

# **GUIDELINES with EXPLANATORY NOTES**

on

**Article 63 of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights<sup>1</sup>**

(Consolidated with the explanatory text adopted by the Office)

The explanatory notes are proposed as a tool to help interpreting the guidelines. They have been drafted by the CPVO, based on the jurisprudence and case law as developed by the internal Committee of the Office in the past years and after an exchange of views with the European Commission, EU Member States and breeders' associations.

The purpose of the explanatory notes is to help applicants to formulate a denomination proposal suitable according to article 63 of Council Regulation 2100/94 and to make it easier for national authorities to analyse the suitability of proposals for denominations according to the rules.

The Administrative Council of the Office had the opportunity to comment on these explanatory notes but did not adopt them formally.

THE ADMINISTRATIVE COUNCIL OF THE COMMUNITY PLANT VARIETY OFFICE,

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

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

Acting pursuant to Article 30 of Commission Regulation (EC) No 874/2009, which requires the said Administrative Council to adopt guidelines establishing uniform and definitive criteria for determining impediments to the generic designation of a variety denomination referred to in Article 63(3) and (4) of Council Regulation (EC) No 2100/94,

HAS ADOPTED THE FOLLOWING GUIDELINES

<sup>1</sup> OJ No L 227, 1.9.1994 p. 1

## Article 1

### Introduction

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

## Article 2

### **There is an impediment for the designation of a variety denomination where its use in the territory of the Community is precluded by the prior right of a third party**

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

1. In the case of a trade mark as a prior right of a third party, the use of a variety denomination in the territory of the Community shall be considered to be precluded by the notification to the Office for the approval of the variety denomination of a trade mark, which has been registered in one or more Member States or at Community level prior to the approval of the variety denomination, and which is identical or similar to the variety denomination and registered in relation to goods which are identical or similar to the plant variety concerned.
2. In the case of a geographical indication or a designation of origin for agricultural products and foodstuffs as a prior right of a third party, a variety denomination in the territory of the Community shall be considered to be precluded where the variety denomination would breach Article 13 of Council Regulation (EEC) N° 2081/92 with respect to the geographical indication or the designation of origin protected in a Member State or in the Community under Articles 5(5), 6 or 17 of that Regulation for goods which are identical or comparable to the plant variety concerned.

#### **Comment:**

The prime source for the Office to deal with prior rights is notification by the holder of such a prior right. Should the Office be informed about a prior right through other channels, the Office will inform the applicant of the existence of such a right and that this right may be an impediment to the proposed variety denomination.

3. An impediment to the suitability of a denomination due to a prior right may be removed where the consent of the holder of the prior right to the use of the denomination in relation to the variety has been obtained.
4. In the case of a prior right of the applicant in respect of whole or part of the proposed denomination, Article 18(1) of Regulation (EC) No 2100/94 shall apply *mutatis mutandis*.

#### **Comments:**

"in the territory of the Community"



This phrase should be interpreted as referring to use either throughout the Community or in any member State(s) thereof.

#### "prior right"

Although it is conceivable that a variety denomination might fall foul of copyright or other rights, the most commonly encountered example of such a prior right will be the registered trade mark. There may also be cases where a variety denomination may be in conflict with a geographical indication or a designation of origin for agriculture products and foodstuffs protected in a Member State or in the Community under Articles 5(5) or 6 of Council Regulation (EEC) No 2081/92.

#### "use precluded by"

### **Trade marks**

There follows an explanation of the circumstances in which a trade mark will be infringed. However, mere infringement does not necessarily preclude use. Unless a trade mark holder chooses to assert his right in relation to a variety denomination, the use of the denomination will not be precluded. In case the CPVO is aware of the existence of a trade mark which is potentially in conflict with the proposed denomination, the Office should inform the applicant about the possibility that the trade mark holder might decide to enforce his rights at a certain point. It is up to the applicant to decide whether he wants to proceed with his denomination proposal or not, the Office will only reject a denomination proposal if there is a well founded objection from a trade mark holder.

By publishing proposed denominations the Office provides the means for trade mark holders who wish to assert their rights to do so by objecting to the denomination. The Office may receive indications from other sources (for example the applicant himself) that a trade mark holder is asserting his right.

