

# The Functioning of the Community Plant Variety Office Board of Appeal<sup>1</sup>

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## 1. Introduction

The purpose of this paper is to explain the practical functioning of the Community Plant Variety Office (hereinafter CPVO or the Office) Board of Appeal (hereinafter the Board of Appeal or the Board) and to draw some conclusions on whether it has fulfilled the objectives for which it was established. The paper will not deal with the substance of the jurisprudence of the Board. A summary and a full text of all cases of the Board of Appeal can be found on the website of the Office.

Chapter 2 offers background information on the system and the criteria for granting an EU plant variety right. The intention is to make the reading of the paper more accessible for those not acquainted with the EU plant variety right system.

## 2. The EU system for plant variety rights – in a nutshell

### 2.1. Introduction

The purpose of plant breeding is to modify plants genetically in such a manner that they adapt more appropriately to the needs of human beings. Plant breeding is as old as agriculture, and its objectives are closely related to the general objectives of agricultural plant production such as increasing plant productivity and quality by developing varieties with improved yield and better resistance to plant pests or diseases.

In this context, plant variety rights present a number of challenges that are different from those faced in other areas. Such challenges include the need to increase food production, for a growing world population with scarce resources and increasingly inconstant weather events, the constant need to adapt to climate

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<sup>1</sup> The paper is based on a presentation I made at CEIPI on 29 January 2016, updated in February 2018. Thanks to Alejandra Aluja for helping me drafting the paper. I nevertheless take full responsibility for the content including potential mistakes.

change, and an increasingly complex regulatory set of rules. The ornamental sector provides new beautiful varieties which are appealing to consumers and contribute hugely to the economy.

The intellectual property protection for plant varieties is tailor-made as a sui generis system under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which explicitly addresses plant intellectual property. TRIPS outlines that members shall provide protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof (Art. 27(1), TRIPS). The International Convention for the Protection of New Varieties of Plants (the 'UPOV Convention'), adopted in Paris in 1961, introduced the modern concept of the sui generis plant breeders' right protection and established a legal framework for plant breeders' rights systems worldwide.

The EU system is based on the system set up by the UPOV Convention, it is implemented at national level by the contracting parties thereto, including 24 Member States of the EU.<sup>2</sup> The EU is also contracting party to the UPOV Convention in its capacity as inter-governmental organization.

The EU system is run by the Community Plant Variety Office, an EU agency with an independent legal status, fully self-financed by the fees charged for the services rendered. The Office has been operational since 1995 and is based in Angers (France). The legal basis of the system is found in Council Regulation (EC) No 2100/94<sup>3</sup> (hereinafter the Basic Regulation or BR). In addition, there are three Commission Regulations relating to proceedings before the Office,<sup>4</sup> fees payable to the Office<sup>5</sup> and the agricultural exemption.<sup>6</sup>

## 2.2. Criteria to grant a community plant variety right (CPVR)

A variety is a plant grouping within a single botanical taxon of the lowest known rank, which grouping, 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 whilst remaining unchanged.<sup>7</sup>

In order to be protectable, a variety is required to be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. The variety must also be uniform, allowances are made for the variation that may be expected from the particular features of its propagation. The variety must also be stable, its relevant characteristics must remain unchanged

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<sup>2</sup> It should be noted that the EU Member States Greece, Cyprus, Luxembourg and Malta are not contracting parties to the UPOV Convention.

<sup>3</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L227.

<sup>4</sup> 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 [2009] OJ L251/3, hereinafter the 'Proceedings Regulation'.

<sup>5</sup> Commission Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office [1995] OJ L121, hereinafter the 'Fees Regulation'.

<sup>6</sup> Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [1995] OJ L173.

<sup>7</sup> Article 5, Basic Regulation.

after repeated propagation. In addition to the above, each variety must be new and be given a suitable denomination.

The Office has not created its own technical infrastructure. Technical examinations to confirm distinctness, uniformity and stability (DUS) are carried out by the Examination Offices entrusted by the Administrative Council of the Office (also referred to as the AC below). The cooperation between the Office and Examination Offices is fundamental for the functioning of the EU system. The entrustment and quality requirements set the standards for DUS testing and the operation of Examination Offices. The Office's quality audit service (QAS) carries out regular assessments of the Examination Offices in order to verify whether they fulfil the entrustment requirements when testing candidate varieties against the DUS criteria.

Technical examinations are carried out according to CPVO technical protocols. The CPVO's technical protocols are based on the relevant UPOV guidelines, they often incorporate additional clarifications as deemed necessary by the Office and national crop experts. The said technical protocols set out a compulsory list of characteristics and are formally adopted by the AC. The effect in practice is that the competent Examination Offices apply the same standards, irrespective of whether they examine national applications or act as Examination Offices on behalf of the Office.

