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MATTERS CONCERNING VARIETY DESCRIPTIONS

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EXECUTIVE SUMMARY

1. The purpose of this document is to consider matters concerning the verification of the conformity of the maintenance of the variety and concerning variety descriptions, which were referred to the Technical Committee by the Administrative and Legal Committee.
2. The TWC is invited to consider the:
 - (a) use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of DUS; and
 - (b) experiences presented by experts with regard to the use of information, documents or material provided by the breeder for verifying the maintenance of the variety.
3. The TWC is also invited to consider the experiences presented by experts with regard to:
 - (a) how variety descriptions are generated in DUS examination;
 - (b) how variety descriptions are used after the granting of a breeders' right;
 - (c) how variety maintenance is verified; and
 - (d) the role of the plant material used as the basis for the DUS examination in relation to:
 - the verification of conformity of plant material to a protected variety;
 - a modified variety description; or
 - where an error is subsequently discovered in the initial variety description.
4. The structure of this document is as follows:

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ANNEX: GUIDANCE ON UPOV VARIETY DESCRIPTION

5. The following abbreviations are used in this document:

CAJ:	Administrative and Legal Committee
TC:	Technical Committee
TC-EDC:	Enlarged Editorial Committee
TWA:	Technical Working Party for Agricultural Crops
TWC:	Technical Working Party on Automation and Computer Programs
TWF:	Technical Working Party for Fruit Crops
TWO:	Technical Working Party for Ornamental Plants and Forest Trees
TWV:	Technical Working Party for Vegetables
TWPs:	Technical Working Parties

VERIFYING THE MAINTENANCE OF THE VARIETY

6. The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, in accordance with the proposal by the CAJ-AG, agreed to the development of guidance on the following matters concerning cancellation of the breeder's rights, which it invited the Technical Committee (TC) to consider in the first instance (see documents CAJ-AG/13/8/10 "Report", paragraph 73; and CAJ/69/13 "Report", paragraph 19):

(a) use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4 "Matters concerning cancellation of the breeder's right" (transcribed below), with an explanation that the information, documents or material could be maintained in a different country;

"15. Annexes I, II and III to this document provide examples of cases in which members of the Union have considered the cancellation of a breeder's right on the basis of information, documents or material provided by the breeder for verifying the maintenance of the variety. In that regard, the CAJ-AG may wish to consider the development of guidance according to the aspects raised by the European Union in Annex IV to this document:

"If the Uniformity or Stability requirement is being questioned, it may be necessary to make a technical verification. In order for the examination office to be able to compare the results of a technical verification for Stability purposes with the plant material once protected, it is important that the authority keeps plant material of protected varieties in a living reference collection, or, that documents such as the variety description, photos of the variety from the DUS test, notes from the field test etc are kept by the authority."

and

(b) use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS").

7. The provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention are reproduced below:

1991 Act of the UPOV Convention

Article 22

Cancellation of the Breeder's Right

(1) *[Reasons for cancellation]* (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) *[Exclusion of other reasons]* No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

8. The TC at its fifty-first session, held in Geneva from March 23 to 25, 2015, considered document TC/51/38 "Matters concerning variety descriptions" and agreed to invite experts to present to the TWPs, at their sessions in 2015, their experiences with regard to the use of information, documents or material provided by the breeder for verifying the maintenance of the variety and the use of versions of Test Guidelines for verifying the maintenance of the variety that were different from the version of the Test Guidelines used for the examination of DUS (see document TC/51/39 "Report", paragraph 215).

9. On May 5, 2015, the TC and TWP experts were invited to present their experiences with regard to the use of information, documents or material provided by the breeder for verifying the maintenance of the variety and the use of versions of Test Guidelines for verifying the maintenance of the variety that were different from the version of the Test Guidelines used for the examination of DUS (see Circular E-15/108). The presentations received will be provided as an Addendum to this document.

10. *The TWC is invited to consider the:*

(a) *use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of DUS; and*

(b) *experiences presented by experts with regard to the use of information, documents or material provided by the breeder for verifying the maintenance of the variety.*

MATTERS CONCERNING VARIETY DESCRIPTIONS

Developments in the CAJ in 2014

11. The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, in accordance with the proposal by the CAJ-AG, agreed to propose that the following matters in document CAJ-AG/13/8/7 “Matters concerning variety descriptions”, paragraph 4, should be considered by the TC in the first instance (see documents CAJ-AG/13/8/10 “Report”, paragraph 74; and CAJ/69/13 “Report”, paragraph 19):

“[...]”

“(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:

“(i) verifying the maintenance of the variety (Article 22 of the 1991 Act, Article 10 of the 1978 Act);

“(ii) the examination of distinctness, uniformity and stability (“DUS”) of candidate varieties; and

“[...]”