A trade mark will be infringed where a variety denomination identical or similar to the mark is used in relation to goods identical or similar to those for which the mark has been registered. Infringement is automatic where both the mark and the denomination, and the goods for which the mark has been registered and the variety, are identical. In the case of mere similarity (whether between the mark and the denomination, or the goods for which the mark is registered and the variety, or both), confusion on the part of the consumer needs additionally to be shown by the holder of the trade mark.

A trade mark with a reputation may be infringed by a variety denomination even where the variety is dissimilar to the goods for which the mark was registered where the denomination takes unfair advantage of, or has a detrimental effect on, the character or reputation of the mark. This form of infringement is less likely but attention should be paid to any denomination which is the same as, or similar to, an established mark with a "reputation" such as "*Coca Cola*".

#### Dealing with objections from trade mark holders



Only a body with appropriate jurisdiction can rule whether a trade mark will be infringed by a particular denomination. However, to establish whether an objector has a prima facie case, the following will be of assistance –

#### **Case 1 – the Trade mark and Variety Denomination are identical**

The first step is to check the registered specification of goods in the registration document supplied by the objector/trade mark holder to see whether the variety is identical to, or similar to, those goods. If the goods specified are “all living plants” then it is clear that the variety must be identical to those goods. The proposed denomination (identical to the trade mark) is unsuitable (see the paragraph ‘Non utilisation of a trade mark’ below).

If the goods specified in the registration document are a narrower group such as roses and rose plants, clearly the variety will only be identical to the goods for which the mark has been registered if it too is a rose or a rose plant. However, it is *possible* that a variety other than a rose might be considered to be similar to the specified goods. Whether the goods are considered to be similar needs to be considered from a Trade Mark perspective this document will not deal with these details. In all such cases, the applicant should be informed. The applicant and the objector are informed about the opinion of the Office and that a formal decision will be taken at the time of decision on the application, with the possibility to appeal.

#### **Case 2 – the Trade mark and Variety Denomination are merely similar**

Where the proposed denomination is not identical but merely similar an assessment must be made of the likelihood of confusion by users. In making this assessment the examiner should err on the side of caution. The applicant should be informed.

#### Limited waiver of the trade mark

An impediment to the suitability of a denomination under this heading may be removed where the consent of the prior right holder to the use of the denomination in relation to the variety has been obtained. Any declaration of waiver of his rights by the holder of a trade mark in relation to the use of an identical or similar designation as a variety denomination must be accompanied by a written consent that the trade

mark holder will not hamper the free use of that denomination in connection with the variety, even after the termination of the Community plant variety right.



#### Use by CPVR holder of his own trade mark

Although this section relates to the prior right of a third party, it is worth noting that article 18(1) of the basic Regulation prohibits the use by a CPVR holder of any right granted in respect of a designation identical to the denomination (e.g. a trade mark) to hinder the free use of the denomination. This remains so even after the termination of the CPVR. Because of this provision, there is no impediment to the use by the holder of his own trade mark as a variety denomination or part thereof. However, the use of a trade mark as a variety denomination may render the trade mark invalid as the variety denomination is deemed to be the generic name of the variety.

#### **Geographical indication or a designation of origin**

As with trade marks, unless the holder of a right to a geographical indication or a designation of origin chooses to assert his right in relation to a variety denomination, the use of the denomination will not be precluded.

The same policy as regards similarity between a variety denomination and a trade mark should apply if there is similarity between a variety denomination and a geographical indication or a designation of origin (see above).

#### Non utilisation of a trade mark

As long as the trade mark is valid for the whole class 31 but the proposed denomination relates to a species for which the trade mark holder is not using his mark, the registered trade mark shall nevertheless be considered as a prior right and the trademark holder may invoke his rights. The registered trademark will therefore be taken into consideration when assessing if the proposed denomination is suitable or not. If the trade mark holder is not using his mark for all or some goods and services in class 31, there is under certain circumstances the possibility for the applicant or any third party to ask a court or a trade mark authority to cancel the trade mark for the whole or for a part of class 31.

(a) The UPOV classes appear in the annex to these Guidelines.

