

# PROTECTION OF NEW VARIETIES OF PLANTS

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## Abstract

*Joining Nature and Divinity, man has been working for tens of thousands of years not only to invent new plants, but also to improve plants, to discover develop and create new varieties of plants with high productivity, high energy value, resistant to disease, pests, low temperatures and drought. With results protected by a special law, a sui-generis law that deviates even from the golden rule of intellectual property, that of not protecting ideas and discoveries as they must belong to everyone and to no one at the same time.*

**Keywords:** *plant, plant variety, new plant variety, variety patent, novelty, distinct character, uniformity, stability, name.*

## 1. Protection system for new plant varieties (conventional, Community, national)

In Part I of this article, entitled "Plants and human food" we showed that in regulating the protection of new plant varieties, the Church has a priority worth mentioning because it demonstrates a remarkable openness (of an institution always considered, but also wrong, in our opinion, hostile to science) towards this field<sup>1</sup>. Proof is an Edict of Papal States dated 1833 which proposed for the first time in the history of intellectual property law the recognition of an exclusive right upon achievements regarding the progress of agriculture under the reasoning that those who put their minds and industry in the service of natural products or of inventions for breeding or for the introduction to agricultural crops of new plant varieties or new cultivation techniques "*it deserves that the fruits of their research and discovery to be guaranteed to the extent that the results reveal science*".

However, nothing significant was to happen in the 19<sup>th</sup> century in this field, despite the valuable research and important results obtained by researchers and breeders before and after 1833. However, the doctrine considers that the French Patent Law from 1844 made no difference between manufacturing industry and agriculture, the latter being seen, moreover as a branch of industry in its broadest sense. But in the absence of an explicit provision in French law of a possibility of patenting new varieties, French

jurisprudence generally open to novelties, has been reluctant to recognize the validity of such patents, many applications being filed to protect new varieties of roses.<sup>2</sup>

## 2. Plant varieties in the Paris Convention for the Protection of Industrial Property

However, the issue of protection of new varieties<sup>3</sup> was also of concern to the international community, but not to a sufficient extent, as long as in art. 1 (3) of the Paris Convention of March 20<sup>th</sup> 1883 on the Protection of Industrial Property, provided that industrial property is to be understood in the broadest sense and '*applies not only to the actual industry and trade, but also in the field of agricultural and extractive industries and all manufactured or natural products, such as: wines, grains, tobacco leaves, fruit, cattle, ores, mineral waters, beer, flowers, flour*".

Although insufficiently clear, the quoted text of the Convention does not exclude in our view "natural products" from the patent, and the enumeration in the text, which is exemplifying, not limiting, reinforces this conclusion. In fact, when in France in 1922, after the famous carnation process "Aline Bonard"<sup>4</sup> and which was followed by persistent demands of the French breeders to be granted exclusive rights over the varieties created by them, the issue of protection of new varieties of plants (of plant varieties), the solution adopted was that of protection as a right of industrial

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<sup>1</sup> Viorel Roș, Ciprian Raul Romișan, Andreea Livadariu, "Protection of new plant varieties. Plants and human food (I)", *Romanian Journal of Intellectual Property Law (RRDPI)* no. 2/2020, pp. 42-86.

<sup>2</sup> B. Devant, R. Plasseraud, R. Gutmann, H. Jacquelin, M. Lemoine, *Brevets d'invention*, quatrième édition, Dalloz, 1971, pp. 119.

<sup>3</sup> See Cornelia Dumitru, "The Public Domain and the Intangible Common Fund of Mankind. Differences in content and legal regime. Consequences and practical applications" in the *Romanian Journal of Intellectual Property Law (RRDPI)* no. 4/2019, pp. 98-123.

<sup>4</sup> Viorel Roș, Ciprian Raul Romișan, Andreea Livadariu, "Protection of new plant varieties. Plants and human food (I)", *Romanian Journal of Intellectual Property Law (RRDPI)* no. 2/2020, pp. 42-86.

property, true, hybrid, because it was similar to the law of trademarks and the law of inventions. However, the proposed system proved to be unattractive, because in 8 years of activity of the special register created for it, only 22 plant varieties were registered. In the face of this (semi) failure, in 1928 a law was submitted and adopted in France which conferred to the author not a trademark right, but a right similar to that of inventor, as a "right of agricultural and horticultural property" the title of protection being a patent issued by the National Office of Agricultural and Horticultural Property.

### 3. Conventional law of protection of new plant varieties. UPOV Convention

On December 2, 1961, the International Convention for the Protection of New Varieties of Plants<sup>5</sup> was adopted in Paris, which created for those who joined it the International Union for the Protection of New Varieties of Plants – UPOV<sup>6</sup>, an intergovernmental organization that currently have 77 members<sup>7</sup>, including the European Union (but EU member states are individually members of UPOV) and the African Intellectual Property Organization - OAPI.

UPOV is headquartered in Geneva and without a relationship of subordination of UPOV to OMPI, based on a cooperation agreement, the latter actually exercises guardianship over UPOV, the Director General of OMPI being also Secretary General of UPOV<sup>8</sup>. The International Convention for the Protection of New Varieties of Plants is administered by UPOV and is often referred to as the UPOV Convention.

The purpose of the UPOV Convention is to ensure that the Member States of the Union recognize the rights of breeders (plant breeders), respectively an exclusive right of use on the basis of a set of defined rules to be introduced into the laws of Member States. In this regard, the UPOV Convention regulates a system of protection via intellectual property rights of plant varieties intended to encourage plant breeders to develop new plant varieties for the benefit of society and to increase investment in this field. The Convention is designed to promote industrially kind of agriculture and genetically uniform, an objective in line with the growth of international trade supported by the World Trade Organization.

Following the model already established in the founding conventions of international intellectual

property law, the UPOV Convention establishes the rules of minimum protection (leaving Member States the opportunity to take into account national circumstances when regulating protection), conditions of protection, duration of rights and rights conferred / recognized to breeders, however without establishing a title of protection (patent or certificate of registration) although the rights recognized in favor of breeders (plant breeders) are similar to those conferred by patents. At the end of the term of protection, the varieties that have been protected pass into the public domain. To prevent abuse in the public interest protected varieties are subject to controls. It is not necessary to authorize the breeder to use the protected variety for research purposes, including its use to obtain other varieties.

Unsafe and unsatisfactory step in its original form, but important for regulating the protection of new plant varieties, the UPOV Convention was revised in 1972, 1978 and 1991, with changes aimed at a clearer delimitation of the object of protection (plant variety was defined), establishing the conditions of protection (four in number: novelty, distinctiveness, homogeneity, stability), consolidating the rights of breeders as well as eliminating the possible cumulation of protections.

Compared to other intellectual property conventions, the UPOV Convention does not seem very attractive since the number of states that have acceded to it is still low (USA, a pioneer in agricultural research but also in the protection of new varieties has joined the UPOV Convention with reservations), and criticism of it is not lacking, one of the most vehement opponents being India, a large country producing and consuming agricultural products and extremely attached to its agricultural traditions that are not in line with those of industrial and uniform agriculture.

Among the criticisms of the UPOV Convention are: affecting agriculture due to the fact that farmers are forbidden to use protected seeds or varieties, the impossibility of farmers complying with the rules of the Convention, the dependence of poor farmers on increasingly expensive factors of production, neglecting the interests of small farmers in favor of large agro-industrial complexes, the incompatibility of the Convention with other legal instruments such as the International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty), the Convention on Biological Diversity or its Nagoya Protocol and the Declaration adopted by the UN General Assembly in

<sup>5</sup> The Convention entered into force in 1968 and has been revised three times, but Member States which have previously acceded are not obliged to accede to the latest version. Romania acceded to this convention by Law no. 186 of October 27, 2000. Romania's contribution to the International Union for the Protection of New Varieties of Plants created by the Convention is paid by the Ministry of Agriculture.

<sup>6</sup> UPOV is the acronym for the French name: Union internationale pour la protection des obtentions végétales".

<sup>7</sup> <https://www.upov.int/overview/en/upov.html>.

<sup>8</sup> Daren Tang, Director General of the World Intellectual Property Organization is the Secretary General of UPOV and his predecessor, Mr. Francis Gurry was the Secretary General of UPOV.

2018 on the rights of peasants and other persons working in rural areas.

As the Convention establishing the World Trade Organization, which has as its Annex C, the Agreement on Intellectual Property Rights in Trade in 1994 has 164 members and 25 government observers, on the one hand it conditions the granting of the most-favored-nation clause to observing the intellectual property rights and on the other hand aims to integrate the UPOV Convention, which has only 77 members into the WTO system and that can only cause dissatisfaction and difficulties for non-members of the UPOV Convention who are members of the WTO.

The shortcomings of the UPOV Convention were also propagated into the national regulations, including those in Romania, which regulated for the first time the protection of new plant varieties by Decree no. 884/1967 on inventions, innovations and rationalizations and subsequently by Law no. 62/1974. The latter provided (in art. 14) that patents should also be granted for *"new varieties of plants, strains of bacteria and fungi, new breeds of animals and silkworms regardless of the conditions under which they were made"*. The conditions of protection were not different from those of technological inventions, but they were unsuitable for inventions involving new plant varieties. Moreover, considering their specificity, the research, experimentation, testing and capitalization of inventions in this field was regulated by special law. The regulations adopted were in line with the 1961 Convention in its original form.

