variety name. This obviously cannot be the case. Many species do not use variety protection e.g. maize, grass, sugar beet etc.

- Article 8(3): This proposal appears to require mixtures to have registered names but it is not very clear.

III. Comments on working paper Nr 10: "Registration of suppliers":

- This proposal seems to be in line with what the Commission has already announced some time ago that they want to introduce the registration system of suppliers also in the seed marketing legislation to harmonize with plant health rules and the food and feed control Regulation (882/2004). This, in principle, seems positive. In addition, it could also be an important tool in assisting IP control.

- Article 1(2): According to this proposal Member States would be allowed not to register those suppliers that only sell material intended for non-professional users. In principle, if registration of suppliers becomes mandatory, it should apply for all suppliers (e.g. for plant health it should not matter, all types of suppliers pose same level of risk).
But in any case this provision needs further clarification in particular as regards the notion of 'non-professional users'. According to the current text the definition of 'non-professional users' appears to be subject to national provisions. In view of harmonization this seems to be problematic.

- Article 2(1)(c): It is unclear from this proposal whether the registration will need to be specific for all activities for each species ('reproductive material concerned').

IV. Comments on working paper Nr 11: "Registration of varieties and other material":

- Point 2: The text says that the current proposal maintains national registration system which could lead later on to registration on EU level. In any case, national registration should lead to 'immediate and automatic' registration at EU level.

- Point 4: This proposal seems like a clear introduction of a catalogue on several levels with different set of requirements. Further, there is a differentiation of variety and "material". What is the "other material"? It is also interesting to see that while in point 2 and 5 it is mentioned that the proposal will depend on the outcomes of the ongoing impact assessment (i.e. the public consultation on the "Options and analysis paper"), such mentioning is not made for this point… (see further comments under Article 2(7)).

- Point 8: For the sake of harmonization a reference should indeed be made to the CPVO denomination database which is THE tool for ensuring the correct practical application of the provisions on variety denomination. Furthermore, later on, in Article 4, there is a concrete cross-reference proposed to the articles of the CPVR regulation which deal with variety denominations.

- Point 10: Is this proposal questioning the concept of distinctness?

Annex:

- Article 2(1): Reference is made to electronic format of national register of varieties. This is fine

in itself but a uniform format for all Member States would then be needed in order to facilitate automatic compilation into a consolidated EU Variety Register.

- Article 2(4): “A variety which is not clearly distinguishable”. This part is very unclear. It has to be better understood what is meant here.

- Article 2 (7): Part B) seems to propose that this second level of "varieties with officially recognized description" is created for conservation varieties, amateur varieties and varieties threatened by genetic erosion". BUT the text states "including in particular" which in practice can in the end include anything.
The last sentence states that “In part A, varieties with satisfactory value for cultivation and use shall be indicated as such”. Does this imply that varieties without satisfactory value for cultivation and use can also be registered?
In general terms, splitting the register adds complexity. If such changes are introduced to variety registration it might be better in a single register to see varieties highlighted as Not VCU or Not DUS so that potential buyers are aware of the risks they take.

- Article 6: VCU definition remains good.