1. Introduction:

The International Union for the Protection of New Plant Varieties adopted on March 19, 1991 the last revision of the UPOV CONVENTION, known as the “UPOV 91 ACT”. This Convention includes in its art.15 (2) an optional exception to the breeder’s Right.

(2) [Optional exception] Notwithstanding Article 14, (Scope of the Breeder’s Right), each Contracting party may, within reasonable limits and subject to safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii)

This article defines the scope of the possible optional exception and clearly establishes also the limits.

At the European Community : in 1994 the Community legislator has made use of the option included in the UPOV 91 Act in the framework of the preparation and adoption of the Council Regulation (EC) nº 2100/94 of 27 July 1994, known as the Basic Regulation, which has created the Community Plant Variety Protection system.

In the recitals of the Council Regulation it is mentioned that:

“Whereas, the exercise of Community plant variety rights must be subjected to restrictions laid down in provisions adopted in the public interest; Whereas this includes safeguarding agricultural production; whereas that purpose requires an authorization for farmers to use the product of the harvest for propagation under certain conditions”
The legal framework of the “farm saved seed” in the Community plant variety rights system is defined in:

1. Art. 14 of the Basic Regulation.

### 2. The agricultural exemption in the Basic Regulation:

Art. 14 of the Basic Regulation defines in the Community Plant variety Rights system the scope and the conditions of the “agricultural exemption” also known as “farm saved seed – semence de ferme - semilla de reempleo”.

**Full text of “Article 14”**

*Derogation from Community plant variety right*

1. Notwithstanding Article 13(2), and for the purposes of safeguarding agricultural production, farmers are authorized to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right.

3. The provisions of paragraph 1 shall only apply to agricultural plant species of:
   
   (a) Fodder plants:
   - *Cicer arietinum* L. - Chickpea milkvetch
   - *Lupinus luteus* L. - Yellow lupin
   - *Medicago sativa* L. - Lucerne
   - *Pisum sativum* L. (partim) - Field pea
   - *Trifolium alexandrinum* L. - Berseem/Egyptian clover
   - *Trifolium resupinatum* L. - Persian clover
   - *Vicia faba* - Field bean
   - *Vicia sativa* L. - Common vetch
   - and, in the case of Portugal, *Lolium multiflorum* lam - Italian rye-grass
   
   (b) Cereals:
   - *Avena sativa* - Oats
   - *Hordeum vulgare* L. - Barley
   - *Oryza sativa* L. - Rice
   - *Phalaris canariensis* L. - Canary grass
   - *Secale cereale* L. - Rye
   - *Triticosecale Wittm.* - Triticale
   - *Triticum aestivum* L. emend. *Fiori et Paol.* - Wheat
   - *Triticum durum* Desf. - Durum wheat
   - *Triticum spelta* L. - Spelt wheat
   
   (c) Potatoes:
   - *Solanum tuberosum* - Potatoes

   (d) Oil and fibre plants:
   - *Brassica napus* L. (partim) - Swede rape
   - *Brassica rapa* L. (partim) - Turnip rape
   - *Linum usitatissimum* - linseed with the exclusion of flax.
3. Conditions to give effect to the derogation provided for in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer, shall be established, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:
- there shall be no quantitative restriction of the level of the farmer's holding to the extent necessary for the requirements of the holding,
- the product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him, without prejudice to certain restrictions which Member States may establish regarding the organization of the processing of the said product of the harvest, in particular in order to ensure identity of the product entered for processing with that resulting from processing,
- small farmers shall not be required to pay any remuneration to the holder; small farmers shall be considered to be:
  - in the case of those of the plant species referred to in paragraph 2 of this Article to which Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (4) applies, farmers who do not grow plants on an area bigger than the area which would be needed to produce 92 tonnes of cereals; for the calculation of the area, Article 8 (2) of the aforesaid Regulation shall apply,
  - in the case of other plant species referred to in paragraph 2 of this Article, farmers who meet comparable appropriate criteria,
- other farmers shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area; the actual level of this equitable remuneration may be subject to variation over time, taking into account the extent to which use will be made of the derogation provided for in paragraph 1 in respect of the variety concerned,
- monitoring compliance with the provisions of this Article or the provisions adopted pursuant to this Article shall be a matter of exclusive responsibility of holders; in organizing that monitoring, they may not provide for assistance from official bodies,
- relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services; relevant information may equally be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs. These provisions are without prejudice, in respect of personal data, to Community and national legislation on the protection of individuals with regard to the processing and free movement of personal data.”

