

EU COMMISSION PROPOSAL ON SEED MARKETING (2023/0227)
**A COMMENTARY FROM THE PERSPECTIVE OF THE RIGHT TO FOOD, THE RIGHT TO SEEDS
AND UNDROP**

Dr. Fulya Batur, Dr. Karine Peschard and Dr. Christophe Golay

December 2023

*In the context of the reform of the European Union (EU) seed marketing legislation, the EU Commission released its Proposal on Seed Marketing (2023/0227) in July 2023.¹ **This Regulation will shape the seed market and peasant seed systems for decades to come.** The following commentary analyses the extent to which the EU Commission proposal integrates the right to food and peasants' right to seeds as enshrined in the United Nations (UN) Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) adopted by the UN General Assembly in 2018.*

The proposal at a glance in light of the right to food and UNDROP

The proposal offers interesting pathways for the diversification of the seed market. However, in its current version, by failing to fully recognise, respect, protect and fulfil the right to seeds, it will detrimentally impact peasant seed systems. The proposal represents a missed opportunity for European policymakers to fulfil their obligations under international human rights law, including the right to food and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), and to take appropriate measures to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity.²

More generally, the fragmentation of EU laws and regulations into technical thematic blocks prevents the full integration and implementation of the right to food and peasants' rights as recognised in UNDROP.

The primacy of the right to food and the right to seeds

In defining the right to food and the right to seeds in its articles 15 and 19, UNDROP builds on a number of binding international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), in which the right to food is enshrined, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). All EU Member States are bound by the ICESCR, CEDAW and the FAO Plant Treaty (ITPGRFA), which shall be interpreted in light of UNDROP.³

In international law, the right to food, which is binding for all EU Member States, implies that States must respect, protect and fulfil peasants' right to seeds and support peasants' seed systems.⁴

UNDROP strongly reaffirms the primacy of human rights, including the right to food and the right to seeds, over other international norms. Article 2.4 provides that "States shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations as applicable to peasants." In Article 19.8, UNDROP also calls on States to prioritise the rights, needs and realities of peasants over seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws. Both these provisions reflect the fact that, as higher-order norms, human rights cannot be traded off or undermined.⁵

¹ The full text of the Proposal on seed marketing (2023/0227 COD) is available [here](#). On the same day, the EU Commission also released its proposal (2023/0226 COD) on new genomic techniques (available [here](#)), which will only be analysed here in its linkages to the seed marketing legislation.

² See [The Right to Seeds in Europe](#) (Geneva Academy, 2021). The summary of this publication is available in [English](#), [French](#) and [Spanish](#).

³ See [Implementing the ITPGRFA in light of the UNDROP](#) (Geneva Academy and APREBES, 2022). This publication is also available in [French](#), [Spanish](#) and [Portuguese](#).

⁴ See two reports of the UN Special Rapporteur on the right to food. Michael Fakhri, Seeds, right to life and farmers' rights, [A/HRC/49/43](#) (2021); Olivier De Schutter, Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation, [A/64/170](#) (2009).

⁵ See [The Right to Seeds and Intellectual Property Rights](#) (Geneva Academy, 2020). This publication is also available in [Spanish](#) and [Romanian](#).

The Commission proposal on seed marketing

A single Regulation is set to replace the 10 Directives currently in place (ornamentals are excluded from the reform, and forest reproductive material is the object of a new, separate Regulation).

- The new Regulation will have direct effect, which means that Member States do not need to transpose it into their national legislation, and that the national judiciary can rely directly on the rights and obligations contained in the EU Regulation.
- A single text will regulate all plant reproductive material: not just seeds, but other vegetative propagating material such as plants or rootstocks. In other words, the same rules will apply to agricultural crop species, vegetables, fruits, vines, etc.
- The main principles of the legislation remain unchanged, including the 2 pillars of variety registration and seed lot certification. A third pillar - mandatory professional operator registration - is added, mirroring the approach adopted in Plant Health Regulation 2016/2031.

The new Regulation is expected to be adopted in 2024-2025, and will come into effect 3 years after adoption. The European Parliament wishes to finalise its first reading of the proposal before the June 2024 elections, with a plenary vote on the proposal foreseen by April 2024. The Council of the European Union plans on adopting its position on the Commission proposal, i.e., its “general approach”, by the end of 2024.

RIGHTS OF PEASANTS

1. RIGHTS OF PEASANTS TO SAVE, USE, EXCHANGE AND SELL THEIR SEEDS AND ACCESS LOCALLY AVAILABLE SEEDS

In Article 19.1d, UNDROP recognizes that peasants and other people working in rural areas have the right to save, use, exchange and sell their farm-saved seeds and propagating material - practices that are absolutely essential to the maintenance of peasant seed systems and agrobiodiversity. Article 19.5 also recognizes their right to rely either on their own seeds or on other locally available seeds of their choice, and to rely on the crops and species that they wish to grow.

At first glance, from the perspective of peasant seed systems, the proposal represents a mixed development compared with the current legal framework.

