

Technical Working Party for Agricultural Crops

Forty-Seventh Session

Naivasha, Kenya, May 21 to 25, 2018

TWP/2/13

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Thirty-Sixth Session

Hanover, Germany, July 2 to 6, 2018

Technical Working Party for Vegetables

Fifty-Second Session

Beijing, China, September 17 to 21, 2018

Technical Working Party for Fruit Crops

Forty-Ninth Session

Santiago de Chile, Chile, November 19 to 23, 2018

Technical Working Party for Ornamental Plants and Forest Trees

Fifty-First Session

Christchurch, New Zealand, February 18 to 22, 2019

SURVEY ON APPROACHES FOR OBTAINING PLANT MATERIAL FROM BREEDERS AND ON DECIDING ON VARIETIES WHOSE EXISTENCE IS A MATTER OF COMMON KNOWLEDGE*Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The purpose of this document is to present the results of a survey on the approaches used by members of the Union for obtaining plant material from breeders and on deciding on varieties whose existence is a matter of common knowledge.

Background

2. The Technical Committee (TC), at its fifty-third session, held in Geneva from April 3 to 5, 2017, noted the report by the Technical Working Party for Fruit Crops (TWF) that plant variety protection offices sometimes had difficulty to obtain plant material from breeders, especially when a variety was no longer in commercialization. The TC noted that, in certain cases, the European Union reminded breeders of the need to maintain their varieties to avoid the possibility of the plant breeder's right being cancelled. The TC also noted that Australia reminded breeders of the importance of providing material of their varieties for maintaining an effective system of protection. It was recalled that genebanks could be an important source of plant material for seed-propagated varieties (see document TC/53/31 "Report", paragraphs 104 and 105).

3. The TC agreed to request the Office of the Union to issue a questionnaire to members of the Union on the approaches used to obtain plant material from breeders, especially when a variety was no longer in commercialization. The questionnaire would also seek information on the approaches used by members of the Union on deciding on varieties whose existence is a matter of common knowledge.

4. The TC agreed that results of the survey should be presented to the Technical Working Parties (TWPs) and the TC at their sessions in 2018.

5. Document TG/1/3 "General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants" (General Introduction) provides the following guidance on "common knowledge":

“5.2.2 Common Knowledge

“5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others:

“(a) commercialization of propagating or harvested material of the variety, or publishing a detailed description;

“(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;

“(c) existence of living plant material in publicly accessible plant collections.

“5.2.2.2 Common knowledge is not restricted to national or geographical borders.”

6. On March 6, 2018, Circular E-18/016 “UPOV Survey: Approaches on Plant Material and Common Knowledge” was issued to designated persons of UPOV members in the Technical Committee.

Survey results

7. Complete responses to Circular E-18/016 were received from 26 members of the Union, namely:

Austria	Japan	Poland
China	Kenya	Republic of Korea
Colombia	Kyrgyzstan	Republic of Moldova
Croatia	Latvia	Romania
Czech Republic	Mexico	Slovakia
Denmark	Morocco	Sweden
European Union	Netherlands	Switzerland
Germany	New Zealand	United States of America
Israel	Norway	

8. The responses to the survey are presented in the Annex to this document. In cases where the responses identified the member of the Union, the name has been replaced by “[UPOV member/authority]”.

9. The TWPs are invited to note the results of the survey on the approaches used by members of the Union for obtaining plant material from breeders and on deciding on varieties whose existence is a matter of common knowledge.

[Annex follows]

ANNEX

APPROACHES FOR OBTAINING PLANT MATERIAL FROM BREEDERS AND ON DECIDING ON VARIETIES WHOSE EXISTENCE IS A MATTER OF COMMON KNOWLEDGE

