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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL

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Geneva, October 29, 1992

EXAMINATION OF THE CONFORMITY OF THE GOVERNMENT BILL ON VARIETY PROTECTION OF AUSTRIA WITH THE 1978 ACT OF THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated October 21, 1992, Dr. Franz Fischler, Federal Minister for Agriculture and Forestry of Austria, requested the advice of the Council of UPOV on the conformity of the Government Bill on Variety Protection, currently before the Austrian Parliament, with the provisions of the 1978 Act of the UPOV Convention (hereinafter referred to as "the 1978 Act"). The Government Bill was attached, together with its explanatory memorandum, to the letter. Annex I to this document contains the text of the letter and Annex II the text of the Government Bill. The latter incorporates the amendments which have been proposed for inclusion in view of the evolution of the draft for a proposed Regulation of the Council of the European Community on Community plant variety rights.

2. Austria did not sign the 1978 Act. Under Article 32(1)(b) of that Act, it must deposit an instrument of accession to become a member of UPOV on the basis of that Act. Under Article 32(3), an instrument of that kind can only be deposited if the State in question has requested the advice of the Council on the conformity of its laws with the provisions of the 1978 Act and if the decision of Council embodying the advice is positive.

Legal Basis for the Protection of New Plant Varieties in Austria

3. The protection of new plant varieties will be governed in Austria by the Federal Law on the Protection of Plant Varieties (Variety Protection Law) and its implementing regulations. Pursuant to the legal principles governing the hierarchy of legal instruments, the implementing regulations will only supplement the Government Bill, consistent with its provisions.

4. An analysis of the Government Bill is given hereinafter in the order of the substantive law provisions of the 1978 Act.

Article 1(1) of the 1978 Act: Purpose of the Convention

5. Article 1(1) of the 1978 Act provides that "the purpose of this Convention is to recognize and to ensure to the breeder of a new plant variety or to his successor in title ... a right." The Government Bill provides for the grant of "variety protection" ("Sortenschutz"). Under its Section 4(1), the person entitled to protection is the person who has bred, or discovered and developed, a variety or his successor in title.

6. The purpose of the Government Bill thus accords with the purpose of the Convention.

7. It is to be noted that Section 4 of the Government Bill contains further provisions on the entitled persons. In particular, it sets out the principle that variety protection does not revert to the State (subsection (3)) and provides for the application *mutatis mutandis* of the provisions of the Patent Law (Federal Law of 1970, as last amended by Law of June 27, 1985) on inventions of employees to the creation and discovery of varieties by employees (subsection (4)).

Article 2 of the 1978 Act: Forms of Protection

8. The "Sortenschutz" provided for by the Government Bill constitutes a "special title of protection" in the meaning of Article 2(1) of the 1978 Act. On the other hand, the Patent Law provides that patents are not granted, in particular, for plant or animal varieties or essentially biological processes for the production of plants or animals.

9. Article 2(2) of the 1978 Act authorizes member States to limit the application of the protection system within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use. Austria avails itself of this faculty in the definition of "species" given in Section 1(1), item 1.

10. Consequently, the Government Bill of Austria conforms to Article 2 of the 1978 Act.

Article 3 of the 1978 Act: National Treatment; Reciprocity

11. Section 3 of the Government Bill provides for a mixed system of national treatment (for nationals of member States of the European Economic Area (EEA) and natural and legal persons having their place of residence or place of business in one of those States) and reciprocity. The latter is automatic in the case of nationals of UPOV member States (not being members of the EEA) and natural and legal persons having their place of residence or place of business in one of those States, or requires the establishment of its existence in the case of third countries. Such a system exists--explicitly or implicitly--in several UPOV member States that are members of the European Community (EC).

12. The Government Bill contains no provision imposing particular conditions or formalities on a breeder from abroad, except for the obligation to designate an agent which applies, pursuant to the EEA rules, to applicants and rights owners (whatever their nationality) having no place of residence or registered office in the EEA (Section 3(2) of the Government Bill).

13. In conclusion, the Government Bill conforms to Article 3 of the 1978 Act.

Article 4 of the 1978 Act: Botanical Genera and Species Which Must or May be Protected

14. Pursuant to Section 2(1) of the Government Bill, the law will apply initially to 13 taxa. Subsection (2) provides that the Federal Minister for Agriculture and Forestry must extend protection to further taxa, by ordinance, when it is possible to undertake the necessary variety examination and when the commercial production or the marketing of varieties of those taxa responds to a demand in Austria. This is a provision which may be interpreted very broadly. A similar provision appeared formerly in the law of Germany and had been recommended by the plant variety protection authorities of that country as a provision offering to breeders the possibility of requesting an extension of protection to a particular species.

15. Austria will conform initially to Article 4 of the 1978 Act and there is no doubt that it will also conform to it subsequently through an extension of protection to all species that are important in that country.

Article 5 of the 1978 Act: Rights Protected; Scope of Protection

16. The effect of variety protection is defined in Section 6 of the Government Bill in terms that conform to Article 5 of the 1978 Act. In addition to the rights set out in Article 5(1) and (3) of the 1978 Act, the breeder also enjoys in Austria the exclusive right to export propagating material of the protected variety into a State which does not grant equivalent protection in respect of varieties of the species concerned to EEA nationals. The structure of the Section in question is similar to that of Article 10 of the German Law in its version of December 11, 1985.

Article 6 of the 1978 Act: Conditions Required for Protection - Article 38: Transitional Limitation of the Requirement of Novelty

17. The conditions of distinctness, homogeneity and stability, and also novelty, are set out in Section 5 of the Government Bill in terms that are taken over from the draft Regulation of the (EC) Council on Community Plant Variety Rights, which is itself based on the 1991 Act of the Convention. These conditions conform to Article 6(1)(a) to (d) of the 1978 Act.

