



Regulatory offences enforcement tool-kit in seed marketing

Regulatory offences enforcement tool-kit in seed marketing

Foreword (purpose and scope):

This tool-kit has been drawn up by the ESA SVOwic IP working group with the aim of providing an overview of possible tools and strategies seed companies can make use of when dealing with regulatory offences.

The tool-kit is focussing on possibilities existing in the context of European legislation and practice. Therefore, the practical applicability of certain elements of this “toolkit” may vary from country to country depending on the national implementation of some pieces of EU law. It is not the aim of the paper to address any enforcement issues regarding plant breeders’ rights or other IP rights. Those aspects are dealt with in the IP enforcement tool-kit (<https://www.euroseeds.eu/vegetables>) adopted in 2011.

This tool-kit has been prepared with the intention to serve as a reference document for companies where they can find suggestions for improving their strategies. It is therefore a mere list of ideas with absolutely no binding value.

1. What is a regulatory offence?

In the present tool-kit breach, infringement or non-compliance of variety registration and seed marketing legislation are considered to constitute regulatory offences. For instance an act whereby an actor is selling seeds of a variety which is not listed on the national variety list/the EU Common Catalogues constitutes a regulatory offence since it is an obligation in the law that only seeds of varieties authorized for marketing can be put on the market. Similarly, if an actor is for instance using the variety denomination of a tomato variety already available on the market but selling another variety under this name such act is also a regulatory offence since a variety has to be sold always under the same denomination.

The aforementioned variety registration and/or seed marketing legislation are laid down on EU level in a number of EU Directives which can be consulted here: http://ec.europa.eu/food/plant/plant_propagation_material/legislation/review_eu_rules/index_en.htm. The actions however normally take place at national level where these EU Directives have been implemented into national law and therefore it is always the **national** variety / seed regulations which have to be consulted before action is taken.

The measures described in the present tool-kit are not specifically designed for infringements of other kinds of public regulations such as plant health rules.

2. Preventive measures

A. Contractual terms / sales conditions

i. Use of material

In order to create awareness on the market with respect to applicable regulations and (the prevention of) regulatory offences, it is worthwhile to include terms in contracts with the customers which remind said customers that all acts carried out regarding the delivered material have to be in line with the applicable seed marketing rules. These contractual terms may read as follows:

“The buyer shall always act regarding the goods delivered to him in accordance with the applicable national seed marketing regulations.”

It should be noted however, that in case of sales to end users, the buyer is usually using the propagating material for growing plants and not for reselling. Therefore such a provision as above is more relevant to contracts with distributors and dealers.

ii. Access to premises

It is also advisable to stipulate in the contract that the customer authorizes the seller access to its business premises so that the seller can carry out inspections in case of a breach of contract, in particular in case of alleged regulatory offences.

“The buyer is under the obligation to allow the seller, or anyone who controls on behalf of the seller, access to its business in order that the seller can carry out inspections.”

B. Protocols / codes

In order to create awareness on the market with respect to applicable regulations and (the prevention of) regulatory offences, defining protocols, best practices or codes of conduct between professionals / companies can be useful. Such documents may lay down ways to prevent regulatory offences or procedures to follow in case of a detected alleged regulatory offence. (For an example please click [here](#).)

C. Monitoring system

It is advisable to have an internal system within the individual companies which allows continuous following and monitoring of the market to detect potential regulatory offences.

D. Building good contacts with authorities – raise awareness

The enforcement of variety registration and/or seed marketing rules is a matter of public law and enforcement of public law is a matter of the public authorities. Therefore public authorities play an important role in this field. It is very important to build and keep good contacts with such authorities. When it comes to offences, variety registration offices, for instance, can be helpful in variety identification trials but also in launching administrative procedures against the party committing the regulatory offence. Good contacts are also important to create awareness within the authorities of regulatory offences regarding propagating material.

An authority which may play an important role is the national competition authority which can be contacted by any party and can launch investigations. This may be helpful when a company can show competitive disadvantages suffered because of the anti-competitive unfair behaviour of other market actors.

E. Educating staff

Within the companies themselves it is important to educate and continuously train staff regarding marketing rules, policy and enforcement and in particular in respect of steps to be taken when something suspicious is experienced. Assistance of national and/or regional professional seed organizations may be useful in the organisation of such trainings.

3. If it really comes to infringement

A. Preparation of actions

When a regulatory offence is detected the first and foremost action is to take evidence. Best is to buy several tins, pouches or other samples of the suspicious material on the market in order to have enough to analyse but also to keep some closed packages for possible further use in proceedings.

Once the nature of the offence is identified the following scenarios may happen:

In case the variety at stake is protected by IP rights

It has to be determined whether there are also plant breeder's rights or other IP right infringing acts linked to the regulatory offence. For tips what to do in case of infringements of IP rights please check the IP enforcement tool-kit: <https://www.euroseeds.eu/vegetables>.

In case the variety at stake is not protected by IP rights:

If there is no infringement of IP rights but just the regulatory offence itself, the actions as described in the subsequent paragraph B could be considered.

B. Possible actions

i. Administrative route

Enforcement of public law is a matter of public authorities. Therefore, after one has become convinced that a regulatory offence is or has been committed, an administrative procedure could be launched. In such a case, the offence must be reported to the responsible (national) authorities and the subsequent action by such authorities must be requested. For AIB members, the AIB could provide assistance in this respect. After the alleged regulatory offence has been reported, the reporting party shall often no longer have a role in the further investigation and enforcement of the regulatory offence.

As a rule, the enforcement of regulatory offences is the exclusive duty of the responsible authorities. The relevant authorities will investigate the reported issue and if it is decided that a regulatory offence is constituted, measures might be taken against the offending party. The possible measures may vary from country to country but in many countries there are for instance administrative fines which can be applied to parties infringing public regulations, i.e. not acting by the rules. The types of authorities which could be involved also vary from country to country. Here therefore only some typical cases are given:

One can contact the variety registration office / seed inspection services or other variety control body, notify the offence to it and request action. A list of national authorities can be found on the site of the OECD:

<http://www.oecd.org/tad/code/listofnationaldesignatedauthoritiesfortheoecdseedsschemes.htm>

In many countries there are also general market surveillance authorities which are responsible for the good and fair functioning of the market and may act if illegal actions are detected.

Further on one can also think of contacting the national competition agency where the regulatory offence amounts to some anti-competitive behaviour and harm for the consumer (A list of national competition authorities of the EU member states can be found on the site of the European Commission: http://ec.europa.eu/competition/ecn/competition_authorities.html), or tax authorities.

ii. Civil route

Contractual clauses – breach of contract

In case the commercial relationship between the actor of the offence and the company suffering from the offence is regulated by a contract, the regulatory offence may also constitute a breach of contract. In such a case the offending party can be brought to court for breach of contract.

Unfair competition

The fraudulent use of a variety denomination, the sales of a different variety under the variety denomination of a registered variety, the sales of varieties without authorization or registration etc. are all acts amounting to unfair competition. Unfair competition is very likely to cause damages to one or several other market actors which constitutes ground for suing the offender in court.