



# First analysis on the Commission Proposal for the EU regulation on the marketing of plant reproductive material

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This analysis gathers the remarks and concerns of Arche Noah and Global 2000 on the Proposal of the European Commission for a Regulation on plant reproductive material<sup>1</sup> (PRM) from a seed savers' point of view and with special regards to agricultural biodiversity.

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## To sum up: The proposal needs to be fundamentally revised.

It is disproportionate, endangers agricultural biodiversity, largely ignores consumers' wishes and does not serve the public benefit, but rather the interests of the agro-industry. It has to be understood from the very outset that the proposed regulation protects private interests of private companies. If there ever has been a reason to do so, these reasons became obsolete with the introduction of the legislation on Plant variety protection (Regulation (EC) 2100/1994).

## Unfit seeds, no consumers' protection without such PRM regulation?

Do we really need such a restrictive and bureaucratic legislation to ensure the availability of qualitative and fit PRM? Are seeds in general so dangerous that they have to be registered and certified before entering the market, like a drug? Are *distinctness, uniformity and stability*<sup>2</sup> of plants important qualities from a consumers' point of view? The proposed rules are grossly disproportionate because sufficient quality could easily be achieved without bureaucracy. Some control may be needed on an industrial scale – but if we allow this principle to rule over all kinds of seed exchanges, we will face further loss of diversity and patronization of consumers.

## Productivity rules

A major goal of the regulation is to raise productivity in agriculture<sup>3</sup>, with intensification and industrialization still being dominant paradigms of the EU agricultural policy. Another goal clearly shows in

<sup>1</sup> Proposal of the European Commission's Directorate General for Health and Consumers (DG SANCO) for a Regulation on the production and making available on the market of plant reproductive material (plant reproductive material law) published on May 6<sup>th</sup> 2013. COM(2013) 262 final – 2013/0137 (COD)

<sup>2</sup> The DUS test is the basic requirement for the registration of a variety to be able to enter the market

<sup>3</sup> Point 3.7. of memorandum

this new regulation: improving economic competitiveness by “*strengthening the Community influence on international standards*”<sup>4</sup> that will help to develop export markets for PRM. “*60% of the world export value in seeds originates from the EU. The package provides more simplified and flexible rules for the marketing of [PRM] with the aim to ensure productivity, adaptability and diversity of Europe's crop production and forests and to facilitate their trading*” (COMM press release on May 6th, 2013)<sup>5</sup>.

## **Biodiversity loses**

Talk is cheap. Though the words “sustainable” and “diversity” can be found many times in the proposed regulation, a thorough analysis of the legal text makes it clear that the foreseen adaptations of the legal system (like “niche markets” and “old varieties”, “heterogeneous material” and “sustainable value of cultivation and use”) do not amount to more than a window dressing – compared to the new restrictions that will be imposed on all kinds of transfers of plant reproductive material. Through the new export provisions and trade agreements, such restrictive legal framework might be imposed to third countries, thereby threatening agricultural biodiversity on a global scale.

## **Sustainability and protection of biodiversity have to become political goals of equal importance as productivity**

The system of registration and certification, rooting in the 1920s, has been designed historically to improve transparency and quality on a then developing seed market. Registration of varieties first served as a voluntary quality-label for improved breeders’ varieties. It was converted into a legal obligation for the marketing of PRM during war time economy.

Today, one century later, we face other challenges. The quality of PRM today is very high in Europe, also in those segments where currently no regulation applies. We do not have to enhance productivity to feed the population of the EU countries, and obesity is a major health problem. But our highly subsidized food is being exported to the world market, sometimes destroying local markets in poor countries. From an environment point of view and against the background of climate change, loss of biodiversity and limited resources like soil and water, yield and productivity have to be achieved by methods of sustainable production. This necessity, however, is not sufficiently reflected in the proposal.

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<sup>4</sup> EU Commission ACTION PLAN for Review of the PRM legislation (2009)

<sup>5</sup> [http://europa.eu/rapid/press-release\\_IP-13-400\\_en.htm](http://europa.eu/rapid/press-release_IP-13-400_en.htm)

# General concerns on the compulsory system of registration and certification

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## History of a post-war system leading to concentration processes

The existing system of registration of varieties on an official catalogue developed since more than one century ago in the US and in Europe<sup>6</sup>. In a first phase, certification of seeds was provided by mostly private associations. As it is still the case in some countries, mainly those of the liberal tradition, those voluntary certificates served as a quality label, providing orientation for customers on a developing new market and serving as a promotion tool for breeders and seed traders<sup>7</sup>. In continental Europe, where the countries are in majority of interventionist philosophy, seed controls were later taken over by state authorities that also ran registers of “highly selected breeds”—first on a voluntary, later on a mandatory basis.

The mandatory registers were seen by governments as a tool to control the development of the agrarian production by allowing for sale only PRM that fulfilled certain norms. It has to be mentioned here that the ideas of “purity” as well as the selection of “valuable” plant traits and the removal of “inferior” varieties fit very well in the then prevailing totalitarian ideologies. It was also during war times that the institutions in charge of the official catalogue were created, such as the GNIS or the CTPS in France, created by Marechal Pétain in 1941 and 1942.

After the Second World War, Europe had to be rebuilt. The green revolution, the need to translocate working forces to other sectors of industry and decolonization played an important role in maintaining the war mantra of productivity. The seed legislation was also maintained, and the former war industry for producing chemicals began to dominate the seed market<sup>8</sup>. From war chemicals to agricultural chemicals there was only a small step<sup>9</sup>. The pesticide industry invested massively in the seed sector<sup>10</sup>. The idea is simple: big quantities of pesticides can be sold if industrial seeds dominate the market that work well in combination with chemical inputs. In general, it is evident that to achieve a big share of the primary production sector is an important strategic goal for the agro-industry and promises a lot of profit, making the farmers which opted for industrial agriculture dependent from a massive use of chemical pesticides and mechanization. The chemical industries bought many seed companies; and the consequence is the ultra-

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<sup>6</sup> See Louwaars, N.P., 2002. Variety Controls. In: Niels P. Louwaars (Ed). Seed Policy, Legislation and Law; widening a narrow focus. Binghamton NY, Food Products Press, The Haworth Press, p. 131-153.

<sup>7</sup> The registration of varieties on a catalogue is still voluntary in the United States, as an example (see Louwaars, N.P. 2005, Seed laws: biases and bottlenecks, Seedling – July 2005). The American system includes some vicious tools, such as the patented seeds and the contracts seed companies make the farmers sign (<http://grist.org/food/seeding-justice-monsanto-vs-soybean-farmer-case-hits-the-supreme-court/>) or the Monsanto Protection Act (<http://www.globalresearch.ca/monsanto-protection-act-signed-by-obama-gmo-bill-written-by-monsanto-signed-into-law/5329388>).

<sup>8</sup> Monsanto, BASF, Bayer, Pioneer-Dupont are all enterprises which have been very active in the war industry and which are now within the top 10 of the seed industries.