In accordance with the rules of the UPOV Convention in its revised form in 1991, Romania formulated for the first time in our law, special rules for the protection of "new plant varieties, hybrids and animal breeds" by Law no. 64/1991 on patents, introducing for patenting of new plant varieties conditions of novelty, distinctiveness, homogeneity and stability.

**The Agreement on Trade-Related Intellectual Property Rights (TRIPs)** is limited (in Article 27.3 (b)) to provide that are excluded from the patent under common law of inventions *"plants and animals other than micro-organisms as well as essentially biological processes for obtaining plants or animals other than non-biological and microbiological processes"* and that *"Members shall provide for the protection of plant varieties by patents, by an efficient sui generis system or by a combination of these two means"*.<sup>9</sup>

#### 4. Protection of new plant varieties in the European Union

Extremely active in UPOV and concerned with the protection of new plant varieties to the highest degree, the European Union has created its own system of Community protection through Regulation (EC) no. 2100 of 27<sup>th</sup> of July 1994 establishing a Community plant variety right system (amended by Regulation No 15/2008 / EC), pursuant to which Regulation (EC) No 874/2009 of the Commission of 17<sup>th</sup> of September 2009 for establishing normative rules for the application of (EC) Regulation No 2100/94 of the Council on the procedure before the Community Plant Variety Office (recast) was adopted.

Regulation (EC) no. 2100/94 established a system for the protection of new plant varieties **as the sole and exclusive form of Community protection of industrial property of plant varieties**, this protection is granted in the proceedings before the body specially set up for that purpose. Protection shall be granted following the verification of compliance with the conditions of novelty, distinctiveness, homogeneity and stability, by a decision of the Office which shall also contain an official description of the variety.

This protection is uniform across the EU. The Office shall keep a register of applications submitted in order to receive protection which are open to public inspection and shall publish a bulletin with the information described in the register.

According to art. 92 of the Regulation, the variety which has been the subject of a Community protection can no longer be subject to national plant variety protection or a patent, any other right granted in an EU Member State being ineffective. In the event that the breeder obtained protection of his variety in a Member State of the Union before obtaining Community protection, the breeder may not invoke national protection as long as Community protection lasts.

We emphasize that according to art. 92 of the Regulation, the variety which has been the subject of Community protection can no longer be subject to national plant variety protection or a patent, any other right granted in an EU Member State being ineffective. In the event that the breeder obtained protection of his variety in a Member State of the Union before obtaining Community protection, the breeder may not invoke national protection as long as Community protection lasts. In other words, the Regulation prohibits concomitant Community and national protection and gives priority to Community protection.

<sup>9</sup> See also comments on the interpretation of art. 23 para. 3 lit. b) of TRIPs: *"In this sense, the Appellate Body (n.n. - Appellate Body within the World Trade Organization) showed that art. 23 para. 3 lit. b) of TRIPs refers to the option of WTO members to protect new plant varieties either by patent or by sui generis rights, or, as these rights are not included in the title of any section, such an exception would not, according to the Commission interpretation and the provision of the Agreement be unnecessary."* in "Disputes over intellectual property rights before the World Trade Organization (Part I)", *Romanian Journal of Intellectual Property Law (RRDPI)* no. 1/2019, pp. 69-96.

The Regulation established the Community Plant Variety Office - OCSP or CPVO, the English acronym for "The Community Plant Variety Office") or OCVV, the French acronym for L'Office communautaire des variétés végétales. This Office, which became operational on the 27<sup>th</sup> of April 1995 and is self-financing is based in Angers, France and has the status of an EU agency. It has 45 employees divided into three units: administrative, technical and legal, to which are added support services<sup>10</sup>.

### 5. Lack of an international registration / patenting system for new plant varieties

Despite the importance to the world economy and the huge human interest in quality agricultural products at this time there is no international system for the protection of new plant varieties with states being able to resort to national protection and Member States of the European Union to Community protection provided for in Regulation (EC) No 2100/94.

The UPOV Convention and the UPOV itself do not enjoy the success that the great developed and agricultural powers would undoubtedly want. However, UPOV's work is notable. UPOV's main activities are to promote the protection of new plant varieties, to harmonize the laws of the Member States, to strengthen cooperation between States and to respect the rights of breeders and to provide legal and administrative assistance to the States and bodies concerned.

UPOV has adopted a set of general rules for the examination of new plant varieties in terms of novelty, distinctiveness, homogeneity and stability and specific guidelines for approximately 160 plant genera and species that are constantly updated.

Cooperation between states within UPOV is also important for the examination of plant varieties. It is based on conventions between states under which a Member State carries out tests on behalf of another or other States or by which a State accepts the results of tests carried out in other States as a basis for decisions to grant protection respectively rights of the breeder. Through this type of cooperation, states reduce the costs of protection procedures (which are also long-lasting), and breeders can obtain protection for new varieties in several countries at lower costs.

### 6. Regulation of the protection of new plant varieties in Romanian law

When Romania, following the model of the UPOV Convention of 1961, regulated for the first time

the protection of new plant varieties (first, by Decree no. 884/1967 on inventions, innovations and rationalizations, then by Law no. 62/1974), the law provides that patents are also granted for "*new plant varieties, bacterial and fungal strains, new animal breeds and silkworms, regardless of the conditions under which they were made*", and the conditions of protection for true inventions and varieties of plants were identical (novelty, inventive step, industrial applicability), which obviously did not make sense because novelty and inventive step as defined in the common law of inventions are not applicable to new plant varieties.

After the April 1991 revision of the UPOV Convention, by Law no. 64/1991, on patents, Romania rethought its protection system in accordance with the UPOV Convention and took over the protection conditions for new plant varieties, respectively, novelty, distinctiveness, homogeneity and stability (which were included in the Regulation for the application of the Law of Inventions) and gave to a specialized body the task of verifying the fulfillment of the conditions for granting the variety patent, the actual granting of the patent remain under the attributions of OSIM.

By virtue of the obligations assumed by the Association Agreements with the European Communities and the Member States of Communities in 1994, Romania has adopted the European Union model for the protection of new plant varieties, adopted by Regulation (EC) no. No 2100 of 27 July 1994 establishing a Community plant variety system of protection (as amended by Regulation No 15/2008 / EC), which also established a separate Office for the processing of applications for protection and also complied with the Agreement on Trade-Related Intellectual Property since 1994 (TRIPs) adopting a sui generis protection system by means of a patent.

In this sense, by Law no. 255/1998 on the protection of new plant varieties, law which abrogated the provisions on the protection of new plant varieties in Law no. 64/1991 and by which (following its amendment by Law no. 204/2011), the competence to register and settle patent applications for new plant varieties was transferred from OSIM to the State Institute for Variety Testing and Registration (ISTIS), an institute established by Law no. 75/1995 on the production, quality control, marketing and use of seeds and propagating material, as well as the registration of agricultural plant varieties and which, previously performed the necessary technical examinations for patenting, OSIM having a more formal role for the issuance of patents.

<sup>10</sup> [https://europa.eu/european-union/about-eu/agencies/cpvo\\_ro](https://europa.eu/european-union/about-eu/agencies/cpvo_ro).

By Order no. 150 of July 17, 2012 of the Minister of Agriculture and Rural Development the Regulation for the application of Law no. 255/1998 on the protection of new plant varieties and by Order no. 2 of January 5, 2012 the costs for the examination procedures for granting the legal protection of the varieties, the issuance of the variety patent and the registration of the varieties names' were approved.

The regulation for the application of Law no. 255/1998, approved by Order no. 150/2012, in the bad tradition of the Romanian executive, adds copiously to the law defining "candidate variety", "derived essential variety", "similar variety", the requirements for the eligibility of the name, adds (in art. 17 letter e) to the revocation cases of the patent a reason for which the law (in art. 34 letter c) provides that the patent is annulled, reduces the "farmer's privilege" provided by art. 21 of the law, to the "small farmers" whom he does not even define, etc. However, if the law is deficient, it cannot be supplemented by the "implementing regulation", and the regulation cannot, in any case, contradict the law.

It is noted that at this date, in Romanian law, the **inventions in the field of biotechnology which refer to "plants or animals (...) which are not limited to a certain variety of plants or a certain breed of animals"**, as well as to a "microbiological process or another technical process or a product, other than a plant variety or a breed of animals, obtained by this process" are patentable according to the common law of inventions (Law no. 64/1991) and obviously if the conditions of novelty, inventive step and industrial applicability (the latter understood in its broadest sense and which also includes agriculture) are met.

However, regarding the **new plant varieties**, they are protectable by a sui generis intellectual / industrial property law, the title of protection in our law being the patent for the variety and the protection conditions provided in the UPOV Convention and in Regulation no. 2100/94, respectively: novelty (but defined differently from the common law of inventions), distinctiveness, homogeneity and stability.

The difference between inventions in the field of plant-related biotechnologies and achievements in new varieties is given by the **level of creativity, which is higher in the case of inventions in the field of plant-related biotechnologies**, compared to that required and / or submitted for the creation of new plant varieties. The invention represents an important technical progress and of considerably greater economic interest in relation to the protected plant variety. An "invented" plant is an absolute novelty and results from an inventive step. A new variety of plant is an

amelioration, an improvement of the qualities of an existing plant.

