Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

18 September 2012*

(Plant varieties — Decision by the CPVO to adapt, of its own motion, the official description of the variety LEMON SYMPHONY — Application for revocation of the Community plant variety right granted for the variety LEMON SYMPHONY — Application for annulment of the Community plant variety right granted for the variety LEMON SYMPHONY — Application for a Community plant variety right for the variety SUMOST 01 — Summons to attend oral proceedings before the Board of Appeal of the CPVO — Period of notice to attend of at least one month)

In Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09,

Ralf Schräder, residing in Lüdinghausen (Germany), represented by T. Leidereiter and W.-A. Schmidt and, in Cases T-133/08 and T-134/08, by T. Henssler, lawyers,

applicant,

v

Community Plant Variety Office (CPVO), represented initially by B. Kiewiet and M. Ekvad, and subsequently by M. Ekvad, acting as Agents, assisted by A. von Mühlendahl, lawyer, and, in Case T-242/09, by A. von Mühlendahl and H. Hartwig, lawyers,

defendant,

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

Jørn Hansson, residing in Søndersø (Denmark), represented by G. Würtenberger and R. Kunze, lawyers,

In Case T-133/08, ACTION brought against the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 007/2007) concerning a challenge to the decision by the CPVO to adapt, of its own motion, the official description of the variety LEMON SYMPHONY in the Register of Community Plant Variety Rights; in Case T-134/08, ACTION brought against the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 006/2007) concerning an application for cancellation of the Community plant variety right granted for the variety LEMON SYMPHONY; in Case T-177/08, ACTION brought against the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 005/2007) concerning an application for a Community plant variety right for the variety SUMOST 01, and, in Case T-242/09, ACTION brought against the decision of the Board of Appeal of the CPVO of 23 January 2009 (Case A 010/2007), concerning an application for cancellation of the Community plant variety right granted for the variety LEMON SYMPHONY,

* Language of the cases: German.

THE GENERAL COURT (Second Chamber)

composed of N.J. Forwood (Rapporteur), President, F. Dehousse and J. Schwarcz, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written procedure and further to the hearing on 28 February 2012,

gives the following

Judgment

Legal context

1 Pursuant to Article 5(1) and (2) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) ('the regulation'):

'1. Varieties of all botanical genera and species, including, inter alia, hybrids between genera or species, may form the object of Community plant variety rights.

2. For the purpose of this Regulation, "variety" shall be taken to mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be:

— defined by the expression of the characteristics that results from a given genotype or combination of genotypes,

— distinguished from any other plant grouping by the expression of at least one of the said characteristics, and

— considered as a unit with regard to its suitability for being propagated unchanged.'

2 Under Article 6 of the regulation, Community plant variety rights are granted for varieties that are distinct, uniform, stable and new. The criteria of distinctiveness, uniformity and stability are currently expressed by the acronym DUS.

3 Pursuant to Article 7(1) of the regulation:

'A variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.'

4 The criteria of uniformity, stability and novelty are defined in Articles 8, 9 and 10 of the regulation respectively.

Background to the dispute

Administrative proceedings before the CPVO

5 On 5 September 1996, the intervener, Mr Jørn Hansson, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right pursuant to the regulation. That application was registered under number 1996/0984. The plant variety for which protection was thereby sought is the variety LEMON SYMPHONY, belonging to the species *Osteospermum ecklonis*.

6 An application to obtain a property right for that variety had already been made in 1994 in Japan by its breeder, Mr Masayuki Sekiguchi. In the 'list of characteristics of the variety', dated 18 April 1994, compiled at the time of that application, a score of 5 had been given under the heading 'Shape of the plant as a whole', corresponding to 'average'.

7 The CPVO directed the Bundessortenamt (German Federal Plant Variety Office) to conduct the technical examination of LEMON SYMPHONY pursuant to Article 55(1) of the regulation.

8 By letter of 6 November 1996, the Bundessortenamt requested the CPVO to provide it with LEMON SYMPHONY plant material to enable it to conduct the technical examination. That letter specified that that material should consist of '20 young plants of marketable quality, neither trimmed nor treated with growth regulators'.

9 The intervener sent the plant material requested to the Bundessortenamt on 10 January 1997.

10 By letter of 13 January 1997, signed by Ms Menne, the agent of the Bundessortenamt responsible for the technical examination of LEMON SYMPHONY, the Bundessortenamt informed the CPVO as follows:

'In accordance with point II(2) of the CPVO technical protocol for distinctness, uniformity and stability tests, we hereby inform you that the propagating material of the variety referred to in the subject heading which was sent to us consists of plants in bud intended for sale which have been treated with growth regulators and trimmed. Therefore, there is a risk that the technical examination will not progress satisfactorily.'

11 The technical examination was nevertheless subsequently carried out at some point in 1997, although the Bundessortenamt is not yet in a position to confirm whether it was conducted directly on the plant material sent by the intervener or on cuttings obtained from that material, as appears to be indicated by a handwritten note dated 30 January 1997 in the file, which states: 'The Bundessortenamt has taken cuttings, wait, TK 30/01/97'. In that technical examination, which was carried out on the basis of the Bundessortenamt's 'Table of Characteristics VI' of 8 August 1997, applicable at that time as the test guidelines, LEMON SYMPHONY was compared to a number of other *Osteospermum* varieties. At the end of that technical examination, the Bundessortenamt concluded that LEMON SYMPHONY fulfilled the DUS criteria necessary for entitlement to a Community plant variety right.

12 On 16 October 1997, on the basis of the same 'Table of Characteristics VI', the Bundessortenamt drafted an examination report to which the official description of LEMON SYMPHONY was attached as an annex. This shows that the characteristic 'Attitude of shoots' was expressed as 'erect' (score of 1).

13 By a decision of the CPVO of 6 April 1999, a Community plant variety right was granted for LEMON SYMPHONY and the official description of that variety was compiled by the Bundessortenamt in 1997 and reproduced in the Register of Community Plant Variety Rights.

14 On 26 November 2001, the applicant, Mr Ralf Schräder, applied to the CPVO for a Community plant variety right pursuant to the regulation. That application was registered under number 2001/1758. The plant variety for which the right was thereby sought was the variety SUMOST 01, belonging to the species *Osteospermum ecklonis*. That variety is grown and marketed by Jungpflanzen Grünewald GmbH ('Grünewald'), a company in which the applicant has a 5% shareholding.

15 Being of the view that the sale of SUMOST 01 infringed the rights which he possesses over LEMON SYMPHONY, the intervener brought an action for infringement against Grünewald before the German civil courts, seeking an order requiring Grünewald to cease marketing SUMOST 01 plus damages. After having ordered a court expert's report from the Bundessortenamt, which concluded, after a 'comparative growing trial', that SUMOST 1 could not be clearly distinguished from LEMON SYMPHONY, the Landgericht Düsseldorf (Düsseldorf Regional Court, Germany) granted those requests by a decision of 12 July 2005, confirmed on appeal by a judgment of the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, Germany) of 21 December 2006. During the compilation of that court expert's report, Grünewald submitted that the LEMON SYMPHONY plant material used in order to make the comparison did not match the plant material examined in 1997, for the purposes of the grant to that variety of the Community plant variety right. The appeal on grounds of lack of jurisdiction and on a point of law lodged by Grünewald before the Bundesgerichtshof (Federal Court of Justice, Germany) was dismissed by a judgment of that court of 23 April 2009. A review of that judgment would nevertheless be possible were the Community plant variety right for LEMON SYMPHONY to be revoked.

16 During the infringement proceedings before the German civil courts, the intervener advanced the contention that LEMON SYMPHONY had never been an erect variety. He produced, in this connection, an expert report of 21 November 2003, prepared by Dr Ludolph of the Lehr- und Versuchsanstalt für Gartenbau (horticultural testing and teaching establishment) in Hanover (Germany). In that report, the expert stated:

'The Bundessortenamt's 1997 examination defines LEMON SYMPHONY as an erect variety. According to the experience acquired and observations gathered in tests, assessments and growing trials conducted over the last few years, LEMON SYMPHONY is not a variety which grows in a completely erect way. While, when it starts growing and until approximately two months after it has been transplanted into a pot, it admittedly grows in a relatively erect way, subsequently, in the middle of the fresh-air growing period (June or July, depending on when cultivation was commenced), the numerous shoots, which are relatively flexible, have a tendency to lean to one side and may from then on be described only as semi-erect. LEMON SYMPHONY has been characterised by this attitude ever since it was originally bred. The attached photo …, which is taken from a specialised periodical dating from the year of the introduction of that variety on the market, shows a semi-erect habitus. The NAIROBI variety, included as a comparison with regard to its erect growth in the table of characteristics in the TG/176/3 examination guidelines, grows in an erect manner throughout its growing period. The attitude of NAIROBI differs markedly from that of LEMON SYMPHONY. Generally speaking, some subsequent descriptions of varieties drawn up by the Bundessortenamt, for example the SEIMORA variety, describe other SYMPHONY varieties with the same growing characteristics as LEMON SYMPHONY as semi-erect.'

17 While the infringement proceedings before the German civil courts were in progress, the CPVO directed the Bundessortenamt to carry out a technical examination of SUMOST 01 in accordance with Article 55(1) of the regulation. In that technical examination, carried out from 2001, LEMON SYMPHONY, among other plants, was used as a comparison variety. That technical examination was carried out under the new TG/176/3 guidelines for the performance of the distinctness, uniformity and stability test, laid down on 5 April 2000 by the International Union for the Protection of New Varieties of Plants (UPOV).

18 In an initial examination report on SUMOST 01 sent to the applicant on 1 August 2003, the Bundessortenamt stated that a second year of examination would be necessary, in so far as that variety had been held not to be distinct from the comparison variety LEMON SYMPHONY.

19 On 27 October 2003, the intervener lodged a written objection to the grant of a Community plant variety right for SUMOST 01, in accordance with Article 59 of the regulation.

20 On 7 October 2004, the Bundessortenamt compiled a second examination report on SUMOST 01, in which it concluded that that variety was not clearly distinguishable from the other widely-known varieties, inter alia LEMON SYMPHONY.

21 On 26 October 2004, the applicant filed an application for cancellation of the Community plant variety right granted to LEMON SYMPHONY, pursuant to Article 21 of the regulation read in conjunction with Article 9 thereof, entitled 'Stability', on the ground that, since 2002 at least, that variety no longer corresponded to its official description entered in 1997 in the Register of Community Plant Variety Rights. In support of his application he submitted, essentially, that, in the examination of LEMON SYMPHONY carried out in 2001 on the basis of the TG/176/3 test guidelines, applicable since 2001, various characteristics of that variety had received different scores in comparison with the official description of that same variety dating from 1997. That demonstrated, he submitted, that the variety at issue lacked stability.

22 On 7 December 2004, the CPVO decided to carry out a technical verification in accordance with Article 64 of the regulation, in order to check whether LEMON SYMPHONY continued to exist in the same form. The applicant and the intervener were informed of that decision on 15 December 2004. The guidelines applied for the purposes of the technical examination were those of the protocol for the distinctness, uniformity and stability test CPVO-TP/176/1, laid down on 31 October 2002 by the CPVO and itself based on the TG/176/3 test guidelines.

23 It is apparent from a letter of 5 January 2005 from the Bundessortenamt to the CPVO that, in general, various factors could be behind the variations noted in the description of the expressions of the characteristics, such as variations linked to environmental factors, a change in the scale of scores in the event of a significant change in the number of comparison varieties to be taken into consideration and changes in the scores due to the application of new test guidelines. Those explanations correspond to those given by Ms Menne, the Bundessortenamt's examiner appointed as court expert by the Landgericht Düsseldorf on 17 November 2004.

24 On 23 February 2005, the intervener filed an objection to the deletion of his variety LEMON SYMPHONY.

25 On 14 September 2005, the Bundessortenamt compiled an examination report concluding that LEMON SYMPHONY should be retained. A new description of the variety, dated the same day, was attached as an annex to that report, from which it is apparent, inter alia, that the characteristic 'Attitude of shoots' was expressed as 'semi-erect to horizontal' (score of 4).

26 On 26 September 2005, the Bundessortenamt compiled a third examination report on SUMOST 01, from which it was apparent also that that variety was not clearly distinct from LEMON SYMPHONY.

27 On 22 March 2006, the CPVO asked the Bundessortenamt whether, having regard to the amendments to the test guidelines applicable to *Osteospermum* which had taken place between 1997 and 2005, it was possible to establish, in respect of the variety LEMON SYMPHONY which had been examined in 2005, a technical description which described the expressions of the characteristics according to the guidelines applicable in 1997. By letter of 12 April 2006, the Bundessortenamt informed the CPVO that it was not possible to provide a description on the basis of the 'Table of Characteristics VI' which

it used in 1997 and referred to a document entitled 'Observations on the application for cancellation of the Community plant variety right in respect of the variety LEMON SYMPHONY, EU1996/0984', attached as an annex to its letter of 5 January 2005 mentioned in paragraph 23 above.

28 By e-mail of 18 May 2006, the Bundessortenamt stated as follows to the OCVV:

'Please find attached the photographs of LEMON SYMPHONY taken in 1997, 2003 and 2004. You can see that the attitude of the shoots has not changed.

The photo taken in 1997 was scanned from a slide, which explains why its colours and its quality are slightly different from those of the digital photos taken in 2003 and 2004. Mr Leidereiter is aware of these photos, because I used them in the legal proceedings against SUMOST 01 (2001/1758).

It is not the variety which has changed, but our scale for measuring the attitude of the shoots. That is explained in the document Haltung_Triebe. In 1997, we knew of only approximately 40 varieties of *Osteospermum* and we assessed the attitude of the shoots in accordance with those varieties. Subsequently, the number of varieties has increased considerably and we were forced to use another scale for that characteristic (that is what "Jahr 2" means).'

29 By letter of 12 June 2006, the CPVO again wrote to the Bundessortenamt as follows: 'In order to allow the [CPVO] to establish that link, we would be grateful if you could indicate, in respect of each characteristic [referred to in] the protocol on *Osteospermum* in force in 1997, what the level of expression of the variety LEMON SYMPHONY in the 2005 trial would be or what the relationship is between the observations made in accordance with the protocol adopted in 2001.'

