

COMMISSION OF THE EUROPEAN COMMUNITIES

COM (78) 510 final

Brussels, 9 October 1978

COMMISSION REPORT TO THE COUNCIL ON THE DIPLOMATIC CONFERENCE ON THE REVISION OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

COM (78) 510 final

Commission Report on the Diplomatic Conference on the Revision of the
International Convention for the Protection of New Varieties of Plants

I. Background

1. The International Convention for the Protection of New Varieties of Plants was concluded on 2 December 1961. The purpose of the Convention is to recognize and protect the right of the breeder of a new plant variety (breeder's right)¹. The breeder's right is designed to guarantee breeders recompense - under a patent - for their breeding work. The Convention lays down in particular the general rules governing eligibility for and the scope of the breeder's right. In any Member State of the Union nationals of other Member States enjoy the same treatment as nationals of that State as regards recognition and protection of the breeder's right (national treatment)².

At present ten countries, including seven Community Member States, are parties to the Convention and thus constitute the Union for the Protection of New Varieties of Plants (UPOV)³:

- Community Member States: Belgium, Denmark, the Federal Republic of Germany, France, Italy, the Netherlands and the United Kingdom;
- other countries: Switzerland, Sweden and South Africa.

2. In recent years several countries, including the USA and Canada have expressed interest in acceding to the Convention. This and other reasons have led UPOV to draft proposals for a completely revised version of the Convention, with the aim of

- clarifying certain points in the text
- and
- creating conditions to make UPOV more attractive to potential Member States⁴.

¹ Article 1(1) of the Convention

² Article 3 of the Convention

³ Article 1(2) of the Convention

⁴ Report on the work of the Committee of Experts on the Interpretation and Revision of the Convention.

3. On 30 January 1978 UPOV called a "Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants" for 9 to 23 October, to be held in Geneva. Invitations have been issued to 148 non-member countries to send "observer delegations" and to 15 "observer organizations" to send representatives to the conference. Among the observer organizations is the European Economic Community. The purpose of the conference is to approve and sign a revised text of the Convention, the basis for discussion being the proposals referred to in paragraph 2.

II. Community participation

1. Hitherto the Community has not been directly involved in the Convention. Nor has it yet developed a Community breeder's right.

It has, however, adopted legal instruments governing the free movement of quality seeds and propagating material, laying down rules for the official approval of varieties, cultivars and the like of agricultural, horticultural and forestry plant species⁵.

The conditions for the approval of varieties are largely the same as those which the UPOV member States apply under the Convention for the Protection of New Varieties of Plants.

⁵ In particular:

- Council Directive 70/457/EEC of 25 September 1970 on the common catalogue of varieties of agricultural plant species (OJ No L 225 of 12.10.1970, p. 1), as last amended by Directive 78/55/EEC of 15 December 1977 (OJ No L 16, 20.1.1978, p. 23);
- Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed (OJ No L 225 of 12.10.1970, p. 7), as last amended by Directive 78/692/EEC of 25 July 1978 (OJ No L 236, 26.8.1978, p. 13);
- Council Directive 66/404/EEC of 14 June 1966 on the marketing of forest reproductive material (OJ No 125 of 11.7.1966, p. 2326), as last amended by Directive 75/445/EEC of 26 June 1975 (OJ No L 196, 26.7.1975, p. 14).

2. Although the Community has not yet taken any action regarding breeder's rights, it must take part in the work on the Convention, for three main reasons:

- The Convention ought not, at any rate as regards intra-Community trade, to be allowed to run counter to the legislation embodied in or adopted pursuant to the Treaty of Rome and in particular the rules laid down in the Treaty regarding the free movement of goods (Articles 30 et seq.) and competition (Articles 85 et seq.);
- The Convention must not be incompatible with or undermine the principles of the abovementioned Community rules on the marketing of seeds and propagating material, in particular, the scope of the system of the breeder's right and of the procedure for the official acceptance of varieties for marketing must as far as possible be the same, unless their different purposes justify exceptions to this;
- The Convention must not prevent the development of the Community's own breeder's right within the framework of the Union; in view of such a development of Community legislation the Convention must provide for the possibility of the Community to accede to the Convention as such.

3. The above requirements were hitherto met to a large extent, because the majority of the member States of the Union were bound by their membership of the Community.

The proposed enlargement of the Union to an unspecified number of countries could change this position.

It therefore appears essential that the Community should in future participate in the work relating to the Convention.

III. Commission proposals for Community participation

1. The Commission is confining itself at this stage to presenting proposals to the Council for the participation of the Community in the revision of the Convention, including the Diplomatic Conference to be held from 9 to 23 October 1978. It may subsequently propose measures to be adopted after the conference.

