



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

23 February 2018*

(Plant variety rights — Application for Community plant variety rights for the plant variety Gala Schnico — Technical examination — Obligation to state reasons — First sentence of Article 75 of Regulation (EC) No 2100/94 — Uniformity — Article 8 of Regulation No 2100/94 — Complementary examination — Article 57(3) of Regulation No 2100/94 — Equal treatment — Examination of the facts by the CPVO of its own motion — Article 76 of Regulation No 2100/94)

In Case T-445/16,

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

v

Community Plant Variety Office (CPVO), represented by M. Ekvad, F. Mattina and U. Braun-Mlodecka, acting as Agents, and by A. von Mühlendahl and H. Hartwig, lawyers,
defendant,

ACTION brought against the decision of the Board of Appeal of the CPVO of 22 April 2016 (Case A 005/2014) concerning an application for a Community plant variety right in respect of the plant variety Gala Schnico,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, E. Bieliūnas and A. Kornezov (Rapporteur), Judges,

Registrar: J. Weychert, Administrator,

having regard to the application lodged at the Court Registry on 5 August 2016,

having regard to the response lodged at the Court Registry on 3 November 2016,

having regard to the written questions put by the Court to the CPVO and the latter's replies to those questions lodged at the Court Registry on 24 May 2017,

further to the hearing on 14 June 2017,

gives the following

* Language of the case: German.

Judgment¹

...

Forms of order sought

21 The applicant claims that the Court should:

- annul the contested decision;
- order the CPVO to pay the costs.

22 The CPVO contends that the Court should:

- dismiss the action as unfounded;
- order the applicant to pay the costs.

Law

...

First plea: designation of the site for the technical examination and the reason for the identified lack of uniformity

...

The first branch: designation of the site for the technical examination

42 It should be noted, at the outset, that it is clear from Announcement No 2/2004 of 15 February 2004, published in the *Official Gazette of the Community Plant Variety Office*, that the CPVO decided to give sole responsibility to GEVES for the technical examination of mutation varieties of apples of the species *Malus domestica Borkh.* which belong, as does the candidate variety, to the Gala mutation group.

...

48 In any case, it should be pointed out that, in accordance with Article 55(1) of Regulation No 2100/94 and Article 13(1) of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ 2009 L 251, p. 3), the Administrative Council of the CPVO is empowered to entrust the responsibility for the technical examination of varieties of the species concerned to one or several competent offices in a Member State. Sole responsibility for the technical examination of the mutation varieties of apples of the species *Malus domestica Borkh.* which belong, as does the candidate variety, to the Gala mutation group, was entrusted to GEVES, as pointed out in paragraph 42 above.

¹ Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

- 49 In this respect, it should, firstly, be stated that due consideration was given to the climatic conditions normally encountered on the GEVES examination site for the purposes of its designation as an examination site for the mutation groups in question, including the Gala mutation group. By way of reply to a measure of organisation of procedure addressed to it, the CPVO produced a number of internal documents that predate the adoption of Announcement No 2/2004, from which it is apparent that, according to the experts on fruit varieties consulted by the CPVO, the climatic conditions typically found on the GEVES site argued in favour of the clustering of technical examinations for Gala mutants on that site.
- 50 The applicant does not put forward any argument which can undermine that assessment. Consequently, the applicant's arguments that GEVES was not a fit site for the technical examination of the candidate variety by reason of the climatic conditions encountered there must be rejected.
- 51 Secondly, the applicant does not claim, as it confirmed at the hearing, that, during the period in which the candidate variety was being examined, the climatic conditions that prevailed on the GEVES site were abnormal.
- 52 Thirdly, the unambiguous and preliminary designation of the examination office charged with the technical examination of all species or varieties belonging to the same mutation group, such as that resulting from Announcement No 2/2004, is in keeping with the general scheme for Community plant variety rights established by Regulation No 2100/94, as well as with the principles of equal treatment, legal certainty and transparency which underpin that regulation.
- 53 That general scheme and those principles require that candidate varieties belonging to the same plant variety mutation group of a given species be assessed under the same conditions.
- 54 To that effect, applicants for Community plant variety rights are reminded in Announcement No 2/2004 that 'only the [CPVO] determines where the candidate variety is examined' and that 'any arrangements which are made directly with an examination office but without consent of the CPVO will therefore jeopardise later examination results'.

...

The second branch: the reason for the lack of uniformity

...

- 63 In those circumstances, and given the broad discretion that the CPVO enjoys in determining the scientifically and technically complex issue of whether a candidate variety has, during a technical examination, displayed its characteristics in a sufficiently uniform way (judgments of 15 April 2010, *Schröder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77, and of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50), the Board of Appeal was entitled to conclude that there was a lack of uniformity in light of the significant differences found in the expression of characteristic 39 during two consecutive years of testing, given, on the one hand, that the technical examination had been carried out in accordance with CPVO Technical Protocol TP/14/2, a fact which, moreover, is not disputed, and, on the other hand, that there was no evidence to suggest that the expression of that characteristic had been precluded by the environmental conditions in which the technical examination had been carried out. Equally, the Board of Appeal did not commit a manifest error of assessment in finding that the CPVO was not obliged, in such cases, to seek every possible explanation for the identified lack of uniformity.

...

The second plea: infringement of Article 57(3) of Regulation No 2100/94 and of the principle of equal treatment

...

The first branch: infringement of Article 57(3) of Regulation No 2100/94

...

- ⁸³ Finally, even if the applicant's arguments had to be interpreted as being to the effect that the problems of uniformity are attributable to the quality of the grafting material examined and that those problems might have diminished naturally with the passage of time, a situation which would have warranted a further year of observation, it is sufficient to note that the responsibility lies solely with applicants for plant variety rights to submit grafting material of sufficient quality.

...

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

- 1. Dismisses the appeal;**
- 2. Orders Schniga GmbH to pay the costs.**

Tomljenović

Bieliūnas

Kornezov

Delivered in open court in Luxembourg on 23 February 2018.

[Signatures]