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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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EXAMINATION OF THE CONFORMITY OF THE LAWS
OF ROMANIA WITH THE 1991 ACT
OF THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated February 23, 1999, Mr. Gabor Varga, Director General of the State Office for Inventions and Trademarks of Romania, requested the advice of the Council of UPOV on the conformity with the UPOV Convention of the Law on the Protection of New Plant Varieties (hereinafter referred to as "the Law") which was adopted by the Parliament of Romania on December 30, 1998. The Annex to this document contains a translation of the Law, as submitted by the Romanian authorities and edited by the Office of the Union. The Law is analyzed below for conformity with the 1991 Act of the UPOV Convention (hereinafter referred to as "the Convention").
2. Romania did not sign the Convention. Under Article 34(2) of the Convention, it must deposit an instrument of accession in order to become a member State of UPOV on the basis of the Convention. Under Article 34(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 Convention and if the decision of the Council embodying the advice is positive.

Basis for the Protection of New Plant Varieties in Romania

3. The protection of new plant varieties will be governed in Romania by the Law and its implementing regulations. An analysis of the Law follows in the order of the substantive law provisions of the Convention.

Article 1 of the Convention: Definitions

4. Article 2(a) of the Law reproduces the essence of the definition of “variety”; Article 2(d) reproduces the essence of the definition of “breeder.” Further provisions on the persons who are entitled to apply for a plant patent in particular cases, and on the entitlements of the employee who has created a variety, are set out in Article 10 of the Law in terms which satisfy the provisions of the Convention.

Article 2 of the Convention: Basic Obligation of the Contracting Parties

5. As set out in its Article 1, the Law is dedicated to the protection and recognition of breeders’ rights through the grant of “plant patents” by the State Office for Inventions and Trademarks. The Law thus complies with Article 2 of the Convention.

6. Article 46(4) of the Law provides for the repeal of the provisions of the Patent Law No. 64/1991 which governed the protection of plant varieties by (industrial) patents, so that the newly established plant patent will be the exclusive form of protection for plant varieties.

Article 3 of the Convention: Genera and Species to be Protected

7. The Law will apply to all genera and species.

Article 4 of the Convention: National Treatment

8. Article 3 of the Law provides for the application of the terms and conditions set out in international conventions concerning plant variety protection to which Romania is a party. The Law thus enables Romania to conform with Article 4 of the Convention. The provisions on the appointment of a representative are set out in Article 4 of the Law.

9. The attention is drawn to Article 43 of the Law, which provides for differentiated obligations with respect to the payment of fees. It is considered that, should those provisions contravene the principle of national treatment enshrined in the UPOV Convention or some other international treaty, the treaty obligations entered into by Romania would prevail.

Articles 5 to 9 of the Convention: Conditions of Protection; Novelty; Distinctness; Uniformity; Stability

10. The conditions for protection are set out in Articles 5 to 9 of the Law in language which, subject to the following, mirrors Articles 5 to 9 of the Convention and the UPOV

Model Law and includes matter dealt with in Regulation No. 2100 of the Council of the European Union on Community Plant Variety Rights.

(a) Article 6(1) of the Law refers to fruit trees and ornamental trees, but not forest trees. This is an omission that can perhaps be corrected in the application of the Law.

(b) Article 6(2)(a) states that novelty is not lost as a result of an agreement on the transfer of the rights in the variety, but makes it conditional upon commercial exploitation not having taken place prior to the filing of the application. The latter condition is superfluous and would in fact have to be interpreted in the light of paragraph (1) (that is, made subject to the periods of time mentioned therein).

(c) Article 6(2)(d) makes a reference to Article 29 which is perhaps erroneous.

(d) The relationship between Article 6(2)(d) and (f) is unclear.

11. Notwithstanding the points mentioned above, the Law can be taken to essentially conform with Articles 5 to 9 of the Convention.

Article 10 of the Convention: Filing of Applications

12. The Law contains no provisions which conflict with those of Article 10 of the Convention; Article 45 of the Law sets out the principle of free choice of the State in which to file the first application.

Article 11 of the Convention: Right of Priority

13. Article 14 of the Law sets out the right of priority in accordance with Article 11 of the Convention. However, the Law does not provide for the possibility of delaying the supply of information, documents and material set out in Article 11(3) of the Convention. This may be remedied through the implementing regulations. It is to be noted that Article 22 of the Law provides for a possibility, open to all applicants, to delay the processing of the application by one year.

Article 12 of the Convention: Examination of the Application

14. Chapter IV of the Law (Articles 11 *et seq.*) makes provisions for the processing of the application and the examination of the variety that is the subject of an application in terms which satisfy Article 12 of the Convention.

Article 13 of the Convention: Provisional Protection

15. Article 21 of the Law specifies that the applicant enjoys provisional protection in the period from the date of publication of his application to the date of the grant of the plant patent, and that he has provisionally all the rights deriving from a plant patent. The Law thus conforms with Article 13 of the Convention.

Article 14 of the Convention: Scope of the Breeder's Right

16. Article 27(1) of the Law sets out an exclusive right of exploitation and a right to prevent others from performing the acts specified in Article 14(1)(a) of the Convention in respect of both the propagating and the harvested material. Whilst this provision satisfies Article 14(1) and (2) of the Convention, the reference to an exclusive right, which is also found in the EC Regulation, would deserve further reflection insofar as a positive right to do may compete with another such right, for instance in the case of an essentially derived variety.

17. Article 27(2) of the law provides for the extension of the right to the varieties specified in Article 14(5) of the Convention.

18. The Law accordingly conforms with Article 14 of the Convention.

Article 15 of the Convention: Exceptions to the Breeder's Right

19. Article 28 of the Law sets out the compulsory exceptions to the breeder's right in terms which satisfy Article 15(1) of the Convention. It is to be noted that the same Article provides for an obligation by any person using the protected variety within the limits of the exceptions to provide information to the holder of the plant patent upon his request.

20. The Law does not provide for a "farmer's privilege" as permitted by Article 15(2) of the Convention

Article 16 of the Convention: Exhaustion of the Breeder's Right

21. Article 29 of the Law sets out the exhaustion the breeder's right in terms which satisfy Article 16 of the Convention.