### 3. Functioning of the Board

#### 3.1. Set up

##### *Quasi-judicial body*

The Board of Appeal is responsible for deciding on appeals lodged against decisions of the Office.

The setting up of the Board of Appeal was necessary in order to guarantee access to justice, in line with the fundamental right of fair and independent access to justice. To my mind, its functioning is similar to that of a court. However, the Board of Appeal is not defined as a court. The term 'court or tribunal' has been interpreted by the Court of Justice of the EU (CJEU) when assessing the applicability of Article 267 TFEU (former Article 234 TEC). Under this Article courts and tribunals in EU Member States may ask the CJEU for a preliminary ruling on the interpretation of EU law. The CJEU has held that in order to qualify as court or tribunal within the meaning of Article 267 TFEU a series of objective criteria must be fulfilled such as the legal foundation of the body, its permanent character, the obligatory jurisdiction, the contentious nature of its proceedings, the consistent application of legal norms by the body as well as its judicial and political independence.<sup>8</sup> Although the Board of Appeal fulfils most if not all of the above listed criteria the General Court has defined the Board as a 'quasi-judicial body'.<sup>9</sup> The said definition emphasises the role of the Board of Appeal having powers and procedures resembling those of a court or a judge. The Board is obliged to objectively determine facts and draw conclusions from said facts so as to provide the basis of a decision. Consequently, such actions may remedy a situation and may affect the legal rights, duties or privileges of specific parties to proceedings.

##### *Composition of the Board of Appeal*

The Board of Appeal is composed by one Chairperson and his/her alternate appointed by the Council of the European Union and two other members selected by the Chairperson from a list adopted by the Administrative Council in accordance with the procedure laid down in Article 47(2) of the Basic Regulation. The Chairperson shall be legally qualified and his/her mandate shall last five years, with the possibility to be renewed for another five years. If the mandate of the Chairperson has been renewed for a second period, the post will not be renewed for a third time. Under principles adopted by the Commission, the

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<sup>8</sup>Elizabeth Florence Emanuel v Continental Shelf 128 Ltd (Case C-259/04) EU:C:2006:215, para 19..

<sup>9</sup>Ralf Schröder v CPVO (Case T-133/08) EU:T:2012:430, paras 137 and 190

post will then be published. There is a possibility for the incumbent Chairperson to reapply if he/she is interested in continuing in that function.

Due to the technical nature of the decisions adopted by the Office on plant varieties the Board of Appeal must make sure that an adequate number of both legally and technically qualified members are made available. The AC adopts a list of technically and/or legally qualified candidates for five years on a proposal from the Office. For the period from February 2016 until February 2021, 23 qualified members have been appointed. All or part of the list can be renewed subject to the participation of the members in a new selection procedure. When an appeal needs to be adjudicated the Chairperson selects two members and their respective alternates, from the above mentioned list. The Board of Appeal can call up to two further members from the list if the nature of the appeal so requires, although this has never happened.

The Basic Regulation foresees the possibility to establish more than one Board. However, taking into account the limited number of cases brought before the Board of Appeal, there has been no need to establish more than one Board. It is worth noting that neither the Chairperson nor the members of the Board are employees of the Office, they are called upon when cases are appealed.

### *Independence*

The requirement of independence refers to both the Board of Appeal as such and/or their members individually. Independence should be ensured vis-à-vis the Office, whose decisions are being reviewed and the parties to proceedings. The said requirement is especially relevant at the stage of the appointment procedure, the composition, the tenure and the removal procedure of the members from the list.

The importance of the said requirement is also underlined in the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies of 19 July 2012. The Joint Statement outlined that the impartiality and independence of Board of Appeal's members should continue to be guaranteed, on the basis of transparent and objectively verifiable criteria to be defined by EU agencies.

Individual members have to be independent and shall not be involved in the work of the Office. They should not be bound by any instructions when making their decisions. Therefore, they must not be members of the CPVO Committees responsible for taking such decisions nor should they perform any other duties in the Office. Their function as members is a part-time occupation, they must inform the Board of Appeal where a conflict of interest may arise that would impede their participation in appeal proceedings. According to Article 48 of the Basic Regulation members must not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to proceedings, or if they participated in the decision under appeal.

The members of the Boards of Appeal will not be removed from the list during the respective term, unless there are serious grounds for such removal. Removal from the list requires a CJEU decision to this effect, on application by the Commission, after obtaining the opinion of the AC.