30 On 2 August 2006, the Bundessortenamt replied to the CPVO's request of 12 June 2006 in the following terms:

'The 2005 technical examination shows that the variety is stable. That means that, taking into account the specific environmental conditions, the amended guidelines and the modified stock, the plant material produced is consistent with the description of the variety in 1997.

The decision relating to the stability of the expression of the characteristics falls within the expert's jurisdiction. An explanation for the apparent differences between the descriptions of the 1997 and 2005 varieties is included in the annex.'

31 It is apparent from the Bundessortenamt's answer of 2 August 2006 and from the comparison of the results of the technical examinations of LEMON SYMPHONY carried out in 1997 and 2005 respectively, compiled by that office and sent to the applicant on 25 August 2006, that, according to that office, the difference in the score for the characteristic 'Attitude of shoots' could be explained by the fact that there was no comparison variety in the 'Table of Characteristics VI' used by that office in 1997 and that LEMON SYMPHONY was the most erect variety during that year. Moreover, there had been a significant increase in the number of *Osteospermum ecklonis* species varieties since 1997 and the test guidelines had been partially amended, requiring the levels of expression to be adapted.

32 By letter of 25 August 2006, the CPVO proposed to the intervener to adapt the official description of LEMON SYMPHONY entered in 1997 in the Register of Community Plant Variety Rights to the new description of the variety of 14 September 2005. The CPVO took the view that such an adaptation was necessary on account, first, of the progress made in plant breeding since the examination of that variety in 1997 and, second, of the amendment of the test guidelines in 2001.

33 The intervener accepted that proposal by letter of 22 September 2006.

34 By decision of 19 February 2007 ('the refusal decision'), the CPVO upheld the objections raised by the intervener against the grant of a Community plant variety right to SUMOST 01 and refused the application for a Community plant variety right for that variety, essentially on the ground that that variety was not clearly distinguishable from LEMON SYMPHONY and that the conditions set out in Article 7 of the regulation had therefore not been met. The CPVO observed, inter alia, that it was apparent from the technical examination that SUMOST 01 differed from LEMON SYMPHONY only in one characteristic, namely the start of the flowering period, and in this by only one mark, and that that difference was too slight, in the case of the *Osteospermum* species varieties, to render it clearly distinct. Furthermore, the CPVO considered LEMON SYMPHONY to be stable.

35 On 11 April 2007, the applicant filed an application for annulment, pursuant to Article 20 of the regulation, of the Community plant variety right granted to LEMON SYMPHONY, essentially on the ground that that variety had never existed in the form reproduced in the official description entered in the Register of Community Plant Variety Rights in 1997.

36 By letter of 18 April 2007, the CPVO informed the intervener of its decision to adapt, of its own motion, the official description of LEMON SYMPHONY, in accordance with Article 87(4) of the regulation ('the decision on the adaptation of the description'). The adapted description as it followed from the 2005 technical examination was enclosed with that letter.

37 By letter of 10 May 2007 ('the decision on the application for cancellation'), the CPVO informed the applicant that the competent committee had verified whether the conditions for the application of Article 21 of the regulation were met and had reached the decision that that was not the case. As a result, it stated, no decision on the cancellation under Article 21 had been taken. According to that committee, the relevant provisions of the regulation did not provide any legal basis for the adoption of an express decision, on application or of the committee's own motion, not to declare the cancellation of the Community right.

38 By letter of 10 May 2007, the CPVO also requested the intervener to submit its comments on the application for revocation of the Community plant variety right granted to LEMON SYMPHONY, filed by the applicant. The intervener challenged that application by letter of 1 June 2007.

39 On 21 May 2007, the CPVO informed the applicant of the decision on the adaptation of the description and the replacement of the official description of LEMON SYMPHONY entered in the Register of Community Plant Variety Rights in 1997 by that of 2005.

40 By letter of 26 September 2007, the CPVO rejected the application for annulment of the Community plant variety right granted to LEMON SYMPHONY filed by the applicant under Article 20 of the regulation ('the decision on the application for annulment'). According to the CPVO, treatment with growth regulators did not necessarily affect the results of the technical examination, given that the plant material had been grown over a period allowing the effect of the treatment to wear off. In addition, according to the CPVO, the Bundessortenamt had confirmed that the examination had progressed satisfactorily.

Proceedings before the Board of Appeal of the CPVO in Cases A 005/2007, A 006/2007 and A 007/2007

41 On 10 May 2007, the applicant brought an appeal before the Board of Appeal of the CPVO, registered under number A 005/2007, against the refusal.

42 In support of that appeal he submitted, essentially, that, given the significant number of differences between the 1997 official description of LEMON SYMPHONY and the results of the outdoor growing trials carried out in respect of the candidate variety SUMOST 01 in 2001 and 2002, SUMOST 01 should be granted Community plant variety protection. In addition, the applicant sought a declaration

that LEMON SYMPHONY was no longer valid. He argued that the plant material of that variety used for the examination had been treated with a growth regulator, contrary to the provisions of the test guidelines. In his opinion, a description of a variety can, moreover, be adapted only in relation to 'relative' characteristics and not in relation to 'absolute' characteristics, such as the attitude of the plant. Lastly, he claimed that the fact that the candidate variety had been held not to be distinct was attributable to the fact that the plant material of that variety submitted for the purposes of the comparative exam was, in fact, material of his candidate variety SUMOST 01.

43 On 11 June 2007, the applicant brought an appeal before the Board of Appeal, registered under number A 006/2007, against the decision on the application for cancellation.

44 In support of that appeal he submitted, essentially, that he had the right to bring an appeal under the combined provisions of Articles 68 and 67 of the regulation, which refer expressly to decisions adopted pursuant to Article 21 of that regulation, that the CPVO's letter of 10 May 2007, mentioned in paragraph 37 above, constituted a decision by which he was refused the adoption of a decision which could have been challenged and that, as a party to the proceedings, he was entitled to a decision of the CPVO even if the latter held that there were no grounds for the cancellation of the right.

45 On 12 July 2007, the applicant brought an appeal before the Board of Appeal, registered under number A 007/2007, against the decision on the adaptation of the description.

46 In support of that appeal, he submitted essentially that he was entitled to bring an appeal under the combined provisions of Articles 68 and 67 of the regulation, that the decision of the CPVO to adapt, of its own motion, the official description of LEMON SYMPHONY was of direct and individual concern to him, that LEMON SYMPHONY was the variety which had been compared to his variety SUMOST 01 in respect of which a plant variety right was sought, that it was apparent from the technical examination that the candidate variety was not clearly distinct from the comparison variety, that the CPVO had based its assessment on the adapted description, which differed from the 1997 description in fundamental respects and that, had the assessment been based on the 1997 description, the varieties would have been held to be clearly distinct.

47 According to an e-mail sent by the Board of Appeal secretariat to its chairperson on 20 September 2007, it transpired that, after contact with the interested parties, it was possible to organise a hearing date which suited all the parties concerned in Cases A 005/2007, A 006/2007 and A 007/2007 only in the first week of December 2007.

48 By letter of 20 September 2007 sent to the Board of Appeal, in response to a telephone call during which the secretariat of the Board of Appeal had informed him of that board's intention to organise common oral proceedings, or at any rate proceedings on the same day, in Cases A 005/2007 and A 006/2007, the applicant's lawyer stated that at that time there was little point in adopting a common decision in those Cases A 005/2007 and A 006/2007, since the annulment proceedings in Case A 010/2007 were still in progress before the CPVO. He submitted that those three cases should be joined later and no decision in Cases A 005/2007 and A 006/2007 could be taken until there had been a ruling in Case A 010/2007. He also stated that the applicant was well aware that the deferral of those two cases would inevitably lead to a significant delay, having regard to the imminent change in the composition of the Board of Appeal, but that he was prepared to accept that delay.

49 On 9 October 2007, the Board of Appeal sent a fax to the parties, entitled 'Preparation for the oral proceedings concerning the SUMOST 01 appeal and the LEMON SYMPHONY appeals', in which it referred to Cases A 005/2007, A 006/2007 and A 007/2007 and alluded to 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 CPVO (OJ 1995 L 121, p. 37) ('the implementing regulation'). That fax was worded as follows:

'In accordance with Article 50 of [the implementing] regulation, the Chairperson of the Board of Appeal of the CPVO intends to summon the parties to attend oral proceedings on Tuesday 4 December 2007 … Unless the Secretariat of the Board of Appeal of the CPVO receives reasoned objections from you within ten days from the date of the present fax, it will be assumed that the proposed date is acceptable to you and the summonses will be issued accordingly.

Your attention is also drawn to Article 59(2) of [the implementing] regulation, which states that "if a party to proceedings who has duly been summoned to oral proceedings before the [CPVO] does not appear as summoned, the proceedings may continue without him."

Please reply by fax to the Secretariat of the Board of Appeal within ten days …'.

50 The lower right hand corner of that fax contained a box with the following text: 'Please date, sign and send back immediately by fax to the Secretariat of the Board of Appeal this acknowledgment of receipt.'

51 The applicant's lawyer signed and dated the acknowledgement of receipt concerned and sent it back to the Secretariat of the Board of Appeal on 9 October 2007.

52 By letter of 17 October 2007, the chairperson of the Board of Appeal wrote to the parties as follows:

'The applicant's request of 20 September 2007 for a deferral of the date of the hearing in respect of the three sets of proceedings has not been granted by the Board.

The Board takes the view that, in Case A 006 (nullity), the issue of whether the applicant is entitled to a decision of the [CPVO] which may be open to appeal and the content of which would (essentially) be "LEMON SYMPHONY is not void" calls for in-depth oral discussion in the oral proceedings. This is an issue which relates to the merits of the appeal. For the moment, the Board takes the view that the [CPVO's] letter of 10 May 2007, as a reply to the applicant's application for revocation, constitutes — in accordance with practice in Germany — a decision in the legal sense. Rejection of the appeal, that is to say, a finding that the applicant was not entitled to a negative decision, brought an end to the proceedings. Were the applicant to be successful, there is no doubt that the reply of 10 May 2007 would be interpreted as a negative decision (to direct the [CPVO] to draft such a decision again would certainly be too legalistic). Next, the Board of Appeal will examine the issue of nullity. That case has reached a stage permitting a final decision, regardless of the outcome of Case A 007 (description of the variety).

It will then be necessary to open the proceedings in Case A 005 (opposition proceedings directed against the application for the right), taking into account the nullity of LEMON SYMPHONY or its validity. That case should also have reached a stage permitting a final decision.

A summons in respect of Case A 007 (description of the variety) cannot yet be issued because the appeal fee has not yet been paid in full. Nevertheless, it would be expedient to deal with that case at the same time, given the connection between the facts in those proceedings. I must point out that the Board of Appeal will first need to examine the issue of the admissibility of the appeal. That appeal is directed against a letter sent to the owner of the Community right for LEMON SYMPHONY, a copy of which the applicant probably received from the [CPVO] for information purposes. It is doubtful whether this constitutes a "decision". Even were that to be case, as in Case A 006, it is not certain whether the applicant can influence the [CPVO's] decision by means of an appeal.

Consequently, the applicant is kindly requested to inform the Board of Appeal as soon as possible, for the purposes of the proper preparation of the proceedings by the Board and the opposing party, whether the proceedings in Case [A 007/2007] should also be opened on 4 December 2007, in which case the fees should be paid within the prescribed period.'

53 By letter dated 19 October 2007, sent to the chairperson of the Board of Appeal, the applicant's lawyer stated his objections to the oral proceedings being held on 4 December 2007. He submitted, in particular, that the information in the letter from the chairperson of the Board of Appeal of 17 October 2007 indicated that she had not yet understood the purpose of the proceedings and that she believed that they were annulment proceedings, and not revocation proceedings. He also reiterated his view that Cases A 005/2007, A 006/2007 and A 007/2007 had not reached a stage permitting a final decision, with the result that, in his opinion, it was not necessary to fix the oral proceedings for that year, and that the annulment proceedings (Case A 010/2007) took priority. Lastly, citing Article 81(2) and Article 48(3) of the regulation, he objected to information provided by the agents of the Bundessortenamt being taken into consideration since he suspected bias on the part of the latter.

54 By letter sent by registered delivery and dated 29 October 2007, receipt of which the applicant's lawyer acknowledged on 6 November 2007, the parties were officially summoned to attend oral proceedings on 4 December 2007 in Cases A 005/2007, A 006/2007 and A 007/2007.

55 On 30 October 2007, the applicant's lawyer received a summons to attend a hearing before the Landgericht Hamburg (Hamburg Regional Court, Germany) on 5 December 2007 at midday. He forwarded it immediately to the chairperson of the Board of Appeal, stating that, as the person responsible for that case, he was obliged to attend the hearing in person.

56 By e-mail of 5 November 2007 sent to the applicant's lawyer, the chairperson of the Board of Appeal responded to the objections set out by that party. Referring expressly to her letter of 17 October 2007, she indicated that she saw 'no reason to defer the oral proceedings', stating that it was 'common ground' that it was Article 21 of the regulation, and not Article 20 thereof, that was under discussion. She asked again whether it was necessary to open the proceedings in Case A 007/2007 on 4 December 2007. Were that to be the case, the chairperson of the Board of Appeal requested rapid quick payment of the fees not yet paid.

57 By e-mail of 8 November 2007 sent to the applicant's lawyer, the chairperson of the Board of Appeal stated to that party that the oral proceedings before the Board of Appeal took 'priority' over the hearing before the Landgericht Hamburg because the corresponding summons dated from 29 October 2007.

58 By letter and fax of 14 November 2007 sent to the Board of Appeal, the applicant's lawyer stated that he assumed that the summons did not relate to the proceedings in Case A 007/2007, since the Board of Appeal had requested his agreement in respect of the oral proceedings in that case and he had not given any such agreement. He repeated his objection to any use of the information from the agents of the Bundessortenamt.

