

# Interview with Martin Ekvad, president of the Community Plant Variety Office (CPVO)

By Riana Harvey, Alexandre Miura, Pia Leonarda Riemenschneider

## ABSTRACT

*Martin Ekvad is President of the Community Plant Variety Office (CPVO) since 2011. Prior to his elevation to the position of President, he held the position of Head of the CPVO Legal Unit from 2003. From 1996 to 2003 Mr. Ekvad worked as a lawyer (Advokat, Member of the Swedish Bar Association) in the law firm Linklaters, in Brussels and in the law firm Magnusson Wahlin Advokatbyrå, in Stockholm. Our Editors had the pleasure of talking with him and getting his opinion on a broad range of topics, from recent case law developments, the current state of Plant Variety Rights (PVR) in the EU, a discussion on the challenges in the registrability of PVRs, and also advice for young practitioners.*

## CAREER

**SIPLR:** We have seen that you have a background in private practice before you started your career at the CPVO. What are the biggest differences you have noted between working in a private practice and working for an EU institution? Are there any similarities?

**Martin Ekvad:** What I liked about practicing law at a law firm was the interaction with clients. Clients came with a legal problem related to their business and my job was to come up with solutions that fit their strategies. On the other hand, when working as a lawyer for an EU institution, it is important to be objective in your positions and decisions, always bearing in mind the interest of all parties to proceedings as well as those of third parties and the public. In fact, it resembles the work I did at the beginning of my career, when I worked for a Swedish court and prepared decisions and judgments for the judges.

The biggest difference is that when I worked with clients I had to make the interest of the client a priority. Another interesting part of working at a law firm was that I worked with many clients from a wide range of sectors. For instance, one day I could be working with a client in the pharmaceutical sector and the next day with a client in the banking sector. It was necessary – and very interesting – to learn about the business behind the legal issues and apply the legislation relevant to the circumstances at hand. Working at a law firm was also stimulating, since I could learn from more experienced lawyers. Working

with a team of motivated professionals sharing the same aims was very rewarding.

When I started at the CPVO, I was concerned that the work would be surrounded by a certain monotony, as the CPVO deals only with plant variety rights. However, I soon learned that it is a complex area in which you need to have a good understanding of the breeding techniques used and that each species must be treated differently. In addition, techniques change and it is important to keep abreast of what is new. As a lawyer, I have also defended decisions before the Board of Appeal, the General Court and the Court of Justice of the EU. Thus, it is very stimulating to work as a lawyer at the CPVO.

**SIPLR:** Your career at the CPVO is impressive, starting at the legal department and moving up to your current position as President. What would you say are the biggest differences in responsibilities you have found between being Head of Legal and being President of the CPVO, and the biggest challenges in both positions?

**Martin:** When I worked as a lawyer, I advised and expressed my opinion to the President on legal matters relating to plant variety protection (PVP) matters, as well as institutional issues such as public procurement, staff regulations, access to documents and data protection. As President, I am ultimately responsible for everything that the CPVO is involved with. If things go well, I get the credit, even if my colleagues did the work, and if problems arise, I am responsible, even if a colleague made a mistake. The challenge of being President lies in trying to ensure that the objectives in the long and short term can be achieved with the resources available. Motivating staff is also an important part of the job. This is a challenge, at the same time as it is very rewarding.

I must admit that going from being a lawyer to being President was a bit tricky. There was a certain transition period before I got fully comfortable with a purely managerial position, leaving the legal work to others. It was a challenge to focus entirely on planning the work, motivating people (not just a small group, but the whole office), implementing strategies and structures and working with budgetary matters. Another very concrete example of the change was that as President, you always represent the Office. It is expected of the President to make presentations and speeches at meetings. Sitting in as a participant in a seminar has become very rare for me.

**SIPLR:** Compared with other IP rights, plant varieties are still unexplored. In your view, what were the needs of the



stakeholders and the particularities of the subject-matter that resulted in the creation of a sui generis system for the protection of plant varieties? Why was there a need for a sui generis system, and do you think in retrospect that traditional IPRs would have been more appropriate? Do you think there might be a need for a revision of the current legal framework, and if so in which direction?