“(c) the status of a modified variety description in relation to (a¹) and (b) above produced, for example, as a result of:

“(i) a recalibration of the scale in the Test Guidelines (particularly for non-asterisked characteristics²);

“(ii) variation due to the environmental conditions of the years of testing for characteristics that are influenced by the environment;

“(iii) variation due to observation by different experts; or

“(iv) the use of different versions of scales (e.g. different versions of the RHS Color Chart).

“(d) situations where an error is subsequently discovered in the initial variety description.”

Developments in the Technical Committee in 2015

12. The TC at its fifty-first session, held in Geneva from March 23 to 25, 2015, considered document TC/51/38 “Matters concerning variety descriptions” and noted the existence of different approaches for generating variety descriptions and verifying the maintenance of varieties in different UPOV members and under different DUS testing systems (see document TC/51/39 “Report”, paragraphs 214 to 219).

13. The TC noted the information in document TC/51/38, paragraphs 9 to 12, in relation to the matters concerning variety description presented in document TC/51/38, paragraph 8.

14. The TC agreed to invite experts to present to the TWPs, at their sessions in 2015, how variety descriptions were generated in DUS examination, how were they used after the granting of a breeders’ right and how variety maintenance was verified. In particular, the TC noted the possible impact of the interaction genotype x environment in generating the variety description.

15. The TC agreed that experts should also be invited to present to the TWPs, at their sessions in 2015, the role of the plant material used as basis for the DUS examination in relation to matters presented in document TC/51/38, paragraph 8.

16. On May 5, 2015, the TC and TWP experts were invited to present to the TWPs, at their sessions in 2015, how variety descriptions are generated in DUS examination, how they are used after the granting of a breeders’ right; how variety maintenance is verified; and the role of the plant material used as basis for the DUS examination in relation to the verification of conformity of plant material to a protected variety, a

¹“(a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description),”

² “[I]f a characteristic is important for the international harmonization of variety descriptions (asterisked characteristics) and is influenced by the environment (most quantitative and pseudo-qualitative characteristics) [...] it is necessary to provide example varieties” in the Test Guidelines (see document TGP/7, Annex 3, Guidance Note GN 28 “Example varieties”, section 1.3 (iii)).

“1.2.3 Example varieties are important to adjust the description of the characteristics for the year and location effects, as far as possible. [...]” (see document TGP/7, Annex 3, Guidance Note GN 28 “Example varieties”, section 1.2.3)

modified variety description or where an error is subsequently discovered in the initial variety description (see Circular E-15/108). The presentations received will be provided as an Addendum to this document.

Developments in the CAJ in 2015

17. The CAJ, at its seventy-first session, held in Geneva on March 26, 2015, endorsed the conclusion of the CAJ-AG, at its ninth session, on the purpose(s) of the variety description developed at the time of the grant of the breeder's right (original variety description), as set out in document CAJ/71/2, paragraph 37, as follows (see document CAJ/71/10 "Report on the conclusions", paragraphs 21 to 24):

"37. The CAJ-AG agreed that, on the basis of document TGP/5 "Experience and Cooperation in DUS Testing", Section 6 "UPOV Report on Technical Examination and UPOV Variety Description", the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description) might be summarized as follows:

- (a) to describe the characteristics of the variety; and
- (b) to identify and list similar varieties and differences from these varieties; combined with the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines;
 - Date and/or document number of Reporting Authority's test guidelines;
 - Reporting Authority;
 - Testing station(s) and place(s);
 - Period of testing;
 - Date and place of issue of document;
 - Group: (Table: Characteristics; States of Expression; Note; Remarks);
 - Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks."

18. The CAJ endorsed the conclusion of the CAJ-AG, at its ninth session, on the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for enforcement of the breeder's right, as set out in document CAJ/71/2, paragraphs 38 and 39, as follows:

"38. The CAJ-AG considered the status of the original variety description in relation to the verification of plant material of a protected variety for the purposes of enforcement of the breeder's right and noted that UPOV guidance on the enforcement of breeders' rights contained in document UPOV/EXN/ENF/1 "Explanatory notes on the enforcement of breeders' rights under the UPOV Convention" explains as follows³:

"SECTION II: Some possible measures for the enforcement of breeders' rights

"While the UPOV Convention requires members of the Union to provide for appropriate legal remedies for the effective enforcement of breeders' rights, it is a matter for breeders to enforce their rights."

[...]

"39. The CAJ-AG agreed that, in relation to the use of the original variety description, it should be recalled that the description of the variety characteristics and the basis for distinctness from the most similar variety are linked to the circumstances of the DUS examination⁴, as set out in paragraph 10 (c) of this document, namely⁴:

- Date and document number of UPOV Test Guidelines;
- Date and/or document number of Reporting Authority's test guidelines;
- Reporting Authority;
- Testing station(s) and place(s);
- Period of testing;
- Date and place of issue of document;
- Group: (Table: Characteristics; States of Expression; Note; Remarks);
- Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks"

³ See document CAJ-AG/14/9/6 "Report on the Conclusions", paragraph 21.

