

JUDGMENT OF THE COURT (Second Chamber)

15 April 2010*

In Case C-38/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 28 January 2009,

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

appellant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: German.

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans, K. Schiemann and P. Küris (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 30 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 3 December 2009,

gives the following

Judgment

- ¹ By his appeal, Mr Schröder seeks to have set aside the judgment of the Court of First Instance of the European Communities (now ‘the General Court’) of 19 November 2008 in Case T-187/06 *Schröder v CPVO (SUMCOL 01)* [2008] ECR II-3151 (‘the judgment under appeal’), by which that court dismissed his action against the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 2 May 2006 (Reference A 003/2004) (‘the contested decision’).

Legal context

- ² Pursuant to Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended by Council Regulation (EC) No 2506/95 of 25 October 1995 (OJ 1995 L 258, p. 3; 'Regulation No 2100/94'), Community plant variety rights are to be granted for varieties that are distinct, uniform, stable and new.

- ³ Article 7 of Regulation No 2100/94 provides:

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

2. The existence of another variety shall in particular be deemed to be a matter of common knowledge if on the date of application ...:

- (a) it was the object of a plant variety right or entered in an official register of plant varieties, in the Community or any State, or in any intergovernmental organisation with relevant competence;

- (b) an application for the granting of a plant variety right in its respect or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime.

The implementing rules ... may specify further cases as examples which shall be deemed to be a matter of common knowledge.'

- 4 Pursuant to Article 54 of Regulation No 2100/94, the CPVO is to examine, inter alia, whether the variety may be the object of a Community plant variety right, whether the variety is new and whether the applicant is entitled to file an application. It is to examine whether the proposed variety denomination is suitable. For such purposes, it may avail itself of the services of other bodies. The first applicant is to be deemed to be entitled to the Community plant variety right.
- 5 According to Article 55 of the Regulation, where the CPVO has not discovered any impediment to the grant of a Community plant variety right, it is to arrange for the technical examination relating to compliance with the required conditions to be carried out by the competent office or offices in at least one of the Member States entrusted by the Administrative Council with responsibility for the technical examination of varieties of the species concerned ('Examination Offices').
- 6 Pursuant to Articles 61 and 62 of the said Regulation, if the CPVO is of the opinion that the findings of the abovementioned examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61 of the Regulation, it is to grant the Community plant variety right. Conversely, applications for a plant variety right are to be refused, inter alia, if the result of the examination is inconclusive.

7 Pursuant to Article 67(2) of Regulation No 2100/94, an appeal lodged against a decision of the CPVO refusing the application for a Community plant variety right has suspensory effect. The CPVO may, however, if it considers that circumstances so require, order that the contested decision not be suspended.

8 Article 70(2) of the Regulation provides:

‘If the decision is not rectified within one month after receipt of the statement of grounds, for the appeal, the [CPVO] shall forthwith:

— decide whether it will take an action pursuant to Article 67(2), second sentence,

and

— remit the appeal to the Board of Appeal’

9 It follows from Articles 71 to 73 of Regulation No 2100/94 that the Board of Appeal is to decide on the appeal brought before it by exercising any power which lies within the competence of the CPVO, or by remitting the case to the competent body of the CPVO for further action. Actions may be brought before the Court of Justice against decisions of the Board of Appeal on appeals. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement,

infringement of the Treaty, of Regulation No 2100/94 or of any rule of law relating to their application, or misuse of power. The Court has jurisdiction to annul or to alter the decision of the Board of Appeal.

- ¹⁰ Article 75 of the Regulation, concerning the statement of grounds on which decisions are based and the right of audience, provides:

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

- ¹¹ Article 76 of the Regulation provides that the CPVO is to make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55 of that regulation. It is to disregard facts or items of evidence which have not been submitted within the time-limit set by the CPVO.

- ¹² Article 88 of the Regulation organises public inspection.

- ¹³ It follows from Article 15(1) and (2) 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) that the designation of an Examination Office is to be effected by a written agreement between the CPVO and that office. The effect of that agreement

is to be such that acts performed or to be performed by members of the staff of the Examination Office in accordance therewith are to be considered, as far as third parties are concerned, to be acts of the CPVO.

- ¹⁴ Pursuant to Article 60(1) of Regulation No 1239/95, where the CPVO considers it necessary to hear the oral evidence of parties to proceedings or of witnesses or experts, or to carry out an inspection, it is to take a decision to that effect, stating the means by which it intends to obtain evidence, the relevant facts to be proved and the date, time and place of hearing or inspection. If oral evidence from witnesses and experts is requested by a party to proceedings, the decision of the CPVO is to state the period of time within which the party to proceedings filing the request must make known to the CPVO the names and addresses of the witnesses and experts whom the party to proceedings wishes to be heard.
- ¹⁵ According to Article 62(1) of that regulation, the taking of evidence may be made conditional upon deposit, by the party requesting that such evidence be taken, of a sum of money.
- ¹⁶ Pursuant to Article 63(2) of the said Regulation, the minutes of the testimony of a witness, expert or party to proceedings are to be read out or submitted to him so that he may examine them. The minutes are to note that this formality has been carried out and that the person who gave the testimony approved the minutes or that objections were raised.

Facts

- ¹⁷ On 7 June 2001, Mr Schröder applied to the CPVO for a Community plant variety right for the plant variety SUMCOL 01, a plant of the species *Plectranthus ornatus*.