**Martin:** I would not say that the PVP system is unexplored. The output of the breeding industry is certainly quantitatively smaller than, for instance, the number of new trade marks, but for good reasons. It takes many years to breed a new variety – 20 years for many species. There is a limit to the number of varieties that can be created each year which have a commercial interest. If one looks at the number of new varieties created, the proportion of those varieties that is protected is quite high. That being said, it is still important to promote the PVP system, especially to SMEs.

The sui generis system that was set up for PVP is different from other IP rights. There will always be some controversy when one talks about IP protection of living material. This can be related to religious or ethical convictions, but also more pragmatic considerations, such as whether it is appropriate to give an exclusive right for food. The breeders' exemption allows all breeders to have access to germplasm, even from protected varieties. In fact, plant breeders rely on getting access to diverse plant materials in order to create new varieties. Ever since I started at the CPVO, some stakeholders in the breeders' community have been stating the protection provided is too weak and that the breeders' exemption should be taken away or at least be limited in time. It is considered unfair that once a well-performing variety has been created, competitors can immediately have access to it. I can certainly understand the arguments and have sympathy for such concerns, but all in all, the system fulfils its purposes. Breeding is constantly evolving and with new techniques such as CRISPR CAS there is the prospect of creating new varieties faster and more efficiently, with qualities that do not yet exist. This may trigger amendments in PVP and patent laws, but we are not yet there.

After the Second World War, it was essential to secure food supply. It was important to ensure that agriculture became efficient and one main element of this was to ensure that the seeds used were of high quality. At that time, public institutions were involved in breeding in many European countries. Private companies had to fund their activities differently, but the patent system was not adapted for plant varieties. Thus, there was a need for an IP system

tailored to the specificities of the industry. Some European countries adopted IP protection for plant varieties. The UPOV Convention was adopted in 1961 and amended in 1978 and 1991.

In view of the concerns raised against monopolies for food, and other arguments I mentioned earlier, the breeders' exemption was introduced. This allows the use of protected varieties for the creation of new varieties and ensures that breeders have access to genetic material. An agriculture exemption has also been developed allowing farmers, under certain conditions, to reuse seeds on their own farms for certain species, without the authorisation of the holder of the plant variety right. Therefore, I think it was appropriate to create a sui generis system and I think it still functions well. However, as with any system, it must over time be adjusted to new technologies, as well as commercial and public interests,

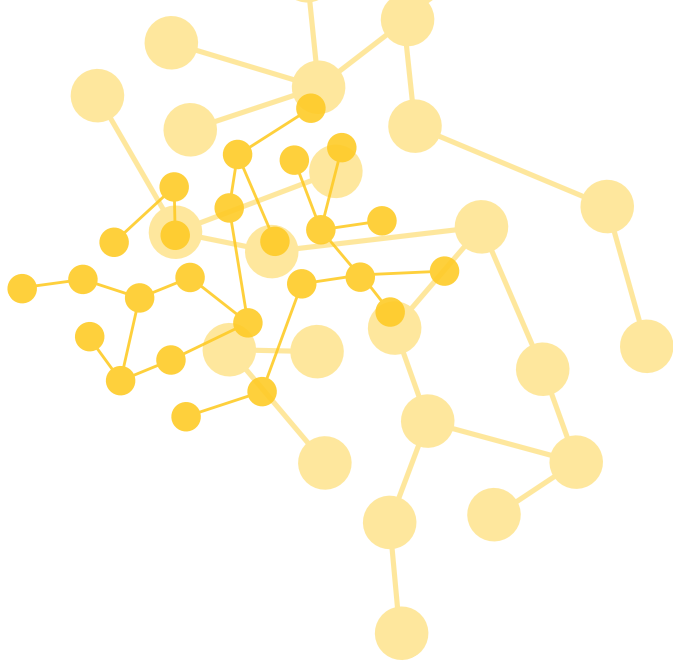
## THE PROCESS OF REGISTRATION

**SIPLR:** In regard to the process of registration, it is known that the basic requirements for granting a CPVR (Community Plant Variety Right) are the DUS criteria (Distinctiveness, Uniformity, Stability), novelty and the variety denomination. Which requirements are the most difficult to assess and the ones most often challenged in application submissions?

