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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

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COMPARATIVE STUDY  
OF CERTAIN ASPECTS OF THE LEGISLATION OF MEMBER STATES

Document prepared by the Office of the Union

This document is a follow-on to document CAJ/V/2.  
It contains a study of the statutory provisions of  
member States on provisional protection and the du-  
ration of protection.

## Chapter I

## PROVISIONAL PROTECTION

A. Introduction

1. Article 7(3) of the Convention lays down that "any member State of the Union may provide measures to protect the breeder against abusive acts of third parties committed during the period between the filing of the application for protection and the decision thereon." The great majority of member States have inserted "provisional protection" into their plant variety protection legislation for the applicant for protection. This provisional protection varies widely from one State to the other, particularly as a result of the fact that the Convention stipulates no particular system and that a number of States have interpreted Article 7(1) of the Convention (laying down that protection shall be granted after examination of the variety) as prohibiting the provisional grant to the applicant for protection of the rights deriving from the title of protection (see paragraph 14 below).

2. The provisional protection arrangements adopted by the member States may be classified according to the following two criteria:

(i) in some States, provisional protection is automatic, in others, a specific application has to be made;

(ii) in those States where provisional protection is automatic, the rights granted and the date from which they may be exercised vary.

3. Denmark, the Netherlands and Spain have not provided for provisional protection.

B. Automatic Provisional Protection

4. The applicant for protection automatically enjoys certain rights. Save for exceptions, these rights consist of the possibility of instituting legal proceedings against anyone using the variety in a way liable to cause prejudice to the applicant. For the sake of simplicity, this person will be referred to here as the "infringer."

5. The type of proceedings to be instituted depends on the State. It is noteworthy that States have not defined an exclusive right granted to the breeder for the duration of examination of the application, and the right which the applicant enjoys de facto is often that which is defined under Article 5 of the Convention and which is granted at the time the title of protection is issued.

6. The applicant enjoys all rights deriving from the title of protection. In Italy, the patent takes effect as from the filing date of the application (Section 7(3)) of Decree No. 974 of August 12, 1975).

7. The applicant may institute infringement proceedings in the same way as the holder of a title of protection. This system has been adopted, with variants, by France and Sweden.

8. In France, events occurring before publication of the issue of a title of protection are not considered to have infringed the rights under the title. However, events occurring after a certified copy of the application for protection has been served on the party presumed liable may be recorded and may be the subject of proceedings (Section 26 of the Law).

9. In Sweden, the penalties for infringement (Sections 36 to 38 of the Law) apply mutatis mutandis to commercial use of a variety in respect of which an application leading to the issue of a title has been made, subject to a small number of exceptions as follows (Section 39 of the Law). Firstly, no penalty may be imposed (fine or a maximum of six months imprisonment) thus excluding the application of Section 36. Secondly, where the use of the variety occurred before the application was published, compensation can only be given in accordance with Section 37(2), that is to say the case is dealt with as if the infringer had not intended to commit the infringement or has not committed an act of negligence and compensation is paid as deemed reasonable. Section 37(1) applies after publication of the application: whoever intentionally

or through negligence makes commercial use of the variety is required to pay reasonable compensation for the use of the variety and compensation for any further damage caused by the infringement. Thirdly, the five-year limit on infringement proceedings counting from the date of infringement does not apply if proceedings are instituted within the year following issue of the title of protection.

10. Section 38 cannot, logically, apply until after publication of the application for protection since only from that time onwards can a commercial use infringing the rights of the applicant be intentional. The applicant can then require that the plants infringing his rights be put at his disposal, against payment, or that they be destroyed.

11. The applicant may institute proceedings for cessation of the infringement. This possibility is given to the applicant once the application is entered in the register of applications in Belgium (Section 36(2) of the Law) and on publication of the application in Switzerland (Section 38(1) of the Law). In Belgium, the courts may require the applicant to deposit security to be returned to him on presentation of the title of protection. If the application for protection is not successful, the applicant having obtained cessation is required to indemnify the other party (Section 37 of the Law). In Switzerland, the applicant must in all cases provide sufficient security to the other party.

12. The applicant may institute proceedings for damages after issue of the title of protection. This possibility is given in Israel (Section 62 of the Law) and in Switzerland (Section 38(2) of the Law). In both countries, proceedings may only concern infringements committed after publication of the application.

13. The applicant may claim equitable remuneration after publication of the title of protection. This possibility is given in the Federal Republic of Germany and concerns the propagating material produced for marketing and material marketed during the time between publication of the application and grant of the title (Section 47(4) of the Law).

