CPVO Case-Law

Vol. II • 2015–2020

Summaries of decisions and judgments of the Board of Appeal, the General Court and the Court of Justice of the European Union

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CPVO

Community Plant Variety Office

CPVO CASE-LAW 2015–2020 Vol. II

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1. FOREWORD BY MARTIN EKVAD, PRESIDENT OF THE CPVO

Martin Ekvad

It has been 25 years since the Community Plant Variety Office (CPVO) first opened its doors. The number of applications in the 1st year was very high – more than 3 000 – both because breeders had been waiting for the opportunity to be granted EU-wide protection through a single application and because the transitional regime enabled them to request EU-wide protection for varieties that were already protected in one or more Member States. However, the first decision of the Board of Appeal (BoA) of the CPVO was not taken until 1999, and the number of appeals per year has remained rather low since – as you will see from the statistics presented in this booklet.

The low number of appeals is a sign that the formal, substantive and technical examinations are conducted in a satisfactory manner and that the grant procedure is transparent. The BoA has the important duty of monitoring the work of the CPVO and providing guidance on how the law should be interpreted.

The grounds for the appeals filed and the arguments raised by appellants demonstrate that appeals are often lodged in areas where the rules leave room for interpretation. During the past 5 years the jurisprudence from the Court of Justice of the European Union has developed, especially in the area of the role of the CPVO and of the BoA when assessing applications and appeal procedures. The Court emphasises that the tasks of both the CPVO and the BoA are characterised by the scientific and technical complexity of the conditions governing the technical examination of applications for Community plant variety rights (CPVRs) and, accordingly, the CPVO and the BoA enjoy a broad margin of discretion in carrying out their functions. In addition, the CPVO, with its BoA, as a body of the European Union, is subject to the principle of sound administration. In accordance with this principle, it must examine all the relevant particulars of an application for a CPVR carefully and impartially and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of the proceedings that it sets in motion. Furthermore, the applicable regulations require that, in proceedings before the CPVO and its BoA, investigations into the facts must be carried out of its own motion, in so far as they relate to the substantive and technical examination. In order to demonstrate that its discretion has been applied in a justified manner and that the facts have been investigated sufficiently, it is the CPVO's duty to give reasoned decisions. The jurisprudence confirms the active role the CPVO and the BoA must take and emphasises the significance of their actions.

In our continued efforts to communicate with stakeholders on the functioning of the EU plant variety right system, we are publishing this second volume of case-law from the BoA and the General Court and Court of Justice of the European Union. A complete set of case-law can be found in the case-law database on the CPVO website.

I would like to thank and congratulate all those who have contributed to the work and achievements in relation to the activities of the BoA over the past 5 years. I will in particular mention the Chair of the BoA, Mr Paul van der Kooij, and the Vice Chair, Ms Sari Haukka, as well as all the members of the BoA, who are listed

in this booklet; and, last but not least, Ms Anne Gardener and Ms Véronique Doreau, Registrars of the BoA. I would also like to take this opportunity to especially thank the Vice President of the CPVO, Mr Francesco Mattina, along with our legal adviser, Ms Orsola Lamberti, and the legal trainee, Ms Marta Vidal, for their excellent work in drafting the contents of this booklet.

2. SUMMARIES OF DECISIONS FROM 2015 TO 2020, BY DECISION DATE

2.1. Board of Appeal

Braeburn 78

Case A001/2015, *Mema GmbH landwirtsch. Ges.* v *CPVO*

15.12.2015

Keywords. Apple, common knowledge, lack of distinctness, testing conditions.

Result. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of Regulation (EC) No 2100/1994 (the 'basic regulation' (BR)).

Background. On 29 May 2009, the applicant (Mema GmbH landwirtsch. Ges.) filed an application (No 2009/0954) for a CPVR for the apple variety 'Braeburn 78', belonging to the species ***Malus domestica*** Borkh**.**

On 18 December 2014, the CPVO refused to grant the CPVR, on the basis of a distinctness, uniformity and stability (DUS) report issued by the examination office in which the candidate variety 'Braeburn 78' was deemed not to be clearly distinct from the closest reference varieties of common knowledge, 'Royal Braeburn' and 'X9466'. The technical examination was carried out on the basis of the applicable CPVO technical protocol (TP), CPVO-TP/14/2.

On 24 February 2015, the appellant (Mema GmbH landwirtsch. Ges.) filed a notice of appeal against the CPVO's decision to reject the application. The appellant contested the correctness of the technical examination. In particular, the appellant challenged the appropriateness of the testing conditions in as much as it affected the skin colouration of the candidate variety and argued that the time for harvesting identified by the examination office was incorrect, which had this led to unfounded results. In other words, according to the appellant, characteristics like the colour and striation of the variety's fruits were observed at an incorrect time and were not assessed correctly. Furthermore, the appellant alleged a lack of documentation concerning the striation of the fruits and submitted a report of observations carried out in South Tyrol, Italy, and not in Angers (where the examination office is located), where the DUS tests took place. The appellant called for the DUS testing to be continued under different conditions and requested the hearing of expert opinions on the distinctness of the candidate variety.

The CPVO contended that the technical examination had been carried out by an official testing centre in accordance with the applicable protocol for apple varieties, including the time for harvest. Accordingly, the CPVO rejected all the arguments put forward by the appellant.

Decision. The BoA acknowledged the influence of environmental factors on certain characteristics and admitted that such interaction is one of the drawbacks of the DUS testing.

The BoA established that the testing location of the examination office fulfilled the entrustment requirements for CPVO examination offices approved by the Administrative Council of the CPVO. To conduct the technical examination of the candidate variety 'Braeburn 78' in a different location would have required a decision of the Administrative Council. Furthermore, test results on distinctness from different locations cannot be compared, as different environmental conditions modify the character expression of the genotype.

According to the BoA, the time of harvesting and the assessment of the eating maturity of the fruits carried out by the examination office were correct, given the experience and knowledge of the applicable protocol and of the crop itself.

Thus, the BoA established that the examination office had conducted the DUS examination in accordance with the applicable protocol and rejected the arguments of the appellant.

Conclusion. The appeal was dismissed as unfounded and the appellant was ordered to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Hort 04

Case A002/2015, *Hortibreed NV* v *CPVO*

15.12.2015

Keywords. Cultivation guidelines, growing cycle, refusal, testing conditions, uniformity.

Result. The appeal was upheld and the CPVO decision annulled. The BoA instructed the CPVO to organise a third examination period and the appellant to bear the costs, pursuant to Article 85(2) of the BR.

Background. On 5 July 2010, the applicant (Hortibreed NV) filed an application (No 2010/1311) for a CPVR for the variety 'Hort 04', belonging to the species ***Rhododendron simsii*** Planch**.** In the application form, no special cultivation conditions were requested for the examination of the candidate variety.

By a letter of 26 March 2012, the CPVO informed the applicant of a problem concerning the uniformity of the flower colour. The applicant attributed this lack of uniformity to climatic factors and the premature pinching during the technical examination, and thus requested a new examination cycle where the variety should be brought into flower later (i.e. in the 2nd week of June). The CPVO granted the request for a second examination cycle. However, the lack of uniformity persisted in both the initial and the later samples of the variety submitted by the applicant. Accordingly, the CPVO rejected the application due to lack of uniformity.

On 7 April 2015, the appellant (Hortibreed NV) filed a notice of appeal against the CPVO decision and asked for an additional growing cycle, providing additional cultivation guidelines. The CPVO asked for the appeal to be dismissed, on the basis that the examination office had complied with the growing conditions as instructed by the applicant.

Decision. The BoA noted that the influence of the cultivation method on the expression of the variety's characteristics was undisputable. However, the appellant was initially unclear about the correct cultivation conditions and specified them at a much later stage. The BoA observed that, in fact, it was only after the final negative report issued by the examination office that complete information was provided.

The BoA also noted that the testing had been conducted in accordance with the CPVO protocol because the appellant had not requested any special growing conditions for the examination of the variety in the technical questionnaire.

However, the BoA established that it could not be ruled out that said growing conditions might influence the expression of the characteristics. Therefore, it considered it reasonable to extend the examination with an additional growing cycle taking account of that condition, namely that the plants should be kept below 2 to 4 °C until 1 March.

Conclusion. The appeal was upheld and the CPVO decision annulled. The BoA instructed the CPVO to organise a third examination period in accordance with the appellant's cultivation guidelines. Finally, it ordered the appellant to bear the costs, pursuant to Article 85(2) of the BR.

Tang Gold

Case A001/2014, *Nador Cott Protection SARL* v *CPVO, the Regents of the University of California*

3.3.2016

Keywords. Access to information, admissibility, application procedure, DUS test, refusal to provide information, right of defence, sample taking.

Result. The BoA held that the appeal was inadmissible and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 20 June 2011, the applicant (the Regents of the University of California) filed an application (No 2011/1544) for a CPVR for the clementine variety 'Tang Gold', belonging to the species *Citrus reticulata* Blanco.

On 26 September 2013, Nador Cott Protection requested to visit the growing trial of the candidate variety in order to check alleged anomalies of the DUS growing trials, take samples and carry out disease testing. In a letter of 17 January 2014, the CPVO authorised the inspection but refused to allow the appellant to take samples, as the applicant denied permission.

On 17 March 2014, the appellant (Nador Cott Protection) lodged an appeal against the decision refusing to allow samples of the candidate variety to be taken. According to the appellant, the variety was affected by diseases and the CPVO should have allowed the samples to be taken.

The applicant's observations sought to contradict the appellant's allegations and statements. According to the applicant, the candidate variety did not show any symptoms of disease and the appellant had not put forward any comments during the previous DUS examination cycles. Moreover, there was no evidence that any diseases would affect the expression of the characteristics of the candidate variety. With regard to the plant material under testing, the applicant also alleged a lack of legislative or regulatory provisions that establish an obligation to allow the taking of samples.

The CPVO argued that the appealed decision in its letter of 17 January 2014 was merely a matter of organisation with respect to the application procedure and not a decision in the sense of Article 67 of the BR, and since it did not terminate the proceedings, it was not an appealable decision pursuant to that article. Furthermore, the CPVO contested the interpretation of the legal provisions invoked by the appellant and concluded that they did not entail an obligation for the CPVO to allow the samples to be taken.

Decision. The BoA established that the CPVO's letter was not to be considered to constitute a decision pursuant to Article 67 of the BR, as the CPVO did not have the competence to decide whether to allow the request to take samples. The appealed administrative act merely contained a communication of the applicant's decision pursuant to Article 88(4) of the BR. Therefore, the appeal was deemed inadmissible.

For the sake of completeness, the BoA also ruled on the merits of the case. First, the BoA observed that, if the appellant had doubts about the correctness of the DUS examination, it could have requested an independent test for the presence of a disease in the candidate variety or a verification of the entire DUS testing process. Therefore, the fact that the appellant had an economic interest in checking the correctness of the DUS examination did not justify its taking of samples for testing at its own premises.

Furthermore, the BoA acknowledged the applicability of the principle of sound administration but also recognised the broad discretion of the CPVO in dealing with the technical examination of varieties. Moreover, it noted that the duty of good administration could not override the obligation to obtain the applicant's authorisation to allow samples of the candidate variety to be taken, as provided for under Article 88(4) of the BR.

Consequently, the BoA did not consider the applicant's refusal to provide samples of the variety to a third party to be contrary to the principle of good administration, the right to an effective remedy, the right to a fair trial or the right of defence.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Tang Gold

Case A003/2014, *Nador Cott Protection SARL* v *CPVO, the Regents of the University of California*

3.3.2016

Keywords. Access to information, admissibility, public access.

Result. The BoA held that the appeal was inadmissible and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 20 June 2011, the applicant (the Regents of the University of California) filed an application (No 2011/1544) for a CPVR for the clementine variety 'Tang Gold', belonging to the species *Citrus reticulata* Blanco.

On 26 September 2013, Nador Cott Protection requested access to all the documents concerning the DUS testing of the candidate variety. Following a confirmatory request pursuant to Regulation (EC) No 1049/2001, the CPVO took the view that access to documents had already been guaranteed. Moreover, it had requested that the examination office make any relevant documents in its possession available.

On 24 April 2014, the appellant (Nador Cott Protection) filed a notice of appeal against said decision, essentially claiming that Article 88 of the BR gave it the right to greater access to documents. According to the appellant, the CPVO should have applied said provision instead of Regulation (EC) No 1049/2001.

The CPVO maintained that Regulation (EC) No 1049/2001 had been applicable to requests for access to documents since its entry into force.

Consequently, the central issue of the appeal concerned the public access procedures and the legal basis for lodging such requests, i.e. whether Regulation (EC) No 1049/2001 or Article 88 of the BR should apply.

Decision. The BoA established that no material differences could be observed between the breadth of access that would have been granted to the appellant under the rights provided in Regulation (EC) No 1049/2001 and those provided in the BR.

The BoA also observed that the object of the appeal was the legal basis for exercising the right of access to documents. Moreover, the BoA found that the CPVO took all measures to provide the requested documents. Therefore, the BoA considered the appeal inadmissible.

As regards the merits of the case, which were assessed for the sake of completeness, the BoA noted that both the CPVO and the examination office provided the greatest access possible to the available documents. In fact, regardless of the legal basis, the appellant did obtain access to all the documents available concerning the 'Tang Gold' variety that could be used in the appeal procedure against the grant of a CPVR.

Conclusion. The BoA declared the appeal lodged by the appellant inadmissible. The appellant was ordered to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

Gala Schnico

Case A005/2014, *Schniga GmbH* v *CPVO*

22.4.2016

Keywords. DUS test, extension of trial, plant material, refusal, uniformity.

Result. The appeal was dismissed and the appellant was ordered to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

Background. On 17 September 2009, the applicant (Schniga GmbH) filed an application (No 2009/1807) for a CPVR for the apple variety 'Gala Schnico', belonging to the species ***Malus domestica*** Borkh.

During the application procedure, the applicant requested an additional year of testing, claiming that the lack of uniformity in fruit colouring observed in the samples of the candidate variety could have been due to differences in the propagating material and not due to the genetic structure of the variety.

On 6 October 2014, the CPVO rejected the application on account of a lack of uniformity during two consecutive growing cycles, as mentioned on multiple occasions during the DUS examination.

On 11 December 2014, the appellant (Schniga GmbH) filed a notice of appeal claiming that the rejection based on lack of uniformity was not substantiated and neither was the refusal to grant another year of testing. Moreover, the CPVO had allegedly breached the principle of equal treatment by not granting the further examination year and destroyed the growing trial, which could have provided useful information.

The parties waived their right to be heard. However, the appellant provided additional evidence including witness statements and expert opinions regarding the characteristics of the candidate variety.

Decision. The BoA established that the technical examination had been conducted according to the relevant technical protocol and that the information provided in support of the decision was adequate. The BoA observed, inter alia, that the appellant did not reply to several invitations from the CPVO to visit the growing trials during the application procedure. When the appellant inspected the trial, it was made clear that the lack of uniformity of the candidate variety would lead to a negative DUS report.

The BoA stated that any alleged differences in the propagating material were irrelevant, as an extended trial may only be allowed in the event of an incorrect examination, which was not the case for the 'Gala Schnico' variety. The BoA also highlighted that the CPVO's approach did not breach the principle of equal treatment.

Furthermore, the appellant was mistaken in believing that the CPVO physically destroyed the plants, as they were maintained at the premises of the examination office after the completion of the technical examination.

Finally, the new arguments that the appellant put before the BoA after waiving its right to be heard were not deemed valid, as they referred to observations on plant material carried out in locations different from that submitted for testing, were made in a different time frame and had no official character.

Therefore, the BoA concluded that the technical examination had been conducted properly and that the arguments of the appellant could not be upheld.

Conclusion. The appeal was dismissed as unfounded and the appellant was ordered to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

Tang Gold

Case A006/2014, *the Regents of the University of California* v *CPVO, Club de Variedades Vegetales Protegidas, Nador Cott Protection SARL*

29.4.2016

Keywords. Admissibility, common knowledge, distinctness, DUS test, reference variety, testing conditions.

Result. The BoA considered the appeal inadmissible and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 20 June 2011, the applicant (the Regents of the University of California) filed an application (No 2011/1544) for a CPVR for the clementine variety 'Tang Gold', belonging to the species ***Citrus reticulata*** Blanco. On 24 October 2014, the CPVO granted the CPVR.

On 16 December 2014, the appellant (the Regents of the University of California) filed a notice of appeal against said granting decision with the specification that the appeal was only directed at the official description of the variety (which is an integral part of that decision). In addition, the appellant pleaded that the granting of the CPVR to the variety 'Tang Gold' should not be suspended as an effect of the appeal. Following a comparison of data contained in the field notebooks of the examination office, the appellant claimed that the list of characteristics contained in the official variety description should have contained more characteristics in which 'Tang Gold' was found to be distinct from 'Nadorcott'. In essence, the appellant alleged that there were more phenotypical differences between the varieties 'Tang Gold' and 'Nadorcott'. Moreover, the appellant contested the note regarding a characteristic of the reference variety 'Nadorcott'. Consequently, the appeal was directed exclusively against the official variety description as an integral part of the decision to grant a CPVR to the variety 'Tang Gold'. On 8 June 2015, the CPVO decided to continue the suspension of the decision to grant the CPVR to 'Tang Gold'.

Decision. First, the BoA noted that the grounds for appeal concerning the correctness of the note on a characteristic of the reference variety 'Nadorcott' was inadmissible as the notes regarding 'Nadorcott' are not part of the description of the variety 'Tang Gold'. The DUS test aims to judge whether a candidate variety is clearly distinct from all varieties of common knowledge and not to measure how distinct 'Nadorcott' is from other varieties. Second, as regards other characteristics that should have been added to the report on the 'Tang Gold' variety's differences from similar varieties, the BoA rejected the appeal as inadmissible as the CPVO has discretionary power to decide which characteristics establish clear distinctness between the candidate variety and varieties of common knowledge.

As regards the nine additional characteristics to be added to the variety description of 'Tang Gold', the data submitted by the appellant were not directly comparable, as the notes in question did not result from a side-by-side comparison. The alleged differences between 'Tang Gold' and the other varieties were not considered to have been sufficiently substantiated by the appellant.

Finally, the BoA noted that the decisions of the CPVO on the non-suspensory effect of an appeal are not appealable pursuant to Article 67 of the BR.

The appeal was therefore deemed inadmissible.

For the sake of completeness, the BoA also ruled on the merits of the case. It established that the notes made by the examination office regarding the 'Nadorcott' variety were justified and that results from

other sources cannot be taken into consideration, especially when a characteristic is very much subject to climatic and weather circumstances and must be observed by the same method and at the same time.

Conclusion. The BoA considered the appeal inadmissible and ordered the appellant to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

Tang Gold

Case A007/2014, *Club de Variedades Vegetales Protegidas* v *CPVO, Nador Cott Protection SARL, the Regents of the University of California*

29.4.2016

Keywords. Applicable protocol and guidelines, distinctness, DUS test, growing conditions, stability, uniformity.

Result. The BoA considered the appeal not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 20 June 2011, the applicant (the Regents of the University of California) filed an application (No 2011/1544) for a CPVR for the clementine variety 'Tang Gold', belonging to the species ***Citrus reticulata*** Blanco. On 24 October 2014, the CPVO granted the CPVR.

On 17 December 2014, the appellant (Club de Variedades Vegetales Protegidas) filed a notice of appeal against the granting decision. In essence, the appellant requested that the CPVR application be refused or that a new examination be carried out, and that it be authorised to examine the supporting documentation of the DUS report, inspect the growing trial and take samples. The appellant claimed that the examination office had not applied the correct technical protocol and that, in any case, the candidate variety did not fulfil the DUS requirements: the decision of the CPVO was therefore based on an invalid technical examination.

The CPVO contended that the issue of public access to documents was the subject matter of appeal A003/2014 and that all the documents available at the time of the request had been provided to the appellant. The CPVO argued that it respected the appellant's right of defence as well as the principle of good administration. Regarding the applicable protocol, the CPVO noted that the relevant date is usually linked to the date of submission of the plant material. However, in the case of fruit varieties, the establishment period prior to the analysis of the harvested material is to be taken into consideration too. Another factor to be considered is whether the final DUS report was taken over from national proceedings. In the case at hand, the CPVO took over the results of the national examination after the new protocol entered into force – which it decided to apply, pursuant to Section VI of said protocol. Therefore, the CPVO considered the relevant date for the application of the protocol to be the first satisfactory growing cycle of the candidate variety (i.e. time of first observation of the fruits) instead of the date of submission of the plant material. Finally, the CPVO maintained that the DUS examination had been carried out correctly and that the candidate variety did fulfil the DUS requirements.

