FSS in the EU and challenges in enforcing PVR

CPVO FSS Seminar, Tartu, Estonia
4 March 2020
1. About Euroseeds
2. Few words on the legal background
3. Rationale for FSS royalty collection
4. Some data on the importance of FSS
5. Collection systems in Europe
6. Challenges
ABOUT EUROSEEDS
Euroseeds: Who are we? What do we do?

- Non-profit association under Belgian law
- SINGLE voice of the European seed industry
- Representing and advocating for the interests of the European seed industry towards:
  - European institutions (EC, EP, Council, CPVO)
  - International organizations (e.g.: UPOV, CBD, FAO, OECD, ISTA etc.)
  - Other stakeholders in the agri-food chain and other related sectors
- In all seed/plant breeding related matters
What crops are we dealing with?

- **39%** Cereals and Pulses
- **26%** Maize
- **14%** Seed Potatoes
- **11%** Vegetables
- **4%** Oil and Fibre Crops
- **3%** Sugar Beet
- **3%** Grasses

EU Seed Market Key Facts and Figures
Who are the members?

- 38 national seed associations
  (Euroseeds Association Members)
- 40 direct company members
  (Euroseeds Individual Members)
- 29 associate company members
  (Euroseeds Associate Members)
European seed sector in terms of value:

- **Seed market** value in the EU € 10 bn

- **Farm gate value** of agricultural products in the EU > € 100 bn

- **Processed agricultural products** value in the EU > € 1000 bn
Results of plant breeding

- **3,500 new varieties** authorized for marketing within the European Union each year

- **42,000 different varieties** of agricultural and vegetable species are available to farmers in the European Union
The investment behind

- **Seed sector employment**: about 52,000

- **Seed sector annual R&D spending**: up to 20% (of turnover)

- **R&D stations** in the seed sector: 750
A few words on the legal background
The legal framework

3 levels:

- **International level:** UPOV Convention
  
  Article 15(2) optional exception to the breeder’s right allowing farmers to use for propagating purposes the product of the harvest they obtained by planting the protected variety + Recommendation to Article 15(2) referring to “common practice”

- **EU level:** Article 14 of Regulation 2100/94 + Implementing Regulation 1768/95

- **National level:** national PVP laws + general rules on IP enforcement
  
  - sometimes better enforcement possibilities under national law
  
  - Euroseeds collects information on national FSS provisions
The legal framework

Justification for the derogation:

- Safeguarding agricultural production

Cornerstones of the FSS exception:

- Safeguarding the legitimate interests of the breeder and the farmer
- Obligation of farmers to provide information on FSS use
- Obligation of farmers to pay an equitable remuneration
The legal framework

Case law:
- Rather homogenous line of case law from CJEU
- Main issue dealt with: information obligation of farmers & seed processors
  - Breeders need a “clue” to be able to ask for information
  - Makes practical enforcement cumbersome

Cases:
- C-305/00 Schulin
- C-182/01 Jäger
- C-336/02 Brangewitz
- C-7-9/05 Deppe
- C-242/14 Vogel
- C-239/18 Freistaat Thüringen

There is also national case law on FSS:
- Euroseeds collects such case law
- Currently cases from DE, FR, NL, BE, SW, ES
THE RATIONALE FOR COLLECTING REMUNERATION ON FSS

Modern plant breeding is a time-consuming and costly endeavour. Plant breeders invest up to 20% of their annual turnover into the development of new varieties, which is higher than other industry sectors.

Investing today for tomorrow’s innovation

Depending on the crops, it can take a plant breeder 6 to 30 years to bring a new variety to market, delivering benefits to farmers and society of higher yield, pest and disease resistance, and use quality, better nutrition and environmental resilience. The breeder must look into the future to predict what farmers and society will need in 10 years’ time and beyond and target his investment to give farmers the innovation they need.

(source: https://iij.sciencesocieties.org/publications/ijj/articles/60/Supplement_15-S-88)
Why do we need PVP?

- Products of plant breeding are of HIGH VALUE
- Future R&D investments to improve on yield & respond to new challenges require incentives
- IP provides this → allows a fair return on investment
Why is it important to pay FSS remuneration?

