



Mr. Peter Button  
Vice-secretary general of UPOV  
34 Chemin des Colombettes  
CH-1211 Geneva 20

27<sup>th</sup> May 2020

### **AIPH contribution in response to UPOV Circular E-19/233**

Dear Mr. Button,

AIPH represents and supports ornamental grower associations globally with the aim to champion a prosperous industry, growing plants that enhance lives, advance societies, and sustain our planet for this generation and the next. AIPH has been informed about the contribution in response to UPOV Circular E-19/233 by the breeder's associations: ISF, CIOPORA, CLI, Euroseeds, APSA, AFSTA and SAA\*.

AIPH would like to support the main conclusions and policy recommendations regarding the use of the concept of EDV, based on the results of the survey under the member companies of the organisations mentioned. AIPH's key arguments supporting these conclusions and policy recommendations, are the following:

With reference to the total outcome of this survey, 36% of the response came from the ornamental industry. This illustrates that these responses and conclusions certainly reflect AIPH's industry as well, recognising that the ornamental industry depends on access to sufficient propagating material of good quality at reasonable prices. This relies on a worldwide, well-functioning Intellectual Property rights system.

#### **Why EDV?**

Relatively small changes can have an enormous impact on the initial variety right holder. "In the field of plant species, this question of principle is of considerable economic importance, particularly in the horticultural and floral sphere where any new variety — whether it be a mutation or a creation - can become a best-seller overnight and capture a market share as large as that



held by the original plant variety right holder”\*\*. That reality calls for some form of effective enforcement of Intellectual Property rights. Without it, incentives to innovate might vanish.

### **Reasons for opening the Explanatory Note**

Last autumn, UPOV organised a special EDV seminar at its office in Geneva, after being requested by the plant breeding industry to open the discussion on UPOV’s current Explanatory Note on EDV (document UPOV/EXN/EDV/2). The reason for this request is that this Explanatory Note narrows down the concept to the retainment of all essential characteristics of the initial variety, stating that the differences which result from the act of derivation should be one or very few. In practice, many EDV’s would fall through this narrow threshold, depriving the breeders of initial varieties and their well-deserved compensation.

Another reason for requesting clarification from UPOV is that some countries decided that the national Plant Variety Office should take the decision whether a variety is essentially derived or not, instead of the breeders concerned in the dispute and eventually the competent court. This approach could cause trouble in the worldwide trade because a variety may be considered an EDV in some countries and not in others.

DNA technology (New Genetic (Breeding) Techniques) is a third reason for the importance of a clear EDV principle. These technologies allow for speedier breeding and make it arguably easier for subsequent breeders to develop a derived variety. A relatively small genetic variation could be sufficient to fulfil the DUS-requirements for a new PVR, whilst in effect the product would remain much the same. In countries with low PBR enforcement or countries that are still members of UPOV 1978 (where the EDV Concept is absent), domestic breeders and, importantly, breeders from abroad (owners of the initial variety) may be left empty-handed, and their long term investments compromised.

### ***EDV is an important component of the UPOV 1991 Act***

Since the 1991 UPOV Diplomatic Conference, AIPH has not been in favour of the EDV concept. Allowing for discussion amongst breeders at the start, AIPH took a modest position. However, AIPH has stated ever since that it has difficulty with the lack of clarity that the EDV concept created in the PBR-system. Now, almost 30 years later, there is still no clarity.

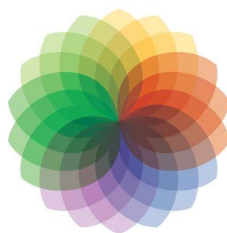
The latest UPOV Explanatory Notes on EDV (2017) have created confusion among breeders, particularly if this means that mutants of protected initial varieties are no longer seen as EDV’s. Discussions about mutants falling under the scope of the EDV, especially if the mutant was found by a grower (the customer of the breeder), were hot topics in former decades, but with interest in alternative dispute resolutions put in place by trade associations, the increase of worldwide trade,



and the development of upcoming new breeding techniques, there have been shifts in the emphasis of EDV discussions. In AIPH's opinion following the survey mentioned, the emphasis is now on:

- further clarity on 1. the EDV concept itself, 2. on genetic thresholds and 3. on essential characteristics, would be very welcome.
- concerns have been raised as regards *the multiple interpretations* of how to apply the EDV concept *in different jurisdictions*.
- that the concept of EDV does not restrict *biodiversity, but rather enhances it* as breeders are incentivised to work with broader germplasm *if they want to avoid developing an EDV*.
- that without a good EDV policy *the value of the PVR system will be considerably lower*. Protection would be sought through a restricted licensing policy in which the new varieties *might no longer be available for small growers*.
- breeders consider it **negative or very negative** if varieties developed with *latest breeding methods (NBTs such as CRISPR-Cas 9 or other recombinant DNA technologies)* and differing in at least one characteristic from the protected initial variety, *were **not** considered as EDVs*. They are of the opinion that this would give the users of these new technologies (which could also be biotech firms that are not part of the agricultural or horticultural industry) a very easy route to take over varieties, and this would diminish the incentive to develop new varieties. In countries with low PBR enforcement or countries that are still member of UPOV 1978 (EDV Concept is absent), domestic breeders and especially breeders from abroad (owners of the initial variety) could be left empty handed and see their long term investments compromised.
- It does not matter whether the characteristic(s) in which the EDV differs from the protected initial variety is of economic, agronomic or societal importance. The breeders emphasize that as long as the variety is predominantly derived from the initial variety, **it remains “derived from”** and should be treated as an EDV.

For the above mentioned reasons, and knowing how much ornamental growers and their industry depend on reliable availability of propagating material which is of good quality and reasonably priced for all growers, large and small, AIPH fully supports the plea of breeders to UPOV to open -up the UPOV explanatory notes on EDV and to provide a clear, consistent and sufficiently broad interpretation of the EDV concept in the UPOV 1991 Convention.



# AIPH

Thank you in advance for your time and effort. Please be assured that AIPH is very willing to provide further response if needed,

Yours sincerely

Tim Briercliffe  
Secretary General

\* ISF: The International Seed Federation,  
CIOPORA: the International Community of Breeders of Asexually Reproduced Horticultural Plants  
CLI: Crop Life International  
APSA: the Asia and Pacific Seed Alliance  
AFSTA: the African Seed Trade Association  
SAA: the Seed Association of the Americas.

\*\* 85/561/EEC: Commission Decision of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.017 - Breeders' rights: roses)

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