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# POSITION

## ON ENFORCEMENT OF PLANT BREEDERS' RIGHTS

Plant breeders' rights (PBRs) provide exclusivity for production and sales of propagating material of protected varieties during a limited period of time. This offers breeders the opportunity to obtain a logical return on the important investment made. This return on investment enables also plant breeders to continue the development of new, improved varieties. To safeguard this continued innovation, it is important that Plant Breeders' Rights can be enforced. ESA supports the principle of "one seed, one plant"; this means that when more than one plant is grown from one seed, either by reproducing the seeds or by producing cuttings, the Plant Breeders' Rights holder should be able to enforce his right.

ESA members are aware that the holders of the Plant Breeders' Rights themselves are responsible for the enforcement of their Plant Breeders' Rights. However, the collection of evidence of illegal reproduction of propagating material seems even more difficult than it generally is regarding other counterfeited products because of the specific nature of the object of protection. Propagating material consists of living material which, via its use, transforms into other products; many characteristics are not immediately and/or directly visible and in case of some crops quantities are very small but still of a high value. There are procedural remedies available to collect evidence on the basis of which a court case can be initiated, such as seizure of evidence or seizure of goods. However, there are still some obstacles that hinder efficient action against infringements. Besides own initiative from companies, the legislator should undertake action as well to make all legal tools really effective.

ESA appreciates initiatives already taken such as the adoption of Directive 2004/48/EC on the enforcement of intellectual property rights and the Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. However, there are still issues that need to be addressed and improved. In this respect ESA pleads for:

- One competent EU court, possibly linked to the future EU Patent Court, or one per Member State for infringement cases regarding

EU Plant Breeders' Rights in order to create more expertise in the field of EU Plant Breeders' Rights within courts;

- Similarly, one competent court per Member State for infringement cases regarding national plant breeders' rights;
- In infringement cases where an expert opinion on variety identity and/or (lack of) distinctness is required a possibility for holders of plant breeders' rights to apply for such an expert opinion to be carried out by CPVO examination offices;
- Acceptance by Courts of official reports and expert opinions of CPVO examination offices;
- Actions on own initiative of examination office/inspection authorities/customs authorities;
- Reversal of burden of proof: an example of the reversal of proof in favour of the Plant Breeders' Right Holder can be found in article 107.2 (1) of the Italian Code on Intellectual Property Rights; this article relates to the extension of protection to harvested material obtained through unauthorized use of propagating material of the protected variety and it states clearly that use shall be presumed unauthorized in the absence of proof of the contrary;
- Penalization of infringements and adoption of the EP and Council directive on criminal measures aimed at ensuring the enforcement of intellectual property rights for which an amended proposal was published on 26 April 2006 with reference COM(2006)168 final.

(1) *“L'autorizzazione del costitutore è richiesta per gli atti menzionati al comma 1 compiuti in relazione al prodotto della raccolta, comprese piante intere e parti di piante, ottenuto mediante utilizzazione non autorizzata di materiali di riproduzione o di moltiplicazione della varietà protetta, a meno che il costitutore non abbia potuto esercitare ragionevolmente il proprio diritto in relazione al suddetto materiale di riproduzione o di moltiplicazione.*

*L'utilizzazione si presume non autorizzata salvo prova contraria.”* (Article 107(2) of the Italian Intellectual Property code (D.lgs.n 30/2005)

The authorisation of the breeder is necessary for the acts, listed in paragraph 1, carried out in respect of the harvest-ed product, including entire plants and parts of plants, obtained through the unauthorised use of the propagating material of the protected variety unless the breeder had a reasonable opportunity to exercise his right in respect of said propagating material. The use is presumed to be unauthorised except if the contrary is proved.

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ESA is the voice of the European seed sector. ESA's members are national associations and individual companies active in research, breeding, production and marketing of seeds of agricultural and ornamental plant species. ESA represents more than 7000 seed businesses in the EU and beyond.

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