Court of Justice of the European Union
Attn. Judges of the 3rd Chamber
Rue du Fort Niedergrünewald
L - 2925 Luxembourg
Grand-Dûché du Luxembourg

By courrier, e-mail (ecj.registry@curia.europa.eu) and fax (+352.43.37.66)

Brussels, 27.02.2012

ESA_12.0094.1

Subject: Case C-59/11 - Baumaux / Kokopelli

Dear Madam,
Dear Sir,

I have the honour of addressing you on behalf of ESA.

ESA (www.euroseeds.org) is representing the European plant breeding and seed production sector with membership of more than 35 national seed associations (representing more than 7.000 businesses) and more than 60 direct company members. On average, the sector invests approximately 15% of its annual turnover of 7 billion EUR in further research and variety development, i.e. a sum of almost 1 billion EUR p.a. which makes the private plant breeding industry is one of the most R&D intensive sectors in Europe.

Following the recently published Opinion of the Advocate General Juliane Kokott in the case *Baumaux v. Kokopelli* (Case C-59/11), ESA considered it its duty to express its legal and socio-economic concerns about this Opinion. We took the liberty of sending you our comments in the form of an *Amicus Curiae* statement that we kindly ask the Court to take into account in its final deliberations.

Yours sincerely,

Garlich von Essen
Secretary General

ESA European Seed Association
Rue du Luxembourg 23/15 - B 1000 Brussels
Phone: +32 (0) 2 743 28 60 - E-mail: secretariat@euroseeds.org - Web: www.euroseeds.org

Court of Justice of the European Union
Case C-59 / 11
Baumaux vs. Kokopelli

ESA European Seed Association *Amicus Curiae* statement

1. In the questions referred to your Court by the Court of Appeal of Nancy, four Directives are identified: Directive 98/95, Directive 2002/53, Directive 2002/55 and Directive 2009/145. In her Opinion of 19 January 2012, Advocate General Kokott advised your Court to invalidate Article 3, §1 of Directive 2002/55[1] because of its alleged incompatibility with the principles of proportionality, freedom to conduct business, free movement of goods and non-discrimination. In doing so, the Advocate General expressed her opinion about the so-called "admission system" which is the object of the said provision and, more particularly, about the status of varieties that allegedly do not meet the admission criteria under that system and/or are subject to the derogation mechanism put in place by Directive 2009/145[2].

Without intending to repeat the unanimous comments provided in the submissions of Graines Baumaux, the Council, the Commission, France and Spain, ESA will set out below why it believes that the Advocate General has not come to the right conclusion.

2. As your Court knows, the "admission system" referred to above requires that all varieties whose seeds or propagating material may eventually go to market are subject to the same authorisation/admission process and requirements. Only seeds and propagating material that fulfil the criteria of Distinctness, Uniformity and Stability (DUS) and, as far as agricultural crops are concerned, have been duly tested on their Value for Cultivation and Use (VCU) will be admitted to the so-called Common Catalogue. Only these seeds can be marketed. This allows farmers and growers to compare these products and make an informed choice. Derogations from these requirements are specifically provided for by the EU seed marketing legislation in the area of conservation varieties and amateur vegetable varieties (Directives 2008/62 and 2009/145). These derogations specifically address the fact that such old varieties do not always fulfil the DUS criteria and are clearly less competitive as regards their VCU. At the same time, however, these varieties still need to comply with some standard requirements in order to allow farmers and growers to properly compare the varieties and to ascertain that the products marketed under specific names and thus expected to deliver certain qualities are indeed of the specified origin and quality. The identity and the quality of the seed and propagating material available in the EU were indeed the core objectives of the European legislator upon enactment of the contested Directives. These

[1] From the outset, ESA wishes to point out that it is remarkable that the Advocate General has declared Article 3 of Directive 2002/55 invalid, but suggests to leave Article 3 of Directive 2002/53 untouched. Although ESA of course agrees that Article 3 of this latter Directive (just as that of the former) is valid, it is clear that, despite the slight difference in wording, both Directives provide for the same admission system (see recitals 6 and 11 of Directive 2002/53 and recitals 7 and 12 of Directive 2002/55). The differentiation based on the different wording of both Articles 3, as put forward by the Advocate General (§§ 120 and 123 of the Opinion), does therefore not seem to be correct.