Question 1

UPOV Member of behalf of whom you are completing this survey

Question 2

Name

Question 3

Job title

Question 4

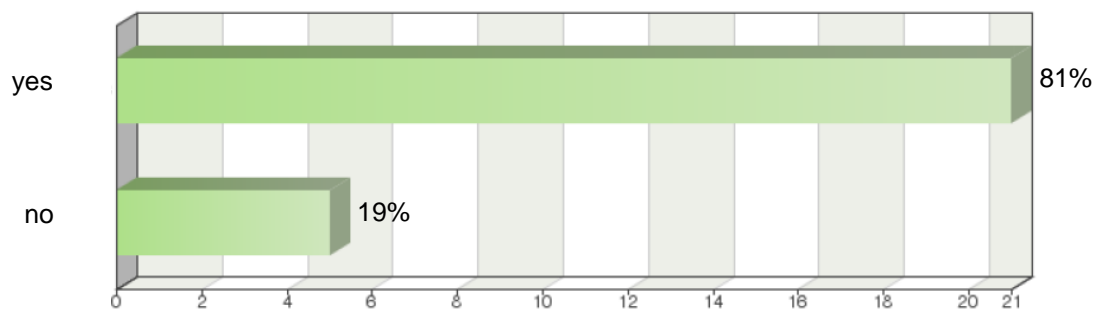
Organization

Question 5

E-mail address

Question 6

Does your PVP Office obtain plant material of varieties of common knowledge?

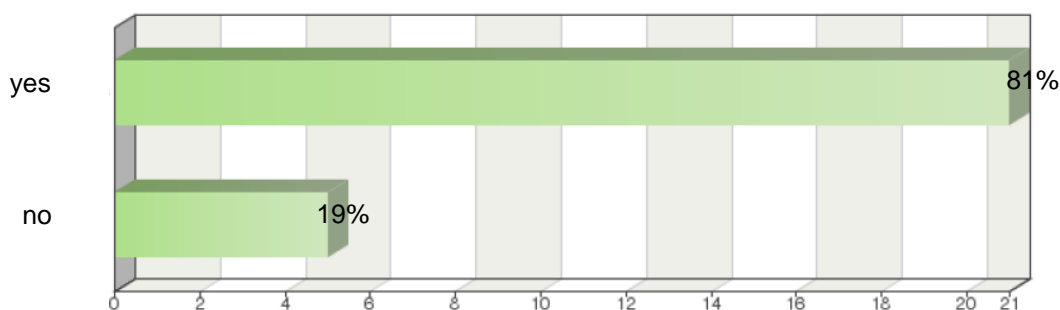


- We obtain about 70% of plant material we request.
- For DUS growing trials, in particular where side by side comparison is essential and for certain genera with living variety collections.
- We require a complete objective description of the varieties of common knowledge for comparison by requesting a description of the most similar variety and any other comparison varieties.
- Generally yes, however not always, as sometimes plant material is not available.
- [UPOV member/authority] does not issue DUS trials, DUS testing is operated by partner offices in member countries of the European Union
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.

- When the [UPOV member/authority] is initiating testing at an entrusted examination office, plant material is requested from applicants; in case varieties of common knowledge are needed for the DUS examination as comparisons and these also belong to the applicant, the [UPOV member/authority] adds this to the plant material request. Varieties of common knowledge not belonging to the applicant are requested by the entrusted examination office to the breeder/maintainer/title holder of the varieties in question.
- Our institute is national authority responsible for testing, registration and PBR.
- of those in the commercial register
- [UPOV member/authority] doesn't carry out DUS tests.
- The office examines the consistency of the information delivered by the applicant under oath.

Question 7

Does your PVP Office request plant material of varieties of common knowledge from breeders?



- Breeders are important for sourcing current commercial varieties.
- Plant material is not requested for varieties of common knowledge, but a complete objective description using our form is required.
- Plant material requests for DUS testing from partner offices in member countries of the European Union are forwarded to [UPOV member/authority] breeders. No further plant material is requested for granting plant breeder's rights (PBR).
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Our first request for references is to the breeders
- Title holders (being sometimes the breeder) are the first contact when requesting material of varieties of common knowledge. Usually it is the entrusted examination office being in charge of requesting varieties of common knowledge, exceptionally the [UPOV member/authority] can request such material together with the request for submission of the material from the candidate variety.
- After registration of new varieties.
- sometimes
- As an exceptional procedure, the Office based on the [UPOV member/authority] Law is authorized to request plant material.