18. Concerning the condition of novelty, it is to be noted that Austria will provide for a "grace period" of one year for acts of marketing done in that country before the filing of the application. Moreover, the condition is based on the notion of "individuals" which had been defined in the first version of the definition of the variety appearing in Section 1(1), item 2, as "a population of plants and parts of such plants where they comprise more than one cell or cell-line and may be used for the production of plants." Article 6(1)(b) of the 1978 Act refers to commercial acts concerning "the variety" and therefore leaves the interpretation of that expression to the States; the interpretation given by the authors of the Government Bill is perfectly admissible.

19. The obligation to file a denomination appears in Section 20, subsection (2), item 2, of the Government Bill (obligation to indicate a provisional designation or a denomination in the application) and subsection (6) (obligation to propose the denomination in the course of the examination of the application, where it has not been given in the application).

20. The Government Bill contains no supplementary conditions which would not be a formality in the meaning of Article 6(2) of the 1978 Act. The question of fees is dealt with in Section 28 of the Government Bill.

21. The Government Bill thus conforms to Article 6 of the 1978 Act.

22. Section 36 of the Government Bill contains provisions--permitted by Article 38 of the 1978 Act--on the automatic transfer into the Variety Protection Register of the varieties that had been entered into the Breeding Book for Cultivated Plants (Zuchtbuch) as elite varieties (Hochzucht).

Article 7 of the 1978 Act: Official Examination of Varieties; Provisional Protection

23. The examination of the variety, and also the possibility of relying on cooperation in examination, is provided for in Section 23 of the Government Bill in terms which conform to Article 7(1) and (2), and Article 30(2), of the 1978 Act. The said Section also deals with the measures with a view to controlling the maintenance of the variety, which measures are involved in the forfeiture of the breeder's right under Article 10 of the 1978 Act.

24. The Government Bill does not provide for provisional protection, but Article 7(3) of the 1978 Act makes no obligation in that respect.

25. In conclusion, the Government Bill conforms to Article 7 of the 1978 Act.

Article 8 of the 1978 Act: Period of Protection

26. Under Section 8 of the Government Bill, protection will be granted for a duration of 30 years for grapevine, trees and hops, and 25 years for the other species. Those durations exceed the minimum periods set out in Article 8 of the 1978 Act.

Article 9 of the 1978 Act: Restrictions in the Exercise of Rights Protected

27. The provisions of Section 13 of the Government Bill relating to compulsory licences conform to Article 9 of the 1978 Act.

Article 10 of the 1978 Act: Nullity and Forfeiture of the Rights Protected

28. The Government Bill provides that a title of protection may be terminated prematurely by a decision of the competent authorities in three manners:

(i) through annulment, dealt with in Section 10;

(ii) through revocation (Entziehung), referred to in Section 8(2), item 3, and dealt with in Section 9;

(iii) through declaration of lack of title (Aberkennung), referred to in Section 8(2), item 4, and dealt with in Section 11.

29. Pursuant to Article 10(1) of the 1978 Act, the title of protection is annulled when it transpires that the variety was not distinct or new. The retroactive effect of the annulment is expressly stated.

30. Revocation is decided when the owner of variety protection has not ensured the continued existence of the variety (referred to in Section 7(1) of the Government Bill) or has not responded to the requests made by the Variety Protection Office for the purpose of checking the maintenance of the variety, or when an annual fee has not been paid. These grounds conform to Article 10(2) and (3) of the 1978 Act. For each of them, the breeder is given, through a written reminder and the grant of a reasonable additional time limit, the possibility of taking corrective measures.

31. Lack of title is declared where the owner of variety protection was not entitled thereto because he was not the breeder or his successor in title. The declaration of lack of title may be supplemented by a transfer of the right to the entitled person. Although Article 10 of the 1978 Act does not refer to this case, the provisions in question are perfectly legitimate. The annulment of a breeder's right granted to a person who was not entitled thereto is provided for in many member States.

32. In conclusion, the Government Bill conforms to Article 10 of the 1978 Act.

Article 11 of the 1978 Act: Free Choice of the Member State in Which the First Application is Filed; Applications in Other Member States; Independence of Protection in Different Member States

33. The Government Bill contains no provision which would be contrary to Article 11 of the 1978 Act or would authorize the introduction of such a provision by decree.

Article 12 of the 1978 Act: Right of Priority

34. The principle of the right of priority, its practical effect--that is, that the application filed in Austria will be considered as having been filed at the same date as the application whose priority is claimed--and the conditions to be met for priority to be validly claimed are set out in Section 20(4) of the Government Bill in terms conforming to Article 12(1) and (2) of the 1978 Act.

35. The possibility of deferring the examination of the variety is provided for in Section 23(3) of the Government Bill in terms conforming to Article 12(3) of the 1978 Act.

36. Consequently, the Government Bill conforms to Article 12 of the 1978 Act.

Article 13 of the 1978 Act: Variety Denomination

37. The provisions regarding variety denominations appear in Sections 14 to 16 and 20(2), item 3, (6), (7) and (8) of the Government Bill, which together adequately cover the provisions of Article 13 of the 1978 Act. The violation of the obligations regarding use of the denomination (or the prohibition of marketing propagating material where no denomination is registered) is an administrative offence punishable under Section 33 of the Government Bill.

Article 14 of the 1978 Act: Protection Independent of Measures Regulating Production, Certification and Marketing

38. The Government Bill contains no provision whereby protection is subject to some measure regulating production, certification or marketing. It conforms therefore to Article 14 of the 1978 Act.

Article 30(1) of the 1978 Act: Implementation of the Convention on the Domestic Level

39. Appropriate legal remedies for the effective defense of the rights deriving from variety protection are provided for in Sections 30 and 31 of the Government Bill.

