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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

TECHNICAL WORKING PARTY FOR ORNAMENTAL PLANTS AND FOREST TREES

Forty-Ninth Session
Gimcheon City, Republic of Korea, June 13 to 17, 2016

MATTERS CONCERNING VARIETY DESCRIPTIONS

Document prepared by the Office of the Union

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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, and to consider the role of the plant material used as basis of the DUS examination in relation to those matters.

2. The TWO is invited to:

(a) note the purpose of the variety description developed at the time of the granted of the breeder's right (original variety description), and 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 paragraph 28 of this document;

(b) note the presentations on "matters concerning variety descriptions" received by the TWPs, at their sessions in 2015, as set out in paragraph 7 of this document;

(c) note the comments by the TWPs, at their sessions in 2015, on matters concerning variety descriptions and the role of plant material used as the basis for the DUS examination, as set out in paragraphs 8 to 26 of this document; and

(d) consider the presentations made by experts on their experiences with regard to the role of plant material used as the basis for the DUS examination in relation to matters presented in paragraph 31 of this document.

3. 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

4. The structure of this document is as follows:

BACKGROUND

5. The background to this matter is provided in document TWO/48/10 “Matters concerning variety descriptions”.

PRESENTATIONS TO THE TWPS AT THEIR SESSIONS IN 2015

6. On May 5, 2015, by means of Circular E-15/108, the TC and TWP experts were invited to make presentations to the TWPs, at their sessions in 2015 on experiences with regard to variety descriptions and verifying the maintenance of the variety, in particular:

- the use of information, documents or material provided by the breeder for verifying the maintenance of the variety;
- 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;
- how variety descriptions are generated in DUS examination, how are they used after the granting of a breeders’ right and how variety maintenance is verified;
- 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 modified variety description or where an error is subsequently discovered in the initial variety description.

7. The following presentations were made during the TWPs, at their sessions in 2015:

TWP	Title:	Presenter:	Available at document:
TWV; TWA; TWF; TWO	Experience with regard to variety descriptions and verifying the maintenance of the variety at the Community Plant Variety Office of the European Union (CPVO)	European Union	TWV/49/10 Add.; TWA/44/10 Add.; TWF/46/10 Add.; TWO/48/10 Add.
TWV	Verifying the maintenance of vegetable varieties	Netherlands	TWV/49/10 Add.
TWV	Verification of the maintenance of the variety in the Republic of Korea	Republic of Korea	TWV/49/10 Add.
TWV	Verifying the maintenance of a variety and Matters concerning variety descriptions	Spain	TWV/49/10 Add.

COMMENTS BY THE TECHNICAL WORKING PARTIES

8. At their sessions in 2015, the TWV, TWC, TWA, TWF and TWO considered documents TWV/49/10, TWC/33/10, TWA/44/10, TWF/46/10 and TWO/48/10 “Matters concerning variety descriptions”, respectively (see documents TWV/49/32 Rev. “Revised Report”, paragraphs 73 to 75; TWC/33/30 “Report”, paragraphs 62 to 64; TWA/44/23 “Report”, paragraphs 56 to 58; TWF/46/29 Rev. “Revised Report”, paragraphs 64 and 65; and TWO/48/26 “Report”, paragraphs 60 to 69).

Technical Working Party for Vegetables

9. The TWV noted the harmonized approaches in the vegetable sector for verifying the maintenance of varieties and the common understanding and use of variety descriptions within the members of the Union.

Technical Working Party on Automation and Computer Programs

Verifying the maintenance of the variety

10. The TWC considered the use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of DUS. The TWC noted that not all UPOV members required the maintenance of varieties to be verified. The TWC noted that China used the original trial data to generate a new variety description in the case of changes to the Test Guidelines.

11. The TWC considered the 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 and noted that some authorities grew the standard sample beside new plant material provided to verify the maintenance of the variety.

Matters concerning variety descriptions

12. The TWC considered the experiences presented by experts with regard to how variety descriptions are generated in DUS examination and noted that in some UPOV members the variety descriptions were generated by the authority while in others the variety descriptions were generated by the breeders.

13. The TWC considered the experiences presented by experts with regard to how variety descriptions are used after the granting of a breeders’ right and noted that Brazil used the variety descriptions to verify the maintenance of varieties, in particular for QL and PQ characteristics. The TWC noted that in many countries additional information could be added to databases of variety descriptions to complement information on a variety. The TWC noted that in Germany the variety description had been stored as a file. There were possibilities to transform the data of the variety description into a new scale in the database in case of change of Technical Guidelines. The TWC also noted that in Germany when characteristics could not be transformed, a new characteristic could be added to the database.

14. The TWC considered the experiences presented by experts with regard to the role of the plant material used as the basis for the DUS examination and noted that in some members, such as the Netherlands, the plant material was considered to represent the variety while its description had limited value only. The TWC noted that in some members the variety description could change and that other descriptions of the same variety could be added to the database without changing the original variety description. The TWC also noted that in Argentina the variety description could only be changed if the variety was not commercialized and that in Brazil it could not be changed after the title is granted.