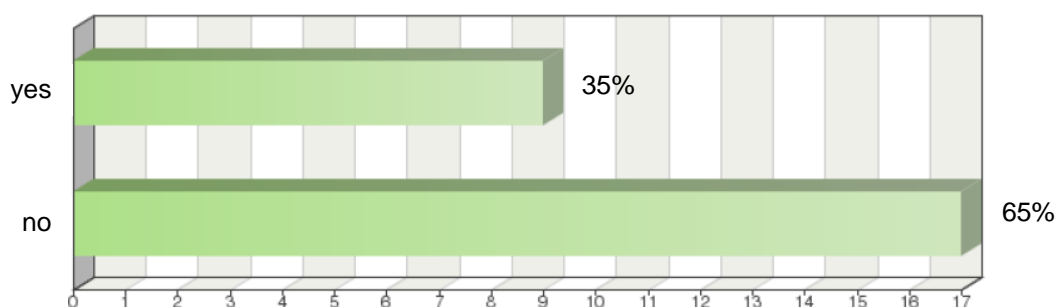
Question 8

What other sources of plant material of varieties of common knowledge does your PVP Office use?

- Research Institutes' collections, Extension Service collections
- Botanic Gardens, private collections, research or industry organizations. The possibilities are not limited.
- Objective descriptions are the only requirement.
- Other examination offices (co-operation in a framework of [UPOV member/authority] entrusted offices), research institutes, botanical gardens, genetic resources, internet, literature
- Public varieties maintained by scientific institutions
- Maintainers, other examination offices.....
- In case of non-protected/non-registered varieties, material may be gained from the market or genebanks.
- From maintainers and examination offices
- Further plant material is requested for the publicly organized maintenance of the variety under private response the reference collection under insect-proof conditions (nuclear stock) as inherent condition for national listing of varieties (NLI). A source of plant materials of commonly known varieties and other local varieties is the [UPOV member/authority] national database of variety collections [website].
- Other PVP Offices, gene banks, maintainers of varieties
- The State Register [UPOV member/authority] and accessible information resources
- We often purchase the materials from seed companies or breeders.
- The official released varieties from the market Reference collections Documented descriptions
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Collected by the DUS testing centers/ stations.
- From (official) maintainers of the varieties. From inspection. Buy in the market/Internet From examination offices, UPOV members and Institutes
- In case the breeder is not able to provide material or the breeder is unknown, either recognized producers of such plant material, other entrusted examination offices, gene banks, or botanic gardens, can be contacted depending on the availability of the plant material.
- Other European Union authorities.
- Another examination offices in some cases, the breeders and the maintainers are the main source
- Bibliographical references
- Original seed samples from variety maintainers for seed certification process.
- The plant material of the reference collection
- None, so far.

Question 9

Does your PVP Office request breeders to provide plant material of varieties of common knowledge of which they are not the breeder?



- For non-protected varieties.
- Objective descriptions of any varieties of common knowledge are requested from a breeder if they use it as a comparison or most similar variety to their candidate variety.
- We apply the case for non-PBR protected varieties only.
- The maintainer of a variety is not always the breeder
- Yes, we have [UPOV member/authority] representatives which represent foreign breeders/applicants.
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Yes but not mandatory
- For vegetables and agricultural crops only in case the breeder stopped with the variety and another company has an approved maintenance of the variety
- normally not, only in exceptional circumstances
- In some cases.

Question 10

If, on request, a breeder does not provide material of their PBR protected variety, how does your PVP Office respond?

- The office informs that it is his obligation by law to provide material at the request of the Council
- The Plant Variety Rights Act [year] has provision to cancel a Right for a variety that is not supplied for official purposes on request. The provision is rarely used as most variety owners are cooperative. The law does not apply to provisionally protected varieties and this causes difficulties.
- Applicants are required to provide objective descriptions of all comparison and most similar varieties if the [UPOV member/authority] does not already have this information. This information must be provided to obtain PBR protection.
- It is replaced with another public or protected variety previously examined that maintains the desired characteristics
- If grant has been issued in the [UPOV member/authority] submission of plant material is a legal obligation, Repetitive ignoring our request can lead to a cancellation of PBR.
- We clarify the legal basis of our request and resend the request.