The purpose of the proposals is to permit close cooperation before and during the conference between the Member States and the Commission, so that a harmonized approach can be worked out on all matters affecting the Community.

2. The Commission therefore proposes:

- that the Member States be requested to put forward or support the solutions set out in Annex I at the Diplomatic Conference;
 - that the Member State chairing the Council be requested, on behalf of the Community, to make a statement of principles with regard to the text of the Convention at the beginning of the Conference; a draft of this statement is at Annex II;
 - that the Commission be empowered to appoint the representatives of the Community, which, pursuant to Rule 7 of the provisional rules of the conference, is invited as an "observer organization";
 - that the General Secretariat of the Council be instructed to arrange coordination meetings during the conference between the Member States of the Community represented there and the Commission.
-

Solutions which the Member States should put forward or support

On the basis of the proposals which the competent UPOV Committee of Experts has drawn up and which are contained in documents DC/3 and DC/5 and, as regards Article 13, in document DC/4, the member States are requested to observe the following procedure in the discussions on a revised text of the Convention:

1. With regard to provisions which concern the Community as such, e.g. Articles 1 to 14, 17, 29, 30, 31, 32, 34 A and 38:

1.1. Member States should essentially support the proposals contained in the abovementioned documents, bearing in mind the following remarks ⁽¹⁾:

1.1.1. Article 3(3) entitles member States of the Union to restrict "national treatment" to nationals of other member States which apply the Convention to the same genus or species and to natural and legal persons resident or having their registered office in one of those States.

Member States are requested to support this provision subject to the reservation that they themselves may apply this authorization to UPOV member States which also belong to the European Community only in so far as this is compatible with the Community rules which prohibit discrimination on grounds of nationality (Article 7 of the EEC Treaty). If this provision is adopted, the above reservation should be recorded in the final act of the conference.

1.1.2. Article 4(3)(a) requires that in an initial phase each member State of the Union apply the Convention to at least five genera or species.

Member States should press for a text laying down criteria which the five genera or species selected by each Member State should meet.

(1)

Textual and linguistic questions and matters of presentation (order and headings of the articles) should otherwise be dealt with as flexibly as possible.

1.1.2a. Article 5(2) lays down that the breeder may make his agreement to the variety being used dependent on conditions which he lays down.

Member States should press for a text which ensures that the conditions laid down by the breeder are compatible with current legislation.

1.1.3. Article 6(1)(a) lays down that one of the conditions required for breeder's protection is that the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. It goes on to list examples of ways in which this common knowledge "may" be established. Under Community rules such distinguishing features are similarly a prerequisite for official authorization of a variety for marketing. In this connection the reference collection (all the varieties from which the new variety must be distinguishable) is defined more clearly. In the context of breeder's protection, distinguishing characteristics must have the same meaning.

The member States are therefore requested to support the proposed provision with the reservation that they themselves may lay down rules, pursuant to this provision, for defining the reference collection in more detail. If the provision is adopted, the above reservation should be recorded in the final act of the conference.

1.1.4. Article 6(1)(b)(i) lays down the principle that the variety must be a new one, but authorizes member States of the Union to allow up to one year's "grace" for marketing the new variety before protection is applied for.

Member States are requested to support this provision. They should, however, agree beforehand that they will take advantage of this "period of grace" only in agreement with each other and, where appropriate, also with certain other member States of the Union - in the light of the prevailing situation. There is no need for this coordination to be mentioned in the final act of the conference.

- 1.1.5. Article 6(1)(b)(ii) lays down that a variety may be regarded as new only if it has not been offered for sale or marketed in the territory of any other member State of the Union for longer than four or, in some cases, six years.

It does not allow for the case in which the member State of the Union in which the application for protection is submitted applies the Convention to the genus or species for the first time after the said period has elapsed. Article 35 does not appear to cover this case adequately.

Member States are requested to support this provision, provided that the abovementioned case is dealt with satisfactorily, i.e. a solution is adopted whereby a breeder in a Member State of the Community can expect equal treatment, and reciprocity between the other member States of the Union is guaranteed in this respect.

- 1.1.6. Article 6(2) lays down that protection may be granted only on condition that the breeder has complied with the "formalities" provided for by national law.

These formalities could include requirements regarding establishment, registration or recognition of the breeder or the appointment of a representative resident in the State concerned.

For the purposes of official acceptance of a variety for marketing under Community rules, the sole requirement is that the variety have been obtained in the prescribed manner within the Community, not necessarily in the Member State of acceptance⁽²⁾. The Member States are requested to support the abovementioned provision. They should, however, agree beforehand that they will provide in their national laws for only such "formalities" as are compatible with the prohibition on discrimination provided for in Article 7 of the EEC Treaty and - in relations with Member States of the Community - do not run counter to the simplification of official acceptance of varieties under Community rules. This coordination need not be mentioned in the final act of the conference.