Article 17 of the Convention: Restrictions on the Exercise of the Breeder's Right

22. Article 37 of the Law contains provisions concerning the grant of compulsory licenses which satisfy the provisions of Article 17 of the Convention, provided that the conditions referred to in its paragraph (1) are cumulative.

Article 18 of the Convention: Measures Regulating Commerce

23. The Law contains no provisions which conflict with Article 18 of the Convention.

Article 19 of the Convention: Duration of the Breeder's Right

24. Article 26 of the Law provides that protection lasts 25 years, or 30 years in the case of fruit and ornamental trees, and grapevine. As in the case of Article 6 (novelty), forest trees are not mentioned.

Article 20 of the Convention: Variety Denomination

25. Article 15 of the Law contains provisions which satisfy Article 20 of the Convention.

Article 21 of the Convention: Nullity of the Breeder's Right

26. Article 24 of the Law contains provisions on the revocation of a plant patent upon a request made by any person within three months from the publication of the grant of the plant patent. The grounds for revocation are lack of novelty, distinctness, uniformity or stability, lack of entitlement to the plant patent and improper variety denomination. This provision does not conform with Article 21 of the Convention insofar as it refers to lack of homogeneity and stability and improper variety denomination. However, it may – and in fact should – be considered as an objection procedure, given that there is no such procedure during the period in which the application is being processed and that the period allowed to third persons is limited to three months.

27. Article 30 of the Law provides for the annulment of the plant patent in conformity with Article 21 of the Convention.

Article 22 of the Convention: Cancellation of the Breeder's Right

28. Article 31 of the Law deals with the forfeiture of the rights under the plant patent in terms which satisfy Article 22 of the Convention.

Article 30 of the Convention: Implementation of the Convention

29. The Law makes adequate provisions for the implementation of the Convention in Romania. Thus:

(a) Chapter X of the Law (Articles 40 *et seq.*), as well as Article 42, provide for remedies for the effective enforcement of the rights under a plant variety right (Article 30(1)(i) of the Convention); decisions of the Registrar may be challenged in accordance with various provisions of the Law, with Article 38 of the Law summing up the procedure.

(b) Article 44 of the Law entrusts the administration of the plant variety protection system to the State Office for Inventions and Trademarks and to the Ministry of Agriculture and Food Industry, and defines their respective tasks.

(c) The Law provides for the establishment of a National Register of Plant Patents Applications and a National Register of Plant Patents, the latter being open to inspection under Article 25 of the Law, and for the publication of information in the Official Bulletin for Industrial Property (Article 30(1)(iii) of the Convention).

General Conclusion

30. The Law, in its main provisions, incorporates the substance of the Convention and (possibly) deviates from it in respect of minor aspects only:

- (a) fees (see paragraph 9, above);
- (b) novelty (see paragraph 10, above);
- (c) the right of priority (see paragraph 13, above);
- (d) the duration of protection (see paragraph 24, above);
- (e) the nullity of the breeder's right (with an inconsistency with Article 15 – see paragraph 26, above).

31. The Office of the Union suggests that the Council may wish

(a) to advise the Government of Romania that the Law, after adoption of suitable regulations, provides the basis for an Act conforming with the Convention, and that it may deposit an instrument of accession to the Convention;

(b) to further advise the Government of Romania that it may wish to correct the (possible) deviations and inconsistencies when opportunity presents;

(c) to request the Office of the Union to inform the Government of Romania of its decision.

32. The Council is invited to take note of the information given above and to adopt the decision set out in the preceding paragraph.

[Annex follows]

LAW ON THE PROTECTION OF NEW PLANT VARIETIES

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject Matter of Protection

Breeders' rights in new varieties of all genera and species of plants are protected and recognized in the territory of Romania through the grant of a variety patent by the State Office for Inventions and Trademarks on the conditions specified in this Law.

Article 2

Definitions

For the purposes of this Law:

(a) "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping may be:

(1) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;

(2) distinguished from any other plant grouping by the expression of at least one of the characteristics under (1);

(3) considered a unit with respect to its suitability for propagation unchanged; the hybrid with the parental forms is also considered to be a variety;

(b) "protected variety" means a cultivated variety for which a variety patent has been granted by the State Office for Inventions and Trademarks;

(c) "propagating material" means seeds, whole plants or various parts of plants that are capable of reproducing whole plants;

(d) "breeder" means:

(1) the person who has bred or discovered and developed a new variety;

(2) the person who is the employer of the person referred to in (1) or who has commissioned the work of creating or discovering new varieties in accordance with this Law or an agreement specifying that the breeders' rights belong to the former;

(3) the successor in title of the person under (1) or (2) as the case may be;

(e) “applicant” means the person who has filed an application for the grant of a variety patent with the State Office for Inventions and Trademarks;

(f) “holder” means the person who holds breeders’ rights;

(g) “Office” means the State Office for Inventions and Trademarks;

(h) “growing tests” means trials conducted by growing to determine the distinctness, uniformity and stability of the new variety in comparison with a reference variety.

Article 3

National Treatment

Any foreign natural or legal person having his place of residence or registered office outside the territory of Romania shall also benefit from the provisions of this Law in terms of the international conventions on plant variety protection to which Romania is party.

Article 4

Representation

Natural and legal persons applying for the protection of a new plant variety may be represented, in the proceedings before the Office concerning the protection of the new variety, by an authorized agent having his place of residence or a registered office in Romania. Representation by an authorized agent is mandatory for foreigners.

CHAPTER II

PATENTABILITY OF NEW PLANT VARIETIES

Article 5

Conditions of Protection

The Office grants protection for a new plant variety and issues a variety patent if the variety is:

- (a) new;
- (b) distinct;
- (c) uniform;
- (d) stable;
- (e) designated by a denomination conforming to the provisions of Article 5.

Article 6

Novelty

(1) The variety is new if, on the filing date of the application for the grant of protection, or on the priority date, propagating material or harvested material of the variety has not been sold or otherwise disposed of to others, either by or with the consent of the breeder, for the purpose of exploitation of the new variety:

(a) on the territory of Romania, earlier than one year before the filing date of the application for a variety patent;

(b) on the territory of other States, earlier than six years before the filing of the application for a variety patent for fruit trees, vines and ornamental trees, and earlier than four years for another species.