<sup>9</sup> E.g. both Monsanto and Dow were producing the Agent Orange which still causes cancers and congenital disabilities in Viet Nam. See [http://www.organicconsumers.org/articles/article\\_27488.cfm](http://www.organicconsumers.org/articles/article_27488.cfm) or [www.vn-agentorange.org/RL34761\\_200905.pdf](http://www.vn-agentorange.org/RL34761_200905.pdf)

<sup>10</sup> See [http://www.livinghistoryfarm.org/farminginthe70s/pests\\_09.html](http://www.livinghistoryfarm.org/farminginthe70s/pests_09.html)

concentration of the seed market in the hands of only few multinationals, lots of them being former war industries<sup>11</sup>.

### **A system inevitably leading to a decrease of biodiversity...**

The system of compulsory registration of varieties and certification of individual lots means that PRM which do not fulfil the criteria are automatically excluded from the market. This legislation therefore inevitably leads to a decrease of diversity of PRM available on the market. The proportionality of this measure has therefore to be checked, to see if the exclusion of many plant-types from the market can be justified.

Our agricultural biodiversity is in danger, and we all know the numbers provided by FAO of 75% loss within the last century. The restrictive seed legislation in the European Union contributed since decades to this decrease of agricultural biodiversity. But politicians are under the pressure of the seed industry that wants to increase their market share, aiming at keeping all local, informal and individual transfers of PRM as marginal as possible.

Shortly before the publication of the proposal, DG Sanco brought forward the argument that *"in the past 15 years, the number of registered varieties has in fact increased significantly"*, thereby denying a significant impact of the seed legislation on agricultural biodiversity<sup>12</sup>. This shows that the negative effect of the legislation has been recognised only half-heartedly, and lessons have not been drawn sufficiently. The used argument, however, can be easily refuted.

### **... and the number of registered varieties is not a proof of the contrary**

Counting *names of varieties* in the European and national catalogues is not an adequate proof for increasing biodiversity in European agriculture. The number of denominations does not really reflect genetic diversity, neither on an infra- nor on an intra-varietal level. But this is the important ecological factor. Varieties on the catalogue are often closely related, differing only punctually from each other. Many varieties show very limited intra-varietal variation, which is due to the uniformity criterion and also relates to the technical conditions for plant variety protection.

Despite the great nominal numbers, there are certain types of crops that are not available for farmers and gardeners. To give one example: There are no open pollinating sweet corn varieties on the market for organic, especially biodynamic farmers. The breeder was denied registration because the open pollinated lines did not show sufficient uniformity – regarding traits that were of no agronomic relevance for the farmers. It is furthermore well known and can easily be tested, that the listing in the catalogue does not guarantee the availability of varieties on the market. Breeders do not always provide PRM of registered varieties. For all those reasons, the number of registered varieties cannot hide the fact that we are losing genetic diversity, the foundation of our food security.

### **Conservation varieties - a proof for an insufficient system**

Another concrete proof of the insufficiency of the current legal system to ensure genetic diversity on the seed market and conservation of the biodiversity was the introduction of two directives on "conservation"

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<sup>11</sup> ETC Group, Who owns Nature, November 2008, p.13s.

[http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/707/01/etc\\_won\\_report\\_final\\_color.pdf](http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/707/01/etc_won_report_final_color.pdf)

<sup>12</sup> Letter by DG Sanco to ARCHE NOAH dated march 14<sup>th</sup>, 2013

and “amateur varieties” few years ago. They showed that the legislation was not well balanced. However, the directives aiming at improving biodiversity turned out a missed try, because of quantitative and geographic restrictions. Due to pressure from the civil society, the new proposal offers small improvements – like the deletion of the DUS (Distinctness, Uniformity, Stability) tests and the reduction of costs for the registration of “old traditional varieties”. However, new restrictions have been invented; the system of compulsory registration of varieties stays in place and is even extended, as shown above. As a consequence and from the overall perspective, even with the derogations proposed, the new regulation will be worse, not better, for future biodiversity.

## **Patronising farmers and other consumers**

The system of compulsory registration and certification is an example of strong state intervention on the market. As already said, this system which is a war time heritage aims at increasing productivity<sup>13</sup>, based on the underlying paradigm of industrial high-input agriculture. That is why the PRM legislation is very well shaped for varieties bred for intensive agriculture. However, recent studies show that varieties bred and used under the conditions of organic agriculture may generate productivity equal to conventional varieties used under intensive conditions<sup>14</sup>, causing far less negative effects for the environment<sup>15</sup>. Our experience is that yield productivity is highly contextual and that industrial seeds do not perform as well under special on-farm-conditions<sup>16</sup>. However, the present legal PRM system per se discriminates other than “industrial varieties”, leading to their exclusion from the market – no matter of supply and demand<sup>17</sup>. This system clearly favours and encourages one single agricultural production system (conventional, intensive), dominated by hybrids seeds.

Contrary to how this legislation is being justified, productivity under high input conditions is not the unique trigger for farmers or gardeners to choose certain plant varieties. Farmers and gardeners also choose plants for the incomparable aesthetic or culinary quality of its fruits, as an alternative for people who suffer from allergies<sup>18</sup>, for their ability to thrive under non-favourable or even extreme farming conditions, or many other reasons. Especially in the organic sector, there is a growing demand for seeds that are bred for organic growing conditions and that are open pollinated. Many case studies show that those varieties often cannot be registered due to the rigid testing criteria. Apparently and unfortunate for these actors, the legislator decided that such qualities are not a good reason for the choice of a variety. It seems evident that in the context of PRM, the state is too present on the market, patronising consumers and reducing their choice. This sadly reminds of the roots of the compulsory system of registration and certification in totalitarian regimes. We think that the remedy is worse than the risk and that this legislation is not proportionate.

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<sup>13</sup> See C-59/11 Association Kokopelli

<sup>14</sup> See <http://66.147.244.123/~rodalein/wp-content/uploads/2012/12/FSTbookletFINAL.pdf>

<sup>15</sup> Research Institute of Organic Agriculture ‘Results from a 21 year old field trial: Organic farming enhances soil fertility and biodiversity’ in *FiBL Dossier*, 1, August 2000, <https://www.fibl-shop.org/shop/pdf/do-1090-doc.pdf>

<sup>16</sup> E.g. winter wheat produced by the seed industry did not resist the Scandinavian winter. Swedish farmers come back to traditional local seeds (see FarmSeed Opportunities).

<sup>17</sup> Example: whereas there is no open pollinating sweet corn varieties on the market for organic, especially biodynamic farmers, an organic breeder was denied registration because the open pollinated lines did not show sufficient uniformity – regarding traits that were of no agronomic relevance for the farmers.

<sup>18</sup> Of the 10,000 edible plant species (4% of all known species), only about 200 are used by humans. Three - rice, maize and wheat - represent nearly 60% of calories and proteins obtained by humans from plants. FAO, *Women: users, preservers and managers of agro biodiversity*, Rome, 1999.



Examples - impact of the regulation on agricultural biodiversity and its actors

#### **Selling Plants on a Farmers' Market – an illegal act?**

As an example, a French vegetable grower has recently been fined for selling plants which were not registered and certified. The farmer will probably be challenged at the Court. The consumers will not be able to purchase the plants directly from the farmer, even if they want! By such regulations, consumers are more and more obliged to buy registered varieties from the seed industry, who is the only winner in this story.

