



ESA

European Seed Association

Farm saved seed in the European Union *Point of view of breeders*

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Farm saved seed in the EU

1. Introduction – some words about ESA
2. IPR infringements
 - precondition of infringement
 - examples of infringements and other common acts of unfair competition
3. FSS in practice
 - legislative framework of FSS and underlying principles
 - overview of royalty collection systems in the EU
 - some interesting examples of systems in Member States
4. Two very important elements of collection systems
 - obligation to give information
 - structure of agricultural holdings – the ‘small farmer’ exception
5. Conclusions





1. European Seed Association

About ESA:

ESA is the voice of the European seed industry, representing the interests of those active in research, breeding, production and marketing of seeds of agricultural, horticultural and ornamental plant species.

ESA's mission is to work for:

- effective protection of intellectual property rights relating to plants and seeds;
- fair and proportionate regulation of the European seed industry;
- freedom of choice for customers (farmers, growers, industry, consumers) in supplying seeds as a result of innovative, diverse technologies and production methods;





1. European Seed Association

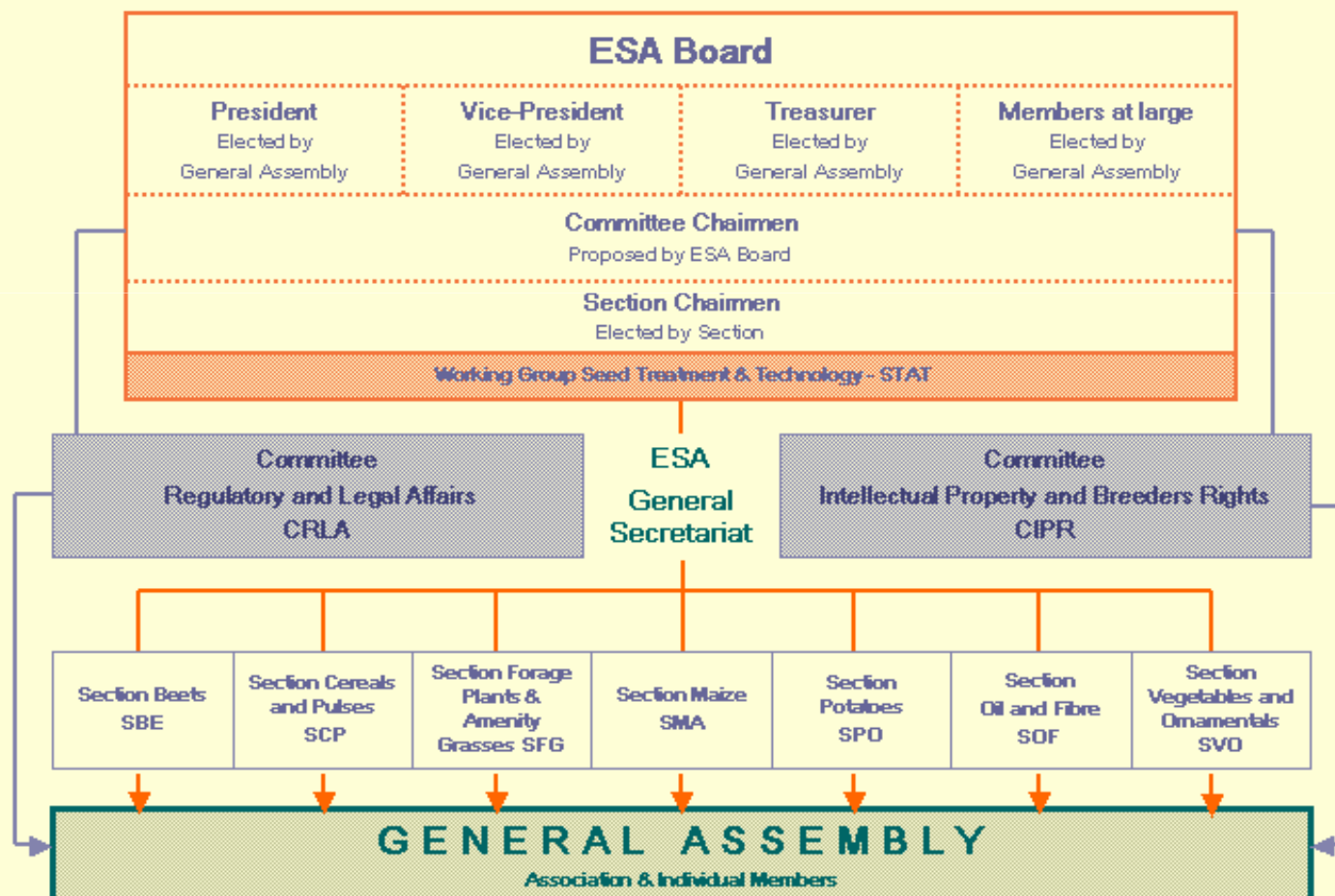
ESA members:

