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
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 agreementin the register
Cumpulsory 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
Exclusive license which confers absolute territorial protection

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