Examples: researchers at the Massachusetts Institute of Technology (MIT) are working to create a plant that produces light through its energy metabolism, the plants that shine will take the place of traditional lamps. This plant if made would be patentable by a patent<sup>11</sup>. A potato variety that has been improved and acquired increased qualities (higher productivity, resistance to frost and drought, taste, etc.) is a new variety of potato (plant) for which protection is provided by granting a patent for the variety.

In their current wording, Law no. 255/1998 and Law no. 64/1991 distinguish between plant varieties and animal breeds which are not patentable as inventions but are susceptible of protection by a sui-generis intellectual right conferred by the patent for varieties and plants and animals which are patentable under the common law of inventions. The differentiated legal treatment and the specific conditions under which the two categories of achievements can be protected lie in the means of obtaining them. Plant varieties and animal breeds (unprotected as inventions) are usually obtained by biological processes, based on human-directed sexual reproduction and observable in nature, while patentable plants or animals are obtained by genetic techniques and processes.

## 7. What are the similarities and differences between the patent and the variety patent?

The patent can be an effective mean of protection for certain technical achievements in the field of vineyards (vegetables), but does not offer a complete and satisfactory system of protection in the case of new varieties, plant varieties. In the absence of a specific protection system, adapted to their particularities, many achievements consisting of new varieties of plants, plant varieties, if not all, would remain unprotected. However, the activity and the material and human efforts made, the useful results obtained, the personal merit of the breeder and of the one who ensured the conditions for this justify the protection by an industrial property right, even if it does not fall within the conventional or traditionally accepted patterns. Moreover, we believe that the protection of new varieties, of plant varieties by intellectual property right is justified more than the protection within it of distinctive signs and especially of indicative ones and domain names.

There are similarities, but also differences, between patents for inventions for plants, protected as

<sup>11</sup> <http://www.cunoastelumea.ro/plante-stralucitoare-care-ar-putea-inlocui-iluminatul-public-inventate-de-cei-de-la-mit/>.

such by inventor's rights and patents for varieties, the first are given by the nature of the activity and the results obtained, the following by own characteristics of the two types of achievements. Thus,

(i) We note first that both the plant or animal patent and the variety patent confer intellectual property rights and the classification of the latter as a "sui-generis right" is not affecting the nature of the right. Moreover, this is the qualification given both by the UPOV Convention and by Regulation no. 2100/94, but also by Directive 2004/48 on the enforcement of intellectual property rights, by Regulation (EU) no. 608/2013 of the European Parliament and of the Council of 12 June 2013 on the enforcement of intellectual property rights by customs authorities and revoking Regulation (EC) No 1383/2003 of the Council, respectively, art. 2 para. (1) lit. h) and i), according to which **"intellectual property right"** means: *"a Community protection upon a plant variety, as provided for in Regulation (EC) No 2100/94 of the Council from 27<sup>th</sup> of July 1994 on establishing a system of Community plant variety protection" and, at the same time, "a right of ownership over a plant variety as provided for in national law"*. The fact that the conditions of protection differ or the authority designated to settle the applications and issuance of the title of protection or the duration and content of the rights does not change the nature of the right that rewards an intellectual activity with useful results for industry.

(ii) The conditions of protection differ significantly and this is due to the specificity of the two types of achievements and the level of creativity involved. In the case of plants and animals - inventions that can be protected under Law no. 64/1991, the conditions are novelty, inventive step, industrial applicability. In the case of new varieties, they are protected if they are new, distinct, homogeneous and stable. But the novelty of the common law of inventions and the novelty of plant varieties are not identical criteria. In common law, the novelty of the plant or animal invention is inferred from the comparison between the claimed invention and the state of the art on the date of filing or, as the case may be, on the date of the priority invoked. In the case of the plant variety, the novelty is of a commercial nature, because the commercialization of the variety before the filing of the patent application for the variety is destructive of the novelty.

(iii) The inventive step is a condition of protection only for the inventions of plants and / or animals patented under Law no. 64/1991 and this has in view the establishment of the non-evidence of the solution for the specialized person. The condition of the distinctive character of the variety that can be protected under Law no. 255/1998 is not equivalent to the

condition of the inventive step, even if a certain resemblance can be made. The distinctive character presupposes that the new variety is different from other varieties known by at least one characteristic.

(iv) uniformity / homogeneity and stability are conditions of protection only for new plant varieties, not for plant or animal inventions.

(v) The issuance of the variety patent does not imply, as required in the case of plant or animal inventions (but also for other inventions in the field of technology) the disclosure of the process for obtaining it. The repeatability of the (culture) process is a condition of protection only for plant or animal inventions, not for plant varieties.

(vi) the scope of protection is different: while for plant or animal inventions the protection covers the production and placing on the market of processed and consumer products, in the case of plant varieties the protection is limited to the act of placing the propagating material on the market.

The conclusion that needs to be drawn from the comparison of plant and animal patents and variety patents is that our legislator has opted for a sui-generis protection of new varieties, and this is a solution in line with TRIPs that requires States to protect new varieties, but does not impose a method of protection, which can be achieved either by patent or by an efficient sui generis system or by a combination of these two means.

We remind you that the Community Office for Plant Varieties does not issue patents for varieties being limited pursuant to art. 62 of Regulation 2100/94 to render a decision containing an official description of the variety. But the name of the title of protection has no relevance to the protection granted and its scope.

## 8. Holder of the patent right for the variety: its breeder and / or successor in title

In our law, the one who creates a new plant variety is called a breeder, a name that is in accordance with the UPOV Convention and Regulation no. 2100/94. But in other legal systems it is called "obtainer"(obtenteur) in French law (art. L613-15-1 et seq. of CPI) or plant breeder in Canada, or simply inventor in the US.

The name of breeder given to the person who makes a new variety of plant seems to us more suggestive, more in line with what it actually does: it improves something (a species of plant, a breed of animal) that exists in a less advanced form than that obtained as a result of breeding.

The right to issue the patent for the variety belongs to the breeder, this being defined in the law (art. 2) as: (1) the person who **created or discovered and developed a new variety**; (2) the person who is the **employer** of the person who created or discovered and

developed the variety or who ordered the activity of creating new varieties, in accordance with the law or on the basis of a contract specifying that the right belongs to the limited partner; and (3) the successor in rights of the first two.

We note that in French law the right is recognized only in favor of the one who creates and **not the one who discovers and develops a plant variety** (art. L623-2 of the CPI), and the doctrine considers unfortunate the elimination from protection of discovered and developed varieties<sup>12</sup>. We believe, however, that the term "to create" also includes varieties that have been "discovered and developed." However, the doctrine does not rule out the possibility that a horticulturist may observe a natural variation of a known plant and that it may be of interest to be fixed and consequently protected.

In turn, "variety patent holder" is defined as the person holding the variety patent or his successor in title. The law admits and, consequently, regulates the co-authorship in the creation, discovery and development of the new variety (art. 10), the discovery of the variety by two or more persons and its development by another person, the breeder's right to associate third parties without any contribution to obtaining the variety as a patent applicant and holder, the rights of the employed breeder when these are not established by contract, respectively the right to a fair remuneration.

The conclusions to be drawn from these definitions are as follows:

a) The status of breeder does not necessarily involve inventive step in the classical sense of the concept and this may also be enjoyed by persons who have no contribution to the production of the variety. There is an important difference between the breeder and the inventor: the new variety (variety) is not a real invention, the variety is not created from scratch, from something that did not exist before.

b) In the common law of inventions, discoveries are excluded from protection, but in the case of plant varieties protection of the discovered variety is permitted. Provided, however, that it is also developed, a conclusion that emerges from the use of the copulative conjunction "and". In other words, the simple discovery if not followed by the development of the variety does not give the discoverer the quality of breeder, respectively does not entitle him to obtain protection on the discovered variety. We note that UPOV Convention too (art. 1) defines the breeder as the person who "created or discovered and developed a

variety", similarly being designated also in art. 11 of Regulation 2100/94

c) Co-authorship is possible in the production of the variety in two forms: (i) creation together and (ii) discovery and development, but the breeder may also associate with persons without any contribution to the production of the variety in and on the occasion of capitalization. However, we believe that this right of association of non-contributing third parties to the production of the variety it applies solely to the independent breeder, the employed breeder not being able to do so since the right belongs to the employer or the limited partner;

d) In the case of varieties obtained from the position of employee (service breeder), the right belongs to the employer, but there is no prohibition by law that the contract provides otherwise.

e) If the right to the variety patent belongs to the employer, the breeder has the monetary rights provided for in the contract, or in the absence of provisions it is entitled to a fair remuneration. However, neither the law nor the implementing regulation do not contain criteria for determining this remuneration.

