Plant variety protection in the European Community

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Abstract

Plant variety protection in the European Community can be obtained by applying for national rights in each country in which it is available (21 out of 25), or by applying for a Community plant variety right to cover all 25 countries in one application. This article describes the key features of the CPVR and the corresponding Office in Angers, France. These are generally in line with the international convention in this field, the UPOV convention. Main areas covered include the structure of the CPVO, the DUS requirement (distinctiveness, uniformity and stability), novelty, variety denomination, compulsory licensing, enforcement, technical examination, and status information. Statistical information on the use of the system is also provided.

Keywords: Plant variety protection; European Community; National rights; UPOV convention; DUS requirement; Distinctiveness; Uniformity; Stability; Novelty; Variety denomination; Compulsory licensing; Enforcement; Technical examination; Status information; Statistical information

1. Introduction

If breeders want to prevent the free use by others of the varieties they have developed, they can seek legal (IPR) protection for their varieties in the form of a plant variety right, also called “plant breeders’ right” (see Jordens’ article [1], and the references therein).

In the European Community two options for plant variety protection exist: national protection (21 national schemes with national coverage) and protection on the Community level.

In this article the outlines are given of the second option as provided for by the Community plant variety protection system.

2. The Community plant variety office

The Community Plant Variety Office, the CPVO, has been created by Council Regulation (EC) no 2100/94 of 27 July 1994 (“the Basic Regulation”) “for the purpose of the implementation of” that regulation. It has its seat in Angers, France.

The core business of the CPVO encompasses:

• The formal examination of applications (article 53). 1
• The substantive examination of applications (article 54).
• The technical examination of candidate varieties (articles 55–58).
• The refusal of applications (article 61).
• The granting of the Community PVR (article 62).
• The approval of variety denominations (article 63).
• The declaration of nullity of Community PVRs (article 20).
• The cancellation of Community PVRs.

2.1. Community agency

The CPVO is a so-called Community agency, a body governed by European public law, distinct from the

1 If not otherwise indicated the articles mentioned relate to the Basic Regulation.
Community institutions such as Council and Commission, that has its own legal personality and, in the case of the CPVO, its own financial resources. There are currently more than twenty bodies answering the definition of Community agency operational, even though different terms are used to designate them (Centre, Foundation, Agency, Office, Observatory).

The creation of agencies finds its background, amongst other considerations, in the wish of the European Council to give more profile to certain tasks of the Community by attributing them to specialized bodies not making part of the main executive Community body, the European Commission. In the case of the CPVO that is not depending on financial support from the Commission, its status as an independent entity guarantees better transparency and accountability towards its main stakeholders, the breeders.

2.2. The President

The CPVO is managed by its President. All the decisions of the CPVO, except those that have to be made by its Board of Appeal, are taken under authority of the President (Article 35(1)). This provision has to be placed in the light of the next paragraph of this article implying, that most of the decisions of the CPVO shall be taken by a Committee of three members of the Office’s staff. In practice, if the President is not self a member of a decision committee, these committees act rather independently from the President, who refrains himself to a role on distance in order to guarantee consistency in the CPVO decisions.

2.3. The administrative council

Attached to the CPVO is an Administrative Council (“AC”), composed of one representative of each Member State and the Commission and their alternates (articles 36 and 37). The responsibilities of the AC are comparable with those of the Board of Directors of a private enterprise. This organ has the power to establish rules on working matters and to issue guidelines for DUS testing. The AC is also the Budgetary authority of the CPVO (article 109(3)) and responsible for the discharge of the president in respect of the implementation of the budget (article 111(3)). The last mentioned responsibilities of the AC are illustrative for the financial autonomy of the CPVO due to its status as a self financing agency (article 113(3)).

2.4. The Board of Appeal

Within the CPVO organization there has been established a Board of Appeal (article 45). With two exceptions, where a direct appeal to the Court of Justice of the European Communities (“the European Court”) is possible, decisions of the CPVO can be challenged before its Board of Appeal.

The Board is composed of a chairman, appointed by the Council, and two other members selected from a list of qualified members established by the AC. In order to guarantee their independence, it requires a decision of the European Court to remove members of the board from the list.

The background of the board members is either technical or legal. The chairman has to have legal qualifications.

Against decisions of the Board of Appeal further appeal can be lodged to the European Court (Article 73). This task has been delegated to the Court of first instance. Until now this possibility has not been used by parties that were affected by Board decisions.

The number of appeal cases is rather small. This can be partly explained by the relative low number of negative decisions on applications for Community PVR. Another reason might be that the CPVO decisions are based on the technical assessment of candidate varieties following strict and comprehensive protocols. These assessments by specialized experts leave as a rule not much room for discussion.

3. Substantive matters

3.1. Subject matter

The substantive part of the Basic Regulation is based on the 1991 version of the UPOV convention.

The subject matter of a Community plant variety right, is a plant variety. In order to be eligible for protection a variety has to be distinct, uniform and stable (the DUS requirements), new and have an adequate variety denomination.

