

**Administrative and Legal Committee**

**CAJ/77/9.**

**Seventy-Seventh Session  
Geneva, October 28, 2020**

**Original: English  
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**OUTCOME OF THE CONSIDERATION OF DOCUMENTS BY CORRESPONDENCE**

*Document prepared by the Office of the Union*

*Disclaimer: this document does not represent UPOV policies or guidance*

**EXECUTIVE SUMMARY**

1. The purpose of this document is to report the outcome of consideration of the Administrative and Legal Committee (CAJ) documents by correspondence, in accordance with the procedure adopted by the Council in 2020<sup>1</sup>.
2. The CAJ approved the decision(s) contained in the following documents:
  - Development of guidance and information materials (document CAJ/77/3 Rev.)
  - Essentially derived varieties (document CAJ/77/4 Rev.)
  - Harvested material (document CAJ/77/5)
  - UPOV denomination similarity search tool (document CAJ/77/7)
3. Documents UPOV/EXN/DEN/1 Draft 4 “Explanatory Notes on Variety Denominations under the UPOV Convention” and CAJ/77/6 “Novelty of parent lines with regard to the exploitation of the hybrid variety” received comments that were not of a straightforward nature and will be discussed at the virtual session of the CAJ (see paragraphs 34 and 35 and paragraphs 49 and 50, respectively, below).
4. This document also contains comments received in response to Circular E-20/120, of August 21, 2020, that have not resulted in a revision of documents but which suggest possible further action for consideration by the CAJ at its virtual session in October 2020 (see paragraph 48) .
5. The structure of this document is as follows:

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<sup>1</sup> The procedure for consideration of documents by correspondence is provided in Circular E-20/094 of July 23, 2020 (available at the TC/56, CAJ/77 and C/54 webpages).

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## BACKGROUND

6. In accordance with Circular E-20/094 of July 23, 2020 (available on the [CAJ/77](#) webpage), the Council decided that the UPOV Sessions in October 2020 would be held in the form of virtual meetings, in combination with prior consideration of documents by correspondence.

7. Circular E-20/120 of August 21, 2020, identified the following documents for the procedure by correspondence and provided an opportunity for comments by September 21, 2020, prior to requests for approval of the proposed decisions in the documents where appropriate:

### Development of guidance and information materials (document CAJ/77/3)

- UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/9 Draft 1)
- UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision)  
(document UPOV/INF/22/7 Draft 1)
- UPOV/INF/23: Guide to the UPOV Code System (document UPOV/INF/23/1 Draft 1)
- UPOV/EXN/DEN: “Explanatory Notes on Variety Denominations under the UPOV Convention”  
(document UPOV/EXN/DEN/1 Draft 4)

TGP/5:	Experience and Cooperation in DUS Testing, Section 6: UPOV Report on Technical Examination and UPOV Variety Description (Revision) (document TGP/5: Section 6/3 Draft 1)
TGP/7:	Development of Test Guidelines (Revision) (document TGP/7/8 Draft 1)
TGP/14:	Glossary of Terms Used in UPOV Documents (Revision) (document TGP/14/5 Draft 1)
TGP/15:	Guidance on the Use of Biochemical and Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS) (Revision) (document TGP/15/3 Draft 1)

Essentially derived varieties (document CAJ/77/4)

Harvested material (document CAJ/77/5)

Novelty of parent lines with regard to the exploitation of the hybrid variety (document CAJ/77/6)

UPOV denomination similarity search tool (document CAJ/77/7)

8. By September 21, 2020, comments of a straightforward nature were received on the following documents identified in Circular E-20/120 of August 21, 2020. The Office of the Union addressed the comments in a revised version of the following documents, with endnote explanations:

Development of guidance and information materials (document CAJ/77/3 Rev.)

UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/9 Draft 2)

Essentially derived varieties (document CAJ/77/4 Rev.)

