



Association for Plant Breeding for the Benefit of Society

Reply by APBRES to UPOV Circular E-21/110

Working Group on Essentially Derived Varieties (WG-EDV)

Comment concerning the Section III : OPTIONS FOR THE ENFORCEMENT OF BREEDERS' RIGHTS IN RELATION TO ESSENTIALLY DERIVED VARIETIES and Section II: ASSESSMENT OF ESSENTIALLY DERIVED VARIETIES

A new section III «Options for the enforcement of breeders' rights in relation to essentially derived varieties» was inserted in the draft «Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention» and provides options for the titleholders for the enforcement of their breeders rights. This is not the task of explanatory notes (EXN) of UPOV which should give guidance to member states to implement the Convention.

The only place where enforcement is mentioned in the 1991 Act is :

Article 30 Implementation of the Convention (1) [Measures of implementation] Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall: (i) provide for appropriate legal remedies for the effective enforcement of breeders' rights; (UPOV 91)

There is an explanatory note on Art. 30, which states that, « *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.* » and further provides a non-exhaustive list of enforcement measures, which might be considered by members of the Union.

How titleholders enforce their rights is not part of the UPOV Convention – and should therefore not be part of an explanatory note on EDVs.

The UPOV Convention is a treaty between States. The explanatory notes to the Convention are generally not addressed to other stakeholders. It is not the task of member states to give advice to breeders on how they should enforce their rights. And UPOV has not done so, thus far.

All explanatory notes (except the one on EDV) have the same preambular text :

« The purpose of these Explanatory Notes is to provide guidance on [xy] under the [1991 Act of the] International Convention for the Protection of New Varieties of Plants. The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned. »

In order to establish coherence between the EXNs, the the preamble of the EXN on Essentially derived varieties should therefore be adapted to the others.

There is no reason why breeders' rights in relation with EDV should be handled differently compared to other parts of breeders' rights.

We are not aware of any other multilateral IP Agreement which gives any recommendations to rights holders on how to enforce their rights.

The draft text of section II on the assessment of essentially derived varieties has been adapted in the same direction. It gives guidance explicitly to the titleholders on how to establish if a variety is an EDV.

There is no role foreseen for titleholders in the 1991 Act of the UPOV Convention regarding the assessment if a variety is an EDV. Therefore it is inappropriate that member states develop guidance for the titleholders on this issue in an explanatory note.

How titleholders assess if a variety is an EDV is not part of the UPOV Convention – and should therefore not be part of an explanatory note on EDVs.

Based on the above concerns, we propose the following amendments:

1. Section III of the draft Explanatory Note on Essentially Derived Varieties under the 1991 Act of the UPOV Convention should be deleted. Any advice to titleholders on how to enforce their rights should be excluded from the Explanatory Note.
2. Section II of the draft Explanatory Note on Essentially Derived Varieties under the 1991 Act of the UPOV Convention should not be changed. The version adopted by the Council on April 6, 2017 should be retained.
3. The preamble of the Explanatory Note on Essentially Derived Varieties under the 1991 Act of the UPOV Convention should be amended in the following way :
« **The purpose of t**These Explanatory Notes **is to** provide guidance on “Essentially Derived Varieties” under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). ~~The purpose of this guidance is to assist members of the Union and relevant stakeholders in their considerations in matters concerning essentially derived varieties.~~ The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned. »