

From: [Szonja Csörgő](#)
To: [mail.Upov](#)
Cc: [Huerta_Yolanda](#); [Garlich_von_Essen](#); [Bert_Scholte](#); [Suelmann_Marian](#)
Subject: Comments of ESA European Seed Association on matters discussed by the CAJ-AG at its Eighth Session on October 25, 2013
Date: Friday, October 25, 2013 12:58:36 PM
Attachments: [ESA_13.0803.pdf](#)
Importance: High

To the attention of Mr. Peter Button

Dear Mr. Button,
Dear Peter,

Please find attached a letter from ESA European Seed Association incorporating our comments on a number of matters discussed by the CAJ-AG this week. We are aware of the fact that the discussions have already taken place partly on Monday and are taking place today and therefore these comments cannot be considered at the Eighth Session of the CAJ-AG. Nevertheless, these matters will continue being discussed in the future CAJ-AG sessions and therefore we trust that there will be room to address them in the coming sessions. We will certainly follow the outcomes of the current CAJ-AG discussions and provide you with further comments in due course.

Thank you very much in advance for your attention and consideration of the attached comments.

With my best regards,

Szonja Csörgő



Szonja CSÖRGŐ

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Contact ESA also on:





Mr. Peter Button
Vice Secretary-General

**International Union for the
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Brussels, October 25, 2013

ESA_13.0803

Subject: Comments of ESA European Seed Association on matters addressed by the CAJ at its Sixty-Eighth Session on October 21 and by the CAJ-AG at its Eighth Session on October 25, 2013

Dear Mr. Button,

By the present letter ESA European Seed Association wishes to reiterate its comments expressed during the Sixty-Eighth Session of the CAJ held on October 21 and to address a few other issues that are scheduled to be addressed by the CAJ-AG at its Eighth Session on October 25, 2013.

1. Explanatory notes on acts in respect of harvested material:

The draft explanatory note (document UPOV/EXN/HRV Draft 10) which was presented to the CAJ and which the CAJ decided to propose for adoption to the UPOV Council contains the following sentence in paragraph 4: „*Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.*“ At the same time work in the CAJ-AG has started on the development of illustrative examples regarding the situations in which the breeder could exercise his right on the harvested material. The document CAJ-AG/13/8/3 presenting the illustrative examples recalls the discussions which took place prior to the Diplomatic Conference in 1991 on the extension of the scope to harvested material and proposes to seek explanations to the examples taking into account also the considerations raised in those discussions. Therefore, some of the examples (in particular example 9) presented in document CAJ-AG/13/8/3 concern situations where products are imported into the country where the protection is granted from countries without protection. Such examples would however not fit into the restrictive interpretation included in paragraph 4 (as cited above) of the explanatory note as proposed for adoption to the UPOV Council.

As expressed during the Sixty-Eighth Session of the CAJ, ESA is concerned regarding the room which remains for discussion of illustrative examples after the adoption of the abovementioned interpretation of the notion of „unauthorized use“. Nevertheless, we understand and can follow the

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explanations given at the Sixty-Eighth Session of the CAJ according to which a revision of the explanatory note on acts in respect of harvested material, and in particular of the interpretation addressed above, remains possible should the discussion on the illustrative examples lead to the conclusion that such revision would be necessary. ESA is therefore confident that the range of examples that can still be discussed in relation to this subject is not going to be limited by the aforementioned paragraph 4.

At the Sixty-Eighth Session of the CAJ comments from the Russian Federation have been distributed and it was concluded that those comments would be addressed by the CAJ-AG. Given that the explanatory note as presented to the CAJ was proposed to the Council for adoption we understand that the comments of the Russian Federation might be considered by the CAJ-AG in the framework of a possible future revision. In this respect, with regard to comment number 3 of the Russian Federation ESA wishes to note that paragraphs 7 and 8 of the explanatory note should not be deleted since it is crucial to clarify in the explanatory note that acts carried out without respecting the conditions of an authorization also constitute „unauthorized use“ for the purpose of Article 14(2) and (3) of the UPOV 1991 Convention. Furthermore, in respect of that comment number 3 of the Russian Federation we would like to draw the attention of the CAJ-AG to the decision of the Court of Justice of the European Union in case [C-140/10](#) (*Greenstar-Kanzi Europe*) which may provide useful elements for the discussion of this matter.

