

## GERMANY

### Plant Variety Protection Act (Sortenschutzgesetz), as last amended in 2013

**Version:** revised by the promulgation of 19 December 1997 I 3164;

most recently amended by Art. 4 para. 85 of the Act of 7 August 2013 I 3154

#### Division 1 Conditions for and scope of plant variety protection

##### Section 1 Conditions for plant variety protection

(1) Plant variety protection shall be granted for a plant variety (variety) if it is

1. distinct,
2. uniform,
3. stable,
4. new, and
5. designated by a registrable variety denomination.

(2) Protection shall not be granted in accordance with the present Act for a variety that is the subject matter of a Community plant variety right.

##### Section 2 Definitions

With the meaning of the present Act,

1. species shall be plant species as well as groupings and subdivisions of plant species,
- 1a. variety shall be a grouping of plants or parts of plants where complete plants can be obtained therefrom, within a single taxon of the lowest known rank, which, irrespective of whether it satisfies the conditions for the grant of a plant variety right ,
  - a) can be defined by the expression of the characteristics resulting from a specific genotype or from a specific combination of genotypes,
  - b) can be distinguished from any other grouping of plants or parts of plants by the expression of at least one of these characteristics, and
  - c) can be considered as a unit with regard to its suitability for being propagated unchanged,
2. propagating material shall be plants and parts of plants, including seeds, which are intended for the production of plants or otherwise for growing,
3. placing on the market shall be the offering, holding in stock for delivery, offering for sale and any kind of delivery to others,
4. application date shall be the date on which the plant variety protection application is received by the Federal Plant Variety Office,
5. contracting state shall be a state that is a Contracting Party of the Agreement on the European Economic Area,
6. member of the Union shall be a state or intergovernmental organisation that is a member of the International Union for the Protection of New Varieties of Plants.

### Section 3 Distinctness

(1) A variety shall be deemed to be distinct if it is clearly distinguishable in the expression of at least one relevant characteristic from any other variety that is a matter of common knowledge on the date of application. The Federal Plant Variety Office shall communicate on request for each species those characteristics that it deems to be relevant to the distinctness of the varieties of this species; it must be possible to recognise and describe the characteristics precisely.

(2) A variety shall be deemed to be a matter of common knowledge in particular if

1. it has been entered in an official register of plant varieties,
2. its entry in an official register of plant varieties has been applied for and the application is granted, or
3. propagating material or harvested material of the variety has already been placed on the market for commercial purposes.

### Section 4 Uniformity

A variety shall be deemed to be uniform if, subject to the variation resulting from the particular features of its propagation, it is sufficiently uniform in the expression of the characteristics that are relevant to distinctness.

### Section 5 Stability

A variety shall be deemed to be stable if it remains unchanged in terms of the expression of the characteristics that are relevant to its distinctness after each instance of propagation or, in the case of a propagation cycle, after each propagation cycle.

### Section 6 Novelty

(1) A variety shall be deemed to be new if, at the date of filing the application, plants or parts of plants of the variety have not been disposed to others for commercial purposes with the consent of the party entitled or of his/her legal predecessor, or only within the following periods:

1. one year within the European Union,
2. four years outside the European Union, or six years in the case of vine (*vitis* L.) and tree species.

(2) Disposal

1. to an official body on the basis of statutory provisions,
2. to third parties on the basis of a contract existing between them and the party entitled or other legal relationship exclusively for the production, propagation, conditioning or storage on behalf of the party entitled,
3. between companies or firms within the meaning of Article 54 para. 2 of the Treaty on the Functioning of the European Union if one of them completely belongs to the other or both completely belong to a third company or firm of this type; this shall not apply to cooperatives,
4. to third parties if the plants or parts of plants have been obtained for experimental purposes or for the breeding of new varieties and no reference is made to the variety at the time of disposal,
5. for the purpose of display at an official or officially-recognised exhibition within the meaning of the Convention relating to International Exhibitions of 22 November 1928 (Act of 5 May 1930, Reich Law Gazette [RGBl.] 1930 Part II p. 727), or at an exhibition that is officially recognised as equivalent by a Contracting Party on its territory, or delivery that is related to such exhibitions,

shall not be deemed to be deleterious to novelty.

(3) Propagating material of a variety that is continuously used for the production of another variety shall not be deemed to have been delivered within the meaning of subsection (1) until plants or parts of plants of the other variety have been delivered.

### **Section 7 Variety denomination**

(1) A variety denomination shall be deemed to be registrable if there is no object of impediment pursuant to subsection (2) or (3).

(2) There is an object of impediment if the variety denomination

1. is not suitable to identify the variety, particularly for linguistic reasons,
2. is not distinctive,
3. consists exclusively of numbers where it is not used for a variety that is exclusively intended for the continuous production of another variety,
4. is identical to or may be confused with a variety denomination under which a variety of the same or of a related species is or was entered in an official register of varieties in a contracting state or by another member of the Union, or propagating material of such a variety has been placed on the market, unless the variety is no longer entered and no longer cultivated and its variety denomination has not assumed any greater significance,
5. may be misleading, especially when it is likely to cause confusion as to the origin, the characteristics or the value of the variety, or as to the original breeder, discoverer or other entitled party,
6. may cause a public nuisance.

The Federal Plant Variety Office shall notify which species it regards as being related within the meaning of No. 4.

(3) If the variety has already been entered in an official register of varieties or if its entry in such a register has been applied for

1. in another contracting state or by another member of the Union, or
2. in another state which, according to a finding ascertained in legal acts of the European Communities or of the European Union, which is to be notified by the Federal Plant Variety Office, evaluates varieties in accordance with rules that correspond to the directives on the common catalogues of varieties of agricultural plant species,

only the variety denomination registered or stated therein shall be registrable. This shall not apply if there is an object of impediment pursuant to subsection (2) or where the applicant makes a plausible case that a third-party right opposes it.

### **Section 8 Entitlement to plant variety protection**

(1) The person who bred or discovered the variety or his/her successor in title shall be entitled to plant variety protection. If more than one party has bred or discovered the variety jointly, they shall be jointly entitled.

(2) The applicant shall be deemed to be the party entitled in the proceedings before the Federal Plant Variety Office unless the Federal Plant Variety Office becomes aware that he/she is not entitled to plant variety protection.

### **Section 9 Unauthorized applicant**

(1) If an unauthorized party has filed a plant variety protection application, the party entitled may require the applicant to transfer to him/her the claim to the grant of plant variety protection.

(2) If plant variety protection has been granted to an unauthorized party, the party entitled may require the holder of the plant variety right to transfer the plant variety protection to him/her. Such claim shall expire five years after notification of the entry in the Plant Variety Protection Register unless the holder of the plant variety right did not act in good faith when obtaining plant variety protection.