9. By September 21, 2020, comments received on the following documents were not of a straightforward nature and, therefore, these documents were not included for approval by correspondence of the proposed decision(s) contained in the documents and will be discussed at the relevant virtual session:

Document UPOV/EXN/DEN/1 Draft 4 “Explanatory Notes on Variety Denominations under the UPOV Convention”

Document CAJ/77/6 “Novelty of parent lines with regard to the exploitation of the hybrid variety”

10. The comments received in relation to documents UPOV/EXN/DEN/1 Draft 4 “Explanatory Notes on Variety Denominations under the UPOV Convention” and CAJ/77/6 “Novelty of parent lines with regard to the exploitation of the hybrid variety” are presented in this document (see paragraphs 34 and 49, respectively, below). This document also contains proposals to address those comments in paragraphs 35 and 50.

11. Circular E-20/160 of September 25, 2020, invited the CAJ to approve the proposed decision(s) contained in the following documents within 30 days (i.e. October 25, 2020):

Development of guidance and information materials (document CAJ/77/3 Rev.)

Essentially derived varieties (document CAJ/77/4 Rev.)

Harvested Material (document CAJ/77/5)

UPOV denomination similarity search tool (document CAJ/77/7)

12. As no objections were received by October 25, 2020, the relevant decisions, reproduced in the paragraphs 13 to 33, 36 to 43 and 51 to 55, are considered to have been taken by correspondence.

AGENDA ITEM 6: DEVELOPMENT OF GUIDANCE AND INFORMATION MATERIALS  
(DOCUMENT CAJ/77/3 REV.)

13. The CAJ considered document CAJ/77/3 Rev.

Information Materials

*UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/9 Draft 2)*

14. The CAJ approved the proposed revision of document UPOV/INF/16/8 “Exchangeable Software”, on the basis of document UPOV/INF/16/9 Draft 2.

15. The CAJ agreed that the Council be invited to consider the proposed revisions to document UPOV/INF/16/9 “Exchangeable Software”, as presented in document UPOV/INF/16/9 Draft 2 for adoption in 2020.

*UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision)  
(document UPOV/INF/22/7 Draft 1)*

16. The CAJ approved the proposed revision of document UPOV/INF/22/6 “Software and Equipment Used by Members of the Union”, on the basis of document UPOV/INF/22/7 Draft 1.

17. The CAJ agreed that the Council be invited to consider the proposed revisions to document UPOV/INF/22/7 “Software and Equipment Used by Members of the Union”, as presented in document UPOV/INF/22/7 Draft 1 for adoption in 2020.

TGP documents

*TGP/5: Experience and Cooperation in DUS Testing: Section 6: UPOV Report on Technical Examination and UPOV Variety Description (Revision) (document TGP/5: Section 6/3 Draft 1)*

18. The CAJ approved document TGP/5: Section 6/3 “TGP/5 Experience and Cooperation in DUS Testing, Section 6: UPOV Report on Technical Examination and UPOV Variety Description”, on the basis of document TGP/5: Section 6/3 Draft 1.

19. The CAJ agreed that the Council be invited to consider document TGP/5: Section 6/3 “TGP/5 Experience and Cooperation in DUS Testing, Section 6: UPOV Report on Technical Examination and UPOV Variety Description”, as presented in document TGP/5: Section 6/3 Draft 1 for adoption in 2020.

*TGP/7: Development of Test Guidelines (Revision) (document TGP/7/8 Draft 1)*

20. The CAJ approved document TGP/7/8 “Development of Test Guidelines”, on the basis of document TGP/7/8 Draft 1.

21. The CAJ agreed that the Council be invited to consider document TGP/7/8 “Development of Test Guidelines”, as presented in document TGP/7/8 Draft 1 for adoption in 2020.

*TGP/14: Glossary of Terms Used in UPOV Documents (Revision) (document TGP/14/5 Draft 1)*

22. The CAJ approved document TGP/14/5 “Glossary of Terms Used in UPOV Documents”, on the basis of document TGP/14/5 Draft 1.

23. The CAJ agreed that the Council be invited to consider document TGP/14/5 “Glossary of Terms Used in UPOV Documents”, as presented in document TGP/14/5 Draft 1 for adoption in 2020.