(2) Novelty shall likewise not be lost where the variety:

(a) forms part of an agreement on the transfer of rights, and the commercial exploitation of the variety did not take place prior to the filing of the application;

(b) forms part of an agreement between the breeder and another person by virtue of which the breeder authorizes the multiplication of the propagating material under his control;

(c) forms part of an agreement between the breeder and a third party concerning the conduct of a study or a field test or laboratory trials, or of small-scale processing trials for the evaluation of the variety;

(d) has been disposed of to others as propagating or harvested material of the variety used for the purposes specified in Article 29(1) and not used for subsequent propagation, those acts not being deemed commercial exploitation of the new variety within the meaning of Article 29(1);

(e) has been disposed of as a result of the breeder having displayed the new variety at an officially recognized exhibition;

(f) has been disposed of to an official body, for statutory purposes or under a contract, with a view to production, reproduction, multiplication, processing or storage, provided that the breeder retains the exclusive right of exploitation of the variety and no other previous disposal for commercial purposes has taken place; if the variety has been thus disposed of for the production of a hybrid which has been marketed, the provisions of paragraph (1) shall be applied;

(g) has been disposed of by a company or firm to another company or firm to which it is subordinate, or which with it is wholly owned by a third such company or firm, provided that no other such disposal has taken place.

Article 7

Distinctness

- (1) A variety is distinct if it is clearly distinguishable, by the expression of one or more relevant characteristics that result from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the filing date of the application with the Office or, where applicable, on the date of the priority claimed.
- (2) The distinctness of a variety is defined by its morphological and physiological characteristics, provided that those characteristics are capable of precise recognition and description.
- (3) Where a plant variety has been granted protection or has been the subject of a variety patent application for such protection or has been entered in the official register of plant varieties of any country, which application would result in the grant of breeders' rights in that particular variety, the said variety shall be deemed a matter of common knowledge on the filing date of the patent application.

Article 8

Uniformity

A variety is uniform if, subject to the variation that might be expected of it owing to the particular features of its propagation, it is sufficiently uniform in the expression of those characteristics that are included in the examination for distinctness, as well as any other characteristics used for variety description.

Article 9

Stability

A variety is stable if the expression of the characteristics that are included in the examination for distinctness, and any other characteristics used for variety description, remain unchanged after repeated propagation, or in special cases at the end of each propagation cycle.

CHAPTER III

RIGHT TO PROTECTION

Article 10

Right to a Variety Patent

- (1) The right to a variety patent shall belong to the breeder. Where that right has been assigned under Article 35, it shall belong to the person to whom it has been assigned.

- (2) If two or more breeders have bred or discovered and developed a new variety jointly, the right to protection shall belong to them jointly.
- (3) The right to the grant of a variety patent shall also belong jointly to the breeder and to any other person if the breeder and the other person have declared in writing that they agree to such joint entitlement.
- (4) A breeder who has created a new variety in an employment relationship is entitled, unless otherwise provided in his employment contract, to the breeders' rights and equitable remuneration.
- (5) When the amount of remuneration is determined, account shall be taken of the economic value of the variety and also the income of the company attributable to its exploitation. The amount of the remuneration shall be established by contract concluded between the breeder or breeders and the company or, where the parties fail to agree, by a court of law.
- (6) Where a judgment has ruled that a person other than the one mentioned in the variety patent is entitled to the grant of protection, the Office shall issue the variety patent to the entitled person and publish the change in the Official Bulletin of Industrial Property.

CHAPTER IV

PROCEDURE FOR THE EXAMINATION OF APPLICATIONS FOR VARIETY PATENTS

Article 11

Filing of the Application

The application for the grant of a variety patent shall be filed with the Office by any natural or legal person entitled to such grant under Article 10, or by the authorized representative of such person as provided by Law.

Article 12

Contents of the Application for a Variety Patent

- (1) The application for the grant of a variety patent shall contain:
 - (a) a request for the grant of a variety patent and the data identifying the applicant or applicants, as the case may be;
 - (b) a provisional denomination of the variety;
 - (c) identification of the botanical taxon, with both its Latin and its common name;
 - (d) a technical questionnaire describing the new variety in a standardized form;

(e) a claim of priority deriving from an earlier application filed in another State, where applicable.

(2) The application for the grant of a variety patent shall be accompanied by the following documents:

- (a) proof of payment of the fee for the filing of the application;
 - (b) documents confirming the priority, if claimed;
 - (c) the power of attorney where the applicant is represented by an authorized agent;
 - (d) a statement by the applicant, on his own responsibility, that the variety for which protection is sought has not been commercially exploited as provided in Article 6;
 - (e) the names of the breeder or breeders and a declaration by the applicant according to which, to the best of his knowledge, no other persons have been involved in the breeding or discovery and development of the variety;
 - (f) the instrument of assignment of the right to the grant of a variety patent where the applicant is not the same person as the breeder;
 - (g) any other documents and material capable of providing information on the origin and testing of the new variety, or on any variety patent application filed in another country;
 - (h) the geographical origin of the variety.
- (3) The application shall relate to one variety only.
- (4) All documentation shall be submitted in Romanian.

Article 13

Official Filing Date of the Variety Patent Application

- (1) The official filing date of the variety patent application shall be the date on which it is filed with the Office, provided that at least the requirements specified in Article 12(1)(a) to (d) have been met and that the application filing fee has been paid.
- (2) The official filing date may also be the filing date of the application under paragraph (1) above where, for valid reasons, foreign applicants, whether natural or legal persons, have submitted documentation in a foreign language, provided that a Romanian translation of the application is produced within three months of the date of receipt of the documentation.

Article 14

Right of Priority

(1) The filing of an application for a variety patent confers a right of priority, starting on the filing date, for any subsequent application for a variety that is not clearly distinguishable from it as provided in Article 7.

(2) Any person who has previously filed a first application in a State party to an international convention in the field of new plant variety protection to which Romania is party shall enjoy a right of priority of 12 months from the filing date of the first application if, within that period, he applies to the Office for the grant of a patent for the same variety, provided that the first application was properly filed on the priority date claimed.