**Martin:** During the technical examination, it is necessary to take into account all species of common knowledge (Article 7 of Regulation 2100/94/EC) for the purpose of assessing distinctiveness. This requires that examination offices have excellent knowledge of existing varieties.

Examination offices can either keep a living reference collection (i.e., plants are planted and kept in the field or indoors) or have documentation. Living reference collections are often kept for species such as trees, while seeds can be stored in seed banks. For many ornamental species, there is no living variety collection, so databases with photographs and descriptions are used to compare the variety being applied for with all the other varieties in the database. Thus, testing can be quite labour-intensive, especially in the agricultural field, where more than 100 reference varieties need to be grown in a given year.

Quantitatively, testing the D criterion is rather complex and cumbersome. In addition, for some species, the differences are rather small and must be determined using specific techniques. Overall, I would say that the D criterion is what keeps us most busy. If one looks at the decisions challenged, distinctiveness is quite often questioned, but issues relating to fees are more frequent.



**SIPLR:** How can there be so many decisions about the fees? Don't people know the fees in advance?

**Martin:** With fees, it is normally a question of whether the fees were paid in time. There can be misunderstandings as regards deadlines, but there can also be human errors on the side of the applicant, a bank or even the CPVO.

**SIPLR:** Next, we want to talk about the relationship with other offices and the nature of that relationship. Since the CPVO is entitled to delegate the technical examinations of certain aspects to component offices or offices in Member States, how does this relationship work?

**Martin:** When the office was created, existing systems were in place in many of the Member States, and that is still the case. Only Greece, Luxembourg, Malta and Cyprus don't have national protection systems. In addition, in order to market seeds in the European Union, you have to have a market authorisation issued by a national competent office. Once one of the national offices in the EU has granted an authorisation, the seeds can be sold throughout the European Union. This means that there are facilities in the EU Member States that are testing varieties. In the Basic Regulation (2100/94/EC), the legislator set out that the CPVO could either create its own facilities or use the already existing ones. The choice was rather easy. Why create new facilities and duplicate the work that is already in place? We only use examination offices in Member States that fulfil certain quality requirements, as determined by the Administrative Council based on a recommendation of the CPVO Quality Audit Service.

Some examination offices are entrusted with more than hundred species, while others test a very limited number of species. The CPVO enters into a Designation Agreement (Article 15 of Regulation 879/2009/EC) with an examination office, under which the examination office undertakes to perform tests and the CPVO undertakes to

pay for the service carried out. For a very limited number of species, the CPVO relies on tests carried out by competent authorities outside the EU.

## PLANT VARIETIES AND CASE LAW

**SIPLR:** In May 2020, the Enlarged Board of Appeal (EBA) made a decision in the Pepper case, a follow-up case to the Tomato and Broccoli cases, and held that products obtained from essentially biological processes are no longer patentable, as they fall under the patent exemption in Art. 53 (b) European Patent Convention (EPC). How does this decision impact the PVP system? What would have been the effects if the EBA had decided differently and those products could be patent-protected under the EPC?

**Martin:** Well, first of all, the processing of applications at the CPVO was not affected at all, because we don't assess patentability. The cases you refer to must be assessed under the EPC and not Regulation 2100/1994. Had the applications you refer to been granted a patent, meaning that products from essentially biological processes would be patentable, certain concerns would have been raised. There was the fear from some breeders and civil societies and many Member States that it would then be possible – through patents – to block the occurrence of natural characteristics and characteristics in varieties created through traditional breeding.

**SIPLR:** Indeed, in our understanding, this decision was very positive for the plant variety protection system. We would think it would cause the numbers of applications to increase, because if you are a breeder and can protect your product under the patent system, that would give you a somewhat stronger right, as there isn't a breeders' exemption, at least under the EPC. Thus, it might have at least a slight effect on the plant varieties system.

**Martin:** If the patent applications had been granted, one consequence could have been that the number of PVP applications would decrease. It might have been the case that some breeders would take the position that patent protection would suffice and that there would be no need to file PVP applications. However, this is not certain. The subject-matter of a patent differs from that of a plant variety and it is quite possible that breeders would file for both a patent and PVP, to get complementary protection. It is difficult to speculate on what the effects would have been and what the reaction of the industry would have been. Personally, I think that new breeding techniques should not be overregulated. It is important to take a science-based approach, not a fear-based one.

