

NEWSLETTER

LEGISLATION

AUSTRIA

ARTICLE 8 FEDERAL LAW ON THE PROTECTION OF PLANT VARIETIES (VARIETY PROTECTION ACT 2001¹)*

<p>INDEX</p> <p>PART I: General Provisions</p> <p>Section 1: Definitions</p> <p>Section 2: Scope of applicability</p> <p>Section 3: Conditions of protection</p> <p>Section 4: Effect of plant variety rights</p> <p>Section 5: Duration and termination of plant variety rights</p> <p>Section 6: Compulsory licenses</p> <p>PART II: Grant of Plant Variety Rights</p> <p>Section 7: Application for plant variety rights</p> <p>Section 8: Rights of priority</p> <p>Section 9: Publication of applications</p> <p>Section 10: Objections to the grant of a plant variety right</p> <p>Section 11: Examination of varieties</p> <p>Section 12: Grant of a plant variety right</p> <p>Section 13: Transfer of a plant variety right</p> <p>Section 14: Cancellation of plant variety rights</p> <p>Section 15: Revocation and official transfer of plant variety rights</p> <p>Section 16: Obligations of the holder of the plant variety right</p> <p>PART III: Variety Denomination</p> <p>Section 17: Proposed and final variety denominations</p> <p>Section 18: Applications concerning the cancellation of variety denominations</p> <p>PART IV: Authorities</p> <p>Section 19: Jurisdiction and rules of procedure</p> <p>Section 20: Jurisdiction of the Patent Office</p> <p>Section 21: Variety and Seed Journal (“Sorten- und Saatgutblatt”)</p> <p>Section 22: Plant Variety Register (“Sortenschutzregister”)</p> <p>PART V: Other Provisions</p> <p>Section 23: Fees</p> <p>Section 24: Civil law claims</p> <p>Section 25: Penal infringements of plant variety rights</p>	<p>Section 26: Fines</p> <p>Section 27: Transitional provisions</p> <p>Section 28: Entry into force</p> <p>Section 29: Execution</p> <p style="text-align: center;">PART I GENERAL PROVISIONS</p> <p style="text-align: center;">DEFINITIONS</p> <p style="text-align: center;">Section 1</p> <p>For the purposes of this Federal Law</p> <p>1. “species” shall mean plant species as well as their combinations and sub-divisions including such that are characterised by a particular propagation system or final use;</p> <p>2. “variety” shall mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be</p> <p style="margin-left: 20px;">a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;</p> <p style="margin-left: 20px;">b) distinguished from any other plant grouping by the expression of at least one of the said characteristics and</p> <p style="margin-left: 20px;">c) considered as a unit with regard to its suitability for being propagated unchanged;</p> <p>3. “variety essentially derived from another variety” shall mean a variety which</p> <p style="margin-left: 20px;">(a) is predominantly bred from an initial variety, or from a variety that is itself predominantly derived from the initial variety, while maintaining the expression of the essential characteristics; and</p> <p style="margin-left: 20px;">(b) is clearly distinct from the initial variety; and</p> <p style="margin-left: 20px;">(c) except for the differences which result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;</p>
---	--

* Text provided by the Austrian authorities. The Law was published in the Official Gazette of August 10, 2001, and entered into force on September 1, 2001.

¹German title: Bundesgesetz über den Schutz von Pflanzensorten (Sortenschutzgesetz)

4. “propagating material” shall mean seeds, plants and parts of plants meant for the production or, otherwise, the growing, of plants;

5. “breeder” shall mean any natural or legal person that bred, or discovered and developed, a variety and this person’s successor in title;

6. “Member of the Union” shall mean a state which is a member of the International Union for the Protection of New Varieties of Plants (“UPOV”);

7. “Member State” shall mean a Member State of the European Community (EC);

8. “EEA country” shall mean a state party to the Agreement on the European Economic Area (EEA).

SCOPE OF APPLICABILITY

Section 2

(1) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall by way of ordinance declare those species protectable under a plant variety right for which there is a possibility of conducting the required plant variety examinations and for whose varieties there is economic demand.

(2) If the holder of a plant variety right was granted a plant variety right under this Federal Law prior to the grant of the Community variety right as laid down in Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ No L 227 of 1 September 1994, p. 1 (hereinafter referred to as “Regulation (EC) No 2100/1994”), the rights under this Federal Law cannot be exercised for the term of the respective Community right in the variety.

