



**CPVO**

Community Plant Variety Office

**Appeal case: A007/2007-RENV**

**DECISION  
of the Board of Appeal  
of 02.09.2016**

Concerning the appeal lodged by

**Ralf Schröder**, Karl-Leisner-Straße 15, D-59348 Lüdinghausen, Germany

Appellant

**Represented by T. Leidereiter**, Green Rights Rechtsanwaltskanzlei Leidereiter, Mönckebergstr. 10 (Barkhof), D-20095 Hamburg, Germany

versus

**Community Plant Variety Office**, 3, boulevard Maréchal Foch, CS 10121, F-49101 Angers Cedex 02, France

**represented by its President, M. Ekvad**

**Jørn Hansson**, Holmevej 36, DK-5471 Sønderød, Denmark

**Represented by G. Würtenberger**, WürtenbergerKunze Rechtsanwälte, Maximiliansplatz 12b, D-80333 Munich, Germany

Other parties to the proceedings

**Relating to the adaptation of a variety description of a plant variety right in accordance with Article 87(4) of Council Regulation (EC) No. 2100/94 of 27 July 1994**

Variety denomination: **Lemon Symphony (1996/0894)**

Species: ***Osteospermum ecklonis***.

## THE BOARD OF APPEAL OF THE CPVO

composed of S. Haukka (Chairperson), A. Pohlmann (Rapporteur) and E. Scott (Member), gives the following decision:

- 1. The appeal is dismissed.**
- 2. The Appellant shall bear the costs of the appeal proceedings.**

### I. SUMMARY OF THE FACTS

1. On 5 September 1996, Mr. Jørn Hansson (hereinafter 'the right holder') filed a Community plant variety application for the variety 'Lemon Symphony'. The right was granted on 6 April 1999.
2. Mr. Schröder (hereinafter 'the appellant') filed a Community plant variety application for the variety 'Sumost 01' on 26 November 2001.
3. On 30 July 2003, the Bundessortenamt (hereinafter 'the BSA') issued an interim report on technical examination of 'Sumost 01'. The interim report was sent to the appellant on 1 August 2003. The result of the examination was that 'Sumost 01' was not clearly distinguishable from the variety 'Lemon Symphony' and that a further examination had to be conducted in 2004.
4. On 27 October 2003, the right holder objected to the grant of the application for 'Sumost 01' under Article 59 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1) (hereinafter 'BR').
5. On 7 October 2004, the BSA issued a negative report on technical examination. The result of the report was that 'Sumost 01' was not clearly distinguishable from the variety 'Lemon Symphony'.
6. On 26 October 2004, the appellant filed an application for cancellation of the Community Plant Variety Right (hereinafter 'CPVR') 'Lemon Symphony', pursuant to Article 21 BR, with retroactive effect as from 2001. The appellant argued that the contested variety lacked stability, pursuant to Article 9 BR, since it did not correspond to its official variety description entered in 1997.
7. On 7 December 2004, the Community Plant Variety Office (hereinafter 'CPVO' or 'the Office') decided to request a technical verification, in accordance with Article 64 BR, in order to check whether 'Lemon Symphony' continued to exist in the same form as the one described in 1997. On 14 September 2005, the BSA reported to the Office that 'Lemon Symphony' should be retained as it was sufficiently uniform and stable in its essential characteristics. On 26 September 2005, the BSA reported to the Office that 'Sumost 01' was not clearly distinguishable from 'Lemon Symphony'. The second technical examination report of 26 September 2005 confirmed the findings of the first report dated 7 October 2004.
8. On 13 October 2005, the Office informed the right holder of its intention to adapt the description of 'Lemon Symphony' in order to bring it in line with the new UPOV Guidelines. The appellant learned about that Office letter when inspecting the file for 'Lemon Symphony'. On 13 January 2006, the appellant objected to the proposed adaptation of the description. On 22 March 2006, the Office sent a communication to the appellant, explaining in detail why an adaptation of the description of 'Lemon Symphony' was considered necessary.
9. On 2 August 2006, the BSA informed the Office that the 'Lemon Symphony' variety was stable. An annex was attached to the communication, explaining the differences between the descriptions of 'Lemon