59 By letter and fax of 14 November 2007 sent to the Board of Appeal, the applicant's lawyer further pointed out that, since the notice period for the summons had not been observed, the Board of Appeal could not hold the oral proceedings on 4 December 2007. He also drew attention to the consequences of a breach of Article 59(2) of the implementing regulation.

60 By e-mail of 15 November 2007, the chairperson of the Board of Appeal replied to the applicant's lawyer, stating that the summons did indeed also relate to the proceedings in Case A 007/2007.

61 By e-mail of 26 November 2007, the chairperson of the Board of Appeal informed the applicant's lawyer, inter alia, that the official summons was merely a 'confirmation of the date' and described as 'irrelevant' the fact that that party had been notified on 6 November 2007. She also asked him: 'Could you have overlooked the fact that you had already agreed to that date on 9 October 2007?'

62 By e-mail of 29 November 2007, the applicant's lawyer informed the secretariat of the Board of Appeal that neither he nor his client would be attending the oral proceedings.

63 Despite the applicant's objections, the Board of Appeal held the oral proceedings in each of the three cases A 005/2007, A 006/2007 and A 007/2007 on 4 December 2007, in the absence of the applicant, as the minutes of the hearing show. Case A 006/2007 was heard before Case A 005/2007.

64 During those proceedings, Ms Menne attended as an expert of the Bundessortenamt and agent of the CPVO. She stated, inter alia, that the LEMON SYMPHONY plant material submitted for the technical examination in 1997 had undoubtedly been treated with growth regulators, but that nevertheless no problems had arisen in that examination 'because the plants grew completely normally'. She also pointed out that, at the time of that technical examination, 'the effect of the growth regulators had worn off' and asserted that 'in the case of LEMON SYMPHONY, there [was] no uncertainty as to the quality of the trials carried out in July/August 1997'. The intervener, for his part, contended that 'growth regulators in general act for only four to six weeks', in particular in the case of *Osteospermum*.

65 By decision of 4 December 2007 (Case A 006/2007), the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the applicant against the decision on the application for revocation.

66 By decision of 4 December 2007 (Case A 005/2007), the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the applicant against the refusal decision.

67 By decision of 4 December 2007 (Case A 007/2007), the Board of Appeal dismissed as inadmissible the appeal brought by the applicant against the decision on the adaptation of the description.

68 In each of those three cases, the Board of Appeal first of all found that the summons to the oral proceedings had been sent in accordance with the proper procedure. It observed, in this respect, that, although it was true that the one-month notice period set in Article 59(1) of the implementing regulation had not been observed, the summons not having been notified to the applicant until 6 November 2007, that was of no consequence since the date of 4 December 2007 had been agreed with the applicant in accordance with that provision. According to the Board of Appeal, the applicant had already accepted, on 9 October 2007, in writing, the date proposed by the Board. Furthermore, the applicant had not made use of the possibility allowed to him to submit a written statement that he was prevented from attending that hearing, on the basis of reasoned objections and within 10 days, that is, by 19 October 2007 at the latest. The applicant had therefore been aware since that latter date that the summons would follow the agreement on that date. Furthermore, the acknowledgement of receipt of the summons of 29 October 2007, signed by the applicant on 6 November 2007, bears the handwritten phrase 'bereits not[iert]' (already noted). The reasoning behind setting a notice period for the summons, namely to ensure that the party being summoned has at least one month's preparation time, or a shorter time if that party consents to it, was therefore respected.

69 The Board of Appeal, moreover, refused the applicant's requests seeking that the date of the hearing be deferred because his lawyer had to attend a hearing before another court and a stay in the proceedings until the adoption of the decision ending the annulment proceedings (Case A 010/2007), either on the ground that the cases were not at a stage to permit a final decision or on account of the infringement proceedings pending before the German civil courts.

70 The mandate of the chairperson of the Board of Appeal expired on 16 December 2007.

Proceedings before the Board of Appeal of the CPVO in Case A 010/2007

71 On 19 October 2007, the applicant brought an appeal before the Board of Appeal, registered under number A 010/2007, against the decision on the application for annulment.

72 In support of that appeal, the applicant submitted, essentially, that the plant material on which the LEMON SYMPHONY technical examination had been carried out in 1997 was defective. He also raised the possibility that cuttings had been taken from the plants sent and that those cuttings were then used in the technical examination. In addition, he drew attention to the differences in relation to the description of LEMON SYMPHONY which had been produced in Japan (see paragraph 6 above). He sent Dr Ludolph's expert report, referred to in paragraph 16 above. He also pointed out that the varieties referred to by way of example in the test guidelines applied from 2001 had, with the exception of the variety NAIROBI, all been compared with LEMON SYMPHONY in 1997. Having regard to the statements made by Ms Menne and the intervener at the hearing on 4 December 2007 in Cases A 005/2007, A 006/2007 and A 007/2007, the applicant offered to prove, by means of an expert opinion, his claim that the repercussions of treatment with growth regulators on the examination were not limited to a duration of four to six weeks. Lastly, the applicant explained that his application for annulment was founded on the combined provisions of Article 20(1)(a) and Article 7 of the regulation. He submitted that, given that a variety cannot be regarded as distinct unless it is distinguishable by reference to the expression of the characteristics which result from a particular genotype or combination of genotypes, no distinction can be made where the expression of the characteristics found results from mechanical treatment and treatment with growth regulators.

73 After having been summoned to the hearing, the applicant objected, in a supplementary pleading of 12 January 2009, to Ms Menne's taking part in that hearing and to her statements being taken into account.

74 The applicant also repeated his offer to prove, by means of an expert opinion, that the results of the DUS examination of LEMON SYMPHONY carried out in 1997 were not explained by the genotype, but by the chemical and mechanical treatment or the fact that cuttings of the plants sent had been used. Moreover, the applicant expressly requested to be able to submit the proposed evidence.

75 The oral proceedings before the Board of Appeal in Case A 010/2007 took place on 23 January 2009.

76 By decision of 23 January 2009 (Case A 010/2007), notified to the applicant on 15 April 2009, the Board of Appeal dismissed as admissible, but unfounded, the appeal brought by the applicant against the decision on the application for annulment, after reasoning of which the following points are reproduced below:

> '4. As a ground for his appeal, the applicant has made the claim that the examination of the variety LEMON SYMPHONY carried out in 1997 was flawed on the grounds that the material examined did not meet the requirements set for the material to be provided, since it had been treated with a growth regulator and it was a plant in bud. The Bundessortenamt informed the [CPVO] that there was a risk that the reliability of the examination might be adversely affected were that material to be used, but was advised to continue with the examination and to take cuttings from the material provided. It is common practice to propagate from cuttings all the varieties used in an examination, taking the cuttings at the same time to ensure that all the material has the same physiological age. The issue of the chemical treatment is not as simple as the applicant claims. The CPVO technical protocol TP/176/1 applicable to *Osteospermum* requires that that material should not have undergone any chemical treatment unless the competent authorities had given their permission for such treatment. A similar provision existed in 1996 before [that protocol] and a [UPOV guideline existed for that variety. The applicant does not appear to take into account the fact that the 1997 examination was carried out under the framework of a protocol agreed upon between the Bundessortenamt and the [CPVO], with the result that his references to

a UPOV description are incorrect. As regards the influence of treatment with a growth regulator, it may justifiably be concluded that that did not influence the examination. The type of growth regulator used during propagation normally has no lasting effect given that the subsequent reviewing of the plant's growth requires further spraying with growth regulators. The information provided by [the intervener], to the effect that growth regulators are used only during the start-up phase and that their effects wear off after four to six weeks, is persuasive. The claim that the examination is not valid because of the use of flawed material is unfounded.

…

The applicant's assertion that all the reference varieties mentioned in the [TG/176/3 test] guidelines were known in 1997 is irrelevant, given that the description of the variety is correct so far as concerns the varieties which were known to the [CPVO] and the Bundessortenamt at the time when LEMON SYMPHONY was being examined.

…

6. The variety LEMON SYMPHONY, which was obtained from generic (sic) crossbreeding between the species *Osteospermum* and *Dimorphotheca* is, as such, unique not only by virtue of its morphological characteristics, but also by virtue of its continuous flowering period, which is longer than that of the current *Osteospermum* varieties. The Japanese report to which the file refers shows that the reference varieties used were varieties of *Dimorphotheca*. On account of the unique character of LEMON SYMPHONY, it was not possible to find, in the examination carried out by the Bundessortenamt in 1997, reference varieties with which it could have been compared.

…

7. The applicant does not claim that LEMON SYMPHONY is not distinguishable from one of the UPOV reference varieties. The applicant has not named a single variety which, at the time of the application, was indistinguishable from LEMON SYMPHONY, which is nevertheless a specific requirement of Article 20(1) of [the regulation], but he bases his appeal on his attempt to prove that the variety did not exist in its current form and that the examination was not valid on the ground that the material provided was flawed.'

77 By letter sent to the Board of Appeal on 30 March 2009, the applicant set out a series of criticisms and objections both with regard to the minutes of the hearing and with regard to the conduct of that hearing, on 23 January 2009, which, he claims, were seriously flawed. He offers, before the General Court, to produce witness evidence to prove this. That letter contains, inter alia, the following claims:

'2. Imprecise account of the alleged agreement concluded between the [CPVO] and the Bundessortenamt

(a) The account on p. 2 of the minutes, according to which the [CPVO] "subsequently" forwarded a copy of the agreement which it had concluded with the Bundessortenamt, gives a distorted and therefore inaccurate image of events. The applicant did not have the opportunity to comment on the "agreement" produced by the [CPVO] before the Board of Appeal took its decision on the participation of Ms Menne in the hearing.

In actual fact, just before the deliberations, the [CPVO] forwarded to the Board of Appeal a document without also sending that document to the applicant.

It was only during the subsequent interruption of the hearing, when the Board of Appeal had already retired to carry out its deliberations, that the applicant was provided with a copy of a document entitled "EXAMINATION OFFICE — DESIGNATION AGREEMENT". The applicant did not have any opportunity to comment on that document before the deliberations and the Board's decision.

That is why the applicant argues that there has been an infringement of his right to be heard. When, after its deliberations, the Board announced its decision that Ms Menne should participate in the hearing, it based its decision also on the fact that "'no element in the agreement concluded between the CPVO and the Bundessortenamt precluded" Ms Menne's participation in the hearing and, consequently, on the document that had been provided to it. This must be regarded as constituting a breach of Article 75 of the regulation … given that the applicant was not able to present his comments on that agreement either orally or in writing.

(b) Even the objections which the applicant subsequently made to the document "EXAMINATION OFFICE — DESIGNATION AGREEMENT" produced by the [CPVO] are not included in the minutes, even though they should be taken into account in the substantive decision:

The copy provided to the applicant bears no signature. The applicant expressly stated that the agreement, in any event, had no longer been valid since 31 December 2006 (see Article 11(1) of that agreement).

Basing his arguments on Article 11(1) of the document, the applicant also disputed the response given by the chairman of the [CPVO] during the hearing that the agreement produced was valid at the time of the examination at issue. In accordance with that clause, the agreement was only valid from, at the earliest, 1 January 2005. That fact was not referred to in the minutes either.

The statement of the chairperson of the [CPVO] that the agreement had been extended was also challenged, on account of a lack of evidence to this effect, by the applicant at the hearing, without that challenge having been reproduced in the minutes.

Lastly, no mention is made either in the minutes of the direction from the Board of Appeal to the [CPVO] that it produce a valid version of the agreement.

For the sake of completeness, I should also like to point out that the document sent to the applicant does not even designate the Bundessortenamt as the [CPVO]'s contracting party. Furthermore, Article 15(2) of the implementing regulation requires that the acts of the staff of the Examination Office are performed "in accordance [with the agreement]". Consequently, only acts which are expressly provided for by the agreement are to be considered, as far as third parties are concerned, to be acts of the [CPVO]. It is not sufficient, by contrast, for the agreement "to remain silent" regarding certain acts.

3. The information provided by Ms Menne

The minutes reproduce the information provided by Ms Menne at the hearing incompletely and imprecisely:

(a) The most serious fault in the minutes is probably the following:

During the hearing, the applicant asked Ms Menne whether the DUS examination of the variety LEMON SYMPHONY had been carried out on the plants sent by [the intervener] or on plants grown from cuttings taken from those plants. Ms Menne answered that question by stating that she could not remember and that she was therefore unable, currently, to say with certainty whether the DUS examination of the variety LEMON SYMPHONY had been carried out on the

plants sent or on the next generation of plants. However, as a result, all of Ms Menne's statements concerning the progress of the examination should be regarded as unreliable, given that it is impossible to see how she could express an opinion on an examination when she is not even aware of the subject-matter of that examination.

Ms Menne's statement that she is able to confirm that the growth regulator used on the variety LEMON SYMPHONY had no influence on the technical examination is also worthless. If Ms Menne does not remember the plants which were used for the purposes of the examination, then it is also not possible for her to establish a link between the plants and the growth regulator.

The minutes also fail to mention the fact that the Board of Appeal ruled as inadmissible the applicant's question asking Ms Menne how she explained the handwritten note in the [CPVO's] file, according to which cuttings had been taken from the plants sent.

(b) The finding on p. 4 of the minutes, according to which Ms Menne was certain as regards the fact that the influence of a growth regulator could not last more than one month, is incorrect. In actual fact, Ms Menne stated that, in her opinion, growth regulators did not produce effects on plants for more than six to eight weeks.

(c) The finding in the minutes that Ms Menne confirmed that in 1997 the variety LEMON SYMPHONY was the only known variety of that type must also be regarded as imprecise. On the contrary, Ms Menne explained that "unique character" by the fact that that variety — unlike all the varieties known previously — flowered all year without a cold period. The applicant stated in reply that that characteristic bore no relation to the external appearance of the variety. That sole characteristic does not, therefore, make it possible to establish whether the variety is distinct within the meaning of Article 7 of the regulation …

The Board of Appeal must take account of the aspects set out above in its decision.

4. The applicant's offers of evidence in his pleading of 12 January 2009

In paragraphs 48 and 49 of its observations, the [CPVO] asked the Board of Appeal to reject the offers of evidence. The minutes, however, do not contain any information as to the explanations provided by the applicant concerning his offers of evidence set out in his pleading of 12 January 2009.

