Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

23 November 2017*

(Plant varieties — Nullity proceedings — Sugar beet variety M 02205 — Article 20(1)(a) of Regulation (EC) No 2100/94 — Article 7 of Regulation No 2100/94 — Distinctness of the candidate variety — Technical examination — Procedure before the Board of Appeal — Obligation to analyse carefully and impartially all the elements relevant to the present case — Power to alter)

In Case T-140/15,

Aurora Srl, established in Finale Emilia (Italy), represented initially by L.-B. Buchman, lawyer, and subsequently by L.-B. Buchman, R. Crespi and M. Razou, lawyers,

applicant,

v

Community Plant Variety Office (CPVO), represented initially by F. Mattina, subsequently by M. Mattina and M. Ekvad, and finally by M. Mattina, M. Ekvad and A. Weitz, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of the CPVO and intervener before the Court, being

SESVanderhave NV, established in Tirlemont (Belgium), represented initially by K. Neefs and P. de Jong and subsequently by P. de Jong, lawyers,

ACTION brought against the decision of the Board of Appeal of the CPVO of 26 November 2014 (Case A 010/2013) concerning nullity proceedings between Aurora and SESVanderhave,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, A. Dittrich and P.G. Xuereb (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

having regard to the application lodged at the Court Registry on 24 March 2015,

having regard to the response of the CPVO lodged at the Court Registry on 29 July 2015,

having regard to the statement in intervention of the intervener lodged at the Court Registry on 23 July 2015,

* Language of the case: English.

having regard to the reply lodged at the Court Registry on 14 October 2015,

having regard to the rejoinder of the CPVO lodged at the Court Registry on 18 December 2015,

having regard to the rejoinder of the intervener lodged at the Court Registry on 17 December 2015,

having regard to the written questions put by the Court to the parties on 20 December 2016 and their replies to those questions lodged at the Court Registry on 16 January 2017,

having regard to the written questions put by the Court to the parties on 22 March 2017 and their replies to those questions lodged at the Court Registry on 18 April 2017,

having regard to the observations submitted by the CPVO and the intervener on the document produced by the applicant at the hearing, lodged at the Court Registry on 20 June 2017,

having regard to the written questions put by the Court to the parties on 14 June 2017 and their replies to those questions lodged at the Court Registry on 29 June 2017,

further to the hearing on 1 June 2017,

gives the following

Judgment

Background to the dispute and the contested decision

Procedure for the grant of a Community plant variety right

1 On 29 November 2002, the intervener, SESVanderhave NV, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1). The Community plant variety right was sought for variety M 02205, a sugar beet variety of the species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll*.

2 The CPVO entrusted the Statens utsädeskontroll (Swedish Seed Testing and Certification Institute, Sweden) ('the Examination Office') with the responsibility of carrying out the technical examination of the candidate variety, in accordance with Article 55(1) of Regulation No 2100/94. The Examination Office was in charge, in particular, of examining whether the candidate variety was distinct from the most similar varieties whose existence was a matter of common knowledge on the date of application for a Community plant variety right ('the reference varieties') within the meaning of Article 7(1) of Regulation No 2100/94. In that respect, sugar beet varieties Dieck 3903 and KW 043 were considered to be most similar to the candidate variety.

3 On 10 December 2004, the Examination Office sent to the CPVO the final technical report, along with the variety description and a document entitled 'Distinctness Information' ('the comparative distinctness report'). The latter document included the following information:

Denomination of reference variety	Characteristics in which the reference variety is different	State of expression of reference variety	State of expression of candidate variety
Dieck 3903	Leaf blade: undulation of margin	6	4
	Leaf blade: blistering	6	5
KW 043	Leaf blade: green colour ('leaf blade colour')	4	5
	Germity: % of monogerm seeds	2	2

4 On the basis of that report, on 18 April 2005, the CPVO granted the intervener the Community plant variety right applied for, under Registration No EU 15118, for variety M 02205. Annexed to that decision were the documents supplied by the Examination Office, including the variety description and the comparative distinctness report.

5 On 20 April 2012, the applicant, Aurora Srl, informed the CPVO that judicial proceedings were pending before the Italian courts — infringement proceedings initiated by the intervener against the applicant — and that an inconsistency had come to light in the certificate of registration for variety M 02205, namely that the states of expression relating to the characteristics 'leaf blade colour' and 'leaf blade: undulation of the margin', as included in the variety description, did not correspond to the states of expression in the comparative distinctness report (respectively, 4 instead of 5 and 5 instead of 4).

6 Following a request for clarification from the CPVO on 23 April 2012, the Examination Office confirmed that the comparative distinctness report did contain an error. However, according to the Examination Office, that error did not affect the finding of distinctness of the candidate variety, particularly since the information supplied in the variety description was correct.

7 On 4 May 2012, the CPVO forwarded a corrected version of the comparative distinctness report to the applicant, indicating that there had been, in fact, an error in the transcription of the information taken from the official variety description.

