

South Africa

Contribution on policy issues relevant for essentially derived varieties (EDVs)
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agriculture, forestry & fisheries

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Comments on the explanatory note for essentially derived varieties:

Definition:

- a) The explanatory note does not provide clear guidance of what is an essentially derived variety, and it does not provide for a mechanism to determine whether a variety is essentially derived variety, or not.

At a high level, it is of course inherently problematic to construct the concept of essentially derived varieties and make its determination dependant on an undefined number of differences in undefined “essential” characteristics and then leave the determination thereof to breeders with competing interests.

- b) It is emphasized that there is a difference between distinctness and essentially derived. Distinctness is interrelated to granting the right of protection, whereas essential derivation will be the scope of the protection. For a variety to be essentially derived, it will be clearly distinguishable from the initial variety. However, an EDV has a high phenotypic and genotypic conformity compared to the initial variety. In order to distinguish between the initial variety and the EDV, the definition of essentially derived characteristics should not be restricted to a limited sub-set of DUS or additional characteristics. There should NOT be a distinction between more important and less important characteristics in establishing an EDV. The essential characteristics must include all characteristics related to the description of the DUS and testing in relating to determining the agronomic value of the variety. Also, the breeding method used must not have any impact on the concept of EDV.

Other challenges with the Explanatory Notes:

The current regime burdens the owner of the initial variety with the responsibility and legal expenses to try to “force” a determination as essentially derived on a variety that was admittedly predominantly derived from her initial variety, and often in circumstances where the the derived variety is commercialised in competition with the initial variety and causing the owner initial variety irreparable harm. This is unfair on the owner of the initial variety.

The explanatory note unfortunately does not ameliorate this problem. With regard to mutations induced by the irradiation of an initial variety, a look at paragraph 10 of the note, which is intended to provide guidance on the application of the definition of essentially derived varieties, and specifically 14(5)(b)(iii):

*“The examples given....make it clear that **the differences which result from the act of derivation** should be one or very few. However, if there are only one or very few that does not necessarily mean a variety is essentially derived. The variety should also be required to fulfil the definition stated in Article 14(5)(b).”*

The phrase in bold begs the question: Can there be any differences but for the act of derivation? In the case of mutations induced by the irradiation of the initial variety, all genetic differences will be the result of the act of derivation. The phrase is redundant and does not assist.

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How many is very few? What is the difference between few and very few?

How many is very few when regard is had to note 9, stating that there is no limit to the amount of (i.e. it can be many) difference which may exist where a variety is considered to be essentially derived.

In the case of mutations induced by the irradiation of the initial variety, and given that all genetic differences will be the result of the act of derivation, what justifies a limit on the number of differences for purposes of determining whether it's an essential variety or not?

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This explanation of the definition is qualified by the definition it seeks to explain, and accordingly renders it meaningless.

Proposals:

- a) Plant Breeding Innovations such as genome editing must be included in the definition of EDV. It is proposed that the statement deleted from the 2009 EDV explanatory notes be added back.
- b) An amendment of UPOV/EXN/EDV/2 within the boundaries of UPOV 1991 is proposed; and there is no need for a modification of UPOV/EXN/CAL/1 or UPOV/EXN/PRP/2.
- c) Application forms for Plant Breeder's Rights must be amended to disclose from which variety a variety was derived, what the act of derivation was, what are the essential characteristics of the initial variety and what are the essential characteristics of the derived variety.

This will allow the owner of the initial variety to object to the application if she contests the descriptions offered. Where a variety is an induced mutation, admitted to have been predominantly derived from an initial variety, and where the owner objects to an application on the basis that the applicant has failed to admit or agree that the variety is an essentially derived variety, the variety must be deemed to be essentially derived pending the final determination by the PBR Authority to the contrary.