The minutes do not mention the fact that, during the hearing, the applicant offered to produce supplementary evidence of his statement that treatment with growth regulators had effects at the time of the examination carried out in 1997. In that regard, the applicant suggested carrying out a new growing trial with plant material in bud, trimmed and chemically treated, and having that trial assessed by an independent expert.

5. Other imprecisions and omissions

The minutes are characterised by further imprecisions and a series of omissions which I will summarise briefly below:

(a) At the time of the decision to allow Ms Menne to participate in the remainder of the hearing, the Board of Appeal did not require that Ms Menne give her opinion "as an expert". The corresponding finding on p. 3 of the minutes is incorrect and is inconsistent with the second paragraph of p. 4 thereof, according to which, as a party to the proceedings, Ms Menne "is part of the [CPVO]". The fact that, so far as concerns the hearing of Ms Menne's evidence, the Board of Appeal did not take a decision on the evidence in accordance with Article 60(1) of the implementing regulation is also a factor which points against Ms Menne's being regarded as an expert.

(b) The remark in the minutes that the applicant puts forward (solely) the fact that the DUS examination carried out in 1997 was "unreliable" is inaccurate. On the contrary, the applicant stated that his application for annulment was based on the argument that the variety LEMON SYMPHONY defined by the description of the variety dating from 1997 was not distinct since the finding relating to the expression of the characteristics was not founded on the genotype of the plant examined.

6. Request

The applicant requests that the minutes of the hearing be corrected and that the inaccuracies, omissions and imprecisions be remedied. The substantive decision must be based on the conduct of the hearing as it is set out in the corrected minutes.'

78 By e-mail of 7 April 2009, the Board of Appeal informed the applicant that his remarks concerning the minutes of the hearing had been sent to the other parties for their information.

Procedure

79 By application lodged at the Registry of the Court of First Instance (now the General Court) on 3 April 2008, the applicant brought an action, registered under number T-133/08, against Decision A 007/2007.

80 By application lodged at the Court Registry on 4 April 2008, the applicant brought an action, registered under number T-134/08, against Decision A 006/2007.

81 By application lodged at the Court Registry on 13 May 2008, the applicant brought an action, registered under T-177/08, against Decision A 005/2007.

82 By order of 3 September 2008 of the President of the Seventh Chamber of the Court, after hearing the parties, Cases T-133/08, T-134/08 and T-177/08 were joined for the purposes of the written procedure, the oral procedure and the judgment.

83 By document lodged at the Court Registry on 25 February 2009, the applicant requested leave to submit a new plea in law, in accordance with Article 48(2) of the Court's Rules of Procedure. The written observations lodged by the CPVO on 23 January 2009 in the oral proceedings before the Board of Appeal in Case A 010/2007 were attached as an annex to that document. Following the inclusion of that document and its annex in the file, the other parties were requested to submit their written observations in response. The CPVO complied with that request by a document lodged at the Court Registry on 23 March 2009. The intervener submitted his observations in his rejoinder.

84 By measure of organisation of procedure of 22 June 2009, the Court (Seventh Chamber) requested the parties to inform it of the results of the appeal in Case A 010/2007 and of any conclusions which should be drawn from the decision of the Board of Appeal in that case, so far as concerned the next steps in the procedure in Joined Cases T-133/08, T-134/08 and T-177/08. The parties complied with that request within the periods prescribed.

85 By application lodged at the Court Registry on 24 June 2009, the applicant brought an action, registered under number T-242/09, against Decision A 010/2007.

86 By order of 15 June 2010 of the President of the Seventh Chamber of the General Court, after hearing the parties, Joined Cases T-133/08, T-134/08 and T-177/08 were joined with Case T-242/09 for the purposes of the oral procedure and the judgment.

87 Following a change in the composition of the Chambers of the Court at the beginning of the new judicial year, the Judge-Rapporteur was assigned to the Second Chamber, to which the present cases were consequently assigned.

88 On hearing the report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure, in accordance with Article 135a of the Rules of Procedure, after having found that some of the parties had submitted a reasoned application to that effect within the prescribed period.

89 The parties presented oral argument and replied to the questions put by the General Court (Second Chamber) at the hearing on 28 February 2012.

Forms of order sought

90 In Case T-133/08 the applicant claims that the Court should:

— annul Decision A 007/2007 and declare void the decision on the adaptation of the description;

— order the CPVO to pay the costs.

91 In Case T-134/08, the applicant claims that the Court should:

— annul Decision A 006/2007;

— order the CPVO to pay the costs.

92 In Case T-177/08, the applicant claims that the Court should:

— annul Decision A 005/2007;

— order the CPVO to pay the costs.

93 In Case T-242/09, the applicant claims that the Court should:

— annul Decision A 010/2007;

— order the CPVO to pay the costs.

94 Should the General Court take the view that the facts require clarification, the applicant also requests it to take, in Case T-242/09, the following measures of organisation of procedure:

— gather the evidence he has offered intended to substantiate the claim that Ms Menne, during the hearing on 23 January 2009, stated that she could no longer remember whether the technical examination of LEMON SYMPHONY had been carried out on the plants sent or on cuttings taken from those plants;

— gather the evidence which he has offered in the form of an expert opinion in order to substantiate his claim that the treatment of the plant material of the *Osteospermum* species with growth regulators and by mechanical trimming does not 'wear off' during the course of the growing examination and that it influences the results of that examination;

— in so far as the Court should consider it necessary, gather the other evidence which he has offered during the appeal proceedings and in the course of the present action.

95 The CPVO contends that the Court should:

— dismiss the action in Case T-133/08 as inadmissible in so far as it seeks the annulment of the decision on the adaptation of the description, and as unfounded as to the remainder;

— dismiss the actions in Cases T-134/08 and T-177/08 as unfounded;

— dismiss the action in Case T-242/09 as inadmissible and, in any event, as unfounded;

— order the applicant to pay the costs;

— rule that it will bear its own costs only in the event that, and in so far as, one of the forms of order sought in the actions is granted.

96 The CPVO also requests the Court to dismiss the application for measures of organisation of procedure submitted by the applicant in Case T-242/09.

97 In each of the Cases T-133/08, T-134/08, T-177/08 and T-242/09, the intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Preliminary observations on the relationships between the four joined cases and on the order in which they should be examined

98 As the applicant correctly observes in his pleadings and as he reiterated at the hearing, the first three joined cases T-133/08, T-134/08 and T-177/08 are linked by a close relationship of interdependence, and they are, moreover, linked to Case T-242/09 (proceedings for revocation of LEMON SYMPHONY) by a relationship of dependence, which justifies that latter case being examined as a priority in the present judgment. The result of that examination would be decisive for the outcome of the other three cases, in the event of the annulment of Decision A 010/2007. The next cases, in descending order of priority and dependence, are Case T-134/08 (proceedings for cancellation of LEMON SYMPHONY), then Case T-133/08 (adaptation of the description of LEMON SYMPHONY) and, lastly, Case T-177/08 (application for a Community plant variety right for SUMOST 01). Those latter three cases will, however, be examined together, in the remainder of the present judgment, since the decisions which they challenge appear to be vitiated by the same procedural irregularity and the same infringement of the rights of the defence, as will be explained in paragraph 216 et seq. below.

99 At the hearing, the applicant stated that he no longer wished to put forward the argument initially submitted in Case T-134/08 and that he now had adopted the argument, submitted in Case T-242/09, that LEMON SYMPHONY had remained stable but had not been described adequately in 1997. However, he did not formally withdraw his action in Case T-134/08, with the result that it is necessary to pursue the examination of that case.

Case T-242/09

Admissibility

100 In Decision A 010/2007, the Board of Appeal held that the applicant, as a party to the proceedings and the person to whom the decision on the application for annulment is addressed, had legal standing to bring an appeal before it.

101 The CPVO states that it does not share this view and submits that the applicant did not have standing as a party to the annulment proceedings, since he had not made an application to that end under Article 1(2) of the implementing regulation. According to the CPVO, those proceedings, initiated under Article 20 of the regulation, are theoretically proceedings in which it acts of its own motion. The CPVO considers, nevertheless, that the error of law thus committed by the Board of Appeal is of no consequence since, in its opinion, the applicant had standing to bring an appeal against the decision on the application for annulment in another capacity, namely as a person to whom that decision was of direct and individual concern.

102 That said, the CPVO and the intervener consider that the action should be dismissed as inadmissible. They submit that an application for annulment of a Community plant variety right is admissible, in the light of Article 20(1)(a) and Article 7 of the regulation, only where there are facts and evidence proving that that variety did not differ by at least one relevant characteristic in its genetic make-up from any other variety whose existence was a matter of common knowledge on the date of the application for a Community plant variety right. In the present case, however, the applicant has merely alleged procedural irregularities, which are not relevant and should therefore not be taken into consideration by the CPVO or by its Board of Appeal in the context of annulment proceedings under Article 20 of the regulation.

103 It does not, however, appear to be necessary to adopt a position on these issues since, as will be explained below, the present action must, in any event, be dismissed as unfounded. According to well-established case-law, it is for the General Court to assess whether in the circumstances of the case the proper administration of justice justifies the dismissal of the action on the merits in a case without ruling on the objection of inadmissibility raised by the defendant (Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 50 to 52, and judgment of 22 November 2007 in Case C-6/06 P *Confradía de pescadores 'San Pedro' de Bermeo and Others* v *Council*, not published in the ECR, paragraph 21).

Substance

104 In support of his action the applicant raises four pleas, alleging, respectively, infringement of the combined provisions of Articles 76 and 81 of the regulation, infringement of the combined provisions of Articles 20 and 7 of the regulation, infringement of Article 75 of the regulation and infringement of Article 63(1) and (2) of the implementing regulation.

The first plea, alleging infringement of the combined provisions of Articles 76 and 81 of the regulation

– Arguments of the parties

105 The applicant submits that there has been an infringement of the 'investigation of its own motion' principle and argues that there is a lack of consistency in the contested decision. In that regard, he claims that he is not challenging the result of the assessment of the evidence made by the Board of Appeal. He claims that the latter, rather, delivered a legally incorrect decision on the ground that it neither gathered nor assessed the evidence, but unilaterally and without verification based its decision

on the otherwise unsubstantiated arguments of the other parties to the proceedings, considered to be 'persuasive', without having regard to the relevant and reasoned objections which he had submitted or to his offers to provide evidence.

106 According to the applicant, the Board of Appeal could not, without erring in law, have concluded that the technical examination of LEMON SYMPHONY in 1997 had been properly carried out and that the CPVO had acted correctly in finding that that variety had a distinct character for the purposes of Article 7 of the regulation.

107 More specifically, the applicant submits, first, that the Board of Appeal infringed Articles 76 and 81 of the regulation by omitting to gather even a single one of the items of evidence which he had offered, even though many facts concerning the technical examination of LEMON SYMPHONY needed to be established and he himself had applied for the corresponding measures of inquiry to be undertaken.

108 In this connection, the applicant begins by observing that it is common ground that, in contrast to the Bundessortenamt's requirements, the plant material provided by the intervener in 1997 for the purposes of the technical examination consisted of plants in bud intended for sale, which had been treated with growth regulators and trimmed. It is only the effects of that treatment on the external appearance described in the description of the variety which are under discussion.

109 Next, the applicant complains that the Board of Appeal, first, did not examine the issue as to the plants on which the technical examination had been carried out. A resolution of this issue is, however, of great importance. The applicant had claimed that, were the cuttings taken in January 1997, the plants which grew from them could not, at the time when the characteristics were established in August 1997, have reached a stage of growth comparable to that of the comparison plants in growing trials which were to have been made available to the Bundessortenamt at the beginning of December 1996, and he had offered to prove his submissions by means of an expert report.

110 In this respect, the Board of Appeal's statement that 'it is common practice to propagate by means of cuttings all the varieties used in an examination, taking the cuttings at the same time to ensure that all the material has the same physiological age' is inconsistent and unsupported by evidence. The Board of Appeal has in no way proved that the 'common practice' at issue was indeed followed in the case in respect of all the varieties compared. It merely refers in this connection to 'advice' given by the CPVO to the Bundessortenamt to continue the examination by taking cuttings. Moreover, its other statements concerning the effects of the growth regulators would have been superfluous had it wished to put forward the idea that the use of cuttings had excluded any possibility of influence. In any event, the 'assumption' on which the Board of Appeal based its decision has not been proved by evidence since that body did not order any measures of inquiry designed to support that argument. It is not even substantiated by Ms Menne's statement, since at the hearing before the Board of Appeal she stated that she was no longer able to remember whether the technical examination had been carried out on the treated plants or on cuttings taken from those plants.

111 In so far as the contested decision must be interpreted as meaning that the Board of Appeal itself also believed that the 1997 technical examination had been carried out on plants which had been chemically and mechanically treated, the applicant then goes on to criticise the Board of Appeal, secondly, on the ground that it made inconsistent findings, which were unsubstantiated by evidence, concerning the alleged lack of effect of the treatment of the plants. In that regard, the applicant points out that he has always maintained that a technical examination carried out on plant material which has been chemically and mechanically treated and which, moreover, as a 'product in bud intended for sale', is at a different stage of growth to that of the other 'young plants' used for the purposes of comparison, does not provide any grounds for a finding that a variety has a distinct character in accordance with Article 7 of the regulation. In order to prove his claims, inter alia as regards the lasting effect of the growth regulators, he offered several times, and again at the hearing before the Board of Appeal, to provide expert evidence and requested that measures of inquiry to that effect to be ordered.

112 The findings made in this respect by the Board of Appeal, in paragraph 4 of the contested decision (p. 7), are not founded on the arguments submitted by the parties during the proceedings before it, but on assumptions which it itself introduced into the proceedings. They are also not apparent from the file and are not substantiated by evidence since, notwithstanding the applicant's requests, that Board did not order any measure of inquiry but chose instead to favour the arguments of Ms Menne. The statements of the Board of Appeal concerning the inapplicability of the TG/176/3 test guidelines are, furthermore, irrelevant and ultimately incorrect, as the letter of the Bundessortenamt of 6 November 1996 demonstrates. Lastly, the Board of Appeal did not take into account the indisputable fact that the plants sent by the intervener were 'products in bud intended for sale', in other words, fully developed plants about to flower, which it was not possible to compare with young plants.