[2] As your Court knows, Directive 2009/145 only concerns "vegetables seeds" (normally) falling under Directive 2002/55. Directive 2008/62 sets up an analogous derogation mechanism for "agriculture seed products" falling under Directive 2002/53, but it has not been identified in the prejudicial questions referred to your Court. For the sake of completeness, ESA's comments relate to all four abovementioned Directives, including Directive 2008/62 which has not directly been taken into consideration by the Advocate General in her Opinion. However, ESA will not refer to other directives regulating the seed marketing system since those are of no interest for the solution of the national proceedings within the framework of which your Court has been seized.

objectives, together with other related objectives, such as protection of the final consumer, free movement of seeds, optimisation of cultivated areas, and more environmentally friendly production, is recognised by the Advocate General (§§ 63-69 of her Opinion).

3. Nevertheless, from the outset, the Advocate General expresses her concerns about the alleged disappearance of traditional varieties and the regression of biodiversity which, according to her, would notably result from the very seed marketing system put in place by the contested Directives (§§ 1 to 4 of the Opinion). In ESA's opinion, the Advocate General's concerns about biodiversity are both factually and legally incorrect and can thus not be of such a nature as to offset the objectives set out above.

4. As to the facts, the Advocate General claims in her Opinion (at §1) that it is "*well known*" that less varieties[3] are being cultivated in Europe and that many "*traditional*" varieties are being lost or "*only*" maintained by gene banks. However, although this statement forms the basis for a large part of the Advocate General's Opinion, it is not substantiated by any verifiable facts. It is also not correct.

As to the number of varieties available, today, thanks to the mutual acceptance of nationally registered varieties via the *EU Common Catalogue of Plant Varieties* and the ensuing Common Market for seed, European farmers have the largest choice of varieties ever at their disposal. When the EU system started in the mid 1970s, the EU catalogues listed some 6.300 vegetable varieties and approx. 2600 agricultural ones. Today (December 2011), around 18.000 vegetable and 19.000 agricultural varieties are listed. For maize alone, some 4.000 varieties are listed from which farmers may choose. This shows that there is *more* choice, not less. Contrary to what the Advocate General contends, it is thus ESA's opinion that – based on the number of varieties listed on the EU Common Catalogues, their breeding pedigrees and thus genetic variability – data and experience prove that European farmers and growers are provided with the *widest possible choice* of planting material. The varieties marketed under the derogations specifically provided for traditional varieties and amateur varieties (Directives 2008/62 and 2009/145) complement this choice. This successful system must be maintained for the sake of both the competitiveness of the European agri-food chain and the sustainable use of biodiversity in breeding.

Moreover, it should be noted that as far as conservation of identity and of the genetic base of varieties is concerned, conservation in gene banks gives better guarantees than the conservation of varieties *in situ*.

5. In view of the foregoing, it is particularly questionable whether the Advocate General, upon assessing whether the "admission system" under Article 3, §1 of Directive 2002/55 is in line with the aforementioned principles of European law, has duly balanced all interests and objectives at stake. This does not appear to be the case. While the importance the Advocate General attaches to biodiversity is perfectly legitimate, the Advocate General, in her reasoning, seems to have equated the common good of biodiversity with the private commercial interests of Kokopelli. Indeed, the Advocate General, although expressing her concerns about the current state of biodiversity in the EU, does not establish that the legislator has not taken this objective into consideration upon enactment of the contested

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It must be noted that the Advocate General is considering biodiversity from an *interspecific* angle, i.e. the number of cultivated species. However, your Court will appreciate that the biodiversity *within each species* (i.e. *intraspecific* biodiversity) is very large and that this is precisely the result of the mandatory "D"- or distinctness-criterion in the "admission system".

Directives. The very existence of Directives 2009/145 and 2008/62 makes it furthermore clear that he has[4].

