

**Ministerial Order No. 940/90
(of October 4, 1990)**

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Whereas Decree-Law No. 213/90 (of June 28, 1990) lays down the general principles of the legal regime governing breeders' rights in new plant varieties;

Whereas it is becoming essential to organize and establish those principles;



Considering the provisions of paragraph (2) of Article 1, paragraph (3) of Article 6 and Articles 8 and 9 of Decree-Law No. 213/90 (of June 28, 1990);

The Government, through the agency of the Minister of Agriculture, Fisheries and Food, orders as follows:

1.—(1) The Regulations on the Protection of New Plant Varieties, annexed to this Order, of which they form an integral part, are approved.

(2) The Regulations on the Protection of New Plant Varieties shall enter force 30 days after the date of their publication.

2.—(1) The National Registry of Protected Varieties, designated by the abbreviation CENARVE, shall be the department responsible for the Implementation of the provisions of this Order.

(2) CENARVE shall operate within the framework of the National Institute of Agricultural Research, and shall be directed by the President of that Institute or by his representative.

3. CENARVE shall be responsible, *inter alia*, for the following:

(a) producing and examining documents in support of the grant of plant breeders' rights;

(b) conducting tests and inspections and taking any other action necessary to evaluate and rule on applications for the grant of plant breeders' rights;

(c) requesting or contracting for the provision of specialized services in its areas of concern, particularly with regard to DHS (distinctness, homogeneity and stability) testing;

(d) producing a periodical journal to publicize the varieties granted protection and also the most important documents from the files on the grant of plant breeders' rights;

(e) seeking the cooperation of the Departments of the ministry of Agriculture, Fisheries and Food where such cooperation proves necessary for the proper conduct of its activities;

(f) coordinating its action with that of other bodies-both national and foreign-that concern themselves with plant variety protection matters, and promoting the conclusion of such agreements and protocols as may prove necessary or useful for the safeguarding of the interests in its charge.

4. The Director of CENARVE shall be responsible, *inter alia*, for the following:

(a) directing CENARVE and coordinating its operations;

(b) presiding over the Technical Board of CENARVE;

(c) issuing plant plant breeders' certificates, amending them or revoking them;

(d) proposing to higher authorities such regulatory and legislative acts and measures as are necessary-for the discharge of CENARVE's duties;

(e) performing any other acts provided for in this Order or in other legislative or regulatory texts.

5.—(1) The Technical Board is a consultative body that advises the Director of CENARVE; its members shall be the following:

- (a) the Director of CENARVE, who shall preside over it;
- (b) the Director of the National Center for the Protection of Agricultural Production, or his representative;
- (c) a representative of the breeders' associations;
- (d) a representative of the seed producers' associations;
- (e) a representative of the associations of producers of vegetative propagating material;
- (f) two public figures of recognized competence in the field of plant variety protection, one of them having legal training.

(2) The members referred to in the foregoing paragraph under (c), (d), (e) and (f) shall be designated by the Director of CENARVE, after the relevant associations have been heard.

(3) The Director of CENARVE may invite public figures of recognized competence to attend meetings of the Technical Board, without the right to vote, should such a step prove useful for the clarification of matters under consideration.

(4) The secretariat shall be provided by a CENARVE official designated by the Chairman of the Board, which official shall not have the right to vote.

6.—(1) The Technical Board of CENARVE shall be responsible, *inter alia*, for the following:

- (a) issuing the advice provided for in this Order and pronouncing on all questions submitted to it by the Director of CENARVE;
- (b) proposing to the Director of CENARVE such acts and measures as it considers useful for the satisfactory performance of the Registry's duties.

(2) Where not provided otherwise by law or by a decision of the Director of CENARVE, the Technical Board shall issue the reports requested of it within a maximum period of one month.

The Technical Board shall meet in accordance with the rules governing it; minutes shall be taken of every meeting.

8.—(1) For the purpose of publicizing the main documents in the files entrusted to CENARVE, a periodical journal entitled CENARVE Bulletin (*Boletim do CENARVE*) shall be produced.