## 9. The object of patent protection for varieties

In order to be protected by a variety patent the achievement must: (i) represent such an achievement, i.e. **to be a new variety and (ii) to meet the conditions of protection established by law.**

The object of patent protection for varieties under Law no. 255/1998 is a new plant variety as defined by law. It seems to us suggestive of the object of protection and the notion of 'plant variety' (used in French law) because it is consistent with what is done by the breeder: a variety of a species that exists and continues to exist alongside the newly created one, the latter being nothing more than something (a group) that differs within a species by some morphological features or a category within the species. But both the UPOV Convention and Regulation (EC) no. 2100/94 and according to their model and our law also use to designate the object of protection the name "new plant variety" and we will comply with the above. However, we also comply considering that we admit that the name of "plant variety" could create issues when assessing the distinctive character of the variety, respectively that characteristic of the new variety that makes it different from the existing ones and which is a condition in order to obtain protection. Or the vegetal variety is an inferior

<sup>12</sup> Carine Bernault, Jean Pierre Clavier, *Dictionnaire de droit de la propriété intellectuelle*, 2<sup>e</sup> édition, Ellipses, 2015, p. 340. But other authors believe that the findings are also protectable. Frederic Pollaud-Dulian, *Propriété intellectuelle, La propriété industrielle*, Economica, 2011, p. 468.

category to the species<sup>13</sup>, which also means that it is less important than the differentiation of variety.

The variety and the plant are different notions and we remind, for the purpose of this study, that the plant is a generic name given to autotrophic plant organisms, living organisms with a simpler organization than animals, which extract their food through roots and are characterized by the presence of chlorophyll and by the fact that the membrane of their cells consists of cellulose and in the case of higher plant species by the composition of root, stem and leaves. They grow naturally or cultivated and are useful to humans. The phases that a plant goes through from a seed to the formation of new seeds represents a developmental cycle. However, plants do not include bacteria, so the protection of new varieties does not include it, their protection can be obtained, where appropriate, by patent. **The variety** is a homogeneous group of plants that have certain common properties and characteristics (morphological, physiological, economic and ecological) that are genetically transmitted.

The law defines **the object of patent protection for varieties** as being "*new plant varieties belonging to all plant genera and species, including, inter alia, hybrids between genera and species*". The object thus defined must not create any confusion: the protection concerns new varieties of plants regardless of the type to which they belong. According to the rules of classification of plant organisms (plant taxonomy<sup>14</sup>), **the genus** is a higher category to which the sub-genera and species<sup>15</sup> are subordinated. The species is a category subordinate to the genus that includes animals and plants with common features. The species is a subdivision in the biological classification made up of related organisms that have common characteristics and can interbreed with each other. Their grouping into species is based on physical similarities, but the most important criterion for association in case of a species is the ability to cross successfully, to mate with each other and give birth to viable offspring. Genetic changes occur in individuals that transmit such changes only within the species, therefore evolution is a process that can only take place within the species.

With reference to hybrids (popularly called mongrel in the case of animals, such as the mule and the hinny), we note that they are the result of crossing specimens (plant or animal) with different genetic traits of different species, genera or even families. Due to fundamental biological incompatibilities, hybrids can be sterile (the mule, the hinny), however hybrids that have the ability to multiply are valuable and can be the

basis for the creation of new species of plants and animals with superior qualities to their predecessors. Hybridization can take place naturally or artificially.

We also note that over time, many varieties lose their valuable qualities, but also that for various interests (economic, to meet aesthetic needs, etc.) they must be adapted to different conditions than those in which they were created, so the process of their improvement is continuous.

The Romanian law for the protection of new varieties defines the variety by adopting a "hybrid" solution, taking from the corresponding definitions of the UPOV Convention and Regulation (EC) no. 2100/1994. The definitions sound purely technical and there are few comments on them. Thus, the variety is defined as the group of plants belonging to a botanical taxon of the lowest known rank, which may be: (1) defined by the expression of characters resulting from a particular genotype or a combination of genotypes; (2) distinct from any other group of plants by the expression of at least one of the aforementioned characters; and (3) considered as a unit with respect to its ability to reproduce as such.

We note, however, that our law, in accordance with the UPOV Convention, is more demanding, more restrictive in terms of the object of protection (since it expressly refers to plants) than the Regulation which refers to "vegetable assembly" and not strictly to plants. Or mushrooms, belonging to the fungal kingdom (the other two kingdoms being the Kingdom of Animalia and the Kingdom of Plantae), are considered more closely related to animals than to plants, so in our law is debatable the possibility of protection by law via variety patent.

## 10. The conditions for the grant of protection of new plant varieties

A plant variety may be patent protected for the new variety if the variety is: (1) new, (2) distinct, (3) uniform) and (4) stable. The conditions currently established by the UPOV Convention and Regulation (EC) no. 2100/94 comply with the characteristics of this type of achievement, but they are not safe from criticism.

### 10.1. The condition for variety novelty

Novelty, an objective criterion in the common law of inventions is in the case of new plant varieties, a legal fiction. And this is because novelty is appreciated

<sup>13</sup> Frederic Pollaud-Dulian, *Propriété intellectuelle, La propriété industrielle*, Economica, 2011, p. 469.

<sup>14</sup> Word created by the combination of taxis = arrangement and nomos = rule used to describe the science that deals with the principles and rules of classification of organisms belonging to the plant kingdom.

<sup>15</sup> The classification system of living organisms comprises the following major systematic units: kingdom, branch, class, order, family, genus, species, variety.



not in relation to what exists as a precedent that could have a destructive effect of novelty (in the traditional sense for it on intellectual property), but in relation to commercial events that may have as an outcome its acknowledgement by the public.

The explanation of the solution lies in the variety characteristics and of the real object of protection: the propagating material and not the process of obtaining. The establishment of this condition is also justified by security reasons of legal relations: failure to submit a variety patent application in a timely manner is natural to result in the breeder being deprived of the possibility of acquiring an exclusive right when third parties cultivate and market reproductive material of the same variety without its consent.

Thus, according to our law, the variety is considered new if at the date of filing the patent application for the variety, the propagating material or vegetative multiplication or a crop product **has not been sold or handed over by the breeder or with his consent to third parties in purpose of exploitation of the variety** on the territory of Romania with more than 1 year or on the territory of other states with more than 4 years from the date of filing the patent application for the variety. In the case of trees, arbors, ornamental shrubs the term is 6 years counted since the submission of application.

The person who has to provide the relevant information on the previous exploitation of the variety is the applicant for the variety patent and such information must be mentioned in the patent application (art. 12), however ISTIS may also request the submission such information. If the variety was not new at the time of filing the patent application or the issuance of the patent was essentially based on information inconsistent with the reality that was provided by the applicant, the patent is revocable.

In the common law of inventions, disclosures made against the will of the inventor in circumstances which are characterized as an abuse are not destructive of novelty, but in the case of patents for varieties such an exemption is not formulated by law, so it could be, we believe, invoked only by taking into account the general principles of law.

a) However, there are non-destructive events and circumstances of novelty

b) Assignment of variety rights, where the variety has not been used prior to the assignment;

c) Production of propagating material by a third party under the control of the breeder by agreement between them.

d) Authorization of third-parties by the breeder to carry out a field or laboratory study, experiment or experimentations on a small sample of plants in order to evaluate the new variety;

e) Making available to a third party the propagating material or as material harvested as a result of its use for the purposes for which the law regulates the exhaustion of rights.

f) Making available as a result of the breeder's exposure of the variety to an officially recognized exhibition. We note here that the exhibition can be made without destructive effect in any official exhibition and not only in international exhibitions.

g) Making available to official bodies for the fulfillment of legal or contractual obligations:

h) Making available to a unit when between the two there are relations of subordination or common belonging to another unit.

We have mentioned earlier that the law allows the appropriation of the right by variety patent and variety discoveries. However, this solution conflicts with the Rio Convention on Biological Diversity of 1992, which by art. 8 states that "subject to the provisions of its national law, the (State Party) shall observe, preserve and maintain the knowledge, innovations and practices of indigenous and local communities which embody traditional ways of life which is of interest for the sustainable preservation and use of biological diversity and promoting their application on a larger scale with the agreement and participation of the depositaries of such knowledge, innovation and practice and encourages the equitable sharing of benefits arising from the use of such knowledge, innovation and practice".

## 10.2. The condition of the distinctive character of the variety

Distinctiveness is a condition for registering signs as trademarks for which it is their meaning to be. The trademark must serve to distinguish products and / or services of the same kind from competitors in a market and for this the sign must be distinctive likely to create in the consumer's perception the arbitrary relationship between sign and product. A similar function in the case of industrial designs fulfills novelty together with individual character. However, the distinctiveness in trademark law is different from the distinctive character of new plant varieties.

In the case of new plant varieties, the distinctive character is complementary to novelty just as the inventive step in the inventions law or the individual character in the case of industrial designs are complementary to the novelty of those types of creations. The connection between novelty and distinctiveness is made in the case of varieties through their notoriety.

The distinctive character of the variety presupposes that it is not enough that the variety has not become known to the public, it must also be different from the notoriously known varieties and its own

characteristics must make it differentiable. The difference is therefore given by the ability of the new variety to differentiate itself by one or more relevant characters (which can be accurately recognized, described and identified) resulting from a genotype or a combination of genotypes compared to any other notorious variety known at the time of filing the application for variety patent.

The condition of distinction is fulfilled if the variety for which protection is sought differs from the previous varieties already known (notoriously known) by an important, precise and slightly fluctuating character or by several characteristics whose combination is likely to confer the quality of new variety. Protection is granted only if the new variety shows a **clear** or **significant** difference from the notoriously known varieties.