Any party to the appeal proceedings can object to members of the Board, for one of the aforementioned reasons or if suspect partiality on the member's behalf.<sup>10</sup> An objection cannot be based on the nationality of the members. The Board will decide as to the action to be taken in the case of objection to a member without the participation of the member concerned who has to be replaced by his/her alternate.<sup>11</sup>

In one case, the appellant suspected partiality on the grounds that the Board had refused to accept the appellant's submissions in the appeal procedure. The appellant argued that there was no legal basis for refusing his submissions and was of the opinion that the refusal was an indication of partiality. The

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<sup>10</sup> Article 48(3), Basic Regulation.

<sup>11</sup> Article 48(4), Basic Regulation.

appellant furthermore alleged that the manner in which the Board of Appeal had planned the hearing, offered additional evidence that the members of the Board of Appeal had already decided in advance on the outcome of the proceedings. Finally, the appellant claimed that, in any case, the alternate composition of the Board of Appeal should not only decide on the objection on impartiality, but also on the substance even if it were not to accept the objection of partiality. The case was handed over to the alternate Chairperson who selected two new members of the Board. This alternate Board of Appeal rejected as unfounded the claims put forward by the appellant and dismissed the objection.<sup>12</sup>

In addition to the requirement of independence of the Board and its members, its degree of budgetary independence from the Office should also be underlined. The activities of the Board are covered by the general budget of the Office. Since the members are not employed fulltime by the Office, they are reimbursed for each case in which they participate. The level of the remuneration is laid down in a decision adopted by the AC based on a proposal by the President of the Office.<sup>13</sup> An appeal fee is foreseen under Article 113(2) of the Basic Regulation and Article 11 of the Fees Regulation. The appeal fee does not cover all the costs of the Board of Appeal. The appeal fee is kept at a reasonable level to ensure that it is not prohibitive. A fee for appeals is nevertheless justified in order to avoid frivolous appeals.

Finally, the Registry of the Board of Appeal must also be independent. It is imperative that the Registry have sufficient staffing, independence in order for it to be fully accountable towards the Board, not the Office. The Registry facilitates exchanges of information and the overall proper functioning of the procedures and all related services of the Board.<sup>14</sup>

### **3.2. Decisions subject to appeal**

Except for two specific instances where a direct action against a decision of the Office may be brought before the CJEU,<sup>15</sup> the appeal against a decision of the Office is brought before the Board of Appeal.

Article 67 of the Basic Regulation envisages the right to appeal against the following decisions taken by the Office:

- a) Nullity/cancellation of a CPVR (Articles 20 and 21)
- b) Compulsory licenses and exploitation rights (Articles 29 and 100(2))
- c) Objections to the grant of a CPVR (Article 59)
- d) Refusal of an application/grant of a CPVR (Articles 61 and 62)
- e) Approval/amendment of variety denominations (Articles 63 and 66)
- f) Fees (Article 83)
- g) Apportionment of costs (Article 85)
- h) Establishment of the Registers/Public inspection (Articles 87 and 88).

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<sup>12</sup> Appeal cases A007/2009, A002/2010 and A003/2010 ‘*Sumost 02*’ and ‘*Seimora*’.

<sup>13</sup> Article 11.5, Proceedings Regulation

<sup>14</sup> Article 12, Proceedings Regulation.

<sup>15</sup> Article 74, Basic Regulation regarding decision on compulsory licensing under Article 29 and exploitation rights referred to under Article 100(2), Basic Regulation.

An appeal against a decision which does not terminate proceedings regarding one of the parties, can only be made in conjunction with an appeal against the final decision, except in cases where the decision allows for a separate appeal.

In addition, an appeal has suspensory effect in relation to the contested decision unless otherwise decided by the Office.<sup>16</sup> This means that the contested decision will not have any effect until the Board of Appeal has decided on the appeal.<sup>17</sup> Guidance, as to what kind of circumstances should be taken into account when considering not suspending the decision, may be found by analogy in the case-law of the CJEU regarding the taking of preliminary measures: a reasonable strong *prima facie* case establishing infringement (of EU law) – *fumus boni iuris* -, no likelihood of serious and irreparable harm to the person requesting it and urgent need for protective measures – *periculum in mora*. To date, no decision has granted a non-suspensory effect.<sup>18</sup>

In my opinion, the right of the Office to take decisions on suspensory effect is questionable. Under such circumstances, the Office has already made its final decision and has had the opportunity to correct its decision in the interlocutory stage pursuant to Article 70 of the Basic Regulation. A preferred alternative would be for the Board of Appeal to take such a decision. Appeals against decisions relating to compulsory licenses do not have suspensory effect. Until now the Office has not taken decisions to grant compulsory licenses.<sup>19</sup>

### 3.3. Who can appeal

The addressee of a decision, or any person who is directly and individually concerned by the decision, may appeal against it.<sup>20</sup> As a consequence, a third party is entitled to appeal even if he did not lodge an objection during the application proceedings.