### **Section 10 Effect of plant variety protection**

(1) Subject to the provisions of sections 10a and 10b, plant variety protection shall have the effect that only the holder of the plant variety right shall be entitled

1. a) to produce, to condition for purposes of propagation, to place on the market, to import or export propagating material of the protected variety, or  
b) to store propagating material of the protected variety for one of the purposes designated at (a),
2. to carry out acts in accordance with No. 1 with other plants or parts of plants, or products obtained directly therefrom, if propagating material was used in their production without the consent of the holder of the plant variety right, and the holder of the plant variety right did not have an opportunity to exercise his/her variety protection right with regard to this utilisation.

(2) The effect of plant variety protection in accordance with subsection (1) shall also cover varieties which

1. are essentially derived from the protected variety (initial variety), if the initial variety itself is not an essentially derived variety,
2. are not clearly distinguishable from the protected variety, or
3. the production of which requires the repeated use of the protected variety.

(3) A variety shall be deemed to be an essentially derived variety if

1. the initial variety or another variety that itself is derived from the initial variety has been predominantly used as the basic material in its breeding or discovery,
2. it is clearly distinct, and
3. except for differences resulting from the derivation method used, it essentially conforms to the initial variety in the expression of the characteristics that result from the genotype or the combination of genotypes of the initial variety.

#### **Section 10a Restriction of the effect of plant variety protection**

(1) The effect of plant variety protection shall not extend to acts in accordance with section 10 subsection (1)

1. in the private domain for non-commercial purposes,
2. for experimental purposes relating to the protected variety,
3. for the purpose of breeding new varieties as well as acts referred to in section 10 subsection (1) with these varieties, with the exception of the varieties in accordance with section 10 subsection (2).

(2) The effect of plant variety protection shall furthermore not encompass harvested material which a farmer has obtained by planting, on his/her own holding, propagating material of a protected variety of the species contained in the list in the Annex, with the exception of hybrids or synthetic varieties, and has been used there as propagating material (farm-saved seed) where the farmer complies with his/her obligations as stipulated in subsections (3) and (6). For the purpose of farm-saved seed, the harvested material may be conditioned by the farmer or by an undertaking (conditioner) commissioned by him/her to do so.

(3) A farmer who makes use of the possibility of using farm-saved seed shall be required to pay a suitable remuneration to the holder of the plant variety right. Remuneration shall be deemed to be suitable if it is considerably lower than the amount that is agreed for the production of propagating material of the same variety in the same territory on the basis of an exploitation right in accordance with section 11.

(4) Agreements between holders of the plant variety right and farmers regarding the suitable amount of remuneration may be based on corresponding agreements between the professional organisations. They may not preclude competition in the seed sector.

(5) The requirement to pay in accordance with subsection (3) shall not apply to small farmers within the meaning of Article 14 para. 3, third indent, of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227 p. 1).

(6) Farmers who make use of farm-saved seed and any conditioners commissioned by them, shall be required to provide the holders of plant variety right with information as to the volume of farm-saved seed.

(7) The Federal Ministry of Food, Agriculture and Consumer Protection is herewith empowered to amend the list of species that are cited in the annex by means of an ordinance where this is necessary in order to adapt it to list for Community plant variety rights.

### **Section 10b Exhaustion of plant variety protection**

Plant variety protection shall not extend to acts which are carried out with plants or parts of plants or products directly obtained therefrom (material) of the protected variety or of a variety to which plant variety protection in accordance with section 10 subsection (1) No. 1 also extends that has been placed on the market by the holder of the plant variety right or with his/her consent, unless such acts

1. involve further production of propagating material without the aforementioned material having been intended for that purpose on delivery, or
2. involve the export of material of the variety which permits propagation of the variety to a country which does not protect varieties of the species to which the variety belongs; this shall not apply if the exported material is intended for growing.

### **Section 10c Suspension of plant variety protection**

If the holder of the plant variety right that has been granted in accordance with the present Act obtains a Community plant variety right for the same variety, the rights from the plant variety protection that has been granted in accordance with the present Act may not be asserted for the duration of the Community plant variety right.

### **Section 11 Legal succession, exploitation rights**

(1) The right to plant variety protection, the claim to the granting of plant variety protection, and the plant variety protection, shall be transferable to natural and legal persons or to commercial partnerships satisfying the requirements in accordance with section 15.

(2) Plant variety protection may be in full or in part the subject of exclusive or non-exclusive exploitation rights.

(3) If a party entitled to exploit contravenes a limitation of the exploitation right in accordance with subsection (2), plant variety protection may be invoked against him/her.

### **Section 12 Compulsory exploitation right**

(1) Where it is justified in the public interest, taking into account economic acceptability for the holder of the plant variety right, the Federal Plant Variety Office may on request grant a compulsory exploitation right to plant variety protection with regard to the entitlements in accordance with section 10, under reasonable conditions, if the holder of the plant variety right does not grant exploitation rights, or grants insufficient exploitation rights. When granting the compulsory exploitation right, the Federal Plant Variety Office shall determine the conditions thereof, particularly the amount of the remuneration to be paid to the holder of the plant variety right.

(2) Any of those concerned may request renewed determination of the conditions on expiry of one year after the grant of the compulsory exploitation right. The request may be repeated on expiry of each year; it may only be based on the circumstances that are decisive for the determination having changed considerably in the ensuing period.

(3) The Federal Plant Variety Office is to hear the professional associations concerned prior to the decision on granting a compulsory exploitation right and on a new determination.

(4) If a compulsory exploitation right has been granted for a variety belonging to a species that is subject to the Seed Trade Act (*Saatgutverkehrsgesetz*), the holder of the plant variety right may require information from the responsible authority regarding

1. who has applied for seed certification for propagating material of the protected variety,
2. what size of the multiplication field has been stated in the request for certification,
3. what weight or quantity has been stated in respect of the lots.

### **Section 12a Compulsory exploitation right with biotechnological inventions**

(1) If the holder of a patent for a biotechnological invention (section 1 subsection (2) of the German Patent Act [*Patentgesetz*]) is not able to exploit the invention without violating a previously granted plant variety protection right, the Federal Plant Variety Office shall on request grant a compulsory exploitation right in accordance with subsections (3) and (4) to plant variety protection with regard to the entitlements in accordance with section 10 on suitable conditions.

(2) The holder of the plant variety right may demand that the patent holder grant to him/her a mutual licence on suitable conditions.

(3) The patent holder must prove that

1. he/she has approached the plant variety protection holder in vain in order to obtain a contractual exploitation right,
2. the invention constitutes significant technical progress of considerable economic interest vis-à-vis the protected plant variety.

(4) Where the compulsory exploitation right is granted, the Federal Plant Variety Office shall set the conditions, in particular the amount of the remuneration payable to the plant variety protection holder. Section 12 subsections (2) and (4) shall apply *mutatis mutandis*.

