

Relationship between the PVR system and the Common Catalogue

The Common Catalogue and the EU Plant Variety Rights system constitute two different systems designed for two different purposes, although in both cases the subject matter is plant varieties.

The Common Catalogue (CC) aims to ensure and to promote the production, the marketing and the use within the EU of plant varieties and propagating material of good quality. It is based in the principle that satisfactory results in vegetable and agricultural cultivation, depend to a large extent on the use of good plant varieties and their appropriate seed or propagating material. To achieve this goal it is important, that when accepting candidate varieties for marketing, the Member States (MS) apply uniform rules which shall be as strict as possible. The CC is based on the compilation of the National Catalogues of the MS, and it covers only the species which have an interest at EU level.

The EU Plant Variety Rights system (EUPVR) it is an industrial property regime which co-exists with the MS national regimes. Its aim is to offer a harmonized IPR regime for plant varieties at EU level and to provide plant breeders an efficient protection for their work and investments, stimulating the breeding and development of new plant varieties.

This presentation is structured in three parts:

- Main characteristics of the Common Catalogue and the PVR systems - Directives 2002/53 (CC of vegetable species), 2002/55 (CC of agricultural species) and Council Regulation 2100/94 (Implements EU PVR)
- Main similarities and differences between CC and EU PVR
- DUS tests

Main characteristics of the Common Catalogue and the PVR systems

To have a clearer understanding about the differences and the traits these two systems have in common, I would like to invite you first to go through some articles and recitals of the Council Directives 2002/55 (on the marketing of vegetable seed) and 2002/53 (on the Common Catalogue of Varieties of Agricultural Plant Species), and afterwards to do the same exercise with the Council Directive 2100/94 on Community Plant Variety Rights.

Directives 2002/53 and 2002/55

The Directive 2002/55 states very clearly its purpose in the first article:

"This Directive shall apply to the production with a view to marketing, and to the marketing, of vegetable seed within the Community"(Art. 1)

The directive 2002/53, in its recitals also refers to the importance of **seed production** for the EU agriculture.

In the recitals of Directive 2002/55 we may read:

"Satisfactory results in vegetable cultivation depend to a large extent on the use of appropriate seed." (3rd Recital).

"Greater productivity will be achieved in Community vegetable cultivation if for the choice of varieties accepted for marketing the Member States apply uniform rules which are as strict as possible"(4th Recital).

Both laws emphasize the important role and contribution of plant varieties and their respective propagating material for the EU agriculture. Based on this principle it has been decided to create Common Catalogues for agricultural and for vegetable species, both Catalogues *"....shall be compiled on the basis of the national catalogues of the Member States."* (Directive 2002/53 Art. 1 2§ and Directive 2002/55 Art. 3 3§).

These directives also precise that *".... each Member State shall establish one or more catalogues of the varieties officially accepted for certification and marketing in its territory."* (Art. 3 1§) (Art. 3 2§).

Once again the purpose of the CC is made very clear, a list of varieties officially accepted for certification and marketing within the EU territory. The Directives also states that *"These catalogues must be drawn up in accordance with uniform rules...."* and defines such rules for acceptance of varieties:

*"...MS shall ensure that a variety is accepted only if it is **distinct, stable and sufficiently uniform**."* (DUS) and, in the case of agricultural species, that *"The variety must be of satisfactory value for cultivation and use"* (VCU) (Articles 4 & 5 and 6th Recital Directive 2002/53). In the case of industrial chicory, varieties listed must also fulfill the VCU requirement.

Article 7 of both Directives refers that: *"Member States shall provide that the acceptance of varieties be based on the results of official examinations, particularly growing trials, covering a sufficient number of characteristics for the variety to be described. The methods used for determining characteristics must be exact and reliable."*

This means that to assess distinctness, uniformity and stability candidates varieties must be tested following a reliable and precise methodology. For this purpose the Commission has adopted the Directives 2003/90 and 2003/91 (which have been updated several times) setting out implementing measures for the purposes of Article 7. These Directives contain a list of species for which MS are obliged to use the Technical Protocols adopted by the Administrative Council of the Community Plant Variety Office, or in their absence the Technical Guidelines approved by the International Union for the Protection of new Varieties of Plants (UPOV).