### **Article 3**

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

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

#### **Comment:**

A proposed denomination is not suitable if the designation does not enable the user to recognise it as a variety denomination. This is *inter alia* the case where the variety denomination consists exclusively of descriptive characteristics which can be attributed to the variety, in particular characteristics or stages of



expression mentioned in the technical protocol used for the DUS test of the species in question or characteristics as to the value of the variety.

Example:

- 'Gustoso' (meaning 'tasty') for a fruit variety, , 'Round Grey' (referring to the shape and the colour of the variety) for a squash variety, 'Robust' for a sweet pepper variety, 'El Magno' (referring to the size of the fruits of the variety) for a Melon. These proposals consist of characteristics only and are therefore **not suitable** as a variety denomination.
- 'Smooth' **suitable** for a barley variety, as this is not linked to a variety characteristics for barley"

A denomination that would only consist of a colour would not be recognizable as a variety denomination. However, some colour indications might have another meaning.

Example

- 'Alba', 'Blanche' or 'Bianca' (meaning 'White') are colour indications in EU languages but are also first names. If the colour indication is not misleading, the denomination is **suitable** as such.

Many breeding and botanical terms are also deemed to render a denomination not recognisable as such.

Example:

- 'F1', 'Hybrid' are **not suitable**

Generic terms are also deemed to render a denomination not recognisable as such since such denominations can designate a range of varieties. This is especially the situation where the denomination contains the common name of the species.

Example

- 'Eurocorn' for a Maize variety is **not suitable**. Pronunciation aspects are also taken into account; 'Eurokorn' is **not suitable**, 'Supreme Cane' is **not suitable** for a sugar cane variety, 'Lichtkorn' is **not suitable** for a rye variety

1. A variety denomination shall be in the form of a "fancy name" or a "code".

**Comment:**

A denomination may be in the form of a "fancy name" or a "code" and the appropriate set of rules below will apply accordingly. The applicant must declare what form the denomination takes. If he makes no declaration the Office will assume the denomination to be a fancy name. A denomination which is declared to be in the form of a code shall be clearly indicated as such in the Office registers by means of a footnote reading "variety denomination approved in the form of a code".



2. A variety denomination shall be considered to cause its users difficulties as regards recognition or reproduction in the following cases:

a) where it is in the form of a "fancy name":

- (i) it consists of a single letter;
- (ii) it consists of, or contains as a separate element, a series of letters not forming a word pronounceable in an official language of the European Union, except where this series in an established abbreviation, such an established abbreviation shall be limited to a maximum of 2 sets of up to 3 characters each, located at each end of the denomination;
- (iii) it contains a number, except where this is an integral part of the name, or where this indicates that the variety is, or will be, one of a numbered series of varieties related through their breeding history;

**Comment:**

**Suitable** denominations could be Henry VIII, Catch 22 or Apollo 11

- (iv) it consists of too many words or elements;

**Comment:**

Normally, more than five words and/or elements will be too many

- (v) it consists of or contains an excessively long word or element;
- (vi) it contains a punctuation mark or other symbol an upper and lower case mixture (save where the first letter is in upper case and the rest of the denomination is written in lower case), subscript, superscript or a design.

b) where it is in the form of a "code":

- (i) it consists of a number or numbers only, except where this is an established practice for designating varieties such as in the case of inbred lines or of similarly specific types of varieties;
- (ii) it consists of a single letter;
- (iii) it contains more than 10 characters, letters, or letters and numbers;
- (iv) it contains more than four alternating groups of a letter or letters and a number or numbers;



**Comment:**

Examples: 12AB34CD, 123ABCD456 are suitable but 1A2B3 is not.

- (v) it contains a punctuation mark or other symbol, a subscript, a superscript or a design.
- 3. On submission of the proposal for a variety denomination, the applicant should declare where the proposed denomination is intended to be in the form of a "fancy name" or of a "code".
- 4. If the applicant makes no declaration on the form of the proposed denomination, the denomination shall be considered to be a "fancy name".

