



CPVO · OCVV

Community Plant Variety Office
Office Communautaire des Variétés Végétales

The Community Plant Variety Protection System¹

I. Introduction

In the European Community two options for plant variety protection exist: national protection and protection on Community level.

In this presentation I will give you the outlines of the second option as offered by the Community plant variety protection system.

II. Substantive provisions

The Community Plant Variety Protection system is operational since April 1995. It has been created by the Council Regulation 2100/94 (the "Basic Regulation"). The system is managed by the Community Plant Variety Office, with its seat in Angers, France.

The substantive part of the Basic Regulation is based on the 1991 version of the UPOV Convention. UPOV is the International Union for the Protection of New Varieties of Plants.

The subject matter of a plant breeders' right, UPOV-type, is a plant variety². In order to be eligible for protection a variety has to be new, distinct, uniform and stable³. And have an adequate variety denomination.

The Community system exists in parallel with the national PVR systems. Of the 27 present EU Member States 23 have a PVR system. Breeders have the choice between protection on a Community scale covering the territory of the 27 EU Member States and protection limited to the territory of one or more EU Member States.

The scope of Community plant variety rights is to a high degree similar to that of a utility patent even though there are some differences due to the specific nature of the subject matter of plant variety rights, plant varieties. The scope of rights is mentioned in Article 13 (2) of the Basic Regulation and includes the exclusive right for the holder to produce and reproduce conditions for the purpose of propagation, sell, market, import and export to the Community and stocking. In addition to acts effected in relation to the protected variety itself, acts effected in relation to essentially derived varieties, other indistinct varieties and hybrid varieties dependent on the protected variety for their production may also constitute infringements (Article 13(2)⁴ read in conjunction with Article 13(5)).

There are important derogations of the scope of the right laid down in Articles 14-16. Article 14 sets out the terms for the so-called agricultural exemption (farmers' privilege). This exemption gives farmers the right to use farm saved seed without the consent of the owner (right holder) of the variety in question. However, the farmer, with the exception of small farmers, must pay the holder an equitable remuneration which shall be sensibly lower than the amount charged for the licensed product (Article 14(3)). If the parties can not agree upon the level of the remuneration, such remuneration should be 50% of the amounts charged for the licensed production of propagating material (Article 5 of Council Regulation No 1768/95⁵).

¹ The text of this article is based on a presentation made on 29 May 2008 in Genoa, Italy.

² The definition of a plant variety given by the UPOV 1991 convention: "a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be:

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and;
- considered as a unit with regard to its suitability for being propagated unchanged."

³ Article 5 of the UPOV 1991 Convention.

⁴ If an article is mentioned without further specification, it refers to the Basic Regulation.

⁵ Council Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights, OJ No L 173/14, 25.7.95

Article 15 of the Basic Regulation excludes from the exclusive rights of the PVR holder “breeding for non-commercial purposes and breeding for the purpose of discovering and developing other varieties” (the breeders’ exemption). Such a breeders’ exemption, considered as one of the important characteristics of UPOV style PVP legislation, does not exist as such in respect of patents.

III. Procedures to obtain a Community PVR

The procedures to be followed and the conditions required, in relation to a variety submitted for community protection, can be summarized as follows.

-Where to apply?

An application for plant variety protection can be made in any of the 23 official languages of the European Union directly to the CPVO or to one of the national agencies in a Member State, which in turn will take the necessary steps to send it on to the CPVO.

-Who can apply?

Any individual or company whose domicile or headquarters is located in the European Union.

Individuals or companies from a state not a member of the European Union can also apply, provided that an agent domiciled in the Community has been nominated.

-Checking the application, formal aspects

When an application is received, the CPVO checks to see that it is complete and eligible and that the variety is novel⁶. If no impediment is found at this stage, the CPVO arranges for a technical examination of the variety submitted.

-Technical examination (DUS assessment)

The purpose of this examination is to assess whether the criteria of distinctness, uniformity and stability (DUS requirements) are complied with.

The CPVO does not itself carry out technical examinations. These are entrusted to bodies deemed competent by the CPVO Administrative Council. Examinations have to be conducted in accordance with guidelines laid down by the CPVO Administrative Council. In its last meeting the Administrative Council has included a number of examination offices of the new Member States in the list of “competent” examination offices for a certain number of species.

As regards agricultural and vegetable varieties as a rule DUS testing has already been launched in the framework of a national listing system before an application for Community PVR has been made. In respect of these varieties the DUS test report to be used for the listing decision will in general be taken over by the CPVO, if the test has been performed in conformity with the applicable quality requirements. For agricultural and vegetables varieties not intended to be commercialised as such, like parental lines, listing is not an option. If for such varieties Community PVR protection is sought, DUS-testing is initiated by the CPVO.