(3) Apart from protectable varieties, this Federal Law shall apply also to

1. plant varieties essentially derived from another variety, except if the protected variety is itself a variety essentially derived from another variety;
2. varieties not clearly distinguishable from the protected variety;
3. varieties whose production requires the repeated use of the protected variety.

CONDITIONS OF PROTECTION

Section 3

(1) The Variety Protection Office (“Sortenschutzamt”) shall grant a plant variety right for varieties which are distinct, uniform, stable, and new.

(2) A variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge on the date of application. The

existence of another variety shall in particular be deemed to be a matter of common knowledge if, on the date of application,

1. it was entered in an official register of plant varieties,
2. an application for its entering in an official register of varieties was filed, provided the application has led to the entering in the meantime, or
3. plants have been reproduced or plants, parts of plants or harvested material of the variety and products obtained directly therefrom have already been offered, disposed of to others, used, imported, or exported.

(3) A variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

(4) A variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

(5) A variety shall be deemed to be new if, at the date of filing of the application, propagating or harvested material of the variety has not, or only within the below-mentioned periods, been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety:

1. earlier than one year before that date in the Austrian federal territory;
2. earlier than four years in territories other than the Austrian federal territory, or, in the case of trees or vines, earlier than six years before the said date.

EFFECTS OF PLANT VARIETY RIGHTS

Section 4

(1) In respect of the propagating material of the protected variety the following acts shall require the authorisation of the holder of the plant variety right:

1. production or multiplication;
2. conditioning for the purpose of propagation
3. offering for sale;
4. selling or other marketing;
5. exporting;
6. importing, and
7. stocking for the purposes mentioned in items 1 through 6. The holder of the plant variety right may make his authorisation subject to conditions and limitations. This shall apply also to the transfer of plant variety rights by assignment.

(2) Notwithstanding the provisions of paragraphs (3) through (5), acts under paragraph (1) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of propagating material of the protected variety, shall require the authorisation of the holder

of the plant variety right, unless the holder of the plant variety right has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) Plant variety rights shall not extend to acts referred to in paragraph (1) where they are

1. done privately and for non-commercial purposes;
2. done for experimental purposes;
3. done for the purpose of developing new varieties; however, if this variety is regularly used to produce propagating material of another variety, the authorisation of the holder of the plant variety right shall be required.

(4) The protection of plant varieties shall not extend to farmers where they use, for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, of a protected variety. Conditions of planting can be laid down in an agreement between the representatives of the holders of the plant variety right and the farmers; small farmers shall be exempted from such an agreement. If necessary to allow implementation of this agreement, the Federal Minister for Agriculture, Forestry, Environment and Water Management can by means of an ordinance issue rules regulating the transfer of the required information from suppliers of processing services, holders of plant variety rights and farmers.

(5) The plant variety right shall not extend to propagating material, harvested material including entire plants, parts of plants or products obtained directly therefrom, of a protected variety which was sold or marketed by, or with the consent of, the holder of the plant variety right, or to the propagating material derived therefrom, unless

1. it was used for further production of propagating material or
2. it was exported into a country which does not offer equal protection of the variety concerned and it was used for propagation, except where the variety concerned was intended for final consumption purposes.

DURATION AND TERMINATION OF PLANT VARIETY RIGHTS

Section 5

(1) The term of protection shall be 30 years for trees and vines as well as for hop and potatoes, for all other species 25 years from the date of grant of the plant variety right.

(2) Plant variety rights shall lapse

1. with effect from the day following the holder's declaration of surrendering of the plant variety right to the Variety Protection Office;
2. upon expiry of the term of protection;
3. upon the entry into force of the withdrawal;

4. upon the entry into force of the revocation, where there was no official transfer of title.

COMPULSORY LICENSES

Section 6

(1) Provided that

1. this is necessary to ensure sufficient supply of the domestic plant production with suitable propagating material;
2. this can, from the financial point of view, be reasonably expected from the holder of the plant variety right; and
3. the license applicant can prove that he tried in vain to be granted a voluntary license under standard business conditions for an appropriate period;

the Revocation Division of the Patent Office shall, upon request, permit that propagating material of a protected variety be produced, marketed, or regularly used in the production of another variety also without the consent of the holder of the plant protection right. The permission shall be granted only where the applicant substantiates that the objectives of the compulsory license can be reached.

(2) The holder of the plant variety right may request the Revocation Division of the Patent Office that the compulsory license be restricted or withdrawn to the degree in which the conditions underlying its grant ceased to exist.

