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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 breeder¹ must not have had reasonable opportunity to exercise ~~his~~the 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 material².

[comment: the breeders associations propose that in due time, the above text is aligned with the new wording in the EXN-PPM]

¹ For the purpose of this EXN the term “Breeder” includes both the breeder according to Article 1 iv of the UPOV 1991 Act and the title holder, as the case may be.

² The UPOV 1991 Act, as well as the UPOV 1978 Act, provide a minimum framework for the protection of new varieties of plants. Therefore, members of the Union are free to provide broader protection than the one provided for in the respective UPOV Acts.

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

4. Authorization is the clear manifestation of an act of will from the side of the breeder. Therefore, "Unauthorized use" refers to the acts in respect of the propagating material that require the, where no such explicit authorization of the holder of the breeder's right in from the territory concerned (Article 14(1) of the 1991 Act), but where such authorization breeder was not obtained. Thus,

The "Unauthorized use" condition should be construed to mean that the propagating material has been used without formal prior consent of the breeder.

The breeder normally doesn't have any possibility to trace the origin of the harvested material to verify whether it has been produced from unauthorized acts can only occur propagating material at a given time and in a given territory.

Therefore, those who are trading/exporting/importing the harvested material shall provide upon request from the breeder and/or other stakeholders (e.g., courts, enforcement authorities, PVP offices) the evidence they must have available, establishing that the harvested material has been obtained from an authorized use of the propagating material of the protected variety or of a variety that has been applied for protection.

Accordingly, anyone dealing with the harvested material of a protected plant variety is obliged to check or to have checked in the territory of the member of the Union where a breeder's right has been granted and is in force supply chain and prove that it has been obtained from an authorized use of the propagating material of that variety. It is not up to the breeder to prove that s/he has not given the authorization (impossible to prove that an act has not taken place, whilst easy for someone to show that s/he has been authorized to do something).

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, (Country A), unauthorized export of propagating material would be an unauthorized act. Likewise, if the propagating material of a variety has been imported in a given territory without the authorization of the breeder, and is multiplied and/or sold, in that territory (Country B) where the variety is not protected then, any activity performed that is listed in Article 14(1)(a) of the 1991 Act of the UPOV Convention shall be regarded as unauthorized. This does not mean that the breeder of the right in Country A can invoke the right granted in Country A in relation to the use of propagating or harvested material of the variety in Country B. However, for the purpose of assessing whether the condition in Article 14.2 of the Convention "obtained through the unauthorized use of the propagating material" is met, in a case relating to import from Country B to Country A, the initial export from Country A mentioned above shall be considered as 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) and the relevant acts that are not undertaken in accordance with the conditions and limitations established by the breeder.

For example, if the breeder puts conditions and limitations to produce harvested material in authorizing the right in respect of propagating material, the production of harvested material in breach of those conditions and limitations should be considered as unauthorized use.

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.

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~~ allows de jure or de facto such an exception into its PVP 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, provided 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 conditions to define the reasonable limits and the safeguarding of safeguard the legitimate interests of the breeder provided in the optional exception, are in place and have been complied with by the propagating material used to obtain the harvested material.~~

(d) Reasonable opportunity to exercise ~~his~~ the right

12. 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 material³.

³ Article 14(2) lies on the assumption that harvested material obtained through the unauthorized use of propagating material is unlawful, unless proven otherwise (i.e., reasonable opportunity did exist). For the breeder, establishing the absence of a “reasonable opportunity”, which is a negative proof (i.e., reasonable opportunity is not...), is impossible since only that which exists will have evidence of its existence. Making a negative claim requires to prove nonexistence which is logically impossible and legally unjustifiable.

Based on the above, the breeder is only able to prove the absence of “reasonable opportunity to exercise his right in relation to the said propagating material” in two manners: Either by a statutory declaration of the breeder affirmatively stating the absence of “reasonable opportunity”, or by showing the absence of legal grounds and/or measures for enforcing one’s breeder’s rights.

Therefore, the absence of a reasonable opportunity may be assumed, and it will be up to the alleged infringer to prove to the contrary that the breeder did in fact have a reasonable opportunity to exercise the right.

13. The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory ~~concerned~~where the propagating material is used (see paragraph 4 above)- [number to be confirmed at later stage]: a breeder can only exercise ~~his~~the right in that territory. -Thus, “exercise his right” in relation to the propagating material means to exercise ~~his~~the right in relation to the propagating material *in the territory concerned*.

14. In order to decide whether the breeder has had a reasonable opportunity to exercise the rights in the territory where the unauthorized use of the propagating material of the protected variety took place the following should be considered:

- The chronology of the events is important. It has to be established if at the time the breeder enforced the rights in relation to the harvested material, the breeder had knowledge of the unauthorized use of the propagating material of the variety and if the breeder had had a reasonable opportunity to oppose the unauthorized use, based on the applicable law and jurisprudence in the territory.
- The place of events can be relevant. In case the use of the propagating material took place in a different territory than the territory in which the harvested material is being used without the breeders’ authorization, the breeder may decide to enforce the right in the territory where the harvested material is being used. Since the action against the user of the harvested material will be decided under the laws of the country in which the harvested material was used, the lack of reasonable opportunity to exercise the right in that territory in relation to the propagating material should be considered as established.

The proposals made are without prejudice to the scope of the exemptions as laid down in the UPOV Convention, and to the principle of exhaustion.

[End of document]