



FREQUENTLY ASKED QUESTIONS

ON

ENLARGEMENT

Romania and Bulgaria

Unofficial document compiled by the CPVO incorporating the questions received on the consequences of enlargement of the EU for the CPVR system and the CPVO with the answers given by the CPVO.

TABLE OF CONTENTS

1	IN WHICH LANGUAGES MAY I FILE AN APPLICATION FROM 01.01.2007?.....	3
2	WILL THE NEW MEMBER STATES NEED TO IMPLEMENT THE BASIC REGULATION IN THEIR NATIONAL LAWS TO APPLY THE COMMUNITY PLANT VARIETY RIGHTS SYSTEM?	3
3	FROM 01.01.2007, WHAT WILL BE THE EXACT DEFINITION OF 'TERRITORY OF THE COMMUNITY'?	3
4	WHAT WILL HAPPEN TO THE CPVRS GRANTED <i>AFTER</i> ACCESSION?.....	3
5	WHAT WILL HAPPEN TO THE CPVRS IN FORCE <i>PRIOR TO</i> ACCESSION?	4
6	WHAT WILL HAPPEN TO APPLICATIONS ONGOING ON THE DATE OF ACCESSION?.....	4
7	IS THERE A POSSIBILITY TO APPLY FOR COMMUNITY PLANT VARIETY PROTECTION FOR VARIETIES PROTECTED BY THE NATIONAL SYSTEM OF A NEW MEMBER STATE?	4
8	IS THERE A POSSIBILITY TO APPLY FOR NATIONAL PROTECTION WHEN A COMMUNITY PLANT VARIETY PROTECTION HAS ALREADY BEEN GRANTED?.....	4
9	WHAT ABOUT VARIETIES WHICH WERE REJECTED, WITHDRAWN OR SURRENDERED IN THE COMMUNITY BUT STILL ARE PROTECTED PURSUANT TO NATIONAL LEGISLATIONS?	4
10	WILL A BREEDER OF A CANDIDATE VARIETY WHICH HAS ALREADY BEEN REJECTED BY A NEW MEMBER STATE PURSUANT TO NATIONAL PROVISIONS BE PERMITTED TO APPLY FOR A CPVR?	4
11	WHEN A NATIONAL PROTECTION IS GRANTED TO A VARIETY IN A NEW MEMBER STATE, CAN A THIRD PARTY OF THE PRESENT COMMUNITY PROPAGATE THIS VARIETY WITHOUT THE BREEDER'S APPROVAL?.....	5
12	WHAT WILL HAPPEN IN CASE OF CONFLICT BETWEEN NATIONAL RIGHTS AND EXTENDED COMMUNITY RIGHTS <i>FOR THE SAME VARIETY</i> ?	5
13	WHAT OF THE CASE WHERE ONE VARIETY IS PROTECTED AT NATIONAL LEVEL IN A NEW MEMBER STATE AND ANOTHER, SEPARATE BUT INDISTINCT VARIETY, IS PROTECTED UNDER THE COMMUNITY SYSTEM, THE SCOPE OF WHICH IS THEN EXTENDED TO THE NEW MEMBER STATE?.....	5
14	HOW WILL THE NOVELTY REQUIREMENTS APPLY TO THE NEW MEMBER STATES? WILL THERE BE A TRANSITIONAL REGIME?	6
15	THE HOLDER OF A COMMUNITY PLANT VARIETY RIGHT MAY REQUIRE PAYMENT OF AN EQUITABLE REMUNERATION. DO GROWERS OF A NEW MEMBER STATE, WHO CONTINUE TO USE A PROTECTED VARIETY, HAVE TO PAY ROYALTIES IF, BEFORE THE DATE OF ACCESSION, THEY HAVE ALREADY USED THAT VARIETY FREELY?.....	6
16	WILL THE FARMER'S EXEMPTION REFERRED TO IN ARTICLE 14 OF THE BASIC REGULATION APPLY TO FARMERS OF THE NEW MEMBER STATES IF, BEFORE THE DATE OF ACCESSION, THEY HAVE ALREADY USED THAT VARIETY FOR THE PURPOSES DESCRIBED IN ARTICLE 14(1) OF THE UPOV '91 ACT WITHOUT PAYMENT OF REMUNERATION?	6
17	HOW AND WHEN WILL THE EXAMINATION OFFICES OF THE NEW MEMBER STATES BE IMPLICATED IN THE DUS TESTING FOR THE PURPOSE OF GRANTING CPVRS?	7
18	WILL THERE BE AN INCREASE OF THE FEES TO BE PAID AS A CONSEQUENCE OF ENLARGEMENT.....	7

