EUROPEAN UNION PLANT VARIETY PROTECTION

THIRD EDITION

GERT WÜRTENBERGER
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OXFORD

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Preface

The Community plant variety rights system celebrated its twentyfifth anniversary in 2020. The high number of applications (3,427 applications in 2020 and more than 72,000 applications in total since the Community Plant Variety Office (CPVO) was established up to the end of 2020) is not only proof of the importance which breeders accord to protecting their breeding and marketing investments on a European Union (EU)-wide basis but is also an indisputable sign of the value of this protection system.

It is a field of law which attracts only a rather restricted audience, resulting in a limited number of publications which would assist authorities who are engaged in the process of granting and enforcing plant variety rights protected at EU level, including national offices which still examine national applications, as well as the judicial bodies and lawyers advising and representing breeders in dealing with problems which are specific to plant varieties. Even on the national level, where granting systems have been in existence for decades in most of the EU Member States, conflicts and problems which lead to the publication of decisions, either on the administrative or on the judicial level, can hardly be observed. On the other hand, it is a field of law which shares the significant problems generally involved in industrial property matters, and which also shows the specific difficulties caused by its relevance to living materials and its relationship to agriculture policies, etc.

The aim of this book is to fill a gap by explaining how the Community plant variety rights system works. As so far, only minimal case law is available, the interpretation given regarding the Basic Regulation and the implementing regulations—deemed to make the system workable—is an attempt by the authors of this book to provide some guidance in this field of law, arising out of each author's specific experiences.

The book should by no means be regarded as exhaustive. This applies not only with regard to the chapters which deal with the procedure before the CPVO, but in particular with regard to the rights arising out of the plant variety rights granted and their enforcement. The book should therefore be seen as a source which gives an idea of how the grant system works, the advantages of Community plant variety rights and the aspects to be considered in exploiting and defending the same. In particular, it should be borne in mind, when reading Chapter 7 on enforcement of Community plant variety rights, that the Basic Regulation provides only a few mechanisms regarding how infringements of Community plant variety rights should be dealt with, leaving the rest to the enforcement systems of the EU Member States. As the rules on enforcement have not been harmonized in the European Union, the book can touch only those major aspects which have turned out to be of practical relevance in infringement proceedings

under the applicable national law. In this respect case law is very limited in comparison with, for instance, patent infringement proceedings throughout the EU Member States.

One particular problem in writing this book is that the entry into force of the Lisbon Treaty in 2009 meant that the European Community was renamed the European Union; however, the text of the EU Regulations governing the plant variety right system has not been amended. We have tried to take this situation into account but it was not possible to use only one term consistently. We nevertheless hope that this will not cause major problems for the readers. As far as possible, the 'European Union' is the term used in this book, although the text of the provisions discussed still refers to the 'Community'.

The book is the result of collaboration and a shared responsibility amongst the authors. However, each author has, in essence, drafted specific parts which the other authors have commented upon (Würtenberger—Chapters 1 and 7, Van der Kooij—Chapter 6, Kiewiet—Chapters 2 and 3, and Ekvad—Chapters 4 and 5).

The text takes into consideration the status of legislation and case law up until 1 January 2021.

We wish to acknowledge the invaluable assistance provided by Karin Grau-Kuntz in implementing the revisions to the third edition of this book.

Gert Würtenberger
Paul van der Kooij
Bart Kiewiet
Martin Ekvad
February 2021

Previous editions of this book included the full text of Appendices 1–3. As these are all freely available online, and in an effort to reduce paper use and maintain portability, whenever reference is made in this edition to the appendices, the reader can find a shortened URL to the relevant regulation in the table of contents.

Contents

List of Abbreviations

AC	Administrative Council
AIPPI	Association Internationale pour la Protection de la Propriété Industrielle
ASSINSEL	International Association of Plant Breeders
BSA	Bundessortenamt
CBD	Convention on Biological Diversity
CIOPORA	International association of breeders of vegetatively reproduced ornamental and fruit plant varieties
CJEU	Court of Justice of the European Union
CPI	Code de la Propriété Intellectuelle
CPVR	Community plant variety right
CVPO	Community Plant Variety Office
DUS	distinctness, uniformity, stability
DUSN	distinctness, uniformity, stability, and novelty
EDV	essentially derived variety
EPC	European Patent Convention
EU	European Union
EUIPO	European Union Intellectual Property Office
IIWG	Inter-Institutional Working Group
IP	intellectual property
ISF	International Seed Federation
OHIM	Office for Harmonization in the Internal Market
PVR	plant variety right
QAS	Quality Audit Service
SD	standard deviations
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UPOV	International Union for the Protection of New Varieties of Plants
WTO	World Trade Organization

Contributors

Würtenberger Gert, Würtenberger Rechtsanwälte. Gert Würtenberger is founder of the German law firm Würtenberger Rechtsanwälte. He studied law at the University of Munich and was admitted as an attorney at law in 1983. His doctoral thesis was on international priority rights. He specializes in the fields of trademark registration and infringement litigation, patent infringement litigation and infringement litigation, unfair competition, copyright, plant variety protection, negotiating and drafting licences in relation to all kinds of intellectual property rights, and EU law, as well as anti-trust law problems related to these fields.

In the course of his legal studies, Gert Würtenberger was trained in the legal department of a German-based chemical company, at the Indo-German Chamber of Commerce in Mumbai, and at a large law firm in Tokyo. He was awarded a scholarship to pursue legal studies at Kings College, London and during that time, he worked in the intellectual property department of a law firm. He has been active in International Trademark Association (INTA) committees and task forces. In September 2014 he was elected President of the German Association for the Protection of Intellectual Property (GRUR).

Kooij Paul van der, Board of Appeal Community Plant Variety Office. Until February 2020 Paul van der Kooij was Associate Professor in intellectual property law at the Department of Company Law (Leiden Law School), Leiden University, the Netherlands. He studied commercial law at the same university. Also in Leiden, he graduated in 1990 on a doctorate thesis on developments in plant variety protection law. He has written many articles for national and international scientific magazines, especially in the field of intellectual property law. He is also the author and co-author of a number of books on various intellectual property law topics, including the Community Regulation on trademarks and the Community Regulation on plant variety rights. Between 1991 and 2011, he was a deputy-judge at the District-Court of The Hague. In 1996 he became a member of the Board of Appeal of the Community Plant Variety Office, and since 2007 he has been Chairman of the Board of Appeal.

Kiewiet Bart, Community Plant Variety Office Bart Kiewiet was the President of the Community Plant Variety Office from 1996 to 2011. After having acquired a law degree at the Free University of Amsterdam, he started his career as an in-house lawyer for the two Dutch commodity boards in the horticultural sector. In 1984 he was appointed as a judge of the Trade and Industry Appeals Board of the Netherlands. In 1987 he was appointed as (Senior) Vice-president of that board, which he combined, until 1996, with the presidency of the Dutch Board for Plant Breeders' Rights. In that capacity he acted as leader of the Dutch delegation to the Diplomatic Conference for the revision of the UPOV Convention of

1991. He also headed the Dutch delegation to the Council working group meetings, where the draft Basic Regulation of the Community plant variety rights system was discussed. After his tenure as CPVO President, Bart Kiewiet joined Vondst Advocaten in Amsterdam in an of-counsel capacity.