### **Section 13 The duration of plant variety protection**

Plant variety protection shall extend to the end of the twenty-fifth calendar year or, in the case of hop, potato, grapevine and tree species, until the end of the thirtieth calendar year following the grant.

### **Section 14 Use of the variety denomination**

(1) Except in the private domain and for non-commercial purposes, propagating material of a protected variety may only be placed on the market if the variety denomination is stated in so doing; where it is stated in writing, it must be easily recognisable and clearly legible. This shall also apply once variety protection has expired.

(2) A right to a designation that is identical to the variety denomination may not be used to prohibit the use of the variety denomination for the variety. Prior third-party rights shall remain unaffected.

(3) The variety denomination of a protected variety or of a variety for which a breeders right has been granted by another member of the Union, or a denomination which may be confused with it, may not be used for another variety of the same species or of a related species.

### **Section 15 Personal scope**

(1) Only the following shall be entitled to the rights from the present Act

1. Germans within the meaning of Article 116 para. 1 of the Basic Law (*Grundgesetz*), as well as natural and legal persons and commercial partnerships that are domiciled or established in Germany,
2. nationals of another contracting state or of a state that is a member of the Union, as well as natural and legal persons and commercial partnerships that are domiciled or established in such state, and
3. other natural and legal persons and commercial partnerships where corresponding protection is afforded to German nationals or persons domiciled or established in Germany in the state to which they belong or in which they are domiciled or established according to a notification from the Federal Ministry of Food, Agriculture and Consumer Protection in the Federal Law Gazette.

(2) Whoever is neither domiciled nor established in a contracting state may only participate in a procedure regulated by the present Act and assert rights in accordance with the present Act if he/she has appointed a representative (procedural representative) who is domiciled or has business premises in a contracting state.

## **Division 2 The Federal Plant Variety Office**

### **Section 16 Status and tasks**

(1) The Federal Plant Variety Office is an autonomous higher federal authority within the portfolio of the Federal Ministry for Food, Agriculture and Consumer Protection.

(2) The Federal Plant Variety Office is responsible for the granting of plant variety protection and for matters related thereto. It shall keep the Plant Variety Protection Register and shall verify the continued existence of the protected varieties.

### **Section 17 Members**

(1) The Federal Plant Variety Office shall consist of the President and of further members. They must have special expertise in the field of plant varieties (expert members) or be qualified to hold judicial office in accordance with the German Judiciary Act (*Deutsches Richtergesetz*) (legal members). They shall be appointed by the Federal Ministry for Food, Agriculture and Consumer Protection for the duration of their work with the Federal Plant Variety Office.

(2) As a rule, only persons are to be appointed as expert members who, having taken a course of studies in natural sciences that is beneficial to their activity at the Federal Plant Variety Office, have passed a state or academic examination at a university in Germany or a final examination abroad that is recognised as equivalent, and have also worked for at least three years in the corresponding specialist area and have the necessary legal knowledge.

(3) If there is a need that is likely to be temporary, the President may appoint persons as assistant members to carry out the duties of members of the Federal Plant Variety Office. Such appointments may be for a specific period or for the duration of the requirement, and shall not be revocable during such period. Furthermore, the regulations regarding members shall also apply to assistant members.

### **Section 18 Examination Boards and Appeal Committees**

(1) The following shall be established within the Federal Plant Variety Office

1. Examination Boards,
2. Appeal Committees for variety protection matters.

The President shall determine their number and shall decide on the allocation of responsibilities.

(2) The Examination Boards shall be responsible for decisions on

1. plant variety protection applications,
2. objections in accordance with section 25,
3. change of the variety denomination in accordance with section 30,
4. (repealed)
5. the grant of a compulsory exploitation right and the determination of the conditions,
6. withdrawal and annulment of the grant of plant variety protection.

(3) The Appeal Committees shall be responsible for decisions on appeals against decisions of the Examination Boards.

### **Section 19 Composition of the Examination Boards**

(1) Each Examination Board shall consist of one expert member of the Federal Plant Variety Office designated by the President.

(2) Decisions in cases under section 18 subsection (2) Nos. 2, 5 and 6, shall be taken by the Examination Board composed of three members of the Federal Plant Variety Office who shall be designated by the President, one of whom must have legal expertise.

## **Section 20 Composition of the Appeal Committees**

(1) Each Appeal Committee shall be comprised of the President or of another member of the Federal Plant Variety Office designated by the President as Chairman, of two further members of the Federal Plant Variety Office designated by the President as assessors and of two honorary assessors. Two of the members of the Federal Plant Variety Office shall have technical expertise, and one shall have legal expertise.

(2) The honorary assessors shall be appointed for six years by the Federal Ministry of Food, Agriculture and Consumer Protection; they may be reappointed. Where an honorary assessor retires prematurely, his/her replacement shall be appointed for the remaining term of office. The honorary assessors are to have special expertise in plant varieties. Owners or employees of breeding establishments or employees of breeders' associations are not to be appointed. A deputy shall be appointed for each honorary assessor; sentences 1 to 4 shall apply *mutatis mutandis*.

(3) The Appeal Committees shall be quorate if attended by the Chairman and one assessor, one of whom must have legal expertise, and one honorary assessor.

## **Division 3 Proceedings before the Federal Plant Variety Office**

### **Section 21 Formal administrative procedure**

The provisions contained in sections 63 to 69 and 71 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) on formal administrative procedures shall apply to proceedings before the Examination Boards and the Appeal Committees.

### **Section 22 Plant variety protection application**

(1) The applicant shall state the name of the original breeder or breeders or discoverer or discoverers of the variety in the plant variety protection application and shall certify that, to the best of his knowledge, no further persons have been involved in the breeding or discovery of the variety. If the applicant is not the original breeder or discoverer, or is not the only original breeder or discoverer, he shall state how the variety came into his possession. The Federal Plant Variety Office shall not be obliged to verify this information.

(2) The applicant shall specify the variety denomination. For the procedure for granting plant variety protection, he may state a provisional denomination with the consent of the Federal Plant Variety Office.

### **Section 23 Priority of the plant variety protection application**

(1) The priority of the plant variety protection application shall be determined, in cases of doubt, by the sequence of the entries in the register of items received at the Federal Plant Variety Office.

(2) If the applicant has already applied for a breeders' right for the variety in another member of the Union, he/she shall be entitled, within one year of the first application having been properly filed, to enjoy the date of that application as priority for the plant variety protection application. Priority may only be claimed in the application for variety protection. It shall lapse if the applicant does not submit copies of the documents of the first application that have been certified by the authority that is responsible for this application to the Federal Plant Variety Office within three months of the filing date.