6. It goes without saying that the mere individual commercial interest of Kokopelli –who is a regular commercial entity, irrespective of its motivation- cannot simply offset the fundamental and general objectives pursued by the European legislator upon enacting the contested Directives. This is all the more so since, as already indicated, the Advocate General expressly recognizes the value of these objectives and acknowledges that they are met by the "admission system" (§§ 63 to 72 of the Opinion). Neither does the Advocate General claim that the "admission system" or the objectives achieved by it, are no longer relevant today. This is correct. Due to the fact that all varieties are authorised for marketing based on the same set of basic criteria (DUS), quality standards and respective testing protocols, the current EU seed marketing legislation provides for a high level of transparency and thus consumer information as well as a level playing field for fair competition of seed suppliers.

7. Given the acknowledgement by the Advocate General that the current "admission system" does meet the objectives envisaged by the European legislator, the Advocate General's conclusion that the "admission system" falls foul of the aforementioned principles of European law, is surprising. It is indeed difficult to understand how the Advocate General can first consider the *admission criteria* to be valid *per se* and to provide effective safeguards for several fundamental principles (§§66, 67 and 75 of the Opinion), to then find that the "admission system" of Article 3, §1 of Directive 2002/55 as such is not valid (§125). In ESA's opinion, as soon as the admission criteria are considered valid and useful, it should of course also be recognized that the "admission system" is valid and useful because this system aims at ensuring an effective upstream control of the admission criteria. In the absence of such a system, the admission criteria would lose their purpose and "raison d'être".

ESA believes that this inconsistency may be attributed to the fact that the objectives pursued by the contested Directives were not correctly balanced, as can be deduced from various parts of the Advocate General's Opinion.

8. Thus, after having recognized the value of the "admission system" (§§66, 67 and 75 of the Opinion), the Advocate General declares that "*the disadvantages of the prohibition of marketing seed of non-accepted varieties obviously outweigh its benefits*" (§94 of the Opinion). The Advocate General's finding in this respect seems to be primarily based on the fact that the admission system would "*limit*" ("*eingeschränkt*" in the original German text) economic operators and consumers whose first concern is allegedly not the level of productivity of agricultural products (§§82 and 83). However, this finding, which appears to be crucial in the Advocate-General's reasoning, can of course never be sufficient to conclude to the invalidity of the "admission system"[5].

[4] For the same of completeness, ESA reminds the Court that prior to Directives 2002/53 and 2002/55, the legislator had already adopted various provisions to ensure the use and conservation of non-admitted varieties (Articles 4.6, 20.2 and 21 of Directive 2002/53 and Articles 4.4, 44.2 and 48.1.b of Directive 2002/55). Directives 2009/145 and 2008/62 were subsequently introduced to make those provisions concrete.

[5] This skewed interpretation of the proportionality test by the Advocate General is all the more worrying here because she also uses the allegedly disproportionate character of the "admission system" to conclude that the "admission system" is allegedly contrary to the *other* principles of European law under examination (freedom to conduct business, see §§109 and 110; free movement of goods, see §114; non-discrimination, see §117). ESA's comments in this respect therefore apply to these other principles too.

Firstly, it should be emphasised that there is no such limitation to the extent that it would paralyze the economic operators and consumers referred to by the Advocate General. Not only can varieties also be applied for under the derogation mechanism of Directives 2009/145 and 2008/62, there are also various networks outside the commercial channels whose purpose is precisely to ensure that such varieties remain accessible and can still be freely cultivated, including by the consumer in his "own backyard" (§83 of the Opinion, "*in ihren eigenen Gärten*").

Secondly, the Advocate General does not claim that it would be *impossible* to cultivate material of non-admitted varieties. The mere fact that the admission system *limits* the cultivation of such varieties is not relevant in view of your Court's case law on proportionality. As reiterated by the Advocate General (§§ 60-61 of the Opinion) this established case law requires a rule to be *manifestly disproportionate* in order to fall foul of this fundamental principle. Given the fundamental objectives pursued by the "admission system", the limitation referred to by the Advocate General, can certainly not be considered as *manifestly disproportionate*. Neither Kokopelli, nor the Advocate General establish the existence of a higher interest or of a valid alternative for the existing "admission system" which could allow to conclude that the said system is manifestly disproportionate.

