

Court of Justice EU, 6 June 2017, Schniga v CPVO



## PLANT VARIETY RIGHTS

**General Court erred in law in the finding that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, on completion of the technical examination of a variety, a new characteristic in respect of that variety:**

- **an application for a Community plant variety right may not be rejected solely on the ground that the characteristic of an examined variety was not referred to in either the technical questionnaire completed by the applicant or in the relevant test guidelines and protocols**

As the Advocate General noted, in point 97 of his Opinion, the assessment of the characteristics of a plant variety necessarily contains a particular uncertainty due to the nature of the object itself to which the technical examination relates, namely a plant variety, as well as the length of time required to conduct such an examination.

55. In those circumstances, only the flexibility that allows the recognised power of the President of the CPVO, under Article 23(1) of the implementing regulation, to insert additional characteristics in respect of a variety is also capable of ensuring the objectivity of the procedure for granting Community plant variety rights. Thus, an application for a Community plant variety right may not be rejected solely on the ground that the characteristic of an examined variety, found during the technical examination and decisive for assessing the distinctiveness of that variety in comparison with other varieties, was not referred to in either the technical questionnaire completed by the applicant or in the relevant test guidelines and protocols.

56. In that regard, it must be recalled that, with regard to the broad discretion conferred on the CPVO, it may, if it considers it necessary, take account of facts and evidence submitted or produced by the parties out of time (see, to that effect, judgment of **19 December 2012, Brookfield New Zealand and Elaris v CPVO and Schniga**, C-534/10 P, EU:C:2012:813, paragraph 50).

- **no restrictions with regard to the time of insertion of a new characteristic**

As to the time when the President of the CPVO may exercise his power under Article 23(1) of the implementing regulation, none of the provisions of that regulation or of the basic regulation preclude the insertion of a new characteristic intervening following the completion of the technical examination, given that

such a characteristic was found when conducting that examination.

- **no infringement of the principle of legal certainty**

Therefore, the fact that the President of the CPVO inserts a new characteristic, the presence of which was found only during the technical examination of a variety, cannot in itself constitute infringement of the principle of legal certainty with regard to third parties, the protected variety of which was chosen as a variety to be used as a reference in light of that technical examination. That cannot give rise to legitimate expectations as regards the extent of that examination and the nature of the distinctive characteristics examined.

67. It follows from all the foregoing considerations that the General Court erred in law in finding that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, on completion of the technical examination of a variety, a new characteristic in respect of that variety, when that characteristic was not referred to in either the technical questionnaire completed by the applicant or in the applicable test guidelines and protocols.

68. Consequently, Schniga's argument must be upheld, and, without it being necessary to analyse the other complaints in the appeal, to set aside the judgment under appeal in so far as it upheld the annulment of the decision of the CPVO by the Board of Appeal on the ground that the distinctive characteristic 'width of stripes' relied on had been inserted by the President of the CPVO.

Source: [curia.europa.eu](http://curia.europa.eu)

## Court of Justice EU, 6 June 2017

(A. Calot Escobar and J.L. da Cruz Vilaça)

JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2017 (\*)

(Appeal — Community plant variety rights — Application for a Community plant variety right — Apple variety 'Gala Schnitzer' — Technical examination — Test guidelines issued by the Administrative Council of the Community Plant Variety Office (CPVO) — Regulation (EC) No 1239/95 — Article 23(1) — Powers of the President of the CPVO — Addition of a distinctive characteristic on completion of the technical examination — Stability of the characteristic during two growing cycles)

In Case C-625/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 November 2015,

Schniga GmbH, established in Bolzano (Italy), represented by R. Kunze and G. Würtenberger, Rechtsanwälte, applicant,

the other parties to the proceedings being:

Community Plant Variety Office (CPVO), represented by M. Ekvad and F. Mattina, acting as Agents, defendant at first instance,

Brookfield New Zealand Ltd, established in Havelock North (New Zealand),  
 Elaris SNC, established in Angers (France),  
 represented by M. Eller, avvocato,  
 interveners at first instance,  
 THE COURT (Fifth Chamber),  
 composed of J. L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet, E. Levits (Rapporteur) and F. Biltgen, Judges,  
 Advocate General: M. Campos Sánchez-Bordona,  
 Registrar: L. Hewlett, Principal Administrator,  
 having regard to the written procedure and further to the hearing on 24 November 2016,  
 after hearing the [Opinion of the Advocate General](#) at the sitting on 18 January 2017,  
 gives the following

### Judgment

1. By its appeal, Schniga GmbH asks the Court to set aside the judgment of the General Court of the European Union of 10 September 2015, *Schniga v CPVO — Brookfield New Zealand and Elaris (Gala Schnitzer)* (T-91/14 and T-92/14, not published, ‘the judgment under appeal’, EU:T:2015:624), by which the General Court dismissed its actions seeking annulment of two decisions of the Board of Appeal of the Community Plant Variety Office (CPVO) of 20 September 2013 concerning the grant of a Community plant variety right for the ‘Gala Schnitzer’ apple variety (Cases A 003/2007 and A 004/2007) (‘the decisions at issue’).

### Legal context

#### EU law

2. Under Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) (‘the basic regulation’), Community plant variety rights are granted for varieties that are distinct, uniform, stable and new.

3. Under Article 7(1) of that regulation, a variety is 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.

4. As regards the criteria of uniformity, stability and novelty, they are defined in Articles 8, 9 and 10 of that regulation respectively.

5. Article 50(1)(f) of that regulation states that the application for a Community plant variety right must contain a technical description of the variety.

6. The question of whether the criteria of distinctness, uniformity and stability (‘the DUS criteria’) are met in a particular case is tested in the context of a technical examination conducted in accordance with Articles 55 and 56 of the basic regulation.

7. Pursuant to Article 55(1) of that regulation:  
*‘Where the [CPVO] has not discovered any impediment to the grant of a Community plant variety right on the basis of the examination pursuant to Articles 53 and 54, it shall arrange for the technical examination relating to compliance with the conditions*

*of the [DUS criteria] to be carried out by the competent office or offices in at least one of the Member States entrusted with responsibility for the technical examination of varieties of the species concerned by the Administrative Council [of the CPVO], hereafter referred to as the “Examination Office or Offices”.’*

8. Under Article 56(2) of that regulation, the technical examination is to be conducted in accordance with test guidelines, issued by the CPVO Administrative Council (‘the Administrative Council’), and any instructions given by the CPVO. Those guidelines describe, inter alia, the plant material required for the technical examination, how the tests are to be performed, the methods to be applied, the observations to be made, the grouping of the varieties included in the test and the table of characteristics to be examined. In the technical examination, plants of the variety at issue are cultivated alongside those of the varieties which the CPVO and the appointed examination office deem to be those to which the candidate variety comes closest according to the description of the candidate variety in the technical description forming part of the application for grant of a Community plant variety right.

9. Article 59(3)(a) of that regulation states:

*‘Objections [to the grant of a Community plant variety right] may be based only on the contention that:*

*(a) the conditions laid down in Articles 7 to 11 are not complied with;*

*...’*

10. Pursuant to Article 72 of the basic regulation:

*‘The Board of Appeal shall decide on the appeal on the basis of the examination carried out pursuant to Article 71. The Board of Appeal may exercise any power which lies within the competence of the [CPVO], or it may remit the case to the competent body of the [CPVO] for further action. The latter one shall, in so far as the facts are the same, be bound by the ratio decidendi of the Board of Appeal.’*

11. Under Article 19(2)(c) of Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Regulation No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ 1995 L 121, p. 37) (‘the implementing regulation’), the application for a Community plant variety right is to contain, among other information, the characteristics of the variety which, in the applicant’s opinion, are clearly distinguishable from other varieties, such other varieties being named (if appropriate) as reference varieties for testing.

12. Article 22 of that regulation, entitled ‘Decision on test guidelines’, states:

*‘1. Upon proposal of the President of the [CPVO], the Administrative Council shall take a decision as to the test guidelines. The date and the species concerned of the decision shall be published in the Official Gazette referred to in Article 87 of this Regulation.*

*2. In the absence of a decision of the Administrative Council as to test guidelines, the President of the [CPVO] may take a provisional decision thereon. The*

*provisional decision shall lapse on the date of the decision of the Administrative Council. Where the provisional decision of the President of the [CPVO] deviates from the decision of the Administrative Council, a technical examination started prior to the decision of the Administrative Council shall not be affected; the Administrative Council may decide otherwise, if circumstances so dictate.'*

13. Under Article 23 of that regulation, entitled 'Powers vested in the President of the [CPVO]':

*'1. Where the Administrative Council takes a decision on test guidelines, it shall include a power whereby the President of the [CPVO] may insert additional characteristics and their expressions in respect of a variety.'*

*2. Where the President of the [CPVO] makes use of the power in paragraph 1, Article 22(2) of this Regulation shall apply mutatis mutandis.'*

14. CPVO Protocol TP/14/1 for Distinctness, Uniformity and Stability Tests of 27 March 2003 (Apple) ('CPVO Protocol TP/14/1') lays down the test guidelines for the technical examination of apple varieties of the species *Malus Mill*. Before that protocol was adopted, there were no test guidelines or general instructions, within the meaning of the basic regulation, for those varieties. In accordance with usual practice with regard to technical examinations, the CPVO used to conduct DUS criteria tests for the varieties in question on the basis of the general and technical guidelines adopted by the International Union for the Protection of New Varieties of Plants (UPOV), an intergovernmental organisation set up under the International Convention for the Protection of New Varieties of Plants, adopted in Paris (France) on 2 December 1961 ('the UPOV Convention').

15. According to Section III 3 of CPVO Protocol TP/14/1, *'the characteristics to be used in DUS tests and preparations of description shall be those referred to in Annex I'*.

16. According to Section III 5 of CPVO Protocol TP/14/1, *'the minimum duration of tests (independent growing cycles) will normally include at least two satisfactory crops of fruit'*. Section IV of that protocol adds that *'candidates may meet the DUS standards after two fruiting periods but in some cases three fruiting periods may be required'*.

17. As stated in Section III 6 of CPVO Protocol TP/14/1:

*'... an applicant may claim either in the Technical Questionnaire or during the test that a candidate variety has a characteristic which would be helpful in establishing distinctness. If such a claim is made and is supported by reliable technical data, a special test may be undertaken providing that a technically acceptable test procedure can be devised. Special tests will be undertaken, with the agreement of the President of CPVO, where distinctness is unlikely to be shown using the characters listed in the protocol.'*

#### **International law**

18. UPOV, of which the European Community became a member on 29 July 2005, has adopted several

guidelines, appearing in the protocols, which are relevant for the purposes of the present proceedings.

19. Those include, first of all, Guidelines TG/14/8 for the conduct of tests for distinctness, uniformity and stability of 20 October 1995, which were established by UPOV for the apple variety *Malus Mill* ('UPOV Protocol TG/14/8').

