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ESA is the voice of the European seed sector. ESA's members are national associations and individual companies active in research, breeding, production and marketing of seeds of agricultural and ornamental plant species. ESA represents more than 7000 seed businesses in the EU and beyond.

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# POSITION

## ON HARVESTED MATERIAL AND DIRECTLY OBTAINED PRODUCTS

The UPOV 1991 Convention has extended the scope of protection to harvested material of the protected variety, provided this harvested material is obtained through the unauthorized use of propagating material of the protected variety and unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

ESA is of the opinion that “unauthorized use” does not only refer to use without the consent of the plant breeders’ right holder but also to any other unauthorized use such as breach of contract.

ESA understands that the “reasonable opportunity” as stipulated in the UPOV Convention does not oblige the breeder to protect his variety in all UPOV member states where his variety might be marketed or produced (1). Similarly, that “reasonable opportunity” does not oblige the breeder to exercise his rights in respect of the propagating material in the countries where his varieties are protected.

This understanding can also be derived from the words “his right”. Taking into account that “his right” is placed in an article describing the scope of the plant breeders’ right this should be interpreted as “his plant breeder’s right”. Further, as the plant breeders’ right is a territorially limited right, it only relates to the plant breeders’ right granted in the territory of the specific UPOV member the law of which contains the provision regarding harvested material and not to any other rights covered by other national or foreign laws. Consequently, “his right” does not refer to plant breeders’ rights in other territories.

The UPOV 1991 Convention also provides for the possibility to extend plant breeders’ rights protection to products made directly from harvested material of the protected variety provided that said products are obtained through the unauthorized use of the harvested material of the protected variety and unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material. Also in this case it should be clear that the same interpretation should be adopted as regards the concepts of “unauthorized use”, “reasonable opportunity” and “his right”.

ESA urges national authorities and the European Union to provide for such an extension in their national laws and in EU law respectively.

(1) See also the “*Calluna case*”; Bundesgerichtshof 14 February 2006, X ZR 93/04