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**ADMINISTRATIVE AND LEGAL COMMITTEE**

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ISSUES CONCERNING THE USE OF MATERIAL SUBMITTED  
FOR EXAMINATION OF DISTINCTNESS, UNIFORMITY  
AND STABILITY

*Document prepared by the Office of the Union*

1. This document is based on document CAJ/45/7, modified as requested by the Administrative and Legal Committee (hereinafter referred to as the "CAJ") at its forty-fifth session held in Geneva on April 18, 2002. Its purpose is to explore the importance of including plant material of candidate varieties, submitted by the applicant, in the collections of varieties used by examining authorities for the examination of distinctness, uniformity and stability (DUS). Furthermore, it identifies the issues which can arise when this practice cannot be freely undertaken. In particular, it considers the situation where a breeder may wish to attach conditions to the use of plant material for such practices, or where the breeder does not permit such a practice at all.

*The exchange of plant materials submitted for DUS examination*

2. The DUS examination of a variety must be made with reference to other varieties. The main reason for this is that a variety must be examined for its compliance with the distinctness criterion, namely that it must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application (see Article 7 of the 1991 Act and Article 6(1)(a) of the 1961 and 1978 Acts of the Convention). In addition, the uniformity requirement for a variety is set according to the particular features of its propagation (see Article 8 of the 1991 Act and Article 6(1)(c) of the 1961 and 1978 Acts).

of the Convention). This means that, for certain types of variety, the standard is, in practice, calculated on the basis of the uniformity of existing varieties.

3. This need for reference to other varieties in the DUS examination, particularly for the purpose of examining distinctness, means that the authorities need access to plant material of all varieties, or adequate information on these varieties, to allow them to be taken into account for the examination of distinctness of candidate varieties. In practice, many authorities and, in particular, those with a government-based testing system, try to establish a collection of plant material of all the relevant varieties of common knowledge to allow their inclusion in growing tests or trials alongside candidate varieties.

4. It is common practice for authorities to exchange plant material, which has been submitted for DUS examination, after breeders' rights have been granted to the variety concerned, or the variety has been entered in an official register. The exchange does not generally take place until after the grant of rights, or official registration of a variety. In most cases, plant material of the varieties is freely available in the market place at this stage. However, it is common practice for the authorities to seek plant material from the original examining authority because they know the sample will be representative of the variety, and it is also more convenient to obtain all varieties from a small number of sources rather than contacting all the individual breeders.

5. Where necessary for the purposes of DUS examination, the practice of exchanging plant material between authorities, or use of plant material by the original authority after the DUS examination is complete, is, in general, tacitly accepted by breeders, although the plant material is not being used for the examination of the variety but for the examination of other candidate varieties. Breeders benefit from the practice because it helps to ensure that their varieties are protected effectively, through an effective examination of distinctness, and that the DUS examination is conducted in an efficient way. Furthermore, in most cases, plant material of the variety is freely available in the market place.

#### *Restrictions on the availability of plant material*

6. Having noted that, in general, the practice of exchanging plant material between authorities is accepted by breeders, it must also be noted that there are some circumstances where breeders do not wish the exchange of plant material between authorities to take place, or only after consultation on a case-by-case basis and/or on the basis of certain conditions. In particular, these cases arise where the varieties are not generally available in the market place and the authorities may be, apart from the breeder, the only source of plant material. One example is the case of parent lines of hybrid varieties.

7. During discussions on the issue at the forty-first session of the CAJ, the Delegation of France highlighted this problem concerning parent lines. It noted (document CAJ/41/9, paragraph 52) that, if protected varieties are not available in the market, other breeders cannot compare their candidate varieties with the unmarketed varieties for the purpose of distinctness and wondered if such varieties were, nonetheless, a matter of common knowledge. It further considered that this problem also existed for third parties.

8. The CAJ has recently considered important elements concerning common knowledge and agreed a text which has been included in document TG/1/3 "Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants" as follows:

“5.2.2 Common Knowledge

“5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others:

“(a) commercialization of propagating or harvested material of the variety or publishing a detailed description;

“(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;

“(c) existence of living plant material in publicly accessible plant collections.”

Sub-paragraph (b) establishes that any parent line, which is a protected variety, should be considered to be a matter of common knowledge, regardless of whether the variety is marketed. This criterion is, effectively, the specific provision made in Article 7 (Distinctness) of the 1991 Act and Article 6(1)(a) of the 1961 and 1978 Acts of the Convention.

9. Clearly, any officially registered or protected variety must be taken into account by authorities when considering distinctness of candidate varieties, irrespective of whether such varieties are marketed or not.

*Conditions for the exchange of material*

10. As noted above, the breeder may wish to allow plant material, submitted for the examination of DUS, to be distributed to other authorities but subject to certain conditions. It would then be for distributing and receiving authorities to consider how it could ensure that these conditions would be observed, before deciding on whether to proceed on the basis of such conditions.

*Situations where no exchange of material can occur*

11. In some situations, the breeder may not wish to allow plant material, submitted for the examination of DUS, to be distributed to other authorities at all. In response to the concerns raised by the Delegation of France at the forty-first session of the CAJ, regarding the lack of access to certain protected varieties, the representative of ASSINSEL stated (see report CAJ/41/9, paragraph 56) that variety descriptions but not plant material of protected varieties could be made available to third parties in this connection and that the construction of a variety description database might solve to some extent the problems relating to “common knowledge.”

12. At the forty-second and forty-third sessions, the CAJ (documents CAJ/42/7, paragraphs 35 to 43, and CAJ/43/8, paragraphs 59 to 67) has recognized the potential importance of the publication of variety descriptions, in the form of a database, for addressing this, and other situations, regarding the examination of distinctness where varieties are unavailable for comparison in growing tests or other trials.

*13. In conclusion, the CAJ is invited to note that:*

*(i) some authorities have established collections of plant material of varieties of common knowledge for the purposes of examination but need to consider how to manage plant material of candidate varieties provided by the breeder, as a part of the application, if conditions are attached to its use for such a purpose;*

*(ii) a system of publishing variety descriptions may, if based on technical information considered to be reliable by the Technical Committee, offer an effective means of examining distinctness to address situations where plant material of varieties is unavailable for comparison in growing tests or other trials.*

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