(3) If the variety denomination has been entered as a trademark for the applicant in the Trademark Register at the Patent Office, or if the entry has been applied for, for goods which include propagating material of the variety, he/she shall be entitled to enjoy the date of the trademark application as priority for the variety denomination. Priority shall lapse if the applicant does not submit to the Federal Plant Variety Office a certificate issued by the Patent Office concerning the entry or application of the trademark within three months of stating the variety denomination. Sentences 1 and 2 shall apply *mutatis mutandis* to marks which are registered in accordance with the Madrid Agreement of 14 April 1891 Concerning the International Registration of Trademarks, in its currently applicable version, and which enjoy protection in Germany.



### **Section 24 Publication of the plant variety protection application**

(1) The Federal Plant Variety Office shall publish the plant variety protection application, stating the species, the stated variety denomination or provisional denomination, the filing date and the name and address of the applicant, of the original breeder or discoverer and of a procedural representative.

(2) If the application has been withdrawn subsequent to its publication, if it has been deemed in accordance with section 27 subsection (2) not to have been filed on grounds of failure to comply, or if the grant of plant variety protection has been rejected, these circumstances shall equally be published by the Federal Plant Variety Office.

### **Section 25 Objections**

(1) Anyone may lodge written objections to the Federal Plant Variety Office against the grant of plant variety protection.

(2) Objections may only be based on the allegation that

1. the variety is not distinct, not uniform, not stable or not new,
2. the applicant is not entitled, or
3. the variety denomination is not registrable.

(3) The time limit for objections shall be as follows

1. in accordance with subsection (2) No. 1, until the granting of plant variety protection,
2. in accordance with subsection (2) No. 2, until three months after publication of the plant variety protection application,
3. in accordance with subsection (2) No. 3, until three months after publication of the stated variety denomination.

(4) Objections shall be reasoned. The facts and evidence justifying the assertion in accordance with subsection (2) shall be provided in detail. If this information is not already contained in the written objection, it must be provided before the expiry of the time limit for objections.

(5) If an objection in accordance with subsection (2) No. 2 leads to the withdrawal of the plant variety protection application or to refusal to grant plant variety protection, and if the objecting party files an application for variety protection within one month following withdrawal, or following the date on which the rejection becomes final for the same variety, he/she may demand that the date of the prior application be deemed to be the filing date of his/her application.

### **Section 26 Examination**

(1) When examining whether the variety satisfies the requirements for the grant of plant variety protection, the Federal Plant Variety Office shall grow the variety or shall undertake the necessary other investigations. It may refrain from doing so if it already has earlier examination results of its own at its disposal.

(2) The Federal Plant Variety Office may have the growing or the other necessary investigations carried out by other technically qualified agencies, including abroad, and may take into account the results of growing trials or other investigations carried out by such agencies.

(3) The Federal Plant Variety Office shall request the applicant to submit to it or to the agency which it designates the necessary propagating material and other material and the necessary further documents within a specified time limit, to provide the necessary information and to permit its verification.

(4) If the applicant claims priority in accordance with section 23 subsection (2), he/she shall submit the necessary propagating material and other material and the necessary further documents within four years of the expiry of the priority period. He/she may not submit further propagating material or further other material after submission. If the first application is withdrawn, or if the grant of breeders rights is refused, before the expiry of the four-year period, the Federal Plant Variety Office may require the applicant to submit the propagating material and other material in time for the next growing period, and to submit the other documents within a specified period.

(5) The Federal Plant Variety Office may supply authorities and agencies abroad with information on examination results where this is necessary for mutual information.

(6) The Federal Plant Variety Office shall require the applicant to submit in writing within a specified period

1. a variety denomination if he has stated a provisional denomination,
2. another variety denomination if the denomination that has been stated is not registrable.

Sections 24 and 25 shall apply *mutatis mutandis*.

### **Section 27 Failure to comply**

(1) If the applicant fails to comply with a request of the Federal Plant Variety Office within the time limit notified to him/her

1. to submit the necessary propagating material or other material or the necessary further documents,
2. to state a variety denomination, or
3. to pay examination fees that are due,

the Federal Plant Variety Office may reject the plant variety protection application if it has indicated this consequence of failure to comply when setting the time limit.

(2) If an applicant or appellant fails to pay the fee due for the decision on a plant variety protection application or on an appeal, the application shall be deemed not to have been filed or the appeal not to have been lodged if the fee is not paid within one month of the Federal Plant Variety Office having notified the fee decision and thereby having indicated this consequence of failure to comply.

### **Section 28 Plant Variety Protection Register**

(1) The following shall be entered in the Plant Variety Protection Register once the grant of plant variety protection has become final

1. the species and the variety denomination,
2. the determined expressions of the characteristics that are relevant for distinctness; with varieties the plants of which are produced by crossing specific parental components, also the reference thereto,
3. the name and address
  - a) of the original breeder or discoverer,
  - b) of the holder of the plant variety right,
  - c) of the procedural representatives,
4. the time at which plant variety protection begins and ends, as well as the reason for termination,
5. an exclusive exploitation right, including the name and address of its holder,
6. a compulsory exploitation right and the conditions determined therefor.

(2) The entry of the determined expressions of characteristics that are relevant for distinctness and the entry of the conditions for a compulsory exploitation right may be replaced by a reference to documents of the Federal Plant Variety Office. The entry may be amended *ex officio* with regard to the number and type of characteristics as well as to the determined expressions of those characteristics where this is necessary in order to render the description of the variety comparable with the descriptions of other varieties.

(3) Amendments to the identity of the holder of the plant variety right or of a procedural representative shall only be entered if they are documented. The holder of the plant variety right or procedural representative shall remain entitled and obliged in accordance with the present Act until the amendment is registered.

(4) The Federal Plant Variety Office shall publish the entries.

### Section 29 Inspection

(1) Anyone shall be entitled to inspect

1. the Plant Variety Protection Register,
2. the documents
  - a) in accordance with section 28 subsection (2), sentence 1,
  - b) of a published plant variety protection application and granted variety protection,
3. the growing
  - a) for examining a variety,
  - b) for varifying the continued existence of a variety.

(2) With varieties the plants of which are produced by crossing specific parental components, details of the parental components shall be excluded from inspection at the request of the party who has filed the plant variety protection application. The request may only be made until the decision on the plant variety protection application has been taken.

### Section 30 Amendment of the variety denomination

(1) A variety denomination designated on the grant of plant variety protection shall be amended if

1. a ground for exclusion in accordance with section 7 subsection (2) or (3) existed on registration and continues to exist,
2. a ground for exclusion in accordance with section 7 subsection (2) No. 5 or 6 has been subsequently entered,
3. a plausible case is made in favour of a conflicting right and the holder of the plant variety right consents to the registration of another variety denomination,
4. the holder of the plant variety right has been prohibited by a final legal decision from using the variety denomination, or
5. a party otherwise obliged to use the variety denomination in accordance with section 14 subsection (1) has been prohibited from using the variety denomination by a final decision, and the holder of the plant variety right is a subsidiary party to the legal dispute or was informed of the dispute, insofar as he was not prevented from asserting his rights by circumstances designated in section 68, second clause, of the German Code of Civil Procedure (*Zivilprozeßordnung*).