That variety was the product of a cross between a plant of the species *Plectranthus ornatus* and a plant of the species *Plectranthus ssp*, which originates in Latin America.

- 18 On 1 July 2001, the CPVO requested the Bundessortenamt (Federal Plant Variety Office, Germany) to conduct the technical examination pursuant to Article 55(1) of Regulation No 2100/94.
- 19 During the first year of the examination procedure, Mr Schröder's competitors opposed the grant of the right being sought, on the basis that the candidate variety was not a new plant variety but a wild variety originating in South Africa and which had been marketed for years in that country and in Germany.
- 20 After first comparing the candidate variety with a reference variety provided in Germany, the Bundessortenamt approached Mr van Jaarsveld from Kirstenbosch Botanical Gardens (South Africa) with a request to provide cuttings or seeds of *Plectranthus comosus* or *Plectranthus ornatus*.
- 21 Following an exchange of letters dated 25 March and 16 October 2002, the Bundessortenamt received, on 12 December 2002, cuttings sent by Mr van Jaarsveld, which he said had come from his private garden.

- 22 Those plants were cultivated and examined during 2003. It then appeared that the differences between the candidate variety and the plants obtained from the cuttings sent by Mr van Jaarsveld were minimal. According to an email dated 19 August 2003 from Mrs Heine, the Bundessortenamt examiner responsible for the technical examination, the differences were admittedly 'significant' but barely visible.
- 23 In a letter of 7 August 2003, the CPVO informed Mr Schröder that the Bundessortenamt had established that 'there [were] shortcomings in the distinctness of the plants from the plants being tested at the Botanical Gardens Kirstenbosch'. None the less, it was common ground between the parties that in actual fact the plants came from Mr van Jaarsveld's private garden. The letter also stated that, according to Mrs Heine, the appellant had been unable to identify the variety SUMCOL 01 when inspecting the Bundessortenamt's test field.
- 24 In September 2003, Mr Schröder submitted his comments on the results of the technical examination. On the basis, first, of the results of his fact-finding mission to South Africa, on which he embarked between 29 August and 1 September 2003, and, second, of the results of his visit to the botanical gardens in Meise (Belgium) on 15 September 2003, he stated that he was convinced that the plants from Mr van Jaarsveld's garden, used for the purposes of comparison, belonged not to the reference variety but to the SUMCOL 01 variety itself. Furthermore, he expressed doubts as to whether the reference variety was a matter of common knowledge.
- 25 The concluding report of the Bundessortenamt of 9 December 2003, drawn up in accordance with the rules of the International Union for the Protection of New Varieties of Plants (UPOV), was sent to the appellant for observations on 15 December 2003, with a covering letter from the CPVO. The report concludes that the candidate variety SUMCOL 01 is not distinguishable from the reference variety *Plectranthus ornatus* from South Africa supplied by Mr van Jaarsveld.

- 26 Mr Schröder submitted his final comments on that report on 3 February 2004.
- 27 By Decision No R 446 of 19 April 2004 ('the refusal decision'), the CPVO refused Mr Schröder's application for a Community plant variety right because of a lack of distinctness of the SUMCOL 01 variety, in accordance with Article 7 of Regulation No 2100/94.
- 28 On 11 June 2004, Mr Schröder brought an appeal before the Board of Appeal of the CPVO against the refusal decision. At the same time, he petitioned to be permitted to inspect the files in the case. The petition was granted on 25 August 2004, that is to say, five days before the expiry of the four-month time-limit which Mr Schröder had for filing a written statement setting out the grounds of appeal, laid down in Article 69 of Regulation No 2100/94. The appellant filed such a statement on 30 August 2004.
- 29 The refusal decision was not the subject of interlocutory revision within the one-month time-limit after receipt of the statement of grounds for the appeal. By letter of 30 September 2004, the CPVO informed the appellant, however, of its decision of the same day to 'defer' its decision on that point for two weeks on the ground that new investigations seemed useful.
- 30 Following a further exchange of letters with Mr van Jaarsveld on 8 and 15 October 2004, and contact with the South African Ministry of Agriculture, the CPVO decided, on 10 November 2004, not to rectify the refusal decision and remitted the appeal to the Board of Appeal.
- 31 In its written answer of 8 September 2005 to a question put by the Board of Appeal, and referring to an email to the CPVO from Mrs Heine dated 20 June 2005 in which it

was stated that the Bundessortenamt had been 'unable to distinguish the plants which are the subject of the application from the plants from South Africa, for which reason it could naturally be argued that all the plants originate from the plants which are the subject of the application', the CPVO admitted that the change of climate and site could cause the plants to react and, as the Bundessortenamt had explained, it could therefore not be completely excluded that varieties which showed such minimal differences as the candidate variety and the reference variety were of the same variety.

32 The parties presented oral argument to the Board of Appeal at the hearing on 30 September 2005. It is clear from the minutes of that hearing that Mrs Heine attended as a representative of the CPVO. She stated, *inter alia*, that, of the six cuttings sent by Mr van Jaarsveld, only four had survived the journey. In order to exclude the possibility that the differences between the candidate variety and the reference variety were due to environmental factors, new cuttings had been made and used as the reference variety. Since they were of the second generation, the differences noted should, in her view, be imputed to genotypical factors.

33 It is also clear from the minutes of the hearing that, when it ended, the Board of Appeal was not totally convinced that the reference variety was a matter of common knowledge. Without questioning the credibility and technical expertise of Mr van Jaarsveld, it considered that certain of his statements to that effect had not been sufficiently supported, with the effect that it considered it necessary for one of its members to make an inspection in South Africa as a means of obtaining evidence pursuant to Article 78 of Regulation No 2100/94.