The well-known varieties are: (i) the varieties protected in Romania, in the European Union and / or in other member states of the UPOV Convention; (ii) registered in the official catalog of varieties of cultivated plants in Romania intended for marketing or in similar registers and catalogs from other States, Contracting Parties to the Convention; (iii) for which there is a registered application for the protection of the variety or for its registration in a variety register in Romania, provided that the application leads to granting the protection or to the registration of variety; (iv) for which there is an application registered abroad for the granting of protection or for the registration of the variety, provided that the application leads to granting the protection or registration; (v) offered for sale or sold on the territory of Romania or of other states.

The condition thus formulated presumes that differentiation by one or more characters must be important and that only varieties which make a significant contribution to what exists can be protected. The character or characters which differentiate the variety from those notoriously known must be recognizable and identifiable and not fluctuating.

Varieties that are distinguished / differentiated from others by an insignificant aspect or by vague or unstable characteristics or by insignificant differences cannot be protected. But despite its importance this qualitative criterion is vague, inconsistent, relative, subjective and consequently susceptible to various interpretations. It is no coincidence that this criterion is a frequent source of rights disputes in the case of variety patents.

The notoriety of the variety in relation to which it is examined and its distinctive character may result from references, culture, marketing, submissions in official registers, presence in important collections or precise description in publications.

### 10.3. Condition of uniformity or homogeneity of the variety

Formulated either as a 'condition of uniformity' (in Law No 255/1998) or as a 'condition of homogeneity' (in the UPOV Convention and Regulation No 2100/94), it presupposes that there is uniformity or homogeneity where the most of the vegetable assembly (of the variety) has the common characteristics that define the species. Uniformity or homogeneity must ensure that all plants belonging to the same new species have a global identity.

The law requires that plants of the new variety to be uniform in all their characteristics. Homogeneity is appreciated only in terms of the essential characters and not all the characters of the variety. Some variations may occur, without compromising homogeneity, if these variations are simply the effect of the natural reproduction of the plants concerned. In other words, variations which may result from the particularities of propagation are allowed if the plants (vegetable assembly) remain sufficiently uniform in their relevant characteristics, including those used to examine distinctiveness and those used to describe the variety (by application for patent variety). According to Regulation 2100/94, homogeneity is assessed in the light of the characteristics used to describe the variety.

The control of homogeneity is carried out in practice on the basis of twenty plants, according to the UPOV directives, according to which a tolerance of 5% of individuals who do not have all the characteristics required to describe the variety is allowed. The characteristics of the controlled variety are the same as those taken into account for distinctiveness and stability.

Absolute uniformity / homogeneity cannot be claimed, which means that a margin of tolerance inherent in the case of Nature's intervention, must be accepted. But without sufficient uniformity / homogeneity, the variety would not be exploitable with satisfactory results and does not deserve to be protected.

### 10.4. Variety stability condition

Stability makes it possible to verify and determine whether the plants derived from the reproduction of the variety for which a variety patent is sought have the same characteristics as the original plants. The stability criterion is considered to be met when a plant is identical to its initial description at the end of each propagation cycle, respectively when the essential characteristics of the variety remain identical after its successive reproductions or multiplications or at the end of each propagation cycle.

In other words, the characteristics of the variety are perpetuated on the occasion of successive

multiplications, generation after generation. But here too, the impact of Nature justifies a dose of tolerance.

In practice, it is found that if the condition of homogeneity is met, the variety is generally considered stable. The UPOV Convention acknowledges that the latter criterion can be measured with less certainty than distinctiveness and novelty.

#### **10.5. What is the sanction for non-compliance with the protection conditions?**

According to art. 34 of Law no. 255/1998, ISTIS declares the annulment of the patent when it finds that at the date of the application for patent or, as the case may be, the a priori invoked, (i) the variety was not new, (ii) the variety was not distinct; (iii) the variety was not uniform and (iv) the variety was not stable.

Also, according to the same text, the variety patent may be declared null and void: (a) the person to whom the variety patent was granted was not entitled, unless there was a transfer of rights to the entitled person; and (b) The variety patent was based essentially on information and documents provided by the breeder. In particular, the latest case of patent annulment seems debatable to us.

#### **10.6. Name of the variety for which protection is sought by variety patent**

The name may or may not be a condition on the merits for the protection of new plant varieties.

It is not because it is not provided as one of the four conditions provided as such by art. 5 para. (1) of Law no. 255/1998. It is, because according to art. 5 para. (2) of the same law and which has the marginal name of "conditions for granting protection" stipulates that "the variety must bear a name, according to the provisions of art. 15 of the law", a similar resolution is provided in Regulation no. 2100/94 in art. 6. But the UPOV Convention (by art. 5) does not stipulate the name as a condition in order to receive protection, although it regulates it (distinctively).

We consider that the name of the variety, although necessary and important for the adopted protection system, does not represent, however, a condition on the merits because it is not provided in art. 34 of Law no. 255/1998, among the reasons for which the annulment of the variety patent may be ordered. If the name does not comply with the requirements of art. 15 of the law, ISTIS cancels the name, not the patent for the variety and will grant a hearing date to the holder of the patent for the variety in order to change the name.

The name must be a generic designation, enabling the new protected variety to be identified. In order to be registered, the name must make it possible to identify the variety in relation to any other variety and to avoid any risk of confusion with any other variety of the same botanical or neighboring species in all UPOV Member

States. It must not be likely to mislead or confuse the origin, provenance, characters or value of the variety or the breeder as a person. It must not be contrary to morals and public order. It cannot be composed only of figures, unless this is an established practice for the designation of varieties. It must be really different from other names designating on the territory of any of the parts of the UPOV a pre-existing variety of the same plant species or of a neighboring species.

The name of the variety is submitted to ISTIS by the applicant together with the patent application, but the applicant can have ISTIS conduct a documentary search on the proposed name, provided the legal fee is paid and we believe, that if the name does not meet the requirements of the law ISTIS may ask the applicant to change it. We believe that the refusal to change it may be grounds for rejecting the application for protection, which would partially justify the classification of the name as a condition on the merits. However, we do not believe that such a solution can be reached by interpreting the law and that a proper amendment of the law would be necessary.

The compliant name is registered by ISTIS at the same time as granting the breeder title. UPOV Member States must verify that no rights relating to the designation registered as the variety name prevents the free use of the name in relation to the protected variety even after the expiry of the breeder's right. The name should be without prejudice to the earlier rights of third parties. If, by virtue of an earlier right, the use of a variety name is prohibited to a person who is obliged to use it, ISTIS must ask the breeder for another name for that variety.

Once the name of the variety is allowed, a variety may not be the subject of an application for a right of ownership in another State unless is the same name. Each national office is required to register the proposed name, unless it finds an inconvenience in connection with that name on its territory. In this case, the breeder may be required to propose another name. In order to ensure this compliance, the Offices should ensure that information on variety names is communicated to each other, mainly proposing, registering and deleting the names. Any Office may submit any comments on the registration of a name to the Office which communicated that name.

The variety patent designates the variety by a name which allows, without confusion and ambiguity, its identification in all States parties to UPOV. The name referred to in the patent shall become binding upon its publication for any commercial transaction even after the expiry of the term for the variety patent.

## **11. Instead of conclusions. Selection of relevant case law on the protection of new plant varieties**

### **11.1. T-135/08 - Schniga v CPVO (Gala Schnitzer). The decision of the General Court dated 13 September 2010**

On 18 January 1999, the Konsortium Südtiroler Baumschuler ('KSB'), the predecessor in title of the applicant, Schniga GmbH, filed an application for a Community plant variety right at the Community Plant Variety Office (CPVO), pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended.

The Community plant variety right was sought for the apple variety (Malus Mill) Gala Schnitzer.

On 5 May 2006, the interveners, Elaris SNC and Brookfield New Zealand Ltd, the licensee and holder respectively of the plant variety right relating to the Baigent reference variety, lodged with the CPVO, pursuant to Article 59 of Regulation No 2100/94, objections to the grant of a right for the Gala Schnitzer variety.

By decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, the committee responsible for deciding on objections to the grant of Community plant variety rights ('the committee') granted a Community plant variety right for the Gala Schnitzer variety and dismissed the objections.

By decision of 21 November 2007 ('the contested decision'), the Board of Appeal annulled the decision granting a Community plant variety right for the Gala Schnitzer variety and also the decisions dismissing the objections, and the Board of Appeal itself refused the application concerning the Gala Schnitzer variety. In particular, it found that Article 61(1)(b) of Regulation No 2100/94 did not allow the CPVO to authorise KSB to submit new material, since KSB had not complied with the request in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94, by which the CPVO had requested it to provide a phytosanitary certificate confirming that the material submitted was virus-free.

By the Decision dated the 13<sup>th</sup> of September 2010, the General Court allowed the appeal and annulled the contested decision, stating the reasons set out below.

Article 55(4) of Regulation No 2100/94 provides that the CPVO is to determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.

