OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 3 December 2009 [1]

I – Introduction

1. By the present appeal, Mr Ralf Schräder asks the Court to set aside the judgment of the Court of First Instance (Seventh Chamber) of 19 November 2008 in Case T-187/06 *Schräder* v *Community Plant Variety Office* ('CPVO') [2] ('the judgment under appeal'), by which that Court dismissed Mr Schräder's action against the decision of 2 May 2006 of the Board of Appeal of the CPVO ('Board of Appeal') (the 'contested decision') to reject his application for the grant of Community plant variety rights, under Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [3] in respect of plant variety SUMCOL 01 ('the candidate variety').

2. The appeal essentially raises the question whether the Court of First Instance was correct to confirm the contested decision, according to which the candidate variety was not clearly distinguishable from the reference variety which was to be regarded as a matter of common knowledge.

II – Legal context

3. According to Article 6 of Regulation No 2100/94, Community plant variety rights are to be granted for varieties that are distinct, uniform, stable and new.

4. According to Article 7 of Regulation No 2100/94:

'1. A variety shall be deemed to be distinct if it is clearly distinguishable, by reference to the expression of the characteristics that results from a particular genotype or combination of

1 — Original language: English.
2 — [2008] ECR II-3151.
3 — OJ 1994 L 227, p. 1.

genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.

2. The existence of another variety shall in particular be deemed to be a matter of common knowledge if on the date of application determined pursuant to Article 51:

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

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

The implementing rules pursuant to Article 114 may specify further cases as examples which shall be deemed to be a matter of common knowledge.'

5. According to Article 67 of Regulation No 2100/94, decisions of the CPVO which have been taken pursuant, inter alia, to Articles 61 and 62 are subject to appeal.

6. Under Article 70 of Regulation No 2100/94:

'1. If the body of the [CPVO] which has prepared the decision considers the appeal to be admissible and well founded, the [CPVO] shall rectify the decision. This shall not apply where the appellant is opposed by another party to the appeal proceedings.

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

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

— remit the appeal to the Board of Appeal.'

7. Article 75 of Regulation No 2100/94 provides with regard to the statement of the grounds of the decision and to the right to be heard:

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

8. According to Article 76 of Regulation No 2100/94:

'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. It shall disregard facts or items of evidence which have not been submitted within the time-limit set by the [CPVO].'

9. Articles 60, 61, 62 and 63 of Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office [4] lay down rules on the taking of evidence by the CPVO, the commissioning of experts, the costs of taking evidence and on the minutes of oral proceedings and of taking of evidence respectively.

III – Factual background

10. In the judgment under appeal, the facts giving rise to the present dispute were set out as follows:

'10 On 7 June 2001, the applicant, Mr Ralf Schräder, applied to the CPVO for a Community plant variety right pursuant to Regulation No 2100/94. That application was registered under number 2001/0905.

11 The plant variety for which the right was sought was SUMCOL 01 ("the candidate

4 — OJ 1995 L 121, p. 37.

variety"), originally submitted as belonging to the species *Coleus canina, Katzenschreck*. The parties later agreed that it belonged to the species *Plectranthus ornatus*.

12 In his application, the applicant indicated that the candidate variety had already been marketed within, but not outside of, the European Union, initially in January 2001, under the name "Verpiss dich" ("get lost"). It was the product of a cross between a plant of the species *Plectranthus ornatus* and a plant of the species Plectranthus ssp. (known in German as South American "Buntnessel").

13 On 1 July 2001, the CPVO requested the Bundessortenamt (Federal Plant Variety Office, Germany) to conduct the technical examination pursuant to Article 55(1) of Regulation No 2100/94.

14 It is clear both from the file, from the statement of facts in the contested decision and from the claims of fact made in the application and not disputed by the CPVO that, during the first year of the examination procedure, the applicant's competitors opposed the grant of the right being sought. The competitors argued that the candidate variety was not a new plant variety but a wild variety originating in South Africa and which had been marketed for years in that country and in Germany.

15 The candidate variety was first compared to a reference variety provided by the Unger firm, one of the applicant's competitors, and classified by it as belonging to the species *Plectranthus comosus*, "similar to *ornatus*". It appeared that the two varieties were not clearly distinguishable from each other. However, Unger was unable to provide any evidence that the reference variety was already known. In its interim report, drawn up in accordance with the rules of the UPOV (International Union for the Protection of New Varieties of Plants) and dated 28 November 2002, the Bundessortenamt stated the following:

"… this year, SUMCOL 01 was not distinct from the plants from Unger, designated as *Plectranthus ornatus*. Mr Unger was unable, however, to provide any

proof of the plants' commercialisation in the market since 1998. The examination needs to be retaken in 2003."

16 On 20 March 2002, Dr Menne, acting on behalf of Mrs Heine, the Bundessortenamt examiner responsible for the technical examination, approached Mr E. van Jaarsveld from Kirstenbosch Botanical Gardens (South Africa) with a request to provide cuttings or seeds of *Plectranthus comosus* or *Plectranthus ornatus*, which he wished to use as reference varieties. At the same time, he was asked whether varieties of this species were available on the market in South Africa.

17 In his reply of 25 March 2002, Mr van Jaarsveld stated the following:

"*Plectranthus comosus* and *P. ornatus* are grown commonly in our country. The first named is now a declared invasive weed and may no longer be sold by nurseries. There are variegated cultivars available which are often grown and I think is still legal to propagate. *P. ornatus* is still used a lot and sold by nurseries. It is now autumn and I will search for seeds of both species. As not one are [sic] indigenous locally we do not grow them here at Kirstenbosch and I will have to check the plants in peoples [sic] gardens for seed."

18 In a letter of 15 May 2002, Mrs Miller, of the Royal Horticultural Society Garden in Wisley (United Kingdom) wrote to Mrs Heine in the following terms:

"I am afraid that we do not have seeds of *Plectranthus*. I suggest that you contact either the Botanical Society of South Africa at Kirstenbosch … or Silverhill Seeds …, Cape Town, South Africa.

The *Coleus canina* is almost certainly *Plectranthus ornatus* which has been known incorrectly as P. comosus in the past. I have bought some plugs of "*C. canina*" and they are more or less

identical with the plants of *P. ornatus* that I have been growing for years and with a plant I received from a British nursery early last year for identification."

19 In a letter of 16 October 2002, Mr van Jaarsveld expressed the following opinion of a photograph of the candidate variety sent to him by Mrs Heine:

"Your plant in question is definitely *P. ornatus Codd*. I know that species very well. *P. comosus* is a large shrub with very different hair leaves."

20 On 12 December 2002, the Bundessortenamt received cuttings sent by Mr van Jaarsveld, which he said had come from his private garden. Since some of the cuttings had not survived the journey, probably because of the cold, the Bundessortenamt reproduced the survivors in order to obtain additional cuttings. The plants thus obtained were cultivated along with the plants of the SUMCOL 01 candidate variety during the examination year 2003. At the end of that examination, it appeared that the differences between the candidate variety and the plants obtained from the cuttings sent by Mr van Jaarsveld were minimal. According to an email from Mrs Heine dated 19 August 2003, the differences were "significant" but barely visible.