Symphony' of 1997 and 2005. The letter included as an attachment a table prepared by the BSA comparing the data of 'Lemon Symphony' of the 1997 test according to the national table of characteristics of 1997 and the data of the same variety of the test in 2005 according to CPVO-TP/176/1 of 2002. In that table, the BSA explained the reasons for the differences between the two versions. In particular, as regards the different notes of the characteristic 'plant: attitude of shoots', the BSA explained that the differences were due to the fact that no example varieties were listed in the table of characteristics in 1997 and that 'Lemon Symphony' was the most upright variety in that year. Furthermore, an expanded range of varieties in the following years led to the different note in 2005. As regards the differences in the colour charts, the BSA stated that in 1997 the RHS colour chart edition of 1986 was used whereas for the test in 2005 the RHS colour chart edition of 2001 was applied. According to the BSA, the colours are very similar and belong to the same colour group. The table was sent by the Office to the appellant on 25 August 2006.

10. On 25 August 2006, the Office proposed to the right holder to adapt the description of 'Lemon Symphony'. The table mentioned above in para. 9 was again attached to that letter. The Office proposal was accepted by the right holder on 22 September 2006.
11. On 19 February 2007, the Office refused the application for the CPVR 'Sumost 01' on the ground that that variety was not clearly distinguishable from 'Lemon Symphony' and upheld the objection raised by the right holder (Office decisions R 701 and OBJ 07-023).
12. On 11 April 2007, the appellant filed an application for nullity, pursuant to Article 20 BR, of the CPVR 'Lemon Symphony'.
13. On 18 April 2007, the Office informed the right holder of its decision to adapt the description of 'Lemon Symphony' in accordance with Article 87(4) BR.
14. On 10 May 2007, the Office informed the appellant that the competent Committee of the Office had reviewed whether the conditions in Article 21 BR were met and had come to the conclusion that that was not the case. A decision to cancel 'Lemon Symphony' under Article 21 BR had therefore not been taken.
15. On 21 May 2007, the appellant was informed about the decision to adapt the description of 'Lemon Symphony'.
16. On 12 July 2007, the appellant filed an appeal against the decision to adapt the description (Case A 007/2007). The statement of grounds was filed on 20 September 2007.
17. In the appeal proceedings, the appellant requested that the oral proceedings be postponed until a later date. On 4 December 2007, the oral hearing took place without the appellant. On the same date, the Board of Appeal rejected the appeal. In the decision, the Board of Appeal held that the appellant had been summoned in due form. According to the Board, the appellant's request for postponing the oral hearing was unfounded.
18. By application lodged at the Registry of the General Court on 3 April 2008, the appellant brought an action, registered under number T-133/08, against Decision A 007/2007.
19. 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. By order of 15 June 2010, those three joined cases were also joined with Case T-242/09. The parallel cases concerned actions brought by the same appellant a) against the decision of the Board of Appeal of the Office 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' (T-134/08), b) against the decision of the Board of Appeal of the Office of 4 December 2007 (Case A 005/2007) in relation to the application for the Community plant variety right for the variety 'Sumost 01' (T-177/08), and c) against the decision of the Board of Appeal of the Office of 23 January 2009 (Case A 010/2007) in relation to the application for nullity of the Community plant variety right granted for the variety 'Lemon Symphony' (T-242/09).
20. On 18 September 2012, the General Court set aside the decision of the Board of Appeal of the Office of 4 December 2007 (Case A 007/2007) concerning a challenge to the decision by the Office to adapt, of its



own motion, the official description of the variety 'Lemon Symphony' in the Register of Community Plant Variety Rights (Joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Schröder v CPVO – Hansson*, EU:T:2012:430). The Court held that the appellant had not been properly summoned to the oral proceedings before the Board of Appeal because the necessary minimum period of notice had not been observed. The appellant's non-attendance at that hearing did not therefore entitle the Board of Appeal to continue those proceedings in his absence. The Court concluded that Article 59(2) of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ L 251, 24.9.2009, p. 3) (hereinafter 'the Implementing Regulation') and the right to be heard had been infringed which led to the annulment of the contested decision A 007/2007 (as well as of the parallel decisions A 005/2007 and A 006/2007).

21. On the other hand, in the same joint judgments of 18 September 2012, the General Court dismissed the action brought by the appellant against the decision of the Board of Appeal of the Office of 23 January 2009 (Case A 010/2007) concerning the application for nullity of the Community plant variety right granted for the variety 'Lemon Symphony' (T-242/09). The further appeal filed by the appellant against judgment T-242/09 was rejected by the Court of Justice on 21 May 2015 (C-546/12 P, *Schröder v CPVO*, EU:C:2015:332).

