

**Technical Working Party for Vegetables****TWV/56/14****Fifty-Sixth Session****Virtual meeting, April 18 to 22, 2022****Original:** English**Date:** March 10, 2022

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**NEW ISSUES ARISING FOR DUS EXAMINATION***Document prepared by experts from the European Union**Disclaimer: this document does not represent UPOV policies or guidance*

The annexes to this document contain presentations to be made by experts from the European Union, at the fifty-sixth session of the TWV:

- Annex I      “Characteristics with one single observation in multi-annual testing”;
- Annex II     “Acceptance of final reports based on variety descriptions with the same notes;
- Annex III    “Issue of reporting of the absence of similar varieties mentioned under chapter 16 of variety descriptions”.

[Annexes follow]



# Characteristics with one single observation in multi-annual testing

CPVO, EU

April 2022, TWV/56

## Background of the discussion



For vegetable species with multi-annual testing, the TG (and CPVO Technical protocols - TPs) states:

### 3.1 Number of Growing Cycles

“The minimum duration of test should normally be two independent growing cycles”

That implies that each characteristic mentioned should be observed in each growing cycles.

**BUT**, in practice some characteristics are **observed only during one growing cycle**

And, in that case, the **requirements of the TG (CPVO TP) are not met.**

## Background of the discussion



**Legal cases** (criticism from the European Court of Justice) and **surveys** (launched in 2019 and 2020) that triggered a discussion between the CPVO and the EU Examination Offices (EOs).



**Legal analysis** made in 2021 by the Legal Service of the CPVO



Draft of a **guidance** / Revision of the protocols



Proposal that will be discussed with the CPVO and EOs by the end of 2022

## Results of the surveys



Vegetable sector

**13 species:** French bean, carrot, celery, cucumber, leek, lettuce, melon, pea, pepper, tomato, water melon, cauliflower and beetroot.

### **Disease resistance characteristics:**

several EOs usually perform a single observation, a second observation is done in the following situations

- If there is no claim in the TQ on that disease resistance
- If the result does not match the claim on the TQ
- In case of uniformity problem
- In case of doubts on the results obtained

## Results of the surveys



### Vegetable sector

**13 species:** French bean, carrot, celery, cucumber, leek, lettuce, melon, pea, pepper, tomato, water melon, cauliflower and beetroot.

#### Non-disease resistance characteristics:

Ploidy	VG	QL	Only for vegetatively propagated varieties: Spathes: length	VG	QN
Seed characteristics (French bean, peas)	all	all	Flower: width of upper sepal	VG	QN
Germity	VG/MS	QL	Plants: proportion of male sterile plants	VG	QN
Parthenocarpy	VG	QL	Male sterility	VS/MS	QN
Seed: colour	VG	PQ	Only for vegetatively propagated varieties: Flower: male sterility	VG	QL
Only varieties with plant anthocyanin coloration present: Flower: colour of wing	VG	PQ	Plant: type of male sterility	VG	QL
Only varieties with plant anthocyanin coloration absent: Flower: colour of standard	VG	PQ	Flower: shape of apex of upper sepal	VG	PQ
Pod: colour	VG	PQ	Excluding varieties with pod parchment: entire: Pod: thickened wall	VG	QL
Foliage: colour	VG	PQ	Pod: parchment	VG	QL
Fruit: ground colour of skin at physiological ripeness	VG	PQ	Excluding varieties with pod parchment: entire: Pod: suture strings	VG	QL
Flower: colour	VG	QL	Stem: fasciation	VG	QL
Stem: anthocyanin coloration of axil	VG	QL	Bolting stem: fasciation	VG	QN
Plant: anthocyanin coloration	VG	QL	Axillary sprouting	VG	QN
Only varieties with pod colour green: intensity of green colour	VG	QN	Stem: number of nodes up to and including first fertile node	MS	QN
Only varieties with foliage colour: green (Char 6, state 2) Foliage: intensity of colour	VG	QN	Time of beginning of bolting (for celery and lettuce)	MG/VG	QN
Immature seed: intensity of green colour	VG	QN	Bolting tendency (from an early sowing)	MG	QN
Plant: height of primary umbel at time of its flowering	VG	QN			

- a 2<sup>nd</sup> observation is carried out in case the result of the single observation does not match the information provided in the TQ.
- this applies also to special trials such as bolting, male sterility or germity.