In the *Sunglow* case, the Board of Appeal considered the exclusive distributor of a reference variety, which was very similar to the candidate variety, to have *locus standi*.<sup>21</sup> In another case, a federation of associations was found not individually concerned by the Board. On appeal the Court concluded that the interpretation of 'individually' in the Basic Regulation should be the same as the one established by the Court of Justice when deciding on *locus standi* and confirmed the decision of the Board.<sup>22</sup>

In this context it could be mentioned that there are no restrictions as to who can object to the Office before a title is granted. This means that objections can be made without the objector being directly and individually concerned. Objecting is free of charge. The person filing the objection before the Office can be party to appeal proceedings in its capacity as addressee of the decision on the objection. In this respect the possibility to become party to proceedings before the Office as well as before the Board of Appeal is rather open. A party from outside the EU may only participate as party to proceedings before the Board

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<sup>16</sup> Article 67(2), Basic Regulation.

<sup>17</sup> Applicable in *ex parte* proceedings only.

<sup>18</sup> In the appeal case A006/2014 '*Tang Gold*' or appeal case A019/2013 '*Orri*' the request for non-suspensory effect was denied due to absence of a likelihood of serious and irreparable harm and no urgent need for such measure to be taken.

<sup>19</sup> A first request for a compulsory license was received by the CPVO on 16 March 2017. A decision will be rendered in spring 2018

<sup>20</sup> Article 68, Basic Regulation.

<sup>21</sup> Cases A005-6/ A005-6/2003 '*Sunglow*'.

<sup>22</sup> FECOAV v CPVO (Case T-95/06) EU:T2008:25, para 84.

of Appeal if he has appointed a procedural representative who is domiciled in the EU. The Office is always party to appeal proceedings.<sup>23</sup>

### 3.4. Appeal proceedings

The procedure is crucial to the functioning of the Board of Appeal, it ensures both its efficiency to manage its caseload and its respect of the procedural guarantees.

In its capacity as a quasi-judicial body the Board must respect the principle of due process, and the right to be heard. In order to discharge these obligations, the Board must set realistic timelines, determine the presence of *locus standi*, organize oral hearings, whilst remaining within a pre-determined budget. The Board follows the rules laid down in the Basic Regulation and the Proceedings Regulation. Pursuant to Article 51 of the Proceedings Regulation the provisions relating to proceedings before the Office also apply to appeal proceedings *mutatis mutandis* unless otherwise provided. There is no provision in the legislation which gives the Board the competence to adopt procedural rules.

The appeal proceedings start with the filing of a notice of appeal. Such a notice shall be lodged within two months from the receipt or the publication of the contested decision. In order to have the appeal accepted, the appellant shall include in the abovementioned document the designation of the party, the number of the appealed decision and a statement of the form of order sought. The language of the notice also determines the language of the entire appeal procedure.

Once received, the Secretariat of the Board of Appeal numbers the appeal and asks for the grounds of appeal to be filed together with the debit note of the first third of the appeal fee, which should be paid within one month from the lodging of the notice of appeal.<sup>24</sup> If the appellant fails to pay the fee, a reminder is served granting him a further month to act and stating the consequences of failure to pay. Once the deadline has expired, if the first third of the appeal fee remains unpaid the appeal case is deemed not to have been duly filed. Following the payment of the first third of the appeal fee, the appeal case will be published in the Official Gazette of the CPVO, under chapter 9.1. In the event that parties other than the appellant have been involved in the application procedure, the Secretariat informs them of the possibility to intervene as parties to the appeal proceedings giving them two months to reply from the receipt of the notice of appeal.

Following the lodging of the notice of appeal, the appellant shall also file the grounds of appeal within four months from the service or publication of the contested decision. Upon receipt of the grounds and only for *ex parte* proceedings,<sup>25</sup> the Secretariat of the Board will set an interlocutory revision of the decision to be carried out by the Committee that adopted the contested decision, internally known as the 'Rectification Committee'.<sup>26</sup>

The said Committee has the function to assess the possibility of rectifying the contested decision in the light of the reasons put forward by the appellant (interlocutory revision). If the contested decision is rectified, the first third of the appeal fee shall be refunded, unless the facts on which the interlocutory revision is made were not available at the time of the original decision.<sup>27</sup> The appellant is informed of the outcome of the Rectification Committee. Should the Committee decide to rectify the contested decision, a

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<sup>23</sup> Article 68, Basic Regulation.

<sup>24</sup> The appellant shall pay an appeal fee of EUR 1,500 according to Article 11 of the Fees Regulation.