22. On 10 February 2016, the Registry of the Board of Appeal asked the appellant whether he wished to continue with the remaining appeals. With letter dated 22 February 2016, the appellant confirmed that he wished to maintain the appeals in the remaining three cases, including this case A 007/2007-RENV. On 23 March 2016, the Registry of the Board of Appeal proposed to hold the oral hearing in English. On 2 May 2016, the appellant confirmed in writing that he agreed to English being the language of the hearing. Following a request made by the appellant to change the date for the oral hearing, the parties were summoned on 4 May 2016 to the hearing to take place on 2 September 2016. The communication confirmed that the language of the hearing would be English. The composition of the Board of Appeal in these proceedings is different from the composition of the Board of Appeal in case A 007/2007.

23. The oral hearing took place on 2 September 2016.

24. The appellant requests

- to annul the decision of the Office to adapt the description of the plant variety right 'Lemon Symphony' according to Article 87(4) BR.

25. The main arguments of the appellant can be summarised as follows:

- The appeal is admissible. The appellant is a direct competitor of the right holder and as such individually concerned by the Office decision to adapt the description of 'Lemon Symphony'.
- The Office unlawfully altered the variety description of 'Lemon Symphony'. There are two possible reasons for explaining the differences between the notes 1 ('erect') and 4 ('semi-erect to horizontal') of the characteristic 'attitude of shoots' of 'Lemon Symphony' between 1997 and 2005. Either the BSA erroneously classified the attitude of shoots of 'Lemon Symphony' as 'erect' when it was in fact 'semi-erect to horizontal' (Alternative 1). Or the plant material of 1997 grew in fact 'erect' whereas the plant material of 2005 was 'semi-erect to horizontal' (Alternative 2).
- In both alternatives, the plant variety 'Lemon Symphony' (or the amended variety description) must be cancelled. An alteration of the description cannot be considered. It is inadmissible to alter a feature, which alters the identity of the variety (Alternative 1). Likewise, if the characteristic was originally present but altered subsequently (Alternative 2), the granted plant variety would have to be cancelled and, at best, a new plant variety right displaying the altered characteristic could be granted.
- The variety description serves not only as a point of departure and basis of the infringement procedure. Rather, it is the sole document that permits competitors and customers of the holder of the plant variety right to obtain information about the scope of the plant variety right. The variety description defines the scope of protection of the right.
- An alteration of the description would only be admissible if they are alterations of the originally selected wording and, in particular, supplements and clarifications or minor corrections to the original description which do not alter the identity of the variety as a result. The purpose of those admissible alterations is to describe the variety in a better and more complete way and to



distinguish it more clearly from other varieties. However, the alteration at issue does not belong to this group of admissible alterations.

- The explanations given by the Office are not convincing because they are contradictory and incomplete. A subsequent alteration of the feature 'attitude of shoots' could only be considered if that characteristic was relative, when it could be established when examining a variety in comparison with other varieties. However, the 'attitude of shoots' is not a relative feature. The existing states of expression 'erect', 'semi-erect' etc. have no reference to other plants. Rather, they are linked to objective criteria. Any alteration of the classification of an objective characteristic of a variety leads to an alteration to the identity of the variety.
- As regards the feature 'leaf: width', the finding that the difference in one note is not relevant because plants react to environmental influences is simply unfounded. The statement that the differences could presumably be traced back to the fact that in 1997 no example varieties had been available for this characteristic is incorrect. The width of the leaf is a quantitative characteristic that is easily determined by measurement. It is also erroneous in law that the leaf width is largely dependent on the prevailing climatic conditions in a given examination year.
- The appellant also explicitly refers to the arguments, facts and evidence submitted in the parallel proceedings Nos. A 005/2007 and A 006/2007.

26. The Office and the right holder request that the appeal be dismissed because the adaptation was covered by Article 87(4) BR.

27. In particular, the right holder argues that the adaptation has to be seen in the context of the technical verification of 'Lemon Symphony' following the nullity and cancellation applications filed by the appellant against that plant variety. The original variety description of 'Lemon Symphony' was based on a national table of characteristics, namely the so-called 'Merkmalsliste IV' of the BSA of 1997. In contrast, the technical verification of 'Lemon Symphony' according to Article 64 BR was based on a different technical protocol adopted by the Administrative Council of the Office which shows significant differences as far as the notes and characteristics are concerned. It was therefore necessary to adapt the variety description of 'Lemon Symphony' in order to safeguard the 'readability' of the variety description set up in 1997 in light of the technical protocol valid in 2005. The variety description set up in 2005 does neither substitute the plant variety description set up in 1997 nor can it be regarded as a new description of the protected variety 'Lemon Symphony'.

