



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2017\*

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

In Case C-625/15 P,

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

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

applicant,

the other parties to the proceedings being:

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

**Brookfield New Zealand Ltd**, established in Havelbock North (New Zealand),

**Elaris SNC**, established in Angers (France),

represented by M. Eller, avvocato,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of J. L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet, E. Levits (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 November 2016,

\* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 18 January 2017,  
gives the following

### Judgment

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

### Legal context

#### *EU law*

- 2 Under Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) (‘the basic regulation’), Community plant variety rights are granted for varieties that are distinct, uniform, stable and new.
- 3 Under Article 7(1) of that regulation, a variety is deemed to be distinct if it is clearly distinguishable, by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application.
- 4 As regards the criteria of uniformity, stability and novelty, they are defined in Articles 8, 9 and 10 of that regulation respectively.
- 5 Article 50(1)(f) of that regulation states that the application for a Community plant variety right must contain a technical description of the variety.
- 6 The question of whether the criteria of distinctness, uniformity and stability (‘the DUS criteria’) are met in a particular case is tested in the context of a technical examination conducted in accordance with Articles 55 and 56 of the basic regulation.
- 7 Pursuant to Article 55(1) of that regulation:

‘Where the [CPVO] has not discovered any impediment to the grant of a Community plant variety right on the basis of the examination pursuant to Articles 53 and 54, it shall arrange for the technical examination relating to compliance with the conditions of the [DUS criteria] to be carried out by the competent office or offices in at least one of the Member States entrusted with responsibility for the technical examination of varieties of the species concerned by the Administrative Council [of the CPVO], hereafter referred to as the “Examination Office or Offices”.’

- 8 Under Article 56(2) of that regulation, the technical examination is to be conducted in accordance with test guidelines, issued by the CPVO Administrative Council (‘the Administrative Council’), and any instructions given by the CPVO. Those guidelines describe, inter alia, the plant material required for the technical examination, how the tests are to be performed, the methods to be applied, the observations to be made, the grouping of the varieties included in the test and the table of characteristics to be examined. In the technical examination, plants of the variety at issue are

cultivated alongside those of the varieties which the CPVO and the appointed examination office deem to be those to which the candidate variety comes closest according to the description of the candidate variety in the technical description forming part of the application for grant of a Community plant variety right.

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

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

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

...’

10 Pursuant to Article 72 of the basic regulation:

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

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

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

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

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

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

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

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

14 CPVO Protocol TP/14/1 for Distinctness, Uniformity and Stability Tests of 27 March 2003 (Apple) (‘CPVO Protocol TP/14/1’) lays down the test guidelines for the technical examination of apple varieties of the species *Malus Mill*. Before that protocol was adopted, there were no test guidelines or general instructions, within the meaning of the basic regulation, for those varieties. In accordance with

usual practice with regard to technical examinations, the CPVO used to conduct DUS criteria tests for the varieties in question on the basis of the general and technical guidelines adopted by the International Union for the Protection of New Varieties of Plants (UPOV), an intergovernmental organisation set up under the International Convention for the Protection of New Varieties of Plants, adopted in Paris (France) on 2 December 1961 ('the UPOV Convention').

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

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

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

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

#### *International law*

18 UPOV, of which the European Community became a member on 29 July 2005, has adopted several guidelines, appearing in the protocols, which are relevant for the purposes of the present proceedings.

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

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

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

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

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

'One means of ensuring that a difference in a characteristic, observed in a growing trial, is sufficiently consistent is to examine the characteristic on at least two independent occasions. This can be achieved in both annual and perennial varieties by observations made on plantings in two different seasons or,

in the case of other perennial varieties, by observations made in two different seasons after a single planting. Guidance on the possible use of other approaches, such as two different environments in the same year, is explored in document TGP/9, “Examining Distinctness”.’

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

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

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

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

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

### **Background to the dispute**

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

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

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

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

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

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

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

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

Our intention was supported and we were recommended to send with the interim report a request for authorisation to use this characteristic as an additional one, in accordance with CPVO [Protocol] TP/14/1, paragraph III, chapter 3.”