40. The administration of the plant variety protection system is entrusted under Section 17 of the Government Bill to the Federal Institute of Plant Production (Bundesanstalt für Pflanzenbau), which will act as the Variety Protection Office. The procedure in cases of annulment or revocation of variety protection, granting of compulsory licences and cancellation of the denomination was attributed to the Nullity Section of the Patent Office.

41. Appeals from decisions of the Variety Protection Office must be lodged with the Federal Minister for Agriculture and Forestry (Section 18 of the Government Bill). The decisions of the Nullity Section of the Patent Office may be challenged with the Supreme Patent and Trademark Chamber (Section 19 of the Government Bill).

42. The publication of information on protection is provided for in Sections 21 and 22 of the Government Bill. Under Section 27(3) the Variety Protection Register is public, except in respect--in particular--of the formulas of hybrid varieties.

43. In conclusion, the Government Bill contains the elements enabling Austria to conform to Article 30(1) of the 1978 Act.

General Conclusion

44. In the opinion of the Office of the Union, the Government Bill essentially conforms to the 1978 Act. A law based on the Bill will enable Austria to "give effect to the provisions of this Convention" as provided by Article 30(3) of the said Act.

45. The Council is invited to:

(i) take a positive decision on the conformity of the Government Bill of Austria on Variety Protection--and, insofar as it becomes law, of the laws of Austria--with the provisions of the 1978 Act;

(ii) authorize the Secretary-General to inform the Government of Austria of that decision.

[Annexes follow]

ANNEX I

LETTER, DATED OCTOBER 21, 1992, FROM MR. FRANZ FISCHLER,
FEDERAL MINISTER FOR AGRICULTURE AND FORESTRY OF AUSTRIA,
TO THE OFFICE OF THE UNION

The Austrian Parliament is currently considering a Government Bill on Variety Protection.

In view of the interest of Austria in becoming a member of UPOV as soon as possible, I have the honor to request herewith the Council to examine the Government Bill and give its advice on the occasion of its session of October 29, 1992.

The amendments expected to be made to the Government Bill and shown in the annex to the Bill are based on the revised proposal of the EC for a Regulation on Community plant variety rights.

It is of course understood that the advice of the Council, which is expected with the greatest interest, can only be subject to the condition that the Bill becomes law.

I should like to thank in advance the Council for its readiness to examine the Government Bill before the latter acquires force of law in Austria.

[Annex II follows]

GOVERNMENT BILL**Federal Law on the Protection of Plant Varieties****(Variety Protection Law)****Part 1****General****Section 1****Definitions**

(1) For the purposes of this Federal Law:

1. "Species" shall mean species of plants and their groupings and subdivisions, including those characterized by a specific system of propagation or a specific final use,
2. "Variety" shall mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be
 - defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
 - distinguished from any other plant grouping by the expression of at least one of the said characteristics and
 - considered as a unit with regard to its suitability for being propagated unchanged;
3. "Propagating material" shall mean seed, plants and parts of plants, intended for the production of plants or for other growing,
4. "Marketing" shall mean announcing, advertising, offering, placing on sale, selling or any other form of cession where such activities are performed commercially,
5. "Related species" shall mean species within a genus or of related genera in which the same or a similar variety denomination can lead to confusion in trade and which are specified in an ordinance under subsection (2), and
6. "Union State" shall mean a member State of the International Union for the Protection of New Varieties of Plants.

(2) The Federal Minister for Agriculture and Forestry shall specify the related species (subsection (1), item 5) by ordinance.

Section 2**Material Scope of Application**

(1) The grant of variety protection may be claimed for varieties of the following species:

1. Wheat (*Triticum aestivum*)
2. Durum Wheat (*Triticum durum*)
3. Barley (*Hordeum vulgare*)
4. Oats (*Avena sativa*)
5. Rye (*Secale cereale*)
6. Maize (*Zea mays*)
7. Potato (*Solanum tuberosum*)
8. Sugar beet (*Beta vulgaris* subsp. *vulgaris* var. *altissima*)
9. Sweet pepper (*Capsicum annuum*)
10. Radish (*Raphanus sativus*)
11. Poplar (*Populus* sp)
12. Willow (*Salix* sp.)
13. Vine (*Vitis* sp.)

(2) The Federal Minister for Agriculture and Forestry shall declare further species to be eligible for protection, by ordinance, if there exists the possibility of carrying out the necessary variety examination (Section 23) and the need for commercial production or marketing of varieties exists in Austria.

Section 3

Right to File Applications

(1) The person having entitlement to the variety (Section 4(1)) may file an application for protection of the variety with the Variety Protection Office if he belongs to one of the following categories of persons:

1. citizens of an EEA State,
2. natural and legal persons, unincorporated commercial law companies and trading companies having their place of residence or place of business in an EEA state,
3. natural and legal persons, unincorporated commercial law companies and trading companies having their place of residence or place of business in a Union State as also nationals of a Union State, if such Union State affords variety protection or an equivalent protective right to varieties of the same species and,
4. natural and legal persons, unincorporated commercial law companies and trading companies if, in the States to which they belong or in which they have their place of residence or place of business, Austrian citizens may obtain variety protection or an equivalent right for varieties of the same species and the fact that this condition is met has been established by ordinance of the Federal Minister for Agriculture and Forestry.

(2) A person who has neither place of residence nor place of business in an EEA State may only assert rights under this Federal Law before the Variety Protection Office or before the Federal Minister for Agriculture and Forestry through a representative with powers of attorney and before the Nullity Section of the Patent Office or before the Supreme Patent and Trademark Chamber through an attorney-at-law or a patent attorney. A representative who is not an attorney-at-law or patent attorney must have his place of residence in Austria. Patent attorneys and attorneys-at-law shall be subject to the regulations governing their profession. The powers of attorney shall entitle the representative to assert any rights under this Federal Law before those authorities; any restriction of the powers of attorney shall be without effect. The powers of attorney shall be submitted in the original or as a certified copy.

