

Via e-mail

INTERNATIONAL UNION FOR THE PROTECTION OF NEW
VARIETIES OF PLANTS (UPOV)
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**Explanatory notes on Acts in respect of harvested material under the UPOV
Convention, UPOV/EXN/HRV Draft 5**

Dear members of the CAJ-AG,

CIOPORA appreciates it that UPOV has taken into consideration its concerns in regard to the protection of harvested material. It also appreciates that UPOV now has included some explanations in regard to the term “harvested material”, more illustrative examples in order to explain the matter and a clarification of situations regarding exhaustion. However, unfortunately the Explanatory Note remains to be unclear in some important aspects – in respect to “harvested material”, but now also in respect to “propagating material”. This gives reason for a consideration whether it might be more appropriate to discuss the term “propagating material” first, before finalizing the Explanatory Note on Harvested Material.

1. Harvested Material

The explanation in respect to harvested material is not clear to CIOPORA. What does the explanation mean: *The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that harvested material has the potential to be used as propagating material?*

The question remains about the classification of e.g. apples. Apples do not have the potential to be used as propagating material (for propagation true-to-type), but are in general considered to be “harvested material”.

2. Propagating Material

The illustrative examples 2, 4 and 6 in the Explanatory Note draw a picture of propagating material, which seems to be too restricted and not in line with the definition of propagating material in the PBR laws of many UPOV members.

The examples 2 and 4 declare plants and flowers as “harvested material”, irrespective of whether such plants or flowers (i.e. parts of plants) are capable of producing entire

plants. In the PBR laws of several UPOV members such plants and parts of plants fall under the definition of “propagating material”. CIOPORA has made a compilation of the definitions of “propagating material” in the PBR laws of selected UPOV members (the texts of the laws are taken from the UPOV website in English language). The compilation is attached to this letter as Annex 1.

The compilation shows that the definition of “propagating material” is different (sometimes significantly, but at least in details) in all of the selected PBR laws. Some UPOV members have adopted a broad definition of “propagating material”, which includes any plants and parts of plants which are capable of producing another plant (with the same essential characteristics) or which are meant for growing or cultivation, while other UPOV members have adopted a restricted definition of “propagating material”, which is limited to material intended for the reproduction of plants.

Applying these different definitions of “propagating material” to some forms of material of vegetatively reproduced ornamental and fruit varieties (such as cuttings, young plants, pot plants, cut-rose plants, apple-trees, apples, cut-roses) it turns out that under some definitions almost all forms of material are considered to be propagating material, while under other definitions almost none of them are considered to be propagating material.

It goes without saying that this situation gives reason for concern among the breeders of vegetatively reproduced ornamental and fruit varieties. The term “propagating material” is one of the key terms in the UPOV system. The classification of material as “propagating material” or “harvested material” plays a significant role for the question whether a title-holder can grant a license for acts in respect to plant material or not.

Against this background it seems advisable to suspend the discussion about the Explanatory Note on Harvested Material and first start a discussion and draft an Explanatory Note on “Propagation and Propagating Material”. The term “propagation” should be included in such new Explanatory Note, too, because also this term is not understood in the same way within the industry and the related circles.

3. Exhaustion

CIOPORA appreciates the clarification in number 18 respect of the retroactive effect of unauthorized propagation.

CIOPORA will be pleased to further contribute to the discussion.

With kind regards,

CIOPORA



Dr. Edgar Krieger
Secretary General

The definition of „Propagation material” in the PRB laws of selected UPOV member states (alphabetical order, texts are taken from the UPOV website)

Australia (Section 3):

propagating material, in relation to a plant of a particular plant variety, means any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced.

Austria (Section 1 (4)):

“propagating material” shall mean seeds, plants and parts of plants meant for the production or, otherwise, the growing, of plants;

Brazil (Article 5 xvi):

“propagation material” means every and any part of the plant or plant structure that is used in the reproduction and multiplication thereof;

Chile (Article 2 c)):

“Propagating material” means seed, fruit, plants or parts thereof intended for the reproduction of plants;

Germany (Article 2 (2)):

“Propagating material” shall mean plants and parts of plants, including seeds, intended for the production of plants or for any other growing,

Israel (Chapter 1):

“propagating material” - a plant and any part of it, which is intended for cultivation or propagation, including seeds and tissue cultures;

Japan (Article 2 (3)):

The term “propagating material” as used in this Act shall mean entire plants or parts of plants used for propagation.

Kenya (Section 2):

“seed” means that part of a plant which is or is intended to be used for propagation and includes any seed, seedling, corm, cutting, bulb, bulbil, layer, marcott, root, runner, scion, set, split, stem, stock, stump, sucker or tuber so used or intended to be so used;

Netherlands (Section 2):

“Propagating material” shall mean plants or parts thereof that are intended for cultivation by planting or sowing or by any other means;

Switzerland (Article 2(3)):

"Propagating material" shall be deemed to be seeds, seedlings, grafts, stocks and any other parts of the plant, including the material obtained by in vitro production, which are meant to be propagated, sown, planted or replanted.

Turkey (Article 2 (h)):

Propagating material: all plants or their parts used for propagating plants.

The **European Union** does not use the term propagating material. Instead, the term "variety constituents" is used.

Article 5 (3): A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as "variety constituents."

Article 13 (2): Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as "material," shall require the authorization of the holder:

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned in (a) to (f).