- 26 The CPVO sent a further interim report to Schniga on 7 February 2005, again with the result “no remarks”.
- 27 On 19 December 2005, the BSA sent its final technical examination report to the CPVO and to Schniga (“the final examination report”), stating that the candidate variety was uniform, stable and distinct from the reference variety, on the basis of the characteristic “Fruit: Width of stripes”.
- 28 At point 9, under the heading “Date and/or document number of national Test Guidelines”, the final examination report states: “2003 03-27 CPVO TP/14/1”.
- 29 It is clear from points 16 and 17 of the final examination report, concerning the comparison of the candidate variety with the reference variety, that the candidate variety has broad stripes (note 7), whilst the reference variety has narrow to medium stripes (note 4), that assessment being based on the evaluation of an additional characteristic “Fruit: width of stripes”, corresponding to characteristic No 40 of UPOV Protocol TG/14/9 of 6 April 2005 (“the additional characteristic at issue”). The CPVO notes in that regard that the additional characteristic at issue did not appear either in [CPVO Protocol TP/14/1] or in [UPOV Protocol TG/14/8] ...
- 30 By letter of 24 January 2006, the CPVO informed the BSA that incorrect guidelines had been cited in the final examination report and that it was not CPVO Protocol TP/14/1 (adopted in March 2003) but UPOV Protocol TG/14/8 (adopted in 1995) that ought to have been used as the basis for the examination report, for it was the latter that was in force at the date on which the decision was taken to test the candidate variety in January 1999.
- 31 On 9 February 2006, the BSA sent the CPVO an amended version of the final examination report. Point 17 of that version reads:

“The variety was tested according to [UPOV Protocol TG/14/8]. The variety description was produced on the basis to the table of characteristics of the [CPVO Protocol] TP/14/1 from 27 March 2003 which came into force during the testing period. This allows the [candidate] variety to become part of the reference collection for varieties with later priority. The variety is distinct, uniform and stable according to both [protocols].”
- 32 On 5 May 2006, the interveners, Brookfield New Zealand Limited and Elaris SNC, the licensee and the holder, respectively, of the plant variety right relating to the reference variety, lodged with the CPVO, pursuant to Article 59 of [the basic regulation], objections to the grant of the plant variety right sought for the candidate variety. Those objections were based on the earlier right in respect of the reference variety.

- 33 The pleas in law relied on in support of the objections were: first, the plea covered by Article 61(1)(b) of [the basic regulation] that Schniga’s failure to comply with the requirements for submitting material for the technical examination, laid down by the CPVO, ought to have led the latter to refuse the application for a plant variety right and, second, the plea covered by Article 7 of that regulation, that the candidate variety is not distinct from the reference variety.
- 34 By decision of 14 December 2006, followed by a corrigendum of 5 February 2007, the President of the CPVO authorised the use of the additional characteristic at issue in order to establish distinctness between the candidate variety and the reference variety. However, that decision makes no mention of the additional characteristic “anthacyanin coloration at the basement of the filaments”, also referred to in the final examination report. The decision in question is expressly based on Article 23 of [the implementing regulation].
- 35 By decisions of 26 February 2007, the CPVO committee responsible for deciding on objections to the grant of Community plant variety rights granted the plant variety right sought for the candidate variety (“the decision granting a plant variety right”) and dismissed the objections (“the decisions dismissing the objections”). It based its decision on, inter alia, the fact that, “for technical reasons”, taking the additional characteristic at issue into account was warranted, even though the latter was not referred to in the protocols in force on the date of the application for a plant variety right.
- 36 On 11 April 2007, both the interveners filed a notice of appeal with the Board of Appeal of the CPVO [(“the Board of Appeal”)], under Articles 67 to 72 of [the basic regulation], against the decision granting a plant variety right and the decisions dismissing the objections.
- 37 By decision of 21 November 2007 in Joined Cases A 003/2007 and A 004/2007, the Board of Appeal upheld those appeals, cancelled the decision granting a plant variety right and the decisions dismissing the objections, and rejected the application for a plant variety right; the Board gave a decision only on the first of the two pleas outlined in paragraph 33 above ...
- 38 Following an action for annulment brought by Schniga before the General Court, the decision of the Board of Appeal of 21 November 2007 was annulled by judgment of 13 September 2010, *Schniga v CPVO — Elaris and Brookfield New Zealand (Gala Schnitzer)* (T-135/08, ..., EU:T:2010:397). The appeal lodged against that judgment was dismissed by judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga* (C-534/10 P, ..., EU:C:2012:813).
- 39 The Board of Appeal thereupon resumed examination of the appeals brought by the interveners in the light of the second plea outlined in paragraph 33 above, criticising the CPVO for granting the right sought to a variety that was not distinct. By [the decisions at issue], the Board of Appeal again cancelled the decision granting a plant variety right and the decisions dismissing the objections and rejected the application for a plant variety right.
- 40 On the one hand, on the basis of Article 56(2) of [the basic regulation] and Articles 22 and 23 of [the implementing regulation], the Board of Appeal held in essence that:
- the protocol and test guidelines in force for the purposes of the technical examination were, at the material times, UPOV Protocol TG/14/8 ... and CPVO Protocol TP/14/1 ... (paragraph 19 of the [decisions at issue]);
  - those protocols do not mention the additional characteristic at issue;