## **The notion of variety: whose interest?**

The variety is a technical and juridical concept. It is not a natural condition of any wild or cultivated plants, because it is essential for evolution (and also for a sustainable agriculture) that living organisms are diverse (not uniform) and able to develop (not stable). The fact that – generally and apart from only narrow derogations in Articles 36 and 57 – solely the marketing of DUS-varieties is allowed, leaves aside and endangers a wide spectrum of plant diversity.

Are distinctiveness, uniformity and stability important qualities for farmers? Not on the level that is applied in the tests. Instead, DUS tests are primarily needed to define distinctive “plant groupings” in order to be able to claim plant variety rights (PVR) - private exclusive rights – on them. Modern varieties tend to be genetically very similar due to common genealogy, and their distinctiveness – necessary to achieve private property rights - would be very hard to prove if each variety was not highly homogenous. However, the draft proposal forces all PRM of “relevance” for the European Union into the concept of variety registration, even if the operator does not want to claim PVR! On the other hand, for breeders who do claim exclusive PVR, the procedure has been simplified (Article 63) and thereby costs reduced – a fact that clearly shows how much private economic interests influence this regulation.

Taken that as a fact, we draw the conclusion that plants that are open pollinating (and therefore biologically freely reproducible, different than F1 Hybrids) and not protected by a PVR (and therefore legally freely reproducible) or patent have to be exempted from the obligation of variety registration.

## **Evolving plant diversity on the fields - or genetic resources put on ice?**

Keeping a broad agricultural biodiversity also means keeping a broad genetic diversity. Most of the varieties nowadays bred by the industry are however often genetically very close from each other. Whilst locally adapted crops often display good tolerance against pests, diseases and other factors in their specific environment, many newly bred hybrid seeds are quite sensitive and are only able to exploit their potential under optimal conditions. These factors – genetic monocultures, monogenic resistances and plants thriving well under high input conditions - multiply the risks to face a real disaster if e.g. a pest targets a particular genome, especially in a context of globalization of the exchanges, of the travels and of climate change and rarefaction of the natural resources. In addition, some varieties registered by the industry are not available on the market. Therefore, we object to the claim of the industry saying that “The European seed industry plays a key role in the conservation and the creation of biodiversity for agricultural production”<sup>19</sup>. Well, the industry creates varieties - but not necessarily genetic diversity.

<sup>19</sup> ESA – Press release – *International day of biodiversity – An important day for Europe’s plant breeders – Brussels, May 21 2013*

Open pollinated plants are per se part of evolving plant populations. When used and reproduced, such plants adapt to their environment.

However, in all species that display the necessary biological traits for it, hybrid seeds dominate the market. Apart from the fact that those seeds are attractive for farmers because of their productivity (under optimal and high input conditions), the hybrid breeding provides a big advantage for the breeders: They are not stable if reproduced on a farm, because only the F1 generation is sold on the market. When reproduced on farm, the plants split up in many different traits and types. So these varieties have to be purchased every season. Hybrid seeds fit very well in the concept of the DUS test – following Mendel's rules, they are very homogeneous and therefore even small differences between varieties make distinctions possible. That is also an advantage allowing to achieve Plant Variety Rights.

The problem is that the system of registration tends to reinforce *any* dominating breeding system and discriminate alternative ways. Why? On the one hand, that is because the legal system is very costly, built on complex structures and specialized know how in the public authorities as well as within the breeders. Therefore, there is little flexibility within such bureaucratic system to adapt (the tests and procedures) to breeding systems different from the mainstream - especially when the principle of full costs recovery is applied! That is how obligatory registration in the end promotes non reproducible seeds and genetic uniformity.

Allowing for an increase of plant-types and -traits available on the market would not only serve consumers' interests, but would add to the efforts of safeguarding biodiversity and thereby reduce public and private costs. If a, let's say local crop type, is available on the market for more than a few years, this probably means that some farmers and gardeners want to use it. If these plants are cultivated and propagated, permanently and by a bigger number of people, their existence is not acutely threatened. To put it very simple: If plants are available and used, there is no need to conserve or save them.

### **Why does the seed industry want to keep the system as it is?**

This legislation promotes the interests of the seed industry, to accelerate the oligopolistic appropriation of the base of daily food globally (in Europe and then in the whole world, due to the exports of legislation through equivalence systems) and to promote industrialised uniformity in agriculture.

In detail, there are different reasons why the seed industry more or less sticks to the present system. The most important is that the restrictive and costly rules have an adjusting effect on the market, thereby helping the big actors to eliminate competitors from the market and to enlarge their market share.

Taking into account the (accelerating) concentration processes on the seed sector and the steadily dropping number of breeding companies during the last decades – while the system of obligatory registration and certification was in place in the EU – it is not understandable how this system can be regarded as a “protection” of the SMEs. And how should that work, when obligations are the same for large companies and SMEs (excluding, as it is planned, only micro-actors)? And yes, there are small breeders uttering that this system is a burden, both from a technical and a financial point of view. However, these actors do not have a lot of resources to be represented in Brussels, contrary to the huge multinationals.

In addition, breeders apparently got used to the current system: They had to comply with this system for decades. The result is that the procedures have already been integrated in their daily work since a long time. Moreover, the registration and certification system protects the breeders that are already on the

market from the risk of potential new comers<sup>20</sup> - at least until the big ones eat them. As it will always be easier for the big ones to cope with the obligations, they are the natural winners in this game.

By integrating derogations for micro-enterprises in the proposed regulation, the Commission concedes that access to the PRM market is impossible for the smallest and that the market is frozen. However, fixing micro-enterprises in micro-niches is not a true solution.

## **Concentration of power on the seed market**

In 1996, the ten largest companies in the seed industry had a market share of around 20% (BD 2011, p.2). Today, the three largest companies Monsanto, DuPont (Pioneer) and Syngenta, control more than 50% of the world market<sup>21</sup>. The corporations influence prices, terms of business and, increasingly, the political sphere. The IAASTD analyses that market concentration hampers research and development, hinders the entry on the market of new actors and reduces competition.

## **Does a need to increase productivity legitimate the proposed system?**

One of the main justifications brought forward for the system of compulsory registration of varieties and certification of the individual lots is the need to increase productivity. The increasing number of people on earth scares the law makers - and this fear is fed by the industry, that promises new varieties with higher productivity as a solution and spends a lot of money in communicating that their seeds guarantee the highest yields. But one should not forget that the market leaders in seeds are also leading in agro-chemicals. The original business of these corporations - pesticides and fertilizers - has been supplemented by the production of seeds in order to achieve better profits. It is in the economic interest of these companies to develop varieties that need more, not less fertilizers and pesticides.

In general, the mantra of productivity can be opposed by the phenomenon of food waste and obesity. Food waste has never been so high in Europe (90 million tons of food are wasted annually in Europe)<sup>22</sup> and obesity (often linked to overconsumption) is one of the greatest health challenges, as it has tripled in many countries of the WHO European Region since the 1980s and is responsible for 2–8% of health costs<sup>23</sup>. Additionally it has to be understood that a yield measured in tons is not a suitable measurement for the nutritional value of the harvest. Often the nutritional value stays the same or even decreases when the yield measured in tons increases.