It is apparent from the contested decision that the Board of Appeal took the view that the discretion conferred on the CPVO by that provision did not allow

it to authorise KSB to submit new material, in so far as the preconditions for refusing the application filed by KSB had been met. The Board of Appeal held that, due to the viral infection of the material submitted, of which KSB had informed the CPVO, KSB could never have submitted the phytosanitary certificate requested. It then noted that KSB had not provided the phytosanitary certificate requested and inferred that, by not providing that document, KSB had failed to comply with the requests in an individual case contained in the CPVO's letters of 26 January 1999 and 25 March 1999. In accordance with Article 61(1)(b) of Regulation No 2100/94, however, the CPVO was required to refuse the application concerning the Gala Schnitzer variety as soon as that failure to comply had been established.

That reasoning must be rejected, since it misconstrues the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

That discretion includes the right for the CPVO to define, should it deem it necessary, the requirements which it applies to the examination of an application for a Community plant variety right, on condition that the period within which the applicant for such a right must respond to the request in the individual case made to him has not expired.

In that connection, it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that, when it finds that the lack of precision which it has noted may be corrected, the CPVO has the power to continue with the examination of the application filed with it and is not required, in that situation, to refuse that application. Thus envisaged, that discretion makes it possible to avoid any pointless increase in the period between the filing of an application for a Community plant variety right and the decision on that application which would arise if the applicant were required to file a new application.

In addition, that discretion enables, first, the CPVO to satisfy itself that its requests in individual cases are clear and that the applicant alone is responsible for the fact that its actions fail to comply with those requests and, second, applicants to know their rights and obligations without ambiguity and to take steps accordingly, which is a requirement inherent in the principle of legal certainty (see, to that effect, Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17).

### **11.2. T-133/08, T-134/08, T-177/08 și T-242/09. Schröder v OCVV - Hansson (LEMON SYMPHONY). The decision of the General Court dated 18 September 2012**

On 5 September 1996, the intervener, Mr Jørn Hansson, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right

pursuant to the regulation. That application was registered under number 1996/0984. The plant variety for which protection was thereby sought is the variety LEMON SYMPHONY, belonging to the species *Osteospermum ecklonis*.

By a decision of the CPVO of 6 April 1999, a Community plant variety right was granted for LEMON SYMPHONY and the official description of that variety was compiled by the Bundessortenamt in 1997 and reproduced in the Register of Community Plant Variety Rights.

On 26 November 2001, the applicant, Mr Ralf Schröder, applied to the CPVO for a Community plant variety right pursuant to the regulation. That application was registered under number 2001/1758. The plant variety for which the right was thereby sought was the variety SUMOST 01, belonging to the species *Osteospermum ecklonis*. That variety is grown and marketed by Jungpflanzen Grünewald GmbH ('Grünewald'), a company in which the applicant has a 5% shareholding.

On 26 October 2004, the applicant filed an application for cancellation of the Community plant variety right granted to LEMON SYMPHONY, pursuant to Article 21 of the regulation read in conjunction with Article 9 thereof, entitled 'Stability', on the ground that, since 2002 at least, that variety no longer corresponded to its official description entered in 1997 in the Register of Community Plant Variety Rights. In support of his application he submitted, essentially, that, in the examination of LEMON SYMPHONY carried out in 2001 on the basis of the TG/176/3 test guidelines, applicable since 2001, various characteristics of that variety had received different scores in comparison with the official description of that same variety dating from 1997. That demonstrated, he submitted, that the variety at issue lacked stability.

By decision of 19 February 2007 ('the refusal decision'), the CPVO upheld the objections raised by the intervener against the grant of a Community plant variety right to SUMOST 01 and refused the application for a Community plant variety right for that variety, essentially on the ground that that variety was not clearly distinguishable from LEMON SYMPHONY and that the conditions set out in Article 7 of the regulation had therefore not been met. The CPVO observed, inter alia, that it was apparent from the technical examination that SUMOST 01 differed from LEMON SYMPHONY only in one characteristic, namely the start of the flowering period, and in this by only one mark, and that that difference was too slight, in the case of the *Osteospermum* species varieties, to render it clearly distinct. Furthermore, the CPVO considered LEMON SYMPHONY to be stable.

On 11 April 2007, the applicant filed an application for annulment, pursuant to Article 20 of the regulation, of the Community plant variety right granted to LEMON SYMPHONY, essentially on the ground that that variety had never existed in the form reproduced in the official description entered in the Register of Community Plant Variety Rights in 1997.

The decisions issued by the OCSP were appealed to the Boards of Appeal, which dismissed the appeals.

Invested in applications for annulment of the decisions of the Boards of Appeal, the General Court allowed the actions in part. Here are some of the arguments put forward by the Court of First Instance.

Under Article 76 of the regulation, entitled 'Examination of the facts by the [CPVO] of its own motion', the infringement of which is claimed in the present case, the CPVO is to make investigations on the facts of its own motion in proceedings before it, 'to the extent that they come under the examination pursuant to Articles 54 and 55' of that regulation.

Under Article 54 of the regulation, the CPVO is to conduct a substantive examination of the application for a Community plant variety right. In that context, it is to examine, inter alia, whether the variety may be the object of a Community plant variety right pursuant to Article 5 and whether the variety is new pursuant to Article 10 of that regulation.

Under Article 55 of the regulation, where the CPVO has not discovered any impediment to the grant of a Community plant variety right on the basis of a preliminary examination, it is to arrange for the technical examination relating to compliance with the conditions laid down in Articles 7 to 9 (DUS criteria) to be carried out by the competent office or offices in at least one of the Member States (Examination Office or Offices).

It must also be noted at the outset that Article 76 of the regulation, relating to the examination of the facts by the CPVO of its own motion, is, in the strict sense, inapplicable to the proceedings before the Board of Appeal when adjudicating on an appeal against a decision of the CPVO which has refused to declare, on the application of a party, the nullity of a Community plant variety right, because such proceedings do not come within the scope of Articles 54 and 55 of the regulation.

In the course of such proceedings, it is not for the Board of Appeal to carry out the substantive examination provided for in Article 54 or the technical examination provided for in Article 55 of the regulation, or even to rule on the lawfulness of such an examination carried out by the CPVO in the context of an application for a Community plant variety right.

The task of the Board of Appeal is solely to rule, on the application of an interested party, on the lawfulness of a decision of the CPVO adopted under

Article 20(1)(a) of the regulation refusing to declare the Community plant variety right null and void on the ground that it has not been 'established' by that party that the conditions set out in Article 7 or in Article 10 of that regulation were not satisfied at the time when the right was granted.

Since annulment proceedings were initiated not by the CPVO of its own motion, but on the application of an interested party, Articles 76 and 81 of the regulation, read in conjunction with Article 20 thereof, thereby place the onus on that party to prove that the conditions for that declaration of nullity have been met.

As regards the applicant's other arguments, by which he criticises the Board of Appeal for not having responded to his criticisms as to the unreliability of the technical examination of LEMON SYMPHONY carried out in 1997, expressed in the light of the development of the technical description of that variety since 2001, these must be rejected as irrelevant since, first, it has already been accepted that that technical examination had in any event been carried out on appropriate plant material, namely the cuttings originally taken from the plants sent to the Bundessortenamt by the intervener, and that, secondly, the applicant has not identified any other plant variety from which LEMON SYMPHONY, even described with a 'semi-erect to horizontal' attitude of shoots, was not clearly distinguishable in 1997. That assessment is consistent with the principal arguments set out by the CPVO and the intervener in response to the second plea.

Accordingly, even if, as the applicant claims, the 1997 technical examination culminated in an incorrect finding as to the level of expression attributed in respect of the characteristic 'Attitude of shoots', and a level of expression different to that attributed in the Bundessortenamt's examination report of that year should have been attributed to LEMON SYMPHONY in respect of that characteristic from 1997 onwards, that would not have had any effect on the assessment of the distinctive character of that variety for the purpose of Article 7 of the regulation, since that assessment was not determined exclusively, if at all, by reference to that characteristic.

First, the General Court observes in this connection that the adapted 2006 description of LEMON SYMPHONY differs from the original 1997 description only in respect of the single characteristic 'Attitude of shoots', the level of expression attributed to which was changed from 'erect' (see paragraph 12 above) to 'semi-erect to horizontal' (see paragraph 25 above).

Second, the General Court observes that the applicant has not yet proved that the effect of that amendment was that the DUS criteria had not been satisfied in 1997. It follows that, even if LEMON

SYMPHONY had been described from the outset as having a level of expression 'semi-erect to horizontal' in respect of the characteristic 'Attitude of shoots', it would have obtained a Community plant variety right.

Admittedly, the applicant claimed, during the proceedings before the Board of Appeal, that, had the examination of SUMOST 01 been carried out using for the purposes of the comparative examination the initial description of LEMON SYMPHONY, those two varieties would have been considered to be clearly distinct (see contested decision A 007/2007, p. 2). However, that submission was expressly rejected by the Board of Appeal, which observed in the contested decision that '[t]he test procedure would not have taken a different course if the Office had not immediately adapted and registered the variety description...'. Moreover, the applicant did not specifically challenge that assessment in the present action.