Technical Working Party for Agricultural Crops

15. The TWA noted the experience of the European Union examination offices that, for agricultural crops, a standard sample of the plant material submitted for DUS examination was usually kept by the authority and would be used for verifying the maintenance of the variety against the material provided by the breeder.

16. The TWA agreed to invite Australia, the European Union and Germany to make a presentation on matters concerning variety descriptions at its forty-fifth session, to be held in 2016.

Technical Working Party for Fruit Crops

17. The TWF agreed that the plant material used as the basis for DUS examination was representative of the protected variety. The TWF agreed that, whenever possible, authorities should maintain a reference sample of the plant material of a protected variety. The TWF agreed that the description of a variety had limitations due to its link to the circumstances of the DUS examination but was an important element of the plant variety protection system and a useful tool for the analysis of distinctness.

Technical Working Party on Ornamental Plants

18. The TWO considered the use of Test Guidelines for verifying the maintenance of the variety where the version of the Test Guidelines was different from the Test Guidelines used for the examination of DUS. It noted that, in many cases, different versions of Test Guidelines were still useful for verifying the maintenance of a variety, because many characteristics and states of expression would be essentially the same.

19. The TWO noted that, in the United Kingdom, the same version of the Test Guidelines used for the examination of DUS was used for verifying the maintenance of the variety.

20. The TWO noted that Germany and the Netherlands used data generated during the examination of DUS and additional information, such as photographs, to verify maintenance of a variety.

21. The TWO noted that in some members, in litigation cases, there were ongoing discussions on access and ownership of plant material that was not maintained by the authority and agreed that verification of conformity was more difficult when the authority did not maintain a standard sample of the material used for DUS examination.

22. The TWO noted that, in Germany, new plant material of protected varieties would be requested from breeders for establishing distinctness in relation to candidate varieties in species with no living variety collection. The plant material submitted would be verified for maintenance of the variety.

23. The TWO noted that, in New Zealand, the verification of maintenance could be conducted when growing a variety for comparison during the examination of DUS of other varieties.

24. The TWO noted that, for ornamental plants, it was not always possible or feasible for authorities to maintain a living plant material collection for DUS examination purposes and noted that, in such circumstances, the variety descriptions generated from the DUS examination were used for selecting similar varieties for examining distinctness of candidate varieties.

25. CIOPORA explained that variety descriptions were important for the enforcement of breeders' rights and were frequently challenged when seeking to determine if plant material in question was of the protected variety.

26. The TWO agreed to invite Australia, the European Union, Germany and the Netherlands to make a presentation on matters concerning variety descriptions at its forty-ninth session, to be held in 2016.

DEVELOPMENTS IN THE TECHNICAL COMMITTEE IN 2016

27. The TC, at its fifty-second session, held in Geneva from March 14 to 16, 2016, considered document TC/52/21 "Matters concerning variety descriptions" (see document TC/52/29 Rev. "Revised Report", paragraphs 138 to 142).

28. The TC noted that the CAJ, at its seventy-first session, had endorsed the conclusion of the CAJ-AG, at its ninth session, on the:

(i) purpose of the variety description developed at the time of the grant of the breeder's right (original variety description), as follows:

> "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."

and

(ii) 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 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 follows:

"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 examination, as set out in paragraph 10 (c) of this document, 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"

29. The TC noted the presentations on "matters concerning variety descriptions" received by the TWPs, at their sessions in 2015, as set out in paragraph 7 of this document.

30. The TC noted the comments by the TWPs, at their sessions in 2015, on matters concerning variety descriptions and the role of plant material used as the basis for the DUS examination, as set out in paragraphs 8 to 26 of this document.

31. The TC agreed to invite experts to present to the TWPs, at their sessions in 2016, their experiences with regard to the role of plant material used as the basis for the DUS examination in relation to the following matters:

(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", with an explanation that the information, documents or material could be maintained in a different country;

(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");

(c) 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;

(d) the status of a modified variety description produced, for example, as a result of:

(i) a recalibration of the scale in the Test Guidelines (particularly for non-asterisked characteristics);
(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 Colour Chart); and

(e) situations where an error is subsequently discovered in the initial variety description.

Presentations to the TWPs at their sessions in 2016

32. On April 12, 2016, by means of Circular E-16/095, the TC and TWP experts were invited to make presentations to the TWPs, at their sessions in 2016 on their experiences with regard to the role of plant material used as the basis for the DUS examination in relation to matters presented in paragraph 31 of this document.

33. The presentations made at the forty-ninth session of the TWO under this agenda item will be published as an addendum to this document.

34. The TWO is invited to:

(a) note the purpose of the variety description developed at the time of the granted of the breeder's right (original variety description), and 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 paragraph 28 of this document;

(b) note the presentations on "matters concerning variety descriptions" received by the TWPs, at their sessions in 2015, as set out in paragraph 7 of this document;

(c) note the comments by the TWPs, at their sessions in 2015, on matters concerning variety descriptions and the role of plant material used as the basis for the DUS examination, as set out in paragraphs 8 to 26 of this document; and

(d) consider the presentations made by experts on their experiences with regard to the role of plant material used as the basis for the DUS examination in relation to matters presented in paragraph 31 of this document.

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