(3) The holder of the plant variety right shall be obliged to make available to the person enjoying the right under the compulsory license at least such quantity of propagating material as is necessary for maintenance breeding corresponding to the scope of the compulsory license.

(4) The holder of the plant variety shall be entitled to claim equitable remuneration from the person enjoying the right under the compulsory license. This remuneration, as well as any necessary security, shall be determined by the Revocation Division of the Patent Office upon request.

(5) The holder of the plant variety right shall be entitled to authorise other persons to use the protected variety.

PART II GRANT OF PLANT VARIETY RIGHTS

Application for Plant Variety Rights

Section 7

(1) The breeder shall be entitled to file an application for a plant variety right in respect of a variety at the Variety Protection Office when

1. the breeder has a seat, or is domiciled, in an EEA country, a Member State, or a Member of the Union, or

2. in a state where the breeder has a seat, or is domiciled, Austrian nationals can obtain a plant variety right or an equal proprietary right for varieties of the same kind.

(2) Persons who are not domiciled, or do not have a seat, in an EEA country or in a Member State can, before the Variety Protection Office and with the Federal Minister for Agriculture, Forestry, Environment and Water Management, assert rights under this Federal Law only through an authorised representative who is domiciled, or has a seat in the federal territory and, before the Revocation Division of the Patent Office and the Supreme Patent and Trademark Chamber (Oberster Patent- und Markensenat), only through a lawyer or a patent attorney.

(3) Applications filed for the grant of a plant variety right shall contain at least:

1. name, nationality and address of the applicant and his representative;
2. the species as well as, where applicable,
 - (a) the type of use;
 - (b) the propagation system; and
 - (c) the information that the variety is, in every propagating cycle, produced using particular hereditary components;
3. the description of the characteristics essential for the distinctness of the variety;
4. the proposed denomination of the variety or the final variety denomination;
5. name and address of any other breeder;
6. information in respect of any earlier application for a plant variety right already filed for this variety in another EEA country, Member State, or Member of the Union, and which decision was made in such a case;
7. in the case of genetically modified plants all relevant data and documents concerning the existence of the genetically modified organism and the authorisation already granted under Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ No L 117, of 8 May 1990, p. 15) and, if this variety is intended for a novel food or for a novel food ingredient, on the authorisation already granted under Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients (OJ No L 43 of 14 February 1997, p. 1); and
8. a sufficient quantity of propagating material for the Variety Protection Office, which shall either be attached to the application or communicated to the Variety Protection Office upon request.

(4) To discoveries and breeds by employed persons,

sections 6 through 19 of the 1970 Patent Act, Federal Law Gazette No 259 ("Patentgesetz"), shall apply *mutatis mutandis*.

RIGHTS OF PRIORITY

Section 8

(1) If applications for a proprietary right in respect of a variety or a variety denomination are filed at the Variety Protection Office by several persons independently of each other, the earlier application shall have priority over the later one, the decisive factor being the date of receipt of the application by the Variety Protection Office. If several applications for the grant of a plant variety right are received by the Variety Protection Office on the same day, these applications shall have the same priority. Where notices of variety denominations for varieties of related species have the same priority and no agreement is reached, the Variety Protection Office shall decide by drawing lots for which applicant the variety denomination given notice of should be registered.

(2) In derogation thereof, the Variety Protection Office shall grant the applicant who already filed an application for a plant variety right in another EEA state, Member State or Member of the Union the priority corresponding to the date of this earlier application. The right of priority shall, however, be acquired only if

1. it is expressly claimed in the application to the Variety Protection Office;
2. at the time of claiming the right not more than one year has passed since the earlier application; and
3. at the latest three months following the claim the applicant furnishes proof of the earlier application by submission of copies of the application documents; the copies shall be certified true by the authority responsible for such applications in the respective foreign country.

PUBLICATION OF APPLICATIONS

Section 9

(1) The Variety Protection Office shall publish applications for variety rights which appear to be acceptable in the Variety and Seed Journal ("Sorten- und Saatgutblatt") on the basis of the information supplied by the applicant. The publication shall contain at least:

1. the species;
2. the proposed variety denomination or the registered variety denomination;
3. the date of application;
4. any priority rights claimed;
5. name, nationality and address of the applicant;

6. the reference number of the application.
- (2) The Variety Protection Office shall permit everybody who so requests to inspect the documents relating to applications for grant of a plant variety right and the test results and shall allow the growing trials of varieties, conducted for purposes of examination, to be viewed. The following shall be withheld from inspection:
1. in the case of varieties the plants of which are produced by crossing of specific hereditary components the data of the hereditary components as well as
 2. business and trade secrets.