14. The statement of grounds accompanying the Bill submitted to Parliament in 1967 (Drucksache des Bundesrats 51/67, page 39) gives the following explanation for the origin and scope of these arrangements:

"The provision does not institute provisional protection since it does not grant an exclusive right or a right to prohibit... The grant of provisional protection, as contained in the patent law, is not possible on account of the Convention (Article 7) which explicitly states that protection may only be granted after examination of the new variety. The right to remuneration is not a right to damages. Consequently it is not necessary that there be culpability on the part of the user and the limit on proceedings [three years from the time the interested party was apprised of the infringement and of the identity of the infringer] referred to in paragraph (3) [of Article 47] does not apply."

15. Section 47(5), which enables action to be taken under other statutory provisions, such as those concerning enrichment without cause or prohibited acts such as the theft of propagating material, are also applicable for the period preceding issue of the title of protection.

#### C. Provisional Protection as a Result of a Specific Application

16. This is the system of protective directions adopted by South Africa (Sections 14 to 16 of the Law) and the United Kingdom (Schedule 1 to the Law). These arrangements operate as follows:

(i) If the applicant for protection wishes to obtain a protective direction he must apply for it in his application for protection;

(ii) The applicant must give an undertaking to the effect that during the validity of the protective direction (generally the period during which the application is under examination) no material relating to the variety will be marketed in the country except for the purpose of experiment or of increasing the stock of propagating material of the variety, subject to the material thus produced becoming or remaining the property of the applicant;

(iii) The protective direction is given by the Controller or the Registrar if he is satisfied that the applicant has duly given the undertaking and that he has furnished all information, facilities and material that may be required to examine the application;

(iv) During the validity of the protective direction, the variety enjoys the same protection as if a title of protection had been granted;

(v) Any breach of the undertaking may lead to the application for protection being rejected in the United Kingdom.

## Chapter II

### DURATION OF PROTECTION

#### A. Introduction

17. Article 8 of the Convention provides that the duration of protection, counted from the date of issue of the title of protection, shall be at least 18 years in the case of vine and trees, including their rootstocks, and 15 years in the case of other plants. By only laying down a minimum, it therefore leaves great latitude to the member States to lay down the term of protection. The effective terms of protection in the member States are shown below for the major groups of species and for a number of individual species in the table at the end of the chapter.

18. However, over and above the differences in the effective duration of protection, there are also differences in the laws as regards the determination of the terms. The lawmaker himself has set the terms of protection (rigid systems) in a number of States. In other States, he has simply set the upper limits and has left the determination of the effective duration of protection to the executive (flexible systems). In yet further States, there exists an intermediate system. Moreover, there are a number of differences in details.

#### B. Systems for Determining the Duration of Protection Under the Law

19. Rigid systems. The effective terms of protection are laid down in the laws as follows:

(i) 18 years for vine and trees and 15 years for other plants: Denmark (Section 12 of the Law), Sweden (Section 21 of the Law - see also paragraph 25 below). It should be noted that Denmark makes no reference to vine;

(ii) 25 years for hops, potato, vine and trees and 20 years for other plants: Federal Republic of Germany (Section 18 of the Law - see also paragraph 25 below);

(iii) 30 years for plants with woody stems such as vine and trees and 15 years for other plants: Italy (Section 4(j) of Law No. 722 of July 16, 1974 (Ratification and Implementation of the Paris Convention for the Protection of New Varieties of Plants) and Section 7(1) and (2) of Decree No. 974 of August 12, 1975).

20. Flexible systems. The laws lay down limits and the executive is entrusted with settling in each case the effective duration of protection. The lower limits are those contained in the Convention (15 and 18 years) and apply to the groups of plants as defined by the Convention, save in Spain where the lower limit of 15 years applies to herbaceous plants and the 18 year limit to ligneous plants (Section 9(1) of the Law).

21. The upper limits are as follows:

(i) 20 years: Spain (Section 9(2) of the Law);

(ii) 25 years: Belgium (Section 11(2) of the Law), Netherlands (Section 51 of the Law), United Kingdom (Section 3(1) of the Law);

(iii) 25 years for vine and trees and 20 years for other plants: South Africa (Section 21(1) of the Law).

22. Intermediate systems. A first type of intermediate system is one in which the duration is set by the law but a given body has the possibility of granting a longer term. Such is the case in Israel and in Switzerland:

(i) In Israel, the term of protection is 18 years for vine, trees and other perennials and 15 years for other plants (Section 38(a) of the Law). The Minister of Agriculture may set a longer term for certain species or groups of species (Section 38(b) of the Law). The Law sets no upper limit.

(ii) In Switzerland, the term of protection is set at 20 years for all species and the Federal Council is empowered to extend such duration to 25 years at most for certain species or groups of plants (Section 14 of the Law - see also paragraph 25 below).