20. Next, UPOV document TG/1/3, entitled '*General introduction to the examination of distinctness, uniformity and stability and the harmonised descriptions of new varieties of plants*', adopted by UPOV on 19 April 2002 ('UPOV Protocol TG/1/3'), provides the basis for all UPOV guidelines for the examination of the DUS criteria ('the DUS examination').

21. Pursuant to Section 1.3 of UPOV Protocol TG/1/3, *'the only binding obligations on members of [UPOV] are those contained in the text of the UPOV Convention itself, and this document must not be interpreted in a way that is inconsistent with the relevant Act for the [UPOV member] concerned'*. The purpose of that protocol is 'to set out the principles which are used in the examination of DUS' and it states that *'[this will ensure] that examination of new plant varieties is conducted in a harmonised way throughout the members of [UPOV]'*.

22. According to Section 4.2.3 of UPOV Protocol TG/1/3, *'the characteristics included in the individual Test Guidelines are not necessarily exhaustive and may be expanded with additional characteristics if that proves to be useful and the characteristics meet the conditions set out above'*.

23. Section 5.3.3.1.1 of the UPOV Protocol TG/1/3 states:

*'One means of ensuring that a difference in a characteristic, observed in a growing trial, is sufficiently consistent is to examine the characteristic on at least two independent occasions. This can be achieved in both annual and perennial varieties by observations made on plantings in two different seasons or, in the case of other perennial varieties, by observations made in two different seasons after a single planting. Guidance on the possible use of other approaches, such as two different environments in the same year, is explored in document TGP/9, "Examining Distinctness".'*

24. Pursuant to Section 6.2 of UPOV Protocol TG/1/3:

*'... Relevant characteristics of a variety include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, any obvious characteristic may be considered relevant, irrespective of whether it appears in the test guidelines or not.'*

25. Section 7.2 of UPOV Protocol TG/1/3 adds:

*'The relevant or essential characteristics include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, all obvious characteristics may be*

considered, irrespective of whether they appear in the Test Guidelines or not.’

26. Lastly, new Guidelines TG/14/9 for the conduct of tests for distinctness, uniformity and stability for apple fruit varieties were adopted by UPOV in document UPOV/TG/14/9 of 6 April 2005 (‘UPOV Protocol TG/14/9’). The table of characteristics contained in UPOV Protocol TG/14/9 includes Characteristic No 40, entitled ‘Fruit: width of stripes’, which did not appear in the table of characteristics contained in UPOV Protocol TG/14/8.

#### **Background to the dispute**

27. The General Court summarised the background to the case, in paragraphs 22 to 43 of the judgment under appeal, as follows:

‘22 On 18 January 1999, the *Konsortium Südtiroler Baumschuler*, the predecessor in title of the applicant, [*Schniga*], filed an application for a Community plant variety right at the CPVO, pursuant to [the basic regulation] ... That application was registered under number 1999/0033. The plant variety for which the right was sought is the apple variety of the species *Malus Mill* with the denomination *Gala Schnitzer* (“the candidate variety”).

23 In February 1999, the CPVO requested the Examination Office of the *Bundessortenamt* (German Federal Plant Variety Office, “the BSA”) established in *Wurzen* (Germany) to conduct the technical examination of the candidate variety pursuant to Article 55(1) of [the basic regulation]. For the purposes of that examination, the variety *Baigent* (“the reference variety”), considered to be closest to the candidate variety, was used as the comparable variety.

24 In 2001, the plant material submitted by *Schniga* for the technical examination proved to be virus-infected. The technical examination was therefore stopped, and then resumed in spring 2002, after *Schniga* had been allowed by the CPVO to submit new, virus-free, material of the candidate variety. It continued throughout 2003 and 2004 ...

25 By letter of 18 January 2005, the BSA informed the CPVO as follows:

“[On] January 13th 2005 we sent you the interim report on the DUS-examination of the [candidate] variety on behalf of the [CPVO]. We consider this candidate variety distinct from the [reference] variety, on the basis of a characteristic which for the time being is not listed in the CPVO [Protocol] TP 14/1, “Flower: colour of base of filament (after anther dehiscence)” ...

... [Evidence was given] that the concerned characteristic is sufficiently consistent and repeatable, exhibits sufficient variation between varieties and thus enables to establish distinctness ...

From this background, the concerned characteristic has also been proposed for inclusion during the revision of [UPOV Protocol TG/14/9], but was dropped off in order to reduce the number of characteristics down to a reasonable amount.

Our intention was supported and we were recommended to send with the interim report a request for authorisation to use this characteristic as an

additional one, in accordance with CPVO [Protocol] TP/14/1, paragraph III, chapter 3.”

26 The CPVO sent a further interim report to *Schniga* on 7 February 2005, again with the result “no remarks”.

27 On 19 December 2005, the BSA sent its final technical examination report to the CPVO and to *Schniga* (“the final examination report”), stating that the candidate variety was uniform, stable and distinct from the reference variety, on the basis of the characteristic “Fruit: Width of stripes”.

28 At point 9, under the heading “Date and/or document number of national Test Guidelines”, the final examination report states: “2003 03-27 CPVO TP/14/1”.

29. It is clear from points 16 and 17 of the final examination report, concerning the comparison of the candidate variety with the reference variety, that the candidate variety has broad stripes (note 7), whilst the reference variety has narrow to medium stripes (note 4), that assessment being based on the evaluation of an additional characteristic “Fruit: width of stripes”, corresponding to characteristic No 40 of UPOV Protocol TG/14/9 of 6 April 2005 (“the additional characteristic at issue”). The CPVO notes in that regard that the additional characteristic at issue did not appear either in [CPVO Protocol TP/14/1] or in [UPOV Protocol TG/14/8] ...

30 By letter of 24 January 2006, the CPVO informed the BSA that incorrect guidelines had been cited in the final examination report and that it was not CPVO Protocol TP/14/1 (adopted in March 2003) but UPOV Protocol TG/14/8 (adopted in 1995) that ought to have been used as the basis for the examination report, for it was the latter that was in force at the date on which the decision was taken to test the candidate variety in January 1999.

31 On 9 February 2006, the BSA sent the CPVO an amended version of the final examination report. Point 17 of that version reads:

“The variety was tested according to [UPOV Protocol TG/14/8]. The variety description was produced on the basis to the table of characteristics of the [CPVO Protocol] TP/14/1 from 27 March 2003 which came into force during the testing period. This allows the [candidate] variety to become part of the reference collection for varieties with later priority. The variety is distinct, uniform and stable according to both [protocols].”

32 On 5 May 2006, the interveners, *Brookfield New Zealand Limited* and *Elaris SNC*, the licensee and the holder, respectively, of the plant variety right relating to the reference variety, lodged with the CPVO, pursuant to Article 59 of [the basic regulation], objections to the grant of the plant variety right sought for the candidate variety. Those objections were based on the earlier right in respect of the reference variety.

33 The pleas in law relied on in support of the objections were: first, the plea covered by Article 61(1)(b) of [the basic regulation] that *Schniga*’s failure to comply with the requirements for submitting

material for the technical examination, laid down by the CPVO, ought to have led the latter to refuse the application for a plant variety right and, second, the plea covered by Article 7 of that regulation, that the candidate variety is not distinct from the reference variety.

34 By decision of 14 December 2006, followed by a corrigendum of 5 February 2007, the President of the CPVO authorised the use of the additional characteristic at issue in order to establish distinctness between the candidate variety and the reference variety. However, that decision makes no mention of the additional characteristic “anthocyanin coloration at the basement of the filaments”, also referred to in the final examination report. The decision in question is expressly based on Article 23 of [the implementing regulation].

35 By decisions of 26 February 2007, the CPVO committee responsible for deciding on objections to the grant of Community plant variety rights granted the plant variety right sought for the candidate variety (“the decision granting a plant variety right”) and dismissed the objections (“the decisions dismissing the objections”). It based its decision on, inter alia, the fact that, “for technical reasons”, taking the additional characteristic at issue into account was warranted, even though the latter was not referred to in the protocols in force on the date of the application for a plant variety right.

36 On 11 April 2007, both the interveners filed a notice of appeal with the Board of Appeal of the CPVO [(“the Board of Appeal”)], under Articles 67 to 72 of [the basic regulation], against the decision granting a plant variety right and the decisions dismissing the objections.

37 By decision of 21 November 2007 in Joined Cases A 003/2007 and A 004/2007, the Board of Appeal upheld those appeals, cancelled the decision granting a plant variety right and the decisions dismissing the objections, and rejected the application for a plant variety right; the Board gave a decision only on the first of the two pleas outlined in paragraph 33 above ...

38 Following an action for annulment brought by Schniga before the General Court, the decision of the Board of Appeal of 21 November 2007 was annulled by judgment of 13 September 2010, *Schniga v CPVO — Elaris and Brookfield New Zealand (Gala Schnitzer)* (T-135/08, ..., EU:T:2010:397). The appeal lodged against that judgment was dismissed by judgment of [19 December 2012, Brookfield New Zealand and Elaris v CPVO and Schniga](#) (C-534/10 P, ..., EU:C:2012:813).

39 The Board of Appeal thereupon resumed examination of the appeals brought by the interveners in the light of the second plea outlined in paragraph 33 above, criticising the CPVO for granting the right sought to a variety that was not distinct. By [the decisions at issue], the Board of Appeal again cancelled the decision granting a plant variety right and the decisions dismissing the objections and rejected the application for a plant variety right.

40 On the one hand, on the basis of Article 56(2) of [the basic regulation] and Articles 22 and 23 of [the implementing regulation], the Board of Appeal held in essence that:

- the protocol and test guidelines in force for the purposes of the technical examination were, at the material times, UPOV Protocol TG/14/8 ... and CPVO Protocol TP/14/1 ... (paragraph 19 of the [decisions at issue]);

- those protocols do not mention the additional characteristic at issue;

- neither in the technical questionnaire nor during the test period had Schniga submitted a request for the additional characteristic at issue to be taken into account under Section III 6 of CPVO Protocol TP/14/1 (paragraph 21 of the [decisions at issue]);

- the additional characteristic at issue was not mentioned in the BSA’s letter to the CPVO of 18 January 2005 and the BSA had made no request to the CPVO concerning it; it was mentioned for the first time in the final examination report, and subsequently in the decision of the President of the CPVO of 14 December 2006 authorising its use (paragraph 22 of the [decisions at issue]);

- in those circumstances, the fact that the BSA took into account, for the purposes of the technical examination, an additional characteristic not listed in CPVO Protocol TP/14/1 in force at that time constituted an infringement of Section III 3 of that protocol (paragraph 25 of the [decisions at issue]);

- the decision of the President of the CPVO of 14 December 2006 to permit retrospectively the use of that additional characteristic in the technical examination was fundamentally flawed, coming as it did some 12 months after the final examination report, and it cannot be justified, particularly in the light of Article 22(2) of [the implementing regulation] (paragraph 26 of the [decisions at issue]).