In the absence of listing systems for ornamentals, the DUS assessment of ornamental varieties which are candidate for Community protection, is as a rule initiated by the CPVO.

⁶ A variety will be novel if, on the date of application for protection of the variety, it has not been sold or disposed of with the consent of the breeder:

- earlier than one (1) year before that date within the territory of the Union;
- earlier than four (4) years before that date outside the territory of the European Union or;
- earlier than six (6) years in the case of trees and vines.



Three basic principles govern the actual DUS testing in the European Community organised under the responsibility of national listing authorities, national PVR authorities or the CPVO.

- Test method prescribed by PVR/listing authority

Testing takes place in respect of the main species on the basis of test guidelines adopted by the CPVO Administrative Council. Where no such guidelines exist, testing is done on the basis of UPOV test protocols directly or national test guidelines.

- Test location selected by PVR/listing authority

The PVR/listing authority is responsible for the place where the testing of a candidate variety takes place. As regards availability of examination potential the situation in respect of ornamental species differs from that of the other species. For most of the ornamental species only one competent examination office is available. This is the result of a development started long before the Community PVR system came into force.

Also in respect of fruit species the number of competent examination offices per species is very limited. In the case of apples the CPVO has achieved a degree of centralised testing.

DUS examination facilities for the major agricultural, vegetable and fruit species are available in a number of countries. The CPVO chooses, in the case it has to organise a test for a variety for the assessment of which several test possibilities are available, the examination office on the basis of a set of well defined criteria, such as the geographical origin of the variety and the preference of the breeder.

- Official testing.

Most of the testing is done by organisations with an independent, sometimes official, status. The responsibility for the final DUS assessment is in the hands of those organisations, even when, as in the case of the French maize testing approach, or the Dutch vegetables testing, part of the assessment is performed by breeders.

Varieties submitted for protection are compared during the examination with other varieties submitted as part of an application for Community protection and with appropriate varieties of common knowledge at the time of application.

- One key, several doors

In the framework of a so-called Strategic Discussion the structure of DUS testing as described above has been reviewed.

The main conclusion of the discussion is , that meeting well defined quality requirements should be the major regulating tool as regards examination offices involved in DUS testing in the European Community not only in the framework of the Community PVP system but also in respect of DUS testing for listing purposes. This conclusion is based on the presupposition that the relevant authorities, national and community listing authorities, as well as national and community PVR authorities, accept the so-called "**one key, several doors principle**". This principle implies that a DUS test report produced by an examination office that meets, as far as the species in question is concerned, these quality requirements will be accepted by all Community and national authorities competent for listing and PVR purposes. The Administrative Council of the CPVO is the competent authority to establish whether an examination office meets the quality requirements and can be given the status of "entrusted examination office". The new DUS examination approach will be operational as from 1 January 2010.

- Checking variety denomination

In addition to compliance with the DUS requirements, a variety must be identified by a variety denomination. The variety denomination is proposed by the applicant and has to be approved by the CPVO. To be approved by the CPVO, a variety denomination must fulfill several criteria. For example, it must allow the variety to be clearly identified and ensure it is different from a denomination identifying an existing variety of the same botanical species or a related one.



The CPVO is in the process of creating a comprehensive database of variety denominations to be used as a tool in the assessment of proposed denominations. This project is the fruit of cooperation between UPOV and the CPVO.

- Grant of title

If the CPVO is of the opinion that the findings of the examination are sufficient to base a positive decision upon and the other requirements have been met, it grants a Community plant variety right. In so doing, the CPVO issues the title holder with a certificate attesting to the grant of protection and a copy of the decision containing an official, detailed description of the protected variety.

Community protection may be granted as a general rule for twenty five (25) years, or for thirty (30) years in the case of vines, potatoes and trees.

-Appeals

A Board of Appeal has been established which is responsible for deciding on appeals made against decisions taken by the CPVO. The Board is made up of a Chairman and his/her alternate and members chosen by the Chairman from a list (drawn up on the basis of a strict regulatory procedure) depending on the cases under consideration. The Board of Appeal acts independently from the other organs of the CPVO.

The decisions of the Board of Appeal are open for appeal with the Court of Justice of the European Communities in Luxembourg.