21 In a letter of 7 August 2003, the CPVO informed the applicant that the Bundessortenamt had established that "there are shortcomings in the distinctiveness of the plants from the plants being tested at the Botanical Gardens Kirstenbosch". It is common ground between the parties that in actual fact the plants came from Mr van Jaarsveld's private garden. The letter also stated that, according to Mrs Heine, the applicant had been unable to identify his variety SUMCOL 01 when inspecting the Bundessortenamt's test field.

22 In September 2003, the applicant submitted his comments on the results of the technical examination. On the basis, on the one hand, of the results of his fact-finding mission to South Africa, on which he embarked between 29 August and 1 September 2003 and, on the other, on the results of his visit to the botanical gardens in Meise (Belgium) on

15 September 2003 he stated that he was convinced that the plants from Mr van Jaarsveld's garden, used for the purposes of comparison, did not belong to the reference variety but to the SUMCOL 01 variety itself. Furthermore, he expressed doubts as to whether the reference variety was a matter of common knowledge.

23 The concluding report of the Bundessortenamt of 9 December 2003, drawn up in accordance with UPOV rules, was sent to the applicant for observations on 15 December 2003, with a covering letter from the CPVO. The report concludes that the candidate variety SUMCOL 01 is not distinguishable from the reference variety *P. ornatus* South Africa (van Jaarsveld).

24 The applicant submitted his final comments on that report on 3 February 2004.

25 By Decision No R 446 of 19 April 2004 ("the rejection decision"), the CPVO rejected the application for a Community plant variety right because of a lack of distinctiveness of the SUMCOL 01 variety, in accordance with Article 7 of Regulation No 2100/94.

26 With regard, more particularly, to whether the reference variety was a matter of common knowledge, the CPVO stated as follows in the rejection decision:

"During the technical examination, the SUMCOL 01 variety was not clearly distinguishable, in regard to the characteristics observed, from the reference material, *Plectranthus ornatus* from South Africa, which at the time that the application was introduced (7 June 2001), was a matter of common knowledge.

…

Mr van Jaarsveld stated that the botanical gardens in Kirstenbosch concentrated on native species. *P. ornatus* is not a species native to South Africa, which explains why it is not cultivated in the botanical

gardens. However, the [reference] variety is on the market and is sold in nurseries in South Africa, with the result that it can be found in private gardens, such as that of Mr van Jaarsveld. Since that variety is available on the market and can be found in private gardens, it must be regarded as a matter of common knowledge.

The [CPVO] has no reason to doubt the origin of the plant material indicated by Mr van Jaarsveld."

27 On 11 June 2004, the applicant brought an appeal before the Board of Appeal of the CPVO against the rejection decision. At the same time, he petitioned to be permitted to inspect the files in the case. The petition was granted on 25 August 2004, that is to say, five days before the expiry of the four-month time-limit for filing a written statement setting out the grounds of appeal laid down in Article 69 of Regulation No 2100/94. The applicant nonetheless filed such a statement on 30 August 2004.

28 The rejection decision was not the subject of interlocutory revision under Article 70 of Regulation No 2100/94 within one month after receipt of the statement of grounds for the appeal, as provided for in that article. By letter of 30 September 2004, the CPVO informed the applicant, however, of its decision of the same day to "defer" its decision on that point for two weeks on the ground that new investigations seemed useful.

29 On 8 October 2004, Mr van Jaarsveld provided the CPVO with the following information:

"*Plectranthus ornatus* was described in Dr L.E. Codd's "Plectranthus and allied genera in southern Africa" [*Bothalia* 11, 4: page 393-394 (1975)]. Dr Codd in his diagnosis states "Grows over rocks in semi-shade at altitudes of 1 000 and 1 500 m from Ethiopia to Tanzania. Cultivated and semi-naturalised in South Africa." I can thus state and confirm with Dr Codd that this plant has been in our local nursery trade for more than 30 years. By 1975 the plant had already been extensively used and traded, but under the name *P. neochilus*. *Plectranthus ornatus* is found today in gardens all over South Africa and is widespread in the horticultural trade."

30 On 13 October 2004, the CPVO asked Mr van Jaarsveld further questions about the location and date of the cuttings sent, proof of their purchase, alternative sources of acquisition and possible origins of the plant material from Europe, as well as the literary reference to Dr Codd's book.

31 On 15 October 2004, Mr van Jaarsveld replied as follows:

"The plants in question were not bought – it is a common clone which people all over Cape Town and RSA [Republic of South Africa] grow. The plants I sent them were from my private garden (I live and work at Kirstenbosch Botanical Gardens), I got a cutting some years back from a friend's [sic] garden in Plumstead which were spread by the [horticultural] trade. We even used to grow it in our Botanical Gardens under the name *P. neochilus*, however since we found out that it is an alien we have eradicated it from Kirstenbosch Botanical Gardens as we only grow RSA plants. This clone is available from nurseries all over RSA and has been in our [horticultural] trade since the early seventies. I have been working with *Plectr.* for many years and am well acquainted with this clone; it is not grown from seed and thus all from the same genetic source, thus a single clone.

I will send you a copy of the relevant pages from Dr Codd."

32 The CPVO also contacted the South African Ministry of Agriculture, with reference to Mr van Jaarsveld's opinion, and asked for more information about the general availability of *Plectranthus ornatus*.

33 In her reply of 2 November 2004, Mrs J. Sadie of that ministry stated the following:

"I have been in contact with another *Plectranthus* expert, Dr Gert Brits, who is also a breeder.

Firstly, *Plectranthus* is one of the genera in the work field of Mr Ernst van Jaarsveld for many years; therefore he is really the expert with regard to this genus and you can believe his information.

The publication by L.E. Codd in 1975, "Plectranthus (Labiateae) and allied genera in southern Africa", *Bothalia* 11(4):371-442 refers to *P. ornatus* as cultivated and semi-naturalised in South Africa. This is confirmed by Andrew Hankey in his article in *Plantlife* No 21, September 1999, "The genus *Plectranthus* in South Africa: diagnostic characters and simple field keys", p. 8–15.

Secondly, *Plectranthus ornatus* is a species of tropical African origin (Tanzania and Kenya). This species is very similar to the South African species, *P. neochilus*, the differences are the longer inflorescence of the latter and the rounded leaf tip of *P. ornatus*. It seems that nurseries get mixed up with the 2 species. As the nurserymen are mostly not qualified botanists, they take the word of others for identification of plants and also very few will know the fine distinction made between species like these two.

Fact is, this species originates from Africa, and if plants, even from a private garden are indistinguishable from a variety submitted for plant breeders' rights, it means that the "variety" is not unique.