**SIPLR:** Article 14(3) of Regulation No. 2100/94/EC on Community plant variety rights (CPVR) incorporates a breeders' exemption. A limited breeders' exemption is also included in the Unitary Patent Law (Article 27(c) of the Agreement on the Unified Patent Court). Is there a difference between those two breeders' exemptions and do you think that the provision of the Unitary Patent Law will affect the plant variety rights protection in any way?

**Martin:** Yes, there is a difference – that’s why it is referred to as a ‘limited’ breeders’ exemption, which you will find in the patent legislation in some EU Member States, such as Germany, France and the Netherlands. The limited breeders’ exemption means that you can use protected varieties in your research freely, without the authorisation of the holder, but you cannot market the resulting invention without the consent of the patent holder. Under the ‘PVP breeders’ exemption’, as laid out in Article 14(3) of Regulation No. 2100/94/EC, you can use protected varieties to create a new variety and you can also market the new variety without the authorisation of the holder(s) of the varieties used in the breeding process. In the patent legislation, the research exemption is more limited. I do not see that there will be any particular effects on the plant variety rights protection (PVR) following the introduction of the Unitary Patent Law, since plant varieties cannot be protected by patents, and I believe that the PVR system will remain attractive for the purpose of protecting new plant varieties. However, I believe that it is to the benefit of society that the limited breeders’ exemption was introduced in the Unitary Patent Law, since this will ensure access for breeders to genetic material.

**SIPLR:** As is set out under Article 13(2) and (3) CPVR, the cascade effect allows for PVR to extend to harvested material obtained through unauthorised use of the variant constituents of the protected variety, unless the right holder has had reasonable opportunity to exercise their right in relation to the variety constituents in question. However, the recent CJEU decision in *Club de Variedades Vegetales Protegidas v Adolfo Juan Martínez Sanchis* (C-176/18) involving Nadorcott clementines clarified that where there was an activity of planting a protected variety and harvesting the fruit thereof, which is not liable to be used as propagating material, authorisation of the right holder would be required so long as the conditions under Article 13(3) CPVR were met.

**Martin:** So, I think this case is a little bit complex because it mixes a lot of things. It relates to what a farmer and an applicant can do before a variety is protected – the provisional protection – and also the scope of protection of a harvested material.

The CJEU has affirmed that only plant materials with a capacity for propagation can fall under the primary protection regime enshrined in Article 13(2) of the Basic Regulation. This means that, in each case, what will need to be ascertained is whether or not the plant material in question falls under the definition of ‘variety constituents’, understood as ‘entire plants or parts of plants as far as such parts are capable of producing entire plants’. So, it could indeed be defended that the CJEU has implicitly acknowledged that, where the product of a harvest itself constitutes propagating material, the activity of harvesting the concerned variety falls under Article 13(2) of the Basic Regulation, without triggering the application of Article 13(3) of the Basic Regulation. Otherwise, the qualification introduced by the CJEU, with the botanical distinction based on the reproductive nature of varieties used for ascertaining whether Article 13(3) of the Basic

Regulation is applicable, would be rendered meaningless.

This assumption is also aligned with the underlying principle that the CJEU is seemingly seeking to ensure, namely, the principle that CPVR holders enforce their rights at the propagation stage of a variety. In any case, it will be interesting to see how the competent national courts of the EU Member States will apply the findings of the CJEU in practice.

What makes the issue complex is that plant material can sometimes be harvested material within the meaning of ordinary use of the language, but at the same time be a variety constituent within the meaning of the Basic Regulation. If a breeder sells potatoes of a protected variety as variety constituents to a farmer, the farmer will then plant them and subsequently harvest new potatoes. The farmer is allowed to sell the harvested potatoes for consumption (table potatoes). However, he cannot sell the harvested potatoes to someone in order for that person to reproduce them – that would be an infringement. Accordingly, if a potato is sold and eaten, it is legal, but if the same potato is used for multiplication purposes, it is illegal.

**SIPLR:** Further, the CJEU also stated that PVR holders are not entitled to prohibit performance of Article 13(2) of the Basic Regulation acts during the pre-grant protection period. Do you think that this could undermine the earlier point raised (in that farmers could be incentivised to use the pre-grant period to their advantage), and what would the implications – if any – be in practice?