#### Article 4

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

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

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

- a) A denomination is prima facie unsuitable if it is exactly the same as a variety denomination already registered or used in a Member State of the European Union or a contracting party to the International Convention for the Protection of New Varieties of Plants (hereinafter "UPOV") in a relation to a variety of a closely related species
- b) "may be confused with" shall be considered to cover *inter alia* a variety denomination, containing a difference of only one letter, or of accents on letters, in relation to the variety denomination of a variety of a closely related species, which has been entered into an official register of plant varieties, as defined below under (e) or is marketed the European Union, the European Economic Area or in a contracting party to UPOV. However, without prejudice to Article 7, a difference of only one letter in an established abbreviation as a separate entity of the variety denomination shall not be regarded as confusing. Also, where the different letter is prominent in a way that makes the denomination clearly distinct from already registered variety denominations, it shall not be regarded as confusing. Differences of two or more letters shall not generally be regarded as confusing except where two letters simply change places. A difference of one digit between numbers (where a number is permissible in a fancy name) is not to be regarded as confusing.



**Comment:**

It is recommended that the freely accessible web based CPVO VarietyFinder is used in the process to check if the proposed denomination is not the same or similar to denominations of existing varieties of the same genus or, if appropriate, UPOV class.

As a general rule, there should be 2 letters difference between 2 variety denominations. However, there are cases where 1 letter difference is sufficient and others where 2 letters difference are not sufficient.

1. One letter difference is sufficient where the different letter is prominent in a way that makes the denomination clearly distinct from another variety denomination. This is the case when the denomination is short or when the different letter is placed first in the denomination. In all cases, pronunciation is used as a supportive argument.

- a) Where the denominations in question are short, there is in most cases (but not all) no likelihood of confusion even if there is only one letter difference. As a rule of thumb, words consisting of less than five letters are considered by the Committee as short. When one denomination is a 5 letters word and the other one four, the 2 letters rule applies.

Example:

- 'Anja' <> 'Anka'; 'dati' <> 'Dato'; 'Diva'<>'Dida' **suitable**, 4 letters words, no pronunciation issue
- 'Elsa' <> 'Elza'; 'Fao' <> 'Faoh', 'Jaco' <> 'Jako' **not suitable**, same pronunciation in several EU languages

- b) There is in most cases less likelihood of confusion where the first letter is different. The reason for this is that the visual difference is more apparent than in cases where the different letter is hidden in the word. Another reason is that the first letter in many cases changes the pronunciation in a more apparent way than if the letter is hidden in the in the word. However, when this first letter does not have an effect on pronunciation, this difference is not sufficient.

Example:

- 'Meagan' <> 'Reagan'; 'Kinky'<>'Binky'; 'Hagar'<>'Magar' **suitable**
- 'Anna' <> 'Hanna'; **not suitable**, same or similar pronunciation

- c) In case of denominations which have a meaning, one letter difference can substantially affect that meaning in such a way that there is no likelihood of confusion. That meaning might also be a first name. The principle will always be that the Office will assess the meaning. The breeder might always bring to the knowledge of the Office a meaning that was not recognised.



Example:

- Power<>Powder<>Poker, Ruby<>Rugby, Topic<>Tonic **suitable**

2. 2 letters difference might not be sufficient, when the pronunciation of the denomination proposed is the same or very similar to the pronunciation of the existing denomination, at least in some EU languages, making the proposal confusing.

Example:

- 'Aladin'<>'Allalin'; 'Azzor'<>'Amor'; 'Curletta'<>'Curlita' **suitable**, 2 letters difference and significant phonetical effect
- 'Accord'<>'Akord'; 'Attac'<>'Atak'; 'Estel'<>'Estelle'; 'Josefine'<>'Josephine'; Krystian <> Christian **not suitable**, same or similar pronunciation

This is also the case where the 2 letters simply change place, unless there is a clear pronunciation difference.

Example:

- Monper'<>'Monpre': **not suitable**, the 2 letters difference simply change place
- 'Florina'<>'Florian'; **suitable** because there is a clear pronunciation difference

3. When a company proposes a denomination, including an abbreviation identifying this company, that abbreviation will not be considered for the purpose of establishing the suitability of the proposal.