Decision. As regards the applicable protocol, the BoA upheld the arguments put forward by the CPVO and concluded that it had applied the correct protocol.

Concerning the technical examination, the BoA considered that the candidate variety was distinct, uniform and stable, rejecting the claim that the examination office's assessment was incorrect. As regards the alleged lack of distinctness, the BoA addressed all the characteristics referred to by the appellant as a basis for the claim of lack of distinctness (i.e. 28, 31, 68 and 18). Concerning characteristic 28 – 'number of grooves at stalk end' – the BoA considered that a statistical method should have been applied. However, as this was not the case, the characteristic could not be taken into consideration.

Regarding characteristic 31 – 'depression at distal end' – the BoA referred to a visit to the growing trial where it observed that the note on this characteristic (i.e. 'present'/'absent') was given to each tree individually on the basis of what was observed in the majority of the fruits. In other words, indicating that a tree displayed the characteristics did not mean that all its fruits did. Due to this, and also to the limited differences observed, characteristic 31 was not suitable for establishing distinctness.

As regards characteristics 68 ('fruits: number of seeds by controlled cross-pollination') and 18 ('anther: viable pollen'), the BoA considered that the varieties displayed consistent and clear differences. The BoA rejected the claim that they could only be assessed through laboratory tests and confirmed that they could be analysed visually (using a magnifying glass at most).

The BoA also ruled on the uniformity and stability of 'Tang Gold'. It observed that the uneven development in some trees during 2015 was due to the grafting technique used. Grafting may or may not be successful, depending on the climatic conditions; however, the issues caused by it dissolve during the establishment period. This was the case for the candidate variety. The appellant also claimed that there could have been a viral infection in the trees assessed. Nonetheless, the BoA considered that this claim was not very probable as the plant material complied with the phytosanitary requirements of the region of testing. Moreover, the alleged infection could hardly affect the expression of the relevant characteristics. Consequently, the candidate variety was sufficiently uniform and stable.

With regard to the access to the documents of the file, the BoA confirmed that the issue was the subject matter of appeal A003/2014.

Therefore, the BoA did not uphold any of the arguments put forwarded by the appellant.

Conclusion. The BoA considered the appeal not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Tang Gold

Case A008/2014, *Nador Cott Protection SARL* v *CPVO, Club de Variedades Vegetales Protegidas, the Regents of the University of California*

29.4.2016

Keywords. Distinctness, DUS test, right of being heard, right of defence, stability, technical examination, testing conditions, uniformity.

Result. The BoA considered the appeal not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 20 June 2011, the applicant (the Regents of the University of California) filed an application (No 2011/1544) for a CPVR for the clementine variety 'Tang Gold', belonging to the species ***Citrus reticulata*** Blanco. On 24 October 2014, the CPVO granted the CPVR.

On 23 December 2014, the appellant (Nador Cott Protection) filed a notice of appeal against said granting decision. In essence, the appellant requested that the BoA refuse the CPVR application or order the CPVO to carry out a new examination, and that it authorise the appellant to examine the supporting documentation of the DUS report and to provide additional observations. The appellant argued that the candidate variety did not fulfil the DUS requirements. In particular, it was not distinct from the 'Nadorcott' variety and also lacked uniformity and stability. Moreover, according to the appellant, the examination office had not applied the correct technical protocol to assess the candidate variety. In addition, the appellant alleged a breach of the right to be heard and of the right of defence. The appellant also requested that the suspension of the grant decision be maintained throughout the entirety of the appeal proceedings.

The CPVO maintained that the DUS examination had been carried out correctly and that the candidate variety did fulfil the DUS requirements. First, regarding the applicable protocol, the CPVO noted that the relevant date is usually linked to the date of submission of the plant material; however, in the case of fruit varieties, the establishment period prior to the analysis of the harvested material is to be taken into consideration too. Another factor to be considered is whether the final DUS report was taken over from national proceedings. In the case at hand, the CPVO took over the results of the national examination after the new protocol entered into force – which it decided to apply, pursuant to Section VI of said protocol. Therefore, the CPVO considered the relevant date for the application of the protocol to be the first satisfactory growing cycle of the candidate variety (i.e. time of first observation of the fruits) instead of the date of submission of the plant material. Furthermore, the CPVO argued that it had respected the appellant's right of defence as well as the principle of good administration. Finally, the CPVO noted that there was no need for an order of suspensory effect of the appeal, as the appeal already has such an effect under Article 67 of the BR.

Decision. Concerning the applicable technical protocol, the BoA upheld the position of the CPVO (see above).

As regards the alleged lack of distinctness, the BoA addressed all the characteristics mentioned by the appellant to substantiate the claim of lack of distinctness (i.e. 28, 31, 68 and 18). Concerning characteristic 28 – 'number of grooves at stalk end' – the BoA considered that a statistical method should have been applied. However, as this was not the case, the characteristic could not be taken into consideration.

Regarding characteristic 31 – 'depression at distal end' – the BoA referred to a visit to the growing trial where it observed that the note on this characteristic (i.e. 'present'/'absent') was given to each tree individually on the basis of what was observed in the majority of the fruits. In other words, indicating that a tree displayed the characteristics did not mean that all its fruits did. Therefore, and also due to the limited differences observed, characteristic 31 was not suitable to establish distinctness.

As regards characteristics 68 ('fruits: number of seeds by controlled cross-pollination') and 18 ('anther: viable pollen'), the BoA considered that the varieties displayed consistent and clear differences. The BoA rejected the claim that they could only be assessed through laboratory tests and confirmed that they could be analysed visually (using a magnifying glass at most).

The appellant argued that the physiological stage of the 'Tang Gold' trees was not adequate and that the distance between the trees tested was excessive. As regards the physiological stage of the 'Tang Gold' trees, according to the BoA, since the testing material bears fruit after 2 to 3 years of growing, it was clear that the micro-propagules used as propagating material had been taken from adult plants and not from young seedlings. On the distance between the trees, the BoA noted that it is more important to use very well-established identical rootstocks and that many characteristics are observed on the plant parts collected from trees and observed side by side.

The BoA also ruled on the uniformity and stability of the 'Tang Gold' variety. It observed that the uneven development in some trees during 2015 was due to the grafting technique used. Grafting may or may not be successful, depending on the climatic conditions; however, the issues caused by it dissolve during the establishment period. This was the case for the candidate variety. The appellant also claimed that there could have been a viral infection on the trees assessed. Nonetheless, the BoA considered that this allegation was not very probable as the plant material complied with the phytosanitary requirements of the region of testing; moreover, the alleged infection could hardly affect the expression of the relevant characteristics. Consequently, the candidate variety was sufficiently uniform and stable.

Regarding the suspension of the contested decision, the BoA established that, as soon as its decisions in Cases A006/2014, A007/2014 and A008/2014 became final, the suspension of the contested decision of 24 October 2014 had to be lifted.

Conclusion. The BoA considered the appeal not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Markeep

Case A006/2015, *Elizabeth Keep* v *CPVO*

15.8.2016

Keywords. Annual fee, cancellation, fees, lack of payment of fees, ***restitutio in integrum***.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 18 October 2005, the applicant (Elizabeth Keep) filed an application (No 2005/1917) for a CPVR for the species ***Buddleja davidii*** Franch., with the denomination 'Markeep'. On 8 June 2009, the CPVO granted the CPVR.

On 26 February 2015, the CPVO issued a debit note requesting the payment of the annual fee for the 7th year of the term of protection of the CPVR, relating to the period from 8 June 2015 to 7 June 2016. However, the payment for the annual fee, due on 1 May 2015, was not received.

On 11 May 2015, the CPVO sent a reminder by registered post setting a new time limit of 1 month for payment. The debit note and the payment reminder were sent to the appellant's procedural representative.

On 8 June 2015, an email from the CPVO was sent to the representative, with the payment reminder attached, stating that the CPVR would be cancelled in the event of non-payment of the outstanding annual fee.

On 20 July 2015, the CPVO cancelled the CPVR for the variety 'Markeep', pursuant to Article 21(2)(c) of the BR. On 6 August 2015, the appellant (Elizabeth Keep) lodged a notice of appeal against said decision, requesting the reversal of the cancellation decision on the grounds that, unlike the reminder letter, the email dated 8 June 2015 had not been received. Moreover, the payment had not been made on time due to staff changes and restructuring in the appellant's accounts department.

On 24 November 2015, the CPVO sent a reminder requesting payment of the outstanding appeal fee within 1 month and stating that, in the event of non-payment, the appeal would be dismissed. The letter was returned as undeliverable. After the change in procedural representative, the CPVO sent, on 26 January 2016, another reminder requesting payment of the outstanding appeal fee, which was duly paid on 16 February 2016. On 22 January 2016, the CPVO issued credit and debit notes to the former representative and the new representative, respectively, after the cancellation of the CPVR, cancelling (through the credit notes) and then requesting (through the debit notes) the payment of the seventh annual fee.

Decision. The BoA dismissed the appeal as not well founded. Regarding the procedure followed by the CPVO, it correctly cancelled the CPVR for the variety 'Markeep', in accordance with Article 21(2)(c) of the BR.

First, the BoA stated that the bankruptcy of the first procedural representative was irrelevant as it entered administration following insolvency on 5 May 2015, more than 4 months after the expiry of the final deadline for the payment of the seventh annual fee.

Second, pursuant to Article 83 of the BR, the specific situation of the former representative, which might have prevented compliance with the final deadline, could not be taken into account in assessing the legality of the contested decision.

Nevertheless, pursuant to Article 80 of the BR, if a deadline is missed, a ***restitutio in integrum*** request may be filed seeking a reinstatement of rights. According to the BoA, it was clear from the file that the appellant did not submit any such request. Moreover, even if the appeal could be considered a request for ***restitutio in integrum***, it would have to be rejected as inadmissible on the grounds that the request must be filed in writing within 2 months of the cause of non-compliance with the time limit ceasing to operate. The omitted act must also be completed within the same period. This condition was not satisfied. Even if it had been, the request would still have to be rejected on the grounds that the appellant did not take all due care in the particular circumstances of the case.

Finally, as regards the credit and debit notes sent by the CPVO to the former representative and the new representative after the cancellation of the CPVR, the CPVO had no legal basis for issuing such cancellations of and requests for payment. The negative legal consequence of the non-payment of the annual fee is the cancellation of the protection: the CPVO could no longer claim payment of the unpaid annual fee.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Starlight

Case A009/2015, *The State of Israel – Ministry of Agriculture and Rural Development, Agricultural Research Organization* v *CPVO*

22.8.2016

Keywords. Plant material, postponement, submission of plant material.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 4 November 2010, the applicant (The State of Israel – Ministry of Agriculture and Rural Development, Agricultural Research Organization) filed an application (No 2010/2355) for a CPVR for the grapevine variety 'Starlight', belonging to the species ***Vitis vinifera*** L. The submission of plant material for the technical examination had been scheduled for spring 2011. However, due to problems with the sending of the plant material by the applicant, the CPVO allowed a postponement of the submission of plant material for planting until March 2012.

Upon receiving the plant material, the examination office informed the CPVO that it did not comply with the quantitative and qualitative requirements provided for by the applicable technical protocol. However, the CPVO agreed to perform the technical examination with the material submitted. By an email of 16 November 2012, the CPVO informed the applicant of a potential viral infection. On 9 April 2013, the positive results of the virus test, together with the indication that the examination office had destroyed the plant material, were sent to the applicant. Contrary to the CPVO's opinion concluding that the plants were infected with the virus when they were delivered, the applicant argued that the infection occurred in Italy, on the examination office's premises. In the absence of certainty of when and where the material had been infected by the virus, the CPVO allowed a second submission of the plant material. However, it was not submitted by the deadline. The CPVO rejected the applicant's request for an additional postponement of the submission date.

By a decision of 21 September 2015, the CPVO rejected the application for a CPVR for the variety 'Starlight' on the grounds that the applicant had failed to comply with Article 55(4) and (5) of the BR.

On 20 November 2015, the appellant (The State of Israel – Ministry of Agriculture and Rural Development, Agricultural Research Organization) lodged an appeal against said decision, requesting the annulment of the decision and the grant of a new deadline for the submission of the plant material.

Decision. The BoA observed that the appellant had been informed fully and in a timely manner of the submission requirements concerning the plant material necessary to carry out the technical examination. These requirements are regulated in the special issue of the ***Official Gazette of the Community Plant Variety Office***, the ***S2 Gazette***, and are communicated to applicants. Despite the fact that the appellant was unable to obtain the import permission in order to submit the plant material on time, the CPVO allowed a later submission even though such a situation is not specifically covered by the rules on postponement. Moreover, despite the fact that the quantity of plant material submitted was not in conformity with the submission requirements, the CPVO agreed, along with the examination office, to carry out the technical examination with the material submitted.

As the CPVO allowed a second submission after the positive results of the virus test, it is not relevant whether the virus was already present at the time of the first submission. It was also not necessary to clearly establish where the samples were infected. Moreover, the appellant never made any remarks as regards the submission period allowed or any request for an extension, and did not indicate that preparing the second sample for submission would comprise the 'cleaning' of infected material, this being a procedure that would have taken more than 2 years.

The appellant argued that the infection of the plant material took place in Italy. Therefore, the CPVO would have presumed that the appellant had plant material available for shipment to the examination office. Moreover, a period of 2 years for propagation of virus-free plants and their eventual import to Italy must be deemed to be appropriate and sufficient. Furthermore, there were no grounds on the basis of which a new deadline for submission could be granted in conformity with the applicable regulations. Therefore, the CPVO correctly decided to reject the application.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Lemon Symphony

Case A006/2007 RENV, *Ralf Schräder* v *CPVO, Jørn Hansson*

2.9.2016

Keywords. Cancellation procedure, stability, variety description.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 5 September 1996, the applicant (Jørn Hansson) filed an application (No 1996/0894) for a CPVR for the variety 'Lemon Symphony', belonging to the species ***Osteospermum ecklonis***. On 6 April 1999, the CPVO granted the CPVR.

On 26 October 2004, Mr Schräder filed a request for the cancellation of the CPVR granted to the variety 'Lemon Symphony', on the grounds of lack of stability. The CPVO rejected the request.

On 11 June 2007, the appellant (Ralf Schräder) filed a notice of appeal against said decision, alleging a lack of correctness of the technical examination of the candidate variety and its lack of stability. On 4 December 2007, the BoA rejected the appeal. The appellant brought an action before the Court of Justice of the European Union against said decision. The General Court held that the appellant had not been properly summoned to the oral proceedings before the BoA as the necessary minimum period of notice had not been observed. Consequently, the Court concluded that Article 59(2) of Regulation (EC) No 874/2009 (the 'proceedings regulation' (PR)) and the right to be heard had been breached, and consequently annulled the contested decision.

The Registry of the BoA resumed the case by asking the appellant if he wanted to continue with the appeal in Case A006/2007. The appellant confirmed his interest in the appeal procedure.

Decision. The BoA dismissed the appeal lodged by the appellant. The appellant claimed that the CPVR for 'Lemon Symphony' should be cancelled with retrospective effect or, alternatively, with immediate effect. The BoA considered that the appellant had not been able to submit evidence and facts of sufficient substance to raise serious doubts as to the stability of the variety 'Lemon Symphony'.

The BoA observed that the description of the characteristics of a variety may change, depending on numerous factors. Plant varieties consist of living material. In the case of ***Osteospermum***, the tolerance range of the characteristics described is relatively high since the examination is normally only conducted over 1 year of testing and takes place outdoors, thus leading to more substantial variations than in cases of examinations carried out in a greenhouse.

The differences in three notes regarding the 'attitude of shoots' characteristic could be explained by the fact that no example varieties for this characteristic had been developed in 1997. The BoA noted that variations in the descriptions of characteristics are often due to environmental conditions. In the case of ***Osteospermum***, in addition to being a variety cultivated outdoors and thus more affected by environmental factors, the number of varieties of common knowledge increased substantially between 1997 and 2005. Consequently, 'Lemon Symphony' was considered stable in its essential characteristics.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Lemon Symphony

Case A007/2007 RENV, *Ralf Schräder* v *CPVO, Jørn Hansson*

2.9.2016

Keywords. Cancellation, stability, uniformity, variety description, variety verification.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 5 September 1996, the applicant (Jørn Hansson) filed an application (No 1996/0894) for a CPVR for the variety 'Lemon Symphony', belonging to the species ***Osteospermum ecklonis***. On 6 April 1999, the CPVO granted the CPVR.

On 26 October 2004, Mr Schräder filed a request for the cancellation of the CPVR on the grounds of lack of stability and because the variety no longer corresponded to its official description entered in 1997. The CPVO rejected the request. The CPVO decided to request a technical verification in order to check whether 'Lemon Symphony' continued to exist in the same form as the one described in 1997. The examination office concluded that 'Lemon Symphony' should be retained as it was sufficiently uniform and stable in its essential characteristics. However, the variety 'Sumost 01' was not clearly distinct from 'Lemon Symphony'.

On 18 April 2007, the CPVO informed the right holder of its decision to adapt the variety description of 'Lemon Symphony' in order to align it with the new International Union for the Protection of New Varieties of Plants (UPOV) guidelines. The appellant (Ralf Schräder) lodged appeal A007/2007 against the decision to adapt the variety description, claiming that it was of direct and individual concern to him, as 'Lemon Symphony' was the reference variety for the testing of the variety 'Sumost 01', for which he had sought a CPVR. The appellant claimed that, when compared with the initial variety description, his variety was distinct, whereas when compared with the new variety description, his variety was deemed not distinct.

The BoA rejected the appeal and the appellant brought an action before the Court of Justice of the European Union. The Court held that the appellant had not been properly summoned to the oral proceedings before the BoA, as the necessary minimum period of notice had not been observed. Consequently, the Court concluded that Article 59(2) of the PR and the right to be heard had been infringed, and annulled the contested decision.

On 10 February 2016, the Registry of the BoA resumed the case by asking the appellant to confirm his interest in continuing with the appeal in Case A007/2007, which he did.

Decision. The BoA preliminary observed that the new documents submitted by the appellant at the oral hearing were admissible as they merely confirmed the information already exchanged by the parties in the appeal proceedings. Furthermore, the other parties were aware of the documents submitted in the parallel proceedings as the parties in all three parallel proceedings were the same and they had the opportunity to comment on them during the oral hearings.

The BoA considered that the CPVO exercised its broad discretion correctly in adapting the variety description and that the adaptation of the official description of 'Lemon Symphony' was in line with the purpose of Article 87(4) of the BR, which is to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned. In this sense, if the number of comparable varieties increases over the years, the assessment of the relative criteria changes. In such a situation, it is necessary to adapt the description of 'old' varieties in order to obtain a more precise comparative basis for future

examinations. Moreover, the BoA observed that the adaptation of the description did not affect the identity of the protected plant variety.

The BoA established that variations in the description of characteristics are due to a number of factors, particularly environmental conditions and changes in the scale of notes because of an increased number of varieties or because the applicable guidelines change. In the case of ***Osteospermum***, in addition to being a variety cultivated outdoors and thus more affected by environmental conditions, the number of varieties increased substantially between 1997 and 2005. This led to a higher number of variations within the same species and to an inevitable adaptation of the methods of assessment of varieties. In this context the BoA emphasised that updating all 'old' variety descriptions would have represented an unreasonable workload for the CPVO and that this should only be done where there was a specific reason for adapting the description.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Sumost 01

Case A005/2007 RENV, *Ralf Schräder* v *CPVO, Jørn Hansson*

2.9.2016

Keywords. Cancellation, distinctness, DUS test, objections, stability, variety description, technical examination.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 26 November 2001, the applicant (Ralf Schräder) filed an application (No 2001/1758) for a CPVR for the variety 'Sumost 01', belonging to the species ***Osteospermum ecklonis***.

On 27 October 2003, the right holder (Jørn Hansson) of the variety 'Lemon Symphony' (i.e. the reference variety) filed an objection to the grant of a CPVR to 'Sumost 01' under Article 59 of the BR.

