



Brussels, 26.9.2019
COM(2019) 428 final

2019/0201 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the Eighth Session of the
Governing Body of the International Treaty on Plant Genetic Resources for Food and
Agriculture**

EXPLANATORY MEMORANDUM

SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the eighth session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture in connection with the envisaged adoption of a revised Standard Material Transfer Agreement (SMTA) and amendment to Annex I to the Treaty concerning the expansion of coverage of the Multilateral System of Access and Benefit-sharing (MLS).

1. CONTEXT OF THE PROPOSAL

- **The International Treaty on Plant Genetic Resources for Food and Agriculture**

The International Treaty on Plant Genetic Resources for Food and Agriculture ('the Agreement') aims at establishing a global system to provide farmers, plant breeders and scientists with access to plant genetic materials, ensuring that recipients share benefits they derive from the use of these genetic materials and recognizing the enormous contribution of farmers to the diversity of crops that feed the world. The Agreement entered into force on 29 June 2004.

The European Union and all its Member States are party to the Agreement¹.

- **The Governing Body**

The Governing Body is composed of representatives of all Contracting Parties and has as a main objective to promote the full implementation of the Treaty, including the provision of policy guidance on the implementation of the Treaty.

The Governing Body holds regular sessions at least once every two years. The decisions are taken by consensus unless it is decided (by consensus) to employ another method to arrive at decisions on certain measures. Consensus is always required for amendments of the Treaty and its annexes. Each Contracting Party has one vote and may be represented at the sessions of the Governing Body by a single delegate, who may be accompanied by an alternate, experts and advisers. It is necessary to have a quorum, which is constituted by the majority of delegates.

Coordinated positions are established in a Council Working Party before each Governing Body and details of these positions are adjusted on the spot if needed. For each Governing Body a declaration of voting rights is adopted.

- **The envisaged act of the Governing Body**

On 11-16 November 2019, during its eighth session, the Governing Body is to adopt a resolution regarding the Standard Material Transfer Agreement, the Multilateral System of Access and Benefit-sharing and Annex I to the Agreement ('the envisaged act').

The purpose of the envisaged act is to revise the SMTA, as referred to in Article 12.4 of the Agreement, and amend Annex I to the same Agreement in order to expand the coverage of the MSA, as referred to in Article 10 of the Agreement, on the plant genetic resources for food and agriculture listed in that Annex.

¹ Council Decision 2004/869/EC of 24 February 2004 concerning the conclusion, on behalf of the European Community, of the International Treaty on Plant Genetic Resources for Food and Agriculture (OJ L 378, 23.12.2004, p. 1–2).

Article 23 of the Agreement provides that amendments of the Treaty shall be adopted by consensus of the Contracting Parties present at the session of the Governing Body and shall come into force among Contracting Parties having ratified, accepted or approved it on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by two-thirds of the Contracting Parties. According to Article 24.2 of the Agreement Article 23 of that Agreement shall apply to the amendment of annexes.

The envisaged act will become binding on the parties in accordance with Articles 4 of the Agreement which provides that each Contracting Party shall ensure the conformity of its laws, regulations and procedures with its obligations as provided in the Agreement.

2. POSITION TO BE TAKEN ON THE UNION'S BEHALF

In its fifth session in 2013, the Governing Body adopted Resolution 2/2013 establishing an Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing, with the task to develop a range of measures that will (a) increase user-based payments and contributions to the Benefit-sharing Fund (BSF) in a sustainable and predictable long-term manner, and (b) enhance the functioning of the MLS by additional measures.

In Resolution 2/2017, the Working Group was requested to elaborate criteria and options for possible adaptation of the coverage of the MLS, coming with a package of measures to enhance the MLS: 1) a revised SMTA, with special emphasis on the Subscription System; (2) an amendment of Annex I of the International Treaty to expand the coverage of the MLS.

The Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing agreed during its 9th meeting (17-21 June 2019) on a proposal for a package of measures that simultaneously adopts the revised SMTA and the amendment of Annex 1, which will be presented to the eighth session of the Governing Body for discussion and adoption.