(3) In order to prove the claim of priority from another State, the applicant shall submit to the Office, within three months from the filing of the application, certified copies of the documents of the first application, as well as the propagating material or other evidence proving that the varieties referred to in both applications are identical.

(4) Priority claimed under paragraph (3) above shall be recognized in so far as the priority fee prescribed by law has been paid.

(5) Failure to observe the time limit provided for in paragraph (2) above or failure to pay the priority fee shall result in non-recognition of the priority claimed.

(6) Acts performed within the period provided for in paragraph (2), such as the filing of another application or publication or use of the variety to which the first application relates, do not constitute grounds for refusal of a subsequent application and do not give rise to any third party rights.

Article 15

Variety Denomination

(1) The variety shall be designated by a generic denomination to permit its identification.

(2) The denomination shall be specified in the granted variety patent and shall also be used after the expiry of its term of validity.

(3) The denomination shall differ from any denomination that designates another existing variety belonging to the same or a closely related species.

(4) The denomination shall not consist only of figures, except where this is an established practice for the designation of certain plant varieties.

(5) The denomination shall not mislead or cause confusion concerning the characteristics, value or identity of the variety or of the breeder.

- (6) If applications for the grant of variety patents are filed in Romania and simultaneously in other countries, the variety shall be registered under the same denomination in all the countries in which applications are filed, except where the Office considers the denomination unsuitable.
- (7) If, by virtue of a prior right, the denomination has already been used or may cause confusion with the use of the denomination of another variety, the Office shall request the applicant to submit another denomination for his variety.
- (8) In order to establish a correct denomination, the applicant may ask the Office, against payment of a preliminary examination fee, to conduct a search concerning the variety denomination.
- (9) Any person who sells or markets propagating material of a protected variety is obliged to use the denomination of that variety even after expiry of the term of protection.
- (10) Where a protected variety is offered for sale or marketed, a trademark or trade name or any other similar indication may be affixed to it for identification of the plant variety on the market.
- (11) The variety denomination shall be entered in the National Register of Protected Varieties at the same time as the variety patent is issued.
- (12) Where at least one of the conditions specified in paragraphs (1) to (9) is not fulfilled, the Office shall cancel the registered denomination.

Article 16

Examination of the Application as to Form

- (1) Within two months from the filing date of an application for the protection of a new variety, the Office shall ascertain whether the documentation filed by the applicant satisfies the formal requirements for the application set forth in Articles 10(1) to (4) and 12.
- (2) If the application meets the requirements referred to in paragraph (1) above, the Office shall enter the application in the National Register of Variety Patent Applications and notify the applicant accordingly.
- (3) Applications for the protection of new varieties filed with the Office shall be published, within three months from the date of filing, in the Official Bulletin of Industrial Property.
- (4) Where the application for the grant of a variety patent does not meet one of the provisions of Articles 10 and 12, the Office shall decide, within an examination board, to reject the application.

Article 17

Substantive Examination of the Application

- (1) The Office shall within nine months carry out a substantive examination of the variety patent application with respect to its novelty and the variety denomination as provided in Articles 6 and 15.
- (2) The Office shall notify the applicant or his successor in title of the result of the substantive examination of the application; where the result is negative, a period not exceeding three months shall be accorded for reply.
- (3) The applicant may for legitimate reasons ask the Office for a two-month extension of the period for reply.
- (4) If after the substantive examination the Office decides that the application meets the requirements laid down in Articles 6, 12 and 16, the variety shall undergo technical examination by a competent national authority to which the Office shall send the documentation within one month from the decision.
- (5) Where the application has not met the requirements of Articles 6, 10, 12 and 16 and the applicant neither responds to the notification within the prescribed period nor applies for an extension, the Office shall reject the application.

Article 18

Technical Examination of the New Variety

- (1) The variety shall undergo a technical examination in order:
 - (a) to verify that the variety belongs to the botanical taxon stated;
 - (b) to establish that the variety is distinct, uniform and stable within the meaning of Articles 7 to 9;
 - (c) to establish the official description of the variety.
- (2) The technical examination shall be performed by a competent national authority if the applicant fails, on filing the application with the Office, to submit the findings of growing tests carried out by another internationally recognized authority.
- (3) Where growing tests on a new variety have not been performed by the national authority or by an internationally recognized authority, the Office may take into account a technical report drawn up by another competent authority and purchased with the applicant's consent, provided that the prescribed fee is paid.
- (4) The competent national authority or company designated to perform the growing tests shall carry out the necessary tests to determine whether the provisions of Articles 7 to 9 have been satisfied. The applicant shall make samples of the propagating material available to the

authority conducting the tests in the amount requested and shall notify the Office of the date of delivery.

(5) Within two years from the start of the growing tests, the national competent authority shall draw up, on the basis of the results obtained, a technical report comprising the test findings and the morphological and physiological characteristics of the new variety as compared with the reference variety and the conclusions regarding the fulfillment of the requirements laid down in Articles 7 to 9.

(6) Where the growing tests have been conducted by a foreign competent authority or by the breeder, they may be subjected to analysis by the national authority. The validity of the tests shall be confirmed by a notice sent to the Office within six months from the receipt of the documentation. Refusal of the validity of the test findings shall be pronounced by the national authority in writing with a statement of reasons.

(7) The Office shall reject the application for a variety patent if the validity of the tests is disputed by the national authority.

(8) The decision of the Office may be challenged by the applicant before the Board of Appeal of the Office within three months from the communication.

(9) The Board of Appeal may decide:

- (a) to accept the appeal and grant the variety patent;
- (b) to accept the appeal, return the application for further substantive examination and where applicable request repetition of the test;
- (c) to reject the applicant's appeal.

Article 19

Testing of the Variety

(1) For the testing of the new variety the national authority may conduct its own growing tests or accept the findings of tests performed by the applicant.

(2) The growing tests shall be conducted according to the methodology approved by the Ministry of Agriculture and Food Industry and the Office on the basis of the international guidelines for the testing of new plant varieties.