113 Second, the applicant submits that the Board of Appeal failed to take into account several material items of evidence which he had put forward or assessed them in a manifestly incorrect manner.

114 In that context, the applicant points out that he has consistently disputed the contention, put forward by the CPVO, that the plants examined in 1997, as plant material of the variety LEMON SYMPHONY, were identical to those examined in 2005. In his opinion, the fact that, from 2002 onwards, it was no longer possible to describe that variety in the same way as in 1997 demonstrates the unreliability of the technical examination of that variety carried out in that year, on account of the treatment of the 1997 material. The Board of Appeal failed to examine that argument of the applicant, concluding in paragraph 5 of the contested decision (p. 8) that the LEMON SYMPHONY plants from 1997 and 2005 were identical in appearance and that it was only because of a modified guideline that the variety had had to be described differently from 2000 onwards. According to the applicant, that conclusion is irrelevant.

115 First, none of the parties disputed the applicant's argument that the plants examined in 2001 as plant material of the variety LEMON SYMPHONY were attributed, so far as concerns the characteristic 'Attitude of shoots', the level of expression 'erect to semi-erect (2)'. The TG/176/3 test guidelines had already been applied in the course of that examination year. Consequently, it is not possible logically to explain the fact that, in respect of that same characteristic, the application of that guideline did not warrant the attribution of the level of expression 'semi-erect to horizontal (5)' until 2005. Rather, a significant amendment of the description ought already to have been noted in 2001.

116 Second, the fact that it was the TG/176/3 test guidelines that referred, for the first time, to examples of varieties in respect of the characteristic 'Attitude of shoots', while the 'Table of Characteristics VI' did not, is also not such as to substantiate the contested decision. The applicant's argument that all of the varieties cited by way of example (apart from the variety NAIROBI) had already been grown in connection with the 1997 technical examination was not disputed either. Since LEMON SYMPHONY had indeed been compared with those varieties, the Board of Appeal's conclusion is irrelevant. Moreover, the applicant's argument that the ZULU variety, which, in 1997, had been compared to LEMON SYMPHONY, is an 'erect' variety, was not challenged in any way. Lastly, the new version of the CPVO technical protocol TP/176/1 dating from 2007 proves the irrelevance of the Board of Appeal's assertions. According to the applicant, had the examples used in 2001 not correctly reflected the *Osteospermum* range, they could not have been reproduced in the same form in the 2007 version.

117 Third, the Board of Appeal did not take into account the Bundessortenamt's e-mail of 22 March 2006, in which that office stated that it was unable to compile, in 2006, a description on the basis of the Table of Characteristics VI used in 1997. According to the applicant, that statement contradicts the finding of the Board of Appeal that the plants in 2005 were of an identical phenotype to that of the plants examined in 1997. He submits that, had the plants been identical in 2005, they should, under the Table of Characteristics VI, have been described in exactly the same way as in the 1997 description.

118 Fourth, the contested decision's account of the examination of LEMON SYMPHONY in Japan is inaccurate. Contrary to what the Board of Appeal maintains, that examination indisputably concerned the same variety, with the result that, according to the applicant, there ought to have been a more detailed analysis of the issue as to why the plants had been assessed differently in Japan.

119 Fifth, the Board of Appeal did not in any way take into account the expert report compiled by Dr Ludolph for the intervener, from which it was evident that LEMON SYPHONY had never been an erect variety. A correct assessment of that aspect should, according to the applicant, have led the Board of Appeal to conclude that, even from the point of view of the intervener, the technical examination of that variety in 1997 was incorrect.

120 Sixth, lastly, the contested decision does not in any way take into account the fact that, apart from the case of LEMON SYMPHONY, there has been no adaptation of the description of any other variety of *Osteospermum*.

121 The CPVO and the intervener contend that this plea is unfounded, having regard inter alia to the CPVO's discretion in the technical examination of a variety and in the use of plant material.

– Findings of the Court

122 First of all, it must be pointed out that, under Article 20(1)(a) of the regulation, the CPVO is to declare the Community plant variety right null and void 'if it is established' that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right.

123 Under Article 76 of the regulation, entitled 'Examination of the facts by the [CPVO] of its own motion', the infringement of which is claimed in the present case, the CPVO is to make investigations on the facts of its own motion in proceedings before it, 'to the extent that they come under the examination pursuant to Articles 54 and 55' of that regulation.

124 Under Article 54 of the regulation, the CPVO is to conduct a substantive examination of the application for a Community plant variety right. In that context, it is to examine, inter alia, whether the variety may be the object of a Community plant variety right pursuant to Article 5 and whether the variety is new pursuant to Article 10 of that regulation.

125 Under Article 55 of the regulation, where the CVPO has not discovered any impediment to the grant of a Community plant variety right on the basis of a preliminary examination, it is to arrange for the technical examination relating to compliance with the conditions laid down in Articles 7 to 9 (DUS criteria) to be carried out by the competent office or offices in at least one of the Member States (Examination Office or Offices).

126 It must also be noted at the outset that Article 76 of the regulation, relating to the examination of the facts by the CPVO of its own motion, is, in the strict sense, inapplicable to the proceedings before the Board of Appeal when adjudicating on an appeal against a decision of the CPVO which has refused to declare, on the application of a party, the nullity of a Community plant variety right, because such proceedings do not come within the scope of Articles 54 and 55 of the regulation.

127 In the course of such proceedings, it is not for the Board of Appeal to carry out the substantive examination provided for in Article 54 or the technical examination provided for in Article 55 of the regulation, or even to rule on the lawfulness of such an examination carried out by the CPVO in the context of an application for a Community plant variety right.

128 The task of the Board of Appeal is solely to rule, on the application of an interested party, on the lawfulness of a decision of the CPVO adopted under Article 20(1)(a) of the regulation refusing to declare the Community plant variety right null and void on the ground that it has not been 'established' by that party that the conditions set out in Article 7 or in Article 10 of that regulation were not satisfied at the time when the right was granted.

129 Since annulment proceedings were initiated not by the CPVO of its own motion, but on the application of an interested party, Articles 76 and 81 of the regulation, read in conjunction with Article 20 thereof, thereby place the onus on that party to prove that the conditions for that declaration of nullity have been met.

130 Admittedly, this arrangement with regard to the burden of proof and the taking of evidence differs appreciably from that provided for in the Community trade mark field by Article 76 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), which provides that 'in proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought'. That difference in the rules of evidence can, however, be explained by the fact that, unlike the regulation on the Community trade mark, Regulation No 2100/94 does not distinguish between absolute and relative grounds for refusal of registration.

131 Moreover, the rules implemented by the regulation are consistent with those implemented, in the field of Community designs, by Article 63(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), pursuant to which:

'In proceedings before it the Office shall examine the facts of its own motion. However, in proceedings relating to a declaration of invalidity, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.'

132 Those rules are, moreover, consistent with the general principles of law and rules of procedure applicable with regard to the burden of proof and taking of evidence, inter alia the maxim *actori incumbit onus probandi*. Attention must be drawn, in this context, to the fact that, under Article 81(1) of the regulation, the infringement of which is also alleged in this case, the CPVO, in the absence of procedural provisions in that regulation or in the implementing regulation, is to apply the 'principles of procedural law which are generally recognised in the Member States'.

133 Accordingly, the first ground of appeal must be rejected as being founded on the incorrect premise that the burden of proof lay, in the present case, on the CPVO by virtue of Articles 76 and 81 of the regulation.

134 In any event, it is not apparent from the provisions of the regulation in respect of which infringement is claimed that the proceedings before the CPVO are purely investigative in nature. In particular, the 'principle of examination of its own motion' set out, with regard to the technical examination, in the first sentence of Article 76 thereof, must be reconciled with the rule, set out in the second sentence of that article, that the CPVO is required to disregard facts or items of evidence which have not been submitted within the period set by it. It is thus a matter for the parties to the procedure before the CPVO to submit in due time the facts which they intend that that office find and appraise, adducing the evidence which they wish to see admitted in support of those facts.

135 In so far as those provisions are applicable to the appeal proceedings against a decision of the CPVO taken under Article 20 of the regulation and refusing to declare the nullity of the Community plant variety right granted to a plant variety, it is thus for the party alleging that nullity to put forward the facts and submit the evidence which, in its view, prove that the conditions for the application of Article 20 of the regulation have been met (see, by analogy, Case C-413/08 P *Lafarge* v *Commission*

[2010] ECR I-5361, paragraph 29 and the case-law cited). Where the CPVO does not agree with its analysis, the onus is on that party, at least, to provide specific and substantiated information in support of its submissions. As the case may be, the facts and evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which the Board of Appeal may conclude that the rules on the burden of proof have been satisfied (see, by analogy, *Lafarge* v *Commission*, paragraph 30 and the case-law cited). Moreover, the Board of Appeal is under the obligation to examine carefully and impartially all the relevant elements of the case concerned, ensuring compliance with the general principles of law and with the applicable rules of procedure governing the burden of proof and the taking of evidence.

136 In the present case, the applicant essentially complains that the Board of Appeal based its decision exclusively on the version of the facts put forward by the CPVO and the intervener, without gathering or assessing the evidence which he had offered and, in particular, without granting his request for the adoption of a measure of inquiry consisting, in the present case, of an expert opinion which was supposed to establish, inter alia, the effect of the growth regulators, a request which he made twice in the course of the written procedure (paragraphs 72 and 74 above) and which he had repeated at the hearing before the Board of Appeal.

137 In that regard, however, the General Court considers it appropriate to apply by analogy to the Board of Appeal of the CPVO, which is a quasi-judicial body, the Court's case-law according to which a request for the adoption of measures of inquiry made by a party cannot be accepted if that party offers no evidence whatever to justify such measures (Case 51/65 *ILFO* v *Haute Autorité* [1951-1965] ECR 87).

138 Neither in the administrative procedure before the CPVO nor during the appeal proceedings before the Board of Appeal did the applicant advance any evidence whatsoever, or the slightest information (such as an ad hoc scientific study, an extract from a specialised publication, an expert report carried out at his request or even a simple statement of a botanical or horticultural expert), capable of constituting prima facie evidence to support his contention, repeated many times but never substantiated, and disputed by all the other parties to the proceedings, including the Bundessortenamt and the competent committee of the CPVO, that chemical and mechanical treatment or the taking of cuttings such as that carried out in the present case might have distorted the results of the technical examination of LEMON SYMPHONY in 1997.

139 Moreover, while the Board of Appeal was won over, ultimately, by the arguments of the other parties to the proceedings, it did not come to that conclusion 'unilaterally and without verification' as the applicant maintains, but by relying on its own knowledge and on its own expertise in botanical matters, after having examined, inter alia, the issue of whether it was still possible to describe LEMON SYMPHONY in 2005 using the TG/176/3 test guidelines in force in 1997 and explaining the reasons why it intended to accept the CPVO's arguments rather than those of the applicant, as is apparent, inter alia, from paragraph 4 of the contested decision. The applicant does not claim any infringement of the obligation to state reasons in this respect.

140 Accordingly, the alleged infringement of the rules on the burden of proof and taking of evidence has not been proved to the requisite legal standard.

141 Rather, it must be stated that, under cover of that claim and in contrast to what he maintains, the applicant is in actual fact seeking to obtain from the General Court a fresh assessment of the relevant facts and evidence.

142 In this connection, it is therefore necessary to make a distinction depending on whether or not the findings and factual assessments made by the Board of Appeal are the result of complex assessments in the botanical or genetics field, requiring expert or specific scientific or technical knowledge.

143 If that is so, the review which, according to case-law, it is for the General Court to carry out of such findings and factual assessments is that as to manifest errors of assessment (Case T-187/06 *Schräder* v *CPVO (SUMCOL 01)* [2008] ECR II-3151, paragraphs 59 to 63, essentially confirmed on appeal by the judgment in Case C-38/09 P *Schräder* v *CPVO* [2010] ECR I-3209, paragraph 77). That is true, for example, of the assessment of the distinctive character of a variety, in the light of the criteria set out in Article 7(1) of the regulation.

144 If that is not so, on the other hand, as regards factual assessments which are not of a specific technical or scientific complexity, it is apparent from that case-law that the General Court carries out a complete or full review of legality (*SUMCOL 01*, paragraph 65, and Case C-38/09 P *Schräder* v *CPVO*, paragraph 77).

145 In the present case, the applicant first complains that the Board of Appeal did not examine the issue as to the plant material on which the technical examination was ultimately carried out, from July 1997 onwards. The examination of that purely factual issue does not require expert knowledge or specific technical knowledge and is not of a complexity such as to justify a limit to the scope of judicial review.

146 In reply to the applicant's complaint, it is, however, sufficient to point out that, when the Board of Appeal observed, in paragraph 4 of the contested decision, that 'it is common practice to propagate by means of cuttings all the varieties used in an examination, taking the cuttings at the same time to ensure that all the material has the same physiological age', it implicitly, but definitely, made the finding that that had also been the case in the present instance.

147 Not only is that finding compatible with the objective data of the case, as is apparent from the case-file, but its accuracy is also borne out both by the wording of the handwritten note of 30 January 1997, referred to in paragraph 11 above, '[t]he Bundessortenamt has taken cuttings, wait, TK 30/01/97', TK being the initials of the Bundessortenamt civil servant responsible at the time of the technical examination, and by the fact that the technical examination took place only months later, in July or August 1997. It is, furthermore, not inconsistent with the statements made by Ms Menne at the hearing before the Board of Appeal, since she merely declared that she was no longer able to remember whether the technical examination had been carried out on the plants sent by the intervener or on cuttings taken from those plants.