8 Subsequently, the applicant informed the CPVO that other errors had come to light in the corrected version of the comparative distinctness report, namely that, in the corrected version of the document, the note corresponding to the 'leaf blade colour' characteristic had not been rectified. In that respect, the CPVO confirmed, on 11 May 2012, that the state of expression of variety M 02205 relating to that characteristic was 4 and not 5. The 'leaf blade colour' characteristic was removed from the comparative distinctness report since, following the last correction, that characteristic was no longer relevant for the purpose of distinguishing the candidate variety from variety KW 043, given that their respective state of expression had become identical.

9 In the course of the correspondence exchanged at that time between the Examination Office and the CPVO, the latter also queried whether the state of expression of varieties M 02205 and KW 043 was identical with regard to the 'germity' characteristic.

10 In the corrected version of the comparative distinctness report sent to the CPVO on 27 April 2012, the Examination Office maintained the reference to the 'germity' characteristic, while adding to its state of expression a percentage variation, namely 29% for the candidate variety as against 94% for reference variety KW 043.

11 Following this succession of corrections, the comparative distinctness report was worded as follows:

Denomination of reference variety	Characteristics in which the reference variety is different	State of expression of reference variety	State of expression of candidate variety
Dieck 3903	Leaf blade: undulation of margin	6	5
	Leaf blade: blistering	6	5
KW 043	Germity: % of monogerm seeds	2 (94%)	2 (29%)

Nullity proceedings before the CPVO at first instance

12 On 28 August 2012, the applicant lodged a request for nullity of the Community plant variety right granted to the intervener, pursuant to Article 20 of Regulation No 2100/94, on the ground that the successive corrections to the comparative distinctness report showed that variety M 02205 did not satisfy the 'distinctness' requirement for the purposes of Article 7(1) of the regulation. More particularly, in the statement of grounds of appeal before the CPVO, the applicant disputed the fact that, following the abovementioned corrections, the only distinguishing factor between variety M 02205 and variety KW 043 was the percentage variation relating to the state of expression of the 'germity' characteristic, namely 29% for M 02205 as against 94% for KW 043. According to the applicant, that meant that it was inappropriate to choose that characteristic for the purpose of a finding of distinctness of the candidate variety, given that, in accordance with the explanations in Annex 1 to the protocol adopted by the CPVO on 15 November 2001 in respect of the species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll* ('the Protocol of 15 November 2001'), applicable in the present case, the distinctness of a candidate variety can be justified under the 'germity' characteristic only with two notes difference between the note of the candidate variety and that of the reference variety — which was unquestionably not the case here.

13 On 13 May 2013 — to the extent that, following the abovementioned corrections, the distinction between variety M 02205 and variety KW 043 proved, in fact, to lie solely in the difference in percentage relating to the 'germity' characteristic — the CPVO contacted the Examination Office to check whether the 'germity' characteristic was the only distinguishing characteristic between those varieties or if other characteristics of that nature had also been observed during the technical examination.

14 On 14 May 2013, the Examination Office issued an updated version of the comparative distinctness report, including new characteristics which the Examination Office considered to be appropriate for the purpose of establishing the distinction between the varieties concerned. The version in question was as follows:

Denomination of reference variety	Characteristics in which the reference variety is different	State of expression of reference variety	State of expression of candidate variety
Dieck 3903	Leaf blade: undulation of margin	6	5
	Leaf blade: blistering	6	5
KW 043	Germity: % of monogerm seeds	2 (94%)	2 (29%)
	Root: length	6	3
	Leaf blade: undulation of margin	4	5
	Leaf blade: glossiness	4	5
	Leaf blade: blistering	4	5

15 In the light of those characteristics, the CPVO on 16 May 2013 informed the parties to the nullity proceedings that variety M 02205 was distinct from all varieties of common knowledge within the meaning of Article 7 of Regulation No 2100/94. In addition, the CPVO stated that the change in the characteristics that had occurred was due to the fact that the practice of the various Examination Offices varied in respect of both how they draft distinctness reports and how they choose the characteristics deemed relevant for the purpose of establishing the distinctness of a candidate variety. Moreover, according to the CPVO, it was precisely on the basis that the practice of the various Examination Offices varied that the CPVO had justified its decision to opt for the 'germity' characteristic. However, in so far as that characteristic proved to be inappropriate for the purpose of establishing the finding of distinctness, it was finally removed from the list of characteristics in the final version of the comparative distinctness report, as established on 9 September 2013. That version was worded as follows:

Denomination of reference variety	Characteristics in which the reference variety is different	State of expression of reference variety	State of expression of candidate variety
Dieck 3903	Leaf blade: undulation of margin	6	5
	Leaf blade: blistering	6	5
KW 043	Root: length	6	3
	Leaf blade: undulation of margin	4	5
	Leaf blade: glossiness	4	5
	Leaf blade: blistering	4	5

16 As a result of the various corrections to the comparative distinctness report, the applicant — in oral submissions at the hearing before the CPVO — submitted additional arguments with a view to establishing that, at the time of the Community plant variety right at issue, variety M 02205 was not distinct from reference variety KW 043.