Variety = investment

Plant breeder developing a new variety
Farmer using certified seed
Farmer using farm saved seed

Return on investment

(source: https://dl.sciencesocieties.org/publications/cs/articles/50/Supplement_1/S-85)
SOME STATISTICS ON FSS USE
Statistics on the use of FSS

Euroseeds collects statistics par country through its national seed association members

- Reliable data available for harvest years 2016, 2017, 2018
- Have a picture on the situation and be able to identify trends
- Data on approx. 15 countries
Winter wheat - Area sown by FSS vs. total area sown per country (2016-2018)
Potato – Area sown by CS/FSS vs. total area sown per country (2016-2018)
Country examples – Poland all crops CS/FSS/total area sown (2016-2018)
Country examples – Germany all crops CS/FSS/total area sown (2016-2018)
Country examples – Spain all crops CS/FSS/total area sown (2016-2018)
Country examples – UK all crops CS/FSS/total area sown (2016-2018)
Country examples – Sweden all crops CS/FSS/total area sown (2016-2018)
Area sown by FSS – all countries & crops (2016-2018)
COLLECTION SYSTEMS IN EUROPE
National FSS royalty collection systems

- Euroseeds collects information on national FSS royalty collection systems through yearly survey
- Currently detailed information available on 15 countries
- In cereals, it is known that systems are in place in:
  IE, UK, ES, FR, BE, NL, DK, FI, SW, PL, DE, HU, SK, CZ, EE, LT, LV
- In potatoes, it is known that systems exist in:
  UK, FR, BE, NL, DK, FI, SW, PL, DE, HU, SK, CZ, EE, LT, LV
FSS Royalty Collection Systems
Cereals

- System is place
- System with difficulties
- Discussions are ongoing or have taken place
FSS Royalty Collection Systems
Potatoes

- System is place
- System with difficulties
- Discussions are ongoing or have taken place

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National FSS royalty collection systems

Various models exist:

- Who runs the system?
  - National seed/breeders’ association (mandated by breeders) – e.g.: NL, SW, FI etc.
  - Separate entity founded and mandated by right holders (Ltd or non-profit) – e.g.: HU, CZ, PL, DE etc.

- Is it based on an agreement?
  - Yes – e.g.: FI, SW, ES, FR, UK, BE etc.
  - No – e.g.: CZ, IE, DE, PL, HU etc.
National FSS royalty collection systems

Various models exist:

- System making use of Single Farm Payment Scheme – e.g.: FI, SW, DK
- System based on declarations from farmers – e.g.: CZ, HU, DE
- UK system – relying party on processors
- FR system – CVO (contribution volontaire obligatoire)
National FSS royalty collection systems

Some examples: System based on declarations from farmers (DE)

Farm Saved Seed Royalty Collection by STV (Farmers)

1st step: letter to farmer (info request), term: 8 weeks

2nd step: reminder (info request), term: 4 weeks

3rd step: reminder (info request), soliciot, term: 3 weeks

4th step: sue for information, soliciot

Cross checks: info by seed treatment dices + letter to farmers in case of divergences

Invoice, payment terms: 2 weeks

1st reminder, payment terms: 2 weeks

2nd reminder + dunning charge, soliciot, term: 2 weeks

Default summons + charges, soliciot

* When a request for information was presented with clues, failure to answer constitutes a contravention against the seed marketing legislation. In this case, the full license fee instead of farm saved seed royalties will be invoiced.
National FSS royalty collection systems

Some examples: French system - CVO
National FSS royalty collection systems

Some examples: UK system for combinable crops

- Covers wheat, barley, oats, field peas, field beans, oilseed rape, triticale, linseed, yellow lupins
- Based on agreement between BSPB & 3 NFUs
- Farmers have choice to pay (i) via FSS processors (based on tonnes) or (ii) directly to BSPB (based on ha) – 75-80% of FSS royalties collected through processors
- BSPB farmer database – declaration forms sent out 2/year
- Under UK law not providing information in declaration is criminal offence
- Extensive communication efforts: FAIR PLAY
CHALLENGES
National FSS royalty collection systems

Some challenges with regard to FSS royalty collection:

- Creating a system is not that easy
  - very political issue, much negotiation is needed – e.g.: Austria
  - situation different per crop, yields vary, many small farms, setting up a system is economically not viable – e.g.: Italy
- CJEU case law not making FSS enforcement easier – need for clues – bad atmosphere - leading to many court cases – e.g.: Germany
- Activity of mobile cleaners can make collection more difficult – renting machines – e.g.: Germany, Poland
- Political situation at national level – change of legislation – system almost destroyed – e.g.: Poland
- Movement of potato FSS between countries – border areas – e.g.: Belgium/France/Netherlands