34 On 27 December 2005, the Board of Appeal ordered the taking of evidence in question. It made implementation of that measure subject to the condition that the appellant pay a fees advance of EUR 6000 under Article 62 of Regulation No 1239/95.

- 35 In a document dated 6 January 2006, the appellant claimed that he was not required to provide evidence and had not sought the taking of evidence which had been ordered. He pointed out that it was for the CPVO to determine distinctness for the purposes of Article 7 of Regulation No 2100/94. That was why, in his view, a ‘reconnaissance trip’ to South Africa could be envisaged only under Article 76 of Regulation No 2100/94. Under that provision, it was not for him to pay a fees advance.
- 36 By the contested decision, the Board of Appeal dismissed the appeal against the refusal decision. It considered, essentially, that the SUMCOL 01 variety could not be clearly distinguished from a reference variety which was a matter of common knowledge at the time that the application was made, namely, the *P. ornatus Südafrika* variety, a specimen of which had been provided by Mr van Jaarsveld. It also did not implement the order for taking evidence since it ‘was finally persuaded that the variety used for comparison was the reference variety and not the SUMCOL 01 variety, and that the reference variety was common knowledge on the date of application.’

The action before the General Court and the judgment under appeal

- 37 On 18 July 2006, Mr Schröder brought an action against the contested decision before the General Court, in which he raised eight pleas.
- 38 The first plea, which was divided into three branches, alleged infringement of Article 62 in conjunction with Article 7(1) and (2) of Regulation No 2100/94. The second and third pleas alleged, respectively, infringement of Article 76 of that regulation and infringement of Article 75 thereof and the ‘general prohibition, in a State governed

by the rule of law, on taking decisions by surprise.’ The fourth and fifth pleas alleged infringement, respectively, of Article 60(1) of Regulation No 1239/95 and of Article 62(1) of that regulation. The sixth to eighth pleas alleged infringement, respectively, of Article 88 of Regulation No 2100/94, of Article 70(2) of that regulation and of the first sentence of Article 67(2) thereof.

39 After defining the limits of its power of review, the General Court considered the substantive assessments made by the Board of Appeal under Article 7(1) and (2) of Regulation No 2100/94. With regard to the question whether the plant from Mr van Jaarsveld’s private garden was a plant of the SUMCOL 01 variety, the General Court concluded, in paragraph 87 of the judgment under appeal, that the candidate variety and the reference variety from Mr van Jaarsveld’s private garden constituted two different varieties. Furthermore, it considered, in paragraph 92 of the judgment, that the Board of Appeal was fully entitled to conclude, first, that the reference variety was a matter of common knowledge, having found that the appellant had not put forward any specific argument or evidence to challenge the assimilation of the reference variety from Mr van Jaarsveld’s garden to the South African variety of the *Plectranthus ornatus* species and, second, that Mr van Jaarsveld’s statements were corroborated by the South African authorities and several scientific publications.

40 Moreover, with regard to the appellant’s argument alleging infringement of Article 62 of Regulation No 2100/94 inasmuch as the SUMCOL 01 variety was clearly distinct from the reference variety, the General Court found, in paragraph 104 of the judgment under appeal, that there was a contradiction in that argument and that the premiss on which it was based was erroneous.

41 Consequently, the General Court rejected the first plea raised.

- 42 With regard to the second plea, alleging infringement of Article 76 of Regulation No 2100/94, the General Court considered, in paragraph 127 of the judgment under appeal, that ‘the Board of Appeal [had been] entitled to deduce from the evidence at its disposal that the SUMCOL 01 variety could not be clearly distinguished from a reference variety which was a matter of common knowledge at the time that the application was introduced’ and that ‘[i]t was thus in no way required to carry out a new technical examination.’
- 43 The third plea, alleging infringement of Article 75 of Regulation No 2100/94, was rejected on the ground that, while the Board of Appeal can decide of its own motion on a measure to take evidence, such a measure can also be deferred of the board’s own motion, the question that counts being whether the parties have had an opportunity to present their comments on the grounds and evidence advanced by the board.
- 44 With regard to the fourth plea, alleging infringement of Article 60(1) of Regulation No 1239/95 relating to the conditions under which Mrs Heine took part in the proceedings before the Board of Appeal, the General Court found, in paragraph 130 of the judgment under appeal, that ‘Mrs Heine appeared [at the hearing before the Board of Appeal] in her capacity as an agent of the CPVO and not a witness or an expert’.
- 45 In considering the fifth plea, alleging infringement of Article 62 of Regulation No 1239/95 inasmuch as the Board of Appeal could not lawfully require Mr Schröder to deposit a sum of money in order for a measure to take evidence to be ordered, the General Court found, in paragraph 116 of the judgment under appeal, that that plea appeared to be well founded and that the order providing for a measure to take evidence of 27 December 2005 was therefore vitiated by illegality. In the following paragraph of the judgment, however, it rejected the plea as ineffective having regard to the effect of the contested decision.

⁴⁶ With regard to the sixth plea, alleging infringement of Article 88 of Regulation No 2100/94 inasmuch as Mr Schröder was unable to consult the file, the General Court found, in paragraph 134 of the judgment under appeal, that ‘the [appellant] received the entire file and was placed in a position effectively to defend his point of view.’