23. A second type of intermediate system is to be found in France: the duration of protection is 20 years and, in the case of species where "the constitution of the elements for production of the species requires a considerable time" it is of 25 years. It is therefore the executive that defines these species (Section 6 of the Law).

24. It should be noted that in those States having adopted a rigid system, the law also leaves some latitude in determining the term of protection since it is necessary to define what constitutes a tree or a plant with a woody stem.

#### C. Termination of Protection at the End of the Calendar Year

25. Three States have determined the duration of protection in such a way that it ends at the close of a calendar year:

(i) the Federal Republic of Germany (Section 18 of the Law) and Switzerland (Section 14 of the Law) set the termination of protection at the end of a calendar year;

(ii) Sweden (Section 21 of the Law) calculates the term of protection from the beginning of the calendar year following that in which the title of protection was issued.

#### D. Temporarily Provisional Nature of Protection

26. In Spain, the title of protection is of a provisional nature for a period of two years. At the end of that period, it automatically becomes final if no opposition to the grant of the title has been filed. Once it has become final, either on completion of the period of time or because opposition has been settled, corresponding appeals may be made. The provisional nature of the title has to be mentioned on all documents, packaging or advertising relating to the product covered by the title (Section 8(3) of the Law). During the provisional period of the title, the holder of the title enjoys all rights deriving therefrom. This period is included, where appropriate, in the period of protection (Section 8(4) of the Law).

#### E. Possibility of Extending the Protection of the Variety

27. In the United Kingdom, the Controller may extend protection of a variety under the following conditions (Section 3(5) of the Law):

- (i) The holder must make an application for extension;
- (ii) The holder, for reasons beyond his control, must not have been adequately remunerated by the grant of the rights;
- (iii) The Controller may make extension subject to restrictions, conditions and other provisions;
- (iv) The period of protection, including the extension, may not exceed 25 years;
- (v) Extension may not be followed by a further extension.

#### F. Term of Protection where the Transitional Limitation on the Novelty Requirement is Applied

28. Reference is made to document CAJ/V/2 (chapter V, paragraphs 182 to 189).

Effective Duration of Protection in the Member States  
(in years)<sup>1</sup>

	ZA	D	B	DK	E	F	IL	I	NL	UK	S	CH
<u>1. Agricultural species</u>												
- all species except the following (as appropriate)	15	20	20	15	16	20	15	15	20	15	15	20
+ fodder grasses, lucerne and clover					-					20		
+ potato												
+ hops	20	25	25		15	25			25	20		25
	-	25	25	-	-	25	-	-	-		-	-
<u>2. Vegetable species</u>												
- all species except the following (as appropriate)	15	20	20	15	-	20	15	-	20	15	15	20
+ onion	20		-		-	-		-		-		-
+ tomato	18				-			-		-		-
+ rhubarb	-	-	-	-	-	-	-	-	-	20	-	-
<u>3. Fruit trees (pips and stones), forest trees and roadside trees</u>	25 20 or 18*	25	25	18	-	25	18	30	25	25	18	25
<u>4. Small fruit</u>												
- black currant	-	20	25	15	-	20	-	-	20	20	15	-
- red and white currants	-	20	25	15	-	25	-	-	20	20	15	-
- gooseberry	-	20	25	15	-	25	-	-	20	15	15	-
- raspberry	-	20	25	15	-	20	-	-	-	20	15	20
- blackberry	-	20	25	15	-	25	-	-	-	-	15	-
- strawberry	15	20	20	15	-	20	15	-	20	15	15	20
<u>5. Ornamental plants</u>												
- woody												
+ rose	15	20	20	15	18	20	18	30	20	15	15	20
+ rhododendron	-	20	20	15	-	25	-	-	20	20	-	-
- herbaceous	15	20	20	15	16	20	15	15	20	20 18or 15**	15	20

<sup>1</sup> A dash means that the species or group of species is not protected. Where there is no sign, the duration of protection is that given above for the category of species concerned.

\* In South Africa, the duration of protection is 25 years for the following fruit species: apple, citrus, peach, pear. It is 20 years for: almond, avocado, litchi, macadamia, mango, pecan, plum, vine. It is 18 years for the following fruit and stimulant species: apricot, banana, cherry, coffee, granadilla, guava, kiwi fruit, pawpaw, pineapple, quince, tea.

\*\* In the United Kingdom, the duration of protection is 20 years for daffodil, freesia, gladiolus and narcissus. It is 15 years for carnation, chrysanthemum, dahlia, delphinium and lily. For minor species protected under the Plant Breeders' Rights (Herbaceous Perennials) Scheme 1969, it is 20 years (paeony), 18 years (12 species, including alstroemeria and non-bulbous varieties of iris) or 15 years (most species).