(2)

The case of varieties from non-Community countries may be disregarded here.

- 1.1.7. Article 7 lays down that eligibility for protection must be officially verified. The examination must include official cultivation trials.

A proposed explanatory note on Article 7 states that an examination procedure which includes cultivation trials undertaken by the applicant may, under certain conditions, be regarded as compatible with the UPOV Convention.

Member States are requested to support both the provision and the explanatory note. They should, however, agree beforehand that at any rate in respect of species covered by the Community rules on the marketing of seeds and propagating material they will not make use of the possibility of non-official cultivation trials for varieties which are not intended exclusively for non-member countries. This coordination need not be recorded in the final act of the conference.

- 1.1.8. Article 9(2) guarantees the breeder equitable remuneration in the event that the free exercise of the breeder's right is restricted for reasons of public interest in order to ensure the widespread distribution of the variety.

Member States are requested to support this provision. They should, however, agree beforehand that the scope of this provision may not be extended beyond the original purpose (defence, emergencies, etc.) to include cases in which a restriction results from the application of Community rules on the free movement of goods or competition. This coordination need not be mentioned in the final act of the conference.

- 1.1.9. The second sentence of Article 12(4) specifies the various matters occurring during the "priority period" do not give rise to any right in favour of a third party or to any right of personal possession.

Member States are requested to support this provision, provided that a satisfactory solution is found to the case where a person acting in good faith has seed stocks when the breeder's right enters into effect.

1.1.10. Article 13(4)(a)⁽³⁾ deals with the case where the breeder's right in respect of the variety and trade-mark protection for the variety denomination coincide. It lays down that the breeder may not, as from the time when the variety denomination is registered, continue to assert his right in order to hamper the free use of the variety denomination.

The proposal contains three alternatives as to the territorial scope of the provision. The breeder may not continue to assert his right

- in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs (alternative 1);
- in the member State concerned (alternative 2);
- in any member State of the Union (alternative 3).

The Commission regards alternatives 1 and 2 - at least as far as the Member States of the Community are concerned - as incompatible with the Community rules on the free movement of goods.

Member States should therefore aim at a solution which ensures that:

- the breeder's right in the Community context serves no other purpose than to protect against unauthorized persons⁽⁴⁾;
- the objective of the Community rules on the marketing of seeds and propagating material, in particular regarding the common catalogue of varieties, including variety denominations, are not jeopardized.

1.1.11. Article 13(5)⁽³⁾ lays down that a variety denomination must be the same in all member States of the Union. Exceptions are permissible only if the authority competent for the issue of the title of protection "considers that denomination unsuitable in that State".

(3) Document DC/4

(4) Cf Commission Decision of 21 September 1978 relating to a procedure initiated pursuant to Article 85 of the EEC Treaty in respect of the right to protection for varieties of maize seed.

Member States should support the principle of standard variety denominations. They are requested to support the proposed provision subject to the reservation that they may themselves lay down criteria as regards unsuitability of a variety denomination in accordance with the development of Community law on the marketing of seeds and propagating material. If the provision is adopted, the reservation should be recorded in the final act of the conference.

1.1.12. Article 13(6)⁽³⁾ lays down that the competent authorities of the member States of the Union shall inform each other of matters concerning variety denominations, including in particular the submission, registration and cancellation of such denominations.

While supporting this principle, the Member States should endeavour to find a wording which makes clear that information must be supplied not only on the variety denomination submitted but also on other points which relate to the variety in respect of which an application for protection has been submitted. This could be particularly important for delimiting the reference collection, when examining whether a new variety is distinguishable from other varieties according to Article 6.

They should furthermore ensure that the rules of procedure for the exchange of information, including the exact contents thereof, are fixed at Union level, in the light of (or in combination with) the rules applying to or developed for the official acceptance of varieties.

1.1.13. Article 13(8)(b)⁽³⁾ states that, in the context of breeder's rights, the denomination of a variety is to be regarded as the generic name for that variety.

No person may apply for, or obtain, a right which could hamper the free use of the denomination.

(3) Document DC/4.

The alternatives for the area to which the Article should apply are the same as in Article 13(4)(a)⁽⁵⁾.

The solution depends on which alternative is adopted for the abovementioned Article. Member States should therefore take into account the principles set out above⁽⁵⁾.

- 1.1.14. Article 13(9)⁽³⁾ permits the addition of a trade mark or a trade name to the denomination of the variety.

