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EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

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EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on the scope of the breeder's right concerning acts in respect of harvested material (Article 14(2) of the 1991 Act) under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

ACTS IN RESPECT OF HARVESTED MATERIAL

(a) Relevant article**Article 14** of the **1991 Act** of the UPOV Convention

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[...]

1. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material **and** that the breeder must not have had **reasonable opportunity** to exercise his right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".

(b) Harvested material

2. The UPOV Convention does not provide a definition of harvested material. However, Article 14(2) of the 1991 Act refers to "[...] harvested material, *including entire plants and parts of plants*, obtained through the unauthorized use of propagating material of the protected variety [...]", thereby indicating that harvested material includes entire plants and parts of plants obtained through the use of propagating material.

3. 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 at least some forms of harvested material have the potential to be used as propagating material. *When harvested material has the potential to be used as propagating material, it has to be considered as propagating material, unless the person using the material can prove that he did not use it or could not use it as propagation material.*

(c) Unauthorized use of propagating material*Acts in respect of propagating material*

4. "Unauthorized use" refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder's right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder's right has been granted and is in force.

5. With regard to "unauthorized use", Article 14(1)(a) of the 1991 Act of the UPOV Convention states that "Subject to Articles 15 [Exceptions to the Breeder's Right] and 16 [Exhaustion of the Breeder's Right], the

following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material in the territory concerned, where such authorization was not obtained.

6. For example, in the territory of a member of the Union where a breeder’s right has been granted and is in force, unauthorized export or import of propagating material would be an unauthorized act.

As soon as material of the protected variety has been sold or otherwise marketed by the right holder or with his consent, the right becomes exhausted in relation to the material concerned.

If harvested material is imported in a territory, whereby the use of the propagating material and consequently the production of harvested material have both taken place outside the territory of import, and there has been no act of authorization by the right holder in the territory of import, the use of the propagation material can be considered to be unauthorized.

Conditions and limitations

7. Article 14(1)(b) of the 1991 Act of the UPOV Convention further states that “[t]he breeder may make his authorization subject to conditions and limitations”. Thus, subject to Articles 15 and 16, “unauthorized use” also refers to the acts listed in Article 14(1)(a) (i) to (vii) that are not undertaken in accordance with the conditions and limitations established by the breeder.

8. Document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”, provides guidance concerning the conditions and limitations to which the breeder’s authorization may be subject, for acts in respect of propagating material under the UPOV Convention.

The conditions and limitations according to which a breeder may authorize the acts (UPOV article 14, par.1) in respect of the propagating material are a matter for the breeder to decide. Any act of the licensee which isn’t in accordance with the aforementioned conditions and limitations will be considered as unauthorized use.

Compulsory exceptions to the breeder’s right

9. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section I “Compulsory Exceptions to the Breeder’s Right”, provides guidance on the provisions for the compulsory exceptions to the breeder’s right provided in Article 15 (1) of the 1991 Act of the UPOV Convention. “Unauthorized use” would not refer to acts covered by Article 15 (1) of the 1991 Act of the UPOV Convention.

Optional exception to the breeder’s right

10. Article 15(2) of the 1991 Act of the UPOV Convention [Optional exception] states that “Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the 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)”. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section II “The Optional Exception to the Breeder’s Right”, provides guidance on the optional exception provided in Article 15 (2) of the 1991 Act of the UPOV Convention.

11. Where a member of the Union decides to incorporate this optional exception into its legislation, “unauthorized use” would not refer to acts that were covered by the optional exception. However, subject to Articles 15(1) and 16, “unauthorized use” would refer to acts that were included in the scope of the breeder’s

right and were not covered by the optional exception in the legislation of the member of the Union concerned. In particular, “unauthorized use” would refer to acts that did not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception.

Reasonable opportunity to exercise his right

d) His right

12. The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 4 above): a breeder can only exercise his right in that territory. Thus, “exercise his right” in relation to the propagating material means to exercise his right in relation to the propagating material *in the territory concerned*.