17 The applicant claimed, in particular, that the last and penultimate versions of the comparative distinctness report showed that the notes of expression that they contained, relating to reference varieties KW 043 and Dieck 3903, did not come from the comparative growing trials that took place in 2003 and 2004 but were sourced from their official variety descriptions, as established at the time a Community plant variety right was granted for each variety. According to the applicant, such practice is not only unacceptable but also unlawful as it goes against all the rules applicable in that field — pursuant to which the distinctness of a candidate variety must be based solely on data obtained during comparative growing trials in two independent growing cycles following the application to register a candidate variety. The applicant is of the opinion that there is only one possible explanation that could justify the CPVO's decision to base the finding of distinctness of variety M 02205 on the official variety descriptions of reference varieties KW 043 and Dieck 3903. The explanation is that, following the removal of the 'leaf blade colour' and 'germity' characteristics from the comparative distinctness report, none of the other data derived from the results of the comparative growing trials of 2003 and 2004 could prove that the candidate variety was distinct.

18 For the avoidance of any doubt in that respect, on 23 May 2013, the applicant asked the CPVO to provide it with all documents from the Examination Office relating to the file concerning variety M 02205. By letter of 5 June 2013, the CPVO replied to the applicant's request but only partially, by providing no more than the lists of varieties used in the technical examination of 2003 and 2004, as submitted by the Examination Office.

19 The applicant made a number of further requests for additional information before the CPVO with a view to obtaining the results of the growing trials. Those requests were not successful during the administrative procedure before the CPVO, on the ground that the data had to be retained by the Examination Office. It was only on 2 March 2015 that the CPVO sent to the applicant the results of the growing trials.

20 By Decision NN 010 of 23 September 2013, the CPVO dismissed the applicant's request for nullity under Article 20(1)(a) of Regulation No 2100/94, on the ground that variety M 02205 was clearly distinct from the reference varieties, including KW 043. The CPVO explained that, at the time the final report was issued, the Examination Office was aware of the correct notes of expression for all the characteristics of the candidate variety and, therefore, the transcription errors in the comparative distinctness report were immaterial with regard to the finding of distinctness of that variety; furthermore, that fact had been confirmed by the Examination Office.

21 According to the CPVO, the candidate variety was clearly distinct from all other sugar beet varieties of common knowledge, on account of a number of characteristics. In that regard, first of all, the CPVO recalled that the updated version of the comparative distinctness report of 14 May 2013 confirmed the finding of distinctness of variety M 02205 as against reference variety KW 043, on account of four other characteristics. Next, the CPVO argued that the fact that the 'germity' characteristic had originally been mentioned in the comparative distinctness report, despite its lack of relevance for the purpose of proving the distinctness of the candidate variety, while unfortunate, had not affected the final finding. According to the CPVO, that was all the more so since comparative distinctness reports are submitted optionally by the Examination Offices, for information purposes only. Lastly, the CPVO indicated that, at the time it realised that the 'germity' characteristic was not a relevant characteristic to be mentioned in the report, it asked the Examination Office not for 'additional' or 'new' characteristics, as argued by the applicant, but for another characteristic to be selected, which had been observed during the comparative growing trials and was relevant for the purpose of illustrating the distinctness of the candidate variety.

22 In the light of the foregoing, the CPVO refused to declare the Community plant variety right at issue null and void.

Proceedings before the Board of Appeal of the CPVO

23 On 4 October 2013, the applicant filed a notice of appeal with the Board of Appeal of the CPVO, under Articles 67 to 72 of Regulation No 2100/94, against the decision to reject its request for nullity.

24 In the statement of grounds of appeal, the applicant expressed, in particular, concerns about the source of the data relating to reference variety KW 043, as included in the last and penultimate versions of the comparative distinctness report.

25 As before the CPVO at first instance, the applicant reiterated its claim that the distinctness of variety M 02205 had been established with regard to reference varieties KW 043 and Dieck 3903 on the basis not of data collected from a comparative growing trial but, more probably, of notes in the certificates of the reference varieties derived from comparative growing trials carried out at various points in time, namely in 2001 and 2002 for KW 043 and in 2002 and 2003 for Dieck 3903. In that respect, the applicant indicated that the notes of expression given to variety KW 043 in the comparative distinctness report were identical to those in the official variety description. According to the applicant, it is however common ground between testing institutes that, due to the fact that notes of expression of sugar beet-specific characteristics are extremely influenced by external factors, the probability of recording the same notes of expression from comparative growing trials carried out in different years is extremely low.

The contested decision

26 By Decision A 010/2013 of 26 November 2014 ('the contested decision'), the Board of Appeal dismissed the applicant's appeal as unfounded, holding, in particular, that the latter had overestimated the importance of the comparative distinctness report, whereas, in fact, that document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the Community plant variety right at issue.

27 As regards the issue of comparative growing trials, the Board of Appeal took the view that the applicant had merely argued that no direct comparison had been carried out between the candidate variety and the reference varieties. After characterising the direct comparison of varieties as 'a basic rule' in the context of such trials, the Board of Appeal found that such comparison had been carried out in the present case, as confirmed by Mr C., the expert from the Examination Office, at the hearing before it.