The idea that it is the duty of the European Union to “feed the world” must be rejected. Europe produces more food than it needs for feeding its own population, exporting the surplus; those products are often sold at low prices in developing countries, thereby destroying local food markets<sup>24</sup>. Ruining farmers and local food systems increases rural exodus and poverty and plunges even developing countries in

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<sup>20</sup> The Kokopelli case is an emblematic example in which a private enterprise that manages to comply with the system wants to forbid the access to the market to an NGO selling the original more heterogeneous varieties which can therefore not be registered.

<sup>21</sup> ETC Group / Böll Foundation in 2011, p.9

<sup>22</sup> DG SANCO: <http://ec.europa.eu/food/food/sustainability/>

<sup>23</sup> World Health Organisation (WHO): <http://www.euro.who.int/en/what-we-do/health-topics/noncommunicable-diseases/obesity>

<sup>24</sup> World Trade Organisation (WTO) [http://www.wto.org/english/forums\\_e/ngo\\_e/posp44\\_tacd\\_agridumping\\_e.pdf](http://www.wto.org/english/forums_e/ngo_e/posp44_tacd_agridumping_e.pdf)



dependence from European intensive agriculture and its industries. Local food systems have to be reinforced in developing countries instead of increasing production in developed countries.

### **Does the objective of transparency on the seed market legitimate the proposed system?**

The compulsory registration of varieties is reasoned with the goal of transparency on the market. However, transparency could easily be achieved by labelling requirements similar to an operator's label – informing the consumer about e.g. quality criteria like germination rate, important plant traits, used breeding methods, associated intellectual property rights or trademarks, etc. - and would allow an informed choice. Labelling is seen as a sufficient means of transparency for other markets like e.g. the food market. An easy self-inscription of varieties that are open pollinated, freely reproducible, bred with conventional techniques and not protected by IPRs, on a register without DUS tests and at no costs, would at any time ensure traceability (and biodiversity).

Another argument brought forward for the maintenance of the present system is that it would be difficult or impossible for the users of PRM to recognise inadequacies concerning identity or quality at the time of purchase. This may be true; however, it is true for most product markets - be they packaged food, construction services, travel arrangements or software. All these markets flourish to great diversity without any mandatory official premarket tests like in the PRM regulation. Registration could however remain as an voluntary option and will provide those consumers who want it with respective PRM categories.

Neither the existing national nor the future Union register can fulfil their own transparency promises: The register does *NOT* guarantee that a listed variety is really *AVAILABLE* on the market (some are just registered – as can easily be tested), and the register cannot inform the consumer about the *REAL PERFORMANCE* of a crop under local conditions. In everyday life, most PRM consumers take their information from, and make their choices on the basis of, online or printed catalogues provided by the suppliers they trust.

Despite consumers' demands, the draft regulation does not provide transparency when breeding methods and Intellectual Property Rights related to the varieties on the seed market are concerned.

### **Do the arguments of security and quality of PRM legitimate the proposed system?**

The seed industry tries to justify the maintenance of the system of compulsory registration and certification by the need to protect consumers from getting seeds which may be dangerous for their health and for other plants' health. However, conventionally bred and well adapted seeds and PRM have almost no intrinsic risk for human safety or health. Therefore it is grossly disproportional to demand administrative procedures that have no apparent benefit for the public.

Seeds are most often not directly edible. They either have to be sown to harvest their fruits or they have to be processed. Therefore, in almost no cases do they represent a direct threat to human health; in contrary to traditional food products, for which nevertheless no strict premarketing tests exist.

Persons with little practical experience in agriculture might fear that edible plants that "wildly" cross with others might develop poisonous contents. This is, however, very unlikely. The free pollination of cultivated plants has been the basis of seed production since the very beginning of agriculture. 10.000 years of co-

evolution of humans with their cultivated plants later, the food crops commonly grown and consumed can be considered as safe. Not to forget that many important crops are indeed poisonous if you consume them in a wrong way – like eating raw beans or the green stems of tomatoes. Nevertheless, it is allowed to sell these products even in the supermarket, because the collective knowledge in our society usually protects us from such mistakes.

Industry tries to scare the public opinion and policy makers regarding plant health, thereby promoting their own interests. The strategy is to put in our minds that registration and certification of plants are a way to ensure plant health - by mixing the PRM regulation with the regulation on plant health, which is especially designed to ensure that priority pests are not becoming established in EU territory or spread beyond its actual occurrence. In the real world living organisms (including PRM) are permanently surrounded by other living organisms (being they ubiquitous like yeast bacteria or mould or rather adapted to certain conditions), most of them being beneficial or neutral, while some may be detrimental under specific conditions. These conditions differ greatly through the territory of the EU. Therefore the concept of “healthy seeds” is pure ideology. Seeds and PRM can only be judged as “fit for purpose” if the intended use is known. A certain pest in a PRM lot may be problematic in Sicily but totally irrelevant in Northern Sweden. It is known that in local economies every successful operator is depending on returning customers, therefore the operators own interest and their knowledge regarding the local conditions and how they best can be met is sufficient. Any European wide regulation would be disproportionate and not subsidiary.

The idea that obligatory registration guarantees important *qualities* for farmers or food consumers is also a wrong analysis. What is really tested during the registration procedure? It is first of all the Distinctness, Uniformity and Stability of a plant population – a test that has great relevance for achieving (private, exclusive) plant variety rights – but that must not be the objective of a market regulation.

In the tests on “value for cultivation and use”, plant populations are compared with other varieties that are already on the market, regarding their yield and other traits like resistance to diseases. But what is not tested regularly are qualities like nutritional value, wholesomeness, digestibility or simply taste, and the tests cannot guarantee for the farmers in a non-optimal environment that plants will be able to exploit their full potential. Most registered varieties were bred for the use in intensive agriculture - including the use of pesticides that can be very harmful for human health and the environment.

Generally, what is high quality depends on the specific demands of the users – and those demands can differ greatly. For a household gardener, a variety without official registration might fit perfectly, however one may not be able to purchase it due to market restrictions (and the proposed derogations are not sufficient to solve that problem). Farmers looking for seeds or plants with special aesthetic or culinary qualities do not always get what they need from the professional market. Organic farmers, looking for seeds or plants combining a lower than average yield potential with high robustness and therefore little need for external inputs, are not sufficiently provided with adequate PRM.

**It is therefore not justifiable that a registration procedure that has a strong selective effect on the available PRM is *obligatory* and *absolute* - *absolute* because there are no *real* alternative ways to enter the market (the micro-niches derogations being no *real* alternative because they *exclude most actors*).**

## **Protecting consumers against their own will**

Suggesting that the PRM users are, different than other consumers, not able to make an informed choice based on correct labelling is, from our point of view, an insult on farmers and gardeners. Considering the reduction of choice on the seed- and on the food-market that results from this kind of “protection” and that is due to the technical, financial and administrative burdens imposed on varieties and operators, it seems that an increasing demand for more diverse and locally produced food is being ignored. Therefore, the proposal cannot be regarded as an instrument to safeguard consumers’ interests. One of the main weaknesses of this legislation is that it only focuses at large scale. The reality is totally different at local scale, where the traceability is easily achieved through the direct marketing of seed. This however shows how much this legal system is focussed on the industrial system.