Introduction

Following the completion of accession negotiations, the European Union looks forward to welcoming Bulgaria and Romania as from **1 January 2007**.

Accession of new Member States will have an impact on the CPVR system and hence on the work of the CPVO. This part of the CPVO's web site deals with enlargement matters relating to the CPVR system and the CPVO.

Questions asked

1. IN WHICH LANGUAGES MAY I FILE AN APPLICATION FROM 01.01.2007?

At present the CPVO is working in all 21 languages of the Community. Since the languages of the new Member States will acquire official status, the CPVO will have to work in 23 languages. From 01.01.2007, any application to the CPVO may be filed in one of the 23 languages. The CPVO will make the necessary forms available from early 2007 on.

2. WILL THE NEW MEMBER STATES NEED TO IMPLEMENT THE BASIC REGULATION IN THEIR NATIONAL LAWS TO APPLY THE COMMUNITY PLANT VARIETY RIGHTS SYSTEM?

The Community plant variety rights system is enshrined in a directly applicable Council Regulation. Thus, in the absence of any derogation or transitional arrangements, the Basic Regulation will apply from the date of accession in the territories of the new Member States without the need for implementation.

3. FROM 01.01.2007, WHAT WILL BE THE EXACT DEFINITION OF 'TERRITORY OF THE COMMUNITY'?

Article 2 of Council Regulation (EC) No 2100/94 (the "Basic Regulation") states that Community plant variety rights shall have uniform effect within the territory of "the Community". On accession the meaning of "Community" in relation to the "acquis communautaire", of which the Basic Regulation forms part, will be changed, so as to include the territories of the new member States. The term "Member State" (of the Community) will be construed accordingly.

4. WHAT WILL HAPPEN TO THE CPVRS GRANTED *AFTER* ACCESSION?

Following the new definition of "Community", as mentioned in question 3, Community plant variety rights granted *after* accession will apply after the 01.01.2007 throughout the territories of both the new and current Member States.

All actions permitted under the CPVR system for the current Member States will apply in exactly the same way in the EU with extended borders from 01.01.2007. A community rights title holder will be granted protection guarantying him exclusive exploitation rights for his variety throughout the EU with extended borders.

In this respect, there will be no derogation and no transitional period.

5. WHAT WILL HAPPEN TO THE CPVRS IN FORCE *PRIOR TO ACCESSION*?

The automatic consequence of the new definition of "Community" will be that Community plant variety rights in force *prior* to the date of accession will extend, as of that date, to the territories of the new Member States (at no extra cost to the holders of those rights and with no formalities). In this respect, there will be no derogation and no transitional period.

6. WHAT WILL HAPPEN TO APPLICATIONS ONGOING ON THE DATE OF ACCESSION?

For *ongoing* applications, the CPVO will need to consider the following possible effects from the date of accession:

(a) the stipulation in article 82 of the Basic Regulation that an applicant from outside the territory of the Community must use a procedural representative who *is* based in that territory will cease to apply to applicants in the new Member States;

(b) the provisional protection conferred (from the date of publication of the application) by article 95 of the Regulation will extend to the territories of the new Member States and apply as from 1.01.2007.

7. IS THERE A POSSIBILITY TO APPLY FOR COMMUNITY PLANT VARIETY PROTECTION FOR VARIETIES PROTECTED BY THE NATIONAL SYSTEM OF A NEW MEMBER STATE?

