

Burden of proof in Nullity and Cancellation Proceedings before the CPVO

Martin Ekvad*

1. Introduction

The Basic Regulation does not contain explicit rules on burden of proof as regards proceedings before the Community Plant Variety Office (below referred to as the Office or CPVO). There is however a reference in Article 81 Basic Regulation¹ stating that in the absence of procedural provisions, the Office shall apply the principles of procedural law which are generally recognized in the Member State.

In practise, the Office justifies its positions in decisions. If a party invokes an argument or fact, the Office expects that the request is substantiated with evidence. The question of how to assess facts can arise in various stages in proceedings before the Office, such as during the formal and substantial examinations of applications dealing and can relate to issues such as entitlement to apply for a Community Plant Variety Right (CPVR) and novelty, or after the grant of the CPVR regarding the timely payment of annual fees. A specific issue that has been analysed by the Office, the Board of Appeal, the General Court and the Court of Justice of the EU (CJEU), is to what extent a party to proceedings must provide evidence before the Office should open a procedure of nullity (Article 20 of the Basic Regulation) or cancellation (Article 21 Basic Regulation). Following the outcome of the CJEU ruling, rules were introduced in the Proceedings Regulation² in order to clarify the procedures in this respect. This paper will focus on the said jurisprudence and the following changes in the mentioned regulation. Taking into account the many arguments raised in the cases, I have shortened the presentation to the issue of burden of proof. I have also elaborated on who can make such requests and become party to proceedings, since that question is quite closely linked to the first. Although most of my comments are left until the last section of the paper, some comments are made in relation to cases as they are presented below.

Mr Paul van der Kooij has worked with these cases during the last ten years, first in his capacity as member of the CPVO Board of Appeal then in his capacity as Chairman. I have worked on the cases from the side of the Office during the same period. The parties to proceedings have been very innovative and I must admit that the Office,

at least myself, has been struggling to come to terms with the many questions raised, and I presume that Mr van der Kooij must have had similar experiences during the past years. By addressing this subject in this paper, I will immortalise our endeavours.

Although I have worked on these cases on behalf of the Office, I will try to remain objective. I am sure I did not fully succeed in that, which is why I ask the readers to show some indulgence to this fact.³

Case Law

Proceedings before the Office

In 2001 an application was made for CPVR for the variety *Sumost 01*. The Office refused the application since the variety was not considered distinct from the variety *Lemon Symphony*, for which CPVR were granted in 1999 and owned by Mr Hansson. On 26 October 2004 the applicant for *Sumost 01*, Mr Schröder, asked the Office to cancel the variety *Lemon Symphony* claiming it was no longer stable pursuant to Article 21 of the Basic Regulation. On 11 April 2007 Mr Schröder filed an application asking the Office to declare the variety *Lemon Symphony* null and void pursuant to Article 20 of the same Regulation. He argued, in essence, that the material submitted for DUS test by the applicant had been treated with a growth regulator, which had such effects on the material that it could not be considered to represent the variety.

Without going to the merits of the requests, the question was raised whether the mere filing of such requests would oblige the Office to initiate proceedings. In fact, there are no rules in the Basic Regulation providing for third parties' claims for annulment and cancellation. It is nevertheless peculiar that Article 85 of the Basic Regulation contains rules on who should pay for the costs in proceedings for revocation and cancellations. The Office contacted the Examination Office in Germany, Bundessortenamt, in order to get an expert opinion on the claims and requested a technical verification of the variety *Lemon Symphony* in order to ascertain if the continuing existence of the variety was unaltered pursuant to Article 64 of the Basic Regulation.

* M. Ekvad LL.M. is President van het Communautair Bureau voor Plantensoorten (CPVO) en oud-advocaat te Stockholm en Brussel.

- 1 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, p. 1.
- 2 Commission Regulation (EC) 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, as lastly amended by Commission Implementing Regulation (EU) 2016/1448 of 1 September 2016, OJ L236/1, 2.9.2016, amending aforementioned Commission Regulation (EC) 874/2009.
- 3 The opinions expressed in the paper are purely personal and cannot bind the Office or the EU.