<sup>25</sup> Such as the cancellation of a CPVR for non-payment of annual fees or the refusal to grant a CPVR based on a negative DUS report provided that there was no third party involved in the application procedure such as an objector.

<sup>26</sup> Article 70, Basic Regulation.

<sup>27</sup> Article 83(4), Basic Regulation.

new decision is rendered; otherwise the appeal is remitted to the Chairperson of the Board of Appeal who will appoint the rapporteur and one member and their respective alternates to examine the case.

On the other hand, for *inter partes* proceedings, the appeal case is directly remitted to the Board of Appeal upon receipt of the grounds of appeal. Also, in these cases the Chairperson appoints the rapporteur, one member and their respective alternates to examine the case. Moreover, the Office and the other parties receive the notice and the grounds of appeal and are invited to send their written observations to the Board within a fixed deadline. Following the remittal of the case to the Board, a time limit of one month is given to the appellant to pay the remaining two thirds of the appeal fee, otherwise and after the expiration of the deadline (which is set in the reminder),<sup>28</sup> the appeal will be dismissed. Upon payment of the remaining part of the appeal fee, the Board of Appeal will proceed with the examination of the case.

When examining the appeal, the Board of Appeal shall, as often as necessary, invite the parties to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings within specified time limits.<sup>29</sup> It shall disregard facts or items of evidence which have not been submitted within the time limit set by the Office.<sup>30</sup>

The Basic Regulation does not specifically state that the Board should refuse further unsolicited spontaneous submissions filed by a party. In this respect the Board of Appeal has taken different approaches for different cases. It rejected the spontaneous submission of the appellant in the *Seimora* case, allowing a spontaneous submission in the *Gala Schnico* case.<sup>31</sup> The lack of a clear rule in this respect gives the Board the discretion to act as it sees fit in each specific case. One could argue that if the Board believes that the information submitted is of relevance when assessing the facts on its own motion, a spontaneous submission may be allowed. I nevertheless believe that spontaneous submissions should only be allowed exceptionally. In my opinion, Article 71.2 of the Basic Regulation allows a restrictive interpretation. A broader interpretation could lead to a situation where parties could endlessly file submissions to the Board to which the other parties would in turn be entitled to comment on. This would undoubtedly hinder the efficiency of the Board in its organization of appeals and could be used as a tactic for parties to stall the proceedings when this would be in their interest. In most cases it is sufficient that parties other than the appellant are given the possibility to respond to the appeal. By way of example, under Article 83 of the Rules of Procedure of the General Court, further submissions may only be made if the General Court so decides, upon request.

In the *M02205* case<sup>32</sup> the General Court made some important statements on the extent to which the CPVO and the Board of Appeal must carry out investigations on its own motion. The Court first stated that it is important to recall that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a margin of discretion in carrying out its functions.<sup>33</sup> That discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of the Basic Regulation.<sup>34</sup> The CPVO is subject to the principle of sound administration, in accordance with which it must examine carefully and impartially all the relevant particulars of an application for a Community plant variety right and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings

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<sup>28</sup> Article 83(2), Basic Regulation.

<sup>29</sup> Article 71, Basic Regulation.

<sup>30</sup> Article 76, Basic Regulation read in conjunction with Article 51, Proceedings Regulation.

<sup>31</sup> Appeal cases A003/2010 and A005/2014.

<sup>32</sup> *Aurora Srl v CPVO* (Case T-140/155) EU:T:2017:830, 23 November 2017

<sup>33</sup> *Brookfield New Zealand and Elaris v CPVO and Schniga* (C-534/10 P) EU:C:2012:813, para 50 and the case-law cited

<sup>34</sup> *Schniga v CPVO* (C-625/15 P) EU:C:2017:435, 8 June 2017, para 46 and the case-law cited

which it sets in motion.<sup>35</sup> Article 76 of the Basic Regulation provides that in proceedings before it, the CPVO shall make investigations on the facts of its own motion, to the extent that they relate to the substantive examination or the technical examination.<sup>36</sup>

The Court referred to Article 51 of the Proceedings Regulation which states that the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings.<sup>37</sup> Accordingly, the principle of examination of the facts of its own motion applies in proceedings before the Board of Appeal and the Board of Appeal is bound by the principle of sound administration, pursuant to which it is required to examine carefully and impartially all the relevant factual and legal information in the case before it.<sup>38</sup>

In practice this means that the Board of Appeal is not limited to assess arguments and facts raised before the Office, but the Board may also initiate further examinations should it find it necessary. Under Article 72 of the Basic Regulation it is stated that the Board of Appeal may exercise any power which lies within the competence of the Office. In cases where the Board would find that the investigation made by the Office is not satisfactory, it may remit the case to the competent body of the Office for further action (principle of 'administrative continuity'). Even if the party who has brought the appeal has not raised a specific ground of appeal, the Board of Appeal is bound to examine whether or not, in the light of all relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling.<sup>39</sup>

It can be noted that the principle of administrative continuity also applies as regards the Board of Appeal of the EUIPO and the EUIPO Office.<sup>40</sup> The rapporteur shall examine the appeal and draft an opinion, which is a confidential internal document of the Board, not shared with the parties. The opinion of the rapporteur is discussed in a meeting with the other members of the Board before the hearing takes place or is sent to them for comments if no oral proceedings are to take place.