Section 4

Entitled Persons

- (1) The person who has bred or discovered and developed a variety (original breeder) or his successor in title may claim the grant of variety protection. If more than one person has discovered or bred the variety jointly, the claim shall belong to such persons jointly. If more than one person has discovered or bred the variety independently, Section 20(4) shall be of application.
- (2) Save proof to the contrary, the person who first files an application for the variety shall be deemed to be the entitled person.
- (3) Variety protection may be assigned. It shall not revert to the State.
- (4) Sections 6 to 19 of the Patent Law 1970, BGBl. Nr. 259, shall apply mutatis mutandis to varieties discovered or bred by employees.

Section 5

Variety Requirements

- (1) Variety protection shall be granted by the Variety Protection Office for varieties that are distinct, homogeneous, stable and new.
- (2) A variety shall be deemed to be distinct if its individuals are clearly distinguishable, as a whole or with respect to a specific distribution, in the expression of at least one characteristic, from the individuals of all other varieties that are a matter of common knowledge on the filing date of the application. The existence of another variety shall be a matter of common knowledge, in particular, if, on the day of the application,
 - (a) it is already entered in an official list of varieties,
 - (b) its entry in an official list of varieties had been applied for, subject to subsequent acceptance of the application, or
 - (c) individuals of the variety have been propagated for commercial purposes or individuals, other plant parts or harvested material of the variety and products directly obtained therefrom have already been offered, supplied to others, used, imported or exported.
- (3) A variety shall be deemed to be homogeneous if its individuals, as a whole or with respect to a given distribution, are sufficiently uniform in the expression of each relevant characteristic, notwithstanding a small number of variations, taking into account the particular features of its propagation.
- (4) A variety shall be deemed to be stable if its individuals, as a whole or with respect to a given distribution, correspond in each relevant characteristic to the expression that is characteristic of the variety after each propagation or each propagation cycle.
- (5) A variety shall be deemed to be new if, on the filing date of the application, individuals of the variety have not yet been supplied to others for commercial purposes or, if so, only within the following periods of time:
 - (a) one year in Austria
 - (b) four years, or six years in the case of vine and trees, abroad.

Section 6

Effect of Variety Protection

- (1) Variety protection shall have the effect that the owner of variety protection alone shall be entitled to
1. market propagating material of the protected variety or produce it for such purpose or
 2. utilize plants or parts of plants of the protected variety, normally marketed for purposes other than those of propagation, for the commercial production of ornamental plants or cut flowers or
 3. utilize propagating material of the protected variety for the commercial production of propagating material of another variety where propagating material of the protected variety must be used repeatedly to produce the propagating material of the other variety or
 4. introduce propagating material of the protected variety into another State in which natural and legal persons and unincorporated commercial law companies having their place of residence or place of business in an EEA State and citizens of an EEA State are not granted variety protection or an equivalent protective right for varieties of the same species.
- (2) The use of propagating material of a protected variety as initial material for creating a new variety and the marketing thereof shall not require the consent of the owner of variety protection, subject to subsection (1), item 3.

Section 7

Obligations of the Owner of Variety Protection

- (1) The owner of variety protection shall be required to take the necessary measures to ensure the continued existence of the variety.
- (2) The owner of variety protection shall be required, at the request of the Variety Protection Office, to provide free of charge to that Office the propagating material of the variety required for examination of the protected variety and also propagating material of hereditary components used in producing the variety and to provide any information required to assess the continued existence of the variety.
- (3) The owner of variety protection shall enable the Variety Protection Office to verify that the continued existence of the variety is ensured and shall provide all necessary information.

Section 8

Duration and Termination of Variety Protection

- (1) The duration of protection shall be 30 years in the case of vine and trees, including their rootstocks, and in the case of hops and 25 years in the case of all other species as from grant of variety protection.
- (2) Variety protection shall terminate

1. on renunciation of protection by the owner of variety protection
2. on expiry of the term of protection,
3. on entry into force of revocation (Section 9),
4. on entry into force of a declaration of lack of title where no transfer takes place (Section 11(5)).

(3) Termination of variety protection as a result of renunciation shall take effect at the beginning of the day following communication of renunciation to the Variety Protection Office.

Section 9

Revocation of Variety Protection

Variety protection shall be revoked by the Variety Protection Office if the owner of variety protection, despite a written reminder and the grant of a reasonable additional time limit,

1. does not satisfy his obligations under Section 7 or
2. does not pay the required annual fee.

Section 10

Annulment of Variety Protection

Variety protection shall be annulled on request by the Nullity Section of the Patent Office if it transpires that the variety was not distinct (Section 5(2)) or was not new (Section 5(5)). The final declaration of nullity shall have retroactive effect as from the day of grant of variety protection.

Section 11

Declaration of Lack of Title and Ex Officio Transfer of Variety Protection

(1) Variety protection shall be withdrawn by the Nullity Section of the Patent Office, on request, from the owner of variety protection if it is proved that he was not entitled thereto (Section 4(1)).

(2) Together with the request for declaration of lack of title to variety protection, the petitioner may request the Nullity Section of the Patent Office to transfer the variety protection to himself ex officio.

(3) The right to declaration of lack of title and ex officio transfer of variety protection shall belong exclusively to the person who has the right to grant of variety protection and it shall lapse in respect of a bona fide owner of variety protection within 3 years of the time of entry in the Variety Protection Register.

(4) Any reciprocal claims to damages or reimbursement deriving from the declaration of lack of title and the transfer shall be assessed in accordance with civil law and asserted in civil proceedings.

(5) Where no transfer takes place, variety protection shall expire with the entry into force of the declaration of lack of title.