*TGP/15: Guidance on the Use of Biochemical and Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS) (Revision) (document TGP/15/3 Draft 1)*

24. The CAJ approved document TGP/15/3 “Guidance on the use of Biochemical and Molecular Markers in the examination of Distinctness, Uniformity and Stability (DUS)”, on the basis of document TGP/15/3 Draft 1.

25. The CAJ agreed that the Council be invited to consider TGP/15/3 “Guidance on the use of Biochemical and Molecular Markers in the examination of Distinctness, Uniformity and Stability (DUS)”, as presented in document TGP/15/3 Draft 1 for adoption in 2020.

Other matters for consideration by the CAJ

*UPOV/INF/23: Software and Equipment Used by Members of the Union (Revision)*  
(document UPOV/INF/22/7 Draft 1)

26. The CAJ approved the “Guide to the UPOV Code System”, on the basis of document UPOV/INF/23/1 Draft 1.

27. The CAJ proposed that the TC consider a new draft of document UPOV/INF/23/1 “Guide to the UPOV Code System” in 2021.

*Reference to UPOV PRISMA in UPOV guidance and information materials*

28. The CAJ approved the proposals for revision of documents UPOV/INF/6 and TGP/5 Section 2, as proposed in paragraphs 58 and 59 to this document, for adoption by the Council at its session in 2021.

*Essentially Derived Varieties*

29. The CAJ noted that matters concerning essentially derived varieties were considered in document CAJ/77/4.

*Harvested Material*

30. The CAJ noted that matters concerning harvested material were considered in document CAJ/77/5.

*Novelty of parent lines with regard to the exploitation of the hybrid variety*

31. The CAJ noted that matters concerning novelty of parent lines with regard to the exploitation of the hybrid variety were considered in document CAJ/77/6.

Tentative program for the development of guidance and information materials

32. The CAJ approved the program for the development of information materials, as proposed in Annex VI to document CAJ/77/3 Rev.

33. The CAJ approved the program for the development of TGP documents, as set out in Annex VII of document CAJ/77/3 Rev. taking into account the conclusions of the TC.

Explanatory Notes

*UPOV/EXN/DEN: Explanatory Notes on Variety Denominations under the UPOV Convention*  
(document UPOV/EXN/DEN/1 Draft 4)

34. In reply to Circular E-20/120 of August 21, 2020, comments were received from Brazil; the European Union; Euroseeds and the International Seed Federation (ISF) on document UPOV/EXN/DEN/1 Draft 4 that were not of a straightforward nature and, therefore, document UPOV/EXN/DEN/1 Draft 4 was not included in Circular E-20/160 of September 25, 2020, for approval by correspondence and is presented for consideration by the CAJ at its virtual session on October 28, 2020, in conjunction with the comments received, which are reproduced in Annex I to this document.

35. *The CAJ is invited to:*

(a) *note the replies received from members of the Union in response to Circular E-20/017, reproduced in Annex I to document CAJ/77/3 Rev.;*

(b) *consider the request by the TWV, at its fifty-fourth session, not to introduce Class 205B in document UPOV/EXN/DEN/1 (see paragraph 25 of document CAJ/77/3 Rev.);*

*(c) consider the proposed revision of document UPOV/EXN/DEN “Explanatory Notes on Variety Denominations under the UPOV Convention”, on the basis of document UPOV/EXN/DEN/1 Draft 4, in conjunction with the comments received on document UPOV/EXN/DEN/1 Draft 4 in response to Circular E-20/120, as presented in Annex I to this document; and*

*(d) on the basis of the comments in Annex I to this document and discussions at the seventy-seventh session of the CAJ, invite the Office of the Union to prepare a draft of document UPOV/EXN/DEN “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/EXN/DEN/1 Draft 5), for comments by the CAJ by correspondence; and based on the comments received, the Office of the Union to prepare a new draft of document UPOV/EXN/DEN for consideration at the seventy-eighth session of the CAJ, to be held in 2021.*

#### AGENDA ITEM 7: ESSENTIALLY DERIVED VARIETIES (DOCUMENT CAJ/77/4 REV.)

36. The CAJ considered document CAJ/77/4 Rev.

37. The CAJ agreed to establish the WG-EDV and approved the terms of reference for the WG-EDV, as set out in Annex II to document CAJ/77/4 Rev., in conjunction with the modified “Policy issues in conjunction with the breeders’ customs and practices” in Annex I of document CAJ/77/4 Rev.

