

GUIDELINES

on

Article 63 of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights¹

THE ADMINISTRATIVE COUNCIL OF THE COMMUNITY PLANT VARIETY OFFICE,

Having regard to the need to promote the harmonisation of rules governing variety denominations throughout the European Union for both listing and plant variety rights.

Having regard to Article 20 of the 1991 act of the UPOV Convention on variety denominations.

Acting pursuant to Article 30 of Commission Regulation (EC) No 1239/95, which requires the said Administrative Council to adopt guidelines establishing uniform and definitive criteria for determining impediments to the generic designation of a variety denomination referred to in Article 63(3) and (4) of Council Regulation (EC) No 2100/94,

HAS ADOPTED THE FOLLOWING GUIDELINES

¹ OJ No L 227, 1.9.1994 p. 1

Article 1

Introduction

In considering whether there is an impediment to the approval of a variety denomination under article 63 of Council Regulation (EC) No 2100/94 the Community Plant Variety Right Office (the "Office") shall have regard to the guidelines set out below. Below each Article, the relevant sub-paragraph of Article 63(3) and 63(4) the Regulation (EC) No 2100/94 is indicated.

Article 2

There is an impediment for the designation of a variety denomination where its use in the territory of the Community is precluded by the prior right of a third party
(Article 63 (3)(a) of Regulation 2100/94)

1. In the case of a trade mark as a prior right of a third party, the use of a variety denomination in the territory of the Community shall be considered to be precluded by the notification to the Office for the approval of the variety denomination of a trade mark, which has been registered in one or more Member States or at Community level prior to the approval of the variety denomination, and which is identical or similar to the variety denomination and registered in relation to goods which are identical or similar to the plant variety concerned.
2. In the case of a geographical indication or a designation of origin for agricultural products and foodstuffs as a prior right of a third party, a variety denomination in the territory of the Community shall be considered to be precluded where the variety denomination would breach Article 13 of Council Regulation (EEC) N° 2081/92 with respect to the geographical indication or the designation of origin protected in a Member State or in the Community under Articles 5(5), 6 or 17 of that Regulation for goods which are identical or comparable to the plant variety concerned.
3. An impediment to the suitability of a denomination due to a prior right may be removed where the consent of the holder of the prior right to the use of the denomination in relation to the variety has been obtained.
4. In the case of a prior right of the applicant in respect of whole or part of the proposed denomination, Article 18(1) of Regulation (EC) No 2100/94 shall apply *mutatis mutandis*.

Article 3

There is an impediment for the designation of a variety denomination where it may commonly cause its users difficulties as regards recognition or reproduction

(Article 63 (3)(b) of Regulation 2100/94)

1. A variety denomination shall be in the form of a "fancy name" or a "code".
2. A variety denomination shall be considered to cause its users difficulties as regards recognition or reproduction in the following cases:
 - a) where it is in the form of a "fancy name":
 - (i) it consists of a single letter;
 - (ii) it consists of, or contains as a separate element, a series of letters not forming a word pronounceable in an official language of the European Union, except where this series in an established abbreviation, such an established abbreviation shall be limited to a maximum of 2 sets of up to 3 characters each, located at each end of the denomination;
 - (iii) it contains a number, except where this is an integral part of the name, or where this indicates that the variety is, or will be, one of a numbered series of varieties related through their breeding history;
 - (iv) it consists of too many words or elements;
 - (v) it consists of or contains an excessively long word or element;
 - (vi) it contains a punctuation mark or other symbol an upper and lower case mixture (save where the first letter is in upper case and the rest of the denomination is written in lower case), subscript, superscript or a design.
 - b) where it is in the form of a "code":
 - (i) it consists of a number or numbers only, except where this is an established practice for designating varieties such as in the case of inbred lines or of similarly specific types of varieties;
 - (ii) it consists of a single letter;
 - (iii) it contains more than 10 characters, letters, or letters and numbers;
 - (iv) it contains more than four alternating groups of a letter or letters and a number or numbers;
 - (v) it contains a punctuation mark or other symbol, a subscript, a superscript or a design.
3. On submission of the proposal for a variety denomination, the applicant should declare where the proposed denomination is intended to be in the form of a "fancy name" or of a "code".
4. If the applicant makes no declaration on the form of the proposed denomination, the denomination shall be considered to be a "fancy name".

Article 4

There is an impediment for the designation of a variety denomination where it is identical or may be confused with a variety denomination under which another variety of the same or of a closely related species is entered in an official register of plant varieties or under which material of another variety has been marketed in a Member State or in a Member of the International Convention for the Protection of New Varieties of Plants, unless the other variety no longer remains in existence and its denomination has acquired no special significance.