⁴⁷ Concerning the seventh plea, alleging infringement of Article 70(2) of Regulation No 2100/94 relating to the time-limits within which the CPVO must make its decision, and which seriously infringed the appellant’s rights, the General Court stated the following in paragraphs 142 and 143 of the judgment under appeal:

‘142 Even if the time-limit laid down in Article 70 of Regulation No 2100/94 was exceeded by a month and 10 days, the Court considers that that delay is justified in the light of the specific circumstances of the present case, in particular, by the need to question persons in a distant country.

143 In any event, the exceeding of that time-limit is not of such a nature as to justify the annulment of the contested decision, but, at most, the award of damages, should the [appellant] appear to have suffered any sort of damage.’

⁴⁸ With regard to the eighth plea, alleging infringement of the first sentence of Article 67(2) of Regulation No 2100/94, relating to the conditions for removing the application for the plant variety right from the register, the General Court held, in paragraph 148 of the judgment under appeal:

‘In that regard, even supposing that the application for the plant variety right was removed from the register of the CPVO immediately after the adoption of the [refusal] decision, contrary to the first sentence of Article 67(2) of Regulation No 2100/94,

which provides that an appeal lodged against such a decision is to have suspensory effect, that illegality is extraneous to the [refusal] decision itself and therefore cannot affect the validity of that decision or, consequently, the validity of the contested decision.’

49 Consequently, the General Court dismissed Mr Schröder’s action.

Forms of order sought

50 Mr Schröder asks the Court, principally, to set aside the judgment under appeal and annul the contested decision or, in the alternative, refer the case back to the General Court and, in any event, order the CPVO to pay all the costs arising from the proceedings before the General Court and before the Court of Justice.

51 The CPVO contends that the Court should dismiss the appeal and order the appellant to pay the costs of the proceedings before the General Court and before the Court of Justice.

The appeal

52 Mr Schröder puts forward two pleas in support of his appeal, the first, alleging procedural defects, is divided into six branches and the second, alleging infringement of Community law, is divided into five branches.

- 53 The CPVO contends, principally, that the appeal is inadmissible on the ground that it deals only with matters of fact and assessments of evidence and, in the alternative, that each of the pleas should be rejected and the appeal should therefore be dismissed.

The first plea

- 54 The first plea is divided into six branches.

The first and second branches, alleging infringement of Article 7 of Regulation No 2100/94

– Arguments of the parties

- 55 By the two branches of the first plea, Mr Schröder, essentially, challenges the findings of the General Court relating to whether the plant from Mr van Jaarsveld's private garden, which was used as a reference variety, was the same variety as the SUMCOL 01 candidate variety.
- 56 By the first branch of the plea Mr Schröder challenges the findings of the General Court in paragraphs 76, 79 and 131 of the judgment under appeal, relating to the statements of Mrs Heine on whether the van Jaarsveld reference variety is identical to the SUMCOL 01 candidate variety.

- 57 In that regard, he maintains, first, that the General Court was wrong to state, in paragraph 131 of the judgment under appeal, that he had put forward no evidence in support of his argument that Mrs Heine's statements had been recorded in the contested decision in an incomplete fashion.
- 58 Secondly, Mr Schröder claims that the minutes of the hearing on 30 September 2005 before the Board of Appeal, referred to in paragraph 79 of the judgment under appeal, cannot provide definitive proof as to the statements made by the parties at the hearing, as those minutes were drawn up in breach of Article 63(2) of Regulation No 1239/95.
- 59 Thirdly, the General Court, in paragraph 79 of the judgment under appeal, relied, incorrectly, on items of evidence which were not in the case-file and thus distorted the evidence. In addition, it based its findings on mere speculation as far as Mrs Heine's email of 20 June 2005 is concerned.
- 60 By a second branch of this plea, alleging procedural errors in connection with the findings of the General Court in paragraphs 36, 71, 73, 74, 79 and 131 of the judgment under appeal, according to which the reference variety and the candidate variety were not in fact identical, Mr Schröder essentially challenges the conclusion reached by the General Court that the plants sent by Mr van Jaarsveld were not of the SUMCOL 01 variety.
- 61 To that end, Mr Schröder claims that the General Court made two errors of law.
- 62 The first error of law results from the fact that the General Court imposed excessive demands with regard to his submissions and thus infringed the principles governing the taking of evidence. In particular, given the time that had already elapsed since

the examination of the plants, it was not possible for Mr Schröder to submit more evidence in order to refute the assertions made by Mrs Heine at the hearing before the Board of Appeal. Mr Schröder points out, moreover, that the General Court held, in paragraph 130 of the judgment under appeal, that Mrs Heine had made her statements as a party to the proceedings, not as a witness or expert. Since Mr Schröder had disputed those statements, the Board of Appeal and the General Court were not entitled to give more weight to the submissions of the CPVO without taking the evidence which he offered to adduce. By generally rejecting his offers to produce evidence, the General Court infringed Mr Schröder's right to be heard.

⁶³ The second error of law consisted of a distortion of the facts and the evidence. Mr Schröder submits that, in drawing the contested conclusion in paragraph 74 of the judgment under appeal, according to which his submissions had not been sufficiently specific, the General Court distorted the facts and evidence. In particular, the General Court ignored the fact that Mr Schröder had commented, at the hearing before the Board of Appeal, on the varieties compared in the course of 2003 and, in his written observations of 14 October 2005, on the specific differences between the varieties compared. Finally, the General Court ignored his offer, made in point 43 of his application, to supply an expert's report in support of his assertion that those differences could be explained by the reproduction of the reference variety by the Bundessortenamt.