The agricultural exemption, as defined in art.14, allows farmers to use the product of their harvest with regard to community protected varieties, as propagating material under strict and defined conditions.

The derogation does not apply to all protected plant species, only to certain species belonging to the **agricultural** plant groups listed below:
- fodder plants: 8 species for the entire Community and an additional one for Portugal;
- cereals: 9 species;
- potatoes: 1 species;
- oil and fibre plants: 3 species (with the exclusion of flax);

In other words, a total of 21 species for the entire Community, and 22 for Portugal, are covered by the derogation on the use of farm-saved seed.

Consequently the agricultural exemption does not apply to protected varieties belonging to the vegetables, fruits and ornamental sectors.

The conditions for giving effect to this derogation, and to safeguard the legitimate interests of the breeder and of the farmer, are based on the following criteria:

- There shall be no quantitative restriction of the level of the farmer’s holding to the extent necessary for the requirements of the holding.

- The product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him (without prejudice to certain restrictions which Member States may establish regarding the organisation and processing of the said product of the harvest, in particular in order to ensure identity of the product entered for processing with that resulting from processing).

- Farmers using farm-saved seed shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area.

- ‘Small farmers’ as defined in Article 14 of the Basic Regulation shall not be required to pay any remuneration to the holder of a protected plant variety.

- Monitoring compliance with this derogation shall be a matter of exclusive responsibility of holders.
Relevant information may also be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs.

These provisions are without prejudice, in respect of personal data, to Community and national legislation on the protection of individuals with regard to the processing and free movement of personal data.

The detailed conditions to give effect to the agricultural exemption were established in implementing rules adopted by Commission Regulation.


It must be noted that if these conditions are harmonised at Community level, the details relating to the exercise of the rights, the use of the authorisations or to the fulfilment of the obligations of farmers using the farm-saved seed, of processors and of holders, are governed by the law of the Member State, including its international private law, unless otherwise specified in the Regulation.

The implementing Regulation specifies in particular the obligations of farmers, processors and holders.

The different chapters deal with very relevant aspects of the farm saved seed derogation as:

- The holder and the farmer.
- Remuneration.
- Information to be provided by: farmers, processors, right holders and official bodies.
- Monitoring by the holder.
- Infringement and special law claims.
3.1. - Remuneration to be paid by the farmer

The level of equitable remuneration to be paid to the holder may be specified in a contract between the holder and the farmer concerned.

Where the level of remuneration is fixed in agreements between organisations of holders and of farmers, with or without the participation of organisations of processors based in the Community, whether at Community, national or regional level, the agreed levels serve as guidelines for setting the remuneration to be paid in the region and for the species concerned, provided such associated levels and conditions have been:

- notified in writing to the Commission, and
- published in the ‘Official Gazette’ by the Community Plant Variety Office.

To date, the Office has published only two agreements, one effective in Germany, the other in Sweden.

If no contract has been concluded, the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area.

When no agreement is applicable, the remuneration to be paid is 50% of the amounts due for the licensed production of propagating material, to which certain variations are nevertheless possible (see Article 5(5) and (6) of Regulation 1768/95 as amended by Regulation 2605/98).

The farmer’s individual obligation to pay the equitable remuneration begins when he actually uses the product of the harvest for propagation in the field: the holder may then determine the date and details of the payment. Nonetheless, payment is not due before the date on which the obligation begins.

As for small farmers, who are exempted from paying fees to the holders, and in the event of disputes, it is the farmers themselves who must provide proof that they meet the conditions required of small farmers.
Ruling of the European Court of Justice: the case Saatgut-Treuhandverwaltungsgesellschaft ('STV') v. Deppe/Hennings/Lübbe C-7/05, C-8/05 and C-9/05, 8 June 2006, concerns the interpretation of Article 5 of Regulation 1768/95 on the remuneration for the use of Farm Saved Seed. One of the main questions was how to determine the equitable remuneration to the holder, which, in the absence of a contract shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area. The court held that a level of 80 % was too much.

3.2. - Information to be provided by the farmer

The information to be provided by the farmer to the holder may be covered by a contract between the holder and the farmer concerned.

Where such contract has not been concluded or does not apply, the farmer shall be required to provide the holder, at the latter’s request, with a statement of the information required by the holder and covered in Article 8 of the implementing Regulation.