## Overview of the proposed system

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Since 2011, the Commission actively reviews the legislation on the marketing of Seed and other Plant Reproductive Material (PRM). This process is part of the initiative on “Better Regulation” and is aiming at gathering a number of directives into one single regulation. On May 6<sup>th</sup> 2013, European Commission’s Directorate General for Health and Consumers (DG SANCO) published a Proposal for a Regulation of the European Parliament and of the Council on the production and making available on the market of plant reproductive material (plant reproductive material law).

**Plant reproductive material (PRM)** is now the term used for seeds, grafts and any other plant material capable of, and intended for, producing entire plants.

**Registration and certification:** The proposal continues with the system that has been in place already: compulsory pre-market registration and certification of Annex 1 listed species and genera. Annex 1 lists several hundred species and genera - agricultural crops, fruits, vegetables, herbs, forage plants - that have to comply with those rules.

**Professional Operators** are natural or legal persons carrying out, as a profession, activities with regard to plant reproductive material (Article 3(6)). They have to be registered and fulfil certain requirements (Articles 5-8).

**Making available on the market** replaces the existing term “marketing” and covers all activities performed by the professional operators, whether free of charge or not (article 3(5)), and whether aiming at commercialisation or not. The specification “aiming at commercial exploitation” has been deleted from the definitions. This minor change in wording results in an immense expansion of the scope of the legislation.

**The Officially Recognised Description (ORD)** aims at replacing the “conservation varieties” (including landraces) and ‘amateur varieties’ as currently regulated under the Directives 2008/62/EC and 2009/145/EC. The varieties will continue to be registered, on the basis of an ‘officially recognised description’ which shall be recognised – but not produced – by the competent authorities. The ORD is conditioned by two limitations. Following article 57, the variety either must have been registered before, or PRM belonging to that variety must have been available on the market before the entry into force of the PRM regulation (hereafter “historical restriction”). In addition, an ORD-variety must be produced (article 57.2(a)) and maintained (article 86.4) in one or several “region(s) of origin” (hereafter “geographical restriction”). Compared with the existing system, performance of DUS tests is not a pre-condition to the registration anymore. Quantitative restrictions have been deleted.

**Niche markets** are a newly introduced exemption from seed registration requirements. Pursuant to article 36, persons other than professional operators or professional operators employing no more than ten persons and whose annual turnover or balance sheet total does not exceed EUR 2 million are exempted from seed registration requirements. However, they are only allowed to make available small quantities on the market. The details of the niche market derogation shall be set by the Commission in a delegated act.

**Heterogeneous material:** Under article 14.1, “Plant reproductive material may be produced and made available on the market only if it belongs to a variety registered in a national variety register” and a variety is defined as “a plant grouping within a single botanical taxon of the lowest known rank”

(article 10(1)). However, under article 14.3 the Commission may adopt delegated acts setting out that PRM may be produced and made available on the market without belonging to a variety.

**All these 3 categories (ORD, niche markets and heterogeneous material)** shall only be made available on the market if they fulfil the requirements for “standard material” (article 12.4).

**Basic requirements for ALL species and genera:** Other than in the current system that only regulates species listed in an Annex, the new regulation lays out “basic rules” for ALL species and genera of which PRM is made available (according to Title III: Production and making available on the market of plant reproductive material not belonging to genera or species listed in Annex I).

**Fees:** Compared with the existing system, the proposal offers some improvements, decreasing the costs for the different actors. The big multinationals of the seed industry are already performing a certain number of tests compulsory to the registration of varieties and the certification of PRM lots themselves. Asking for more flexibility, they obtained in the new regulation the possibility of performing tests under official control. If a variety has been granted a (private, exclusive) plant variety right, that variety shall be deemed to be distinct, uniform and stable, for the purpose of the official description, and will therefore not have to perform the DUS tests again. This is another reduced burden from the point of view of commercial breeders and the seed industry (Article 63). Fees for registration under ORD shall be reduced (article 88). Small operators are excluded from the variety registration fees (article 89). On the other hand, the principle of full costs recovery is introduced in the regulation, which will lead to generally higher fees, especially for those which will not be able to perform the requested tests themselves.

**Small packages:** Existing derogations concerning small packages have been deleted in the regulation proposal.

A certain number of **other derogations**, as for example the exemptions for local circulation in the fruit directive (2008/90/EC), have been deleted.

## Analysis and criticisms of the proposed regulation

### The restrictive system is being expanded

With the new regulation, the rules for the transfer of seeds and other plant reproductive material will become even more restrictive and overregulated than today:

### The scope of the legislation goes beyond the commercial sector

In the present legislation, the scope of the directives is at least limited to the dissemination of seeds and seedlings for the purpose of commercial exploitation. This restriction on the commercial sector is prescribed within the definitions in the different directives. The scope of the new regulation, however, applies to any form of transfer of plant reproductive material, without restriction on the commercial area and without lower limits.

For this reason, the words “aiming at commercial exploitation”, which have been deleted from the scope of the present legislation, must be reintroduced in the definition of “making available on the market” (article 3(5)). Limiting the scope of the PRM law to commercial activities would solve some problems mentioned in this paper, including the exclusion of individuals from the scope of the regulation.

### Private exchanges of seeds, grafts and other PRM restricted

As a consequence of the extension of the scope beyond the commercial sector, individuals would have to rely on the exclusions in Article 2. Article 2, which is also not receivable for farmers, however, restricts private activities to seed swap *in kind*. As soon as individuals would like to swap against money, they enter into the category of “Niche Market”, having to fulfil all the obligations of article 36 that are still largely undefined. This is an unjustifiable restriction: as a comparison, the private sale of furniture, clothing and other household items is of course possible without restrictions.



Examples - impact of the regulation on agricultural biodiversity and its actors

#### Seed swap – leave your purse at the door!

Franziska has heard about a seed and plant swap in her neighbourhood on Saturday. She is curious to get some seeds for her balcony and to get advice from other urban gardeners. She has, however, no own seeds to give, and offers EUR 3.- to a lady in exchange for two handmade seed packages. But she has to learn that this is not possible, but would be illegal. For reasons of consumer protection, the seeds – if sold - would have to meet specific requirements (identified as “standard material” and distinct labelling. *That’s just too complicated*, the lady with the seeds says regretfully. Franziska feels ashamed to ask for the seeds for free. She arrives at home without seeds and very disappointed.

Is such regulation protecting or patronizing citizens? From our point of view, individual activities to conserve and develop crop diversity and to make available plants not provided by the industry should be rewarded, not restricted!

## Diversity farmers face administrative penalties - the notion of operator

The definition of operator has been clarified compared with the first draft. Now there is no doubt that individuals that do not work with PRM as a part of their profession are excluded from the definition of operators in Article 3. It is however very negative that farmers have not been excluded from the definition. Anyone carrying out activities with regard to plant reproductive material as a part of his profession (Article 3 (6)) must register as an "operator" with the competent authorities and must fulfil requirements for quality management and traceability (Articles 5-8). Farmers who pass on seeds and other plant reproductive material clearly fall within this definition. At the same time, no adequate exceptions are foreseen for farmers that would allow them to pass on (even for free to gardeners) seeds and other PRM from their own harvest – neither to other farmers nor to individuals (for example, at a farmers market). The exception in article 36 for "niche markets" solves this problem insufficiently - see below!