In the event of an amendment being made to the variety denomination in accordance with sentence 1 No. 1, there shall be no claim to compensation for a financial disadvantage in accordance with section 48 subsection (3) of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).

(2) The Federal Plant Variety Office shall require the holder of the plant variety right to propose another variety denomination within a specific time if it finds that there are grounds for an amendment in accordance with subsection (1). If the deadline passes without result, it may stipulate a variety denomination *ex officio*. At the request of the the holder of the plant variety right or of a third party, the Federal Plant Variety Office shall stipulate a variety denomination if the applicant can prove a legitimate interest. Sections 24, 25 and 28 subsection (1) No. 1 and subsection (4) shall apply *mutatis mutandis* to the determination of the other variety denomination and its notification.

### Section 31 Termination of plant variety protection

(1) Plant variety protection shall expire if the holder of the plant variety right has waived it in writing vis-à-vis the Federal Plant Variety Office.

(2) The grant of plant variety protection shall be withdrawn if it emerges that the variety was not distinct or was not new when plant variety protection was granted. There shall be no claim to compensation for economic disadvantage in accordance with section 48 subsection (3) of the Administrative Procedure Act. A withdrawal on other grounds shall not be permissible.

(3) The grant of plant variety protection shall be revoked if it emerges that the variety is not uniform or is not stable.

(4) The grant of plant variety protection may only be revoked in other respects if the holder of the plant variety right

1. has failed to comply with a request in accordance with section 30 subsection (2) to state another variety denomination,
2. despite a reminder has failed to comply with an obligation given rise to by an ordinance in accordance with section 32 No. 1 with regard to verification of the continued existence of the variety, or
3. has failed to pay annual fees that are due within an additional time limit.

### **Section 32 Powers to issue procedural regulations**

The Federal Ministry for Food, Agriculture and Consumer Protection is herewith empowered by means of an ordinance

1. to regulate the details of the procedure before the Federal Plant Variety Office, including the definition of the characteristics that are relevant for distinctness, the determination of the scope of the examination and the subsequent verification of the continued existence of the protected variety,
2. to determine the gazette for notifications of the Federal Plant Variety Office.

### **Section 33 Fees and expenses**

(1) The Federal Plant Variety Office shall charge fees and expenses for its individually-attributable official acts under the present Act and for the examination of plant varieties at the request of foreign or supranational entities and an annual fee for each commenced year of the duration of variety protection (protection year).

(2) The Federal Ministry for Food, Agriculture and Consumer Protection is herewith empowered, in agreement with the Federal Ministries of Finance and of Economics and Technology, to determine by means of an ordinance the acts for which fees are due and the fee rates, and in so doing to provide for fixed rates or basic rates and determine the time for the generation and collection of fees. The significance, economic value or other benefit ensuing from the individually attributable official act, including for breeding and for the general public, shall be suitably taken into account. The expenses to be refunded may be determined in derogation from the Federal Act on Fees (*Bundesgebührengesetz*).

(3) A different regulation may be provided by a special fee code of the Federal Ministry for Food, Agriculture and Consumer Protection in accordance with section 22 subsection (4) of the Federal Act on Fees for the domain of the federal administration at the time of the incurrence and of the collection of the fee.

(4) No reduction in accordance with section 15 subsection (2) of the Administrative Expenses Act (*Verwaltungskostengesetz*) in the version applicable until 14 August 2013 shall be granted for fees for the examination of a variety and for the rejection of an application for variety protection.

(5) The objection fee shall be refunded in the case of a successful objection. The appeals fee shall be refunded on request in the case of a successful appeal to the Patent Court or of a successful legal appeal. The appropriate part of the appeals fee shall be refunded in the case of partial success. However, the refund can be fully or partly omitted if the decision is based on facts that could have been asserted or proven earlier. Sentences 1 to 4 shall apply *mutatis mutandis* to expenditure in appeals procedures. There shall be no entitlement to a refund of costs in accordance with section 80 of the Administrative Procedure Act.

## **Division 4 Court proceedings**

### **Section 34 Appeal**

- (1) Appeals shall be available to the Patent Court against the orders of the Appeal Committees.
- (2) An appeal fee shall be payable in accordance with the Patent Cost Act (*Patentkostengesetz*) within the time limit for appeals; if it is not paid, the appeal shall be deemed not to have been lodged.

(3) An appeal against the registration of a variety denomination in accordance with section 30 subsection (2) and against a decision for which immediate enforcement has been ordered shall have no suspensory effect.

(4) The President of the Federal Plant Variety Office may accede to the appeal proceedings.

(5) A Chamber of Appeal shall rule on appeals. In the cases falling under section 18 subsection (2) Nos. 3 and 4, it shall rule composed of three legal members and in other cases composed of one legal member as chairman, a further legal member and two technical members.

### **Section 35 Appeal on points of law**

(1) Appeals on points of law against the ruling of the Chamber of Appeal shall be available to the Federal Court of Justice if the Chamber of Appeal has admitted this in its ruling.

(2) Section 34 subsection (3) shall apply *mutatis mutandis*.

### **Section 36 Application of the Patent Act (*Patentgesetz*)**

Unless otherwise stipulated in sections 34 and 35, the provisions of the Patent Act on appeals proceedings before the Patent Court and proceedings for appeals on points of law before the Federal Court of Justice, as well as concerning legal aid, shall apply *mutatis mutandis* in these proceedings.

### **Division 5 Rights violations**

#### **Section 37 Right to forbearance, damages and remuneration**

(1) Action may be taken by the violated party against anyone who, without the consent of the holder of the plant variety right,

1. uses material that is subject to plant variety protection to commit one of the acts referred to in section 10 subsection (1), or
2. uses the variety denomination of a protected variety or a designation that may be confused with it for a different variety of the same or of a related species,

to have them remedy the damage, and should there be a danger of a repeat action, to forego such action. The entitlement shall also exist if a violation is imminent for the first time.

(2) Anyone who acts intentionally or negligently shall be liable to provide compensation to the violated party for the damage ensuing therefrom. The profit which the violating party obtained by violating the right may also be taken into account when assessing the compensation. The damage claim may also be calculated on the basis of the amount which the violator would have had to pay as a suitable remuneration if he/she had obtained permission to use the variety.

(3) The holder of the plant variety right may require appropriate remuneration from the party who has carried out one of the acts designated in section 10 subsection (1) with material that is subject to variety protection between publication of the application and grant of variety protection.

(4) (repealed)

#### **Section 37a Right to destruction and recall**

(1) In cases falling under section 37 subsection (1), the violated party may demand the destruction of material which is the subject of the infringing act and which is in the possession or ownership of the violating party. Sentence 1 shall apply *mutatis mutandis* to any equipment belonging to the violating party and which has been primarily used for the production of this material.