- 4 Opinion of Advocate General Sharpston, delivered on 13 November 2014, *Ralf Schröder v Community Plant Variety Office (CPVO)*, Case 546/12 P, E.U.C.2014.2373, paragraph 76.
- 5 A 2006/2007 (Cancellation request) and 2010/2007 (Nullity request).
- 6 *Ralf Schröder v Community Plant Variety Office (CPVO)*, Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09, E.U.2012.430, 18 September 2012.
- 7 Cases T-133/08, T-134/08 and T-177/08.
- 8 Paragraph 103 of the judgement of the General Court.
- 9 Case C-23/00 P *Council v Boehringer* [2002] E.C.R. I-1873, paragraphs 50 to 52 and Case C-6/06 P *Confradia de Pescadores San Pedro de Bermeo and others v Council*, Paragraph 21, judgement of 22 November 2007.
- 10 Paragraphs 126-129 of the judgment of the General Court.

The Office struggled with the question whether a person who makes such a request is entitled to become party to proceedings before the Office. The concern was raised that allowing such requests and parties to proceedings in a lenient manner could open the door for abuse. Some years later the Advocate General alluded to the same argument, stating that a person seeking measures of inquiry must put forward evidence to justify obtaining them in order to avoid entirely frivolous demands.⁴

Based on the arguments, facts and evidence provided by Mr Schröder and Mr Hansson and relying on the comments made by the Examination Office, the Office concluded that the prerequisites for taking a decision on nullity or on cancellation were not fulfilled. No formal proceedings were initiated and the petitioner was informed of the position of the Office in two separate letters dated 10 May 2007 (request for cancellation) and 26 September 2007 (request for nullity). The Office took the view that since no proceedings were opened, there could be no party to proceedings within the meaning of Article 1 of the Proceedings Regulation.

Proceedings before the Board of Appeal

On 11 June 2007 Mr Schröder filed one appeal against the non-cancellation decision (A 006/2007) and another one on 19 October 2007 against the non-nullity decision (A010/2007).

On 4 December 2007 the Board of Appeal decided⁵, in the cancellation case (A 006/2007), that the letter sent by the Office must be regarded as a decision which is subject to appeal. The Board nevertheless came to the conclusion that the appellant had no right to require the Office to take a decision on the matter. In a decision on 23 January the Board of Appeal decided in the nullity case (A010/2007), now in a new composition, that the letter sent by the Office was a decision which is subject to appeal. However, this time the Board concluded that the appellant was party to proceedings.

In both cases the Board of Appeal rejected the appeals on the merits and the issue of the burden of proof was not mentioned in the decisions.

Proceedings before the General Court

The decisions were appealed to the Court of First Instance (hereinafter the General Court). The Nullity case (T-242/09) and the Cancellation case (T-134/08) were joined with two other cases (T-133/08 and T-177/08) relating to similar subject matters and involving the same parties.⁶

The General Court concluded that there was a material procedural defect in three⁷ of the contested decisions of the Board of Appeal, including the cancellation case. Accordingly, and the Court annulled the appealed decisions of the Board of Appeal. The cases were sent back to the Board for new decisions. I will come back to this. Before the General Court a number of procedural issues were mentioned but I will concentrate on the question

whether a party seeking annulment of a CPVR bear the burden of proof.

The Office stated that it did not agree with the decision of the Board of Appeal in the sense that Mr Schröder had the standing as a party to the annulment proceedings before the Office, since he had not made an application to that end under Article 1(2) of the Proceedings Regulation. The Office also reiterated that in nullity proceedings it acts on its own motion. The CPVO nevertheless considered that this part of the decision of the Board was of no consequence since the appellant was entitled to appeal pursuant to Article 68 of the Basic Regulation in another capacity, namely as a person to whom that decision of the Office was of direct and individual concern. That said, the Office and Mr Hansson argued that the action should be dismissed as inadmissible. They submit that a request for annulment of a CPVR is admissible only where there are facts and evidence proving that that variety was not distinct or not novel on the date of the application. In the present case, however, Mr Schröder 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. The Court stated that it did not have to adopt a position on the admissibility since the action before it was dismissed as unfounded.⁸ 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.⁹

The General Court concluded that the Office's mandate to make examination of the facts of its own motion is not applicable to the proceedings before the Board of Appeal in nullity 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 Basic Regulation. In nullity proceedings the task of the Board of Appeal is solely to rule, on the application of an *interested party* (*my emphasis*), on the lawfulness of a decision refusing to declare the CPVR null and void. The Board should assess if it has been established by the interested party that the conditions for distinctness or nullity were not satisfied at the time when the right was granted. 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 Basic 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.¹⁰ It is interesting to note that the Court here accepted, without any reasoning, that an interested party may initiate nullity proceedings.