OBJECTIONS TO THE GRANT OF A PLANT VARIETY RIGHT

Section 10

- (1) Any person may lodge with the Variety Protection Office a reasoned written objection to the grant of a plant variety right based on the contention that
1. the variety does not comply with the conditions of protection; or
 2. the variety denomination is not permissible; or
 3. the applicant is not entitled to file an application for the grant of a plant variety right.
- (2) Objections may be lodged until the following deadlines:
1. until the closure of proceedings, in the case of paragraph (1) item 1 hereof;
 2. within three months of the publication of the variety denomination in the Variety and Seed Journal, in the case of objections under paragraph (1) item 2 hereof; and
 3. within three months of the publication of the application in the Variety and Seed Journal, in the case of objections under paragraph (1) item 3 hereof.
- (3) The objector shall, upon written request, be informed about the result of the examination by the Variety Protection Office. If an objection under paragraph (1) item 3 leads to the final and binding refusal or rejection or withdrawal of the application for grant of the plant variety right, the Variety Protection Office shall inform the objector thereof without delay. If the objector files an application for grant of a plant variety right in respect of the same variety within one month of service of the written notification, and if he proves that he is eligible to receive protection, he can request that the date of the earlier application be deemed the date of his application.

EXAMINATION OF VARIETIES

Section 11

- (1) The Variety Protection Office shall, based on its own

growing trials or other appropriate investigations, verify that the variety complies with the conditions of protection (examination for registration). The examination shall be conducted for so long a period as is adequate to allow a reliable evaluation.

(2) The Variety Protection Office may, in the place of its own examinations, base its evaluation on the findings of other examination offices of EEA countries, Member States or Members of the Union, provided these examination offices can be considered qualified for an examination for registration with a view to their respective technical equipment, investigation methods and local conditions of cultivation, and that these findings are available to the Variety Protection Office.

(3) The applicant shall

1. in respect of the Variety Protection Office
 - (a) provide free of charge the propagating material of the variety and of hereditary components used in the production of the variety, required for the examination;
 - (b) provide every information on the maintenance of the variety and permit the verification of such information;
 - (c) permit inspections of the enterprise;
2. permit the Variety Protection Office
 - (a) to take the necessary amount of samples of the variety free of charge; and
 - (b) to inspect the records concerning the maintenance of the variety.

If, despite written request and granting of an appropriate extension period, the applicant does not fulfil these obligations, the application shall be refused in the form of an administrative ruling by the Variety Protection Office.

(4) If the applicant can invoke a right of priority, the Variety Protection Office shall, on his request, suspend the examination for a maximum of five years following application in another EEA country, Member State or Member of the Union. Withdrawal or rejection of an application shall have the consequence that, after an appropriate period of time, the Variety Protection Office shall immediately start the examination.

(5) After the grant of the plant variety right the Variety Protection Office shall examine if the continuing existence of the protected variety is ensured, if there are grounds for suspicion that the holder of the plant variety right does not take sufficient measures to ensure such continuing existence of the variety. For purposes of examination the Variety Protection Office shall be entitled in respect of the plant variety right

1. to inspect the enterprise;
2. to take samples of the variety, free of charge, at the quantity required; and

3. to inspect the records relating to the maintenance of the variety.

(6) The Variety Protection Office shall be entitled to communicate the results of its own examinations as well as those of examinations carried out by the other domestic examination offices to examination offices of EEA countries, Member States or Members of the Union that are responsible for the grant of plant variety rights or equal proprietary rights.

GRANT OF A PLANT VARIETY RIGHT

Section 12

(1) The plant variety for which the application for the plant variety right was filed shall be entered into the Plant Variety Register when

1. all requirements for the grant of the plant variety right have been satisfied and
2. a permissible variety denomination has been submitted.

(2) The holder of the plant variety right shall receive a document evidencing the entry of the plant variety into the Plant Variety Register. If the plant variety will not be registered, the Variety Protection Office shall issue a negative ruling.

(3) During the period between the publication of the application in the Variety and Seed Journal and the grant of the plant variety right the person who filed the application for the grant of a plant variety right shall be entitled to an appropriate remuneration from everyone who performs acts requiring the authorisation of the holder of the plant variety right pursuant to section 4. This claim can however be asserted only from the time when the plant variety right is granted and shall be subject to a limitation period of one year of the publication of the grant of the plant variety right.