The holder of a variety protected in one or more national system(s) of the EU 27 with extended borders may apply for a CPVR. If his candidate variety fulfils the Distinctness, Uniformity, Stability criteria and is novel according to article 10 of the Basic Regulation, it will be granted a CPVR. This possibility already exists today for applicants coming from a new Member State being also a member of the UPOV. See also the last paragraph of section 17.

From the date of grant, and since cumulative protection is prohibited according to article 92 of the Basic Regulation, the holder of the national right will be unable to invoke the rights conferred by such national protection for the variety for as long as the CPVR remains effective. The national protection right will become a 'sleeping right' for the duration the Community right.

8. IS THERE A POSSIBILITY TO APPLY FOR NATIONAL PROTECTION WHEN A COMMUNITY PLANT VARIETY PROTECTION HAS ALREADY BEEN GRANTED?

Since Article 92 of the Basic Regulation prohibits cumulative protections of national rights or patents with Community plant variety rights, when a Community plant variety right is granted, no national right should be granted. Nevertheless, if it *is* granted, it is ineffective.

9. WHAT ABOUT VARIETIES WHICH WERE REJECTED, WITHDRAWN OR SURRENDERED IN THE COMMUNITY BUT STILL ARE PROTECTED PURSUANT TO NATIONAL LEGISLATIONS?

As soon as this CPVR is surrendered/withdrawn, the holder of the national right will be able to invoke his national right again if this right is still in force.

10. WILL A BREEDER OF A CANDIDATE VARIETY WHICH HAS ALREADY BEEN REJECTED BY A NEW MEMBER STATE PURSUANT TO NATIONAL PROVISIONS BE PERMITTED TO APPLY FOR A CPVR?

If the CPVO would receive an application regarding a candidate variety that has already been rejected by a new Member State, the CPVO would nevertheless review the application. The CPVO would however only grant CPVR if the application would comply with the novelty requirement and the DUS requirements.

11. WHEN A NATIONAL PROTECTION IS GRANTED TO A VARIETY IN A NEW MEMBER STATE, CAN A THIRD PARTY OF THE PRESENT COMMUNITY PROPAGATE THIS VARIETY WITHOUT THE BREEDER'S APPROVAL?

Since the protection is granted under national legislation on plant breeder's rights, the national law of that Member State will apply. Enforcement of the national right will be dealt with by the national Court.

12. WHAT WILL HAPPEN IN CASE OF CONFLICT BETWEEN NATIONAL RIGHTS AND EXTENDED COMMUNITY RIGHTS *FOR THE SAME VARIETY*?

Since Article 92 of the Basic regulation prohibits cumulative protections of national rights or patents with Community plant variety rights, conflict could arise between national rights granted in a new Member State prior to accession and an extended Community right *relating to the same variety*.

One holder has assigned his entitlement to apply for CPVR to a third party who was granted a national right

The breeder of a new plant variety has the entitlement to apply for plant variety rights in many different systems throughout the world. Rather than applying for a Community plant variety right, the breeder may have assigned his entitlement to do so, whilst retaining (and exercising) the right to apply under the national systems in the new Member States (or vice versa). This case is not regulated in the Basic Regulation or in any accession treaty. A solution must be found between the holders. If no agreement is reached, the case may need to be decided by a court.

13. WHAT OF THE CASE WHERE ONE VARIETY IS PROTECTED AT NATIONAL LEVEL IN A NEW MEMBER STATE AND ANOTHER, SEPARATE BUT INDISTINCT VARIETY, IS PROTECTED UNDER THE COMMUNITY SYSTEM, THE SCOPE OF WHICH IS THEN EXTENDED TO THE NEW MEMBER STATE?

Romania and Bulgaria are members of UPOV.

In the UPOV countries no such conflict should arise between extended Community rights and national rights. This is because, in order to obtain protection for a variety at national level, the variety must be distinct from all other varieties of common knowledge at the date of application. Once a variety acquires plant variety rights it is deemed to be of common knowledge. Accordingly, it should not be possible to obtain national protection in a new Member State for a variety already protected under the Community system – and vice versa.

If double protection *has* occurred, the error can and should be sorted out under existing rules such as rules on priority.