There are herbarium specimens of *P. ornatus* in the Pretoria Herbarium which were collected from a garden in 1960. Confirmation of herbarium specimens collected from naturalised and garden plants in South Africa is in the recent publication of Dr H.F. Glen, "Cultivated Plants of southern Africa – names, common names, literature", 2002, p. 326.

… We can determine sources of production of *P. ornatus*, but that will take time. However, one reference I can give you is Rodene Wholesale Nursery in Port Elizabeth that complained about a *P. neochilus* variety being registered in the USA, but from the pictures they can't distinguish it from the standard P. neochilus they've been growing for about 15 years."

34 On 10 November 2004, the CPVO decided not to rectify the rejection decision under the interlocutory revision procedure laid down in Article 70 of Regulation No 2100/94 and remitted the appeal to the Board of Appeal. The CPVO noted that the crucial question was whether the plant material of the reference variety sent to the Bundessortenamt by Mr van Jaarsveld was, as the applicant claims, material of the SUMCOL 01 variety exported from Germany to South Africa. The CPVO answered that question in the negative on the basis of the technical examination carried out by the Bundessortenamt, which revealed the existence of differences in regard to plant height, leaf width and the length of the tube of the corolla.

35 In its written answer of 8 September 2005 to a question asked by the Board of Appeal, the CPVO admitted that the change of climate and site could cause the plants to react and, as the Bundessortenamt had explained, it could not be completely excluded that the varieties which showed such minimal differences as the candidate variety and the reference variety could be of the same variety.

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

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

38 …

39 On 27 December 2005, the Board of Appeal ordered the measure of inquiry in question. It made implementation of that measure subject to the condition that the applicant pay a fees advance of EUR 6 000 under Article 62 of Commission Regulation (EC) No 1239/95 …

40 In a document dated 6 January 2006, the applicant claimed that he was not required to provide evidence and had not sought the measure of inquiry which had been ordered. He pointed out that it was for the CPVO to determine distinctness within the meaning of Article 7 of Regulation No 2100/94. That was why, in his view, a "reconnaissance trip" to South Africa could be envisaged only under Article 76 of Regulation No 2100/94. Under that provision, it was not for him to pay a fees advance.

41 By decision of 2 May 2006 (Case A 003/2004, the "contested decision") the Board of Appeal rejected the appeal against the rejection decision. It considered, essentially, that the SUMCOL 01 variety could not be clearly distinguished from a reference variety which was a matter of common knowledge at the time that the application was made.

42 With regard to the failure to implement the order for measures of inquiry, the Board of Appeal indicated as follows at page 20 of the said decision:

> "The order for evidence relating to the issue of the identity and common knowledge of the reference variety originating from the garden of van Jaarsveld was not issued because the Board, after initial doubts about the abovementioned reasons, was finally persuaded that the variety used for comparison was the reference variety and not SUMCOL 01, and that the reference variety was common knowledge on the date of application.
>
> For this reason, the fact that the Appellant has not paid the advance fee for the taking of evidence was not a causal factor in the decision not to take evidence."'

IV – Proceedings before the Court of First Instance and the judgment under appeal

11. By application lodged on 18 July 2006, Mr Schräder brought an action for annulment

of the contested decision before the Court of First Instance. The action was, essentially, based on eight pleas, alleging infringements of Regulation No 2100/94 – more particularly, of Article 62 in conjunction with Article 7(1) and (2), Article 67(2), Article 70(2), Article 75 and the 'general prohibition, in a State governed by the rule of law, on taking decisions by surprise', Article 76 and Article 88 – as well as infringement of Articles 60(1) and 62(1) of Regulation No 1239/95.

12. By the judgment under appeal, the Court of First Instance, after rejecting each of those pleas as unfounded, ineffective or irrelevant, dismissed the action as unfounded and ordered Mr Schräder to pay the costs.

V – Forms of order sought before the Court

13. Mr Schräder claims that the Court should:

— set aside the judgment of the Court of First Instance (Seventh Chamber) of 18 November 2008 in Case T-187/06;

— allow the appellant's application for annulment of the decision of the Board of Appeal of the CPVO of 2 May 2006 (Reference A003/2004) made in the proceedings at first instance.

With regard to the second point, in the alternative:

— refer the case back to the Court of First Instance for fresh judgment;

— order the CPVO to pay all the costs arising from the present proceedings, the proceedings before the Court of First Instance and the proceedings before the Board of Appeal.

14. The CPVO contends that the Court should:

— dismiss the appeal;

— order Mr Schräder to pay the costs of the proceedings before the Court of First Instance and before the Court.

17. The second plea is structured in five parts and alleges further infringements of Community law, manifest contradictions and procedural errors, in particular in so far as the Court of First Instance confirmed that a detailed description of a plant variety in academic literature can be taken into account in establishing whether a candidate variety is a matter of common knowledge.

VI – The appeal

A – *Preliminary remarks*

18. As regards the CPVO, it takes the view that the pleas on which the present appeal is based should be declared inadmissible, as they are directed entirely against factual assessments and the appraisal of evidence carried out by the Court of First Instance. In any event, the CPVO contests each of the arguments put forward by Mr Schräder and submits that his pleas should be rejected as unfounded.

15. In support of his appeal, Mr Schräder puts forward two pleas in law, which are each divided into several separate parts.

16. By his first plea, which comprises six parts, Mr Schräder claims, in essence, that the Court of First Instance, in its review of the contested decision, committed a number of procedural errors in that it imposed excessive demands with regard to his submissions, drew contradictory conclusions, infringed the right to be heard, made manifestly incorrect findings of fact and distorted facts and evidence.

19. In this context, as the present appeal does indeed raise issues of admissibility and since both parties to the present proceedings have commented on the scope of judicial review in cases concerning the grant of a Community plant variety right under Regulation No 2100/94, it seems appropriate to make some general remarks concerning the role of the Community Courts in such cases and the confines of their respective jurisdictions.

20. It should be noted, at the outset, that decisions taken by the CPVO on the grant or refusal of Community plant variety rights are potentially subject – apart from the possibility of interlocutory revision by the CPVO-body which prepared the decision concerned itself – to a three-tier review system, whereby a first 'internal' appeal lies to the Board of Appeal. Following that administrative review procedure there exists, as is apparent from Article 73(1) and (2) of Regulation No 2100/94, the possibility of judicial review by the Court of First Instance and, pursuant to Article 225 EC, by the Court of Justice on appeal.

21. In that regard, it is important to bear in mind that the subject-matter of review is different at each of those levels. As far as the Board of Appeal is concerned, it follows from Articles 71 and 72 of Regulation No 2100/94 that it may re-examine the case and decide it and, in doing so, may itself exercise any power which lies within the competence of the CPVO. It is thus entitled to carry out a new, full examination as to the merits of the appeal, in terms of both law and fact. [5]

22. The Court of First Instance is called upon to review the lawfulness of a decision of the Board of Appeal against which an action has been brought. It thus considers whether that decision is, by reference to the time of its adoption by the Board of Appeal, [6] vitiated by one of the grounds mentioned in Article 73(1) of Regulation No 2100/94, namely lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of that regulation or of any rule of law relating to their application, or misuse of power.