TRANSFER OF A PLANT VARIETY RIGHT

Section 13

(1) Transfer of a plant variety right by assignment shall take effect on the written application of one of the parties involved, from the time of its entry in the Plant Variety Register. The document on which the entry is to be based shall be attached to the application for entry.

(2) The ranking shall be determined by the order of the applications for entry received by the Variety Protection Office, provided that the application is registered. Applications received at the same time shall have equal rank.

CANCELLATION OF PLANT VARIETY RIGHTS

Section 14

(1) The Variety Protection Office shall cancel the plant variety right if it is established that the variety is not, or no longer, uniform or stable.

(2) The Variety Protection Office shall cancel the plant variety right if the holder of the plant variety right, despite written request and granting of an appropriate extension period,

1. does not provide the Variety Protection Office with the necessary information or does not submit the documents or the propagating material required to verify the maintenance of the variety;
2. fails to pay the due annual fees; or,
3. in cases where the variety denomination is cancelled after the grant of the plant variety right, does not submit another suitable variety denomination.

REVOCAION AND OFFICIAL TRANSFER OF PLANT VARIETY RIGHTS

Section 15

(1) A plant variety right shall, on application, be cancelled by the Revocation Division of the Patent Office if

1. it is established that the variety was not, or no longer, distinct or new, or
2. proof is furnished that the holder of the plant variety right was not eligible to receive protection.

(2) The final and binding revocation shall take effect retrospectively from the date of the grant of the plant variety right.

(3) Simultaneously with his application for revocation of the plant variety right pursuant to paragraph (1) item 2 the applicant can file an application with the Revocation Division of the Patent Office for the official transfer of the plant variety right to himself.

(4) Revocation and official transfer of the plant variety right pursuant to paragraph (3) can be claimed only by persons who have a claim to the grant of the plant variety right and shall be subject to a limitation period of three years following the time of the entry of the plant variety right in the Plant Variety Register vis-à-vis the *bona fide* holder. The official transfer shall take effect from the time of its entry in the Plant Variety Register.

(5) Mutual claims for compensation and return under revocation and official transfer shall be evaluated under civil law and enforced in civil action.

OBLIGATIONS OF THE HOLDER OF THE PLANT VARIETY RIGHT

Section 16

(1) The holder of the plant variety right shall be obliged to take sufficient measures to ensure the continuing existence of the variety.

- (2) The holder of the plant variety right shall be obliged, vis-à-vis the Variety Protection Office,
1. to permit to verify that the continuing existence of the variety has been ensured;
 2. to make available free of charge the propagating material required for the examination of the protected variety as well as propagating material of hereditary components used in the production of the variety;
 3. to provide all the necessary information;
 4. to render all the necessary assistance free of charge;
 5. to submit all the necessary books of account and records and permit their inspection;
 6. to make known all the places and means of transportation serving the production or marketing of the protected variety and permit access to them.
4. consist exclusively of information about the nature of the variety or of plant designations;
 5. contain the terms “variety” or “hybrid”.
- (4) When the examination of the variety has been completed the Variety Protection Office shall, in the case of a variety for which only a proposed name has been supplied, require the applicant to submit a final variety denomination within a specified period. If the applicant does not comply with this request, the application for the variety protection right shall be refused by decree.
- (5) If a proposed or final variety denomination is not permissible, the Variety Protection Office shall require the applicant to submit a permissible, proposed or final, denomination within an appropriate period. If the period expires without the applicant having complied with the request, the application for the variety protection right shall be refused by decree.
- (6) If the variety has already been registered or protected in another EEA country, Member State or Member of the Union, only the variety denomination used there may be registered by the Variety Protection Office, provided it is not contrary to the provisions of paragraphs (2) and (3).
- (7) Once the variety has been entered in the Plant Variety Register, the holder of the plant variety right may not assert, in respect of the variety concerned, any rights he may have in a mark that is similar to the variety denomination.
- (8) The variety denomination shall be cancelled by the Variety Protection Office *ex officio* where

