

DECISION
(N° NCL001)

On **16 March 2007**, the Community Plant Variety Office received

from: Pixley Berries (Juice) Ltd.
Poolend, Ledbury
UK - Herefordshire HR8 2RB

represented by: Philippe de Jong and Elena Bertolotto
Avenue du Port 86C, boîte 414
BE-1000 Brussels

an application for a compulsory licence in relation to :

the variety 'Ben Starav' (File number: **2009/1820** – EU 35825 of 8 July 2013)

of species *Ribes nigrum* L.

right holder: Lucozade Ribena Suntory Limited
The Royal Forest Factory
UK - Coleford GL16 8JB

represented by: Alexandra Pygall and Lucy Calvert
1 Finsbury Circus
UK - London EC2M 7SH

For the reasons stated in the Annex hereto, the competent Committee for taking decisions on an application for a compulsory exploitation right has decided, pursuant to Article 29 of Council Regulation (EC) n° 2100/94, **not to grant a compulsory licence** in relation to the above-mentioned Community Plant Variety Right.

Date: **28th March 2018**

Signed:

Dirk Theobald

Francesco Mattina

Jean Maison

Taken under the authority of the President of the Office,



Martin Ekvad

The attention of the applicant is drawn to their possibility to appeal against this decision. Notice of appeal shall be filed by the applicant in writing to the attention of the Community Plant Variety Office within two months of the service of the decision.

The attention of the applicant is drawn to the possibility of an appeal against this decision by a third party to whom it is of direct and individual concern. Notice of such appeal shall be filed in writing to the attention of the Community Plant Variety Office within two months of the publication of the decision.

Appeals are subject to a fee.

Annex

1. Background

1. On 12 October 2009 Smith Kline Beecham Limited (hereinafter referred to as "GSK") filed a Community plant variety right (CPVR) application No 2009/1980 for the variety 'Ben Starav' of the species *Ribes nigrum L.* By Decision No (EU) 35825 of 8 July 2013 the Office granted a CPVR. By request of 18 November 2014 GSK asked the Office to effect the recordal of the transfer of rights to Lucozade Ribena Suntory Limited (hereinafter referred to as "LRS" or "the holder"). The recordal has been published in the Official Gazette No 201501 of 15 February 2015.
2. On 16 March 2017 the Office received an application for a compulsory licence by Pixley Berries (Juice) Limited (hereinafter referred to as "PB Juice" or "the applicant") pursuant to Article 29 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (hereinafter referred to as the "Basic Regulation"), in respect of the variety 'Ben Starav'.
3. On 3 May 2017 the Office acknowledged receipt of the application for a compulsory licence with a date of 16 March 2017 (hereinafter referred to as the "application"). The recordal of the application was published in Chapter VII.1 of the Official Gazette No 201703 of 15 June 2017.
4. On 4 May 2017 the Office informed LRS of the application filed by PB Juice. By the same letter the Office invited LRS to send to the Office any written observations in relation to the application within two months of service. Moreover, the Office invited the parties to proceedings (i) to come to an amicable settlement on a contractual licence in accordance with Article 38(3) of Commission Regulation (EC) No 874/2009 (hereinafter referred to as "the Proceedings Regulation"), (ii) to inform the Office whether they intended to seek the intervention of the Office with the aim of reaching such amicable settlement and (iii) to inform the Office whether they intended to request an oral hearing in accordance with Article 38(1) of the Proceedings Regulation.
5. On 13 June 2017 LRS informed the Office of three missing exhibits (namely A.2, A.22 and B.1). Furthermore, LRS stated that an amicable settlement was unlikely to take place and that, therefore, they would not request the Office's assistance. Second, LRS also considered it likely that an oral hearing should take place even if not yet requesting it. Lastly, LRS requested an extension of the time limit to submit written observations (*inter alia* on the basis of the numerous exhibits enclosed with the application) pursuant to Article 70 of the Proceedings Regulation.
6. On 4 July 2017, the Office informed LRS of the transmittal of the missing exhibits, as well as of the intention of the Office to request PB Juice to specify the elements of direct relevance amongst the submitted evidence. Finally, the Office granted the requested time extension, with the deadline for written observations until 5 September 2017.
7. On 4 July 2017, PB Juice requested an oral hearing. Next, PB Juice confirmed that the several attempts to negotiate a voluntary licence were unsuccessful, and based on the assumption that LRS was not interested in reaching an amicable settlement, declined the Office's proposal of assistance.
8. On 5 July 2017 the Office requested PB Juice, with copy to LRS, to reformulate the list of exhibits and to provide a summary of the most relevant evidences in support of the arguments put forward in the application by 1st September 2017. Finally, the Office informed PB Juice that the request for an oral hearing would have been addressed after receiving the observations of the holder.
9. On 17 July 2017 LRS, further to requesting confirmation from the Office that no new evidence could be submitted by the applicant before a decision is taken by the Office, also requested a revision of the time limit given to the applicant to clarify the relevance of the evidence by 22 August 2017 (seven weeks from the CPVO notification) and to grant LRS seven weeks from receipt of the applicant's revised submissions to lodge its observations. LRS finally confirmed again that an amicable settlement was not likely to be reached.

10. On 25 July 2017 the Office confirmed that the applicant was not allowed to file additional evidence nor to resubmit the application for a compulsory licence. Furthermore, the Office agreed to grant LRS an extension of time until 2 October 2017. Finally, the Office acknowledged that the parties could not reach an amicable settlement.
11. On 30 August 2017 PB Juice submitted the documents requested by the Office on 5 July 2017.
12. On 2 October 2017 LRS filed its observations in response to PB Juice's application for a compulsory licence (hereinafter referred to as the "reply").
13. On 10 October 2017 the Office informed PB Juice about the outcome of the Administrative Council's meeting held on 4 October 2017. On that occasion the Office informed the Administrative Council that a decision on the application for compulsory licence shall be taken after consulting the Administrative Council pursuant to Article 29(1) of the Basic Regulation and Articles 37 to 43 of the Proceedings Regulation. Having considered the complexity of the case and the large volume of the file, in order for the Administrative Council members to be able to provide an opinion pursuant to Article 29(1) of the Basic Regulation, on proposal of the Office the Administrative Council members appointed 5 members ("the AC Assessment Team") to carry out a preliminary analysis of the application for compulsory licence. The following 5 Member States volunteered to be part of the AC Assessment Team: the Netherlands, Germany, Sweden, Denmark and the Czech Republic.
14. On 9 November 2017 the Office summoned the parties to proceedings to an oral hearing scheduled to take place on 10 January 2018 at the Office's premises. The members of the AC Assessment Team were invited to attend the hearing. Four of them, except the Czech Republic, attended the hearing.

