

**Technical Working Party for Ornamental Plants and Forest
Trees**

TWO/57/7

**Fifty-Seventh Session
Roelofarendsveen, Kingdom of the Netherlands,
March 31 to April 3, 2025****Original:** English**Date:** March 17, 2025**PROPOSAL FOR A REVISION OF DOCUMENTS TGP/9/2 (EXAMINING DISTINCTNESS) AND
TGP/10/2 (EXAMINING UNIFORMITY)***Document prepared by an expert from the European Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The purpose of this document is to present a proposal for a revision of documents TGP/9/2 (Examining Distinctness) and TGP/10/2 (Examining Uniformity) with regard to the uniformity assessment of characteristics not listed in test guidelines.
2. The objective is emphasizing the need to comply with the uniformity requirement irrespective of the test guidelines applied, in line with the provision of document TG/1/3 "General Introduction to DUS" that "any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not".

PROPOSALS:

Document TGP/9/2 (Examining Distinctness):

3. To add in document TGP/9/2 the following section from document TGP/10/2 (section 1.2):

"The 'General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants' (document TG/1/3), hereinafter referred to as the 'General Introduction', Chapter 6.2, clarifies that 'Relevant characteristics of a variety include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not'. Hence, it is a matter for the authority to decide, in addition to those characteristics included in the UPOV Test Guidelines or national guidelines, which other characteristics it may include in its consideration of distinctness, which must also be considered for uniformity and stability."

Document TGP/10/2 (Examining Uniformity)

4. To modify the existing document as follows (additions highlighted, ~~deletions~~ as strikethrough):

1.2 The "General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants" (document TG/1/3), hereinafter referred to as the "General Introduction", Chapter 6.2, clarifies that "Relevant characteristics of a variety include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not". Hence, it is a matter for the authority to decide, in addition to those characteristics included in the UPOV Test Guidelines or national guidelines, which other characteristics it may include in its

consideration of distinctness, which must also be considered for uniformity and stability provided that these characteristics comply with the basic requirements set out in TG/1/3, section 4.2.

[Annex follows]

1. Background:

The subject “assessing uniformity in characteristics not listed in the Test Guidelines” was discussed during the Annual Meeting between the Community Plant Variety Office of the European Union (CPVO) and its Examination Offices where – depending on whether the examiner refers to UPOV Document TG/1/3 or to UPOV document TGP/10/2 – different conclusions were drawn. A subsequent investigation into the causes of the different conclusions on whether to assess uniformity of characteristics that are not part of the Test Guidelines revealed an apparent mistake in document TGP/10/2 (Examining Uniformity).

The discussions in the aforementioned meeting were held to follow-up on a decision by the CPVO’s Board of Appeal (BoA) (case A10/2008 blueberry variety ‘Jewel’) who indeed held that Uniformity shall be assessed only on the basis of the characteristics listed in the test guideline applicable. In the case decided, a lack of Uniformity was identified in the characteristic “anthocyanin coloration of the young shoot” which was not part of the test guideline applicable but was part of a previous version of that test guideline. Referring to UPOV document TG/1/3, the BoA held that any characteristic irrespective of whether it appears in the test guideline can be used to assess Uniformity; however, before a characteristic that is not part of the test guideline applicable is assessed its use must – according to the PVP law of the European Union – be approved by the President of the CPVO. This procedural requirement was not respected.

The current internal procedure at the CPVO to consider additional characteristics is applied only where an additional characteristic is required to establish Distinctness. Having regard to aforementioned decision of the BoA said procedure therefore has to be extended to cases where a lack of Uniformity is observed whereby it is of no relevance whether the characteristic in question was part of a previous version of the test guideline or whether it is used in other test guidelines, decisive is that the characteristic complies with the requirements set out in UPOV document TG/1/3, section 4.2. Before said CPVO-internal procedure is amended examiners are consulted and some expressed the view - referring to UPOV document TGP/10/2 – that additional characteristics can only be used to establish Distinctness but not to declare a variety non-uniform.

The requirement that the use of an additional characteristic shall be formally approved before it can be used may only exist in the European Union, However, the proposal for a revision of documents TGP/9/2 (Examining Distinctness) and TGP/10/2 (Examining Uniformity) with regard to the uniformity assessment of characteristics not listed in the Test Guidelines is not limited to the European Union.

2. An overview of the relevant UPOV Documents:

UPOV Convention Article 8 (Uniformity):

*“The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its **relevant** characteristics.” [highlighting added]*

Document “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of harmonized Descriptions of New Varieties of Plants” (TG/1/3):

“2.4 Characteristics as the Basis for Examination of DUS

“[...] All Acts of the UPOV Convention have established that a variety is defined by its characteristics and that those characteristics are therefore the basis on which a variety can be examined for DUS.