38. The CAJ approved the following composition of the WG-EDV: Australia, Brazil, Chile, China, Ecuador, European Union, France, Japan, Kenya, Netherlands, Sweden, United Republic of Tanzania, United States of America, APSA, APBREBES, CIOPORA, CropLife International, Euroseeds, ISF and SAA.

39. The CAJ agreed that the first meeting of the WG-EDV will take place on December 8, 2020, by virtual means.

40. The CAJ agreed to request the WG-EDV to propose a timeline for its work at its first meeting, for consideration by the CAJ at its session in 2021.

#### AGENDA ITEM 8: HARVESTED MATERIAL (DOCUMENT CAJ/77/5)

41. The CAJ considered document CAJ/77/5.

42. The CAJ noted the information and proposals received in reply to UPOV Circular E-19/232, as reproduced in Annexes I to III to document CAJ/77/5.

43. The CAJ agreed to invite the Office of the Union to consult the members of the Union that provided information and proposals in reply to Circular E-19/232, in order to explore how to provide guidance on the term “unauthorized use of propagating material”, including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session.

#### Proposals for next steps

##### *Japan*

44. In reply to Circular E-20/120 of August 21, 2020, the Delegation of Japan expressed its support for the decisions in document CAJ/77/5 and stated that it “would be in favor of the organization of a seminar on harvested material by UPOV in 2021 in order to exchange information on this topic”.

*Euroseeds*

45. In reply to Circular E-20/120 of August 21, 2020, the following comments were received from Euroseeds, on document CAJ/77/5:

"We have noted that on this matter it is proposed to have a proposal for consideration by the CAJ at its next session, with the intention of investigating in the meantime how best guidance could be given on the notion of 'unauthorized use of propagating material'. Euroseeds is in agreement with the proposed procedure. However, we wish to take this opportunity to express some key elements in relation to the notion of 'unauthorized use'. Euroseeds believes that 'unauthorized use' does not only refer to use without the consent of the plant breeders' right holder (i.e. consent for the acts listed in Article 14(1)(a) of the UPOV 1991 Convention) but also to any other unauthorized use, such as breach of contract. In that sense, Euroseeds advocates for a broad interpretation of the notion of 'unauthorized use' and would also like to emphasize that the decision rendered by the Court of Justice of the European Union in case C-176/18, which suggests a limited interpretation, has important negative consequences for breeders.

"Based on the above, Euroseeds would like to see a good and strong explanatory note on harvested material recognizing the needs of breeders for a strong protection and workable enforcement possibilities also on harvested material. In this respect, for further information, we refer to the [Euroseeds position on harvested material](#)."

*The International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) and the International Seed Federation (ISF)*

46. In reply to Circular E-20/120 of August 21, 2020, the following joint comments were received from the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) and ISF, on document CAJ/77/5:

"In response to UPOV Circular E-20/120 of August 21, 2020, we very much appreciate the suggestion of Japan to develop guidance on the term 'unauthorized use of propagating material'. The discussion about the topic comes at the exactly right time, since the matter has gained particular importance in the recent past, as the European Court of Justice (CJEU) in the case C-176/18 (Nadorcott) issued a far-reaching decision with the main focus on the question under which circumstances the requirement of 'unauthorized use of propagating material (variety constituents)' is given for the exercise of the plant breeders right on harvested material.

"CIOPORA and ISF, therefore, are supportive of the proposal of Japan to add in the EXN, in relation to 'unauthorized use' of propagating material, the acts of planting and growing (cultivation). This would solve the situation where trees (propagating material) have been produced prior to the granting of the Plant Breeders Right and then are planted on the premises of a grower, who continuously produces fruits over several years.