It should also be mentioned, that the Board of Appeal has decided on a case-by-case basis whether to join closely related appeal cases. In 2016 a specific provision was introduced in the Proceedings Regulation specifying that several appeals filed against a decision may be considered in the same proceedings. In addition, in cases where appeals filed against decisions are to be examined by the Board having the same composition, the Board may deal with those appeals in joint proceedings.<sup>41</sup>

This ensures efficiency and legal certainty and contributes to avoiding inconsistent outcomes. Parties to the appeal proceedings shall be entitled to make oral representations.<sup>42</sup> Once the written procedure is closed, the common practice is that the parties exercise their right to be heard. Oral proceedings are organized in which the parties have the opportunity to present and defend their arguments. Parties may be requested to send the oral pleadings in writing to the Registrar of the Board of Appeal before the hearing. Although not compulsory, it is very convenient for the interpreters, as well as for the members of the Board when the language of proceedings is not their mother tongue.

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<sup>35</sup> Schniga v CPVO (C-625/15 P) EU:C:2017:435, 8 June 2017, para 47 and the case-law cited.

<sup>36</sup> Art 54 and 55, Basic Regulation

<sup>37</sup> Schröder v CPVO (C-546/12 P) EU:C:2015:332, para 46

<sup>38</sup> Boomkwekerij van Rijn-de Bruyn BV v CPVO (T-767/14), EU:T:2017:494, para 73

<sup>39</sup> Henkel KGaA v OHIM (Case T-308/01) EU:T:2003:241, para 29.

<sup>40</sup> Procter & Gamble v OHIM (BABY-DRY) (T-163/98) EU:T:1999:145, para 38, not overturned on this point by the European Court of Justice in Case C-383/99 P Procter & Gamble v OHIM

<sup>41</sup> Article 51(a), Proceedings Regulation

<sup>42</sup> Article 71(2), Basic Regulation.

The Office usually invites an expert from the Examination Office concerned to participate in the hearing. The expert will be part of the Office's delegation in his/her capacity as agent of the CPVO according to Article 15(2) of the Proceedings Regulation.<sup>43</sup> It should be noted that if a duly summoned party of the proceedings does not appear before the Board of Appeal, such proceedings will take place in their absence.

In general, oral proceedings before the Board of Appeal are public. However, the Board can decide to make them private when serious and unwarranted disadvantages may derive from an unrestricted hearing. To date, this has never occurred. Although the Board's decisions usually require an oral hearing, when the Board considers that it has received sufficient information to be able to make a decision, the Chairperson may ask the parties whether they agree to waive their right to be heard. The Board will then promulgate a decision without an oral hearing. In such a case, the parties will be granted additional time to present further and final written arguments.

Within three months after the closure of oral proceedings, the decision on the appeal shall be forwarded in writing to the parties to the appeal proceedings.<sup>44</sup> Surprisingly, there is no deadline laid down in the Proceedings Regulation within which the Board must send the decision in case there is no oral hearing. It can be assumed that, by analogy the Board in such cases would be obliged to send a decision within three months from the date when the written procedure is closed.

As regards the costs, the Basic Regulation clearly stipulates that costs should be borne by the losing party (Article 85). However, the Board may be asked by the parties to determine such costs, in accordance with Articles 85(5) and 76(3) of the same regulation. It could be that the parties reach a different agreement on costs, in which case, note must be taken by the Board upon communication of the parties to proceedings.

Finally, once the parties are notified of the final decision of the Board, they have two months from the notification or the publication of the decision to lodge an action before the General Court of the European Union on the grounds of lack of competence, infringement of essential procedural requirements or of the Treaty or of the Basic Regulation or of any other rule or law relating to their application, or in case of misuse of power. The General Court may confirm, annul or alter the contested decision.<sup>45</sup> The Office is obliged to comply with said judgement. A further appeal may be brought before the Court of Justice.