23. The subject-matter of an appeal before the Court of Justice pursuant to Article 225 EC is, by contrast, the legality of the decision or judgment of the Court of First Instance. In the present appeal, the Court of Justice consequently has no jurisdiction to review the decision taken by the Board of Appeal, let alone the decision originally taken by the CPVO. Nor is the appeals procedure intended as a general re-examination of the application brought before the Court of First Instance. Rather, as follows from settled case-law, the jurisdiction of the Court of Justice in an appeal is limited to a review of the findings of law of the Court of First Instance – to the exclusion, in principle, of any findings of fact – on the pleas argued before that court. [7]

5 — In that regard, parallels can be drawn from the review system set up under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1): see, in particular, Case C-29/05 P *OHIM* v *Kaul* [2007] ECR I-2213, paragraphs 56 and 57.

6 — Cf. in this context *Kaul*, cited in footnote 5, paragraphs 53 and 54; cf. also Case C-416/04 P *Sunrider* v *OHIM* [2006] ECR I-4237, paragraph 55.

7 — See, to that effect, Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 49, and Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59.

24. In addition, when reviewing administrative acts of Community institutions, the Community Courts are, as the Court of First Instance pointed out in its preliminary considerations in paragraphs 59 to 62 of the judgment under appeal, also subject to certain limitations as regards the 'depth' of judicial review to be carried out.

25. In that regard, it is apparent from the case-law of the Court that where Community authorities are, when exercising their powers, called upon to make complex assessments of a technical, scientific, economic or social nature, those authorities are to be accorded a certain margin of appreciation. [8] It also follows from the case-law that, when reviewing an administrative decision based on such an appraisal, the Community judicature must not substitute its own assessment for that of the competent authority. Consequently, judicial review in such matters must be limited to verifying that the measure in question is not vitiated by any manifest errors or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its discretion. [9] In particular, as the Court of First Instance pointed out in paragraph 61 of the judgment under appeal, the Community judicature must in such cases examine whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all the information which must be taken into account in order to assess the complex situation concerned. [10]

26. That case-law is, in my view, also applicable as regards the grant of Community plant variety rights to the extent, however, that an administrative decision in that field is the result of complex assessments of the kind referred to in the aforementioned case-law, as is without doubt, as the Court of First Instance held in paragraphs 63 to 66 of the judgment under appeal, the case when it comes to appraising the distinctive character of a plant variety in the light of the criteria laid down in Article 7(1) of Regulation No 2100/94.

8 — See to that effect, inter alia, Case C-99/99 *Italy* v *Commission* [2000] ECR I-11535, paragraph 26; Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 49; Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569, paragraph 65; Case C-87/00 *Nicoli* v *Eridania* [2004] ECR I-9357, paragraph 37; Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83; and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34.

9 — See, to that effect, Order of the President of the Court in Case C-474/00 P(R) *Commission* v *Bruno Farmaceutici and Others* [2001] ECR I-2909, paragraph 90; Case C-202/06 P *Cementbouw* v *Commission* [2007] ECR I-12129, paragraph 53; and Case C-343/07 *Bavaria and Bavaria Italia* [2009] ECR I-5491, paragraph 82.

10 — See, to that effect, Case C-525/04 P *Spain* v *Commission* ('*Lenzing*') [2007] ECR I-9947, paragraph 57, and C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraphs 76 and 77.

27. That said, as the various branches of the pleas on which Mr Schräder relies are in part overlapping and in part repetitive, it is appropriate to examine together (i) the first and second parts of the first plea and (ii) the third, fourth and fifth parts of that plea. Likewise, the first, second and third parts of the second plea will be examined together.

B – *Pleas in law*

1. The first plea

(a) The first and second parts of the first plea, concerning the findings of the Court of First Instance on the question whether the reference variety and the candidate variety were in fact the same variety

(i) Main arguments

28. By the first part of his first plea, Mr Schräder challenges the findings of the Court of First Instance, in paragraphs 76, 79 and 131 of the judgment under appeal, relating to the statements of Mrs Heine on the question whether the van Jaarsveld reference variety was actually identical with the SUMCOL 01 candidate variety. Mr Schräder maintains, first, that the Court of First Instance was wrong to state, in paragraph 131 of the judgment under appeal, that he had put forward no evidence in support of his argument that Mrs Heine's statements were recorded in the contested decision in an incomplete fashion. Second, the minutes of the hearing on 30 September 2005 before the Board of Appeal, referred to in paragraph 79 of the judgment under appeal, cannot provide definitive proof as to the statements made by the parties at the hearing, as those minutes were made in contravention of Article 63(2) of Regulation No 1239/95. Third, the Court of First Instance relied, also in paragraph 79 of the judgment under appeal, on items of evidence which were not in the case-file and thus distorted the evidence and based its findings on mere speculation as far as Mrs Heine's email is concerned.

29. The second part of the first plea alleges procedural errors in connection with the findings of the Court of First Instance, in paragraphs 36, 71, 73, 74, 79 and 131 of the judgment under appeal, to the effect that the van Jaarsveld reference variety and the candidate variety were not in fact identical. According to Mr Schräder, the Court of First Instance could not reasonably hold, in paragraph 73 of

the judgment under appeal, that the general factors referred to by him were not sufficient to refute the conclusion drawn by the Bundessortenamt that the differences noted between the van Jaarsveld reference variety and the candidate variety SUMCOL 01 could not be attributed to environmental factors.

30. In that regard, in the first place, Mr Schräder submits that the Court of First Instance imposed excessive demands with regard to his submissions and thus infringed the principles governing the taking of evidence. In particular, given the time that had already elapsed since the examination of the plants, it was not possible for him to submit more specific evidence in order to refute the assertions made by Mrs Heine at the hearing before the Board of Appeal. Mr Schräder points out, moreover, that the Court of First Instance held, in paragraph 130 of the judgment under appeal, that Mrs Heine had made her statements as a party to the proceedings, not as a witness or expert. As Mr Schräder had disputed those statements, the Board of Appeal and the Court of First Instance were not entitled to give more weight to the submissions of the CPVO without taking the evidence which he offered to adduce. By generally rejecting his offers to produce evidence, the Court of First Instance infringed Mr Schräder's right to be heard.

31. In the second place, Mr Schräder submits that, in drawing the contested conclusion in paragraph 74 of the judgment under appeal, according to which his submissions had not been sufficiently specific, the Court of First Instance distorted the facts and evidence. In particular, the Court of First Instance ignored the fact that Mr Schräder had commented, at the hearing before the Board of Appeal, on the varieties compared in 2003 and, in his written observations of 14 October 2005, on the specific differences between the varieties compared. Finally, the Court of First Instance ignored his offer, made in point 43 of his application, to supply expert evidence in support of his assertion that those differences could be explained by the reproduction of the reference variety by the Bundessortenamt.