"The effective protection of harvested material is very important for breeders. Therefore, it might be advisable to have a seminar about the matter in the first half of 2021."

47. The joint comments from ISF, African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA) and Seed Association of the Americas (SAA), received in reply to Circular E-20/120, of August 21, 2020, expressed support to the above proposal from CIOPORA and ISF to organize a seminar on this topic, as reproduced below:

"We welcome the contributions from European Union and Japan. We agree that this is a matter of great importance.

"ISF has sent a letter co-signed with CIOPORA on the matter and we thank members for their consideration of our request on organizing a seminar/webinar, to further address the definition of "unauthorized use" and clarification of the Explanatory Note."

*48. The CAJ is invited to consider the proposal to organize a seminar in the first half of 2021, to exchange information on matters concerning harvested material and unauthorized use of propagating material.*

AGENDA ITEM 9: NOVELTY OF PARENT LINES WITH REGARD TO THE EXPLOITATION OF THE HYBRID VARIETY (DOCUMENT CAJ/77/6)

49. In reply to Circular E-20/120 of August 21, 2020, comments on document CAJ/77/6 were received from the European Union, Euroseeds and joint comments from ISF, AFSTA, APSA and SAA, that were not of a straightforward nature and, therefore, document CAJ/77/6 was not included in Circular E-20/160 of September 25, 2020, for approval by correspondence and is presented for consideration by the CAJ at its virtual session on October 28, 2020, in conjunction with the comments received, which are reproduced in Annex II to this document.

50. *The CAJ is invited to:*

*(a) note the replies to the survey to explore the status of the novelty of parent lines in relation to exploitation of the hybrid in members of the Union, as presented in document CAJ/77/6 and its Annexes;*

*(b) invite members of the Union, ISF, AFSTA, APSA and SAA to make presentations on the novelty of parent lines with regard to the exploitation of the hybrid variety at the seventy-eighth session of the CAJ, with a view of inviting the Office of the Union to seek to prepare common guidance on this matter for consideration by the CAJ at its seventy-ninth session, on the basis of the presentations and discussions at the seventy-eighth session of the CAJ.*

AGENDA ITEM 11: UPOV DENOMINATION SIMILARITY SEARCH TOOL (DOCUMENT CAJ/77/7)

51. The CAJ considered document CAJ/77/7.

52. The CAJ noted the conclusion of the CPVO and the Office of the Union that the CPVO similarity algorithm is performing well and that, for the time being, it would not be a suitable use of resources to seek improvements to the algorithm for the purposes of checking the similarity of variety denominations.

53. The CAJ agreed that the Office of the Union explore with the CPVO possibilities for the variety denomination search tool to consider checking denominations for characteristics, as set out in paragraphs 14 to 16 of document CAJ/77/7.

54. The CAJ agreed to report to the CAJ, at its seventy-eighth session, on the outcome of that exploration.

55. If appropriate, a report on recent developments can be made by the Office of the Union at the seventy-seventh session.

[Annex follows]

ANNEX I

Document UPOV/EXN/DEN  
“Explanatory Notes on variety denominations under the UPOV Convention”  
(Document UPOV/EXN/DEN/1 Draft 4):  
Comments received in reply to Circular E-20/120 of August 21, 2020

This Annex contains the following:

- (a) Appendix I: Comments from Brazil
- (b) Appendix II: Comments from the European Union
- (c) Appendix III: Comments from Euroseeds
- (d) Appendix IV: Comments from ISF

[Appendix I follows]

ANNEX I, APPENDIX I

BRAZIL

The Delegation of Brazil provided the following comments concerning d document UPOV/EXN/DEN/1 Draft4 "Explanatory Notes on Variety Denominations under the UPOV Convention":

"Item 2.3.3 (a) (i)

"- The deletion of the text 'e.g. if it concerns a letter at the beginning of a word' and the addition of the 'Examples of suitable denominations' 'Marina and Martina', 'Dora and Dorka' and 'Goran and Gran' make a substantial change in the rule suggested by the UPOV/INF/12/5 ;

"- The added examples (specially Marina and Martina (at least in Portuguese)) would make clear different almost all (if not all) denominations with differences of 1 letter, that provides 1 visual and 1 phonetical differences;

"- That being said, if this approach is agreed by the members, we would agree too, for the benefits of having this harmonized rule and to have an objective criteria.