2. Requests of the parties to proceedings

15. The parties to proceedings put forward the following requests:

2.1 PB Juice requests the Office to:

- a) Grant the applicant a compulsory licence in respect of the variety 'Ben Starav' (CPVR No 35825) to
 - a. principally:
 - i. produce, at PB Farm or other sites designated by PB Juice, blackcurrant fruit on the basis of healthy cuttings supplied to PB Juice by LRS-licensed propagators in amounts up to 3000 cuttings, it being understood that such supply should take place for the first time in autumn 2017 and then annually as required by the applicant,
 - ii. further propagate from such supplied cuttings, during a period of two years, and
 - iii. stock the said propagating and harvested material at PB Juice, PB Farm or other sites designated by PB Juice, for those purposes,
 - b. subsidiarily:
 - i. propagate, at PB Farm or other sites designated by PB Juice, 'Ben Starav' cuttings/plants, on the basis of elite material to be provided to PB Juice by LRS-licensed propagators in quantities not less than 1000 units,
 - ii. perform, at PB Farm or other sites designated by PB Juice, activities (i) – (ii) outlined under the principal licence request above,

for the purpose of enabling PB Juice to use material of 'Ben Starav' for its production of 100% NFC blackcurrant juice.

- b) Order the CPVR holder of 'Ben Starav' to disclose to the applicant and the CPVO, supported by evidence, the applicable licence fee and, on the basis of the evidence, to specify that, in return for the compulsory licence, the applicant is to pay to the CPVR holder the same licence fee under the same conditions as applicable to the CPVR holder's licensed growers (in case the principally requested licence is granted) or propagators (in case the subsidiary licence is granted).

2.2 LRS requests the Office to:

- (a) refuse the application for the compulsory licence of 'Ben Starav' CPVR filed by PB Juice.
- (b) if the application should finally succeed, to be granted the right to submit further submissions as to the appropriate terms of any such licence, before any final decision on the terms of the licence is made.

3. The oral hearing

16. On 10 January 2018 an oral hearing took place at the premises of the Office with the parties to proceedings, representatives from the Office, in particular the members of the Committee responsible to take decisions on requests for compulsory licence, and the invited members of the Administrative Council.
17. The applicant, first, reiterated their arguments that 'Ben Starav' contains exceptional characteristics such as ideal organoleptic properties and a good adaptability across a range of different environments. In this respect, LRS's remarks on the existence of alternatives to 'Ben Starav' relies on the doctrine of essential facilities where only if there are no alternatives an essential facility must be declared. However, since the case at hand is not about competition law, the existence of alternatives is not relevant under Article 29 of the Basic Regulation and, therefore, the assessment must be carried out on the variety as such.
18. Second, as regards the notion of public interest, when the market is not sufficiently, or not at all, supplied, (like in the case of 'Ben Starav' supplied only as ingredient to produce a soft drink) the grant of a compulsory licence is appropriate. In the context of that plea the grounds of public interest include the benefit that 'Ben Starav' provides to public health if it could be used for the production of 100% (NFC) juices, as the consumption of said juices is associated with a healthy lifestyle. Third, due to the climate change, it would be in the public interest to use a variety that adapts well to different climatic conditions. Fourth and most importantly the public interest is justified by the need to supply the market with material offering specific features. The market at stake should be not only that of juice drinks but also that of 100% (NFC) juice market. The latter represents a segment of the juice market and even assuming that there is only one market of relevance (the juice market), the fact that the holder only produces soft drinks, leads to the conclusion that there is a need to supply the market/segment of 100% juice. Lastly, the fact that 'Ben Starav' was bred, when the program was launched, relying on public funding, justifies the grant of a compulsory licence.
19. As regards other varieties used by the applicant, when asked about the differences between 'Pixley Noir' and 'Pixley Black', and their "specific features" in comparison to those of 'Ben Starav', PB Juice stated that Pixley Noir and Pixley Black are trademarks and not varieties protected by a PVR.
20. The applicant is not involved in breeding varieties but selects the best available varieties on the market. Furthermore, PB Juice also stated in reply to a question from the Office that it is not contested the existence of other varieties but that they do not have the same unique features of 'Ben Starav'.
21. The holder contended that the application for a compulsory licence was brought under Article 41(2)(b) of the Proceedings Regulation, requiring that a need to supply the market with material offering specific features should be proved. Accordingly, the focus should be on the need to supply the market with the specific variety 'Ben Starav'. In that respect the fact that a variety is not used to produce 100% blackcurrant juice does not mean that there is a need for the market to be supplied for such use. 'Ben Starav' is not necessary to produce the said juice as there are many other varieties that can be used as alternatives. In this respect, the applicant

has not provided any evidence that 'Ben Starav' is necessary for the production of 100% juice. In this context owing an IP right is a proprietary exclusive right which can only be eroded if a genuine public need exists and in the present case, to follow such a line of reasoning would erode the purposes of PVRs and would disincentivise the system. Therefore, the request for a compulsory licence does not meet the requirement of the public interest, as it is merely based on LRS's private commercial interests to be able to use a variety that can guarantee premium characteristics at a premium price.

22. As regards the market definition, LRS observed, first, that in this case the definition of a market was not necessary since the applicant had not shown that the public interest test had been met for any markets. However, if a definition was needed, the one relied upon by the applicant, and borrowed from competition law, was of no assistance, as competition cases refer to dominance, while the present case is about PVRs. The market definition should encompass any users of blackcurrant plants, including growers and consumers of the various end products, and it is the public need of that broader market that has to be taken into account. Hence, all blackcurrant berries are juiced and processed and, therefore, the market is made of all the varieties of blackcurrants. As regards the alleged unique organoleptic properties of 'Ben Starav', their reference is very subjective and 'Ben Starav' has not been bred for its organoleptic properties but for its taste to produce Ribena. Moreover, the taste is not so relevant as blackcurrant varieties are normally blended and not directly consumed.
23. As regards the ground of public health put forward by the applicant, it rather refers to potential benefits connected to the habit of drinking blackcurrant juice generally associated with a healthy lifestyle without a specific direct link with 'Ben Starav' characteristics that other blackcurrants do not possess. Lastly, the fact that 'Ben Starav' was developed with some public funding at the very outset, is irrelevant for the finding of a public interest that can justify the grant of a compulsory licence.
24. Following the parties' pleadings, the President of the Office informed the parties that a draft decision would be presented to the AC for their opinion on the occasion of the meeting of 21 March 2018.
25. Finally, as regards the licence fee that would need to be determined in case the Office would decide to grant a compulsory licence, the Office proposed to the parties a two week deadline for negotiation and, in case of no agreement, two additional weeks to submit their proposals on the licence fee to the Office. The parties agreed to the proposal.