- neither in the technical questionnaire nor during the test period had Schniga submitted a request for the additional characteristic at issue to be taken into account under Section III 6 of CPVO Protocol TP/14/1 (paragraph 21 of the [decisions at issue]);
  - the additional characteristic at issue was not mentioned in the BSA's letter to the CPVO of 18 January 2005 and the BSA had made no request to the CPVO concerning it; it was mentioned for the first time in the final examination report, and subsequently in the decision of the President of the CPVO of 14 December 2006 authorising its use (paragraph 22 of the [decisions at issue]);
  - in those circumstances, the fact that the BSA took into account, for the purposes of the technical examination, an additional characteristic not listed in CPVO Protocol TP/14/1 in force at that time constituted an infringement of Section III 3 of that protocol (paragraph 25 of the [decisions at issue]);
  - the decision of the President of the CPVO of 14 December 2006 to permit retrospectively the use of that additional characteristic in the technical examination was fundamentally flawed, coming as it did some 12 months after the final examination report, and it cannot be justified, particularly in the light of Article 22(2) of [the implementing regulation] (paragraph 26 of the [decisions at issue]).
- 41 In paragraph 27 of the [decisions at issue], the Board of Appeal made reference in that connection to its decision of 8 October 2009 in Case A 010/2008 (JEWEL), according to which the use of an additional characteristic must receive the prior approval of the President of the CPVO in order to ensure legal certainty, objectivity in the handling of applications for grant of a plant variety right and the predictability of the behaviour of all the players concerned.
- 42 On the other hand, the Board of Appeal held, in paragraphs 28 and 29 of the [decisions at issue], that the technical examination in the light of the additional characteristic at issue had in any event also been flawed by the fact that it had taken place over a period of one year only, that is to say, 2005, as acknowledged by the BSA, whereas all other characteristics had been assessed in the two consecutive growing seasons 2004 and 2005. In its opinion, that constituted a clear infringement of the protocols and guidelines applicable in the present case, in particular, UPOV TG/1/3 and UPOV TG/14/8, which require for apple varieties an examination over at least two fruiting seasons in order to establish uniformity and stability.
- 43 Consequently, the Board of Appeal found, in paragraphs 30 and 31 of the [decisions at issue], that the candidate variety could not be held to be legally distinct from the reference variety.'

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

- 28 By two applications lodged at the Court Registry on 10 February 2014, Schniga brought an action for annulment of the decisions at issue.
- 29 In support of its actions, Schniga raised a single plea in law, divided into two parts, the first alleging that, contrary to that which was found by the Board of Appeal, the CPVO could not rely on the additional characteristic at issue in the technical examination, the second alleging that the Board of Appeal was wrong to take the view that the results of the technical examination were flawed merely on the basis that, as regards the additional characteristic at issue, it related to one crop cycle only, in contravention of the applicable test guidelines.
- 30 By the judgment under appeal, the General Court dismissed those actions.