(2) The violated party may take action against the violating party in cases falling under section 37 subsection (1) to have a recall of material that has been unlawfully produced or disseminated, or that is intended for unlawful dissemination, or for its final removal from the distribution channels.

(3) Claims in accordance with subsections (1) and (2) shall be ruled out if the measure is disproportionate in individual cases. The legitimate interests of third parties shall also be taken into account when examining proportionality.

### Section 37b Right to information

(1) The violated party may take action against the violating party in cases falling under section 37 subsection (1) in order to obtain information without delay on the origin and distribution channel of the material that violates the right.

(2) In cases in which the violation of the right is evident, or in cases in which the violated party has filed an action against the violating party, the claim shall also exist regardless of subsection (1) against a person who, on a commercial scale,

1. was in possession of material that was in breach of a right,
2. made use of services that were in breach of a right,
3. provided services that were used for activities that were in breach of a right, or
4. according to information from a person designated in accordance with No. 1, 2 or No. 3, was involved in the manufacture, production or distribution of such material

unless the person would have been entitled to refuse to testify in the proceedings against the violating party in accordance with sections 383 to 385 of the Code of Civil Procedure (*Zivilprozessordnung*). Should the claim in accordance with sentence 1 be asserted in court, the court may suspend the legal dispute that is pending against the violating party on request until the legal dispute being pursued in respect of the right to information has been dealt with. The party that is obliged to provide information may demand from the violated party compensation for the expenditure necessary to provide the information.

(3) The person required to provide information shall provide information on

1. the name and address of the producers, suppliers and other previous owners of the material or services, as well as of the commercial customers and points of sale for which they were intended, and
2. the quantity of the material that has been produced, delivered, received or ordered, as well as on the prices that were paid for the material or services in question.

(4) The claims in accordance with subsections (1) and (2) shall be ruled out if the assertion of the claim is disproportionate in an individual case.

(5) If the party obliged to provide the information provides incorrect or incomplete information, intentionally or with gross negligence, he/she shall be obliged to compensate for the damage ensuing therefrom.

(6) Anyone who has provided true information without having been obliged to do so in accordance with subsection (1) or subsection (2) shall only be liable vis-à-vis third parties if he/she knew that he/she was not obliged to provide the information.

(7) In cases in which the violation is evident, the obligation to provide information may be ordered by an interim injunction in accordance with sections 935 to 945 of the Code of Civil Procedure.

(8) The information may only be used as evidence in criminal proceedings or in proceedings in accordance with the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*) in respect of an offence committed against the party obliged to provide information prior to the giving of information or against a family member designated in section 52 subsection (1) of the Code of Criminal Procedure with the consent of the party obliged.

(9) If the information can only be provided using traffic data (section 3 No. 30 of the Telecommunications Act [*Telekommunikationsgesetz*]), a prior court order on the permissibility of the utilisation of the traffic data, for which the violated party shall apply, shall be required for it to be provided. The Regional Court in whose district the party obliged to provide information is resident, domiciled or established shall have exclusive jurisdiction for issuing this order regardless of the value at dispute. The decision shall be taken by the civil chamber. The provisions contained in the Act on Procedure in Family Matters and Non-Contentious Matters (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) shall apply *mutatis mutandis* to the proceedings. The violated party shall pay the costs of the court order. A complaint shall be admissible against the ruling of the Regional Court. The complaint shall be submitted within a period of two weeks. The provisions on the protection of personal data shall remain unaffected in other respects.

(10) Subsection (2) in conjunction with subsection (9) shall restrict the fundamental right to the privacy of telecommunications (Article 10 of the Basic Law).

### **Section 37c Rights of submission and inspection**

(1) Where sufficient probability exists of a violation of rights within the meaning of section 37 subsection (1), the right holder or another party entitled may take action against the alleged violating party for submission of a title or inspection of a thing which is at his/her disposal if this is necessary in order to justify his/her claims. In cases of a rights violation that has been committed on a commercial scale, the right shall also extend to the submission of banking, financial or commercial documents. Where the alleged violating party claims the information to be confidential, the court shall take the necessary action in order to ensure the protection that is necessary in individual cases.

(2) The right in accordance with subsection (1) shall be ruled out if the claim is disproportionate in an individual case.

(3) The obligation to submit a title or to tolerate the inspection of a thing may be ordered by means of an injunction in accordance with sections 935 to 945 of the Code of Criminal Procedure. The court shall take the necessary measures in order to ensure the protection of confidential information. This shall apply in particular in cases in which the injunction is issued without previously hearing the respondent.

(4) Section 811 of the German Civil Code (*Bürgerliches Gesetzbuch*) as well as section 37b subsection (8) shall apply *mutatis mutandis*.

(5) If there was no violation, or no immanent violation, the alleged violating party may demand from the party which requested submission or inspection in accordance with section (1) compensation for the damage which he/she incurred by virtue of the request.

### **Section 37d Security in respect of damage claims**

(1) The violated party may also claim against the violating party in case of a rights violation that has been committed on a commercial scale in cases falling under section 37 subsection (2) to submit bank, financial or commercial documents or for suitable access to the documents in question which are at the disposal of the violating party and are needed in order to enforce the damage claim if it is questionable whether the damage claim can be met without such submission. Where the violating party asserts that such information is confidential, the court shall take the necessary action in order to ensure the protection that is required in the individual case.

(2) The claim in accordance with subsection (1), sentence 1, shall be ruled out if the claim is disproportionate in the individual case.

(3) The obligation to submit the documents designated in subsection (1) may be ordered by means of an injunction in accordance with sections 935 to 945 of the Code of Civil Procedure if the damage claim is evident. The court shall take the requisite action in order to ensure the protection of confidential information. This shall apply in particular in cases in which the injunction is handed down without a prior hearing of the respondent.

(4) Section 811 of the Civil Code, as well as 37b subsection (8), shall apply *mutatis mutandis*.

### **Section 37e Promulgation of the judgment**

If an action had been lodged on the basis of the present Act, the winning party may be awarded the power in the judgment to publish the judgment at the expense of the losing party if it shows that it has a legitimate interest. The nature and extent of the notification shall be determined in the judgment. The power shall expire if it has not been taken up within three months of the judgment becoming final. The finding in accordance with sentence 1 shall not be provisionally enforceable.

### **Section 37f Lapse**

The provisions contained in Division 5 of Book 1 of the Civil Code shall apply *mutatis mutandis* to lapse of the claims for violation of a right that is protected in accordance with the present Act. Section 852 of the Civil Code shall apply *mutatis mutandis* if the party obliged has obtained something by virtue of the violation at the expense of the party entitled.

### Section 37g Claims from other statutory provisions

Claims from other statutory provisions shall remain unaffected.

