

Translation of a letter dated December 16, 2021 (reference BLW-562.0-15/5)

sent by: Swiss Confederation
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Comments on document UPOV/EXN/EDV/3 Draft 3 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”

Dear Vice Secretary-General,

We would like to thank you for the opportunity to comment on the above-mentioned document prior to its submission by the Consultative Committee to the Council for approval.

The proposed explanatory notes contain major amendments in relation to the previous notes of April 6, 2017, in key areas. As they may have far-reaching implications in practice, especially with regard to new ways of breeding, we have some concerns about the present document being approved by the Council. We would like to convey the following comments:

1. “Policy objectives” in the view of Switzerland

According to the Records of the Diplomatic Conference of 1991, participants expressed the view that the consent of the original breeder should also be required for acts involving varieties that differ only in a few (insignificant) characteristics from the original variety (see paragraphs 1073, 1087 et seq. of the Records).

In the past 30 years, great progress has been made in biotechnology and new varieties can be bred faster and more cheaply. That may well justify new explanatory notes on essentially derived varieties (EDV). Nevertheless, we are of the view that considering all monoparental varieties as essentially derived seems excessive and incompatible with the original concept, for the following reasons:

- (a) A principle of the UPOV system is that all breeders have access to existing varieties and are free to market new varieties. An exception is the marketing of EDV, which requires the consent of the original breeder. As a rule, exceptions should be limited to a few situations. Under this new interpretation, however, the exception could well apply in future to many new varieties produced using new breeding methods, thus calling into question the basic freedom to market varieties under the plant variety protection system.
- (b) The plant variety protection system should promote innovation and diversity of varieties. Should the application of new breeding methods in monoparental cases result in EDV, we have difficulty in seeing how those goals can be as broadly met as under the current explanatory notes. Small and medium-sized breeding firms, in particular, depend more on varieties from other firms than large breeding companies with their own pool of starting material. The former can no longer be sure that they will actually be able to market a newly bred variety, even if it has fundamental, valuable new characteristics.
The decisive factor in determining whether a variety is an EDV should not be the effort required to breed it, but whether or not it has added value thanks to innovative new characteristics. So-called “free-riding” should not be encouraged, but genuine innovation should.

2. Comments on individual points of the proposed explanatory notes

According to the current explanatory notes of April 6, 2017 (paras. 10 and 11), a variety shall be considered essentially derived if it differs from the initial variety in **one or very few characteristics**. In addition, the differences must not be such that the variety fails to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety (para. 9).

Under paragraph 13 of the proposed explanatory notes, the number of differences between an EDV and the initial variety is **not** limited to one or very few. Further, the differences may also include essential characteristics. In our view, this contradicts Article 14(5)(b)(i) of the 1991 Act, which provides that an EDV must retain the expression of the essential characteristics of the initial varieties.

In the case of monoparental varieties, all differences result from one or more derivations, and they are therefore not taken into account when determining the status of EDV (para. 14 of the proposed explanatory notes). Thus, it can be concluded that derivatives of monoparental varieties always result in EDV.

With regard to the methods listed in Article 14(5)(c), it is stated in the proposed explanatory notes that the exclusive use of one or more of those methods will usually result in an EDV (para. 17). In the explanatory notes of April 6, 2017, however, the view is expressed that the use of those methods does not necessarily result in an EDV (para. 13).

In summary, the relationship between subparagraphs (i) and (iii) of Article 14(5)(b) appears to us to be unclear and requires interpretation. However, we are astonished that the same wording can be interpreted so differently in the space of just four years. We would like to know the reasoning behind this new interpretation and whether it is even compatible with Article 14(5).

3. Next steps

Before we can give our approval for the adoption of the revised explanatory notes, we would like to know the basis for the new interpretation of EDV, whether it is compatible with the legal provisions of the UPOV Convention and what impact on breeding and the market is expected. We would therefore request that the Working Group on Essentially Derived Varieties or the UPOV Secretariat submit written responses to the above questions to the Consultative Committee before it approves the explanatory notes and submits them to the Council. Furthermore, we wish to inform you that we are largely in agreement with the comments made by Spain on the marked version of document UPOV/EXN/EDV/3 Draft 2 of September 3, 2021.

Your sincerely,

(Signed) Peter Kupferschmied
Head of the Plant Health and Varieties Department
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