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# **Analysis of court decisions on propagating material and harvested material – CH and EU**

Seminar on Propagating and Harvested Material in the Context of the  
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## **Analysis of court decisions on propagating material – CH and EU**

- I. Relevant legal provisions
- II. Court decisions
- III. Definition of propagating material and harvested material
- IV. Interplay with exhaustion doctrine
- V. Conclusions

## **I. Relevant legal provisions**

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### **CH: propagating material and harvested material**

Art. 5 Sortenschutzgesetz: "Vermehrungsmaterial" (propagating material)

Art. 2 (3) Sortenschutzgesetz: "Als Vermehrungsmaterial gelten Saatgut, Pflanzgut, Edelreiser, Unterlagen und alle anderen Pflanzenteile, einschliesslich *in vitro* hergestellten Materials, die zur Vermehrung, Saat, Pflanzung oder Wiederpflanzung vorgesehen sind." (As propagating material are considered seeds, planting material, scions, rootstocks, and any other plant parts - including material produced *in vitro* - which is intended to be used for propagation, seeding, planting or replanting.)

[no definition of harvested material]

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## **EU: variety constituents and propagating material**

Art. 13 (2) EU Regulation 2100/94: „[...] 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 [...]"

Art. 5 (3) EU Regulation 2100/94: „ 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' .”

[no definition of harvested material]

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## **II. Court decisions**

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## **II. Court decisions**

German Federal Supreme Court, 14.2.2006, X ZR 93/04 – Melanie

Facts: Whole plants produced in a UPOV country where the variety is not protected are imported (and subsequently sold) as ornamental plants (garden center).

Findings: The Federal Court of Justice considered whole (pot) plants (which were not destined for the production of plants or other cultivation) as variety constituents within the meaning of Art. 13 (2) Regulation 2100/94.

The Court also held that those plants could not be seen as harvested material within the meaning of Art. 13 (3) Regulation 2100/94, as “no act of a harvest” occurred in their production.

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## **III. Definition of propagating material and harvested material**

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with cabability of propagation		
Capability of multiplication/ cultivation		
Intention seller/buyer		
Obvious purpose, Custom		
Actual Use		

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with cabability of propagation		
Capability of multiplication/ cultivation		
Intention seller/buyer	} Objective criterion, must be intelligible/ascertainable by factual circumstances	
Obvious purpose, Custom		
Actual Use		

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with capability of propagation		
Capability of multiplication/cultivation		
Intention seller/buyer	} use intended by the buyer but only as far as the seller could notice	
Obvious purpose, Custom		
Actual Use		

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with capability of propagation		
Capability of multiplication/cultivation		
Intention seller/buyer	} use intended by the buyer but only as far as the seller could notice	
Obvious purpose, Custom		
Actual Use		interpretative sources

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with cabability of propagation	+	
Capability of multiplication/ cultivation	+	
Intention seller/buyer		
Obvious purpose, Custom	+	
Actual Use		

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	Propagating Material (CH) Art. 2 (3) Sortenschutzgesetz	Plant Constituents (EU CPVR) Art. 5 (3) EU Regulation 2100/94
Part of plant with cabability of propagation	+	+
Capability of multiplication/ cultivation	+	+
Intention seller/buyer		
Obvious purpose, Custom	+	+/-
Actual Use		

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#### IV. Interplay with exhaustion doctrine

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#### Value chains in the plant breeding sector

Breeder: propagating material

trade

Farmer: harvested material

trade

Manufacturer: products

trade

Consumer

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## **Interplay with exhaustion doctrine**

„Cascade solution“: IP system which shows effects mainly upstream in the plant breeding value chain (incentive for breeder to exercise her/his right upstream)

Exhaustion: burden of proof shifts (currently harvested material is only affected if the breeder proves that the material was obtained through the unauthorized use of propagating material)

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## **V. Conclusions**

- Propagating material implies an element of purpose or intent which has to be intelligible and can be determined using objective criteria for interpretation.  
Possible definition of the purpose: use intended by the buyer but only as far as the seller could notice or as tacitly agreed
- Harvested material: living material which cannot be reproduced to a plant of the protected variety or is not destined to be used for propagation or cultivation
- Replacement of cascade solution by exhaustion rule?

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**Thank you for your attention!**