Pursuant to Article 172 of the Rules of Procedure of the General Court, the action brought before the General Court shall be made against the Office to which the Board of Appeal that adopted the contested decision belongs. Therefore, the Office, and not its Board of Appeal, is party to proceedings, acting as defendant before the General Court. However, as it was claimed by the Office and confirmed by the General Court in the *Gala Schnitzer* case,<sup>46</sup> even though the Office is automatically designated as defendant, it does not mean that it is required systematically to defend the decisions of its Board of Appeal that are contested before the General Court.<sup>47</sup> This underlines the Board of Appeal's judicially independent from the Office.

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<sup>43</sup> This has been confirmed by the CJEU in the case CPVO v Ralf Schröder, Case C-38/09 P, points 134-136

<sup>44</sup> Article 52, Proceedings Regulation.

<sup>45</sup> The Court has elaborated on the competence it has to alter decisions of the Board of Appeal in Case T-140/155 Aurora Srl v CPVO, 23 November 2017, paras 87-94

<sup>46</sup> <sup>46</sup> Schniga v CPVO (Joined cases T-91/14 and No T-92/14) EU:T:2015:624

<sup>47</sup> It is necessary to apply, to that effect and by analogy, the established case-law applicable for trademarks cited by the Office and the General Court, Cases T-91/14 and T-92/14 para 23

The above procedure may be summarized as follows:

- i) Decision of the Office.
- j) Servicing and publication of the decision.
- k) Lodging of the appeal (2 months from b, Article 69 BR); 1/3 appeal fee are due on receipt of the appeal.
- l) Grounds of appeal (4 months from b, Article 69 BR).
- m) Interlocutory revision by the Office (Article 70 BR).
- n) Remittal to the BoA; 2/3 of the appeal fee, EUR 1000, are due upon request within one month from the remittal of the appeal to the Board of Appeal.
- o) Examination of the appeal by the Board with or without holding oral proceedings (Article 71 BR).
- p) Decision of the Board of Appeal (Article 72 BR).
- q) Possibility to lodge an action before the CJEU (Article 73 BR).

Decision process of the Board of Appeal:

- a) Composition of the Board: 1 chairman + 2 members.
- b) Step 1: nomination of the rapporteur and the other members.
- c) Step 2: Opinion of the rapporteur.
- d) Step 3: Oral proceedings in Angers.
- e) Step 4: Decision of the Board within 3 months of the oral proceedings.
- f) Step 5: Possible appeal to the General Court of the European Union.
- g) The General Court may annul or alter the contested decision and the Office must comply with the content of the judgment.
- h) The ruling from the General Court may be appealed before the Court of Justice.

## **4. How does the Board of Appeal shape the EU PVR System**

### **4.1. Enforces solid decisions**

The Office is, on a regular basis, faced with the challenge of deciding on matters not regulated in detail in law. The Office must often decide on cases where different principles and interests collide. As has been stated above, the Office has discretion to deal with various aspects on implementing the EU plant variety right system. Taking the aforementioned information into account, the existence of the Board of Appeal is highly necessary in order to verify that the Office is exercising its powers and discretion in a way consistent with legal certainty, transparency and good public administration.

The majority of cases appealed to the Board, concern the DUS requirements. This reflects the importance of the daily work carried out by both the Office and the Examination Offices. The Board is constantly

testing and often challenging the regulatory framework, offering clarification, highlighting weaknesses and ensuring a culture of excellence. In this respect, the Board of Appeal has given the Office as well as applicants important guidance on how to settle cases.

The Board has been given an important responsibility by the legislator, a responsibility which has been confirmed by the CJEU. In a landmark case, the General Court stated that appraisals of scientific and technical complexity justify a limited scope of judicial review by the Courts. The General Court would only assess such issues should the Office and or the Board have committed a manifest error of assessment. In relation to technical matters, the Court of Justice would only review points of law and would only intervene if facts or evidence had been distorted. In practice, this means that the Board of Appeal is in principle the last instance to review such matters which in my view amplifies the importance of its work.<sup>48</sup> This does not mean that the CJEU would not rule on less technical issues such as novelty and the question whether a variety is of common knowledge or not.<sup>49</sup>

The provisions laid down in the Basic Regulation and in the Proceedings Regulation, as well as those laid down in the technical guidelines and protocols, provide a sufficient degree of flexibility for the Office and the Examination Offices in order to fulfil their tasks. At every stage of the procedure there is ample room to take into account the specific circumstances of the case at hand. Therefore, it can be concluded that the Office and the Board of Appeal have a broad margin of discretion in matters which are technically complex.