The value for cultivation and use is specified in article 5 paragraph 4 of the Directive 2002/53

"The value of a variety for cultivation or use shall be regarded as satisfactory if, compared to other varieties accepted in the catalogue of the Member State in question, its qualities, taken as a whole, offer, at least as far as production in any given region is concerned, a clear improvement either for cultivation or as regards the uses which can be made of the crops or the products derived therefrom. Where other, superior characteristics are present, individual inferior characteristics may be disregarded."

The directive 90/2003 contains in its annex III a list of characteristics that have to be taken into consideration in the examination of the value for cultivation or use.

1. Yield.
2. Resistance to harmful organisms.
3. Behavior with respect to factors in the physical environment.
4. Quality characteristics.

The methods used shall be specified when the results are submitted.

To be included in a National List a variety must also have a suitable denomination (Article 9 §6):

"So far as the suitability of the denomination of a variety is concerned, Article 63 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (1) shall apply."

In order to facilitate the procedures to check the suitability of the proposed variety denominations, the Commission has adopted the Regulation 930/2000 (subsequently amended and recast in 637/2009) establishing implementing rules as to the suitability of the denominations of varieties of agricultural plant species and vegetable species.

Article 9 2§ (in both Directives) also indicates that *"Member States shall, as far as possible, ensure at the time of acceptance that the variety is known by the same name in all Member States"*

Another condition for acceptance of candidate varieties in the National Catalogues, is that *"...varieties accepted must be maintained according to accepted practices for the maintenance of the variety."*

Directives 2002/53 and 2002/55 include also articles, or are directly linked, to other EU legislation about certification and control of seed in the market.

Acceptance shall be valid until the end of the tenth calendar year following acceptance.

Acceptance of a variety may be renewed at given intervals if it is still cultivated on such a scale as to justify this, or should be retained in the interest of conserving plant genetic resources, and providing that the requirements as to distinctness, uniformity and stability are still satisfied.

To sum up, these two Directives define the rules applicable for the acceptance, within the EU, of candidate varieties for the production of certified seed or other propagating material and the marketing within the EU.

Main conditions for listing in a National catalogue or in the Common Catalogues:

DUS (CPVO TP or UPOV TG)

Suitable denomination (article 63 Regulation 2100/94)

VCU for agricultural species (amenity grasses excluded) and industrial chicory (Annex III Directive 90/2003)

Varieties must be maintained according to accepted practices for the maintenance of the variety

Council Regulation 2100/94

The purpose of this Regulation is to implement the sole and exclusive form of EU industrial property rights for plant varieties, which shall have a uniform effect within the EU. (Articles 1 & 2)

This system coexists with the 23 National systems for protection of plant breeders' rights; it is up to the applicant to choose the EU PVR protection or the National(s) PVR protection(s) (article 92 prohibits cumulative protection). The Regulation establishes in its article 4th the Community Plant Variety Office to manage the system.

The rights of the holder of an EU plant variety right and prohibited acts are defined in: Article 13

The following acts in respect of variety constituents, or harvested material of the protected variety, shall require the authorization of the holder:

- (a) Production or reproduction (multiplication);
- (b) Conditioning for the purpose of propagation;
- (c) Offering for sale;
- (d) Selling or other marketing;
- (e) Exporting from the Community;
- (f) Importing to the Community;
- (g) Stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorization subject to conditions and limitations.

These provisions shall apply in respect of harvested material only if:

- It has been obtained through the unauthorized use of variety constituents of the protected variety and
- The holder had not a reasonable opportunity to exercise his right in relation to the said variety constituents.

A Community plant variety right as an object of property shall be regarded in all respects, in the entire EU territory, as a corresponding property right in each Member State (Article 22)

The Regulation includes two derogations:

- Farmers' privilege for 21 agricultural species (Article 14)
- Breeders' exception (Article 15 c)

The EU PVR protection is applicable to varieties of all botanical genera and species (article 5), if they meet the following criteria (article 6):

- Distinct (article 7)
- Uniform (article 8)
- Stable (article 9)
- New
- Denomination in accordance with the provisions of article 63

Novelty is defined in article 10:

"A variety shall be deemed to be new if, at the date of application, variety constituents or harvested material of the variety have not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety:"

(a) *Earlier than one year before the abovementioned date, within the territory of the Community;*
 (b) *Earlier than four years or, in the case of trees or of vines, earlier than six years before the said date, outside the territory of the Community."*

The formal and the substantive examination of the applications are carried out by the CPVO (articles 53 & 54). If the application fulfils the requirements foreseen in the substantive and formal examination, the CPVO makes the necessary arrangements for the technical examination, to check the compliance with the criteria of distinctness, uniformity and stability (DUS).