⁶⁴ With regard to the first branch of the plea, the CPVO argues, first, that the report dated 12 December 2003, submitted by Mrs Heine, pointed to three minimal differences between the two varieties concerned. Challenging and assessing such a finding is not a matter for the Court but only for experts.

⁶⁵ The CPVO next points out that the report in question was never challenged by Mr Schröder. Mrs Heine's opinion relies on a scientific basis, whereas the email of 20 June 2005 is manifestly speculative and not definitive.

- ⁶⁶ Finally, the CPVO states that Mrs Heine's credibility is strengthened by the recognised competence of the Bundessortenamt in the field of registration and protection of plant varieties.
- ⁶⁷ With regard to the second branch of the plea, the CPVO argues, essentially, that the General Court was entitled to exercise only a limited review of the finding that there were differences between the two plants concerned and of the origin of those plants. It adds that the General Court was not required to take expert advice.

– Findings of the Court

- ⁶⁸ Since the first two branches of the plea relate to infringement of Article 7 of Regulation No 2100/94, it is appropriate to consider them together.
- ⁶⁹ In accordance with Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the facts or evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, *inter alia*, Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 22, and Case C-173/04 P *Deutsche SiSi-Werke v OHIM* [2006] ECR I-551, paragraph 35).
- ⁷⁰ It should be pointed out that the General Court rejected as unfounded Mr Schröder's argument that the CPVO and the Board of Appeal were wrong to hold that the SUMCOL 01 variety lacked distinctness for the purposes of Article 7(1) of Regulation No 2100/94.

- 71 In paragraph 73 of the judgment under appeal, the General Court stated that the factors referred to by Mr Schröder were not sufficient to establish that the Bundessortenamt, and, later, the CPVO and the Board of Appeal, made a manifest error of assessment on that point capable of leading to annulment of the contested decision.
- 72 Mr Schröder challenges that finding in so far as, first, the General Court stated, in paragraph 74 of the judgment under appeal, that the evidence which he had adduced concerning the effect of environmental factors was not sufficient to refute the opposite conclusion drawn by the Bundessortenamt and in so far as, secondly, in paragraphs 77 to 79 of the judgment under appeal, the General Court did not accept Mr Schröder's arguments on the basis of statements made by Mrs Heine at the hearing before the Board of Appeal and in an email sent to the CPVO.
- 73 By seeking to demonstrate that the General Court could not reasonably conclude that the facts and circumstances referred to above were not sufficient to refute the conclusion drawn by the Bundessortenamt and confirmed by the Board of Appeal, Mr Schröder, although formally pleading an error of law, is essentially calling into question the factual assessments carried out by the General Court and, in particular, disputing the probative value it attached to those facts.
- 74 Consequently, the first and second branches of the first plea are, to that extent, inadmissible.
- 75 As regards the arguments that the General Court distorted the facts and the evidence when it assessed the arguments based on Mrs Heine's statements and on the possible impact of environmental factors on the differences between the reference variety and the candidate variety, it must be pointed out that the General Court is the sole judge

of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the inaccuracy of the findings of the General Court is apparent from the documents in the case-file (Joined Cases C-75/05 P and C-80/05 P *Germany and Others v Kronofrance* [2008] ECR I-6619, paragraph 78 and case-law cited).

⁷⁶ Facts not submitted by the parties before the departments of the CPVO cannot be submitted at the stage of the action brought before the General Court. The General Court is called upon to assess the legality of the decision of the Board of Appeal by reviewing the application of European Union law made by that board, particularly in the light of facts which were submitted to the latter, but that Court cannot carry out such a review by taking into account matters of fact newly produced before it (see, by analogy, Case C-29/05 P *OHIM v Kaul* [2007] ECR I-2213, paragraph 54).

⁷⁷ In addition, it must be recalled that the General Court, which has jurisdiction only within the limits set by Article 73(2) of Regulation No 2100/94, was not required to carry out a complete review in order to determine whether or not the SUMCOL 01 variety lacked distinctness for the purposes of Article 7(1) of Regulation No 2100/94 but that it was entitled, in the light of the scientific and technical complexity of that condition, compliance with which must be verified by means of a technical examination which, as is clear from Article 55 of Regulation No 2100/94, is to be entrusted by the CPVO to one of the competent national offices, to limit itself to a review of manifest errors of assessment.

⁷⁸ Consequently, the General Court was entitled to consider that the evidence on the file was sufficient to permit the Board of Appeal to rule on the refusal decision.

- 79 In addition, as the Advocate General remarked in point 45 of his Opinion, the General Court, in paragraph 74 of the judgment under appeal, merely stated that the explanations, testimony and expert's reports put forward by Mr Schröder were not sufficient to refute the conclusion drawn by the Bundessortenamt.
- 80 The General Court did not err in law in so deciding.
- 81 With regard to the assessment concerning Mrs Heine's statements, the General Court considered, in paragraph 79 of the judgment under appeal, that there was no need to attribute particular importance to the statement which Mrs Heine made in the email on 20 June 2005, noting that she had not maintained her position at the hearing before the Board of Appeal.
- 82 It should be pointed out in that regard that the General Court did not infringe the rules governing the taking of evidence or the standard of proof when it determined, in its absolute discretion, the probative value to be accorded to that statement.
- 83 Moreover, even on the assumption that it is established, as Mr Schröder claims, that the minutes of the hearing before the Board of Appeal had not been submitted for approval by the parties, contrary to Article 63(2) of Regulation No 1239/95, the findings made by the General Court in the abovementioned paragraph 79 are to be made by it alone and may not be challenged on appeal.
- 84 It is for the General Court alone to determine whether Mrs Heine's statements were recorded in the contested decision in an incomplete fashion. Thus, when it considered, in paragraph 131 of the judgment under appeal, that that was not so, the General Court did not distort the facts of the case.