(ii) Assessment

32. I should like to recall at the outset the settled case-law according to which the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation

of those facts by the Court of First Instance and the legal conclusions it has drawn from them. [11]

33. Thus, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice. [12]

34. It is, next, necessary to place the complaints at issue into their context as regards the judgment under appeal.

35. In the parts of the judgment under appeal to which those complaints relate, the Court of First Instance rejected as unfounded the first branch of the first plea submitted to it, by which Mr Schräder contended that the CPVO and the Board of Appeal were wrong to hold that the SUMCOL 01 variety lacked distinctiveness within the meaning of Article 7(1) of Regulation No 2100/94.

36. The Court of First Instance held, in paragraph 73 of the judgment under appeal, that the factors referred to by Mr Schräder were not sufficient to establish that the Bundessortenamt and, later, the CPVO and the Board of Appeal committed in that regard a manifest error of assessment, capable of leading to annulment of the contested decision.

37. By the first two parts of the first plea on appeal, that finding is essentially challenged in two respects: firstly, in so far as the Court held, in paragraph 74 of the judgment under appeal, that the considerations concerning the effect of environmental factors referred to by Mr Schräder were not sufficient to refute the conclusion to the contrary drawn by the Bundessortenamt and, secondly, in so far as the Court did not accept, in paragraphs 77 to 79, the arguments put forward by Mr Schräder

11 — See to that effect, in particular, Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others* v *Commission* [2008] ECR I-10193, paragraph 58; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51; and judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission*, paragraph 72.

12 — See to that effect, *Coop de France bétail et viande and Others* v *Commission*, cited in footnote 11, paragraph 59; *General Motors* v *Commission*, cited in footnote 11, paragraph 52; and *Evonik Degussa* v *Commission*, cited in footnote 11, paragraph 73.

on the basis of the statements made by Mrs Heine at the hearing before the Board of Appeal and in an email to the CPVO.

38. In so far as Mr Schräder is therefore essentially seeking to demonstrate that the Court of First Instance could not reasonably conclude that the facts and circumstances referred to above were not sufficient to refute the conclusion drawn by the Bundessortenamt and confirmed by the Board of Appeal, he is, although formally pleading errors in law, in reality calling into question the factual assessments carried out by the Court of First Instance on that point and disputing the probative value it attached to those facts.

39. Within those confines, the first and second parts of the first plea must, in the light of the aforementioned case-law, [13] be held to be inadmissible.

40. In so far as Mr Schräder alleges that the Court of First Instance distorted facts and evidence, when assessing the arguments based on Mrs Heine's statements and on the possible impact of environmental factors on the differences between the reference and the candidate varieties, according to settled case-law, the Court of Justice considers that there is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [14]

41. However, the submissions referred to in the context of the first and second parts of the first plea are confined to challenging in various respects the assessment of the facts carried out by the Court of First Instance and, in particular as regards the conclusion drawn in paragraph 74 of the judgment under appeal, the incomplete nature of that assessment. Nevertheless, Mr Schräder has not shown in what way the Court of First Instance distorted the clear sense of the evidence within the meaning of the case-law referred to above. It should be noted in that regard that demonstrating that the Court of First Instance could or, in the view of Mr Schräder, should have appraised the evidence in a different way and attached a different value to those facts is not the same as showing that the Court's assessment of those facts and evidence was clearly incorrect.

13 — See points 32 and 33 above.

14 — See to that effect, inter alia, Case C-304/06 P *Eurohypo* v *OHIM* [2008] ECR I-3297, paragraph 34; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37; and *Industrias Químicas del Vallés* v *Commission*, cited in footnote 10, paragraph 60.

42. Apart from that, I do not think that the claims that the Court of First Instance infringed, in the passages of the judgment under appeal at issue, the rules of procedure governing the burden of proof and the taking of evidence are founded.

43. Firstly, it is important to bear in mind that it was not for the Court of First Instance to conduct a full assessment itself of whether the SUMCOL 01 variety lacked distinctiveness within the meaning of Article 7(1) of Regulation No 2100/94. Its task was rather to examine whether, in carrying out that assessment, the Board of Appeal had committed a manifest error. [15]

44. Secondly and more particularly, as regards the assessment concerning Mrs Heine's statements, even on the assumption that, as Mr Schräder claims, the minutes of the hearing had not been submitted for approval by the parties, contrary to Article 63(2) of Regulation No 1239/95, that procedural mistake is of itself not enough to call into question the reference made to the minutes by the Court of First Instance in paragraph 79 of the judgment under appeal. Moreover, it is not for the Court of Justice on appeal, but for the Court of First Instance, to determine whether Mrs Heine's statements were recorded in the contested decision in an incomplete fashion, which that Court, in paragraph 131 of the judgment under appeal, held, without committing a manifest error of appraisal, [16] not to be established. Finally, in paragraph 79 of the judgment under appeal, the Court of First Instance set out why, in its view, in the overall assessment of the evidence, particular credit should not be accorded to Mrs Heine's statement contained in the email of 20 June 2005. It thereby determined, in the exercise of its exclusive jurisdiction to assess the evidence, the probative value to be attached to that statement and it has not been shown that, in doing so, the Court infringed the rules governing the taking of evidence or the burden of proof.

45. The same applies in my view as regards (i) the taking into account, by the Court of First Instance, of the statement made by Mrs Heine at the hearing before the Board of Appeal and (ii) the conclusion drawn in paragraph 74 of the judgment under appeal. With regard, more particularly, to the latter point, it cannot be said that the Court of First Instance, as Mr Schräder reads the judgment, 'imposed excessive demands' with regard to his submissions or 'reproached' him for not having adduced more specific evidence;

15 — Cf. points 25, 26 and 36 above.

16 — It should be noted, more particularly, that at point 41 of the application to the Court of First Instance, Mr Schräder had offered evidence, in the form of hearing Mrs Heine as a witness, with a view to confirming his submissions at the hearing before the Board of Appeal and not, specifically, on the completeness of the minutes.

rather, it simply held, in assessing the value to be attached to that evidence – and therefore without, in my view, committing a procedural error – that the explanations, testimony and expert's reports put forward by him were not sufficient to refute the conclusion drawn by the Bundessortenamt.

46. Lastly, in so far Mr Schräder repeatedly alleges – as he does throughout the pleas put forward by him in the present appeal – incomplete assessments of the facts and complains that the Court of First Instance rejected his offers to supply evidence, I would point out that the Court of Justice has consistently held, regarding the assessment by the Court of First Instance of applications made by a party for measures of organisation of procedure or of inquiry, that the Court of First Instance is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by that court alone and is not open to review by the Court of Justice on appeal, except where that evidence has been distorted or the inaccuracy of the findings of the Court of First Instance is apparent from the documents in the case-file. [17] As such distortion or inaccuracy has not been demonstrated in the present context, [18] the complaints to the effect that the Court of First Instance ignored offers to adduce evidence should, in my view, be rejected.