Ekvad Martin, Community Plant Variety Office Martin Ekvad has been the President of the Community Plant Variety Office since 2011. Previously he was the Head of the Legal Unit at the Community Plant Variety Office. Before taking up his post at the Community Plant Variety Office, Martin Ekvad worked as a lawyer (Advokat) in the law firm Linklaters in Brussels and the law firm Magnusson Wahlin Advokatbyrå in Stockholm. His main areas of practice are intellectual property law and competition law. Prior to working in private practice he worked at a civil court. He has a law degree from the University of Lund, Sweden and an LL.M. from King's College, London.

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1
Introduction

A. History of a Community-wide Plant Variety Protection System—From National Rights to the EC Regulation on Plant Variety Protection

1.01 Plant breeding aims to alter plants genetically in such a manner that they adapt more appropriately to the needs of human beings. It is as old as agriculture, and its objectives are tightly interwoven with the general goals of agricultural plant production. More recently, plant breeding has also obtained importance as a source for energy and raw materials.[1]

1.02 The first work on plant breeding and genetics was conducted by an Augustinian monk, Gregor Johann Mendel, who transformed the monastery garden into his laboratory in the mid-1890s. In the course of his observations, he discovered that many plants change some of their characteristics from generation to generation. Since the publication of the so-termed 'Mendelian Laws', plant breeding and genetics have experienced a stormy development. The growing population and the changes in the living conditions of the majority of the people living in Europe and North America, due to the Industrial Revolution, increased the rate of development of nutritional plants which served the needs caused by these two developments in society. Due to scientific progress in breeding more productive varieties and systematic production of plant seeds,

[1] For an overview of the economic, environmental, climatological, political, and legal contexts of the plant breeding industry and its significance to the European Union, see M. Paulsen, *Report on plant breeding: what options to increase quality and yields?*, 24 January 2014, 2013/2099 (INI).

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economic interest in the marketing of breeders' results increased. With increased interest in breeders' achievements, demand for appropriate protection of the efforts into new breeds became more and more evident. Examination systems for agricultural crops were introduced, but this did not prevent third parties from participating in the success of breeders, as there was no restriction on free disposal of seeds obtained from harvesting the crops. This led to a demand by breeders for appropriate protection, equivalent to patents, and to a resolution by the Conseil International Scientifique Agricole, with the express purpose of drawing the governments' attention to the fact that breeders have to be granted a remuneration claim against use of their varieties.[2]

1.03 While the USA took this demand into account by extending the Patents Act in 1930, creating a plant patent for new plant breedings,[3] Germany, as the first European State, intended to grant protection through a special law.[4] However, due to political developments in the 1930s, introducing a special law for the protection of plant breeders was no longer considered desirable. In France, fruit breeders requested, at an international congress in 1903, the ability to examine and register new varieties, as well as to create a certificate granting the breeder, for a limited time, the exclusive right in the propagation of a new variety. 'Le Décret' dated 5 December 1922, which provided the foundation of a variety register and a seed distribution control, was the first attempt at legislative regulation. This, however, later proved to be impractical. Therefore, in 1932, a catalogue of cultivated plant varieties, as well as a register of selected plants, was introduced. It stated that plants could be brought into commerce only if they had first been entered into the catalogue. While the Netherlands had a more or less detailed system for the protection of new plant varieties[5] that was introduced during the first half of the twentieth century, most of the other European countries did not provide any special protection for new plant breedings besides patent protection. However, since patent legislation had been developed to serve the needs of non-living material, this protection was rarely applied.

1.04 In 1955, Germany followed suit with a law on plant variety and seed protection of cultivated plants. The first part of the law provided a legal basis for plant variety protection. A protection right for plant breeds, similar to patent rights, was created taking into account the difficulty of patenting breeding results.

1.05 With the increasing importance of the international trade of plant material, the unsuitability of patent protection, and the lack of protection of plant breeding in many countries, demand for protection of plant varieties on an international basis increased. The AIPPI (Association Internationale pour la Protection de la Propriété Industrielle)

[2] Cf F. Wuesthoff (1932) *GRUR* 510.

[3] For details, see M.D. Janis, H.H. Jervis, and R. Peet, *Intellectual Property Law of Plants* (Oxford University Press, 2014), chapter 6.

[4] Cf draft of a seed and plant material law which intended protection for new varieties of cultural plants obtained through breeding activities.

[5] *Kwekersbesluit* of 1 January 1942, published in the *Official Gazette* dated 10 January 1942, 14; a French translation was published in (1944) *Prop Ind* 44.

Congresses, in Vienna in 1952 and in Brussels in 1954, highlighted the demand for effective protection of plant novelties, and comparisons were made with the protection of industrial inventions. The International Chamber of Commerce passed a resolution demanding the appropriate protection for breeds in the areas of agriculture, horticulture, flower breeding, and forestry. Simultaneously, the Expert Committee for Patent Questions of the European Council formulated a corresponding recommendation during its session of 15 July 1951. At long last, the International Association of Plant Breeders (ASSINSEL), the predecessor to the International Seed Federation (ISF), requested an international agreement at the occasion of its congress in Vienna in June 1957. This suggestion was taken up by the French Government in 1957, which called for an international conference in Paris in May that year. Right from the beginning of the discussions, the core question was whether the system should be implemented into the Paris Convention, or whether an independent convention should be created. This question was caused by a fundamental problem regarding the relationship between the intended protective rights compared to patent rights. The consultations in the following years led to conferences in Paris, in November and December 1961, resulting in the so-called 'UPOV Convention'.[6]

In the preamble of the UPOV Convention it is stated that the protection of new varieties of plants is not only important for the development of agriculture but also for safeguarding the interests of breeders. The Convention was amended in 1972. Continuing discussions on the international scene showed, however, that in respect of certain provisions in the Convention, it was difficult to reach an agreement between interested States. Therefore, the Council of UPOV appointed a Committee of Experts in 1974 to interpret and revise the Convention. In 1978, a draft for a revised Convention was presented.[7] This draft was discussed in a Diplomatic Conference and eventually signed by eleven mostly European participants—ten countries which already had been contractual parties of the former Convention and one new member—in the same year. In the following years, discussions on the international level continued while, with regard to the European Community (EC), the idea of introducing a means of protection necessary to safeguard the breeding industry's interest in the form of a unitary European plant variety right was born.

1.06 After years of preparatory work, a first draft of a Council Regulation on Community plant variety rights was published on 28 September 1990. As the Diplomatic Conference intended to amend the UPOV Act of 1978 came nearer, the consultations on the draft were postponed until the results of that Conference were known.

[6] International Union for the Protection of New Varieties of Plants (Union Internationale pour la Protection des Obtentions Végétales), see <http://www.upov.int/upovlex/en/upov_convention.html>.

[7] For details, see A. Heitz, *The History of the UPOV Convention and the Rationale for Plant Breeders' Rights*, in Seminar on the Nature of and Rationale for the Protection of Plant Varieties under the UPOV Convention 1990, 28 (1994).

The 1991 Diplomatic Conference resulted in the adoption on 19 March 1991 of the 1991 Act of the UPOV Convention. The 1991 Act contains fundamental amendments to the UPOV Act adopted in 1978.

The draft of the Council Regulation was amended accordingly. This draft resulted in the adoption of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights (hereafter referred to as the 'Basic Regulation'). The main part of the Basic Regulation entered into force on 1 September 1994, whereas Articles 1 to 3, 5 to 29, and 49 to 106 applied as from 27 April 1995. On 29 July 2005, the European Community acceded to the UPOV Convention, as revised in 1972 and 1991.[8] It was the first intergovernmental organization to become a UPOV member since this possibility had been opened up under the UPOV 1991 Act. Unless otherwise stated, provisions cited in the course of the present work are referring to the Basic Regulation.