(Article 63 (3)(c) of Regulation 2100/94)

In evaluating the identity of, or confusion with, a variety denomination of another variety, the following shall apply:

- a) A denomination is prima facie unsuitable if it is exactly the same as a variety denomination already registered or used in a Member State of the European Union or a contracting party to the International Convention for the Protection of New Varieties of Plants (hereinafter "UPOV") in a relation to a variety of a closely related species
- b) "may be confused with" shall be considered to cover *inter alia* a variety denomination, containing a difference of only one letter, or of accents on letters, in relation to the variety denomination of a variety of a closely related species, which has been entered into an official register of plant varieties, as defined below under (e) or is marketed the European Union, the European Economic Area or in a contracting party to UPOV, However, without prejudice to Article 7, a difference of only one letter in an established abbreviation as a separate entity of the variety denomination shall not be regarded as confusing. Also, where the different letter is prominent in a way that makes the denomination clearly distinct from already registered variety denominations, it shall not be regarded as confusing. Differences of two or more letters shall not generally be regarded as confusing except where two letters simply change places. A difference of one digit between numbers (where a number is permissible in a fancy name) is not to be regarded as confusing.
- c) Without prejudice to Article 7, this provision shall not apply to a variety denomination in the form of a code, if the reference variety denomination is equally in the form of a code. In such a case, a difference of only one character, letter or number, will enable two codes to be satisfactorily distinguished. Blank spaces are to be ignored when comparing denominations in code form.
- d) "closely related species" shall have the meaning as defined in the Annex to the guidelines;
- e) "a variety no longer remains in existence" shall be considered to mean a variety no longer in commercial existence;
- f) "an official register of plant varieties" shall be considered as a reference to the common catalogue of varieties of agricultural plant species or of vegetable species, or to any register compiled and maintained by the Community Plant Variety Office, or by an official body of the Member States of the Community or the European Economic Area, or of a contracting party to UPOV;

- g) "a variety the denomination of which has acquired no special significance": the denomination of a variety which has at one time been entered in an official register of plant varieties and thereby acquired special significance shall in each case be considered to have lost that special significance on the expiry of a 10-year period after deletion from that register, if this variety has not acquired significance by other means since then, e.g. through commerce.

Article 5

There is an impediment for the designation of a variety denomination where it is identical or may be confused with other designations which are commonly used for the marketing of goods or which have to be kept free under other legislation
(Article 63 (3)(d) of Regulation 2100/94)

Designations which are commonly used for the marketing of goods or which have to be kept free under other legislation shall be considered to mean in particular:

- a) currency denominations, or terms associated with weights and measures;
- b) expressions that, by virtue of legislation, shall not be used for purposes other than those envisaged by that legislation.

Article 6

There is an impediment for the designation of a variety denomination where it is liable to give offence in one of the Member States or is contrary to public policy
(Article 63 (3)(e) of Regulation 2100/94)

This heading would cover names of unsavoury characters from recent history, words with an offensive or abusive meaning in a language of the EU.

Article 7

There is an impediment for the designation of a variety denomination where it is liable to mislead or to cause confusion concerning the characteristics, the value or the identity of the variety, or the identity of the breeder or any other party to the proceedings
Article 63 (3)(f) of Regulation 2100/94

A variety denomination shall be considered to mislead or to cause confusion if:

- a) it conveys the false impression that the variety has particular characteristics or value;
- b) it conveys the false impression that the variety is related to, or derived from, another specific variety;
- c) it refers to a specific characteristic or value in a way which conveys the false impression that only that variety possesses it, whereas in fact other varieties of the same species may possess the same characteristic or value;

- d) by dint of its similarity to a well-known trading name other than a registered trade mark or variety denomination, it suggests that the variety is another variety, or conveys a false impression concerning the identity of the applicant, the person responsible for the maintenance of the variety, or the breeder;
- e) it consists of, or contains:
 - (i) comparatives or superlatives;
 - (ii) the botanical or common names of species within the same UPOV crop sector as the variety, the UPOV crop sectors being agricultural crops, ornamentals and forestry species, vegetables and fruits;
 - (iii) the name of a natural or legal person, or a reference thereto, so as to convey a false impression concerning the identity of the applicant, the person responsible for the maintenance of the variety, or the breeder;
 - (iv) a geographical name that would be likely to deceive the public as to the characteristics or value of the variety.