148 That finding also addresses the applicant's objection that, had cuttings been taken from the plants provided by the intervener in January 1997, the plants grown from those cuttings could not, when the characteristics were determined in August 1997, have reached a stage of growth comparable to that of the comparison plants on which the growing trials were conducted and which were made available to the Bundessortenamt in December 1996. Relying on its own experience, the Board of Appeal observed that the practice of taking cuttings, considered by it to be 'common practice', applies to all the varieties used in the technical examination, in order to ensure that all the material has the same physiological age.

149 That finding of fact is considered by the Board of Appeal to be well known. According to the case-law of the Court of Justice in Community trade mark proceedings, OHIM bodies are not required to prove, in their decisions, the accuracy of well-known facts. It is also the case-law of the Court that the finding, by the General Court, as to whether the facts on which the Board of Appeal of OHIM has based its decision are well known or not is a factual assessment which, save where the facts or evidence are distorted, is not subject to review by the Court of Justice on appeal (see Case C-273/05 P *OHIM* v *Celltech* [2007] ECR I-2883, paragraphs 39 and 45 and the case-law cited; see order of the Court of Justice of 3 June 2009 in Case C-394/08 P *Zipcar* v *OHIM*, not published in the ECR, paragraph 42 and the case-law cited). The General Court takes the view that it is appropriate to transpose that case-law of the Court of Justice, firstly, to the bodies of the CPVO and, secondly, to the judicial review which the General Court exercises over their decisions.

150 In the present case, the applicant merely called into question that finding made by the Board of Appeal as regards the common practice of taking cuttings, in addition to whether it occurred in the present case, without putting forward any information or evidence whatsoever to that effect. In those circumstances, and in the absence of any evidence to the contrary, that finding of a well-known fact must be confirmed.

151 The first complaint must accordingly be rejected as unfounded, and the finding of the Board of Appeal that the 1997 technical examination was carried out on cuttings taken from the plants sent by the intervener must, by contrast, be confirmed.

152 In those circumstances, there is no need to examine the applicant's second complaint, by which he criticises the Board of Appeal for having made inconsistent findings, unsupported by the evidence, concerning the alleged lack of effect, in the present case, of the treatment of the plants with growth regulators. That complaint was set out only 'in so far as the contested decision must be interpreted as meaning that the Board of Appeal itself also believed that the 1997 technical examination had been carried out on plants which had been chemically and mechanically treated', rather than on cuttings taken from those plants. It follows, however, from the foregoing that the Board of Appeal excluded that basic factual premise.

153 In any event, the findings made in that regard by the Board of Appeal for the sake of completeness, in paragraph 4 of the contested decision, are based on complex assessments of a scientific or technical nature, the judicial review of which must be restricted to a review as to manifest errors of assessment.

154 Having regard to the CPVO's wide discretion with regard to complex botanical assessments, the arguments put forward by the applicant fail to show that there was a manifest error vitiating those findings and assessments.

155 As regards, more specifically, the issue of chemical treatment, it must be observed that when the Board of Appeal, which, pursuant to Article 11(2) of the implementing regulation, consists of technical and legally qualified members, explained in paragraph 4 of the contested decision that the type of growth regulators used during propagation normally has no lasting effect given that the subsequent reviewing of the plants' growth requires further spraying with growth regulators, it based that assessment not only on the information given by the intervener, which it described as 'persuasive', according to which growth regulators are used only during the start-up phase and their effects wear off after four to six weeks, but also on the practical experience and technical expertise acquired by its members.

156 In so far as the applicant seeks to call into question that factual assessment, the onus is on him to provide specific and substantiated information proving its manifest inaccuracy in the particular circumstances of the present case.

157 The General Court points out that, at no stage in the four sets of proceedings which he initiated before the CPVO and its Board of Appeal, nor during the proceedings before the General Court, nor, it appears, during the proceedings before the Landgericht Düsseldorf, the Oberlandesgericht Düsseldorf or the Bundesgerichtshof, did the applicant produce any specific information or evidence whatsoever capable of substantiating his submissions, inter alia, as to the lasting effect of the growth regulators.

158 As regards the applicant's other arguments, by which he criticises the Board of Appeal for not having responded to his criticisms as to the unreliability of the technical examination of LEMON SYMPHONY carried out in 1997, expressed in the light of the development of the technical description of that variety since 2001, these must be rejected as irrelevant since, first, it has already been accepted that that technical examination had in any event been carried out on appropriate plant material, namely the cuttings originally taken from the plants sent to the Bundessortenamt by the intervener, and that, secondly, the applicant has not identified any other plant variety from which

LEMON SYMPHONY, even described with a 'semi-erect to horizontal' attitude of shoots, was not clearly distinguishable in 1997. That assessment is consistent with the principal arguments set out by the CPVO and the intervener in response to the second plea.

159 Accordingly, even if, as the applicant claims, the 1997 technical examination culminated in an incorrect finding as to the level of expression attributed in respect of the characteristic 'Attitude of shoots', and a level of expression different to that attributed in the Bundessortenamt's examination report of that year should have been attributed to LEMON SYMPHONY in respect of that characteristic from 1997 onwards, that would not have had any effect on the assessment of the distinctive character of that variety for the purpose of Article 7 of the regulation, since that assessment was not determined exclusively, if at all, by reference to that characteristic.

160 First, the General Court observes in this connection that the adapted 2006 description of LEMON SYMPONY differs from the original 1997 description only in respect of the single characteristic 'Attitude of shoots', the level of expression attributed to which was changed from 'erect' (see paragraph 12 above) to 'semi-erect to horizontal' (see paragraph 25 above).

161 Second, the General Court observes that the applicant has not yet proved that the effect of that amendment was that the DUS criteria had not been satisfied in 1997. It follows that, even if LEMON SYMPHONY had been described from the outset as having a level of expression 'semi-erect to horizontal' in respect of the characteristic 'Attitude of shoots', it would have obtained a Community plant variety right.

162 Admittedly, the applicant claimed, during the proceedings before the Board of Appeal, that, had the examination of SUMOST 01 been carried out using for the purposes of the comparative examination the initial description of LEMON SYMPHONY, those two varieties would have been considered to be clearly distinct (see contested decision A 007/2007, p. 2). However, that submission was expressly rejected by the Board of Appeal, which observed in the contested decision that '[t]he test procedure would not have taken a different course if the Office had not immediately adapted and registered the variety description…'. Moreover, the applicant did not specifically challenge that assessment in the present action.

163 In any event, the technical arguments put forward by the applicant cannot succeed, in the light of the technical considerations expressed in the contested decision, which are subject to a limited review, and in the light of the arguments in response submitted by the CPVO and the intervener.

164 In particular, the fact that the plant material sent by the intervener to the Bundessortenamt did not meet the requirements set by that office, in its letter of 6 November 1996, does not appear to be conclusive. That office stated that there was a risk that the technical examination might be affected, but not that it had become impossible. As the intervener correctly points out, it falls within the discretion of the competent national office to examine and decide, during the technical examination, whether the plant material sent is in fact inappropriate or whether, as in the present case, the technique of taking cuttings makes it possible for the defects initially affecting the plant material to be remedied.

165 As to the remainder, the only issue in dispute which is theoretically subject to full judicial review by the General Court is, as the applicant correctly points out, that as to whether the levels of expression which might be attributed in respect of the characteristic 'Attitude of shoots' must be determined according to relative or absolute criteria. That issue calls for linguistic rather than botanical knowledge.

166 In the course of the exercise of that review, it must nevertheless be stated that, contrary to what the applicant claims, the characteristic 'Attitude of shoots', the levels of expression of which run, according to the test guidelines, from 'erect' to 'drooping', through 'semi-erect' and 'horizontal' and

the nuances between those terms, is not, except in extreme cases, an 'absolute' characteristic which can be determined in a thoroughly objective manner using only the measurement of the angle of inclination of the shoots, but a characteristic which, by reason of the specific nature of its expression, can, depending on the case, be the subject of a relative and comparative assessment between varieties of the same species, as the Bundessortenamt's document of 18 May 2005, attached as annex A 27 to the application in Case T-177/08, clearly shows.

167 According to the Bundessortenamt, the attribution to LEMON SYMPHONY in 1997 of the level of expression 'erect' in respect of the description of the characteristic 'Attitude of shoots' follows from the comparison of that variety with the reference varieties used in the growing trials and the finding that LEMON SYMPHONY was 'the most erect' of the varieties on which trials were performed that year. Subsequently, the increase in the number of varieties of the *Osteospermum ecklonis* species and the amendment of the test guidelines led the Bundessortenamt to propose an adaptation of that description to state the level of expression as 'semi-erect to horizontal'. However, LEMON SYMPHONY remained exactly the same between 1997 and 2005. There was no material amendment of the description affecting the identity of the variety, but merely an amendment of the terms originally chosen, which does not change the identity of the variety but merely enables it to be described more accurately, in particular by delimiting it in relation to other varieties of the species.

168 The General Court takes the view that those explanations are sufficiently detailed and persuasive to resist firmly the attempted challenge to them made by the applicant in his arguments.

169 Moreover, the photographs used both before the German civil courts and in the proceedings before the CPVO (see paragraph 28 above) confirm, at least in the eyes of a lay observer, that the attitude of the shoots of LEMON SYMPHONY did not change appreciably between 1997 and 2005.

170 In the light of all the above considerations, the first plea must be rejected as in part unfounded and in part irrelevant.

The second plea, alleging infringement of the combined provisions of Articles 20 and 7 of the regulation

– Arguments of the parties

171 The applicant complains that the Board of Appeal dismissed his appeal on the sole ground, set out in paragraph 7 of the contested decision (p. 9), that he had 'not named a single variety which, at the time of the application, was indistinguishable from LEMON SYMPHONY, which is nevertheless a specific requirement of Article 20(1) of [the regulation]'. In doing so, he submits, the Board of Appeal failed to have regard to the scope of Articles 7 and 20 of the regulation.

172 Since, for the purposes of the application of Article 20(1)(a) of the regulation, it is necessary, in the applicant's view, to base a decision on the protected variety in the form defined by its official description, the plant variety right ought to be declared null and void if and in so far as the CPVO finds that the variety protected by the right was not described using expressions of characteristics resulting from the genotype of the variety, but using expressions attributable to chemical or mechanical treatment. It would then be proved that the variety initially described never existed. That, it is submitted, is precisely the case here.

173 The CPVO and the intervener contest those arguments.

– Findings of the Court

174 This plea is based on the premise that in 1997 the variety LEMON SYMPHONY 'was not described using expressions of characteristics resulting from the genotype of the variety, but using expressions attributable to chemical or mechanical treatment'.

175 Since that premise has already been rejected as factually groundless in the examination of the first plea, this plea must therefore be rejected also.

The third plea, alleging infringement of Article 75 of the regulation

– Arguments of the parties

176 The applicant claims that the Board of Appeal based its decision on grounds on which he was unable to present his comments, orally or in writing, prior to its adoption. He adds that those procedural errors were decisive in the assessment by the Board of Appeal.

177 The grounds at issue here, he argues, are those relating to the (allegedly 'common') 'practice' of using cuttings for the purposes of the comparative examination, to the alleged lack of lasting effect of the type of growth regulator used in the propagation of the LEMON SYMPHONY material for the purposes of the technical examination, to the finding that it was apparent from the Japanese report in the case-file that the reference varieties used were of the *Dimorphoteca* species and to the finding that, in 1997, the Bundessortenamt had been unable to find reference varieties with which that variety could be compared.

178 The CPVO and the intervener contest those arguments.

– Findings of the Court

179 In accordance with Article 75 of the regulation, decisions of the CPVO must be accompanied by statements of the grounds on which they are based and may 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.

180 Observation of the rights of the defence, a general principle of European Union law, compliance with which by the CPVO Article 75 of the regulation seeks to ensure, means, as a rule, that the parties to proceedings are given the opportunity to comment on the facts and documents on which a judicial decision will be based and to discuss the evidence produced and the observations made to the court as well as the pleas in law on which the court intends to base its decision. In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be able to debate the matters of fact and of law which will determine the outcome of the proceedings (see Case C-197/09 RX-II *M* v *EMEA* [2009] ECR I-12033, paragraph 41 and the case-law cited).

181 In other words, that right must be construed as meaning that it guarantees that the parties will not be confronted with a completely unexpected judicial decision. None the less, this does not mean that the judge must grant the parties the right to be heard on every point of his legal assessment before delivering his judgment (judgment of 12 May 2010 in Case T-491/08 P *Bui Van* v *Commission*, paragraph 85).

182 In respect of the ground relating to the 'common practice' of using cuttings for the purposes of the comparative examination, it has already been explained, in the examination of the first plea, that that finding is based on a well-known fact. Since the CPVO bodies are not required to prove, in their

decisions, the accuracy of such facts, the applicant's rights of defence cannot have been infringed solely by reason of such a finding, even though the issue was not the subject of discussion in writing or at the hearing before the Board of Appeal.

183 In any event, the applicant is not credible when he claims not to know of such a practice, the reality of which is acknowledged by both the CPVO and the intervener. Accordingly, both in his appeal against the decision on the application for annulment, brought before the Board of Appeal on 19 October 2007, and in his supplementary pleading of 12 January 2009, he himself had referred to the possibility that cuttings had been taken from the plants sent by the intervener and that those cuttings had then been used in the technical examination (see paragraphs 72 and 74 above).

184 As to the remainder, this plea is ineffective inasmuch as it is directed against the other grounds of the contested decision referred to by the applicant. Those other grounds were included in the Board of Appeal's assessment for the sake of completeness, as is apparent from the examination of the first plea. Consequently, even if it were to be proved, as it is alleged, that the statement of those grounds infringed the rights of the defence, that would not be such as to lead to the annulment of the contested decision.

185 The third plea must therefore be rejected as in part unfounded and in part irrelevant.

The fourth plea, alleging infringement of Article 63(1) and (2) of the implementing regulation

– Arguments of the parties

186 The applicant claims that, during the hearing on 23 January 2009 before the Board of Appeal and in the minutes of that hearing (attached as annex K 12 to the application), the rights which he derives from Article 63 of the implementing regulation were 'heavily infringed'. The minutes were not read out to any of the parties to the proceedings and consequently none of the parties approved those minutes. Furthermore, the minutes contain numerous inaccuracies. The statements of the parties to the proceedings, in particular those of Ms Menne, which were favourable to him, were not reproduced in the minutes, a fact which makes it significantly more difficult for him to assert his rights. The applicant refers, as to the remainder, to the wording of his letter to the Board of Appeal of 30 March 2009, reproduced in paragraph 77 above.