28 In addition, the Board of Appeal stated that the data included in the comparative distinctness report could only be derived from the results of the comparative growing trials carried out in respect of the candidate variety and those considered to be most similar. In that regard, first of all, the Board of Appeal explained that, because of environmental influences on the expression of the characteristics, candidate varieties could not be compared with results documented and collected earlier. Indeed, it is a basic rule that, in comparative growing trials, the direct comparison of a candidate variety with reference varieties is a condition precedent for the grant of a Community plant variety right. Next, the Board of Appeal stated that the examiner from the Examination Office confirmed at the hearing before it that a direct comparison of living material had been carried out in the present case. Lastly, the Board of Appeal concluded that the CPVO and the Examination Office had followed the correct examination procedure, as provided for in the Protocol of 15 November 2001.

29 With regard to the applicant's argument alleging that the CPVO failed to communicate to it the results recorded from the comparative growing trials of 2003 and 2004, despite several requests to that effect, the Board of Appeal considered that that data had to be retained by the Examination Office.

Accordingly, it concluded that there was no sinister motive behind the circumstances surrounding the refusal to grant access and that, most probably, they stemmed from a misunderstanding between the CPVO and the Examination Office.

Forms of order sought

30 The applicant claims that the Court should:

– annul the contested decision;

– alter that decision by declaring Community plant variety right No EU 15118 null and void;

– order the CPVO to pay the costs, including those incurred by the intervener.

31 The CPVO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs;

– in the alternative, should the action against the decision of the Board of Appeal be successful, order the CPVO to bear only its own costs pursuant to Article 190(1) of the Rules of Procedure of the General Court.

32 The intervener claims that the Court should:

– dismiss the action in its entirety;

– order the applicant to pay the costs of the intervener;

– in the alternative, dismiss the request for alteration of the contested decision, remit the case to the Board of Appeal and order the CPVO to pay the costs of the intervener.

Law

Admissibility

33 In the statement in intervention and the rejoinder presented before the Court, first of all, the intervener claims that the action is inadmissible because none of the applicant's pleas in law are based on Article 20(1)(a) of Regulation No 2100/94, which, according to the intervener, is the only legal basis available to have a Community plant variety right declared null and void.

34 Next, the intervener submits that Annexes 15 to 18, produced for the first time in the applicant's reply, must be declared inadmissible in so far as the applicant provided no reasons capable of justifying the delay in submitting those annexes.

35 Lastly, the intervener takes issue with the applicant for failing to present its reply in a clear and precise manner, contrary to the requirements derived from the case-law. In particular, it submits that the applicant's arguments were not presented in a logical and systematic manner; instead, they are intertwined and overlapping in a way that makes it impossible for the intervener to determine with

certainty the essence of the rebuttal which the applicant intends to make. Therefore, the intervener leaves it to the Court to determine whether, having regard to the abovementioned defects, the reply may be found to be inadmissible.

36 In the written observations lodged at the Court Registry on 20 June 2017, with regard to the document filed by the applicant at the hearing before the Court, the intervener disputed the admissibility of the additional evidence submitted by the applicant on that occasion, on the ground that it had not been presented before the Board of Appeal.

37 The applicant challenges the arguments put forward by the intervener.

38 First, with regard to the intervener's assertion concerning the absence of an express reference to Article 20(1)(a) of Regulation No 2100/94, it must be noted, first of all, that a party is not required to indicate expressly the provisions on which its pleas are based. It is sufficient for the subject matter of that party's application and the main points of fact and law on which it is based to be set out sufficiently clearly in the application (see judgment of 15 January 2013, *Gigabyte Technology* v *OHIM — Haskins (Gigabyte)*, T-451/11, not published, EU:T:2013:13, paragraph 28 and the case-law cited). That case-law applies, *mutatis mutandis*, where there is an error in the identification of the provisions on which the pleas in law of an action are based (see judgment of 15 January 2013, *Gigabyte Technology* v *OHIM — Haskins (Gigabyte)*, T-451/11, not published, EU:T:2013:13, paragraphs 27 to 30).

39 In any event, it is important to observe that the applicant did not err when it based its action before the Court on Article 263 TFEU and Article 73 of Regulation No 2100/94, instead of Article 20(1)(a) of the regulation. Indeed, according to the wording of Articles 20 and 73 of Regulation No 2100/94, respectively, while the first provision lists cases in which the CPVO must declare a Community plant variety right null and void, and state the effects of such declaration, the second provision applies in the case of an annulment action before the EU courts against the decisions of the Boards of Appeal. Therefore, the applicant rightly based the present action on Article 73 of the regulation. Accordingly, the intervener's claim alleging inadmissibility of the action due to the absence of an express reference to Article 20(1)(a) of Regulation No 2100/94 must be rejected.

40 Secondly, the intervener's claim alleging lack of clarity and precision of the reply must be rejected. Indeed, the arguments put forward by the applicant in the reply are sufficiently clear and intelligible, which is also confirmed by the fact that the CPVO presented a detailed summary of those arguments, without any reference to potential comprehension issues.