⁴ See document CAJ-AG/14/9/6 "Report on the Conclusions", paragraph 22.

19. The CAJ noted that the TC had noted the existence of different approaches for generating variety descriptions and verifying the maintenance of varieties in different UPOV members and under different DUS testing systems. It also noted that the TC had agreed to invite experts to present to the TWPs, at their sessions in 2015, how variety descriptions were generated in DUS examination, how they were used after the granting of a breeders' right and how variety maintenance was verified. The CAJ further noted that the TC had agreed that experts should also be invited to present to the TWPs, at their sessions in 2015, the role of the plant material used as the basis for the DUS examination in relation to matters presented in document TC/51/38, paragraph 8.

20. The CAJ noted that the TC had agreed to include discussion on variety descriptions and the role of plant material, including minimum number of growing cycles for DUS examination, during its fifty-second session, to be held in Geneva in 2016.

21. The TWC is invited to consider the experiences presented by experts with regard to:

(a) how variety descriptions are generated in DUS examination;

(b) how variety descriptions are used after the granting of a breeders' right;

(c) how variety maintenance is verified; and

(d) the role of the plant material used as the basis for the DUS examination in relation to:

- the verification of conformity of plant material to a protected variety;

- a modified variety description; or

- where an error is subsequently discovered in the initial variety description.

[Annex follows]

ANNEX

UPOV GUIDANCE ON VARIETY DESCRIPTION

Reference to “variety description” in the UPOV Convention

The 1991 Act of the UPOV Convention does not make reference to “variety description”.

The 1978 Act of the UPOV Convention makes the following references to “description”:

“Article 6: Conditions Required for Protection

“(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

“(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description.

[...]

“(d) The variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.”

Document TGP/5 “Experience and Cooperation in DUS Testing”, Section 6 “UPOV Report on Technical Examination and UPOV Variety Description”

Components of a variety description are presented in the Annex “UPOV Variety Description” to document TGP/5 “Experience and Cooperation in DUS Testing”, Section 6 “UPOV Report on Technical Examination and UPOV Variety Description”, a copy of which is attached as an Annex to this document. The items forming the UPOV variety description are as follows:

1. Reference number of Reporting Authority
2. Reference number of Requesting Authority
3. Breeder’s reference
4. Applicant (name and address)
5. (a) Botanical name of taxon
(b) UPOV code
6. Common name of taxon
7. Variety denomination
8. Date and document number of UPOV Test Guidelines
9. Date and/or document number of Reporting Authority’s test guidelines
10. Reporting Authority
11. Testing station(s) and place(s)
12. Period of testing
13. Date and place of issue of document
14. Group: (Table: Characteristics; States of Expression; Note; Remarks)
15. Characteristics Included in the UPOV Test Guidelines or Reporting Authority’s Test Guidelines (Table: Characteristics; States of Expression; Note; Remarks)
16. Similar Varieties and Differences from These Varieties
17. Additional Information
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

The “UPOV Variety Description” clarifies that the description is not composed of a description of the characteristics (item 15) in isolation. In particular, the key elements of a variety description at the time of grant of the breeder’s right might be summarized as follows:

- (a) characteristics of the variety (Item 15); and
- (b) similar varieties and differences from these varieties (Item 16);
combined with
- (c) the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines (Item 8);
 - Date and/or document number of Reporting Authority’s test guidelines (Item 9);
 - Reporting Authority (Item 10);
 - Testing station(s) and place(s) (Item 11);
 - Period of testing (Item 12);
 - Date and place of issue of document (Item 13);
 - Group: (Table: Characteristics; States of Expression; Note; Remarks) (Item 14);
 - Additional Information (Item 17);
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

The characteristics used in the growing trial for establishing distinctness and the differences in state of expression between candidate and the most similar variety(ies) should be provided in the variety description, as detailed in the addendum to item 16 “Similar Varieties and Differences from These Varieties” as follows:

- “18. Explanatory Notes to the Annex: UPOV VARIETY DESCRIPTION
[...]
“(d) Ad Number 16 (Annex: UPOV Variety Description)”

“Only those characteristics that show sufficient differences to establish distinctness should be given. Information on differences between two varieties should always contain the states of expression with their notes for both varieties; if possible, in columns if more varieties are mentioned.”

Reference to variety description in other UPOV documents

Document TG/1/3 “General introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants” and associated TGP documents make several mentions to variety descriptions with respect to the DUS examination. However, the purpose and status of the variety description generated at the time of the grant of the breeder’s right are not discussed.

[End of Annex and of document]