(3) After having received the documentation and conducted the examination as to form, the Office, together with the national authority, shall establish the site for the trials and the amount of material necessary for organizing them and notify the applicant accordingly, inviting him to submit the propagating material requested. The Office and the national authority may request the applicant to submit all information, documents and materials necessary for the satisfactory conduct of the technical examination.

- (4) If within the period allowed the information, documents or materials requested are not submitted, the variety patent application shall be rejected.
- (5) The applicant has the right to inspect the crop trials during the testing of the new variety.

Article 20

Decisions of the Office

- (1) The Office shall decide, on the basis of the technical report of the national authority or of an internationally recognized authority, whether the new variety meets the requirements laid down in Articles 7 to 9 and 16, and shall grant the variety patent or reject the application as appropriate.
- (2) The decision to reject shall be taken by the Office only after the applicant has been notified of the grounds for rejection and allowed a period of at least three months within which to submit comments.
- (3) Decisions to grant variety patents, each with the description of the variety attached, shall be published in the Official Bulletin of Industrial Property within three months from the decision.
- (4) During the term of the variety patent the official description of the protected variety may be amended by the Office or the applicant, subject to mutual consultation, in response to developments in agrobiological knowledge and variety description methods without the scope of protection and the characteristics of the new variety being thereby affected. Amendments made to the official description shall be published in the Official Bulletin of Industrial Property.
- (5) Decisions of the Office may be challenged by applicants on just grounds, the appeals being lodged with the Board of Appeal of the Office in accordance with Article 38(1).

Article 21

Provisional Protection

- (1) During the period between the publication of the variety patent application under Article 16(3) and the grant of the variety patent, the applicant shall provisionally enjoy all rights conferred on the patent holder under Article 27.
- (2) The infringement by third parties of the rights provided for in paragraph (1) above shall make the infringers liable for damages under civil law, payment of the damages being enforceable once the rights have been granted.
- (3) Any person who commits the acts provided for in Article 27 without the holder's authorization during the period of provisional protection shall be liable under Article 40(1).

- (4) When the variety patent application has been rejected, the applicant shall not enjoy the rights provided for in paragraph (1) above.

Article 22

Extension of the Time Limit

- (1) The time limit for the examination of the application for a variety patent and for verifying the growing test findings may be extended by one year on payment of the fees provided for in items 3 and 4 of the Appendix.

Article 23

Withdrawal of the Application

The application for a variety patent may be withdrawn, on a request submitted to the Office by the applicant, at any time until the decision on the grant of the variety patent is taken.

Article 24

Revocation of the Decision to Grant the Variety Patent

- (1) Within three months from publication any person may apply to the Office for revocation of the decision to grant a variety patent where at least one of the conditions set forth in Articles 6 to 10 and 15 has not been met; the request shall be made in writing and substantiated.
- (2) The request for revocation shall be examined by the Board of Appeal within three months from the filing thereof with the Office.
- (3) The Board of Appeal may, if it sees fit, ask the national authority to repeat the growing tests on the variety or to use the services of an expert who shall take part in the reexamination of the new variety.
- (4) The decision of the Board of Appeal shall be communicated to the parties within 15 days of being pronounced.
- (5) The decision of the Board of Appeal may be appealed against as provided in Article 38.
- (6) Final decisions shall be published in the Official Bulletin of Industrial Property within 30 days.

Article 25

Issue of the Variety Patent and Registration of the Variety Denomination

- (1) The variety patent shall be issued by the Director General of the Office in pursuance of the decision to grant the variety patent.
- (2) The variety patent and the variety denomination shall be entered in the National Register of Protected Varieties, which is open to the public and may be consulted by third parties on payment of the inspection fee prescribed by law.
- (3) Where the application is filed by two or more applicants, the variety patent shall be issued to the first applicant mentioned in the application, and the others shall be issued duplicates thereof .
- (4) Where the breeder is not the holder of the patent, he shall be entitled to receive a duplicate of the granted variety patent on request.

CHAPTER V

PROTECTION OF THE VARIETY

Article 26

Duration of Variety Protection

- (1) The term of protection of the variety shall be 25 years as from the date of grant of the variety patent.
- (2) For species of fruit trees, vines and ornamental trees the term of the variety patent shall be 30 years as from the date of the grant of protection.

CHAPTER VI

RIGHTS OF THE HOLDER

Article 27

Exclusive Rights of the Holder

- (1) The holder of rights shall enjoy the exclusive right of exploitation of the new variety and the right to prevent any person, without his authority, from performing the following acts in relation to the propagating material and harvested material of the protected variety:

- (a) production or reproduction;
 - (b) processing for the purpose of propagation;
 - (c) offering for sale;
 - (d) selling or other marketing;
 - (e) importing;
 - (f) exporting;
 - (g) stocking for one of the purposes mentioned in subparagraphs (a) to (f).
- (2) The provisions of paragraph (1) shall also apply to varieties:
- (a) that are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
 - (b) that are not clearly distinguishable from the protected variety within the meaning of Article 7;
 - (c) the production of which requires repeated use of the protected variety.
- (3) For the purposes of paragraph (2)(a) a variety shall be deemed “essentially derived” from another variety when:
- (a) it is predominantly derived from the initial variety or from a variety that is itself predominantly derived from the initial variety;
 - (b) it is distinguishable in terms of Article 7 from the initial variety from which it is derived;
 - (c) it conforms to the initial variety in the expression of the essential characteristics resulting from a genotype or combination of genotypes thereof, except for the differences resulting from the derivation.

Article 28

Exceptions to the Exclusive Rights of the Holder

- (1) The rights conferred by a variety patent under Article 27 shall not extend to:
- (a) acts done privately and for non-commercial purposes;
 - (b) acts done for experimental purposes, including those done in the process of breeding other varieties from initial material.
- (2) The persons who use the protected variety in the manner provided for in paragraph (1) are obliged to inform the holder accordingly.

Article 29

Exhaustion of the Holder's Rights

(1) The holder's rights shall not extend to acts in relation to any propagating or harvested material of the protected variety or of a variety covered by the provisions of Article 27(2) or to those in relation to parts of the plant of the protected variety or to any material derived from that variety that have been sold or marketed by the holder or with his consent unless such acts involve:

- (a) propagation of the protected variety;
- (b) exporting the material of the protected variety to a third country that does not protect varieties of the genus or species to which the new variety belongs, except where the exported material is used for consumption.