### Section 38 Court proceedings on plant variety protection

(1) The Regional Courts shall have exclusive jurisdiction for all actions whereby a claim is asserted from one of the legal relationships regulated by the present Act (court proceedings litigation on plant variety protection) regardless of the value at dispute.

(2) The *Land* Governments are herewith empowered to allot by means of an ordinance the plant variety protection matters for the districts of several Regional Courts to one of them where this serves the practical furtherance or more rapid conclusion of the proceedings. The *Land* Governments may transfer this empowerment to the *Land* Ministries of Justice. The *Länder* may furthermore agree to completely or partly transfer tasks that are incumbent on the courts of one *Land* to the court of another *Land* that has jurisdiction.

(3) Of the costs arising from the collaboration of a patent attorney, the fees in accordance with section 13 of the Lawyers Remuneration Act (*Rechtsanwaltsvergütungsgesetz*) and the necessary expenses of the patent attorney shall be refunded.

(4) Subsections (1) to (3) shall also apply to all actions by means of which a claim is asserted from one of the legal relationships regulated in Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights (OJ L 227 p. 1) in its respectively applicable version.

### Section 39 Criminal provisions

(1) Anyone who

1. in contravention of section 10 subsection (1), including in conjunction with subsection (2), produces, conditions for the purposes of propagation, places on the market, imports, exports or stores propagating material of a variety that is protected in accordance with the present Act, a plant, a part of a plant or a product, or
2. in contravention of Article 13 para. 1, in conjunction with para. 2, sentence 1, including in conjunction with para. 4, sentence 1, or para. 5, of Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights (OJ L 227 p. 1) propagates, conditions for the purpose of propagation, offers for sale, places on the market, imports, exports or stores material of a variety protected by a Community plant variety right

shall be punished with up to three years' imprisonment or a fine.

(2) Where the offender acts on a commercial basis, the punishment shall be up to five years' imprisonment or a fine.

(3) The attempt shall be punishable.

(4) In cases falling under subsection (1), the offence shall only be prosecuted on request unless the criminal prosecution authority considers *ex officio* intervention to be required because of the particular public interest in criminal prosecution.

(5) Objects to which the criminal offence is related may be confiscated. Section 74a of the German Criminal Code (*Strafgesetzbuch*) shall be applied. The provisions on confiscation shall not be applied where the claims designated in section 37a are admitted in proceedings in accordance with the provisions contained in the Code of Criminal Procedure with regard to the compensation of the violated party (sections 403 to 406c).

(6) In the event of a conviction, it shall be ordered that the sentence be published on request if the violated party so moves and puts forward a legitimate interest therein. The nature of the publication shall be laid down in the judgment.



### **Section 40 Provisions on regulatory fines**

(1) Anyone who, intentionally or negligently,

1. places propagating material of a variety protected in accordance with the present Act on the market if the variety denomination is not stated therein, or not in the prescribed manner, in contravention of section 14 subsection (1),
2. uses a variety denomination of a variety protected in accordance with the present Act or a designation that may be confused with it for another variety of the same or of a related species, in contravention of section 14 subsection (3), or
3. fails to use the denomination of a variety protected by a Community plant variety right, fails to use it correctly, completely or in the prescribed manner, in contravention of Article 17 para. 1, including in conjunction with para. 3, of Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights (OJ EC L227 p. 1)

shall be deemed to have committed an offence.

(2) The regulatory offence may be punished with a fine of up to five thousand Euro.

(3) Objects to which the regulatory offence refers may be confiscated. Section 23 of the Regulatory Offences Act shall be applied.

(4) The Federal Plant Variety Office shall be the administrative authority within the meaning of section 36 subsection (1) No. 1 of the Act on Regulatory Offences.

### **Section 40a Provisions on Measures by the Customs Authority**

(1) Material that is the subject of a violation of plant variety protection granted in Germany or in accordance with Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights (OJ EC L 227 p. 1) in the respectively valid version shall be subject, unless Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ EU L 196 p. 7), in the respectively valid version, applies, on request by the holder of the plant variety right and on provision of security by him/her, to seizure by the customs authorities, on its import or export where the rights violation is evident. This shall only apply in trade with other contracting states where controls are carried out by the customs authorities.

(2) Where the customs authority orders a seizure, it shall promptly notify the person entitled to dispose and the applicant. The applicant shall be informed of the origin, quantity and place of storage of the material, together with the name and address of the person entitled to dispose; the privacy of correspondence and posts (Article 10 of the Basic Law) shall be restricted in that respect. The applicant shall be afforded the opportunity to inspect the material where such inspection does not constitute a breach of commercial or operational secrets.

(3) Where no objection is made to the seizure at the latest within two weeks of service of the notification in accordance with subsection (2), sentence 1, the customs authority shall order the confiscation of the seized material.

(4) If the person entitled to dispose objects to the seizure, the customs authority shall promptly inform the applicant thereof. The latter shall be required to promptly state to the customs authority whether he/she is upholding the request under subsection (1) in respect of the seized material.

1. The customs authority shall promptly suspend the seizure if the applicant withdraws the request.
2. The customs authority shall take the necessary measures if the applicant upholds the request and submits an executable court ruling ordering the impounding of the seized material or the limitation of the right to dispose thereof.

Where neither of the cases referred to in Nos. 1 and 2 is applicable, the customs authority shall suspend the seizure on expiry of two weeks after service of the notification on the applicant in accordance with sentence 1; if the applicant proves that the court ruling in accordance with No. 2 has been applied for but that he/she has not yet received it, the seizure shall be upheld for a further two weeks at most.

(5) If the seizure proves to have been unjustified from the outset, and if the applicant has upheld the request in accordance with subsection (1) with regard to the seized material, or has not made a prompt declaration (subsection (4), sentence 2), he/she shall be obliged to compensate for the damage that seizure has caused to the person entitled to dispose.

(6) The application in accordance with subsection (1) shall be submitted to the Federal Finance Office, and shall be effective for one year unless a shorter period of validity is applied for; it may be repeated. The cost of official acts related to the application shall be collected from the applicant in accordance with section 178 of the German Fiscal Code (*Abgabenordnung*).

(7) Seizure and confiscation may be challenged with the legal remedies that are allowed for the regulatory fine procedure under the Regulatory Offences Act against seizure and confiscation. The applicant shall be heard in the appeal proceedings. An immediate complaint shall be available against the ruling of the Local Court; it shall be ruled on by the Higher Regional Court.

### **Section 40b Procedure in accordance with Regulation (EC) No. 1383/2003**

(1) If the competent customs authority in accordance with Article 9 of Regulation (EC) No. 1383/2003 suspends the release of the goods or detains them, it shall promptly inform the right-holder, as well as the applicant or the possessor or owner of the goods, thereof.

(2) In cases falling under subsection (1), the right-holder may apply to have the goods destroyed in the simplified procedure described below within the meaning of Article 11 of Regulation (EC) No. 1383/2003.