"- However, it would be nice to mention that, if the text of the 2.3.3. (a) (i) will be kept as it is, the items (ii), (iii), (iv) and (v) have to be deleted, because in all of them you would have at least 1 letter difference, providing 1 (or more) visual and 1 (or more) phonetical difference(s)."

[Appendix II follows]

ANNEX I, APPENDIX II

EUROPEAN UNION

The Delegation of the European Union provided the following comments concerning document UPOV/EXN/DEN/1 Draft 4 "Explanatory Notes on Variety Denominations under the UPOV Convention":

"The EU and its Members States can agree to note the replies received from members of the Union in response to Circular E-20/017, (b) consider the request by the TWV, at its fifty-fourth session, not to introduce Class 205B in document UPOV/EXN/DEN/1.

"However, the EU and its Member States cannot agree to (c) consider the proposed revision of document UPOV/EXN/DEN 'Explanatory Notes on Variety Denominations under the UPOV Convention'.

"As regards the draft of the Section 2.3.3 (a) (i) on page 7 reading 'difference of one letter provides for a clear visual **AND** phonetic difference, e.g. if it concerns a letter at the beginning of a word' we would like keep the original word '**OR**' and to state the following.

"The practice shows that the meaning of words often play an important role and can be sufficient to avoid confusion, even if the two criteria (visual and phonetic) are not met. In examples like 'Power' <>'Poker' or 'Angle' <>'Ankel' <>'Angel', the visual or the phonetic similarity does not lead to confusion because the meaning of these words is clear.

"We are of the opinion that in this case, the requirement to have both a visual and phonetic difference might lead to a more restrictive approach, whereas the consideration of the concept could contribute to refine it and allow to keep the initial wording version '**visual or phonetic' difference'. We therefore insist to introduce the concept as an additional criteria in the assessment of the similarity.**

"The EU and its Member States (d) note that, subject to agreement by the CAJ, an agreed draft of document UPOV/EXN/DEN/1 will be presented for adoption by the Council in 2020."

[Appendix III follows]

ANNEX I, APPENDIX III

EUROSEEDS

Euroseeds provided the following comments concerning document UPOV/EXN/DEN “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/EXN/DEN/1 Draft 4):

“However, we take good note that the new draft 4 does not include the examples to which we objected in paragraph 2.3.3. ii).

With regards to paragraph 2.3.3. (b), we regret that our proposal to include examples of suitable denominations has not been taken into account. We would also like to suggest changing the term “or” to “and” in the following sentence: ‘if the difference does not provide a clear phonetic difference **and** a widely-recognizable difference in meaning’.

“Indeed, a denomination should only be rejected when it fulfils both criteria:

“• if it does not provide a clear phonetic difference, but does provide a widely recognizable difference in meaning, a denomination is suitable: see Power / Poker

“• if it does not provide a widely-recognizable difference in meaning, but does provide a clear phonetic difference, a denomination is suitable: e.g. Power / Kracht (Dutch for Power).”

[Appendix IV follows]

ANNEX I, APPENDIX IV

INTERNATIONAL SEED FEDERATION

ISF provided the following comments concerning document UPOV/EXN/DEN “Explanatory Notes on Variety Denominations under the UPOV Convention”:

“ISF and Euroseeds would like to thank you for the opportunity to provide our comments in the view to prepare the UPOV/EXN/DEN/1 Draft 3 to be discussed in October 2020 by the CAJ. In circular E-20/017 you invited members and observers to:

“(a) consider document UPOV/EXN/DEN/1 Draft 3, attached and posted at [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=55678](https://www.upov.int/meetings/en/details.jsp?meeting_id=55678), which includes the changes to document UPOV/INF/12/5 that were agreed by the Working Group on Variety Denominations (WG DEN);

“(b) consider the proposals of the Community Plant Variety Office (CPVO) of the European Union to amend section 2.3.3 of document UPOV/EXN/DEN/1 Draft 3, as reproduced in the Annex to this circular (the proposals by the CPVO appear in yellow highlight).