- (2) The CENARVE Bulletin shall publish the following, *inter alia*:



- (a) applications for the grant of plant breeders' rights accepted by CENARVE;
- (b) the refusal and the grant of plant breeders' certificates, and also the amendment, revocation or lapse thereof where applicable.

Ministry of Agriculture, Fisheries and Food
Signed on September 14, 1990

For the Minister of Agriculture, Fisheries and Food,
Alvaro dos Santos Amaral Secretary of State for Agriculture.

Regulations on the Protection of New Plant Varieties

Chapter I General Provisions

Object

1. These Regulations establish the legal regime for the protection of plant breeders' rights in accordance with Decree-Law No. 213/90 of June 28, 1990.

Persons to Whom the Regime Applies

2.—(1) Foreigners shall enjoy the protection granted to nationals under the conditions laid down in the conventions to which Portugal is party.

(2) In the absence of international conventions, foreigners shall enjoy the protection granted to nationals except where the legal order in the country concerned, while granting protection to its own nationals, does not do so to Portuguese nationals in the same circumstances.

Definitions

3. For the purposes of these Regulations:

(a) "clone" means a group of individuals produced by vegetative propagation from a single plant that have an identical genetic heritage;

(b) "line" means a natural or artificial sexually-reproduced group having sufficient uniformity;

(c) "strain" means the offspring of plants of the same origin, produced by breeding and possessing numerous common characteristics;

(d) “hybrid” means a plant resulting from spontaneous or induced crosses from parent material with a generally different genetic heritage;

(e) “new plant variety” means any variety (cultivar), clone, line, strain or hybrid recognized as such from a technical or commercial point of view.

Chapter II Fundamental Principles

Content of Plant Breeders’ Rights

4.—(1) The breeders’ rights in a plant variety shall confer on their owner exclusive entitlement to produce and market plants of that variety or the corresponding reproductive or vegetative propagating material.

(2) Plant breeders’ rights shall not prevent the use of the protected plant variety as initial or basic material for the production of other varieties, except where its repeated or systematic use is necessary.

Requirements for the Grant of Plant Breeders’ Rights

5.—(1) Breeders’ rights in a plant variety shall be granted for any new product which:

(a) is distinct, meaning that, irrespective of the manner in which it is produced, it differs from any other variety the existence of which is a matter of common knowledge by one or more characteristics susceptible of recognition and precise description;

(b) is homogeneous, meaning that all the plants constituting the new variety are similar with respect to the particular features of their reproduction or vegetative propagation;

(c) is stable, meaning that, after a succession of reproductions or vegetative propagations, it has the same essential characteristics according to the description given by its breeder;

(d) is new, meaning that, on the filing date of the corresponding application for protection, it has not been put on sale or marketed within the country for more than one year—with its breeder’s consent—or abroad for more than six years or four years in the case of woody plants or herbaceous plants respectively.

(2) In addition to the conditions specified in the foregoing paragraph, the grant of plant breeders’ rights shall be determined by the conformity of the relevant denomination to the provisions of these Regulations and by compliance with the other conditions laid down therein.

Term of Plant Breeders’ Rights

6. Plant breeders’ rights shall have a term of 15 or 20 years for herbaceous and woody plants respectively.

Protected Species

7. The botanical species the varieties of which may be the subject of plant breeders rights shall initially be the following:

- (a) cereals: rice, oats, rye, barley, maize, wheat and triticale;
- (b) oil-bearing plants: Sunflower,
- (c) fodder plants: ryegrass, vetch, lupin, clover, lucerne fescue.

Chapter III Procedure for the Grant of Protection

Persons Qualified to Apply for the Grant of Plant Breeders' Rights

8.—(1) The grant of plant breeders' rights in a plant variety may be applied for by the breeder thereof or by whoever succeeds him, whether by contract *ormortis causa* , provided that the person concerned is:

- (a) of Portuguese nationality;
- (b) of foreign nationality but resident in Portugal;
- (c) a legal entity with headquarters in Portugal;
- (d) a national of a member State of the International Union for the Protection of New Varieties of Plants (UPOV) or a natural person or legal entity with residence or headquarters in one of the States of the Union, provided that the State concerned grants protection to the species or genus to which the variety referred to in the application belongs;
- (e) a national of another State or a natural person or legal entity with residence or headquarters in a State in which Portuguese, or foreigners resident in Portugal and legal entities with headquarters in Portugal, enjoy the same protection as is accorded to the nationals of the State concerned with respect to varieties belonging to the genus of species referred to in the application.