4. Arguments of the parties

4.1.1 Arguments of PB Juice

26. The applicant puts forward the following arguments linked to the facts and to the law in support of its application.

On the facts

Argument 1

The applicant's business

- PB Juice is a UK company specialised in the processing of fruit, including blackcurrants and is, *inter alia*, a European ingredient supplier of "not from concentrate" ('NFC') juice to packers, bottlers and NFC consumer brands across Europe.
- The fruit processed by PB Juice is grown at PB Farm, which is a sub-contractor of PB Juice. PB Farm grows blackcurrants exclusively for PB Juice.

- In terms of NFC blackcurrant juice ingredients, PB Juice is the only significant UK supplier to both the EU and UK markets.

Argument 2

The breeding program of the blackcurrant variety 'Ben Starav'

- The variety 'Ben Starav' was initially bred by the Scottish Crop Research Institute ("SCRI") and Mylnefield Research Services ("MRS"), which then became the James Hutton Institute ("JHI") in 2011. In this respect, 'Ben Starav' is the result of a breeding programme benefiting from public – Scottish, UK and EU - funding to an, ultimately, public research institute.

Argument 3

The CPVR holder

- Despite the public funding's investment deployed to develop the variety, 'Ben Starav' only serves the private benefit of its CPVR holder for the production of a soft drink (or juice drink) marketed under the trademark "Ribena".
- LRS only grants licenses to 3 propagators with the authorization to propagate cuttings of 'Ben Starav' which are then supplied to about 35 growers to produce blackcurrant berries, which are then supplied back to LRS or one of its designated affiliates.
- LRS does not supply any juice market at all, that is neither the NFC nor "from concentrate" ("FC") market, but only the "juice drink" market with consumer products (as opposed to ingredient products). 'Ben Starav' is used to produce a FC juice which is then mixed with other ingredients to produce the soft drink Ribena.

On the law

Argument 4

The public interest

A. The legal framework

- o The compulsory licence request is based on Article 41(2) (b) of the Proceedings Regulation, according to which the public interest can be established on the basis of "*the need to supply the market with material offering specific features*".

B. The market at stake

- o The market to be supplied within the meaning of Article 41(2)(b) of the Proceedings Regulation is the NFC juice sub-market.

C. Material offering unique properties

- o 'Ben Starav' has unique properties both in terms of tolerance to climate change and in terms of quality of its berries and the resulting juice (referred to as organoleptic and compositional unique characteristics). In this respect, all types of plant material listed under Article 13 of the Basic Regulation offer such specific characteristics vis-à-vis other blackcurrants varieties.

D. The need to supply the NFC juice market with material from 'Ben Starav'

- o There is no 'Ben Starav' material available in sufficient quantities to operators and consumers on the NFC juice market. Consequently, there is a need to supply said market at

every level (from the growers, to the ingredient producers, the NFC customers of those producers and the NFC juice consumers).

Argument 5

The applicant's unsuccessful attempts to obtain a contractual licence for 'Ben Starav'

- The applicant has sought to obtain a contractual licence for the variety 'Ben Starav' since 2009 without success.
- PB Juice and LRS do not compete in the same market and consequently there is no threat to LRS should PB Juice produce NFC juice from the variety 'Ben Starav'. LRS only produces soft drinks/cordials obtained FC fruit juices.

Argument 6

The applicant's appropriate financial and technical capacity to make use of a compulsory licence for 'Ben Starav'

- Concerning the financial capacity, PB Juice is a reliable company with a growing business.
- Concerning the technical capacity, the fruit processed by PB Juice is grown by PB Farm, which holds approximately 140 ha used for the cultivation of blackcurrants. Moreover, PB Juice has the capacity to increase its demand up to 1.000.000 litres per annum in the expanding NFC juice market.

4.1.2 Arguments of LRS

27. LRS puts forward the following arguments in reply to PB Juice application.

Argument 1

The legal framework

- The aim of the Basic Regulation is to stimulate the breeding and the development of new varieties and, accordingly, the compulsory licence should not be the default position but only be granted under "*certain circumstances in the public interest*".

Argument 2

The public interest

- The applicant bears the burden of proof that there is a public interest justifying the grant of a compulsory licence and not merely that a licence is desired by the applicant to serve its own personal and commercial interest.

Argument 3

The application made under Article 41(2)(b) of the Proceedings Regulation

A. The market at stake

- o In the present case a definition of the market is not relevant since the applicant has not shown that the public interest test has been met for any of the relevant markets.

- The applicant's choice of the NFC sub-market is artificial and useless, as there is no legitimate reason for the market to be limited to one sub-sector of the overall market for blackcurrant berries and their resulting juice.
- The market should be defined as the market for blackcurrant plants, blackcurrant berries and beverages made from blackcurrant berries (instead of one specific blackcurrant product).

B. The plant material

- The variety 'Ben Starav' was not developed to produce NFC juice and its alleged unique properties or characteristics are not specific to the production of NFC juice.

C. The alleged specific features of the material of 'Ben Starav' are not unique

- Any public health benefits of blackcurrants in general cannot be relevant and it cannot be inferred from the non-use of 'Ben Starav' to produce NFC juices that the lack of a compulsory licence to 'Ben Starav' will have any harmful effects on the public health in the EU.
- The variety 'Ben Starav' is not unique in the sense that none of the characteristics alleged by the applicant (namely consistent high yield of good quality fruit, a harvest season which does not conflict with other cultivars, ripening at harvest, good juice quality, bud-breaking across a wide range of winters, good compositional analysis and excellent colour) are to be deemed "unique" to said variety but are shared by all good fruiting plants for juicing purposes. In this respect, it suffices to mention that there are 12 other varieties of blackcurrant used for the "Ribena" production.