28. The Office is of the opinion that the documents submitted by the appellant at the oral hearing are belated and should be disregarded. It is questionable if the letter, in which the President of the Office informed the right holder of his decision to amend the variety description, is an appealable act. It is also questionable if the appellant is directly and individually concerned. According to Art. 87(4) BR, specified expressions of characteristics may be adapted. These expressions are converted to notes and, accordingly, notes of characteristics may be adapted. Differences in notes of a description can occur to some extent due to variations of environmental factors. Different notes can also be explained by a change in the range of varieties in the reference collection. A variety whose height was small in relation to existing varieties ten years ago can ten years later be considered not so small if the breeding development goes towards smaller varieties. The use of different protocols may also influence the notes in a variety description. A few characteristics of the 1997 table of characteristics disappeared or were worded differently so that direct links are no longer possible. For these reasons, it was justified to change the notes of some characteristics but there is a clear explanation in each case. The adaptation may be made if it is in the light of current principles and in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned. Since 2002/03, all varieties are tested in accordance with CPVO-TP/176/1. The Office found it therefore appropriate to update the description of 'Lemon Symphony'. This will render the description comparable with recent varieties. The Office is not obliged to update all 'old' variety descriptions of the species as claimed by the appellant. If a comparison is, for some reason, needed in relation to a variety tested under an old protocol, it may be the case that the variety description of that variety will be updated as well. Thus, there must be a specific reason for the adaptation (e.g. when a variety has passed a technical verification).



## II. REASONS

### A. ON THE ADMISSIBILITY

29. The appeal is directed against the letter of the Office dated 18 April 2007 to the right holder, in which the Office informed the right holder about its decision to adapt the description of 'Lemon Symphony' (hereinafter the 'contested decision'). The letter is a 'decision' in the meaning of Article 68 BR. The letter explicitly states that '...pursuant to Article 35.1 of Regulation 2100/94, I decided to adapt the variety description of which you will find enclosed an original copy'.
30. Decisions concerning the adaptation of a variety description are generally subject to an appeal. This follows from Article 67(1) BR, according to which an appeal shall lie from decisions of the Office which have been taken pursuant to the entering or deletion of information in the Register pursuant to Article 87 BR. This includes the adaptation of the official variety description in respect of the specified expressions of those characteristics according to Article 87(4) BR.
31. Since the contested decision was not addressed to the appellant, pursuant to Article 68 BR, he would be entitled to file an appeal only if that decision 'is of direct and individual concern' to him.
32. According to the case-law, the terms of Article 68 BR must be regarded as being identical to those of the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union (formerly Article 230(4) of the Treaty establishing the European Union). The terms 'direct and individual concern' have been specifically interpreted by the Court of Justice. Care should be taken to provide a consistent interpretation of the concept of 'direct and individual concern' in so far as the terms of the basic regulation do not prevent it (see, to that effect, judgment of 31 January 2008, T-95/06, *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*, EU:T:2008:25, para. 79 and the case-law cited therein).
33. Reference should be made to *Plaumann v Commission* in order to determine whether a person is individually concerned within the meaning of Article 68 BR. It follows that the appellant must be affected by the decision adapting the variety description by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and distinguished individually just as in the case of the person addressed (judgment of 15 July 1963, C-25/62, *Plaumann v Commission*, EU:C:1963:17, para. 107).
34. It is necessary to determine first the role and legal value of the variety description before deciding whether the appellant may be individually affected by the contested decision.
35. The positive examination report of the Examination Office includes a description of the variety (Article 57(1) BR). The decision to grant the CPVR also includes an official description of the variety (Article 62 BR). The description is entered in the Register of the CPVR (Article 87(2)(b) BR).
36. The unique nature of the plant variety right is reflected by the fact that the emphasis is on the physical material, the plants themselves, and not on the description of the variety. In other words, both the evaluation as to grant and also decisions relating to infringement of registered plant variety rights are also made by reference to the actual plants concerned. In particular, for assessing the distinctness, uniformity and stability (DUS) criteria, the plant material of the candidate plant is normally compared with control varieties from within the same species in a comparative cultivation. Variety descriptions of plant varieties do not have the same legal value as patent claims. Whereas the scope of protection of patents is assessed on the basis of the patent claim, the assessment of a plant variety is generally conducted in a trial (technical examination and technical verifications) and not on the basis of the variety description. The variety description is nothing more than a 'snapshot' of the plant variety right when that right was tested.
37. On the other hand, the description is not completely irrelevant when identifying a plant variety right. The description is one of the relevant tools when identifying the right and determining its scope of protection, for example, in infringement proceedings.