⁸⁵ In addition, that irregularity, even if it were established, would have no effect on the contents of Mrs Heine's statement, as taken into account by the General Court in paragraph 79 of the judgment under appeal.

⁸⁶ Consequently, the first and second branches of the plea under consideration must be rejected in their entirety.

The third, fourth and fifth branches, alleging errors of law in the appraisal of the probative value of Mr van Jaarsveld's statement

– Arguments of the parties

⁸⁷ In these three branches of the first plea, Mr Schröder is essentially challenging the General Court's reasoning in paragraph 81 of the judgment under appeal in which it endorsed the position of the Board of Appeal that on the basis of 'experience "it could be excluded" that plants of the SUMCOL 01 variety could have reached Mr van Jaarsveld's private garden.'

⁸⁸ In that regard, Mr Schröder claims, in the third branch, that the General Court's findings in paragraph 82 of the judgment under appeal are erroneous inasmuch as he showed that, from 19 August 2003, plants of that variety could be bought by mail order in Germany and that, in South Africa, that variety was available, not in the horticultural trade, but only in Mr van Jaarsveld's garden. Furthermore, Mr Schröder considers that the General Court distorted the evidence which he adduced in so far as

it endorsed the finding of the Board of Appeal that the reference variety was generally available at nurseries in South Africa.

- ⁸⁹ By the fourth branch, Mr Schröder submits, in the context of a challenge to the General Court's appraisal of the credibility and impartiality of Mr van Jaarsveld in paragraphs 84, 93 and 95 of the judgment under appeal, that the General Court failed to take account of the evidence he adduced in regard to the reasons which Mr van Jaarsveld had to prevent the SUMCOL 01 variety obtaining a Community plant variety right.
- ⁹⁰ By the fifth branch, he claims that in paragraph 85 of the judgment under appeal, the General Court erred in law by failing to take account of his statements concerning Mr van Jaarsveld's 'credibility' and the likelihood that the latter's statements were true.
- ⁹¹ For its part, the CPVO considers that Mr Schröder is merely challenging findings of fact, which are not subject to review by the Court. In addition, Mr Schröder's allegation that Mr van Jaarsveld is a competitor was raised for the first time on appeal, contrary to Article 42 of the Rules of Procedure of the Court.

– Findings of the Court

- ⁹² Since the third, fourth and fifth branches of the first plea relate to the General Court's appraisal of the presence of the SUMCOL 01 plant in Mr van Jaarsveld's private garden in South Africa, they should be considered together.

- 93 In that regard, the General Court held, in paragraph 86 of the judgment under appeal, that Mr Schröder's 'argument intended to refute the thesis adopted by the Board of Appeal that on the basis of experience "it could be excluded" that plants of the SUM-COL 01 variety could have reached Mr van Jaarsveld's private garden is, in any event, of no consequence.'
- 94 That response to that part of the plea is not marred by any error of law.
- 95 As the General Court was able to note, even if it were established that the SUM-COL 01 variety was to be found in Mr van Jaarsveld's garden in South Africa, that fact would have no effect on the scientific findings, which constitute the basis of the contested decision, that differences existed between that variety and the plant from Mr van Jaarsveld's private garden which was used as a reference variety.
- 96 Consequently, the third, fourth and fifth branches of the plea under consideration must be rejected as ineffective.

The sixth branch based on the finding that the reference variety could be considered a matter of common knowledge.

– Arguments of the parties

- 97 By the sixth branch of this plea, Mr Schröder is essentially challenging the findings made by the General Court in paragraphs 68, 80, 90, 91 and 96 of the judgment under appeal in so far as they concern whether the plants from Mr van Jaarsveld's private garden were a matter of common knowledge within the meaning of Article 7(2) of Regulation No 2100/94.

- 98 To that end, he claims that the General Court made several errors of law.
- 99 First, Mr Schröder claims that the General Court erred in law, and distorted the evidence, in presuming, incorrectly, that the Board of Appeal, the CPVO and the Bundesortenamt had assimilated Mr van Jaarsveld's reference variety to a 'variety' described by Mr Codd, a South African botanist.
- 100 Secondly, the judgment under appeal is contradictory inasmuch as, in paragraphs 80 and 96 thereof, it is stated that Mr Codd has described a botanical 'species' *Plectranthus ornatus*, whereas in paragraph 91 of that judgment reference is made to the 'variety' *Plectranthus ornatus*.
- 101 Thirdly, the General Court extended the subject-matter of the dispute, although it stated in paragraph 68 of the judgment under appeal that the CPVO could not rely for the first time, before the General Court, on a 'variety' described by Mr Codd since that variety had not been taken into account by the Board of Appeal.
- 102 The CPVO considers that this branch of the present plea is lacking in precision and must be rejected under Article 112 of the Rules of Procedure of the Court.
- 103 None the less, it argues that the reference variety must be regarded as a matter of common knowledge since Mr van Jaarsveld confirms that it was already being marketed

in South Africa at the date on which the application for a Community plant variety right was lodged, that those plants were provided by one of his friends, that the General Court correctly verified whether the ‘variety’, and not the ‘species’, was a matter of common knowledge, and that Mr Schröder has not proven that the operative part of the judgment under appeal would have been different if the General Court had not taken account of the scientific literature.

