



Mr. Peter Button
Vice Secretary-General

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

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ESA_14.0373

Subject: Comments of ESA European Seed Association on the draft UPOV explanatory notes posted circulated to UPOV members and Observers for comments by June 20

Dear Mr. Button,

By the present letter ESA European Seed Association wishes to submit its comments on the draft explanatory notes circulated to UPOV members and observers for comments. First of all ESA would like to thank UPOV for all the work already done on the draft explanatory notes and their revision and would also like to express its gratitude for the opportunity to comment on these drafts as an observer organization already in this early stage. This possibility is very important for ESA as an organization representing European breeders. Further on, we also thank you for having allowed ESA to submit its comments a few days after the deadline making it thus possible for us to have a direct consultation of our members.

1. Draft explanatory notes on Propagation and propagating material (UPOV/EXN/PPM Draft 2):

We have the following general comments on the draft explanatory note on Propagation and propagating material:

- The title of the explanatory note is “on Propagation and Propagating Material” however the text of the note is only dealing with the notion of propagating material. This may lead to some confusion or misunderstandings therefore we propose either to develop also some guidance equally on the definition of “propagation” or to change the title accordingly.
- As a general remark, the whole context of this explanatory note would be much clearer with some kind of an introductory paragraph before paragraph 1 under point (b) to recall that there is no definition of propagating material under UPOV 1991 although this term is of crucial importance for breeders as it determines the scope of material on which a breeder can directly (unconditionally) exercise his right. The preamble on page 3 does not provide sufficient information on this aspect therefore we propose to include some further explanation to this regard.

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2. Draft explanatory notes on Harvested material (UPOV/EXN/HRV/2 Draft 1):

We have the following comments on the draft explanatory note on Harvested material:

- In point 1 the text in the penultimate sentence has been changed into “*exercise the right*” instead of “*exercise his right*”. The justification of this change - as explained in the endnotes - is that the word “the” is a gender neutral term. We are of the view that in this context it is not precise to use the words “the right” and in the explanatory notes it is more important to be precise than gender neutral. Further on, the text of Article 14(2) reads “*unless the breeder has had reasonable opportunity to exercise **his** right*”. Therefore, we think it would be advisable to stick to the wording of the Convention itself also in the explanatory notes. If it is really an issue to use gender neutral terms we propose to clarify in an endnote that for the purpose of the explanatory notes the term “his” means “his or hers”.
- In point 4, in the first sentence the words “*holder of the breeder’s right*” has been changed to “breeder”. This change is acceptable only if it is clarified earlier in the sentence, and in line with the text of Article 14(2), that the acts have to take place “*in respect of the propagating material of the protected variety*”. Further on, the words “*in the territory concerned*” should be deleted from this sentence since unauthorized use can also refer to breach of contract which breach may occur on another territory.
- In the same point 4, the last paragraph reads as follows: “*The breeder can enforce their right in the territory...*” This text, again to be in line with the text of Article 14(2), should be changed into “*The breeder can enforce his right in the territory...*”.
- We propose to include an additional paragraph or point after the current point 4 to clarify in general that the holder of the breeder’s right should have at least one opportunity to exercise his right. This should be a guiding principle.
- As regards the alternative texts proposed in paragraph 7 we are of the view that the first version is the most appropriate. (“*For example, in the territory of a member of the Union where a breeder’s right has been granted and is in force, unauthorized export of propagating material would be an unauthorized act.*”)
- In point 9 there have been two sentences added to the end. We agree to the essence of the addition but we propose to reformulate the text in order to use a terminology which is consistent with the content and purpose of the explanatory note. In other words, we propose not to refer to infringements and offence of PBR but rather to put the mentioned acts in the context of unauthorized use. Such text could read as follows: “*The act of an individual who purchases and produces propagating material from a licensee, which act is not in accordance with the conditions and limitations set by the breeder, should be considered as unauthorized use.*”
- As regards the alternatives offered under point 14, we are of the opinion that the first text option is the most appropriate (starting with “The term “his right”...”).
- In point 15, for the same reasons as explained above, we propose to change the wording “*a breeder may be considered to be able to exercise their right*” into “*his right*”.

- As a general comment on the examples, we would welcome a little bit more explanation on the actual circumstances which are presented in the individual examples. This would benefit all readers to better understand the scenarios presented in the examples.
- In example 3 there is a text alternative (b) which is not correct since the text in Article 16(1) of UPOV has an “OR” between (i) and (ii) and not an “AND”. This implies that if one of those conditions (either (i) or (ii)) is fulfilled there is no exhaustion and in example 3 there is further propagation involved. The same comment applies to text alternative (b) in example 4.
- Example 5 is confusing. The illustration states in a text box in the left upper corner “Export authorized under certain conditions/limitations set by the breeder” but the text below starts the statement that “The breeder of variety 2 did not authorize export of plants for further propagation.” We propose to clarify the apparent contradiction in this example.

3. Draft explanatory notes on Nullity of the breeder’s right (UPOV/EXN/NUL/2 Draft 1):

We have the following comment on the explanatory note on Nullity of the breeder’s right:

- In point 9 we propose to add in the end of the first sentence the words “*and will depend on the relevant legislation of the member of the Union concerned*” so that the sentence reads: “*The retroactive effects of nullity may vary in practice and will depend on the relevant legislation of the member of the Union concerned*”. Further on, the retroactive effects of nullity may also depend on contractual arrangements. This could also be mentioned in the explanatory notes.