41 In paragraph 27 of the [decisions at issue], the Board of Appeal made reference in that connection to its decision of 8 October 2009 in Case A 010/2008 (JEWEL), according to which the use of an additional characteristic must receive the prior approval of the President of the CPVO in order to ensure legal certainty, objectivity in the handling of applications for grant of a plant variety right and the predictability of the behaviour of all the players concerned.

42 On the other hand, the Board of Appeal held, in paragraphs 28 and 29 of the [decisions at issue], that the technical examination in the light of the additional characteristic at issue had in any event also been flawed by the fact that it had taken place over a period of one year only, that is to say, 2005, as acknowledged by the BSA, whereas all other characteristics had been assessed in the two consecutive growing seasons 2004 and 2005. In its opinion, that constituted a clear infringement of the protocols and guidelines applicable in the present case, in particular, UPOV TG/1/3 and UPOV TG/14/8, which require for apple varieties an examination over at least two fruiting seasons in order to establish uniformity and stability.

43 *Consequently, the Board of Appeal found, in paragraphs 30 and 31 of the [decisions at issue], that the candidate variety could not be held to be legally distinct from the reference variety.'*

#### **The actions before the General Court and the judgment under appeal**

28. By two applications lodged at the Court Registry on 10 February 2014, Schniga brought an action for annulment of the decisions at issue.

29. In support of its actions, Schniga raised a single plea in law, divided into two parts, the first alleging that, contrary to that which was found by the Board of Appeal, the CPVO could not rely on the additional characteristic at issue in the technical examination, the second alleging that the Board of Appeal was wrong to take the view that the results of the technical examination were flawed merely on the basis that, as regards the additional characteristic at issue, it related to one crop cycle only, in contravention of the applicable test guidelines.

30. By the judgment under appeal, the General Court dismissed those actions.

31. As regards the first part of the single plea in law, the General Court, first, in paragraph 76 of the judgment under appeal, found that the procedural provisions laid down in CPVO Protocol TP/14/1 were applicable to the application for a grant of a Community right to the candidate variety. Next, the General Court recognised, in paragraph 80 of the judgment under appeal, the precedence of the protocols adopted by CPVO over those adopted by UPOV.

32. The General Court furthermore recalled, in paragraphs 81 and 82 of the judgment under appeal, that the CPVO enjoys broad discretion for the purposes of conducting the technical examination of a variety and that, in particular, the implementing regulation grants the President of the CPVO the power to insert additional characteristics and their expressions in respect of a variety where the Administrative Council takes a decision as to the test guidelines. It added, in essence, in paragraph 83 of that judgment, that that discretion is limited by the protocols and test guidelines adopted by the Administrative Council, which are binding on it.

33. In the end, the General Court came to the conclusion, in essence, in paragraph 86 of the judgment under appeal, that the President of the CPVO is not empowered to authorise the taking into account, during the technical examination of a variety, of a characteristic not listed in CPVO Protocol TP/14/1 and, consequently, rejected the first part of the single plea in law.

34. As regards the second part of the single plea in law, the General Court rejected it as ineffective, after finding that the first ground relied on by the Board of Appeal in the decisions at issue, namely that the CPVO could not rightly rely on the additional characteristic at issue in the context of the technical examination of the candidate variety, was not vitiated by unlawfulness and was sufficient to legally justify those decisions. However, the General Court emphasised that that

technical examination had taken place over a period of one year only, that is to say, 2005, in clear infringement of CPVO Protocol TP/14/1 and UPOV Protocol TG/1/3, so that it was necessary, in any case, to reject the action.

#### **Forms of order sought by the parties**

35. Schniga claims that the Court should:

- set aside the judgment under appeal; and
- order the CPVO and the interveners to pay the costs.

36. The CPVO contends that the Court should:

- uphold the appeal; and
- order each party to bear its own costs.

37. Brookfield New Zealand and Elaris contend that the Court should:

- dismiss the appeal; and
- order Schniga to pay the costs.

#### **The appeal**

##### **Arguments of the parties**

38. The appeal brought by Schniga is based on a single ground of appeal alleging infringement, by the judgment under appeal, of Articles 7 and 56 of the basic regulation, read in conjunction with Articles 22 and 23 of the implementing regulation.

39. By its first complaint, Schniga, supported, in substance, by the CPVO, submits that the General Court wrongly found that the protocols and test guidelines relating to the grant of a Community plant variety right are binding on the CPVO.

40. Brookfield New Zealand and Elaris take the view that the General Court did not err in law in finding that the rules of procedure which the CPVO imposes on itself are necessarily binding and that they take precedence over those of UPOV. The obligatory nature of the rules of conduct which an administrative body imposes on itself is all the more essential where that body enjoys broad discretionary powers.

41. By its second complaint, Schniga submits, first, that the General Court erred in law in finding that CPVO Protocol TP/14/1 was applicable to an application for a Community plant variety right lodged before its entry into force.

42. As regards, second, whether the President of the CPVO may insert a new characteristic in respect of a variety, Schniga argues that none of the provisions of the basic regulation or the implementing regulation prevents such an insertion following the conclusion of the technical examination.

43. Pursuant to Article 23(1) of the implementing regulation, the President of the CPVO has the power to take into consideration all distinctive characteristics of the examined variety, even if that characteristic is not mentioned in the application for a Community plant variety right.

44. According to Brookfield New Zealand and Elaris, the material moment that fixes the procedural framework applicable to an application for a Community plant variety right is not the date on which the application was lodged, but that of the actual beginning of the technical examination. To ensure legal certainty, the DUS examination cannot take account of

distinctive characteristics introduced after the technical examination.

#### Findings of the Court

45. It is appropriate to examine, at the outset, the second complaint of the single ground of appeal, and, more specifically, the argument alleging that the General Court wrongly found, in paragraphs 87 to 93 of the judgment under appeal, that the President of the CPVO was not entitled to insert the additional characteristic at issue for the candidate variety.

46. As a preliminary point, it must be recalled that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a broad discretion in carrying out its functions (see, to that effect, [judgment of 19 December 2012, Brookfield New Zealand and Elaris v CPVO and Schniga](#), C-534/10 P, EU:C:2012:813, paragraph 50). That broad discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of the basic regulation (see, to that effect, judgment of 15 April 2010, [Schröder v CPVO](#), C-38/09 P, EU:C:2010:196, paragraph 77).

47. Secondly, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine all the relevant particulars of an application for a Community plant variety right with care and impartiality and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings which it sets in motion (judgment of 19 December 2012, [Brookfield New Zealand and Elaris v CPVO and Schniga](#), C-534/10 P, EU:C:2012:813, paragraph 51).

48. It is in that context that it must be assessed whether the General Court misinterpreted, as argued by Schniga and the CPVO, the provisions of the basic regulation and of the implementing regulation relating to the powers of the President of the CPVO.

49. Under Article 56(2) of the basic regulation, the conduct of any technical examinations is to be in accordance with test guidelines issued by the Administrative Council and any instructions given by the CPVO.

50. In that regard, in the first place, pursuant to Article 22(1) of the implementing regulation, the Administrative Council takes a decision as to the test guidelines upon proposal of the President of the CPVO. Article 22(2) of that regulation specifies that, in the absence of a decision of the Administrative Council as to test guidelines, the President of the CPVO may take a provisional decision thereon.

51. Moreover, under Article 23(1) of the implementing regulation, where the Administrative Council takes a decision on test guidelines, it is to include a power whereby the President of the CPVO may insert additional characteristics and their expressions in respect of a variety.

52. Consequently, even supposing that CPVO Protocol TP/14/1 had been applicable to the proceedings at issue, the President of the CPVO was, in any event, empowered to insert a new characteristic, in the present case the 'width of stripes', for the examination of the candidate variety.

53. Only an interpretation of that kind of the powers of the President of the CPVO, as is clear, in particular, from Article 23 of the implementing regulation, is capable of taking account of the particularities of the purpose and the procedure for the grant of a Community plant variety right.

54. As the Advocate General noted, in [point 97 of his Opinion](#), the assessment of the characteristics of a plant variety necessarily contains a particular uncertainty due to the nature of the object itself to which the technical examination relates, namely a plant variety, as well as the length of time required to conduct such an examination.

55. In those circumstances, only the flexibility that allows the recognised power of the President of the CPVO, under Article 23(1) of the implementing regulation, to insert additional characteristics in respect of a variety is also capable of ensuring the objectivity of the procedure for granting Community plant variety rights. Thus, an application for a Community plant variety right may not be rejected solely on the ground that the characteristic of an examined variety, found during the technical examination and decisive for assessing the distinctiveness of that variety in comparison with other varieties, was not referred to in either the technical questionnaire completed by the applicant or in the relevant test guidelines and protocols.

56. In that regard, it must be recalled that, with regard to the broad discretion conferred on the CPVO, it may, if it considers it necessary, take account of facts and evidence submitted or produced by the parties out of time (see, to that effect, judgment of [19 December 2012, Brookfield New Zealand and Elaris v CPVO and Schniga](#), C-534/10 P, EU:C:2012:813, paragraph 50).

57. It must be recognised to have such a right, a fortiori, when, as in the present case, the evidence relevant to the examination of the distinctiveness of a variety is found during the objective procedure which constitutes the technical examination undertaken by the CPVO and completed by a national examination office.

58. Moreover, such an understanding of the powers of the President of the CPVO is supported by UPOV Protocol TG/1/3, Section 4.2.3 of which indicates in particular that the characteristics contained in the test guidelines are not exhaustive and may be expanded with additional characteristics if that proves to be useful.

59. Additionally, the powers of the President of the CPVO being laid down in the basic regulation and the implementing regulation, the CPVO's test guidelines and protocols adopted by the Administrative Council cannot be intended to restrict or have the effect of restricting those powers.

60. For that reason, the procedure provided for under Section III 6 of CPVO Protocol TP/14/1, referred to by the General Court in paragraph 93 of the judgment under appeal, which relates to cases in which the insertion of a new characteristic is requested by the applicant for a Community plant variety right, cannot prevent the President of the CPVO from inserting a new characteristic of his own motion in the context of the technical examination of a variety.

61. As to the time when the President of the CPVO may exercise his power under Article 23(1) of the implementing regulation, none of the provisions of that regulation or of the basic regulation preclude the insertion of a new characteristic intervening following the completion of the technical examination, given that such a characteristic was found when conducting that examination.

62. So, on the one hand, pursuant to Sections 6.2 and 7.2 of UPOV Protocol TG/1/3, referred to by the General Court in paragraph 77 of the judgment under appeal, the relevant characteristics for the purpose of examining the DUS criteria are determined by reference to the variety description established '*at the date of grant of protection*' applied for, not by reference to the variety description established at the date when the application is lodged.