Having made this interpretation of the Basic Regulation, the General Court nevertheless looked into the Community trade mark system and referred to Article 76 of

Council Regulation (EC) No 207/2009 on the Community trade mark¹¹ 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”.

The Court admitted that the interpretation of the Basic Regulation that it just made differs from the wording of the Community trade mark Regulation, but explained that the difference from that rule and the above mentioned interpretation of the Basic Regulation can be explained by the fact that the latter regulation does not distinguish between absolute and relative grounds for refusal of registration. The General Court found stronger support of its interpretation of the Basic Regulation in Article 63(1) of Regulation No 6/2002 on Community designs¹² which reads:

“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.”

The General Court concluded its reasoning by stating that the rules in the above mentioned Design Regulation is consistent with the general principles of law and rules of procedure applicable with regard to the burden of proof and taking of evidence such as the principle *Actori incumbit onus probandi*, ‘the burden of proof is on the plaintiff.’ Article 81 of the Basic Regulation explicitly states that “principles of procedural law which are generally recognised in the Member States” should be applied in the absence of other rules in the Basic Regulation.

In essence, the General Court concluded that the above mentioned principle was applicable when the Board of Appeal assesses decisions of the CPVO and that the Board is not bound by Article 76 of the Basic Regulation which states that the Office shall assess the facts on its own motion. It is a matter for the parties to the procedure to submit in due time the facts and evidence they intend the Office to appraise. Accordingly, it will be up to the party invoking the breach of Article 20 of the same Regulation to prove that the conditions in that Article are met.¹³

The Court then went on and assessed if the Board of Appeal had breached the principle of burden of proof and other grounds invoked. The Court reiterated that when the General Court reviews findings and factual assessments of the Board of Appeal in relation to specific technical or scientific complexity, its review is limited to

manifest errors of assessments. As regards other factual assessments, the General Court carries out a full review of legality.¹⁴

I will just give two examples of two in my opinion important statements by the General Court in this respect.

First, Mr Schröder complained that the Board of Appeal based its decision on the arguments and facts put forward by the CPVO and the intervener without gathering or assessing the facts he invoked. He also requested that adoption of a measure of inquiry be made and that the Board should hear an expert on the matter. The measures invoked would show the alleged effect of the growth regulator. In response to this argument the General Court said that a request for the adoption of measures of inquiry made by a party cannot be accepted if that party offers no evidence whatsoever to justify such measure.¹⁵ The Court came to the conclusion that the applicant had not submitted such evidence capable of constituting prima facie evidence in support of his contention.

Second, Mr Schröder contested the fact that the Examination Office had taken cuttings of the plants submitted by the applicant of *Lemon Symphony* to the Examination Office. Relying on its own experience the Board of Appeal took the position that the taking of cuttings is “common practice” in order to ensure that all material has the same physiological age. The Court referred to case law in the trade mark area in which the CJEU has taken the position that the EUIPO is not required to prove in their decisions the accuracy of well-known facts. If a fact is well-known or not is a factual assessment which is not subject to review by the CJEU on appeal unless the facts or evidence are distorted.¹⁶ In the absence of any evidence to the contrary, the General Court took the position that the “common practice” referred to by the Board of appeal was a well-known fact and applied the invoked case law also to proceedings before the Office.

Proceedings before the CJEU

In the appeal before the CJEU the CPVO continued to argue that nullity proceedings brought on the basis of Article 20 of the Basic Regulation are exclusively covered by examination of its own motion. Therefore, there is no party to such proceedings and the CPVO is required to examine all the facts objectively. During the oral hearing before the CJEU, Advocate General Sharpston posed a number of pertinent questions to the parties as regards whether the proceedings in question are investigative or adversarial in nature and whether the party seeking annulment bear the burden of proof. She then addressed those questions in detail in her opinion, which was followed by the CJEU.

Although the parties to proceedings before the CJEU (the CPVO and Mr Hansson on the one hand and Mr Schröder on the other) disagreed on most issues, they all agreed that the General Court had erred in law in its conclusion that the Board of Appeal could not assess facts of its

- 11 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).
- 12 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).
- 13 In paragraph 135 of the judgment reference is made to Case C-413/08 P *Lafarge v Commission*, [2010] ECR I-5361.
- 14 Case T-187/06 *Schröder v CPVO (SUMCOL)* [2008] ECR II-3151, paragraphs 59-63 and 65, Case C-38/09 P *Schröder v CPVO* [2010] ECR I-3209, paragraph 77.
- 15 Paragraph 137 of the judgment of the General Court, referring to Case 51/65 *ILFO v Haute Autorité* [1951-1965] ECR 87.
- 16 Paragraph 149 of the judgment of the General Court, referring to Case C-273/05 P *OHIM v Celltech*, [2007] ECR I-2883, paragraphs 39 and 45.