(6) Transfer shall become effective on entry in the Variety Protection Register.

Section 12

Voluntary Licenses

The owner of variety protection shall be entitled to permit other persons to use the protected variety (Section 6).

Section 13

Compulsory Licenses

(1) Where it appears justified to ensure that domestic plant production is adequately supplied with suitable propagating material and it is economically acceptable for the owner of variety protection, permission shall be granted by the Nullity Section of the Patent Office on request to commercially produce, market or repeatedly use in the production of another variety propagating material of a protected variety without the consent of the owner of variety protection. Permission shall only be granted where the applicant convincingly shows that the objectives of the compulsory license can be attained.

(2) The compulsory license shall be restricted or withdrawn by the Nullity Section of the Patent Office, on a request from the owner of variety protection, where the grounds for its grant no longer apply.

(3) The entitled person may renounce the compulsory license at any time.

(4) The owner of variety protection shall be required to make propagating material available to the person entitled under the compulsory license, to at least the extent necessary for the maintenance breeding that corresponds to the scope of the compulsory license.

(5) The owner of variety protection shall have a claim to appropriate remuneration from the person entitled under the compulsory licence. Both this remuneration and the necessary guarantee, where appropriate, shall be determined on request by the Nullity Section of the Patent Office.

Section 14

Variety Denomination

(1) A variety denomination shall be registered by the Variety Protection Office for each protected variety.

(2) A variety denomination may consist of three identifying elements at most (words, letters or groups of letters, numbers), but not exclusively of numbers.

(3) Denominations shall be excluded from registration where they

1. are similar to a denomination that is used or has been used, in Austria or in any other Union State, for a variety belonging to the same species

as the filed variety or to a related species (Section 1(2)), unless the earlier variety is no longer protected and is no longer used and its denomination has acquired no special significance,

2. may cause offense,
3. are likely to mislead, particularly as regards identity, origin, properties or value of the variety,
4. consist exclusively of statements as to their nature or of names of plants,
5. contain the words "variety" or "hybrid."

(4) Where the variety has already been filed or protected in another Union State, only the variety denomination used in such state may be registered by the Variety Protection Office, except where excluded under subsections (2) and (3).

(5) Once the variety has been entered in the Variety Protection Register, the owner of variety protection may not assert, in respect of the variety concerned, any rights he may have in a mark that is similar to the variety denomination.

(6) The variety denomination shall be cancelled ex officio by the Variety Protection Office if it transpires that the denomination does not satisfy subsection (2), subsection (3), items 1-5, or subsection (4) or if the owner of variety protection himself requests cancellation and is able to prove a legitimate interest. A variety denomination shall further be cancelled by the Variety Protection Office on the basis of a final decision given as the result of a cancellation request under Section 16. In such cases, the Variety Protection Office shall invite the owner of variety protection to submit a new variety denomination for registration, whereby subsection (4) shall not be of application.

(7) The Variety Protection Office shall communicate the registered variety denomination and the species to which the protected variety belongs without delay in writing to the Patent Office.

Section 15

Obligation to Use a Denomination

Propagating material of a variety may only be marketed during the term of variety protection under the variety denomination registered with the Variety Protection Office. Where no variety denomination is registered for the protected variety, propagating material of the variety may not be marketed. Even after the expiry of variety protection, propagating material of the variety may only be marketed under the registered variety denomination.

Section 16

Request for Cancellation of a Variety Denomination

(1) The cancellation of a variety denomination may be requested from the Nullity Section of the Patent Office

1. by the owner of a trademark for the same type of goods or services that was filed before registration of the variety denomination and which is still lawfully valid (Section 14 of the Trademark Protection Law 1970),
 2. by any person who shows that an unregistered mark used by him for the same type of goods or services was already recognized by the trade circles concerned as an identification for the goods or services of his undertaking at the time of registration of a similar variety denomination (Section 14 of the Trademark Protection Law 1970) or
 3. by an entrepreneur if his name, his trade name or the particular designation of his undertaking or a designation similar to one of such designations (Section 14 of the Trademark Protection Law 1970) has been registered as a variety denomination or as an element of such denomination and if the use of the variety denomination is likely to lead to confusion in commercial transactions with one of the above-mentioned signs of the petitioner's undertaking.
- (2) Cancellation under subsection 1, item 2, must be requested from the Nullity Section of the Patent Office within three years of entry of the variety denomination in the Variety Protection Register, unless the mark was known to the owner of variety protection at the time of entry in the Variety Protection Register as identification of the goods or services of the petitioner's undertaking or should have been known to him.
- (3) Once variety protection has expired, cancellation proceedings shall be conducted unilaterally by the Nullity Section of the Patent Office.

Part 2

Authorities

Section 17

Variety Protection Office

The Federal Institute of Plant Production (Section 21 of the Federal Law on Federal Agricultural Institutes, BGBI Nr. 230/1982) shall act as the Variety Protection Office.

Section 18

Federal Minister for Agriculture and Forestry

Appeals from decisions taken by the Variety Protection Office shall be heard by the Federal Minister for Agriculture and Forestry. Where it is necessary to take expert evidence, the Federal Minister for Agriculture and Forestry may also call on institutes and other offices as experts.

Section 19

Nullity Section of the Patent Office; Supreme Patent and Trademark Chamber

(1) Appeals from final decisions of the Nullity Section of the Patent Office shall be heard by the Supreme Patent and Trademark Chamber. The Patent Law

1970 shall apply to proceedings before the Nullity Section of the Patent Office and before the Supreme Patent and Trademark Chamber. The provisions on fees in Section 168(1), items 3 and 4, of the Patent Law 1970 shall likewise apply.

(2) On a proposal by the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Economic Affairs, the Federal President shall additionally appoint such number of non-standing technically qualified members of the Patent Office and such number of technically qualified and legally qualified members of the Supreme Patent and Trademark Chamber as are necessary to assume the duties under this Federal Law. Only persons with qualifications in variety protection matters may be appointed.