63. For that reason, the technical description of the candidate variety required by Article 50(1)(f) of the basic regulation and Article 19(2)(c) of the implementing regulation can, with regard to the President of the CPVO in the exercise of his power under Article 23(1) of the basic regulation, have only indicative value.

64. On the other hand, such a solution is not incompatible with the principle of legal certainty.

65. Although it is possible for third parties, whose protected variety was chosen as a variety to be used as a reference in light of the technical examination, to raise objections to the grant of a Community plant variety right, those objections must seek, in accordance with Article 59(3)(a) of the basic regulation, to show that the DUS criteria are not satisfied.

66. Therefore, the fact that the President of the CPVO inserts a new characteristic, the presence of which was found only during the technical examination of a variety, cannot in itself constitute infringement of the principle of legal certainty with regard to third parties, the protected variety of which was chosen as a variety to be used as a reference in light of that technical examination. That cannot give rise to legitimate expectations as regards the extent of that examination and the nature of the distinctive characteristics examined.

67. It follows from all the foregoing considerations that the General Court erred in law in finding that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, on completion of the technical examination of a variety, a new characteristic in respect of that variety, when that characteristic was not referred to in either the technical

questionnaire completed by the applicant or in the applicable test guidelines and protocols.

68. Consequently, Schniga's argument must be upheld, and, without it being necessary to analyse the other complaints in the appeal, to set aside the judgment under appeal in so far as it upheld the annulment of the decision of the CPVO by the Board of Appeal on the ground that the distinctive characteristic 'width of stripes' relied on had been inserted by the President of the CPVO.

#### **The actions before the General Court**

69. In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the General Court is set aside, the Court of Justice may give final judgment in the matter if the state of the proceedings so permits.

70. In the present case, the Court of Justice finds that the actions brought by Schniga for annulment of the decisions at issue are ready for judgment and that the Court should therefore give final judgment on those actions.

71. In that regard, the fact that the General Court addressed the second part of Schniga's single plea in law, in paragraphs 103 and 104 of the judgment under appeal, only for the sake of completeness, is not decisive, in so far as the parties had the opportunity to put forward, in detail, before that court and before the Court of Justice, their arguments in relation to that second part.

72. In view of the above, first, the first part of the single ground of appeal raised by the applicant in support of its action must be upheld for the reasons set out in paragraphs 46 to 68 above.

73. As regards, second, the second part of that single ground of appeal, the Board of Appeal annulled the decisions granting a Community plant variety right and the decisions dismissing the objections on the ground that the technical examination as regards the additional characteristic at issue took place over a period of one year only, that is to say, 2005, and not over two consecutive growing seasons.

74. Schniga and the CPVO submit that, in practice, the BSA itself found that the additional characteristic at issue had been examined after 2005, namely during 2006 and 2007. In any event, faced with a procedural error capable of being rectified, the Board of Appeal should have remitted the case to the competent body of the CPVO for it to adopt the necessary measures.

75. Brookfield New Zealand and Elaris argue that Schniga did not, at any stage in the procedure, request correction of the irregularities found.

76. In that regard, it must be recalled that, by decision of 14 December 2006, the President of the CPVO approved the use of the additional characteristics at issue in order to establish the distinction between the candidate variety and the reference variety and that, by decision of 26 February 2007, the CPVO granted Schniga a Community plant variety right in respect of the candidate variety.

77. It is not disputed that, at the date on which the decisions granting a Community plant variety right and

the decisions dismissing the objections were made, namely, 26 February 2007, the CPVO had available to it only the final examination report, adopted by the BSA on 19 December 2005, and modified on 9 February 2006, which indicated that that characteristic had been found during the crop production cycle in 2005. It was only on 8 August 2008 that the BSA informed the CPVO that that characteristic had also been found during the crop production cycles in 2006 and 2007.

78. Therefore, a Community plant variety right was granted to Schniga for the candidate variety without the CPVO possessing the evidence establishing that the additional characteristic at issue had been examined over the course of two crop production cycles, in violation of both CPVO Protocol TP/14/1 and UPOV Protocol TG/1/3.

79. In that regard, the broad discretion enjoyed by the CPVO in the exercise of its functions, referred to in paragraph 46 above, cannot allow it to avoid the technical rules that regulate the conduct of the technical examinations without breaching the duty of good administration and its obligations of care and impartiality. In addition, the binding nature of those rules, including for the CPVO, is confirmed by Article 56(2) of the basic regulation which requires that the technical examinations are carried out in accordance with those rules.

80. Therefore, the Board of Appeal was right to find that the CPVO had granted a Community plant variety right for the candidate variety on the basis of an improper technical examination.

81. It follows that the second part of the single plea at law at first instance was unfounded.

82. Consequently, the decisions at issue should be confirmed.

83. However, pursuant to Article 72 of the basic regulation, the Board of Appeal may either exercise any power which lies within the competence of the CPVO or remit the case to the competent body of the CPVO for further action.

84. While it is true that the Board of Appeal enjoys broad discretion in respect of the opportunity of ruling, itself, on the application or of remitting the case to the competent body of the CPVO, the fact remains that, when it decides to exercise a power which lies within the competence of the CPVO, it is required to examine carefully and impartially all the relevant particularities of a Community plant variety right application and to gather all the factual and legal information necessary to exercise its discretion, as noted in paragraph 47 above.

85. The Board of Appeal, exercising a power which lies within the competence of the CPVO, found that the candidate variety could be granted the Community plant variety right applied for, even though it was uncertain that the characteristic ‘width of stripes’ was not repeatable during two consecutive growing cycles.

86. With regard, first, to the fact that the error having led to the annulment by the Board of Appeal of the decisions granting a Community plant variety right and the decisions dismissing the objections in favour of the

candidate variety was not attributable to the applicant and, second, that that irregularity, in any event, does not in itself determine the merits of the application for a Community plant variety right, a remittance to the competent body of the CPVO for the continuation of the technical examination in order to ensure that the additional characteristic at issue satisfied the requirement of repeatability would have allowed the CPVO to possess all the relevant elements in order to assess the validity of the grant of the Community plant variety right in favour of the candidate variety and would have made it better able also to ensure the rights of the applicant.

87. The fact that Schniga did not seek such a production of elements cannot be effectively relied on in order to justify the failure of the Board of Appeal to remit the case to the competent body of the CPVO, since there cannot be a requirement that an applicant for a Community plant variety right, who has been granted such a right, must question, of his own initiative, the very validity of the right which he has been granted.

88. Consequently, the decisions at issue must be annulled, in so far as, by those decisions, the Board of Appeal, first, found that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, following the completion of the technical examination of a variety, a new characteristic for that variety where that characteristic was not mentioned in either the technical questionnaire relating to the application or in the applicable test guidelines and protocols, and, secondly, annulled the decisions granting a Community plant variety right and the decisions dismissing the objections without having first, pursuant to Article 72 of the basic regulation, remitting the case to the competent body of the CPVO in order to possess all the relevant elements for the assessment of the validity of the Community plant variety right granted.

#### **Costs**

89. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable 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. Lastly, Article 140(3) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides in particular that the Court may order interveners other than Member States or institutions to bear their own costs.

90. In the present case, since Schniga has applied for costs from the CPVO and the CPVO has been partially unsuccessful, it must be ordered to bear its own costs and to pay those incurred by Schniga, in so far as the dispute arose owing to a mistake attributable to the CPVO. Moreover, Brookfield New Zealand and Elaris must be ordered to bear their own costs.

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

1. Sets aside the judgment of the General Court of the European Union of 10 September 2015, *Schniga v CPVO – Brookfield New Zealand and Elaris (Gala Schnitzer)* (T-91/14 and T-92/14, not published, EU:T:2015:624);
2. Annuls the decisions of the Board of Appeal of the Community Plant Variety Office (CPVO) of 20 September 2013 relating to the grant of a Community plant variety right for the Gala Schnitzer apple variety (Cases A 003/2007 and A 004/2007);
3. Orders the Community Plant Variety Office to bear its own costs and to pay those incurred by Schniga GmbH;
4. Orders Brookfield New Zealand Ltd and Elaris SNC to bear their own costs.

Delivered in open court in Luxembourg on 8 June 2017.

A. Calot Escobar

J.L. da Cruz Vilaça

\*Language of the case: English.

---

**OPINION OF ADVOCATE GENERAL  
CAMPOS SÁNCHEZ-BORDONA**

delivered on 18 January 2017 (1)

Case C-625/15 P

Schniga GmbH

v

Community Plant Variety Office (CPVO)

(Appeal — Community plant variety rights — Apple variety ‘Gala Schnitzer’ — Opposition — Refusal by the Board of Appeal of the application for a Community plant variety right — Annulment by the General Court — New decision of the Board of Appeal rejecting the application for a Community plant variety right)

1. More than 17 years have passed since the Konsortium Südtiroler Baumschuler, the legal predecessor of Schniga GmbH (‘Schniga’), filed an application for a plant variety right with the Community Plant Variety Office (CPVO). (2) It related to an apple variety called Gala Schnitzer, and it has not yet been possible to decide definitively whether that Office must allow the application or refuse it.
2. On 26 February 2007, the competent CPVO committee granted the right applied for to the apple variety Gala Schnitzer, (3) finding that it was sufficiently distinct from the variety Baigent, whose existence had been raised by its holder (Brookfield) in order to oppose the new registration. However, the grant of 26 February 2007 was annulled on 21 November 2007 by the Board of Appeal of the CPVO, owing to certain procedural irregularities.
3. An action was brought against the decision of the Board of Appeal of 21 November 2007 before the General Court, which annulled that decision by judgment of 13 September 2010. (4)
4. Once the judgment of the General Court of 13 September 2010 had become final (when the Court of Justice dismissed the appeal brought against it), (5) the

Board of Appeal of the CPVO had to review the objection to the Committee’s decision of 26 February 2007.

5. By decisions of 20 September 2013, (6) the Board of Appeal of the CPVO again annulled the grant of 26 February 2007, again for reasons relating, in particular, to the procedure followed.

6. Schniga contested those two decisions of the Board of Appeal before the General Court which, this time, confirmed them by judgment of 10 September 2015, *Schniga v CPVO — Brookfield New Zealand and Elaris (Gala Schnitzer)* (7) (‘the judgment under appeal’), against which this appeal is brought.

7. This is, therefore, the second time that the dispute concerning the same plant variety has come before the Court of Justice; it focuses, rather than on its substantive aspects (that is, on the differences between the two kinds of apple), on the procedural aspects. The technical examination of the genetic material, on which a declaration that the plant variety is distinctive largely depends, is key to the CPVO granting or refusing the right. Therefore, the rules governing the manner in which that examination is to be made out have legal relevance.