## Results of the surveys



### Other sectors

#### Agricultural

- The observations are made twice, but there are exceptions to the rule:
- The issue should be addressed on general level by providing a guidance document referring to the relevant UPOV principles.
- It should furthermore be reviewed by the Legal Service of the CPVO

Species	Characteristic	Method	Type
Cereals	Seasonal type	VG	PQ
Grasses	Ploidy	C (lab)	QL
Maize	Resistances	VS	QL
Beta	Germity	C	PQ

#### Ornamental

- No survey carried out
- Essentially one single observation is made although sometimes the test duration in the TPs is indicated as being two cycles (with one year of establishment of the plants).

#### Fruit

- No survey carried out
- In principle, the DUS examiners observe each characteristic twice. Exceptionally, it may happen that characteristics are observed only once.

## Legal analysis



Based on applicable legislation, guidelines and relevant case law on the matter:

- **UPOV TG/1/3 and TGP Documents**
- The **Basic Regulation** (Council Regulation (EC) No 2100/94) and the **Proceeding Regulation** (Commission Regulation (EC) No 874/2009)
- **Case law** (C-625/15 P of 8 June 2017 'Gala Schnitzer')

Conclusion:

- The CPVO can adopt the decision **to deviate from the two-year rule** if such a decision is taken in a framework that can guarantee legal certainty.
- **Duty of transparency** of the CPVO Office concerning the characteristics observed during one single growing cycle -> any deviation from the provisions of publicly available and officially adopted rules (regulations, protocols, guidelines, instructions) shall be made public.

## Guidance/Framework



- The CPVO will address the issue by drafting a document that may allow the DUS examiners to perform only one single observation for crops with multi-annual testing (harmonisation of practices).
- Tool: Draft of a general guidance or introduction of a wording/codes in the CPVO TPs of the relevant species?
- Elaborate criteria that may enable to safely carry out only one observation for certain characteristics of the CPVO TPs
- Follow-up at the UPOV level? Feedback of UPOV members?



# Acceptance of final reports based on variety descriptions with the same notes

CPVO, EU

April 2022, TWV/56

## Examples



### Candidate variety A (Lettuce, self-pollinated, TP 2016)

Denomination of similar variety	Characteristics in which the similar variety is different	State of expression of similar variety	State of expression of candidate variety	TP/TG	
<b>Reference variety B</b>	Plant: diameter	5-medium	5-medium (smaller)	char. 5	VG/QN
	Leaf: intensity of colour of outer leaves	6-medium to dark	6-medium to dark (lighter)	char.17	VG/QN

### Candidate variety C (French bean, mostly self-pollinated, TP 2013)

Denomination of similar variety	Characteristics in which the similar variety is different	State of expression of similar variety	State of expression of candidate variety	TP/TG	
<b>Reference variety D</b>	Leaf: intensity of green colour	7-dark	7-dark (lighter)	char. 8	VG/QN
	Terminal leaflet: size	4-small to medium	4-small to medium (smaller)	char. 10	VG/QN
	Pod: intensity of ground colour	6-medium to dark	6-medium to dark (duller)	char. 25	VG/QN
	Pod: length (excluding beak)	4-short to medium (ca. 13 cm)	5-medium (13 to 14 cm)	char. 17.1	MS/QN

## UPOV TGP/9



### TGP9 5.2.3.2.4

Varieties with the same Note in the UPOV Test Guidelines for a given characteristic **would not normally be considered to be clearly distinguishable** with respect to that characteristic.