The proposed revision of the SMTA consists in requiring mandatory payment from recipients of plant genetic resource for food and agriculture under the Multilateral System with the aim to develop new varieties to support a sustainable income to the BSF. The mandatory payments are to be implemented by a subscription system based on a percentage of the yearly turnover from plant genetic resources for food and agriculture. This system is to be complemented by a single-access option for occasional users of the MLS.

The proposed amendment of Annex I to the Agreement is linked to the revision of the SMTA and consists in substantive extension of this Annex, allowing broader access to plant genetic resource for food and agriculture.

The Union should therefore support this proposal because it is in line with the Union's position. It is therefore necessary for the Council to take a decision for the purpose of establishing the position to be adopted on behalf of the Union with a view to the eighth session of the Governing Body with regard to the proposal for an amendment.

The proposal for amendment will not require a change of existing Union law.

3. LEGAL BASIS

- **Procedural legal basis**

Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’².

Application to the present case

The Governing Body is a body set up by an agreement, namely the International Treaty on Plant Genetic Resources for Food and Agriculture.

The act which the Governing Body is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Articles 12.4, 23 and 24.2 of the International Treaty on Plant Genetic Resources for Food and Agriculture.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

- **Substantive legal basis**

Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union’s behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

Application to the present case

The envisaged act pursues objectives and has components in the area of agriculture and the protection of the environment. These elements of the envisaged act are inseparably linked without one being incidental to the other.

² Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Articles 43(2) TFEU and 192(1) TFEU.

- **Conclusion**

The legal basis of the proposed decision should be Articles 43(2) TFEU and 192(1) TFEU, in conjunction with Article 218(9) TFEU.

4. PUBLICATION OF THE ENVISAGED ACT

As the act of the Governing Body will amend Annex I to the Treaty and the standard material transfer agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Eighth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 43(2) and 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The International Treaty on Plant Genetic Resources for Food and Agriculture ('the Agreement') was concluded by the Union by Council Decision 2004/869/EC¹ and entered into force on 29 June 2004.
- (2) Pursuant to Articles 23 and 24.2 of the Agreement, the Governing Body may adopt amendments to the Agreement and its annexes.
- (3) The Governing Body, during its eighth session on 11-16 November 2019, is to adopt a resolution on the revision of the Standard Material Transfer Agreement (SMTA), which should establish mandatory payments of users of the Multilateral System of Access and Benefit-sharing (MLS). Such a resolution should be adopted on the basis of a proposal for amendments by the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing agreed during its 9th meeting on 17-21 June 2019.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Governing Body, as the resolution will be binding on the Union.
- (5) The Union should support the adoption of the resolution as it is in accordance with the Union's position. The revision of the SMTA and the amendment to Annex I to the Agreement to expand the MLS should contribute to achieving the main objectives of the Agreement, should provide for an incentive for conserving and using plant genetic resources of a wider range of species and should generate increased user-based income to invest in crop diversity leading to increased food security.
- (6) The revision of the SMTA and the amendment to Annex I to the Agreement to expand the MLS would not require any change in Union law,

¹ Council Decision 2004/869/EC of 24 February 2004 concerning the conclusion, on behalf of the European Community, of the International Treaty on Plant Genetic Resources for Food and Agriculture (OJ L 378, 23.12.2004, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the eighth session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture to be held between 11 and 16 November 2019, as regards the adoption of a revised Standard Material Transfer Agreement and the amendment to Annex I to that Treaty concerning the expansion of coverage of the Multilateral System of Access and Benefit-sharing shall be based on the draft revised Standard Material Transfer Agreement and the draft amendment to Annex I to the Treaty set out in Annexes 1 and 2 to this Decision.

Article 2

Where the position referred to in Article 1 is likely to be affected by new scientific or technical information presented after the adoption of this decision and before or during the eighth session of the Governing Body or where new proposals are made at that meeting on which there is not yet a Union position, the Union position shall be established by means of on the spot co-ordination before the Governing Body is called to decide on those proposals.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President.*