On 19 February 2007, the CPVO refused to grant the CPVR on the grounds that the candidate variety was not clearly distinct from the reference variety 'Lemon Symphony' and upheld the objection.

On 10 May 2007, the appellant (Ralf Schräder) filed a notice of appeal against said decisions.

On 4 December 2007, by Decision A005/2007, the BoA rejected the appeal. The appellant then brought an action before the Court of Justice of the European Union. The General Court annulled Decision A005/2007.

The case was therefore resumed before the BoA. The appellant essentially argued that the variety 'Lemon Symphony' should not have been considered a variety of common knowledge; that the CPVR for 'Lemon Symphony' should have been cancelled, pursuant to Article 21 of the BR; and that the technical examination of the variety 'Sumost 01' did not prove that it lacked distinctness.

Decision. By a decision of 2 September 2016, the BoA dismissed the appeal lodged by the appellant requesting the annulment of the CPVO decisions of 19 February 2007 and the grant of a CPVR to the variety 'Sumost 01' or, alternatively, requesting the cancellation of the CPVO decisions and the declaration that the variety 'Lemon Symphony' does not exist.

According to the BoA, on the filing date of 'Sumost 01' (26 November 2001), there existed a valid CPVR for 'Lemon Symphony' as confirmed by the first decision of the BoA and at a later stage by the Court (judgment of 18 September 2012 in joined Cases T-133/08, T-134/08, T-177/08 and T-242/09, ***Schräder*** v ***CPVO – Hansson***, EU:T:2012:430; judgment of 21 May 2015, C-546/12 P, ***Schräder*** v ***CPVO***, EU:C:2015:332).

As regards the alleged lack of stability of 'Lemon Symphony' under Article 21 of the BR, the BoA considered that the appellant had not been able to submit evidence and facts of sufficient substance to raise serious doubts as to the stability of the variety 'Lemon Symphony' (see appeal A006/2007 RENV).

'Lemon Symphony' was a variety of common knowledge in the meaning of Article 7(1) of the BR on the filing date of 'Sumost 01'. Plant material with the characteristics of 'Lemon Symphony' was also a matter of common knowledge, within the meaning of Article 7(1), through sales of the variety from October 1999 onwards.

Moreover, the BoA considered that the variations in the descriptions of characteristics were immaterial as they were due to a number of factors. Said factors include environmental conditions and changes in the scale of notes because of the increased number of varieties or the modifications in the guidelines leading to an inevitable adaptation of the methods of assessment of varieties, concerning characteristics such as 'attitude of shoots: width of leaf' or the time of flowering. In conclusion, the differences were deemed too negligible to establish the distinctness of 'Sumost 01'.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Pinova

Case A005/2016, *KIKU GmbH* v *CPVO, Sächsisches Landesamt Für Umwelt Landwirtschaft Und Geologie*

16.8.2017

Keywords. Evidence of commercialisation, marketing, novelty, nullity.

Result. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 30 August 1995, the applicant (Sächsisches Landesamt Für Umwelt Landwirtschaft Und Geologie) filed an application (No 1995/1072) for a CPVR for the apple variety 'Pinova', belonging to the species *Malus domestica* Borkh. On 15 October 1996, the CPVO granted the CPVR.

On 4 December 2014, the appellant (KIKU GmbH) (at the time, the nullity petitioner) requested that the CPVO declare the CPVR null and void on the grounds of lack of novelty. The nullity request was based on the alleged lack of novelty of the variety on the filling date (i.e. 30 August 1995), together with the provisions applicable to applications filed during the transitional regime under Article 10(1)(b) read in conjunction with Article 116(1) and (2) of the BR.

The appellant argued that the variety could have been marketed from 5 June 1986 onwards, the date on which the German Democratic Republic granted a plant variety right (***Wirtschaftssortenschutz***) to the variety at issue. However, to be eligible for the CPVR protection, the variety must not have been commercialised prior to 1 September 1988, the date on which the 6-year grace period established by Article 10(1)(b) in conjunction with Article 116(1) and (2) of the BR started. Furthermore, the appellant referred to advertisements published on certain websites and in brochures from the right holder that showed that the variety had been 'on the market since 1986'.

The right holder, on the other hand, contended that, even though 'Pinova' could have been marketed from 5 June 1986, it was only made available to certain authorised growers, solely for testing purposes. Therefore, this testing activity fell outside of the scope of Article 10(2) of the BR.

On 20 June 2016 the CPVO rejected the nullity request. On 27 July 2016, the appellant filed a notice of appeal against said decision, alleging a lack of novelty and the incorrectness of the assessment carried out by the CPVO.

Decision. The BoA dismissed the appellant's arguments that the variety at issue had been marketed prior to 1 September 1988 and that consequently it lacked novelty as unfounded.

The BoA established that the mere fact that a right had been granted did not constitute substantive evidence that the variety had indeed been commercialised. In addition, the BoA noted that the wording 'on the market since 1986' as regards the variety 'Pinova', contained in the right holder's brochure and on other websites, did not provide substantive evidence of the commercialisation of the variety either. Finally, the transfer of material of a variety for testing purposes cannot be considered an act of disposal of the material for the purposes of the exploitation of the variety and hence does not affect the novelty requirement.

The BoA therefore concluded that the appellant had not provided adequate evidence to prove the lack of novelty.

Conclusion. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Cripps Pink

Case A007/2016, *Pink Lady America LLC* v *CPVO and Western Australian Agriculture Authority*

14.9.2017

Keywords. Evidence of commercialisation, grace period, novelty, nullity.

Result. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Background. On 29 August 1995 the applicant (Western Australian Agriculture Authority) filed an application (No 1995/1039) for a CPVR for the apple variety 'Cripps Pink' belonging to the species ***Malus domestica*** Borkh. On 15 January 1997 the CPVO granted the CPVR.

On 26 June 2014 the appellant (Pink Lady America LLC) (at the time, the nullity petitioner) filed a nullity request on the grounds of lack of novelty. According to the appellant, the variety had been commercialised in Australia from 1985 and well before 1 July 1992. The appellant claimed that, as the variety had been put on the market in Australia before the applicable grace period, the information regarding the first date of commercialisation submitted in the application to the CPVO was incorrect.

The appellant also made submissions regarding the correct interpretation of Articles 10 and 116 of the BR. Firstly, the appellant claimed that novelty is assessed in accordance with Article 10 of the BR to ensure that the grace periods referred to therein are met. Secondly, the question of whether the application for the CPVR was made within 1 year of the BR coming into effect must be considered. If it was filed during that period, Article 116 of the BR applies and the grace period provided for by Article 10(1)(a) of the BR (concerning the date of commercialisation within the EU) is the same as that concerning the date of commercialisation outside the EU.

The grace period concerning the first date of commercialisation outside the EU remains the same under the transitional regime, as Article 116 of the BR only provides a derogation from Article 10(1)(a) and has no impact on Article 10(1)(b). The derogation under Article 116 is without prejudice to the provisions of Article 10(2) and (3).

Accordingly, the appellant submitted that the relevant commercialisation dates had to be interpreted as follows.

- **Within the EU.** 1 September 1988, as Article 116 of the BR applies and provides a derogation from the provisions of Article 10(1)(a).
- **Outside the EU.** 29 August 1989, as Article 10(1)(b) of the BR is unaffected by Article 116.

The CPVO rejected the nullity request. The CPVO stated that it must declare a CPVR null and void if it is established that the conditions laid down in Article 10 of the BR were not met on the date of application. Moreover, only where there are serious doubts that these conditions were met as of the date of application can a re-examination of the protected variety right by way of nullity proceedings be justified. The CPVO also observed that a third party seeking the annulment of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the grant of the right. Finally, the CPVO highlighted that it is bound by the interpretation of the Court of Justice.

On 18 November 2016 the appellant filed a notice of appeal requesting that the CPVO declare the CPVR null and void on the grounds of lack of novelty pursuant to Article 10(1)(a) and (b) of the BR or, alternatively, pursuant to only Article 10(1)(b) in conjunction with Article 116.

Decision. The BoA confirmed the decision of the CPVO, taking into account that no evidence of sale or disposal of the plant material within the EU earlier than 6 years before the date of entry into force of the BR had been submitted. The case fell under the scope of the transitional regime, pursuant to Article 116 of the BR.

As regards the selling or using of the variety outside the EU, the BoA found that the evidence submitted by the appellant did not constitute substantive proof that raised serious doubts as to the validity of the CPVR at issue as it did not prove that material of the variety was sold, or otherwise disposed of, by or with the consent of the breeder for the purposes of exploiting the variety.

Therefore, the BoA did not uphold any of the arguments put forwarded by the appellant seeking to declare the CPVR null and void.

Conclusion. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

Royal Braeburn

Case A001/2017, *Mema GmbH landwirtsch. Ges.* v *CPVO, The François Family Trust*

13.3.2018

Keywords. Cancellation, DUS test, growing conditions, stability, uniformity, testing conditions.

Result. The BoA dismissed the appeal and ordered the appellant to bear 50 % of the costs of the appeal proceedings, pursuant to Article 85(2) of the BR.

Background. On 12 August 1998, the applicant (The François Family Trust) filed an application (No 1998/1082) for a CPVR for the apple variety 'Royal Braeburn', belonging to the species ***Malus domestica*** Borkh.

On 20 October 2003, the CPVO granted the CPVR. By a letter of 20 April 2016, the appellant (Mema GmbH landwirtsch. Ges.) filed a cancellation request, claiming that the variety had not been uniform or stable since 2012/2013. By a decision of 21 November 2016, the CPVO rejected said request.

On 23 January 2017, the appellant filed a notice of appeal requesting that said decision be set aside and that the CPVR be cancelled. The appellant also requested the admission of additional forms of evidence, including witness statements and expert opinions, as well as a complementary examination of the contested variety at a testing station other than the entrusted examination office. Finally, the appellant required an inspection of the fruits of the contested variety harvested in 2017.

The appellant alleged a breach of Article 75 of the BR, claiming the CPVO had breached its right to be heard because it had been hindered from presenting comments to the examination office on the examination office's communication of May 2016 with the CPVO. In addition, the appellant submitted that the contested decision was not well reasoned and that the CPVO had breached Article 76 of the BR, as it did not properly examine the evidentiary value of the photographs of the contested variety's fruits and it did not consider the request to carry out a supplementary examination. Moreover, the appellant claimed that the CPVO had behaved in a contradictory manner since in this case it had relied on pictures taken by the examination office, but it had not done so in appeal A001/2015 ('Braeburn 78'). The appellant also called into question the correctness of the DUS examination, in particular with regard to the appropriate time of maturity and the photographs taken of the candidate variety. Finally, the appellant argued that the testing location was not appropriate and that the CPVO should have taken into account the observations carried out in another research centre, provided by the appellant.

In its observations in reply, firstly, the CPVO contested the alleged violation of Article 75 of the BR, claiming that the examination offices are deemed to be part of the CPVO and not parties to the proceedings. Consequently, there was no need to provide an additional round of observations regarding the comments of the examination office which merely confirmed that the candidate variety lacked stability. Secondly, the CPVO considered its decision to be properly justified and rejected the allegation of contradiction in relation to the 'Braeburn 78' appeal case. Indeed, that case concerned a different variety and different characteristics. As for the alleged violation of Article 76 of the BR, the CPVO maintained that the evidence provided by the appellant, in particular the expert opinion based on photographs and not on a side-by-side growing trial, was insufficient to raise serious doubts as to the stability of the variety. In addition, the CPVO maintained that the DUS examination had been performed correctly. Finally, the CPVO referred to the fact that the verification of the stability of a protected variety is a matter of exclusive competence

of the entrusted examination office, so the conclusions of another research centre could not be taken into account.

Decision. Further to the parties' submissions and a visit to the examination office's premises, as well as an oral hearing, the BoA ruled that the appeal was not well founded.

First, the BoA dismissed the evidence provided by the appellant, as photographs taken in a location other than that of the entrusted examination offices and of samples that are not verified do not conform to the conditions for the verification of stability.

Second, the BoA established that the examination office did not make any mistakes in establishing the time of maturity of the candidate variety. As regards the question of whether the use of photographs was an adequate assessment tool, the BoA noted that certain characteristics such as the striation of the fruits could only be reliably observed in the living plant material through visual observations.

Third, regarding the test location, the BoA stated that because of the complex genotype–environment interaction, DUS examinations preferably had to be carried out at a single location, keeping all test conditions and material as equal as possible. Therefore, the BoA rejected the request for complementary testing as the examination of 'Gala' mutants such as the candidate variety had been entrusted to the Groupe d'Étude et de contrôle des Variétés et des Semences (French Variety and Seed Study and Control Group, i.e. the French examination office) with the official 'apple announcement' (OG No 01/2004) of 1 January 2004 adopted by the Administrative Council of the CPVO. The DUS test could therefore not have been performed anywhere else at the time of the application.

Fourth, the BoA shared the CPVO's view that examination offices are to be considered part of the CPVO. Nonetheless, this does not exclude the fact that the CPVO should have shared all the communications available. In the present case, the BoA considered that the appellant had not had the opportunity to comment on the findings of the examination office before the contested decision was taken.

Finally, the BoA deemed the request for witness statements and expert opinions not relevant because of the inspection carried out at the premises of the examination office in the presence of the appellant, accompanied by its witness and expert, who also had the opportunity to be heard during the oral hearing.

Conclusion. The BoA dismissed the appeal and ordered the refund of 50 % of the appeal fee to the appellant, pursuant to Article 85(2) of the BR.

Siberia

Case A009/2017, *Siberia Oriental BV* v *CPVO*

15.10.2018

Keywords. Admissibility, appeal, time limit.

Result. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 28 July 1995, the applicant (Siberia Oriental BV) filed an application (No 1995/0101) for a CPVR for the variety 'Siberia', belonging to the species ***Lilium*** L. On 2 August 1996, the CPVO granted the CPVR, with an expiry date of 1 February 2018.

The right holder contested the calculation carried out by the CPVO regarding the duration of the protection and held that, according to Articles 19 and 116 (the latter being on the transitional regime affecting the duration of certain rights granted between 1995 and 1996) of the BR, the right should not have expired until the end of 2021. Moreover, the right holder stated that the entry in the Register of Community Plant Variety Rights regarding the date of expiry of the CPVR should have been amended pursuant to Article 53(4) and (5) of the PR, as the CPVO made a patent mistake in calculating the duration of the CPVR.

By a decision of 23 October 2017, the CPVO rejected the request to amend the expiry date of the CPVR as it deemed it inadmissible. According to the CPVO, it is possible to file an appeal concerning an entry in the register within 2 months of the relevant decision being served. However, no appeal had been filed within said time limit. Furthermore, Article 53(4) and (5) of the PR regarding the amendment of patent mistakes in decisions of the CPVO was not applicable: in the article, reference is made to linguistic errors, errors of transcription, patent mistakes or obvious procedural errors. In the CPVO's opinion, there was no legal basis for amending the duration of the CPVR.

On 23 November 2017, the appellant (Siberia Oriental BV) filed a notice of appeal claiming that the CPVO had erred in declaring the request for the amendment of the term of duration of the CPVR inadmissible. The misinterpretation of Article 116 of the BR by the CPVO was in fact a patent mistake in the sense of Article 53(4) of the PR. In addition, according to the appellant, the CPVO had an obligation ***ex officio*** to correct any errors in the register.

Decision. The BoA held that appeal A009/2017 could not be based on Article 67 in connection with Article 87 of the BR, as appeals can be lodged against the initial entry of the CPVR's expiry date in the register but not the amendment of such an entry. Furthermore, the decision of the CPVO to reject the request to amend the expiry date in the register was not a decision subject to appeal pursuant to Article 67(1) of the BR. Indeed, it is not a decision pertaining to the entering or deletion of information in the register as provided for by Article 87 of the same regulation.

The BoA also observed that the appellant could not invoke Article 53(4) of the PR either. Indeed, the alleged error could not be regarded as a patent mistake, given that Article 116(4), fourth indent, of the BR could be prima facie subject to more than one interpretation.

As the appeal was inadmissible, the BoA did not consider it necessary to adjudicate on the merits of the case.

Conclusion. The BoA dismissed the appeal as inadmissible and ordered the appellant to bear the costs, pursuant to Article 85(1) of the BR.

M 02205

Case A010/2013 RENV, *Aurora SRL* v *CPVO, SESVanderHave NV*

27.2.2019

Keywords. Distinctness, DUS test, nullity, testing conditions, variety description.

Result. The BoA upheld the appeal as admissible and well founded, annulled the appealed decision and remitted the case to the competent body of the CPVO.

Background. On 29 November 2002, the applicant (SESVanderHave NV) filed an application (No 2002/1973) for a CPVR for the sugar beet variety 'M 02205', belonging to the species ***Beta vulgaris*** L. ssp. ***vulgaris*** var. ***altissima*** Döll. On 18 April 2005, the CPVO granted the CPVR.

On 28 August 2012, the appellant (Aurora SRL) (at that time, the nullity petitioner) lodged a nullity petition pursuant to Article 20 of the BR, on the grounds that the successive corrections to the comparative distinctness report of the official variety description showed that the 'M 02205' variety did not satisfy the distinctness requirement for the purposes of Article 7(1) of the BR. Following the concerns expressed by the nullity petitioner, the CPVO modified the comparative distinctness report accompanying the variety description of the CPVR. However, as this had no impact on the distinctness of the candidate variety, it rejected the nullity petition.

On 4 October 2013, the appellant filed a notice of appeal with the BoA. In the statement of grounds for appeal, the appellant expressed, in particular, concerns regarding the source of the data relating to the reference variety 'KW 043', as included in the last and penultimate versions of the comparative distinctness report. By Decision A010/2013 of 26 November 2014, the BoA dismissed the appeal as unfounded, holding, in particular, that the appellant had overestimated the importance of the comparative distinctness report, whereas, in fact, that document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the CPVR at issue.

On 24 March 2015, the appellant filed an action before the General Court seeking the annulment of the BoA decision and the declaration of nullity of the CPVR.

By a judgment of 23 November 2017, ***Aurora*** v ***CPVO – SESVanderHave*** (Case T-140/15, EU:T:2017:830), the Court annulled the decision of the BoA in appeal A010/2013. The appellant requested that the CPVO decision of 23 September 2013 on the nullity petition be reversed and that the CPVR be declared null and void on the grounds of lack of distinctness. The Court established that by failing to ensure that the distinctness of the 'M 02205' variety from the reference varieties was established on the basis of data derived from the comparative growing trials of 2003 and 2004, the BoA did not duly fulfil its obligations. Consequently, the case was remitted to the BoA.

In BoA proceedings A010/2013 RENV, the appellant maintained the three grounds for appeal submitted during the first appeal against the CPVO's rejection of the nullity petition, referring to additional data revealed after the initial BoA decision and alleging several inaccuracies occurring in documents supporting the original grant of protection.

The appellant argued that because of the multiple corrections made by the CPVO and the use of the additional distinctness information document produced by the CPVO at a later stage of the procedure, the

original CPVR certificate did not include all the characteristics relevant for establishing the distinctness of the candidate variety. Moreover, the appellant pointed out that said corrections breached Article 87(4) of the BR as they were neither made by the CPVO of its own motion nor done for the purpose of rendering the variety comparable with the descriptions of the taxon concerned. Furthermore, the appellant pointed out that the DUS examination was carried out by comparing living material with data sourced from the variety descriptions of the reference varieties, instead of a side-by-side comparison. Finally, the appellant claimed that according to the results of the growing trials communicated after the first BoA decision, the contested variety lacked distinctness.

The CPVO and the right holder argued that the data inserted as corrections existed before the CPVR was granted, and therefore had no impact on the distinctness assessment. Moreover, it is not the distinctness information document that determines the scope of the CPVR, but the variety description. According to the CPVO, the crucial information in the variety description is presented in the table of characteristics – together with the state of expressions and the corresponding notes, both of which were available to the appellant. In fact, since a single characteristic can be sufficient to establish distinctness from another variety, it is a legitimate possibility that at the end of the examination process just one of the characteristics distinguishing the candidate variety from similar varieties will be included in the distinctness information document of the variety description. The CPVO stressed that amendments to the distinctness information document of the variety description carried out in order to correct clerical mistakes, pursuant to Article 53(4) of the PR, do not change the scope of protection of the variety. In addition, the CPVO argued that all examinations were conducted in accordance with the applicable rules, as confirmed by the entrusted examination office, by growing the varieties side by side. Finally, the results of the growing trials submitted after the first BoA decision had no impact and confirmed the distinctness of the variety 'M 02205'.

