



Ms Stella Kyriakides  
Member of the European Commission  
Directorate General for Health and Food Safety  
Rue Froissart 101

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Brussels

CC: Mr. Giorgos Rossides, Head of Cabinet  
Ms Claire BURY, Deputy Director-General  
Ms. Angela NOTARRIGO, member of the Deputy Director-General's administration  
Ms Dorothee ANDRÉ, Head of Unit  
Ms Päivi MANNERKORPI, Team Leader Unit G1, Plant Reproductive Material  
Mr Martin EKVAD, President of the CPVO

### **Request for Revision of the Council Regulation (EC) No 2100/94 (Basic Regulation)**

Dear Commissioner,

CIOPORA is the International Association of Breeders of Asexually Reproduced Horticultural Varieties. Euroseeds is the European seed association representing breeders of agricultural and vegetable crops. Plantum is the Dutch association of breeders and young plant raisers. AIPH is the International Association of Horticultural Producers representing grower organisations internationally. For many years our organizations have been representing and supporting said breeders in questions of Intellectual Property Protection for plants in Europe and worldwide. The organizations are observers in the Administrative Council of the CPVO, and CIOPORA, Euroseeds and AIPH are also observers in UPOV. All four organizations are included in the Transparency Register of the EU.<sup>1</sup>

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<sup>1</sup> AIPH is registered in the EU Transparency Register under no. 873862119851-81, CIOPORA under no. 834378913628-15, Euroseeds under no. 11362308587-10, Plantum under no. 779809814433-48.

By way of this letter, we would like to express our concern with the fact that the European Commission has not yet included the Community Plant Variety Right (CPVR) system into the recently published Roadmap on the EU Action Plan on IP.

Whereas the CPVR system for protection of new plant varieties is indeed one of the most robust in the world, it has been operational for more than twenty-five years. While, during this period, plant breeding technologies and global horticulture and agriculture have significantly advanced, there have not been any pertinent changes in the legislation. The present non-inclusion of the Community Plant Variety Right (CPVR) system into the EU IP Roadmap is even more so disconcerting as already in 2011 the final report of the *Evaluation of the Community Plant Variety Right Acquis*<sup>2</sup> requested an improvement of the Basic Regulation, pointing out several weaknesses that the system entails.

The current CPVR system does not effectively address the latest developments and challenges of the green industry. For example, the recent decision of the European Court of Justice (CJEU) in case C-176/18 (Nadorcott)<sup>3</sup> has exposed significant loopholes and weaknesses of the **provisional protection and the protection of harvested material** under the CPVR system.

The decision in case C-176/18 has confirmed the very limited scope of provisional protection and the protection of harvested material, with two significant consequences:

- Contrary to the intention of the lawmakers, the weak provisional protection does not provide an incentive for breeders to commercialize their varieties before a PBR is granted. Growers and consumers will equally suffer from this development. If breeders cannot exercise control over the harvested material even after protection is granted, they will have to seriously consider whether to bring a variety on the market before the Community Plant Variety Right (CPVR) grant.

Important to note, the UPOV 1991 Act sets the **minimum standards** that Member States shall adopt. Member States may go beyond these requirements and provide for a stronger protection.

Particularly, in respect of provisional protection, Art. 13 of the UPOV 1991 Act reads:

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<sup>2</sup> Evaluation launched by the Directorate-General for Health and Consumers in collaboration with GHK – April 2011

<sup>3</sup> On December 19, 2019, the CJEU ruled that, because no authorization is required for propagation of varieties during the period of provisional protection, the requirement of “unauthorized use of variety constituents” for the enforcement of CPVR on harvested material is not given.

*“Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder’s right and the grant of that right. Such measures shall have the effect that the holder of a breeder’s right shall **at least** be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article 14.” (bolding and underline added)*

The Basic Regulation has adopted the minimum requirement as to provisional protection, providing the titleholder with only a limited protection (i.e. reasonable compensation) during the time between the publication of the application and the grant. This limitation has led to the negative outcome from the Nadorcott decision of the CJEU, as exposed above.

- The limited scope of protection for harvested material is particularly disadvantageous for vegetatively reproduced horticultural varieties. Due to globalization these varieties are increasingly grown outside the EU and the products (such as flowers and fruits) are imported into the EU. This is particularly concerning for those products grown in territories with a low-level or no IP protection for plant varieties. Breeders are very concerned that the CJEU decision makes it impossible in the future to exercise their rights on the harvested material grown without the breeders’ consent in foreign countries and imported into the EU. However, this was exactly the purpose of including the provision of harvested material into the Basic Regulation (see recitals of the BR). Furthermore, this is also detrimental for European growers, who will not be able compete against cheaper products coming from countries with low or no IP protection. This may lead to a loss of income, jobs, or even the loss of complete businesses.

Besides these emerging issues, there are also long-standing matters that concern breeders, and more particularly, breeders of seed-propagated agricultural crops. One of such major concerns is the lack of effective enforcement possibilities on the so-called “agricultural exception” or “farm-saved-seed exception” provided for in Article 14 of the CPVR Regulation. This particular exception allows farmers growing any of the 21 crops listed in Article 14 to save part of the harvest that they produced and re-use the seeds on their own holding under the condition that they pay an equitable remuneration to the breeder of the protected variety. According to the CPVR Regulation and the Implementing Regulation 1768/1995, in order to enforce their rights, breeders have the right to ask information from farmers and seed processors on their use of farm-saved-seed. This possibility however has been largely limited and weakened by a series of CJEU rulings from the early 2000s<sup>4</sup> which, since then, has made it rather challenging for breeders to collect the remuneration that is due. This has led to considerable losses for breeders

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<sup>4</sup> E.g. Schulin, Brangewitz

and - in certain crops - has put a halt to breeding development since the return on investment is not guaranteed despite the existence of an IP title.

Another concern refers to the **duration of the protection** of a CPVR. Breeders invest large amounts of money and time in the development of new varieties, i.e. it may take up to 20 years to bring a new fruit variety to the market. To incentivize the further development of improved varieties, the CPVR system should guarantee a fair return on investment for breeders. Moreover, the legislation should not differentiate between trees and vines on the one side and other species on the other; it should rather encompass the former to all woody plants. The standard term of protection under the CPVR Regulation is 25 years, except for trees and vines where it is 30 years. It is also possible to ask for an extension of the term of protection to other crops by way of an Implementing Regulation, which has been done already for potatoes. Actually, a concrete proposal to add woody crops, flower bulb species and asparagus to this category is under consideration by DG Sante and we hope that this action point can be positively concluded in the near future.

New developments in breeding and trade worldwide on the one hand and the recent jurisdiction on the other hand make it necessary to adapt the legislation to the current situation in the industry.

Thus, and based on the reasons presented above, CIOPORA, Euroseeds, Plantum and AIPH urgently ask the European Commission to consider a revision of the Council Regulation (EC) No 2100/94.

We remain at your disposal for further discussion.

We thank you in advance.

Kind regards,

SIGNED

Dr. Edgar Krieger

CIOPORA

SIGNED

Szonja Csörgő

Euroseeds

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Judith de Roos

Plantum

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Tim Briercliffe

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