3.2. The DUS requirements

A variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety.

The definition of a plant variety given by the Basic Regulation: “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.”
whose existence is a matter of common knowledge on the date of the application (article 7).

Distinctness has to be detectable on the level of the phenotype. Apart from morphological characteristics, for instance colour or shape of a leaf, the distinctness could be based on physiological characteristics such as disease resistance.

To assess this requirement candidate varieties have to be compared with existing varieties, the characteristics of which are close to those of the candidate. The comparison is performed on the basis of detailed technical guidelines adopted by the Administrative Council of the CPVO on the basis of protocols developed in the framework of UPOV. In order to select the relevant reference varieties the competent examination offices make use of extensive databases with descriptions and photographs of varieties of common knowledge. It is not excluded that in the near future DNA fingerprints will be used as well in this selection process.

A variety shall be regarded as sufficiently uniform if ‘...’ the plants of which it is composed are ... similar or genetically identical as regards the characteristics, taken as a whole, which are considered for this purpose’ (article 8). When assessing uniformity the particular features of its propagation shall be taken into account. This implies for instance that in respect of seed propagated varieties a lower degree of uniformity is accepted than in respect of vegetatively propagated varieties.

A variety shall be regarded as stable if, ‘after successive propagations or multiplications or at the end of each cycle ... it remains true to the description of its essential characteristics’ (article 9). Taking into account that the DUS examination is limited in time, the assessment of stability necessarily results in a provisional opinion. For this reason, sometimes the CPVO has to verify “the continuing existence unaltered of the protected varieties” (article 64). If the verification would establish that the variety no longer complies with the uniformity or stability requirement the Community plant variety right shall be cancelled (article 21(1)). The verification is not performed systematically but only in the case when signals from examination offices and/or professional circles have been received, that material of a protected variety might not be any longer in conformity with its original description. Also when a variety is the object of an infringement procedure, material of that variety could on request of the competent judge be compared on behalf of the Office with its original description or, if available, its original sample.

3.3. Novelty

Novelty is another requirement which a variety must fulfill. Novelty has nothing to do with the characteristics of the candidate variety. It is a notion linked to its commercial history. A variety is considered to be novel if, on the date of application for protection of the variety, it has not been sold or disposed of for exploitation purposes 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.

3.4. Variety denomination

In addition to the DUS and novelty requirements mentioned above, 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.

3.5. Relation to national systems

As said the Community system exists in parallel with the national PVR systems of the EU Member States. All but four of these states have adopted PVR legislation. The national systems are not harmonised and based on different versions of the UPOV convention.

The Community system offers protection on a Community scale. On the basis of one application a Community plant variety right can be obtained that is valid in the territory of all the Member States of the European Community. National protection is limited of course to the territory of the state in question.

It is up to the breeder seeking PVR protection in the European Community to decide what type of protection he prefers. If he sees a market for a new variety in more than two Member States the Community option is the logical choice.

As follows from article 92 of the Basic Regulation any variety which is the subject of a Community plant variety right shall not be the subject of a national plant variety right or a any patent for that variety. It is nevertheless not prohibited that part of a variety, for instance a gene coding for a disease resistance, is protected by a patent whereas the variety as such is protected with a Community plant variety right.

3.6. The scope of the right

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 plant variety rights. 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, condition for the purpose of propagation, sell, market, import and export to the Community and stocking material (variety constituents/harvested material) of the variety. 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) read in conjunction with Article 13(5)).

3.7. Derogations

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 1768/95 [2]).

Article 15 of the Basic Regulation excludes from the exclusive rights of the PBR 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.

3.8. Compulsory licensing

In line with the UPOV convention article 29(1) contains the provision that compulsory (exploitation) licences shall be granted only on grounds of public interest.

Recently a new paragraph has been added to this article introducing the possibility of granting a compulsory licence to the holder of a patent for a biotechnological invention incorporated in a protected variety. In order to qualify for such compulsory licence, the patent holder has to demonstrate that:

(i) he/she has applied unsuccessfully to the holder of the plant variety right to obtain a contractual licence and

(ii) the invention constitutes significant technical progress of considerable economic interest compared with the protected variety.

In the case a holder of a Community plant variety right has been granted—by a competent national patent authority—a compulsory licence for the non-exclusive use of a patented invention incorporated in the protected variety in question, a cross-licence shall be granted, on application, to the holder of the patent (article 29(5a)).

The competent authority for granting such compulsory licences or cross-licences is the CPVO. The new provisions laid down in article 29 as regards (cross) compulsory licences to be granted to patent holders should, as follows from article 12 of the so-called Biotech Directive [3] find their complement in the provisions of national patent legislation in the EU member states containing provisions to grant compulsory licences in respect of patented inventions to holders of Community plant variety rights.

3.9. Enforcement

Under Community law, there is no legal system in place as regards infringement procedures for plant variety rights. The procedures in such proceedings are governed by national law. However, the Basic Regulation provides some basic conditions regarding civil claims, infringements and jurisdiction (Articles 94–107). 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). 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 to 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)). 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.