Example:

- 'ES Fabian' **not suitable** if a denomination 'Fabian' or 'Fabia' already exists. In such a case, the company abbreviated as ES will be considered to make an unfair utilisation of an existing denomination (see Art 3.2.a (ii) )
- 'KWS Valdia' **not suitable** where 'Valdia' already exists.
- 'Solero CL' **not suitable** if 'NK Solero' exists and there is no biologic link between the two varieties, the core part of both denominations, 'Solero', being indeed the same and the addition of prefix or suffix being not sufficient to avoid the confusion.



The same rule applies in case the denomination contains a number where this indicates that the variety is, or will be, one of a numbered series of varieties related through their breeding history (see Art 3.2.a (iii) );

Example:

- 'Tomer 79' **not suitable** where 'Tomer' already exists and both varieties come from different breeders or are not biologically related.
- 'Tomer 79' **suitable** where 'Tomeu' already exists

- c) Without prejudice to Article 7, this provision shall not apply to a variety denomination in the form of a code, if the reference variety denomination is equally in the form of a code. In such a case, a difference of only one character, letter or number, will enable two codes to be satisfactorily distinguished. Blank spaces are to be ignored when comparing denominations in code form.
- d) "closely related species" shall have the meaning as defined in the Annex to the guidelines;
- e) "a variety no longer remains in existence" shall be considered to mean a variety no longer in commercial existence;

**Comment:**

"no longer remains in existence"

As mentioned, this should be read as meaning no longer in commercial existence; in other words, it must be ascertained whether the variety is still cultivated on a commercial basis. Various sources including unofficial trade registers may be used for this purpose. The continued physical existence alone of a variety will not prevent the re-use of the denomination, provided of course that it has acquired no special significance.

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

Since the law is not fully clear the Office applies the following principle. It is considered that the denomination of a variety which has been registered in a plant variety rights register or in an official National list for the purpose of marketing authorisation has anteriority over the denomination of a variety which has been proposed but not registered yet. If both potentially similar variety denominations are linked to varieties which are still under procedure, the firstly published denomination in an official gazette is deemed to have anteriority. Finally, if none of the proposals for denomination have been published, the anteriority is with the denomination which has first been proposed.



It should be noted that the CPVO Variety Finder and the project of cooperation in variety denominations constitute a suitable tool to communicate denomination proposals which have not been published yet: denominations which have been the subject of a request for advice from the CPVO are stored in the database and made available in subsequent tests.

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

**Comment:**

*Significance acquired by virtue of registration*

In relation to a variety once entered on an official register, the general assumption should be that its denomination has thereby acquired special significance. However, -

1. the expiry of a ten year period since the variety was deleted from the register may lead to the conclusion that despite the entry of a variety on a register, its denomination has lost any significance conferred thereby;

Unless there are exceptional circumstances, the Office applies the ten years period. It should be noted that the UPOV Guidelines on Variety Denominations generally discourage the re-use of variety denominations.

However, if the variety has never been marketed and has been withdrawn before registration, the utilisation of the same or a similar denomination is possible without time restriction.

2. Where a variety was registered for an unusually short period (e.g. a few days) the fact of registration alone may be considered not to have conferred significance.

*Significance acquired otherwise than by virtue of registration*

A variety may still have acquired significance by other means e.g. through commerce. In relation to a variety never registered but extensively marketed, the significance of the denomination must simply be assessed on the basis of any perceived continued impact of the denomination within the industry.

It should be noticed in this respect that the CPVO has included commercial registers in its procedures to check the suitability of variety denominations for similarity. Information about the Dutch commercial registers maintained by the VKC (authority for registration and judgement of floricultural crops in The Netherlands), the KAVB (Dutch Royal General Bulb Growers' Association) and PPO (Applied Plant Research from Wageningen University) are regularly received.



## Article 5

**There is an impediment for the designation of a variety denomination where it is identical or may be confused with other designations which are commonly used for the marketing of goods or which have to be kept free under other legislation**

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

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

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

### **Comment:**

Examples of expressions which contains an element that, by virtue of legislation, is not to be used for purposes other than those envisaged by that legislation; can be a name or abbreviation of an international organisation excluded from trade mark protection under an international convention (cf. Art. 6 ter (1)(b) of the Paris Convention).