(2) Persons or entities not resident or not having headquarters in Portugal may apply for the grant of plant breeders' rights only if they designate a representative who fulfils those conditions.

(3) Where two or more persons have jointly discovered a plant variety, the corresponding application for plant breeders, rights shall likewise be drawn up jointly; a representative shall however be appointed who shall act in the name of all of them in any relations to be conducted with CENARVE.

(4) The representative referred to in the foregoing paragraph may be one of the applicants or a third party. Where no representative is appointed, the applicant named first shall be considered the representative.

Application for the Grant of Plant Breeders' Rights

9.—(1) The application for the grant of plant breeders' rights may be filed with CENARVE personally or sent by registered letter with notice of receipt.

(2) The application, made on the appropriate printed forms provided by CENARVE, shall be written in Portuguese, and any documents to be submitted that are written in a foreign language shall be accompanied by a duly certified translation.

(3) The date of the application shall be that of its filing with CENARVE.

Conditions to Be Met by the Application for the Grant of Plant Breeders' Rights

10. The application for the grant of plant breeders' rights shall contain the following particulars, *inter alia*:

- (a) the name or business style of the applicant, with domicile or headquarters;
 - (b) the nationality of the applicant in the case of a natural person;
 - (c) the name and address of the representative, if any;
 - (d) the name and address of the breeder, if other than the applicant;
 - (e) the denomination of the plant variety or the designation given it by its breeder;
 - (f) where the plant variety is protected or where protection has already been applied for in any country, the following particulars shall also be given:
 - the identity of that country or those countries;
 - the denomination registered in that country or those countries;
 - the number under which the application for or title of protection is registered;
 - the date of the application or title granted;
 - (g) if any priority is claimed, the date of the first application for protection and the country in which it was filed;
 - (h) the signature of the applicant or his representative.
- (2) The application shall be accompanied by the following:
- (a) a full description of the plant variety;
 - (b) a power of attorney signed before a notary, where the application is filed by a representative;
 - (c) where the application is not filed by the breeder, a document attesting the acquisition of the corresponding rights;

(d) a declaration stating that the plant variety is new within the meaning of these Regulations;

(e) a declaration stating that the applicant undertakes, as from the grant of plant breeders' rights, not to exercise his rights in the use of any trademark or trade name liable to cause confusion with the denomination for which protection is sought that may have been registered in his favor in the country or in any other country with which Portugal has entered into an agreement on Identical or similar goods;

(f) any other particulars that the applicant considers useful for the full evaluation of the application;

(g) the amount of fees payable;

(h) an inventory of the documents submitted to CENARVE.

(3) The description referred to in subparagraph (a) of the foregoing paragraph shall state, *inter alia*:

(a) the botanical species to which the plant variety belongs;

(b) the main morphological and physiological characteristics and also, in the case of hybrid varieties, the main morphological and physiological characteristics of the parents;

(c) the technique used to breed the variety concerned;

(d) the similarities and differences of the variety in relation to any other variety in existence.

Benefit of Priority

11.—(1) When applying for the grant of breeders' rights in a plant variety, the person concerned may claim the benefit of priority if, less than one year previously, he has filed an application in due form for the protection of the same variety in a member country of UPOV.

(2) The effect of the benefit of priority shall be that the date of the application shall be deemed to be that of the earlier application filed in the foreign country.

(3) The request for priority shall be considered in the light of copies of the documents attesting the filing of the earlier application for the grant of plant breeders' rights on the basis of which priority is claimed, duly certified and dated by the appropriate departments.

(4) The documents referred to in the foregoing paragraph shall be filed together with the application for the grant of plant breeders' rights or within the three months thereafter, failing which the benefit of priority shall not be recognized.

(5) Where appropriate, the applicant shall state in the application for the grant of plant breeders' rights the date on which he intends to submit the propagating material referred to in paragraph (3) of Article 16, as the period of four years following the date on which the priority expires may not be exceeded.

