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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

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ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Fourth Session****Geneva, October 22 and 23, 2001****STATUS OF INFORMATION INCLUDED IN THE
TECHNICAL QUESTIONNAIRE OF TEST GUIDELINES***Document prepared by the Office of the Union***Introduction**

1. At its twenty-ninth session held in Uppsala, Sweden, from June 27 to 30, 2000, the Technical Working Party for Agricultural Crops (TWA) discussed the different actions that might be available should the information provided by the applicant in the Technical Questionnaire prove to be incorrect (see paragraph 41 of document TWA/29/21).
2. At its thirty-fourth session held in Brion, France, from September 11 to 15, 2000, the Technical Working Party for Vegetables (TWV), whilst recognizing the usefulness of information provided by applicants in Technical Questionnaires, expressed concern on the reliability and consistency of such information (see paragraph 28 of document TWV/34/15).
3. The matters raised at the TWA and TWV were brought to the attention of the Technical Committee at its thirty-seventh session held in Geneva from April 2 to 4, 2001, (see paragraphs 13 to 15 of the Annex to document TC/37/3), and the Technical Committee decided to request advice from the Administrative and Legal Committee (hereinafter referred to as "the Committee") on the status of the information provided in the Technical Questionnaire in relation to the application for a plant breeder's right with a view to incorporating that advice into the appropriate TGP document(s) (see paragraph 117 of document TC/37/8 Prov. and paragraphs 6 and 86 of document CAJ/43/8 Prov.).

Important Functions of the Technical Questionnaire

4. The Test Guidelines contain an Annex “Technical Questionnaire¹ to be completed in connection with an application for a plant breeder’s right.” In the Technical Questionnaire, certain indications are requested on the origin, maintenance and reproduction of the variety relevant for the examination of distinctness, uniformity and stability (DUS). The applicant is also requested to indicate some characteristics of the variety as they relate to the corresponding characteristics in the Test Guidelines and specify the state of expression which best corresponds to the candidate variety. The applicant is asked in another part of the Technical Questionnaire to give an indication of the characteristic(s) by which he/she considers the candidate variety to be different from the other varieties most closely resembling it. The applicant is encouraged to provide any additional information which he/she considers helpful in establishing that the variety is distinct, as well as any particulars he/she believes useful for the testing of the candidate variety which may help to distinguish the candidate variety. In the final part of the Technical Questionnaire, the applicant for a plant breeder’s right indicates whether the variety requires prior authorization for release under legislation concerning the protection of the environment, human and animal health, and should this be the case, a copy of the authorization should be included as an attachment.
5. The function of the Technical Questionnaire may vary depending on the type of examination system used in different countries.
6. In a system in which the Government conducts all aspects of the examination, among other functions, the information provided in the Technical Questionnaire, in conjunction with the characteristics from the Table of Characteristics of the Test Guidelines, will enable the testing authorities to group the varieties with other varieties in such a way that the examination can be conducted in a reasonable and efficient manner.
7. In a system in which at least part of the DUS examination is conducted by the applicant, the grant of the plant breeder’s right is essentially based upon the information and documents furnished by the applicant. In this respect, the information provided in the Technical Questionnaire may play an important role in the examination for compliance with the conditions for protection.
8. The Committee should consider specifying the function of the information provided by the applicant in the Technical Questionnaire. For example, it should be decided if the applicant must provide information or not as part of the application, or if the information has only an advisory role. In systems in which the information plays a crucial role in the examination and/or the granting of a breeder’s right, an error could have a great impact. Article 21 of the 1991 Act provides that the nullity of the breeder’s right should be declared if the conditions of distinctness, uniformity and stability were not complied with at the time of the grant of the breeder’s right. In this respect, if the decision of the authority was based on erroneous information provided by the applicant, the right could be declared null and void.

¹ Technical Questionnaire (UPOV Publication No. 644(E), Important Texts and Documents, Section 12, as adopted by the Technical Committee on October 12, 1990, and amended by the Technical Committee on March 24, 1999 (Annex II, pages 1 to 3 of document TC/26/6, and paragraphs 73 and 74 of document TC/35/12)).

Relationship Between the Application for a Plant Breeder's Right and the Technical Questionnaire

9. The UPOV Convention is silent as to the relationship between the Technical Questionnaire and the application for a plant breeder's right. It is mentioned in the UPOV Convention that subsequent applications may enjoy the priority date of a first application that has been "duly" filed (see Article 11 of the 1991 Act and Article 12 of the 1978 and 1961 Acts). It is left to the national law to determine what are the elements of an application to consider it "duly" filed. The UPOV Convention (Article 12 of the 1991 Act and Article 7 of the 1978 and 1961 Acts) further provides that the authority, for the purposes of the examination, may require the breeder to furnish all the necessary information, documents or material. It is also left to the national law or regulations to request when and what type of technical information concerning the candidate variety is necessary for the examination.

10. For the countries that follow the "UPOV Model Form² for the Application for Plant Breeders' Rights," the applicant is requested to include a "Variety description." It further indicates that the description of the variety should be attached to the special Technical Questionnaire for the species to which the variety belongs. With regard to the quality of the information provided, the UPOV model application includes the following statement before the signature of the applicant: "I/We hereby declare that, to the best of my/our knowledge, the information given in this form and in the annexes, is complete and correct."