Article 8

There is an impediment for the designation of a variety denomination where, in the case of a variety which has already been entered:

- (a) in one of the Member States**
- (b) in a Member of the International Union for the Protection of New Varieties of Plants; or**
- (c) in another State for which it has been established in a Community act that varieties are evaluated there under rules which are equivalent to those laid down in the Directives on common catalogues;**

**in an official register of plant variety rights or material thereof and has been marketed there for commercial purposes, and the proposed variety denomination differs from that which has been registered or used there, unless the latter one is the object of an impediment pursuant to paragraph 3
63 (4) of Regulation 2100/94**

Where there is an impediment under paragraph (3), the Office must create a synonym.

"Official register of plant varieties"

An "official register of plant varieties" shall be considered as a reference to the common catalogue of varieties of agricultural plant species or of vegetable species, or to any register compiled and maintained by the Community Plant Variety Office, or by an official body of the Member States of the Community or the European Economic Area, or of a contracting party to UPOV.

H-P ZACH
Chairman of the Administrative Council

Angers, 21 March 2007

ANNEX

CLOSELY RELATED SPECIES

“Closely related species” as specified in Article 63(2)(c) of Council Regulation 2100/94 and referred to in Article 4(d) of these Guidelines should have the following meaning:

- a) As a general rule, for genera and species not covered by the list of classes in this Annex, a genus is considered to be a class
- b) If there are more than one class within a genus, the list of classes in Part I below shall apply
- c) If classes encompass more than one genus, the list of classes in Part II below shall apply.

Part I

Classes within a genus

<u>Classes</u>	<u>Botanical names</u>
Class 1.1:	Brassica oleracea
Class 1.2:	Brassica other than Brassica oleracea
Class 2.1:	Beta vulgaris L. var. alba DC., Beta vulgaris L. var. altissima
Class 2.2:	Beta vulgaris ssp. vulgaris var. conditiva Alef. (syn.: B. vulgaris L. var. rubra L.), B. vulgaris L. var. cicla L., B. vulgaris L. ssp. vulgaris var. vulgaris.
Class 2.3:	Beta other than classes 2.1 and 2.2.
Class 3.1:	Cucumis sativus
Class 3.2:	Cucumis melo
Class 3.3:	Cucumis other than classes 3.1 and 3.2
Class 4.1:	Solanum tuberosum L.
Class 4.2:	Solanum other than class 4.1

Part II

Classes encompassing more than one genus

<u>Classes</u>	<u>Botanical names</u>
Class 201:	Secale, Triticale, Triticum
Class 202:	Panicum, Setaria
Class 203*:	Agrostis, Dactylis, Festuca, Festulolium, Lolium, Phalaris, Phleum and Poa
Class 204*:	Lotus, Medicago, Ornithopus, Onobrychis, Trifolium
Class 205:	Cichorium, Lactuca
Class 206:	Petunia and Calibrachoa
Class 207:	Chrysanthemum and Ajania
Class 208:	(Statice) Goniolimon, Limonium, Psylliostachys
Class 209:	(Waxflower) Chamelaucium, Verticordia
Class 210:	Jamesbrittenia and Sutebra
Class 211:	Edible Mushrooms <ul style="list-style-type: none">○ Agaricus bisporus○ Agaricus blazei○ Agrocybe cylindracea○ Auricularia auricula○ Auricularia polytricha (Mont.) Sacc.○ Dictyophora indusiata (Ventenat:Persoon) Fischer○ Flammulina velutipes○ Ganoderma lucidum (Leyss:Fries) Karsten○ Grifola frondosa

- *Hericium erinaceum*
- *Hypsizigus marmoreus*
- *Hypsizigus ulmarius*
- *Lentinula edodes*
- *Lepista nuda* (Bulliard:Fries) Cooke
- *Lepista sordida* (Schumacher:Fries) Singer
- *Lyophyllum decastes*
- *Lyophyllum shimeji* (Kawamura) Hongo
- *Meripilus giganteus* (Persoon:Fries) Karten
- *Mycoleptodonoides aitchisonii* (Berkeley) Maas Geesteranus
- *Naematoloma sublateritium*
- *Panellus serotinus*
- *Pholiota adiposa*
- *Pholiota nameko*
- *Pleurotus cornucopiae* var. *citrinooleatus*
- *Pleurotus cystidiosus*
- *Pleurotus cystidiosus* subsp. *Abalonus*
- *Pleurotus eryngii*
- *Pleurotus ostreatus*
- *Pleurotus pulmonarius*
- *Polyporus tuberaster* (Jacquin ex Persoon) Fries
- *Sparassis crispa* (Wulfen) Fries
- *Tricholoma giganteum* Masee

* Classes 203 and 204 are not solely established on the basis of closely related species