PART III

VARIETY DENOMINATION

Proposed and Final Variety Denominations

Section 17

- (1) For the term of protection, and even after its expiration, propagating material of a protected variety may be marketed only under the variety denomination registered by the Variety Protection Office. In the procedure for grant of the plant variety right a proposed variety denomination may be used.
- (2) Proposed or final variety denominations shall be permissible where they comply with the provisions set out in Regulation (EC) No 2100/1994 and Commission Regulation (EC) No 930/2000 of 4 May 2000 establishing implementing rules as to the suitability of the denominations of varieties of agricultural plants and vegetable species (OJ No L 108 of 5 May 2000, p. 3) and there is no reason for exclusion.
- (3) Denominations shall be excluded from registration where they
1. are similar to a denomination which, within the domestic territory, the territory of an EEA country, a Member State, or a Member of the Union, is, or was, used for a variety belonging to the same, or a related, species as the registered variety, unless the older variety is no longer protected or used and its denomination has acquired no special significance;
 2. are liable to give offence;
 3. are liable to mislead, in particular concerning the identity, the origin, the characteristics, or the value of the variety;
1. it is established that
 - (a) the variety denomination is not, or no longer, in accordance with paragraph (2);
 - (b) there is an impediment to the variety denomination pursuant to paragraph (3);
 - (c) the variety denomination is not, or no longer, in accordance with paragraph (6);
 2. the holder of the plant variety right, providing sufficient proof of his legitimate interest, applies for the cancellation; or
 3. an application for cancellation was approved in a final and binding way.
- The Variety Protection Office shall in these cases request the holder of the plant variety right to submit a new variety denomination for registration; in such cases, paragraph (6) shall not apply.
- (9) The Variety Protection Office shall inform the Patent Office in writing of the registered variety denomination and the species to which the protected variety belongs.

Application for Cancellation of Variety Denominations

Section 18

(1) An application for the cancellation of a variety denomination can be filed with the Revocation Division of the Patent Office

1. by the holder of an identical trademark for identical goods or services registered prior to the registration of the variety denomination and still rightfully existing;
2. by the holder of an identical or similar trademark for identical or similar goods or services registered prior to the registration of the variety denomination and still rightfully existing, provided this constitutes a risk that it might cause confusion with the public, which includes the risk that the variety denomination might be intellectually associated with the trademark;
3. by the holder of an identical or similar trademark for goods or services not similar registered prior to the registration of the variety denomination and still rightfully existing trademark which is known within the domestic territory, provided that the use of the variety denomination would unjustifiably and in an unfair way exploit or impair the distinctness or the reputation of the known trademark;
4. by the person furnishing proof that the non-registered mark held by him for the same, or for similar, goods or services was, among groups of market participants involved, considered a characteristic of the goods or services provided by his enterprise already at the time of the registration of the contested identical or similar variety denomination; or
5. by an entrepreneur if his name, his trade name, or the particular designation of his undertaking, or a designation similar to one of these designations, has been registered as a variety denomination, or as an element thereof, and if the use of the variety denomination would be liable to cause the risk of confusions with one of the above-mentioned names or designations of the applicant.

(2) Applications under paragraph (1) shall be rejected if the applicant was informed about the use of the registered variety name and tolerated it for a period of five successive years. This shall apply only where the holder of the plant variety right did not act in bad faith in the procedure for the entry of the variety denomination into the Plant Variety Register.

(3) After the expiry of the plant variety right the cancellation procedure shall be conducted by the Revocation Division of the Patent Office *ex parte*.

(4) The five-year-period referred to in paragraph (2) shall, with respect to the claims that are, at the time of the entry into force of this Federal Law, valid against the holder of a variety denomination registered at that time, begin to run as of the entry into force of this Federal Law. Applications for cancellation pursuant to paragraph (1) item 4 shall be rejected if, at the time of the entry into force of this Federal Law, the period provided for in section 16 paragraph (2) of the Variety

Protection Act, Federal Law Gazette No 108/1993, has already expired.

PART IV

AUTHORITIES

Jurisdiction and Rules of Procedure

Section 19

(1) The Variety Protection Office shall be the Austrian Federal Office and Research Centre of Agriculture (Bundesamt und Forschungszentrum für Landwirtschaft).

(2) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall decide about appeals from decisions of the Variety Protection Office.

(3) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall, vis-à-vis the Variety Protection Office, be the supreme authority having subject-matter jurisdiction for the purposes of the General Law on Administrative Procedures (AVG).

(4) Unless otherwise provided in this Federal Law, the authorities shall apply the AVG.

(5) Any other legislation referred to in this Federal Law shall apply as amended from time to time.

JURISDICTION OF THE PATENT OFFICE

Section 20

(1) The Revocation Division of the Patent Office shall decide in procedures concerning

1. the granting of compulsory licenses pursuant to section 6;
2. the revocation and official transfer of variety protection rights pursuant to section 15;
3. the cancellation of variety denominations pursuant to section 18.

