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TC/52/21
ORIGINAL: English
DATE: January 26, 2016

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

TECHNICAL COMMITTEE

Fifty-Second Session
Geneva, March 14 to 16, 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 TC is invited to:

(a) note that the CAJ, at its seventy-first session, 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 granted of the breeder's right (original variety description), as set out in paragraph 12 of this document; 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 set out in paragraph 13 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 17 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 18 to 40 of this document; and

(d) consider whether 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 matters presented in paragraph 5 of this document.

3. The structure of this document is as follows:

4. 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

BACKGROUND

5. 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 invite the TC to consider the development of guidance on the following matters concerning variety descriptions (see document 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”, 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 Color Chart); and

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

DEVELOPMENTS IN THE TECHNICAL COMMITTEE IN 2015

6. 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" (see document TC/51/39 "Report", paragraphs 214 to 219).

7. The TC 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.

8. The TC 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.

9. 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.

10. 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.

11. 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.

DEVELOPMENTS IN THE CAJ IN 2015

12. 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/71/11 "Report", paragraphs 30 to 33):

> "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."

13. 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 follows[1]:

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

"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[2]:

- 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"

14. 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.

15. 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.

PRESENTATIONS TO THE TWPS AT THEIR SESSIONS IN 2015

16. 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.

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

17. 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

Technical Working Party for Vegetables

18. The TWV, at its forty-ninth session, held in Angers, France, from June 15 to 19, 2015, considered document TWV/49/10 “Matters concerning variety descriptions” (see document TWV/49/32 Rev. “Revised Report”, paragraphs 73 to 75).

19. 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

20. The TWC, at its thirty-third session, held in Natal, Brazil, from June 30 to July 3, 2015, considered document TWC/33/10 “Matters concerning variety descriptions”.

21. 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.

22. 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 (see document TWC/33/30 “Report”, paragraphs 62 to 64).

Matters concerning variety descriptions

23. 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.

24. 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.

25. 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 (see document TWC/33/30 "Report", paragraphs 65 to 67).

Technical Working Party for Agricultural Crops

26. The TWA, at its forty-forth session, held in Obihiro, Japan, from July 6 to 10, 2015, considered document TWA/44/10 "Matters concerning variety descriptions" (see document TWA/44/23 "Report", paragraphs 56 to 58).

27. 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.

28. 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

29. The TWF, at its forty-sixth session, held in Mpumalanga, South Africa, from August 24 to 28, 2015, considered document TWF/46/10 "Matters concerning variety descriptions" (see document TWF/46/29 "Revised Report", paragraphs 64 and 65).

30. 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

31. The TWO, at its forty-eighth session, held in Cambridge, United Kingdom, from September 14 to 18, 2015, considered document TWO/48/10 "Matters concerning variety descriptions" (see document TWO/48/26 "Report", paragraphs 60 to 69).

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. The TC is invited to:

(a) note that the CAJ, at its seventy-first session, 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 granted of the breeder's right (original variety description), as set out in paragraph 12 of this document; 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 set out in paragraph 13 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 17 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 18 to 40 of this document; and

(d) consider whether 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 matters presented in paragraph 5 of this document.

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