

Overview and Implications

of

Commission Directive 2009/145/EC

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“providing for certain derogations, for acceptance of vegetable landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion and of vegetable varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions and for marketing of seed of those landraces and varieties”

Prior to the introduction of Directive 2008/62/EC¹, seeds could only be legally marketed if they fulfilled strict criteria for accession to a National List, which EU member states are mandated to keep, and on the EC Common Catalogue of Agricultural Plant Varieties (searchable via the Eurisco database). This listing² was only open to seeds which fulfilled the well-known DUS criteria – that is, they must be Distinct, Uniform and Stable (See box below). If the variety in question is an agricultural crop (excluding vegetables) then, to qualify for conventional registration, it must also display some commercial advantage under the Value for Cultivation and Use (VCU) criteria³.

Distinct, Uniform and Stable – DUS

The DUS criteria stem from the Plant Breeders' Rights system, developed under successive International Union for the Protection of Varieties of Plants (UPOV) agreements, first established in 1961, of which Ireland is a signatory.

Distinct – A plant variety is regarded as distinct if it is clearly distinguishable in one or more important characteristics from any other variety known in the European Community at the time when the application for acceptance of the variety is made.

Uniform – A plant variety is sufficiently uniform if, apart from a few aberrations, the plants of which it is composed are similar or genetically identical as regards the characteristics considered by the National Authorities for the purpose of determining sufficiently uniform.

Stable – Stability is determined after successive propagation or multiplications, whereby the variety remains true to the description of its essential characteristics.

Source: DEFRA, 2005

¹ Now amended as 2009/145/EC.

² According to rules laid down in Council Directive 70/458/EEC.

³ "The value of a variety for cultivation or use shall be regarded as satisfactory if compared to other varieties accepted in a National List its qualities taken as a whole offer, at least as far as production in any given region is concerned, a clear improvement...Where superior characteristics are present individual inferior characteristics may be disregarded" (DEFRA, 2005)

If a variety didn't make a national list or the Common Catalogue, then it was technically illegal for such "non-varieties" to be marketed in any way on the common European market. This illegality extended, for example, even to the sharing or giving away of free seed to neighbouring farmers (Kastler, 2005). The stated aim of this bureaucratisation was to ensure high-quality seed which is "true to identity, high in purity and germination capacity and free from certain pests and diseases" (DAFF, 2011) and, consequently, facilitating the free movement of certified seed across member states (Ibid.).

Now, with 2009/145/EC, special provisions are laid out which allow derogations from the above criteria "for...vegetable landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion and of vegetable varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions and for marketing of seed of those landraces and varieties". This was integrated into Irish national legislation on October 30th 2009 by Brendan Smith, Minister for Agriculture, Fisheries and Food (ISB, 2009).

Important points in the act signed by Brendan Smith include:

- 3 (2) "The Minister may, in respect of a denomination of a conservation variety known before 25 May 2000...derogate...unless to do so would violate a right protected under Article 2⁴ of that Regulation."
- 3 (3) "The Minister may register more than one name in respect of a conservation variety if he or she is satisfied that the names are historically in use."
- 5 (1) "A person shall not maintain, produce, sell or supply a conservation variety except in the region of origin of that variety."
- 5 (2) "A person may produce seed of a conservation variety in an additional region approved in accordance with Article 11 of the Commission Directive."
- 5 (3) "A person may sell or supply seed of a conservation variety in an additional region of the State approved in accordance with Article 13 of the Commission Directive."

⁴ "1. In the case of a trade mark as a prior right of a third party, the use of a variety denomination in the territory of the Community shall be considered to be precluded by the notification to the competent authority for the approval of the variety denomination of a trade mark, which has been registered in one or more Member States or at Community level prior to the approval of the variety denomination, and which is identical or similar to the variety denomination and registered in relation to goods which are identical or similar to the plant variety concerned. 2. In the case of a prior right of the applicant in respect of whole or part of the proposed denomination, Article 18(1) of Regulation (EC) No 2100/94 shall apply *mutatis mutandis*."