(3) The composition of the Chamber in proceedings under Sections 10, 11 and 13 shall be governed by the Patent Law 1970, with the proviso that each Chamber of the Nullity Section of the Patent Office shall comprise a technically qualified member and each Chamber of the Supreme Patent and Trademark Chamber shall comprise a legally qualified and a technically qualified member appointed on the proposal of the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Economic Affairs. The composition in proceedings under Section 16 shall be governed by the Trademark Protection Law 1970.

Part 3

Procedure

Section 20

Variety Application and Communication of the Variety Denomination

(1) An application for variety protection in respect of the variety shall be filed with the Variety Protection Office.

(2) The application shall contain:

1. the name and address of the applicant for the variety and of his representative, where appropriate,
2. the species and, where appropriate, the type of use, the propagating system and a statement that certain hereditary components are used in each propagating cycle to produce the variety,
3. the provisional designation (subsection (6)) or the variety denomination (Section 14) and
4. the category of persons to which the applicant belongs in accordance with Section 3(1).

(3) The application shall be accompanied by:

1. a description of the characteristics that determine the distinctness of the variety,
2. evidence of the statements made under subsection (2), item 4, and
3. the powers of attorney (Section 3(2)), where the applicant acts through a representative.

(4) Where a variety is filed with the Variety Protection Office by more than one person, independently of each other, the earlier application shall take precedence over the subsequent applications. The day of receipt of the application at the Variety Protection Office shall be decisive. Where more than one application is received on the same day, they shall all have the same precedence.

(5) By derogation from the second sentence of subsection (4), where the applicant has already filed an application for variety protection for the variety in another Union State, the Variety Protection Office shall grant him precedence corresponding to the date of that application (priority right). However, the priority right shall only be acquired if:

1. it is explicitly claimed in the application filed with the Variety Protection Office,
2. at the time of assertion, not more than one year has passed since the application in the other Union State and
3. three months, at the latest, after assertion, proof is furnished of the earlier application by submitting copies of the application documents; the copies must have been certified by the foreign application authority.

(6) The provisional designation shall only be valid for the variety protection granting procedure. Section 14(3), items 2 and 3, shall be of application. Where the result of the variety examination (Section 23) is positive, the Variety Protection Office shall invite the applicant, in the case of a variety for which only a provisional designation has been given, to communicate a variety denomination within the meaning of Section 14 and shall set a reasonable time limit. Where the applicant does not comply with this invitation, the application for the variety shall be rejected by a decision of the Variety Protection Office.

(7) Where the provisional designation or variety denomination is not acceptable, the applicant shall be invited by the Variety Protection Office to communicate an acceptable designation or denomination within a reasonable period of time. Where no communication is made within the time limit, the application for the variety shall be rejected by a decision of the Variety Protection Office.

(8) The order of precedence of a variety denomination shall be governed by subsection (4), mutatis mutandis, with the proviso that in the event of communications of variety denominations for varieties of related species having the same precedence, lots shall be drawn by the Variety Protection Office to decide for whom the communicated variety denomination is to be registered should no agreement be achieved.

Section 21

Plant Variety Gazette

(1) The Variety Protection Office shall publish a Plant Variety Gazette to appear at least quarterly.

(2) In addition to the communications governed by Section 22, the Variety Protection Office shall communicate the withdrawal, refusal and rejection of published variety applications, the grant, termination, nullity and lack of

title of variety protection, changes in the identity of the owner of variety protection and the publication, change or cancellation of variety denominations and ordinances issued under this Law--notwithstanding their publication in the Federal Law Gazette--in the Plant Variety Gazette.

(3) Additionally, decisions of courts and administrative authorities and information of general interest concerning variety protection matters may also be published.

Section 22

Publication of Applications

(1) The Variety Protection Office shall publish in the Plant Variety Gazette, on the basis of the particulars provided by the applicant, those applications for varieties that are not automatically to be refused or rejected. The publication shall contain the species, the variety denomination or provisional designation (Section 20(6)), the date of the application, a claim to priority, where appropriate, the name and address of the variety applicant, and the file number of the application.

(2) The Variety Protection Office shall permit any person, on request, to inspect the application documents and the test results and shall allow the growing trials to be viewed (Section 23(1)). Access shall not be afforded to documents in accordance with Section 20(3), item 2, and to data on the hereditary components in the case of varieties whose plants are produced by crossing specific hereditary components.

Section 23

Variety Examination

(1) The Variety Protection Office shall examine, on the basis of its own growing trials or other suitable investigations, whether the variety meets the requirements of Section 5 (registration examination). The examination shall be carried out for as long as required to obtain a reliable assessment. The applicant shall provide to the Variety Protection Office, on demand, the propagating material of the variety needed for the examination, together with the hereditary components used in the production of the variety, free of cost, and shall further give full information on the maintenance of the variety and permit its verification. The applicant shall be required, for the purpose of verification, to permit the Variety Protection Office to visit his facilities, to take the necessary quantity of free samples of the variety and to inspect the records concerning maintenance of the variety.

Where the applicant fails to comply with these obligations, despite a written reminder and the stipulation of an appropriate additional time limit, the application shall be rejected by the Variety Protection Office.

(2) The Variety Protection Office may base its assessment on the results of other examination bodies in EEA States or in Union States in lieu of its own examinations where such examination bodies may be considered for registration examination in view of their technical facilities, their testing methods and the local growing conditions and where the results are available to the Variety Protection Office.

(3) Where the applicant may claim a priority right (Section 20(5)), the examination shall be postponed, at his request, by the Variety Protection Office for up to 5 years at most following the application in the other Union State. Withdrawal or refusal of the application in the Union State concerned shall cause the examination to be put in hand by the Variety Protection Office within a suitable period of time.