187 The CPVO and the intervener dispute those arguments.

188 The intervener having in particular contended that the minutes were indeed read out, since the chairperson of the Board of Appeal dictated them on a recording device during the hearing, the applicant replies, on the basis of the personal testimony of his lawyer, that that last statement relating to the recording of the minutes of the hearing and the reading of them to the parties is false. He offers to prove this by calling the chairperson of the Board of Appeal and the President of the CPVO as witnesses.

Findings of the Court

189 Under Article 63(1) and (2) of the implementing regulation:

'1. Minutes of oral proceedings and of the taking of evidence shall record the essentials of the oral proceedings or of the taking of evidence, the relevant statements made by the parties to proceedings, the testimony of the parties to proceedings, witnesses or experts and the result of any inspection.

2. The minutes of the testimony of a witness, expert or party to proceedings shall be read out or submitted to him so that he may examine them. It shall be noted in the minutes that this formality has been carried out and that the person who gave the testimony approved the minutes. Where his approval is not given, his objections shall be noted.'

190 Thus, the primary function of the minutes of the hearing (and of the taking of evidence which may accompany it), whether this is before the General Court or before a quasi-judicial body such as the Board of Appeal of the CPVO, is to record the 'essentials' (Article 63(1) of the implementing regulation) of the oral proceedings or of the taking of evidence. Thus, they in no way constitute a transcript of the hearing or even an exhaustive account of it, reproducing the detail of the exchange of views to which it gave rise.

191 Moreover, it is usual, before the European Union Courts, for the 'relevant' statements made by the parties to proceedings, namely those which may influence the outcome of the proceedings (such as the withdrawal of a head of claim, the calculation, in figures, of the amount of a claim, the admission of a relevant fact or the submission of a new argument or fact) to be recorded by the Registrar in the minutes of the hearing, either of his own motion or at the request of the judge or a party.

192 The applicant's various complaints must be examined in the light of these general considerations.

193 As regards, first, the complaint concerning the alleged failure to read out the minutes and, therefore, their non-approval by the parties, suffice it to note that in the present case there was no 'testimony of a witness, expert or party to proceedings' within the meaning of Article 63(2) of the implementing regulation, with the result that it was not necessary to read out the minutes or to have them approved by the 'person who gave the testimony'. The applicant's arguments based on the omission of those formal requirements must therefore be rejected as irrelevant.

194 As regards, second, the complaint concerning the alleged 'numerous inaccuracies contained in the minutes', this must be rejected from the outset since the applicant does not identify those inaccuracies. None the less, to the extent to which this complaint is indissociable from those set out in the applicant's letter of 30 March 2009 to the Board of Appeal, and repeated in the application in Case T-242/09, it will be discussed in paragraph 196 below.

195 As regards, third, the complaint concerning the omission from the minutes of the essential statements of the parties to the proceedings, in particular those of Ms Menne, which were favourable to the applicant, this must also be rejected as lacking any details whatsoever. However, in so far as the applicant means by this the statement in which Ms Menne said that she could no longer remember whether the technical examination of LEMON SYMPHONY in 1997 had been carried out on the plants sent by the intervener to the Bundessortenamt or on cuttings taken from those plants, it must also be rejected on the ground that the contested decision, while implicitly finding that the 1997 technical examination had been carried out on cuttings, had also, essentially, provided for both of the possibilities in order to conclude, in any event, that the technical examination had been conducted properly. Accordingly, Ms Menne's statement cannot be considered to be essential.

196 As regards, fourth, the complaints set out in the applicant's letter of 30 March 2009, as repeated in the application and reproduced in paragraph 77 above, it is appropriate to add the following:

— the complaint alleging the 'imprecise account of the alleged agreement concluded between the [CPVO] and the Bundessortenamt', concerning in particular Ms Menne's participation at the hearing as an internal technical expert and agent of the CPVO is irrelevant since, in the present action (unlike those in Cases T-133/08, T-134/08 and T-177/08), the applicant does not put forward any ground for annulment based on the fact of that participation;

— the complaint alleging the omission from the minutes of the 'information provided by Ms Menne' at the hearing is indissociable, so far as concerns point 3(a) of the applicant's letter of 30 March 2009, from the complaint examined in paragraph 195 above; it must, moreover, be rejected, so far as concerns point 3(b) and (c) of that letter, because of the failure to link it in any comprehensible way with the pleas and arguments in the present action;

— the complaint alleging the omission from the minutes of the 'applicant's offers of evidence' made during the hearing must be rejected for the reasons set out already in paragraphs 136 to 140 above;

— the complaint alleging 'other imprecisions and omissions' is indissociable, so far as concerns point 5(a) of the applicant's letter of 30 March 2009, from the complaint set out in the first indent above; it must also be rejected, so far as concerns point 5(b) of that letter, because of the failure to link it in any comprehensible way with the pleas and arguments in the present action.

197 The fourth ground of appeal must accordingly be dismissed as unfounded.

Substantive conclusions in Case T-242/09

198 It follows from all of the foregoing that the action in Case T-242/09 must be dismissed as unfounded, without it being necessary to rule on the requests for measures of organisation of procedure made by the applicant (see paragraph 94 above).

Cases T-133/08, T-134/08 and T-177/08

Substance of the actions

Overview of the various pleas in the actions

199 In support of his action in Case T-133/08, the applicant puts forward five pleas alleging, respectively, infringement of Article 59(2) of the implementing regulation, infringement of Article 75 of the regulation, infringement of the combined provisions of Article 71(1) and Article 68 of the regulation, infringement of Article 73 of the regulation and of Article 230 EC and, lastly, infringement of Article 48 of the regulation.

200 In support of his action in Case T-134/08, the applicant puts forward four pleas alleging, respectively, infringement of Article 59(2) of the implementing regulation, infringement of the combined provisions of Article 71(1) and Articles 21, 67 and 68 of the regulation, infringement of Article 73 of the regulation and Article 230 EC and, lastly, infringement of Article 48 of the regulation.

201 In support of his action in Case T-177/08, the applicant puts forward six pleas alleging, respectively, infringement of Article 59(2) of the implementing regulation, infringement of Article 75 of the regulation, infringement of the combined provisions of Articles 81(2) and 48 of the regulation, infringement of Article 60 of the implementing regulation, infringement of Article 62 of the regulation and, lastly, infringement of Article 48 of the regulation. The new plea which he requested to submit by document of 25 February 2009 (see paragraph 83 above) relates to the third of those pleas and will, as appropriate, be examined together with that plea.

202 It is necessary to examine as a priority the plea, common to the three actions, alleging infringement of Article 59(2) of the implementing regulation and of the right to be heard.

The plea, common to the three actions, alleging infringement of Article 59(2) of the implementing regulation and of the right to be heard

– Arguments of the parties

203 The applicant claims that the three contested decisions were adopted in breach of his right to be heard and of Article 59(2) of the implementing regulation, since the oral proceedings took place, on 4 December 2007, at a hearing to which he had not duly been summoned and which he had refused to attend for legitimate reasons.

204 According to the CPVO, the applicant cannot rely on the fact that he did not receive the summons until 6 November 2007, since the planned date of the hearing had been agreed on previously with him and he had not withdrawn his agreement, giving reasons, within the period set for that purpose in the course of the preparation of the oral proceedings.

205 The CPVO points out; first, that Article 59(1) of the implementing regulation does not preclude the Board of Appeal and the parties to the procedure agreeing on the date of the oral proceedings. That course of action is also advisable, given the large number of persons involved in the proceedings and the brevity of the minimum notice period of one month provided for in that provision.

206 The CPVO contends, second, that, as is shown by the e-mail of 20 September 2007 from the secretariat of the Board of Appeal to its chairperson, the date of the hearing had already been agreed upon at that time, with the result that the fax sent by the Board of Appeal to the parties on 9 October 2007 cannot be regarded as anything other than a written confirmation of that agreement. The period expiring on 19 October 2007, set for the parties in that fax, was not a period for the purposes of their agreement, but a period within which to submit objections to the holding of the hearing, on the basis only of reasons preventing them from attending on the date set. The applicant's letter of 19 October 2007 does not contain any argument from which such objections can be identified.

207 The CPVO contends, third, that the remarks of the chairperson of the Board of Appeal, in her letters of 17 October and 5 November 2007, concerning the payment of the fees in Case A 007/2007, do not mean that the date agreed upon had been called into question.

208 In the event that the General Court does not accept its argument that a date had already been agreed upon in October 2007, the CPVO contends, fourth, that the agreement should be understood as meaning that the parties to the proceedings had agreed on a shorter notice period within the terms of Article 59(1) of the implementing regulation.

209 In any event, the CPVO contends, fifth, that the meaning and purpose of the notice period, which are to allow the parties to take the appropriate measures with a view to their participation in the oral proceedings and to allow them sufficient preparation time, were complied with in the present case. Furthermore, the fact that the minimum notice period of one month was shortened by two days is merely 'a trifling matter' on which the applicant cannot rely in the light of the events preceding it. Such a 'ploy' should be regarded as abusive, considered against the facts which preceded the summons. Lastly, the CPVO describes the alleged procedural defect as 'insignificant' and invokes the case-law according to which an applicant has no legitimate interest in securing the annulment of a decision for a formal defect in the case where the administration is bound to issue a new, identical decision (Case 117/81 *Geist* v *Commission* [1983] ECR 2191, paragraph 7). That, it is submitted, is the position in the present case since, according to the CPVO, the Board of Appeal's finding was correct as to the substance of the case.

210 Lastly, as regards the summoning of the applicant's lawyer to attend a hearing before the Landgericht Hamburg on 5 December 2007, the CPVO points out that that summons was issued after the agreement between the parties in the present case and adds that the person concerned could have attended the hearing in Angers on 4 December and that in Hamburg on 5 December.

211 According to the intervener, the sole purpose of the notification of 9 October 2007 was to agree on a date with the parties, after the chairperson of the Board of Appeal had confirmed by telephone with their lawyers that the hearing could be planned for that specific date. The applicant did not, initially, express any objection to that notification and he therefore ought to have assumed that the hearing would take place on the date agreed. Moreover, the formal reference to Article 59(2) of the implementing regulation in the notification of 9 October 2007 shows clearly that it was to be regarded as mandatory.

212 The intervener also takes the view that the Board of Appeal was not required to take into account the objections expressed by the applicant in his letter of 19 October 2007, since these did not concern any reason preventing him from attending which related to the date of the hearing as such, but only the issue of whether the state of the proceedings warranted the holding of oral proceedings at the beginning of December. The decision on that matter, however, is a matter which comes within the Board of Appeal's discretion.

213 As regards the applicant's argument concerning the summoning of his lawyer to attend a hearing before the Landgericht Hamburg, the intervener considers this to be misplaced since the date of the hearing before the Board of Appeal had been agreed upon at an earlier date. That lawyer ought therefore to have requested that the hearing before the German court be deferred if he was unsure as to whether he would be sufficiently prepared for it because of the hearing before the Board of Appeal.

214 As regards, more specifically, the issue of the applicant's standing to bring legal proceedings in Case T-133/08, the intervener considers that this matter had been clearly addressed in the letters of the chairperson of the Board of Appeal.

215 Lastly, in his rejoinder, the intervener points out that if, as is apparent from the second sentence of Article 59(1) of the implementing regulation, it is possible to agree on a shorter notice period, the same principle should be applied *a fortiori* in regard to a hearing date set long before the one-month notice period. The setting of such a date is, moreover, in accordance with the principles underlying the requirement of a summons, that is, to guarantee the proper conduct and fairness of the proceedings.

– Findings of the Court

216 Pursuant to Article 59 of the implementing regulation:

'1. The parties to proceedings shall be summoned to oral proceedings provided for in Article 77 of the [regulation] and their attention shall be drawn to paragraph 2 hereof. At least one month's notice of the summons dispatched to the parties to proceedings shall be given unless the parties to proceedings and the [CPVO] agree on a shorter period.

2. If a party to proceedings who has duly been summoned to oral proceedings before the [CPVO] does not appear as summoned, the proceedings may continue without him.'

217 In the present case, it is not disputed either by the applicant or by the intervener, and has otherwise been expressly acknowledged by the Board of Appeal in the three contested decisions, that the minimum notice period of one month set in the second sentence of Article 59(1) of the implementing regulation was not observed, the summons for the hearing on 4 December 2007 not having been notified to the applicant until 6 November 2007.

218 Having regard to its title and its actual wording, the Board of Appeal's fax of 9 October 2007 cannot on any view be regarded as having fulfilled the function of a valid summons to the applicant within the prescribed period, all the more so because it was not drafted in the language of the case and was not notified to its addressee in accordance with the relevant provisions of Article 64 et seq. of the implementing regulation, that is to say, by registered delivery with acknowledgement of receipt. Moreover, that fax states that the Board of Appeal 'intends to' summon the parties to oral proceedings held on a particular day.

219 The only issue in dispute is thus whether the failure to comply with the minimum notice period of one month constitutes a substantive procedural defect such as to warrant the annulment of the three contested decisions.

220 In this connection, it is appropriate to start by examining the two grounds put forward by the Board of Appeal, in each of the three contested decisions, as justification for setting the date of the hearing on 4 December 2007, that is to say, within a period less than the minimum notice period of one month provided for in Article 59(1) of the implementing regulation, notwithstanding the objections set out by the applicant's lawyer in his letters of 20 September, 19 October, and 5, 14 and 29 November 2007.

221 As regards, first, the ground that the applicant accepted in writing, on 9 October 2007, the date of the hearing proposed by the Board of Appeal, it is true that, in accordance with the second sentence of Article 59(1) of the implementing regulation, the parties may agree with the CPVO on a notice period shorter than that of one month normally provided for by that provision.