D. Alternatives to 'Ben Starav'

- The only comparator to 'Ben Starav' that has been provided by the applicant is the variety 'Ben Lomond'. However, contrary to the applicant's assertions, its flavour has not changed over time.
- LRS provides a summary table comparing existing freely available varieties with 'Ben Starav' which shows that none of the features of 'Ben Starav' are unique. In this respect, the varieties 'Ben Hope', 'Ben Finlay' and 'Ben Lomond' are comparable to 'Ben Starav', and have similar harvest seasons. Said table only represents, however, a tiny proportion of the total number of varieties available in the UK and the EU.
- The applicant's evidence on the alleged "uniqueness" of 'Ben Starav' (namely the applicant's own evaluation and Annexes A.14, A.15 and A.16) are not conclusive and do not support the claim for a compulsory licence.

E. No public interest "need" to supply the market

- There is no public interest "need" to supply the market with 'Ben Starav' in terms of any of the relevant types of material, i.e. the blackcurrant plant material for growing or propagation, the blackcurrant berries and the blackcurrant juice, as each type of said material is sufficiently supplied.

F. The applicant's claimed interest is private instead of public

- There is no evidence that the applicant is the only significant UK supplier of NFC blackcurrant juice ingredients to the EU and the UK markets.
- The request is specific to the commercial desire of the applicant to expand and does not relate to the public in the EU and the UK. In this respect, there are other ways to increase production to meet the growing market's demand.

Argument 4

The public funding

- The public funding is not included in the list of examples of "public interest" given by the Proceedings Regulation.
- 'Ben Starav' was only created and protected as the result of a privately funded programme. In particular, the later stage of development of 'Ben Starav' took place after public funding ceased in 1991.
- The public funding is no reason for one particular grower to benefit from the research by ways of a compulsory licence.

Argument 5

The applicant's attempts to obtain a licence

- LRS is under no obligation to grant a licence to use the variety 'Ben Starav'. The holder enjoys discretion to grant licences for the exploitation of their CPVRs to selected growers and propagators.

Argument 6

The applicant's financial and technical capacity to make use of a compulsory licence

- PB Juice has been successfully growing without using 'Ben Starav'.

5. Position of the Office

5.1 Preliminary considerations

28. Intellectual property rights (IPRs) fulfil two closely-related roles, namely protecting innovator's investments and making the spread of technological progress easier by providing incentives to innovate. That is the essence of IPRs to grant innovators a temporary right to exclude others from using or making the goods or services protected by those rights as a sort of reward for having registered and disclosed the innovation¹. In other words, IPRs encourage to innovate and to disclose the results of said innovation in granting their authors the possibility to collect a monopoly's profit from their outcome. In this way, IPRs' systems promote investment in R&D and IPRs owners receive an incentive to disclose their innovations to the public in order to benefit from the legal protection granted by IPRs. This system properly works as long as holders are confident

¹ Article 7 of the TRIPS Agreement: "*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in manner conducive to social and economic welfare, and to a balance of rights and obligations*".

in IPR's ability to protect their investments, prevent them from infringement, and grant them a competitive advantage on their competitors, either in licensing their innovations, or in refusing to do so.

29. According to the preamble to the Basic Regulation, CPVRs are a *sui generis* IPR with uniform effect throughout the European Union. Thus, as other IPRs, CPVRs are exclusive proprietary rights within the meaning of Article 17 of the Charter of Fundamental Rights of the European Union² that can only be limited, on one side, by a number of exceptions to the scope of protection of the CPVR (Article 15 of the Basic Regulation), and, on the other side, the compulsory licence claims to provide a safety valve for cases where there is an overriding public interest³. The most important exception in the context of CPVRs, that guarantee the free access to protected varieties for the development and exploitation of new varieties in order to stimulate further plant breeding activities, is the breeder's exemption.
30. Because of the exempted acts there is no need for breeders to seek a licence in order to use protected plant varieties for private, non-commercial or further breeding purposes. However, unlike the said limitations of the effects of CPVRs applicable by laws under Article 15 of the Basic Regulation, a compulsory licence can only be granted by the Office and only on grounds of public interest.
31. The existence of a public interest which is required for the grant of a compulsory licence depends on the circumstances of the individual case and is decided by weighing the above mentioned protectable interests of the titleholder with the public interest. In this sense the German Federal Court of Justice has stated that "*The question of whether there is a public interest conferring a compulsory licence must be answered by weighing all the circumstances and interests involved in the individual case. It should be noted that the legal system grants the patent holder an exclusive right over which he may in principle alone determine. The public interest can therefore only be affected if special circumstances arise which make the full recognition of the exclusive right and the interests of the patent proprietor withdraw, because the interests of the general public dictate the exercise of the patent by the licence seeker*"⁴. To that effect, since the grant of a compulsory licence signifies a considerable intervention in the statutory exclusivity rights of the titleholder, it is necessary to observe the principle of proportionality.
32. In EU law the principle of proportionality stipulates that any legal action by public authorities must be no more onerous for the subjects affected than is appropriate, necessary and reasonable to achieve the objectives of the action.
33. In light of the above principles, the Office has appraised whether the condition of public interest claimed by PB Juice is fulfilled. In doing so the Office will assess, first, the admissibility criteria of the application, and second, its merits.

5.2 On the admissibility

34. The formal requirements for the admissibility of a compulsory licence request are specified under Articles 37(1), 37(4), 37(5) and 42 of the Proceedings Regulation, as well as under Article 10(1)(a) of the Commission Regulation (EC) No 1238/95 on the fees payable to the Community Plant Variety Office (hereinafter referred to as the "Fees Regulation"). The admissibility of the application is assessed against each of the said formal requirements.

²"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected."

³ Article 17.1 of the International Convention for the Protection of New Varieties of Plants (UPOV Convention): "*Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest*".

⁴ German Federal Court of Justice, judgment of 11 July 2017 in case with docket no. X ZB 2/17, "*Raltegravir*" para. 38, GRUR 2017, 1017.

5.2.1 Article 37(1) of the Proceedings Regulation

35. Pursuant to Article 37(1) of the Proceedings Regulation read in conjunction with Article 29(1) of the Basic Regulation, an application for a compulsory licence shall contain the identification of the parties, the identification of the variety affected by the request, a proposal of the type of acts to be covered by the compulsory licence, the identification of the public interest concerned, and a proposal for an equitable remuneration with the basis for its calculation based on the information available to the applicant on the royalties paid by licence growers or propagators. All these elements appear in the application for a compulsory licence submitted by PB Juice and, therefore, these requirements have been fulfilled.