“Regarding a) ISF and Euroseeds have no further comments to add. This draft reflects well the practices of breeders.

“Regarding b), the proposal of CPVO to amend Section 2.3.3 ii) to add an extra option (to approve a denomination if there is only a difference of one letter, not at the beginning of a word, when it provides a clear visual and phonetic difference), ISF and Euroseeds have some concerns. In the examples given, we don’t see that ‘Alexandra’ and ‘Alexandru’ or ‘Lila’ and ‘Leila’ bring ‘a clear visual and phonetic difference’ for a clear distinction of both potential varieties. From the examples it is not clear what the criteria are to assess a clear visual and phonetic difference.

“Regarding the two alternative proposals of CPVO for Section 2.3.3 b), to reject denominations which have a difference of 2 or more letters, but without providing a clear phonetic difference or a widely-recognizable difference in meaning, ISF and Euroseeds can agree with either proposal. However, we would like to suggest CPVO to provide another example for Alternative 2 of a suitable denomination although there is no clear phonetic difference, to really state the ‘widely recognizable difference in meaning’. Otherwise we would support Alternative 1.”

[Annex II follows]

Document CAJ/77/6 "Novelty of parent lines with regard to the exploitation of the hybrid variety":  
Comments received in reply to Circular E-20/120 of August 21, 2020

This Annex contains the following:

- (a) Appendix I: Comments from the European Union
- (b) Appendix II: Comments from Euroseeds
- (c) Appendix III: Joint comments from ISF, AFSTA, APSA and SAA

[Appendix I follows]

ANNEX II, APPENDIX I

EUROPEAN UNION

The Delegation of the European Union provided the following comments concerning document CAJ/77/6 "Novelty of parent lines with regard to the exploitation of the hybrid variety":

"The EU and its Member States can

"(a) note the replies to the survey to explore the status of the novelty of parent lines in relation to exploitation of the hybrid in members of the Union, and

"(b) consider the proposal to provide an explanation on this topic in the Explanatory Notes on Novelty. However, we have doubts about the approach of allowing room for interpretation as regards the novelty of the hybrid parent lines because of impacts on exploitation. Therefore, we believe it would be important to make the effort to provide common guidance on this issue in the explanatory note in order to avoid any divergence of interpretation between the members of the Union. Maybe as a first step a discussion at technical level (e.g. TC, TWPs) could be of use."

[Appendix II follows]

ANNEX II, APPENDIX II

EUROSEEDS

The Delegation of Euroseeds provided the following comments concerning document CAJ/77/6 “Novelty of parent lines with regard to the exploitation of the hybrid variety”:

“We would like to thank the UPOV Secretariat for the survey conducted among UPOV members and the overview of the responses received that is provided in Annex II to the document [CAJ/77/6]. We note that interpretations and practices differ in the various UPOV members and we also note the previous discussions that took place on this matter within UPOV. Nevertheless, the proposed way forward included in paragraph 12 of the document [CAJ/77/6] is not acceptable for the members of Euroseeds. Having diverging interpretations among UPOV member countries on a notion such as novelty which is key for obtaining protection, creates an unworkable environment for breeders.