In the course of the exercise of that review, it must nevertheless be stated that, contrary to what the applicant claims, the characteristic 'Attitude of shoots', the levels of expression of which run, according to the test guidelines, from 'erect' to 'drooping', through 'semi-erect' and 'horizontal' and the nuances between those terms, is not, except in extreme cases, an 'absolute' characteristic which can be determined in a thoroughly objective manner using only the measurement of the angle of inclination of the shoots, but a characteristic which, by reason of the specific nature of its expression, can, depending on the case, be the subject of a relative and comparative assessment between varieties of the same species, as the Bundessortenamt's document of 18 May 2005, attached as annex A 27 to the application in Case T-177/08, clearly shows.

According to the Bundessortenamt, the attribution to LEMON SYMPHONY in 1997 of the level of expression 'erect' in respect of the description of the characteristic 'Attitude of shoots' follows from the comparison of that variety with the reference varieties used in the growing trials and the finding that LEMON SYMPHONY was 'the most erect' of the varieties on which trials were performed that year. Subsequently, the increase in the number of varieties of the *Osteospermum ecklonis* species and the amendment of the test guidelines led the Bundessortenamt to propose an adaptation of that description to state the level of expression as 'semi-erect to horizontal'. However, LEMON SYMPHONY remained exactly the same between 1997 and 2005. There was no material amendment of the description affecting the identity of the variety, but merely an amendment of the terms originally chosen, which does not change the identity of the variety but merely enables it to be described more accurately, in particular by delimiting it in relation to other varieties of the species.

The General Court takes the view that those explanations are sufficiently detailed and persuasive to resist firmly the attempted challenge to them made by the applicant in his arguments.

Moreover, the photographs used both before the German civil courts and in the proceedings before the CPVO confirm, at least in the eyes of a lay observer, that the attitude of the shoots of LEMON SYMPHONY did not change appreciably between 1997 and 2005.

### **11.3. T-140/15 - Aurora v OCVV - SESVanderhave (M 02205). The Decision of the General Court dated 23 November 2017**

On 29 November 2002, the intervener, SESVanderhave NV, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1). The Community plant variety right was sought for variety M 02205, a sugar beet variety of the species *Beta vulgaris* L. ssp. *Vulgaris* var. *altissima* Döll.

The CPVO entrusted the Statens utsädeskontroll (Swedish Seed Testing and Certification Institute, Sweden) ('the Examination Office') with the responsibility of carrying out the technical examination of the candidate variety, in accordance with Article 55(1) of Regulation No 2100/94. The Examination Office was in charge, in particular, of examining whether the candidate variety was distinct from the most similar varieties whose existence was a matter of common knowledge on the date of application for a Community plant variety right ('the reference varieties') within the meaning of Article 7(1) of Regulation No 2100/94. In that respect, sugar beet varieties Dieck 3903 and KW 043 were considered to be most similar to the candidate variety.

On the basis of that report, on 18 April 2005, the CPVO granted the intervener the Community plant variety right applied for, under Registration No EU 15118, for variety M 02205. Annexed to that decision were the documents supplied by the Examination Office, including the variety description and the comparative distinctness report.

On 28 August 2012, the applicant lodged a request for nullity of the Community plant variety right granted to the intervener, pursuant to Article 20 of Regulation No 2100/94, on the ground that the successive corrections to the comparative distinctness report showed that variety M 02205 did not satisfy the 'distinctness' requirement for the purposes of Article 7(1) of the regulation. More particularly, in the statement of grounds of appeal before the CPVO, the applicant disputed the fact that, following the abovementioned corrections, the only distinguishing factor between variety M 02205 and variety KW 043

was the percentage variation relating to the state of expression of the 'germity' characteristic, namely 29% for M 02205 as against 94% for KW 043. According to the applicant, that meant that it was inappropriate to choose that characteristic for the purpose of a finding of distinctness of the candidate variety, given that, in accordance with the explanations in Annex 1 to the protocol adopted by the CPVO on 15 November 2001 in respect of the species *Beta vulgaris* L. ssp. *Vulgaris* var. *altissima* Döll ('the Protocol of 15 November 2001'), applicable in the present case, the distinctness of a candidate variety can be justified under the 'germity' characteristic only with two notes difference between the note of the candidate variety and that of the reference variety — which was unquestionably not the case here.

By Decision NN 010 of 23 September 2013, the CPVO dismissed the applicant's request for nullity under Article 20(1)(a) of Regulation No 2100/94, on the ground that variety M 02205 was clearly distinct from the reference varieties, including KW 043. The CPVO explained that, at the time the final report was issued, the Examination Office was aware of the correct notes of expression for all the characteristics of the candidate variety and, therefore, the transcription errors in the comparative distinctness report were immaterial with regard to the finding of distinctness of that variety; furthermore, that fact had been confirmed by the Examination Office.

By Decision A 010/2013 of 26 November 2014 ('the contested decision'), the Board of Appeal dismissed the applicant's appeal as unfounded, holding, in particular, that the latter had overestimated the importance of the comparative distinctness report, whereas, in fact, that document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the Community plant variety right at issue.

By its Decision of 23 November 2017, the General Court upheld the appeal, essentially retaining the following arguments.

Under Article 20(1)(a) of Regulation No 2100/94, the CPVO must declare a Community plant variety right null and void if it is established that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right. Moreover, under Article 7(1) of the regulation, '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 whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.'

Furthermore, it must be pointed out that the Court has stated, in that regard, that the conditions relating, in particular, to distinctness are, under Article 6 of the regulation, a prerequisite for the grant of a Community plant variety right. Therefore, in the absence of those conditions, the right granted is unlawful, and it is in the public interest that it be declared null and void (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 52).

The Court has also ruled that the CPVO has a broad discretion concerning the declaration of nullity of a plant variety right for the purposes of Article 20 of Regulation No 2100/94. Therefore, only where there are serious doubts that the conditions laid down in Articles 7 or 10 of that regulation had been met on the date of the examination provided for under Articles 54 and 55 of that regulation can a re-examination of the protected variety by way of nullity proceedings under Article 20 of Regulation No 2100/94 be justified (see, to that effect, judgment of 21 May 2015, *Schröder v CPVO* (C-546/12 P, EU:C:2015:332, paragraph 56).

In that context, a third party seeking a declaration of nullity of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the plant variety right following the examination provided for in Articles 54 and 55 of that regulation (see, to that effect, judgment of 21 May 2015, *Schröder v CPVO* (C-546/12 P, EU:C:2015:332, paragraph 57).

It was thus for the applicant to adduce, in support of its request for nullity, evidence or facts of sufficient substance to raise serious doubts in the mind of the Board of Appeal as to the legality of the plant variety right granted in the present case.

Consequently, the Court must examine whether the elements adduced by the applicant before the Board of Appeal, in that regard, were sufficient to raise serious doubts in the mind of the Board of Appeal and if, accordingly, they could justify a re-examination of variety M 02205 by means of nullity proceedings based on Article 20(1)(a) of Regulation No 2100/94.

In order to answer that question, first of all, it is necessary to ascertain the requirements imposed by the legislation at issue concerning the drafting of the notes of expression on which the findings as to whether or not a plant variety is distinct must be based. Next, it is necessary to examine whether the arguments put forward by the applicant in that regard could raise serious doubts in the mind of the Board of Appeal. Lastly, the Court must consider whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts.

First, with regard to the requirements imposed by the legislation at issue, it must be noted that, under Article 56(2) of Regulation No 2100/94, the conduct of any technical examination is to be performed in

accordance with test guidelines issued by the Administrative Council and any instructions given by the CPVO. In that regard, it must be pointed out that the broad discretion enjoyed by the CPVO in the exercise of its functions cannot allow it to avoid the technical rules that regulate the conduct of the technical examinations without breaching the duty of good administration and its obligations of care and impartiality. In addition, the binding nature of those rules, including for the CPVO, is confirmed by Article 56(2) of Regulation No 2100/94, which requires that the technical examinations are carried out in accordance with those rules (judgment of 8 June 2017, *Schniga v CPVO*, C-625/15 P, EU:C:2017:435, paragraph 79).

In that context, it must be observed that, in accordance with the abovementioned Article 56(2), the CPVO adopted the Protocol of 15 November 2001 with a view to establishing test guidelines governing the technical analysis and the conditions for registration of varieties coming within the sugar beet species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll*. Under point III.2., headed ‘Material to be examined’, and point III.5., headed ‘Trial designs and growing conditions’, of the protocol, candidate varieties must be directly compared with reference varieties in growing trials to be carried out normally in at least two independent growing cycles. Moreover, in the contested decision, the Board of Appeal itself stressed the importance of compliance with that requirement, which, in its own words, is a condition precedent for the grant of a Community plant variety right (see paragraph 28 above).

It follows that the notes of expression in the comparative distinctness report, on the basis of which the distinctness of a candidate variety is established, have to correspond to the notes collected from comparative growing trials carried out in two independent growing cycles following the application for a Community plant variety right for the candidate variety.

Secondly, with regard to the arguments put forward by the applicant, the documents in the case file show that the applicant claimed, before the Board of Appeal, that the fact that the notes of expression given to variety KW 043 in the comparative distinctness report were identical to those in its official variety description supports the assumption that the notes were sourced from the official description and not from comparative growing trials carried out in 2003 and 2004, for the purpose of a Community plant variety right being granted for variety M 02205. Furthermore, by relying on concrete examples from other official variety descriptions, the applicant sought to show that the probability of recording the same notes for a sugar beet variety from year to year was very low.