Unlike in other fields of intellectual property law, such as trademarks and designs, there is no Community legislation which harmonizes the national plant variety laws of the Member States of the European Union (EU) by regulation.[9]

B. Structure of the Community Plant Variety Protection System

(1) The Community Plant Variety Rights System

1.07 The Community plant variety rights system is an autonomous protection system that is part of EU law, independent from the relevant national systems. It is to be distinguished from the national laws of the EU Member States on plant variety protection. It neither substitutes nor harmonizes such national systems, but is thought to be an alternative to them.

1.08 The Community plant variety rights system grants owners an exclusive right in a certain variety, defined by its characteristics observed during the DUS (distinctness, uniformity, stability) tests, and described in the official variety description included in the decision to grant a Community plant variety right (Article 62). It has a uniform effect within the whole European Community (now European Union, see below) (Article 2). In spite of this uniform character, it is also possible for the owner to grant licences only for a part of the European Union (see Chapter 6, paragraphs 6.121 Contractual exploitation rights *et seq*). In 2009 the Treaty of Lisbon abolished the European Community, with the European Union as its legal successor. Nevertheless, the system created by the

[8] Council Decision of 30 May 2005, approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised in Geneva on 19 March 1991, OJ L192, 22 July 2005.

[9] See P.A.C.E. van der Kooij, 'Towards an EC Directive on Plant Breeder's Rights' (2008) *JIPLP* 97 *et seq*, outlining the reasons for justification of such a Harmonization Directive.

Basic Regulation is still called a system of 'Community plant variety rights', for the implementation of which the 'Community Plant Variety Office' is responsible.

1.09 A further aspect of the uniform character is that all relevant substantive and procedural rules are determined by EU legislation laid down in the Basic Regulation and implementing regulations. Consequently, national laws are not applicable. Article 97 provides an important exception to this general principle, namely an application of national rules regarding infringement and damages arising out of infringing activities.[10] Moreover, application of national laws provides compensation claims to be given in connection with activities of third parties relating to a variety in the time between publication of the application for grant of a Community plant variety right and the grant of the right.[11]

1.10 In all other respects, the effects of Community plant variety rights are determined solely by the Basic Regulation, whereas the national procedural law of that Member State will be applicable to the competent courts responsible for civil law claims according to Article 101 numbers 1 to 3, Article 103.[12]

(2) Accession of new Member States to the European Union

1.11 A fundamental principle of the conditions for accession to the European Union is the taking of the so-termed adherence to the '*acquis communautaire*', that is to say, the assumption of the entire EU system and legislation by the acceding new Member States. While the existing regulations and other provisions will be adopted in the so-termed 'Act of Accession' and, as far as necessary, transitional periods will also be provided, a material amendment of the EU law is, however, ruled out.

1.12 As Article 2 of the Basic Regulation states: 'Community plant variety rights shall have uniform effect within the territory of the Community [*sic*]'. On accession, the term 'Community' will also include the territories of the new EU Member States. A consequence thereof is that Community plant varieties granted after accession will apply throughout the territory of both the new and the existing EU Member States. With regard to Community plant variety rights in force prior to the date of accession, the said rights will be extended as from the date of accession to the territories of the new EU Member States. Due to the automatic extension of the Basic Regulation, and all those Regulations and other laws related to the Community plant variety right system, not only procedural questions arise[13] but also other particular questions, the answers to which affect national laws of the new EU Member States; particularly the extension of

[10] See Chapter 7, paragraph 7.52.
[11] See Chapter 7, paragraphs 7.44–7.46.
[12] In 2011 the Commission published an evaluation of the system, DG SANCO, *Evaluation of the Community Plant Variety Rights Acquis—Final Report*, April 2011. See Chapter 7, paragraphs 7.53–7.72.
[13] Appointment of procedural representatives according to Article 82 of the Basic Regulation, see Chapter 4, paragraph 4.108.

the provisional protection by Article 95[14] and the novelty requirements referred to in Article 10(1) of the Basic Regulation.[15] Moreover, extension of the farmer's exemption as referred to in Article 14 of the Basic Regulation may cause difficulties in the territory of the new EU Member States.[16]

(3) Coexistence with national systems

1.13 As mentioned before, in contrast to other areas of intellectual property rights, such as copyrights, patents, trademarks, or utility designs, no harmonization has been initiated, so far, by the European legislator within the European Union as far as plant variety protection through plant variety protection rights is concerned. The Community system leaves the national systems based on the UPOV Convention untouched. While it is not possible to claim any national plant variety rights simultaneously, besides a Community right granted for the same variety, national rights may be maintained as 'dormant' rights for the time of existence of the Community right, and can be 'revived' once the Community right is no longer effective.

1.14 In spite of the lack of harmonization of national laws in the EU Member States, so far no significant discrepancy can be observed in the procedure for grant of national and Community rights and the scope of protection of such rights. The Administrative Council of the Community Plant Variety Office (CPVO) has appointed as examination offices[17] national institutions responsible for the examination of new varieties of specific varieties on the national level. When assessing candidate varieties for Community rights they must follow CPVO guidelines based on the DUS[18] test protocols as developed on the UPOV[19] level. The effect in practice is that the same standards are applied by all the so-called 'Competent Examination Offices', irrespective of whether they examine national applications or act as examination offices for CPVO applications.

The UPOV rules, especially the UPOV test guidelines, set out the principles which are to be used in examination of DUS in order to ensure that the examination of new plant varieties is conducted in a harmonized way throughout the territory of the Member States of UPOV. This practice results in internationally recognized descriptions of protected varieties. As the CPVO and its examination offices follow those UPOV standards, the rights granted under the Community system as well as those granted under the national laws of EU Member States are in line with the UPOV principles. This

[14] See Chapter 7, paragraphs 7.44–7.46.
[15] See Chapter 3, paragraphs 3.60 *et seq*.
[16] See Chapter 6, paragraphs 6.51 *et seq*.
[17] See Article 55 of the Basic Regulation.
[18] Abbreviation for distinctness, uniformity, and stability.
[19] UPOV Doc TG/1/3 General Introduction to the Examination of DUS and the development of harmonized description of new varieties of plants and specific UPOV guidelines related to the examination of certain species as applicable (for further detail see Chapter 3, paragraphs 3.22–3.74).

ensures that the requirements for protection that a new variety have to fulfil for grant of Community rights and national plant variety rights respectively are similar.[20]

C. Relation of Plant Variety Protection to Seed Law and Seed Distribution Systems

1.15 The law on distribution of seeds should not be confused with the law on the protection of plant variety rights. While the latter grants exclusive rights in a variety defined by certain characteristics to its holder, the right to market certain seeds is a public right, which does not interfere with plant variety rights.[21] In the endeavour to safeguard those species used for agricultural purposes, an assessment and official examination of seed material will be carried out. There is a need to achieve high-quality harvest to the best possible extent. The distribution of seeds of certain species require, prior to their marketing, certifications granted through an official examination where the so-termed value for cultivation and use has been assessed and confirmed. So far, such examination has been performed on a national level. In order to ensure that EU trade is not disturbed by significant differences in such national proceedings, due to lack of harmonization on the EU level, the Council has passed Directive 2002/53/EC of 13 June 2002[22] substituting 70/457/EEC of 29 September 1970,[23] on the common catalogue of varieties of agricultural plant species. The Directive concerns the acceptance for inclusion in a common catalogue of varieties, agricultural plant species of those varieties of beet, fodder plants, cereal, potato, and oil and fibre plants, the seed of which may be marketed under the provisions of Directive 2002/53/EC.[24] The common catalogue is a compilation of national catalogues, which the EU Member States are obliged to establish. Listing of a variety on a national catalogue leads, in principle, automatically, after notification to the Commission, to inclusion in the common catalogue. Deletion from the national catalogue results in deletion from the common catalogue. The listing in the common catalogue opens the way for commercialization of the variety in the territory of all the Member States.