2. Explanatory notes on Essentially Derived Varieties:

First of all ESA would like to thank and congratulate the Office of UPOV for the organization of the excellent seminar on matters related to essentially derived varieties held on October 22, 2013 and is convinced that the elements discussed at the seminar will provide useful considerations for the further work of the CAJ-AG on this important matter.

Document CAJ-AG/13/8/2 regarding the revision of the explanatory notes on EDVs contains a number of elements where ESA wishes to have the possibility to be closely involved in the discussions as those elements are of high importance for our members.

Paragraphs 6 and 7 deal with the question of using genetic information of the initial variety to obtain an EDV. ESA feels that this matter has to be addressed in the explanatory note but would like to see any statement in this regard in the explanatory note supported by solid argumentation. Without being currently in the position of being able to give you our official views on this matter we are confident to be able to contribute substantially to this discussion soon.

Paragraphs 15 to 27 deal with a number of issues concerning EDVs which do not have a protection title of their own. It is indeed a matter for the explanatory notes to clarify that such EDVs fall under the scope of the protection of the initial variety. However before deciding whether guidance on the questions of variety denomination, variety description and register (paragraphs 22-27) should or should not be given in the explanatory notes it is perhaps opportune to exchange views and experiences regarding the question of whose competence should it be to decide whether a variety is an EDV or not. We believe that it is only after having considered this initial question that the CAJ-AG could consider giving guidance on the abovementioned matters.

3. Explanatory notes on propagation and propagating material:

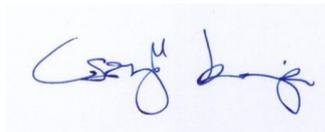
ESA would like to reiterate that in the EU Regulation no. 2100/94 on community plant variety rights the notion of propagating material is not used to define the scope of the right. The term used in the EU regulation is „variety constituents“ which are defined as a plant grouping consisting of entire plants or parts of plants as far as such part are capable of producing entire plants.¹ ESA believes that the definition in the EU regulation is appropriate for the purpose of determining the basic scope of the plant variety right and is therefore comfortable with the draft explanatory notes (document UPOV/EXN/PPM Draft 1) which leave room for a wide definition such as the one in the EU regulation. Nevertheless, we would like to point out that in the non-exhaustive list of factors that might be taken into account when deciding whether material qualifies as propagating material as presented in paragraph 3 of the document the word „and“ between points (iv) and (v) should be deleted in order to avoid any impression that those factors would constitute a cumulative list.

Having expressed the points of view above, ESA is looking forward with great interest to the presentation of the work of the CAJ-AG to the Sixty-Ninth Session of the CAJ in March 2014. Though ESA is an observer to the UPOV CAJ, the TC and the Council, is concerned by the fact that discussion on these important matters only comes to the CAJ in a later stage and comments made during CAJ sessions are taken back for consideration to the CAJ-AG where not all observers are invited to participate and further contribute to the consideration of these matters as of the beginning. We understand the intention to limit the real substantial discussion to a smaller group in order to keep efficiency of the work nevertheless we feel that such efficiency is impaired in case breeders' organizations who fully support the UPOV system and for whom such matters are of crucial importance do not have the possibility to be involved in the discussions. Therefore, we kindly request you to please consider inviting ESA to the relevant parts of the future CAJ-AG sessions as you see appropriate.

ESA trusts that you will give due consideration to the matters addressed in the present letter.

Thank you very much in advance for your attention.

Yours sincerely,

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

Szonja Csörgő

Director Intellectual Property and Legal Affairs

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