

Contracts in relation to Plant Breeders' rights

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Overview of presentation

- Contracts which may trigger CPVO action
 - License agreements
 - Compulsory licenses
 - Transfer of rights
- Case law
 - pvr v. competition law
 - Farm saved seed

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Legal Basis

- The holder may make his autorisation subject to conditions and limitations (Art 13)
- Rights may form, in full or in part, the subject of contractually granted exploitation rights, exclusive or non exclusive (Art 27)



License Agreements

- Right to licensees to use the protected variety against payment to the holder
- On request, the CPVO shall register an exclusive license agreement in the register



Cumpolsory licenses (Art 29)

- May be granted by the CPVO under certain conditions
- The CPVO shall stipulate the type of acts covered and reasonable conditions such as
 - an appropriate royalty
 - possible time limitations



Transfer of a right

- Agreement between the holder and the successor in title
- Purchase of some or all assets in a company
- Merger between companies
- On request, the CPVO shall register a transfer in the register



SCOPE - Article 13(8)

Not exercise right if it violates:

- Public morality
- Public policy
- Public security
- Protection of health and lifes of humans animals or plants
- The environment
- Industrial commercial property
- Competition
- Trade of agricultural production



Limitations under Competition Law

- Agreements which
 - may affect trade between Member States and
 - which have as their object or effect the prevention, restriction, or distortion of competition within the common market are prohibited.
- Such agreements shall be automatically void
- Exemption may be given by the Commission

- Any abuse of a dominant position is prohibited.



Nungesser v Commission

- An agreement which
 - Allowed the parties to prevent all importations into Germany or exports from Germany to other Member States of the Community
 - INRA, the french Licensor, to refrain from having the relevant seeds produced in Germany by other licensees or by INRA itself



Nungesser v Commission

- The Court distinguished between
 - Open exclusive license
 - Exclusive license which confers absolute territorial protection



Nungesser v Commission

- Open exclusive license
 - A licensor agrees not to license anyone else in the licensee's territory
 - Licensor will not compete in the territory himself
 - However, parallel imports are allowed



Open exclusive license

Lor agrees not to license anyone else than Licensee A in Germany
Lor agrees not to compete in Germany himself

**Lincensor
France**

**Licensee A
Germany**



Exclusive license which confers absolute territorial protection

- Lor forbids Lee to sell to customers in France
- Lor will not itself compete in Germany forbids Lee to sell to customers in France
- Lor will do everything in its power to prevent export from France to Germany

Licensor
France

Licensee
Germany



Louis Erauw-Jacquery Sprl v La Hesbignonne

- Erauw-Jacquery had granted a license agreement to La Hesbignonne
 - Propagate basic seeds
 - Sell seeds reproduced from the basic seeds (reproductive seeds)
 - Prohibition to export the basic seeds
 - Not to sell the reproductive seeds below minimum selling prices



Louis Erauw-Jacquery Sprl v La Hesbignonne

- An export ban in relation to **basic seeds** do not infringe competition law.
- A plant breeder is entitled to reserve the propagation of **basic seeds** to institutions approved by him and an export ban is objectively justified in order to protect his right.



Louis Erauw-Jacquery Sprl v La Hesbignonne

- The Court held that;
- The provision on a minimum price had its object and effect the restriction of competition **if**;
- The agreement had an effect trade between member state to an appreciable degree.



The « Sicasov » decision

- Sicasov is a french cooperative of breeders
- A standard license agreement of Sicasov was assessed by the Commission



The « Sicasov » decision

- The obligation not to entrust **basic seeds** to a third party, not to export them and related provisions, did not infringe competition law
- A restriction not to export **certified seeds** to UPOV Member States or EU Member States that do not provide for pvr protection did not infringe competition law



The « Sicasov » decision

- However, a restriction on the export of **certified seeds** did infringe competition rules but was exempted since parallel imports were not prohibited under the agreement



The « Roses » decision

- The Commission condemned two provisions in a standard pvr license agreement
- An obligation to transfer all rights to new developments of the protected variety, or a variety being applied for, to the holder (a so called exclusive grant-back clause)
- The Commission held that this effectively removed the licensee from the market of mutations which it discovered



The « Roses » decision

- A clause prohibiting the licensee to challenge the validity of the plant variety right on which the license was based (non-challenge clause)
- The Commission held that this clause
 - *denied the licensee the opportunity, open to any third party, of removing an obstacle to his economic activity by means of a petition for revocation*
 - *The technical examination do not entirely exclude the possibility of a wrongfully conferred right*



Block exemption Regulation 772/2004

- Regulation on certain categories of technology transfer agreements
- Pvr covered by the block exemption
- Suspicion on
 - Price fixing
 - Absolute territorial protection
 - Grant back clauses
 - No-challenge clauses



Farm saved seed

- A farmer using farm saved seed must pay the holder an equitable remuneration « sensibly lower » than the normal fee
- The fee can be determined in a contract between
 - Individual farmers and holders



Farm saved seed

- A contract between organisations of farmers and holders can be used as a **guideline** if published in the CPVO Gazette



Equitable remuneration

- If no contract
- 50% of the amount charged for the
 - licenced production of propagating material
 - of the lowest category qualified for official certification
 - of the same variety in the same area



Saatgut-Treuhandverwaltungs GmbH v Deppe and others

- One of the questions that arose in this case was whether 80% could be seen as « sensibly lower »
- 80% was mentioned in an agreement between organisations of farmers and breeders, but the contract had not been published in the CPVO Gazette
- The court answered this question in the negative



Conclusions

- CPVO is involved in contracts only to a limited extent
- Case law from community courts and the Commission shows that license agreements may be contrary to competition law.
- Stricter conditions may be imposed on licensees concerning basic seeds than certified seeds
- Sensitive clauses
 - Price fixing
 - Absolute territorial protection
 - Grant back clauses
 - No challenge clauses