41 The Court will examine at a later stage whether it is appropriate to rule on the intervener's arguments alleging inadmissibility of Annexes 15 to 18, presented by the applicant for the first time in its reply, and of the additional evidence submitted by the applicant at the hearing before the Court.

Substance

The applicant's first head of claim, seeking annulment of the contested decision

42 In support of its action, the applicant puts forward three pleas in law. In the first place, it claims, in essence, that the Board of Appeal was wrong to conclude that variety M 02205 was distinct from reference variety KW 043. In its opinion, the contested decision was adopted in breach of Articles 6 and 7 of Regulation No 2100/94, on the ground that the essential requirement that a candidate plant variety for a Community plant variety right must be 'distinct' from reference varieties was not satisfied in the present case. In the second place, the applicant is of the opinion that the Board of Appeal breached the principles of legal certainty and protection of legitimate expectations when it considered

that the CPVO was entitled to change retroactively the characteristics used to justify the grant of a Community plant variety right. In that respect, the applicant also claims that the Board of Appeal erred in law when interpreting Article 87(4) of Regulation No 2100/94.

43 In the third place, in the context of its third plea in law, the applicant submits, in essence, that the contested decision was adopted in breach of the principle of transparency and the right of access to documents. In that regard, it puts forward three grounds of challenge.

44 First, in the light of the last and penultimate versions of the comparative distinctness report, the applicant argues that the obligation to base the comparison of a candidate variety with reference varieties on data derived from comparative growing trials was breached in the present case.

45 Secondly, the applicant maintains that the examination procedure was not conducted in a transparent manner since, during the administrative procedure and despite several requests, the CPVO had not communicated to the applicant the documents concerning the results of comparative growing trials performed by the Examination Office in 2003 and 2004, that would have enabled the applicant to check whether the obligation referred to in paragraph 44 above had been complied with. For the same reasons, the applicant alleges infringement of the right of access to documents.

46 Thirdly, the applicant takes issue, in essence, with the Board of Appeal for failing to carry out the necessary verifications, despite the evidence adduced by the applicant with regard to the errors made by the Examination Office, and for simply accepting the oral statements of Mr C. that comparative growing trials had taken place in 2003 and 2004. In so doing, the Board of Appeal failed to comply with the requirement of impartiality derived from Article 41(1) of the Charter of Fundamental Rights of the European Union.

47 The Court must examine, in the first place, the applicant's third plea in law and, more particularly, the first and third grounds of challenge in support of that plea.

48 As has been noted in paragraph 44 above, in the context of the first ground of challenge, the applicant claimed, in particular, that the last and penultimate updated versions of the comparative distinctness report showed that the distinctness of variety M 02205 had been based, in part, on data collected outside the comparative growing trials of 2003 and 2004 — contrary to the applicable rules that the comparison of a candidate variety with reference varieties must be based only on data derived from comparative growing trials.

49 More specifically, the applicant has doubts as to the source of the characteristics included in these latter versions of the comparative distinctness report, concerning variety KW 043. In that respect, the applicant submits that a detailed examination of the notes of expression mentioned in these latter versions, concerning variety KW 043, shows that the notes of expression are identical to the data recorded in the official variety description of KW 0433, as established in 2002 following the comparative growing trials of 2000 and 2001. However, according to the applicant, such a coincidence is highly unlikely, given the effect that seasons can have on phenotypic expression.

50 The applicant therefore concludes that the data in the last and penultimate versions of the comparative distinctness report, concerning reference variety KW 043, did not come from comparative growing trials but was sourced from the official variety description of that reference variety, as established at the time of the Community plant variety right for that variety.

51 The applicant does not dispute the fact that comparative growing trials took place in 2003 and 2004. However, in the context of its third ground of challenge, it takes issue, inter alia, with the CPVO for simply accepting, despite the evidence adduced by the applicant, the oral statements of Mr C., the expert from the Examination Office, without proceeding to any verification of the errors allegedly made by the office.

52 The CPVO disputes the applicant's arguments. First of all, it argues, in essence, that the applicant claims that the Examination Office did not compare the candidate variety directly with the reference varieties. In that regard, the CPVO states that, contrary to the applicant's assertions, at the hearing before the Board of Appeal, the expert from the Examination Office who conducted the technical analysis in the present case had confirmed that the examination of variety M 02205 had been performed in accordance with the Protocol of 15 November 2001 and that the candidate variety had been compared with all reference varieties during two consecutive growing cycles.

53 In addition, the CPVO submits that the Board of Appeal had no reason to question the reliability of Mr C.'s statements at the hearing before it regarding the conduct of the technical examination and, in particular, the confirmation that variety M 02205 had been compared directly, in the comparative growing trials, with all other sugar beet varieties of common knowledge.

54 The intervener, in turn, maintains, in essence, that the applicant, without adducing any evidence to that effect, claimed that the data recorded in the last version of the comparative distinctness report, concerning variety KW 043, did not come from comparative growing trials carried out in 2003 and 2004. The intervener argues that, according to the judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 57), it is for the party requesting a declaration of nullity to adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the grant of the Community plant variety right at issue. Accordingly, in its view, the applicant failed to adduce the evidence that it was required to adduce.