[...]

“In addition to their use in defining a variety, characteristics are the basis for examining distinctness, uniformity and stability.

[...]

“6.2 Relevant Characteristics

“At least for the purposes of the 1991 Act of the UPOV Convention it is necessary to clarify the meaning of relevant characteristics. Relevant characteristics of a variety include at least all characteristics used for the

examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, **any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not.** [highlighting added]

Document TGP/10/2 (Examining Uniformity):

“1.2 The “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” (document TG/1/3), hereinafter referred to as the “General Introduction”, Chapter 6.2, clarifies that “Relevant characteristics of a variety include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not”. Hence, it is a matter for the authority to decide, in addition to those characteristics included in the UPOV Test Guidelines or national guidelines, which **other characteristics it may include in its consideration of distinctness, which must also be considered for uniformity and stability.**” [highlighting added]

The highlighted parts in the paragraph of TGP/10/2 above read disconnected from the provisions of document TG/1/3 led to the interpretation that – as long as the assessment of a characteristic is not required to establish distinctness – its compliance with the uniformity requirement shall be ignored.

The various UPOV documents are meant to complement each other and must be read as a whole. Furthermore, document TGP/10/2 addresses Uniformity, not Distinctness whereas the paragraph highlighted above actually addresses Distinctness, whereby the assessment of Uniformity is merely a side condition that must be fulfilled.

3. Excursus:

An important side question that must be addressed is the selection of characteristics for inclusion into the Test Guidelines. Guidance is provided in document TG/1/3 which reads:

4.2 Selection of Characteristics

4.2.1 The basic requirements that a characteristic should fulfill before it is used for DUS testing or producing a variety description are that its expression:

(a) results from a given genotype or combination of genotypes (this requirement is specified in Article 1(vi) of the 1991 Act of the UPOV Convention but is a basic requirement in all cases);

(b) is sufficiently consistent and repeatable in a particular environment;

(c) exhibits sufficient variation between varieties to be able to establish distinctness;

(d) is capable of precise definition and recognition (this requirement is specified in Article 6 of the 1961/1972 and 1978 Acts of the UPOV Convention, but is a basic requirement in all cases);

(e) allows uniformity requirements to be fulfilled;

(f) allows stability requirements to be fulfilled, meaning that it produces consistent and repeatable results after repeated propagation or, where appropriate, at the end of each cycle of propagation.

[...]

A further requirement is led down in document TGP/7/10 (Development of Test Guidelines) under GN 12: *it must have been used to develop a variety description by at least one member of the Union.*

In praxis, the mere compliance with the requirements listed above does not lead automatically to an inclusion of a given characteristic into the TG. Its inclusion is rather dependent on its actual need to establish distinctness. A review of Test Guidelines of different crops or of different versions of the same crop or test guidelines drafted by different national authorities reveal that the list of characteristics contained therein may

vary greatly and may consequently lead to different conclusion on the compliance with the uniformity requirement if obvious characteristics that are not part of the test guideline are not assessed.

A few examples:

In *Agapanthus* (TG/266/1), only the presence of leaf variegation is assessed whereas in *Salvia* (TG/316/1), also the distribution of the secondary colour is assessed.

In *Prunus* varieties bred as rootstocks (TG/187/2Rev.), flower and fruit characteristics are not assessed whereas in fruit varieties (TG/70/5; TG/35/8, TG/53/7 Rev.2 etc.), these are essential characteristics.

In ornamental varieties of *Camellia* (TG/275/1 Corr.), only the presence of hairs at the ovary is assessed whereas for Tea (*Camellia sinensis*) (TG/238/2), also the density of the hairs at the ovary is assessed.

In kiwifruit (*Actinidia*) varieties, the type of hairs on the young shoot as well as the shape of the apex of the leaf blade are assessed if the technical examination is conducted pursuant to TG/98/6 whereas no assessment of these characteristics is made if the technical examination is conducted pursuant to TG/98/7.

And finally, if an *Acer* variety is examined pursuant to a national test guidelines in Poland, the plant type (tree vs. shrub) is assessed whereas this is not the case if the variety is examined pursuant to a national test guidelines in the Netherlands (Kingdom of the). Variegation is assessed in Poland but not in the Netherlands. By contrast, leaf characteristics are assessed in the Netherlands on long and short shoots whereas the Polish national test guidelines does not foresee a separate assessment on the two different shoot types

[End of Annex and of document]