5.2.2 Article 37(4) and 5 of the Proceedings Regulation

36. According to Article 37(4) of the Proceedings Regulation, the application for compulsory licence shall be accompanied by documents evidencing that the applicant has applied unsuccessfully to obtain a contractual licence from the holder of the plant variety right. In this respect, Article 37(5) of the same regulation provides three examples of cases when a request for a contractual licence shall be considered unsuccessful, i.e. the lack of response to the request within a reasonable period, the refusal to grant the contractual licence and the offers for a contractual licence made under unreasonable fundamental terms including those relating to the royalty to be paid, or on terms which, seen as a whole, are obviously unreasonable.
37. PB Juice has furnished evidence (Annexes B.2 to B.10 to the application) of several attempts to obtain a contractual licence for the exploitation of 'Ben Starav' since 2009 and the refusal, in all those cases, from the holder to grant such licence. Moreover, the holder does not dispute the refusal (see para. 80 of the reply). Consequently, this requirement has been fulfilled.

5.2.3 Article 10(1)(a) of the Fees Regulation

38. According to Article 10(1)(a) of the Fees Regulation, a fee of € 1500 for the processing of an application for compulsory right shall be paid by the person making the request.
39. On 15 March 2017 the applicant paid the € 1500 application fee for the compulsory exploitation right. Therefore, this requirement is fulfilled.

5.2.4 Article 42 of the Proceedings Regulation

40. Finally, according to Article 42 of the Proceedings Regulation the person to whom the compulsory licence is granted shall have the appropriate financial and technical capacity to make use of the compulsory licence.
41. As regards, first, the financial capacity, the applicant has submitted its financial accounts as at 31 January 2016 (Annex A.27 to the application) which furnishes evidence that the company is in a good financial situation. The holder does not comment on that, except by stating that PB Juice has been able to grow without using the blackcurrant variety 'Ben Starav' (para. 81 of the reply). Accordingly, the financial capacity of the applicant has been proved.
42. Second, as regards the technical capacity, the applicant makes express reference to PB Farm being its sub-contractor, which according to the statements made during the oral hearing is Mr. Thompson's own farm. PB Farm is, therefore, a sole proprietorship owned by Mr. Thompson who is also the Director of Pixley Berries Ltd. In that respect, the applicant has submitted that PB Farm would be growing, propagating and stocking the blackcurrants of the variety 'Ben Starav' that, afterwards, would be processed by PB Juice as it is confirmed in the form of order sought of the application.
43. Therefore, since Mr. Thompson acts as sole trader under the business name of "PB Farm", and he is the Director of PB Juice, the technical capacity of PB Juice has been proved.

44. In view of all the foregoing the application for a compulsory licence is admissible.

5.3 On the merits

5.3.1 Grounds of public interest: general considerations

45. Article 29(1) of the Basic Regulation stipulates that compulsory licences shall only be granted on grounds of public interest. Article 41(2) of the Proceedings Regulation further provides three grounds that may, in particular, constitute a public interest:

- a) The protection of life or health of humans, animals and plants;
- b) The need to supply the market with material offering specific features;
- c) The need to maintain the incentive for continued breeding of improved varieties.

46. As a preliminary point it should be observed at the outset that the applicant has based the compulsory licence request specifically on Article 41(2)(b) of the Proceedings Regulation, i.e. in the need to supply the market with material offering specific features, "*because it believes that that provision best fits the purpose of the present case*" (see para. 23 of the application). In fact, it is apparent from points A.2 to A.5 of the application, that the applicant has focused his arguments to prove that there was a need to supply the market with material of 'Ben Starav' offering specific features. Moreover, when establishing the legal framework under point A.1 of the application, the ground defined under Article 41(2)(b) of the Proceedings Regulation is underlined, which can be understood as a way of reflecting that the relevant ground of public interest is the need to supply the market with material offering specific features. Finally, in the letter of the applicant to the Office of 30 August 2017, accompanying the documents requested by the Office on 5 July 2017, PB Juice confirmed that the public interest conditions set out under Article 41(2)(b) of the Proceedings Regulation were met in the present case (see indent 3 of said letter).

47. It must be noted that the mere fact that the list of grounds that may constitute a public interest under Article 41(2) of the Proceedings Regulation is not exhaustive, does not exonerate the applicant from the burden of furnishing evidence of the grounds of public interest on the basis of which the compulsory licence is sought. Since compulsory licences are granted by the Office on request of one or more persons, Article 37(1)(d) of the Proceedings Regulation stipulates that the application shall contain "*a statement setting out the public interest concerned, including details of facts, items of evidence and arguments presented in support of the public interest claimed*". Consequently, the applicant bears the burden of proof as to the grounds of public interest for a request of compulsory licence. The duty of the Office to examine facts on its own motion under Article 76 of the Basic Regulation is limited to facts that may come under the examination pursuant to Articles 54 and 55 of the Basic Regulation. Those Articles do not refer to an investigation on whether there is a public interest to grant a compulsory licence. In the opinion of the Office, the Office should therefore rely on the facts and arguments raised by the parties to proceedings.

5.3.2 The protection of life or health of humans, animals and plants (Article 41(2)(a) of the Proceedings Regulation)

48. According to the applicant's statements during the oral hearing, based on the fact that the list of grounds in said Article 41(2)(b) of the Proceedings Regulation is not exhaustive, the grounds of public interest shall include the benefit that 'Ben Starav' provides to the public health if it could be used for the production of 100% juices, as the consumption of said juices is associated with a healthy lifestyle. Second, due to the climate change, it would be in the public interest to use a variety that adapts well to different climatic conditions, as it is the case for 'Ben Starav'.

49. The applicant has failed to show the specific benefits provided by 'Ben Starav' to public health if it could be used for the production of 100% juices. The general statement that the consumption of fruit juices is associated with a healthy lifestyle cannot succeed as it does not provide any evidence that 'Ben Starav'

possesses better healthy characteristics than those of any other blackcurrants, such as being naturally rich in vitamin C. Blackcurrants, like other fruits and vegetables (among others, apricots, grapefruit, kiwifruit, lemon, melon, and orange), in general are rich in many essential vitamins that human beings consume in their daily diet or from supplements. However, the content in vitamin C is not a characteristic specific only to 'Ben Starav' that other varieties of blackcurrant do not possess as well. Moreover, 'Ben Starav' is used as one of the variety's ingredients to produce the holder's soft drink "Ribena", therefore being available to the public for consumption. Lastly the concept of "*healthy lifestyle*" referred to by the applicant as being a ground for public interest, is generic in nature and does not refer specifically to nutritional properties of blackcurrant varieties as it is meant to refer to a good balance in the daily habits such as, *inter alia*, good nutrition, daily physical exercise, weight and stress management, personal hygiene, absence of addictions, safe environment, and adequate sleep. Thus, the applicant cannot merely rely on the concept of "healthy lifestyle" to substantiate the ground for public interest to be granted a compulsory licence to use a protected plant variety right⁵.