- (6) the request for priority shall be accompanied by the amount of the fee payable.

Denomination of the Plant Variety

12.—(1) Any plant variety shall be designated by a single denomination that enables it to be identified and is different from that used for any other plant variety of the same or a related species already registered in the country or in any other member State of UPOV.

(2) The denomination given to a protected variety may not be used as a trademark or trade name for any new plant variety of the same or a related species.

Conditions to Be Met by the Denomination

13.—(1) The denomination of the plant variety may be composed of:

- (a) not more than three words;
- (b) an alphanumerical combination comprising not more than four elements;
- (c) a combination of words and letters comprising not more than four elements;
- (d) a combination of words and numerals comprising not more than four elements;

(2) The proposed denomination shall be written in full.

(3) The proposed denomination must not:

- (a) be difficult to pronounce or remember;
- (b) be misleading as to the origin, source, value or characteristics of the plant variety or the identity of the breeder;

(c) be identical, or easy to confuse, with another denomination already registered in the country or in any other member State of UPOV, which is used to designate a plant variety of the same species or species in the same class;

(d) be contrary to morality or public policy;

(e) incorporate the botanical or common name of a plant genus or species, or the words “variety,” “cultivar,” “hybrid,” “form” or “cross”;

(f) give the impression that the plant variety derives from another variety, or is related to such a variety, when that is not the case;

(g) evoke solely characteristics that are common to other protected plant varieties of the same species;

(h) be inadequate for linguistic reasons;

(i) be identical to a denomination used to designate another commonly-grown plant variety, even if the latter variety is already public property.

(4) Notwithstanding the provisions of the foregoing paragraph, if the plant variety for which protection is sought is already protected in another member State of UPOV, or if an application for protection has already been filed in such a State, only the previously-used denomination may be proposed and registered.

(5) The denomination of the protected plant variety shall always be used for the marketing of the said variety, or for the marketing of propagating material of the variety, even after the term of protection has expired.

Acceptance or Rejection of the Application

14.—(1) Within a period of five working days following the date of its filing with CENARVE, the application for the grant of plant breeders' rights shall be examined to determine whether it fulfils the conditions laid down in these Regulations.

(2) If it contains all the elements necessary for evaluation, the application shall be accepted and entered in a special register, in which the filing date shall also be recorded.

(3) Where the application is incomplete, or where CENARVE considers that further details are necessary, it shall invite the applicant to provide them and shall set a time limit for the purpose which shall be neither shorter than 15 days nor longer than 30 days.

(4) Where the elements requested pursuant to the foregoing paragraph are not communicated within the time limit set, the application shall be rejected and the fact shall be notified to the applicant, who shall not be entitled to repayment of any fees already paid.

Publication of the Application and Oppositions Filed Against It

15.—(1) Once the application has been accepted, it shall be published in the CENARVE Bulletin, which shall record the date of filing, the name or business style of the applicant with residence or headquarters, the name or business style of the breeder—if other than the applicant—with residence or headquarters, the proposed denomination and the main characteristics of the variety as given in the application.

(2) Within two months following the date of the publication referred to in the foregoing paragraph, any interested party may file opposition to the grant of plant breeders' rights.

(3) Oppositions shall be filed in triplicate and shall clearly and precisely state:

(a) the name or business style and residence or headquarters of the opponent;

(b) the application for plant breeders' rights opposed and the issue of the CENARVE Bulletin in which it was published;

(c) the grounds on which the grant of plant breeders' rights should be refused.

(4) Oppositions filed with CENARVE shall be communicated to the applicant, in order that the latter may reply to them within a period of 30 days.

Decision on the Continuation of the Procedure

16.—(1) On expiry of the time limit set in paragraph (2) of the foregoing Article or, where oppositions have been filed, after the submission of the reply or the expiry of the time limit allowed for the purpose, the Director of CENARVE shall decide whether to continue or to cancel the procedure, basing his decision, *inter alia*, on oppositions filed and, if possible, satisfying himself that the requirement specified in subparagraph (d) of paragraph (1) of Article 5 has been fulfilled.