CHAPTER VII

LAPSE OF THE VARIETY PATENT

Article 30

Invalidation of the Variety Patent

(1) Any person having a legitimate interest may file a request for invalidation with the Office at any time during the period of protection.

(2) The Board of Appeal shall invalidate the variety patent when it is established:

(a) that the variety was not new in terms of Article 6 or distinct in terms of Article 7 on the filing date of the application, or on the date of any priority claimed;

(b) that, where the grant of the variety patent was essentially based on trials carried out or on information and documents submitted by the applicant, the variety was not uniform in terms of Article 8 or stable in terms of Article 9 on the date of grant;

(c) that the person who has been granted the variety patent is not entitled to it, except where the rights have been transferred to the entitled person.

(3) Decisions shall be communicated to the parties within 15 days of pronouncement, and may be challenged under Article 38.

(4) The decision to invalidate the variety patent shall be entered in the National Register of Protected Varieties and published in the Official Bulletin of Industrial Property.

(5) The decision to invalidate the variety patent shall come into effect on the date on which the application was filed with the Office.

Article 31

Forfeiture of Rights

(1) The Office shall declare the holder's rights forfeit where one of the following situations obtains:

(a) the holder does not fulfil his obligation to maintain the protected variety as provided in Article 33(1);

(b) the holder does not act on a request by the Office or the national authority that he supply information or material for the purpose of verifying the protected variety during the term of the patent;

(c) the holder does not, within the time allowed, propose a suitable denomination for the plant variety where the Office has asked for a change in the denomination because it no longer fulfils the conditions set forth in Article 15;

(d) the holder fails to pay the fees for keeping the variety patent in force;

(2) The Office shall not declare the holder's rights forfeit before having notified him of his failure to comply with one of the obligations under paragraph (1)(a) to (c). Forfeiture of rights shall be published in the Official Bulletin of Industrial Property and shall be effective as of the date of entry in the National Register of Protected Varieties.

(3) The holder may, within six months from the date of publication of the forfeiture, request the Office to revalidate the variety patent on just grounds.

(4) The decision of the Board of Appeal on the request for revalidation of the patent shall be communicated to the parties within 15 days of its pronouncement and may be challenged under Article 38. Revalidation of the variety patent shall be published in the Official Bulletin of Industrial Property.

(5) Exploitation of the variety by third parties during the period between the forfeiture of rights and the revalidation of the patent shall not constitute infringement of the rights provided for in Articles 25 and 27.

Article 32

Renunciation of the Variety Patent

(1) The holder may renounce the variety patent at any time during the protection period on the basis of a written declaration submitted to the Office.

(2) The holder is obliged to inform the breeder of his intention to renounce the variety patent. At the breeder's request the holder is obliged to transfer his rights in the patent to him before filing the written declaration of renunciation.

(3) Renunciation shall be effective as of the date of its submission to the Office. Renunciation shall be recorded in the National Register of Protected Varieties and published in the Official Bulletin of Industrial Property.

(4) Where the variety patent has been the subject of a license contract, renunciation is possible only with the consent of the licensee.

CHAPTER VIII EXPLOITATION OF THE PROTECTED VARIETY

Article 33

Maintenance of the Protected Variety

(1) The holder is obliged to maintain the protected variety throughout the term of the variety patent so that the variety retains all the characteristics presented in the official description on the date of grant of the variety patent.

(2) In order to verify the distinctness, uniformity and stability of the protected variety, the national authority may ask the holder to supply seed, propagating material or documents, or any other information required for the purpose.

(3) The Office may, at any time, during the term of the variety patent, request the holder to provide information and documents attesting the existence of the variety and the maintenance of its characteristics.

(4) Where the holder does not comply with the request, the Office shall declare his rights under the variety patent forfeit in accordance with Article 31(1)(a).

Article 34

Transfer of Variety Rights

(1) The right to apply for a variety patent, the rights in the variety patent, the rights deriving from the filing of the application for the variety patent with the Office and the rights derived from the variety patent may be transferred to other natural or legal persons.

(2) The transfer of rights is performed by assignment, by an exclusive or non-exclusive license contract or by legal or testamentary provision.

(3) The rights in a new variety shall likewise be transferred in the case of prosecution of the holder in accordance with the Law.

(4) The transfer of rights shall not affect rights acquired by third parties before the date of transfer.

(5) The assignment or exclusive license shall be entered in the National Register of Variety Patent Applications or the National Register of Protected Varieties, as the case may be, and shall become enforceable against third parties on the date of registration.

Article 35

Assignment Contract

The variety for which a patent application has been filed or for which a patent has been granted may be the subject of an assignment contract.

Article 36

License Contract

- (1) A variety for which a patent has been granted may be the subject of a license contract.
- (2) Where an exclusive license is granted, the licensee shall enjoy the exclusive right of exploitation of the new variety within the limits specified in the license contract.
- (3) Whenever a non-exclusive license is granted, the holder shall retain the right to grant licenses to third parties. The licensee does not have the right to transfer the right of exploitation of the variety to third parties.
- (4) The holder may publish his offer to grant the license in the Official Bulletin of Industrial Property.
- (5) The Office shall enter the exclusive license contract in the National Register of Protected Varieties and publish it in the Official Bulletin of Industrial Property.

Other license contracts may also be entered in the Register at the request of the interested party.

Article 37

Compulsory Licenses

- (1) The Office may grant a compulsory license at the request of any interested party after the expiry of a period of five years from the date of grant of the variety patent when:
 - (a) the holder does not exploit the protected variety and cannot justify his inaction;
 - (b) the protected variety is a matter of public interest.
- (2) A compulsory license shall be non-exclusive and shall be granted on specific conditions regarding duration, the exploitation of the variety and the amount of compensation payable to the holder.