55 In that respect, first of all, it must be recalled that, under Article 20(1)(a) of Regulation No 2100/94, the CPVO must declare a Community plant variety right null and void if it is established that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right. Moreover, under Article 7(1) of the regulation, 'a variety shall be deemed to be distinct if it is clearly distinguishable, by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.'

56 Furthermore, it must be pointed out that the Court has stated, in that regard, that the conditions relating, in particular, to distinctness are, under Article 6 of the regulation, a prerequisite for the grant of a Community plant variety right. Therefore, in the absence of those conditions, the right granted is unlawful, and it is in the public interest that it be declared null and void (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 52).

57 The Court has also ruled that the CPVO has a broad discretion concerning the declaration of nullity of a plant variety right for the purposes of Article 20 of Regulation No 2100/94. Therefore, only where there are serious doubts that the conditions laid down in Articles 7 or 10 of that regulation had been met on the date of the examination provided for under Articles 54 and 55 of that regulation can a re-examination of the protected variety by way of nullity proceedings under Article 20 of Regulation No 2100/94 be justified (see, to that effect, judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 56).

58 In that context, a third party seeking a declaration of nullity of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the plant variety right following the examination provided for in Articles 54 and 55 of that regulation (see, to that effect, judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 57).

59 It was thus for the applicant to adduce, in support of its request for nullity, evidence or facts of sufficient substance to raise serious doubts in the mind of the Board of Appeal as to the legality of the plant variety right granted in the present case.

60 Consequently, the Court must examine whether the elements adduced by the applicant before the Board of Appeal, in that regard, were sufficient to raise serious doubts in the mind of the Board of Appeal and if, accordingly, they could justify a re-examination of variety M 02205 by means of nullity proceedings based on Article 20(1)(a) of Regulation No 2100/94.

61 In order to answer that question, first of all, it is necessary to ascertain the requirements imposed by the legislation at issue concerning the drafting of the notes of expression on which the findings as to whether or not a plant variety is distinct must be based. Next, it is necessary to examine whether the arguments put forward by the applicant in that regard could raise serious doubts in the mind of the Board of Appeal. Lastly, the Court must consider whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts.

62 First, with regard to the requirements imposed by the legislation at issue, it must be noted that, under Article 56(2) of Regulation No 2100/94, the conduct of any technical examination is to be performed in accordance with test guidelines issued by the Administrative Council and any instructions given by the CPVO. In that regard, it must be pointed out that the broad discretion enjoyed by the CPVO in the exercise of its functions 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 Regulation No 2100/94, which requires that the technical examinations are carried out in accordance with those roles (judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 79).

63 In that context, it must be observed that, in accordance with the abovementioned Article 56(2), the CPVO adopted the Protocol of 15 November 2001 with a view to establishing test guidelines governing the technical analysis and the conditions for registration of varieties coming within the sugar beet species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll*. Under point III.2., headed ‘Material to be examined’, and point III.5., headed ‘Trial designs and growing conditions’, of the protocol, candidate varieties must be directly compared with reference varieties in growing trials to be carried out normally in at least two independent growing cycles. Moreover, in the contested decision, the Board of Appeal itself stressed the importance of compliance with that requirement, which, in its own words, is a condition precedent for the grant of a Community plant variety right (see paragraph 28 above).

64 It follows that the notes of expression in the comparative distinctness report, on the basis of which the distinctness of a candidate variety is established, have to correspond to the notes collected from comparative growing trials carried out in two independent growing cycles following the application for a Community plant variety right for the candidate variety.

65 Secondly, with regard to the arguments put forward by the applicant, the documents in the case file show that the applicant claimed, before the Board of Appeal, that the fact that the notes of expression given to variety KW 043 in the comparative distinctness report were identical to those in its official variety description supports the assumption that the notes were sourced from the official description and not from comparative growing trials carried out in 2003 and 2004, for the purpose of a Community plant variety right being granted for variety M 02205. Furthermore, by relying on concrete examples from other official variety descriptions, the applicant sought to show that the probability of recording the same notes for a sugar beet variety from year to year was very low.

66 In that regard, it must be observed that, as has been noted in paragraphs 18 and 19 above, although the applicant had requested, several times, access to the file concerning variety M 02205, including the results of the comparative growing trials of 2003 and 2004, the CPVO did not communicate those results to the applicant until 2 March 2015, that is to say, after the date of the Board of Appeal’s decision. Therefore, the applicant was clearly not in a position to rely on evidence other than that

produced by it before the CPVO bodies, namely the comparison between the data in the comparative distinctness report and that recorded in the official variety descriptions for M 02205 and KW 043 respectively as well as, by way of illustration, data taken from other official variety descriptions.

67 In addition, the applicant was fully entitled to rely before the Board of Appeal on the series of errors in the comparative distinctness report, mentioned in paragraphs 5 to 15 above, which gave rise to a succession of corrections of that report and could also raise serious doubts in the mind of the Board of Appeal, at the very least, as to the reliability of the notes of expression corresponding to the characteristics included in the comparative distinctness report. Moreover, as pointed out, in essence, by the applicant before the Board of Appeal, the fact that the corrections were late was liable to reinforce those doubts.