- Association members:
 - 33 National Seed Associations – 24 countries
- Individual Members:
 - 50+ Individual Seed Companies
- Associate Members:
 - 6 companies



1. European Seed Association

ESA Organigram



1. European Seed Industry

Key facts and figures:

Item	Value
Seed sales in EU 27	€ 6.9 – 7.3 billion
Employment	> 30 000
Annual R&D Spending	15 – 20 % (of turnover)
R&D Stations	600
R&D Employees	> 5 000



2. IPR Infringements

Precondition of infringement: to have a right
Protection (national or EU) → Right → Infringement

Infringement:

Acts requiring authorisation of the right holder are listed in legislation
(e.g.: sales, offering for sales, reproduction, import, export etc.)



If accomplished without authorisation of the right holder



Infringement

(except in cases where an exemption applies)



3. Farm Saved Seed

Farm Saved Seed:

- use of farm saved seed → illegal reproduction (if the variety is protected)
- except in the case of crops which are exempted under the 'agricultural exemption'

Other acts of unfair competition (examples):

- Sales of uncertified seed (brown bagging)
- Sales of varieties not listed on the Common catalogue



3. Farm Saved Seed – legal framework

UPOV 1991 Convention:

- Art. 15(2) provides for an optional exception to the breeder's right to allow farmers to use for propagating purposes the product of the harvest they obtained by planting the protected variety

National PVP laws:

- On the basis of the UPOV convention national PVP laws provide for an exception for those varieties listed in that national law

EU law:

- Art. 14 of the Basic Regulation provides for an 'agricultural exemption' in respect of certain species of fodder plants, cereals, potatoes and oil and fibre plants
- Implementing Regulation (1768/95) lays down details of the application of the 'agricultural exemption'
- ECJ case law – interpretation of the current provisions (cases C-305/00 *Schulin*, C-182/01 *Jäger*, C-336/02 *Brangewitz* and C-7 to 9/05 *Deppe*)



3. Farm Saved Seed – governing principles

Justification and main purpose of IPRs

- Provide a framework (granting of an exclusive right for innovation) which allows for obtaining a fair return of the investments put in that innovation
- IP protection and royalty collection on FSS use is essential in order to assure further R&D

Justification of the ‘agricultural exemption’

- Safeguarding agricultural production

Cornerstones of the ‘agricultural exemption’

- Safeguarding the legitimate interests of the breeder and the farmer
- Obligation to provide information
- Obligation to pay an equitable remuneration



Farm Saved Seed in practice

Systems for royalty collection on FSS use

- Usually two sets of rules apply – national PBR and CPBR but collection is organised in one system → simple
- Cereals: 16 of 27 Member States – UK, IE, FI, SW, EE, PL, SK, CZ, HU, DE, NL, BE, FR, DK, LT, LV
- Potatoes: 13 of 27 Member States – UK, SW, FI, EE, NL, DE, CZ, DK, HU, SK, LT, LV, BE
- Set-up and effectiveness of the national collection systems differ on a wide range (see findings of the study of Mr. Rutz)



Royalty collection on FSS in place for cereals

- System functioning relatively well
- System just started
- System not functioning
- Difficulties
- First discussions

The map shows the following status for various European countries:

- System functioning relatively well (Dark Green):** Ireland, United Kingdom, France (northern and eastern parts), Germany, Poland, Czech Republic, Slovakia, Austria, Hungary, Romania, Bulgaria, Greece, Turkey, and parts of Spain and Italy.
- System just started (Light Green):** Portugal, Spain (central and southern parts), Italy (central and southern parts), and parts of France and Germany.
- System not functioning (Red):** A small area in western France.
- Difficulties (Orange):** A large area in central France.
- First discussions (Lightest Green):** No countries are currently shown in this category.

