



**CPVO**

Community Plant Variety Office

**Appeal case: A005/2007-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 Community plant variety right application 2001/1758**

Variety denomination: **Sumost 01**

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, the contested decisions in the present appeal).
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 10 May 2007, the appellant filed an appeal against the Office decisions R 701 and OBJ 07-023 dated 19 February 2007 to refuse the application for the Community plant variety right 'Sumost 01' (Case A 005/2007). The statement of grounds was filed on 11 July 2007.
16. 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.
17. By application lodged at the Registry of the General Court on 13 May 2008, the appellant brought an action, registered under number T-177/08, against Decision A 005/2007.
18. 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 (A 007/2007) in relation to the decision by the Office to adapt the official description of the variety 'Lemon Symphony' in the Register of Community Plant Variety Rights (T-133/08), b) against the decision of the Board of Appeal of the Office of 4 December 2007 (Case A 006/2007) relating to the application for cancellation of the Community plant variety right granted for the variety 'Lemon Symphony' (T-134/08), 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).
19. 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 005/2007) concerning an application for a Community plant variety right for the variety 'Sumost 01' (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 005/2007 (as well as of the parallel decisions A 006/2007 and A 007/2007).
20. 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).
21. 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 005/2007-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 005/2007.
22. The oral hearing took place on 2 September 2016.
23. The appellant requests
- to annul decisions R 701 and OBJ 07-023 of the Office of 19 February 2007 and to grant Community plant variety right for the variety 'Sumost 01', or, alternatively, to cancel the decisions R 701 and OBJ 07-023 of 19 February 2007 and to declare that 'Lemon Symphony' does not continue to exist.
24. The main arguments of the appellant can be summarised as follows:
- The Office wrongly decided that 'Lemon Symphony' should be considered a commonly known variety, from which 'Sumost 01' was not clearly distinct. On the relevant day of application, 26 November 2001, there was no commonly known variety from which 'Sumost 01' did not clearly differ.
  - It is questionable whether 'Lemon Symphony' is a 'variety' in the meaning of Article 5(2) BR. The variety 'Lemon Symphony' should be cancelled on the basis of Article 21 BR.
  - In any event, the rejection was based on the incorrect findings that 'Sumost 01' was not clearly distinct from the variety 'Lemon Symphony'. The technical examinations of 2004 and 2005 do not prove that 'Sumost 01' lacked distinctness already on 26 November 2001.
  - The appellant also referred to the arguments, facts and evidence submitted in the parallel proceedings A 006/2007 and A 007/2007.
25. The Office and the right holder request that the appeal be dismissed because the variety 'Sumost 01' has not been shown to be clearly distinct from the legally valid reference variety 'Lemon Symphony', contrary to the allegation of the appellant.
26. The right holder points out that there cannot be any doubt that the grant of protection for 'Lemon Symphony' was justified, following the termination of the nullity proceedings with the final and binding judgment of the Court of Justice in case C-546/12 P (see above para. 20). For this reason, the 'Lemon Symphony' variety had to be taken into account in the distinctness, uniformity and stability (DUS) examination of 'Sumost 01'. 'Lemon Symphony' has to be regarded as a variety of common knowledge in the sense of Article 7 BR. In



three reports, the BSA came to the conclusion that the candidate variety 'Sumost 01' does not keep the necessary distance to 'Lemon Symphony'. Finally, it is undisputed that plants of the variety 'Lemon Symphony' had been marketed long before the application date of 'Sumost 01' on 26 November 2001. Already for this reason, 'Lemon Symphony' had to be taken into account as it was commonly known at the application date of 'Sumost 01'.

27. The Office shares the view taken by the right holder and points out that the nullity of 'Lemon Symphony' is not an issue any more due to the final and binding judgment of the Court of Justice. 'Lemon Symphony' is therefore in force and legally valid. The Office has no reasons not to rely on the DUS reports in which the variety 'Sumost 01' was declared not distinct from the variety 'Lemon Symphony'.

## II. REASONS

### A. ON THE ADMISSIBILITY

28. The appeal is directed against the CPVO decisions Nos. R 701 and OBJ 07-023 of 19 February 2007, in which the Office refused the application for the CPVR 'Sumost 01' and upheld the objection of the right holder on the ground that that variety was not clearly distinguishable from 'Lemon Symphony'. The appeal complies with the provisions of Article 67, 68, 69 BR and Article 45 of the Implementing Regulation and is, therefore, admissible.