- 31 As regards the first part of the single plea in law, the General Court, first, in paragraph 76 of the judgment under appeal, found that the procedural provisions laid down in CPVO Protocol TP/14/1 were applicable to the application for a grant of a Community right to the candidate variety. Next, the General Court recognised, in paragraph 80 of the judgment under appeal, the precedence of the protocols adopted by CPVO over those adopted by UPOV.
- 32 The General Court furthermore recalled, in paragraphs 81 and 82 of the judgment under appeal, that the CPVO enjoys broad discretion for the purposes of conducting the technical examination of a variety and that, in particular, the implementing regulation grants the President of the CPVO the power to insert additional characteristics and their expressions in respect of a variety where the Administrative Council takes a decision as to the test guidelines. It added, in essence, in paragraph 83 of that judgment, that that discretion is limited by the protocols and test guidelines adopted by the Administrative Council, which are binding on it.
- 33 In the end, the General Court came to the conclusion, in essence, in paragraph 86 of the judgment under appeal, that the President of the CPVO is not empowered to authorise the taking into account, during the technical examination of a variety, of a characteristic not listed in CPVO Protocol TP/14/1 and, consequently, rejected the first part of the single plea in law.
- 34 As regards the second part of the single plea in law, the General Court rejected it as ineffective, after finding that the first ground relied on by the Board of Appeal in the decisions at issue, namely that the CPVO could not rightly rely on the additional characteristic at issue in the context of the technical examination of the candidate variety, was not vitiated by unlawfulness and was sufficient to legally justify those decisions. However, the General Court emphasised that that technical examination had taken place over a period of one year only, that is to say, 2005, in clear infringement of CPVO Protocol TP/14/1 and UPOV Protocol TG/1/3, so that it was necessary, in any case, to reject the action.

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

- 35 Schniga claims that the Court should:
- set aside the judgment under appeal; and
  - order the CPVO and the interveners to pay the costs.
- 36 The CPVO contends that the Court should:
- uphold the appeal; and
  - order each party to bear its own costs.
- 37 Brookfield New Zealand and Elaris contend that the Court should:
- dismiss the appeal; and
  - order Schniga to pay the costs.

## The appeal

### *Arguments of the parties*

- 38 The appeal brought by Schniga is based on a single ground of appeal alleging infringement, by the judgment under appeal, of Articles 7 and 56 of the basic regulation, read in conjunction with Articles 22 and 23 of the implementing regulation.
- 39 By its first complaint, Schniga, supported, in substance, by the CPVO, submits that the General Court wrongly found that the protocols and test guidelines relating to the grant of a Community plant variety right are binding on the CPVO.
- 40 Brookfield New Zealand and Elaris take the view that the General Court did not err in law in finding that the rules of procedure which the CPVO imposes on itself are necessarily binding and that they take precedence over those of UPOV. The obligatory nature of the rules of conduct which an administrative body imposes on itself is all the more essential where that body enjoys broad discretionary powers.
- 41 By its second complaint, Schniga submits, first, that the General Court erred in law in finding that CPVO Protocol TP/14/1 was applicable to an application for a Community plant variety right lodged before its entry into force.
- 42 As regards, second, whether the President of the CPVO may insert a new characteristic in respect of a variety, Schniga argues that none of the provisions of the basic regulation or the implementing regulation prevents such an insertion following the conclusion of the technical examination.
- 43 Pursuant to Article 23(1) of the implementing regulation, the President of the CPVO has the power to take into consideration all distinctive characteristics of the examined variety, even if that characteristic is not mentioned in the application for a Community plant variety right.
- 44 According to Brookfield New Zealand and Elaris, the material moment that fixes the procedural framework applicable to an application for a Community plant variety right is not the date on which the application was lodged, but that of the actual beginning of the technical examination. To ensure legal certainty, the DUS examination cannot take account of distinctive characteristics introduced after the technical examination.

### *Findings of the Court*

- 45 It is appropriate to examine, at the outset, the second complaint of the single ground of appeal, and, more specifically, the argument alleging that the General Court wrongly found, in paragraphs 87 to 93 of the judgment under appeal, that the President of the CPVO was not entitled to insert the additional characteristic at issue for the candidate variety.
- 46 As a preliminary point, it must be recalled that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a broad discretion in carrying out its functions (see, to that effect, judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50). That broad discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of the basic regulation (see, to that effect, judgment of 15 April 2010, *Schröder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77).