- Submission of propagating material on request is obligatory. If no material is provided, protection can be terminated.
- We ask for clarification of non-delivery first.
- If no plant material for DUS testing is provided, the application for PBR will be rejected.
- Repeated requests
- If PBR protected varieties are not provided we inform CPVO.
- By agreement between our agency and the testing center for new varieties, we do not request a grade material after testing
- we could not force to submit materials even if it is protected varieties. Usually, we will try to find other resources or obtain 2nd similar varieties.
- We always discuss with the breeders and inform him of the importance of providing the material to enable us to proceed with DUS test.
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Has never happened
- The PBR application would be deemed to have been withdrawn during the applying stage. The PBR would be cancelled after the granting of title.
- Agriculture and vegetable crops: In case of national applications, we send a reminder to the breeder/maintainer. Sometimes a standard seed sample is required from the PVP office in the country of original description of the variety. In case of no reply, the PVP office is informed.
- In case the variety is protected at [UPOV member/authority], the breeders' attention is drawn on the fact that a protected variety needs to be in unaltered existence and therefore plant material of such variety needs to be available. The Office will launch the formal procedure of a technical verification on the continued existence of the protected variety, which first includes the request for comments from the holder of the variety as to the unavailability of material of his variety. Depending on the comments, a formal request for submission of material may be issued. In case no material is submitted for such verification the PBR might be cancelled
- It is the breeder's obligation.
- The Office communicates with the breeder. In case of a variety protected on EU level the Office informs the [UPOV member/authority] and they proceed according to the approved procedure
- Additional time could be allowed for the provision of plant material in case of temporary lack of availability otherwise it is rejected.
- No experience.
- The plant variety protection service does not require the supply of plant material in cases where the DUS examination is not conducted in [UPOV member/authority] and the protection is based on the transfer of the DUS examination report from a member country. Moreover, the [UPOV member/authority] law on the protection of plant varieties provides for the forfeiture of the breeder's right in case of non-presentation of plant material of protected varieties in [UPOV member/authority]. For this purpose, the plant variety protection service requires an undertaking signed by the breeder, at the time of filing the application for protection, to present the plant material of the protected variety.
- We inform that based on the current law, the lack of response is cause to revoke the breeder's title.

Question 11

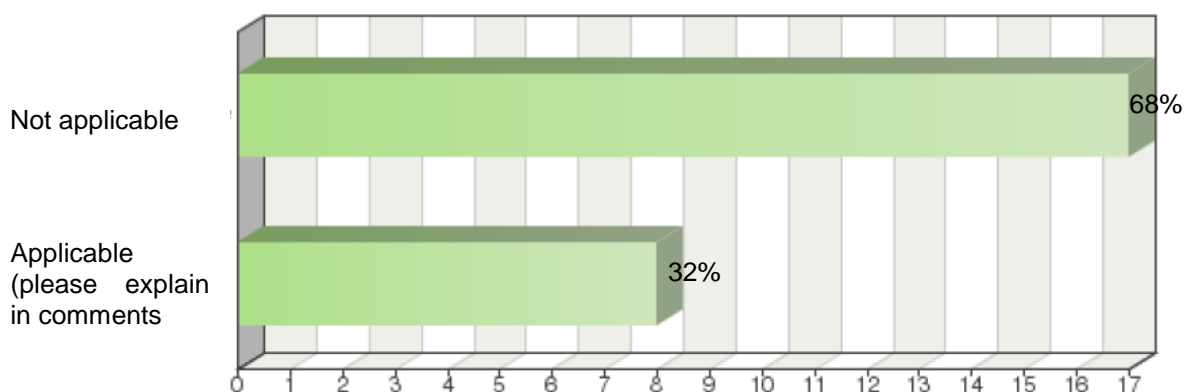
If, on request, a breeder does not provide material of their non -PBR protected variety, how does your PVP Office respond?

