



CIOPORA Position

on

Minimum Distance / Distinctness

as approved by its Annual General Meeting on 02 April 2014 in The Hague, NL

Key Statements:

- **CIOPORA demands a sufficient minimum distance between varieties for an effective Plant Variety Right.**
- **Since new varieties are bred, selected and introduced mainly for commercial targets, the requirement “clearly” should be seen as a judgmental and evaluative requirement, and should not end in a simple search of a botanical difference.**
- **The requirement “clearly distinguishable” should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration. Accordingly, a new type of characteristics (“relevant for the determination of clearly distinguishable”) should be included into chapter 4.8 of TG/1/3 and the test-guidelines should determine for each characteristic whether it is considered relevant for the determination of “clearly distinguishable”.**
- **The relevant authorities should have the continuing obligation to take into consideration additional characteristics proposed by applicants, if such additional characteristics are important for the determination of “clearly distinguishable”.**
- **Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.**
- **In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics must be sufficiently broad. Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance. The decision should be made on a crop by crop basis.**



- **Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. The possibility to search for a difference in a subsequent growing trial if such difference was not clear in the first properly performed examination should be eliminated.**
- **The possibility of randomized “blind” testing in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be *clearly* distinguishable from the reference variety.**
- **The decision on which characteristics are relevant for the determination of “clearly distinguishable”, on how many of such characteristics must differ from each other and on the distance between such characteristics should be made on a crop-by-crop basis by a panel of experts, including representatives of the breeders of the crop concerned.**

Full Text:

Minimum Distance

CIOPORA demands a sufficient minimum distance between varieties for an effective Plant Variety Right.

The TRIPS agreement requires that a ‘sui generis’ system for the protection of plant varieties is effective. One of the most important requirements for effective PBR protection is a sufficiently broad minimum distance between varieties. An insufficient distance between varieties results in multiple weaknesses of the protection:

- The exclusive right of the breeder of the first variety is weakened. The exclusive right is mainly determined by the scope of protection. If PBR protection is granted for other very similar varieties, these other varieties are considered to be clearly distinguishable from the first variety, and thus fall out of the scope of the right of the first variety.
- The purpose of IP protection to support the commercial interest of the innovators is disregarded by not differentiating between important and unimportant characteristics.
- The obligation of the breeder to maintain his protected variety true-to-type is at risk if no tolerance is allowed. The breeder will potentially not be able to fulfill his obligation to



maintain the variety true to type, if already very minor differences lead to a new variety.

- A fair examination of candidate varieties is not given anymore, because the environmental variation of the phenotypic appearance of the reference varieties compared to the previous years and to the year of their initial examination makes it extremely difficult for the examination offices to judge if the reference variety is still the one which has been granted protection – particularly in species where no living reference collection exist.
- The enforcement of PBR is very difficult, because very soon a plant runs out of the scope of protection if the plant differs from the variety description in only one or two minor characteristics.
- The phenotypic variation within a variety, caused by environmental influences or by cultivation methods, is larger than the variation tolerated between two separate varieties. This makes it very difficult to identify a plant in the production and trade chain.

In today's reality, based on the UPOV 1991 Act, even a very small difference between two varieties makes the varieties *clearly distinguishable* in the eyes of the examination offices. Based on a pure botanical approach, all characteristics of a species are considered to be equally essential. In contrast to the UPOV 1978 Act, no differentiation is made anymore between characteristics important or unimportant for a variety. As a consequence, even a difference in one unimportant characteristic can make a variety clearly distinguishable from another variety in the eyes of the examination offices.

This systematical and inbuilt narrowing of the distances between varieties is supported by UPOV even more, by allowing for example randomized blind tests if doubts exist over the distinctness of two varieties.

This pure botanical approach runs contrary to the legal character of intellectual property protection and devaluates the requirement of "clearly distinguishable" in Article 7 of the UPOV 1991 Act to a sole measurement of a difference in at least one characteristic in the meaning of Article 1 (vi) of the UPOV 1991 Act (definition of variety).

As a result, the initial improvement of the UPOV 1991 Act compared to the UPOV 1961 and 1978 Act, aiming at a better control of "varieties, which are not clearly distinguishable from the protected variety" (Article 14 (5) (a) (ii) of the 1991 Act) has been impeded by this botanical approach.

Taking into consideration the weaknesses resulting from too small minimum distance and from the undifferentiated evaluation of important and unimportant characteristics, CIOPORA requires the following changes in the DUS examination:



- Since new varieties are bred, selected and introduced mainly for commercial targets, the requirement “clearly” should be seen as a judgmental and evaluative requirement, and should not end in a simple search of one botanical difference.
- The requirement “clearly distinguishable” should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration. Accordingly, a new type of characteristics (“relevant for the determination of clearly distinguishable”) should be included into chapter 4.8 of TG/1/3¹, and the test-guidelines should determine for each characteristic whether it is considered relevant for the determination of “clearly distinguishable”.
- The relevant authorities should have the continuing obligation to take into consideration additional characteristics proposed by applicants, if such additional characteristics are relevant for the determination of “clearly distinguishable”.
- Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.
- In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics must be sufficiently broad. Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance. The decision should be made on a crop by crop basis.
- Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. If a difference was not clear in the first properly performed examination, the possibility to search for a difference in a subsequent growing trial, according to chapter 5.2.3.2.4 of TGP/9, should be eliminated.
- The possibility of randomized “blind” testing according to chapter 6.4 of TGP/9 in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be *clearly* distinguishable from the reference variety.
- The decision on which characteristics are relevant for the determination of “clearly distinguishable”, on how many of such characteristics must differ from each other and on the distance between such characteristics should be made by a panel of experts, including representatives of the breeders of the crop concerned.

¹ TG/1/3: “GENERAL INTRODUCTION TO THE EXAMINATION OF DISTINCTNESS, UNIFORMITY AND STABILITY AND THE DEVELOPMENT OF HARMONIZED DESCRIPTIONS OF NEW VARIETIES OF PLANTS”

CIOPORA

UNITING BREEDERS, PROTECTING INNOVATION



CIOPORA suggests that these changes, which first have to be included into the general UPOV TGP documents, should afterwards be included into the single UPOV test guidelines gradually, species by species, by the Technical Working Parties and the Technical Committee, taking into consideration the input of the breeders.

The changes should not have retroactive effects for varieties which are already on the market or for which protection has been granted.