- 47 Secondly, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine all the relevant particulars of an application for a Community plant variety right with care and impartiality and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings which it sets in motion (judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 51).
- 48 It is in that context that it must be assessed whether the General Court misinterpreted, as argued by Schniga and the CPVO, the provisions of the basic regulation and of the implementing regulation relating to the powers of the President of the CPVO.
- 49 Under Article 56(2) of the basic regulation, the conduct of any technical examinations is to be in accordance with test guidelines issued by the Administrative Council and any instructions given by the CPVO.
- 50 In that regard, in the first place, pursuant to Article 22(1) of the implementing regulation, the Administrative Council takes a decision as to the test guidelines upon proposal of the President of the CPVO. Article 22(2) of that regulation specifies that, in the absence of a decision of the Administrative Council as to test guidelines, the President of the CPVO may take a provisional decision thereon.
- 51 Moreover, under Article 23(1) of the implementing regulation, where the Administrative Council takes a decision on test guidelines, it is to include a power whereby the President of the CPVO may insert additional characteristics and their expressions in respect of a variety.
- 52 Consequently, even supposing that CPVO Protocol TP/14/1 had been applicable to the proceedings at issue, the President of the CPVO was, in any event, empowered to insert a new characteristic, in the present case the ‘width of stripes’, for the examination of the candidate variety.
- 53 Only an interpretation of that kind of the powers of the President of the CPVO, as is clear, in particular, from Article 23 of the implementing regulation, is capable of taking account of the particularities of the purpose and the procedure for the grant of a Community plant variety right.
- 54 As the Advocate General noted, in point 97 of his Opinion, the assessment of the characteristics of a plant variety necessarily contains a particular uncertainty due to the nature of the object itself to which the technical examination relates, namely a plant variety, as well as the length of time required to conduct such an examination.
- 55 In those circumstances, only the flexibility that allows the recognised power of the President of the CPVO, under Article 23(1) of the implementing regulation, to insert additional characteristics in respect of a variety is also capable of ensuring the objectivity of the procedure for granting Community plant variety rights. Thus, an application for a Community plant variety right may not be rejected solely on the ground that the characteristic of an examined variety, found during the technical examination and decisive for assessing the distinctiveness of that variety in comparison with other varieties, was not referred to in either the technical questionnaire completed by the applicant or in the relevant test guidelines and protocols.
- 56 In that regard, it must be recalled that, with regard to the broad discretion conferred on the CPVO, it may, if it considers it necessary, take account of facts and evidence submitted or produced by the parties out of time (see, to that effect, judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50).

- 57 It must be recognised to have such a right, a fortiori, when, as in the present case, the evidence relevant to the examination of the distinctiveness of a variety is found during the objective procedure which constitutes the technical examination undertaken by the CPVO and completed by a national examination office.
- 58 Moreover, such an understanding of the powers of the President of the CPVO is supported by UPOV Protocol TG/1/3, Section 4.2.3 of which indicates in particular that the characteristics contained in the test guidelines are not exhaustive and may be expanded with additional characteristics if that proves to be useful.
- 59 Additionally, the powers of the President of the CPVO being laid down in the basic regulation and the implementing regulation, the CPVO's test guidelines and protocols adopted by the Administrative Council cannot be intended to restrict or have the effect of restricting those powers.
- 60 For that reason, the procedure provided for under Section III 6 of CPVO Protocol TP/14/1, referred to by the General Court in paragraph 93 of the judgment under appeal, which relates to cases in which the insertion of a new characteristic is requested by the applicant for a Community plant variety right, cannot prevent the President of the CPVO from inserting a new characteristic of his own motion in the context of the technical examination of a variety.
- 61 As to the time when the President of the CPVO may exercise his power under Article 23(1) of the implementing regulation, none of the provisions of that regulation or of the basic regulation preclude the insertion of a new characteristic intervening following the completion of the technical examination, given that such a characteristic was found when conducting that examination.
- 62 So, on the one hand, pursuant to Sections 6.2 and 7.2 of UPOV Protocol TG/1/3, referred to by the General Court in paragraph 77 of the judgment under appeal, the relevant characteristics for the purpose of examining the DUS criteria are determined by reference to the variety description established 'at the date of grant of protection' applied for, not by reference to the variety description established at the date when the application is lodged.
- 63 For that reason, the technical description of the candidate variety required by Article 50(1)(f) of the basic regulation and Article 19(2)(c) of the implementing regulation can, with regard to the President of the CPVO in the exercise of his power under Article 23(1) of the basic regulation, have only indicative value.
- 64 On the other hand, such a solution is not incompatible with the principle of legal certainty.
- 65 Although it is possible for third parties, whose protected variety was chosen as a variety to be used as a reference in light of the technical examination, to raise objections to the grant of a Community plant variety right, those objections must seek, in accordance with Article 59(3)(a) of the basic regulation, to show that the DUS criteria are not satisfied.
- 66 Therefore, the fact that the President of the CPVO inserts a new characteristic, the presence of which was found only during the technical examination of a variety, cannot in itself constitute infringement of the principle of legal certainty with regard to third parties, the protected variety of which was chosen as a variety to be used as a reference in light of that technical examination. That cannot give rise to legitimate expectations as regards the extent of that examination and the nature of the distinctive characteristics examined.