50. As regards, next, the applicant's assertion that 'Ben Starav' adapts well to different climatic zones and, therefore, guarantees good harvests throughout different seasons, does not either furnish convincing evidence of public interest. In that respect, the applicant did not substantiate the said ground. It is sufficient to note that the fact that 'Ben Starav' adapts well in different environments does not mean that other blackcurrants are not available in the juice market as it is also proved by the applicant who is making use of other blackcurrant varieties.

5.3.3 The need to supply the market with material offering specific features (Article 41(2)(b) of the Proceedings Regulation)

51. The Office will follow the same order of arguments as put forward in the application.

5.3.3.1 On the market at stake

52. As regards the relevant market to be taken into consideration, PB Juice claims that it should be the NFC juice market. During the oral hearing the applicant also stated that, in case the Office should consider the partition between NFC and FC juice markets as not relevant for the purpose of granting a compulsory licence, then the relevant market should be the juice market; not the juice drinks, but the 100% juice market. The applicant has argued that jurisprudence from the EU Commission in competition cases should be used as guiding principles as regards the market definition. However, when it comes to the existence of alternative varieties, reference to competition law and the doctrine of essential facilities, according to the applicant is not appropriate to apply competition law. LRS disputes that a definition of the market is relevant in the case at hand. However, should a definition of the market be deemed necessary, then it would be the market for blackcurrant plants, blackcurrant berries, and beverages made from blackcurrant berries.
53. Article 41(2)(b) of the Proceedings Regulation does not provide any guidance on how to define the market. However, it is apparent that the market must be assessed in the context of the public interest in question. The question to be asked is to which market must the variety be made available on in order to resolve a problem which is in the interest of the public. The applicant argues that the refusal to grant a licence for the variety 'Ben Starav' has effects on the NFC juice market. It is argued that it is in the public interest that a licence is granted to satisfy the needs on the mentioned market.
54. Without taking a stand on whether one market definition is more correct than another, for the purpose of the assessment of this request for a compulsory licence, the Office will analyse the effects on the market invoked by the applicant. This is made below under Section 5.3.3.3.

⁵ See Annex A.1 to the application or even more clearly, the above mentioned letter of 30 August 2017 in which PB Juice states that "research suggests that blackcurrants have a number of beneficial health components and health effects", as well as reference to the general benefits of NFC Juice, or to allegation of the unique properties of 'Ben Starav' (as for example under para. 29 of the application as regards the climate change).

55. For the sake of completeness, the Office will nevertheless make one observation as regards the applicant's views on comparisons with competition law. When it comes to defining the market, the Office is of the opinion that although competition law is not directly applicable, it may indeed be helpful to study the analysis made by the Commission in similar cases, in particularly the method used.
56. The method used when analysing the relevant product market under EU competition law is that account must be taken to the fact that a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.⁶
57. Accordingly, account is taken to alternatives on the market. If there is a great choice of substitutes for a product in question, there is less need for the Competition authorities to intervene in the market. The Office is of the opinion that the same reasoning applies when assessing the public interest under the Basic Regulation. The more alternatives available to growers, the less public interest that the CPVO grants a compulsory licence.

5.3.3.2 On the material offering specific features

58. It should be observed at the outset that the concept of specific features implies that, contrary to what is alleged by the applicant, a comparison is made with alternatives. If only one variety possesses certain features (features which are important for the public interest) such features can be specific within the meaning of Article 41(2)(b) of the Proceedings Regulation. However, if a range of varieties possesses the same features (it can be an important feature such as resistance to a certain disease), the feature is not specific to one variety. This interpretation is also supported by the wording used in the different linguistic versions of the aforesaid Article (for instance "caractéristiques déterminées" in French or "caratteristiche specifiche" in Italian, "características específicas" in Spanish or "bestimmte Merkmale" in German). That being said, as regards the concept of material offering specific features, PB Juice claims that 'Ben Starav' has unique properties in terms of tolerance to the climate change and in terms of the quality of its berries and the resulting juice (organoleptic and compositional characteristics). According to LRS the variety 'Ben Starav' is not unique in the sense that none of the characteristics alleged by the applicant are "unique" to said variety but shared by all good fruiting plants for juicing purposes.
59. The Proceedings Regulation does not contain a hint on the kind of specific features referred to under Article 41(2)(b) of the same regulation. In this respect, other versions of the Regulation in different languages (like in French "matériel présentant des caractéristiques déterminées", Spanish "material que presente características específicas", Italian "materiali dotati di caratteristiche specifiche", German "Material, das bestimmte Merkmale aufweist"), clarify that it should be interpreted as making reference to material that is provided with concrete characteristics. It seems, then, that the characteristics need to be linked to the material and that they need to be tangible. It would seem logical to add that said characteristics should not be offered by any other variety of blackcurrant, as in that case it could be considered that the market is already supplied with material offering said characteristics.
60. In the case at hand, the material to be supplied is material of the variety 'Ben Starav'. In this respect, PB Juice claims that 'Ben Starav' has unique characteristics which make it unmatched compared to any other blackcurrant varieties. Said characteristics are i) a consistent high yield of good quality fruit, ii) harvest season not in conflict with other cultivars (early-mid season), iii) even ripening at harvest, iv) even bud-break across a range of winters reflecting good adaptation to both warm and cold winters, v) good juice quality from an organoleptic point of view, vi) good compositional analysis (Brix, acid) in terms of NFC juice market requirements and vii) excellent colour due to presence of high amounts of anthocyanins. In the applicant's submission, no other variety offers the same characteristics. All the said characteristics are specific and are found in 'Ben Starav'.

