

Court of Justice EU, 21 May 2015, Schröder v CPVO



PLANT VARIETY RIGHTS

DISTINCT VARIETY

The General Court wrongly held that the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal.

- In that regard, it must be noted first, as was observed by the General Court in paragraph 126 of the judgment under appeal, that the wording of Article 76 of Regulation No 2100/94 limits the application of the principle that the CPVO is to examine of its own motion the facts to those which are the subject of examination under Articles 54 and 55 of that regulation.
- Secondly, under Article 51 of Regulation No 874/2009, the provisions relating to proceedings before the CPVO apply mutatis mutandis to appeal proceedings. Thus, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal.

No lead to the setting aside of the judgment: The General Court, non the less checked of the judgment under appeal whether the evidence meets the criteria pertaining to the principle of the examination of the facts of its own motion

- That error of law, and the arguments set out in paragraph 135 of the judgment under appeal which possibly gave rise to that error, do not, however, in themselves lead to the setting aside of the judgment under appeal given that the General Court, none the less, checked in paragraph 136 et seq. of the judgment under appeal whether the evidence adduced by the appellant before the Board of Appeal meets the criteria pertaining to the principle of the examination of the facts of its own motion.

Appellant had not adduced, to the requisite legal standard, the facts and evidence which had not been fulfilled in technical examination of the variety LEMON SYMPHONY

- In view of those findings, and bearing in mind the principles set out in paragraphs 57 and 58 above, the General Court did not err in law in the taking of evidence when it found that the appellant had not adduced, to the requisite legal standard, the facts and evidence which make it possible to establish that the condition laid down in Article 7 of Regulation No 2100/94 had not been fulfilled in the technical examination of the variety LEMON SYMPHONY, which would have justified a declaration of nullity for the purposes of Article 20(1) of that regulation.

The General Court rightly rejected measure of inquiry: the appellant did not advance any evidence whatsoever

- The General Court found in paragraph 138 of the judgment under appeal that the appellant did not advance any evidence whatsoever, or the slightest information to justify his request.
- In those circumstances, the appellant cannot claim that the General Court was wrong to hold that he could not seek the adoption of measures of inquiry, given that he did not present prima facie evidence.

Consideration of the General Court that the appellant has produced no evidence of inadequacy of technical research for granting LEMON SMYPHONY is factual and not testable

- Thus, since the appellant has not managed to demonstrate that the plant material used for the technical examination of the variety LEMON SYMPHONY was not appropriate and that the DUS criteria had therefore not been satisfied, the arguments relating to the adaptation of the description of that variety are themselves ineffective.
- Secondly, as was observed in paragraph 82 above, an appeal is limited to points of law, since the appraisal of the facts and the assessment of evidence do not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

In so far the description of the 'attitude of shoots' as characteristic is determined by a comparison with other plant varieties, a refinement of the description is inevitable where other plant varieties emerge

- In addition, the General Court cannot be criticised for having considered that the adaptation of the description of the 'attitude of shoots' characteristic did not call into question the protection of the variety LEMON SYMPHONY. In so far as that characteristic is determined by a comparison with other plant varieties, a refinement of the description is inevitable where other plant varieties emerge.

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Court of Justice EU, 21 May 2015

(A. Tizzano, S. Rodin, E. Levits (rapporteur), M. Berger and F. Biltgen)

JUDGMENT OF THE COURT (First Chamber)

21 May 2015 (*)

(Appeals — Community plant variety rights — Community Plant Variety Office (CPVO) — Regulation (EC) No 2100/94 — Articles 20 and 76 — Regulation (EC) No 874/2009 — Article 51 — Application to initiate nullity proceedings in respect of Community plant variety rights — Principle of examination by the CPVO of its own motion — Proceedings before the Board of Appeal of the CPVO — Substantial evidence)

In Case C-546/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 November 2012,

Ralf Schröder, residing in Lüdinghausen (Germany), represented by T. Leidereiter, Rechtsanwalt, appellant,

the other parties to the proceedings being:

Community Plant Variety Office (CPVO), represented by M. Ekvad, acting as Agent, and A. von Mühlendahl, Rechtsanwalt,

defendant at first instance,

Jørn Hansson, represented by G. Würtenberger, Rechtsanwalt,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, E. Levits (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2014,

after hearing the [Opinion of the Advocate General](#) at the sitting on 13 November 2014,

gives the following

Judgment

1. By his appeal, the appellant seeks to have set aside the judgment of the General Court of the European Union in *Schröder v CPVO — Hansson (LEMON SYMPHONY)*, T-133/08, T-134/08, T-177/08 and T-242/09, EU:T:2012:430 ('the judgment under appeal'), in which the General Court dismissed his action brought against the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 23 January 2009 (Case A 010/2007), concerning an application for annulment of the Community plant variety right granted for the variety LEMON SYMPHONY ('the decision at issue').

Legal context

2. Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended by Council Regulation (EC) No 2506/95 of 25 October 1995 (OJ 1995 L 258, p. 3; 'Regulation No 2100/94'), provides that in order to obtain Community plant variety rights, a variety must be, inter alia, distinct and new.

3. Article 7 of that regulation provides:

'1. A variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.

...'

4. Article 10 of Regulation No 2100/94 lays down the criteria governing the condition that a variety for which Community plant variety rights are being sought must be new.

5. Article 20 of that regulation, on the nullity of Community plant variety rights, provides:

'1. The [CPVO] shall declare the Community plant variety right null and void if it is established:

(a) that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right;

or

(b) that where the grant of the Community plant variety right has been essentially based upon information and documents furnished by the applicant, the conditions laid down in Articles 8 and 9 were not complied with at the time of the grant of the right;

or

(c) that the right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

2. Where the Community plant variety right is declared null and void, it shall be deemed not to have had, as from the outset, the effects specified in this Regulation.'

6. Articles 54 and 55 of that regulation describe the substantive examination and the technical examination which a plant variety must undergo in order to obtain Community plant variety rights.

7. As regards the rules governing proceedings before the CPVO, Article 75 of that regulation states:

'Decisions of the [CPVO] shall state the reasons on which they are based. They shall be based only on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing.'

8. Article 76 of Regulation No 2100/94 provides:

'In proceedings before it the [CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55. It shall disregard facts or items of evidence which have not been submitted within the time limit set by the [CPVO].'

9. Article 81 of Regulation No 2100/94, relating to general principles, is drafted as follows:

'1. In the absence of procedural provisions in this Regulation or in provisions adopted pursuant to this Regulation, the [CPVO] shall apply the principles of procedural law which are generally recognized in the Member States.

...'

10. Commission Regulation (EC) No 874/2009 of 17 September 2009 lays down implementing rules for the

application of Regulation No 2100/94 as regards proceedings before the CPVO (OJ 2009 L 251, p. 3).

11. As regards appeals against the decisions of the CPVO, Article 51 of that regulation provides:

'Unless otherwise provided, the provisions relating to proceedings before [the CPVO] shall apply to appeal proceedings mutatis mutandis; parties to proceedings shall in that regard be treated as parties to appeal proceedings.'

12. Article 63 of that regulation provides:

'1. Minutes of oral proceedings and of the taking of evidence shall record the essentials of the oral proceedings or of the taking of evidence, the relevant statements made by the parties to proceedings, the testimony of the parties to proceedings, witnesses or experts and the result of any inspection.

2. The minutes of the testimony of a witness, expert or party to proceedings shall be read out or submitted to him so that he may examine them. It shall be noted in the minutes that this formality has been carried out and that the person who gave the testimony approved the minutes. Where his/her approval is not given, his/her objections shall be noted.

3. The minutes shall be signed by the employee who drew them up and by the employee who conducted the oral proceedings or taking of evidence.

4. The parties to proceedings shall be provided with a copy and, where appropriate, a translation of the minutes.'

Background to the dispute and the decision at issue

13. The General Court set out the facts giving rise to the dispute as follows:

*'5 On 5 September 1996, the intervener, Mr Jørn Hansson applied to the [CPVO] for a Community plant variety right pursuant to [Regulation No 2100/94]. That application was registered under number 1996/0984. The plant variety for which protection was thereby sought is the variety LEMON SYMPHONY, belonging to the species *Osteospermum ecklonis*.*

...

7. The CPVO directed the Bundessortenamt (German Federal Plant Variety Office) to conduct the technical examination of LEMON SYMPHONY pursuant to Article 55(1) of [Regulation No 2100/94].

8. By letter of 6 November 1996, the Bundessortenamt requested the CPVO to provide it with LEMON SYMPHONY plant material to enable it to conduct the technical examination. That letter specified that that material should consist of "20 young plants of marketable quality, neither trimmed nor treated with growth regulators".

9. The intervener sent the plant material requested to the Bundessortenamt on 10 January 1997.

10. By letter of 13 January 1997, signed by Ms Menne, the agent of the Bundessortenamt responsible for the technical examination of LEMON SYMPHONY, the Bundessortenamt informed the CPVO as follows:

"... we hereby inform you that the propagating material of the variety referred to in the subject heading which was sent to us consists of plants in bud intended for sale which have been treated with growth regulators

and trimmed. Therefore, there is a risk that the technical examination will not progress satisfactorily."

*11. The technical examination was nevertheless subsequently carried out at some point in 1997, although the Bundessortenamt is not yet in a position to confirm whether it was conducted directly on the plant material sent by the intervener or on cuttings obtained from that material, as appears to be indicated by a handwritten note dated 30 January 1997 in the file, which states: "The Bundessortenamt has taken cuttings, wait, TK 30/01/97". In that technical examination, which was carried out on the basis of the Bundessortenamt's "Table of Characteristics VI" of 8 August 1997, applicable at that time as the test guidelines, LEMON SYMPHONY was compared to a number of other *Osteospermum* varieties. At the end of that technical examination, the Bundessortenamt concluded that LEMON SYMPHONY fulfilled the DUS criteria necessary for entitlement to a Community plant variety right.*

12. On 16 October 1997, on the basis of the same "Table of Characteristics VI", the Bundessortenamt drafted an examination report to which the official description of LEMON SYMPHONY was attached as an annex. This shows that the characteristic "Attitude of shoots" was expressed as "erect" (score of 1).

13. By a decision of the CPVO of 6 April 1999, a Community plant variety right was granted for LEMON SYMPHONY and the official description of that variety was compiled by the Bundessortenamt in 1997 and reproduced in the Register of Community Plant Variety Rights.

*14. On 26 November 2001, the [appellant] ... applied to the CPVO for a Community plant variety right pursuant to [Regulation No 2100/94]. That application was registered under number 2001/1758. The plant variety for which the right was thereby sought was the variety SUMOST 01, belonging to the species *Osteospermum ecklonis*. ...*

15. Being of the view that the sale of SUMOST 01 infringed the rights which he possesses over LEMON SYMPHONY, the intervener brought an action for infringement ... before the German civil courts, seeking an order requiring [the cessation of the marketing of] SUMOST 01 plus damages. After having ordered a court expert's report from the Bundessortenamt, which concluded, after a "comparative growing trial", that SUMOST 01 could not be clearly distinguished from LEMON SYMPHONY, the Landgericht Düsseldorf (Düsseldorf Regional Court, Germany) granted those requests by a decision of 12 July 2005, confirmed on appeal by a judgment of the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, Germany) of 21 December 2006. During the compilation of that court expert's report, [it was] submitted that the LEMON SYMPHONY plant material used in order to make the comparison did not match the plant material examined in 1997, for the purposes of the grant to that variety of the Community plant variety right. ...

16. During the infringement proceedings before the German civil courts, the intervener advanced the contention that LEMON SYMPHONY had never been an erect variety. He produced, in this connection, an expert report of 21 November 2003 ... In that report, the expert stated:

“The Bundessortenamt’s 1997 examination defines LEMON SYMPHONY as an erect variety. According to the experience acquired and observations gathered in tests, assessments and growing trials conducted over the last few years, LEMON SYMPHONY is not a variety which grows in a completely erect way. ... The NAIROBI variety, included as a comparison with regard to its erect growth in the table of characteristics in the TG/176/3 examination guidelines, grows in an erect manner throughout its growing period. The attitude of NAIROBI differs markedly from that of LEMON SYMPHONY. Generally speaking, some subsequent descriptions of varieties drawn up by the Bundessortenamt, for example the SEIMORA variety, describe other SYMPHONY varieties with the same growing characteristics as LEMON SYMPHONY as semi-erect.”

17. While the infringement proceedings before the German civil courts were in progress, the CPVO directed the Bundessortenamt to carry out a technical examination of SUMOST 01 in accordance with Article 55(1) of [Regulation No 2100/94]. In that technical examination, carried out from 2001, LEMON SYMPHONY, among other plants, was used as a comparison variety. That technical examination was carried out under the new TG/176/3 guidelines for the performance of the distinctness, uniformity and stability test, laid down on 5 April 2000 by the International Union for the Protection of New Varieties of Plants (UPOV).

...

20. On 7 October 2004, the Bundessortenamt ... concluded that [SUMOST 01] was not clearly distinguishable from the other widely-known varieties, inter alia LEMON SYMPHONY.

21. On 26 October 2004, the [appellant] filed an application for cancellation of the Community plant variety right granted to LEMON SYMPHONY, pursuant to Article 21 of [Regulation No 2100/94] ... on the ground that, since 2002 at least, that variety no longer corresponded to its official description entered in 1997 in the Register of Community Plant Variety Rights. In support of his application he submitted, essentially, that, in the examination of LEMON SYMPHONY carried out in 2001 on the basis of the TG/176/3 test guidelines, applicable since 2001, various characteristics of that variety had received different scores in comparison with the official description of that same variety dating from 1997. That demonstrated, he submitted, that the variety at issue lacked stability.

22. On 7 December 2004, the CPVO decided to carry out a technical verification in accordance with Article 64 of [Regulation No 2100/94], in order to check whether LEMON SYMPHONY continued to exist in the

same form. The [appellant] and the intervener were informed of that decision on 15 December 2004. The guidelines applied for the purposes of the technical examination were those of the protocol for the distinctness, uniformity and stability test CPVO-TP/176/1, laid down on 31 October 2002 by the CPVO and itself based on the TG/176/3 test guidelines.

23. It is apparent from a letter of 5 January 2005 from the Bundessortenamt to the CPVO that, in general, various factors could be behind the variations noted in the description of the expressions of the characteristics, such as variations linked to environmental factors, a change in the scale of scores in the event of a significant change in the number of comparison varieties to be taken into consideration and changes in the scores due to the application of new test guidelines. ...

...

25. On 14 September 2005, the Bundessortenamt compiled an examination report concluding that LEMON SYMPHONY should be retained. A new description of the variety, dated the same day, was attached as an annex to that report, from which it is apparent, inter alia, that the characteristic “Attitude of shoots” was expressed as “semi-erect to horizontal” (score of 4).

...

28. By e-mail of 18 May 2006, the Bundessortenamt stated as follows to the OCVV:

“Please find attached the photographs of LEMON SYMPHONY taken in 1997, 2003 and 2004. You can see that the attitude of the shoots has not changed. ...”

29. By letter of 12 June 2006, the CPVO again wrote to the Bundessortenamt as follows: “In order to allow the [CPVO] to establish that link, we would be grateful if you could indicate, in respect of each characteristic [referred to in] the protocol on Osteospermum in force in 1997, what the level of expression of the variety LEMON SYMPHONY in the 2005 trial would be or what the relationship is between the observations made in accordance with the protocol adopted in 2001.”

...

31. It is apparent from the Bundessortenamt’s answer of 2 August 2006 and from the comparison of the results of the technical examinations of LEMON SYMPHONY carried out in 1997 and 2005 respectively, compiled by that office and sent to the [appellant] on 25 August 2006, that, according to that office, the difference in the score for the characteristic “Attitude of shoots” could be explained by the fact that there was no comparison variety in the “Table of Characteristics VI” used by [the CPVO] in 1997 and that LEMON SYMPHONY was the most erect variety during that year. Moreover, there had been a significant increase in the number of Osteospermum ecklonis species varieties since 1997 and the test guidelines had been partially amended, requiring the levels of expression to be adapted.

32. By letter of 25 August 2006, the CPVO proposed to the intervener to adapt the official description of

LEMON SYMPHONY entered in 1997 in the Register of Community Plant Variety Rights to the new description of the variety of 14 September 2005. The CPVO took the view that such an adaptation was necessary on account, first, of the progress made in plant breeding since the examination of that variety in 1997 and, second, of the amendment of the test guidelines in 2001.

33. The intervener accepted that proposal by letter of 22 September 2006.

34. By decision of 19 February 2007 (“the refusal decision”), the CPVO upheld the objections raised by the intervener against the grant of a Community plant variety right to SUMOST 01 and refused the application for a Community plant variety right for that variety, essentially on the ground that that variety was not clearly distinguishable from LEMON SYMPHONY and that the conditions set out in Article 7 of [Regulation No 2100/94] had therefore not been met. ...

35. On 11 April 2007, the [appellant] filed an application for annulment, pursuant to Article 20 of [Regulation No 2100/94], of the Community plant variety right granted to LEMON SYMPHONY, essentially on the ground that that variety had never existed in the form reproduced in the official description entered in the Register of Community Plant Variety Rights in 1997.

36. By letter of 18 April 2007, the CPVO informed the intervener of its decision to adapt, of its own motion, the official description of LEMON SYMPHONY, in accordance with Article 87(4) of [Regulation No 2100/94] (“the decision on the adaptation of the description”). The adapted description as it followed from the 2005 technical examination was enclosed with that letter.

37. By letter of 10 May 2007 (“the decision on the application for cancellation”), the CPVO informed the [appellant] that the competent committee had verified whether the conditions for the application of Article 21 of [Regulation No 2100/94] were met and had reached the decision that that was not the case. ...

39. On 21 May 2007, the CPVO informed the [appellant] of the decision on the adaptation of the description and the replacement of the official description of LEMON SYMPHONY entered in the Register of Community Plant Variety Rights in 1997 by that of 2005.

40. By letter of 26 September 2007, the CPVO rejected the application for annulment of the Community plant variety right granted to LEMON SYMPHONY filed by the [appellant] under Article 20 of [Regulation No 2100/94] (“the decision on the application for annulment”). ...

Proceedings before the Board of Appeal of the CPVO in Cases A 005/2007, A 006/2007 and A 007/2007

41. On 10 May 2007, the [appellant] brought an appeal before the Board of Appeal of the CPVO [the Board of Appeal], registered under number A 005/2007, against the refusal.

...

43. On 11 June 2007, the [appellant] brought an appeal before the Board of Appeal, registered under number A 006/2007, against the decision on the application for cancellation.

...

45. On 12 July 2007, the [appellant] brought an appeal before the Board of Appeal, registered under number A 007/2007, against the decision on the adaptation of the description.

...

63. Despite the [appellant]’s objections, the Board of Appeal held the oral proceedings in each of the three cases A 005/2007, A 006/2007 and A 007/2007 on 4 December 2007, in the absence of the [appellant], as the minutes of the hearing show. ...

64. During those proceedings, Ms Menne attended as an expert of the Bundessortenamt and agent of the CPVO. She stated, inter alia, that the LEMON SYMPHONY plant material submitted for the technical examination in 1997 had undoubtedly been treated with growth regulators, but that nevertheless no problems had arisen in that examination “because the plants grew completely normally”. She also pointed out that, at the time of that technical examination, “the effect of the growth regulators had worn off” and asserted that “in the case of LEMON SYMPHONY, there [was] no uncertainty as to the quality of the trials carried out in July/August 1997”. The intervener, for his part, contended that “growth regulators in general act for only four to six weeks”, in particular in the case of *Osteospermum*.

65. By decision of 4 December 2007 (Case A 006/2007), the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the [appellant] against the decision on the application for revocation.

66. By decision of 4 December 2007 (Case A 005/2007), the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the [appellant] against the refusal decision.

67. By decision of 4 December 2007 (Case A 007/2007), the Board of Appeal dismissed as inadmissible the appeal brought by the [appellant] against the decision on the adaptation of the description.

68. In each of those three cases, the Board of Appeal first of all found that the summons to the oral proceedings had been sent in accordance with the proper procedure. It observed, in this respect, that, although it was true that the one-month notice period set in Article 59(1) of [Regulation No 874/2009] had not been observed, the summons not having been notified to the [appellant] until 6 November 2007, that was of no consequence ...

...

Proceedings before the Board of Appeal of the CPVO in Case A 010/2007

71. On 19 October 2007, the [appellant] brought an appeal before the Board of Appeal, registered under number A 010/2007, against the decision on the application for annulment.

72. In support of that appeal, the [appellant] submitted, essentially, that the plant material on which the LEMON SYMPHONY technical examination had been carried out in 1997 was defective. He also raised the possibility that cuttings had been taken from the plants sent and that those cuttings were then used in the technical examination. ... He also pointed out that the varieties referred to by way of example in the test guidelines applied from 2001 had, with the exception of the variety NAIROBI, all been compared with LEMON SYMPHONY in 1997. Having regard to the statements made by Ms Menne and the intervener at the hearing on 4 December 2007 in Cases A 005/2007, A 006/2007 and A 007/2007, the [appellant] offered to prove, by means of an expert opinion, his claim that the repercussions of treatment with growth regulators on the examination were not limited to a duration of four to six weeks. Lastly, the [appellant] explained that his application for annulment was founded on the combined provisions of Article 20(1)(a) and Article 7 of [Regulation No 2100/94]. He submitted that, given that a variety cannot be regarded as distinct unless it is distinguishable by reference to the expression of the characteristics which result from a particular genotype or combination of genotypes, no distinction can be made where the expression of the characteristics found results from mechanical treatment and treatment with growth regulators.

73. After having been summoned to the hearing, the [appellant] objected, in a supplementary pleading of 12 January 2009, to Ms Menne's taking part in that hearing and to her statements being taken into account.

74. The [appellant] also repeated his offer to prove, by means of an expert opinion, that the results of the DUS examination of LEMON SYMPHONY carried out in 1997 were not explained by the genotype, but by the chemical and mechanical treatment or the fact that cuttings of the plants sent had been used. Moreover, the [appellant] expressly requested to be able to submit the proposed evidence.

...

76. By [the decision at issue], the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the [appellant] against the decision on the application for annulment ...'.

Procedure before the General Court and the judgment under appeal

14. By application lodged on 24 June 2009, the appellant brought an action against the decision at issue.

15. By order of 15 June 2010, the President of the General Court decided to join the actions brought by the appellant against Decisions A 007/2007 (Case T-133/08), A 006/2007 (Case T-134/08), A 005/2007 (Case T-177/08) and A-010/2007 (Case T-242/09) for the purposes of the oral procedure and the judgment.

Case T-242/09

16. In support of his action in Case T-242/09, the appellant relied on four pleas in law for the annulment.

17. As regards the first plea alleging infringement of Articles 76 and 81 of Regulation No 2100/94, the General Court held, in paragraph 126 of the judgment under appeal, that those provisions are inapplicable to nullity proceedings in respect of a Community plant variety right under Article 20 of that regulation, having regard to the actual wording of Article 76. It concluded in paragraphs 128 and 129 of that judgment that the burden of proof that a plant variety does not satisfy the conditions for obtaining a Community plant variety right falls on the party challenging that right.

18. Holding that the system established by Regulation No 2100/94 is consistent with the provisions in force in relation to Community designs and with general principles of law, the General Court rejected that argument as irrelevant.

19. The General Court added, however, in paragraph 134 of the judgment under appeal, that in any event proceedings before the CPVO are not purely inquisitorial in nature, since the parties must plead in due time the facts which they want the CPVO to determine and adduce the evidence which they wish to be admitted by that office.

20. On that basis, the General Court carried out an examination of the arguments advanced by the appellant in paragraphs 135 to 170 of the judgment under appeal.

21. With regard to the refusal by the CPVO to grant the request made by the appellant to adopt measures of inquiry, the General Court, applying by analogy the ruling given in the judgment in *ILFO v High Authority*, 51/65, EU:C:1966:21, found in paragraph 138 of the judgment under appeal, that at no point in the proceedings before the CPVO had the appellant advanced any evidence or information whatsoever to support his case. It concluded that there was no infringement of the rules on the burden of proof and the taking of evidence and considered that the appellant was in fact seeking to obtain from the General Court a fresh assessment of the relevant facts and evidence.

22. Therefore, the General Court made a distinction between whether or not the factual findings and assessments made by the Board of Appeal are the result of complex assessments, bearing in mind that, as regards complex assessments requiring expert or scientific knowledge, the review carried out by the General Court is limited to ascertaining whether there has been a manifest error.

23. As regards, first, the issue of the nature of the plant material used for the technical examination of the variety LEMON SYMPHONY in 1997, the General Court found, in paragraph 149 of the judgment under appeal, that the Board of Appeal had considered that it was well-known that the practice of taking cuttings was commonplace. In that respect, it applied by analogy the case-law relating to the Office for Harmonisation in the Internal Market (OHIM), in accordance with which OHIM's Boards of Appeal are not required to prove, in their decisions, the accuracy of well-known facts.

24. The General Court considered that the question of the effect of growth regulators on plant samples

supplied for the technical examination of the variety LEMON SYMPHONY concerned complex botanical assessments. It noted in paragraph 157 of the judgment under appeal that the appellant did not adduce any evidence that made it possible to identify a manifest error of assessment.

25. Secondly, with regard to the appellant's arguments relating to the adaptation of the original description of the variety LEMON SYMPHONY in 2006, concerning the 'attitude of shoots' characteristic, the Court found, in paragraph 161 of the judgment under appeal, that the appellant had failed to demonstrate that that characteristic was decisive for the grant of a Community plant variety right for that plant variety.

26. Moreover, the General Court made it clear, in paragraph 166 of the judgment under appeal, that the 'attitude of shoots' characteristic, the levels of expression of which run from 'erect' to 'drooping', was not absolute and could, depending on the case, be the subject of a relative and comparative assessment between varieties of the same species.

27. Therefore, the General Court rejected the first plea in law as being unfounded in part and ineffective in part.

28. As regards the second plea alleging infringement of Articles 7 and 20 of Regulation No 2100/94, that was rejected by the General Court in the light of the evidence adduced in the examination of the first plea relating to the chemical and mechanical treatment of the material used for the technical examination in 1997 and the use of material which grew from cuttings.

29. As regards the third plea alleging infringement of Article 75 of Regulation No 2100/94, the General Court stated, in paragraphs 181 and 182 of the judgment under appeal, that the right to be heard did not mean that a judge had to hear the parties on every point of his legal assessment. In particular, in the examination of the first plea, the General Court found that the use of cuttings for a technical examination is a common practice known to the appellant.

30. As regards the fourth plea alleging infringement of Article 63 of Regulation No 874/2009, the General Court held, in essence, that the Board of Appeal had not committed any procedural error.

31. The General Court therefore dismissed the entire action.

Cases T-133/08, T-134/08 and T-177/08

32. With regard to the actions in Cases T-133/08, T-134/08 and T-177/08, the General Court found, in paragraph 217 of the judgment under appeal, that the minimum notice period of one month for the hearing on 4 December 2007 before the Board of Appeal was not observed with regard to the appellant.

33. The General Court concluded in paragraph 237 of the judgment under appeal that there was a material procedural defect leading to the annulment of the three contested decisions in Cases T-133/08, T-134/08 and T-177/08. However, it refused the request for variation of the decision on the adaptation of the description.

The appeal

34. In support of his appeal, the appellant relies on five grounds which are subdivided into different arguments.

35. On the basis of the first and second grounds of appeal, the appellant, in essence, alleges that the General Court infringed the rules on the burden of proof and the taking of evidence, and the principle of the examination of the facts by the CPVO of its own motion. By his third and fourth grounds, the appellant claims that there has been an infringement of the duty to review legality and a failure to state reasons in the judgment under appeal. Under the fifth and sixth grounds, the appellant, in essence, alleges that the General Court did not safeguard his right to be heard and did not carry out a full review of the legality of the decision at issue.

The first ground of appeal

Arguments of the parties

36. Under his first ground of appeal, the appellant alleges, in essence, that the General Court erred in law in holding that the Board of Appeal could not act of its own motion, and that it infringed his right to an effective remedy and the principle of good administration.

37. In the first place, the appellant criticises the General Court for having held, in paragraph 126 of the judgment under appeal, that Article 76 of Regulation No 2100/94 did not apply to proceedings before the Board of Appeal and, consequently, for having infringed Article 51 of Regulation No 874/2009.

38. In the second place, the finding in paragraph 129 of the judgment under appeal that nullity proceedings before the CPVO and its Board of Appeal are adversarial proceedings is not compatible with the wording of Article 20 of Regulation 2100/94. Their inquisitorial nature is also borne out by a comparison with the corresponding provisions on the Community trade mark and Community designs.

39. In the third place, the General Court distorted the appellant's arguments at first instance in paragraph 133 of the judgment under appeal.

40. In the fourth place, the General Court infringed the principles of good administration and the right to an effective remedy by refusing to examine the evidence which he adduced before the Board of Appeal.

41. The CPVO sets out the specific characteristics of the proceedings before it. In particular, it states that nullity proceedings brought on the basis of Article 20 of Regulation No 2100/94 are exclusively covered by examination of its own motion. Therefore, there is no party to those proceedings, and the CPVO is required to examine all the relevant facts objectively. Mr Hansson argues that the CPVO has a broad discretion with regard to the assessment of evidence submitted by a third party in order to justify the initiation of such proceedings.

42. In the present case, the CPVO applied those principles and refused to initiate the nullity proceedings requested by the appellant.

43. Beyond that, the CPVO and Hansson contend that the appellant's arguments are at best irrelevant, and at

the very least inadmissible, in that they seek to challenge the General Court's assessment of the facts.

Findings of the Court

44. Since the appellant disputes the approach adopted by the General Court concerning the taking of evidence and the burden of proof in relation to the proceedings before the Board of Appeal, it must be ascertained, first of all, whether the Court erred in law in that context.

45. In that regard, it must be noted first, as was observed by the General Court in paragraph 126 of the judgment under appeal, that the wording of Article 76 of Regulation No 2100/94 limits the application of the principle that the CPVO is to examine of its own motion the facts to those which are the subject of examination under Articles 54 and 55 of that regulation.

46. Secondly, under Article 51 of Regulation No 874/2009, the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings. Thus, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal.

47. The General Court, consequently, erred in law in holding that the principle of examination of the facts by the CPVO of its own motion does not apply to proceedings before the Board of Appeal.

48. That error of law, and the arguments set out in paragraph 135 of the judgment under appeal which possibly gave rise to that error, do not, however, in themselves lead to the setting aside of the judgment under appeal given that the General Court, none the less, checked in paragraph 136 *et seq.* of the judgment under appeal whether the evidence adduced by the appellant before the Board of Appeal meets the criteria pertaining to the principle of the examination of the facts of its own motion.

49. Thus it is necessary to ascertain, next, whether the General Court did not commit an error of law in that regard.

50. To that end, it should be noted that the proceedings which led to the decision at issue are proceedings before the Board of Appeal before which there has been brought an appeal against a decision of the CPVO refusing to annul a Community plant variety right pursuant to Article 20(1) of Regulation No 2100/94.

51. Under that provision, the CPVO must declare the Community plant variety right null and void if it has been established that the conditions laid down in Articles 7 and 10 of Regulation No 2100/94 have not been met on the date the right was granted.

52. In that regard, the conditions relating, in particular, to distinction and novelty are, under Article 6 of the regulation, a prerequisite for the grant of a Community plant variety right. Therefore, in the absence of those conditions, the right granted is unlawful, and it is in the public interest that it be declared null and void.

53. It is true that a declaration annulling a right improperly granted can also be made in the interests of a third party, especially where that party made an application for a plant variety right which was refused

because the candidate variety was not distinguishable from the improperly protected variety.

54. However, that cannot justify allowing a third party to apply, in all circumstances and without specific reasons, for the annulment of that protection after the proceedings granting that right, and after the expiry of the time-limits laid down in Article 59 of Regulation No 2100/94 for third parties to lodge their objections.

55. In that regard, it must be noted that, in the procedure for granting protection, the candidate plant variety, under Articles 54 and 55 of that regulation, must undergo a substantive examination and a thorough and complex technical examination.

56. Thus, the CPVO has a wide discretion concerning annulment of a plant variety right for the purposes of Article 20 of Regulation No 2100/94, in so far as the protected variety underwent the examination set out in the previous paragraph. Therefore, only where there are serious doubts that the conditions laid down in Articles 7 or 10 of that regulation had been met on the date of the examination provided for under Articles 54 and 55 of that regulation can a re-examination of the protected variety by way of nullity proceedings under Article 20 of Regulation No 2100/94 be justified.

57. In that context, a third party seeking 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 a plant variety right following the examination provided for in Articles 54 and 55 of that regulation.

58. Consequently, in an action brought against the decision at issue, it is for the appellant to demonstrate, on the facts and evidence relating to the substantive and technical examination which he adduced before the CPVO, that the CPVO was required to carry out the review provided for under Article 20(1)(a) of Regulation No 2100/94.

59. It is in light of those factors that the Court must, finally, examine whether the General Court did not err in law in its review of the application of the principle of 'examination of the facts of its own motion' by the Board of Appeal.

60. As regards evidence which the appellant adduced to justify the annulment of the protection previously granted, the General Court found, first, in paragraph 138 of the judgment under appeal that the appellant did not advance any evidence whatsoever, or the slightest information capable of constituting *prima facie* evidence to support his claim that the chemical and mechanical treatment or the taking of cuttings such as that carried out in the present case might have distorted the results of the technical examination of the variety LEMON SYMPHONY in 1997.

61. Secondly, in paragraph 157 of the judgment under appeal, the General Court observed that at no point in the proceedings did the appellant produce any specific information or evidence whatsoever capable of substantiating his submissions, *inter alia*, as to the lasting effect of the growth regulators.

62. Finally, as regards the arguments alleging infringement of the principle of good administration

and of the right to an effective remedy, it appears from the documents in the file that the appellant argued in support of his action before the Board of Appeal that the plant material, on which the technical examination of the variety LEMON SYMPHONY had been carried out in 1997, was deficient on the grounds that (i) the plants used for the examination had undergone mechanical and chemical treatment, and (ii) they were plant cuttings sent by Mr Hansson.

63. In view of those findings, and bearing in mind the principles set out in paragraphs 57 and 58 above, the General Court did not err in law in the taking of evidence when it found that the appellant had not adduced, to the requisite legal standard, the facts and evidence which make it possible to establish that the condition laid down in Article 7 of Regulation No 2100/94 had not been fulfilled in the technical examination of the variety LEMON SYMPHONY, which would have justified a declaration of nullity for the purposes of Article 20(1) of that regulation.

64. Consequently, the arguments alleging infringement of the principle of good administration and of the right to an effective remedy cannot succeed.

65. It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

66. On the basis of his second ground of appeal, the appellant alleges, in essence, that the General Court, in paragraphs 136 to 138 of the judgment under appeal, infringed the rules on the burden of proof and the taking of evidence.

67. By the first argument under that ground of appeal, the appellant claims that the General Court wrongly applied to the requests for the adoption of measures of inquiry, submitted to the CPVO, the case-law of the Court of Justice arising out of the judgment in *ILFO v High Authority*, 51/65, EU:C:1966:21, according to which a request for the adoption of measures of inquiry made by a party cannot be accepted if that party offers no evidence whatsoever to justify such measures.

68. According to the appellant, in doing so, the General Court committed four errors of law. In the first place, the principles of the case-law cited are not compatible with Article 76 of Regulation No 2100/94. In the second place, the General Court failed to comply with its obligation to state reasons, in that it did not explain the appropriateness of applying that case-law. In the third place, it infringed the right to fair process by introducing a condition relating to the adoption of a measure of inquiry which was not mentioned at any stage of the proceedings. In the fourth place, it wrongly reproduced the case-law cited, as that case-law does not mention the need for prima facie evidence for the adoption of a measure of inquiry.

69. By his second argument, the appellant claims that, even assuming that it was for him to produce prima facie evidence in order to put forward his arguments, the judgment under appeal is nevertheless vitiated by an error of law, given that the General Court distorted the facts and evidence which the appellant adduced,

particularly with regard to the influence of mechanical and chemical treatment of the plant material examined and propagation by means of cuttings.

70. The CPVO and Mr. Hansson contend that the judgment under appeal 'is correct' irrespective of whether the burden of proof or the burden of proving a prima facie case rests with the appellant, given that the Board of Appeal assessed the arguments and points of view advanced by the appellant. Moreover, the General Court did not err in law in applying the rules thus developed for adopting measures of inquiry.

Findings of the Court

71. As regards the appellant's first argument, the General Court cannot be reproached, in the first place, for infringing its obligation to state reasons.

72. First, it is settled case-law that the obligation for the General Court, under Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 thereof and Article 81 of the Rules of Procedure of the General Court, to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case. The reasoning of the General Court may therefore be implicit on condition that it enables the persons concerned to know the reason for the General Court's decision and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, judgment in *Nexans and Nexans France v Commission*, C-37/13 P, EU:C:2014:2030, paragraph 21 and the case-law cited).

73. In paragraph 137 of the judgment under appeal, the General Court justified the application by analogy of the principles established in the judgment in *ILFO v High Authority* (51/65, EU:C:1966:21) to the Board of Appeal on the ground that it is a quasi-judicial body.

74. Moreover, the very principle of examination of the facts by the CPVO of its own motion under Article 76 of Regulation No 2100/94 does not preclude such an application, since, as is clear from paragraphs 53 and 54 above in the context of a request to open nullity proceedings provided for in Article 20(1) of that regulation, it is for the appellant to provide the substantive evidence showing that there are serious doubts about the legality of the contested protection.

75. Secondly, as the [Advocate General stated in point 76 of her Opinion](#), Article 81 of Regulation No 2100/94 stipulates that the principles of procedural law generally recognised in the Member States apply to proceedings before the CPVO.

76. Therefore, the General Court cannot be criticised for having found that the appellant should have presented to the Board of Appeal prima facie evidence in order to secure from it the adoption of a measure of enquiry.

77. In the second place, it is not clear from the judgment under appeal that the General Court erred in its application of the principles developed in the judgment in *ILFO v High Authority* (51/65, EU:C:1966:21).

78. The General Court found in paragraph 138 of the judgment under appeal that the appellant did not advance any evidence whatsoever, or the slightest information to justify his request.

79. In those circumstances, the appellant cannot claim that the General Court was wrong to hold that he could not seek the adoption of measures of inquiry, given that he did not present prima facie evidence.

80. In that respect, the appellant claims that the General Court distorted the facts and evidence which he adduced in the proceedings before the CPVO, concerning, first, the influence of the chemical and mechanical treatment of the material used for the technical examination of the variety LEMON SYMPHONY and, secondly, the use of cuttings of that variety for that examination.

81. It must be noted at the outset that it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts. However, when the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see, inter alia, judgment in *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 41 and the case-law cited).

82. In the first place, the appellant refers to the letter of 13 January 1997 sent by the agent of the Bundessortenamt responsible for the technical examination of the variety LEMON SYMPHONY, stating that *'there is a risk that the technical examination will not progress satisfactorily [because of the treatment with growth regulators of the material sent]'*.

83. In that regard, first, as is clear from the presentation of the facts by the General Court in paragraph 64 of the judgment under appeal, that agent of the Bundessortenamt demonstrated at the hearing before the Board of Appeal in cases A 005/2007, A 006/2007 and A 007/2007 on 4 December 2007 that there was *'no uncertainty as to the quality of the trials carried out in July/August 1997'*, given that the effect of the growth regulators had disappeared.

84. Secondly, the General Court held in paragraph 164 of the judgment under appeal that it falls within the discretion of the competent national office to examine or decide, during the technical examination, whether the plant material sent by Mr Hansson is in fact inappropriate or whether, as in the present case, the technique of taking cuttings makes it possible for the defects initially affecting the plant material to be remedied.

85. Since the appellant did not at any time challenge the assertion of the agent of the Bundessortenamt, which was made after the matters on which he relies, and which states that the effects of the growth regulators had disappeared by the time of the technical

examination of the variety LEMON SYMPHONY, the General Court concluded, without distorting any facts of the case or any evidence advanced by the appellant, that the appellant had not provided any evidence capable of calling the Board of Appeal's assessment into question.

86. In the second place, as regards the appellant's claims relating to the risks connected with the use of material which grew from propagation by means of cuttings from a variety in order to carry out the technical examination, suffice it to state that the appellant submits that, since such a risk is a matter of common knowledge, it is not necessary to provide evidence of the existence of that risk in the present case.

87. In those circumstances, the General Court could only find that the appellant had failed to satisfy the conditions necessary for the adoption of a measure of inquiry.

88. Therefore, the General Court cannot be accused of having distorted the facts of the case or the evidence adduced by the appellant.

89. In the light of the foregoing, the second ground of appeal cannot succeed.

The third ground of appeal

Arguments of the parties

90. By his third ground of appeal, the appellant claims, in essence, that the General Court, in paragraphs 141 to 151 of the judgment under appeal, was in breach of its obligation to carry out a review of legality and distorted the facts.

91. First, the appellant alleges that the General Court failed to appreciate the fact that the CPVO's expertise concerning the practice of taking cuttings cannot be described as 'a matter of common knowledge'. In any event, that 'fact' was distorted, and that description was not subject to a review of legality.

92. Secondly, the General Court, in paragraph 147 of the judgment under appeal, erred in law by not giving reasons for its finding that the reasoning of the Board of Appeal is 'compatible with the objective data of the case, as is apparent from the case-file'.

93. Thirdly, the appellant identifies certain errors committed by the General Court, in particular in paragraph 147 of the judgment under appeal in its references to certain facts of the case.

94. The CPVO contends that much of this ground entails a repetition of the arguments submitted in the previous grounds.

95. Mr Hansson contends that the errors of fact identified by the appellant have no effect on the legality of the judgment under appeal.

Findings of the Court

96. In the first place, the appellant's arguments seek, in reality, to challenge the General Court's assessment of the facts which, as has been noted in paragraph 81 above, and subject to any distortion of the facts, is not open to review by the Court of Justice at the stage of an appeal.

97. Thus, when the appellant criticises the General Court for finding that, for the technical examination,

the use of cuttings taken from plants sent by Mr Hansson is a matter of common knowledge, the appellant necessarily starts from the premiss that material grown from cuttings is not appropriate for conducting that examination; otherwise that argument is irrelevant.

98. The examination of that factor requires an assessment of the facts which is outside the jurisdiction of the Court of Justice at the stage of an appeal.

99. In any event, it was for the appellant to provide evidence to that effect in support of his claims, which he has not done, as was established in paragraphs 84 to 86 above.

100. In the second place, even assuming that the General Court committed errors in designating the names of the agents of the CPVO and of the Bundessortenamt, the appellant does not indicate to what extent those errors are capable of calling into question the lawfulness of the judgment under appeal. In any event, it is not clear that such errors would affect the lawfulness of that judgment.

101. Consequently, the third ground of appeal must be rejected.

The fourth ground of appeal

Arguments of the parties

102. By his fourth ground of appeal, which relates to paragraphs 152 to 157 of the judgment under appeal, the appellant alleges, in essence, that the General Court failed to state reasons.

103. By the first argument within that ground of appeal, the appellant claims that the judgment under appeal is inconsistent in that, on the one hand, in paragraph 10 of the judgment under appeal, the General Court found that the mechanical and chemical treatment of the plant material sent had threatened the technical examination of the variety LEMON SYMPHONY and, on the other, in paragraph 156 of that judgment, the General Court found that the appellant had not presented any specific information establishing that the plant material examined was not appropriate for conducting that examination.

104. By his second argument, the appellant claims that the General Court should have reviewed whether the evidence relied on contained all the information which should have been taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it.

105. The CPVO contends that the appellant challenges only the factual findings made by the General Court. In addition, the second argument under the fourth ground of appeal is wholly unfounded.

106. Mr Hansson states that it was for the appellant to establish, or at least to provide evidence that growth regulators lead, not only to an incorrect evaluation of the criteria determining the rights, but also to an incorrect assessment of the criterion of distinctiveness laid down in Article 7 of Regulation No 2100/94.

Findings of the Court

107. Since the appellant claims within this ground that, in the first place, the judgment under appeal is vitiated by a contradiction, suffice it to note, as is clear from

paragraph 83 above, that the General Court found that the Bundessortenamt had considered that there was no doubt about the quality of the plant material used for the technical examination of the variety LEMON SYMPHONY. Therefore, the judgment under appeal contains no contradiction when it states, in paragraph 156, that the appellant provided no information to the contrary.

108. In the second place, in any event, the assessments of the General Court, as they result from paragraphs 152 to 157 of the judgment under appeal, which the appellant challenges under that ground, were made for the sake of completeness in paragraphs 141 to 151 of that judgment. Therefore, even if the fourth ground raised by the appellant in support of his appeal were to be allowed, the judgment under appeal could not, however, be set aside.

109. Consequently, the fourth ground of appeal must be rejected.

The fifth and sixth grounds of appeal

Arguments of the parties

110. In the fifth ground of appeal, the appellant disputes the assessments of the General Court in paragraphs 159 to 162 of that judgment.

111. He submits, in the first place, that the General Court infringed Article 7 of Regulation No 2100/94 by its finding in paragraph 159 of the judgment under appeal that the distinctive character, for the purposes of that provision, of the variety LEMON SYMPHONY was not determined 'exclusively, if at all' by reference to the characteristic 'attitude of shoots'. Furthermore, the General Court also improperly extended the scope of the proceedings.

112. In the second place, the appellant states that the General Court, in paragraph 160 of the judgment under appeal, distorted the facts in finding that the adapted 2006 description of the variety LEMON SYMPHONY did not differ from the original 1997 description. Furthermore, the General Court infringed Article 20(2) of Regulation No 2100/94 in not finding that the variety for which the description was amended should not have been protected.

113. Under the sixth ground of appeal, which challenges the General Court's assessments in paragraphs 165 to 168 of the judgment under appeal, the appellant claims, first of all, that that Court distorted the facts in that the appellant did not limit his arguments to the issue of the relative or absolute character of the 'attitude of shoots'.

114. Next, the appellant criticises the General Court for having improperly extended the scope of the proceedings to the arguments relating to the proceedings in Case T-177/08.

115. Finally, the General Court infringed its obligation to carry out a full review of the legality of the decision at issue by not upholding the appellant's argument alleging that the Board of Appeal had not taken his arguments into consideration.

116. In relation to the fifth ground, the CPVO contends that the General Court's finding in paragraph 159 of the

judgment under appeal must be understood as meaning that in 1997 no comparable variety was available.

117. Mr Hansson contends that the disputed findings are not decisive in terms of the issue of the distinctive character of the protected variety.

118. In relation to the sixth ground, the CPVO contends that the appellant misinterprets the judgment under appeal. In addition, none of the considerations relating to the attitude of the shoots is decisive for determining the legality of the judgment under appeal.

119. Mr Hansson contends that the assessment of the distinctiveness of a variety is based on a comparison between the variety sought and known varieties of the same species. Consequently, the distinctive criteria could be assessed only by making such a comparison.

Findings of the Court

120. As a preliminary point, it must be stated, first, that, by the fifth and sixth grounds of appeal, the appellant is challenging assessments made by the General Court in paragraphs 159 to 162 and 165 to 168 of the judgment under appeal concerning arguments of the appellant which the General Court held to be ineffective, as is stated in paragraph 158 of that judgment.

121. Consequently, given that the General Court rightly found that the appellant had not adduced any evidence or means of proof capable of challenging the technical examination which resulted in the grant of the right to the variety LEMON SYMPHONY, the appellant's arguments relating to the level of expression attributed in respect of the characteristic 'attitude of shoots' cannot lead to the judgment under appeal being set aside.

122. Thus, since the appellant has not managed to demonstrate that the plant material used for the technical examination of the variety LEMON SYMPHONY was not appropriate and that the DUS criteria had therefore not been satisfied, the arguments relating to the adaptation of the description of that variety are themselves ineffective.

123. Secondly, as was observed in paragraph 82 above, an appeal is limited to points of law, since the appraisal of the facts and the assessment of evidence do not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

124. In that regard, the appellant cannot challenge the General Court's factual assessments, in particular in relation to the level of expression attributed in respect of the characteristic 'attitude of shoots' concerning the variety LEMON SYMPHONY.

125. It is in the light of those considerations that each of the arguments advanced in support of the fifth and sixth grounds of the appeal must be examined.

126. First, the appellant alleges that the characteristic 'attitude of shoots' necessarily comes within the examination of the distinctive character of a variety under Article 7 of Regulation No 2100/94.

127. However, in criticising the General Court for infringing that article, when in paragraph 159 of the judgment under appeal the General Court found that the

assessment of the distinctive character of a plant variety was not determined exclusively, if at all, by reference to the 'attitude of shoots' characteristic, the appellant has misinterpreted the judgment under appeal.

128. The General Court did not consider, in the context of the examination of the distinctive character of a variety as provided for under Article 7 of Regulation No 2100/94, that the 'attitude of shoots' characteristic should not be taken into account. It is, however, clear that the examination of the distinctive character of a plant variety necessarily presupposes the existence of reference plant varieties. Therefore, it is on the basis of whether such varieties exist that the 'attitude of shoots' characteristic must be examined, and that it must play a more, or less, decisive role with regard to the distinctive character of the plant variety to be protected.

129. Accordingly, the Court of Justice must reject the first and second arguments advanced within the fifth ground of appeal and the third argument advanced within the sixth ground of appeal.

130. In addition, the General Court cannot be criticised for having considered that the adaptation of the description of the 'attitude of shoots' characteristic did not call into question the protection of the variety LEMON SYMPHONY. In so far as that characteristic is determined by a comparison with other plant varieties, a refinement of the description is inevitable where other plant varieties emerge.

131. In those circumstances, the third and fourth arguments advanced under the fifth ground of appeal must be rejected.

132. Finally, the appellant cannot, without contradicting himself, criticise the General Court, first, for having ruled on arguments relating to the proceedings in Case T-177/08, when the appellant himself put forward those arguments, and secondly, for having failed to carry out a full review of the legality of the decision at issue, in that that decision did not take into account the appellant's arguments relating to the nature of the 'attitude of shoots' characteristic, and at the same time criticise the General Court for having specifically ruled on the nature of that characteristic. The first and second arguments advanced within the sixth ground of appeal must therefore be rejected.

133. Since the fifth and sixth grounds of appeal must be rejected, it is clear from all the foregoing that the appeal must be dismissed in its entirety.

Costs

134. In accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the CPVO has applied for costs and Mr Schröder has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;
 2. Orders Mr Ralf Schröder to pay the costs.
- [Signatures]

* Language of the case: German.

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 13 November 2014 (1)

Case C-546/12 P

Ralf Schröder

The other parties to the proceedings being:

Community Plant Variety Office (CPVO)

and

Jørn Hansson

(Appeal — Community plant variety rights — Decision of the Board of Appeal in annulment proceedings — Investigation of the facts of its own motion — Article 76 of Regulation (EC) No 2100/94)

1. In this appeal from the judgment of the General Court in Case T-242/09 (2) Mr Schröder challenges its ruling dismissing his action against the decision of the Board of Appeal ('the Board') of the Community Plant Variety Office ('the CPVO' or 'the Office') of 23 January 2009 concerning an application for annulment of the Community plant variety right ('CPVR') granted to the variety *Osteospermum ecklonis* LEMON SYMPHONY. (3)

2. In brief the background to the litigation is as follows. On 5 September 1996 Mr Hansson (the intervener in the proceedings before the CPVO) submitted an application to the CPVO for a CPVR for LEMON SYMPHONY. The CPVO asked the Bundessortenamt (German Federal Plant Variety Office) to conduct the required technical examination. To do so the Bundessortenamt asked for '*20 young plants of marketable quality, neither trimmed nor treated with growth regulators*'. Mr Hansson sent the requested plant material on 10 January 1997. The expert responsible for conducting the technical examination wrote to the CPVO in the following terms: '*In accordance with point II(2) of the CPVO technical protocol for distinctness, uniformity and stability tests ("DUS"), we hereby inform you that the propagating material of the variety referred to in the subject heading which was sent to us consists of plants in bud intended for sale which have been treated with growth regulators and trimmed. Therefore, there is a risk that the technical examination will not progress satisfactorily.*' The technical examination was nevertheless subsequently carried out ('the 1997 technical examination'), although the General Court noted in the judgment under appeal that the Bundessortenamt had not been able to confirm whether it was conducted directly on the plant material sent by Mr Hansson or on cuttings obtained from that material. The Bundessortenamt subsequently prepared an examination report to which the official description of LEMON SYMPHONY was attached as an annex, showing that the characteristic 'attitude of shoots' was expressed as 'erect'. (4)

3. The CPVR for LEMON SYMPHONY was granted on 6 April 1999.

4. On 26 November 2001 Mr Schröder submitted an application for a CPVR for the *Osteospermum ecklonis* variety SUMOST 1. (5) The technical examination showed that SUMOST 1 was not distinct from the variety LEMON SYMPHONY. Mr Schröder's application was therefore unsuccessful. In order to pursue his claim for protection for SUMOST 1 Mr Schröder subsequently launched a number of applications with a view to overturning the decision to grant a CPVR for LEMON SYMPHONY. In the administrative procedure and before the General Court Mr Schröder claimed that that CPVR should be declared null and void. His case is essentially that the 1997 technical examination was invalid, because the material used for the purposes of that examination was flawed. He argues that LEMON SYMPHONY had never existed in the form reproduced in the official description entered in the Register of Community Plant Variety Rights in 1997.

5. Mr Schröder maintains that the 1997 technical examination was defective for the following reasons. First, cuttings had been taken from the plants sent to the Bundessortenamt and those cuttings were used in the tests instead of the material sent by Mr Hansson (the holder of the CPVR for LEMON SYMPHONY). Second, the material tested consisted of plants in bud that had been treated by growth regulators. Third, there were differences from the description of LEMON SYMPHONY that had been produced in Japan. Fourth, under Council Regulation (EC) No 2100/94 (6) a variety is not distinct unless it is distinguishable by reference to the expression of the characteristics which result from a particular genotype or combination of genotypes; no distinction can be made where the expression of the characteristics found results from mechanical treatment and treatment with growth regulators.

6. Mr Schröder now puts forward six grounds of appeal.

7. In my view only the first ground — that the General Court erred in law, thereby infringing his fundamental rights, in ruling that the Board was not subject to an obligation to investigate the facts of its own motion — discloses a true point of law; and that ground is unfounded for the reasons that I set out below.

European Union law

Fundamental rights

8. Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') (7) guarantees a person's right to have his affairs handled impartially, fairly and within a reasonable time by the EU institutions.

9. Article 47 of the Charter provides for the right to an effective remedy and a fair hearing.

Regulation (EC) No 2100/94

10. The Basic Regulation establishes a system (which co-exists with national regimes) for granting industrial property rights for plant varieties that are valid throughout the European Union. (8) The CPVO was established to implement the Regulation. (9) Varieties of all botanical genera and species, including, inter alia,

hybrids between genera or species, may form the object of a CPVR. (10) In order to obtain protection a variety must be distinct, uniform, stable and new. (11) The holder of a CPVR enjoys the exclusive right to carry out or authorise the acts listed in Article 13(2). (12) A CPVR may be obtained following the filing of an application; the conditions governing that process are laid down in Chapter I of the Regulation. The CPVO is responsible for making a formal, substantive and technical examination of the application. (13)

11. Article 7(1) states: *'A variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.'* (14) According to Article 7(2) the existence of another variety is a matter of 'common knowledge' where (a) it was the object of a plant variety right or entered in an official register of plant varieties, in the Community or any State, or in any intergovernmental organisation with relevant competence; or (b) where an application for granting a CPVR or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime.

12. A variety is deemed to be 'stable' if, inter alia, the expression of the characteristics included in the examination for distinctness remains unchanged after repeated propagation. (15)

13. Article 20 ('Nullity of Community plant variety rights') provides:

'1. The Office shall declare the Community plant variety right null and void if it is established:

(a) that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right; ...

2. Where the Community plant variety right is declared null and void, it shall be deemed not to have had, as from the outset, the effects specified in this Regulation.'

14. The conditions for cancelling CPVRs are contained in Article 21.

15. Decisions of the CPVO must be accompanied by statements of the grounds on which they are based and must be based only on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing. (16)

16. In the absence of procedural provisions in the Regulation, the CPVO must apply the principles of procedural law which are generally recognised in the Member States. (17)

17. An appeal lies to the Boards of Appeal from decisions of the CPVO taken pursuant to, inter alia, Articles 20 and 21. (18)

18. Article 76 states: *'In proceedings before it the Office shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55. It shall disregard facts or items of evidence which have not been submitted within the time limit set by the Office.'*

19. The CPVO may of its own motion and upon consultation with the holder adapt the official variety description in respect of the number and type of characteristics or of the specified expressions of those characteristics. (19)

20. In exercising its functions the Board of Appeal may exercise any power which lies within the competence of the CPVO. (20)

21. Article 73(1) confers a right to appeal to the Court of Justice against decisions of the Board. Such actions may be brought on the limited grounds laid down in Article 73(2). (21)

Commission Regulation (EC) No 1239/95

22. Regulation No 1239/95 (22) contains the detailed rules for the purposes of applying the Basic Regulation. Article 51 states that unless otherwise provided, the provisions relating to proceedings before the Office apply mutatis mutandis to appeal proceedings.

Administrative proceedings

23. A full account of the administrative proceedings before the relevant committee of the CPVO and the Board of Appeal is set out in paragraphs 5 to 78 of the judgment under appeal. In brief, the position is as follows.

24. On 27 October 2003, Mr Hansson (as rights holder for LEMON SYMPHONY) lodged a written objection in respect of Mr Schröder's application (of 26 November 2001) for a CPVR for SUMOST 1. (23) By decision of 19 February 2007 ('the refusal decision'), the Office upheld his objections and refused Mr Schröder's application, essentially on the ground that SUMOST 1 was not clearly distinguishable from LEMON SYMPHONY and that the conditions set out in Article 7 of the Regulation had therefore not been met.

25. Then, on 26 October 2004, Mr Schröder filed an application for cancellation of the Community plant variety right previously granted for LEMON SYMPHONY, pursuant to Article 21 of the Regulation, on the ground that the characteristics used for the variety description, including those assessed in the examination for distinctness, were not stable and therefore did not meet the requirements in Article 9. By letter of 10 May 2007, the CPVO informed Mr Schröder that the competent committee had decided that the conditions for cancellation under Article 21 of the regulation were not met ('the decision rejecting cancellation').

26. On 7 December 2004, the CPVO decided to carry out a technical verification in order to check whether LEMON SYMPHONY continued to exist in the same form. On 14 September 2005, the Bundessortenamt compiled an examination report concluding that the variety should be retained. A new description of LEMON SYMPHONY, dated the same day, was attached as an annex to that report, from which it is apparent, inter alia, that the characteristic 'attitude of shoots' was now expressed as 'semi-erect to horizontal'. By letter to Mr Hansson of 25 August 2006, the CPVO proposed to adapt the official description of LEMON SYMPHONY entered in the

register in 1997 to the new description of 14 September 2005. The CPVO took the view that such an adaptation was necessary, first, on account of the progress made in plant breeding since the 1997 technical examination and, second, because, following amendment of the test guidelines in 2001, the difference in the score for the characteristic ‘attitude of shoots’ could be explained by the fact that there was no comparison variety in the ‘Table of Characteristics VI’ used in 1997 and that LEMON SYMPHONY was the most erect variety during that year. Moreover, there had been a significant increase in the number of *Osteospermum ecklonis* species varieties since 1997 and the test guidelines had been partially amended, requiring the levels of expression to be adapted.

27. Mr Hansson accepted that proposal by letter of 22 September 2006. By letter of 18 April 2007, the CPVO informed Mr Hansson of its decision to adapt, of its own motion, the official description of LEMON SYMPHONY in accordance with Article 87(4) of the Regulation (‘the adaptation decision’). On 21 May 2007, the Office informed Mr Schröder of the decision on the adaptation of the description and the replacement of the official description of LEMON SYMPHONY entered in the Register of Community Plant Variety Rights in 1997 by that of 2005.

28. Mr Schröder appealed against the refusal decision, the decision rejecting cancellation and the adaptation decision to the Board of Appeal. (24) He was unsuccessful in all three applications.

29. On 11 April 2007, Mr Schröder filed an application for annulment of the CPVR granted to LEMON SYMPHONY. By letter of 26 September 2007 the CPVO rejected that application. An appeal was lodged with the Board on 19 October 2007. (25)

30. On 23 January 2009, the Board dismissed the appeal as unfounded (‘the annulment decision’). The Board made the following findings. First, the Bundessortenamt had informed the CPVO of a risk that the examination might be unreliable if the material provided (plants in bud that had been treated with growth regulators) were used, but had been advised to continue with the examination and to take cuttings from that material. Second, it is common practice to propagate all the varieties used in an examination from cuttings, taking them at the same time to ensure that all the material has the same physiological age. Third, the issue of chemical treatment was not as simple as Mr Schröder claimed. (26) Fourth, it could justifiably be concluded that treatment with growth regulators did not influence the examination. The type of growth regulator used during propagation normally has no lasting effect given that the subsequent reviewing of the plant’s growth requires further spraying with growth regulators (the Board preferred the information provided by Mr Hansson in that respect). Fifth, Mr Schröder’s assertion that all the reference varieties mentioned in the guidelines were known in 1997 was irrelevant. Sixth, the variety LEMON SYMPHONY, which was obtained from generic crossbreeding between the species *Osteospermum* and

Dimorphotheca, is as such unique, not only by virtue of its morphological characteristics, but also by virtue of its continuous flowering period, which is longer than that of the current *Osteospermum* varieties. Given LEMON SYMPHONY’s unique character, it was not possible to find, for the examination carried out by the Bundessortenamt in 1997, reference varieties with which it could have been compared.

31. By letter of 30 March 2009, Mr Schröder set out a series of criticisms and objections with regard both to the minutes and to the conduct of the hearing that took place on 23 January 2009. Before the General Court, Mr Schröder offered to produce evidence in support of his claims. (27)

Proceedings before the General Court and judgment under appeal

32. Mr Schröder brought four separate actions in the General Court challenging the Board’s decisions. (28) In each case he sought the annulment of the relevant decision and costs from the CPVO. All four cases were joined for the purposes of the judgment.

33. The General Court pointed out that the first three joined cases (T-133/08, T-134/08 and T-177/08) were closely linked and were dependent upon Case T-242/09 concerning the annulment proceedings. That case was therefore considered first.

34. Mr Schröder advanced four pleas. The first three alleged infringements of the Basic Regulation: (i) of Article 76 (examination of the facts by the Office of its own motion) and Article 81 (application of procedural provisions recognised by the Member States); (ii) of Article 7 (conditions for distinctness of a variety) and Article 20 (annulment of a CPVR); and (iii) of Article 75 (obligation to state reasons). The fourth plea alleged infringement of Article 63(1) and (2) of the Implementing Regulation (rules concerning minutes of oral proceedings and of taking evidence).

35. The General Court found Case T-242/09 to be unfounded. It therefore dismissed the appeal by judgment of 18 September 2012.

36. In Cases T-133/08, T-134/08 and T-177/08 the General Court upheld the appeals on the plea alleging infringement of Article 59(2) of the Implementing Regulation concerning the summons to the oral proceedings before the CPVO and the right to be heard. It accordingly set aside the Board’s rulings on the refusal decision, the decision rejecting cancellation and the adaptation decision.

The appeal and the procedure before the Court

37. Mr Schröder seeks to have the judgment under appeal set aside in so far as it concerns the decision in Case T-242/09, his application for annulment of the CPVR for LEMON SYMPHONY to be granted and his costs in the four sets of proceedings before the General Court.

38. Mr Schröder’s six grounds of appeal may be summarised as follows. First, the General Court erred in law by ruling that the Board was not able to act of its own motion in annulment proceedings. In so doing the General Court breached his rights regarding the burden

of proof and the taking of evidence before the Board — as a result, it failed to fulfil its duty of review and infringed his right to a fair hearing, good administration and an effective remedy. Second, the General Court erred in finding that a party is not entitled to measures of inquiry in proceedings before the Board unless he has adduced at least prima facie evidence in support of such an application and thereby infringed the rules concerning the burden of proof and the taking of evidence. Moreover, even if it is assumed that the burden of proof rests upon the applicant in annulment proceedings before the Board, the General Court denied his right to be heard and distorted the facts and the evidence. Third, the General Court erred in law by assuming a fact (the practice of propagating test specimens from cuttings) to be a ‘well known’ fact when (in his view) that fact is incorrect. It thereby failed to fulfil its duty of review and distorted the facts and the evidence. Fourth, the General Court ruled incorrectly that he had not adduced evidence in support of his submission concerning the effects of growth regulators. The judgment is thus contradictory and the grounds are deficient. Furthermore, the General Court failed to review the legality of the Board’s decision. Fifth, the finding that the characteristic ‘attitude of shoots’ of an *Osteospermum* variety was not included in the examination of distinctness infringes Articles 7 and 20 of the Basic Regulation. It is an impermissible extension of the subject matter of the dispute, and by so doing the General Court raised of its own motion an issue that was not put to it by the parties and was not a matter of public policy. Sixth, he contests the finding that the ‘attitude of shoots’ of an *Osteospermum* variety can be determined in relation to other plants forming part of the examination in question. Such a finding is a distortion of the facts, an infringement of the Regulation, an impermissible extension of the subject matter of the dispute and an infringement of the duty to conduct a full review. The decision is therefore contradictory.

39. The CPVO, supported by Mr Hansson (rights-holder for LEMON SYMPHONY, the intervener in the proceedings before the General Court and the other party to the proceedings before the Board of Appeal), asks the Court to dismiss the appeal and to order Mr Schröder to pay the costs of the proceedings.

Assessment

First ground: error of law in finding that the Board could not act of its own motion, and breach of right to an effective remedy and a fair hearing

Relevant passages from the judgment of the General Court

40. The General Court stated that Article 76 of the Basic Regulation (concerning the examination of the facts by the CPVO of its own motion) is, strictly speaking, inapplicable to the proceedings before the Board of Appeal. (29) The task of the Board is solely to rule, on the application of an interested party, on the lawfulness of a decision of the CPVO adopted under Article 20(1)(a) of the Regulation refusing to declare a CPVR null and void on the ground that that party has

failed to establish that the conditions set out in Article 7 or 10 of that regulation were not satisfied at the time when the CPVR was granted. (30) Since annulment proceedings were initiated not by the CPVO of its own motion, but following Mr Schröder’s application, Articles 76 and 81 read together with Article 20 of the Regulation placed the onus on Mr Schröder to prove that the conditions for that declaration of nullity were met. (31) These arrangements as to the burden of proof and the taking of evidence differed appreciably from those provided for by Article 76 of Council Regulation (EC) No 207/2009 on the Community trade mark. (32) The difference in the rules of evidence of the Community trade mark and plant variety regimes could, however, be explained by the fact that, unlike the regulation on the CTMR, the Basic Regulation does not distinguish between absolute and relative grounds for refusal of registration. The Basic Regulation’s rules were consistent with those in Council Regulation (EC) No 6/2002 (33) dealing with designs and with general principles of law and rules of procedure applicable to the burden of proof and taking of evidence, inter alia the maxim *actori incumbit onus probandi*. (34) Accordingly, the first ground of appeal had to be rejected as being founded on the incorrect premiss that the burden of proof lay, in the present case, on the CPVO by virtue of Articles 76 and 81 of the Basic Regulation. (35)

41. The General Court then observed that it was not apparent from the provisions of the Basic Regulation that the proceedings before the CPVO are purely investigative in nature. In particular, the ‘principle of examination of its own motion’ (set out, with regard to the technical examination, in the first sentence of Article 76) had to be reconciled with the rule (set out in the second sentence of that article) that the CPVO is required to disregard facts or items of evidence which have not been submitted within the period set by it. It was thus for the parties to the procedure before the CPVO to submit in due time the facts which they intended that the office should find and appraise, adducing the evidence which they wished to see admitted in support of those facts. (36) In so far as those provisions were applicable to appeal proceedings against a decision of the CPVO taken under Article 20 of the Regulation refusing to annul the CPVR, it was thus for the party seeking annulment to put forward the facts and submit the evidence which, in its view, proved that the conditions annulling the CPVR were met. The Board was then required to examine carefully and impartially all the relevant elements of the case, ensuring compliance with the general principles of law and with the applicable rules of procedure governing the burden of proof and the taking of evidence. (37)

42. Next, the General Court considered that Mr Schröder was essentially complaining that the Board had based its decision exclusively on the version of the facts put forward by the CPVO and Mr Hansson, without gathering or assessing the evidence which he had offered and, in particular, without granting his request for the adoption of a measure of inquiry

consisting of an expert opinion to establish, inter alia, the effect of the growth regulators. (38) The General Court considered that Mr Schröder's request could not be accepted as he had not offered any evidence to justify such measures. (39)

43. The General Court found that during the administrative phase of the proceedings, Mr Schröder had failed to advance any material information (such as an ad hoc scientific study, an extract from a specialised publication, an expert report carried out at his request or even a simple statement from a botanical or horticultural expert) capable of constituting prima facie evidence to support his contention (repeated many times but never substantiated, and disputed by all the other parties to the proceedings) that chemical and mechanical treatment or the taking of cuttings such as that carried out in the present case might have distorted the results of the 1997 technical examination. (40) Moreover, while the Board preferred the arguments of the CPVO and Mr Hansson, it did not come to that conclusion 'unilaterally and without verification' (as Mr Schröder maintained), but by relying on its own knowledge and expertise in botanical matters, after having examined, inter alia, whether it was still possible to describe LEMON SYMPHONY in 2005 by reference to the 1997 test guidelines and explaining the reasons why it intended to accept the CPVO's and Mr Hansson's arguments rather than Mr Schröder's. (41)

44. The General Court ruled that Mr Schröder had not proved to the requisite legal standard that the Board had infringed the rules on burden of proof and the taking of evidence. (42) By making his claim, Mr Schröder was in effect seeking to obtain a fresh assessment of the relevant facts and evidence. (43)

45. The General Court went on to reject Mr Schröder's other arguments criticising the Board for not responding to his arguments concerning the unreliability of the 1997 technical examination. First, it held that that technical examination had been carried out on appropriate plant material, namely the cuttings originally taken from the plants sent to the Bundessortenamt by Mr Hansson. Second, Mr Schröder had failed to identify any other plant variety from which LEMON SYMPHONY, even if described as having a 'semi-erect to horizontal' attitude of shoots, was not clearly distinguishable in 1997. That assessment was consistent with the principal arguments set out by the CPVO and Mr Hansson. (44) Thus, even if, as Mr Schröder claimed, the 1997 technical examination found an incorrect level of expression regarding the characteristic 'attitude of shoots' and a different level of expression should have been attributed from 1997 onwards, that would not have had any effect on the assessment of the distinctive character of LEMON SYMPHONY for the purposes of Article 7 of the Regulation, since that assessment was not determined exclusively, if at all, by reference to that characteristic. (45) In that respect, the 2005 adapted description of LEMON SYMPHONY differed from the 1997 description only in that it changed the characteristic 'attitude of shoots' from 'erect' to 'semi-

erect'. (46) Furthermore, Mr Schröder had not established that the effect of that change was that the DUS (47) criteria had not been satisfied in 1997. Thus, the CPVR would have been granted for LEMON SYMPHONY in any event. (48) Moreover, the Board expressly rejected Mr Schröder's claim that if the examination of SUMOST 1 been conducted using the 1997 description of LEMON SYMPHONY the two varieties would have been found to be clearly distinct. (49)

46. The General Court ruled that in any event, Mr Schröder's technical arguments could not succeed, in the light of the technical considerations expressed in the contested decision, which were subject to a limited review, and in the light of the arguments in response submitted by the CPVO and Mr Hansson. (50) In particular, the fact that the plant material sent by Mr Hansson to the Bundessortenamt did not meet the requirements set by that office in its letter of 6 November 1996 was not conclusive. (51)

47. In relation to the dispute as to the characteristic 'attitude of shoots', the General Court pointed out that the question was whether that characteristic should be determined according to relative or absolute criteria. (52) It rejected Mr Schröder's submissions and concluded, citing the Bundessortenamt's explanations, that the characteristic should be subject to a relative and comparative assessment between varieties of the same species. (53) The General Court found that LEMON SYMPHONY remained exactly the same between 1997 and 2005. There was no material amendment of the description affecting the identity of the variety, but merely an amendment of the terms originally chosen. That did not change the identity of the variety but merely enabled it to be described more accurately, in particular by delimiting it in relation to other varieties of the species. (54) Finally, in reaching that conclusion, the General Court took into account photographs of the plants on the file derived from the proceedings before the German courts. (55)

Arguments of the parties

48. Mr Schröder advances four arguments in support of his first ground. He submits that the General Court erred in law by ruling that in annulment proceedings the Board does not investigate the facts of its own motion. In so doing it: (i) infringed Article 51 of the Implementing Regulation; (ii) erred in considering that annulment proceedings are adversarial in nature; (56) (iii) distorted the facts in stating that he had argued that the burden of proof rested on the CPVO; and (iv) violated his fundamental rights by refusing to examine the evidence he had offered in the proceedings before that court.

49. The CPVO states that the General Court's description of the administrative proceedings before the Board is inaccurate in that the Board is entitled to investigate the facts of its own motion. It nevertheless submits that the first ground is unfounded and/or inoperative; and inadmissible in so far as Mr Schröder seeks a reexamination of the facts.

50. Mr Hansson supports the CPVO.

Analysis

51. In examining Mr Schröder's first ground of appeal it is necessary to interpret Article 76 of the Basic Regulation. Are such proceedings investigative or adversarial in nature; and does the party seeking annulment bear the burden of proof? The parties agree that the General Court erred in ruling that Article 76 of the Regulation does not apply to proceedings before the Board.

52. I too agree with that view.

53. I shall start by considering Article 76 in relation to proceedings before the CPVO, before turning to the Board. According to the first limb of Article 76 the CPVO must investigate the facts of its own motion to the extent that they concern the substantive and technical examinations. (57) Thus, where it is submitted in annulment proceedings that the conditions in Article 7 (concerning the distinctness of a plant variety) have not been met, the Office has an express obligation to investigate the facts.

54. It is true that the second limb of Article 76 provides that the parties also have a role in submitting evidence, in so far as the CPVO must disregard facts or items which have not been submitted in accordance with the relevant time limit. The party seeking annulment clearly has a role and a right to submit evidence in support of his application. (58)

55. However, the wording means that the CPVO may not make a decision solely on the basis that the person seeking annulment has failed to satisfy the burden of proof, because it has an express obligation to investigate the facts concerning the technical examination of its own motion.

56. Furthermore, the relevant provisions of the Implementing Regulation (59) suggest that the proceedings are more investigative than adversarial in nature in so far as the Office directs proceedings with regard to the taking of evidence and the commissioning of expert reports. In contrast, in a purely adversarial process the applicant bears the burden of proof in establishing his case and the defendant has to demonstrate that the conditions on which the defence is based are satisfied.

57. The provisions governing the procedure before the CPVO apply equally to the Board. (60) In deciding on appeal from a decision of the CPVO the Board may exercise 'any power which lies within the competence of the Office'. (61) Therefore, as the CPVO has a broad discretion in carrying out its functions (62) and a clear and established role under Article 76 of the Regulation to investigate facts of its own motion, in particular relating to the technical examination, it follows from the express wording of Article 72 of the Regulation and Article 51 of the Implementing Regulation that Article 76 applies *mutatis mutandis* to the Board.

58. I am not suggesting that the Board must request a technical examination for the purposes of Article 55(1) whenever annulment proceedings are brought on the grounds that the requirements of Article 7 regarding distinctness are not met. (Nor is that Mr Schröder's case. He considers that the 1997 technical examination

was invalid and that if the Board had investigated the evidence available it would inevitably have reached that conclusion. The Board rejected that view and the General Court confirmed its findings.) I do however consider that the General Court erred in law by interpreting Article 76 of the Basic Regulation as being inapplicable to proceedings before the Board.

59. That said, I agree with the General Court that, in relation to the CPVR, there is no equivalent to the absolute and relative grounds for refusal to register a trade mark. In CPVR annulment proceedings the pertinent point is (in the instant case) whether the conditions governing the distinctness of the variety in Article 7 of the Regulation are met. That investigation requires technical knowledge and expertise which reside with (the Office and) the Board of Appeal in carrying out the necessary assessment. That process is not the same as that governed by the Community trade mark regime, which seeks to establish in opposition proceedings whether the proprietor of an earlier trade mark can demonstrate certain elements, such as genuine use of the earlier trade mark. Those issues do not arise in annulment proceedings under the CPVR regime, such as the present, where the question is whether, at the time that the CPVR was granted (in 1999, based upon the 1997 technical examination), LEMON SYMPHONY was a distinct variety. (63) In that respect Mr Schröder's submissions concerning the provisions governing the burden of proof and the taking of evidence in the context of the CTMR are irrelevant.

60. The General Court also refers to Article 63(1) of the Designs Regulation. In my view that too provides a different framework to CPVR and therefore does not impugn the judgment under appeal. First, Article 63(1) contains a general rule that in design proceedings OHIM is to examine the facts of its own motion. That rule is qualified in relation to invalidity proceedings, where OHIM is restricted to examining the facts and evidence provided by the parties. That follows from the fact that such proceedings cannot be initiated by OHIM itself under the Designs Regulation. (64) There is no equivalent to that requirement in relation to annulment proceedings under Article 20 of the Basic Regulation.

61. Furthermore, Mr Schröder is correct in criticising the General Court's description of his plea as being based on the premiss that the burden of proof was borne by the CPVO. That statement is not borne out by the General Court's description of his case in paragraph 105 of its judgment. However, the General Court's error does not constitute a distortion of the facts. (65) It is not a factual finding, but rather an incorrect description of his plea. It is thus irrelevant to the validity of the judgment under appeal.

62. Were Mr Schröder's fundamental rights to good administration and to a fair hearing infringed as a result of those errors?

63. Mr Schröder's case before the General Court was that the Board had based its decision exclusively on the facts put forward by the CPVO and Mr Hansson. He claimed that the Board should instead have gathered evidence of its own motion and then assessed the

evidence that he had advanced, in particular concerning his contention that the 1997 technical examination was irredeemably flawed because (i) the plants tested had been derived from cuttings treated with growth regulators; and (ii) such treatment did not ‘wear off’ during the examination period.

64. Mr Schröder argued that, in so doing, the Board infringed his fundamental rights to have his affairs handled impartially and fairly (Article 41 of the Charter) and to an effective remedy and a fair hearing (Article 47 of the Charter). He now submits that in reaching its decision the General Court did not examine whether the Board had carefully and impartially examined all the relevant elements of the case. Furthermore, the General Court failed to assess those facts that were not sufficiently investigated by the Board; it simply confirmed that tribunal’s earlier distortion of the facts. If the General Court had not made those errors it would have ruled that the Board had infringed his fundamental rights in reaching its decision. By committing those errors the General Court itself infringed his rights under Articles 41 and 47 of the Charter.

65. I do not accept Mr Schröder’s submission.

66. The General Court found, first, that Mr Schröder had not at any stage of the administrative proceedings advanced any element capable of constituting *prima facie* evidence to support his contention that chemical and mechanical treatment or the taking of cuttings (such as that carried out in the present case) might have distorted the results of the technical examination of LEMON SYMPHONY in 1997. (66) Second, the General Court rejected his argument that the Board reached its conclusion solely by reference to the evidence submitted by Mr Hansson and the CPVO. It considered that, although the Board preferred those submissions, it relied on its own knowledge and expertise in botanical matters. (67) Third, the General Court considered that Mr Schröder was in effect seeking to obtain a fresh assessment of the facts and the evidence. (68) It then examined the Board’s findings and considered them to be compatible with the objective data on the case file. Fourth, it observed that, in the Board’s experience it was a ‘well known’ fact (69) that the practice of taking cuttings applied to all varieties used in the technical examination. Fifth, it considered that Mr Schröder was merely calling into question the Board’s findings in that respect. (70)

67. In making that assessment the General Court did not in my view simply confirm the Board’s decision. Rather, it conducted a full and complete review of the proceedings before the Board. It took account of the evidence submitted by all parties. It found that Mr Schröder had submitted no evidence to support his submissions. It also found that the Board had relied on its own expertise in assessing the factual and technical elements of his case. (71)

68. I therefore consider that Mr Schröder’s fundamental rights to good administration and to an effective remedy and a fair hearing have not been infringed.

69. Mr Schröder also submits that the General Court failed to take into account the fact that the Board had not made a statement of the grounds for its decision in accordance with Article 75 of the Basic Regulation.

70. I consider that there is no breach of that provision. In determining whether the 1997 technical examination was valid, the General Court examined the grounds on which the Board’s decision was based. It found that the Board had excluded Mr Schröder’s factual premiss concerning the reliability of that examination. It considered that there was no manifest error vitiating those assessments for the reasons stated in point 67 above. Furthermore, it found that he had not shown in 1997 that LEMON SYMPHONY was clearly distinguishable from any other plant variety. Finally, the General Court rejected Mr Schröder’s submissions questioning the effect of the 1997 technical examination on the basis that there was an incorrect finding as to the level of expression attributed to the characteristic ‘attitude of shoots’. It considered that that characteristic had no effect on the assessment of the distinctive character of LEMON SYMPHONY for the purposes of Article 7 of the Regulation.

71. I therefore consider Mr Schröder’s fourth argument to be unfounded.

72. Whilst it is true that the General Court erred in its interpretation of Article 76 of the Basic Regulation and that its description of the incidence and significance of the burden of proof in annulment proceedings is incorrect, the contested judgment is not based upon those errors. What matters is that the General Court correctly interpreted Articles 7 and 20 of the Regulation. It concluded that the Board had correctly decided that, contrary to Mr Schröder’s arguments, LEMON SYMPHONY was distinct because it was distinguishable by reference to the expression of characteristics resulting from genotype rather than from mechanical or chemical interference. It is settled case-law that the Court has no jurisdiction to establish facts or to examine the evidence which the General Court accepted in support of those facts, unless that evidence has been distorted. That is not the case here. (72)

73. The first ground of appeal therefore cannot succeed. That ground underpins Mr Schröder’s whole appeal inasmuch as the remaining five grounds turn on whether the General Court’s interpretation of Articles 7 and 20 is correct. I shall therefore address each of those grounds only briefly in turn.

Second ground: measures of inquiry

74. Mr Schröder complains that the General Court erred in confirming the Board’s decision rejecting his request for measures of inquiry. The purpose of his request had been to obtain expert evidence to the effect that chemical and mechanical treatment or the taking of cuttings such as that carried out in the present case distorted the results of the 1997 technical examination. The General Court rejected his argument on the ground that he had failed to submit *prima facie* evidence in support of that request. Mr Schröder advances four arguments in support of the second ground of appeal. In brief, he alleges that the General Court: (i) infringed the

rules concerning the burden of proof and the taking of evidence with regard to his application for measures of inquiry; (ii) failed to state reasons and denied him a fair hearing and an effective remedy; (iii) raised of its own motion an issue that was not put to it by the parties and was not a matter of public policy, thereby unlawfully extending the scope of the proceedings; and (iv) wrongly applied the Court's case-law in reaching its decision.

75. Those arguments are four variants on the same theme and I shall consider them together.

76. As the Regulation makes no separate provision for measures of inquiry in the administrative phase, it follows from Article 81 that the principles of procedural law generally recognised in the Member States apply to proceedings before the Board (or the CPVO). In my view, the General Court was correct in applying principles from the Court's case-law (73) to the effect that the person seeking measures of inquiry must put forward evidence to justify obtaining them. The purpose of that rule is to ensure that entirely frivolous demands are not pursued. It seems to me that, in referring to the Court's case-law, the General Court respected the provisions of Article 81 of the Regulation.

77. It is settled case-law that the duty incumbent upon the General Court (under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union) to state reasons for its judgments does not require it to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the grounds on which the judgment under appeal is based and provides the Court of Justice with sufficient material for it to exercise its powers of review on appeal. (74)

78. The General Court provided a full account of its reasons in paragraphs 136 to 139 of the judgment under appeal. In setting out those reasons the General Court was simply applying legal principles to the facts before it. That seems to me to be entirely unexceptionable.

79. I therefore consider the second ground of appeal to be unfounded.

Grounds 3, 4, 5 and 6

80. Mr Schröder focuses on various aspects of the alleged flaws in the 1997 technical examination in Grounds 3, 4, 5 and 6. I shall therefore consider them together.

81. In accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the facts or evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. (75)

82. In essence Mr Schröder complains that the General Court erred in making the following findings. First, that

the practice of propagating specimens for testing by means of cuttings is a 'well known' fact (Ground 3). (76) Second, that the use of growth regulators on those specimens did not affect the validity of the tests (Ground 4). (77) Third, that the description of the characteristic 'attitude of shoots' did not affect the assessment of the distinctive character of LEMON SYMPHONY (Ground 5). (78) Fourth, in deciding that the description of that particular characteristic is subject to a comparative assessment between varieties of the same species (Ground 6). (79)

83. The General Court rejected Mr Schröder's complaints.

84. Mr Schröder now seeks to demonstrate that the General Court could not reasonably have concluded that the facts and circumstances were not sufficient to establish that the 1997 technical examination was irredeemably flawed. Although formally he is pleading errors of law, in reality he is questioning the General Court's assessment of the facts and the probative value it attached to those facts.

85. In the light of the Court's established case-law, Grounds 3, 4, 5 and 6 must therefore be considered inadmissible.

86. I add that in my view they are in any event unfounded.

87. Distortion of facts and/or evidence exists where without recourse to new evidence the existing assessment of the evidence is manifestly incorrect. (80) The alleged errors identified by Mr Schröder are that the General Court: (i) stated that the author of a note on the case file was the Bundessortenamt's expert, whereas he believes it to have been an official of the CPVO; and (ii) indicated that the only issue in dispute was whether the characteristic 'attitude of shoots' should be determined according to relative or absolute criteria.

88. The first point is a matter of detail concerning the author of a file note, the content of which is not challenged. The second concerns the General Court's characterisation of Mr Schröder's argument rather than being a matter of evidence. Neither point shows that the General Court committed a manifest error of assessment: neither impinges upon the facts and circumstances of the 1997 technical examination in a way that affects the assessment of that examination.

89. Furthermore, I recall that the parameters of the General Court's jurisdiction for review are set by Article 73(2) of the Basic Regulation. It was not therefore required to carry out a complete and detailed factual assessment in order to determine whether or not LEMON SYMPHONY lacked distinctness for the purposes of Article 7(1) of that regulation (in the context of Mr Schröder's application for annulment under Article 20). Rather, the General Court was entitled, in the light of the scientific and technical complexity of that issue, to limit itself to a review of manifest errors of assessment. (81)

90. The General Court was therefore entitled to reach the conclusion that the evidence on the file was sufficient to permit the Board to rule that the 1997

technical examination was not invalid on the grounds that the material used was defective and that Mr Schröder had failed to demonstrate that LEMON SYMPHONY was not clearly distinguishable from any other plant variety in 1997.

91. Furthermore, it is clear from the relevant paragraphs of the judgment under appeal (82) that in reaching its conclusions the General Court conducted a thorough review of the Board's decision. In so doing it provided reasons for its findings which are based upon the grounds and the evidence put forward by the parties to the proceedings.

92. I therefore conclude that if (quod non) Grounds 3, 4, 5 and 6 are admissible, they are in any event unfounded.

Costs

93. If the Court agrees with my assessment that the appeal should be dismissed, then, in accordance with Articles 137, 138, 140 and 184 of the Rules of Procedure (read together), Mr Schröder, the unsuccessful party on all grounds of appeal, should be ordered to bear the costs.

Conclusion

94. I therefore consider that the Court should:

– dismiss the appeal; and

– order Mr Schröder to pay the costs.

1 – Original language: English.

2 – Judgment in Schröder v CPVO — Hansson (LEMON SYMPHONY), T-133/08, T-134/08, T-177/08 and T-242/09, EU:T:2012:430, 'the judgment under appeal'.

3 – A yellow daisy-like flower used as an ornamental bedding plant.

4 – See paragraphs 7 to 12 of the judgment under appeal. I summarise the administrative proceedings before the CPVO and the Board in points 23 to 36 below.

5 – A variety grown and marketed by Jungpflanzen Grünewald GmbH ('Grünewald'), in which Mr Schröder has a 5% shareholding.

6 – Of 27 July 1994 on Community plant variety rights (OJ 1994 L 227 p. 1), ('the Basic Regulation' or 'the Regulation').

7 – OJ 2010 C 83, p. 389.

8 – Articles 1 and 3.

9 – Article 4.

10 – Article 5(1).

11 – Article 6.

12 – Namely: (a) production or reproduction (multiplication); (b) conditioning for the purpose of propagation; (c) offering for sale; (d) selling or other marketing; (e) exporting from the Community; (f) importing to the Community; (g) stocking for any of the purposes mentioned in (a) to (f).

13 – Chapter II of the Basic Regulation.

14 – The provisions governing the examination of applications are to be found in Chapter II. According to Article 54, the CPVO examines whether the conditions for granting a CPVR are met. Article 55(1) makes provision for the technical examination which concerns, inter alia, establishing whether the conditions

in Article 7 relating to distinctness are met. The examination is conducted by the authorities designated by the Member States and entrusted with that responsibility, as set out in Article 30(4).

15 – Article 9.

16 – Article 75.

17 – Article 81(1).

18 – Article 67. Pursuant to Article 21 the CPVO must cancel the CPVR if it is established that the conditions for uniformity (Article 8) and stability (Article 9) are no longer met.

19 – Article 87(4).

20 – Article 72.

21 – In that regard, appeals lie to the General Court on points of law only. The grounds on which such action may be brought pursuant to Article 73(2) of the Regulation include lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, the Basic Regulation or any rule of law relating to the application of those instruments, or misuse of power.

22 – Establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ 1995 L 121, p. 37) ('the Implementing Regulation'). It was repealed and replaced by Commission Regulation (EC) No 874/2009 (OJ 2009 L 251, p. 3) with effect from 14 October 2009, after the material time in the main proceedings. Those rules include the right of the parties to proceedings to file documents in support of their position (Article 57) and rules concerning the taking of evidence (Article 60) and the commissioning of experts (Article 61).

23 – Mr Hansson also considered that the sale of SUMOST 1 infringed his rights relating to LEMON SYMPHONY. He therefore took action against Grünewald in the German courts and obtained a ruling in his favour. Grünewald's appeal to the Bundesgerichtshof (Federal Court of Justice) was dismissed on 23 April 2009.

24 – The Board's appeal decisions are respectively A 005/2007 (concerning an application for the grant of a CPVR for the variety SUMOST 1), A 006/2007 (concerning an application for cancellation of the CPVR for LEMON SYMPHONY) and A 007/2007 (challenging the CPVO decision to adapt of its own motion the official description of LEMON SYMPHONY).

25 – A 010/2007 (challenging the CPVO decision concerning the annulment of the CPVR for LEMON SYMPHONY) ('the contested decision').

26 – According to the Board, that was because the chemical treatment in question had been carried out in compliance with the relevant test protocols.

27 – Mr Schröder made that offer after he had lodged his application with the General Court on 24 June 2009: see paragraph 77 of the General Court's judgment.

28 – Respectively Case T-177/08 (the refusal decision A 005/2007); Case T-134/08 (the decision rejecting

cancellation A 006/2007); Case T-133/08 (the adaptation decision A 007/2007); and Case T-242/09 (the annulment decision A 010/2007).

29 – Paragraph 126.

30 – Paragraph 128.

31 – Paragraph 129.

32 – Of 26 February 2009 (OJ 2009 L 78, p. 1) (‘the CTMR’), which provides that in proceedings before it the Office for Harmonisation in the Internal Market (‘OHIM’) is to examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the OHIM is restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. See paragraph 130.

33 – Of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) (‘the Designs Regulation’) which provides that OHIM is to examine the facts of its own motion, save in proceedings relating to a declaration of invalidity where it is restricted to examining the facts, evidence and arguments put by the parties. See paragraph 131.

34 – Paragraph 132. See further Article 81(1) of the Basic Regulation.

35 – Paragraph 133.

36 – Paragraph 134.

37 – Paragraph 135.

38 – Paragraph 136.

39 – Paragraph 137; see in particular judgment in *ILFO v High Authority*, 51/65, EU:C:1966:21.

40 – Paragraph 138.

41 – Paragraph 139.

42 – Paragraph 140.

43 – Paragraph 141.

44 – Paragraph 158.

45 – Paragraph 159.

46 – Paragraph 160.

47 – Set out in the CPVO technical protocol for distinctness, uniformity and stability (DUS) tests; see point 2 above.

48 – Paragraph 161.

49 – Paragraph 162.

50 – Paragraph 163.

51 – Paragraph 164.

52 – Paragraph 165.

53 – Paragraph 166.

54 – Paragraphs 167 and 168.

55 – Paragraph 169.

56 – Article 20 of the Basic Regulation.

57 – Conducted pursuant to Articles 54 and 55 of the Basic Regulation.

58 – See further Article 57 of the Implementing Regulation.

59 – See Articles 60 and 61 of the Implementing Regulation.

60 – Article 51 of the Implementing Regulation.

61 – Article 72 of the Basic Regulation.

62 – Judgment in *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50.

63 – A Community trade mark may be declared invalid under Article 52(1) CTMR where, for example it has been registered contrary to Article 7 because, inter alia, the trade mark in question is devoid of any distinctive character (Article 7(1)(b)).

64 – Article 52 of the Designs Regulation.

65 – Judgment in *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, paragraphs 78 and 79.

66 – See paragraph 138 of the judgment under appeal.

67 – See paragraph 139 of the judgment under appeal.

68 – See paragraph 141 of the judgment under appeal.

69 – See paragraph 149 of the judgment under appeal.

70 – See paragraph 150 of the judgment under appeal.

71 – That finding might be thought inconsistent with the General Court’s interpretation of Article 76 in so far as the General Court stated that strictly speaking the Board is not required to investigate facts of its own motion.

72 – Judgment in *Brookfield New Zealand and Elaris v CPVO and Schniga*, EU:C:2012:813, paragraphs 39 and 40 and the case-law cited.

73 – Judgment in *ILFO v High Authority*, EU:C:1966:21, at pp. 95 and 96.

74 – Judgment in *Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 64.

75 – Judgment in *Brookfield New Zealand and Elaris v CPVO and Schniga*, EU:C:2012:813, paragraphs 39 and 40 and the case-law cited.

76 – See paragraph 145 of the judgment under appeal.

77 – See paragraphs 152 to 157 of the judgment under appeal.

78 – See paragraphs 158 to 162 of the judgment under appeal.

79 – See paragraphs 165 to 168 of the judgment under appeal.

80 – Judgment in *PepsiCo v Grupo Promer Mon Graphic*, EU:C:2011:679, paragraphs 78 and 79 and the case-law cited.

81 – Judgment in *Schröder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77.

82 – Paragraphs 145 to 168 of the judgment under appeal.