IV. Publicity

Every two months the CPVO publishes an Official Gazette containing all the information appearing in its Registers, in particular applications for protection, proposals for variety denominations and titles granted. Any other information the CPVO feels the public should be informed about may also be published in the Gazette. Furthermore the CPVO has created a website (<http://cpvo.europa.eu>) containing all the information published in the Official Gazette and other data concerning the CPVO and the Community system.

V. Enforcement

Under Community law, there is no common legal system in place as regards infringement procedures for plant variety rights. However, the Basic Regulation provides some basic conditions regarding civil claims, infringements and jurisdiction (Articles 94 to 107). These rules together with the Lugano Convention ensure that there will always be a competent court to deal with infringements of Community plant variety rights (Article 101). The procedures in such proceedings are governed by national law. Article 103 provides that, where jurisdiction lies with national courts, the rules of procedure of the relevant State governing the same type of action relating to corresponding national property rights shall apply.

Article 105 requires a national court or other body hearing an action relating to a Community plant variety right to treat the right as valid. This provision underlines the fact that only the Office is competent with regard to the nullification or cancellation of a Community plant variety right.

Article 107 provides that Member States shall take all appropriate measures to ensure that the same provisions are made applicable to penalize infringements of Community plant rights as apply the matter of infringements of corresponding national rights. Accordingly, even though the Basic Regulation is silent as regards the sanction of seizure and destruction of infringing material, a holder of a Community plant variety right may ask a national court for such a remedy if such remedy is provided for under national law.

The Basic Regulation states that the holder has a right to a reasonable compensation in case there is an infringement of his rights (Article 94 (1)). As mentioned above, this is the case even if the infringer was in good faith. However, if it is established that the infringement was carried out intentionally or negligently, the infringer shall be liable to compensate the holder of the CPVR for any further damage resulting from the act of infringement. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived there from by the person who committed the infringement (Article 94 (2)).



Article 95 provides that the holder of a Community plant variety right may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, affected an act that he would be prohibited from performing subsequent thereto.

In addition to what is said in the Basic Regulation concerning enforcement, it could be mentioned that on 29 April 2004 the European Parliament and the Council adopted Directive 2004/48/EC on the enforcement of intellectual property rights.⁷ The directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. The scope of the directive covers any infringement of intellectual property rights as provided for by Community law and/or by national law of the Member States. Accordingly, infringements of Community plant variety rights as well as national plant variety rights in any of the Member States of the European Union are covered. The directive includes an obligation on the Member States to provide for a number of measures in their national laws relating to issues such as procedures and remedies, evidence, right of information, provisional and precautionary measures, injunctions and legal costs. The Member States shall take the necessary measures to comply with the directive by 29 April 2006.

Another interesting aspect of enforcement is the recent amendment of the Regulation dealing with customs action against goods suspected of infringing certain intellectual property rights.

On 22 July 2003 the Council adopted Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.⁸ The Regulation applies with effect from 1 July 2004. The Regulation sets out conditions for action by the customs authorities when goods are suspected of infringing an intellectual property right in certain specified situations. The Regulation also contains provisions on actions to be taken relating to goods found to infringe an intellectual property right at the end of the prescribed procedure. The Regulation covers goods infringing intellectual property rights listed in the Regulation, which includes national plant variety rights under the laws of the Member States as well as Community plant variety rights.

VI. Recent developments

The Community system is very successful. In 2008 more than 3000 applications for Community plant variety rights were received by the Community Plant Variety Office (CPVO). At present more than 16.500 Community plant variety rights are in force.

This development shows that the breeding industry is still able to create a constant stream of new varieties. New varieties with traits such as higher yield, better quality traits, have more effective resistances against pests and diseases. New varieties that are better adapted to the needs of farmers and flower producers, to the requirements of the processing industry or, in the case of ornamentals, to the ever changing taste of the consumers.

It also shows that although other industrial property rights are available for varieties per se, trademarks or for biotechnological inventions encompassing more than one single variety patents, the plant variety right UPOV type is still considered by breeders as an adequate instrument to protect the output of their industry.

The number of applications for Community protection is higher than the sum of the national applications received by the national PVR authorities within the European Community. This shows that protection on European scale is an attractive alternative for national protection for those varieties which have an international market.

Unfortunately the present economic crisis has left its traces also in the Community PVP system. Since the beginning of this year a drop in applications in the order of 15% is visible. Most affected are ornamentals and agricultural species.

I expect that this development, as the crisis itself, is of temporary nature. There are no signs that the Community PVP system suffers from a structural lack of interest in this type of intellectual property right.

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⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195/16, 2.6.2004.

⁸ Council Regulation (EC) No 1393/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ L 196/7, 2.8.2003