1.16 The national catalogues list the varieties which are accepted for certification and marketing. The Member States must ensure that a variety is accepted only if it is distinct, stable, and sufficiently uniform. The variety must have an adequate variety denomination. Furthermore, the variety must be of satisfactory value for cultivation and use, although this last condition only applies to agricultural varieties. Vegetable varieties, with regard to which Council Directive 2002/55/EC of 13 June 2002 on the marketing

[20] Consideration should be given to the fact that the EU Member States Greece, Cyprus, Luxembourg, and Malta are not contracting parties to the UPOV Convention.

[21] See Article 18 UPOV.

[22] Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species, OJ L193/1, 20 July 2002.

[23] OJ L225/1, 12 October 1970.

[24] Article 1 of Council Directive 2002/53/EC.

of vegetable seeds is applicable, are not subject to the requirement of value for cultivation and use.[25]

In *Association Kokopelli v Graines Baumaux SAS*,[26] the Court of Justice of the European Union (CJEU or 'Court of Justice') confirmed, in its judgment of 12 July 2012, the validity of Council Directive 2002/55/EC,[27] excluding the marketing of vegetative varieties which are not listed.

D. Relation between Plant Variety Rights and Patents

1.17 As far as plant breeding is concerned, provisions of plant variety protection allow for special legal protection, particularly due to the modern breeding methods. However, the question arises regarding the extent to which patent protection plays a part, alongside the said 'special protection'.

1.18 A system developed specifically to protect respective plant varieties suggests that it clearly rules out, or leaves only limited space to, patent protection, irrespective of the concrete requirements for a patent application.[28] The (biological) creation of a new plant variety differs from a (technical) invention. However, these differences have become significantly less important because of the application of modern breeding techniques ('SMART Breeding') where chemical or physical—or, in any case, non-biological—processes play an even greater role, so that the separation of biological plant variety protection and technical patent protection has become questionable.

1.19 In view of the above, the question of the relationship between plant variety and patent protection is more relevant than ever and has practical legal implications as the requirements for obtaining plant variety protection are less strict. In turn, the effect of plant variety right protection is more restricted than that of a patent, as far as its exclusiveness is concerned. The patent requires a technical instruction (ie teaching), whereby the invention has to be new, involve an inventive step, and has to be susceptible to industrial application. On the other hand, the requirements for the grant of a plant variety right, which are adapted to the particularities of living material with regard to distinctness, uniformity, and stability, are less demanding and easier to determine. This results in the relatively narrow scope of protection of a plant variety right. It does not generally extend to all products (particularly not to those for consumption or use), but only to the propagation material of the protected variety and material directly obtained from unauthorized propagation material. Furthermore, the scope of plant variety protection is limited by the so-called 'breeder's exemption', which enables any other breeder to

[25] Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed, OJ L193/33, 20 July 2002.
[26] See *Association Kokopelli[/] Graines Baumaux SAS*, Case C-59/11, EU:C:2012:447 for preliminary ruling.
[27] Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed.
[28] R. Lukes ['Das Verhältnis von Sortenschutz und Patentschutz bei biotechnologischen Erfindungen'] (1987) *GRUR Int* 318 *et seq*; P. Lange ['Patentierungsverbot für Pflanzenzüchtungen'] (1996) *GRUR Int* 587; H. Neumeier (1990) *Sortenschutz und/oder Patentschutz für Pflanzenzüchtungen* 13 *et seq*, 245 *et seq*.

further breed and newly develop valuable varieties, without the consent of the breeder of the initial (protected) variety (although a certain dependence is provided for by the legislator). A patent right has the legal effect of giving comprehensive exclusive rights which the owner, alone, is entitled to exercise. The patent owner is the only one who is entitled to produce, offer, commercialize, and use the patented object. Thus, third parties are allowed to use the inventions within a very limited scope for experimental purposes only, whereas protected plant material may be used, without limitation, for the creation of new varieties (the breeder's exemption; see Chapter 6, paragraph 6.87). Only commercialization of new varieties may be subject to the consent of the holder of the right.[29] If the patented invention is a process, he is the only one who is allowed to use the said process. His right, as far as a process patent is concerned, does not extend only to the application of the patent, but also to products directly obtained from the process. Apart from a special exemption for research, there does not exist a general freedom to develop further patent-protected objects or processes, unlike that which is provided with regard to plant variety protection.[30] The main reason is that further development always involves the use and production of a product to which only the patent owner is entitled. The differences of plant variety protection law from patent law, especially where the breeder's exemption and the so-called 'farmer's privilege' are concerned, result from the specific features of the subject matter—living material—and the stronger commitment to public interest.[31]

1.20 For this reason, a double protection prohibition has existed since plant variety law, as an independent protection law for plant breeding, has been established: a new plant variety may be protected by a plant breeder's right only, whereas the technique generally enabling the creation of new varieties is open to patent protection. This principle, which was, of course, not recognized right from the outset, was initially stipulated in the 1961 UPOV Convention and subsequently taken into account in national and European laws, for instance, particularly in Article 1, paragraph 2 number 2 *PatG* (German Patents Act) 1968; Article 2, number 2 *PatG* 1981 in connection with Article 41, paragraph 1 of the German Plant Variety Protection Law (*Sortenschutzgesetz*); Article 3(1)(c) of the Dutch Patent Act (*Rijksoctrooiwet* 1995); and, above all, Article 53(b) EPC (European Patent Convention). Admittedly, in the latest 1991 UPOV Convention, the double protection is no longer expressly contained. Nevertheless, it is questionable that the conclusion may be drawn that it is abolished, or that the legal necessity no longer exists.[32] In any case, it is rightly included once again in Article 92 of the Basic Regulation and Article 4, paragraph 1(a) of the Directive on the protection of biotechnological inventions. If the plant variety law constitutes an independent special law,

[29] See Chapter 6, paragraph 6.20.

[30] In a number of Member States an exception to this general rule has been enacted, see Chapter 6, paragraph 6.87.

[31] For further details see R. Lukes ['Das Verhältnis von Sortenschutz und Patentschutz bei biotechnologischen Erfindungen'] (1987) *GRUR Int* 318 *et seq*.

[32] See J. Straus ['Biotechnologische. Erfindungen; ihr Schutz und seine Grenzen'] (1992) *GRUR* 266.

adapted to the particularities of living material in respect of both its grant requirements and its scope of protection, there should not exist, alongside the said law—so long as it is applicable—a general option for obtaining patent protection for a variety that has other requirements and legal effects. Therefore, patent protection cannot exist alongside plant variety protection for the same object. While a patent may protect a component to be implemented into plants of different varieties or species, plant variety rights protect only one individual variety. There are, however, areas of protection where plant variety protection alone should be applied, and there are others where patent protection should be granted either alongside or on its own.

1.21 The plant variety protection and/or patent protection question may only be answered by proper guidelines which, on the one hand, take into consideration that a protection law customized for living material exists, and which, on the other hand, take account of the special needs of breeders for protection of their already achieved or possible future development results, in the field of genetic engineering and microbiology.