**Martin:** I think the present situation can be improved. The provisional protection (i.e., the limited protection between when the application is published and when the title is granted by the CPVO) is rather weak. When you create a new variety, you want it to reach the market as soon as possible. Producers/farmers also want to have access to the best new varieties and, ultimately, so do consumers – so it is in everyone’s interest that the varieties are being used. However, if the provisional protection available is weak, there is a risk that commercialisation is put on hold.

In the present situation it is not possible to enforce the plant variety right until the grant decision has been made and that it is clear that the plant variety is distinct, uniform, stable, and novel.

It is clear that the CJEU has marked a relevant distinction in scope between the provisional period of protection for a CPVR applied for (pursuant to Article 95 of the Basic Regulation), according to which only a right to claim reasonable compensation arises, and the definite period of protection afforded for a granted CPVR (pursuant to Article 94 of the Basic Regulation), according to which enforcement rights can be claimed by the CPVR holder from the time of the grant. This finding of the CJEU is not surprising, in so far as it stems naturally from the wording of the cited articles of Regulation 2100/94/EC. However, when considering the findings in this judgment as a whole, the practical impact for CPVR holders is significant, as overall they will lose a certain control over harvested material of their varieties. In essence, the door has been left ajar for farmers to propagate a given plant variety for

which a CPVR title has been applied but not yet granted, without being subject to liability for subsequent harvesting activities. However, once protected, CPVR holders can request reasonable compensation from those nurseries that multiplied their varieties during the provisional period of protection afforded to them.

Some practical implications arising from the described findings can indeed be anticipated. For instance, breeders may consider postponing the marketing of propagating material of the varieties for which the CPVR grant is pending, until the very moment when such CPVR title is granted. However, it should be borne in mind that the technical examination ('DUS' testing) of varieties for which CPVR protection has been applied can take up to several years depending on the species (e.g., fruit trees). Hence, breeders may be inclined to seek alternative solutions in the meantime and re-evaluate their marketing strategies. For example, they may consider entering into licensing contracts imposing certain restrictions on growers, where these contracts should of course be carefully and clearly drafted, so as to be valid and enforceable.

In the framework of the Commission's IP Strategy, it is foreseen that the Basic Regulation will be reviewed by the end of 2022. This provides a window of opportunity to address areas where protection can be improved, such as the provisional protection.

**SIPLR:** What is the rationale for the PVR not having a retroactive effect, like a patent?

**Martin:** I believe the rationale for the missing retroactive effect is that before it is ascertained that a variety complies with the criteria of protection, it should not be possible to hinder others from using this specific variety.

The period of protection of a CPVR is counted from the date of granting. Due to the examination process of the variety, quite some time may pass between the time of application and the grant of the CPVR, depending on the species of the variety and the duration of the DUS examination. Particularly for fruit varieties, the DUS examination takes a long time, often 3–5 years.

However, it is to the benefit of the propagators and growers, as well as consumers, to access new varieties as soon as possible. If there were no protection during this period, breeders would be reluctant to put varieties on the market. Under the current legal framework (Article 95 of the Basic Regulation), the breeder cannot act against unauthorised use of their variety during the period between the application and the grant of the CPVR. If there is an unauthorised use, the applicant has to wait until the right is granted before taking any action. After this, they may require reasonable compensation from any person who used the variety without their authorisation. The result of the current situation is that it is in some cases difficult for the breeder to control the volume and pace of the commercialisation of the variety applied for in the period between the application for plant variety protection and the grant of the title.

Since there is a public interest in using a new variety as soon as possible, it is reasonable that there is an incentive on the part of the applicant for placing the material of the

applied-for variety on the market prior to the grant of protection, in order to put the breeder in a position to control the exploitation of their variety (i.e., to grant licenses and stop unauthorised production).

**SIPLR:** The previously mentioned case leads to questions concerning reasonable compensation. In particular, does a grower who has planted a plant variety during the pre-grant protection period have to pay a reasonable compensation to the PVR holder just once or does the reasonable compensation have to be paid on each harvest? Is there a threshold to what can be considered a reasonable compensation in this case?