38. The subsequent adaptation of the description of an existing variety may have an impact on its scope of protection if the modified expressions of the characteristics are changed in such a manner that it affects the identity of the originally protected variety. In the case at hand, the appellant's Community plant variety application 'Sumost 01' was objected by the right holder of 'Lemon Symphony'. The Office found that 'Sumost 01' lacks distinctness because it cannot be clearly distinguished from 'Lemon Symphony'. According to the appellant, the subsequent adaptation of the description was not covered by Article 87(4) BR because the changes affected the identity of 'Lemon Symphony'.
39. Consequently, a potential link between the adaptation of the description of 'Lemon Symphony' and the fate of the appellant's application for 'Sumost 01' cannot be completely excluded from the outset. Whether or not the adaptation of the description under Article 87(4) BR *de facto* affects the appellant's rights does not have to be decided when assessing the 'individual concern' in the context of the admissibility of this appeal. The admissibility of the appeal has to be distinguished from the question whether the appeal is well-founded. In the context of admissibility, the condition of 'individual concern' laid down in Article 263(4) TFEU must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, by analogy, judgment of 31 January 2008, T-95/06, *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*, EU:T:2008:25, para. 116 and the case-law cited therein). It cannot be excluded that, as argued by the appellant, the adaptation of the description had an impact on the identity of 'Lemon Symphony' and thus affected the appellant's CPVR application 'Sumost 01'.
40. Finally, the fact that the Office discussed the possible impact of adapting the description of 'Lemon Symphony' with the appellant in an exchange of communications in 2006 (see above para. 8-9) is also an indication that the Office considered that the appellant was individually concerned by the contested decision. Active participation in the administrative procedure is a factor which may be taken into account to establish, in conjunction with other specific circumstances, whether a third party is individually concerned (see, by analogy, judgment of 4 July 2006, T-177/04, *easyJet v Commission*, EU:T:2006:187, para. 35 and the case-law cited therein).
41. Taking into account the exceptional circumstances of this case, the Board of Appeal concludes that the appellant is individually concerned by the Office decision to adapt the description of 'Lemon Symphony'.
42. The appellant is also 'directly concerned'. This requires that the contested act directly affects the legal situation of an applicant and leaves no discretion to the authorities responsible for implementing that act, such implementation being purely automatic and resulting from European Union law alone, without the application of other intermediate rules (judgment of 27 February 2014, C-132/12 P, *Stichting Woonpunt and others v Commission*, EU:C:2014:100, para. 68 and the case-law cited therein). The contested decision led directly to the adaptation of the variety description. A further implementing act was not necessary. Therefore, the contested decision directly affects the appellant.
43. The appeal, therefore, complies with the provisions of Article 67, 68, 69 BR and Article 45 of the Implementing Regulation and is, therefore, admissible.

*Admissibility of the documents submitted by the appellant at the oral hearing*

44. At the oral hearing, the appellant submitted additional documents, namely a table of characteristics ('Anlage BF 13') including the plant variety 'Nairobi' with the characteristic 'plant: attitude of shoots: erect (Note 1)', a table with a list of plant varieties, among them 'Nairobi' of 1995 and 'Zulu' of 1995 ('Anlage BF 14'), and a copy of a US-patent filed on 9 August 1996 granted for an *Osteospermum* plant named 'Cape Daisy Zulu', according to which said plant has an 'upright growth habit'.
45. The Board of Appeal finds that these documents are admissible in the present proceedings. The documents only confirm the information already given by the appellant in the appeal proceedings. Thus, already in the statement of grounds of 20 September 2007, the appellant had referred to the varieties 'Nairobi', 'Sunny Boy', 'Sirius', 'Tanga', 'White Flash' and 'Zulu' (pages 21-22 of the statement of grounds). The tables submitted by the appellant do not add anything new to the arguments already brought forward in 2007. Moreover, there are no indications that the documents were submitted by the appellant to delay the proceedings. The other parties had the opportunity to comment on the documents during the oral hearings. The documents are admissible.