On 29 April 2004 the European Parliament and the Council adopted Directive 2004/48/EC on the enforcement of intellectual property rights [4]. The provisions in this directive are complementary to the rules in the Basic Regulation concerning enforcement. 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 [5]. 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.

### 4. Procedures

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

#### 4.1. Where to apply?

An application for plant variety protection can be made in any of the twenty official languages of the European Community direct 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.

#### 4.2. Who can apply?

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

Individuals or companies from a state which is a member of the International Union for the protection of new varieties of plants (UPOV) but not a member of the European Union can also apply, provided that an agent domiciled in the Community has been nominated.

#### 4.3. Checking the application

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

#### 4.4. Technical examination

The purpose of the technical examination is to ensure that in respect of a candidate variety the criteria of distinctness, uniformity and stability, are complied with. The CPVO does not itself carry out these examinations. They are entrusted to bodies deemed competent by the CPVO Administrative Council. At present more than 20 examination offices have obtained the qualification “competent”. The major ones are: the Bundessortenamt in Germany, GEVES in France, NIAB in the UK and the Raad voor het Kwekersrecht in the Netherlands. All the offices performing examinations on behalf of the CPVO render similar services in the framework of national listing and plant variety protection systems. Examinations have to be conducted in accordance with guidelines laid down by the CPVO. Varieties submitted for protection are compared during the examination with other varieties submitted for Community protection and with appropriate varieties of common knowledge at the time of application.
4.5. Grant of title

If the CPVO is of the opinion that the findings of the examination are sufficient to base a decision upon, it decides whether or not to grant a Community plant variety right. In the case of a successful application, 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 variety in question.

In the case, that the examination does not lead to clear conclusions, for instance in respect of the assessment of distinctness, an extension of the examination period, with the same sample, can be ordered. It is the responsibility of the breeder to submit sample material, that meets the relevant conditions in respect of germination, flowering, etc. Only in very exceptional cases the breeder will be offered the possibility to submit a new sample, if the first sample does not perform adequately.

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. These periods are maxima. For each year of protection an annual fee has to be paid. When the commercial lifetime of a variety is shorter than the maximum protection period, the breeder could decide to give up protection.

4.6. Appeals

This subject is covered by Section 2.4 above.

4.7. Status information and 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 denomination and grants of titles. 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 [6] which contains comprehensive information about the Community system. The website contains all the information published in the Gazette. Due to legal restrictions the information published on the web has not yet an official status. Furthermore all relevant legislation, news, texts of presentations can be found on the non-confidential part of the website.

The CPVO is in close co-operation with UPOV in the process of creating a database for variety denominations to be fed by all the UPOV Member States. In first instance this data base will only be accessible to authorities within the European Community responsible for national PVR and listing systems. Once the data base is well established it could be made available for all the users of the Community system.

5. The state of the system

The Community system is very successful. In 2004 almost 2700 applications for Community plant variety rights were received by the CPVO. It is to be expected that at the end of 2005 more than 11,000 Community plant variety rights will be in force.

This development shows that the breeding industry, although faced with the effects of the difficult economic situation, is still able to create a constant stream of new varieties. New varieties have traits such as higher yield, better quality and/or more effective resistance to pests and diseases. Additionally, new varieties may be 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, trade marks, 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: new varieties of plants.

The high number of applications for Community protection (the number of applications received by the CPVO—more than 20,000—is higher than the sum of the national applications received by the national PVR authorities within the European Community over the same time period) shows that protection on a European scale is an attractive alternative for national protection for those varieties which have an international market. The accession on 1 May 2004 of ten new Member States to the EU has added to the attractiveness of the Community system. The Community plant variety rights are now valid in the territory of 25 European States.

6. Statistics

As an annex to this article some statistics are provided—see Figs. 1–4.

Fig. 1 shows the relative weight of ornamental varieties in the Community system. The predominant position of ornamentals is due to the output of ornamental breeding industry and to the fact that most ornamental varieties are vegetatively propagated and for that reason miss the “natural” protection of seed propagated varieties.

Fig. 2 shows the constant growth of the system since the CPVO became operational. Taking into account the limits of the market for new varieties it is to be expected that the system will reach on the medium term its ceiling as regards the number of annual applications.

As Fig. 3 shows the number of protected varieties is still growing. This implies that the number of new titles
granted is superior to the number of titles, which are surrendered by their owners. The decision of the breeder whether or not to maintain the protection of a variety depends on the commercial value of the variety taking into account the costs of the maintenance resulting from the level of the annual fee.

Fig. 4 shows the numbers of applications of European Community origin. Dutch breeders are the most

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**Fig. 1.** Applications received for Community Plant Variety Rights, by type of plant (27/04/1995–31/12/2004).

**Fig. 2.** Evolution of annual number of applications received for Community Plant Variety Rights (01/01/1996–31/12/2004).
important users of the Community system, which reflects their important position as regards breeding in the ornamental and vegetables sectors. Germany and France have a dominant position as regards breeding of agricultural varieties.

References