4. Draft explanatory notes on Essentially Derived Varieties (UPOV/EXN/EDV/2 Draft 4):

We have the following comments on the explanatory notes on EDVs:

- Although we understand the intention to provide some guidance on possible interpretations of the term “essential characteristics” we are concerned that the list of examples and counter-examples provided in points 6 and 7 can be easily misunderstood. Instead of having such examples we propose to replace points 6 and 7 with the following text: “*For the purpose of interpreting the term “essential characteristics” any phenotypic characteristic that is relevant for DUS purposes can be relevant.*”
- In paragraph 10 it is stated that “*The words “except for the differences which result from the act of derivation” do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by the words in paragraph (i).*” These words in paragraph (i) are essentially the same as the words in the second half of paragraph (iii). Therefore, in order to avoid confusion and misinterpretation, we propose to refer in the first sentence of this point 10 to “*the words of paragraphs (i) and (iii)*”.
- We propose to delete the whole point 14. Should this not be possible, we at least propose to delete the words “*but may provide an indication of the purpose to change the essential characteristics of the initial variety*”. The efforts, costs and difficulties involved in a breeding program are not indicative of any aim or intention.

- Points 14 and 15 together have the sub-heading “Method of breeding”. In line with the previous comment we can accept the current points 14 and 15 however we are of the opinion that under this sub-heading the reader should rather get an explanation that the methods listed in Article 14(5)(c) are only some examples but they do not necessarily result in EDVs and that there could be other methods that result in EDVs which are not listed in Article 14(5)(c).
- We propose to delete point 20 because according to point (i) of Article 14(5)(b) an EDV has to be predominantly derived from the initial variety or from a variety which is itself predominantly derived from the initial variety. A hybrid however is not predominantly derived from the initial variety (i.e. the parent line) therefore this paragraph should be deleted.
- Point 21 has been changed compared to the text discussed in the CAJ-AG in October 2013 but the text still suggests that the EDV variety could be obtained via the use of molecular information only. From ESA’s point of view this text proposal is still not appropriate because in our opinion the physical use of the initial variety is an indispensable requirement to be able to infer the potential development of an EDV.
- As regards figure 1 (and all other figures) we would like to mention that in the explanation boxes about variety “B” the fact that the condition “retains the expression of essential characteristics of “A” on one hand; and the condition “conforms to “A” in essential characteristics” on the other hand are indicated in two separate indents creates the false impression if those two conditions were different from each other whereas they are not. In order to avoid such confusion we propose to keep only one of these indents.
- As a last comment of general nature on this explanatory note we would like to remind that the UPOV Secretariat was requested to provide guidance on the relationship between paragraphs (i) and (iii) of Article 15(5)(b) but such guidance is still missing from the document.

5. Draft explanatory notes on Variety denominations (UPOV/INF/12/5 Draft 1):

We have the following comments on the explanatory notes on Variety denominations:

- In point 2.3.1 sub (b) it is not fully clear whether the requirement refers only to characteristics which are included in the relevant TG. Some clarification on this aspect would be useful in our opinion.
- Point 2.3.3 (b) (iii) refers to a case where a difference of one letter at the beginning may not provide a clear visual and phonetic difference. The example in the second bullet under this sub point should not be here since it is a counter example belonging to sub (ii). Further on, the example given in the first bullet does not have a difference of one letter in the beginning but of two letters.
- In point 2.3.3 (d) we propose to mention 10 years as an example of suitable period. This is what is indicated in the CPVO guidelines on variety denominations.
- We understand that point 2.4 is intended to provide guidance on what it means that the denomination has to be different from any other denomination designating an existing variety of the same plant species or of a closely related species. We propose to also

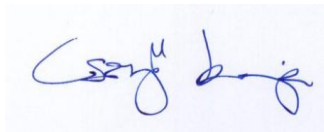
specify here that this does not only refer to denominations used for protected varieties but also denominations registered under national variety registration laws.

- In paragraph 3, in the introductory text it is stated that “*the authority shall refuse to register it and shall require the breeder to propose another denomination with a prescribed period*”. The words “prescribed period” indeed appear in Article 20(3) of the UPOV Convention but in practice the breeder may propose a new denomination at any time before the grant. In order to avoid confusion it would be useful to clarify that the “*prescribed period*” basically refers to before grant.
- In point 4(a) the first sentence of this point seems to suggest that prior rights can only be intellectual property rights (“*under plant breeder’s rights law, trademark law or any other intellectual property legislation*”). This is however not necessarily the case. For example trade names can be prior rights but they are not considered to be IP rights under all national legislations. In point (e) of this same point 4 there are examples of prior rights given where also trade names are mentioned (sub (iii)). This, in our view, is correct but may be inconsistent with what is stated under point (a). Therefore we propose to delete the mentioned sentence under point (a) and instead refer only to the list of examples on point (e).
- In point 4(e) sub point (i) the last sentence reads: “*In cases of mere similarity or small likelihood of association by users, waivers granted to breeders by prior trademark right holders could be a suitable solution.*” In trademark law the commonly used terminology is “*likelihood of **confusion***” therefore we propose to also use “likelihood of confusion” here instead of “likelihood of association”.

ESA trusts that you will give due consideration to the matters addressed in the present letter. We remain at your entire disposal for any further clarification you may deem to be necessary regarding the above comments.

Thank you very much in advance for your attention.

Yours sincerely,

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

Szonja Csörgő

Director Intellectual Property and Legal Affairs