

**Working Group on Essentially Derived Varieties (WG-EDV)**

**UPOV/WG-EDV/2/3**

**Second Meeting  
Geneva, February 4, 2021**

**Original:** English  
**Date:** March 15, 2021

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**REPORT**

*adopted by the Working Group on Essentially Derived Varieties*

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**OPENING OF THE MEETING**

1. The Working Group on Essentially Derived Varieties (WG-EDV) held its second meeting via electronic means on February 4, 2021, chaired by Mr. Peter Button, Vice Secretary-General of UPOV.
2. The meeting was opened by the Chair, who welcomed the participants.
3. The list of participants is reproduced in the Annex to this report.

**ADOPTION OF THE AGENDA**

4. The WG-EDV adopted the draft agenda as proposed in document UPOV/WG-EDV/2/1.

**JOINT PRESENTATION BY BREEDERS' ORGANIZATIONS AND DISCUSSION IN RELATION TO ISSUES FOR CONSIDERATION**

5. The WG-EDV considered document UPOV/WG-EDV/2/2.
6. The WG-EDV received a joint presentation on behalf of the international breeders' organizations, made by the representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA). The joint presentation and the narrative, are reproduced in Annexes I and II, respectively, of document UPOV/WG-EDV/2/2.
7. The Delegation of Argentina thanked the breeders' organizations for their presentation. It noted the explanation provided in slide 15 concerning mutations in apple and requested clarification on which part of the text of the current Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (document UPOV/EXN/EDV/2) the breeders' organizations understood to indicate that not all mutations would be considered to be EDVs.
8. The Delegation of Sweden expressed appreciation to the breeders' organizations for the presentation. It requested clarification on whether changes in the color of the apples or ornamental varieties could be considered as "cosmetic" or considered as changes in essential characteristics. In relation to the proposal in the presentation that the "revised Explanatory Notes affirms EDV-related roles and accountabilities in the PBR system and defines processes for managing EDV cases, including assessing EDV, relevant guidelines and options for dispute resolution", it requested clarification on whether those aspects would go beyond the scope of the Explanatory Notes.

9. In relation to the point raised by the Delegation of Argentina, the representative of CIOPORA explained that the third sentence of paragraph 9 of document UPOVEXN/EDV/2 provided that “[t]he differences must not be such that the variety fails ‘to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety’”. He explained that the current wording could imply that, if a derived variety was different in one essential characteristic, then that variety would fail to retain the expression of the essential characteristics of the initial protected variety and would be considered to be outside the scope of EDV. In reply to the first question from the Delegation of Sweden, he confirmed that changes of colors of fruits, for example apples, or of ornamental varieties, were not cosmetic and the change of color would be considered as a change to an essential characteristic, with important commercial value.

10. In reply to the second question from the Delegation of Sweden, a representative of the International Seed Federation (ISF) explained that the holder of the breeder's right of the protected initial variety was fully entitled to pursue the assertion of that right against any putative essentially derived variety from that protected initial variety. He was of the view that the breeder of the initial protected variety was in the best position to make a determination as to whether or not a new variety could be an essentially derived variety. In his opinion, it was not within the competencies of the Plant Breeders' Rights (PBR) authority to evaluate what would be the essential characteristics of every variety, because the examination of Distinctness, Uniformity and Stability (DUS) did not necessarily identify the essential characteristics. He concluded that it was up to the breeder of the initial protected variety to identify potential EDVs and pursue different options for negotiations and dispute resolution, such as arbitration or judicial procedures.

11. In relation to the comments provided by the representative of CIOPORA on paragraph 9 of document UPOVEXN/EDV/2, the Delegation of Argentina also wondered if the explanation of essential characteristics, as provided in paragraph 6 of document UPOVEXN/EDV/2, had the possibility to be understood as meaning that almost any characteristic could fall within the notion of essential characteristics.

12. In relation to the question raised by the Delegation of Argentina, another representative of ISF noted that it was important to understand what was meant by “retain the expression of the essential characteristics” in paragraph 9 of document UPOVEXN/EDV/2. She noted that it could be understood either as requiring an EDV to retain “all” the essential characteristics or as meaning that an EDV does not need to retain “all” the essential characteristics of the initial protected variety because some differences on essential characteristics might result from the act of derivation or particular breeding methods. She explained that the breeders' organizations were supportive of the latter interpretation because “the number of differences between an essentially derived variety and its initial variety is not necessarily limited to one or very few differences, and may also include differences in essential characteristics, taking into account different breeding methods”, as provided in the presentation and its scenarios.

13. The Delegation of Kenya expressed appreciation for the presentation and noted that the concept of essentially derived varieties provided the means by which the UPOV Convention strike a balance between the scope of the breeder's right, on the one hand, and the breeder's exemption, on the other hand. It was important to ensure that the rights of the breeders of initial varieties did not undermine the principle of the breeder's exemption to encourage the use of the best protected varieties in breeding programs in order to develop new varieties for the benefit of society. He noted that it would be important for breeders to have clarity on the EDV concept in order to avoid unintended inhibition in their use of the breeder's exemption.

14. The representative of CIOPORA expressed support for the comment made by the Delegation of Kenya and clarified that when differences result from random recombination produced by regular crossing and selection, that would typically not result in EDVs. He confirmed that, in the proposals concerning EDVs, there was no intention to block innovations reaching the market for commercialization, to the contrary the proposals for a clear EDV principle provided incentives to breed more diverse varieties. He explained that breeders were aware of the innovative capacity of new breeding technologies. He said that a clear EDV concept would provide the basis for the negotiation between the breeder of the initial protected variety and the breeders involved in the development of EDVs. He was of the view that breeders would find agreements on commercializing the EDVs when there was added value in bringing those EDVs to the market.

15. 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.

## DATE AND PROGRAM OF THE THIRD MEETING

16. The WG-EDV recalled the agreed timeline at its first meeting, held on December 8, 2020, as reported in document UPOV/WG-EDV/2/2, paragraphs 2 to 4 (see also document UPOV/WG-EDV/1/3 "Report", paragraphs 6 to 8):

<u>April/May 2021</u> [date to be decided]	Third Meeting of the WG-EDV (by virtual means):  - consideration by the WG-EDV of a preliminary draft text for revision of UPOV/EXN/EDV/2 (to be posted at least 4 weeks before the third meeting)
<u>June/July 2021</u> [date to be decided]	Consideration of UPOV/EXN/EDV/3/Draft 1 by correspondence (6 weeks for comments)
<u>October 2021</u> [date to be decided]	Fourth Meeting of the WG-EDV (at the fringes of the CAJ session)  - consideration of UPOV/EXN/EDV/3/Draft 2 by correspondence (to be posted 6 weeks before the fourth meeting in English)

17. The WG-EDV agreed that the third meeting of the WG-EDV be held via electronic means, on April 27, 2021 from 12 to 2 p.m. (Geneva time).

18. The following program was agreed for the third meeting of the WG-EDV:

1. Opening of the meeting
2. Adoption of the agenda
3. Preliminary draft text for the revision of the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
4. Date of the fourth meeting

19. The WG-EDV agreed that it would be helpful for the Office of the Union to hold information sessions on EDV in English, French and Spanish for members of the Union and participating observer organizations in the WG-EDV.

20. *This report was adopted by correspondence.*

[Annex follows]

## ANNEXE / ANNEX / ANEXO

## LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des membres /  
in the alphabetical order of the French names of the members /  
por orden alfabético de los nombres en francés de los miembros)

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