A request which has not been made directly to the farmer concerned shall be considered to comply with Community law if it is sent to farmers through organisations of farmers or cooperatives, concerning all farmers who are members of such organisation or cooperative, or processors who have provided such services to the farmers concerned pursuant to the second indent of Article 8(5) of the implementing Regulation. For a request made through organisations, cooperatives and processors, it is not necessary to indicate each farmer. The organisations, cooperatives, processors or suppliers may be authorised by the farmers concerned to forward the required information to the holder.

The holder’s right to request information does have its limits, however, as has been shown by the following rulings of the European Court of Justice:

- the judgment of 10 April 2003 in the Schulin case (C-305/00) established that the holder may only be authorised to request information from a farmer if he has some indication that this farmer has used seed of a protected variety.
- the judgment of 11 March 2004 in the Jäger preliminary ruling (case C-182/01) confirmed the Schulin ruling, among other things;

3.3. - Information to be provided by the processor

The details of information to be provided by the processor to the holder may be covered by a contract between the holder and the processor concerned.

Where such contract has not been concluded or does not apply, the processor shall be required to provide the holder, at the latter’s request, with a statement of the information required by the holder and covered in Article 9 of the implementing Regulation.

The judgment of 14 October 2004 in the Brangewitz case (C-336/02) established that a processor is required to provide the holder with the necessary information concerning not only farmers for whom the holder has an indication that the supplier has carried out or plans to carry out such operations, but also all the other farmers for whom the supplier has processed or plans to process the product of the harvest obtained.

3.4. - Information to be provided by the holder

Details of the information to be provided by the holder to the farmer may be covered by a contract between the holder and the farmer concerned.

Where such contract has not been concluded or does not apply, the holder shall be required to provide the farmer, at the latter’s request, with a statement of the information required by the holder and covered in Article 10 of the implementing Regulation.

3.5. - Information provided by official bodies

A request for information on the actual use of material, by planting, of specific species or varieties, or on the results of such use, which a holder addresses to an official body, must be made in writing.

The official body may only withhold the requested information in the following cases:

- if it is not involved in the monitoring of agricultural production,
- if it is not allowed, under Community rules or rules of Member States governing the general discretion applicable in respect of
activities of official bodies, to provide such information to holders,

- if it is under its discretion, pursuant to the Community legislation or the legislation of Member States under which the information has been collected, to withhold such information,

- if the requested information is not or no longer available,

- if such information cannot be obtained through ordinary performance of the tasks of the official body,

- if such information can only be obtained with additional burden or costs, or such information relates specifically to material which does not belong to varieties of the holder.

If the official body decides to refuse to give the requested information, it shall inform the holder requesting the information in writing and indicate the reason for this decision.

3.6. - Other obligations for processors

Aside from the technical obligations applicable in the event of processing outside the farmer’s holding, the Member States can impose qualification requirements upon processors.

3.7. - Monitoring by the title holder

Monitoring compliance with this derogation shall be a matter of exclusive responsibility of holders.

- Monitoring of farmers: corresponds to the holder to monitor compliance with the provisions concerning the fulfilment of the farmer’s obligations, the farmer must provide evidence supporting his statements of information at the request of the holder.

- Monitoring of processors: the holder has to monitor compliance with the provisions of the Basic Regulation concerning the fulfilment of the obligations of the processor, the farmer must provide evidence supporting his statements of information at the request of the holder.
• Manner of monitoring: the monitoring shall be carried out by the holder. He may make appropriate agreements to ensure assistance from organisations of farmers, processors, cooperatives or other circles of the agricultural community.

Conditions relating to the methods of monitoring laid down in agreements between organisations of holders and of farmers or processors based in the Community at Community, national, regional or local level respectively, shall be used as guidelines, if these agreements have been notified to the Commission in writing by authorised representatives of the relevant organisations and published in the “Official Gazette of the Community Plant Variety Office”.

4. **Infringement**

The holder may invoke the rights conferred by the Community plant variety right against a person who contravenes any of the conditions or limitations attached to the derogation to the Community plant variety rights in the case of the use of farm-saved seed:

- A person who does not fulfil his obligations (pursuant to Article 14(3) of the Basic Regulation) may be sued by the holder.

- If held liable, the infringer may be ordered by the Court to stop the infringement and to pay damages.

---------------------

The Community rules on farm saved seed presented in this document are the result of laborious work of the legislator in his effort to find a balance. These rules are sometimes very detailed and very technical and the European Court of Justice needed to interpret them.

Angers, 12.02.2007