1.22 It remains to be seen whether Directive 98/44/EC of the European Parliament and the European Council of 6 July 1998, on the legal protection of biotechnological inventions, may solve the problem of a proper delimitation. The Directive, which in accordance with Article 189 (now Article 249) of the EC Treaty addresses the Member States and which has been implemented into national law, does not (at least not explicitly) bind the European Patent Office, being an entity in the meaning of an international organization and relying on written contracts concluded between States.[33] Moreover, it is doubtful whether the Directive has to be considered as later case law in the sense of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties regarding the interpretation of Article 53(b) EPC, and thus, regard must be had to the interpretation of Article 53(b) EPC. After all, the definitions of terms contained in the Directive naturally give leeway to an interpretation that is not capable of solving the delimitation question without ambiguity.[34]

In its decision G1/98, dated 20 December 1999, the Enlarged Board of Appeal [of the EPO] held that Article 53(b) did not exclude anything other than plant varieties which can be protected under plant variety rights.[35] In consequence, the EPO until recently granted patents on plant inventions claiming plant groupings which encompass plant varieties provided that the claims are not specifically related to an individual plant variety.[36] In its decisions G2/12 (Tomato II) and G2/13 (Broccoli II) dated 25 March

[33] See H. Ballreich, *Münchner Gemeinschaftskommentar zum EPÜ*, 9, Lieferung Jan 1986, Article 5 Margin Note 43; for further details on the question of Directive 98/44/EC as a factor of interpretation of the European Patent Convention see J. Straus (1998) *GRUR Int* 1 *et seq*.

[34] European Patent Office, Technical Chamber, T/10/54/96–3.3.4 *Transgenic Plant/Novartis* EPO OJ 1998, 511 Margin Note 114 *et seq*; M. Kock, 'Patenting non-transgenic plants in the EU' in M. Duncan and H. Zech (eds), *Research Handbook on Intellectual Property and the Life Sciences* (Edward Elgar, 2017), chapter 4, illustrates these difficulties in relation to non-transgenic breeding results.

[35] *Novartis/Transgenic Plant* (2000) EPOR, p 313.

[36] For a detailed discussion of the Enlarged Board's decision, see eg M. Llewelyn and M. Adcock, *European Plant Intellectual Property* (Hart, 2006), pp 310 *et seq*.

2015, the Enlarged Board of Appeal came to the conclusion that claims bearing specific plants or plant parts are not excluded under Article 53(b) EPC, even though such claims encompass material being the result of a process not being patentable as essentially biological. In contrast to the aforementioned decisions, the Enlarged Board of the EPO decided recently that from Article 53(b) EPC in combination with Rule 28(2) EPC it follows that plants produced by essentially biological process are excluded from patentability.[37]

1.23 Via Directive 98/44/EC, the European legislator continues to deem national patent law as the essential basis for legal protection of biotechnological inventions. This, however, needs to be adapted or supplemented regarding technological development of biotechnological material, but must still meet the requirements for patentability.[38] The legal scope provided by the Directive is limited to the following: firstly, the scope of patent protection granted for biotechnological inventions; secondly, the possibility of providing a deposition system, in addition to the written description; and, finally, to the granting of a non-exclusive compulsory licence with regard to the dependence between plant varieties and inventions, and vice versa.[39] With the general patentability of plant material, necessity is acknowledged to reward the inventor. This has the effect of recognizing his innovative achievement, by granting an exclusive exploitation right (albeit limited in time), not only in order to create an incentive for inventive activities but also, more particularly, to prompt him to disclose his knowledge by way of patent applications and, by doing so, to enable third parties to make further improvements in the field of biotechnology, based upon the disclosed progress.

E. Trade Secret Protection

1.24 Know-how to be protected as secrets is an important complementary means to protect undisclosed know-how and business information. As a result of European-wide discussions on the need for a better and in particular harmonized protection system for trade secrets, the EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure was passed and obliges Member States to incorporate the Directive into national law. It provides encompassing protection of non-disclosed information if its owner takes reasonable steps setting up an internal organization structure which is apt to safeguard that know-how and trade secrets remain under control of its owner. Protection of plant material under the regime of the Trade Secrets Directive may be relevant in two scenarios: plant material publicly not available is used unlawfully by unauthorized third parties, and traces of parent lines will be isolated from hybrid seed through

[37] EPO OJ 2019, A34 (G3/19) [(*Pepper*)].
[38] See Recital 8 of Directive 98/44/EC.
[39] Recital 13.

reverse engineering. According to Article 3(1)(b) of the Directive, reverse engineering of plant material being on the market may be admissible if such material has been made available to the public. However, with regard to parent lines of hybrids, breeders usually take complex protective measures to exclude the presence of parent lines in hybrid seeds or to limit their presence as far as possible. Insofar as the question of public availability in the sense of the Trade Secrets Directive is to be considered, if one arrives at the conclusion that the breeder has applied the best possible measures to exclude the presence of parent line material in the hybrid seed, it is reasonable to exclude such plant material from the reverse engineering exemption.

F. Relation to International Treaties

(1) TRIPS

1.25 In 1985, the USA strived for a better protection of intellectual property by means of trade politics. During the so-called 'Uruguay Round', the USA decided that within the negotiations for the further development of the GATT Agreement (a general agreement on tariffs and trade), trade-related aspects on intellectual property rights (TRIPS) should be included. As an annex to the GATT 1994, the TRIPS Agreement had to be signed by all those States that wanted to become members of the World Trade Organization (WTO).

1.26 All EU Member States, as well as the European Union itself, concerning matters within its competence, are bound by TRIPS. TRIPS was approved as part of the multilateral negotiations of the Uruguay Round by Council Decision 94/800/ EC[40] and concluded in the framework of the WTO. Despite the TRIPS Agreement, there are still major disparities regarding the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures which are used to preserve evidence, and the calculation of damages or the arrangement for applying injunctions, differ significantly from one Member State to another. From the consultations held by the Commission regarding enforcement of intellectual property rights it has turned out that in some Member States there are no measures, procedures, and remedies, such as the right of information and recall at the infringer's expense of the infringing goods placed on the market.[41] This has caused the Commission to initiate Directive 2004/48/ EC to approximate legislation systems in the Member States in order to ensure an effective and homogeneous level of enforcement of intellectual property (IP) rights in the internal market.[42]

[40] OJ L336/1, 23 December 1994.
[41] See Recital 7 of Directive 2004/48/EC on the enforcement of intellectual property rights.
[42] See Chapter 7, paragraph 7.187.

1.27 The TRIPS Agreement encompasses all areas of copyrights and industrial property rights. With regard to the general provisions having influence on the plant variety system, the following may be emphasized. Article 27, paragraph 1 obliges all Member States to provide patent protection for inventions in all fields of technology. Exemptions to this general rule are listed in paragraphs 2 and 3. As far as the protection of plant varieties or inventions on living material is concerned, paragraph 3 is relevant. According to this provision, the Member States may exclude plants and animals from patent protection so long as they are not micro-organisms. This similarly applies to processes regarding the production of plants and animals, if such processes are mainly biological. Non-biological or micro-biological processes for the production of plants and animals, however, cannot be excluded from patent protection. According to paragraph 3(b), second sentence, the Member States are obliged to provide protection for plant varieties either through patents or through a protection system, either on its own or by means of a mixture of both. The European Union has chosen the second possibility. According to Article 1, the system of Community plant variety rights, as established by the Regulation, is the sole and exclusive form of Community industrial property rights for plant varieties. This provision corresponds with Article 53(b) EPC, which excludes plant varieties from patentability.