own motion in nullity proceedings. The CJEU agreed and concluded, making reference to Article 51 of the Proceedings Regulation, that the principle of examination of the facts by the CPVO of its own motion also applies to proceedings before the Board of Appeal. The General Court, consequently, erred in law on that point. The CJEU stated that this error did not lead to the setting aside of the contested judgment, since the General Court had nevertheless assessed whether the evidence adduced by the appellant before the Board of Appeal meets the criteria pertaining to the principle of the examination of the facts of its own motion.

The CJEU further held that if a prerequisite to grant a CPVR is not met, it is in the public interest that the latter is declared null and void. It may also be in the interest of a third party that a variety is declared null and void, especially where that party made an application for a plant variety right which was refused because the candidate variety was not distinguishable from the improperly protected variety.¹⁷ However the CJEU continued stating that this cannot justify allowing a third party to apply in all circumstances and without specific reasons, for the annulment of that protection after the proceedings granting that right, and after the expiry of the time-limits laid down in Article 59 of the Basic Regulation for third parties to lodge their objections. The Court justified this by stating that, the candidate plant variety, under Articles 54 and 55 of that Regulation, must undergo a substantive examination and a thorough and complex technical examination before it is granted. For this reason, the Office has a wide discretion when assessing the conditions under Article 20 of the Basic Regulation. Therefore, only where there are serious doubts that the conditions laid down in Article 7 (distinctness) or 10 (novelty) of the Basic Regulation had been met on the date of the examination can a re-examination of the protected variety by way of nullity proceedings under Article 20 of the Basic Regulation be justified. A third party seeking annulment of a plant variety right must adduce evidence and facts of sufficient substance to raise such serious doubts.

The CJEU came to the same conclusions as the General Court that Mr Schröder did not provide the necessary information or evidence to substantiate his claims.

Proceedings before the Board of Appeal, Renvoi

To complete the circle, as mentioned above, the General Court annulled the appealed decisions of the Board of Appeal in the cancellation case (Case 134/08). The case was sent back to the Board for a new decision. In the cancellation case, now A006/2007-RENV, decided on 2 September 2016, the Board reconfirmed that cancellation and nullity proceedings can be initiated on request by a third party and concluded that Mr Schröder was entitled to appeal. However, on the substance, the appeal was not considered to be well-founded. The Board of Appeal relied on reports and explanation of the Examination Office and the Office concluded that the appellant had not been able to submit evidence and facts of sufficient

substance to raise serious doubts as to the stability of the variety *Lemon Symphony*. The time to appeal this decision has lapsed which should put an end to these long but interesting proceedings.

2. Amendments to the Proceedings Regulation

The above referred judgment of the CJEU in the *Lemon Symphony* case was taken in May 2015. In September 2016 the Commission amended the Proceedings Regulation and certain provisions were introduced on nullity and cancellation proceedings in line with the Court's reasoning. A new Article 53a states that proceedings for nullity and cancellations may be opened on the conditions that there are *serious doubts* as regards the validity of the title. The same Article specifies that such proceedings can be initiated by the Office on its own motion or upon request. The person making such request must provide evidence and facts raising serious doubts as to the validity of the title. It also states that any decision of the Office to reject a request shall be communicated to the person making the request and the holder of the CPVR. Although not stated in the law, I am sure that the Office will also inform the mentioned persons if the request is upheld. The Office shall not take into account written submissions or documents that have not been submitted in time set by the Office.

3. Comments

It is quite clear from the jurisprudence referred to above and the amendment of the Proceedings Regulation that proceedings on nullity and cancellations can be initiated by the Office or by a third party. This is in my opinion correct. It is important that third parties can be active in ensuring that an EU administration takes decisions which are well founded and based on the rule of law. For instance, if a person is accused of infringing a protected variety, and if the person in question realises that there are facts and evidences showing that the Office decision to protect the variety was wrong, it should indeed be possible for him to make such a request.

Whilst the right to intervene is important there must be tools for the administration in order to avoid abusive claims so as to ensure that it can operate efficiently. The Court contributed to establishing a balance by making it necessary for the person making a request to provide sufficient evidence and facts to raise a serious doubt as to the validity of the title before the Office is obliged to open up proceedings. This is quite a high threshold, but is in my opinion correctly justified by the Court. Firstly, because any person could have, before the granting, objected to the application. Secondly, the candidate variety must undergo a substantive examination and a thorough and complex technical examination before it is granted. It can be noted that during the application procedure the Office will need to carefully assess facts of its own motion. If a variety is refused, for instance by reference

to a non-distinct variety which was of common knowledge at the date of application, the Office needs to justify in its decision its technical findings as well to ascertain that the reference variety indeed was of common knowledge at that date. The fact that the Office already made a thorough assessment, justifies that it has a wide discretion when assessing the conditions under Article 20 and 21 of the Basic Regulation. If no new arguments are presented than those presented during the application procedure by a person making a request under Article 20 and 21 of the same Regulation, the Office should not reopen the case.

Under the new rules in Article 53a of the Proceedings Regulation, which are based on the ruling of the CJEU, a two tier test is introduced. Firstly, an assessment must be made if the condition “serious doubts” is met. It would be fair to assume that a desk top assessment would in most cases suffice. If the Office concludes that there are no serious doubts based on the evidence produced, the Office will not open a procedure. If no proceeding is opened, there can presumably be no party to proceedings. Of course the person making the request could argue that the assessment of the Office as to whether the condition “serious doubts” has been met is in itself a procedure, and that it is party to that proceeding. Whether the person becomes party or not, has as I see it two main consequences. One is that, if the request is rejected, the person making the request must pay certain costs under Article 85 of the Basic Regulation. Another consequence is that any party to proceedings before the Office is entitled to appeal to the Board of Appeal. It would ultimately be up to the Board of Appeal to decide, pursuant to Article 68 of the Basic Regulation, if the person in question is entitled to make an appeal. I expect that in most cases the Board would find a justification to allow an appeal. I find that reasonable and I doubt that in practise there will be frivolous requests to the Office and appeals to the Board taking into account the cost aspects. It can be mentioned that the Office has received relatively few requests for cancellation and nullity.

Secondly, if the Office finds that there are serious doubts, the Office may open a procedure which could mean to redo the substantive examination and/or the technical examination from the outset. The person making the request would in my opinion become party to the proceedings before the Office and in that capacity be entitled to appeal if the Office in the end decides to reject the request on the merits.

The Board of Appeal in its decision in the Case A 006/2007-RENV concluded that there were no serious doubts about the continued legal validity of the variety and held that the appeal was not well-founded. Following the adoption of the new rules in the Proceedings Regulation, I assume

that in a similar case in the future, the Board could conclude that no proceedings will be opened. It should also be noted that in this specific case a technical examination on the continued existence of *Lemon Symphony* had already been carried out. I would say that the reason for the Office to initiate such an examination was not based on serious doubts, but rather on a wish to exclude the risk that a protected variety no longer complied with the technical criteria for protection.

The CJEU concluded that the Board of Appeal may examine the facts of its own motion and take the same measures as the Office pursuant to Article 76 of the Basic Regulation. If a technical examination needs to be redone, the Board has in the past remitted the case to the competent body of the Office for a complementary examination rather than open up such an investigation of its own.

The obligation of the Office to assess its own motion goes further than what the General Court proposed and what is laid down in the Community Design Regulation. If the “serious-doubts-test” has been passed, the facts should be re-examined. It seems like the situation is similar in the EU Trade Mark Regulation for absolute grounds of refusal, where the EUIPO will examine the facts of its own motion. The absolute grounds represents a public interest and the same can be said as regards CPVR as was concluded by the CJEU.

I believe that the General Court’s position, which was followed by the CJEU, on the fact that a party to proceedings must produce certain *prima facie* evidence before investigative measures are opened is correct. It is also reasonable that the administration needs to substantiate well-known facts. It would place the administration under quite some burden if any such request would need to be accepted taking into account the time and resources this would take. Accordingly, whilst acknowledging third parties rights to intervene in proceedings before the Office, there are certain limitations introduced in order to find a balance between the right of being heard and provide evidence and the need for the administration to ensure procedural efficiencies.

The various turns and arguments raised by the parties to proceedings, the Office, the Board of Appeal and the Court of Justice in the above mentioned cases show that the legislation was not crystal clear. I believe that the judgements and the changes in the Proceedings Regulation have provided very important guidance to the Office in this respect. I am nevertheless sure that the issue of the burden of proof in proceedings before the Office will be further elaborated in future cases, although I will not provide any evidence in this paper to prove that statement!