(2) Cancellation of the procedure shall be notified to the applicant with sufficient statement of reasons.

Tests for, Distinctness, Homogeneity and Stability

17.—(1) New plant varieties for which plant breeders' rights have been applied for shall be tested to determine their distinctness, homogeneity and stability.

(2) The tests referred to in the foregoing paragraph shall be carried out by CENARVE or by any other body, either national or foreign, designated by it.

(3) CENARVE shall inform the applicant of the quantity of propagating material that he has to provide, and also of the place and date of delivery: it shall likewise inform him of the body that will be carrying out the tests the place in which they will be carried out, the date on which they will start and their expected duration.

(4) In the course of the tests, CENARVE may request the applicant to provide further information or additional propagating material, setting a date for compliance.

(5) Where the applicant does not deliver the propagating material referred to in paragraph (3) to the place or on the date specified, or where without explanation he refuses to cooperate in the manner described in the foregoing paragraph, the application shall be cancelled without reimbursement of any fees already paid.

Test Results

18.—(1) Once the DHS tests have been completed, the body that has carried them out shall draw up a report on them and also a final assessment of the new plant variety.

(2) The documents referred to in the foregoing paragraph shall be sent to the applicant, who shall be allowed one month within which to comment on them.

Advice of the Technical Board

19. Once the period referred to in paragraph (2) of the foregoing Article has expired, the file shall be submitted to the Technical Board of CENARVE for its advice.

Decision and Publication

20.—(1) Once the advice of the Technical Board of CENARVE has been given or the period set for the purpose has expired, the file shall be submitted to the Director of CENARVE for a decision.

(2) If the plant breeders' rights applied for are granted, a title called a "plant breeder's certificate" shall be issued in which the following particulars shall appear:

- (a) the number thereof;
- (b) the species to which the plant variety qualifying for plant breeders' rights belongs;
- (c) the denomination given to the plant variety;
- (d) the name of the owner of plant breeders' rights and that of the breeder if another person;
- (e) the date of grant of the certificate and that on which the protection afforded by it ceases to operate;
- (f) the signature of the Director of CENARVE.

(3) The grant of the plant breeder's certificate shall be published in the CENARVE Bulletin, which shall record the elements referred to in the foregoing paragraph.

(4) Refusal to grant plant breeders' rights shall also be published, with an indication of the grounds on which it was pronounced.

Recording in the National Register of Protected Varieties

21.—(1) The grant of plant breeders' rights shall be recorded in the Register of Protected Varieties in chronological order.

(2) The Register entry referred to in the foregoing paragraph shall contain the following:

- (a) the elements mentioned in paragraph (2) of the foregoing Article;
- (b) the serial number and dates of filing and acceptance of the application;
- (c) the description of the plant variety, drawn up after the tests of identity, homogeneity and stability;
- (d) the name and residence of the representative, if any;
- (e) the date on which the plant breeder's certificate was issued, and the date of publication thereof in the CENARVE Bulletin;
- (f) payment of the required fees;
- (g) revocation or transfer of the plant breeder's rights;

- (h) any licenses granted;
 - (i) judicial actions concerning the plant breeders' rights.
- (3) Any alteration to Register entries shall be communicated to CENARVE for recording.

Chapter IV **Subsequent Controls and Maintenance Fees**

Subsequent Controls

22.—(1) CENARVE may demand of the owner of plant breeders' rights that he provide additional material or documents for the purposes of tests to determine whether the protected plant variety still retains the characteristics on the basis of which the said rights were granted.

(2) For the purposes of the controls referred to in the foregoing paragraph, CENARVE may inspect the maintenance growing plots.

(3) Failure to observe the provisions of paragraph (1), or unwarranted opposition to the inspections referred to in the foregoing paragraph, shall cause the plant breeders' rights concerned to be revoked.

Maintenance Fees

23. The owner of plant breeders' rights shall pay the appropriate maintenance fee for each year of the term of protection.

Chapter V **Transfer of Plant Breeders' Rights and Exploitation Licenses**

Transfer of Plant Breeders' Rights

24.—(1) Plant breeders' rights shall be transferable by contract or by inheritance.

