

Comments from the European Union in reply to UPOV Circular E-26/074

The European Union thanks the UPOV Office for preparing the draft proposals for the revision of the document UPOV/EXN/HRV/1 **“Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention”**. In our view, further work is required towards finalization of this document's revision. However, at this moment, we submit the following preliminary observations. The reference to paragraphs is in relation to the numbering in document WG-HRV/10/2.

1. We welcome the insertion of paragraph 2 on the importance of the cascade principle as establishing a clear hierarchy of legal provisions, which are to be applied conditionally, ensuring the system's proportionality and legal certainty. The principle is for us a cornerstone of PBRs, which shall be preserved.
2. We also welcome the insertion of paragraph 7 on the principle of territoriality of PBRs and the conclusion that the unauthorised use is to be assessed on the basis of the law of the contracting Party where the right is protected.
3. We consider that it should be made clear in the entire document that the authorisation of the breeder can refer to one, more or all acts established in the scope of protection of the right. See for example: “8. “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) for one or more of the acts covered by the scope of protection, but where such authorization was not obtained¹”. The principle is explained in paragraph 11 of the document (already present, not part of the proposed revision) but not always clearly reflected in the conclusions and examples which treat authorisation rather as a single block. The document would benefit from a clarification of this matter so that the explanatory note better reflects reality and explains the conclusions reached.
4. We appreciate the clear explanation of the concept of “reasonable opportunity” and welcome the principle of assessing it together with the unauthorised use “as a whole”, in paragraphs 19 and 20. This was a matter on which the study was very helpful.
5. Paragraph 23 concerning the relationship between the scope of protection and the exhaustion tackles a complex matter. This paragraph would benefit from further discussion. The study was very brief on the topic and the conclusion quoted in the note (Conclusion 15) is very schematic: exhaustion implies the correct and early exercise breeders' rights². In particular, we can see the following scenarios:
 - i. For propagating material, according to the primary scope of protection as described in Article 14(1)(a) and (b). If the breeder correctly provided consent for one or more of the uses described, the right is exhausted.
 - ii. For harvested material, when the unauthorised use occurs and the reasonable opportunity is missing under Article 14(2), if the breeder cannot exercise its rights on non-authorised acts under (i) on the propagating material, but it can exercise its rights on the harvested material, the right is exhausted.
 - iii. Further propagation of authorised propagating material after one or more authorised acts “revives” the exhausted right.

¹ Addition underlined.

² See conclusions point 11 and 12, page 39 of the Study.

- iv. Acts that involve the export of material allowing propagation into a country with no PBR system also “revives” the exhausted right. However, if the mentioned acts are done for final consumption, the right stays exhausted³.

The proposed revision attempts to summarise the above while at the same time referring to additional scenarios like the re-import of harvested material in the country of initial protection (point c of paragraph 23). Said scenarios would benefit from a separate and clear explanation. In general, in our reading, paragraph 23 would require further elaboration.

³ See conclusions points 13, 14 and 15, page 39 of the Study.