



ESA views on various UPOV matters

UPOV CAJ

Geneva, October 31, 2018

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Topics for today

- The EDV concept
- Conditions and limitations concerning the breeder's authorization
- Provisional protection

THE EDV CONCEPT





The EDV concept

Article 14(5)

(b) [...], a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.



The EDV concept

In other words:

EDV = a variety fulfilling the combination of the criteria described in Article 14(5)(b)(i), (ii) and (iii)

- ✿ Predominant derivation from initial variety
- +
- ✿ Clearly distinguishable
- +
- ✿ High level of conformity

Predominant derivation is a prerequisite for essential derivation, not a synonym.



Why EDV?

- ❖ The EDV principle is a manner to compensate the breeder of the initial variety for the “predominant use” of his variety by another breeder.
- ❖ Under the breeders exemption one is free to use/re-use all the characteristics of a variety in a new combination.
- ❖ In respect of an EDV however the specific combination of characteristics of the initial variety is being used and essentially maintained and therefore also the “reputation” of the initial variety is used.
 - Breeder of initial variety deserves a benefit from EDV.



The EDV concept

Predominant derivation

- ❖ Difficult to determine if a variety has been created by crossing and selection from two varieties or by an act of derivation from one variety
- ❖ Shifting the burden of proof → breeder of potential EDV to prove (by showing breeding records) that initial variety was not predominantly used
- ❖ Thresholds to trigger such reversal of burden of proof to be determined scientifically & separately for each species



The EDV concept

Indirect derivation

Proposal from ISF & ESA

Another example of a way in which it might be possible to obtain EDV from an initial variety could be the physical use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid. In such a case the parent line is the initial variety. The hybrid is obtained by using the initial variety and the EDV is obtained by using the hybrid. It might be that the breeder of the EDV did not use the initial variety himself, but by using the hybrid he is using a variety that is derived from the initial variety. This means the initial variety has been used in the derivation process.



The EDV concept

Conformity

- ✿ The method used will be an indication that the variety might be an EDV BUT the method is not decisive
- ✿ List of methods – open list
- ✿ Decisive: level of conformity (genotype AND phenotype) between initial variety and the predominantly derived variety
- ✿ Such conformity should be higher than average level of conformity between the varieties of the species



The EDV concept

Conformity (cont.)

- ✿ With new breeding methods several characteristics can be changed in one go
- ✿ This does not change the basic principle of conformity
- ✿ Essential characteristics should be retained but not all → if essential characteristic changed due to act of derivation, variety can still be an EDV (see Article 14(5)(b)(iii))
- ✿ Even in case of several differences, resulting variety could still be an EDV



The EDV concept

Essential characteristics

- ✿ Essential, relevant, important are used as synonyms in UPOV documents
- ✿ But there is no list of “most important” or “truly essential” characteristics
- ✿ All characteristics that can be relevant to determine a variety should be taken into account (DUS, VCU or other characteristics)



The EDV concept

Who should decide whether a variety is an EDV?

- ✿ In case of dispute, matter for courts to decide
- ✿ Not for PVP offices to decide on this matter at the moment of PVP application or otherwise



CONDITIONS & LIMITATIONS CONCERNING THE BREEDER'S AUTHORIZATION



Conditions and limitations concerning breeder's authorization

Article 14(1)(b):

The breeder may make his authorization subject to conditions and limitations.

- ✿ UPOV Explanatory Note provides relevant examples
- ✿ Principle of contractual freedom should be respected but national contract laws may foresee certain limitations
- ✿ It should however not be allowed to subject the breeder's authorization to conditions which are against the compulsory exceptions foreseen in UPOV – e.g.: a contractual limitation of the breeder's exemption should not be allowed

→ e.g.: it is specifically mentioned in Swiss law

Article 9 of Swiss patent law:

1. The effect of the patent does not extend to (e) the use of biological material for the purpose of breeding or discovery and developing a plant variety;
2. Agreements which restrict or repeal the rights under paragraph 1 are null and void.

→ ESA proposes to clarify this in UPOV Explanatory Note



PROVISIONAL PROTECTION



Provisional protection

- ✿ Question is whether the current UPOV Explanatory Note (UPOV/EXN/PRP) should be revised or not
 - ESA is of the view that the current EXN covers the necessary aspects & sees no reasons to revise

- ✿ Ongoing court case in EU: [C-176/18](#) (Club de Variedades Vegetales Protegidas vs. Adolfo Juan Martinez Sanchis)
 - ✿ Legal discussion ongoing in Spain since years
 - ✿ Questions related to the scope of the right and its extension to harvested material
 - ✿ One question discussed is whether the condition of “unauthorized use” for the purpose of exercising the right on harvested material can be fulfilled if the purchase of the variety took place during the period of provisional protection



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