



Summary of the negotiations in the Working Group on Essentially Derived Varieties (2020 – 2021)

At the CAJ Meeting in October 2020 a Working Group comprising of 13 member countries and the European Union, 6 breeder organisations, and APBRES was formed. The Working Group started its work in December 2020 and later held three more meetings to develop a proposal for the revision of the Explanatory Notes (EXN) on Essentially Derived Varieties (EDV). The report and all the Working Group's working documents can be found [here](#). The way the Working Group carried out its mandate demonstrates the great influence of the seed industry on UPOV and on important decisions.

In the first meeting *"The WG-EDV agreed, as a first step in informing its work, to invite the breeders' organizations to present an overview of the aspects of document UPOV/EXN/EDV/2 that they would wish to be reviewed to reflect the practice and understanding of breeders on essentially derived varieties and to present proposals on those aspects."* The WG further agreed that the breeder's presentation at its second meeting, should be *"followed by discussion and consideration of the presentation by the WG-EDV in relation to the issues identified in Annex II to document [UPOV/WG-EDV/1/2](#)."* It is important to note, that Annex II which has been mentioned, includes the listing of 65 issues and proposals concerning specific aspects of the current Explanatory Notes, identified by members and observers. It is thus remarkable that only the breeders were invited for a presentation in the Working Group, although the breeders already had the majority of presentations in the Seminar on the Impact of Policy on Essentially Derived Varieties (EDVs) on Breeding Strategy, which initiated the revision of the Explanatory Notes. Their position was thus well known.

In the second session, the breeders' associations made their presentation. This was followed by four questions from members which were answered by the breeders' associations. Then something happened that would be inconceivable in any other multilateral agreement, but which illustrates well how UPOV functions. At the request of the Chair of the Working Group (Peter Button, the Vice-Secretary General of UPOV), *"The WG-EDV agreed to request the Office of the Union to prepare a preliminary draft text for a revision of document UPOV/EXN/EDV/2 for consideration by the WG-EDV at its third meeting, on the basis of the proposals presented in the joint presentation by the international breeders' organizations, taking into account the points raised during the meeting by the Delegations of Argentina, Kenya and Sweden and the clarifications provided by the representatives of the breeders' organizations."* With this decision, the 65 proposals of the member countries and observers recorded in the working documents were simply swept aside and never discussed. Instead, the drafting of the revised Explanatory Note simply incorporated the wishes of the industry. It is already astonishing to make such a proposal, but it is even more surprising that member states are so willing to hand over the power of definition to industry.

The draft submitted to the Working Group by the Office of the Union contained some substantial changes to the existing Explanatory Note. Immediately before the third meeting, the members of the Working Group received some fundamental criticism on this draft through a letter from the biotech company Inari. The company criticised the fact that the draft Explanatory Note cannot be reconciled with the UPOV 1991 Act and its legislative history and stated that the draft would have an anti-innovation effect. Inari, therefore, urged the Working Group to reconsider the Explanatory Note in order to allow varieties derived from new breeding technologies to get the full scope of Plant

Breeders Rights protection. They further requested that the breeders' exemption is not limited to breeding by crossing and selection. For observers following the discussion, it was interesting to see how the new breeding technologies, repeatedly described by the industry and by some governments as extremely innovative, are in the new draft in any case only an essential derivative of the original variety. And it is extremely confusing when breeders' organisations such as the International Seed Federation write on their website that "Technological advances drive innovation in plant breeding to create new varieties", but in the UPOV negotiations take the position that the results of these new breeding techniques (such as gene editing) are always essentially derived varieties. Surprisingly, these objections were not addressed during the third session of the Working Group. Instead, the breeders' organisations expressed full support for the preliminary draft, and the Working Group only adjusted details in the text.

It was then Spain, that submitted a comment in the run-up to the 4th working group, which brought the core question of the revision back into the discussion. Spain stated that the new wording is *"inconsistent with Article 14(5)(b)(i)" and that in specific cases "the variety should not automatically be considered as essentially derived, and each case should be reviewed on a case-by-case basis."* [...] *"Otherwise, one would be favoring classic plant breeding technologies and penalizing any technological advance that includes genomic technologies allowing mono-parental breeding. [...] It would be all the more surprising if obstacles were to be placed in the way of granting rights for new varieties that do indeed possess unique essential characteristics in comparison with existing varieties. The meaning of the final wording of this explanatory note is crucial, as it could change the spirit of the Convention as drafted."* But already before the 4th meeting Spain's request was rejected by the Seed Industry in a joint comment. The Industry *"believe that the proposed revision of the current Explanatory Notes on EDV is critical to provide greater fairness and legal certainty for breeders, PBR owners, and developers of essentially derived varieties, such as gene-edited varieties, and to restore the balance between the owners of PBR and the owners of Patents, which are commonly used to protect gene-editing technologies and traits."* And that *"the approach to classify varieties that differ in one or more essential characteristics from their IV [initial variety] as no longer eligible EDV's is inherently wrong."*

APBRES also submitted [a comment with proposed amendments](#) in advance of the 4th session. The reason for this was that in the proposed draft a completely new section "Options for the enforcement of breeders' rights in relation to essentially derived varieties" was introduced out of nowhere. We argued that the way titleholders enforce their rights is not part of the UPOV Convention – and should therefore not be part of an explanatory note on EDVs. APBRES, therefore, requested the deletion of this section, as it is not the task of member states to advise breeders on how they should enforce their rights. In their comment published before the meeting, the seed industry rejected the proposal made by APBRES.

During the 4th meeting of the Working Group, the lines were as described above. The Spanish proposal was rejected by the seed industry, which was supported by the United States, Canada, and the EU Community Plant Variety Office. In the end, the WG-EDV *"agreed it would be important for members of the WG-EDV to take the opportunity to discuss those comments with the Delegation of Spain prior to the CAJ."* The proposals by APBRES were not supported. But the representative of APBRES stated that they still do not agree with the text as it is proposed.

The subsequent discussions at the CAJ meeting are described in the [APBRES Report on the 2021 UPOV Session](#).