8. Schniga seeks to obtain the longed-for protection of the right over the apple variety Gala Schnitzer, which it considers to be new, stable and distinct, given the significant innovative nature of the width of its stripes. In the judgment at issue, however, the General Court, on confirming the decisions of the Board of Appeal, refused it protection because, in essence: (a) of failure to comply, *ratione temporis*, with certain guidelines for the technical examination, and (b) of the alleged exceeding of his powers by the President of the CPVO.

**I – Legal framework**

**A – EU law**

**1. Regulation (EC) No 2100/94 (8)**

9. Under Article 6, Plant variety rights are to be granted for varieties that are distinct, uniform, stable and new. Of those criteria, the first three are designated, in English, by the acronym DUS, derived from the initials of those corresponding qualities. (9)

10. According to Article 7(1) a variety is to 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.

11. The remaining criteria of uniformity, stability and novelty are found in Articles 8, 9 and 10 of Regulation No 2100/94, respectively.

12. Whether the DUS criteria have been met is verified in every case by means of a technical examination, carried out in accordance with Articles 55 and 56 of Regulation No 2100/94.

13. Under Article 55(1) of that regulation:

*‘1. Where the Office has not discovered any impediment to the grant of a Community plant variety right on the basis of the examination pursuant to Articles 53 and 54, it shall arrange for the technical examination relating to compliance with the conditions*

*laid down in Articles 7, 8 and 9 [DUS criteria] to be carried out by the competent office or offices in at least one of the Member States ...'*

14. Article 56(2) states:

*'2. The conduct of any technical examinations shall be in accordance with test guidelines issued by the Administrative Council and any instructions given by the Office.'*

15. In general, those guidelines describe the plant material required for the technical examination, the detailed procedure for the tests, the methods applied, the observations made, the grouping of the varieties on which the tests are carried out, and the table of the characteristics examined. In the context of this last point, the plants of the candidate variety are cultivated beside the reference varieties which the CPVO and the designated examination centre consider to be the closest, according to the technical description, which forms part of the application for protection.

## **2. Regulation (EC) No 1239/95 (10)**

16. Article 22, under the heading 'Decision on test guidelines', reads as follows:

*'1. Upon proposal of the President of the Office, the Administrative Council shall take a decision as to the test guidelines. The date and the species concerned of the decision shall be published in the Official Gazette [of the CPVO] referred to in Article 87 of this regulation.*

*2. In the absence of a decision of the Administrative Council as to test guidelines, the President of the Office may take a provisional decision thereon. The provisional decision shall lapse on the date of the decision of the Administrative Council. Where the provisional decision of the President of the Office deviates from the decision of the Administrative Council, a technical examination started prior to the decision of the Administrative Council shall not be affected; the Administrative Council may decide otherwise, if circumstances so dictate.'* (11)

17. Article 23, under the title 'Powers vested in the President of the Office', states:

*'1. Where the Administrative Council takes a decision on test guidelines, it shall include a power whereby the President of the Office may insert additional characteristics and their expressions in respect of a variety.*

*2. Where the President of the Offices makes use of the powers referred to in paragraph 1, Article 22(2) shall apply mutatis mutandis.'*

## **3. Protocol TP/14/1 (12)**

18. CPVO Protocol TP/14/1 lays down the guidelines for the technical examination of apple varieties of the species *Malus Mill.* Before that protocol was adopted, there were no such general principles or general instructions, for the purposes of Regulation No 2100/94, for those varieties. In accordance with usual practice with regard to technical examinations, the CPVO assessed the DUS criteria for the varieties in question on the basis of the general and technical guidelines adopted by the International Union for the Protection of New Varieties of Plants ('UPOV'), an

intergovernmental organisation set up under the International Convention for the Protection of New Varieties of Plants. (13)

19. According to Section III 3 of CPVO Protocol TP/14/1, the characteristics to be used in DUS tests and in preparations of description are to be those referred to in Annex I.

20. On the other hand, under Section III 5 of CPVO Protocol TP/14/1, the minimum duration of tests (independent growing cycles) is normally to include at least two satisfactory crops of fruit. Section IV adds that candidate varieties may meet the DUS standards after two fruiting periods, but that in some cases three fruiting periods may be required.

21. Section III 6 of CPVO Protocol TP/14/1 provides that an applicant may claim, either in the Technical Questionnaire or during the test, that a candidate variety has a characteristic that would be helpful in establishing distinctiveness. If such a claim is made and is supported by reliable technical data, the test may be undertaken, providing that a technically acceptable test procedure can be devised. Furthermore, special tests will be undertaken, with the agreement of the President of the CPVO, when distinctness is unlikely to be shown using only the characters listed in the protocol.

## **B – International law deriving from UPOV**

### **1. UPOV Protocol TG/1/3**

22. The UPOV (the International Union for the Protection of New Varieties of Plants), of which the European Union became a member on 29 July 2005, has adopted several protocols and guidelines relevant for the purposes of the present proceedings. Specifically, UPOV document TG/1/3, entitled '*General introduction to the examination of distinctness, uniformity and stability and the harmonised descriptions of new varieties of plants*', of 19 April 2002 ('UPOV Protocol TG/1/3'), provides the basis for all the UPOV guidelines for the examination of DUS.

23. The purpose of UPOV Protocol TG/1/3 is reflected in Section 1.2:

*'The purpose of this document ... and the associated series of documents specifying Test Guidelines' Procedures ... is to set out the principles which are used in the examination of DUS.*

*... The identification of those principles ensures that examination of new plant varieties is conducted in a harmonised way throughout the members of the Union.'*

24. Section 1.3 of UPOV Protocol TG/1/3 states:

*'The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and this document must not be interpreted in a way that is inconsistent with the relevant Act for the Union Member concerned.'*

25. The second sentence of Section 4.2.3 of UPOV Protocol TG/1/3 provides as follows:

*'The characteristics included in the individual Test Guidelines are not necessarily exhaustive and may be expanded with additional characteristics if that proves*

to be useful and the characteristics meet the conditions set out above.’

26. As regards the relevant characteristics, Section 6.2 of the Protocol states:

*‘Relevant characteristics of a variety include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, any obvious characteristic may be considered relevant, irrespective of whether it appears in the Test Guidelines or not.’*

27. In relation to the examination of stability, Section 7.2 provides:

*‘The relevant or essential characteristics include at least all characteristics used for the examination of DUS or included in the variety description established at the date of grant of protection of that variety. Therefore, all obvious characteristics may be considered, irrespective of whether they appear in the Test Guidelines or not.’*

28. Insofar as concerns apples, the TG/14/8 Guidelines for the conduct of tests for distinctiveness, uniformity and stability, of 20 October 1995 established by UPOV for the Malus Mill variety (‘UPOV Protocol TG/14/8’), apply.

29. UPOV Protocol TG/14/9 of 6 April 2005 contains new guidelines for the examination of DUS for all the Malus domestica Borkh apple varieties, except those used only as rootstocks or as ornamental varieties. (14) The table of characteristics contained in UPOV Protocol TG/14/9 includes Characteristic No 40, entitled ‘Fruit: width of stripes’, which did not appear in the table of characteristics annexed to UPOV Protocol TG/14/8.

## II – Background to the dispute

30. The complex facts giving rise to the proceedings are described in paragraphs 22 to 43 of the judgment under appeal. They can be summarised as set out below.

### A – Administrative stage

31. The application for a plant variety right for the apple variety of the species Malus Mill with the denomination Gala Schnitzer (‘the candidate variety’) was filed with the CPVO on 18 January 1999. (15) The following month, the Office requested the Examination Office of the Bundessortenamt (German Federal Plant Variety Office; ‘the BSA’) to conduct the technical examination of the candidate variety, pursuant to Article 55(1) of Regulation No 2100/94. For the comparison the Baigent (‘the reference variety’) was used, owing to its similarity to the candidate variety.

32. The material submitted by Schniga being virus-infected, the examination was suspended in 2001 until spring 2002, at which time, having been requested to do so, that company submitted new, healthy material. The examination was conducted during 2003 and 2004.

33. By letter of 18 January 2005, the BSA informed the CPVO that it had sent the interim report on the DUS examination of the candidate variety, which it considered distinct from the reference variety on the basis of a characteristic that was not listed in CPVO

Protocol TP/14/1, ‘Flower: colour of base of filament (after anther dehiscence)’. It also stated that evidence had been given that the characteristic concerned was sufficiently consistent and repeatable, and exhibited sufficient variation between varieties, thus making it possible to establish distinctness.

34. On 7 February 2005, the CPVO sent Schniga a further interim report with the observation ‘no remarks’. The BSA sent the final technical examination report to Schniga and to the CPVO on 19 December 2005. It is clear from points 16 and 17 of that report, concerning the comparison of the candidate variety with the reference variety, that the former has broad stripes (note 7), and the latter has narrow to medium stripes (note 4). It is also stated in the report that that assessment was based on the evaluation of the additional characteristic ‘Fruit: width of stripes’, corresponding to characteristic No 40 of UPOV Protocol TG/14/9 (‘the additional characteristic at issue’). The CPVO noted in that regard that the additional characteristic at issue did not appear either in CPVO Protocol TP/14/1 or in UPOV Protocol TG/14/8.

35. By letter of 24 January 2006, the Office informed the BSA that incorrect guidelines had been cited in the final examination report and that it was not CPVO Protocol TP/14/1 that ought to have been used as the basis for the examination report, but UPOV Protocol TG/14/8, which was in force at the date on which the decision was taken to test the candidate variety (January 1999).

36. On 9 February 2006, the BSA sent the CPVO an amended version of the final technical examination report, point 17 of which read:

*‘The variety was tested according to the UPOV [Protocol] TG/14/8 from 1995. The variety description was produced on the basis of the table of characteristics of the [CPVO Protocol] TP/14/1 from 27 March 2003 which came into force during the testing period. This allows the [candidate] variety to become part of the reference collection for varieties with later priority. The variety is distinct, uniform and stable according to both [protocols].’*

37. On 5 May 2006, Elaris and Brookfield, the former the holder of the plant variety right for the Baigent variety and the latter the licensee of that right, lodged with the CPVO, pursuant to Article 59 of Regulation No 2100/94, objections to the grant of the plant variety right sought for the variety Gala Schnitzer, relying upon the earlier right in respect of the Baigent variety.

38. The pleas in law put forward by Brookfield and Elaris related, on the one hand, to the right accorded to Schniga to submit virus-free plant material, when the CPVO ought to have refused its initial application and, on the other, to the fact that the candidate variety was not sufficiently distinct from the reference variety.

39. By decision of 14 December 2006, the President of the CPVO authorised the use of the additional characteristic at issue in order to distinguish between the candidate variety and the reference variety. (16) The decision was expressly based on Article 23 of Regulation No 1239/95.