*The role of Ms. Menne at the oral hearing of 2 September 2016*

46. At the hearing before the Board of Appeal, the Office confirmed that Ms. Menne, an employee of the BSA who was present at the hearing, acted in her capacity as an agent of the Office and not as a witness or expert. The appellant, who had objected to the presence and statements of Ms Menne, withdrew his objection.
47. However, for the sake of completeness, it should be noted that according to Article 68 second sentence BR, the Office is a party to the appeal proceedings. Since Ms. Menne took part in the hearing before the Board of Appeal as an agent of the Office, the obligations flowing from Articles 60(1) and 15(1) of the Implementing Regulation do not apply in her case. In particular, her presence at the hearing did not require the adoption of a measure for taking evidence within the meaning of Article 60(1) of the Implementing Regulation. Moreover, pursuant to Article 15(2) of the Implementing Regulation, the acts performed by Ms. Menne pursuant to the terms of the agreement between the Office and the BSA concerning technical examinations are to be considered acts of the Office as far as third parties are concerned (see, to that effect, judgment of 15 April 2010, C-38/09 P, *Schröder v CPVO*, EU:C:2010:196, para. 133-136).

**B. ON THE SUBSTANCE**

48. The appeal is, however, not well-founded.
49. Pursuant to Article 87(4) BR, the Office may of its own motion and upon consultation with the holder adapt the official variety description in respect of the number and type of characteristics or of the specified expressions of those characteristics, when necessary, in the light of the current principles governing the description of varieties of the taxon concerned, in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned.
50. Article 87(4) BR gives the Office discretion whether or not to adapt the variety description. The Office has to consult the right holder before adapting the description. The Office informed the right holder about the intended adaptation on 25 August 2006. On 22 September 2006, the right holder gave his consent to the proposed adaptation.
51. In 2006, the appellant and the Office exchanged communications concerning the adaptation of the description of 'Lemon Symphony'. In its letter of 22 March 2006 (see above para. 8), the Office explained in detail why the adaptation was necessary. In particular, the Office pointed out that a new Protocol for the examination of *Osteospermum* was adopted by the Administrative Council on 31 October 2002. All *Osteospermum* varieties have been examined on the basis of the new Protocol since 2003. According to the letter, it is important that all varieties examined before 2003 are comparable to new variety applications. Therefore, the official description of 'Lemon Symphony' needed to be adapted.
52. Moreover, the Office also forwarded a list prepared by the BSA to the appellant (see above para. 9) with detailed explanations of the differences between the data of the 1997 examination of 'Lemon Symphony' (conducted on the basis of the national table of characteristics) and the 2005 examination of 'Lemon Symphony' (conducted on the basis of the new Protocol mentioned in the letter of 22 March 2006).
53. It follows from the above explanations given by the Office that the Office in fact exercised the broad discretion conferred on it by Article 87(4) BR in order to find, whilst stating reasons in support thereof and taking due account of all the relevant circumstances, that it was appropriate to adapt the variety description in this specific case.
54. Furthermore, the Office made correct use of the discretion conferred on it by Article 87(4) BR. The explanations given by the Office confirm that an adaptation of the official description of 'Lemon Symphony' was in line with the purpose of Article 87(4) BR, which is to 'render the description of the variety comparable with the descriptions of other varieties of the taxon concerned'. Most characteristics included in the description are not absolute criteria but have to be assessed in relation to other comparable varieties. If the number of comparable varieties increases over the years the assessment of the relative criteria changes. In





such a situation, it is necessary to adapt the description of 'old' varieties in order to obtain a more precise comparative basis for future examinations. This was precisely the situation for *Osteospermum*.