“We are conscious of the fact that some PBR offices and national laws consider that the novelty of parental lines is lost in cases where the hybrids, composed of these parental lines, have already been produced and/or sold or otherwise disposed of. Euroseeds is of the opinion that the fact that the hybrid has been disposed of beyond the grace period should not have any effect on the novelty of the parent line. This is because PBR is granted for a specific variety and that specific variety has to fulfil the novelty criterion. The hybrid is a different variety from its parent lines;<sup>1</sup> they are both protectable separately on their own and therefore the lack of novelty of one should, in principle, have no consequence for the novelty of the other. Further on, the novelty requirement according to Article 7 of the UPOV 1991 Convention states that “the variety shall be deemed to be new if, at the date of filing of the application for a breeder’s right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, [...]”. As mentioned, hybrid and parental lines are different from each other, therefore the disposal of the hybrid would not meet the requirement of Article 7 according to which it is the propagating or harvested material of the variety itself that needs to be disposed of for destroying novelty.

“On such an important notion, which is key for obtaining protection, harmonized interpretation is necessary across UPOV members to ensure legal certainty and to allow breeders to conduct their businesses globally. We therefore invite UPOV members to discuss this matter further in the next session of the CAJ.”

[Appendix III follows]

ANNEX II, APPENDIX III

INTERNATIONAL SEED FEDERATION (ISF),  
ASSOCIATION AFRICAINE DU COMMERCE DES SEMENCES (AFSTA),  
ASIA AND PACIFIC SEED ASSOCIATION (APSA) AND  
SEED ASSOCIATION OF THE AMERICAS (SAA)  
(JOINT COMMENTS)

ISF, AFSTA, APSA and SAA provided the following joint comments concerning document CAJ/77/6 "Novelty of parent lines with regard to the exploitation of the hybrid variety":

"As mentioned in the document, ASSINSEL provided a position in March 2000 during the 41st session of the CAJ.

"Following the dissolution of ASSINSEL, I would like to share with you the position of the International Seed Federation on the matter of novelty.

"According to article 6 of the UPOV 1991 Act a plant variety shall be deemed to be new if, at the date of filing of the application for a PBR, propagating or harvested material of that variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of that variety within specific time limits in or outside the territory of filing.

When filing an application for PBR the applicant needs to declare the date of first sales. ISF recommends official authorities such as PBR offices to take the date of the invoice as date of first sales. Furthermore, ISF interprets "exploitation" as "commercial exploitation" to clarify that the disposal of propagating material to others for the purpose of testing does not harm its novelty status.

These conditions should apply for all kinds of varieties, be they sexually or asexually reproduced, pure lines, populations, or hybrids of different kinds. **Hybrid parental lines as well should be subject to these same conditions.**

Some PBR offices and national laws consider that parental lines are not novel in cases where the hybrids, composed of these parental lines, have already been produced and/or sold. **ISF is convinced from its interpretation of the UPOV Convention that the commercialization of a hybrid does not affect the novelty of the respective parental inbred lines.** First, F1 hybrid seed exhibits heterosis and consequently is, by definition, different to and more than the sum of the material harvested separately from both female and male parents. Second, seed harvested from an F1 hybrid has undergone one generation of inbreeding and represents a segregating mix of germplasm from both parents of the F1. It is therefore obviously not justified for some PBR offices and national laws to state that parental lines are not novel in cases where the hybrids, composed of these parental lines, have already been produced and/or sold.

Nonetheless, breeders who wish to protect their parental material in countries which do not (yet) follow this interpretation need to assess the effect of local interpretation on the novelty of parent lines when starting to commercialize their hybrid(s).

In case the possibility for protection in a certain country is opened up for a certain species, a transitional period should be established during which the application of varieties that have been protected outside the territory is allowed. To avoid misuse, the remaining protection period could be set so it provides the same period of protection as in the country where the variety had received its first protection.'

"[Page 9 of ISF View on Intellectual Property, 28 June 2012]

"We took good note of the results of the survey UPOV conducted amongst its members, picturing different approaches of the matter. However, we cannot support to include the proposed paragraph 7. **A clear, consistent and coherent interpretation of UPOV Convention amongst its members is critical for the seed sector to be able to conduct its business and deliver locally adapted quality seed all around the world.**

We would like to get an opportunity to further explain the importance of the position of the seed sector. In this regard, we kindly request to make a presentation of the positioning of the seed sector at next CAJ meeting."

[End of Annex II and of document]