- 7 (1) “A person may only produce seed of a conservation variety in accordance with a permit (“conservation variety permit”).”
- 7 (2) “The Minister may grant a conservation variety permit, attach conditions to the conservation variety permit, vary a condition, revoke a conservation variety permit or refuse an application.”
- 14 (1) “The Minister may charge a fee in respect of an application for registration in the national catalogue, for certification or for the performance of another function under these Regulations, such fee, not exceeding the cost, estimated by the Minister charging the fee of providing the service to which the fee relates.”

The specifics of the directive itself are relatively arcane but the following, from the Scottish government, are points of note:

- The overall aim of the Directive is the sustainable use of plant genetic resources, for traditionally grown varieties and landraces and for varieties of 'no intrinsic value for crop production, but developed for growing under particular conditions'. In practice, *this means encouraging the marketing of conservation (or heritage) varieties and of varieties intended specifically for amateur gardeners*. In order to facilitate and promote the use of conservation and amateur varieties of vegetables the Directive provides limited derogations from general acceptance and marketing requirements i.e. it allows for less rigorous listing and marketing regimes for these sorts of varieties.
- *The Directive limits maintenance and marketing of conservation varieties to a defined region of origin*, although in certain circumstances additional areas of seed production may be approved. This is to preserve the genetic identity of traditional varieties in their region of adaptation. It is proposed that the region of origin should be drawn as simply as possible⁵. Conservation varieties will need a registered maintainer.
- *There is no region of origin limitation for amateur varieties, and no requirement for a maintainer*. Once on the Common Catalogue, an amateur variety will be marketable throughout the EU.

⁵ Envisioned to comprise national boundaries.

- To be eligible as a conservation or amateur variety, the variety must not be listed on the Common Catalogue or have been deleted from the Common Catalogue within the last two years, and not be the subject of European or national plant breeders' rights or have an application for rights pending.
- *The Directive restricts the maximum number of hectares used to produce seed of any one conservation variety, to between 10 and 20 ha depending on the species.* It is not anticipated that these limits will cause any difficulties. *For amateur varieties, limits are applied through the maximum net weight per package of 5 to 250 g depending on the species.* The area limits and packet sizes are given in Annexes I and II of the Directive.
- Suppliers will be required to keep records of sales of conservation and amateur varieties and make these available to the relevant Certifying Authorities if requested.

Source: Scottish Government, 2010

Furthermore, directive 2009/145/EC states that “a Member State may approve additional regions in its own territory for the marketing of seed of a conservation variety provided that those regions are comparable to the region of origin as regards the natural and semi-natural habitats of that variety. Where Member States approve such additional regions, they shall ensure that the amount of seed necessary for the production of at least the quantity of seed referred to in Article 15 is reserved to conserve the variety in its region of origin.”

Implications of the Legislation

Europe’s seed laws previous to 2009/145/EC were a veritable threat to locally-adapted, terroir-specific heritage varieties of food crops, rapidly displaced by more modern, homogeneous cultivars. This is particularly concerning, taking into account the adaptability and genetic diversity necessitated by imminent and fundamental challenges approaching (or already present in) our food system, such as a peak in oil production and climate variability.

While the directive’s explicit aim was to encourage “the marketing of conservation (or heritage) varieties and of varieties intended specifically for amateur gardeners” (Scottish Government, 2010) what it seems destined, in fact, to do is reduce farmer and consumer choice, remove heritage varieties from appropriate environments and ensure that the marketing of anything but the most

commercial (and privately controlled) crops is greatly limited. The absurdity of this limitation by over-regulation is seen, for example, in the maximum allowable seed packet sizes - such as just 25g for carrot, leek, radish, garlic, beet and other seed.