In that regard, it must be observed that, as has been noted in paragraphs 18 and 19 above, although the applicant had requested, several times, access to the file concerning variety M 02205, including the results of the comparative growing trials of 2003 and 2004, the CPVO did not communicate those results to the applicant until 2 March 2015, that is to say, after the date of the Board of Appeal's decision. Therefore, the applicant was clearly not in a position to rely on evidence other than that produced by it before the CPVO bodies, namely the comparison between the data in the comparative distinctness report and that recorded in the official variety descriptions for M 02205 and KW 043 respectively as well as, by way of illustration, data taken from other official variety descriptions.

In addition, the applicant was fully entitled to rely before the Board of Appeal on the series of errors in the comparative distinctness report, mentioned in paragraphs 5 to 15 above, which gave rise to a succession of corrections of that report and could also raise serious doubts in the mind of the Board of Appeal, at the very least, as to the reliability of the notes of expression corresponding to the characteristics included in the comparative distinctness report. Moreover, as pointed out, in essence, by the applicant before the Board of Appeal, the fact that the corrections were late was liable to reinforce those doubts.

In the light of the foregoing, the Court must find that the applicant adduced, before the Board of Appeal, factual elements of sufficient substance to raise serious doubts as to whether the data used for reference variety KW 043 was sourced from its official variety description. The Board of Appeal was thus required to verify whether that contention was well founded and draw the appropriate conclusions for the applicant's action.

Moreover, it should be added that, in its replies to the written questions put by the Court, the CPVO recognised that the notes of expression relating to variety KW 043, as included in the last and penultimate versions of the comparative distinctness report, did not correspond to the data collected from the comparative growing trials of 2003 and 2004 but were sourced from the official variety description for KW 043.

Thirdly, with regard to whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts, in the first place, it is important to recall that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a margin of discretion in carrying out its

functions (see judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50 and the case-law cited). That discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of Regulation No 2100/94 (see judgment of 8 June 2017, *Schniga v CPVO*, C-625/15 P, EU:C:2017:435, paragraph 46 and the case-law cited).

In the second place, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine carefully and impartially all the relevant particulars of an application for a Community plant variety right and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings which it sets in motion (see judgment of 8 June 2017, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-625/15 P, EU:C:2017:435, paragraph 47 and the case-law cited).

In the third place, it should be recalled that Article 76 of Regulation No 2100/94 provides that 'in proceedings before it [the CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55.'

Lastly, the Court has held that, under Article 51 of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the CPVO (OJ 2009 L 251, p. 3), the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46).

Thus, on the one hand, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46). On the other hand, the Board of Appeal is also bound by the principle of sound administration, pursuant to which it is required to examine carefully and impartially all the relevant factual and legal information in the case before it.

#### **11.4. TUE. T-112/18 - Pink Lady America v. OCVV - WAAA (Cripps Pink)<sup>16</sup>. The decision of the General Court dated 24 September 2019**

On 29 August 1995, the predecessor in title of the Western Australian Agriculture Authority ('the

<sup>16</sup> For a comment on this General Court of the European Union case: Ciprian Raul Romițan, "Plant varieties. Procedure for declaring nullity. Cripps Pink apple variety. News. Derogatory grace period. The notion of exploitation of the variety. Commercial evaluation. Evidence submitted late to the Board of Appeal. Evidence presented for the first time before the Tribunal", in the *Romanian Journal of Intellectual Property Law (RRDPI)* no. 2/2020, pp. 127-149.

WAAA' or 'the intervener'), the Department of Agriculture and Food Western Australia ('the Department'), filed an application for a Community plant variety right at the Community Plant Variety Office (CPVO) pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.

The plant variety in respect of which the right was sought is 'Cripps Pink', a variety of apple belonging to the species *Malus Domestica Borkh*, developed by Mr John Cripps ('the breeder'), a researcher in the Plant Industries division of the Department, by crossing the Golden Delicious and Lady Williams varieties.

The application form for a Community plant variety right stated that the Cripps Pink apple trees were first marketed within the European Union in 1994 in France and first marketed outside the European Union, more specifically in Australia, in 1988. On 12 March 1996, the CPVO informed the representative of the Department that the Cripps Pink variety did not fulfil the novelty requirement under Article 10 of the Basic Regulation. In July 1996, the Department explained that 1988 should have been considered to be the date of the 'first plantings in Australia for experimental purposes'. The Department went on to state that the relevant date for the purposes of Article 10 of the Basic Regulation was July 1992, being the date when Cripps Pink apple trees were marketed in the United Kingdom under the trade name 'Pink Lady'. On 15 January 1997, the CPVO granted Community plant variety right No 1640 to the Cripps Pink variety.

On 26 June 2014, the applicant, Pink Lady America LLC ('the applicant' or 'PLA'), lodged an application for nullity in relation to the Cripps Pink Community plant variety right under Article 20 of the Basic Regulation, arguing that the Community plant variety right at issue did not fulfil the novelty conditions laid down in Article 10 of that regulation. On 19 September 2016, by Decision No NN 17, the CPVO dismissed the applicant's nullity application. The Decision was upheld by the Board of Appeal of the CPVO.

By the Decision dated the 24<sup>th</sup> of September 2019, the General Court dismissed the action against the decision of the Board of Appeal of the CPVO, citing, in essence, the following grounds.

The relevant date for the purposes of the combined application of Articles 10 and 116 of the Basic Regulation is therefore 1 September 1994, the date of publication of the Basic Regulation in the *Official Journal*.

The effect of Article 116 of the Basic Regulation is to extend the grace period laid down in Article 10(1)(a) of the regulation from 1 year before the application for protection to four, or 6 years in the case of trees, before the date of entry into force of the Basic

Regulation. The relevant date in this case was therefore 1 September 1988 for sales and disposals within the European Union.

As regards the grace period for sales and disposals outside the territory of the European Union, as set out in Article 10(1)(b) of the Basic Regulation, that provision is not affected by Article 116 of the regulation.

In the present case, the documents in the case establish that the application for Community plant variety rights was made by the intervener's predecessor in law on 29 August 1995. Therefore, it was filed within 1 year of the entry into force of the Basic Regulation.

Concerning the burden of proof in nullity proceedings, The General Court recalled that an applicant seeking a declaration of nullity in respect of a Community plant variety right must adduce evidence and facts of sufficient substance to give rise to serious doubts as to the legality of the plant variety right granted following the examination provided for in Articles 54 and 55 of that regulation (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 57 and judgment of 23 November 2017, *Aurora v CPVO — SESVanderhave (M 02205)*, T-140/15, EU:T:2017:830, paragraph 58). It was thus for the applicant to put forward, in support of its nullity application, evidence or facts of sufficient substance to raise serious doubts on the part of the CPVO regarding the legality of the plant variety right granted in the present case.

Regarding the assessment of the novelty requirement in the light of sales or disposals made outside the European Union, The General Court specified that a disposal for the purposes of testing of the variety which does not amount to sale or disposal to third parties for purposes of exploitation of the variety does not negate novelty for the purposes of Article 10 of the Basic Regulation (judgment of 11 April 2019, *Kiku v CPVO — Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie (Pinova)*, T-765/17, not published, under appeal, EU:T:2019:244, paragraph 74).

It follows from this case-law that the concept of 'exploitation' of the variety within the meaning of Article 10(1) of the Basic Regulation relates to exploitation for profit, as further demonstrated by the provisions of the Basic Regulation relating to contractual exploitation rights, but this concept excludes commercial trials aimed at assessing varieties under commercial conditions across a range of soil types and different farming systems to determine their value to customers.

Further, as the intervener explained during the hearing before the Board of Appeal, the purpose of the 'commercial trials' in this case was to assess varieties under commercial conditions across a range of soil

types and different farming systems to determine their value for customers. The trials thus enabled the performance of the variety in question to be monitored under much more representative field conditions, the full crop cycle to be assessed, and, finally, producers to receive more performance data.

These statements by the intervener are corroborated by the breeder's statutory declaration of 6 August 2015 and also by the rebuttal statutory declaration of Mr Geoffrey Godley, Agricultural Advisor to the Department, of 13 January 2015. It is apparent from the breeder's statement of 6 August 2015 that the purpose of distributing the Cripps Pink variety to nurseries and orchardists 'was to see how the trees performed in a non-research station environment'. Mr Godley's statement also indicates that he acknowledges having participated, at the material time, in the 'commercial evaluation' activities, which consisted of

collecting information from growers 'on yield, harvest, storage, packing, shipping and consumer reaction to the variety apples.'

Finally, it should be noted that according to the explanations provided during the hearing before the Board of Appeal by the CPVO Technical Expert on Apples, commercial evaluation is a common practice in apple selection. The expert explained that apple selection takes place in two stages: a first stage which consists of carrying out research to test and select varieties, and a second stage which consists of assessing the commercial use of apple trees.

In those circumstances, the Board of Appeal correctly concluded that commercial evaluation did not amount to commercial exploitation and that, accordingly, sales or disposals made for testing purposes before the grace period were circumstances that did not negate novelty.

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