55. The Board of Appeal has considered the arguments, facts and evidence presented by the parties in the written procedure and at the oral hearing. In particular, the Board of Appeal relies on the BSA examination reports dated 30 July 2003, 7 October 2004, 14 September 2005 and 26 September 2005 (see above para. 3, 5 and 7) and on the table prepared by the BSA comparing the data of 'Lemon Symphony' of the 1997 test according to the national table of characteristics of 1997 and the data of the same variety of the test in 2005 according to CPVO-TP/176/1 of 2002. The table was forwarded to the appellant on 25 August 2006 (see above para. 9). The Board of Appeal considers that those documents are important facts capable of confirming that the discretion granted by Article 87(4) BR to adapt the variety description of 'Lemon Symphony' was exercised correctly. The appellant has not shown that the technical examination conducted by the BSA had been erroneous.
56. The examination report for 'Lemon Symphony' of 1997 was prepared on the basis of the national table of characteristics. As of 2001, the examination of *Osteospermum* was conducted on the basis of the UPOV-Guidelines. Some characteristics of the former national table were deleted or reworded in the UPOV-Guidelines, with the result that those data could not be directly compared anymore. For example, the characteristic of the national table 'ray floret: colour of the middle stripe of lower side' (characteristic No. 16 of the 1997 table) was changed into 'ray floret: colour of the middle of lower side' under the UPOV-Guidelines (characteristic No. 17). At the same time, the number of colours was increased and the order changed.
57. The differences in one note (characteristics 'leaf: width', 'Leaf: colour of upper side', 'Inflorescence: diameter' and 'ray floret: length') are not regarded as significant because the plants react on environmental conditions. The describing characteristics for one and the same variety may change, depending on numerous factors. Plant varieties consist of living material. The characteristics of plants depend on different factors like the quality of the cutting, the application of fungicides or insecticides, the soil, the use of fertilizers, the watering of the plants, the temperature or light. In particular, in the case of *Osteospermum*, the tolerance range of the describing characteristics is relatively high since the examination is normally conducted only during one year and takes place outdoors, thus leading to more substantial variations than an examination inside a greenhouse.
58. These variations within one and the same variety are confirmed by the comparison of the data of the variety 'Lemon Symphony' for 2004 and 2005 as the BSA examination reports of 7 October 2004 and 14 September 2005 demonstrate. The characteristics 'Leaf: width', 'Inflorescence: diameter', 'Ray Floret: length' and 'Ray floret: width' varied in one note between 2004 and 2005. The characteristic 'shoot: length' varied in two notes. As regards the characteristics 'ray floret: colour of base of upper side', different RHS-colour cards were used (2004: RHS 0093C; 2005: RHS 0086B). These differences confirm that the describing characteristics of one and the same variety can vary in different years. It is impossible to prevent those variations even when selecting and examining all the characteristics in the most meticulous manner. Consequently, every description of a variety has a tolerance range which must be taken into account when assessing the stability of a variety.
59. Moreover, the difference in three notes (as regards the characteristic 'attitude of shoots') can be explained in that way that no example varieties for this characteristic had been developed in 1997. This characteristic could only be assessed in relation to other varieties. 'Lemon Symphony' was the most upright variety in 1997. The appellant claims that the plant variety right 'Zulu' had also an upright position of the shoots. However, the excerpt of the US patent submitted by the appellant does not prove this. The characteristic 'upright growth habit' mentioned in the patent excerpt is not the same as 'attitude of shoots'. Moreover, US patent applications follow different methods than the examination of Community plant variety rights. In the case of a US patent application, it is the inventor who describes the characteristics, and there is no standardised growing trial involving comparison with other varieties. It is therefore impossible to know whether the characteristics and method of assessment mentioned in the US patent excerpt for 'Zulu' correspond to the characteristics of the actual plant material as they would be assessed in the UPOV growing trial.
60. Only when the UPOV-Guidelines were introduced, it was possible to assess this characteristic with example varieties. In general, it is difficult to assess the characteristic 'attitude of shoots' because there are shoots



which grow more horizontal or erect and other shoots of the same plant which grow semi-erect. Furthermore, the tolerance range of this characteristic is considerable when assessing it over the years (see above para. 57). Finally, as explained by the Office, an expanded range of varieties and variations between 1997 and 2005 led to the different note. This made the use of another scale for this characteristic necessary. In other words, not the variety has changed but the scale to judge the attitude of the shoots.