There is a strong connection between biodiversity and local production. The exchange of farm saved seeds and their use for direct sales, as part of the portfolio of small scale farmers, contributed substantially to the evolution of genetic diversity in agriculture and to food security. Since the very beginning of agriculture, farmers have selected and re-used seeds for the following season. This is a continuous agricultural practice in Europe and other parts of the world. It is absolutely disproportional to marginalize and threaten these activities with administrative burdens and penalties. Increased market share for breeders' is the main reason behind. This is also a violation of farmers' rights, as stipulated in the International Treaty on Plant Genetic Resources (ITPGRFA).



Examples - impact of the regulation on agricultural biodiversity and its actors

### **Jack must not pass on seeds on the farmers market**

Jack is a passionate diversity farmer. He cultivates a large number of rare varieties of tomatoes on his farm. He markets the fruits on a farmers market. Many are rare seeds he cannot buy on the seed market, and he has to save his own seeds. In springtime on the farmers market, many of his customers ask for seeds and seedlings to plant them in their own gardens. They know Jack and believe in the quality of his products - otherwise they would not buy from him. However, Jack may not pass on seeds to his customers - otherwise he might face an administrative penalty. That is because he operates his labor-intensive farm with 11 employees = annual work units (vegetable growers need lot of work units). Thus, the exception for niche markets according to article 36 does not apply to him.

**Does this really make sense?**

## The International Treaty on Plant Genetic Resources for Food and Agriculture

The International Treaty recognizes the enormous contribution of farmers to the diversity of crops that feed the world, and affirms the fundamental importance of Farmers' Rights to save, use, exchange and sell farm-saved seed and other propagating material in this context. The revision of the EU PRM marketing law has to integrate all the commitments arising from the ITPGRFA into legislation. It has to ensure that farmers' activities of on farm biodiversity conservation and dynamic management are not restricted.

Exchanging farm-saved PRM is a very old tradition, a part of our rural culture, and has proved an effective strategy of labour division in rural communities as well as a meaningful measure for achieving good PRM quality since ages. These activities of farmers and their communities contribute to the conservation and, by farmers' breeding activities, the further development of agricultural biodiversity. This might help improving the resilience of agro-ecosystems in climate change. Furthermore, ensuring local PRM supply and the

possibility to rely on local knowledge should be considered as an essential part of emergency preparedness and response in any case of disaster.

The exchange of seed and other plant reproductive material between farmers, and the direct marketing of seed at a local scale are not a commercial activity in the sense of the legislation. On the contrary, they are complementary activities and have to remain out of scope in order to ensure legal security for diversity farmers.

## Disproportionate and inapplicable

**As a consequence of the discrimination of individuals and diversity farmers, thousands of infractions to this legislation would happen each year.** This regulation would unfairly criminalise a large, innocent and not sufficiently informed part of our society. Such legislation painfully reminds of its historical roots in the totalitarian regimes of the 1920<sup>th</sup> and 1930<sup>th</sup>, trying to control life in general and actions of individuals<sup>25</sup>. In addition, such rules which are not proportionate would unduly create a black market and may be challenged before the Court.

## ALL species and genera are affected now

Even for very rare crops with little or no economic importance, so-called "basic requirements" concerning quality and labelling will have to be fulfilled (articles 47 to 50). What is really bad: it is only allowed to pass on PRM of any species not listed in Annex 1 *with a denomination* when an official or officially recognized description of the variety is available (article 50)!



Examples - impact of the regulation on agricultural biodiversity and its actors

### The garden orache is not allowed to carry her name

The garden orache (*Atriplex hortensis*) is an old Indo-European underutilized crop plant, grown as spinach or lettuce and as an ornamental. There are different botanical races known which also differ in taste – distinguishable by the sizes and colours of their leaves (light green, dark green, dark red, striped). Some local races have been carrying local names for a very long time – like the “Kaiserspinat” in lower Austria, just to name one. However, anyone who wants to make available orache in the future, must not use a denomination that might resemble a variety name except if an official (OD) or officially recognized description (ORD) is available (article 50). OD and ORD are requested to ensure “transparency for consumers”. However, a simple description provided would be sufficient, whilst this obligation is clearly disproportionate and discriminates against underutilized crops – leading to the vanishing of old crop names or the crops themselves. Is it really in the consumers’ interest? No!

## Deficiencies with regards to Democracy and the principle of subsidiarity

More than 50 important legal issues shall be decided by the commission only after the adoption of the regulation by so-called delegated and implementing acts (the first one gives the possibility to the Commission to arbitrarily take legal acts on often very basic issues). Agricultural biodiversity issues are to a large extent conditioned by such secondary acts, causing legal uncertainty on many articles, whilst stringent and transparent criteria are missing.

<sup>25</sup> <http://www.history-ontheweb.co.uk/concepts/totalitarianism.htm>



That way, many details would be withdrawn from democratic control in the interest of the public. From a democratic perspective, it is important that for all issues except administrative details needed for implementation (like forms and statistics) the conventional European law making process is respected. All major EU institutions must have a say on topics which will largely influence the substance of the legislation, especially concerning its capacity to safeguard and enhance biodiversity.

## **Annex 1 – a “technical detail”? Example for a delegated act**

Annex 1 lists all species and genera to which obligatory registration and certification apply. It makes a great difference, also from a biodiversity perspective, whether the future list will include few major “commodities” or hundreds of species, including such that – with regards to the EU territory – have to be considered as rare. This decision must not be taken behind closed doors. However, Article 11 delegates the amendment of Annex 1 to the Commission. The proposed “criteria” for this amendment are extremely weak: Genera and species shall be included that represent a ‘significant’ area of production or a ‘significant’ value of production or are made available by a ‘significant’ number of operators. What is significant? One should think that – considering the proportionality of the measure - it would not be proportionate to include species representing e.g. less than 1% of area or value. It is important to ensure that plants from vulnerable species won’t be endangered by an inclusion in Annex 1.

Many provisions now regulated on national level will in the future be regulated at Community level, thereby leaving no spaces for national derogations that might allow adaptations to specific regional situations. The Lisbon Treaty qualifies agriculture as shared competence between the EU and its Member States. However, in case of plant reproductive material, the Commission sees only a regulation appropriate to achieve the objectives and to ensure free movement of PRM. Taking into account the principle of subsidiarity, it should be considered that certain matters aiming at conserving local agro-cultural particularities (importance of the demand for organic or local, traditional products should be left in the competence of Member States).

## **Regarding transparency...**

The compulsory registration of varieties is reasoned with the goal of transparency on the market. However, and as explained above, neither the existing national nor the future Union register can fulfil their transparency promises: The register does *NOT* guarantee that a listed variety is really AVAILABLE on the market (some are just registered), and the register cannot inform the consumer about the *REAL PERFORMANCE* of a crop under local conditions.

BUT at the same time there is a gross lack of transparency in the proposed regulation, depriving consumers of information they might want to get! For example, concerning the genealogy of a variety, confidentiality will be granted to breeders simply on their demand (Article 75). There are no labelling requirements or other consumers’ information proposed in the regulation covering the used breeding methods or patents applying to registered varieties. However, many consumers would consider those important issues in order to make an informed choice.