(2) Appeals from decisions of the Revocation Division of the Patent Office shall be subject to the decision of the Supreme Patent and Trademark Chamber. Procedures before the Revocation Division of the Patent Office and the Supreme Patent and Trademark Chamber as well as matters concerning fees, shall be governed by the 1970 Patent Act.

(3) On the proposal of the Federal Minister for Agriculture, Forestry, Environment and Water Management, in agreement with the Federal Minister for Transport, Innovation and Technology, the President of the Federal Republic of Austria shall, in addition, appoint that number of non-permanent, technically qualified members of the Patent Office as well as that number of technically and legally qualified members of the Supreme Patent and Trademark Chamber which is necessary to attend to the tasks under the present Federal Law.

Such appointments shall be made exclusively to persons having subject-matter competence in matters related to plant variety rights.

(4) The composition of the committees of the Revocation Division and the Supreme Patent and Trademark Chamber in procedures under paragraph (1) items 1 and 2 shall be governed by the 1970 Patent Act subject to the provision that each committee of the Revocation Division of the Patent Office has one technically qualified member and each committee of the Supreme Patent and Trademark Chamber has one legally and one technically qualified member who were appointed on the proposal of the Federal Minister for Agriculture, Forestry, Environment and Water Management in agreement with the Federal Minister for Transport, Innovation and Technology. The composition of committees in procedures under paragraph (1) item 3 shall be governed by the 1970 Trademark Act (“Markenschutzgesetz”).

VARIETY AND SEED JOURNAL
 (“SORTEN- UND SAATGUTBLATT”)

Section 21

(1) The Variety Protection Office shall issue a Variety and Seed Journal (“Sorten- und Saatgutblatt”) to be published at least quarterly.

(2) The following shall be published in the Variety and Seed Journal:

1. the application for the grant of a plant variety right;
2. the withdrawal, rejection and refusal of any application that has been published;
3. the grant, termination, cancellation, and revocation of any plant variety right;
4. any change with respect to the applicant for, or holder of, the plant variety right;
5. the submission of a proposed or final variety denomination;
6. any changes in, or cancellations of, variety denominations;
7. the information under section 6 of the 1997 Seed Act (“Saatgutgesetz”), Federal Law Gazette I No 72; and;
8. information and documents relating to
 - (a) ordinances issued on the basis of this Federal Law;
 - (b) international developments within the framework of UPOV;
 - (c) relevant Community legislation;
 - (d) decisions of courts and administrative authorities;

- (e) other matters of general interest concerning the protection of plant varieties and seeds.

PLANT VARIETY REGISTER
 (“SORTENSCHUTZREGISTER”)

Section 22

(1) The Variety Protection Office shall keep a public register of plant variety rights.

(2) The following data shall be entered in the Plant Variety Register stating the date of entry:

1. the registration number;
2. the date of application and, if applicable, the date establishing priority;
3. the species as well as, if applicable,
 - (a) the type of use;
 - (b) the propagation system; and
 - (c) the reference that the variety is produced in every propagating cycle by using specific hereditary components;
 - (d) in the case of a genetically modified variety, the reference to the genetic modification;
4. the variety denomination;
5. name and address of the holder of the plant variety right and his agent;
6. the day when the plant variety right begins to run;
7. the employer’s exploitation right;
8. the names and addresses of holders of voluntary licenses and compulsory licenses;
9. the reference to proceedings pending before the Revocation Division of the Patent Office and before the Supreme Patent and Trademark Chamber;
10. date and reason of the termination of the plant variety right;
11. the revocation as well as
12. the legal and official transfers.

(3) During the hours of office the Plant Variety Register at the Variety Protection Office shall be open to public inspection and everybody may make copies on the spot or, subject to the available equipment, have extracts made at his cost. The following data shall be withheld from inspection:

1. in the case of varieties the plants of which are produced by the crossing of specific hereditary components, the data on the hereditary components as well as
2. business and trade secrets.
- (4) Data processing as defined by the 2000 Data Protection Act (“Datenschutzgesetz”) for purposes of the automatic keeping of the Plant Variety Register shall be permitted.

PART V

OTHER PROVISIONS

Fees

Section 23

- (1) For the acts of the Variety Protection Office pursuant to this Federal Act, fees shall be charged.
- (2) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall in agreement with the Federal Minister for Finances, in accordance with the average costs accruing, determine the fees, their maturity and the way of their collection in a tariff.