Another example is Council Regulation the 834/2007 on organic production and labelling of organic products. In particular, according to article 23.1 of that Regulation, *1. For the purposes of this Regulation a product shall be regarded as bearing terms referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules laid down in this Regulation. In particular, the terms listed in the Annex, their derivatives or diminutives, such as 'bio' and 'eco', alone or combined, may be used throughout the Community and in any Community language for the labelling and advertising of products which satisfy the requirements set out under or pursuant to this Regulation.*

## Article 6

**There is an impediment for the designation of a variety denomination where it is liable to give offence in one of the Member States or is contrary to public policy**

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

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



## Article 7

**There is an impediment for the designation of a variety denomination where it is liable to mislead or to cause confusion concerning the characteristics, the value or the identity of the variety, or the identity of the breeder or any other party to the proceedings**

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

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

- a) it conveys the false impression that the variety has particular characteristics or value;

### Comment:

Descriptive characteristics of the variety are frequently indicated or suggested in the variety denomination. Such indications or suggestions are not suitable if they cannot be attributed to the variety, especially if the characteristics are mentioned in the technical DUS protocol for the species in question and do not match the description established for the variety.

However, it should be evaluated whether the characteristic indicated is of nature to mislead the user of the variety. For example, 'Blue star' might be considered to be misleading for an ornamental variety where the flower colour is not blue, where this will not be the case for a sugar beet variety.

When assessing this aspect, it should also be considered how recognisable the characteristic is. For an ornamental with purple flowers, 'Blue Star' is not suitable, neither is 'Bluestar'. However, 'Blustar' is suitable because it is considered that the word 'blue' is no longer recognisable as such.

Also, some words indicating characteristics might have another meaning. The colour indication should in any case not be misleading as to the characteristic for the denomination to be approved.

Example:

- 'Early Renet' **not suitable** for an apple variety if the variety is not early or not earlier than the variety 'Renet';

- b) it conveys the false impression that the variety is related to, or derived from, another specific variety;



**Comment:**

1. The false impression that a variety is related to or derived from another specific variety arises especially when variety denominations have common words. This rule does not apply to descriptive words, adjectives or words considered as generic. A word is especially considered as generic when it has already been used by different breeders for different varieties of the same species without biologic relationship between them. Varieties are considered to be related if they come from the same applicant.

Example:

- 'California Sunset' **not suitable** if 'Sunset' already exists for only a variety or a series of varieties from the same breeder and there is no biologic relation between both varieties
- 'Chipper' <> 'Beacon Chipper', 'Delight' <> 'Summer Delight', 'Rio Colorado' <> 'Rio Grand Russet', 'Island Sunshine' <> 'Andean Sunshine' **not suitable** if there is no biologic relation between these varieties or the common word is not generic.
- 'All Star', 'Red Star', 'Misca Yellow' where 'Misca star' exists: all varieties containing the words 'Misca' or 'Star' are only suitable if they have a biological relationship with 'Misca Star' or there are existing varieties from other breeders containing 'Misca' or 'Star'
- 'Allstar' <> 'Star' : attaching words does not change the situation, as long as the attached word is still recognisable.
- 'Buffy Ball' where 'Ice Ball', 'Eight Ball', 'Summer Ball', 'Ball bicolor', 'One Ball' exist and have been registered by different breeders. It is considered that 'Buffy Ball' is **suitable** as the word "Ball" generic and not monopolised by a breeder.
- May Hero <> May. The peach variety 'May Hero' is part of a series bred by an American breeder but other varieties with composed denominations containing the word "May" and bred by other breeders exist. The proposal is **suitable**

2. The same applies when where the 2 words denomination is a first name

- 'Maria Sarah' where 'Maria' already exists; 'Jean Pierre' where 'Jean' already exists.

- c) it refers to a specific characteristic or value in a way which conveys the false impression that only that variety possesses it, whereas in fact other varieties of the same species may possess the same characteristic or value;



- d) by dint of its similarity to a well-known trading name other than a registered trade mark or variety denomination, it suggests that the variety is another variety, or conveys a false impression concerning the identity of the applicant, the person responsible for the maintenance of the variety, or the breeder;

**Comment:**

This is in particular the case of series. If a breeder has a series 'Cherry Reagan', 'Cream Reagan', 'Sweet Reagan', 'Yellow Reagan', another breeder cannot name his variety of the same species using the well know name of this former US President unless there is a biological relationship with the existing varieties.