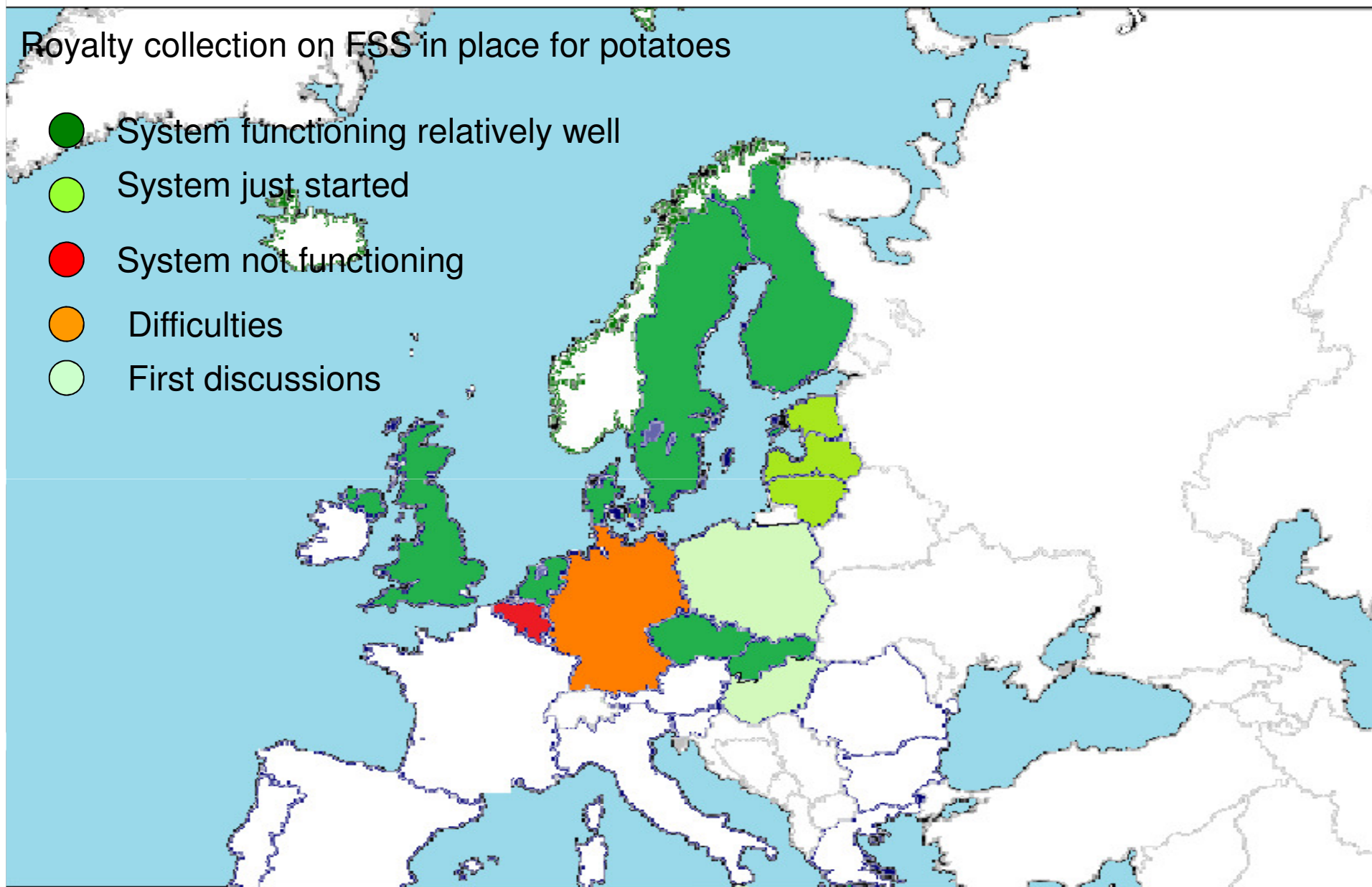
WHEAT ONLY

- System functioning relatively well
- System just started
- System not functioning
- Difficulties
- First discussions