#### *Admissibility of the document submitted by the appellant at the oral hearing*

29. At the oral hearing, the appellant submitted an additional document, namely a table of characteristics for 'Lemon Symphony' dated 1997 and of 'Sumost 01' covering the years 2003-2005 ('Anlage BF 18'). The right holder requests to declare the document submitted by the appellant at the oral hearing inadmissible.
30. The Board of Appeal finds that the document submitted by the appellant at the oral hearing ('Anlage BF 18') is admissible in the present proceedings. The document only repeats the information already exchanged by the parties in these appeal proceedings. The table submitted by the appellant does not add anything new to the arguments already brought forward in 2007. A similar, even though more comprehensive, table was submitted by the appellant together with the statement of grounds dated 11 July 2007 (as 'Anlage BF 16'). The other parties also had the opportunity to comment on the document during the oral hearing. The document is therefore admissible.

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

31. 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.
32. 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



33. The appellant's pleas can be described in essence as consisting of two separate claims. First, the appellant argues that the CPVR 'Lemon Symphony' cannot be considered as a variety of common knowledge at the time of his application for 'Sumost 01' as the CPVR for 'Lemon Symphony' needs to be declared null and void (Article 20 BR) or cancelled (Article 21 BR) with retroactive effect. In any case, according to the appellant, 'Sumost 01' cannot be compared to Lemon Symphony as described in the modified variety description. Second, even if the CPVR for 'Lemon Symphony' was legally valid, 'Sumost 01' was clearly distinguishable from the variety 'Lemon Symphony'.

*About the legal validity of the CPVR 'Lemon Symphony' on 26 November 2001*

34. According to Article 7(1) BR, a variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application.

35. Pursuant to Article 7(2)(a) BR, the existence of another variety shall in particular be deemed to be a matter of common knowledge if on the date of application it was the object of a plant variety right or entered in an official register of plant varieties.

36. The Board of Appeal will first examine whether there existed a valid CPVR for 'Lemon Symphony' on the filing date of 'Sumost 01' (26 November 2001). 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 (see above para. 9). The Board of Appeal considers that those reports are important facts capable of establishing the legal validity of the CPVR 'Lemon Symphony'. The appellant has not shown that the technical examination conducted by the BSA had been erroneous.

37. As regards the alleged nullity of the CPVR of 'Lemon Symphony' pursuant to Article 20 BR, the Board of Appeal finds that this question has been decided in a legally binding manner. In its decision of 10 May 2007, the Board of Appeal already held that the variety 'Lemon Symphony' was not null and void under Article 20 BR (Decision A 010/2007). In particular, the Board of Appeal pointed out that 'Lemon Symphony' was correctly tested in 1997. This decision was confirmed by the General Court (see above para. 19) and by the Court of Justice (see above para. 20).

38. As regards the alleged lack of stability of 'Lemon Symphony' under Article 21 BR, which, according to the appellant, should lead to cancellation of the CPVR of 'Lemon Symphony' with effect from 1 January 1998, the Board of Appeal considers that the appellant has not been able to submit evidence and facts of sufficient substance to raise serious doubts as to the stability of the variety 'Lemon Symphony' (see appeal A006/2007-RENV).

39. 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.

40. 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.

41. The CPVR 'Lemon Symphony' was stable as demonstrated by the examination reports of 7 October 2004 and 14 September 2005 prepared by the BSA. 13 of 19 characteristics for 'Lemon Symphony' were identical in the reports of 2004 and 2005. The differences mentioned in para. 40 above are clearly insufficient to cast any doubt on the stability of the variety and are due to the usual tolerance range of the variety.
42. Moreover, the comparison of the characteristics of 'Lemon Symphony' (1997) and 'Lemon Symphony' (2005) confirms that the variety 'Lemon Symphony' was also stable in its essential characteristics between 1997 and 2005.
43. The differences in one note of the 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 (see above para. 39).
44. Contrary to the allegation of the appellant, 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.
45. 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. 39-40). 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.
46. 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. 40). 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'.



47. 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. 39).
48. 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.
49. In conclusion, the Board of Appel 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.
50. Furthermore, in its judgment of 18 September 2012, the General Court confirmed that the characteristic 'attitude of shoots' was a relative criterion which is subject to a comparative assessment between varieties of the same species (see above para. 19). The General Court also confirmed that the conclusion reached by the BSA, namely that the change of the characteristic 'attitude of shoots' from 'erect' to 'semi-erect to horizontal' (see above para. 44) did not affect the identity of the variety 'Lemon Symphony', was correct:

*'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.'* (emphasis added)

51. In conclusion, the results of the technical examination reports issued by the BSA on 7 October 2004 and 14 September 2005 reveal that 'Lemon Symphony' was stable during this period of time (see above para. 41).