- e) it consists of, or contains:

- (i) comparatives or superlatives;

**Comment:**

Denominations are considered in their potential figurative sense when assessing whether they are comparatives or superlatives

Example

- 'Margareta improved' is a comparative where the variety 'Margareta' exists, 'Duettop' is considered to be a superlative when 'Duet' exists. These proposal are **not suitable**
- 'Crème de la Crème', 'Excellent', 'Best of British', 'First Price', 'Fuji Supreme', 'Mister Perfect', 'Perfection', 'Summit', 'Superior', 'Exceptional', 'Hyper' are considered to be superlatives and **not suitable**

- (ii) the botanical or common names of species within the same UPOV crop sector as the variety, the UPOV crop sectors being agricultural crops, ornamentals and forestry species, vegetables and fruits;

**Comment:**

For instance; primrose is not suitable when it is used as a component of denominations for an ornamental variety; However, such names can also be first names like Veronica or Iris in which case they are **suitable** as denominations, or colour indications like Rose, Orange, Lilac, Lavender or Fuchsia, in which case they are **suitable** as a component of a denomination provided the colour indication is not misleading. Such names are also suitable when they have another meaning like cosmos.

It should be specified that genus and species names should be understood as botanical names.



- (iii) the name of a natural or legal person, or a reference thereto, so as to convey a false impression concerning the identity of the applicant, the person responsible for the maintenance of the variety, or the breeder;

**Comment:**

Companies might use an abbreviation for their identification in variety denominations denomination. This is rendered possible according to article 3.2.a.ii above. It should be noted that the abbreviation established to identify company A cannot be used by company B for the denominations of varieties not bred by company A. If several companies were involved in the breeding of a variety, the established abbreviation of any of these companies in the denomination would be suitable.

Example

- Variety 'ABC Ambition' listed with DEF as the Breeder. ABC is the name of the company which bought the license for the marketing of the variety which remains the property of DEF. ABC is **not suitable** in the denomination because this company is not the breeder or its successor in title.

- (iv) a geographical name that would be likely to deceive the public as to the characteristics or value of the variety.

**Comment:**

In general, names of cities and countries are suitable as denominations.

In case the denomination proposal is a geographical indication and the species of the variety in question is widely grown in the area designed by that geographical indication, the proposal is only suitable if the variety has been bred in this area.

For example, 'Castilla' for a pepper variety. The region of Castilla y León, and more particularly Fresno de la Vega traditionally cultivates pepper known as 'pimiento morron'. The proposal is not suitable as the variety is not originating from this region and since the region is known for its pepper varieties



## Article 8

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

**(a) in one of the Member States**

**(b) in a Member of the International Union for the Protection of New Varieties of Plants; or**

**(c) in another State for which it has been established in a Community act that varieties are evaluated there under rules which are equivalent to those laid down in the Directives on common catalogues;**

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

63 (4) of Regulation 2100/94

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

*"Official register of plant varieties"*

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

### **Comment:**

In the ornamental sector, varieties commercialised are sometimes listed in commercial registers like the registers held by the VKC (authority for registration and judgement of floricultural crops in The Netherlands), the KAVB (Dutch Royal General Bulb Growers' Association) and PPO (Applied Plant Research from Wageningen University). It is checked that varieties applied for Community plant variety rights bear the same denomination as in these registers if they have already been commercialised.