13. The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not had a “reasonable opportunity” to exercise their rights in relation to the propagating material.

e) Reasonable opportunity

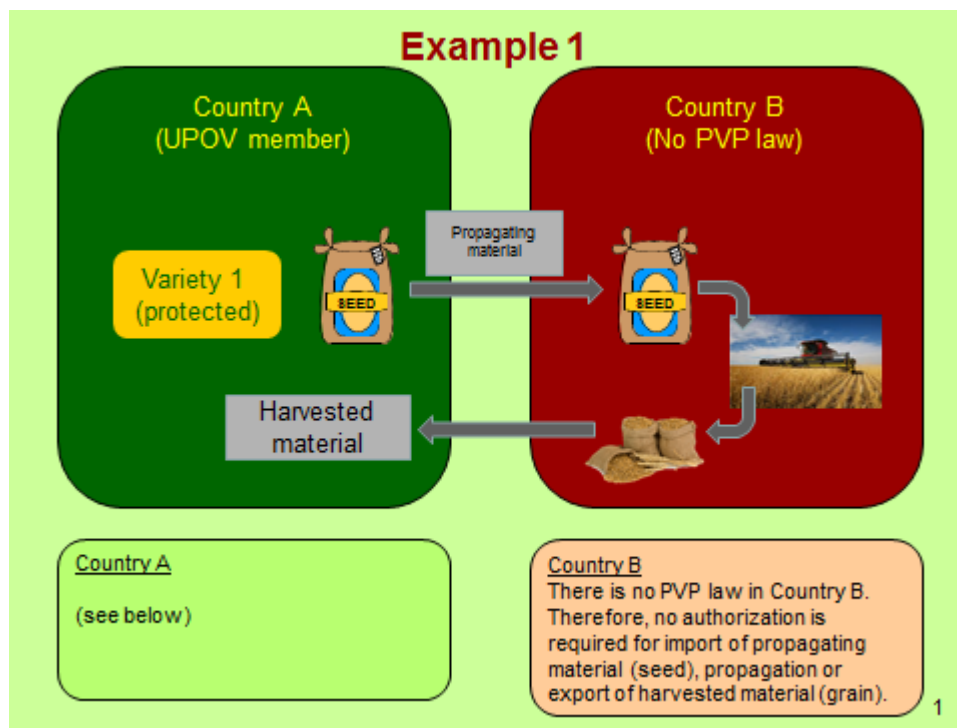
14. A right holder cannot be considered to have had reasonable opportunity to exercise his (territorial) right against imported harvested material, when this harvested material is imported in the territory concerned and where the use of propagating material and consequently the production of harvested material were taking place outside this territory. On the grounds of article 16 sub (1) (i) of the 1991 Act the scope of the right – and the acts of article 14, par. 1 – can’t cover other territories than the territory concerned.

15. Article 14, par. 1 or 2 UPOV doesn’t impose an obligation to the right holder to actively apply for plant breeders rights protection across the world. That would not be a reasonable requirement and hence could not mount to a reasonable opportunity.

16. The requirement of reasonable opportunity implies that the rightholder a) had knowledge of the alleged unauthorized use of the propagating material and b) that there are means to exercise his right.

17. Exercise his right means a right has been granted. Only in that case one can enforce his right.

18. As soon as the right is granted it can be exercised. Whether the right can be exercised in respect to harvested material will depend on whether the use of the propagating material - that led to the production of the harvested material - can be considered as unauthorized.



Example 1

Unauthorized import of harvested material from country B to country A

The right holder of Variety 1 can exercise his right on the imported harvested material if the harvested material is put on the market in the territory concerned (Country A) for the first time. There is no exhaustion of the right on the grounds of article 16 UPOV if the rightsholder didn't give his consent for the "act" of import of the harvested material.

Example 2

One of the acts of article 14, par. 1 UPOV concerns to harvested material (within the same territory/ region)

The same situation except for the fact that:

- a) Legal entity A and Legal entity B are established in the same region/ territory (article 16, 3 UPOV), for example the European Union. It can be compared with the situation that in one territory (one Country) one of the acts of article 14 UPOV, par. 1 takes place regarding propagation and harvested material.
- b) Legal entity B uses propagating material to produce a harvest of Variety 1 of Legal entity A without the consent of A and sells or markets the harvested material to another Legal person in the same territory.

In that case there is an infringement of the right of Legal entity A by Legal entity B if

- a) the harvest is obtained by use of the propagating material of A without his authorization.
- b) and A didn't have a reasonable opportunity to exercise his right in relation to the propagating material concerned.

Legal basis example 2:

- a) there is no exhaustion of the right because the harvested material is put on the market without consent (article 16, par. 1 en 2 UPOV)
- b) article 14, par. 2 UPOV applies regarding the selling or marketing of the harvested material.

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