#### **4.2. Rather few appeals**

As per January 2018, a total of 174 appeals have been lodged before the Board of Appeal, 6 of which are ongoing, 21 were withdrawn by the appellant and 64 decisions were rectified by the Office. The high number of rectified decisions does not mean that the Office considers that the contested decision was wrong. A rectification is often based on information not available to the Committee at the time of taking the decision but submitted by the applicant in an appeal when faced by the negative decision. The Board of Appeal has rendered 83 decisions, seven of which were lost by the Office and in nine cases both the Office and the appellant partially succeeded. It is also interesting to mention that the number of appeals filed by third parties is very limited.

The above-mentioned figures represent a very low number of appeals compared to the total number of applications filed with the Office since 1995 which comes to more than 61,000. Since 1997, the year the first appeal was lodged, on average there were 9 appeals per year. Therefore, it can be concluded that the EU plant variety protection system works well, through a complex technical examination where parties are invited to visit the fields if they are interested in doing so.

The main reasons for successful appeals are:

- Examination was not performed in conformity with the applicable Technical Protocol (TP).
- Conditions for testing were not optimal.
- Difficulties in establishing common knowledge or origin of a reference.
- No novelty because of proven earlier commercialization of the candidate variety.

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<sup>48</sup> Ralf Schröder v CPVO (Case T-187/06) EU:T:2008:511 'the appraisals of scientific and technical complex questions justify a limited scope of judicial review by the Court. Court should only examine that when the authority was finding facts and applied the law there is no manifest errors or misuse of powers'.

<sup>49</sup> Boomkwekerij van Rijn-de Bruyn BV v CPVO (Case T-767/14) paras 70, 71, 72 and the case law cited

The Board of Appeal has a 'filter function' for access to the CJEU. 19 out of the 83 decisions were brought before the General Court and six judgements were further appealed to the Court of Justice. In most of the cases the CJEU confirmed the CPVO's original decision and/or the decision of the Board but there are a few cases where the Court has given constructive criticism on the decision appealed. The fact that very few decisions are brought to the CJEU shows, in my opinion, that although it has not yet been a practical problem, it would be appropriate to have all CPVO appeals dealt with by the same chamber of the Court. This would avoid a rather long and steep learning curve in a quite complex area of law for judges who never heard a PVR case before.

#### **4.3. Contributes to transparency**

One of the great challenges of the Office is to provide applicants with enhanced legal certainty and transparency. The Board of Appeal will continue to play a very important role in this respect. The growing awareness among plant breeders of the peculiarities of the system may prevent errors from occurring. At the same time, the cases remitted to the Board have become progressively more complicated over the years and the written and oral statements of the Office have become more and more sophisticated. The fact that the Office is party to the appeal proceedings is valuable for all participants of the appeal proceedings due to the technical specificities of plant varieties. The Board of Appeal benefits enormously from the presence of the representatives of the Office, especially from the presence of the technical expert that conducted the DUS examination of the variety. This expert is able to answer scientific questions raised by the parties and the Board and gives further explanations on how the testing was conducted. This contributes to transparency.

#### **4.4. Ensures diligence from the CPVO**

The Board of Appeal ensures that decisions of the Office follow the applicable rules and procedures. The Board confirms, improves and corrects CPVO decisions on a continuous basis. The sheer consciousness, by decision makers at the Office, that a decision may be appealed and scrutinized by the Board is a motivating factor to ensure that each case is handled correctly and that each decision is fair. The Board of Appeal has proven to be reasonably fast in taking decisions, taking into account that it is not a permanent body of the Office. The members have their own professional activities, which they have to juggle with their status as member of the Board of Appeal.

### **5. Concluding Remarks**

As can be seen from the above, the Board of Appeal functions well.

I will, in these brief concluding remarks, address some important contributing factors to this conclusion.

The independence of the Board is ensured by the fact that the Chairperson and its alternate are appointed by the Council and the members by the AC. The members are clearly bound by the rules on independence. The remuneration of the members of the Board is set by the AC, this ensures that there are no budgetary reasons which would impede the independence of the Board. Although the Registrar of the Board of Appeal is an employee of the Office, internal procedures ensure that the Office cannot use undue influence to dictate how cases are handled. The fact that the Board's decisions can be subject to further actions before the CJEU ensures that general principles applied under EU law, also apply to the EU plant variety right system.

The interlocutory revision of the appeal procedure has proven to be important, this ensures that cases are not dealt with by the Board which can be resolved at an earlier stage.

The appeals to the Board of Appeal are decided upon in a timely manner. To my mind, the appeals to the Board would appear to have increased, if not in volume then certainly in complexity. The appeal procedure is sometimes used to delay the granting of a right for commercial opponents to gain competitive advantages. Submitting numerous and voluminous submissions is characteristic of such actions. In my opinion, it may be necessary to adopt rules giving full control to the Board to decide the number of submissions allowed by parties as well as the length of such documents.

Overall, the Board of Appeal fulfils the objectives it has been established to achieve.