



Ministerie van Economische Zaken

The ABS Regulation and UPOV

Mutual supportiveness in
national implementation

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Introduction

Netherlands

- National approach to EU-regulation
- NL focus on stakeholder involvement: plant breeding
- Some breeders in NL and DE started court case at CFI; annulment of the EU ABS Reg asked for.
- Why?

Here & now

- Give insight into the issues raised & share thoughts
- Raise awareness that this needs to be tackled in EU

Objective

- Find grounds to come to a common solution in the EU



Relationship NP/EU ABS Reg and other int'l instruments

- Article 4(1) NP: NP *'shall not affect rights and obligations of any Party deriving from any existing int'l agreement'*, unless said instrument would damage or threaten biological diversity.
- Article 4(3) NP: NP *'shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol'*
- Recital 14 EU ABS Reg; *'NP should be implemented in a manner that is mutually supportive with other int'l instrument...'*



Other int'l instruments; UPOV 1991

- Each Party (amongst them the EU) shall grant and protect breeders' rights (PBR);
- Granting criteria; variety should be:
 - New
 - Distinct
 - Uniform
 - Stable
- Fitting these, a right is granted.



Other int'l instruments; UPOV 1991 (cont'd)

- Breeders' exemption; the breeder's right shall not extend to acts done for the purpose of breeding other varieties;
- Breeders' exemption = fundamental aspect of the UPOV system of plant variety protection
- Aim of breeders' exemption; open access to new varieties in order to encourage the development of new varieties of plants, for the benefit of society. Positive impact on biodiversity.



The challenge: mutual supportiveness

- Scenario:

Breeder Jones from the Netherlands accesses GR A in Brazil after entry into force of the Nagoya Protocol for both Parties and obtains a PBR on plant variety 1, based on GR A. Breeder Simons subsequently buys plant variety 1 on the market with the intention of using it under the breeders' exemption.

- What are the obligations of breeder Simons?



Obligations of user under breeders' exemption

- Step 0: does the material fall under the scope of the EU ABS Regulation?
- Assuming that breeder Simons actually uses GR A, they would need breeder Jones to ascertain (article 2 EU ABS Regulation):
 - When GR A was accessed;
 - Where it came from and whether that state exercised sovereign rights;
 - Whether other ABS instruments are applicable.
- But breeder Simons obtained GR A on the market; and has no link with breeder Jones.
- Could a well-functioning CH facilitate?



Obligations of user under breeders' exemption (cont'd)

- Step 1: If within scope; DD obligation (article 4(3)):
 - Seek, keep and transfer to subsequent users: no direct link between breeder Jones and breeder Simons; impossible to transfer all info to any other breeder, because breeder Jones does not know who Simons is.
 - Breeder Simons could make public all relevant info for subsequent users, but that would require them to openly share confidential business information; e.g. Article 4(3)(b)(vi); benefit sharing arrangements with provider.
- Could this be possible?



Obligations of user under breeders' exemption (cont'd)

- Since breeder Jones cannot transfer all info, breeder Simons will have to seek info required under article 4(3)(b)(vi);
- Absolute clarity is needed, otherwise breeder Simon cannot use the material (article 4(5) ABS Reg);
- Since not all info will be publically available, bilateral contacts have to be made with breeder holding the PBR;



Relationship DD obligation and breeders' exemption

- Bilateral contact to the detriment of the open system provided by UPOV's breeders' exemption?
 - Very onerous on breeder Simons, especially since Jones typically used multiple varieties protected with PBR in their breeding process – Simons would have to search for all those?
 - Departure from working methods in breeding sector and confidentiality issues: breeder Simons would want to work discretely with the new variety, without his competitors knowing.



DD obligation and breeders' exemption: mutually supportiveness?

- Breeders' exemption aims to encourage development new varieties and hence further the development of biodiversity;
- The DD-obligation seems to hamper the proper functioning of the breeders' exemption;
- As a consequence, the DD obligation might have the perverse effect of hampering the development of biodiversity;
- Some breeders in NL and DE seem to have that view; court case at CFI; annulment of the EU ABS Reg asked for.



Million dollar question

Can users comply with their obligations stemming from the NP and the EU ABS Reg, without hampering the full functioning of the UPOV system and in particular the breeders' exemption?



Any ideas and opinions?

THANK YOU!