(2) Any transfer under the foregoing Article shall be communicated to CENARVE within one month, and shall give rise to payment of the corresponding fee.

License Contracts

25.—(1) The owner of plant breeders' rights may by contract, either free of charge or for a consideration, authorize another person to exploit the plant variety covered by the rights.

(2) The conclusion of a contract as referred to in the foregoing paragraph shall be communicated to CENARVE for recording in the Register of Protected Varieties.

(3) Unless expressly provided to the contrary, the conclusion of a contract shall not prevent the breeder from concluding other contracts or from exploiting the plant variety in question direct.

(4) The owner of an exploitation license may not transfer it or allow another person to exploit the plant variety in question without the express authorization of the breeder.

(5) Transfer of the license shall be communicated to CENARVE for recording in the Register of Protected varieties.

Compulsory Licenses

26.—(1) At the request of interested parties, CENARVE may decide to grant compulsory licenses where such a step is considered necessary for the safeguarding of the public interest which requires the rapid and wide distribution of the plant variety in question.

(2) When it grants a compulsory license, CENARVE shall set the equitable compensation, which shall be economic in character, that accrues to the owner of the plant breeders' rights after the interested party has been heard and the Technical Board has given its advice.

(3) A compulsory license shall be dependent:

(a) on the interested parties possessing the technical and economic means necessary for the efficient exploitation of the plant variety concerned;

(b) on the owner of the plant breeders' rights having refused without justification to enter into a license contract with the interested party;

(c) on the interested party providing every assurance of payment of the compensation referred to in paragraph (2);

(d) on a period of three years having elapsed after the date of grant of the plant breeders' rights concerned;

(e) on payment of the fee due for the purpose.

(4) The term of the compulsory license shall be from two to four years; that term may be prolonged if the conditions on the basis of which the license was granted continue to obtain.

(5) A compulsory license may be revoked if its holder fails to discharge the obligations that he has assumed.

Chapter VI Lapse and Revocation of Plant Breeders' Rights

Lapse of Plant Breeders' Rights

27. Plant breeders' rights shall lapse on expiry of the periods referred to in Article 6.

Revocation

28.—(1) Plant breeders' rights shall be revoked:

- (a) for failure to pay the fees due;
- (b) where the plant variety ceases to display the characteristics on the basis of which they were granted;
- (c) at the request of the owner;
- (d) where the owner has not provided the material demanded by CENARVE for the purposes of verifying the continued presence of the characteristics of the plant variety in question;
- (e) where the owner of the rights opposes the inspections referred to in paragraph (2) of Article 19;
- (f) where it is shown that the holder of the rights is not the rightful owner thereof.

(2) In the case provided for in subparagraph (f) of the foregoing paragraph, and at the request of the rightful owner, plant breeders' rights may be granted to the said owner without the necessity of a new grant procedure.

Chapter VII Final Provisions

Fees

29.—(1) Each of the acts provided for in these Regulations shall give rise to the payment of the following fees, which are calculated according to a system of points:

	points
(a) application for plant breeders' rights (Article 9)	12 500
(b) claim of the benefit of priority (Article 11)	4 500
(c) opposition to the grant of protection (Article 15)	4 500
(d) testing of distinctness, homogeneity and stability carried out by CENARVE (Article 17)	25 000 to 41 500



(e)	testing of distinctness, homogeneity and stability carried out by other bodies (Article 17)	variable
(f)	grant of plant breeders' rights (Article 20)	17 500
(g)	maintenance of plant breeders' rights (Article 23):	
	first year	8 000
	second year	20 000
	third year	35 000
	fourth year	50 000
	fifth and following years	70 000
(h)	registration of transfer of plant breeders' rights (Article 24)	8 000
(i)	registration of a license contract (Article 25)	7 500
(j)	other alterations or entries made in the Register	1 500
(2)	The amount of the fee provided for in subparagraph (c) of the foregoing paragraph shall be refunded if the opposition filed is judged valid.	
(3)	The amount of the fee provided for in subparagraphs (d) and (c) of paragraph (1) shall be set by CENARVE according to the complexity and cost of the tests.	
(4)	The value of each point is 1.50 escudos.	