14. HOW WILL THE NOVELTY REQUIREMENTS APPLY TO THE NEW MEMBER STATES? WILL THERE BE A TRANSITIONAL REGIME?

According to the 'period of grace'- the period during which the candidate variety may still be considered as 'novel'- referred to in article 10(1) of the Basic Regulation and since the term "Community" will acquire its new meaning only with effect from the date of accession, the CPVO has made the following interpretation:

a) A breeder of a new Member State will be able to apply for a CPVR if the candidate variety has not been commercialized more than 1 year within the present territory of the Community;

b) During the first year following the accession of the new Member States – i.e. from 01.01.2007 to 31/12/2007- a breeder may apply for a CPVR if, **on the date of application**, the candidate variety has not been commercialized for more than one year inside the present 25 Member State territory of the Community and/or more than 4 years (6 years for trees and vines) outside the present 25 Member State territory of the Community.

This reading of Article 10 is not evident but can be explained as follows. On 01.01.2007, the territory of the new Member States will be incorporated in the territory of the Community. Accordingly, it is clear that commercialization in the new Member States after the accession will be regarded as commercialization within the territory of the Community. However, it is not until 01.01.2008 that commercialization in the new Member States can be regarded as exploitation “earlier than one year” before the date of application within the territory of the Community. The reference to “territory of the Community” in Article 10 (1) (a) can thus not be applied to the territory of the new Member States until such territory has been part of the Community for one year. In other words, there is no retroactive effect of the Community territory to the 2 new Member States as a result of the accession.

c) From 01.01.2008, the same will apply to candidate varieties commercialized within the present territory of the 25 Member State Community as within the extended borders of the Community (27 Member States), namely the 1 year rule under article 10(1)(a) of the Basic Regulation.

15. THE HOLDER OF A COMMUNITY PLANT VARIETY RIGHT MAY REQUIRE PAYMENT OF AN EQUITABLE REMUNERATION. DO GROWERS OF A NEW MEMBER STATE, WHO CONTINUE TO USE A PROTECTED VARIETY, HAVE TO PAY ROYALTIES IF, BEFORE THE DATE OF ACCESSION, THEY HAVE ALREADY USED THAT VARIETY FREELY?

Certain plant varieties protected under the Community system are no doubt currently under cultivation in the new Member States. At present, there is no requirement for persons growing these protected varieties to pay royalties. However, when the territorial scope of Community plant variety rights granted prior to accession is extended to the new Member States, these varieties will no longer be freely available. Royalties would have to be paid on request of the holder.

16. WILL THE FARMER’S EXEMPTION REFERRED TO IN ARTICLE 14 OF THE BASIC REGULATION APPLY TO FARMERS OF THE NEW MEMBER STATES IF, BEFORE THE DATE OF ACCESSION, THEY HAVE ALREADY USED THAT VARIETY FOR THE PURPOSES DESCRIBED IN ARTICLE 14(1) OF THE UPOV ‘91 ACT WITHOUT PAYMENT OF REMUNERATION?

The ‘farmer’s exemption’ referred to in Article 14 of the Basic Regulation will apply directly in the new Member States from the date of accession.

17. HOW AND WHEN WILL THE EXAMINATION OFFICES OF THE NEW MEMBER STATES BE IMPLICATED IN THE DUS TESTING FOR THE PURPOSE OF GRANTING CPVRs?

From a qualitative and quantitative point of view, immediately following enlargement, the CPVO will be able to cover its technical examination needs using the present network of Examination Offices. Later on, the CPVO may propose the Administrative Council to designate offices or institutions in the new Member States as new Examination Offices, particularly if the CPVO receives applications for varieties of species where those states have special expertise.

In order to decide to what extent DUS reports resulting from proceedings for the grant of national plant variety rights in the new Member States could be used as a basis for granting a CPVR, the CPVO would need to know the details of the DUS protocols used, how those protocols were applied, the content of the reference collections etc., for all species, in both countries concerned. The CPVO will collect such technical information.

18. WILL THERE BE AN INCREASE OF THE FEES TO BE PAID AS A CONSEQUENCE OF ENLARGEMENT

There will be no increase of the fees to be paid to the CPVO as a consequence of enlargement.