47. In the light of the foregoing considerations, it seems to me that the first and the second parts of the first plea should be rejected.

(b) The third, fourth and fifth parts of the first plea, alleging errors in law in the assessment of the credibility of Mr van Jaarsveld's statement

(i) Main arguments

48. The third part of the first plea concerns the availability of SUMCOL 01 in South Africa in 2002 and is directed against the finding of the Court of First Instance, in paragraph 82 of the judgment under appeal, that '[a]t very most, the applicant has established

17 — See to that effect, Case C-47/07 P *Masdar* v *Commission* [2008] ECR I-9761, paragraph 99; Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19; and Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 78.

18 — Cf. points 41 to 45 above.

that a Kenyan undertaking, Florensis, had a small number of specimens at the end of 2001 for the purposes of productivity tests and that a South African undertaking, Alba-Atlantis, had shown a passing interest at the beginning of 2002 in obtaining an exclusive distribution licence for that variety in South Africa'. According to Mr Schräder, those findings are incorrect since he had also shown that plants of the candidate variety could be obtained in Africa from Germany by mail order. In addition, the Court of First Instance ignored his offer to supply evidence that it was a plant of the candidate variety which grew in Mr van Jaarsveld's private garden and not a specimen of a variety commonly available at nurseries in South Africa. Furthermore, Mr Schräder submits that the appraisal of the Court of First Instance was illogical and distorted the evidence in so far as it endorsed the finding of the Board of Appeal that the reference variety was generally available at nurseries in South Africa, despite the fact that Mr Schräder had asserted – without being contradicted on that point – that a South African undertaking had an interest in obtaining an exclusive distribution licence for that variety.

49. By the fourth part of the first plea, Mr Schräder challenges the appraisal carried out by the Court of First Instance, in paragraphs 84, 93 and 95 of the judgment under appeal, of the credibility and impartiality of Mr van Jaarsveld as an expert witness with regard to the registration of SUMCOL 01. In that regard, the Court of First Instance did not take account of parts of his submissions and ignored his offers to adduce evidence that Mr van Jaarsveld in fact had an interest in preventing the candidate variety from being registered.

50. The fifth part of the first plea is directed, more specifically, against the finding of the Court of First Instance, in paragraph 85 of the judgment under appeal, that Mr Schräder produced no evidence which cast serious doubts on the credibility of Mr van Jaarsveld's statements. Mr Schräder maintains that the Court of First Instance did not take due account of various submissions showing that Mr van Jaarsveld's credibility was doubtful.

(ii) Assessment

51. First of all, the complaints advanced in the context of the third, fourth and fifth parts of the first plea are essentially directed against the reasoning of the Court of First Instance on the basis of which it rejected, in paragraph 81 of the judgment under appeal, the arguments by which Mr Schräder sought to refute the thesis adopted by the Board of Appeal that on the basis of experience the possibility could be excluded that plants of

the SUMCOL 01 variety could have reached Mr van Jaarsveld's private garden.

52. However, in paragraphs 86 and 87 of the judgment under appeal, the Court of First Instance made it clear that, even supposing the Board of Appeal had, as Mr Schräder sought to demonstrate, erroneously adopted that thesis, such an error would have no effect on the legality of the contested decision as, in any event, the alleged possibility could not call into question the CPVO's assessment, based on the results of the technical examination, that the SUMCOL 01 variety and the van Jaarsveld variety constituted two different varieties.

53. It is therefore apparent that the complaints advanced in the framework of the third, fourth and fifth parts of the first plea are directed against grounds of the judgment under appeal which were included by the Court of First Instance purely for the sake of completeness. As those complaints, even on the assumption that they are well founded, cannot therefore lead to that judgment being set aside, they must, according to well-established case-law, be rejected as ineffective. [19]

54. To my mind, however, those complaints must in any event be considered inadmissible given that they relate, more particularly, to the findings of the Court of First Instance that it was not established that SUMCOL 01 had been available at the relevant time in South Africa and to the findings rejecting other claims by which the applicant sought to show that Mr van Jaarsveld's statements were not credible. By challenging those assessments, Mr Schräder is clearly calling into question appraisals of fact carried out by the Court of First Instance and requesting the Court of Justice to substitute, on those points, its own assessment for that made by the Court of First Instance. [20]

55. Moreover, it does not appear to me that the Court of First Instance distorted, in the reasoning of the judgment under appeal concerned, the clear sense of evidence or that it based its findings on insufficient evidence. [21]

56. It follows that the third, fourth and fifth parts of the first plea should be rejected.

19 — See to that effect, inter alia, Case C-273/05 P *OHIM* v *Celltech* [2007] ECR I-2883, paragraphs 55 and 56; Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 17; and Case C-244/91 P *Giorgio Pincherle* v *Commission* [1993] ECR I-6965, paragraph 31.

20 — See in that regard points 33 and 34 above and the case-law cited.

21 — I refer in that regard also to point 46 above and the case-law cited.

(c) The sixth part of the first plea, alleging erroneous findings as to whether the reference variety could be regarded as a matter of common knowledge

(i) Main arguments

57. By the sixth part of the first plea, which refers to paragraphs 90, 91, 68, 80 and 96 of the judgment under appeal, Mr Schräder alleges essentially that the Court of First Instance committed several errors of law when examining the question whether the van Jaarsveld variety could rightly be regarded as a matter of common knowledge within the meaning of Article 7(2) of Regulation No 2100/94. Those errors were caused by the fact that the Court of First Instance failed to distinguish clearly between 'variety' and 'species' and used those notions partly synonymously.

58. According to Mr Schräder, first, the Court of First Instance erred, and distorted evidence, in presuming that the Board of Appeal, the CPVO and the Bundessortenamt had assimilated the van Jaarsveld reference variety to a 'variety' described by Dr Codd. Second, the judgment under appeal is contradictory as, in paragraphs 80 and 96, it is stated that Codd has described a botanical 'species' *Plectranthus ornatus*, whereas in paragraph 91 of that judgment reference is made to the 'variety' *Plectranthus ornatus*. Third, the Court of First Instance extended the subject-matter of the proceedings although it stated in paragraph 68 of the judgment under appeal that the CPVO could not rely for the first time, in the context of the proceedings before it, on a 'variety' described by Codd on the ground that that variety had not been taken into account by the Board of Appeal.

(ii) Assessment

59. The first claim put forward in the framework of the sixth part of the first plea appears to be based on a somewhat curtailed reading of paragraph 91 of the judgment under appeal.