The result is the same when comparing the data of the variety 'Lemon Symphony' of the 1997 test on the one hand and the data of the variety 'Lemon Symphony' of the examination conducted in 2005. All differences are due to the above-mentioned factors (see above para. 42-49). 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. The only purpose of changing the scale of the assessment was to obtain a more precise comparative basis for the examination. This change of the scale did not influence the identity of the variety. As mentioned above, the appellant has not been capable of establishing errors in the examination reports prepared by the BSA and there are no reasons to doubt the results of those reports. 'Lemon Symphony' is stable in its essential characteristics.

52. Therefore, the Board of Appeal considers that the appellant failed to adduce evidence and facts of sufficient substance to raise serious doubts as to the contested lack of stability of 'Lemon Symphony' between 1997 and 2005. Consequently, when 'Sumost 01' was filed on 26 November 2001, there existed a legally valid CPVR for 'Lemon Symphony', which is deemed to be a matter of common knowledge under Article 7(2)(a) in connection with 7(1) BR.
53. For the sake of completeness, even assuming that no legally valid CPVR existed for 'Lemon Symphony' on 26 November 2001, this would not change the fact that plant material with the characteristics of 'Lemon Symphony' existed on 26 November 2001. Its existence was a matter of common knowledge in the meaning of Article 7(1) BR. In this respect, it should be noted that the wording of Article 7(2) BR ('in particular') makes it clear that the situations listed under letters a) and b) of that provision are only examples. As the right holder has demonstrated with documentary evidence attached to its submission of 31 October 2007, plant material with the characteristics of 'Lemon Symphony' was a matter of common knowledge, within the meaning of Article 7(1) BR, through sales of the variety from October 1999 onwards (Annex BG 1-3). The appellant has not produced any evidence that the material on the market changed. The evidence confirms that plant material for 'Lemon Symphony' with its characteristics noted in 2002 was available on the German market at the latest from autumn 1999.
54. Thus, 'Lemon Symphony' was a generally known variety in the meaning of Article 7(2)(a) read in connection with Article 7(1) BR on the date of the application of Sumost 01.
55. Therefore, the appellant's argument, namely that 'Lemon Symphony' was not legally valid, has to be refused.

*About the alleged distinctness of 'Sumost 01' – the technical examinations of 2004 and 2005*

56. The Appellant argues, secondly, that even if 'Lemon Symphony' was legally valid, 'Sumost 01' would still be distinct. The Board of Appeal will first examine this argument as regards the technical examinations of 2004 and 2005.
57. The report on technical examination dated 7 October 2004 concluded that the variety 'Sumost 01' was not clearly distinguishable from the variety 'Lemon Symphony'. The report listed 19 different characteristics of the varieties under comparison, 17 of which were identical. Differences (in one note) were found only as regards the characteristics 'Shoot: length' and 'Ray floret: width'.
58. Likewise, the report on technical examination dated 26 September 2005 came to the same conclusion: The variety 'Sumost 01' was not clearly distinguishable from the variety 'Lemon Symphony'. According to the report, there was only one difference out of 19 characteristics of the varieties under comparison, namely as regards the characteristic 'Time of beginning of flowering' (difference of one note).
59. The differences are too minor to establish distinctness of 'Sumost 01'. The differences are of only one note and are due to the reaction of the plants to environmental conditions (see above para. 39-40 and 43). Moreover, the report of 2005 shows that the statistically relevant differences between 'Sumost 01' and 'Lemon Symphony' detected in 2004 ('shoot: length' and 'ray floret: width') could not be found in 2005. Likewise, the difference detected in 2005 ('time of beginning of flowering') were not found in the 2004 report. Consequently, the variations within the same variety were more significant than the variations between the varieties under comparison.



60. Finally, the lack of distinctness of 'Sumost 01' is also indicated by the fact that the appellant was not capable of distinguishing the varieties under comparison during a visit at the BSA on 19 July 2004. This had already been pointed out by the Board of Appeal in Decision A 010/2007 of 23 January 2009 (which was confirmed by the General Court and the Court of Justice - see above para. 19-20).
61. The Board of Appeal therefore finds that 'Sumost 01' is not clearly distinguishable from the variety 'Lemon Symphony' when using the data of the technical examination reports of 2004 and 2005.