- Politely thank them
- With patience and explanation. Usually we can persuade the breeder. In many cases the breeder initially does not really understand why the material is needed, hence the initial refusal
- Applicants are required to provide objective descriptions of all comparison and most similar varieties if the [UPOV member/authority] does not already have this information. This information must be provided to obtain PBR protection.
- If the variety has been listed in the [UPOV member/authority] submission of plant material is a legal obligation, Repetitive ignoring our request can lead to a deletion from the national list and Common catalogue.
- It is replaced with another public or protected variety previously examined that maintains the desired characteristics
- We try to order plant material for next season. Some varieties, even if not PBR protected, are listed at national level so there is an obligation to provide the examination office with plant material anyway.
- We explain the purpose of our request. Normally, the breeder provides material. If not possible, the variety cannot be considered in the growing trial.
- Also we ask for information about reasons for non-delivery.
- If the non-PBR protected variety is neither nationally listed nor registered in the [UPOV member/authority] national database, we will not consider this variety for DUS testing of new varieties. In any other case, we would reject the applications for PBR of all varieties, which had been declared to be close to this non-PBR protected variety (in the TQ).
- No response
- For entering into the register it is necessary to provide the material of the variety, if the material is not provided, the variety is not brought to the state register
- we cannot force to submit materials even if it is protected varieties. Usually, we will try to find other resources or obtain 2nd similar varieties.
- We ask the breeder to give the reason for not providing the material and from their response we can source the material from other sources.
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Has never happened
- According to the rule, the PBR application would be deemed to have been withdrawn during the applying stage, if the applicant did not provide the requested material. However, it is not mandatory for the applicant/ breeder to provide material of their non-PBR protected variety.
- The PVP authority is informed. Often they cannot force the breeder. In that case the variety is not used in the DUS test
- The [UPOV member/authority] draws the attention to the importance of providing material to the breeder concerned in writing. If no material is provided despite this communication, the [UPOV member/authority] looks for other reliable sources; in case no plant material can be sourced, the DUS examination is carried out without the inclusion of such material. If the examination office is of the opinion that the variety not available may be close to the candidate variety, this lack of availability is mentioned on the variety description in case of a positive DUS report.
- The breeder must provide material of varieties registered in the National Official Catalogue for the reference collection.

- In case the variety is registered in the Common Catalogue or in the National List the Office or other Offices are entitled to request the representative sample of the variety. If there is no plant material available the process of withdrawal of the variety can start.
- In case of denial, if there are reasons for lack of availability, a deadline is given, or another company is searched
- No experience.
- For unprotected varieties that are the subject of an application for protection in [UPOV member/authority], the breeder is obliged to provide the necessary plant material for the DUS examination, otherwise the application is rejected.
- There is no precedent in this case.

Question 12

If, on request, a breeder does not provide material of a variety of common knowledge of which they are not the breeder, how does your PVP Office respond?



- It depends if the material is or has been protected. We would not ask a breeder to supply material of another breeders protected variety but would for non-protected varieties. We would use persuasion and explanation.
- Applicants are required to provide objective descriptions of all comparison and most similar varieties if the [UPOV member/authority] does not already have this information. If the applicant cannot provide this information, then a literature search is conducted to complete the objective description of the variety.
- Office proposes the protected varieties from national collection with the desired characteristics
- We try to order plant material for next season or look for other source.
- We will then send the request to the variety owner
- Sometimes the PVP office requests the applicant to provide the material of similar variety. However, it is not mandatory for the applicant.
- The PVP authority is informed. They cannot force the breeder. In that case the variety cannot be included in the DUS test
- In case the breeder requested to provide material of a variety of common knowledge is not the breeder of such variety he cannot be held responsible for a non-submission, - see also reply to question 11

Question 13

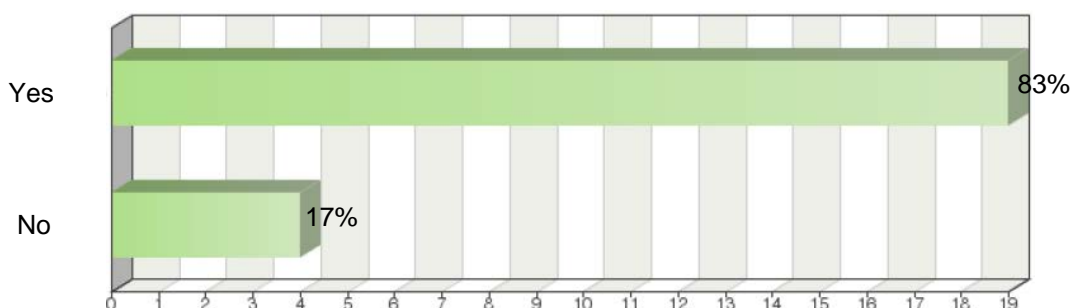
What does your PVP Office do if it is unable to obtain material of a variety of common knowledge from any source?