Strictly consigning certain varieties to their so-called region of origin, and at most their state of origin, flies in the face of the reality that many varieties have adapted perfectly advantageously to new conditions across time and space. If, to extend the scenario *ad absurdum*, overbearing EU legislation had been in place constraining the spread of purple and yellow carrot varieties in Afghanistan five millennia years ago, then the vegetable's free worldwide spread would have been significantly obstructed. The implications for farmer and consumer autonomy here are self-evident. Hemming the marketing of heritage varieties into certain arbitrary bio-regions holds parallels with the maintenance of less commercial varieties as static gene bank museum pieces, for genetic resource tapping as needed, and not as living testaments to diverse cultures, tastes, growing conditions and preferences.

The necessity for a maintainer of the varieties in question, as noted by the Scottish Government on page three above, isn't made explicit or expanded upon in 2009/145/EC. How this is carried out could be a further cause of contention. This shouldn't be a major complicating factor, due to the absence of Plant Breeders' Rights in the relevant cases, but as was seen in the Linda potato controversy in Germany (see box below), the assignment of a single maintainer and subsequent changes can threaten the status of crop varieties.

The Linda Potato

Complications arose with this potato variety in Germany in the middle of the last decade when Europlant, Linda's breeder and registered maintainer (since 1974), decided to de-register the variety in 2004, shortly before their 30 years of Plant Breeder Rights were set to expire.

Linda had been relatively popular and organic farmers reportedly liked it due to its suitability for organic production.

Once de-registered however, the variety could no longer be legally grown or sold in Germany, yet no one else was able to re-register it and take on its maintenance without paying for expensive tests and a new application.

A compromise was reached, whereby Europlant agreed to grow and sell Linda while the necessary tests were undertaken, at which point, more open varietal registration was obtained. However, the case is illustrative of potential disruptions which improperly thought-out maintenance procedures could cause.

As Antonio Onorati, a founding member of the board of GRAIN - the Sustainable Agriculture NGO – states, “calling for the free circulation of seeds among small farmers in the EU, that’s also dangerous if there is no negotiated framework. That hides the potential to build a farmer seed industry. Establish rules? Yes. But we must develop rules that do not take us into conformist solutions” (GRAIN, 2005).

Of course, the necessity to dictate where varieties which stray from the commercial norm are to be cultivated is symptomatic of the EU bureaucracy’s stifling of diversity and adaptability. Such trends are to be expected with such centralised decision-making structures (Siedentop, 2002). What is more worrying, however, is that the purported giving with one hand⁶ may be, in fact, consciously designed to take with the other, thereby clamping down on freedom of choice and the marketing of heritage crop varieties at a time when we see a simultaneous move towards increased intellectual property regulations on seeds in Europe. This flagrantly goes against the open market ethos of the EU, and is a legal development whose implementation must be very closely monitored.

References:

- DAFF (2011) *Seed Certification*, Available from <http://www.agriculture.gov.ie/farmingsectors/crops/seedcertification/> [Accessed 06/04/11]
- DEFRA (2005) *Guide to National Listing of Varieties of Agricultural and Vegetable Crops in the UK*, Available from www.defra.gov.uk
- GRAIN (2005) *Collective rights over farmers’ seeds in Italy*, Seedling, July 2005 Issue
- Kastler, G. (2005) *Seed Laws in Europe: Locking Farmers Out*, Seedling, July 2005 Issue, GRAIN
- Irish Statute Book (2009) *SI No. 431/2009 – European Communities (Marketing of Seeds) Regulations 2009*, Available at <http://www.irishstatutebook.ie/2009/en/si/0431.html>
- Scottish Government (2010) *Consultation on the Transposition of Commission Directive 2009/145/EC on Amateur and Conservation Varieties of Vegetables Seed*, Available at <http://www.scotland.gov.uk/Publications/2010/08/12173149/2>
- Siedentop, L. (2002) *Democracy In Europe*, New York: Columbia University Press

⁶ I.e. the use of promising language regarding the protection of conservation varieties.