As already indicated, the only real other interest at stake in this case is the commercial interest of Kokopelli to try and bypass the legislative framework that is currently in place. It goes without saying that this (illegitimate) private interest is not higher than the public interest which is protected by the contested Directives.

As to possible alternatives, it is clear that the alternative suggested by Kokopelli and supported by the Advocate General, i.e. to establish a *labelling system*, is clearly not viable. As the Advocate General herself expressly acknowledges, a labelling system would not ensure that the required quality criteria are effectively respected since there will be no more control upstream. A labelling system will not provide the same guarantees as the "admission system" in view of the objectives pursued (see §§ 67 and 75 of the Opinion).

9. A further indication that the Advocate General has not duly taken into account the objectives of the contested Directives in her interpretation of the aforementioned principles of European law, is her contention that the current "admission system" is not necessary and therefore disproportionate because seed producers already have an incentive to keep on innovating because of the *plant variety rights* system (§91 of the Opinion). This only confirms ESA's concern that the Advocate General considers the current "admission system" as a sort of tool which exists only for the economic benefit of breeders only, rather than a carefully considered mechanism in the benefit of the farmers, the seed sector and the society as a whole. It goes without saying that the existence of plant variety rights does not make the admission system redundant. Although several of the admission criteria are similar to the criteria to obtain a plant variety right, the two regimes are fundamentally different as to the objectives pursued. Whereas, the regime of plant variety rights establishes private rights in the interest of the breeder of a new variety, the "admission system" serves the public interest, including that of the consumer. The existence of plant variety rights can therefore not be used in support of the argument that the current "admission system" is invalid.

10. In conclusion, ESA if of the opinion that the current EU legal framework does not unduly restrict, but rather enables fair access to the market. Its principal admission requirements define a minimum product and quality standard. Companies are free to (and in fact in some cases do) market seed with much higher standards and farmers and growers are free to demand such higher standards. Still, the basic admission requirements and

associated tests ensure that new varieties compete in a highly transparent manner with a maximum of independent, verified information supplied to consumers (i.e. farmers and growers) and that a basic minimum quality assurance is provided. Given that considerable time may lie between seed purchase and final harvest, and given the overall policy goals such as guaranteeing food security while preserving natural resources (sustainable intensification of farming), this basic quality assurance must not be jeopardized. As discussed, clearly defined derogations from these principal rules already apply to such varieties that, for specific reasons, may not comply with the general variety registration and seed marketing requirements (e.g. traditional varieties and amateur varieties).

11. A common market where the same rules apply to everyone and aim both at ensuring a certain standard of quality and identity of the marketed seeds (which contribute to the realization of most of the objectives pursued by the contested Directives) and at preserving biodiversity, is in the interest of all operators in the seed sector, from the seeds producer to the final consumer. An endorsement by your Court of the Advocate General's Opinion would greatly endanger the balance that the legislator has managed to establish between the interests and the objectives at stake.

In particular, the conclusion of the Advocate General's Opinion will have serious repercussions on small and medium sized enterprises. Europe's plant breeding sector is still characterised by a large number of such SMEs. E.g., in France, Germany, Hungary, Poland, Italy and Spain alone, there are more than 1.500 micro enterprises (less than 10 employees and less than 2 mio EUR turnover) and more than 400 small (between 10 and 50 employees and up to 10 mio EUR turnover) and medium sized (between 50 and 250 employees and up to 50 mio. EUR turnover) while there are only some 25 larger companies in these countries. It is in particular these SMEs that attach specific importance to the current variety registration and seed marketing system which subjects all varieties to the same minimum criteria and respective independent testing and control. This system successfully guarantees that farmers and growers are not only fully aware of the important characteristics of seed products, but also that this information is provided as a result of an independent (official) assessment based on a harmonised and controlled standard protocol. Without such a standard authorisation system and independent assessment and control, it is clear that specifically SMEs will lose an important element for their future success.

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