WHEAT ONLY

Royalty collection on FSS in place for potatoes

- System functioning relatively well
- System just started
- System not functioning
- Difficulties
- First discussions



Farm Saved Seed Data – FSS use in %

Country (data for 2004 – ESA)	Winter wheat	Winter barley	Potatoes (2003 data - ESA)
Belgium	45	15	49
Czech Republic	50.2	48.1	43
Denmark	15	10	40
Germany	55	48	55
Estonia	85	85	23
Ireland	30	ND	40
France	47	30	46
Hungary	58	64	44
The Netherlands	34	23	39
Poland	88.6	92.6	90
Slovakia	53	54	42
Finland	84	ND	60
Sweden	27	39	52
United Kingdom	46	41	39

Farm Saved Seed in practice - NL model

Main features of the collection system:

- Collection carried out by Dutch seed association (Plantum NL)
- Covers both varieties protected by national PBR or CPBR but only for species listed in the Dutch seed law (only cereals and potatoes)
- Royalty level: potatoes 60%; cereals 65%
- Small farmers are not exempted by legislation – in practice not invoiced
- System considered to be relatively effective



Farm Saved Seed in practice – NL model

Obligation to provide information:

- Farmers are allowed to use FSS only if they inform the breeders about this use before 1st May
- To these farmers questionnaires are sent out by Plantum NL – can send back or fill in via Internet
- Declare varieties and territory
- Farmers are quite collaborative

Own holding:

Limited concept - definition of own company



Farm Saved Seed in practice – UK model

Main features of the collection system:

- System based on agreement between breeders and farmers union (cereals, pulses, oilseed rape) – for potatoes no agreement
- Intensive information campaign organised by BSPB – Fair Play
- Remuneration – flat rate per crop: 46-60% of certified rate
- Small farmers are exempted (EU definition) – 92 t = 18 ha
- Database of 19 000 farmers but not all + no official help
- System work in general quite well



Farm Saved Seed in practice – UK model Bag Tag

- This variety is protected by plant breeders' rights. By opening this bag or container in any way you are agreeing to the following conditions attached to the use of this protected variety:
 - You will provide information to the BSPB on any sales, use and plantings of certified seed
 - You will declare and pay royalties promptly to the BSPB if farm saved seed of this variety is used.
 - You will grant the BSPB access to records to audit/verify any use of farm saved seed
 - You will pass on the above contractual obligations to a new purchaser of this seed.
 - These conditions are set out in full on the breeders' website and in the conditions of sale attached to the seed sale invoice.



Farm Saved Seed in practice – ESA Bag Tag

Text developed by the ESA TF FSS and suggested for seed companies for use in their conditions of sales or as Bag Tag:

ATTENTION

This variety is protected by Plant Breeders' Rights. The use of this variety as Farm Saved Seed is subject to certain conditions including the obligation to declare and pay a royalty to the plant breeder. The procedures for declaration and payment differ from country to country. For further information contact Company "Y" or the National Seed Association in the country of use. Payments on Farm Saved Seed support continued investment and innovation in plant breeding.