Decision. According to the BoA, the CPVO – including the BoA in its first decision – and the right holder failed to demonstrate that the re-examination carried out by the CPVO was comprehensive and objective. Therefore, the finding that the variety is clearly distinct from the reference varieties cannot be deemed valid. In particular, the analysis of the evidence was not exhaustive since the technical data from the examination office were not in the CPVO's possession when the contested decision was adopted. Furthermore, the identity of the notes of expression of the reference variety 'KW 043' in the comparative distinctness report with the notes contained in its official variety description supports the appellant's argument that these notes were sourced from the official variety description and not from the comparative growing trials carried out in 2003 and 2004. In addition, the fact that the examination office was aware of the correct data concerning the candidate variety is of no relevance since the CPVO should verify these data. Finally, the CPVO failed to give an exhaustive reply to the appellant's arguments and to prove that the errors made during the proceedings did not affect the assessment of distinctness and that the corrections made fall within the scope of 'admissible corrections' pursuant to Article 87(4) of the BR.

Conclusion. The BoA annulled the contested decision and ordered the re-examination of the validity of the CPVR to be carried out by the competent body of the CPVO. In particular, the BoA established that the competent body had to carry out a full and complete examination and analysis to verify the accuracy of the notes on the relevant characteristic (i.e. 'leaf blade: green colour', which is not distinct from the variety of common knowledge 'KW 043', according to the appellant). It is also incumbent upon the competent body of the CPVO to examine whether this characteristic is sufficiently stable and reliable to be taken into account in the determination of whether the contested variety can be qualified as clearly distinct from another variety, pursuant to Article 7 of the BR.

The request for damages put forward by the appellant was rejected as premature and unsubstantiated. The CPVO was ordered to bear the costs of the proceedings.

Oliver

Case A007/2018, *Bejo Zaden BV* v *CPVO*

17.5.2019

Keywords. Comparable varieties, DUS test, uniformity, parental lines, refusal, scope of protection, seed-propagated variety, technical protocol.

Result. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 25 April 2017, the applicant (Bejo Zaden BV) filed an application (No 2017/1150) for a CPVR for the potato variety 'Oliver', belonging to the species ***Solanum tuberosum*** L. A title for a national plant variety right had already been granted based on a DUS report, which the CPVO asked to take possession of once it was finalised. As 'Oliver' was the first ever hybrid seed-propagated potato variety, the examination office had to develop an ad hoc technical protocol while at the same time examining the candidate variety and taking into consideration the fact that there were no reference varieties available at the time of testing. As a result of the DUS test, the examination office considered the variety sufficiently uniform. The CPVO did not consider the DUS report to be a sufficient basis on which to grant the CPVR.

On 25 July 2018, the appellant (Bejo Zaden BV) filed a notice of appeal against the CPVO decision not to grant the CPVR. The appellant claimed that the CPVO had not provided a correct interpretation of Article 8 of the BR regarding the uniformity of the candidate variety. According to the appellant, uniformity is subject to the variation that may be expected from the particular features of propagation. The CPVO had not taken into consideration the fact that the candidate variety was a hybrid seed-propagated potato variety (and thus subject to a higher degree of variability in the expression of characteristics): therefore, the refusal to grant a CPVR was deemed unfounded. The appellant argued that the variety should have been treated as a population and that uniformity should have been assessed with the less strict method applicable to cross-pollinated population varieties. Furthermore, the appellant claimed that the scope of protection of the variety derived from its parents' formula. The parental lines of the slightly inbred variety 'Oliver' are vegetatively propagated, and hence are uniform by definition. Slightly inbred parent lines are heterozygous, but uniform and stable because they are propagated vegetatively. However, the resulting hybrid is genetically variable in a way comparable to a population, such as ryegrass. The CPVO should have taken these factors into account. Moreover, the examination office did not observe certain distinctive characteristics relating to light sprouts contained in the protocol applicable to vegetatively propagated potatoes (CPVO-TP/023/2). Finally, the CPVO should have followed the advice of the examination office and adopted a more lenient approach to uniformity, given the innovative nature of the candidate variety.

The CPVO argued that it did take into account the candidate variety's propagation features and considered that it would indeed be comparable to a population. However, the CPVO claimed that, even considering the above arguments, the candidate variety was not sufficiently uniform to be granted a CPVR. In fact, the range of variation scored in six characteristics would have covered, in the case of vegetatively propagated varieties, the scope of protection of at least two distinct varieties. In addition, the CPVO noted that 11 characteristics relating to light sprouts were not observed as they were not part of a normal DUS examination and were to be assessed in special test conditions; besides, they did not bear any relevance to the normal growing/production cycle. Therefore, an assessment of these characteristics was not possible. The CPVO also claimed that it is not bound by the opinion of the examination office when deciding whether to grant a CPVR. Finally, it observed that the fact that a variety is innovative does not entail excessive flexibility in the assessment of the registration requirements.

Decision. The BoA acknowledged that 'Oliver' represented a new type of potato variety. It also noted that, according to UPOV (in Section 4 of its test guidelines' procedures (TGP) document TGP/13/1, 'Associated document to the general introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants'), the DUS testing of new types of varieties does not differ in principle from the testing of any other variety, unless otherwise specified. However, new varieties may require additional factors to be taken into consideration. Due to the propagation features and resulting higher degree of variation within the variety, a different uniformity standard from that contained in the current protocol (i.e. CPVO-TP/023/2) should be applied.

Moreover, the BoA recognised that, in relation to hybrid varieties, it is specified in Section 2 of UPOV-TGP/10/1 ('Associated document to the general introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants'), that the tolerance limits for uniformity are set according to the specific situation resulting from genetic and environmental influences on the variation in the expression of characteristics.

The BoA also noted that, in cases where no relative uniformity standards exist because the new variety is the first of its type, UPOV recommends finding out the uniformity standards applied to similar species where varieties of the same type have been already tested (see TGP/13/1, Section 4.5.5). In the absence of comparable varieties, the BoA took into consideration varieties of other species with similar genetic structures, such as maize and leek. However, the variation was considered to be higher in 'Oliver'.

Even considering the above, the BoA held that 'Oliver' was not sufficiently uniform, subject to the particular features of its propagation, in its expression of the characteristics observed in the technical examination. Indeed, although a precise uniformity threshold could not yet be identified, the appropriate threshold would have to be more stringent than the level of variation found in the candidate variety. Granting protection for the variety 'Oliver' would provide an unjustifiably broad scope of protection due to said high level of variation. The appellant itself explained that the sufficient degree of uniformity in the hybrid has to be achieved through the selection of parents.

Finally, the BoA considered that light sprout characteristics should be included in the new technical protocol for seed-propagated potato varieties as they are relevant for the assessment of distinctness. Nonetheless, considering that the candidate variety was not uniform, observing them in the present case would not have made any difference to the outcome of the examination procedure. Finally, the BoA observed that uniformity and stability in the parent lines is a prerequisite for uniformity and stability in the hybrid and should be considered in relation to the stability of the hybrid.

Therefore, the BoA rejected the appellant's arguments in their entirety and upheld the decision not to grant a CPVR on the grounds of lack of uniformity, even in light of the impact of the 'Oliver' variety's particular propagation features on the expression of the characteristics observed during the technical examination.

Conclusion. The BoA dismissed the appeal as not well founded and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Gala Perathoner

Case A004/2016, *Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft* v *CPVO*

17.1.2020

Keywords. Distinctness, DUS test, morphological differences, mutant, refusal, testing conditions.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Background. On 27 February 2009, the applicant (Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft) filed an application (No 2009/0353) for a CPVR for the apple variety 'Gala Perathoner', belonging to the species ***Malus domestica*** Borkh.

On 21 March 2016, the CPVO rejected the application on the grounds of lack of distinctness, pursuant to Article 7 of the BR.

On 25 May 2016, the appellant (Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft) filed a notice of appeal before the BoA, claiming that the climate conditions under which the variety had been tested were not appropriate since the area of Angers (the location of the entrusted examination office) did not allow 'Gala' mutants to fully develop the characteristics rooted in their genetic structure. The appellant requested that the DUS examination be carried out in a more suitable location.

The appellant also argued that the DUS examination was deficient due to, inter alia, the incorrect picking time of the fruits of the candidate variety. Moreover, according to the appellant, the 'Gala Perathoner' trees were grafted on a rootstock different from that used for the reference varieties. Furthermore, the appellant claimed that the samples of 'Gala Perathoner' and those of the reference varieties were of different ages. Finally, the differences between the reference varieties were allegedly smaller than those observed between 'Gala Perathoner' and the reference varieties.

Decision. The BoA dismissed the claim regarding the suitability of the DUS testing location. The Administrative Council of the CPVO, when entrusting the French examination office, did in fact take the climatic conditions of the relevant region into account. Moreover, the applicant was aware of the fact that, at the time of the application, Angers was the only examination site entrusted, by a decision of the Administrative Council.

As regards the claims concerning the correctness of the DUS testing, the BoA concluded that the arguments put forward by the appellant were not decisive. Indeed, the documents and declarations of the experts at the oral hearing confirmed that the experts had carefully followed the applicable technical protocol. Concerning the differences in the rootstocks used and the ages of the trees compared, the BoA observed that it was not very probable that these factors had influenced the expression of the relevant characteristics (i.e. fruit colour).

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.

Stark Gugger

Case A008/2018, *Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft* v *CPVO*

24.1.2020

Keywords. Distinctness, DUS test, testing comparable varieties, morphological differences, mutant, refusal.

Result. The BoA dismissed the appeal and ordered the appellant to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

Background. On 25 July 2011, the applicant (Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft) filed an application (No 2011/1918) for a CPVR for the apple variety 'Stark Gugger', belonging to the species *Malus domestica* Borkh.

On 2 July 2018, the CPVO rejected the application on the grounds of lack of distinctness from a variety of common knowledge with the denomination 'Jeromine'.

On 29 August 2018, the appellant (Griba Baumschulgenossenschaft landwirtschaftliche Gesellschaft) filed a notice of appeal, claiming that the pruning method used by the examination office had affected the assessment of the distinctness of the candidate variety. Moreover, the appellant argued that the DUS examination had not been performed correctly and that the testing site was not appropriate, as the candidate variety had been developed under different climatic conditions than that of the examination office.

Decision. The BoA held that it was not the location of the site or the pruning method that prevented the candidate variety 'Stark Gugger' from being distinct from the variety of common knowledge 'Jeromine'. The BoA noted that both varieties derived from the same mutant, 'Red Delicious', and therefore the genetic difference between them is very small, and generally not measurable by deoxyribonucleic acid fingerprinting. In fact, the parent, the mutant variety 'Red Delicious', was selected out of the green/red 'Delicious' variety for the deep red colour of its fruits. Both 'Stark Gugger' and 'Jeromine' were selected for a deeper, purplish fruit colour. The fruit colour differences in mutants from the same initial parent variety are difficult to distinguish, and sometimes these mutants are even identical in their phenotypes.

The BoA also observed that the CPVO had no reason or obligation to apply the pruning method suggested by the appellant. Moreover, the appellant merely stated that this method promoted a better yield, which is not a relevant factor in the DUS testing, as designed by the applicable protocol.

The CPVO did not have any obligation to initiate the DUS testing in a location different from that selected by the Administrative Council. Moreover, according to the BoA, the fact that 'Stark Gugger' had been discovered/selected in northern Italy was not relevant, as this argument is only valid if a new seedling variety is bred – crossed and selected – under specific climatic conditions and as a consequence has adapted to the climate of its origin. This was not the case for the candidate variety. The BoA also noted that initial seedling variety 'Delicious' was bred in a subtropical climate; consequently, the climatic differences between Beaucouzé (the testing location) and northern Italy (the location of origin) do not play a significant role.

Therefore, the arguments of the appellant were rejected.

Conclusion. The BoA dismissed the appeal and ordered the appellant to bear the costs of the proceedings, pursuant to Article 85(1) of the BR.

2.2. Court of Justice of the European Union

2.2.1. General Court

Gala Schnitzer

Joined Cases T-91/14 and T-92/14, *Schniga GmbH* v *CPVO, Brookfield New Zealand Ltd, Elaris SNC*

10.9.2015

Keywords. Additional characteristic, applicable protocol and guidelines, distinctness, DUS test, technical examination.

Result. The General Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 18 January 1999, Schniga GmbH (the applicant before the CPVO) filed an application (No 1999/0033) for a CPVR for the apple variety 'Gala Schnitzer', belonging to the species ***Malus domestica*** Borkh. Due to a viral infection in the plant material submitted for DUS testing, the technical examination was stopped and then resumed in spring 2002, after Schniga GmbH had been allowed to submit new, virus-free material of the candidate variety. For the purposes of the technical examination, the variety 'Baigent', considered to be the closest to the candidate variety, was used as the reference variety. The examination office found the candidate variety distinct from the reference variety – which was owned by Elaris SNC – on account of the additional characteristic 'fruit: width of stripes', not included in either CPVO-TP/14/1 of 27 March 2003 or the UPOV 'test guidelines' (TG) protocol TG/14/8 of 20 October 1995. The CPVO informed the examination office that they had based their report on the incorrect protocol: UPOV TG/14/8 (adopted in 1995) should have been applied, as it was the protocol in force on the date on which the candidate variety was tested in January 1999.

The examination office declared the candidate variety distinct from the reference variety on the basis of the additional characteristic 'fruit: width of stripes'. Elaris SNC and its exclusive licensee ('the interveners') lodged objections to the grant of the CPVR to the candidate variety 'Gala Schnitzer'. The objections were rejected and the CPVR granted. On 14 December 2006, followed by a corrigendum of 5 February 2007, the president of the CPVO authorised the use of the additional characteristic to establish distinctness.

The interveners filed two appeals against said decisions. The appeals were upheld by the BoA. The BoA annulled the decision granting the CPVR and the decision dismissing the objections and rejected the application for the CPVR. Following an action before the General Court, the BoA decisions were annulled by a judgment of 13 September 2010 in Case T-135/08. The BoA therefore resumed the appeals in order to deal with the claim of lack of distinctness put forward by the right holder and the licensee of the reference variety. By a further decision of 20 September 2013, the BoA again cancelled both decisions and rejected the application for a CPVR.

On 10 February 2014, Schniga GmbH (the applicant before the General Court) brought two actions against the BoA decisions before the General Court seeking the annulment of the decisions of the BoA.

Decision. The judgment of the Court is based on the following three major issues: (1) the protocols and test guidelines applicable ***ratione temporis***; (2) the relationship between the respective protocols and test guidelines of the CPVO and UPOV; and (3) the legal nature of protocols and test guidelines adopted by the Administrative Council of the CPVO and their binding effect on its president.

As regards, first, the determination of the protocols and guidelines applicable ***ratione temporis***, according to the general legal principle of ***tempus regit actum***, procedural rules (such as those contained in CPVO-TP/14/1) are generally taken to apply from the date on which they enter into force. The applicability of this principle to the case at hand is confirmed by Article 22(2) of the PR under which, according to the Court's interpretation, new test guidelines adopted by the Administrative Council are, as a general rule, directly applicable to ongoing examination procedures. Therefore, the CPVO protocol of 2003 should have been applied since it entered into force during the technical examination. Moreover, if the president of the CPVO makes use of the power under Article 23(1) of the PR, Article 22(2) of the same regulation must apply as well. Finally, the contention that the president had the power to exercise his discretion at any stage of the procedure to add an additional characteristic was also disputed by UPOV TG/1/3, Sections 6.2 and 7.2, which stipulate that the relevant characteristics for the purposes of DUS testing are determined by reference to the variety description established on the date of the grant of protection and not by reference to the variety description established on the date when the application was lodged. The fact that, in the designation agreement, reference was made to UPOV guidelines where no CPVO technical protocols had been adopted for the technical examination was irrelevant. In fact, such reference does not prejudice the applicability of any test guidelines that may be adopted by the CPVO in the course of the technical examination. Therefore, the BoA correctly held that the applicable technical protocol was the CPVO one from the date of entry into force. The procedural requirements contained in said protocol were not fulfilled.

Second, as regards the relationship between CPVO protocols and UPOV guidelines, the Court established that the fact that the EU is a member of the UPOV convention does not mean that UPOV guidelines must take precedence over protocols drawn up by the CPVO in the hierarchy of norms. According to UPOV TG/1/3 ('General introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants'), said guidelines are only recommendations that have no legal binding effect. Therefore, in the event of divergence, CPVO technical protocols prevail over UPOV guidelines.

Third, according to the Court, unlike UPOV guidelines, CPVO test protocols are deemed to be akin to legal rules, as they are officially adopted by the Administrative Council of the CPVO and are published in the ***Official Gazette of the Community Plant Variety Office***. Therefore, their procedural rules are binding and limit the president of the CPVO's powers of discretion. Hence, the procedure for the adoption of additional characteristics established by said CPVO protocol of 2003 was breached.

Finally, as regards the fact that the additional characteristic on the basis of which distinctness was established was only tested during a single growing cycle, the Court confirmed the assessment made by the BoA. According to the Court, the fact that the result of the technical examination was based on a characteristic observed during only one growing cycle was a breach of the rules of the applicable protocol that establish that characteristics must be observed at least during two independent growing cycles.

Conclusion. The Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Oksana

Case T-767/14, *Boomkwekerij van Rijn-de Bruyn BV* v *CPVO, Artevos GmbH, Dachverband Kulturpflanzen- und Nutztiervielfalt eV*

13.7.2017

Keywords. Commercialisation, common knowledge, distinctness, entitlement, evidence of commercialisation, novelty, objections, plant material.

Result. The General Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 8 June 2005, Boomkwekerij van Rijn-de Bruyn BV (the applicant before the CPVO) filed an application (No 2005/1046) for a CPVR for the pear variety with the denomination 'Xenia' and subsequently, from 22 October 2010 onwards, the denomination 'Oksana', belonging to the species ***Pyrus communis*** L. The technical examination was carried out by the Bundessortenamt (the German Federal Plant Variety Office) in accordance with Article 55(1) of the BR.

During the examination, the examination office found out that the candidate variety had already been listed in Moldova and Ukraine. Moreover, it had been in the reference collection of the Bundessortenamt for more than 20 years and it had been sold in Switzerland under the name 'Noiabriskaia Novembra' for the past 6 years.

By an email of 30 November 2005, the breeder, the Research Institute for Horticulture, Moldova, asserted that it had not sold the candidate variety for the purposes of commercial exploitation. On 16 October 2007, Artevos GmbH ('the intervener') lodged an objection against the grant of a CPVR to the candidate variety on the grounds of lack of novelty.

The breeder sent two letters, dated 8 August 2008, to the director and the representative of the intervener – and later also sent a copy to the CPVO – in which, on the basis of its intellectual property rights (referred to as 'copyright'), it requested that the intervener cease all production and sale of the fruit tree of the variety 'Noiabriskaia', which belonged to the candidate variety, and withdraw its objection to the application for a CPVR. It also stated that, at the end of the 1980s, the candidate variety had been sent to the Dresden-Pillnitz Institute for Fruit Growing, Germany, for research purposes, in the context of a cooperation agreement, and that the institute could have transferred the candidate variety to other federal collections without its authorisation.

By an email of 9 February 2011, the examination office confirmed that the candidate variety was identical to the variety 'Noiabriskaia', for which plant material had been propagated in a nursery in Magdeburg, Germany, and commercialised in the former German Democratic Republic since 1985.

On 31 January, 14 March and 10 November 2011, the CPVO received three further objections on the basis of lack of novelty, to which the applicant replied that any growing activity since 2000 had been of trees planted for testing and examination purposes only.

By a decision of 29 July 2013, the CPVO rejected the application for a CPVR on the grounds of lack of novelty within the meaning of Article 10 of the BR, based on the fact that the candidate variety was the same as the variety 'Noiabriskaia', which was commonly known and had also been sold for a number of years, as proven by the invoices annexed to the objections.

On 6 September 2013, Boomkwekerij van Rijn-de Bruyn BV (the applicant before the General Court) lodged a notice of appeal against the rejection decision and the decision upholding the four objections.

