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POSITION

ON FARM SAVED SEED

European agriculture needs continuous innovation in plant breeding and crop science as a high strategic priority to achieve sustainable increase in agricultural productivity. This is necessary to meet the demands of the increasing population, food security and to maintain economic competitiveness of European agriculture. The most important source of innovation and development to satisfy these demands is through research and genetic improvement delivered through the plant breeding industry. An effective system of IP protection including Plant Breeder's Rights is essential for sustained investment and delivery of improved varieties to farmers and benefits to society as a whole.

ESA understands the farm saved seed exemption provided for as the 'Agricultural Exemption' as allowing farmers to use on their own holding the product of their harvest of certain well defined species under certain conditions and obliging those farmers to inform the rights holder comprehensively about the use of the exemption and to pay an equitable remuneration to him for the use of his protected variety. The exemption from the breeder's right was originally intended to safeguard agricultural production.

In principle, the farm saved seed exemption as provided in Regulation (EC) No. 2100/94 and its implementing regulation (EC) No. 1768/95 as well as in Directive 98/44/EC has to date failed to achieve the above in the following respects and therefore should be abolished:

1. The justification for the exemption based on the safeguarding of agricultural production has become obsolete. ESA understands the notion of 'safeguarding agricultural production' as referring to a situation of shortage of production and availability of seeds and varieties for farmers and considers that for those purposes there is no need any more for farmers to save seeds.

2. Plant breeders all over Europe increasingly face severe difficulties in enforcing their rights as regards the use of farm saved seed by farmers. This is substantially due to the fact that several rulings of the European Court of Justice (e.g.: Schulin, Brangewitz) have delivered an interpretation of the relevant EU provisions which led to the practical unenforceability of breeders' rights in that respect. Due in large part, to lack of enforcement possibilities to obtain information from farmers on the use of farm saved seed an effective farm saved seed payment collection system has not been achieved in most Member States.
3. The genetic progress in terms of yield increase in cereals is low compared to hybrid crops such as maize because breeders' income from certified seed and farm saved seed royalties does not allow for higher research expenditures and slows down innovation. The reduced innovation in crops where farm saved seed is allowed is also reflected by the fact that new breeding techniques that are used in non farm saved seed crops and that could accelerate the breeding of better performing varieties are not being applied to farm saved seed crops.
4. Seeds of crops falling under the farm saved seed regime are not effectively controlled in the EU Member States on diseases, pests and weeds. For tuber bearing species, such as potatoes, this can lead to the undesirable spread of soil and tuber borne diseases, which is contradictory to the spirit of the EU plant health regime.
5. The farm saved seed concept is applied in an uneven, non-harmonised way in the different Member States of the EU which at the end also leads to a distortion of competition.

Nevertheless, if for overriding political reasons, this exemption is maintained, the following principles must be observed:

1. The use of farm saved seed should only be allowed for species where it has been traditionally used. This is clearly underlined in the Recommendation of the UPOV Diplomatic Conference on Article 15(2) as attached to the UPOV 1991 Convention.
2. The use of farm saved seed should only be allowed for species for which effective remuneration systems can be implemented.

The legal basis for the collection of royalties under the 'agricultural exemption' requires urgent improvement. In this respect there is a need for the legislators to clearly put in place an unambiguous legal obligation for farmers, processors and other parties (such as seed traders, warehouse owners etc.) of the (seed) supply chain to supply relevant information as to the use of farm saved seed to the breeders, without a requirement for prior evidence of use being obtained by the holder of rights.

3. The level of royalties as provided by Regulation (EC) No. 2100/94 needs to be 'sensibly lower' than the royalty charged on certified seed. With current obstacles to collection, and interpretation of 'sensibly lower' by the ECJ, the safeguarding of the legitimate interest of breeders, as also required by the EU regulation, is not achieved.

This legitimate interest of breeders must be safeguarded by providing for an obligation for farmers to pay remuneration at a level of royalties reflecting a fair payment for the genetic potential exploited by the user of protected varieties. There is no evidence of lower expres-

sion of genetic potential in farm saved seed. Therefore, ESA is of the opinion that only a 100% royalty payment on farm saved seed use would constitute a level of fair payment. The royalty amounts only to a small part of the seed price and through the use of farm saved seed farmers already save costs involved in packaging, cleaning, certification etc.

4. The definition of 'own holding' as set out in Article 4(2) of Regulation 1768/95/EC is too vague and creates uncertainties as it allows diverging interpretations. A wide interpretation of this notion puts the legitimate interests of breeders and farmers out of balance which balance can only be safeguarded if a sufficiently restrictive definition is adopted.
5. In order not to discriminate, small farmers should not be exempted from the obligation to pay remuneration. However right holders should be free not to collect the remuneration for the use of farm saved seed of their varieties if the costs of collection are higher than the amount due.

ESA is the voice of the European seed sector. ESA's members are national associations and individual companies active in research, breeding, production and marketing of seeds of agricultural and ornamental plant species. ESA represents more than 7000 seed businesses in the EU and beyond.

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