Member States should endeavour to obtain a wording which guarantees that the Community rules on the marking of seeds and reproductive material are not affected. These rules do not permit such additions on the prescribed official labels (agricultural seed and reproductive material, certified vegetable seed), suppliers' labels (basic vegetable seed, forestry reproductive material and all small packages) or adhesive labels or markings used on packages in their place⁽⁶⁾. The proposal cannot therefore be implemented, except in publicity, on documents available separately from the goods or on the parts of the package which are clearly separated from the prescribed marking.

- 1.1.15. Article 14(1) states that the right accorded to the breeder is independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

Member States should endeavour to find a wording which makes it clear that the right accorded to the breeder is also independent of measures taken to regulate the acceptance of varieties for marketing.

(3) Document DC/4

(5) See above 1.1.10

(6) The reference to breeding for conservation purposes is of no importance here.

- 1.1.16. Article 14(2) states that the measures referred to in paragraph 1 "shall", as far as possible, avoid hindering the application of the provisions of the Convention.

Member States may support this provision, but should agree in advance that it does not form a legal basis giving the Convention precedence over national or Community law which has been or may be adopted in this sector.

- 1.1.17. Article 17(1) defines the States which may be invited as observers to meetings of the Council.

Member States should endeavour to find a wording guaranteeing the Community regular representation in the Council.

- 1.1.18. Article 29 allows member States of the Union to conclude special agreements among themselves for the protection of new varieties of plants, insofar as such agreements do not contravene the provisions of the Convention.

Comparison of this provision, which is not different from the present text, with the present text of Article 30(2) shows that its scope is apparently limited. There is in particular no guarantee that a Community breeder's right, created as part of Community legislative procedure, would be covered.

Member States should therefore endeavour to obtain a wording permitting this.

- 1.1.19. Article 30(2) refers to agreements between the competent authorities on the examination of varieties and the assembling of reference collections and documents.

Member States may support this provision, but should agree in advance that they will apply it only insofar as the contracts are compatible with Community law on the official acceptance of varieties for marketing and subject to a future centralization of Community trials.

1.1.20. Article 31 governs the signature of the Act. All nine Member States should sign.

1.1.21. Article 32 governs ratification of the Convention and accession. Both are limited to States.

Member States should press for a text which ensures that accession of the Community as such is possible at the latest when a Community breeder's right is developed.

1.1.22. Article 34A(2) grants derogation from certain clauses of the Convention to member States of the Union which grant protection under patent legislation.

Member States may support this provision, provided that it will not apply in Member States of the Community.

1.1.23. Article 38 lays down the procedure for settling disputes between member States of the Union.

Member States may support it, but should agree in advance that disputes between member States of the Union which are also Members of the Community will be settled at Community level. This agreement need not be included in the final Act of the Conference.

1.2. If amendments are proposed to the provisions concerning the Community as such, Member States should, in their Opinions, take into account the remarks made under 1.1.

If the amendments proposed contain new points of view, they should coordinate their attitude on the initiative of a Member State or of the Commission in the proposed coordination meetings

2. In the case of provisions which do not interest the Community as such (Articles 15, 16, 18 to 28, 32A to 34, 35 to 37, 39 to 41), Member States should make every effort to work out a coordinated position. The proposed coordination meetings should be convened for this purpose on the initiative of one Member State.

Statement of principles by the
Council President

As representative of the country which is not only one of the founding members of the Union but also currently occupies the Presidency of the European Community, I have the honour, on behalf of the European Community to make the following statement:

The Community wishes to express its high regard for the work done to date in UPOV. It welcomes this conference and supports its aims; it approves the intention to draft a new text of the Convention, incorporating, on the one hand, necessary clarifications and, on the other, amendments which will improve the working of the Convention and enable other States to participate within a far wider framework than hitherto. I can assure you that the Community Member States represented at the conference and the Community representatives will do their best to make the conference a success. They will at the same time naturally ensure that the results achieved or sought in pursuance of Community agreements are not jeopardized. I refer in particular to the Community principles concerning non-discrimination on grounds of nationality, concerning the free movement of goods and concerning competition and to the Community provisions relating to the marketing of seeds and propagating material of agricultural, horticultural and forestry plant species.

The Community also intends to develop breeder's rights, within the narrower context of the Community, with a view to the further elimination of national barriers. It therefore hopes that a provision will be included in the Convention which will permit its accession at a later date. It also intends to invite those UPOV Member States which are from the same region but which are not members of the Community to participate in this work from the outset. Those UPOV member States which are from the same region but which are not members of our Community will be invited to participate in this work from the outset.

In conclusion, the Community wishes the conference fruitful discussion and every success.