11. If the Technical Questionnaire constitutes, in certain countries, one of the elements of the application, the fact that it is duly completed will be taken into consideration for giving a filing date. The filing date is important in the examination of the novelty and distinctness requirements. The filing date of the first application may also become the priority date for subsequent applications of the same candidate variety. A filing date will be given on the assumption that the different elements of the application are complete and correct.³

Issues to Consider on the Status of the Information Provided in the Technical Questionnaire

12. The discovery that information in the Technical Questionnaire proves to be incorrect could be raised at different stages and by different persons or entities, and could have different legal consequences.

13. The authority or the applicant may find the error during the examination of the requirements for filing the application or during the DUS examination. The TWA discussed that, depending on the type of error, some authorities may reject the application, whilst others will allow for a rectification of the error (see paragraph 41 of document TWA/29/21).

14. Procedural administrative law principles in different national laws normally provide for a mechanism of correction of errors when the application is incomplete and/or incorrect. This type of procedure usually gives the applicant a prescribed time period, to be counted from the day of receipt of the request from the authority, to correct the error or to complete the

² UPOV Model Form for the application for plant breeders' rights (Important Texts and Documents, Section 10, as amended by the Council on October 14, 1984, reproduced from document C/XVIII/9 Add., Annexes II and IV, Part I).

³ See also Article 35 of the UPOV Model Law of 1996 on the Protection of New Varieties of Plants.

information. Any application that is not corrected within the prescribed period will normally entail the lost of the filing date.⁴ Some countries may provide for an additional time period if the applicant justifies the need for it.

15. The situation could be more complex if the error has been identified one, two or three years after the filing date. For example, in a system in which the Government conducts all aspects of the examination, the discovery of the error could take place at the time of the DUS examination. This may arise if the material provided, including seeds of the candidate variety, relates to characteristics different to those described in the Technical Questionnaire. The UPOV Convention provides, when priority is claimed, that the breeder shall be allowed for a certain period of time (two years in Article 11(3) of the 1991 Act and four years in Article 12(3) of the 1978 and 1961 Acts) after the expiration of the period of priority, in which to furnish any necessary information, documents or material required for the purpose of the examination. The fact that the authority discovers an error rather late in the procedure will affect other pending applications that have been filed afterwards. The UPOV Convention provides that any candidate variety should be clearly distinguishable from any other variety whose existence is a matter of common knowledge. Among other elements, an application renders the candidate variety part of common knowledge only if the application leads to the granting of a plant breeder's right. Therefore, an error in a particular application identified at a later stage may delay the granting of a plant breeder's right for other pending applications with a later filing date.

16. If a particular error in the Technical Questionnaire increases the burden of work for the authority, or creates a delay in the examination of other applications, or obliges an additional year of testing to complete the DUS examination, the authority may want to consider when requesting the breeder to rectify the error, that the applicant provide reasonable justification or that the acceptance of the correction of the error be subject to a declaration by the applicant stating that the error was made in good faith.

17. An example of bad faith could take place when a breeder provides information in the Technical Questionnaire on the characteristics of candidate variety "A" and, in the event that priority is claimed, during the period between the filing of the application and the date to furnish the material to the authority for the technical examination, the breeder develops a variety "B" with different characteristics and presents to the authority the seeds of variety "B."

18. In order to avoid abuse, it is proposed that any application that it is not corrected within the prescribed period, or the justification of which is not satisfactory, or if there are grounds to determine that the error was made in bad faith, the authority may decide to reject the application and the breeder will lose the filing date. The breeder may then choose to file a new application.

19. A balance needs to be reached between the flexibility of the procedure for the grant of the breeder's right to allow for the correction of unintentional errors and a mechanism to discourage abusive practices.

20. An error could also be identified by the authority or by a third party after the right has been granted. This could be of particular relevance in a system in which at least part of the DUS examination is conducted by the applicant. The nature of the error could be important

⁴ See also Article 35(3) of the UPOV Model Law of 1996.

enough to affect the decision of the authority as to the compliance with the conditions for protection. Should this be the case, as provided in Article 21 of the 1991 Act, the breeder's right could be declared null and void. Such a nullity declaration could have additional legal consequences if protection for another variety has been rejected based on the granting of a breeder's right that later on has been declared null and void.

21. The Committee is invited to express its views on the following matters:

(i) the information provided in the Technical Questionnaire is part of the application for a breeder's right;

(ii) unintentional errors in the information provided in the Technical Questionnaire trigger the mechanism for rectification of errors;

(iii) when there are grounds to consider that an error in the information provided in the Technical Questionnaire has been made in bad faith, this may cause the rejection of the application and the loss of the filing date;

(iv) an error in the information provided in the Technical Questionnaire, if it affects the decision of the authority, could have legal consequences in respect of pending or rejected applications of third parties. In such cases, appropriate remedies or reinstatements should be considered;

(v) if the decision to grant a breeder's right was based on erroneous information provided by the applicant in the Technical Questionnaire, the breeder's right could be declared null and void.

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