- 67 It follows from all the foregoing considerations that the General Court erred in law in finding that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, on completion of the technical examination of a variety, a new characteristic in respect of that variety, when that characteristic was not referred to in either the technical questionnaire completed by the applicant or in the applicable test guidelines and protocols.
- 68 Consequently, Schniga's argument must be upheld, and, without it being necessary to analyse the other complaints in the appeal, to set aside the judgment under appeal in so far as it upheld the annulment of the decision of the CPVO by the Board of Appeal on the ground that the distinctive characteristic 'width of stripes' relied on had been inserted by the President of the CPVO.

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

- 69 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the General Court is set aside, the Court of Justice may give final judgment in the matter if the state of the proceedings so permits.
- 70 In the present case, the Court of Justice finds that the actions brought by Schniga for annulment of the decisions at issue are ready for judgment and that the Court should therefore give final judgment on those actions.
- 71 In that regard, the fact that the General Court addressed the second part of Schniga's single plea in law, in paragraphs 103 and 104 of the judgment under appeal, only for the sake of completeness, is not decisive, in so far as the parties had the opportunity to put forward, in detail, before that court and before the Court of Justice, their arguments in relation to that second part.
- 72 In view of the above, first, the first part of the single ground of appeal raised by the applicant in support of its action must be upheld for the reasons set out in paragraphs 46 to 68 above.
- 73 As regards, second, the second part of that single ground of appeal, the Board of Appeal annulled the decisions granting a Community plant variety right and the decisions dismissing the objections on the ground that the technical examination as regards the additional characteristic at issue took place over a period of one year only, that is to say, 2005, and not over two consecutive growing seasons.
- 74 Schniga and the CPVO submit that, in practice, the BSA itself found that the additional characteristic at issue had been examined after 2005, namely during 2006 and 2007. In any event, faced with a procedural error capable of being rectified, the Board of Appeal should have remitted the case to the competent body of the CPVO for it to adopt the necessary measures.
- 75 Brookfield New Zealand and Elaris argue that Schniga did not, at any stage in the procedure, request correction of the irregularities found.
- 76 In that regard, it must be recalled that, by decision of 14 December 2006, the President of the CPVO approved the use of the additional characteristics at issue in order to establish the distinction between the candidate variety and the reference variety and that, by decision of 26 February 2007, the CPVO granted Schniga a Community plant variety right in respect of the candidate variety.
- 77 It is not disputed that, at the date on which the decisions granting a Community plant variety right and the decisions dismissing the objections were made, namely, 26 February 2007, the CPVO had available to it only the final examination report, adopted by the BSA on 19 December 2005, and modified on 9 February 2006, which indicated that that characteristic had been found during the crop production cycle in 2005. It was only on 8 August 2008 that the BSA informed the CPVO that that characteristic had also been found during the crop production cycles in 2006 and 2007.