61. As regards the differences in the RHS colour chart (concerning the characteristics 'ray floret: colour of margin of upper side' [1997: RHS 014C; 2005: RHS 013B], 'ray floret: colour of middle of upper side' [1997: RHS 014C; 2005: RHS 013B] and 'ray floret: colour of base of upper side' [1997: RHS 086C; 2005: RHS 086B]), one has to bear in mind that the colour cards are tools to describe colours more accurately than just with words. There exist colour cards, each containing closely related colours, which are so similar that they can hardly be distinguished. Moreover, the texture of a colour card is different from the texture of plant material which makes it more difficult to find the identical corresponding colour with the help of a colour card. Consequently, it is particularly difficult to accurately describe colours. The result of this assessment can differ over the years, even with one and the same variety (see above para. 57). Furthermore, in 1997, the RHS colour chart edition of 1986 was used whereas for the test in 2005 the RHS colour chart edition of 2001 was used. The colour charts RHS 013 and RHS 014 were not modified in the new edition. Both colours are very similar and belong to the same colour group. The colour chart RHS 086 was slightly modified between 1986 and 2001. Nevertheless, the colours are very similar and belong to the same colour group. The different colour descriptions (concerning the characteristic 'Ray floret: colour of middle of lower side' [1997: yellow; 2005: yellow brown]) are due to the expanded range of varieties and the fact that there were varieties in 2005 which show a higher proportion of yellow than 'Lemon Symphony'. The difference of the note 2 (1997) and note 7 (2005) with regard to the characteristic 'Ray floret: colour of middle of lower side' is not to be seen in a quantitative way: Under the national table of characteristics used in 1997, the note 7 was given to the colour 'violet blue'.
62. The difference of two notes concerning the characteristic 'time of beginning of flowering', the change of expression is due to the expanded range of varieties and the reaction to the environmental conditions (see above para. 57-58).
63. In conclusion, the Board of Appeal finds that variations in the descriptions of characteristics are due to a number of factors, in particular, environmental conditions, changes in the scale of notes because of an increased number of varieties or because the Guidelines changed. Quantitative characteristics depend very much on the environmental conditions. These variations are more significant for plants which are cultivated outdoors (like *Osteospermum*). In the case of *Osteospermum*, the number of varieties increased substantially between 1997 and 2005. This led to a higher number of variations within the same species and, consequently, to an inevitable adaptation of the methods of assessment of varieties concerning characteristics like attitude of shoots, width of leaf, or time of flowering.
64. Finally, the Office has also given convincing reasons why there was no need to update all 'old' variety descriptions as claimed by the appellant. In the case of 'Lemon Symphony', there was a specific reason for adapting the description resulting from the technical verification of that variety in 2005. It would mean an unreasonable workload for the Office to be obliged to adapt all 'old' variety descriptions without any specific reason like in the case at hand.
65. Consequently, the adaptation of the official variety description for 'Lemon Symphony' was in line with the rationale of Article 87(4) BR. This had already been pointed out by the Board of Appeal in decision A 010/2007 of 23 January 2009. The Board of Appeal confirmed in that decision that the appellant's claim that the description of 'Lemon Symphony' should not have been modified was not well-founded. According to the Board of Appeal, the 1997 test was accurate in relation to the other varieties included in that test where the expression could not be denoted in absolute terms. This concerned, for example, the characteristic 'attitude of shoots' (see above para. 59). The Board of Appeal explained that the adaptation of the description was due to the introduction of UPOV Guidelines by the CPVO in 2000. There existed no guidelines for *Osteospermum* prior to that date. As the Board of Appeal emphasized in the decision, the variety 'Lemon Symphony' resulting from a generic crossing between the Genera *Osteospermum* and *Dimorphoteca* was as such unique not only in its morphologic characteristics but also in showing a continuous flowering period that was longer than in the other *Osteospermum* varieties. This unique nature of the variety 'Lemon Symphony' led to the situation that no reference varieties could be found to compare with in the 1997 test.



Decision A 010/2007 was confirmed by the General Court (see above para. 20) and by the Court of Justice (see above para. 21). In particular, the General Court stated:

*'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 BSA'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 BSA, 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 BSA 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.'*

66. In conclusion, the Office made correct use of the discretion conferred on it by Article 87(4) BR when deciding that an adaptation of the description of 'Lemon Symphony' was necessary in this specific case in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned. The adaptation of the description did not affect the identity of the protected plant variety. The appeal is not well-founded and has to be dismissed.

### C. ON THE COSTS

67. Since the appeal is dismissed and the appellant is the losing party, it shall bear the costs of the appeal proceedings pursuant to Article 85(1) BR.

68. Pursuant to Article 73 BR, an action may be brought before the Court of Justice against this decision within two months of its service.

  
S.HAUKKA

Chairperson

  
A.POHLMANN

Rapporteur