⁶ Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) OJEC C 372/5 of 9.12.97

61. As regards the existence of said characteristics in the varieties of blackcurrant present in the market, from the evidence provided by both parties it appears that this existence is confirmed. In particular, Annexes A.13 to A.16 from the applicant and Annexes 2 to 6 from the holder represent convincing evidence that the alleged "unique features" are shared by different varieties of blackcurrants.
62. In particular, i) the consistent high yields at around 10t/ha present in 'Ben Starav' (Annex A.14 to the application) are also present, for example, in 'Ben Alder' (Annex 3 to the reply); ii) the harvest period of 'Ben Starav' is very similar to that of 'Ben Lomond' (Annex A. 16 to the application and Annex 5 to the reply); iii) as there is no evidence concerning the even ripening at harvest neither of 'Ben Starav' nor of other varieties, this characteristic cannot be analysed; iv) chill requirements of 'Ben Starav' is rated as low/medium giving this variety a good adaptability across a range of environments (Annex A.14 to the application), but in this respect also the winter chilling requirement of 'Ben Gairn' and 'Ben Hope' has been assessed as relatively low (Annexes 2 and 3 to the reply); v) other varieties such as 'Ben Hope' also share good sensory qualities with 'Ben Starav' or even from 'Ben Alder' is stated that its fruit quality is excellent with high colour stability and in this respect the variety is recommended for juice production, to give just a few examples (Annex 3 to the reply); vi) other varieties such as 'Ben Alder', 'Ben Tirran', 'Baldwin' or 'Ben Avon' have high Brix (above 15 Brix) as 'Ben Starav' (Annexes 2, 3 and 6 to the reply) and vii) on the colour of the juice due to the presence of high amounts of anthocyanins, also 'Ben Hope', 'Ben Gairn', 'Ben Dorain' or 'Ben Kilbreck' share this feature (Annex A. 15 to the application).
63. The holder has not contested that 'Ben Starav' has the characters invoked by the applicant. However, the holder claims that the applicant failed to provide evidence to support that other varieties do not have the same or similar characteristics.
64. In view of all the foregoing, it can be concluded that the alleged unique characteristics of the variety 'Ben Starav' do not fulfil the requirement of Article 41(2)(b) of the Proceedings Regulation on the material offering specific features, as these features are also offered by other varieties of blackcurrant. The applicant has failed to provide evidence to support that other varieties do not have the same or similar characteristics.

5.3.3.3 On the need to supply the market with material from 'Ben Starav'

65. In brief, PB Juice claims that there is no 'Ben Starav' material available in sufficient quantities to operators and consumers on the NFC juice market and that, consequently, there is a need to supply said market at every level. As regards LRS, it claims that there is no public interest "need" to supply 'Ben Starav' in terms of any of the relevant types of material, i.e. the blackcurrant plant material for growing or propagation, the blackcurrant berries and the blackcurrant juice, as each type of said material is sufficiently supplied.
66. During the proceedings it has become clear that there are a number of blackcurrant varieties available on the market. This is not disputed by the applicant. As mentioned above under points 61 to 64, the Office is not convinced that the characteristics of the variety 'Ben Starav' are so unique that it would need to supply the market. It seems, then, logic to conclude that the need to supply said market of blackcurrants with material of 'Ben Starav' for the purpose of granting a compulsory licence, does not exist.
67. As regards the existence of alternatives to 'Ben Starav', PB Juice claimed in the oral hearing that the existence of said alternatives is a consideration that belongs to competition law, in particular to the doctrine of the essential facilities and that, accordingly, it should not be taken into consideration as this is not a case of competition law and that, therefore, the assessment should be made on the variety as such. The Office does not agree with the applicant, as the existence of alternatives in the market indeed precludes the existence of a need for the material for which a compulsory licence has been requested. This has also been the approach followed in a recent decision of the German Federal Court of Justice in its judgement of 11 July 2017, regarding a patent on the antiviral agent "Raltegravir" where the Court stated that "*a compulsory licence cannot be granted if the public interest can be satisfied with other, essentially equivalent alternatives*".⁷

⁷ See judgment of the German Federal Court of Justice of 11 July 2017, in case No X ZB 2/17, para. 39.

68. Moreover, were the applicant's reasoning to be accepted and the NFC juices market considered as the relevant market, there are other varieties of blackcurrant available offering the same characteristics for said production. The applicant has not proved that 'Ben Starav' and only 'Ben Starav' is necessary for the production of NFC juices and that no other varieties available can be used as an alternative. The best evidence of this is PB Juice's own production as ingredient supplier of NFC blackcurrant juice where, further to using their own selected varieties 'Pixley Noir' and 'Pixley Black', it also uses 'Ben Hope', 'Ben Gairn' and 'Ben Tirran'⁸. And given that the applicant's company is reliable and growing as Annex A.27 to the application reveals, it does not seem that even for the applicant's own interest there is an imperious need to be supplied with material of 'Ben Starav'.
69. Furthermore, this is also coherent with the approach of the applicant itself when stating that "*for PB Juice it is important not to be dependent on one single or only a few varieties which do not withstand the large range of climatological conditions. In view of wide weather variations, the applicant needs both well-adapted varieties and a range of varieties*" (see para. 6 of the application). Thus, the applicant recognises that in order to supply the NFC Juice market it would never suffice relying on the material of the variety 'Ben Starav', but access to other varieties would be necessary.
70. Finally, according to PB Juice's own philosophy, even the terroir plays an important role as stated in their website <https://www.pixleyberries.co.uk/our-philosophy> as follows: "*Pixley Berries fruit growing sites are carefully chosen for soil, aspect, height above sea level and surrounding environmental features such as hedgerows and woodland reservoirs of insects and the natural ecology. Important features include frost drainage and height above sea level to improve winter chilling and to extend the harvest in Summer. Air movement is important so we look for a compromise between shelter and exposure. Our blackcurrants particularly enjoy our deep rich silty clay loams associated with the old hop growing areas of Herefordshire, providing good reserves of moisture and nutrients during our drier summers*".
71. As a consequence, the applicant has not proven a public interest consisting in the need to supply the market of blackcurrant with material of the variety 'Ben Starav'. As has been said above, the public interest cannot be limited to the private interests of the applicant for the compulsory license⁹.
72. If there had been a true demand the applicant could have provided documents showing requests from customers, consumers, trade organizations claiming that the market is not functioning, or results of surveys to the relevant players on the market. The applicant has not provided any documentary evidence in support of its position that there is a public need to provide the NFC juices market with 'Ben Starav'.
73. It is therefore apparent from the foregoing that the ground of a public interest in this case has not been proved.

5. 3. 4 On the public funding of the variety 'Ben Starav'

74. As regards the public funding's claim, PB Juice put forward that 'Ben Starav' is the result of a breeding program benefiting from public funding and that said public funding should prevent that only one company benefits from the variety. On the other hand, LRS further to emphasizing the private funding for the breeding of said variety, considers that the involvement of a public body is no reason for one particular grower to enjoy the benefits of the research by ways of a compulsory licence.

