

From: [Szonja Csörgő](#)
To: [mail.Upov](#)
Cc: [Garlich von Essen](#)
Subject: Comments of ESA European Seed Association on documents to be discussed by the CAJ-AG at its seventh session on October 29-30, 2012
Date: October 08, 2012 12:36:54
Attachments: [ESA_12_0696.pdf](#)
Importance: High

To the attention of Mr. Peter Button

Dear Mr. Button,

Please find attached a letter from ESA European Seed Association incorporating our comments on a number of draft explanatory notes that are going to be addressed in the seventh session on the CAJ-AG this October.

We trust that you will transfer these comments to the members of the CAJ-AG and they will give due attention to them during their discussions on October 29-30, 2012.

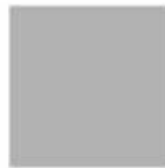
Thank you very much in advance.

Best regards,

Szonja Csörgő

Manager Intellectual Property and Legal Affairs

Contact ESA now also on:



Rue du Luxembourg 23/15
B 1000 Brussels
Phone: +32 (0) 2 743 28 60
secretariat@euroseeds.org
www.euroseeds.org





Mr. Peter Button
Vice Secretary-General

**International Union for the
Protection of New Varieties of
Plants (UPOV)**

34, chemin des Colombettes
CH-1211 Geneva 20
Switzerland

e-mail: upov.mail@upov.int

Brussels, October 8, 2012

ESA_12.0696

Subject: Comments of ESA European Seed Association on matters to be addressed by the CAJ-AG at its Seventh Session on October 29 and 30, 2012

Dear Mr. Button,

By the present letter ESA European Seed Association wishes to express its comments on a few issues that are scheduled to be addressed by the CAJ-AG at its Seventh Session to be held on October 29-30, 2012. Though ESA is an observer to the UPOV CAJ and Council - which bodies also address matters discussed formerly in the CAJ-AG - there are some topics of high importance on the agenda of the CAJ-AG at its upcoming sessions which is the reason why ESA feels it important to contribute to these discussions already at the CAJ-AG level.

1. Explanatory notes on the definition of breeder:

The draft explanatory note (document UPOV/EXN/BRD Draft 5) makes reference only to the 1991 version of the UPOV Convention. ESA understands that the formal reason for this is that the definition of breeder was introduced only in the latest version of the Convention. However, the term „breeder“ is also widely used in the 1978 version of the Convention. ESA is of the view that in case the explanatory note on the notion of breeder does not make any reference to UPOV `78 one could think that the term „breeder“ as used in the `78 Convention has a different meaning from the term „breeder“ in the 1991 Convention. ESA believes that this is not the case and it is certainly not the intention of the explanatory note to cause such confusion. Therefore we propose to mention in the explanatory note that the same interpretation of the term „breeder“ applies also to the UPOV `78 Convention. Nevertheless, we are aware of the fact that in the `78 version of the Convention it was formally not mentioned that the employer or the commissioner of the work could also be the breeder where national law provides so. In order to make this technical difference clear we propose to insert a footnote which could mention that the possibility for an employer or commissioner to be considered as breeder is not mentioned in the `78 Convention. It should be

noted however that it does not mean that national law could not provide for this possibility even under UPOV '78.

Point (c) of the draft explanatory note deals with the notion of „person“. The current draft states that legal person refers to „an entity with rights and obligations“. ESA is of the opinion that an entity does not need to actually have rights and/or obligations to be considered a legal person. What is relevant in this respect is that the entity can engage itself in civil law matters, i.e. it can obtain rights and/or obligations. Therefore we suggest changing the current text to read: „*an entity which can obtain right and/or obligations*“.

2. Explanatory note on harvested material:

The draft explanatory note (document UPOV/EXN/HRV Draft 8) states in the last sentence of point 13 that it is a matter for each member of the Union to determine what reasonable opportunity is. As exercising „his right“ can only be done in the territory where the breeder has a right it is clear that the “reasonable opportunity” as stipulated in the UPOV Convention does not oblige the breeder to protect his variety in all UPOV member states where his variety might be marketed or produced. This is a general principle that should apply in all UPOV Member States. Similarly, that “reasonable opportunity” does not oblige the breeder to enforce his rights in respect of the propagating material in the countries where his varieties are protected. We are of the opinion that the meaning of the notion „reasonable opportunity“, is not a matter for the individual UPOV members to determine. As this may weaken the provision for the protection of the harvested material, it is in conflict with its mandatory character that was agreed after a long discussion during the Diplomatic Conference in 1991. Additionally it may lead to different decisions by national courts in similar cases, eroding the harmonization effect of the UPOV Convention. Therefore it should be interpreted in the same way by all UPOV members. Consequently we request the AG to clarify this point in the explanatory note.

Furthermore, we noticed that the practical illustrative examples have been deleted from the document. ESA regrets that these examples are not part of the draft any more as we believe that the lack of such examples weakens the explanatory value of the document. Therefore ESA suggests putting at least some illustrative examples back into the note.

3. Explanatory note on EDVs:

From document CAJ-AG/12/7/3 point 23 we understand that the CAJ-AG has already considered the question whether all mutations should be considered as EDVs irrespective of the number of differences and was not in favour. However, ESA would like to reiterate the view - already communicated to the UPOV Secretariat before the sixth session of the CAJ-AG - that the selection methods named in Article 14 (5) (c) UPOV 1991 (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) do indeed very often - in the case of mutants most likely - but not automatically result in an EDV. In order to assess whether a variety is essentially derived an individual evaluation of each suspected case in the light of the applicable rules and regulations is needed. In other words, the criterion of differences should be applied in each and every case and it is clear from the definition as well as from the notes of the Diplomatic Conference (see for instance paragraph 1084 of the Records of the Diplomatic Conference (1992, Geneva)) that an EDV has to be judged on its similarity to the initial variety and not on the breeding method by which it was obtained.

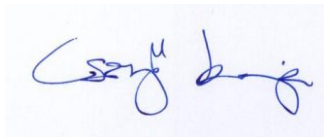
4. Explanatory note on propagation and propagating material:

In respect of a future explanatory note on propagating and propagation material, ESA would like to underline that in the EU Regulation no. 2100/94 on community plant variety rights the notion of propagating material is not used to define the scope of the right. The term used in the EU regulation is „variety constituents“ which are defined as a plant grouping consisting of entire plants or parts of plants as far as such parts are capable of producing entire plants.¹ ESA believes that the notion of variety constituents as defined in the EU regulation is appropriate for the purpose of defining the basic scope of the plant variety right. Therefore, we propose that any future explanatory note on the notion of propagating material should not be formulated in a way to preclude a wide definition such as the one in the EU regulation.

ESA trusts that the above expressed comments can be transmitted to the participants of the Seventh Session of the CAJ-AG and that they will give due consideration to these matters in their discussions on October 29 and 30, 2012.

We thank you very much in advance for your attention.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Szonja Csörgő', is centered on a light blue rectangular background.

Szonja Csörgő

Manager Intellectual Property and Legal Affairs

¹ See Article 5(3) of Regulation (EC) no. 2100/94