- (3) The compulsory license confers on the licensee the right to receive original propagating material from the holder.
- (4) The grant of a compulsory license shall not prevent the patent holder from exploiting the variety or from granting licenses to third parties.
- (5) Compulsory licenses shall be granted by the Office, acting through the Board of Appeal, and by the Ministry of Agriculture and Food Industry, acting through its representatives.
- (6) Where it is ascertained that the licensee has failed to fulfil his obligation to exploit the variety in the manner specified, the compulsory license may, at the holder's request, be revoked by the Office, acting through the Board referred to in paragraph (5).
- (7) Decisions of the Board of Appeal concerning the grant or withdrawal of compulsory licenses shall be communicated to the parties within 15 days of pronouncement, and shall be subject to the appeals provided for in Article 38.
- (8) The Office shall register the compulsory license in the National Register of Protected Varieties and publish it in the Official Bulletin of Industrial Property.

CHAPTER IX

PROTECTION OF RIGHTS IN NEW PLANT VARIETIES

Article 38

Appeals Against Decisions of the Office

- (1) Decisions of the Office may be appealed against by interested parties before the Office within three months from communication.
- (2) The appeal or the request for revocation or cancellation of the variety patent, as the case may be, shall be considered by the Board of Appeal within three months of being filed. The composition of the Board shall be different from the composition of the Examination Board, being composed of representatives of the Ministry of Agriculture and Food Industry and the Office.
- (3) The finding of the Board of Appeal shall be communicated to the parties within 15 days of being pronounced, and may be challenged in the court of Bucharest within 30 days of being communicated.
- (4) The decision of the court of Bucharest may be appealed before the Court of Appeal of Bucharest within 15 days of being communicated.
- (5) The Office is obliged to submit to the court, at its request, the necessary documents and information for judging the case referred to it.

Article 39

Competence of the Courts

Litigation seeking to deprive of his status the breeder, patent holder or holder of other rights derived from the variety patent, including economic rights under an assignment or license contract, or litigation relating to failure to comply with the provisions of Articles 33(1) and 34, shall be within the competence of the courts of law.

CHAPTER X

OFFENSES AND PENALTIES

Section 1

Article 40

Infringement and Disclosure

(1) Any of the acts mentioned in Article 27 and any of the acts mentioned below, performed without the variety patent holder's authorization shall be deemed infringement:

(a) using a denomination other than the registered denomination of the new variety for propagating material produced and sold;

(b) using the registered denomination of a new variety for propagating material produced and sold that does not belong to that variety;

(c) giving a denomination to propagating material produced and sold that is so close to the denomination of the protected variety that it may cause confusion;

(d) selling propagating material with false indications that it belongs to a variety for which a variety patent has been granted, thereby misleading purchasers;

(e) falsehood in the registration of a variety in the National Register of Protected Varieties;

(f) drawing up false reports, and falsification of documentation required by this Law;

(g) submitting documents containing false information.

(2) The acts specified in paragraph (1) shall constitute an offense punishable with imprisonment for a term of three months to three years or with a fine of 3 million to 15 million lei, which amount shall be updated by Government decision according to the rate of inflation. The attempted act shall likewise be punished.

- (3) Disclosure of data and information constituting a trade secret concerning a new variety for which a variety patent has been applied for or granted shall be punished under criminal law.
- (4) Where any of the offenses provided for in paragraphs (1) and (3) is committed by a public official in the course of his duties, it shall be punished with imprisonment for a term of six months to five years.
- (5) Criminal proceedings shall be initiated on a complaint by the injured party.
- (6) The holder is entitled to claim damages under the provisions of ordinary legislation for prejudice caused him, and the infringing goods shall be seized under the provisions of criminal law.

Section 2

Article 41

Actions for Infringement

- (1) A legal action for infringement may only be initiated by the holder after publication of the grant of the variety patent.
- (2) Where a license has been granted and where not otherwise provided in the contract, the licensee may not sue for infringement without the consent of the holder.
- (3) The holder of an exclusive license may initiate a legal action for infringement if the variety patent holder has been informed of the alleged infringement and has not taken any action within a time limit requested by the licensee.
- (4) Where a legal action for infringement has been brought by the variety patent holder, any of the licensees may intervene to demand that the prejudice caused by the infringement be made good.

CHAPTER XI

Article 42

Provisional Measures, Evidence

- (1) The holder may request the court:
 - (a) to order provisional measures where there is a risk of infringement of the rights deriving from the variety patent and where such infringement is liable to cause irreparable prejudice, and also where there is a risk of evidence being destroyed;

(b) to order, immediately on application, measures to put an end to the infringement of rights committed by a third party in connection with the introduction into commercial channels of imported merchandise that would infringe those rights;

(c) to order the seizure or destruction of the propagating material referred to in Article 40(1)(b) to (d).

(2) The court shall order the infringer of the rights under the variety patent to inform the holder of the identity of third parties who have taken part in the production and distribution of the propagating material referred to in Article 40(1)(b) to (d).

(3) The provisions of Articles 581 and 582 of the Code of Civil Procedure shall be applicable to the ordering of the measures referred to in paragraph (1).

(4) When provisional measures are ordered, the court may oblige the plaintiff to provide security in an amount that it shall specify.

(5) The court may ask the plaintiff to supply any evidence available to prove that he is the holder of the rights infringed or the infringement of which is unavoidable.

(6) Where the evidence supporting the claims of the plaintiff is in the defendant's possession, the court may order the defendant to produce the evidence, provided that the confidentiality of the information is guaranteed as provided by law.

(7) The court shall order the plaintiff to pay the defendant all damages arising from improper exercise of the procedural rights concerning the variety.

Article 43

Fees

(1) The fees for the procedures provided for in this Law shall be paid into the bank account of the Office in the amounts and by the time limits specified in the Appendix which forms an integral part of this Law.

(2) Romanian applicants or holders, whether natural or legal persons, shall pay the forms in lei. Foreign natural and legal persons who are applicants or holders or to whom industrial property rights have been transferred shall pay the fees in currency. Where there are two or more applicants or holders, the fees owed jointly shall be paid in currency.

(3) Applicants for or holders of variety patents whose rights have not been transferred to them or who have not transferred their rights as provided by law before the time of payment shall pay the fees specified in the Appendix, reduced by 50 per cent of each fee, if they are natural or legal persons or domestic research or education institutes.

(4) The reduction provided for in paragraph (3) shall be applicable to each procedure separately, on the date of payment, if the conditions specified in the said paragraph are satisfied and supporting documents are supplied.