(4) After grant of variety protection, the Variety Protection Office shall verify that the continued existence of the protected variety is assured if there is any doubt whether the owner of variety protection has taken adequate steps to ensure the continued existence of the variety (Section 7(1)). The Variety Protection Office shall be entitled, for the purposes of verification, to visit facilities, take the necessary quantity of free samples of the variety and inspect the records concerning maintenance of the variety.

(5) The Variety Protection Office shall be entitled to communicate the results of variety examinations carried out by the Office itself or by other Austrian examination bodies to foreign bodies competent for the grant of variety protection or of an equivalent protective right.

Section 24

Objections to Variety Applications

(1) Any person may lodge a reasoned objection, in writing, with the Variety Protection Office on the grounds that

1. the variety does not satisfy the requirements of Section 5 or
2. the variety denomination is not acceptable (Section 14(2) to (4)) or
3. the applicant is not an entitled person (Section 4(1)).

(2) Objections under subsection (1), item 1, may be submitted during the whole duration of the procedure, objections under subsection (1), item 2, until expiry of three months after publication of the variety denomination in the Plant Variety Gazette and objections under subsection (1), item 3, until expiry of three months after publication of the variety application in the Plant Variety Gazette.

(3) Objections under subsection (1), items 2 and 3, must have been received at the Variety Protection Office by the last day of the time limit (subsection (2)) at the latest.

(4) The Variety Protection Office shall examine the objections lodged and take into account the result of such examination in taking its decision.

(5) The person lodging the objection shall be informed, if he so requests in writing, by the Variety Protection Office of the result of the examination under subsection (4). Where an objection under subsection (1), item 3, results in final rejection or refusal or withdrawal of a variety application, the person lodging the objection shall be informed thereof by the Variety Protection Office in writing without delay. Where the person lodging the objection files an application for the variety within one month of service of the written communication and where he proves that he is the entitled person (Section 4(1)), he may require that the filing date be the date of the earlier application.

(6) Where an objection under subsection (1), item 2, is justified, the Variety Protection Office shall proceed in accordance with Section 20(7).

Section 25

Grant of Variety Protection

If an acceptable variety denomination has been communicated for the filed variety (Section 14(2) to (4)) and the other requirements for the grant of variety protection have been satisfied, the Variety Protection Office shall grant variety protection by entry in the Variety Protection Register. A certificate attesting thereto shall be issued to the owner of variety protection. If no entry is made in the Variety Protection Register, the Variety Protection Office shall issue a notification of refusal.

Section 26

Transfer of Variety Protection

(1) The legal transfer of variety protection shall take effect on entry in the Variety Protection Register.

(2) The order of precedence shall be determined by the chronological order in which requests for entry are received at the Variety Protection Office, on condition that the request results in an entry. Requests that are received at the same time shall enjoy the same precedence.

(3) Entry in the Variety Protection Register shall be effected on a written request to the Variety Protection Office by one of the persons concerned.

(4) The certificate on the basis of which the entry is to be effected shall be submitted, in the original, or in a duly certified copy, together with the request for entry. Where the certificate is not a public document, it shall be required to bear the duly certified signature of the person exercising his right.

(5) The request for entry and the certificate shall be subject to formal and substantive examination by the Variety Protection Office.

Section 27

Variety Protection Register

(1) The Variety Protection Office shall keep a Variety Protection Register.

(2) There shall be entered in the Variety Protection Register, together with the date of the entry:

1. the registration number,
2. the date of the application and, where appropriate, the date of priority,
3. the species, the type of utilization if necessary, the propagation system and a note that the variety is produced in each cycle of propagation with the use of certain hereditary components,

4. the variety denomination,
5. the name and address of the owner of variety protection and of his representative,
6. the day on which variety protection begins,
7. the name and address of owners of voluntary licenses and of compulsory licenses,
8. the right of use of the employer (Section 4(4)),
9. the note on pending procedures before the Nullity Section of the Patent Office and the Supreme Patent and Trademark Chamber (Sections 10, 11, 13 and 16),
10. the day and reason for termination of variety protection,
11. the declaration of nullity,
12. the declaration of lack of title and,
13. transfers.

(3) The Variety Protection Register shall be public. Inspection of the documents on which entry is based and viewing of the growing trials (Section 23(1) and (4)) shall be permitted by the Variety Protection Office to any person. Access shall not be available to documents submitted in accordance with Section 20(3), item 2, or, in the case of varieties of which the plants are produced by crossing certain hereditary components, to data concerning those hereditary components.

(4) On request, the Variety Protection Office shall issue certified extracts from the Variety Protection Register against reimbursement of costs.

(5) The capture and processing of data for the purposes of the automated keeping of the Variety Protection Register shall be permitted.

Section 28

Application Fees, Examination Fees and Annual Fees

(1) When applying for a variety, the applicant shall pay an application fee to the Variety Protection Office.

(2) The application fee shall be laid down by ordinance of the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Finance, as a lump sum corresponding to the average administrative costs--with the exception of the costs of variety examination (subsection (4))--normally incurred in connection with the processing of applications.

(3) Where the application fee or an examination fee that has become due has not been paid by the applicant despite a written reminder from the Variety Protection Office and the grant of a reasonable additional time limit, the variety application shall be rejected by the Variety Protection Office.

(4) Examination fees shall be paid by the applicant for variety examinations under Section 23(1) and (2) carried out by Austrian examination bodies.

(5) The examination fees shall be laid down by ordinance in a schedule of fees issued by the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Finance, in accordance with the average costs incurred for examinations as a result of experience.