68 In the light of the foregoing, the Court must find that the applicant adduced, before the Board of Appeal, factual elements of sufficient substance to raise serious doubts as to whether the data used for reference variety KW 043 was sourced from its official variety description. The Board of Appeal was thus required to verify whether that contention was well founded and draw the appropriate conclusions for the applicant's action.

69 Moreover, it should be added that, in its replies to the written questions put by the Court, the CPVO recognised that the notes of expression relating to variety KW 043, as included in the last and penultimate versions of the comparative distinctness report, did not correspond to the data collected from the comparative growing trials of 2003 and 2004 but were sourced from the official variety description for KW 043.

70 Thirdly, with regard to whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts, in the first place, it is important to recall 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 margin of discretion in carrying out its functions (see judgment of 19 December 2012, *Brookfield New Zealand and Elaris* v *CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50 and the case-law cited). That discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of Regulation No 2100/94 (see judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 46 and the case-law cited).

71 In the second place, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine carefully and impartially all the relevant particulars of an application for a Community plant variety right 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 (see judgment of 8 June 2017, *Brookfield New Zealand and Elaris* v *CPVO and Schniga*, C-625/15 P, EU:C:2017:435, paragraph 47 and the case-law cited).

72 In the third place, it should be recalled that Article 76 of Regulation No 2100/94 provides that 'in proceedings before it [the CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55.'

73 Lastly, the Court has held that, under Article 51 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 CPVO (OJ 2009 L 251, p. 3), the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46).

74 Thus, on the one hand, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46). On the other hand, the Board of Appeal is also bound by the principle of sound administration, pursuant to which it is required to examine carefully and impartially all the relevant factual and legal information in the case before it.

75 In the present case, the Board of Appeal limited itself to stating its view on whether comparative growing trials took place in 2003 and 2004 — fact confirmed, according to the Board of Appeal, at the hearing before it by Mr C., the expert from the Examination Office. As is apparent from paragraph 25 above, however, the applicant's statement of grounds of appeal before the Board of Appeal clearly shows that the applicant did not call into question, in general terms, the fact that comparative growing trials had actually taken place but, more specifically, whether the distinctive character of variety M 02205 had been established on the basis of results derived from those trials. Moreover, it should be noted that it is not apparent from the contested decision or the minutes of the hearing before the Board of Appeal whether Mr C. was questioned, at that hearing, on any other issue than that of the procedure usually followed by the Examination Office when comparing sugar beets.

76 Consequently, before such a claim, which the CPVO subsequently confirmed before the Court as being well founded, the declarations of the expert from the Examination Office confirming that comparative trials had taken place in 2003 and 2004 were clearly not sufficient for the Board of Appeal to find that the 'distinctness' requirement had been established on the basis of data that complied with the applicable technical rules, and dismiss the applicant's appeal.

77 On the contrary, the Board of Appeal was required to use its broad investigative powers under Article 76 of Regulation No 2100/94, interpreted in the light of the case-law referred to in paragraph 74 above, to verify the source of the notes of expression of reference variety KW 043 in the last and penultimate versions of the comparative distinctness report and draw the appropriate conclusions. In fact, in accordance with the principle of sound administration, laid down in Article 41(1) of the Charter of Fundamental Rights, the Board of Appeal was required to examine carefully and impartially all the relevant particulars with a view to assessing the validity of the Community plant variety right at issue and to gather all the factual and legal information necessary to exercise that discretion (see, to that effect, judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 84).

78 It was therefore for the Board of Appeal to ensure that it had, at the time of the adoption of the contested decision, all the relevant information — namely, more specifically, the results of the comparative growing trials of 2003 and 2004 — with a view to being able to assess, on the basis of relevant data, whether the finding of distinctness of variety M 02205, compared with reference variety KW 043, had been carried out in compliance with the technical rules applicable.

79 However, it must be noted that the CPVO admitted at the hearing before the Court that, at the time of adoption of the contested decision, the Board of Appeal did not have the results of the comparative growing trials of 2003 and 2004. The results were not sent to the CPVO until after the adoption of the contested decision.

80 It follows that, by failing properly to ensure that the distinctive character of variety M 02205, compared with the reference varieties, was established on the basis of data derived from the comparative growing trials of 2003 and 2004, the Board of Appeal did not duly fulfil its obligations.

81 That conclusion is not put in question by the arguments raised by the CPVO.

82 In the first place, in its replies to the written questions put by the Court, the CPVO relies on arguments relating, on the one hand, to the subsequent notes added to the 'root length' characteristic, stemming from the calculation method based on the so-called 'least significant difference' test

presented for the first time before the Court, and, on the other hand, to the fact that, in any event, varieties M 02205 and KW 043 are unquestionably distinct, based on the results from the comparative growing trials of 2003 and 2004, in view of the 'leaf blade colour' characteristic.