Angers, 28 November 2012

**B. Bátorová**

Chairperson of the Administrative Council



## ANNEX

### CLOSELY RELATED SPECIES

“Closely related species” as specified in Article 63(2)(c) of Council Regulation 2100/94 and referred to in

Article 4(d) of these Guidelines should have the following meaning:

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

#### Part I

#### *Classes within a genus*

| <u>Classes</u> | <u>Botanical names</u>  |
|----------------|---|
| Class 1.1:     | Brassica oleracea   |
| Class 1.2:     | Brassica other than Brassica oleracea   |
| Class 2.1:     | Beta vulgaris L. var. alba DC., Beta vulgaris L. var. altissima   |
| Class 2.2:     | Beta vulgaris ssp. vulgaris var. conditiva Alef. (syn.: B. vulgaris L. var. rubra L.), B. vulgaris L. var. cicla L., B. vulgaris L. ssp. vulgaris var. vulgaris.  |
| Class 2.3:     | Beta other than classes 2.1 and 2.2.  |
| Class 3.1:     | Cucumis sativus   |
| Class 3.2:     | Cucumis melo  |
| Class 3.3:     | Cucumis other than classes 3.1 and 3.2  |
| Class 4.1:     | Solanum tuberosum L.  |
| Class 4.2:     | Tomato & Tomato rootstocks : <ul style="list-style-type: none"><li>○ Solanum lycopersicum L. (Lycopersicon esculentum Mill.)</li><li>○ Solanum cheesmaniae (L. Ridley) Fosberg (Lycopersicon cheesmaniae L. Riley)</li><li>○ Solanum chilense (Dunal) Reiche (Lycopersicon chilense Dunal)</li><li>○ Solanum chmielewskii (C.M. Rick et al.) D.M. Spooner et al. (Lycopersicon chmielewskii C. M. Rick et al.)</li><li>○ Solanum galapagense S.C. Darwin &amp; Peralta (Lycopersicon cheesmaniae f. minor (Hook. f.) C. H. Müll.) (Lycopersicon cheesmaniae var. minor (Hook. f.) D. M. Porter)</li><li>○ Solanum habrochaites S. Knapp &amp; D.M. Spooner (Lycopersicon agrimoniifolium Dunal) (Lycopersicon hirsutum Dunal) (Lycopersicon hirsutum f. glabratum C. H. Müll.)</li><li>○ Solanum pennellii Correll (Lycopersicon pennellii (Correll) D'Arcy)</li><li>○ Solanum peruvianum L. (Lycopersicon dentatum Dunal) (Lycopersicon peruvianum (L.) Mill.)</li></ul> |



- Solanum pimpinellifolium L.  
(Lycopersicon pimpinellifolium (L.) Mill.)  
(Lycopersicon racemigerum Lange)

And hybrids between those species

Class 4.3: Solanum melongena L.

Class 4.4: Solanum other than classes 4.1, 4.2 and 4.3

## Part II

*Classes encompassing more than one genus*

| <u>Classes</u> | <u>Botanical names</u>  |
|----------------|---|
| Class 201:     | Secale, Triticale, Triticum   |
| Class 202:     | Megathyrus, Panicum, Setaria, Steinchisma   |
| Class 203*:    | Agrostis, Dactylis, Festuca, Festulolium, Lolium, Phalaris, Phleum and Poa  |
| Class 204*     | Lotus, Medicago, Ornithopus, Onobrychis, Trifolium  |
| Class 205:     | Cichorium, Lactuca  |
| Class 206:     | Petunia and Calibrachoa   |
| Class 207:     | Chrysanthemum and Ajanía  |
| Class 208:     | (Stalice) Goniolimon, Limonium, Psylliostachys  |
| Class 209:     | (Waxflower) Chamelaucium, Verticordia   |
| Class 210:     | Jamesbrittania and Sutura   |
| Class 211:     | Edible Mushrooms <ul style="list-style-type: none"> <li>○ Agaricus</li> <li>○ Agrocybe</li> <li>○ Auricularia</li> <li>○ Dictyophora</li> <li>○ Flammulina</li> <li>○ Ganoderma</li> <li>○ Grifola</li> <li>○ Hericium</li> <li>○ Hypsizigus</li> <li>○ Lentinula</li> <li>○ Lepista</li> <li>○ Lyophyllum</li> <li>○ Meripilus</li> <li>○ Mycoleptodonoides</li> <li>○ Naematoloma</li> <li>○ Panellus</li> <li>○ Pholiota</li> <li>○ Pleurotus</li> <li>○ Polyporus</li> <li>○ Sparassis</li> <li>○ Tricholoma</li> </ul> |
| Class 212:     | Verbena L. and Glandularia J.F.Gmel.  |

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