Farm Saved Seed in practice – DE model

Main features of the system:

- Royalty collection organised within STV GmbH – breeders are stakeholders
- Agreement between breeders and farmers + further clauses to stimulate use of certified seed
- Remuneration: 30-80% of licence fee for certified seed
- Small farmers exempted by legislation
- Widely accepted system



Farm Saved Seed in practice – DE model

Agreement terminated by BDP in 2008 because:

- Non-disclosure practices by farmers (wrong declarations)
- Rulings of the ECJ in 2001, 2003 regarding the obligation of farmers to provide information and 2004 regarding processors



- Right holder needs to have an indication that the farmer used FSS → cannot ask information from all farmers
- ECJ suggests that farmer get this indication via distribution chain *but* this option does not work in practice



- System not effective – only 1/3 of potential FSS remuneration collected



Farm Saved Seed in practice – HU model a newly established system

Main features of the system:

- Royalty collection organised by an independent non-profit company – founded by 8 right holders who are stakeholders
- Other right holders contract with the company and give it a mandate for collection
- Covers both varieties protected by national PBR and CPBR
- Only those species are covered by the system for which the company is mandated by its stakeholders or other breeders
- Small farmers are exempted by legislation – for potato: 1 ha; for field crops: 20 ha
- Remuneration: 50% of the royalty fee for certified seed



Farm Saved Seed in practice – HU model a newly established system

Information obligation:

- Obligation by law to provide information on use of FSS and territory sown – only for those for which there is indication
- National authorities obliged to give information to the collection company – if they have the information; on request; on proof of right; upon payment of incurring costs
- No information received from authorities so in practice questionnaires sent out to all farmers → good return rate
- Intensive information campaign from collection company
- Legislation amended in May 2009 → System started in September 2009 → effectiveness to be seen



Three crucial elements of collection systems

➤ Three key elements of the systems of major importance:

- ✓ obligation for farmers and processors to provide information on FSS use
- ✓ definition of the notion of “own holding”
- ✓ structure of agricultural holdings in Member States → very different → can cause distortions in collection



Own holding

- Article 4(2) of Commission Regulation (EC) No. 1768/95:

“An ‘own holding’ within the meaning of Article 14 (1) of the basic Regulation shall be considered to be any holding or part thereof which the farmer actually exploits for plant growing, whether as his property or otherwise managed under his own responsibility and on his own account, in particular in the case of leaseholds. “

- Important to safeguard the legitimate interests of the breeders and farmers



Small Farmer

EU definition of small farmers:

- 92 tons for cereals
- 185 tons for potatoes
- Most Member States follow the EU definition but they are free to apply different definitions



Structure of agricultural holdings

Country (Eurostat 2009)	No. of holdings	Average size (ha)	< 5 (%)	5-50 (%)	> 50 (%)
Belgium	48 000	28.6	25.4	56.3	18.3
Czech Republic	39 400	89.3	50.4	32.9	16.7
Denmark	44 600	59.7	3.7	62.1	34.2
Germany	370 500	45.7	22.6	54.4	23.0
Estonia	23 300	38.9	36.1	52.8	11.1
Ireland	128 200	32.3	6.5	75.8	17.7
France	527 400	52.1	24.7	37.9	37.4
Hungary	626 300	6.8	89.4	8.7	1.9
The Netherlands	76 700	24.9	28.0	57.5	14.5
Poland	2 391 000	6.5	68.5	30.5	1.0
Slovakia	69 000	28.1	87.2	8.6	4.2
Finland	68 200	33.6	9.7	69.6	20.7
Sweden	72 600	42.9	15.0	60.3	24.7
United Kingdom	299 800	53.8	39.8	35.5	24.7

Small Farmer

Assessment:

- Due to the differences in agricultural structure number of small farmers differs on a wide range (if EU-like definition applies) → *potential impact on effectiveness*
- No reasons to maintain such an exemption from royalty payment → *unfair*
- In lack of legislative exemption in practice no invoicing would take place → *not economic*
- If upheld for political reasons → *what definition of 'small farmer' should be adopted?*



Conclusions

1. Royalty collection systems are in place

- in ~ 50% of the Member States for cereals and ~ 30% for potatoes
- Some systems are effective others are less effective
- New systems are being established (like HU) but still half of the Member States does not have any royalty collection

2. EU legislation has some important shortcomings

- Obligation to provide information for right holders
- Exemption of small farmers

3. Breeders need to protect their varieties!

- No protection → no rights → no enforcement



THANK YOU FOR YOUR ATTENTION!

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