- 78 Therefore, a Community plant variety right was granted to Schniga for the candidate variety without the CPVO possessing the evidence establishing that the additional characteristic at issue had been examined over the course of two crop production cycles, in violation of both CPVO Protocol TP/14/1 and UPOV Protocol TG/1/3.
- 79 In that regard, the broad discretion enjoyed by the CPVO in the exercise of its functions, referred to in paragraph 46 above, cannot allow it to avoid the technical rules that regulate the conduct of the technical examinations without breaching the duty of good administration and its obligations of care and impartiality. In addition, the binding nature of those rules, including for the CPVO, is confirmed by Article 56(2) of the basic regulation which requires that the technical examinations are carried out in accordance with those rules.
- 80 Therefore, the Board of Appeal was right to find that the CPVO had granted a Community plant variety right for the candidate variety on the basis of an improper technical examination.
- 81 It follows that the second part of the single plea at law at first instance was unfounded.
- 82 Consequently, the decisions at issue should be confirmed.
- 83 However, pursuant to Article 72 of the basic regulation, the Board of Appeal may either exercise any power which lies within the competence of the CPVO or remit the case to the competent body of the CPVO for further action.
- 84 While it is true that the Board of Appeal enjoys broad discretion in respect of the opportunity of ruling, itself, on the application or of remitting the case to the competent body of the CPVO, the fact remains that, when it decides to exercise a power which lies within the competence of the CPVO, it is required to examine carefully and impartially all the relevant particularities of a Community plant variety right application and to gather all the factual and legal information necessary to exercise its discretion, as noted in paragraph 47 above.
- 85 The Board of Appeal, exercising a power which lies within the competence of the CPVO, found that the candidate variety could be granted the Community plant variety right applied for, even though it was uncertain that the characteristic 'width of stripes' was not repeatable during two consecutive growing cycles.
- 86 With regard, first, to the fact that the error having led to the annulment by the Board of Appeal of the decisions granting a Community plant variety right and the decisions dismissing the objections in favour of the candidate variety was not attributable to the applicant and, second, that that irregularity, in any event, does not in itself determine the merits of the application for a Community plant variety right, a remittance to the competent body of the CPVO for the continuation of the technical examination in order to ensure that the additional characteristic at issue satisfied the requirement of repeatability would have allowed the CPVO to possess all the relevant elements in order to assess the validity of the grant of the Community plant variety right in favour of the candidate variety and would have made it better able also to ensure the rights of the applicant.
- 87 The fact that Schniga did not seek such a production of elements cannot be effectively relied on in order to justify the failure of the Board of Appeal to remit the case to the competent body of the CPVO, since there cannot be a requirement that an applicant for a Community plant variety right, who has been granted such a right, must question, of his own initiative, the very validity of the right which he has been granted.
- 88 Consequently, the decisions at issue must be annulled, in so far as, by those decisions, the Board of Appeal, first, found that Article 23(1) of the implementing regulation did not grant the President of the CPVO the power to insert, following the completion of the technical examination of a variety, a

new characteristic for that variety where that characteristic was not mentioned in either the technical questionnaire relating to the application or in the applicable test guidelines and protocols, and, secondly, annulled the decisions granting a Community plant variety right and the decisions dismissing the objections without having first, pursuant to Article 72 of the basic regulation, remitting the case to the competent body of the CPVO in order to possess all the relevant elements for the assessment of the validity of the Community plant variety right granted.

### Costs

- <sup>89</sup> Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Lastly, Article 140(3) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides in particular that the Court may order interveners other than Member States or institutions to bear their own costs.
- <sup>90</sup> In the present case, since Schniga has applied for costs from the CPVO and the CPVO has been partially unsuccessful, it must be ordered to bear its own costs and to pay those incurred by Schniga, in so far as the dispute arose owing to a mistake attributable to the CPVO. Moreover, Brookfield New Zealand and Elaris must be ordered to bear their own costs.

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

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

Da Cruz Vilaça  
Levits

Berger

Borg Barthet  
Biltgen

Delivered in open court in Luxembourg on 8 June 2017.

A. Calot Escobar  
Registrar

J.L. da Cruz Vilaça  
President of the Fifth Chamber