(2) Paris Convention

1.28 The increasing importance of international trade in the nineteenth century, and the character of an invention as a bodiless valuable property, not bound to a certain geographic locality or country, led to an international understanding that a worldwide protection of inventions should be strived for. Starting with the Patents Congress in Vienna in 1873, a first international convention was achieved in 1883, namely the Paris Convention for the Protection of Industrial Property. The Paris Convention has been developed further in a series of revision conferences, the last being held in Stockholm in 1967.

1.29 The Convention is valid in all Member States of the European Union. A Community plant variety right is formed in a manner that complies with all applications arising out of the Paris Convention with regard to protection of inventions, although the European Union is not a formal member of the Paris Convention. Since the TRIPS Agreement came into force the European Union is, now, also bound by international law to comply with the material provisions of the Paris Convention.

(3) UPOV Convention

1.30 The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization. The UPOV is neither part of nor a specific union,

in the sense of the Paris Convention. However, the Paris Convention is closely connected with the UPOV, in particular, through a common office in Geneva with the World Intellectual Property Organization. Its activities are governed by the UPOV Convention, the purpose of which is to ensure that the Member States of UPOV acknowledge the achievements of breeders of new plant varieties, by making available to them an exclusive property right on the basis of a set of uniform and clearly defined principles. On 29 July 2005, the European Community became a member of UPOV by depositing the instrument of accession at the General Secretariat of UPOV in Geneva. Consequently, the European Community (now the European Union) and indirectly the CPVO is now bound by the UPOV Convention.

(4) Convention on Biological Diversity (CBD)

1.31 On 2 June 1992 the Convention on Biological Diversity (CBD) was signed by the European Community and all Member States and concluded by the European Community on 25 October 1993.[43] Its objectives:

> . . . are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies and by appropriate funding.[44]

1.32 The CBD establishes the sovereign rights of nations to control access to their biological diversity to safeguard, *inter alia*, an equitable sharing of the benefits arising out of the utilization of genetic resources.[45] For this purpose, the parties to the CBD safeguard that patents and similar rights support the goals of the CBD and will not be in contradiction thereto.[46] In 2004 the parties to the CBD were instructed to elaborate and negotiate an international regime on access to genetic resources and benefit sharing to implement the CBD in this respect. This resulted in the Nagoya Protocol to the CBD on 30 October 2010, which sets out the general framework on 'Access and benefit-sharing' established in Articles 8(j) and 15 of the CBD.[47]

On 4 October 2012 the European Commission adopted its proposal[48] on compliance measures for users of the Nagoya Protocol, which led to Regulation (EU)

[43] Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, OJ L309/1, 13 December 1993.

[44] Preamble Art 1, objectives.

[45] Article 15(7) CBD.

[46] Article 16(5) CBD.

[47] For further details, see M. Buck and C. Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization to the Convention on Biological Diversity' (2011) 20(1) *RECIEL* 47.

[48] European Commission, proposal for regulation of the European Parliament and of the Council on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization in the Union; COM (2012) 526 final.

No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.[49] Moreover, Regulation (EU) 1866/2015 lays down detailed rules for the implementation of Regulation (EU) 511/2014 as regards the register of collections, monitoring user compliance, and best practices. A specific guidance document on the scope of application and care obligations of Regulation (EU) 511/2014 is still under development.[50] As previously mentioned, the Nagoya Protocol sets out the general framework of 'Access and Benefit Sharing', established in Articles 8(j) and 15 of the CBD. It organizes the 'due diligence' obligations which must be observed by all users of genetic resources within the European Union in order to establish that the genetic resources were 'accessed' in accordance with applicable international requirements and that the sharing of benefits from their utilization occurred under mutually agreed terms, as required by the Nagoya Protocol. For this reason, the Regulation implements Articles 15 and 17 of the Nagoya Protocol for the European Union to ensure compliance with the access and benefit sharing requirements of the Protocol.

On 28 July 2014, a group of plant breeders filed with the General Court an application for the annulment of Regulation 511/2014/EU of 16 April 2014. Five pleas were raised (T-559/14): violation of international legal obligations of the European Union and its Member States through the restriction of the breeder's exemption; violation of EU international law obligations under the CBD (Article 3(5) TEU); violation of the principle of conferral (Article 5(2) TEU); manifest disproportionality of the Nagoya Protocol (Article 5(4) TEU); and violation of the principle of legal certainty. However, the action was dismissed as inadmissible.

[49] OJ L150/59, 20 May 2014.
[50] OJ C313/01, 27 August 2016.

2

The Community Plant Variety Office

A. General

2.01 The Community Plant Variety Office (CPVO) was created by Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights[1] ('the Basic Regulation') 'for the purpose of the implementation and application of' that Regulation. It has its seat in Angers, France.

The core business of the CPVO encompasses:

- formal examination of applications for a Community plant variety right (Article 53);[2]
- substantive examination of applications (Article 54);
- technical examination of candidate varieties (Articles 55 to 58);
- refusal of applications (Article 61);
- grant of Community plant variety rights (Article 62);
- approval of variety denominations (Article 63);
- declaration of nullity of Community plant variety rights (Article 20); and
- cancellation of Community plant variety rights (Article 21).

In Chapters 3 and 4 the tasks mentioned above will be considered in more detail.

B. European Union Agency

2.02 The CPVO is an agency of the European Union (EU), which is a body governed by European public law, distinct from the EU institutions such as the Council and

[1] As amended by Council Regulation (EC) No 2506/95 of 25 October 1995, OJ L258/3, 28 October 1995; Council Regulation (EC) No 807/2003 of 14 April 2003, OJ L122/36, 16 May 2003; Council Regulation (EC) No 1650/2003 of 18 June 2003, OJ L245/28, 29 September 2003; Council Regulation (EC) No 873/2004 of 29 April 2004, OJ L162/38, 30 April 2004; and Council Regulation (EC) No 15/2008 of 20 December 2007, OJ L8/2, 11 January 2008.

[2] If not otherwise indicated, references to 'Articles' in this book relate to Articles of the Basic Regulation.

European Union Plant Variety Protection. Third Edition. Gert Würtenberger, Paul van der Kooij, Bart Kiewiet, and Martin Ekvad, Oxford University Press.
DOI: 10.1093/oso/9780192898234.003.0002

Commission, with its own legal personality (Article 30(1)) and, in the case of the CPVO, its own financial resources. There are currently forty-six bodies operating under the definition of EU agency, even though different terms are used to designate them (centre, foundation, agency, office, and observatory). The creation of agencies has been driven by the desire of the European Council to give a higher profile to certain tasks of the EU by attributing them to specialized bodies which are not part of the main executive EU body, the European Commission.

There are two types of agencies, those, like the CPVO, created by a regulation of the EU Council and agencies with a mission limited in time created by the EU Commission.

In 2009, the growing number of agencies, the increase of their tasks, and their use of a significant amount of resources led the European Parliament, the EU Council, and the European Commission to launch an inter-institutional dialogue on decentralized agencies. An Inter-Institutional Working Group (IIWG) was created to assess the situation, specifically the coherence, effectiveness, accountability, and transparency of these agencies.