By a decision of 2 July 2014 (Case A007/2013), the BoA dismissed the applicant's appeal and established that the candidate variety lacked novelty. The BoA took account of various matters in reaching its conclusion that the candidate variety was not new. It stated that it was clear from the information in the file that the candidate variety was similar in all its characteristics to the variety called 'Noiabriskaia', which had been developed between 1962 and 1969 and had been added to the collection at Wurzen in 1982, at the latest, and subsequently also to the Bundessortenamt's reference collection.

On 17 November 2014, the applicant brought an action against the BoA's decision before the General Court, seeking its annulment.

The applicant essentially put forward two pleas in law. The first plea in law referred to an infringement of Article 75 of the BR – that a decision of the CPVO must only be based on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing. The applicant based its claims on, on the one hand, the alleged failure of the CPVO to forward the email from the Bundessortenamt of 24 August 2005 – in which the Bundessortenamt informed the CPVO that some clarification was needed regarding the novelty of the variety – until 3 April 2014, and, on the other hand, the two letters from the breeder of 8 August 2008. The applicant claimed that it had not been in a position to exercise its right to be heard until the oral part of the procedure before the BoA.

The second plea in law referred to an infringement of Article 10 of the BR. According to the applicant, the plant material sold under the name 'Noiabriskaia' or 'Noiabriskaia Novembra' did not belong to the candidate variety and the BoA erred in its assessment concerning the novelty of the candidate variety within the meaning of Article 10 of the BR.

Decision. The Court ruled first on the plea of inadmissibility raised by the CPVO in respect of several exhibits annexed to the application. In this regard, the Court found that the new documents were inadmissible, as they were not produced in the context of the proceedings before the CPVO.

Concerning the first plea in law, on the deficiencies in the forwarding of documents to the applicant, the Court found that even if the CPVO had made a mistake in not sending said documents to the applicant, the applicant had still received them before the BoA hearing. Therefore, the documents could still be subject to observations by the applicant and could still be discussed at that time. The applicant did not establish how its defence might have been better assured had the documents been available earlier and therefore the adversarial principle and the rights of the defence had been duly respected.

Conclusion. The General Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Seimora and Sumost 02

Joined Cases T-425/15, T-426/15 and T-428/15, *Ralf Schräder* v *CPVO, Jørn Hansson*

4.5.2017

Keywords. Annulment, assignment, cancellation, distinctness, entitlement, nullity, objections, uniformity, variety verification, non-partiality.

Result. The General Court dismissed the actions and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 17 December 2001, the intervener (Jørn Hansson) was granted a CPVR for the variety 'Seimora', belonging to the ***Osteospermum ecklonis*** species. The parties to the proceedings acknowledged that the 'Seimora' variety was identical to the variety protected in Japan under the denomination 'Orange Symphony' in 1997 by its breeder, Mr Masayuki Sekiguchi.

On 26 November 2001, Mr Schräder (the applicant before the CPVO, later nullity petitioner) filed an application for a CPVR for the variety 'Sumost 02', of the same species as 'Seimora'. The intervener lodged an objection to the grant of a CPVR to the variety 'Sumost 02' on the grounds of its lack of distinctness from 'Seimora'.

In 2004, Mr Schräder filed a request for the cancellation of the CPVR granted to the variety 'Seimora' on the grounds of lack of uniformity. Consequently, at the same time as the technical examination of the variety 'Sumost 02', the CPVO asked the Bundessortenamt (the German Federal Plant Variety Office) to undertake a technical verification of the variety 'Seimora'. In 2005, the Bundessortenamt noted a lack of uniformity. However, after the observations of the intervener, the CPVO decided to continue the technical examination in 2006 and 2007, and in 2007 the Bundessortenamt concluded that the variety 'Seimora' was uniform in the sense of Article 8 of the BR and found that 'Sumost 02' was not distinct from 'Seimora'.

In 2007, Mr Schräder filed a nullity petition against 'Seimora' on the grounds of lack of novelty, pursuant to Article 10 of the BR. In 2008, the nullity petitioner extended his request for nullity to cover lack of entitlement. By decisions of 21 September 2009, the CPVO rejected the cancellation and nullity petitions. By a decision of the same date, the CPVO upheld the objection filed by the intervener and rejected the application for the variety 'Sumost 02'.

Therefore, Mr Schräder lodged an appeal before the BoA against the decision to reject his application for the variety 'Sumost 02' (Case A007/2009), and one against the decision rejecting the cancellation request (Case A003/2010). Mr Schräder asked for the proceedings of the three cases to be adjourned until the CPVO had ruled on the nullity request. After the rejection of his request, Mr Schräder filed an objection with the BoA against suspected partiality. By a decision of 15 May 2012, the alternate BoA rejected the objection.

Mr Schräder filed a second objection with the BoA, declaring that its members had made an inappropriate, even excessive, use of their powers. This objection was also rejected by the alternate BoA.

By a decision of 24 February 2014, the CPVO rejected the nullity petition on the grounds that Mr Schräder could not prove that 'Orange Symphony' and 'Seimora' were identical, and that Mr Sekiguchi was the breeder of the variety.

In April 2014, Mr Schräder filed another appeal before the BoA against this decision, claiming that the parties to the proceedings had not disputed the fact that Mr Sekiguchi was the breeder of the variety and calling into question the authenticity of the deed of assignment dated January 2000 as submitted by the intervener, in which Mr Sekiguchi assigned his rights to the intervener for the variety 'Orange Symphony – Seimora'. By decisions of 24 February 2015, the BoA rejected all the appeals.

On 29 July 2015, Mr Schräder (the applicant before the General Court) brought an action against the BoA's decisions before the General Court seeking the annulment of the three BoA decisions (Cases A003/2010 (Case T-425/15), A002/2014 (Case T-26/15) and A007/2009 (Case T-428/15)).

Decision. As regards, first, the suspected partiality of the BoA's members put forward in both Case T-425/15 and Case T-428/15, the Court found that the BoA had not infringed Article 48 of the BR by continuing with the hearings in spite of Mr Schräder's objections and his request to adjourn the proceedings. The Court found no likely indication of any cause for suspicion of partiality of the BoA's members.

The second plea in law referred to the infringement of Articles 21 and 65 of the BR in Case T-425/15. Mr Schräder put forward that no supplementary technical verification should have been carried out in 2006 and 2007 and that the CPVO should have declared the variety 'Seimora' not uniform on the basis of the results of the first technical verification carried out by the Bundessortenamt in 2005. The Court found that according to Articles 53 to 65 of the BR, the CPVO cannot be prevented from proceeding to a supplementary technical verification when this is justified in view of the assessment of the results of the case. Thus, the CPVO had decided with good reason to continue the technical verification in 2006 and 2007.

Third, as regards Case T-426/15, Mr Schräder claimed that the decision in Case A002/2014 was vitiated by contradictions, so it infringed Article 75 of the BR. According to the Court, contradictions in the reasoning of the BoA could not lead to the annulment of the decision since it was undisputed between the parties to the proceedings that 'Orange Symphony' is the same variety as 'Seimora'. Moreover, the intervener, as the original breeder (if it were true that he had obtained the variety in Denmark) or the assignee (since Mr Sekiguchi had assigned the right to apply for protection in the EU to him), was entitled to apply. Therefore, the annulment of the decision of the BoA would have led to another decision to reject the nullity request again, thus resulting in a lack of legitimate interest on Mr Schräder's part in the annulment of the decision.

Fourth, concerning Case T-426/15, Mr Schräder claimed that the BoA had infringed Article 20 read in conjunction with Articles 11, 54 and 76 of the BR. Mr Schräder divided his plea into two parts. First, he argued that there was no proof that the assignment was valid. When applying for the CPVR at issue, the intervener had declared that he was the breeder of the variety and that he obtained it in Denmark, without mentioning the existing assignment. Moreover, the signature of Mr Sekiguchi on the assignment was not the same as on other documents. Second, according to the applicant, no evidence had been furnished that the assignment had been accepted by the intervener, as required by both Danish and Japanese legislation. The Court found no grounds for doubting the authenticity of the assignment document according to the legal principle that documents must be construed in accordance with their actual terms. Moreover, the difference between the signatures could be explained by the fact that one was in Latin script and the other in kanji. Consequently, the assignment was deemed valid and, according to Article 11 of the BR, the intervener was entitled to claim a CPVR for 'Seimora'. Finally, the acceptance of the assignment was implicitly, but necessarily, established in view of the filing of the application for a CPVR with the CPVO in the intervener's own name and in view of the fact that the document had been produced in legal proceedings.

Lastly, regarding Case T-428/15, the fifth plea in law was based on the infringement of Article 7 of the BR and infringement of the rules on the burden of proof and provision of evidence. In that respect, according to the applicant, the BoA made a mistake in declaring that the variety was deemed to be a matter of common knowledge since, if a variety is declared null and void under Article 20 of the BR, it must be deemed to have been lacking, from the outset, the attributes specified in the regulation. The Court stated that there was no need to rule on this question, for the reason that this plea would only have been successful if the decision had been set aside.

Conclusion. The General Court dismissed the appeals and ordered Mr Schräder to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

M 02205

Case T-140/15, *Aurora SRL* v *CPVO, SESVanderHave NV*

23.11.2017

Keywords. Applicable protocol and guidelines, distinctness, DUS test, variety description, growing cycles.

Result. The General Court annulled the decision of the BoA and remitted the case to the BoA. Moreover, it ordered the CPVO and the right holder to bear the costs of the proceedings, under Article 134(1) of the Rules of Procedure of the General Court.

Background. On 29 November 2002, SESVanderHave NV (the applicant before the CPVO) filed an application (No 2002/1973) for a CPVR for the sugar beet variety 'M 02205', belonging to the species ***Beta vulgaris*** L. ssp. ***vulgaris*** var. ***altissima*** Döll. On 18 April 2005, the CPVO granted the CPVR.

On 28 August 2012, Aurora SRL (the nullity petitioner, later appellant before the BoA) lodged a nullity petition pursuant to Article 20 of the BR, claiming that the successive corrections to the comparative distinctness report of the variety description showed that the variety 'M 02205' did not satisfy the distinctness requirement for the purposes of Article 7(1) of the BR. Following the concerns expressed by the nullity petitioner, the CPVO modified the comparative distinctness report accompanying the variety description of the CPVR granted. However, as this did not have an impact on the distinctness of the candidate variety, it rejected the nullity petition.

On 4 October 2013, Aurora SRL filed a notice of appeal with the BoA. In the statement of grounds for appeal, the appellant expressed, in particular, concerns about the source of the data relating to the reference variety 'KW 043', as included in the last and penultimate versions of the comparative distinctness report. By Decision A010/2013 of 26 November 2014, the BoA dismissed the appeal as unfounded, holding, in particular, that Aurora SRL had overestimated the importance of the comparative distinctness report, whereas, in fact, the document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the CPVR at issue.

On 24 March 2015, Aurora SRL (the applicant before the General Court) filed an action before the General Court seeking the annulment of the BoA decision and the declaration of nullity of the CPVR.

By a judgment of 23 November 2017, ***Aurora*** v ***CPVO – SESVanderHave*** (T-140/15, EU:T:2017:830), the Court annulled the decision of the BoA in appeal A010/2013. The applicant requested that the CPVO decision of 23 September 2013 on its nullity petition be reversed and the CPVR declared null and void for lack of distinctness.

Decision. The Court annulled the decision of the BoA on the following grounds. First, concerning the data on which the CPVO based the distinctness of the variety 'M 02205', the Court considered that, taking into account the serious doubts raised by the applicant as to whether the data used for reference variety 'KW 043' were sourced from its official variety description, the BoA did not duly fulfil its obligations when ensuring that the distinctive character of variety 'M 02205', compared with the reference varieties, was established on the basis of data derived from the comparative growing trials of 2003 and 2004.

Furthermore, the CPVO recognised that the last two versions of the comparative distinctness report did not correspond to the data collected from the comparative trials but to the official variety description for 'KW 043', admitting to non-compliance with the protocol rules stating that candidate varieties must be directly compared with reference varieties in growing trials, normally to be carried out in at least two independent growing cycles.

The BoA is required to use its broad investigative powers (as confirmed by a judgment of 8 June 2017, ***Schniga*** v ***CPVO***, C-625/15 P, EU:C:2017:435) in order to gather all factual and legal information necessary to exercise its discretion. In addition, the CPVO admitted at the hearing before the Court that the BoA was not in possession of the data from the trial at the time of the decision. The BoA failed to exercise its obligation to review the substance of the case.

The Court also noted that, under Article 73(3) of the BR, it has the competence not only to annul, but also to alter, the contested decision. However, its power to alter decisions does not have the effect of substituting its own assessment for that of the BoA where the latter has not taken a decision yet. Consequently, the case was remitted to the BoA.

Conclusion. The Court annulled the contested decision and remitted the case to the BoA. Moreover, it ordered the CPVO and the right holder to bear the costs of the proceedings, under Article 134(1) of the Rules of Procedure of the General Court.

Gala Schnico

Case T-445/16, *Schniga GmbH* v *CPVO*

23.2.2018

Keywords. DUS test, examination reports, extension of trial, growing conditions, off-types, refusal, request for complementary examination, testing conditions, uniformity.

Result. The General Court dismissed the action and ordered the applicant to pay the costs of the proceedings, in accordance with Article 134(1) of the Rules of Procedure of the General Court.

Background. On 17 September 2009, Schniga GmbH (the applicant before the CPVO) filed an application (No 2009/1807) for a CPVR for the apple variety 'Gala Schnico', belonging to the species ***Malus domestica*** Borkh.

During the application procedure, the applicant requested an additional year of testing, since the lack of uniformity in the fruit colouring observed in the samples of the candidate variety could have been due to differences in the propagating material and not to the genetic structure of the variety.

On 6 October 2014, the CPVO rejected the application on the grounds of the lack of uniformity observed during two growing cycles. The applicant requested to inspect the testing location. However, the CPVO answered that the variety was no longer under testing.

On 11 December 2014, the applicant filed a notice of appeal claiming that the rejection based on lack of uniformity was not substantiated, and neither was the refusal to grant another year of testing. Moreover, the CPVO had allegedly breached the principle of equal treatment by not granting the supplementary year of testing and destroyed the growing trial, which could have provided useful information.

On 22 April 2016, the BoA rejected the appeal, asserting that the technical examination had been carried out in conformity with the applicable technical protocol, that the lack of uniformity had been observed accordingly during two consecutive growing cycles and that the final report by the examination office allowed the CPVO to rightly conclude that the candidate variety was not sufficiently uniform. Accordingly, the BoA considered that a complementary examination was not justified.

On 5 August 2016, Schniga GmbH (the applicant before the General Court) brought an action for the annulment of said decision before the General Court. The applicant essentially claimed that the BoA had given an incorrect interpretation of the CPVO's ***ex officio*** obligation to investigate the facts relating to the technical examination and disputed the suitability of the location of the technical examination.

Decision. First, Schniga GmbH alleged a breach of the duty to state reasons pursuant to Article 75 of the BR. It claimed that the BoA did not explain why the CPVO had not further investigated the applicant's claim that in other regions the variety did not show the problems with uniformity observed during the technical examination. According to the Court, the duty to state reasons may be satisfied without it being necessary to reply expressly and exhaustively to all the arguments put forward by the parties, provided that the CPVO sets out the facts and legal considerations of essential importance in the decision. The Court therefore found that the statement of reasons in the contested decision was sufficient as it informed the applicant of the grounds for the contested decision in order to be able to exercise the right of defence, and allowed the Court to review its legality.

Second, Schniga GmbH claimed a breach of Articles 8 and 76 of the BR, as the technical examination was carried out in a location that did not allow the candidate variety to express the distinctive traits encoded in its genetic structure in a typical way and because the CPVO failed to examine the facts of the case of its own motion. In this respect, the Court stated that the examination office had been designated by a decision of the Administrative Council of the CPVO, taking the climatic conditions into account. Furthermore, the Court stated that the technical examination was carried out in accordance with CPVO-TP/14/2, which was not disputed, and secondly, that there was no reason to suppose that the expression of characteristic 39 had been prevented by the environmental conditions under which the technical examination was carried out.

Finally, Schniga GmbH submitted that there had been a breach of Article 57(3) of the BR and of the principle of equal treatment, based on the argument that the CPVO had not considered the necessity of a complementary technical examination and that the BoA had not carried out an adequate examination of the facts at issue, but merely adopted a formalistic point of view. In this respect, the Court confirmed the decision of the BoA when it stated that there was no scientific or technical reason to grant a 3rd year of examination since the results of 2012 and 2013 showed a lack of uniformity. Finally, as regards the principle of equal treatment, the Court stated that, unlike the present case, the other cases cited by the applicant in support of the request for another year of testing did not concern the examination of the uniformity of the varieties, but of their distinctness. Thus, the Court concluded that the reasons justifying the extension of the technical examination were not necessarily comparable.

Conclusion. The General Court dismissed the action and ordered the applicant to pay the costs of the proceedings, in accordance with Article 134(1) of the Rules of Procedure of the General Court.

M 02205

Case T-140/15 DEP, *Aurora SRL* v *CPVO, SESVanderHave NV*

27.9.2018

Keywords. Costs, lawyer's fees, recoverable costs, reimbursement, taxation of costs.

Result. The General Court ordered the CPVO to reimburse the applicant for EUR 36 690.

Background. On 29 November 2002, SESVanderHave NV (the applicant before the CPVO) filed an application (No 2002/1973) for a CPVR for the sugar beet variety 'M 02205', belonging to the species ***Beta vulgaris*** L. ssp. ***vulgaris*** var. ***altissima*** Döll. On 18 April 2005, the CPVO granted said right.

On 28 August 2012, Aurora SRL (the nullity petitioner, later appellant before the BoA) lodged a nullity petition pursuant to Article 20 of the BR, claiming that the consecutive corrections to the comparative distinctness report of the variety description showed that the variety 'M 02205' did not satisfy the distinctness requirement for the purposes of Article 7(1) of the BR. Following the requests put forward by the nullity petitioner, the CPVO modified the comparative distinctness report accompanying the variety description of the CPVR. However, as this did not have an impact on the distinctness of the candidate variety, it rejected the nullity petition.

On 4 October 2013, Aurora SRL filed a notice of appeal before the BoA. In the statement of grounds, the appellant expressed, in particular, concerns about the source of the data relating to reference variety 'KW 043', as included in the last and penultimate versions of the comparative distinctness report. By Decision A010/2013 of 26 November 2014, the BoA dismissed the appeal as unfounded.

On 24 March 2015, Aurora SRL (the applicant before the General Court) filed an action before the General Court for the annulment of the BoA decision and the declaration of nullity of the CPVR on the grounds of lack of distinctness. The Court annulled the contested decision and remitted the case to the BoA. Moreover, it ordered the CPVO and the right holder to bear the costs of the proceedings, under Article 134(1) of the Rules of Procedure of the General Court. By a letter of 5 December 2017, Aurora SRL asked the CPVO to pay the costs. The CPVO contested the amount requested.

In the absence of an agreement on the amount of the recoverable costs, Aurora SRL submitted an application for taxation of costs, pursuant to Article 170(1) of the Court's rules of procedure.

Decision. Pursuant to settled case-law showing that, in the absence of any provisions of EU law relating to fee scales, the Court must make an unfettered assessment of the facts of the case, taking into account the subject matter and nature of the dispute, its significance from the point of view of EU law, the difficulties presented by the case, the amount of work that the contentious proceedings generated for the agents or counsels involved and the economic interests the parties had in the dispute (see, to that effect, the order of 6 October 2009, 'Nadorcott', T-95/06 DEP, not published, EU:T:2009:389, paragraph 46, and the case-law cited).

The Court considered that, even taking into account the experience of the appointed lawyer, in view of the circumstances of the main proceedings set out above, the hourly rates claimed by the lawyer – which were, moreover, not substantiated by the appellant – did not appear to have been objectively necessary. Therefore, an hourly rate of EUR 300 was deemed appropriate for the dispute. Consequently, the Court carried out an equitable assessment of the amount of lawyer's fees recoverable by Aurora SRL from the CPVO on the basis of the criteria above in the amount of EUR 36 690.

Conclusion. The Court ordered the CPVO to reimburse the applicant for the amount of EUR 36 690.

Braeburn 78

Case T-177/16, *Mema GmbH LG* v *CPVO*

5.2.2019

Keywords. Admissibility, annulment, applicable protocol and guidelines, conduct of test, distinctness, DUS test, nullity, obligation to state reasons.