*About the alleged distinctness of 'Sumost 01' – The situation on 26 November 2001*

62. Finally, the appellant argues that the technical examinations conducted in the years 2004 and 2005 do not prove that 'Sumost 01' was not clearly distinguishable from the CPVR for 'Lemon Symphony' on 26 November 2001 (filing date of 'Sumost 01').
63. As shown above, the CPVR for 'Lemon Symphony' was stable between 1997 and 2005. The differences of the characteristics between the variety description for 'Lemon Symphony' in 1997 and the result of the technical examination in 2005 are due to the expanded range of varieties, the reaction to environmental factors and the fact that the examination reports of 1997 and 2005 were based on different tables of characteristics (1997: national table / 2005: UPOV-Guidelines). All this was explained in detail above (see para. 42-49).
64. On 18 April 2007, following the technical verification, the Office decided to adapt the official variety description for 'Lemon Symphony' because the Office considered such an adaptation necessary, in the light of the then 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 (Article 87(4) BR). However, this adaptation of the official description did not affect the identity of the CPVR for 'Lemon Symphony'. The adaptation of the official description for 'Lemon Symphony' in 2007 and the question of stability of the variety between 1997 and 2005 are two sides of the same coin. The arguments used above for explaining why the changes between the characteristics in 1997 and 2005 did not affect the identity of the CPVR 'Lemon Symphony' are the same as the arguments that justify the adaptation of official description of that right.
65. Consequently, 'Lemon Symphony' was stable on 26 November 2001. The appellant's allegation that the variety was not stable on that date has not been corroborated with a single piece of evidence. Furthermore, since the adaptation of the official description for 'Lemon Symphony' was lawful and in line with Article 87(4) BR (see parallel proceedings A007/2007-RENV), the former official description of 'Lemon Symphony' of 1997 is irrelevant when deciding whether 'Sumost 01' was clearly distinguishable from 'Lemon Symphony' or not.
66. The Board of Appeal emphasizes that the question of distinctness has to be assessed on the basis of a comparative cultivation (as done by the BSA between 2003 and 2005), and not by making a purely theoretical comparison on the basis of a variety description which has been replaced in the meantime.
67. For the sake of completeness, even when embarking on the theoretical exercise of comparing the data available for 'Sumost 01' in 2005 with the data of 'Lemon Symphony' in 1997 (using an official description which is not valid anymore), the result would still be the same. Seven characteristics of the varieties are identical ('leaf: length', 'leaf: degree of lobing', 'leaf: variegation', 'Inflorescence: number of complete ray floret whorls', 'Inflorescence: shape of ray floret', 'Ray floret: width' and 'Disc: colour') and the differences can be explained using exactly the same arguments as elaborated above. In particular, as regards the describing characteristic 'Attitude of shoots', which can be distinguished by 3 notes ('Lemon Symphony 1997: Erect / note 1; 'Sumost 01' (2005): Semi-erect to horizontal / note 4), the same arguments as set out above in para. 44 apply. Likewise, the difference in characteristic 'shoot: length' is 2 notes ('Lemon Symphony (1997): Very short / note 1; 'Sumost 01' (2005): Short / Note 3). The differences in notes are also likely to be related to the fact that no example varieties for these characteristics had been developed in 1997. The characteristics could only be determined in relation to other varieties cultivated in 1997. Moreover, those characteristics have also a large tolerance range and are particularly influenced by the environmental conditions described above. The remaining characteristics can be distinguished by one note only, which would not be sufficient to clearly distinguish the varieties if they had been cultivated under identical conditions. Finally, as regards the characteristics 'ray floret: colour of margin of upper side', 'ray floret: colour of middle of upper side' and 'ray floret: colour of base of upper side', the colour descriptions



are identical. The fact that different colour card numbers have been used does not influence the assessment. The differences are absolutely minimal. The same explanations as given above in para. 46 apply.

68. In summary, contrary to the allegation of the appellant, it is clear that the CPVR 'Lemon Symphony' was stable and that 'Sumost 01' was not clearly distinguishable from 'Lemon Symphony' in the meaning of Article 7(1) BR when the application for 'Sumost 01' was filed on 26 November 2001.

#### *Conclusion*

69. On the filing date of 'Sumost 01' (26 November 2001), there existed a valid Community plant variety registration for 'Lemon Symphony'. The plant variety 'Lemon Symphony' is distinct and stable. There do not exist any grounds for nullity or cancellation under Article 20 or 21 BR. Consequently, 'Lemon Symphony' was a generally known variety in the meaning of Article 7(2)(a) in connection with 7(1) BR on the filing date of 'Sumost 01'. Plant material with the characteristics of 'Lemon Symphony' was also a matter of common knowledge, within the meaning of Article 7(1) BR, through sales of the variety from October 1999 onwards.

70. According to the technical examinations conducted in 2003, 2004 and 2005, 'Sumost 01' is clearly not distinguishable from the variety 'Lemon Symphony'. Consequently, the Office correctly upheld the objection and refused protection of 'Sumost 01' as a Community plant variety right on the basis that it lacked distinctness under Article 7 BR.

#### **C. ON THE COSTS**

71. 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.

72. 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