83 In so far that those arguments concern the review of legality of the contested decision, suffice it to say that the legality of contested acts must be assessed only on the basis of the matters of fact and law on which they were adopted, with the result that the Court cannot accede to invitations by the CPVO, in short, to replace the grounds on which the contested decision is based (see judgment of 12 November 2013, *North Drilling* v *Council*, T-552/12, not published, EU:T:2013:590, paragraph 25 and the case-law cited). In so far as the arguments concern the Court's power to alter decisions, it should be pointed out that exercise of that power must, in principle, be limited to situations in which, after reviewing the Board of Appeal's reasoning, the Court is in a position to determine, on the basis of the matters of fact and law as established, what decision the Board of Appeal was required to take (see judgment of 18 September 2012, *Schräder* v *CPVO — Hansson (LEMON SYMPHONY)*, T-133/08, T-134/08, T-177/08 and T-242/09, EU:T:2012:430, paragraph 250 and the case-law cited). Since the Board of Appeal made no finding on the method of calculation based on the 'least significant difference' test or on the results from the comparative growing trials of 2003 and 2004, it is not for the Court to assess those arguments in the context of its power of alteration.

84 Furthermore, with regard to the 'leaf blade colour' characteristic, it must be observed that the CPVO's argument contradicts its own previous finding — referred to in paragraph 8 above — that the 'colour leaf blade' characteristic was not relevant for the purpose of establishing the 'distinctness' requirement of the candidate variety. Accordingly, the CPVO's arguments must be rejected in any event.

85 In the second place, the requirement referred to in paragraph 63 above cannot be put in question either by the CPVO's argument that, for the sake of 'consistency', the notes in the comparative distinctness reports, with regard to the reference varieties, should be sourced from their official variety descriptions.

86 Therefore, the first and third grounds of challenge put forward in support of the third plea in law are well founded. Accordingly, the contested decision must be annulled, without it being necessary for the Court to take a view on the other grounds of challenge and pleas in law of the applicant in support of its first head of claim.

The applicant's second head of claim, seeking alteration of the contested decision

87 By its second head of claim, the applicant asks the Court to alter the Board of Appeal's decision and declare Community plant variety right No EU 15118 null and void.

88 The CPVO and the applicant deny the possibility for the Court, in the present case, to alter the contested decision. In addition, the CPVO disputes even the Court's competence to state its view on the applicant's second head of claim. In its opinion, in so far as the finding of distinctness of a plant variety under Article 7 of Regulation No 2100/94 is of a scientific and technical complexity such as to justify a limit to the scope of judicial review, the applicant's request for alteration of the contested decision must be declared inadmissible.

89 As a preliminary point, it must be noted that, in the light of the clear wording of Article 73(3) of Regulation No 2100/94, the Court is competent not only to annul, but also to alter, the contested decision.

90 On the substance, it should be recalled that the Court's power to alter decisions does not have the effect of conferring on it the power to substitute its own assessment for that of a Board of Appeal of the CPVO, or to carry out an assessment on which that Board of Appeal has not yet adopted a position (see, by analogy, judgment of 21 July 2016, *Apple and Pear Austria and Star Fruits Diffusion* v *EUIPO*, C-226/15 P, EU:C:2016:582, paragraph 67 and the case-law cited).

91 Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which, after reviewing the Board of Appeal's reasoning, the Court is in a position to determine, on the basis of the matters of fact and law as established, what decision the Board of Appeal was required to take (see, to that effect, judgment of 18 September 2012, *LEMON SYMPHONY*, T-133/08, T-134/08, T-177/08 and T-242/09, EU:T:2012:430, paragraph 250 and the case-law cited).

92 In the present case, the Board of Appeal clearly did no more than state its view on whether comparative growing trials took place in 2003 and 2004. By contrast, the Board of Appeal failed to examine the applicant's contention that the distinctive character of variety M 02205 was established on the basis of data in respect of reference variety KW 043 sourced from its official variety description, and not on the basis of results from the comparative growing trials carried out in 2003 and 2004.

93 Having regard to the foregoing, the Court must find that it cannot make that assessment itself. Consequently, the case must be remitted to the Board of Appeal in order to allow the latter to rule, in the light of the above reasons, on the applicant's appeal against the CPVO's decision to reject its request for nullity. The applicant's second head of claim, seeking alteration of the contested decision, must therefore be rejected.

94 In the light of those considerations, it is not necessary to rule on whether or not Annexes 15 to 18, presented by the applicant for the first time in its reply, and the additional evidence submitted by the applicant at the hearing before the Court are admissible.

Costs

95 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

96 In the present case, the CPVO and the intervener have been largely unsuccessful. Since the applicant has applied only for the CPVO to pay the costs, it is appropriate, first, to order the CPVO to bear its own costs and pay those incurred by the applicant and, secondly, to find that the intervener shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 26 November 2014 (Case A 010/2013);**

2. **Dismisses the action as to the remainder;**

3. **Orders the CPVO to bear its own costs and pay those incurred by Aurora Srl;**

4. **Orders SESVanderhave NV to bear its own costs.**

Gratsias Dittrich Xuereb

Delivered in open court in Luxembourg on 23 November 2017.

E. Coulon
Registrar

D. Gratsias
President