CIVIL LAW CLAIMS

Section 24

- (1) Whosoever is infringed in a plant variety right due to him under this Federal Law or under Regulation (EC) No 2100/1994 shall be entitled to injunction, removal, publication of the judgement, reasonable compensation, damages, restitution of gains, and rendering of accounts. Also any person who has reason to suspect such infringement may take action for injunction. Sections 147 through 154 of the 1970 Patent Act shall apply *mutatis mutandis*.
- (2) For legal actions and temporary injunctions under this Federal Law or under Regulation (EC) No 2100/1994, jurisdiction shall lie with the Handelsgericht Wien (Commercial Court of Vienna). Section 7 paragraph (2) first sentence (7a) and section 8 paragraph (2) Code of Jurisdiction, shall apply. This shall apply also to temporary injunctions.

PENAL INFRINGEMENTS OF
PLANT VARIETY RIGHTS

Section 25

- (1) Whosoever performs acts under section 4 hereof or under Article 13 of Regulation (EC) No 2100/1994 without the consent of the holder of the plant variety right, and thus infringes a plant variety right, shall be fined by the court up to 360 daily rates.
- (2) Infringements shall be sued only upon the request of the injured party.

(3) To the penal procedure, sections 148, 149 and 160 of the 1970 Patent Act shall apply *mutatis mutandis*.

(4) Jurisdiction in penal matters under this Federal Law or under Regulation (EC) No 2100/1994 shall lie with the Provincial Courts competent to hear penal matters.

FINES

Section 26

(1) Where the act does not constitute a punishable act within the jurisdiction of the courts, or where severer penalties are provided for it under other provisions, any person who

1. markets propagating material of a variety without using the variety denomination provided for in section 17 paragraph (1) hereof or in Article 63 paragraph (1) of Regulation (EC) No 2100/1994;
2. uses a variety denomination entered in the Plant Variety Register, or a similar denomination, for a different variety of the same, or a related, species;
3. in marketing, makes a pretence of a non-existing plant protection right;

shall have committed an administrative offence and shall be fined up to €7,270, in case of repetition of the offence up to €36,440, by the district administrative authority.

TRANSITIONAL PROVISIONS

Section 27

(1) For those of the varieties which, pursuant to the Plant Breeding Act (“Pflanzenschutzgesetz”), Federal Law Gazette No. 34/1948, were entered in the breeding record for crops as specially selected plants, and which were taken over into the Plant Variety Register pursuant to section 36 of the Plant Variety Act, Federal Law Gazette No 108/1993, variety protection rights shall end on 1 March 2003, at the earliest. These varieties shall be transferred into the Plant Variety Register.

(2) Those of the varieties for which a plant protection right was granted in accordance with the provisions of the Plant Variety Act, Federal Law Gazette No 108/1993, shall be transferred into the Plant Variety Register.

(3) For those of the varieties which were transferred into the Plant Variety Register in accordance with paragraphs (1) and (2), the period for which a right of protection was granted shall be appropriated to the term of protection under section 5 and the assessment of the fees.

(4) In section 26, the amounts of €7,270 and €36,440 shall, until 31 December 2001, be replaced by the amounts of ATS 100,000, respectively ATS 500,000.

ENTRY INTO FORCE

Section 28

(1) This Federal Law shall enter into force on 1 September 2001.

(2) Ordinances under this Federal Law may be issued already from the day following its promulgation. Such ordinances may take effect on 1 September 2001, at the earliest.

(3) Upon the entry into force of this Federal Law, the Federal Law on the Protection of Plant Varieties (Variety Protection Act), Federal Law Gazette No 108/1993, and Article 11 of the Euro Conversion Law Agriculture, Forestry, Environment and Water Management – EUG-LFUW², Federal Law Gazette I No 108/2001, shall become invalid.

EXECUTION

Section 29

The execution of this Federal Law shall lie

1. with respect to section 20 paragraph (1) items 1 and 2, with the Federal Minister for Transport, Innovation and Technology in agreement with the Federal Minister for Agriculture, Forestry, Environment and Water Management;

2. with respect to section 20 paragraph (1) item 3, with the Federal Minister for Transport, Innovation and Technology;
3. with respect to section 20 paragraphs (3) and (4), the Federal Minister for Agriculture, Forestry, Environment and Water Management in agreement with the Federal Minister for Transport, Innovation and Technology;
4. with respect to section 23, the Federal Minister for Agriculture, Forestry, Environment and Water Management in agreement with the Federal Minister for Finance Affairs;
5. with respect to sections 24 and 25, the Federal Minister of Justice; and
6. with respect to all other provisions, the Federal Minister for Agriculture, Forestry, Environment and Water Management.

² German title: Euro-Umstellungsgesetz Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft