

Seeds as commons: Conceptual deepening of open source strategies

Executive Summary February 2023

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Seed production Brussels sprouts *Brassica oleracea*

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New commons have become increasingly important. The first part of the report gives a comprehensive conceptual classification of the diversity of local and regional commons initiatives in the field of seeds and varieties and explains the intertwinement of New Commons features with traditional commons elements.

Seed communities in the context of the new organic regulation

The opportunities provided by the new Organic Regulation (EU) 2018/848 are an important step towards expanding and diversifying the seed and other plant propagation material available to organic farmers. First and foremost, organic plant breeders will benefit from the adapted criteria. Currently, the availability of organic seeds and varieties suitable for organic production is insufficient. It is important to create appropriate conditions for their development in order to achieve the Farm to Fork target of 25% of agricultural land being organic by 2030.

The fragmented legislation within the European Union has led to non-harmonised implementation and creates an uneven playing field, as different conditions apply to operators depending on the Member State. A more uniform implementation of the Directives through clearer definitions of exceptions to the scope and a harmonised and risk-based framework for controls would help to create a more level playing field and provide similar opportunities for producers in the different Member States.

Open source seed licence

The development of an open-source seed licence (OSS licence) by the German non-governmental organisation Agrecol in 2016 was a way to keep seeds free from the logic of patenting and plant variety protection. The open source seed licence ensures that not only the seed itself is protected, but also that all future improvements and further developments of the seed remain free of intellectual property rights and thus accessible to everyone. Additional legal support for the OSS licence comes from the fact that it is based on the Nagoya Protocol (CBD 29.10.2010).

Expertise on the compatible use of different seed communities

A concept was developed for a series of activities that ensured the problem analysis and the elaboration of the methodological approach for the development of an expertise on the compatible use of different seed commons. This concept included the elaboration of a questionnaire and mailing to about 50 actors in the field of organic seed production and seed commons, the conduct of interviews and online meetings with lawyers, agricultural scientists and commons experts, and an analysis and evaluation of the questionnaires.

As expected, the role of seed commons was overwhelmingly perceived as positive. Above all, the social functions of seed commons, such as community building and democratic participation, were highlighted. When it came to the new possibilities for marketing unregistered seed, it was noted that there was too little knowledge about this area among some experts. There was also a lack of legal knowledge on details of open source seed licensing.

Legal expertise

The expert opinion prepared by patent attorney Dr. Daniel Alge between November 2022 and January 2023, assesses legal issues related to the protection of open source seeds.

The desire to prevent "private enclosures and a "commercialisation of nature in general; seems difficult due to the possibility created by the legislator to obtain plant variety protection rights. However, the expert opinion considers the objective within a "seed commons" project to be legitimate in principle. Investigations of "historical" or "organically bred" seeds as well as seeds of "conservation and amateur varieties" could also bring considerable scientific knowledge. If this seed has demonstrably already been used in the course of a "seed commons" project, a subsequently granted patent or plant variety right can no longer be asserted against this seed because the patent or plant variety right does not have the required novelty. With such proactively established evidence, legal certainty could then be achieved for such seed before "private enclosure".

The expert assessment concludes that the statement that gene sequences are patentable in the USA is not accurate. In any case, gene sequences existing in nature are not patentable in the USA. Patents or plant variety rights, one of the few possibilities for small and innovative companies to fight against the market power of large companies to conquer the market with their innovations.

For the proposed "open source seed licensing system", Dr. Alge sees the following challenges: Ambiguities as to who is responsible for the quantities of seed required to make it available on the market, questions about the financing of the system and the danger that the goal of "keeping seed free from the logic of patenting and plant variety protection" cannot be fulfilled by the system alone.

In the case of a desirable internationalisation of the OSS licensing system, the differences in the legal bases must be examined and these differences would then also have to be taken into account accordingly in the wording of the OSS licensing agreement.

If it were possible to find political support for this OSS licensing system at the European level, a possibly necessary harmonisation of the legal prerequisites for this could even be considered throughout the EU. Of course, this would then also have an international exemplary effect.