– Findings of the Court

¹⁰⁴ The three arguments put forward in support of this branch of the first plea challenge the conclusion of the General Court, in paragraph 92 of the judgment under appeal, that the reference variety was a matter of common knowledge.

¹⁰⁵ In this respect it should firstly be stated that, contrary to Mr Schröder’s submission, the General Court, in paragraph 91 of the abovementioned judgment, found that the Board of Appeal did not assimilate the reference variety produced by Mr van Jaarsveld to a variety described by Mr Codd, but that the board merely assimilated that reference variety to a variety known in South Africa which is of the species *Plectranthus ornatus*. It intended thereby to refute Mr Schröder’s argument that the plant sent by Mr van Jaarsveld was an isolated plant which was in his garden.

¹⁰⁶ Secondly, with regard to the alleged contradiction between paragraphs 80, 81 and 91 of the judgment under appeal, arising from the alleged confusion between the concepts of ‘variety’ and ‘species’, it should be noted that it is not apparent from those paragraphs that the General Court did not take due account of the distinction between those two concepts. The General Court accepted, in paragraph 80 of the said judgment, that ‘*Plectranthus ornatus* is a species with numerous varieties’ and, in paragraph 91 of the judgment, the General Court referred to ‘the South African variety of the *Plectranthus ornatus* species’.

107 In addition, no contradiction can arise from the mere fact that, as Mr Schröder contends, the General Court incorrectly implied that Mr Codd described a variety of *Plectranthus ornatus* in his publications instead of the corresponding species. As the Advocate General pointed out in point 67 of his Opinion, the very nature of a ‘species’ is that it is composed of its different varieties and, for this reason, a detailed description of such a species cannot be detached from the varieties which it comprises.

108 Thirdly, since the argument alleging an extension of the subject-matter of the dispute is based on a misreading of paragraph 91 of the judgment under appeal, it must be rejected as unfounded.

109 It follows that the sixth branch of the plea under consideration must be rejected.

110 It follows from the foregoing that the first plea must be rejected in its entirety.

The second plea

111 The second plea is divided into five branches.

The first, second and third branches alleging contradictions, errors and breach of Community law concerning the account taken of scientific publications in order to establish that the reference variety was a matter of common knowledge

– Arguments of the parties

- ¹¹² In the first branch of the present plea, Mr Schröder claims, essentially, that, first, in paragraphs 66, 80 and 96 to 100 of the judgment under appeal, the General Court contradicted itself in considering that ‘very different varieties’ can be part of the botanic species *Plectranthus ornatus* and in accepting, by way of conclusion, that the descriptions appearing in the publications correspond to the description of a botanic ‘species’. UPOV Document TG/1/3, of 19 April 2002, refers only to the description of a ‘variety’ in appraising whether it is a matter of common knowledge.
- ¹¹³ Second, given the limits of the General Court’s review, as set out in paragraph 66 of the judgment under appeal, it was not required to verify whether the species at issue was already known, on the basis of a detailed description.
- ¹¹⁴ The CPVO contends that the first branch of the second plea merely repeats the sixth branch of the first plea.
- ¹¹⁵ By the second branch of the second plea, Mr Schröder considers that the investigation of the facts carried out by the CPVO, the Board of Appeal and the General Court is

manifestly incomplete inasmuch as no comparison was made between the expression of the characteristics set out in Mr Codd's publication and that of the candidate variety.

¹¹⁶ The CPVO points out that it is no longer possible, at the appeal stage, to challenge the examination of the facts carried out by it or by the Board of Appeal.

¹¹⁷ By the third branch of this plea, Mr Schröder claims that Article 7(2) of Regulation No 2100/94 prohibits in principle reliance on the detailed description of a variety appearing in a publication for the purposes of appraising the distinctness of a candidate variety. Moreover, International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised on 19 March 1991, to which the European Community is a party, no longer uses the example of a detailed description of a variety as justification that it is a matter of common knowledge, whereas that requirement was expressly mentioned in the version of the Convention as revised on 23 October 1978. Consequently, neither the Board of Appeal nor the General Court was entitled to take as a basis a description appearing in Mr Codd's publication.

¹¹⁸ Furthermore, the General Court's interpretation of Article 7(2) of Regulation No 2100/94 runs counter to the applicable German legislation on plant variety rights, takes no account of the particularities of the object being protected, which is composed of living material, and is contrary to legal literature.

¹¹⁹ The CPVO states that any kind of evidence is admissible when considering whether a candidate variety is a matter of common knowledge and that there is no exception in Regulation No 2100/94.