Result. The General Court found the action well founded, annulled the decision of the BoA and ordered the CPVO to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 20 May 2009, Mema GmbH LG (the applicant before the CPVO) filed an application for a CPVR for the apple variety 'Braeburn 78', belonging to the species ***Malus domestica*** Borkh**.**

On 18 December 2014, the CPVO rejected the application on the grounds of lack of distinctness from the closest reference varieties 'Royal Braeburn' and 'X9466'. The technical examination was conducted in accordance with the applicable CPVO technical protocol, TP/14/2.

On 24 February 2015, the applicant filed a notice of appeal claiming that the DUS technical examination had not been carried out according to the applicable rules. In particular, the applicant contested the appropriateness of the testing conditions in as much as they affected the skin colouration of the candidate variety and argued that the harvest maturity time identified by the examination office was inappropriate, which had led to inconclusive results. Therefore, characteristics such as the colour and striation of the variety's fruits were observed at an inappropriate time and were not assessed correctly.

By a decision of 15 December 2015, the BoA rejected the appeal as unfounded. The BoA relied on the expertise of the examination office as regards the observed characteristics, in particular in terms of the date of harvesting and the date of eating maturity of the relevant varieties to determine the stage at which all fruit characteristics have to be assessed. The BoA dismissed the appeal as the applicant did not put forward sufficient arguments and evidence to cast serious doubt on the correctness of the technical examination.

On 22 April 2016, Mema GmbH LG (the applicant before the General Court) brought an action before the General Court claiming that the decision of the BoA was not sufficiently justified. According to the applicant, the evidence submitted had not been taken into consideration as the BoA relied solely on the assessment carried out by the examination office without considering the arguments or the technical opinions provided by the applicant in support of the claims.

Decision. The Court referred to the general principles applicable to proceedings before the CPVO and its BoA. It noted that the CPVO enjoys broad discretion to exercise its functions, especially as regards the assessment of distinctness of a candidate variety. However, the CPVO must exercise said discretion in compliance with the principle of good administration, on the basis of which it must examine facts with caution and impartiality and take into consideration all factual and legal elements necessary to exercise said discretional power. Moreover, the CPVO must guarantee that all proceedings are applied correctly and effectively.

The Court also observed that, under Article 76 of the BR, the CPVO has an obligation to examine facts of its own motion where said facts refer to the technical examination of varieties. The same rules that apply to

the CPVO also apply to the BoA by virtue of Article 51 of the PR. Therefore, the BoA must examine facts with care and impartiality under the principle of good administration. The BoA may exercise any power that lies in the CPVO's competence, pursuant to Article 72 of the BR.

The Court held that the examination of the case by the BoA must be a full review of the file at the time when the decision was taken. Indeed, all factual and legal elements put forward by the parties to proceedings before both the CPVO and the BoA must be taken into consideration in the appeal proceedings. Irrespective of said factual and legal elements, the BoA has an obligation to verify whether a new decision confirming that of the CPVO needs to be taken or whether the CPVO was wrong and, therefore, a new decision should be adopted accordingly.

Regarding the technical examination, the Court observed that, according to CPVO-TP/14/2, the characteristics of the apple must be observed at the optimal maturity (Point III.5). In fact, the date of harvesting and the date of eating maturity are essential for a correct examination of the candidate variety. The possibility that the alleged non-compliance of the methodology applied by the examination office, as claimed by the applicant, could have had an impact on the assessment of distinctness in conformity with the applicable technical protocol's rules and procedures cannot be ruled out. The BoA failed to provide adequate reasoning pursuant to Article 75, first sentence, of the BR, according to which decisions of the CPVO/BoA must be duly justified.

However, the BoA limited its assessment by relying on the conclusions of the examination office without conducting any further investigation and without providing any reasoning as to why the points put forward by the examination office and the other evidence (namely the technical arguments put forward by the applicant) were to be considered irrelevant and therefore to be rejected.

Conclusion. The General Court found the action well founded, annulled the decision of the BoA and ordered the CPVO to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Pinova

Case T-765/17, *KIKU GmbH* v *CPVO, Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie*

11.4.2019

Keywords. Evidence of commercialisation, novelty, nullity, sale or disposal of variety constituents.

Result. The General Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 30 August 1995, Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie (the applicant before the CPVO) filed an application (No 1995/1072) for a CPVR for the apple variety 'Pinova', belonging to the species ***Malus domestica*** Borkh. On 15 October 1996, the CPVO granted the CPVR.

On 4 December 2014, KIKU GmbH (at the time, nullity petitioner, later appellant before the BoA) filed a nullity request on the basis of lack of novelty pursuant to Article 10(1)(b) in conjunction with Article 116(1) and (2) of the BR.

KIKU GmbH claimed that the variety could have been marketed from 5 June 1986 onwards, the date on which the German Democratic Republic had granted a plant variety right (***Wirtschaftssortenschutz***) to the variety at issue. However, to be eligible for the CPVR protection, the variety must not have been commercialised prior to 1 September 1988, the date on which the 6-year grace period for lack of novelty established by Article 10(1)(b) in conjunction with Article 116(1) and (2) of the BR started. Furthermore, KIKU GmbH referred to advertisements on certain websites and in brochures from the right holder that showed that the variety had been 'on the market since 1986'.

The right holder, on the other hand, stated that even though 'Pinova' could have been marketed from 5 June 1986, it was only made available to certain authorised growers, solely for testing purposes, and that this situation fell outside the scope of Article 10(2) of the BR.

On 20 June 2016, the CPVO rejected the nullity request. On 27 July 2016, KIKU GmbH filed a notice of appeal claiming that the assessment of novelty carried out by the CPVO was not correct. The appeal was dismissed by the BoA on the grounds that the evidence and arguments provided by the appellant did not adequately support its claims.

On 23 November 2017, KIKU GmbH (the applicant before the General Court) filed an action before the General Court for the annulment of the contested decision, essentially arguing that it lacked justification and was incorrect in terms of its substance, namely the assessment of the novelty criteria.

Decision. The Court preliminary observed that the appeal did not lack clarity as claimed by the intervener in the inadmissibility claim it raised.

On the substance, as regards nullity proceedings, the Court acknowledged the broad discretion of the CPVO in assessing the validity of CPVRs.

Nullity proceedings may be initiated by the CPVO ***ex officio*** or on the request of a third party. The nullity petitioner must adduce facts and evidence capable of raising serious doubts as to the legality of the CPVR.

The Court must carry out a review of the legality of the decisions of the BoA on the basis of facts that do not require a complex technical assessment. Therefore, it proceeded to the examination of the evidence concerning the alleged lack of novelty, this being a non-technical issue.

The Court analysed the probative value of documents, namely invoices, delivery notes, turnover statements, witness statements from purchasers and leaflets. Finally, the Court established that activities constituting tests on the variety that do not involve the sale or disposal of the material to third parties for the purposes of exploitation of the variety do not invalidate its novelty within the meaning of Article 10 of the BR.

Conclusion. The Court dismissed the action and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Cripps Pink

Case T-112/18, *Pink Lady America LLC* v *CPVO and Western Australian Agriculture Authority*

24.9.2019

Keywords. Commercialisation, evidence of commercialisation, grace period, novelty, nullity, sale or disposal of variety constituents.

Result. The General Court dismissed the action in its entirety and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

Background. On 29 August 1995, Western Australian Agriculture Authority (the applicant before the CPVO) filed an application (No 1995/1039) for a CPVR for the apple variety 'Cripps Pink', belonging to the species *Malus domestica* Borkh. On 15 January 1997, the CPVO granted the CPVR.

On 26 June 2014, Pink Lady America LLC (the nullity petitioner, and later appellant before the BoA) filed a nullity request on the grounds of lack of novelty. According to the applicant, the variety had been commercialised in Australia from 1985 and well before 1 July 1992. Pink Lady America LLC claimed that, as the variety had been put on the market in Australia before the applicable novelty-bar date, the information regarding the first date of commercialisation submitted in the application form to the CPVO was incorrect.

As regards the interpretation of Articles 10 and 116 of the BR, Pink Lady America LLC claimed that novelty is assessed in accordance with Article 10 to ensure that the grace periods referred to therein are met. Secondly, for the application to be subject to the transitional regime under Article 116, the date of the application must fall within 1 year of the entry into force of the BR. The transitional regime affects the duration of the grace period provided for pursuant to Article 10(1)(a), namely that concerning the first date of commercialisation within the territory of the EU. The grace period regarding the first date of commercialisation outside the territory of the EU is not subject to derogations under the transitional regime. Finally, the derogation under Article 116 of the BR is without prejudice to the provisions of Article 10(2) and (3).

Accordingly, Pink Lady America LLC submitted that the relevant commercialisation dates were as follows.

- **Within the EU.** 1 September 1988, as Article 116 of the BR applies and changes the provisions of Article 10(1)(a).
- **Outside the EU.** 29 August 1989, as Article 10(1)(b) of the BR is unaffected by Article 116.

The CPVO rejected the nullity request. The CPVO also observed that a third party seeking the annulment of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to legality of the grant of the right.

On 18 November 2016, Pink Lady America LLC filed a notice of appeal requesting that the BoA declare the CPVR null and void on the grounds of lack of novelty pursuant to Article 10(1)(a) and (b) of the BR or, alternatively, pursuant to only Article 10(1)(b), in conjunction with Article 116, pursuant to Article 20(1)(a) and (2) of the BR.

By a decision of 14 September 2017, the BoA dismissed the appeal and confirmed the reasoning of the CPVO that no evidence had been submitted that showed any sales or acts of disposal of the variety had been carried out within the EU earlier than 6 years before the date of entry into force of the BR.

On 23 February 2018, Pink Lady America LLC (the applicant before the CPVO) brought an action before the General Court for the annulment of the contested decision and of the CPVR on the grounds of lack of novelty.

Decision. First, by opening nullity proceedings, the CPVO acknowledged that the nullity petitioner had raised serious doubts that might justify a re-examination of the 'Cripps Pink' variety by means of nullity proceedings and initiated adversarial proceedings. However, the admissibility of the nullity petition does not affect the Court's assessment of the merits of the case.

Second, as regards the interpretation of Article 116 of the BR on the transitional regime, the Court acknowledged the BoA's assessment, in particular regarding the extension of the grace periods provided for under Article 10 of the BR. As the application for a CPVR was submitted within 1 year of the entry into force of the BR, two grace periods were applicable: first, for sales and acts of disposal of the variety within the territory of the EU, a period of 6 years before the entry into force of the BR; second, for sales or acts of disposal of the variety outside the EU, a period of 6 years before the filing of the CPVR application.

Third, as regards the probative value of the evidence submitted by the applicant to prove the lack of novelty, the Court found a lack of convincing evidence that the variety had been sold or disposed of to third parties by or with the consent of the breeder for the purposes of commercial exploitation. The Court considered the items provided by the applicant not conclusive enough to establish that a 'novelty-destroying' act took place before the applicable grace periods.

Fourth, as regards the interpretation of the concept of exploitation under Article 10 of the BR, this excludes commercial trials carried out for the sole purpose of exploitation.

Finally, as regards the late submission of evidence, not filed in the BoA proceedings, the applicant did not furnish any explanation for the delayed submission. According to settled case-law, the Court is required to assess the legality of decisions of the BoA by reviewing the BoA's application of EU law, particularly in light of facts that were submitted during the proceedings. In carrying out such a review, the Court cannot take into account facts that are only produced for the first time before it, and on which the BoA could therefore not have taken a decision.

Conclusion. The General Court dismissed the action in its entirety and ordered the applicant to bear the costs of the proceedings, pursuant to Article 134(1) of the Rules of Procedure of the General Court.

M 02205

Case T-278/19, *Aurora SRL* v *CPVO, SESVanderHave NV*

13.3.2020

Keywords. Admissibility, distinctness, nullity.

Result. The General Court dismissed the action and ordered each party to bear its own costs under Articles 134(1) and 135(1) of the Rules of Procedure of the General Court.

Background. On 29 November 2002, SESVanderHave NV (the applicant before the CPVO) filed an application (No 2002/1973) for a CPVR for the sugar beet variety 'M 02205', belonging to the species ***Beta vulgaris*** L. ssp. ***vulgaris*** var. ***altissima*** Döll. On 18 April 2005, the CPVO granted the CPVR.

On 28 August 2012, Aurora SRL (the nullity petitioner, later appellant before the BoA) lodged a nullity petition pursuant to Article 20 of the BR, on the grounds that the successive corrections to the comparative distinctness report of the variety description showed that the variety 'M 02205' did not satisfy the distinctness requirement for the purposes of Article 7(1) of the BR. Following the requests of the nullity petitioner, the CPVO modified the comparative distinctness report accompanying the variety description. However, as this did not have an impact on the distinctness of the candidate variety, it rejected the nullity petition.

On 4 October 2013, Aurora SRL filed a notice of appeal before the BoA. In the statement of grounds, the appellant claimed, in particular, that the source of the data relating to the reference variety 'KW 043', as included in the last and penultimate versions of the comparative distinctness report, did not originate from the growing trial of the candidate variety. By Decision A010/2013 of 26 November 2014, the BoA dismissed the appeal as unfounded, holding, in particular, that Aurora SRL had overestimated the importance of the comparative distinctness report, whereas, in fact, the document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the CPVR at issue.

On 24 March 2015, Aurora SRL (the applicant before the General Court) filed an action before the General Court for the annulment of the BoA decision and the declaration of the right granted as null and void.

By a judgment of 23 November 2017 in Case T-140/15, the Court annulled the decision of the BoA in appeal A010/2013. The applicant requested that the CPVO decision of 23 September 2013 on its nullity petition be reversed and that the CPVR granted be declared null and void on the grounds of lack of distinctness. The Court established that by failing to ensure that the distinctive character of the variety 'M 02205' compared with the reference varieties was established on the basis of data derived from the comparative growing trials of 2003 and 2004, the BoA had not duly fulfilled its obligations. Pursuant to Article 73(3) of the BR, the Court has the competence not only to annul, but also to alter, decisions of the BoA. Nevertheless, the Court's power to alter decisions does not have the effect of allowing it to substitute its own assessment for that of the BoA. Consequently, the case was remitted to the BoA.

By a decision of 27 February 2019, in Case A010/2013 RENV, the BoA established that, in its first decision, it failed to prove that the re-examination by the CPVO was comprehensive and objective. In particular, the analysis of the evidence submitted by the applicant was not exhaustive since the technical data from the examination office were not in the CPVO's possession when the contested decision was adopted. Furthermore, the identity of the notes of expression of the reference variety 'KW 043' in the comparative

distinctness report with the notes contained in its official variety description supported the applicant's argument that these notes were sourced from the official variety description and not from the comparative growing trials carried out in 2003 and 2004. Moreover, the contested CPVO decision was annulled and the case remitted to the competent body of the CPVO. In particular, the BoA established that said competent body had to carry out a full and complete examination and analysis to verify the accuracy of the notes on the relevant characteristic (i.e. 'leaf blade: green colour', which was deemed not to be distinct from the variety of common knowledge 'KW 043', according to the appellant).

On 26 April 2019 Aurora SRL (the applicant before the Court) lodged an action before the Court requesting that the CPVR granted be delared null and void. The applicant submitted that, pursuant to Article 72 of the BR, the BoA had the power to declare the CPVR null and void and considered it to have failed to exercise this power by remitting the case to the competent body of the CPVO. Accordingly, the BoA could have ruled on the nullity request, as there were no longer any technical aspects to be assessed.

Decision. The Court acknowledged the broad discretion of the BoA and stated that the remittal of the case to the competent body of the CPVO fell under the powers of the BoA pursuant to Article 72 of the BR. Moreover, it observed that, contrary to the appellant's opinion, there were still technical issues left to be assessed.

Moreover, according to the Court, the BoA rightly found that the CPVO committee to which it remitted the case had to examine whether the 'leaf blade: colour' characteristic was relevant for the purposes of distinguishing the variety at issue from any other variety. To that end, in accordance with Judgment T-140/15, the BoA rightly required the CPVO committee to carry out a complete examination and analysis to verify the accuracy of the notes regarding the 'leaf blade: colour' characteristic and to examine whether that characteristic was sufficiently stable and reliable to be taken into account for the purposes of determining whether the variety at issue could be deemed 'clearly distinguishable' from any other variety of common knowledge.

As regards the claim on the alteration of the contested decision by the General Court, the Court confirmed that its power could not have the effect of substituting its own assessment for that of the BoA or of assessing an issue on which the BoA did not take a decision. Therefore, as the contested decision did not assess the validity of the CPVR and remitted the case to the competent CPVO committee, the Court rejected the request for alteration put forward by the applicant.

Conclusion. The Court dismissed the action and ordered each of the parties to bear their own costs under Articles 134(1) and 135(1) of the Rules of Procedure of the General Court.

Siberia

Case T-737/18, *Siberia Oriental BV* v *CPVO*

25.6.2020

Keywords. Expiry date, decisions subject to appeal, correction of errors.

Result. The General Court dismissed the action and ordered the applicant to bear its own costs and those incurred by the CPVO.

Background. On 28 July 1995, Siberia Oriental BV (the applicant before the CPVO, later appellant before the BoA) filed an application (No 1995/0101) for a CPVR for the variety 'Siberia', belonging to the species ***Lilium*** L. On 2 August 1996, the CPVO granted the CPVR and set the date of expiry of the right at 1 February 2018.

On 24 October 2011, the applicant asked the CPVO for clarification as to the method that had been used to calculate the duration of the CPVR in respect of the variety 'Siberia', to which the CPVO replied on the following day. From 2015 to 2017 the CPVO and the applicant further continued their exchanges regarding the method of calculation for the duration of said CPVR.

On 24 August 2017, the applicant requested that the CPVO amend the date of expiry of the CPVR for the variety 'Siberia', replacing the date set with that of 30 April 2020.

By a decision of 23 October 2017 the CPVO declared the application for the amendment of the expiry date inadmissible. The reasons provided by the CPVO were, first, that the 2-month deadline for submitting an appeal had expired; second, that the decision of the CPVO was not vitiated by linguistic errors, errors of transcription or patent mistakes as per Article 53(4) and (5) of the PR; and third, that there was no legal basis for amending the date of entry of the CPVR in the register.

On 23 November 2017, the applicant brought an appeal against the decision of 23 October 2017, also asking for an interlocutory revision pursuant to Article 70 of the BR.

By a decision of 8 December 2017 the CPVO refused the application for an interlocutory revision.

By a decision of 15 October 2018 the BoA dismissed the appeal as inadmissible. It considered, in the first place, that Articles 67 and 87 of the BR referred to the initial entry in the register of the date of expiry of a CPVR granted and not to the amendment of that entry, and that therefore the appeal could not be based on those articles. In the second place, it also found that the decision of 23 October 2017 was not open to appeal pursuant to Article 67(1) of the BR. In the third place, the BoA stated that a supposed error in the calculation of the date of expiry of a CPVR cannot be considered a patent mistake within the meaning of Article 53(4) of the PR. And finally, the BoA considered that the appeal had been lodged after the 2-month time limit laid down in Article 69 of the BR and that, consequently, it was inadmissible.

On 17 December 2018, Siberia Oriental BV (the applicant before the General Court) brought an action before the General Court asking the Court to annul the contested decision and to order the CPVO to enter the date of 30 April 2020 in the register instead of the date of expiry currently set out therein.

The reasons cited by the applicant were that the BoA had, on the one hand, failed to state its reasons and, on the other hand, erred in law in declaring the action brought before it as inadmissible.

Decision. The Court analysed, in the first place, the admissibility of the action. In this regard, it declared that the second claim was inadmissible as it is not for the Court to issue orders to the CPVO, but for the CPVO to draw the appropriate inferences from the operative parts and grounds of judgments of EU courts.

The Court also declared that the arguments contained in documents submitted by the applicant in the course of the administrative procedure before the CPVO were not admissible in the action before the Court as the application did not contain the essential elements of fact and law on which the action was based. Moreover, the Court also acknowledged that said documents from the administrative procedure were not annexed to the application.

Subsequently, the Court concentrated on the substance of the action, where it started by analysing the second claim brought by the applicant. In this respect, and regarding the alleged infringement of Articles 67 and 87 of the BR, the Court said, in the first place, that the decision of the CPVO rejecting the application for the correction of the expiry date of the CPVR for 'Siberia' was not covered by Articles 67(1) and 87(2) of the BR on decisions subject to appeal. In this connection, it also stated that the applicant had not appealed against the decision of 2 August 1996 setting the date of expiry of the CPVR for the variety 'Siberia' at 1 February 2018 and that, therefore, said decision had become final. In this regard, the Court also declared that the applicant could not be allowed to reopen the period for appeal by arguing that its application for a correction was related to the entering or deletion of information in the register pursuant to Article 87 of the BR, as this would undermine the definitive nature of the decision on the grant of the CPVR. Moreover, the applicant did not allege the existence of new, material facts in support of its application.

Concerning the alleged infringement of Article 53(4) of the PR, the Court declared that, on the basis of the principle of legal certainty, the rule allowing corrections in exceptional circumstances was to be interpreted strictly. Furthermore, the Court declared that an amendment to the date of expiry of a CPVR would affect the scope and substance of the granting decision and that, accordingly, a request for an amendment could not be regarded as an application for the correction of a linguistic error, an error of transcription or a patent mistake within the meaning of Article 53(4) of the PR.

As regards the first plea in law, on the failure to state reasons, the Court considered that, contrary to the applicant's allegations, the BoA had stated adequate grounds when declaring that it was not possible to appeal against a refusal from the CPVO to exercise its power to correct, of its own motion, mistakes in the register.

Conclusion. The General Court dismissed the action and ordered the applicant to bear its own costs and those incurred by the CPVO.

2.2.2. Court of Justice

Gala Schnitzer

Case C-625/15 P, *Schniga GmbH* v *CPVO, Brookfield New Zealand Ltd, Elaris SNC*

8.6.2017

Keywords. Distinctness, additional characteristic, applicable protocol and guidelines.

Result. The Court of Justice set aside the judgment of the General Court, annulled the BoA decision and remitted the case to the competent body of the CPVO for the continuation of the technical examination. It ordered the CPVO to bear its own costs for the proceedings and those of the appellant, and ordered the interveners to bear their own costs, pursuant to Article 138(1) of the Rules of Procedure of the Court of Justice.

Background. On 18 January 1999, Schniga GmbH (the applicant before the CPVO) filed an application (No 1999/0033) for a CPVR for the apple variety 'Gala Schnitzer', belonging to the species ***Malus domestica*** Borkh. Due to a viral infection in the plant material submitted for DUS testing, the technical examination was stopped and then resumed in spring 2002, after Schniga GmbH had been allowed to submit new, virus-free material of the candidate variety. For the purposes of the technical examination, the variety 'Baigent', considered to be the closest to the candidate variety, was used as the reference variety. The examination office found the candidate variety distinct from the reference variety, which was owned by Elaris SNC, on account of the additional characteristic 'fruit: width of stripes', not included in either CPVO-TP/14/1 of 27 March 2003 or UPOV TG/14/8 of 20 October 1995. The CPVO informed the examination office that they had based their report on the incorrect protocol: UPOV TG/14/8 (adopted in 1995) should have been applied, as it was the protocol in force on the date on which the candidate variety was tested in January 1999.

The examination office declared the candidate variety distinct from the reference variety on the basis of the additional characteristic 'fruit: width of stripes'. Elaris SNC and its exclusive licensee ('the interveners') lodged objections to the grant of the CPVR for the candidate variety 'Gala Schnitzer'. The objection was rejected and the CPVR granted. On 14 December 2006, followed by a corrigendum of 5 February 2007, the president of the CPVO authorised the use of the additional characteristic to establish distinctness.

The interveners filed two appeals against said decisions, which were upheld by the BoA. The BoA annulled the decision granting the CPVR and the decision dismissing the objections, and rejected the application for a CPVR. Following an action before the General Court, the BoA decisions were annulled by a judgment of 13 September 2010 in Case T-135/08. The BoA therefore resumed the appeals in order to deal with the claim of lack of distinctness put forward by the right holder and the licensee of the reference variety. By a further decision of 20 September 2013, the BoA again cancelled both decisions and rejected the application for a CPVR.

On 10 February 2014, the applicant brought two actions before the General Court, seeking the annulment of the BoA decisions.

The General Court dismissed the applicant's action and found that the procedural provisions laid down in CPVO-TP/14/1 were applicable to the application for the candidate variety. Moreover, the Court noted that, despite the power granted to the president of the CPVO by the implementing regulation to insert additional

characteristics, in this case the president did not have the power to authorise the use of a characteristic not listed in the applicable protocol during the technical examination of a variety, as it breached the procedural rules contained in the protocol. Finally, according to the Court, the technical examination clearly infringed both protocols by taking place over a period of only 1 year.

On 23 November 2015, Schniga GmbH (the appellant before the Court of Justice) filed a further appeal before the Court of Justice requesting that the Court set aside the judgment of 10 September 2015, ***Schniga*** v ***CPVO – Brookfield New Zealand and Elaris*** in joined Cases T91/14 and T92/14 (EU:T:2015:624).

Decision. The CPVO enjoys broad discretion in carrying out its functions, especially as regards the assessment of distinctness. The Court of Justice considered that the assessment of the characteristics of a plant variety necessarily contains a particular uncertainty due to the living nature of the plant and the length of time required to conduct the technical examination. According to the Court of Justice, the flexibility that allows the president the power to add further characteristics in respect of a variety is capable of ensuring the objectivity of the grant procedure. Therefore a CPVR application could not be rejected solely because a certain characteristic found during the examination, and which was decisive for assessing distinctness, was not mentioned in the technical questionnaire or in the applicable protocols or guidelines. Therefore, the General Court erred in law in considering that the president of the CPVO does not have the power to add a new characteristic that is not already mentioned in either the technical questionnaire completed by the applicant or the applicable test guidelines and protocols, in respect of a candidate variety under testing.

On the other hand, concerning the duration of the testing of the additional characteristic, the Court of Justice considered that the BoA erred in having refused the application based on the fact that the relevant characteristic had only been tested over one growing cycle, even though it was uncertain that said characteristic could not be repeated over two consecutive growing cycles. The BoA, when exercising a power that lies within the competence of the CPVO, has to carefully and impartially examine all the particularities of the application and gather all factual and legal information. Furthermore, the Court considered that when the CPVO took the granting decision in 2007, it relied solely on the final examination report. It was only after the grant date, on 8 August 2008, that the examination office informed the CPVO that the additional characteristic had also been examined in 2006 and 2007. According to the Court, the BoA should have remitted the case to the competent body of the CPVO for the continuation of the technical examination in order to ensure that the additional characteristic satisfied the requirement of repeatability.

Conclusion. The Court of Justice set aside the judgment of the General Court, annulled the BoA decision and remitted the case to the competent body of the CPVO for the continuation of the technical examination. The Court ordered the CPVO to bear its own costs for the proceedings and those of the appellant, and ordered the interveners to bear their own costs, pursuant to Article 138(1) of the Rules of Procedure of the Court of Justice.

Gala Schnico

Case C-308/18 P, *Schniga GmbH* v *CPVO*

8.11.2018

Keywords. DUS test, examination reports, growing conditions, off-types, refusal, request for complementary examination, uniformity, testing conditions.

Result. The Court of Justice dismissed the action and ordered the applicant to bear the costs of the proceedings, in accordance with Article 137 of the Rules of Procedure of the Court of Justice.

Background. On 17 September 2009, the applicant filed an application (No 2009/1807) for a CPVR for the apple variety 'Gala Schnico', belonging to the species ***Malus domestica*** Borkh.

During the application procedure, Schniga GmbH (the applicant before the CPVO) requested a supplementary year of testing, on the assumption that the lack of uniformity in the fruit colouring observed in the samples of the candidate variety could have been due to differences in the propagating material and not to the genetic structure of the variety.

On 6 October 2014, the CPVO rejected the application based on the lack of uniformity observed during two growing cycles. The appellant requested to inspect the testing location. However, the CPVO answered that the variety was no longer under testing.

On 11 December 2014, the applicant filed a notice of appeal claiming that the rejection based on lack of uniformity was not substantiated, and neither was the refusal to grant an additional year of testing. Moreover, the CPVO had allegedly breached the principle of equal treatment by not granting a further examination year and destroyed the growing trial, which could have provided useful information.

On 22 April 2016, the BoA rejected the appeal, reasoning that the technical examination had been carried out in conformity with the applicable technical protocol, that the lack of uniformity had accordingly been observed during two consecutive growing cycles and that the final report by the examination office allowed the CPVO to rightly conclude that the candidate variety was not sufficiently uniform. Accordingly, the BoA considered that a complementary examination was not justified.

The applicant brought an action before the General Court for the annulment of the decision of the BoA. The General Court dismissed the action, establishing that the contested decision was correct in its substance and adequately justified.

Schniga GmbH (the appellant before the Court of Justice) then lodged a further appeal with the Court of Justice against the judgment of 23 February 2018 in Case T-445/16. The appellant alleged that the General Court had wrongly interpreted the obligation of the CPVO to examine facts of its own motion, as established in Article 76 of the BR in connection with Article 72 of the same regulation. According to the appellant, the CPVO should have proposed, of its own motion, an extension of the technical examination period for the variety concerned or a new location for conducting the examination, in order to be able to rule out, with certainty, the possibility that the lack of uniformity was not due to genetic causes. Furthermore, the appellant claimed that its right to be heard had been breached.

Decision. As concerns, particularly, the extension of the period of the technical examination, the Court of Justice considered that the General Court had rightly reasoned and concluded that the examination had been conducted in conformity with the CPVO BR and the applicable technical protocol. It found that the results of the examination did not show any contradictions and that no atypical meteorological conditions occurred during the growing trials.

As regards the request to conduct the technical examination in another location, the Court of Justice observed that the selection of Angers as the location for the technical examination was based on an exhaustive preliminary study by the CPVO where the suitability of the climatic conditions for growing varieties of the species ***Malus domestica*** Borkh. had been duly assessed by experts.

Accordingly, the Court dismissed all of the appellant's arguments.

Conclusion. The Court of Justice dismissed the action and ordered the appellant to bear the costs of the proceedings, in accordance with Article 137 of the Rules of Procedure of the Court of Justice.

Pinova

Case C-444/19 P, *KIKU GmbH* v *CPVO, Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie*

16.9.2019

Keywords. Admissibility, novelty, nullity, obligation to state reasons.

Result. The appeal was rejected as inadmissible and the appellant was ordered to bear its own costs, pursuant to Article 137 of the Rules of Procedure of the Court of Justice.

Background. On 30 August 1995, Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie (the applicant before the CPVO) filed an application (No 1995/1072) for a CPVR for the apple variety 'Pinova', belonging to the species ***Malus domestica*** Borkh. On 15 October 1996, the CPVO granted the CPVR.

On 4 December 2014, KIKU GmbH (at the time, nullity petitioner, later appellant before the BoA) filed a nullity request on the grounds of lack of novelty, pursuant to Article 10(1)(b) in conjunction with Article 116(1) and (2) of the BR.

KIKU GmbH claimed that the variety could have been marketed from 5 June 1986 onwards, the date on which the German Democratic Republic had granted a plant variety right (***Wirtschaftssortenschutz***) to the variety at issue. However, to be eligible for the CPVR protection, the variety must not have been commercialised prior to 1 September 1988, the date on which the 6-year grace period established by Article 10(1)(b) in conjunction with Article 116(1) and (2) of the BR started. Furthermore, KIKU GmbH referred to advertisements on certain websites and in brochures from the right holder that showed that the variety had been 'on the market since 1986'.

The right holder, on the other hand, stated that even though 'Pinova' could have been marketed from 5 June 1986, it was only made available to certain authorised growers, solely for testing purposes, and that this situation fell outside the scope of Article 10(2) of the BR.

On 20 June 2016 the CPVO rejected the nullity request. On 27 July 2016, KIKU GmbH filed a notice of appeal claiming that the assessment of novelty carried out by the CPVO was not correct. The appeal was dismissed on the grounds that the evidence and arguments put forward by the appellant did not adequately support its claims.

On 23 November 2017, KIKU GmbH (at the time, applicant before the General Court) filed an action before the General Court for the annulment of the contested decision, alleging a wrong assessment of the novelty criteria. Nullity proceedings may be initiated by the CPVO ***ex officio*** or on the request of third parties. In the latter case, the nullity petitioner must provide facts and evidence capable of raising serious doubts as to the legality of the CPVR. In this connection, the Court concluded that the evidence submitted by KIKU GmbH was insufficient to prove a lack of novelty and, in particular, that activities of performing tests on the variety that do not involve the sale or disposal of the material to third parties for the purposes of exploitation of the variety do not invalidate the variety's novelty within the meaning of Article 10 of the BR. Accordingly, the Court dismissed the appeal.

On 11 June 2019, KIKU GmbH (the appellant before the Court of Justice) filed an appeal before the Court of Justice seeking the annulment of the judgment of 11 April 2019 in Case T-765/17. The appellant claimed that the General Court did not rule on the CPVO's obligation to investigate the facts of its own motion,

to the extent that the facts fall within the scope of the technical examination of the candidate variety, pursuant to Article 76 of the BR, and that it erred in the assessment of the novelty of the 'Pinova' variety.

Decision. Pursuant to Article 58(a) of the Statute of the Court of Justice of the European Union, the appeal is subject to a prior admissibility assessment, as it has to raise important questions about the unity, consistency or development of EU law (see Article 170(b) of the Rules of Procedure of the Court of Justice).

The questions raised by the appellant concerned the extent to which the CPVO may assess novelty in the context of nullity proceedings, and whether the transfer of plant material of a protected variety by the right holder for testing purposes affects the variety's novelty.

The Court considered that the appellant failed to provide convincing arguments and reasons as to why such questions are of importance for the unity, consistency or development of EU law.

Conclusion. The appeal was rejected as inadmissible and the appellant ordered to bear its own costs, pursuant to Article 137 of the Rules of Procedure of the Court of Justice.

Cripps Pink

Case C-886/19 P, *Pink Lady America LLC* v *CPVO, Western Australian Agriculture Authority*

3.3.2020

Keywords. Commercial exploitation, grace period, novelty, nullity, sale or disposal of variety constituents.

Result. The Court of Justice rejected the appeal as inadmissible and ordered the appellant to bear its own costs, pursuant to Article 137 of the Rules of Procedure of the Court of Justice.

Background. On 29 August 1995, Western Australian Agriculture Authority (the applicant before the CPVO) filed an application (No 1995/1039) for a CPVR for the apple variety 'Cripps Pink', belonging to the species ***Malus domestica*** Borkh. On 15 January 1997, the CPVO granted the CPVR.

On 26 June 2014, Pink Lady America LLC (the nullity petitioner, later appellant before the BoA) filed a nullity request for lack of novelty. According to the applicant, the variety had been commercialised in Australia from 1985 and well before 1 July 1992. Pink Lady America LLC claimed that, as the variety had been put on the market in Australia before the applicable novelty-bar date, the information regarding the first date of commercialisation submitted in the application form to the CPVO was incorrect.

As regards the interpretation of Articles 10 and 116 of the BR, Pink Lady America LLC claimed that novelty is assessed in accordance with Article 10 to ensure that the grace periods referred to therein are met. Secondly, for the application to be subject to the transitional regime under Article 116, the date of the application must fall within 1 year of the entry into force of the BR. The transitional regime affects the duration of the grace period provided for in Article 10(1)(a), namely that relating to the first date of commercialisation within the territory of the EU. The grace period regarding the first date of commercialisation outside the territory of the EU is not subject to derogations under the transitional regime. Finally, the derogation under Article 116 is without prejudice to the provisions of Article 10(2) and (3).

Accordingly, Pink Lady America LLC submitted that the relevant commercialisation dates were as follows.

- **Within the EU.** 1 September 1988, as Article 116 of the BR applies and changes the provisions of Article 10(1)(a).
- **Outside the EU.** 29 August 1989, as Article 10(1)(b) of the BR is unaffected by Article 116.

The CPVO rejected the nullity request. The CPVO also observed that a third party seeking the annulment of a plant variety right must adduce evidence and facts of a sufficient substance to raise serious doubts as to legality of the grant of the right.

On 18 November 2016, Pink Lady America LLC filed a notice of appeal requesting that the BoA declare the CPVR null and void on the grounds of lack of novelty, pursuant to Article 10(1)(a) and (b) of the BR or, alternatively, pursuant to only Article 10(1)(b) in conjunction with Article 116, pursuant to Article 20(1)(a) and (2).

By a decision of 14 September 2017, the BoA dismissed the appeal and confirmed the reasoning of the CPVO that no evidence had been submitted that showed any sales or acts of disposal of the variety carried out within the EU earlier than 6 years before the date of entry into force of the BR.

On 23 February 2018, Pink Lady America LLC brought an action before the General Court for the annulment of the contested decision and of the CPVR on the grounds of lack of novelty.

By a judgment of 24 September 2019 in Case T-112/18, the General Court dismissed the action.

On 3 December 2019, Pink Lady America LLC (the appellant before the Court of Justice) lodged an appeal before the Court of Justice for the annulment of the judgment of the General Court. According to the appellant, the General Court had misapplied Article 10(2) of the BR by finding that, despite evidence of intense commercial exploitation of the 'Cripps Pink' variety in Australia since 1985, the novelty of the variety was not called into question, given that other evidence proved that the disposal of specimens of the variety had been made 'for trial and evaluation purposes'. Moreover, according to the appellant, the General Court had based its findings on an incorrect interpretation of its own case-law by considering that the disposal by the breeder of the material of the protected variety, in the absence of an express reference to authorisation for commercial use, did not amount to consent to its use for purposes of commercial exploitation and that the scale of the exploitation of the variety at issue was not a factor demonstrating the commercial intent of the exploitation.

Decision. The Court of Justice observed that, pursuant to Article 58(a) of the Statute of the Court of Justice of the European Union, the appeal is subject to a prior admissibility assessment. An appeal has to raise important questions about the unity, consistency or development of EU law, pursuant to Article 170(b) of the Rules of Procedure of the Court of Justice.

In that respect, the appellant failed to identify with clarity the pertinent issue of law and its significance with respect to the unity, consistency and development of EU law.

According to the Court of Justice, the appellant sought, ultimately, a new assessment of the facts and evidence that had been submitted for assessment by the General Court.

Conclusion. The Court of Justice rejected the appeal as inadmissible and ordered the appellant to bear its own costs, pursuant to Article 137 of the Rules of Procedure of the Court of Justice.