60. In the grounds of the judgment under appeal concerned, the Court of First Instance considered the second branch of the first plea before it, by which Mr Schräder claimed that the CVPO had wrongly held that the reference variety was a matter of common knowledge and, in particular, that Mr van Jaarsveld was wrong to state that the plants in question came from a variety which had been available for years in garden shops in South Africa. He contended, in particular, that the only thing

which had been proved was the existence of an isolated plant growing in Mr van Jaarsveld's private garden. [22]

61. In reply to that, in paragraph 91 of the judgment under appeal, the Court of First Instance stated that Mr Schräder had not put forward any specific argument or evidence in support of the second branch of the plea, which, as that Court summarised it, 'challenged the assimilation by the Board of Appeal of the reference variety from Mr van Jaarsveld's garden to the South African variety of the *Plectranthus ornatus* species described in the scientific publications in question and referred to in the statements made by Mr van Jaarsveld and Mrs Sadie'. The Court concluded that the Board of Appeal was 'justified in making such an assimilation' on the basis of Mr van Jaarsveld's various statements.

62. The point of the aforementioned passage was thus not to equate a 'variety' to a 'species' [23] but, rather, to refute the thesis that the specimen sent as a reference variety belonged to an isolated plant in Mr van Jaarsveld's garden and to confirm, on the contrary, the finding by the Board of Appeal, reproduced in paragraph 90 of the judgment under appeal, that, in the light of various factors such as the statements of Mr van Jaarsveld and Mrs Sadie (at the South African Ministry of Agriculture) and the description of Dr L.E. Codd, 'the cuttings sent were those of *P. ornatus* species as cultivated in South Africa'.

63. To my mind, it cannot therefore be maintained that the Court of First Instance distorted the clear sense of the contested decision.

64. The second claim is that there is a contradiction between paragraphs 80, 81 and 91, due to the alleged confusion of the concepts of 'variety' and 'species'.

65. In that regard, the question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to review on appeal. [24]

22 — Cf. paragraph 55 of the judgment under appeal.

23 — It should be noted that in paragraph 91 of the contested judgment the Court of First Instance refers to the assimilation of the reference *variety* to the South African *variety of the Plectranthus ornatus species*.

24 — See to that effect, inter alia, Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 77 and the case-law cited.

66. However, it does not appear from the paragraphs of the judgment under appeal referred to by Mr Schräder that the Court of First Instance did not take due account of the distinction between the concepts of 'variety' and 'species'. Rather, in paragraph 80 of the judgment under appeal, the Court recognised that *Plectranthus ornatus* is a species with numerous varieties and, in paragraph 91, the Court referred to the 'South African variety of the *Plectranthus ornatus* species'.

67. Furthermore, in so far as Mr Schräder contends that the Court of First Instance incorrectly implied in paragraph 91 of the judgment under appeal that Dr Codd described a variety of *Plectranthus ornatus* in his publications instead of the corresponding species, it should be noted that there is, in any event, arguably no absolute contradiction in this context inasmuch as every species – by the very nature of the concept – exists only in its different varieties and, for this reason, a detailed description of a plant species will not be easily detached from the varieties which it comprises.

68. In the light of the foregoing, it does not appear to me that the Court of First Instance misapprehended the distinction between the concepts of 'variety' and 'species' in such a way that its reasoning is contradictory or tainted by erroneous conclusions.

69. Finally, to the extent that the third claim, alleging an extension of the subject-matter of the proceedings, appears to be based on a similarly reductive reading of paragraph 91 of the judgment under appeal, it must also be rejected as unfounded.

70. It therefore seems to me that the sixth part of the first plea should be rejected.

71. It follows from all the foregoing that the first plea should be rejected in its entirety.

2. The second plea

(a) The first, second and third parts of the second plea, alleging that, in so far as it confirms that publications could be taken into account in establishing that the reference variety was a matter of common knowledge, the judgment under appeal is flawed by manifest contradictions, errors relating to the taking of evidence and infringement of Community law

(i) Main arguments

72. The first part of the second plea refers to paragraphs 96 to 100 of the judgment under appeal and concerns, once again, the distinction between botanical species and variety. According to Mr Schräder, since the Court of First Instance failed to recognise that the scientific literature contained descriptions of a botanical species, not of a variety, its reasoning is again manifestly contradictory. In that regard, he submits that paragraphs 80 and 96 of the judgment under appeal show that the Court of First Instance considers *Plectranthus ornatus* to be a species comprising several varieties and, consequently, the descriptions in the publications at issue to be descriptions of a botanical species, whereas the UPOV document TG/1/3, cited by the Court of First Instance, refers only to detailed descriptions of a plant 'variety'. Moreover, the findings of the Court in paragraph 80 of the judgment under appeal are not consistent with the scope of its examination as defined in paragraph 66 of that judgment.

73. By the second part of the second plea, Mr Schräder claims that – as is apparent also from the first part of that plea – the taking of evidence by the CPVO, the Board of Appeal and the Court of First Instance was manifestly incomplete, since no comparison was carried out between the plant characteristics as they were described in the publications taken into account and the characteristics of the candidate variety.

74. By the third part of the second plea, Mr Schräder submits that, contrary to what the Court of First Instance stated in paragraphs 97 to 99 of the judgment under appeal, under Community law a publication of a detailed description of a plant variety may not, as a matter of principle, be taken into account in establishing whether a reference variety is a matter of common knowledge. In support of this submission, Mr Schräder refers to the UPOV Conventions of 1978 and 1991, German law and patent law.

(ii) Assessment

75. Like the sixth part of the first plea, the first, second and third parts of the second

plea seek to call into question the findings on the basis of which the Court of First Instance confirmed that the Board of Appeal was entitled to hold that the reference variety was a matter of common knowledge.

76. In so far as the first part of the second plea overlaps with the sixth part of the first plea, I refer to my observations above. [25] As regards, more particularly, paragraph 98 of the judgment under appeal, it is merely stated that, according to the UPOV document TG/1/3, the publication of a detailed description is, inter alia, one of the aspects which should be taken into consideration in order to establish common knowledge. That statement was made in support of the Court of First Instance's interpretation of Article 7(2) of Regulation No 2100/94, in paragraph 99 of the judgment under appeal, according to which the publication of a detailed description may be taken into account under that provision. Even though, as the Court itself noted in paragraph 97 of the judgment under appeal, the terms of the UPOV rules themselves refer to the publication of a detailed description of a plant 'variety', that circumstance is not of itself sufficient to establish that the judgment under appeal, in accepting that the detailed descriptions contained in the works at issue could be taken into account by the Board of Appeal, is vitiated by a manifest contradiction.

77. As to the second part of the second plea, it should be recalled, first, that, in the framework of the present appeal, it is not the legality of the proceedings, or in particular the legality of the taking of evidence, before the CPVO and the Board of Appeal which may be examined but rather the legality of the proceedings before the Court of First Instance.

78. Second, in the part of the judgment against which the present complaints are directed, the Court of First Instance merely determined whether the Board of Appeal was entitled to take account of the scientific literature at issue to establish whether the reference variety was a matter of common knowledge. It cannot therefore successfully be claimed that the taking of evidence by the Court of First Instance was manifestly incomplete on the grounds that no comparison was carried out between the plant characteristics as they were described in that literature and the characteristics of the candidate variety.