On the one hand, the proposal provides some ad hoc space for peasant seed systems:

- It is the first time that an EU proposal recognizes the role of farmers in the “dynamic management of agrobiodiversity” (Article 30).
- The proposal also provides more room for seeds and other plant reproductive material of non-uniform plant varieties in the EU market.
 - It reforms the concept of conservation varieties (defined in Article 2, registered according to Articles 26 and 53) so that varieties that are locally adapted, whether existing or new, can make it to the EU seed market without following the stringent DUS (distinctiveness, uniformity and stability) criteria, and without mandatory seed lot certification. Seeds of the reformed conservation variety category can be produced as standard seeds or material, which have lighter requirements and rely on post-marketing controls. However, the proposed requirements remain cumbersome for peasants, and require the segregation of seed and food production, which is contrary to peasant practices that need to remain flexible as to the ultimate use of their harvest.
 - Seeds of non-organic heterogeneous material would also be allowed to be marketed in a similar regime to the one established by the EU Organic Regulation 2018/848 (Article 27 of the proposal).

However, this timid step forward is heavily shadowed by the limits set on peasants’ right to save, use, exchange and sell their seeds:

Under the proposed definition of marketing (Article 3), the mere transfer for free and exchange of seeds or other plant reproductive or propagating material amounts to marketing.

Peasants' right to save and exchange seeds outside the scope of seed marketing rules is defined only in a derogation, and a very restrictive one. Article 30 applies to all EU farmers, allowing the exchange of seeds but not their sale. This applies to seeds, as opposed to all plant reproductive material, and it is restricted to certain species and to quantities to be determined by Member States. In addition, it imposes additional phytosanitary rules to ensure the absence of pests that affect seed quality, compared to the Plant Health Regulation, which regulates pests and diseases that cause serious harm to public health, the environment or the economy. Instead, in line with UNDROP, the proposal should include a positive recognition of the right to save, use and exchange seeds, and include monetary compensation for the costs of seed multiplication and conservation. This right could be carved under the principle of mutual aid, as is the case in France, as well as a contribution to the dynamic management of agrobiodiversity.

The proposal is based on the principle of mandatory professional operator registration, with high administrative burden for small-scale producers. It also expands the definition of "marketing" to cover almost all seed production activities. This definition is highly problematic as it encompasses a large share of peasants not engaged in the commercial exploitation of seeds, but rather in food production and in the production of seeds for their own use.

Furthermore, the rules that relate to seed conservation networks and gene banks in the proposal (Article 29) would not allow them to transfer or market seeds to professional operators (i.e., farmers and peasants), which goes against both the FAO Plant Treaty (ITPGRFA) and UNDROP.

The proposal seems to head in the right direction for peasants' right to sell their seeds on the formal market (although not within their own seed systems), as well as their right to access locally available seeds. However, it presents **severe shortcomings in the recognition of their right to save, use, exchange and sell their seeds**, restricting such opportunities to species and quantities to be determined by Member States, and imposing heavy administrative burden on most if not all peasants engaged in the production of seeds (and not necessarily in their marketing or commercial exploitation).

2. RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS

In Article 19.2, UNDROP recognizes that peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.

Through the opening of new pathways for the registration and marketing of locally adapted landraces and new varieties, the proposal makes **positive steps for peasants' right to develop their own seeds**. Conservation varieties (in their new definition) and heterogeneous material could represent avenues for the marketing of varieties developed by peasants, whether individually or through participatory plant breeding.

Peasants' right to maintain their own seeds is seemingly recognized in Article 30 of the Commission proposal (seeds exchanged in kind by farmers), but with an important number of limitations, as mentioned above.

The Commission proposal does not address peasants' **right to control and protect their own seeds and varieties**. This right is even more threatened if the proposal on seed marketing is read together with the proposal on new genomic techniques (NGT) published on the same day. Indeed, even though the Commission proposal foresees the inclusion of information about the genetically modified organisms (GMO) or NGT status of a registered variety, such information is not automatically foreseen on labels for plant reproductive material. The use of GMO or NGT plants is not prohibited in the derogatory market access regimes of conservation varieties and heterogeneous material, the seeds of which are more likely to respond to peasants' needs.

3. RIGHT TO PROTECT PEASANTS' TRADITIONAL KNOWLEDGE, AND ENSURE EQUITABLE SHARING OF BENEFITS

In Articles 19.1a and 20.2, UNDROP recognizes that peasants and other people working in rural areas have the right to the protection of their traditional knowledge, innovation and practices, including in relation to seeds and agrobiodiversity. Article 19.1b recognizes their right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture.

Although the seed marketing legislation cannot positively protect peasants' traditional knowledge, it could at a minimum ensure that varieties listed in national variety registers (and therefore the EU variety

register) do not misappropriate such traditional knowledge. **The proposal does not do enough to protect against such misappropriation:**

- Article 54 on the suitability of variety denominations does not explicitly mention denominations of varieties or populations that have been maintained and developed by peasants;
- Article 47 on the requirements for general variety registration and article 48 on distinctiveness do not provide for safeguards against the registration of peasants' varieties without their consent or knowledge.

4. RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS

Article 10.1 of UNDROP provides that peasants “have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.” In relation to the right to seeds more specifically, Article 19.1c of UNDROP provides that peasants have the “right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture” (Article 19.1c).

The right of peasants to participate in decision-making processes has been ensured in the process of this reform through various stakeholder consultations, ad hoc meetings with representatives from peasant organisations, and the case study on farmer seed exchanges in France conducted as part of impact assessment process.

However, the **proposal itself does not foresee institutional mechanisms that would protect peasants' right to participate in decision-making processes related to the implementation of the legislation at European and national levels.**

- Procedural requirements that relate to variety registration and seed lot certification, or those that will be followed for the development of delegated or implementing acts at EU level, do not include provisions on stakeholder consultations or other types of participation.
- Article 76 establishes the major role of the Standing Committee on Plants, where only representatives of Member States sit, with no other stakeholders, and gives limited powers to the European Parliament. There are no provisions on the establishment of discussion platforms or other types of consultation processes at national level that could ensure the realisation of peasants' right to participate in decision-making.

STATE OBLIGATIONS

1. OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS, NATIONAL AND REGIONAL LAWS AND POLICIES WITH THE RIGHT TO SEEDS

In accordance with UNDROP, States must ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Article 19.8).

In light of this obligation, the Commission's seed marketing proposal misses the mark in considering the essential characteristics of peasant seed systems, which are based on the saving, exchange, sale and use of seeds within their communities. The proposal does not recognize these rights positively, but as a derogation and with undue restrictions. Moreover, it burdens these practices with disproportionate administrative requirements.

2. OBLIGATION TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

In accordance with UNDROP, States have the obligation to respect, protect and fulfil the rights of peasants (Article 2.1), including their right to seeds (Article 19.3).

The obligation of States to respect peasants' right to seeds is violated if regulatory texts create obstacles for peasant seed systems, as this deprives peasants of the means to guarantee their livelihood. According to the obligation to protect and fulfil, states must proactively strengthen peasants' access to, and utilization of, the resources and means to ensure their livelihood.

By equating any seed transfer to marketing, by requiring the segregation of food and seed production as a general rule of thumb, even in derogatory regimes, and by restricting the sale of seeds between and by peasants, the Commission proposal fails to fulfil these human rights obligations.

3. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY

In accordance with UNDROP, states have the obligation to take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity (Article 19.6). This includes the obligation to take appropriate measures to promote peasants' access to a fair, impartial and appropriate system of evaluation of the quality of their products at the local, national and international levels. Removing barriers to the saving, exchange or selling of seeds by peasants is in this context the first layer of State obligations under UNDROP, which also requires the design of an appropriate and ad hoc regulatory regime for peasant seeds.

The proposal does not mention, let alone support, peasant seed systems. It erects unproportionate barriers to the exchange of seeds among peasants, and subjects the sale of peasants' own seeds to the restrictive rules of seed marketing designed for the anonymous industrial market. Although the derogatory pathways to the market have become slightly more flexible, they are accompanied by a double registration obligation, relating to both professional operators and to varieties or heterogeneous material.

4. OBLIGATION TO ENSURE THE RIGHT OF PEASANTS TO PARTICIPATE IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

In accordance with UNDROP, states have the obligation to ensure peasants' participation, directly and/or through their representative organizations, in decision-making processes related to seeds (Articles 10.1, 10.2 and 19.1), as well as their right to information (Article 11.2). States should also promote peasants' participation in the formulation of product quality evaluation processes (Article 11.3).

The preparatory documents that accompany the Commission proposal highlight the successful participation of peasants' organisations such as the European Coordination Via Campesina. The impact assessment included a case study of the French approach to mutual aid within peasant seed systems. Peasant representatives were thus consulted at different stages in the preparatory work that led to the proposal.

However, the content of the proposal itself fails to establish governance and participation structures that would allow peasants to participate in the future elaboration of regulatory texts at European and national levels. The proposal foresees the adoption of a large number of implementing and delegated acts by the European Commission, with the sole support of the Standing Committee, composed of representatives of Member States' competent authorities, with little involvement of the European Parliament and no stakeholder consultation. The only other EU institution to take an integral part in the variety registration process is the Community Plant Variety Office, which grants the exclusive titles on plant varieties, or so-called "breeders' rights." Stakeholder consultation or peasant participation is not foreseen at national level either, whether in the design of the variety registration and seed production requirements, through for instance the establishment of a specific working group or committee to discuss the implementation of the seed marketing legislation. Moreover, the consultation of peasants is not foreseen in key areas that relate to the protection of their traditional knowledge, such as variety denomination or distinctiveness.

In sum, this proposal is a missed opportunity to ensure peasants' meaningful participation in decision-making processes related to seeds.

CONCLUDING REMARKS

If the proposal is not substantially revised, it will become a missed opportunity to integrate peasants' rights to the EU seed marketing legislation, with dire consequences for food security and agricultural biodiversity in the European Union.