– Findings of the Court

- ¹²⁰ By the first, second and third branches of the second plea, Mr Schröder is essentially challenging the fact that the General Court accepted that the detailed description of a variety appearing in a scientific publication can be taken into account as evidence that a variety is a matter of common knowledge within the meaning of Article 7(2) of Regulation No 2100/94.
- ¹²¹ In that connection, in paragraph 96 of the judgment under appeal, the General Court referred, for the sake of completeness, to the scientific literature as confirmation of Mr van Jaarsveld's statements. In paragraphs 97 and 98 of that judgment, the General Court pointed out that, pursuant to the UPOV rules and, in particular, to point 5.2.2.1, 'Common Knowledge', of UPOV Document TG/1/3 of 19 April 2002, 'the publication of a detailed description is, inter alia, one of the aspects which should be taken into consideration in order to establish common knowledge'. In paragraph 99 of the judgment, it was accepted that such a factor may also be taken into account under Article 7(2) of Regulation No 2100/94 and, in paragraph 100 of the judgment, it was held that the Board of Appeal was entitled to take account of the detailed descriptions contained in the works by Mr Codd to establish whether the reference variety was a matter of common knowledge.
- ¹²² In that regard it should be recalled that it is settled case-law that the Court of Justice will reject outright complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness since they cannot lead to the judgment being set aside and are therefore nugatory (Case C-184/01 P *Hirschfeldt v AEE* [2002] ECR I-10173, paragraph 48).
- ¹²³ In the present case, the General Court's reasoning in paragraphs 96 to 100 of the judgment under appeal is set out for the sake of completeness in regard to the reasoning set out in paragraphs 89 to 95 of the judgment.

124 It follows that the first, second and third branches of the second plea are ineffective and must therefore be rejected.

The fourth branch alleging that the General Court erred in law in failing to take account of Mr Schröder's arguments concerning the infringement of Article 62 of Regulation No 2100/94

– Arguments of the parties

125 Mr Schröder claims the General Court erred in law in rejecting his argument alleging infringement of Article 62 of Regulation No 2100/94. He contends that the General Court was wrong to hold, in paragraph 104 of the judgment under appeal, that his thesis, set out in paragraph 103 of that judgment, that the SUMCOL 01 variety should have been recognised by the CPVO as clearly distinct was in apparent contradiction with the thesis put forward by him that the candidate variety and the reference variety were one and the same variety. The alleged contradiction did not exist since, if the plants sent by Mr van Jaarsveld belonged to the variety SUMCOL 01, there was no 'reference variety' to establish the distinction in question.

126 The CPVO contends that this branch of the second plea should be rejected.

– Findings of the Court

- 127 It should be noted at the outset that the General Court, in paragraph 87 of the judgment under appeal, had already rejected the premiss on which Mr Schröder's argument is based, namely, that the reference variety and the candidate variety are one and the same plant.
- 128 Even supposing that, in paragraph 104 of the judgment under appeal, the General Court incorrectly considered that Mr Schröder's position was contradictory, even though he had put forward an alternative plea in the context of Article 62 of Regulation No 2100/94, the Court none the less finds that the General Court rejected that plea on grounds set out in paragraph 106 of the judgment under appeal, which Mr Schröder has not challenged.
- 129 The fourth branch of the second plea must therefore be rejected.

The fifth branch, alleging errors in law in assessing Mrs Heine's participation in the hearing

– Arguments of the parties

- 130 Mr Schröder claims that in appraising, in paragraphs 129 to 132 of the judgment under appeal, the conditions under which Mrs Heine took part in the hearing before the Board of Appeal, the General Court infringed Article 60(1) and Article 15(2) of Regulation No 1239/95.

- 131 In that regard, he states, first, that the General Court overlooked the fact that a decision ordering a measure to take evidence was necessary in order to hear a party to the proceedings and, secondly, that the General Court incorrectly stated that Mrs Heine was an agent of the CPVO, whereas she was an employee of the Bundessortenamt and, thirdly, that neither the CPVO nor the Board of Appeal established that the conditions for valid representation of that office were fulfilled by Mrs Heine.
- 132 The CPVO contends that the invitations it issued for the purposes of the oral procedure on 30 May 2005 were lawful. It is for the President of the CPVO alone to decide on the composition of his delegation and therefore on the participation of Mrs Heine, who had taken part in the preparation of the refusal decision.

– Findings of the Court

- 133 The General Court pointed out in paragraph 130 of the judgment under appeal that it is clear from the minutes of the hearing of the Board of Appeal that Mrs Heine appeared before it in her capacity as an agent of the CPVO and not a witness or an expert.
- 134 Consequently, since Mrs Heine must therefore be regarded as an agent of the CPVO, the obligations flowing from Articles 60(1) and 15(1) of Regulation No 1239/95 cannot usefully be relied on.
- 135 Pursuant to Article 68 of Regulation No 2100/94, since the CPVO was a party to the appeal proceedings and Mrs Heine was its agent, Article 60(1) of Regulation

No 1239/95 was not infringed when the General Court held, in paragraph 130 of the judgment under appeal, that her presence at the hearing did not require the adoption of a measure for taking evidence within the meaning of the latter provision.

136 Furthermore, the General Court rightly pointed out that, pursuant to Article 15(2) of Regulation No 1239/95, the acts performed by Mrs Heine pursuant to the terms of the agreement between the CPVO and the Bundessortenamt concerning the technical examination are to be considered acts of the CPVO as far as third parties are concerned.

137 It follows that the fifth branch of the plea under consideration must be rejected.

138 It follows from the foregoing that the second plea must be rejected in its entirety.

139 It follows from all of the foregoing considerations that the appeal must be dismissed.

Costs

140 Under Article 69(2) of the Rules of Procedure of the Court, applicable to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the CPVO sought such an order and Mr Schröder has failed in his appeal, he must be ordered to pay the costs.

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

- 1. Dismisses the appeal;**
- 2. Orders Mr Schröder to pay the costs.**

[Signatures]