79. As regards the third part of the second plea, it should be emphasised, as the Court of First Instance correctly stated in paragraph 99 of the judgment under appeal, that Article 7(2) of Regulation No 2100/94 mentions certain cases in which, 'in particular', the existence of another variety shall be deemed to be a matter of common knowledge, but that that provision contains neither an exhaustive

25 — See points 66 and 67 above.

list of the factors which can be taken into account in that regard nor any other rule limiting the taking of evidence.

80. Moreover, the fact that Article 7 of the 1991 version of the UPOV Convention, on which Mr Schräder relies in the framework of this part of the plea, does not – as opposed to the 1978 version of that convention – expressly mention the detailed description in a publication as a factor which may be taken into account does not amount to demonstrating that it would not be permissible, under that convention and by implication under Article 7(2) of Regulation No 2100/94, to use such evidence. Also, the comparisons drawn with German law and patent law cannot be conclusive as regards the interpretation of that regulation.

81. Indeed there appear to me to be no compelling reasons why there should be a general exclusion on the taking into account, for the purposes of Article 7(2) of Regulation No 2100/94, of scientific publications. To what extent a particular publication establishes, or contributes to establishing, that a given reference variety is a matter of common knowledge is an entirely different question, to be appraised in the circumstances of each case and, in particular, in view of the specific content of the publication concerned.

82. The Court of First Instance could therefore, in my view, conclude without committing an error in law that the Board of Appeal was entitled to take account of the detailed descriptions contained in the works at issue to establish whether the reference variety was a matter of common knowledge.

83. It should be observed, finally, that those publications were in any event only one of several factors which the Board of Appeal considered in establishing that the van Jaarsveld reference variety was a matter of common knowledge.

84. It follows that the first, second and third parts of the second plea should be rejected.

(b) The fourth part of the second plea, alleging that the Court of First Instance erred in relation to Mr Schräder's arguments concerning an infringement of Article 62 of Regulation No 2100/94

(i) Main arguments

85. By the fourth part of his second plea, Mr Schräder contends that the Court of First Instance was wrong to hold, in paragraph 104 of the judgment under appeal, that his thesis, referred to in paragraph 103 of that judgment, that the SUMCOL 01 variety should have been recognised by the CPVO as clearly distinct was in apparent contradiction with the thesis put forward by him that the candidate variety SUMCOL 01 and the van Jaarsveld reference variety were one and the same variety. The alleged contradiction does not exist since, if – as he argues – the plants sent by Mr van Jaarsveld belonged to the variety SUMCOL 01, there was no 'reference variety' from which SUMCOL 01 was not clearly distinct.

(ii) Assessment

86. In the first place, I would point out that in the context of the third branch of the first plea advanced before the Court of First Instance, Mr Schräder had argued, as that court noted in paragraph 103 of the judgment under appeal, that the CPVO should have held that the SUMCOL 01 variety was clearly distinct. As Mr Schräder had attempted to show, under the first branch of that plea, that the candidate variety and the variety sent by Mr van Jaarsveld were actually the same, the Court of First Instance could, without committing an error in law in that regard, state in paragraph 104 that those two theses were in apparent contradiction.

87. In the second place, the fact that Mr Schräder's arguments in the framework of the third branch of the first plea were based on an erroneous premiss was in the view of the Court of First Instance, as is apparent from paragraph 105 of the judgment under appeal, in any event already clear from a consideration of the first two branches of the first plea.

88. Thus, the complaint that the Court of First Instance wrongly held that the theses put forward by Mr Schräder were contradictory – even supposing that it were founded – cannot be effective and affect the validity of the judgment.

89. The fourth part of the second plea should consequently be rejected.

(c) The fifth part of the second plea, alleging errors in law in assessing Mrs Heine's participation in the hearing before the Board of Appeal

(i) Main arguments

90. By this part of the second plea, Mr Schräder claims that in appraising, in paragraphs 129 to 131 of the judgment under appeal, Mrs Heine's participation in the hearing before the Board of Appeal, the Court of First Instance infringed Article 60(1) and Article 15(2) of Regulation No 1239/95. First, the Court of First Instance disregarded the fact that, according to Article 60(1) of Regulation No 1239/95, the adoption of a measure of inquiry is also required with regard to the participation of a party in a hearing. Thus, even if Mrs Heine appeared in her capacity as an 'agent' of the CPVO and not as a witness or an expert, she should have been formally summoned to the hearing. Second, it was incorrect to state that Mrs Heine was an 'agent' [26] of the CPVO as she was at that time an employee of the Bundessortenamt. Third, neither the CPVO nor the Board of Appeal has substantiated their claim that Mrs Heine could, in the light of the requirements of Article 15(2) of Regulation No 1239/95, validly act on behalf of the CPVO.

(ii) Assessment

91. It should be made clear, first, that, with regard to Mr Schräder's complaint that, contrary to what the Court of First Instance stated in paragraph 130 of the judgment under appeal, Mrs Heine was an employee of the Bundessortenamt and not of the CPVO, it appears that that criticism is based on an inaccuracy in the German version of the judgment under appeal. It is, however, clear both from the French and English versions of that judgment and from a contextual reading of the passage concerned that the Court of First Instance in reality states that Mrs Heine appeared in her capacity as an 'agent' of the CPVO, and thus as its representative.

92. Second, as Mrs Heine acted at the hearing as an agent on behalf of the CPVO, which pursuant to Article 68 of Regulation

26 — In the German version of the judgment under appeal 'Bedienstete', i.e. (public sector) employee.

No 2100/94 is itself a party to the appeal proceedings, and therefore not as a party in her own right, let alone as a witness or an expert, the Court of First Instance did not infringe Article 60(1) of Regulation No 1239/95 by confirming, in paragraph 130 of the judgment under appeal, that her presence at the hearing did not require the adoption of a measure of inquiry within the meaning of that provision.

93. In that context, third, the Court of First Instance noted that the CPVO was entitled to point out that, pursuant to Article 15(2) of Regulation No 1239/95, the acts performed by Mrs Heine pursuant to the terms of the agreement between the CPVO and the Bundessortenamt concerning the technical examination are acts of the CPVO as far as third parties are concerned.

94. Mr Schräder has not substantiated his claim that the Court of First Instance committed an error in law in respect of that finding or in the application of Article 15(2) of Regulation No 1239/95, confining himself to claiming that neither the CPVO nor the Board of Appeal had established that the requirements of lawful representation of the CPVO by Mrs Heine were met.

95. It follows that the fifth part of the second plea is unfounded.

96. In my view, it should therefore be concluded that the second plea should also be rejected in its entirety.

97. On the basis of all the foregoing considerations, I consider that the appeal should be dismissed in its entirety.

VII – Costs

98. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the CPVO has applied for costs against Mr Schräder, who has been unsuccessful, Mr Schräder should be ordered to pay the costs.

VIII – Conclusion

99. For the reasons set out above, I propose that the Court should:

— (1) dismiss the appeal;

— (2) order Mr Schräder to pay the costs.