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**Sent:** Friday, March 25, 2022 10:15 AM

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**Subject:** Comments of Turkey on UPOV/EXN/EDV/3 Draft 3 (UPOV Circular E-22/047)

**Importance:** High

Dear Mr. Button and UPOV Secretariat

With regard to the approval by correspondence of document UPOV/EXN/EDV/3 Draft 3 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”, Turkey evaluate the relevant draft is a violation of the 1991 UPOV convention as UPOV 1991 Convention is not based on genotype but **it is only based on phenotype and morphological characteristics**. Therefore, in case of approval of the draft, it will be great negative effects for the breeding of new plant varieties.

Turkey also share the concerns of attached Swiss and Spanish authorities' comments on the draft.

Therefore Turkey do not support the approval of the current draft to be evaluated in today's meeting and advice EDV Working Group to revise the relevant articles of the explanatory note in harmony with the UPOV 1991 Covention

Sincerely Yours

Mehmet Cakmak  
Designated Person of Turkey to UPOV  
TURKEY

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

**sent by:** Swiss Confederation  
Federal Department of Economic Affairs, Education and Research  
Federal Office for Agriculture  
Plant Health and Varieties Department

**to:** UPOV  
Secretariat  
Chemin des Colombettes  
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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  
Federal Office for Agriculture

Madrid, 9<sup>th</sup> de March de 2022

**Mr Peter Button**  
**UPOV (Unión Internacional para la Protección de las Obtenciones Vegetales)**  
**34 Chemin des Colombettes**  
**CH-1211 Geneva 20**  
**Suiza**

Dear Sir:

My name is Ricardo López de Haro y Wood. I was the representative of Spain in the UPOV Council from 1996 to 2007. During the period 1992-1995 I was President the UPOV Council and I participated in the process of study and approval of the 1991 UPOV Convention (UPOV 1991).

The purpose of this letter is to express my surprise and my disagreement with the draft of Explanatory Notes on Essentially Derived Varieties (Draft EXN/EDV) that are going to be approved by UPOV.

The concept of Essentially Derived Varieties (EDV) was introduced in UPOV 1991 with the purpose of preventing plagiarism, but never blocking innovation in the field of plant breeding to obtain new valuable varieties.

The EXN/VED3 Draft2 is a serious violation of the 1991 UPOV Convention for the following reasons:

1) The Draft EXN/EDV refers to the fact that the main derivation is based on the genetic source of the EDV (paragraph 4 Draft EXN/VED). This paragraph violates UPOV 1991, as the plant variety protection system is based on phenotype and not on genotype. One of the main characteristics of the UPOV system is the possibility for the breeder to use any variety to obtain a new one, the so-called Breeders Exemption (BEX). By basing the derivation on the genotype and not, as to now, on the phenotype, the UPOV protection system is undermined.

2) The Draft EXN/EDV refers to the degree of "genetic conformity" between the EDV and the main variety (paragraph 12 Draft EXN/VED). It is a false premise for two reasons:

2.1) The concept "genetic conformity" is not found in Art. 14.5 of UPOV 1991.

2.2) The concept "genetic conformity" does not exist in Genetics. It is a concept that was introduced by the first time by ISF in 2003 ("View on Intellectual Property") and later in 2005 ("Essential derivation: Information and Guidance to Breeders"). It has been introduced in the EXN/EDV Draft to limit the Breeders Exemption in an illegitimate manner.

3) In the Draft EXN/EDV the New Breeding Technologies (NBT) are mentioned as examples for obtaining EDV (Draft EXN/EDV, paragraphs 15, 16 and 17). The general and widely admitted, but false, assumption is that that whenever NBT are used, EDV will be obtained, forgetting that the word "example" has to be read in its strict grammatical sense. If UPOV does not clarify that "examples" are only "examples", the general and false opinion will exclude these technologies from the scope of the Breeders Exemption. In that case, the Breeders Exemption will only take place by the classical breeding methods of selection and crossing. The damage to research in applied plant genetic will be immense. It is worth considering the fact that NBT did not exist when the UPOV 1991 Convention was approved, i.e., 30 years ago; it was impossible at that time to foresee the enormous value of these new techniques.

The change in the definition of EDVs, as well as the concept “genetic conformity”, require an amendment of UPOV 1991, which requires the calling of a diplomatic conference for such a purpose; any “Explanatory Notes” will have the power of modifying an international law.

A undesirable immediate consequence of this Draft EXN/EDV is that since the new plant varieties obtained by the use of NBT will be considered EDV per definition, their commercial exploitation will be blocked, as the authorization of the owner of the initial varieties from which they were obtained will be required. That will lead to the control of new varieties by a small number of multinationals, with serious consequences to small and medium-sized plant breeding companies. Blocking in this way genetic innovation to obtain new varieties will also be to detriment of consumers and farmers.

For the above reasons, the EXN/EDV3 Draft2 should not be approved by UPOV; the calling of a Diplomatic Conference to regulate this matter seems essential.

Sincerely yours,

Ricardo López de Haro y Wood