222 It is also necessary that the agreement by the parties to a shorter notice period should be definite, since if this is not the case there is a risk that the principle of legal certainty will be infringed. Such an agreement should not therefore simply be assumed or inferred implicitly from a concurrence of certain unclear or ambivalent circumstances.

223 Thus, in the present case, the applicant's agreement to the date of 4 December 2007 cannot be inferred from the mere return by his lawyer of the countersigned fax of 9 October 2007, requested as an 'acknowledgement of receipt'. By definition, an acknowledgment of receipt merely proves that a document has been received. It does not in itself express any indication of the person's wishes such as may lead to an agreement between the parties.

224 In contrast to what the CPVO maintains in its pleadings, the parties' agreement on the date of 4 December 2007 also cannot be inferred from the e-mail sent by the secretariat of the Board of Appeal to its chairperson on 20 September 2007 (see paragraph 47 above; document attached as annex 11 to the statement of defence). Apart from the fact that such a letter, which is internal to the CPVO, cannot be relied on against the applicant if he contests that fact, its wording refers only to preliminary contact with the interested parties as regards setting a hearing date 'which suited all the parties concerned', which appeared to be 'possible' only in the first week of December 2007. That wording does not therefore show that there was already agreement between the parties, on 20 September 2007, as regards the future date of the hearing. Indeed, by letter of the same day to the Board of Appeal (see paragraph 48 above; annex 7 to the application in Case T-133/08), sent specifically in response to those exploratory telephone calls, the applicant's lawyer had set out

objections in principle to the holding of the hearing in Cases A 005/2007 and A 006/2007 until the CPVO had ruled also on Case A 010/2007. Those objections were repeated by letter of 19 October 2007.

225 As regards, second, the ground alleging that the applicant had not made use of the possibility allowed to him to submit a written statement that he was prevented from attending the hearing on 4 December 2007, on the basis of reasoned objections and within a 10-day period, expiring on 19 October 2007, the fax of 9 October 2007 stated: 'Unless the Secretariat of the Board of Appeal of the CPVO receives a reasoned objection from you within ten days from the date of the present fax, it is assumed that the proposed date is acceptable to you and the summonses will be issued accordingly.'

226 However, for the reasons already set out above connected with the sending of the letter of objections of 20 September 2007 (to which a response was not sent until 17 October 2007), it was not possible to make the failure of the applicant to reply to the fax of 9 October 2007 into an assumption of implied or tacit acceptance of the date referred to in that fax.

227 Moreover, the chairperson of the Board of Appeal was well aware of the applicant's reasoned opposition in principle to the holding of the hearing on 4 December 2007, as indicated in her letter of 17 October 2007 to the applicant's lawyer, which, in response to the letter of objections of 20 September 2007, informed that party that 'the applicant's request of 20 September 2007 seeking to obtain the deferral of the date of the hearing in respect of the three sets of proceedings ha[d] not been granted by the Board'.

228 Furthermore, it was also on 19 October 2007 that the applicant brought the action before the Board of Appeal against the decision on the application for annulment. That fact, which constitutes a new and important fact for the purposes of the proper conduct of the various sets of proceedings before the Board of Appeal, like the wording of the letter of the applicant's lawyer of that day to the chairperson of the Board of Appeal, setting out the reasons why he considered that the issue of nullity should be ruled upon as a priority, with the result that there would be no sense in holding a hearing in the other cases before the end of the year, is also such as to rebut the assumption that the date of 4 December 2007 had been accepted.

229 Against that background of express objection, and objection in principle, to a hearing being held solely in the first three cases, the Board of Appeal was not justified in 'assuming' that the applicant had agreed to the holding of a hearing towards the end of 2007, and still less to a shorter notice period than the minimum period of one month provided for in Article 59(1) of the implementing regulation, on the ground that he had not responded within 10 days of the fax of 9 October 2007 having been sent to him.

230 The General Court thus concludes, from the examination of the two grounds advanced by the Board of Appeal, that those grounds do not make it possible to establish to the requisite legal standard that the applicant had agreed to a shorter notice period than the minimum period of one month provided for in Article 59(1) of the implementing regulation.

231 In the absence of compliance with that minimum period of notice, it must be held that the applicant was not properly summoned to the oral proceedings before the Board of Appeal.

232 The applicant's non-attendance at that hearing did not therefore entitle the Board of Appeal to continue those proceedings in his absence. It follows from Article 59(2) of the implementing regulation that the proceedings can be continued *in absentia* only if a party who has been 'duly' summoned does not appear.

233 The plea alleging, in the three cases, infringement of that provision and of the right to be heard is therefore well founded and such as to lead to the annulment of the three contested decisions.

234 None of the arguments put forward by the CPVO and the intervener is such as to bring that conclusion into question.

235 As regards, first, the argument that the meaning and purpose of the notice period were respected in the present context, this conflicts with Article 59 of the implementing regulation, which requires a notice period of 'at least' one month. As the applicant correctly points out, the formal serving of a summons is designed to guarantee the proper conduct and fairness of the proceedings, and compliance with a minimum time interval must give the parties the opportunity to prepare appropriately for the oral proceedings. Since the Community legislature assessed the time interval necessary for that purpose as at least one month, it is not for the Board of Appeal to call into question that assessment on a case-by-case basis.

236 As regards, second, the argument that the minimum notice period had been 'shortened' only by two days, this being a 'trifling matter' giving rise to a procedural defect described as 'insignificant' by the CPVO, the reliance on which by the applicant constitutes an 'abusive ploy', this appears to be based on an assessment of the actual consequences of the infringement of that time period found in the present case.

237 However, the failure to observe that minimum notice period constitutes a material procedural defect which is such as to lead to the annulment of the three contested decisions, without it being necessary to prove, in addition, that that failure harmed the applicant. Such a material procedural defect is comparable to the infringement of an essential procedural requirement, the failure to observe which results in the nullity of the act irrespective of the actual consequences of the infringement (see, to that effect, Joined Cases C-287/95 P and C-288/95 P *Commission* v *Solvay* [2000] ECR I-2391, paragraphs 45 and 46; see Case T-223/06 P *Parliament* v *Eistrup* [2007] ECR II-1581, paragraph 59 and the case-law cited). Consequently, the case-law relied upon by the CPVO is not relevant in the present context.

238 In any event, the refusal of the applicant to appear at the hearing on 4 December 2007 cannot be regarded as constituting an abusive ploy. On the contrary, the applicant had a legitimate and well-founded reason for requesting a stay in the proceedings in the three cases at issue before the Board of Appeal until the adoption of the decision bringing to an end the annulment proceedings (Case A 010/2007).

239 With regard to the rejection of that request for a stay in the proceedings in the three cases at issue, the Board of Appeal gave the following reasons for that rejection in the decision on the application for revocation (the decision on the adaptation of the description and the refusal referring to those same reasons):

'Additional appeal proceedings are pending, in which the applicant seeks a declaration that the variety LEMON SYMPHONY is null and void, in accordance with Article 20 of [the regulation]. Since he considers that the present proceedings are contingent upon the result in those proceedings, the applicant requests, in accordance with Article 106 of the [regulation], that the present proceedings be stayed until a ruling has been made on the annulment proceedings.

That request is not justified. Article 106 of the [regulation] is clearly not applicable. It concerns cases brought before ordinary courts. However, even taking account of a general principle under which a stay in the proceedings is possible and is at the discretion of the Board of Appeal, a stay in the proceedings is out of the question in the present case. A stay in the proceedings presupposes that the present proceedings are contingent upon the ruling given in the other case. That would only be true in the present case were the appeal on the nullity of the right to be decided in the applicant's favour. Therefore, in order for the proceedings to be stayed in the present case, there must be at least a reasonable prospect of success. That is not the case here. The proceedings for a declaration of nullity

are not likely to be successful since, for the reasons set out in this decision, there is no right to request the [CPVO] to issue a decision declaring the contested Community plant variety right LEMON SYMPHONY to be null and void.'

240 As it has already been stated in paragraph 98 above, the three cases at issue here are linked to Case T-242/09 (proceedings for annulment of LEMON SYMPHONY) by a relationship of dependence, since the outcome of that case will be decisive for the outcome of the other cases.

241 Furthermore, the Board of Appeal did not, in the three contested decisions, dispute the existence of that relationship of dependence. Rather, it stated as a reason for the rejection of the request for a stay in the proceedings that the annulment proceedings had no 'reasonable prospect of success', with the result that they could not in any event favourably affect the position of the applicant in the other three cases.

242 By doing so, however, the Board of Appeal seriously prejudged the decision to be taken in those proceedings, even though they had only just begun.

243 Moreover, it prejudged incorrectly, in fact as well as in law. The ground relied upon to justify that assessment, namely, essentially, that the applicant was not entitled to request the CPVO to adopt a decision under Article 20 of the regulation, was not even upheld by the Board of Appeal (admittedly in a different composition) in Decision A 010/2007, in order to justify the rejection of the appeal brought against the decision on the application for annulment. Indeed, the Board of Appeal appears to have rejected the ground at issue as unfounded, in paragraph 1 of Decision A 010/2007, in the light of the judgment in Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana* v *CPVO - Nador Cott Protection (Nadorcott)* [2008] ECR II-31, paragraph 81 of which states that, 'under Articles 20 and 21 of the … regulation, any person may, after a plant variety right has been granted and independently of an appeal lodged before the Board of Appeal, apply to the CPVO for a declaration that the right is null and void or to have it cancelled on the ground that the conditions laid down in Articles 7 to 10 of that regulation were not complied with'.

244 The applicant thus had a legitimate and well-founded ground to object to the hearing being held on 4 December 2007. Conversely, and irrespective of the underlying reasons for her decision, the chairperson of the Board of Appeal used her powers inappropriately, if not abusively, in seeking to hold a hearing on that date notwithstanding the applicant's reasonable and well-founded objections.

245 It follows from all of the foregoing that the plea, common to Cases T-133/08, T-134/08 and T-177/08, alleging infringement of Article 59 of the implementing regulation and of the rights of the defence, is well founded.

246 The three contested decisions in Cases T-133/08, T-134/08 and T-177/08 must therefore be set aside, without there being therefore any need to rule on the other pleas and arguments in the actions.

The decision on the second part of the first head of claim in the action in Case T-133/08

247 The CPVO contends that the action in Case T-133/08 is inadmissible in so far as it seeks, by the second part of its first head of claim, the annulment of the decision on the adaptation of the description. Even had it been admissible for the applicant to bring an appeal before the Board of Appeal against that decision, which is not the case, it is not conceivable, according to the CPVO, that the General Court would annul that decision since the Board of Appeal did not rule in that regard. According to the CPVO, the Board of Appeal must have issued a decision, necessarily unlawful, in order for the decision on the adaptation of the description to be capable of being declared invalid.

248 In that connection, it must be observed that, by the second part of his first head of claim, the applicant is essentially asking the General Court to adopt the decision which the Board of Appeal of the CPVO ought to have taken, that is, a decision annulling the decision on the adaptation of the description. It must therefore be concluded that, by that part of the first head of claim, the applicant is asking for the decision of the Board of Appeal to be altered, by reason of the jurisdiction conferred on the General Court by Article 73(3) of the regulation, pursuant to which the General Court has the power both to annul and to alter Decision A 007/2007.

249 The issue of the admissibility of that second part of the first head of claim therefore arises in the same way as that of the admissibility of similar heads of claim seeking the alteration of decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) in proceedings relating to Community trade marks, by reason of the jurisdiction conferred on the General Court by Article 65(3) of Regulation No 207/2009, the wording of which is identical to that of Article 73(3) of the regulation.

250 In respect of those proceedings, the Court of Justice has held, in its judgment in Case C-263/09 P *Edwin* v *OHIM* [2011] ECR I-5853, paragraph 72, that the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take.

251 In the present case, as the CPVO has correctly observed, the Board of Appeal did not rule on the substantive issues concerning the legality of the decision on the adaptation of the description.

252 In those circumstances, it is not appropriate to uphold the part of the first head of claim in the action in Case T-133/08 seeking annulment of the decision on the adaptation of the description (see, to that effect and by analogy, *Edwin* v *OHIM*, paragraph 74, confirming the judgment in Case T-165/06 *Fiorucci* v *OHIM - Edwin (ELIO FIORUCCI)* [2009] ECR II-1375, paragraph 67).

Costs

Arguments of the parties

253 In each of the four joined cases, the CPVO asks the General Court to rule that the CPVO will bear only its own costs in the event and in so far as one of the forms of order sought in the actions is granted.

254 The applicant contends in reply that there are no grounds for that request and that there is no clear reason to refuse him the reimbursement of his costs if he is successful.

Findings of the Court

255 Pursuant to Article 87(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party bear its own costs in the case where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

256 Under Article 87(4) of the Rules of Procedure, the General Court may order an intervener to bear his own costs.

257 Under Article 136(1) of the Rules of Procedure, applicable to actions brought against the CPVO under Article 130 thereof, where an action against a decision of a Board of Appeal is successful, the General Court may order the CPVO to bear only its own costs.

258 Having regard to the twofold fact that, on one hand, the applicant has been unsuccessful in his submissions in Case T-242/09, the outcome of which was decisive for that of the other three cases, and that, on the other hand, the CPVO and the intervener have been unsuccessful in their principal submissions in those other three cases, a decision that each party is to bear its own costs will constitute a fair application of those provisions.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action brought against the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 23 January 2009 (Case A 010/2007) concerning an application for annulment of the Community plant variety right granted for the variety LEMON SYMPHONY;**

2. **Sets aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 007/2007) concerning a challenge to the decision by the CPVO to adapt, of its own motion, the official description of the variety LEMON SYMPHONY in the Register of Community Plant Variety Rights;**

3. **Dismisses the remainder of the action brought against that decision;**

4. **Sets aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 006/2007) concerning an application for revocation of the Community plant variety right granted for the variety LEMON SYMPHONY;**

5. **Sets aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 005/2007) concerning an application for the grant of a Community plant variety right for the variety SUMOST 01;**

6. **Orders each party to bear its own respective costs.**

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 18 September 2012.

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