The Board of Appeal of the CPVO

Martin EKVAD, President of the CPVO

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Outline

1. The context in which the Board functions
   - The EU PVP System
2. How does the Board function?
   - Criteria for appealing
   - Appeal procedure
   - The decision process
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1. The EU PVP System

- Operational since 1995
- EU PVR is valid in the 28 member states
- National PVR systems in 24 member states

- 1995-2015; around 54,000 applications
- Annually ~3500 applications
  - 2014: 3600
  - 2015: 3200

Plant Variety Rights System
The EU PVP System

- 55% Ornamentals
- 25% Agricultural
- 15% Vegetable
- 5% Fruit
Criteria for protection

- Distinct
- Uniform
- Stable
- Variety denomination
- New
The CPVO

- The CPVO is a self financed EU agency – funded by fees charged for services rendered.

- Staff of 45 people
  - representing 12 nationalities.

- We work in
  - Theory with 24 languages
  - In practice approximately 5 languages.
2. How does the Board function

- **Composition**
  - The Chair and his/her alternate are appointed by the Council for 5 years.
  - The Members are appointed by the Administrative Council for 5 years (a list of 19 persons)
    - Technical experts
    - Legal experts
  - A sitting BoA is made up of the Chairman & 2 members
  - The Chair selects the 2 members for each case
The Appeal Procedure

- Legislative basis: Art 67 of the Basic Regulation (EC) 2100/94 (BR)

- Art 73 BR: Actions may be brought before the Court of Justice against decisions of the Board of Appeals on appeals
Parties to proceedings (Art 68BR)

- **Entitlement to appeal and parties to appeal proceedings**

- Any natural or legal person may appeal
  - addressed to that person, or
  - against a decision which, addressed to another person, is of direct and individual concern to the person

- The **Office** shall be party to the appeal proceedings.
Decisions subject to appeals

<table>
<thead>
<tr>
<th>Nullity / cancellation of a CPVR (art. 20 and 21 of B.R.)</th>
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</thead>
<tbody>
<tr>
<td>Compulsory exploitation rights (art. 29 and 100 para. 2)</td>
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<tr>
<td>Objections to the grant of a CPVR (art. 59)</td>
</tr>
<tr>
<td>Refusal of an application/ Grant of a CPVR (art. 61 and 62)</td>
</tr>
<tr>
<td>Approval/amendment of variety denominations (art. 63 and 66)</td>
</tr>
<tr>
<td>Fees (art. 83)</td>
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<td>Apportionment of costs (art. 85)</td>
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<tr>
<td>Establishment of the Registers/ Public inspection (art. 87 and 88)</td>
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An appeal has **suspensory effect** of the contested decision unless otherwise decided by the CPVO.
How to lodge an appeal?

1. Decision of the CPVO
2. Sending & publication of the decision
   • Within 2 months of the publication
   • 1/3 appeal fee (500 euros)
3. Lodging of the appeal
   • Within 2 months of the publication
   • 1/3 appeal fee (500 euros)
4. Grounds of appeal
   • Within 4 months of the publication
5. Rectification procedure by the CPVO
6. Remittal to the Board of Appeal
   • 2/3 of the appeal fee (1000 euros)
**Decision process of the Board**

**Composition of the Board: 1 chairman + 2 members**

**Step 1:** Nomination of the rapporteur and the other member

**Step 2:** Opinion of the rapporteur

**Step 3:** Oral proceedings in Angers

**Step 4:** Decision of the Board within 3 months of the oral proceedings.

**Step 5:** Possible appeal to the General Court
## Fees

**Appeal fee = 1500 euros per appeal lodged**

| 1/3 are due on receipt of the appeal | 2/3 are due, on request of the Office, within one month from the remittal of the appeal to the Board of Appeal |

The appeal fee may be **reimbursed** in certain circumstances.
3. Examples of cases

- **Gala Schnitzer**

- Appeal on two grounds
  - Procedure – the CPVO had allowed a second sample since the first sample was virus infected
  - Distinctness; the candidate variety was not distinct
- BoA: CPVO was not entitled to allow a second sample; did not rule on distinctness
- GC: Yes, CPVO was entitled to allow a second sample
- CJEU: agreed to the GC

What should the BoA do about the Distinctness ground?
Examples of cases

• BoA re-opened the case
  • Decided that the variety was not distinct
  • President had accepted an additional characteristic too late

• GC: Agreed with the BoA

• CJ EU
  • Pending
Examples of cases

• Case A011/2008 *Santa Fe*
  • CPVO refused; variety not uniform

• Appellant:
  • the growing conditions were not good at the Examination Office
  • the Examination Office mixed up plants