⁸ Extract from the web site of PB Juice <https://www.pixleyberriesjuice.co.uk/blackcurrant>

⁹ Gert Würtenberger, Paul Van Der Kooij, Bart Kiewiet, Martin Ekvad, *European Union Plant Variety Protection*, Oxford, 2015, Second Edition: "*Furthermore, the term 'public interest' seems to indicate that, at least as a general rule, interests which are more or less individual, such as the interests of a particular grower or even a group of growers, cannot lead to the grant of a compulsory license*"(§6.137)

75. In this respect, it should be noted at the outset that both parties seemed to agree that the breeding program of 'Ben Starav' has benefited from both public (para. 9 of the application and para. 73 of the reply) and private funding (Annex A.4 to the application which is a statement made by JHI in which it is acknowledged that GSK - LRS predecessor in title - has been supporting the breeding program of blackcurrants for the past 20 years (paragraphs 9 and 10 of the said statement). In Annex 12 to the reply, which is a print-out from the JHI's website, it is confirmed that the JHI breeding programme of blackcurrant has since 1990 been funded by GSK (paragraph 3). In this respect, it seems that the economic involvement of GSK in the activities of SCRI and JHI has been of special relevance during many years. Said funding affected critical stages of the development and the commercial trialling of 'Ben Starav', and afterwards led this company to apply for a Community plant variety protection on the new variety. In this respect, it could be concluded that the private funding of 'Ben Starav' was higher or of a higher relevance for its development than the public part.
76. The question, then, lies in deciding whether the partial public funding of the breeding program of 'Ben Starav' can be considered as a reason for public interest that justifies the granting of a compulsory licence.
77. The Office considers that this is a legal rather than factual question. The funding of the breeding of a variety should not be taken into account when deciding on whether to grant a compulsory licence or not. A country/public authority may decide to invest money on research and development in a breeding program, for instance when it considers that it is in the interest of the public. However, it is up to that public authority to decide on what to do with the results of the breeding program. It may be that the public authority decides that all rights to the results of the program remains with the authority and that IP rights are sought in the name of the authority. However, if the rights to the results are disposed of to another legal entity, the public authority can no longer make a claim to those results. Neither can the public/taxpayers make such claims regardless if the disposal was wise or not. If the decision to dispose of the results was unwise, the public authority having taken such decision may be held politically accountable. It has to be noted that the entitlement to 'Ben Starav' has never been challenged, not even by the SCRI or JHI. The assessment of the public interest must be made in light of a potential interest that a variety is made available to a licensee. Such a public interest may be as important regardless whether the breeding program was funded by private or public means. In effect, the threshold for granting a compulsory licence should be the same irrespective whether a variety is financed 100 %, partly, or not at all by public funds.
78. Consequently, the partial public funding of 'Ben Starav's' breeding program would not produce any effect on the conclusion reached above that no public interest has been proven in the present case.

Opinion of the Administrative Council

79. Article 41(3) of the Basic Regulation establishes that a majority of three quarters is required for the decisions which the Administrative Council is empowered to take under Article 29 of the same regulation.
80. At the AC meeting of 21 March 2018, the members of the AC Assessment Team have presented their conclusion to the other members by pronouncing the following statement:

*"This is a joint statement made on behalf of the group assigned by the Administrative Council, with the exception of our Czech colleague who could not take part in the deliberations.
To begin with, we wish to state that - in our view - both parties were allowed to present their cases well and free to argue in favour of their respective positions.*

We align ourselves with the reasoning put forward by the Office of the CPVO in document AC-2018-1-2-Annex 1, specifically as regards:

***firstly**, the grounds of public interest and the alleged need to supply the market with material offering specific features. These are arguments that we cannot see have been satisfactorily substantiated by the applicant, neither with respect to blackcurrants in general, nor 'Ben Starav' in particular. While the variety in question does have qualities that, taken together, have led to the granting of a PVR it is, in our view, not sufficient to justify the applicant's request.*

In contrast, and as a theoretical example, a variety containing a unique resistance gene that shows effectiveness towards a sudden and devastating new race of a plant disease with implications for food security, might serve a better case for granting a compulsory licence.

secondly, *the applicant's notion that development of 'Ben Starav' was made possible through public funding which, in itself, is not a legally valid motif for granting a compulsory licence.*

thirdly, *the applicant's health argument that, while it is true that blackcurrant juice is known to contain antioxidants that could be of benefit for our health, it is not justified that access to the variety 'Ben Starav' is necessary to provide the market with this specific commodity; and*

lastly, *and with the words of Würtenberger et al. on the aspect of 'compulsory exploitation rights' - para 6.137, page 172: "Furthermore, the term 'public interest' seems to indicate that, at least as a general rule, interests which are more or less individual, such as the interests of a particular grower or even a group of growers, cannot lead to the grant of a compulsory licence."*

To summarize, therefore, we cannot see the justification for granting a compulsory licence as requested by the applicant".

81. Following the aforesaid statement, the members of the Administrative Council have been invited to express their opinion voting by secret ballot. 25 Member States were present at the meeting or represented by proxy and participated to the vote.
82. The result of the vote is:
 - 23 not in favour of granting a compulsory licence,
 - 1 in favour of granting a compulsory licence,
 - 1 absension.

Conclusion of the Office

83. In view of all the foregoing, after having heard the opinion of the Administrative Council, the CPVO has decided not to grant a compulsory licence requested by PB Juice for the Community Plant Variety Right No 35825 on the variety 'Ben Starav' of the species *Ribes nigrum L.*

Decision

84. The request for a compulsory licence on the variety 'Ben Starav' is admissible but not well-founded.

Information on the possibility to make an appeal

85. An appeal against this decision may be lodged before the Board of Appeal or a direct action may be brought before the Court of Justice of the European Union pursuant to Articles 67(3) and 74 of the Basic Regulation.
86. In case of an appeal before the Board of Appeal, a notice of appeal shall be filed by the applicant in writing to the attention of the Community Plant Variety Office within two months of the service of the decision. Appeals are subject to a fee. The attention of the applicant is drawn to the possibility of an appeal against this decision by a third party to whom it is of direct and individual concern. Notice of such appeal shall be filed in writing to the attention of the Community Plant Variety Office within two months of the publication of the decision.
87. A direct action before the Court of Justice of the European Union against this decision shall be made within two months of the date of service of the decision.

