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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

First Session
Geneva, April 17 to 19, 1978

LAW ON COMPETITION AND PLANT VARIETY PROTECTION

Working document prepared by the Delegation of the Federal Republic of Germany

1. At its sixteenth session, in December 1977, the Consultative Committee proposed to the Council that the Administrative and Legal Committee should discuss, in the spring of 1978, the law on competition in its relation to plant variety protection (see document CC/XVI/5, paragraphs 6 and 19). The Council approved this proposal at its eleventh ordinary session, also in December 1977 (see document C/XI/21, paragraph 58, and Annex III).

2. At the said Council session, the Delegation of the Federal Republic of Germany offered to draft a preparatory working paper on this question. The working paper, which was sent to the Office of the Union in a letter dated February 6, 1978, from the President of the Federal Plant Varieties Office, is attached as an Annex to this document.

[Annex follows]

ANNEX

WORKING PAPER ON COMPETITION LAW AND PLANT VARIETY PROTECTION

The exercise of industrial property rights within the European Communities is subject to certain provisions of the Treaty establishing the European Economic Community as regards trade between the Member States and to the relevant decisions of the Court of Justice of the European Communities (hereafter referred to as "the European Court").

Certain aspects of the question are set out below:

Article 30 of the Treaty prohibits quantitative restrictions on imports between Member States, without prejudice to Articles 31 et seq.

Article 36 of the Treaty contains, inter alia, the following provision:

> "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

This provision implies, therefore, the recognition of the existing industrial property rights in the Member States.

Article 85 of the Treaty reads:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices 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, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

"2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

"3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

The question of the extent to which the exercise of the industrial property rights referred to in Article 36 may be affected by Article 85 has therefore arisen in the context of industrial products. In this context, the European Court held in its decision of July 13, 1966, (Grundig, Consten concerning trademarks) that Article 36 did not preclude the application of Article 85 to such rights. It was maintained that the use of a trademark to prevent imports to an EEC Member State was unlawful since it constituted inadmissible territorial protection. This prohibition limited the exercise of trademark rights only insofar as required to implement the prohibition contained in Article 85(1) of the EEC Treaty. The substance of the right, however, remained unaffected.

The principle of the exercise of industrial property rights being inadmissible in cases where it would constitute an unlawful restriction on competition has long since been recognized also by the national competition laws of various States.

A further judgment given by the European Court was that of June 8, 1971, in Deutsche Grammophon v. Metro in respect of territorial licenses for copyright (records). In the judgment it was held that, although it followed from Article 36 that the Treaty did not affect the substance of industrial property rights afforded by the national law of a Member State, the exercise of such rights could fall under the prohibition contained in the Treaty. Article 36 permitted restrictions on the freedom of trade only where they were justified in order to preserve those rights which were the specific subject matter of the (industrial) property. Where an industrial property right was used to prevent the marketing in a Member State of goods placed on the market by the owner of the right, or with his agreement, on the territory of another Member State, for the sole reason that the product had not been placed on the home market, such prohibition was contrary, by reason of the fact that it maintained the isolation of the national markets, to the Treaty's basic aim of merging the national markets into one common market.

In subsequent judgments (Centrafarm I v. Sterling Drug and Centrafarm II v. Winthrop of October 31, 1974), the European Court held that those principles also applied to patent and trademark rights.

In an individual case the Commission of the European Communities (hereafter referred to as "the Commission") now raised the question of the extent to which the exercise of industrial property rights, in the context of plant variety protection, also may be restricted by other provisions of the EEC Treaty. The basic question is as follows:

A breeder assigned his rights in a variety to two different successors in title (licensees) in two different EEC Member States, in each case for the territory of the appropriate State. He undertook thereby to take all the necessary steps to prevent imports of seed of the variety from one State to the other to ensure that each licensee enjoyed territorial protection for the area of his respective State. The Commission has submitted the following considerations in respect of such territorial protection:

(a) The license agreement constitutes an agreement within the meaning of Article 85(1) of the EEC Treaty;

(b) The commitment of the breeder (licensor) to ensure that imports of seed of the variety from the other EEC Member State are prevented represents a restriction for the purpose of sharing sales markets. It noticeably affects trade between Member States and exerts a direct influence on the flow of goods between those States in a manner incompatible with achieving the aim of a unified market.

(c) The provisions of Article 2 of Council Regulation No. 26 applying certain rules of competition to production of agricultural produce and to trade in such produce (Official Journal of the European Communities No. 30 of April 20, 1962), under which certain agreements between agricultural undertakings or associations of agricultural undertakings concerning the production or sale of agricultural produce are exempted from the provisions of Article 85, do not apply since the agreements in question are not an integral part of a national market organization, do not contribute to achieving the aims of the common agricultural policy set out in Article 39 of the EEC Treaty and have not been concluded between agricultural undertakings or associations of agricultural undertakings.

(d) The fact that industrial property rights in a variety concern botanical matter in no way justifies obstacles to the free movement of certified seed between Member States.

(e) The procedure under Article 85 in no way calls into question national industrial property rights but simply endeavors to bring their exercise into harmony with the overriding principles of the Treaty.

(f) Article 85(1) is therefore of application. An absolute territorial protection is an infringement of this provision since it prevents the free movement of the goods in question.

(g) An exclusive right of production or propagation granted to a licensee by the breeder for a specific area of the common market may, in principle and subject to the requirements of Article 85(3), be exempted from the prohibition contained in Article 85(1). This also applies to an exclusive marketing right, even in conjunction with a prohibition on export, when, for example, it is necessary in order to assist the licensee for a limited period of time in opening up a new market or in introducing a new product insofar as the prohibition on export has no effect on third parties.

(In the case in point, the Commission held that no grounds justifying the application of Article 85(3) had been adduced).

Two of the above considerations deserve particular attention:

1. The considerations do not concern the content of national plant variety rights as such. Their content is explicitly recognized. The considerations deal only with the agreement between the breeder (licensor) and the licensee where such agreement affects trade in seed between the Member States (so-called parallel imports). Thus, explicitly, nothing has as yet been said on the subject of exercising, or restrictions on exercising, industrial property rights not based on such an agreement.

2. The Commission has shown that it considers seed intended for the seed consumer (in this case certified seed) as a product differing from industrial products in no way which could justify its exemption from the provisions of the EEC Treaty. This, of course, says nothing on the treatment of seed not yet intended for the consumer. As far as seed intended for the consumer is concerned, it may be assumed that in future cases where it is not a question of agreements but solely of the exercise of plant variety rights, the Commission will likewise apply the principles evolved by the European Court in respect of industrial property rights.

The following decisions of the European Court are worthy of note since they may one day constitute a yardstick for assessing plant variety rights from the point of view of EEC law:

(a) Judgment of February 29, 1968, in Parke, Davis and Co. v. Probel Reese et al.

The judgment states, inter alia:

Article 36 permits prohibitions and import restrictions, in the context of the rules on the free movement of goods, where these are justified to protect industrial property but with the explicit proviso that they shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

A patent as such, leaving aside the fact that it can be subject matter of agreements, bears no relationship to any of the forms of cartel referred to in Article 85(1) and does not therefore fall under the scope of these rules. It is, however, quite possible that Article 85(1) could be applied in cases where undertakings take concerted action on the working of a patent and thus create a situation likely to correspond to the practices referred to in Article 85(1).

The fact that a patent affords its owner special protection within a State does not however mean that the exercise of the rights under the patent constitutes an offense within the meaning of Article 86 (dominant position, abuse of such position, possible affect on trade between Member States).

(b) The above-mentioned judgment in Centrafarm v. Sterling Drug.

The judgment states, inter alia:

An obstacle to the free movement of goods based on patent rights may be justified when protection is used against a product coming from a Member State in which it is not patentable and which has been manufactured by a third party without the

authorization of the patentee, or when patents are involved whose original owners are legally and economically independent. A deviation from the principle of free movement of goods is not justified, however, when the product has been lawfully placed on the market in the member State from which it is imported by the patentee himself, or, as in the case of the owner of parallel patents, with his authorization.

(c) Judgment of June 22, 1976, in Terrapin v. Terranova concerning trademarks. This judgment sets out the following principles based on earlier decisions:

- Defensive rights do not exist where the protected products have been placed on the market in another member State by the owner of the rights himself or with his authorization.

- Industrial property rights may not be asserted when the exercise of such rights constitutes the subject matter, means or results of a cartel agreement prohibited by the Treaty.

- The same applies when the rights being asserted have originated in the splitting-up of rights which initially belonged to one and the same owner.

- The rights may however oppose the import of goods when rights are based on different national legislations and belong to different, mutually independent, owners since otherwise the specific subject matter of the property rights would be interferred with.

(d) Decision of June 15, 1976, in EMI Records v. CBS Schallplatten concerning trademarks.

The decision makes it clear that the principles evolved by the European Court are not applicable to imports from non-member countries since the rules on the free movement of goods in Articles 30 et seq. apply only to trade "between Member States" while the exercise of a right in order to prevent imports of products from a non-member country does not affect the free movement of goods between the Member States nor does it call into question the unity of the common market which Articles 30 et seq. endeavor to guarantee.

[End of Annex and
of document]