The technical examination is carried out by an entrusted Examination Office (EO), which shall, for the purposes of the technical examination, grow the variety or undertake any other investigations required (Article 56). To perform the technical examination, the EOs must follow the technical protocols adopted by the CPVO Administrative Council, or in their absence the UPOV guidelines or the national protocols.

The varieties registered in the EU PVR are protected for a period of 25 years and in the case of tree species, vine and potatoes this period is enlarged to 30 years (article 19). To benefit from the protection the variety must keep its DUS characteristics and the owner must pay the annual fees. According to article 64, the CPVO can organize technical verifications "... to verify the continuing existence unaltered of the protected varieties"

Main similarities and differences between CC and EU PVR

	Common Catalogue	EU Plant Variety rights
Aim	Production and certification of propagating material of plant varieties with a view to marketing within the EU	Protection IPR of new plant varieties, within the EU
Scope	Agricultural species Vegetable species	All botanical genera and species
Criteria	VCU (agricultural species) Suitable denomination DUS	Novelty Suitable denomination DUS
Processing of applications	National authorities	CPVO (all EU languages)
Fees	Paid to the National authorities	Paid to the CPVO

VCU

It is a specific criterion of the Common Catalogue for agricultural species (for vegetable species only mandatory for industrial chicory), the VCU tests are also official tests but in some cases, depending on the legislation from de MS, they are executed by other organizations than the national authorities, but always under their control. There are no specific protocols to be followed for the performance of the tests (e.g. no reference to number of successful tests, locations, trial design, etc...). However the directive 90/2003, as we've seen previously, indicates in its annex III, a list of characteristics that have to be taken into consideration for the examination of the value for cultivation or use.

Novelty

It is a specific criterion from the EU PVR, only innovations can be protected. The checking of novelty is part of the substantive examination carried out by the CPVO and it is mainly based on the declarations provided by the applicants or evidences provided by third parties.

Checking of proposed denominations

In both systems the proposed denominations must fulfill the conditions laid down in article 63 of the Council Regulation 2100/94.

To facilitate the checking and acceptance of proposed denominations for varieties candidates to the National Catalogues, the Commission has adopted the Regulation 637/2009 establishing implementing rules as to the suitability of the denominations of varieties of agricultural plant species and vegetable species.

In the case of EU PVR, the CPVO Administrative Council has adopted specific guidelines.

The implementing rules adopted by the Commission are very similar to the guidelines adopted by the CPVO Administrative Council.

Assessment of DUS criteria:

These are also criteria which are common to both systems, however there is one difference in the condition of distinctness between the Common Catalogue (article 5) and the EU PVR (article 7) – for EU PVR a candidate variety must be: distinguishable from "... any other variety whose existence is a matter of common knowledge..." for the Common Catalogue the candidate variety must be: distinguishable from "....any other variety known in the Community."

DUS tests

Common catalogue

DUS are performed by national offices, which shall follow the CPVO technical protocols or the UPOV technical guidelines or in their absence the national protocols

EU PVR

DUS performed by a network of entrusted examination offices, which must follow specific quality requirements. The protocols used are also the CPVO technical protocols or the UPOV technical guidelines or in their absence the national protocols

In the years of 2007 and 2008 the CPVO organized some working groups to discuss the future of DUS in the EU, herewith some of the outcome of these discussions:

- Equivalent levels of quality should be achieved for both DUS testing (Common Catalogue and PVR)
- DUS tests in general should be performed by testing stations that fulfill certain quality requirements (audited by the CPVO Quality Audit Service)
- A general agreement to the so called principle "one key several doors", this principle implies that DUS test reports produced by examination offices, entrusted for this task by the Administrative Council of the CPVO, would be accepted as the basis, as far as compliance with the DUS requirements is concerned, for any listing and/or plant variety protection decision in the European Community.

As a conclusion we can say that the purposes of these two systems are rather different but the procedures for acceptance of varieties have many aspects in common. If we consider the criteria used for acceptance the difference concerns the VCU trials and the checking of novelty. The assessment of DUS and checking of variety denominations follows the same rules.