40. In its decision of 26 February 2007, the CPVO committee responsible for deciding on objections to the grant of Community plant variety rights granted the plant variety right sought for the candidate variety and dismissed the objections. In particular, it recognised that, ‘for technical reasons’, taking the additional characteristic at issue into account was justified, even though it was not referred to in the protocols in force on the date of the application for a plant variety right.

#### **B – Proceedings before the Board of Appeal**

41. The Board of Appeal of the CPVO upheld the appeal brought by Brookfield and Elaris against the decision of 26 February 2007, cancelling the decisions it contained and rejecting the application for a variety right. It maintained that Article 61(1)(b) of Regulation No 2100/94 did not give the Office the power to authorise Schniga to submit new material.

42. Schniga filed an action for annulment before the General Court against the decision of the Board of Appeal of 21 November 2007. The action was upheld in the judgment of 13 December 2010, (17) which annulled that decision.

43. The Board of Appeal therefore had to resume examination of the appeal, as regards the distinctiveness of the variety for which the right was sought, after comparing it with the reference variety.

44. The Board of Appeal decided this (second) time that the assessment by the BSA, for the technical examination, of the additional characteristic at issue constituted an infringement of Section III 3 of CPVO Protocol TP/14/1 for the following reasons: (a) neither of the protocols in force, nor their corresponding guidelines, that is to say, UPOV Protocol TG/14/8 (of 1995) and CPVO Protocol TP/14/1 (of 1993), mentioned that characteristic; (b) neither in the technical questionnaire nor during the test period had Schniga submitted a request for that characteristic to be taken into account; (c) the BSA had not mentioned the additional characteristic at issue in its letter to the CPVO, which mentioned it for the first time in the final examination report and in the decision of the President of the Office of 14 December 2006; and (d) that decision of 14 December 2006 permitting the use retrospectively of that characteristic was fundamentally flawed because it had been adopted 12 months after the final report, and was not justified in the light of Article 22(2) of Regulation No 1239/95.

45. Furthermore, the Board of Appeal made reference to its decision in Case A 010/2008 (JEWEL), (18) in which it had declared that the use of an additional characteristic requires the prior approval of the President of the CPVO, in the interests of legal certainty, objectivity in the handling of applications and the predictability of the behaviour of the parties concerned.

46. Likewise, it considered that the fact that the technical examination of the additional characteristic at issue had been carried out by the BSA over one year, whereas, in order to establish the uniformity and stability of apple varieties, such examinations must be conducted, in accordance with the protocols, over at

least two consecutive fruiting seasons, constituted a clear infringement of UPOV Protocols TG/1/3 and TG/14/8.

47. The Board of Appeal concluded that, in law, the candidate variety could not be held to be distinct from the reference variety.

#### **C – The procedure before the General Court and the judgment under appeal**

48. By application lodged at the Registry of the General Court on 10 February 2014, Schniga challenged the two decisions of the Board of Appeal.

49. As regards the substance, Schniga put forward a single plea for annulment divided into two parts: in the first, it alleged infringement of Article 7 and Article 56(2) of Regulation No 2100/94 with regard to the refusal to take into account the additional characteristic at issue observed during the technical examination, as opposed to the lists of characteristics included in the UPOV technical protocols, which are not exhaustive, as is apparent from the guidelines for UPOV Protocol TG/1/3. Furthermore, according to Schniga, the decisions had infringed Article 22(2) and Article 23(1) and (2) of the implementing regulation, for they were based on an incorrect assessment of the discretionary power of the President of the CPVO in that regard and infringed both the right to a hearing with all the safeguards and Schniga’s substantive right to obtain the plant variety right sought, as guaranteed by Articles 7 to 10 of Regulation No 2100/94.

50. In the second part of the plea for annulment, Schniga claimed that it had been wrongly held, in the decisions, that the technical examination on the candidate variety was flawed because it was conducted over one year instead of two.

51. The General Court dismissed Schniga’s action. With regard to the first ground of annulment, it maintained that:

– The application by the Board of Appeal of the procedural rules of CPVO Protocol TP/14/1 was consistent with the case-law of the Court of Justice concerning the temporal effects of procedural rules, which in general are applicable from the date on which they come into force. (19)

– CPVO Protocol TP/14/1 takes precedence over the UPOV Protocols, in particular TG/1/3, Section 1.3 of which makes it clear that the series of recommendations contained in that Protocol are not binding. (20)

– In spite of the wide measure of discretion afforded to the CPVO, (21) this Administration has placed a limit on itself, through the adoption of legal rules such as the protocols and guidelines, so that neither the Office nor its President could take into account an additional characteristic which is not included in CPVO Protocol TP/14/1. (22)

52. Having dismissed the first part of the action, the General Court considered that the second part was ineffective. However, it made a series of observations for the sake of completeness, (23) according to which the fact that the technical examination (relating to the additional characteristic at issue) was conducted over

only one year constituted an infringement of Section III 5 and Section IV of CPVO Protocol TP/14/1, and of Section 5.3.3.1.1 of UPOV Protocol TG/1/3.

53. The General Court therefore dismissed the action and ordered Schniga to pay the costs.

### **III – Proceedings before the Court of Justice and the forms of order sought by the parties**

54. Schniga's appeal was received at the Registry of the Court of Justice on 23 November 2015 and the statements of defence of the CPVO and of Brookfield and Elaris on 2 and 3 February 2016 respectively.

55. Schniga claims that the Court of Justice should set aside the judgment under appeal and order the Office to pay the costs.

56. The CPVO, which disagrees with the decisions of its Board of Appeal endorsed by the General Court, also claims that the Court of Justice should uphold the appeal and order each party to pay its own costs.

57. Brookfield and Elaris claim that the Court of Justice should dismiss the appeal and order Schniga to pay the costs.

58. Schniga, the CPVO and Brookfield appeared at the hearing held on 24 November 2016.

### **IV – Examination of the appeal**

#### **A – Arguments of the parties**

59. Schniga bases its sole ground of appeal on infringement of Articles 7 and 56 of Regulation No 2100/94, read in conjunction with Articles 22 and 23 of Regulation No 1239/95. Its argument is based on three criticisms of the General Court: (a) that the latter failed to have regard to the true function of the guidelines and of the protocols; (b) that it had erred in the classification of the legal nature of those guidelines and protocols and (c) that it had applied them incorrectly.

60. As regards the guidelines and protocols, Schniga claims that they are drawn up in order to explain the manner in which the examination is to be conducted and the requirements for the plant material subject to that examination. Defining the principles makes it possible to harmonise the examination of new plant varieties in the member States of the UPOV. That technical examination must show that the relevant characteristics do not derive from environmental or cultivation conditions, but from the genotype of the variety.

61. At all events, according to Schniga, Section 6.2 of UPOV Protocol TG/1/3 (24) allows all obvious characteristics to be assessed, for it does not require them to appear in the test guidelines. It therefore concludes that neither Regulation No 2100/94 nor the UPOV Convention of 1991 nor the governing principles nor the protocols require the CPVO to exclude from the test characteristics other than those included in the list of the respective protocol or in the applicable guidelines.

62. With regard to the legal nature of the guidelines and protocols, Schniga finds fault with the judgment under appeal for equating them (in paragraph 74 and 75) to binding legal rules. In Schniga's view, they do not merit that classification, but that of guidelines (25) that show the Administration how to proceed, by giving it

technical pointers concerning the harmonised DUS examination.

63. For Schniga, those guidelines cannot preclude the grant of a right, from the moment that the candidate variety meets the requirements of Article 6 of Regulation No 2100/94. It observes, in that regard, that the characteristics found in the test guidelines are not exhaustive and that others may be added, if it is useful to do so and if they meet the required conditions. Furthermore, it stresses the necessary flexibility enjoyed by the CPVO, under the UPOV TG/14/8 guidelines (26) and under CPVO Protocol TP/14/1, (27) in order to determine whether certain characteristics may be relevant and when they are relevant, and also to incorporate them at the end of the technical examination.

64. As regards the errors in the application of the guidelines and protocols, Schniga criticises the General Court (28) for considering that CPVO Protocol TP/14/1 applied to an application lodged prior to its entry into force. Article 22(2) of the implementing regulation provides that the adoption of the guidelines by the Administrative Council and the subsequent cessation of the effects of the provisional decision of the President of the CPVO do not affect, in the event of discrepancies between them, the technical examinations conducted before the intervention of that Council. Therefore, the UPOV TG/14/8 guidelines continued in force for technical examinations already carried out on the candidate variety.

65. Furthermore, Schniga adds, the General Court ignored the second sentence of Section 7.2 of the UPOV TG/1/3 guidelines, pursuant to which obvious characteristics must be taken into account, whether or not they are included in the guidelines for the technical examination. This supports its view concerning the power of the President of the CPVO to take into consideration any characteristics that make it possible for the distinctness of the candidate variety to be described.

66. Finally, Schniga submits, contrary to the opinion of the Board of Appeal endorsed by the General Court, (29) that there are no rules requiring the CPVO, as the body responsible for the technical examination, to reveal at any specific moment the characteristics whose inclusion in the description of the variety it is to propose. Nor, furthermore, do the UPOV TP/14/1 guidelines prescribe any period for inserting the additional characteristics and their expressions in respect of a variety. It is not necessary to require, therefore, as the General Court does, (30) the prior approval of the President of the CPVO, which is also more consistent with the broad discretion conferred on this Office.

67. The CPVO supports Schniga's argument and emphasises that the protocols and guidelines are rules of practice, not rules of law. It would be possible to speak of its 'self-binding' effect in relation to 'the test conditions such as plant material requested and the concept of the technical examination as such' (31) only in order to guarantee equal treatment, that is, that all

candidate varieties be tested under the same cultivation conditions.

68. The CPVO underlines the fact that the publication notices of the protocols and, in particular, that relating to CPVO Protocol TP/14/1 contain a message stating that technical examinations initiated before the decision adopting the protocol will not be affected, unless otherwise announced.

69. For the CPVO, the relevance of the inclusion of the additional characteristics may be evaluated only at the end of the technical examination, which would reinforce the argument that the President of this Office must have the power to take into account an additional characteristic of a candidate variety, at any moment in the procedure before the grant of protection.

70. Brookfield and Elaris deny that the judgment under appeal is vitiated by errors of law. With regard to the binding nature of CPVO Protocol TP/14/1 and the hierarchy of norms between the CPVO Protocols and the UPOV Protocols, they consider that, in accordance with Article 56(2) of Regulation No 2100/94, the test guidelines are legal rules failure to observe which constitutes infringement of that provision. Given that, under Section 1.3 of UPOV TG/1/3, the protocols and guidelines drawn up by that international body have the status of recommendations and therefore lack binding legal force, it must be concluded that the CPVO protocols take precedence over the UPOV protocols.

71. With regard to the application *ratione temporis* of CPVO Protocol TP/14/1, Brookfield and Elaris claim that the moment that fixes the procedural framework applicable to an application for a community plant variety right is not the date on which it is submitted but that of the actual beginning of the technical examination. It is apparent from the file that the BSA carried out the relevant DUS tests in the years 2004 and 2005, that is to say, when CPVO Protocol TP/14/1 was already in force.

72. Finally, for Brookfield and Elaris CPVO Protocol TP/14/1 sets out unambiguously how the additional characteristics are to be taken into account. According to Section III 3 thereof, the DUS tests may refer only to the distinctive characteristics mentioned in Annex I, and the President has to authorise observation of an additional characteristic before the technical examination. Furthermore, it may be inferred from reading Section III 6 of that protocol that the observation of a special characteristic presupposes the prior formal request by the applicant for a special test to be carried out, that is to say, any test on any additional characteristic, and also the approval of the President.

## **B – Analysis of the sole ground of appeal**

### **1. The first part of the ground of appeal, relating to misapplication of CPVO Protocol TP/14/1**

73. Although the criticism of Schniga and the CPVO concerns the three elements discussed in the judgment under appeal (the applicable protocol, its binding nature and its relationship to the UPOV guidelines), strictly speaking, it would be enough to uphold their submissions regarding the application *ratione temporis*

of CPVO Protocol TP/14/1 to conclude that the error of law which they both attribute to the General Court did exist. However, before examining its temporal applicability, it is necessary to analyse the binding legal force of that protocol.

74. The General Court classified the CPVO Protocols as legal rules on the basis of, principally, (a) the *renvoi* which Article 56(2) of Regulation No 2100/94 makes to them as governing the technical examinations; (b) their publication in the Official Gazette of the CPVO, and (c) the self-limitation imposed by the Office in respect of its broad discretion. Schniga, on the other hand, considers them to be mere technical instructions concerning the manner of conducting examinations.

75. In order to settle the dispute regarding the legislative nature of technical rules forming part of EU law (in this case, by means of the *renvoi* made by Regulation No 2100/94), account must be taken of the following matters: (a) the CPVO is an agency of the Union with the power to issue its own instructions, (32) in accordance with which the technical examinations must be conducted; (b) the rules of conduct which contain the guidelines must be published in the Official Gazette of the CPVO, (33) in order to provide greater legal certainty; and (c) the wording of the *renvoi* made by Article 56(2) of Regulation No 2100/94 confirms the necessity of adapting the examinations to the instructions issued by the Administrative Council of the CPVO.

76. In my view, those three elements are arguments in favour of recognising the legal nature (and, by the same token, the binding nature, at least for the Administration itself) of the guidelines, protocols or rules of conduct adopted by the Administrative Council of the CPVO to govern the conduct of the technical examinations. The General Court did not therefore err in law by taking that approach.

77. I disagree, however, with the General Court as regards the consequences of the limit to the discretionary power, which according to the judgment, the CPVO imposed on itself when adopting rules of conduct. (34) I do not believe that those guidelines — precisely because they are legal in nature, which requires them to observe the principle of the hierarchy of norms — may validly curtail the power of the President of the CPVO to include an additional characteristic. Given that that power is governed by higher-ranking provisions of law (to be specific, by Articles 22 and 23 of the implementing regulation), the instructions must abide by those provisions.

78. The judgment under appeal is based on the case-law of the Court of Justice relating to the self-limiting force of rules of conduct concerning competition law and State aid. (35) However, those which the Commission publishes for the application of Articles 101 TFEU, 102 TFEU and 107 TFEU (in which, in effect, it explains how it is going to exercise its discretion in order to apply those articles directly in specific cases) are not comparable to the CPVO rules of conduct which set standards for the approved national bodies for harmonised technical examinations. In the latter case,

the CPVO does not describe how it is going to exercise its discretion in the exercise of its functions, accorded to it by the Court of Justice in view of the scientific and technical complexity of the conditions governing the examination of applications for plant protection rights, (36) nor does it indicate the way in which it will exercise its discretion when granting or refusing plant variety rights.

79. The legal nature of the guidelines, in spite of their unquestionably technical character, therefore fits within a system governed by general legal principles, such as that of the hierarchy of norms, which precludes any conflict with higher-ranking legal rules like Articles 22 and 23 of the implementing regulation. Consequently, those guidelines may not reduce the powers of the President of the CPVO or prevent him, specifically, from assessing an additional characteristic in the terms in which he has done so in this case.

80. As regards the applicability *ratione temporis* of CPVO Protocol TP/14/1, I believe that the criticism levelled by Schniga and the CPVO against the judgment under appeal is accurate.

81. It has been rightly said that the principles relating to the temporal applicability of new legislation form part of the general principles of EU law and can ultimately be traced back to the legal traditions common to the Member States. (37)

82. The Court of Justice has declared, in this context, that a new rule of law applies from the entry into force of the act introducing it, and that, if it does not affect legal situations that have arisen and become definitive under the old law, it does apply to the future effects, and to new legal situations. It recognises as an exception to this rule, without prejudice to the principle of the non-retroactivity of legal acts, cases in which the new rule is accompanied by special provisions specifically laying down its conditions of temporal application. (38)

83. As regards procedural rules, the case-law considers that they are generally taken to apply from the date on which they enter into force. This is not the case for substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that they must be given such an effect. (39)

84. In the present case, the General Court, after recalling that case-law, confirmed the immediate applicability of the procedural provisions laid down in CPVO Protocol TP/14/1, on which the Board of Appeal had based its decision. (40)

85. I disagree with that view and agree with the interpretation proposed by Schniga and the CPVO of Article 22(2) of the implementing regulation. That provision establishes the principle of non-retroactivity of decisions adopted by the Administrative Council, when they deviate from the provisional decision given by the President of the CPVO, for 'a technical examination started prior to the decision of the Administrative Council'. (41)

86. Moreover, the Office has claimed on appeal that the notices of publication of the protocols (also CPVO Protocol TP/14/1) include the express statement that technical examinations started before adoption (of the protocol) will not be affected, unless otherwise decided. (42)

87. Although, strictly speaking, CPVO Protocol TV/14/1 contains no express limits on its temporal application (no specification appears in it to that effect), this being a provision which may be applicable to third parties, it is sufficient if, when it is published, it is made clear that it does not apply to procedures under way. That information is enough for one of the exceptions, upheld by the case-law of the Court of Justice, to the principle that procedural rules are immediately applicable, to come into play.

88. Therefore, both elements (that is, Article 22(2) of the implementing regulation and the publication of the guidelines by the CPVO) emphasise that, in accordance with the legislature's intention and the conduct of the Office itself, the new rules adopted by the CPVO for the technical examinations do not extend to those that are already under way. (43)

89. It is apparent from the foregoing that CPVO Protocol TP/14/1 was not applicable in this case, which means that the corresponding allegation in the first part of the ground of appeal must be upheld. The General Court erred in law by confirming the decision of the Board of Appeal which applied that protocol.

90. It will not be necessary, in the light of what I have just stated, to examine the content of the third argument in the first part of the ground of appeal, concerning the alleged precedence of the CPVO Protocols over those drawn up by the UPOV. (44) Once it has been established that CPVO Protocol TP/14/1 is not applicable to this case, for temporal reasons, the dispute on this point loses relevance.

2. The second part of the sole ground of appeal: the interpretation of Article 23 of Regulation No 2100/94

91. The second part of the sole ground of appeal too must be upheld and I think that this assessment will help to define, with greater accuracy, the powers of the President of the CPVO. What is more, it might even make the analysis of the previous ground unnecessary, because it would confirm the validity of the decision of the President of the CPVO of 14 December 2006, even under the scheme of CPVO Protocol TP/14/1. I should point out that that decision, by approving the use of the additional characteristic at issue to distinguish between the candidate variety and the reference variety (adopting as legal basis specifically Article 23 of Regulation No 1239/95), paved the way for granting the candidate Community protection.

92. The judgment under appeal endorsed the decisions of the Board of Appeal according to which the assessment by the President of the Office of an additional characteristic constituted an infringement of Section III 3 of CPVO Protocol TP/14/1. Furthermore, the General Court stressed that, even if it were accepted that additional characteristics might be inserted, it would be necessary, under Article 23 of the

implementing regulation, to have the prior approval of the President of the CPVO, in order to ensure legal certainty, objectivity in the handling of applications and the predictability of the behaviour of all the players concerned. (45)

93. The criticisms of Schniga and the Office concerning this part of the judgment under appeal (46) might succeed if the interpretation of the General Court were contrary to, or incompatible with, the correct understanding of the powers of the President, in accordance with Article 23, read in conjunction with Article 22, of the implementing regulation. It is therefore necessary to examine both those powers and the manner in which they are to be exercised.

94. The legal regime applicable to the President of the CPVO is governed, principally, by Article 42 of Regulation No 2100/94. As well as the traditional functions of any managing organ of an administrative body (relating to its activity, staff and budget), (47) may be noted his duty to take 'all necessary steps, including the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Office', (48) and to 'place before the Administrative Council draft amendments to this Regulation, to the provisions referred to in Articles 113 and 114 (49) or to any other rules relating to Community plant variety rights. (50)

95. Article 22(2) of the implementing regulation authorises the President to adopt provisional decisions (51) on test guidelines, if this has not already been done by the Administrative Council, which is the appropriate body, on a proposal of the President. (52) Article 23 of that regulation obliges the Administrative Council to authorise the President to insert additional characteristics 'and their expressions in respect of a variety'.

96. Whether the President of the Office may introduce additional characteristics must be assessed in the light of the case-law of the Court of Justice, which has accorded the CPVO broad discretion in performing its duties, owing to the scientific and technical complexity of the conditions governing the examination of applications that characterise the CPVO's task. (53)

97. Furthermore, as the representative of the Office pointed out at the hearing, the procedure for granting Community plant variety rights is distinguished from that followed for other industrial property rights precisely because it is based on the study of a patentable object which is living material, that is to say, which evolves during a relatively long period of time, during which it suffers or may suffer, changes of significance for the grant of that right. All the more reason to establish a flexible margin of technical assessment of the properties or characteristics of the plant products subject to analysis.

98. Article 56(2) of Regulation No 2100/94 makes the technical examinations (carried out by the CPVO itself or by other approved bodies) subject to compliance with the test guidelines issued by the Administrative Council and any instructions given by the Office. In my view, the President, who has the power to issue

instructions under Article 42 of that regulation, may do so in the context of technical examinations too, which, together with the aforementioned broad discretion, tends towards recognition of the power to adopt additional characteristics.

99. However, even if the 'internal instructions' of the President might not have such scope, his power to 'insert additional characteristics and their expressions in respect of a variety' would be unaffected, under Article 23 of the implementing regulation. That power must be respected in any event, to the extent that the Administrative Council, when it adopts a decision on guidelines, has no alternative ('it shall include a power') but to recognise it.