3. TABLES OF DECISIONS

3.1. Decisions reached by the Board of Appeal from 2015 to 2020, by decision date

Table 1

Variety denomination	Case number	Decision reached	Date of decision	Rapporteur	Member	Chair	Further appeal	Page
Braeburn 78	A001/2015	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	15.12.2015	N. van Marrewijk	M. Köller	P. van der Kooij	T-177/16	5
Hort 04	A002/2015	1. The appeal is upheld and the CPVO Decision No R1344 of 9 February 2015 is annulled. 2. The BoA instructs the CPVO to order a third examination period in accordance with the appellant's cultivation guidelines, leaving it to the Bundessortenamt to decide whether the appellant must also submit new plant material for the purposes of continuing the examination. 3. The appellant must bear the costs of the appeal proceedings.	15.12.2015	A. van Wijk	K. Fikkert	P. van der Kooij	None	7
Tang Gold	A001/2014	1. The appeal is inadmissible. 2. The appellant must bear the costs of the appeal proceedings.	3.3.2016	H. Ghijsen	M. Pinheiro de Carvalho	P. van der Kooij	None	8
Tang Gold	A003/2014	1. The appeal is inadmissible. 2. The appellant must bear the costs of the appeal proceedings.	3.3.2016	H. Ghijsen	M. Pinheiro de Carvalho	P. van der Kooij	None	10
Gala Schnico	A005/2014	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	22.4.2016	D. Reheul	H. Ullrich	P. van der Kooij	T-445/16 C-308/18P	11
Tang Gold	A006/2014	1. The appeal is inadmissible. 2. The appellant must bear the costs of the appeal proceedings.	29.4.2016	H. Ghijsen	M. Pinheiro de Carvalho	P. van der Kooij	T-405/16	12
Tang Gold	A007/2014	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	29.4.2016	H. Ghijsen	M. Pinheiro de Carvalho	P. van der Kooij	None	14

Variety denomination	Case number	Decision reached	Date of decision	Rapporteur	Member	Chair	Further appeal	Page
Tang Gold	A008/2014	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	29.4.2016	H. Ghijsen	M. Pinheiro de Carvalho	P. van der Kooij	None	16
Markeep	A006/2015	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	15.8.2016	S. Stürmann	P. Sipos	P. van der Kooij	None	18
Starlight	A009/2015	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	22.8.2016	B. Rücker	P. de Heij	P. van der Kooij	None	20
Lemon Symphony	A006/2007 RENV	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	2.9.2016	A. Pohlmann	E. Scott	S. Haukka	None	22
Lemon Symphony	A007/2007 RENV	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	2.9.2016	A. Pohlmann	E. Scott	S. Haukka	None	23
Sumost 01	A005/2007 RENV	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings.	2.9.2016	A. Pohlmann	E. Scott	S. Haukka	None	25
Pinova	A005/2016	1. The appeal is admissible but not well founded and is therefore dismissed. Decision No NN 15 is upheld. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	16.8.2017	K. Fikkert	A. Pohlmann	P. van der Kooij	T-765/17 C-444/19P	27
Cripps Pink	A007/2016	1. The appeal is admissible but not well founded. Decision No NN 17 is upheld. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	14.9.2017	H. Johnson	O. Kirkorian-Tsonkova	P. van der Kooij	T-112/18 C-886/19P	29

Variety denomination	Case number	Decision reached	Date of decision	Rapporteur	Member	Chair	Further appeal	Page
Royal Braeburn	A001/2017	1. The appeal is dismissed. 2. The appellant must bear 50 % of the costs of the appeal proceedings, pursuant to Article 85(2) of the BR.	13.3.2018	N. van Marrewijk	Z. Szani	P. van der Kooij	None	31
Siberia	A009/2017	1. The appeal is rejected as inadmissible. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	15.10.2018	P. de Heij	M. Köller	P. van der Kooij	T-737/18	33
M 02205	A010/2013 RENV	1. The CPVO Decision No NN 010 of 23 September 2013 is annulled. 2. The case is remitted to the competent CPVO body. 3. The CPVO bears the costs of the appeal proceedings, including the costs incurred by the appellant. The other party to the proceedings bears its own costs.	27.2.2019	K. Riechenberg	M. A. Carvalho	S. Haukka	T-140/15	34
Oliver	A007/2018	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	17.5.2019	B. Rücker	I. Rukavina	P. van der Kooij	None	36
Gala Perathoner	A004/2016	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	17.1.2020	D. Reheul	K. Riechenberg	P. van der Kooij	T-182/20	38
Stark Gugger	A008/2018	1. The appeal is dismissed. 2. The appellant must bear the costs of the appeal proceedings, pursuant to Article 85(1) of the BR.	24.1.2020	H. Ghijsen	F. Lallouet	P. van der Kooij	T-181/20	39

Table 2

Variety denomination	Number of case before General Court	Date of appeal before General Court	Appealed decision	Date of General Court ruling	Ruling of General Court	Number of further appeal before Court of Justice	Date of further appeal	Date of Court of Justice ruling	Ruling of Court of Justice	Page
Gala Schnitzer	T-91/14 and T-92/14	10.2.2014	BoA decisions of 20.9.2013 in Cases A003/2007 and A004/2007	**10.9.2015**	The General Court dismissed the action and ordered Schniga GmbH to bear the costs.	C-625/15P		**8.6.17**	1. The Court of Justice set aside the judgment of the General Court of 10.9.2015 in *Schniga* v *CPVO – Brookfield New Zealand and Elaris (Gala Schnitzer),* T-91/14 and T-92/14. 2. Annulled the decision of the BoA of 20.9.2013 relating to the granting of a CPVR for the 'Gala Schnitzer' apple variety (in Cases A003/2007 and A004/2007). 3. Ordered the CPVO to bear its own costs and those of Schniga GmbH.	40/62
Oksana	T-767/14	17.11.2014	BoA decision of 2.7.2014 in Case A007/2013	**13.7.2017**	The General Court dismissed the action and ordered Boomkwekerij van Rijn-de Bruyn BV to bear the costs.	None				42

Variety denomination	Number of case before General Court	Date of appeal before General Court	Appealed decision	Date of General Court ruling	Ruling of General Court	Number of further appeal before Court of Justice	Date of further appeal	Date of Court of Justice ruling	Ruling of Court of Justice	Page
Seimora and Sumost 02	T-425/15, T-426/15 and T-428/15		BoA decisions in Cases A003/2010, A002/2014 and A007/2009	**4.5.17**	The General Court dismissed the appeal and ordered Mr Ralf Schräder to bear the costs.	None				44
Tang Gold	T-405/16	Appeal abandoned on 12.7.2017								
M 02205	T-140/15	24.3.2015	BoA decision of 26.11.2014 in Case A010/2013	**23.11.17**	The General Court annulled the decision of the BoA and ordered the CPVO to bear the costs of the appellant (quantification of costs made in Order T-140/15 DEP).	None				47

Variety denomination	Number of case before General Court	Date of appeal before General Court	Appealed decision	Date of General Court ruling	Ruling of General Court	Number of further appeal before Court of Justice	Date of further appeal	Date of Court of Justice ruling	Ruling of Court of Justice	Page
Gala Schnico	T-445/16		BoA decision of 22.4.2016	**23.2.18**	The General Court dismissed the appeal and ordered Schniga GmbH to bear the costs.	C-308/18P		**8.11.18**	The Court of Justice dismissed the appeal as not well founded and ordered Schniga GmbH to bear the costs.	49/64
M 02205	T-140/15DEP		BoA decision of 26.11.2014 in Case A010/2013	**27.9.18**	The General Court ordered the CPVO to reimburse Aurora SRL the sum of EUR 36 690 in respect of recoverable costs.	None				51
Braeburn78	T-177/16		BoA decision of 15.12.2015 in Case A001/2015	**5.2.19**	1. The General Court annulled the decision of the BoA of 15.12.2015 in Case A001/2015. 2. Dismissed the remainder of the action. 3. Ordered the CPVO to bear the costs.	None				52

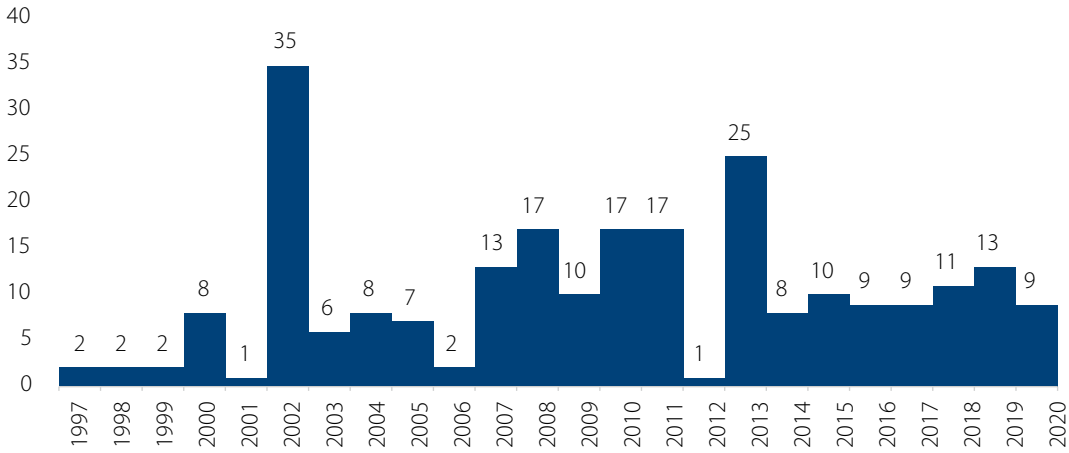
Variety denomination	Number of case before General Court	Date of appeal before General Court	Appealed decision	Date of General Court ruling	Ruling of General Court	Number of further appeal before Court of Justice	Date of further appeal	Date of Court of Justice ruling	Ruling of Court of Justice	Page
Pinova	T-765/17		BoA decision of 16.8.2017 in Case A005/2016	**11.4.19**	The General Court dismissed the appeal and ordered KIKU GmbH to bear the costs.	C-444/19P		**16.9.19**	Inadmissible	54/66
Cripps Pink	T-112/18		BoA decision of 14.9.2017 in Case A007/2016	**24.9.19**	The General Court dismissed the appeal and ordered Pink Lady America LLC to bear the costs.	C-886/19P		**3.3.20**	Inadmissible	56/68
M02205	T-278/19		BoA decision of 26.11.2014 in Case A010/2013	**13.3.20**	The General Court dismissed the appeal and ordered Aurora SRL, the CPVO and SESVander-Have NV to bear their own costs.	None				58

Variety denomination	Number of case before General Court	Date of appeal before General Court	Appealed decision	Date of General Court ruling	Ruling of General Court	Number of further appeal before Court of Justice	Date of further appeal	Date of Court of Justice ruling	Ruling of Court of Justice	Page
Siberia	T-737/18		BoA decision of 15.10.2018 in Case A007/2018	**25.6.20**	The General Court dismissed the action and ordered Siberia Oriental BV to bear its own costs and those incurred by the CPVO.					60
Gala Perathoner	T-182/20	**Pending**								
Stark Gugger	T-181/20	**Pending**								

4. STATISTICS

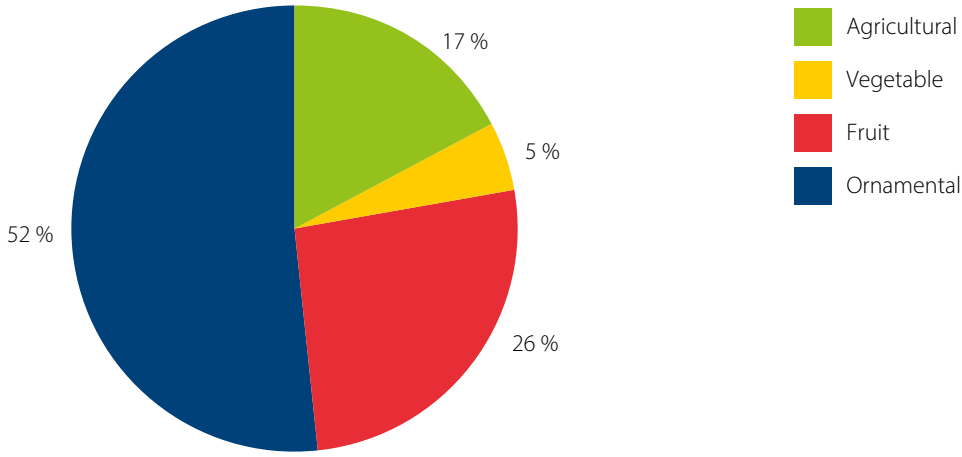
4.1. Number of notices of appeal recorded in the Board of Appeal Registry since 1995

Since its inception, 242 notices of appeal have been filed with the BoA.



4.2. Percentage and number of appealed decisions by crop sector and per species, respectively, since 1995

4.2.1. By crop sector



4.2.2. Per species

Botanical taxon (by crop sector)	Number of appealed decisions per species since 1995
Ornamental	
Osteospermum ecklonis (DC.) Norl.	10
Rosa L.	8
Gerbera L.	8
Chrysanthemum L.	8
Hydrangea macrophylla (Thunb.) Ser.	7
Zantedeschia Spreng.	6
Phlox drummondii Hook.	5
Rhododendron simsii Planch.	4
Gladiolus L.	4
Cordyline Comm. ex R. Br.	4
Mandevilla sanderi (Hemsl.) Woodson	3
Lilium L.	3
Streptocarpus x hybridus Voss	2
Skimmia japonica Thunb.	2
Limonium Mill.	2
Eryngium L.	2
Dieffenbachia Schott	2
Diascia Link & Otto	2
Beaucarnea Lem.	2
Syzygium australe (J. C. Wendl. ex Link) B. Hyland	1
Sutera Roth	1
Schefflera J. R. Forst. & G. Forst.	1
Sanvitalia Lam.	1
Sansevieria ehrenbergii Schweinf. ex Baker	1
Sansevieria cylindrica Bojer ex Hook.	1
Rhus typhina L.	1
Plectranthus ornatus Codd	1
Picea abies (L.) H. Karst.	1
Miscanthus sinensis (Thunb.) Andersson	1
Mandevilla x amabilis (Backh. & Backh. f.) Dress *x M. boliviensis* (Hook. f.) Woodson	1
Lonicera L.	1
Lobelia L.	1
Leucanthemum x superbum (Bergmans ex J. W. Ingram) D. H. Kent	1
Lavandula L.	1
Ilex crenata Thunb.	1
Hosta sieboldiana (Hook.) Engl.	1

Botanical taxon (by crop sector)	Number of appealed decisions per species since 1995
Helleborus niger L.	1
Gypsophila L.	1
Guzmania Ruiz & Pav.	1
Ficus benjamina L.	1
Euphorbia L.	1
Erysimum cheiri (L.) Crantz	1
Dianthus L.	1
Delphinium L.	1
Dasiphora fruticosa (L.) Rydb. subsp. *fruticosa* (syn. *Potentilla fruticosa* L.)	1
Daphne odora Thunb.	1
Cornus kousa Bürger ex Hance	1
Cordyline banksii Hook. f.	1
Convolvulus sabatius Viv.	1
Cenchrus purpurascens Thunb. (*Pennisetum alopecuroides* (L.) Spreng.)	1
Caryopteris incana (Thunb. ex Houtt.) Miq.	1
Canna L.	1
Calibrachoa Cerv.	1
Buddleja davidii Franch.	1
Bidens ferulifolia (Jacq.) DC.	1
Bidens L.	1
Begonia rex Putz.	1
Beaucarnea recurvata Lem.	1
Argyranthemum frutescens (L.) Sch. Bip.	1
Anthurium Schott	1
Total	**125**
Fruit	
Malus domestica Borkh.	16
Pyrus communis L.	7
Citrus reticulata Blanco	7
Citrus L.	6
Prunus armeniaca L.	4
Rubus subg. *Rubus*	3
Prunus salicina Lindl.	3
Vaccinium corymbosum L.	2
Prunus armeniaca L. *x P. salicina* Lindl.	2
Fragaria x ananassa Duchesne ex Rozier	2
Vitis vinifera L.	1
Vitis L.	1
Vaccinium L.	1

Botanical taxon (by crop sector)	Number of appealed decisions per species since 1995
Rubus idaeus L.	1
Punica granatum L.	1
Prunus persica (L.) Batsch	1
Prunus domestica L.	1
Prunus avium (L.) L.	1
Persea americana Mill.	1
Citrus clementina hort. ex Tanaka *x Citrus sinensis* (L.) Osbeck	1
Ananas comosus (L.) Merr.	1
Total	**63**
Agricultural	
Solanum tuberosum L.	9
Triticum turgidum L. subsp. *durum* (Desf.) Husn.	5
Gossypium hirsutum L.	5
x Triticosecale Witt.	3
Triticum aestivum L. emend. Fiori & Paol.	3
Oryza sativa L.	3
Hordeum vulgare L.	2
Trifolium pratense L.	1
Sorghum bicolor (L.) Moench	1
Secale cereale L.	1
Papaver somniferum L.	1
Lolium multiflorum Lam.	1
Helianthus annuus L.	1
Glycine max (L.) Merril	1
Festuca arundinacea Schreb.	1
Eragrostis tef	1
Distichlis spicata	1
Brassica napus L. emend. Metzg.	1
Beta vulgaris L. ssp. *vulgaris* var. *saccharifera* Alef. (syn. *Beta vulgaris* L. ssp. *vulgaris* var. *altissima* Döll)	1
Total	**42**
Vegetable	
Pisum sativum L.	6
Solanum lycopersicum L.	3
Lactuca sativa L.	1
Gynostemma pentaphyllum (Thunb. ex Murray) Makino	1
Brassica oleracea L. var. *italica* Plenck (syn. *Brassica oleracea* L. convar. *botrytis* (L.) Alef. var. *cymosa* Duch.)	1
Total	**12**

4.3. Number of appeal cases, by country of appellant, since 1995

Country of appellant	Number of notices of appeal
Australia	4
Belgium	7
Canada	2
Finland	1
France	25
Germany	48
Hungary	1
Ireland	1
Israel	5
Italy	27
Japan	1
Netherlands	54
New Zealand	6
Norway	2
South Africa	3
Spain	16
Sweden	1
United Kingdom	14
United States	24
	242

4.4. Number of notices of appeal since 1995, subject matter, and legal basis of the appealed decisions

Subject matter of appealed decision	Article of the BR relevant to appealed decision	Number of notices of appeal
Cancellation of CPVR due to unpaid annual fees	Article 21(2)(c)	111
Refusal of CPVR due to lack of distinctness	Articles 61 and 7	36
Grant of CPVR	Article 62	18
Declaration of nullity/non-nullity of CPVR	Article 20	17
Refusal of CPVR due to lack of uniformity	Articles 61 and 8	14
Refusal of CPVR due to a technical examination issue	Articles 61 and 55	12
Refusal of CPVR due to lack of novelty	Articles 61 and 10	9
Refusal of CPVR due to unpaid technical examination fees	Articles 61 and 83	6
Cancellation of CPVR (for reasons other than unpaid annual fees)	Article 21	4
Refusal of CPVR due to lack of entitlement	Articles 61 and 11	4
Entry or deletion of information in the register	Article 87	3
Approval of variety denomination	Article 63	2
Public access	Article 88	2
Objection to grant of CPVR	Article 59	1
Refusal of CPVR due to not remedying formal deficiencies	Articles 61 and 53	1
Amendment of variety denomination	Article 66	1
Suspensory effect of an appeal – contested decision of the CPVO suspended	Article 67(2)	1
		242

5. COMPOSITION OF THE BOARD OF APPEAL OF THE CPVO

The BoA of the CPVO is composed of a chair, an alternate chair and qualified members.

5.1. Chair and alternate chair of the Board of Appeal

Paul van der Kooij was appointed Chair of the BoA for a term of 5 years by a Council decision of 19 February 2018 (OJ C 65, 21.2.2018, p. 4). His previous term ran from 18 December 2012 to 18 December 2017. His new term runs from 19 February 2018 to 18 February 2023. The position of his alternate, Sari Haukka, was renewed for a second term of 5 years by a Council decision of 16 June 2016 (OJ C 223, 21.6.2016, p. 5). Her term runs from 15 October 2016 to 14 October 2021.

5.2. Qualified members of the Board of Appeal

At its meeting of 30 September 2015, the Administrative Council of the CPVO adopted, in accordance with the procedure prescribed by Article 47(2) of the BR, the following list of 22 qualified members of the BoA for a period of 5 years, starting on 23 February 2016 and ending on 22 February 2021.

List of qualified members (from 23.2.2016 to 22.2.2021)

1. Beatrix Bönisch
2. Richard Brand
3. Paul de Heij
4. Krieno Fikkert
5. Huib Ghijsen
6. Helen Johnson
7. Ofelia Kirkorian-Tsonkova
8. Michael Köller
9. François Lallouet
10. Stephan Martin
11. Miguel Angelo Pinheiro De Carvalho
12. André Pohlmann
13. Dirk Reheul
14. Kurt Riechenberg
15. Beate Rücker
16. Ivana Rukavina
17. Elizabeth Scott
18. Péter Sipos
19. Sven Stürmann
20. Zsolt Szani
21. Hanns Ullrich
22. Nicolaas Petrus van Marrewijk

MAIN ACRONYMS, INITIALISMS AND ABBREVIATIONS

Acronym/initialism/ abbreviation	Full term
B	
BoA	Board of Appeal of the CPVO
BR	'Basic regulation': Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights
C	
CPVO/OCVV	Community Plant Variety Office / Office communautaire des variétés végétales
CPVR	Community plant variety right
D	
DUS	Distinctness, uniformity and stability
E	
EU	European Union
O	
OJ	*Official Journal of the European Union*
P	
PR	'Proceedings regulation': Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office
T	
TG	UPOV test guidelines
TGP	UPOV test guidelines' procedures – Associated document to the general introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants
TP	CPVO technical protocol
U	
UPOV	International Union for the Protection of New Varieties of Plants

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25 YEARS ANNIVERSARY CPVO · OCVV

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Odrůdový úřad Společenství
EF-Sortsmyndigheden
Gemeinschaftliches Sortenamt
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