## **DUS and VCU tests – an obstacle for organic breeders**

The current system and concrete implementation of the DUS tests and – for agricultural crops – VCU test (“value for cultivation and use”) is a real obstacle to the access on the market for varieties aimed at production in agro-ecological systems, such as for organic farming.

The detrimental effects of the testing criteria for varieties on biodiversity and sustainable agriculture have been analysed and described for more than 15 years. As long as registration of varieties remains an obligatory or even voluntary standard on the commercial seed market, registration procedures have to be adapted to agro-ecological production systems – otherwise it has a discriminating effect. Despite concrete proposals delivered by the European Consortium of Organic Plant Breeders (EcoPB)<sup>26</sup> and IFOAM-EU, the new regulation fails to deliver a clear solution that allows breeders and farmers to work with genetically diverse and adaptable varieties. DUS tests adapted to the biological features of population varieties are not at all anchored in the legal text, whilst other proposals like on the “sustainable VCU” in article 59 remain very vague, with concrete details being postponed by delegated acts. Article 14.3 on heterogeneous material remains very nebulous concerning the political objectives of this derogation possibility, the details of which shall also be decided as delegated acts.

## **New maintenance breeding rules - crop evolution on the fields prohibited**

The obligations for operators concerning 'variety maintenance' will become stricter in the proposed regulation than in the current directives. Currently, the breeder has the responsibility to maintain the variety according to the general principles of systematic maintenance breeding. A variety is regarded as stable if, after successive propagation, it remains true to the description of its *essential* characteristics. In future however, the operator will be obliged and responsible for keeping the identity of variety so that it remains "consistent with its description", Article 62 defining stability in a way that all characteristics used for the variety description have to remain unchanged after repeated reproduction.

With regards to the dynamic evolution of crops, this objective is absolutely dangerous. For operators it would become very problematic. Why should an operator acting as maintenance breeder be obliged to maintain not just the essential characteristics of a variety, but even traits that are totally irrelevant from any agronomic point of view? If, after some years of maintenance breeding of a registered variety, such plant traits change by natural evolution, this would lead to a withdrawal of the registration or even administrative penalties. Some varieties have been on the market for decades because of unbroken demand by the farmers despite some characteristics of these varieties have evolved – and why not?

Such maintenance rules favour very homogeneous varieties, whilst discriminating against open pollinated and therefore more heterogeneous varieties. Such maintenance rules show that in this regulation, a plant variety is mainly regarded as a technical product that is put on the market unchanged for a calculated period of time. In this concept, any natural adaptation of varieties shall be prevented so that adaptation does not occur on the fields but only in the breeders plots and laboratories. Such regulation neglects all (alternative) breeding concepts that use systematically natural field adaptations of crops. It would become very difficult or even impossible to have varieties on the market for decades, but this again would only serve the profit interests of a few players.

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<sup>26</sup> [http://www.eco-pb.org/fileadmin/ecopb/documents/ECOPB\\_Position\\_EUSeedLawRevision\\_120530.pdf](http://www.eco-pb.org/fileadmin/ecopb/documents/ECOPB_Position_EUSeedLawRevision_120530.pdf)

## **Endangering agricultural biodiversity on a global scale**

The equivalence rules and bilateral and multilateral trade agreements could lead to an "export" of this restrictive EU seed legislation into third countries. Today, 70% of the world's food is still produced by local, small-scale agriculture. In many countries, the supply of seeds and seedlings is ensured by farmers. The introduction of similar "quality standards" and regulations as in the European Union would replace these informal seed systems and force farmers to buy seeds on the market. From the perspective of the industry, this is a huge market potential - especially in developing countries. But it would lead to a dramatic loss of locally adapted crop varieties, creating new dependencies and thus endangering local food security, increase market concentration<sup>27</sup>, leading to a loss of specialized small and medium breeding enterprises, their specific know how and innovative potential.

## **The derogation system: window dressing regarding biodiversity**

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The derogations of Articles 36 (niche markets) and 57 (officially recognised description) will very likely be the most debated by the European Parliament and the Council with regards to agricultural biodiversity. The seed industry will try to reduce the possibility to use these derogations in order to increase its market share. For the different actors fighting for biodiversity, these exceptions are by far not sufficient, same as the biodiversity issues have not been sufficiently taken in account in the present PRM legislation.

## **The best way to improve biodiversity, as explained above, would be to remove the obligation of registration and certification of freely reproducible PRM**

As said before, the proposal pursues the system of mandatory pre-market registration of varieties and certification of PRM. However, this mandatory system cannot be justified other than by some dogmas which are outdated and replaced by the system of private exclusive intellectual property rights that should stay regulated by their respective legislations and *per se* not a matter of a market regulation. An increasing number of farmers and gardeners are explicitly looking for seeds or plants which have special aesthetic or culinary qualities; or for seeds or plants that combine a lower than average yield potential with high robustness and therefore little need for external inputs. In times where one of the biggest health problems in the EU is obesity it is time to say good-bye to a post-war productivity mantra that caused so many environmental problems already. The registration of open pollinating and non IP protected PRM should not be obligatory but only a possibility offered to the breeders.

## **Article 57: Officially Recognised Description**

Article 57 provides for a simplified registration procedure aimed at "traditional old varieties" (see above). However, the simplified admission procedure is too restrictive and insufficient:

- > According to article 57 point 1a the simplified admission procedure is ONLY open for varieties that were demonstrably available before the entry into force of the Regulation on the market ("historical limitation").
- > A further limitation, following article 57 point 1b is the diversity blocked-in-a-museum-concept: one or more "region(s) of origin" must be defined ("geographic limitation").

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<sup>27</sup> see, e.g., the current analyzes of the ETC group: [www.etcgroup.org](http://www.etcgroup.org)

Note that these limitations did not exist in the first draft of the European Commission in July 2012 – when ORD was open to ALL varieties. On pressure from the industry, this opportunity was restricted again. **Now, it has to be reopened!**

The reintroduction of the *region of origin* as a criterion for the varieties registered under ORD creates an obstacle for the preservation of biodiversity. Most actors of the biodiversity are preserving varieties which are not originally from their region, but which have been given to them for some reasons (gift, to protect from war or other natural or not natural events). In many cases the region of origin is simply unknown, or the plants are simply not existing in their region of origin anymore.

The definition of a *region of origin* is nonsense: hardly any major crop originated from Europe, neither wheat nor apple nor tomato. Of course, over the centuries, crops adapted to local conditions. But the dynamic movement of crops around the world throughout centuries has been the motor to unfold diversity. Open pollinating seeds have the ability to adapt to different growing conditions. It makes therefore no sense to restrict their existence to the region of origin, especially in times of climate change (it might be interesting to use varieties from e.g. Central Spain in Central France in some years).



Examples - impact of the regulation on agricultural biodiversity and its actors

**The middle east is not a correct *region of origin* for a wheat**

A farmer in an Austrian wine-growing region cultivates durum wheat landraces he received from a gene-bank. He is searching for a winterkill-proof for his own pasta manufactory. After some years of experiments and selection, he is quite sure that one Iranian landrace fits his demands quite well. He cooperates with several organic farmers in the region that grow and sell grain to his small pasta manufactory. But how can he pass on propagating material of this new selection to them? With his small manufactory, he is "too big" for article 36. And article 57 does not work for him, either: As the national authorities tell him, his *durum* does not come from the right *region of origin*. "That must be a joke", the farmer says, "don't all our wheats originate from that region, and were adapted to new regions in the course of time?"