It took the IIWG three years to reach the conclusions that formed the basis of the so-called 'Common Approach'. This Common Approach contains—non-binding—principles in respect of the governance of the agencies. The Commission was requested to present a Roadmap on the follow-up to the Common Approach, and in December 2012 the Commission published a Roadmap listing ninety issues on which action was needed.

In the framework of this book, it is not relevant to mention and analyse in detail these ninety items, but it should be noted that no recommendation was made regarding changes to the financial management of the so-called 'self-financed agencies', which is the category to which the CPVO belongs.[3] No changes were proposed in respect of the composition of the Administrative Council of the CPVO, with the marginal note that the Roadmap contains a recommendation that the role of the stakeholders of the agencies in the execution of their tasks should be enhanced.

In the case of the CPVO there is no financial dependency on, or support from, the Commission, and this status as an independent entity guarantees better transparency and accountability towards its main stakeholders, the breeders.

The CPVO is represented by its President.[4]

C. Decisions

2.03 All the decisions of the CPVO, except those that have to be made by its Board of Appeal, are taken under the authority of the President.[5] However, it is implied in the Basic

[3] See further Section G of this chapter.
[4] Article 30(3).
[5] Article 35(1).

Regulation that most of the decisions of the CPVO will be taken by a committee of three members of the Office's staff.[6] (See also Section D 'The Administrative Council' below.)

D. The Administrative Council

2.04 Attached to the CPVO is an Administrative Council (AC), composed of one representative of each of the twenty-seven EU Member States and one representative of the Commission and their alternates.[7] Concerning the composition of the AC, the relatively modest position attributed to the European Commission is remarkable. Its only representative in the AC has no vote.[8] The influence of the European Commission in the management of the Community plant variety right system should, nevertheless, not be underestimated.

The size of the AC could be considered as disproportional taking into account the relatively limited size of the CPVO. On the other hand, the fact that all EU Member States are represented in the AC underlines the legitimacy of the Community plant variety protection system in all parts of the EU.

In 2010, in order to strengthen the position of its main stakeholders, the breeders, the AC, on the basis of Article 39(5), changed its rules of procedures and opened up the possibility for organizations 'operating in the sphere of plant variety protection under the Community plant variety protection system' to send observers to its meetings.

In its decision of 11 March 2010 the AC laid down the following conditions for observership:

(1) To have breeding companies as members.
(2) To have the status of non-governmental international organization and deploy activities at the level of the European Union with a direct relationship with the Community plant variety protection system.

On their request, the European Seed Association, CIOPORA, and Plantum have obtained the status of observer in the meetings of the AC. The Secretary General of the International Union for the Protection of New Varieties of Plants (UPOV) has a standing invitation to attend the non-confidential part of the meetings of the AC.

2.05 The responsibilities of the AC are comparable with those of the board of directors of a private enterprise. The most important tasks of this organ, as laid down in Article 36(1) and (2), are to:

(a) advise on matters for which the Office is responsible;
(b) examine the management report of the President;

[6] Article 35(2).
[7] Articles 36 and 37.
[8] Article 41(3).

(c) determine the number, the work allocation, and the duration of the decision committees referred to in Article 35[9] or issue general guidelines in this respect;
(d) establish rules on working methods of the Office;
(e) issue test guidelines (also called 'technical protocols') for DUS (distinctness, uniformity, and stability) testing;
(f) forward to the Commission, amended or not, drafts of legislation proposed by the President of the CPVO or initiated by itself; and
(g) act as the budgetary authority of the CPVO.

Regarding item (c) in the list above, the AC has proposed the creation by the Office of five committees responsible for decisions, these being respectively:

(1) petitions for declaration of nullity or for the cancellation of a Community plant variety right and the award of costs arising from the related procedures;
(2) applications for a compulsory exploitation right or a non-exclusive exploitation right;
(3) applications for a Community plant variety right and objections to the grant of a right;
(4) proposals for a variety denomination and any subsequent amendment; and
(5) the non-suspensory effect of an appeal, *restitutio in integrum*, and the award of costs arising out of appeal procedures.

Implementing the optional task listed as item (e), the AC has issued almost 200 technical protocols in respect of the most important species. These protocols are based on the Test Guidelines adopted by UPOV. Since the UPOV guidelines contain optional elements, implementation on EU level, taking into account the specificities of the growing conditions in the European Union, was considered necessary.

2.06 The functions of the AC related to the budget are subject to the provisions laid down in Articles 109, 111, and 112 respectively. The responsibilities of the AC relating to the adoption and implementation of the budget are illustrative of the financial autonomy of the CPVO due to its status as a self-financing agency (Article 113(3), see below paragraph 2.15). The large majority of Community agencies are (partly) financed by the Commission. In respect of those agencies, it is the European Parliament that acts as budgetary authority.

2.07 The AC has no powers concerning the core business of the CPVO, taking decisions on applications for Community plant breeder's rights and related tasks. As already mentioned, these decisions are taken by deciding committees composed of three members of the CPVO staff.[10] The legal control of these decisions is placed in the hands of a Board of Appeal and the Court of Justice of the European Union (CJEU).[11]

[9] See paragraph 2.03 above.
[10] Article 35 and Articles 6–9 of the Proceedings Regulation.
[11] See Section F below.

2.08 The AC is required to meet at least once a year. Additional meetings can be organized on the initiative of its Chairman, or at the request of the Commission or of one-third of the Member States.[12] In practice the AC meets two or three times per year, mostly in Angers. A Chairman and a Deputy Chairman are elected by the AC from among its members. In principle the term of office of the Chairman and his deputy is a period of three years[13] and is renewable.

As a rule, the AC takes its decisions by a simple majority of the representatives of the Member States. Exceptionally, for instance when exercising its powers in respect of compulsory exploitation rights and the appointment of the President and Vice-President, a majority of three-quarters is required.[14]

E. The President

2.09 The Office is managed by its President, who is assisted by a Vice-President (Article 42). Both the President and Vice-President are appointed by the European Council.[15] The (renewable) term of office of both officials may not exceed five years. Apart from the functions listed in Article 42(2) relating to personnel and financial management, and an advisory role in respect of the AC, the President is charged with the implementation of the CPVO budget.[16]

2.10 Furthermore, as mentioned above, all the decisions of the Office, with the exception of those within the responsibility of the Board of Appeal, fall under the responsibility of the President. The fact that the President is appointed by the European Council gives a certain independence to the President's relations with the AC and the Commission. The President's position in this respect differs from most of the other heads of agencies, who, with the exception of the Executive Director of the European Union Intellectual Property Office (EUIPO), are appointed by their management board or the Commission and have the title of (Executive) Director. The reasons why a rather heavy appointing procedure has been chosen for the heads of the two EU agencies dealing with intellectual property rights are not outlined in the preamble of the respective founding regulations. It is probable that the legal status of these functionaries finds its background in the mission of both agencies, which is the issuing of intellectual property rights directly enforceable in all the EU Member States. This mission requires a high degree of independence for the responsible agents of the agency, which must be guaranteed by the authority of the head of the agency. In this context, it should be noted that the issuing of intellectual property rights is not the monopoly of the EUIPO as its

[12] Article 39(3).
[13] Article 38.
[14] See Article 41 for more details.
[15] Article 43.
[16] Article 110.

name would suggest. It has responsibility neither in respect of Community plant variety rights nor in respect of European patents.