**Martin:** No, there is not a fixed limit to the reasonability and whether the compensation has to be paid one, two, three or even more times. The amount would vary depending on the quantities used and the price for the species in question. If the provisional protection lasts for more than one year, it may be possible to collect a reasonable compensation for each year the variety is reproduced.

**SIPLR:** In the context of plant variety rights, it is possible to grant a compulsory license of rights of CPV protections under Article 29 of the Council Regulation (EC) No 2100/94 of 27 July 1994. In 2017, the first application for such a compulsory license was filed for a plant variety of blackcurrants ('Ben Starav'). The CPVO denied the grant of a compulsory license for several reasons. Would you say that the threshold for the grant of a compulsory license is quite high? Do you think that the instrument of a compulsory license will be used frequently in the future for plant variety rights, while it is provided as an option, and under what circumstances? If not, what would be the requirements, apart from public interest, to obtain a compulsory license?

**Martin:** I believe it is necessary to look at the purpose and reason for a provision, before it can be determined if the threshold is high or not. There are specific requirements in the legislation which have to be fulfilled for compulsory licenses to be granted. The PVP system was created as an incentive for breeders to provide varieties which are to the benefit of society. Compulsory licenses are important to ensure that the exclusivity granted is not misused. It is of particular interest for the legislator to ensure that when it comes to food supply, an intellectual property right should not prevail over public interest. However, when there are alternative varieties on the market, which are accessible to producers and consumers, there is in my view no pressing need to grant a compulsory license. This would undermine the protection and in the longer term the incentive to be innovative. I believe that the blackcurrant case did not set the threshold very high, in relation to the purpose for which it was created. Further, I do not see that the instrument of compulsory license will be frequently used since for most species, there are a number of interchangeable varieties available on the market.

## CAREER OPTIONS

**SIPLR:** To conclude our interview, the last question is particularly interesting for students or young professionals who are interested in PVR. What career advice would you give to newcomers in the intellectual property field and also to those who are seeking a career in the public sector, especially at EU agencies?

**Martin:** When I studied law, I was attracted to the idea of working for an international organisation. I applied for a traineeship at the Commission and to some other international organisations – without success. In hindsight, I am very glad that I worked at a Swedish court, learning the details of litigation, as well as at law firms. This gave me detailed insights into dispute resolution. I believe that working with IP rights and working in the public sector can both be very interesting and challenging.

As a piece of career advice, I think that a traineeship/internship is a fantastic entryway to working with international organisations. For students or young professionals interested in plant varieties, such traineeships are provided by the CPVO. Further, the CPVO is also involved in the ‘Pan-European Seal Professional Traineeship Programme’, which is a common traineeship programme of the EUIPO and the EPO. Members of the Pan-European Seal are entitled to submit shortlists for both the EUIPO and the EPO, from which trainees are then selected. The CPVO is offering internship opportunities to trainees with an IP specialisation within the Pan-European Seal programme with the EPO and the EUIPO, and we also have people who have done a traineeship in one of the other IP offices. Internships/traineeships can be the first step towards a future position in the profession. For example, we have a lawyer who did a traineeship at the CPVO. After her traineeship ended, she first worked in other legal positions, but she later got a job at the CPVO in a competition. If you work as a trainee at a place like the EUIPO, the EPO or another international or national organisation and do a good job, it is probably more likely for these organisations to employ you in the future. If an employer has seen someone working well for six or twelve months, the risk of non-performance when this person is employed is reduced.

Otherwise, I think one has to be a bit persistent, seize the opportunities as they come and make the best of them. What is most important is having a positive approach to the work you are doing and trying to be passionate about it. This makes it much more likely that you will do a good job than if you are suffering while working. As the saying goes, when there is a strong wind, some hide behind walls to protect themselves, while others build a windmill.

**SIPLR:** Thank you for taking the time to speak with us and sharing your valuable knowledge, Martin Ekvad!



### Pia Leonarda Riemenschneider

Pia Riemenschneider is currently working as a trainee lawyer at DLA Piper in the field of patent law. After finishing the First State Examination in 2019 at the Rheinische Friedrich-Wilhelms-Universität (Bonn, Germany), she pursued her LL.M. in European Intellectual Property Law at Stockholm University in 2019/2020. In autumn 2021, Pia will start with her Second State Examination in Cologne, Germany.



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