However, **two varieties which are not distinct for a characteristic on the basis of Notes** in the UPOV Test Guidelines may, for example in a subsequent growing trial, be the subject of a **side-by-side visual comparison** or **statistical analysis**, whereupon it may be possible to establish distinctness. It should be recalled that any use of statistical analysis to establish distinctness should be in accordance with the requirements set out in document **TGP/8**.

## Issue at the CPVO



The CPVO encountered difficulty in accepting these positive reports in the absence of clear evidences supporting the conclusion of the Examination Office on distinctness:

- In several cases, the European Court of Justice pointed out the obligation of the CPVO to provide documentary evidence
- Need of a 'strong' variety description: it is the only official document to support and prove the conclusion on distinctness, shared between the authorities.



The CPVO agrees with UPOV TGP9 recommendation, however, a candidate variety showing identical notes with a reference variety should trigger actions:

- > **short term** technical solution
- > **long term** technical solution (should the technical protocol be revised?)



## Short term actions



To be determined on a case by case basis

- Launch a procedure of **additional characteristic**
- Perform an additional growing cycle to check the reproducibility of the observation (**side-by-side comparison test**, usual practice in the vegetable sector)

- **Collection of supporting evidences:**

*Collected during the normal growing cycle(s) or during an additional growing cycle set up especially for that purpose.*

- **Statistics:** for quantitative characteristics usually visually observed but which can be measured (thresholds and method to be defined with TGP, not always described in the TG)
- **Illustrative pictures**
- **Reports from external/plant experts** (TGP/9, chapter 6.5)
- **Blind test** (TGP/9, chapter 6.4)

## Long term actions



❖ A revision of the Test Guidelines may be foreseen, for instance:

- Specify the requirements in the TG regarding the decision standards for assessing distinctness
- To include more methods of observations (e.g. MS, MG) when it is appropriate
- The scale of notes could be enlarged.  
The scale of notes for all characteristics should be established in such a way that clearly distinct varieties result in a full note span difference in their variety descriptions.  
The edges of the notes should be taken into account

❖ Get the feedback of other UPOV members to know how they manage such cases and exchange information





## Similar varieties to be indicated in chapter 16 of variety descriptions

CPVO, EU

April 2022, TWV/56

## Similar varieties



UPOV TGP 5 section 6

### 16. Similar Varieties and Differences from These Varieties

Denomination(s) of variety(ies) similar to the candidate variety	Characteristic(s) in which the candidate variety differs from the similar variety(ies) <sup>1)</sup>	State of expression of the characteristic(s) for the similar variety(ies) <sup>2)</sup>	State of expression of the characteristic(s) for the candidate variety <sup>2)</sup>
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- 1) In the case of identical states of expression of both varieties, please indicate the size of the difference.
- 2) The state of expression of the candidate variety and similar variety(ies) relate to the DUS examination conducted at the testing station, place and period of testing indicated in 11 and 12.



## Similar varieties

What are 'similar varieties' in the UPOV world?

Term used in the general introduction to define grouping characteristics:



2. Characteristics in which the documented states of expression, even where recorded at different locations, can be used, either individually or in combination with other such characteristics, to organize the growing trial so that similar varieties are grouped together.

⇒ In many situations, it is not possible to report in chapter 16 a comparative description of the candidate variety with all varieties included in the growing trial. Which ones should be reported?



## Similar varieties

CPVO approach

- information under chapter 16 should be provided systematically.
- the term "similar" should not reflect only similar varieties for which it was difficult to establish distinctness
- the information given in chapter 16 has an added value to the distinctness statement, it should describe the closest, or the nearest variety
- exception to this approach when a candidate variety is really unique in its varietal group



## Similar varieties

### Issue

- In case no similar varieties are indicated in chapter 16, some countries have difficulties to take over reports
- In such cases would a standard wording help?
- How to facilitate international cooperation in the exchange of reports?



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