Besides the reintroduction of the geographical restriction, the proposal introduces a historical limitation which means that only a variety that has been made available on the market before the entry into force of the Regulation may be registered under ORD. However, there are many rare plant types that were only used locally and were never available on the market and for which commercialisation would have a positive effect. Those would have to go through the regular registration procedure to be marketed (economically unviable, biologically either impossible or even unwanted).



Examples - impact of the regulation on agricultural biodiversity and its actors

**No future for the „Sunset of Priggilitz “**

During a festival on local apple varieties in a village in Lower Austria a previously unknown local variety was detected, of which several trees could be found in the orchards in the surroundings. The beautiful apple was given a name in a naming contest in the village: "Sunset of Priggilitz". A local nursery now would like to sell the local variety in small numbers. This would create a win-win situation from a biodiversity point of view, by contribution to safeguarding this very rare variety. However, the simplified admission procedure under article 57 aimed at replacing the "conservation varieties" is not open for the "Sunset of Priggilitz" – simply because it cannot be proven that this local variety existed and was on the market before the entry into force of the Regulation.

In addition to old, but not available local crops, also any new development from old varieties would be excluded from the simplified procedure of ORD - for example, selections of farmers who want to better adapt their plants to their local conditions (which is possible thanks to the fact that these varieties are open pollinating and not too stable, however adaptation of these plants in a new area creates almost new ones, partly different from the first generations).

Furthermore, older cultivars that are still on the market today may, in case their approval expires or is withdrawn, apply to ORD only after a waiting period of 5 years - even if the varieties are not legally protected. Public interest cannot justify such a waiting period - it only serves the interests of those breeders who pull the varieties out from the market to make "room" for new varieties.

For these reasons, any geographic, historic and quantitative restrictions must be deleted. They reduce agricultural diversity into a museum concept, failing to conceive diversity as a dynamic process of uttermost importance for a future sustainable agriculture and global food security. Registration under ORD must be re-opened to all open pollinating plants which are not protected by IPRs.

## Article 36 “Niche markets”

Article 36 provides exceptions for seeds and other PRM from the requirement of registration. These exceptions, however, are held unnecessarily restrictive: they only apply to small quantities of PRM. In addition, professional operators can only make use of this exception if they have less than 10 employees (annual working units) and an annual turnover or a balance sheet total of less than EUR 2 million. Material provided under Article 36 must fulfil labelling requirements (labelled as niche market material) and must comply with mandatory requirements on the identification of the propagating material (standard material), which has a financial and technical cost, in particular for individuals actors and farmers. More detailed obligations are again postponed by the Commission to a delegated act, which bears the danger that even small achievements can easily be deleted later.

	<p>Examples - impact of the regulation on agricultural biodiversity and its actors</p> <p><b>Good bye, Grüner aus Maria Lankowitz</b></p> <p>The local salad variety « Grüner aus Maria Lankowitz » - a type that grows well even above 1000m – has been given to the ARCHE NOAH seed collection by the farmers lady who inherited the seeds from her mother. In a project with Austrian organic farmers, this local vegetable was selected on farm and enough seeds were produced to be able to provide an Austrian supermarket chain with small packages for home gardens. The idea of the project is that - by making rare varieties available - those can be saved from vanishing, whilst Austrian diversity farmers can achieve an income. The salad was listed as Amateur-Variety in Austria. Under the new regulation, such a project is not possible anymore. Article 57 would not cover the local salad variety, because it was not available on the market before the entry into force of the regulation. Article 36 cannot be applied because the supermarket chain is too big as an operator. However, the regular registration is, from an economic point of view, impossible. Say “Good bye » to crops like « Grüner aus Maria Lankowitz »!</p>
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### **„Culinary regions“ without local varieties?**

Austrian products and tourism are often marketed in the context of regional culinary traditions. In der « Genussregion Leithaberger Edelkirsche“ (« Culinary Region Leithaberger cherry") it is all about cherries - processed into juice and jam or sold directly to consumers. The farmers in the region cultivate many old cherry trees that shape the landscape. Some of these local cherry varieties have not even been described pomologically. Old trees have to be replanted. Since local varieties are not available in nurseries, a farmer grafts some trees for his own use, but also sells some trees to his neighbour farms with whom he cooperates. But this is illegal: The farmer would have to register as an operator. The varieties must be registered. However, article 57 (ORD) does not apply to varieties not previously available on the market). article 36 does not apply because the farmers works with more than 10 employees (cherry picking and processing needs a lot of handwork).



Examples - impact of the regulation on agricultural biodiversity and its actors

### **Maria must not take money from Sabine for seeds from her own garden**

Maria has a colourful garden aimed at self-supply in the Austrian region “Waldviertel”. She has been seed saving vegetable for years. Her new neighbour Sabine has just started with gardening. Seeing how well Maria’s vegetables thrive in the harsh climate, she would like to try Marias seeds. Of course, she does not yet have seeds to swap. She offers Maria a few euros for the seed, because after all it is much work to gather the seed, isn’t it? But Maria cannot accept money, otherwise she might face an administrative penalty. Her seeds do not meet the requirements (labelling, standard material) required in article 36. So, Sabine gives Maria a movie ticket as a gift. But strange - why can you sell your television privately, but not own seeds?



# Our main demands to the European Commission, the European Parliament and the Council

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## Concerning promoting agro-biodiversity:

- No obligatory registration and certification for seeds and other plant reproductive material (PRM) that is open pollinating and not protected by a private intellectual property right (IPR).
- Re-Open registration based on official recognized description to all varieties; delete all geographic, historical and quantitative restrictions

## Concerning promoting democracy and farmers' rights:

- The scope of the regulation must be limited to the marketing of PRM with a view to commercial exploitation
- All small farmers (as defined in art. 8 (2) of Reg. 1765/92) producing PRM have to be exempted from the scope
- The exchange of seeds and other plant reproductive material between farmers and between farmers and individuals must be excluded from the scope of the regulation;
- Delegated acts: No delegated acts at all. Everything has to be inside a single legal act.

## Concerning promoting consumers' choice and transparency:

- Ensure that open pollinating varieties and seeds bred for organic farming or specific local conditions are not discriminated by norms of (even voluntary) registration, certification and plant health requirements.
- Micro and small enterprises shall only comply with basic rules concerning the operators as long as they are not dealing with GMO or with PRM protected by IPRs (Plant Variety Rights or patents).
- Ensure transparency on breeding methods and Intellectual Property Rights associated with registered varieties and plants.



ARCHE NOAH

**Arche Noah** (Noah's Ark) is a seed savers association in Central Europe, founded in 1990, with today more than 10.000 members, which closely and actively follow the process of review of the PRM law. Arche Noah is politically active in Austria and in Brussels.

[www.arche-noah.at](http://www.arche-noah.at)



**GLOBAL 2000 (Friends of the Earth Austria)** is an independent Austrian environmental organization, working on controversial social themes to uncover potential hazards for humans and the environment since 1982. GLOBAL 2000 is a member of Friends of the Earth, the largest international network of environmental organizations. [www.global2000.at](http://www.global2000.at)