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# POSITION

## ON THE CONCEPT OF EDV

Article 14(5) of the 1991 Act of the Convention for the Protection of New Varieties of Plants (UPOV 91) establishes that the scope of protection of a plant variety also extends to

*a) i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety.*

Moreover, Article 14 (5) provides for the following:

*b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety ("the initial variety") when*

*(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,*

*(ii) it is clearly distinguishable from the initial variety and*

*(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.*

This concept of an "essentially derived variety" (EDV concept) has been trans-posed into the European legislation on plant variety protection (Regulation (EC) no. 2100/94 – Community PVP Regulation) and into the plant variety protection acts of the magnitude of EU Member States.

In view of this EDV concept ESA takes the following positions:

1. In the light of modern breeding techniques, it has become much more likely that a variety bred from an existing variety (initial variety) in its essential characteristics still conforms to the initial variety. The extension of the scope of breeders' rights from a protected initial plant variety to such essentially derived plant varieties forestalls both the unrightful appropriation of the intellectual property of the breeder of the initial variety and the misuse of the breeder's exemption, i.e. the free access to protected varieties for breeding purposes and the possibility to obtain plant variety protection for the resulting new plant varieties. Therefore ESA supports the EDV concept as an instrument for addressing the problem of plagiarism (or me-too varieties) and an important tool for ensuring not only a balanced, but also an efficient protection of plant variety rights.

2. The selection methods named in Article 14 (5) (c) UPOV 1991 (selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering) do indeed very often - in the case of mutants most likely - but not automatically result in an essentially derived variety. Further, this is an open list which does not exclude that also other methods may likely result in essentially derived varieties provided that such methods include in any case the physical use of the initial variety. In order to assess whether a variety is essentially derived an individual evaluation of each suspected case in the light of the applicable rules and regulations is needed.

3. ESA supports the reversal of the burden of proof in favour of the holder of the plant breeders' right of the initial variety once a certain degree of genotypic similarity between the initial variety and a suspected essentially derived variety is reached.

4. A scientific threshold triggering such reversal of the burden of proof needs to be determined for each species or group of species. Furthermore, such thresholds should not be set at too low a level in order to avoid that derivation is deemed too easily. Thresholds set at a too low level will lead to an increased number of unjustified edv court cases. Breeders taken to court would of course still have the chance to prove that they have not used the protected initial variety. But still these breeders would have to take time and cost to defend themselves in court. This could lead to greater reluctance of breeders in the use of germplasm of their competitors' varieties and thereby to a factual limitation of the breeders' exemption. The validity of the scientific thresholds for individual species or groups of species should be regularly reviewed in the light of the most recent technical developments and if necessary be revised.

5. The term "essential characteristics" in Art 14 (5) b) i) and iii) must not be limited to characteristics relevant for the marketing of the variety. Any such limitation would give rise to a very subjective evaluation and thus legal uncertainty. In the UPOV 1991 Convention the adjectives essential, important and relevant in relation to variety characteristics are to be regarded as synonyms. This is revealed by the discussions reflected in paragraphs 516—525 and 545 - 547 including the relevant proposals DC/91/56 and DC/91/57 as mentioned in the minutes of the Diplomatic Conference. This conclusion is further supported by the UPOV technical guidelines, in particular the general introduction to DUS testing (TG/1/3) in paragraphs 2.4.4, 7.1 and 7.2.

ESA is of the opinion that, in order to avoid multiple interpretations of the EDV concept potentially resulting in diverging court decisions, the adoption of the same wording for the definition of EDV would be preferable in the legislation of all UPOV member states. Against that background, ESA is convinced that the difference between the text of Article 13(6) of the EU PVP regulation and Article 14(5) of the UPOV Convention does not mean that under the EU PVP regime other requirements would apply than under UPOV.

6. ESA supports the approach of ISF in the ongoing discussions within the UPOV CAJ- AG according to which it is possible to have a "cascade" of derivation. However, each essentially derived variety shall only be dependent on one, the protected initial variety.

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ESA is the voice of the European seed sector. ESA's members are national associations and individual companies active in research, breeding, production and marketing of seeds of agricultural and ornamental plant species. ESA represents more than 7000 seed businesses in the EU and beyond.

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