- Manage without it
- This is not uncommon. The Convention has provision for the use of additional information for DUS testing and this can include variety descriptions from a range of sources, foreign test reports, International Cultivar Registration Authorities, databases, photos, literature, the internet. Depends very much on the genera and on the candidate variety. The possibilities should not be limited.
- A literature search is conducted for an objective description of the variety. If no description is available the variety is considered insufficiently described and omitted from the examination.
- office proposes to conduct the test in another PVP office or accepts it in the examination, being exclusively examined for qualitative and some pseudo-quantitative characteristics.
- We try to obtain at least a description of the variety in question. Communication and exchange information with other EU offices to ensure that living material is not available any more.
- We compare candidate varieties with available reference varieties only.
- All measures to receive material are recorded. The variety cannot be considered in the growing trial.
- We try to get official description of it at least.
- If there is no plant material of a certain commonly known species available on the national and international level, this variety will not be considered for DUS testing of new candidate varieties.
- Note in database
- All varieties on National list are obliged to be sent on request, and if not received the consequence will be cancelation from National list.
- We will try to obtain the next similar varieties.
- The office use documented descriptions
- We do not conduct DUS test our self. We buy DUS tests from [UPOV member/authority] and other relevant countries.
- Not applicable
- The PVP office would collect all possible information, for example, the publication, variety description.
- Agricultural crops: If the variety cannot be obtained, it cannot be included in the DUS test. The breeder is requested to withdraw form listing (national list). But this cannot be forced. In case of potatoes due to phytosanitary regulations no material outside EU can be obtained. Other crops: We consider this situation as unfavorable for the owner(s) of the variety, but it is their responsibility in case an application is not distinct from their variety.
- As said before, in case plant material of a variety of common knowledge is not available for direct comparison, the DUS examination will be carried out without such variety. If the examination office is of the opinion that the variety not available may be close to the candidate variety, this lack of availability is mentioned on the variety description in case of positive DUS report.
- Our institute tries to obtain material of the variety of common knowledge.
- Try to gain at least the official description of the variety. Discovering the reasons why the material is not available
- So far the case has not been presented, but in case of not finding well-known varieties, we should look for the most approximate in its characteristics and carry out a bibliographical revision of the approximation.
- We haven't had such situation.

- The Plant Breeders' Rights Service may request a description of the variety that is well-known from an official counterpart service.
- There is no antecedent.

Question 14

Is the guidance in the General Introduction, Chapter 5.2.2, consistent with the approach of your PVP Office to determining common knowledge? "5.2.2 Common Knowledge "5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others: "(a) commercialization of propagating or harvested material of the variety, or publishing a detailed description; "(b) the filing of an application for the grant of a breeder's right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be; "(c) existence of living plant material in publicly accessible plant collections. "5.2.2.2 Common knowledge is not restricted to national or geographical borders."



- The guidance is essentially consistent with our approach. Unofficial/voluntary registers of varieties are also included such as International Cultivar Registration Authorities.
- PUBLICLY KNOWN VARIETIES.- (A) IN GENERAL.-A variety that is adequately described by a publication reasonably considered to be a part of the public technical knowledge in the [UPOV member/authority] shall be considered to be publicly known and a matter of common knowledge. (B) DESCRIPTION.-A description that meets the requirements of subparagraph (A) shall include a disclosure of the principal characteristics by which a variety is distinguished. (C) OTHER MEANS.-A variety may become publicly known and a matter of common knowledge by other means. [reference]
- We follow above mentioned approach. However in case of the filling application abroad 5.2.2.1.b) is more or less theory -information on applications are publically available, but getting plant material is very limited.
- The concept of commonly known varieties is solely used for the definition of a collection of plant materials to which new varieties should be different.
- We include the geographical origin when obtaining varieties of common knowledge
- We should however mention some particular challenging situations: - In the European Union seed sector, when varieties are deleted from registration (NLI and CC), some examination offices may discard them as a consequence from their collection but such varieties may enter the list of amateur varieties some years after. - In the fruit and ornamental sector, varieties may no longer be maintained by breeders but still available in peoples' gardens or orchards. Breeders may claim that this material should not be considered as they do not maintain it.
- No, it is not limited to national borders. Indeed, common knowledge is considered worldwide.