(5) The fees for variety patent applications and variety patents payable for the procedure before the Office shall constitute income and shall be assigned to extra-budgetary items as provided by Law.

(6) From the fees paid to it, the Office shall pay the national or international technical authorities, as the case may be, the amounts due for the conduct of growing tests.

Article 44

Competence

(1) Competence for the enforcement of this Law shall belong to the Office and the Ministry of Agriculture and Food Industry.

(2) The Office, as a specialized body responsible to the Government and the sole authority within the territory of Romania for the grant of industrial property protection, shall grant patents for new varieties under this Law and in accordance with the international conventions to which Romania is party, and shall have the following duties:

(a) filing, publishing and examining applications for the grant of patents for new varieties;

(b) keeping the National Register of Variety Patent Applications and the National Register of Protected Varieties;

(c) regularly issuing the Official Bulletin of Industrial Property, and specifically the section for variety patents, which contains information on variety patent applications, denominations of new varieties and proposals for denominations, and also new varieties for which variety patents have been granted;

(d) ensuring the exchange of publications with similar foreign national administrations and specialized international organizations;

(e) establishing, in consultation with the Ministry of Agriculture and Food Industry, the characteristics to be specified in the technical questionnaire in accordance with international guidelines for the protection of new varieties;

(f) certifying authorized representatives for the procedures before the Office relating to the protection of new varieties.

(3) The Ministry of Agriculture and Food Industry, in exercising its prerogatives:

(a) shall decide on the methodology for the testing of new varieties from a technical point of view;

(b) shall cooperate with the Office, with breeders' associations, with the association of variety patent holders, with the association of producers of seed and propagating material, with the George Ionescu Academy of Agricultural and Sylvicultural Science and with

specialized research institutes and testing stations in order to establish the characteristics involved in the protection of new varieties;

(c) shall designate the representatives of the Ministry of Agriculture and Food Industry on the Board of Appeal.

(4) The Office and the Ministry of Agriculture and Food Industry shall entertain relations with similar governmental organizations and with international organizations specialized in the protection of new varieties of plants of which Romania is a member.

Article 45

Protection of New Varieties Abroad

Romanian natural and legal persons shall have the right to choose the State in which they file their first application for the grant of a variety patent or similar title of protection.

CHAPTER XII

FINAL AND TRANSITIONAL PROVISIONS

Article 46

(1) Applications for variety patents filed with the Office under Patent Law No. 64/1991 and Government Decision No. 152/1992 approving the Regulations implementing Patent Law No. 64/1991 for which no decision has been taken to grant or refuse grant shall be settled in accordance with the provisions of this Law.

(2) This Law shall enter into force 90 days following the date of its publication in the Official Gazette of Romania.

(3) Within 90 days following the publication of this Law in the Official Gazette of Romania, the Government shall, on a proposal by the Office, approve the Regulations implementing this Law.

(4) On the entry into force of this Law, the provisions on the protection of plant varieties and hybrids laid down in Articles 7(3) and 11 of Patent Law No. 64/1991, the provisions on plant varieties and hybrids in Chapter III of Government Decision NO. 152/1992 and any other contrary provisions shall be repealed.

APPENDIX

| Crt. No. | Purpose | Time of payment | Amount in Thousands of lei *) | | | | | Amount in \$ | | | | |
|----------|--|--|-------------------------------|----------|----------|----------|---|--------------|---------|---------|---------|----|
| | | | 1 | 2 | 3 | 4 | 5 | 1 | 2 | 3 | 4 | 5 |
| 1. | Filing fee | on filing application | 140 | | | | | 20 | | | | |
| 2. | Priority claim: (a) on filing application | On filing date of application or within 3 months | 350 | | | | | 50 | | | | |
| | (b) within 3 months from filing application for variety patent | on date of claim | 700 | | | | | 100 | | | | |
| 3. | Examination fee for variety patent on plant grouping: for each year of examination | 1 | 910 | | | | | 130 | | | | |
| | | 2 and 3 | 560 | | | | | 80 | | | | |
| | | 4 | 350 | | | | | 50 | | | | |
| 4. | Verification of the growing tests (on request) | at the time of requesting verification | 1400 | | | | | 200 | | | | |
| 5. | Preliminary examination of variety denomination | | | | | | | | | | | |
| 6. | Issue of variety patent | six months after publication date of decision to grant | 700 | | | | | 100 | | | | |
| 7. | Examination of appeal | at the time of lodging the appeal | 350 | | | | | 50 | | | | |
| 8. | Examination of request for revocation | on requesting revocation | 1050 | | | | | 50 | | | | |
| 9. | Examination of request for cancellation | On requesting cancellation | 1050 | | | | | 50 | | | | |
| 10. | Maintenance fee for variety patent - from year 1 to year 5 | at end of each year of protection | 1 38 | 2 350 | 3 315 | 4 280 | 5 | 1 55 | 2 50 | 3 45 | 4 40 | 5 |
| | - subsequent years, per year | at end of each year of protection | 77 | 700 | 630 | 560 | | 110 | 100 | 90 | 80 | 80 |

| Crt. No. | Purpose | Time of payment | Amount in Thousands of lei *) | Amount in \$ |
|----------|--|---|-------------------------------|--------------------|
| 11. | Examination of application for revalidation of variety patent | on requesting revalidation | 700 | 100 |
| 12. | Purchase of international technical report on a new variety | when State Office for Inventions and Trademarks requests report | 2450 | 350 |
| 13. | Inspection of National Register of Protected Varieties | on request | 350 | 50 |
| 14. | Filing change in legal status of patent application or variety patent: (a) assignment (b) licensing (c) other changes | on filing and requesting Registration thereof Idem Idem | 140 350 175 | 20 50 25 |
| 15. | Issue of duplicates, copies, certificates | on filing request with the Office for Inventions and Trademarks | 70 | 10 |

- Variety groups:
1. Cereals and technical plants
 2. Fodder plants
 3. Fruit trees and shrubs, vines
 4. Vegetables, flowers, ornamental trees

*) Calculated at the official exchange rate of the National Bank of Romania on the date of payment.

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