(3) The application must be made in writing to the customs authority within ten working days, or within three working days in the case of perishable goods, of receipt of the notification in accordance with subsection (1). It must contain the information that the goods forming the subject-matter of the proceedings violate a right that is protected in accordance with the present Act. The written consent of the applicant, of the possessor or of the owner of the goods, to their destruction shall be enclosed. In derogation from sentence 3, the applicant, the possessor or the owner of the goods may submit their written declaration directly to the customs authority as to whether or not they consent to the destruction. The period designated in sentence 1 may be extended prior to its expiry by ten working days at the request of the right-holder.

(4) Consent to destruction shall be deemed to have been granted if the applicant, the possessor or the owner of the goods have not objected to destruction within ten working days, or within three working days in the case of perishable goods, of receipt of the notification in accordance with subsection (1). This fact shall be referred to in the notification in accordance with subsection (1).

(5) The destruction of the goods shall be carried out at the expense and under the responsibility of the right-holder.

(6) The customs authority may take on the organisation of the destruction. Subsection (5) shall remain unaffected thereby.

(7) The storage period in accordance with Article 11 para. 1 second indent of Regulation (EC) No. 1383/2003 shall be one year.

(8) Section 40a shall apply *mutatis mutandis* in other respects unless Regulation (EC) No. 1383/2003 contains provisions which preclude this.

## **Division 6 Final provisions**

### **Section 41 Transitional provisions**

(1) The provisions of the present Act shall apply in respect of varieties for which, on entry into force of the present Act, variety protection

1. still exists in accordance with the Seed Act (*Saatgutgesetz*) in the consolidated version published in the Federal Law Gazette, Part III, classification number 7822-1, most recently amended by the Act of 23 December 1966 (Federal Law Gazette I, p. 686), in conjunction with section 52 subsection (1) of the Plant Variety Protection Act of 20 May 1968 (Federal Law Gazette, Part I p. 429), in the version promulgated on 4 January 1977 (Federal Law Gazette Part I, pp. 105 and 286), or

2. has been granted or applied for in accordance with the Plant Variety Protection Act of 20 May 1968, in the applicable version,

subject to the proviso that, in cases falling under No. 1, a grant of plant variety protection can only be withdrawn in accordance with section 31 subsection (2) if it emerges that the requirements of section 2 subsection (2) of the Seed Act were not satisfied when plant variety protection was granted.

(2) Where a patent has been granted or applied for regarding a variety or a process for its breeding prior to the date on which this Act became applicable to the species concerned, the applicant, or his legal successor, may uphold the patent application, or the holder of the patent may uphold the patent or apply for the grant of plant variety protection for the variety. If he/she applies for the grant of plant variety protection, he/she shall be entitled to enjoy the date of the patent application as priority for the plant variety protection application; section 23 subsection (2) sentence 3 shall apply *mutatis mutandis*. The duration of the plant variety protection that has been granted shall be reduced by the number of full calendar years that have elapsed between the filing of the patent application and the filing date. Once the grant of variety protection has become final, rights arising from the patent or from the patent application may no longer be asserted for the variety; pending patent grant procedures shall not be continued.

(3) If a Community plant variety right has been granted for a variety and has been terminated by waiver without there being any grounds for a declaration of nullity or cancellation, an application for the grant of variety protection in accordance with the present Act may be filed within three months of the waiver taking effect. For this application, the holder of the Community plant variety right or his legal successor shall be entitled to enjoy the date of the application for the grant of the Community plant variety right as priority for the variety protection application in accordance with the present Act. The priority shall expire if the applicant does not file the documents concerning the application for the grant of the Community plant variety right, its grant and the relinquishment within the above period. If plant variety protection in accordance with the present Act is granted for the variety, the duration of the protection that has been granted shall be reduced by the number of full calendar years that have passed between the grant of the Community plant variety right and the grant of variety protection in accordance with the present Act.

(4) Varieties for which the application for protection was filed up to one year after the date on which the present Act became applicable to the species in question shall be deemed to be new if propagating material or harvested material of the variety was placed on the market for commercial purposes with the consent of the party entitled or of his legal predecessor more than four years or, in the case of vine and tree species, more than six years prior to the said date. Where variety protection is granted in application of sentence 1, its duration shall be reduced by the number of full calendar years that have passed between the beginning of placing on the market and the filing date.

(5) By derogation from section 6 subsection (1), a variety shall also be deemed to be new if plants or parts of plants of the variety have not been placed on the market for commercial purposes with the consent of the party entitled or of his/her legal predecessor prior to the filing date, or only within the following periods:

1. one year in Germany,
2. four years or, for vine (*vitis* L.) and tree species, six years outside the country,

if the filing date is not later than one year after the entry into force of Article 1 of the Act of 17 July 1997 (Federal Law Gazette Part I p. 1854).

(6) The provision contained in section 10 subsection (1) shall not apply to essentially derived varieties for which plant variety protection has been applied or granted prior to the entry into force of Article 1 of the Act of 17 July 1997 (Federal Law Gazette Part I p. 1854).

(7) Article 229 para. 6 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*) shall apply *mutatis mutandis* subject to the proviso that section 37c in the version applicable until 1 January 2002 is deemed to be equivalent to the provisions of the Civil Code on lapse in the version applicable until 1 January 2002.

## Section 42

(Entry into force)

**Annex**

Source of the original text: Federal Law Gazette Part I 1997, 3176

Species from which propagating material may be saved:

1.	Cereals	
1.1	<i>Avena sativa</i> L.	Oats
1.2	<i>Hordeum vulgare</i> L. sensu lato	Barley
1.3	<i>Secale cereale</i> L.	Rye
1.4	<i>x Triticosecale</i> Wittm.	Triticale
1.5	<i>Triticum aestivum</i> L. emend. Fiori et Paol.	Wheat
1.6	<i>Triticum durum</i> Desf.	Durum wheat
1.7	<i>Triticum spelta</i> L.	Spelt wheat
2.	Fodder plants	
2.1	<i>Lupinus luteus</i> L.	Yellow lupin
2.2	<i>Medicago sativa</i> L.	Lucerne
2.3	<i>Pisum sativum</i> L. (partim)	Field pea
2.4	<i>Trifolium alexandrinum</i> L.	Berseem/Egyptian clover
2.5	<i>Trifolium resupinatum</i> L.	Persian clover
2.6	<i>Vicia faba</i> L. (partim)	Field bean
2.7	<i>Vicia sativa</i> L.	Common vetch
3.	Oil and fibre plants	
3.1	<i>Brassica napus</i> L (partim)	Swede Rape
3.2	<i>Brassica rapa</i> L. var. <i>silvestris</i> (Lam.) Briggs	Turnip rape
3.3	<i>Linum usitatissimum</i> L.	Linseed, except fibre flax
4.	Potatoes	
4.1	<i>Solanum tuberosum</i> L.	Potato