• BoA:
  • No evidence of problems with the growing conditions
Examples of cases

- Case A004/2004 *Ginpent*
  
- Third party:
  - asked the CPVO to amend a Variety Denomination for a protected variety

- CPVO
  - Refused

- BoA:
  - Confirmed the decision of CPVO
Examples of cases

• Case T-187/06 Schräder v CPVO, *Sumcol*

• The appraisals of scientific and technical complex questions justify a limited scope of judicial review by the Court

• Court should only examine that when the authority was finding facts and applied the law there is no manifest errors or misuse of powers

• The Office/BoA enjoys a wide discretion

• This means in practice that the BoA is for complex technical examinations in principle last instance
Examples of cases

• Joined Cases T-133/08, T-134/08 and T-177/08
  • **BoA** concluded that the appellant had been duly summoned and held the oral hearing without the appellant
  • **GC**: Breach of the principle of the right of being heard
  • BoA have to redo the cases
4. BOARD OF APPEAL: Statistics (01/01/1997 - 27/01/16)

- Appeals ongoing: 15
- Decisions BOA: 68
- Decisions Rectified by CPVO: 56
- ECJ/General Court cases: 21
- Withdrawals: 15
- Total: 150
Statistics

[Bar chart showing statistics for the years 1997 to 2015. The chart includes categories for 'Number of appeals lodged', 'Decision taken by the BoA', and 'Decisions rectified by the office'.]
Number of appeals by sector:

- **Agriculture**: 7.79%
- **Vegetable**: 6.49%
- **Fruit**: 27.92%
- **Ornamental**: 57.79%
## Legal basis appeals lodged

<table>
<thead>
<tr>
<th>Article 61 BR</th>
<th>Rejection</th>
<th>Distinctness</th>
<th>Uniformity</th>
<th>Submission plant material</th>
<th>Entitlement</th>
<th>Novelty</th>
<th>Total</th>
</tr>
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<tbody>
<tr>
<td>Article 62 BR</td>
<td>Grant</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>13</td>
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<tr>
<td>Articles 63&amp;66 BR</td>
<td>Variety denomination</td>
<td>3</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Article 83 BR</td>
<td>Fees</td>
<td>Non payment annual fees</td>
<td>68</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Article 59</td>
<td>Objections</td>
<td>Objections</td>
<td>1</td>
<td></td>
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<td></td>
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<tr>
<td>Article 20 BR</td>
<td>Nullity</td>
<td></td>
<td>8</td>
<td></td>
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<tr>
<td>Article 21 BR</td>
<td>Cancellation</td>
<td>(Non) cancellation of a CPVR</td>
<td>3</td>
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<td>Article 87 BR</td>
<td>Registries</td>
<td>Change of variety denomination</td>
<td>2</td>
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**TOTAL (1997-2016)**: 154
16 Decisions were Appealed to the General Court (first instance)

- T-95/06  ‘Nadorcott’
- T-187/06  ‘Sumcol 01’
- T-187/06 DEP I  ‘Sumcol’
- T-133/08  ‘Lemon Symphony’
- T-134/08  ‘Lemon Symphony’
- T-135/08  ‘Gala Schnitzer’
- T-177/08  ‘Sumost 01’
- T-242/09  ‘Lemon Symphony’
- T-367/11  ‘Southern Splendour’
- T-91/14  ‘Gala Schnitzer’
- T-92/14  ‘Gala Schnitzer’
- T-767/14  ‘Oksana’
- T-140/15  ‘M02205’
- T-425/15  ‘Seimora’
- T-426/15  ‘Seimora’
- T-428/15  ‘Sumost’
5 Decisions appealed to the Court of Justice (second instance)

- C-38/09     ‘Sumcol 01’
- C-38/09P-DEP ‘Sumcol 01’
- C-534/10    ‘Gala Schnitzer’
- C-546/12P   ‘Lemon Symphony’ / ‘Sumost’
- C-625/15P   ‘Gala Schnitzer’
Final remarks

- Limited number of appeals
- Oral hearings in most cases
- Rules of Procedure for appeals can be improved
- Technical / legal field - with quite some discretion to the CPVO
- BoA gives important guidance to the CPVO and parties
- Important body – “last instance” for technical matters
- All in all – the appeal proceedings work very well
Further studies

- Booklet of CPVO case law online
  - paper format can be sent on request

- Case law database on the CPVO website
  - BoA cases
  - Appeals to CG and CJ EU
  - Certain cases from the European Patent Office
  - PVR Infringement cases from national courts

- [www.cpvo.europa.eu](http://www.cpvo.europa.eu)
THANK YOU!