The Council exercises disciplinary authority over the President and the Vice-President.[17]

F. The Board of Appeal

2.11 The establishment and functioning of the Board of Appeal (BoA) is set out in Articles 45 to 48 of the Basic Regulation and Articles 11 to 12 of Commission Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the CPVO ('the Proceedings Regulation'). A Board of Appeal of the Office has been established pursuant to Article 45 of the Basic Regulation. However, Article 45 permits the establishment of one or more Boards of Appeal. So far, only one Board has been required, and at the moment it seems very unlikely that a new Board will be established due to the relatively modest number of appeals lodged. Between the start of the Community system and March 2021, 255 appeals were filed, resulting in eighty nine decisions. The Board of Appeal is convened as necessary and, in practice, the Board has been convened between two and six times per year.

The General Court has qualified the Board of Appeal as a 'quasi-judicial body' (Case T-133/08 paras 137 and 190). This implies, as the relevant considerations of the decision in question show, that the usual principles governing procedures before judicial bodies also apply in respect of procedures before the Board of Appeal.

2.12 In each case the Board consists of a Chairman and two other members. The Chairman selects the other two members from a list of qualified members. Each Board must consist of technically and legally qualified members.[18] The Chairman must be a legally qualified member.[19] One of the members is appointed as rapporteur. In practice, the rapporteur prepares a document to the Board summarizing the case and highlighting the crucial issues before the hearing. The rapporteur also drafts the final decision which is signed by both the rapporteur and the Chairman. Decisions of the Board of Appeal are taken by a majority of its members. If the Board is of the opinion that it so requires, it may appoint two additional members. This could be deemed necessary if the level of difficulty requires certain specific expertise or if the case is expected to take a very long time.

2.13 Pursuant to Article 47 of the Basic Regulation, the Council appoints the Chairman and his or her alternate. The Council chooses from a list of candidates prepared by the

[17] Article 43(4).
[18] The qualification required for the members of the Board is determined in Articles 6 and 11 of the Proceedings Regulation.
[19] Article 11(2)of the Proceedings Regulation.

Commission after having received the opinion of the AC of the Office. The other members of the Board are appointed for a period of five years from a list of candidates proposed by the Office and selected by the AC of the Office. The list, or part of it, may be renewed following the five-year period. An up-to-date overview of the composition of the Board can be found on the CPVO website.[20]

2.14 The members of the Board must be independent and may not be bound by any instructions.[21] The members may not be part of a decision committee of the Office or perform any other duties in the Office. The notion of 'duties in the Office' is not very precise. It goes without saying that it covers the tasks performed by the regular staff members of the Office. As the list of Board members shows, this notion does not exclude experts of so-called competent examination offices from membership of the Board. All present members of the Board have activities outside the Office and their function in the Board is only part-time. The members of the Board of Appeal may only be removed on serious grounds by a decision of the CJEU, on application by the Commission after obtaining the opinion of the AC.[22] Article 48 of the Basic Regulation states that if a member of the Board has a personal interest, or has previously been involved as representative of one of the parties to proceedings or participated in the decision under appeal, he or she may not participate. The Board itself decides on the exclusion of one of its members in a specific case after having been informed by the member him/herself, or if there is an objection from any party to the appeal proceedings. Such decisions should be taken without the participation of the member concerned.

A registry to the Board of Appeal has been established by a decision of the President of the Office, pursuant to Article 12 of the Proceedings Regulation. The Secretary of the registry assists the Chairman of the Board of Appeal in preparing the hearing and sends the relevant documents to the parties to the proceedings. The Secretary also draws up the minutes of the oral hearing and the taking of evidence.[23] The Secretary is responsible for apportioning the costs of the parties and confirming in writing any settlement of costs between the parties.[24]

G. Finances

2.15 The principle that the CPVO has to be self-sufficient with regard to its financing is somewhat hidden in Article 113(3)(a): after a transitional period of a maximum four years 'the amounts of fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Office to be balanced'. The

[20] See <http://www.cpvo.europa.eu/main/en/home/community-plant-variety-rights/board-of-appeal>.
[21] Article 47(3) of the Basic Regulation.
[22] Article 47(5) of the Basic Regulation.
[23] Article 12(2) of the Proceedings Regulation, referring to Article 63 of the Proceedings Regulation.
[24] Article 12(2) of the Proceedings Regulation referring to Article 85(5) of the Basic Regulation and Articles 76 and 77 of the Proceedings Regulation.

immediate success of the system has enabled the CPVO to finance its operations from the start without any financial support from the European Commission.

2.16 As mentioned above, its financial autonomy has given the CPVO the—in the framework of the European Union—exceptional position that it is not under the budgetary control of the European Parliament. Whereas the finances of the CPVO are part of the EU finances, its autonomous financial position may be difficult to defend from a principle accounting point of view.[25] For practical reasons, the fact that the AC acts as the CPVO budgetary authority has many advantages. It guarantees that the budgetary needs of the CPVO are thoroughly assessed and, in a flexible way, translated into adequate budgetary provisions.

2.17 The financial autonomy of the CPVO finds its limits in the power of the Commission to adopt, after consultation with the AC, regulations regarding the fees payable to the Office.[26] In Article 113(4) reference is made to the procedure laid down in Article 115,[27] the so-called 'standing committee procedure'. According to this procedure, the Commission will submit draft measures in the form of draft regulations to a (standing) committee of representatives of the Member States. The committee has to deliver its opinion on the draft by the (weighted) majority laid down in the Treaty. The Commission will adopt the measures envisaged, if they are in accordance with the opinion of the committee. If this is not the case, the Commission must submit to the Council a proposal relating to the measures to be taken. The Council acts by qualified majority.

2.18 The fees payable to the CPVO are laid down in Commission Regulation 1238/95 as adapted. The following types of fees are applicable:

- application fee;
- examination fee;
- fee for taking over of reports (see also Chapter 4, paragraph 4.54);
- annual fee;
- appeal fee;
- fee for processing a specific request; and
- fee established by the President.

The three main sources of income of the CPVO are the application fees, the examination fees, and the annual fees.

The income arising from the application fees and annual fees covers much of the expenditure related to the staff working within the CPVO[28] and the expenditure related to buildings, equipment, and administration.[29] The income generated by the examination

[25] See M. Scholten, *The Political Accountability of EU Agencies: Learning from the US Experience* (Maastricht, 2014), p 121.
[26] Article 113(4).
[27] As amended by Council Regulation (EC) No 807/2003 of 14 April 2003, OJ L122/36, 15 May 2003.
[28] Title 1 of the CPVO Budget.
[29] Title 2 of the CPVO Budget.

fees should, in the opinion of the AC, cover the operational expenditure related mainly to the technical examinations performed by the examination offices working in the framework of the Community plant variety protection system. As far as this objective has not been realized part of the technical examinations has been financed out of income from other fees. Since 1 April 2020 the fees paid by applicants cover 100 per cent of the remunerations paid by the Office to the examination offices. There will be a certain discrepancy since the remunerations to examination offices are increased in relation to inflation; the fees paid by applicants are amended every fourth year.

The levels of the examination fees differ for the different fee groups: the agricultural group, the fruit group, the ornamental group, and the vegetable group. These groups are for their part broken down in sub-groups. The fee levels per fee (sub-)group are set according to the costs of the DUS examinations for the species concerned. They vary from €1,900, for most agricultural species, to €3,900, for 'species with special conditions'.

The annual fees (€330) and application fees (€450 for applications submitted by electronic means and €800 for paper applications) are the same for all species.

The income of the CPVO has over the years exceeded its expenditure. It is the policy of the AC and the European Commission to limit its so-called free reserve to 50 per cent of the annual expenditure, at present in the order of €17 million.