(6) The examination fees shall be prescribed by the Variety Protection Office for each growing period that has been commenced. However, they shall be prescribed by the Variety Protection Office once only if complete test results are available to the Office at the beginning of the growing period following the application for variety protection, which results satisfy the requirements of Section 5(2) to (4) and have been obtained either by an examination body of an EEA State outside a procedure under this Federal Law or on the basis of an application for entry of the variety in the Breeding Book for Cultivated Plants (Section 4(1) of the Plant Breeding Law, BGBl. No. 34/1947). The costs of variety examinations in accordance with Section 23(2), carried out by examination bodies of Union States, shall constitute cash expenditure (Section 76 of the AVG [General Procedural Law] 1950, BGBl. No. 172).

(7) Annual fees shall be paid by the owner of variety protection to the Variety Protection Office for each year that has been commenced (protection year) during the term of variety protection. The annual fee for the first protection year shall be 1,000 Sch. For each further protection year up to the sixteenth year of protection, the annual fee in the case of wheat, barley, oats, rye, maize, potato, sugarbeet, peas, seed rape and sunflower shall increase by 500 Sch., and for other species by 300 Sch., as against the annual fee for the preceding protection year in each case. From the seventeenth protection year onwards, the annual fee shall remain the same.

(8) The annual fee for the first protection year shall become due two months after grant of variety protection. The annual fee for each further protection year that has been commenced shall be due in advance on the anniversary of the date of grant of variety protection. Annual fees may be paid two months before they become due.

Section 29

Procedural Provisions

Where not otherwise laid down by this Federal Law, the Variety Protection Office shall apply the AVG [General Procedural Law?] 1950.

Part 4

Civil Law and Penal Law Provisions

Section 30

Civil Law Claims

Any person who has suffered an infringement of a right belonging to him under variety protection may take action for injunction, removal, publication of judgment, appropriate compensation, damages, surrender of profit and rendering of accounts; any person who has reason to suspect such infringement may

also take action for injunction. Sections 147 to 154 of the Patent Law 1970 shall apply mutatis mutandis.

Section 31

Penal Infringement of Variety Protection

(1) Any person who violates variety protection (Section 6) shall be sentenced by the Court to a fine of up to 360 daily rates.

(2) The same penalty shall be imposed on the owner or director of an enterprise who does not prevent the infringement of variety protection committed by a person working for him or on his behalf in the course of the activities of the enterprise. Where the owner of the enterprise is a legal person, this provision shall apply to the bodies of the enterprise guilty of such omission. The enterprise shall be jointly and equally liable with the guilty party for the fines inflicted on the bodies.

(3) Prosecution shall take place only at the request of the injured party.

(4) Sections 148, 149 and 160 of the Patent Law 1970 shall apply mutatis mutandis for the penal procedure.

Section 32

Jurisdiction

(1) The Commercial Court of Vienna shall have exclusive jurisdiction for actions and injunctions under this Federal law. Sections 7(2), first sentence, 7a and 8(2) of the Jurisdictional Rules shall be of application. This shall also apply to injunctions.

(2) Jurisdiction in penal matters under this Federal Law shall belong to the Provincial Courts competent to hear penal matters.

Section 33

Administrative Offenses

Where the act does not constitute a punishable act within the jurisdiction of the courts or is not liable to heavier penalties under other provisions, any person who:

1. markets propagating material of a variety without using the variety denomination required by Section 15,
2. infringes the marketing prohibition under Section 15,
3. uses a variety denomination entered in the Variety Protection Register or a similar denomination for a different variety of the same or of a related species,
4. in the course of marketing, claims non-existent variety protection or
5. fails to comply with the obligation under Section 13(4) to make propagating material available,

shall have committed an administrative offense and shall be sentenced by the district administrative authority to a fine of up to 100,000 Sch.

Part 5

Final and Transitional Provisions

Section 34

Citations of Other Federal Laws

Where citation is made in this Federal Law to other Federal Laws preference shall be to the current version of such laws.

Section 35

Provision on Entry Into Force

- (1) This Federal Law shall enter into force on January 1, 1993.
- (2) Ordinances under this Federal Law may already be issued on the day following its promulgation. Such ordinances may take effect at the earliest on January 1, 1993.

Section 36

Transitional Provision

Varieties that, on the day of entry into force of this Federal Law, are entered in the Breeding Book for Cultivated Plants (Sections 8, 9 and 10 of the Plant Breeding Law) as elite, with or without reservation, shall be entered ex officio in the Variety Protection Register two months after entry into force of this Federal Law if the Variety Protection Office does not receive within one month of the entry into force of this Federal Law a written declaration of renunciation by the breeder. Where the variety denominations of such varieties do not comply with Section 14(2) to (4), Section 14(6) shall be of application. The period during which the variety was entered in the Breeding Book as elite, with or without reservation, shall be taken into account for the period of protection and for the calculation of the annual fees (Section 28(7)); however, calculation of the period of protection and of the annual fees shall only take into account the full years in which the variety was entered in the Breeding Book for Cultivated Plants. The expiry of the period of protection (Section 8(2), item 2, in conjunction with Subsection (1)) shall nevertheless not take place less than ten years after entry into force of this Federal Law.

Section 37

Implementation

The following shall be responsible for the implementation of this Federal Law:

1. in the case of Section 16, the Federal Minister for Economic Affairs,
2. in the case of Sections 30 to 32, the Federal Minister for Justice,
3. in the case of Section 3(2), last sentence, Sections 10, 11, 13 and Section 19(1) and (3), the Federal Minister for Economic Affairs, in agreement with the Federal Minister for Agriculture and Forestry,
4. in the case of Section 14(7) and Section 19(2), the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Economic Affairs,
5. in the case of Section 28(2) and (5), the Federal Minister for Agriculture and Forestry, in agreement with the Federal Minister for Finance, and
6. in the case of all other provisions of this Federal Law, the Federal Minister for Agriculture and Forestry.

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