100. The President is not deprived of his power to adopt additional criteria if, in a particular case, the Administrative Council has forgotten to authorise him to do so or in similar circumstances. This is clearly evidenced by the reference made by Article 23(2) to Article 22(2) of the implementing regulation, under which the President must be able to adopt at least provisional decisions on the additional characteristics.

101. That interpretation of the President's powers is, on the one hand, in accordance with the broad discretion which he is to enjoy when performing his duties and, on the other, that most consistent with the spirit of the principles affirmed in UPOV Protocol TG/1/3, which are also the basis for the action of the European Union, as a signatory of that international organisation. I would even venture to suggest that Article 23 of the implementing regulation is the expression, at European level, of Section 4.2.3 of that Protocol, (54) which contains the flexibility necessary for the characteristics of the guidelines not to be considered exhaustive and for additional characteristics to be accepted, including those identified during the technical examination.

102. In short, I conclude from the foregoing that the President has the power to adopt additional criteria, deriving directly from Regulations No 2100/94 and No 1239/95, irrespective of whether or not CPVO Protocol TP/14/1 was in force. The guidelines could not reduce a power legally established and developed in the abovementioned regulations, which are indisputably of a higher rank than the protocols and guidelines.

103. Finally, as regards the moment at which the President must take the decision relating to the inclusion of the additional characteristics, Schniga and the CPVO rightly note that there is no rule that specifies it. Consequently, the criticisms of the judgment under appeal in that regard are unfounded. (55) Admittedly, the delay in adopting that decision in this case (almost 12 months) may not have been the best administrative practice, but that does not invalidate it, failing any temporal indication in the applicable rules.

104. The second part of the ground of appeal is therefore unfounded too.

#### **V – Effects of setting aside the judgment under appeal**

105. If the appeal is allowed, the judgment under appeal will subsequently be set aside, in so far as it

confirmed the decisions of the Board of Appeal. Logically, those decisions should also be annulled.

106. Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. However, I do not believe that this case is in that position, in particular, because the judgment under appeal only set out considerations ‘for the sake of completeness’, not of a decision-making nature, on the second part of the ground for annulment put forward by Schniga, which the General Court itself described as ineffective. Since, in those circumstances, the appellant could not appeal against those considerations, (56) the case should be heard again before the adjudicating body from which the annulled decisions emanated. I accept that, owing to the excessive duration of this dispute (to which I have referred at the beginning of my Opinion, the solution is not satisfactory, but I cannot see how to avoid it.

107. Lastly, the setting aside of the judgment under appeal means that the Court of Justice must also decide on the costs of the proceedings at first instance. In accordance with Article 137(1), in conjunction with Article 184(2), of the Rules of Procedure of the Court of Justice, the CPVO should be ordered to pay the costs at first instance and on appeal, since the decisions of its Board of Appeal should be annulled and the appellant has applied for costs. However, since the Office intervened in support of Schniga, also at first instance, it cannot be said that it has been unsuccessful. Therefore, each party must bear its own costs.

#### VI – Conclusion

108. In the light of the foregoing considerations, I propose that the Court should:

- (1) set aside the judgment of 10 September 2015 of the General Court in Cases T-91/14 and T-92/14, *Schniga v CPVO — Brookfield New Zealand and Elaris (Gala Schnitzer)*;
- (2) annul the decisions of the Board of Appeal of the Community Plant Variety Office of 20 September 2013, in Cases A 003/2007 and A 004/2007;
- (3) order each party to pay its own costs at first instance and on appeal.

---

1. Original language: Spanish.

2. Obtaining a new plant variety may lead, in certain circumstances and if certain conditions are met, to the grant of an intellectual property right and, accordingly, to a monopoly for the exploitation of the seed of that plant, fruit or flower.

3. Decisions EU 18759, OBJ 06-021 and OBJ 06-022, of 26 February 2007.

4. Judgment of 13 December 2010, *Schniga v CPVO — Elaris and Brookfield New Zealand (Gala Schnitzer)*, T-135/08, EU:T:2010:397.

5. Judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813.

6. Decisions of 20 September 2013, Cases A 003/2007 and A 004/2007.

7. Cases T-91/14 and T-92/14, not published, EU:T:2015:624.

8. Council Regulation 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’).

9. Text of footnote not relevant in English.

10. Commission Regulation of 31 May 1995 establishing implementing rules for the application of Regulation No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ 1995 L 121, p. 37). Hereafter, I shall use the designations ‘implementing regulation’ and ‘enforcing regulation’ indiscriminately. This regulation was repealed by Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Variety Office (OJ 2009 L 251, p. 3), which is not applicable *ratione temporis* to the present case.

11. Regulation No 874/2009 (see previous footnote) reproduced Article 22 in full, but its recent amendment, by Commission Implementing Regulation (EU) No 2016/1448 of 1 September 2016 amending Regulation No 874/2009 (OJ 2016 L 236, p. 3) has introduced, in the interest of clarity and in order to avoid overlaps, as stated in recital 22, a new paragraph 3, the wording of which is as follows:

*‘3. In the absence of a decision of the Administrative Council, or a provisional decision of the President of the Office as referred to in paragraph 2, as to text guidelines established by the Office, the guidelines per genera and species of the UPOV shall apply. In the absence of such guidelines, national guidelines developed by a competent authority in charge of the technical examination of a plant variety may be used, provided that the President of the Office agrees to such use. The competent authority shall submit those guidelines to the Office, and the Office shall publish them on its website.’*

12. CPVO Protocol TP/14/1 for Distinctness, Uniformity and Stability Tests of 27 March 2003 (Apple) (‘CPVO Protocol TP/14/1’). The only version available is in English.

13. Adopted in Paris on 2 December 1961.

14. Which are governed, respectively, by UPOV Protocol TG/163/3 (Apple rootstocks) and UPOV Protocol TG/192/1 (Ornamental Apple).

15. The application was registered under number 1999/0033.

16. However, that decision did not cite the additional characteristic ‘anthocyanin colouration at the basement of the filaments’, which also appeared in the final examination report.

17. Cited in footnote 4 of this Opinion. An appeal was brought against that judgment of the General Court (Case C-534/10 P); this was dismissed by the Court of Justice in its judgment of 19 December 2012, cited in footnote 5.

18. Decision of 8 October 2008.
19. By reference to the judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited. See paragraphs 73 to 76 of the judgment under appeal.
20. Paragraphs 79 and 80 of the judgment under appeal.
21. The General Court cited its judgment of 19 November 2008, *Schräder v CPVO* (SUMCOL 01), T-187/06, EU:T:2008:511, paragraphs 59 to 64, confirmed by the judgment of 15 April 2010, *Schräder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77.
22. Paragraphs 81 to 87 of the judgment under appeal.
23. Paragraphs 103 and 104 of the judgment under appeal.
24. See point 26 of this Opinion.
25. According to its reading of Section 4.2.3 of UPOV Protocol TG/1/3.
26. It refers to Section IV 3.
27. According to its interpretation of Section III 3.
28. The appellant states, in paragraph 57 of its appeal, that its criticisms of the mistakes in the application of the UPOV TG/14/8 guidelines and of CPVO Protocol TP/14/1 are expressed as a precaution and for the sake of completeness, because it believes that it is irrelevant which of those two documents may have been applicable.
29. Paragraph 91 of the judgment under appeal.
30. Paragraphs 92 and 93 of the judgment under appeal.
31. Paragraph 43 of its statement of defence to the appeal.
32. See Article 56(2) of Regulation No 2100/94, transcribed in point 14 of this Opinion.
33. Article 22(1) of the Implementing Regulation, transcribed in point 16 of this Opinion.
34. Paragraph 85 of the judgment on appeal.
35. It refers to the judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211; and of 11 September 2008, *Germany and Others v Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 60 and the case-law cited.
36. Judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:2012:813, paragraph 50.
37. See the complete examination of the matter offered by Advocate General Kokott in the Opinion delivered in *Commission v Moravia Gas Storage*, C-596/13 P, EU: C:2014:2438, points 26 to 33.
38. Judgment of 26 March 2015, *Commission v Moravia Gas Storage*, C-596/13 P, EU:C:2014:2438, paragraph 32 and the case-law cited.
39. *Ibidem*, paragraph 33.
40. Paragraphs 75 and 76 of the judgment under appeal.
41. It is logical for that rule to be stated only in relation to the differing aspects of conflicting decisions, since, when they coincide, there will not be any legal uncertainty, but rather the confirmation and validation of the measures applicable to the examinations, until then provisional.
42. The notice is on the CPVO website, on the tab leading to the technical protocols; it reads as follows: *'In accordance with Article 56(2) of Council Regulation (EC) [No] 2100/94, technical examinations which are initiated by the ... Office, or technical examinations for which the CPVO envisages to take over the results, must be performed in accordance with the test protocols which have been adopted by the Administrative Council. Technical examinations started prior to the date of entry into force are not affected unless otherwise announced'*.
43. This interpretation is also reinforced with the new paragraph 3 of Article 22 of the Implementing Regulation (see footnote 11 of this Opinion), according to which, when there is no decision of the Administrative Council or no provisional decision of the President of the Office, the UPOV guidelines per genera and species (recital 19) apply as to test guidelines. Although that paragraph is subsequent to the facts of the case, it shows the legislature's desire for clarity, in accordance with that recital.
44. This is stated by the General Court in paragraphs 79 and 80 of the judgment under appeal.
45. See paragraphs 87 to 93 of the judgment under appeal.
46. Contained, in particular, in points 64 to 69 of this Opinion.
47. Article 42(1)(b), (c) and (d) of that regulation.
48. Emphasis added.
49. Article 113 concerns the fees of the agency and Article 114 concerns the implementing rules, such as Regulation No 1239/95.
50. Paragraph 2(f) and (g) of that Article. Emphasis added.
51. Regulation No 2016/1448 (see footnote 11 of this Opinion) has suppressed paragraph 2 of Article 23 of the Implementing Regulation, because decisions on test guidelines should have a permanent nature. Due to their significance for their users, and in order to reflect that the decision of the President of the Office, when exercising the powers referred to in paragraph 1 of that Article, is not a provisional one, as stated in recital 20 of Regulation No 2016/1448.
52. Article 36(1)(e), in relation to Article 42(1)(g) and Article 56(2) of Regulation No 2100/94.
53. Judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813), paragraph 50. On this point I share the view of Advocate General Mazák in the Opinion in *Schräder v CPVO*, C-38/09 P, EU:C:2009:753, points 25 and 26 and the case-law cited.
54. See point 25 of this Opinion.
55. See paragraphs 92 and 93 of the judgment under appeal.
56. Judgment of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, EU:C:2013:606, paragraph 85 and the case-law cited.