Question 15

If no, what are the differences?

- No Comments
- Not applicable
- (a) The commercialization of a variety or publication of a detailed variety description is not yet considered as criterion. The criterion (c) has not yet been defined as criterion for common knowledge.
- Because we do not conduct DUS test our self, we are depending on the country we buy DUS tests from in this matter.
- Common knowledge is restricted to northern countries within EU.
- Not applicable

Question 16

What specific criteria does your PVP Office apply to determine if the existence of a variety is a matter of common knowledge?

- No specific criteria
- It is important to fix the date when a candidate variety becomes a variety of common knowledge. The next step is to begin the process of identifying similar varieties globally and then determining which of those have living material available. In many cases the [UPOV member/authority] is aware of a similar variety but that variety is not present in [UPOV member/authority]. Guidance is on the website [reference]
- IN GENERAL.-A variety that is adequately described by a publication reasonably considered to be a part of the public technical knowledge in [UPOV member/authority] shall be considered to be publicly known and a matter of common knowledge. Adequate or sufficient descriptions of a variety are crop specific and based on the volume of new varieties developed, higher volume crops require more descriptive data while lower volume crops require less; in order to distinguish a candidate variety from a comparison or most similar variety.
- Criteria see 5.2.2.
- Comments: TGP/1/3, art. 5.2.2.1 (a) (b) (c)
- We take into account all information, which is available for us.
- (i) a current or former national listing (NLI) or registration (PBR) or even the filing of an application for NLI/PBR of a variety.
(ii) a current or former international listing (NLI) or registration (PBR) or even the filing of an application for NLI/PBR of a variety.
- International databases, national listing, plant variety rights registers
- Varieties listed in the Common catalog and European Union protected varieties are considered as varieties of common knowledge. National protected varieties in [UPOV member/authority], [UPOV member/authority] and [UPOV member/authority] are considered as common knowledge as well.
- The office use any of criteria a, b or c depending on which criteria will enable the office to determine if the existence of a variety is a matter of common knowledge
- N/A
- The standard varieties are on the market in [region] within the European Union.

- - In case a variety was the object of a plant variety right or entered in an official register of plant varieties, in the European Union or any State, or in any intergovernmental organization;
- varieties for which an application for the granting of a plant variety right in its respect or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime.
- Varieties which are or have been marketed;
- Varieties which are kept in publicly accessible collections like gene-banks or botanical gardens
- Varieties which have been described or are mentioned in databases whatever the availability of the plant material is
- We use UPOV Test Guidelines.
- There are not specific criteria.
- National and international databases. Scientific publications in general. Panels of experts for National List of commercial varieties.

Question 17

What specific criteria does your PVP Office consider do not determine that the existence of a variety is a matter of common knowledge?

- No specific criteria
- Sales of a variety determined to be not true to type do not establish common knowledge. There have been cases where a first sale date for a variety has been amended because material sold was later determined to be not true to the variety. A variety is not considered common knowledge if material is sold or advertised i) in a generic manner without the denomination or any identifying name/indication. ii) in disposal of surplus material from evaluation or trials iii) in the course of increasing stock/multiplying the variety and ownership of any material has not changed
- Experimental and proprietary lines are not usually considered varieties of common knowledge and may be difficult to obtain detailed descriptions.
- Exclusion of varieties not suitable for our climatic condition, varieties at which living plant material is not available, "old varieties" which not correspond with "modern breeding method".
- Deleted, withdrawn varieties and varieties from pre-registration testing.
- Not applicable
- the commercialization of propagating or harvested material of a variety without any official listing (NLI) or registration (PBR)
- Candidates tested at other authorities.
- none
- N/A
- The variety is no longer in use within the European Union
- Agriculture and flowers: no specific criteria Vegetables: in some cases we exclude varieties if no longer commercialized
- Varieties which are not publically available, held in non-accessible collections e.g. at breeders premises
- Geographical and pedoclimatic criteria.
- There are not specific criteria.
- None detected.

[End of Annex and of document]