

JUDGMENT OF THE GENERAL COURT (Third Chamber)

5 February 2019 (*)

(Plant varieties — Application for a Community plant variety right for the plant variety Braeburn 78 (11078) — Designation of another examination office — Scope of the examination to be carried out by the Board of Appeal — Obligation to state reasons)

In Case T-177/16,

Mema GmbH LG, established in Terlan (Italy), represented by B. Breitingner and S. Kirschstein-Freund, lawyers,

applicant,

v

Community Plant Variety Office (CPVO), represented by M. Ekvad, F. Mattina, O. Lamberti and U. Braun-Mlodecka, acting as Agents, and A. von Mühlendahl and H. Hartwig, lawyers,

defendant,

ACTION brought against the decision of the Board of Appeal of the CPVO of 15 December 2015 (Case A 001/2015) concerning an application for the grant of a Community plant variety right for the plant variety Braeburn 78,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen (Rapporteur), President, V. Kreuschitz and N. Półtorak, Judges,

Registrar: R. Ükelyté, Administrator,

having regard to the application lodged at the Court Registry on 22 April 2016,

having regard to the response lodged at the Court Registry on 11 July 2016,

having regard to the change in the composition of the Chambers of the General Court,

having regard to the decision to suspend proceedings of 24 October 2016,

having regard to the decision to suspend proceedings of 22 March 2018,

further to the hearing on 25 September 2018,

gives the following

Judgment

Legal framework

The basic regulation

- 1 Under Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) ('the basic regulation'), Community plant variety rights are granted for varieties that are distinct, uniform, stable and new.
- 2 According to Article 7(1) of the basic regulation, a variety is to 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 for the grant of a Community plant variety right.
- 3 The question whether the criteria of distinctness, uniformity and stability are met in a particular case is tested in the context of a technical examination conducted in accordance with Articles 55 and 56 of the basic regulation.

4 Article 55(1) of the basic regulation provides as follows:

‘1. ‘Where the [Community Plant Variety] Office has not discovered any impediment to the grant of a Community plant variety right on the basis of the examination [in respect of the formal and substantive conditions laid down in] Articles 53 and 54, it shall arrange for the technical examination relating to compliance with the conditions of the [criteria of distinctness, uniformity and stability] to be carried out by the competent office or offices in at least one of the Member States entrusted with responsibility for the technical examination of varieties of the species concerned by the Administrative Council [of the Community Plant Variety Office], hereafter referred to as the “Examination Office or Offices”.’

5 Under Article 56 of the basic regulation, the conduct of any technical examinations is to be in accordance with test guidelines issued by the Administrative Council and any instructions given by the Community Plant Variety Office (CPVO). Those guidelines describe, inter alia, the plant material required for the technical examination, how the tests are to be performed, the methods to be applied, the observations to be made, the grouping of the varieties included in the test and the table of characteristics to be examined. In the technical examination, plants of the variety at issue are cultivated alongside those of the varieties which the CPVO and the appointed examination office deem to be those to which the candidate variety comes closest according to the description of the candidate variety in the technical description forming part of the application for the grant of a Community plant variety right.

6 Article 57(1) to (3) of the basic regulation provides as follows:

‘1. The Examination Office shall, at the request of the [CPVO] or if it deems the results of the technical examination to be adequate to evaluate the variety, send the [CPVO] an examination report, and, where it considers that the conditions laid down in Articles 7 to 9 are complied with, a description of the variety.

2. The [CPVO] shall communicate the results of the technical examinations and the variety description to the applicant and shall give him an opportunity to comment thereon.

3. Where the [CPVO] does not consider the examination report to constitute a sufficient basis for decision, it may provide of its own motion, after consultation of the applicant, or on request of the applicant for complementary examination. For the purposes of assessment of the results, any complementary examination carried out until a decision taken pursuant to Articles 61 and 62 becomes final shall be considered to be part of the examination referred to in Article 56 (1).’

7 As regards the rules governing proceedings before the CPVO, Article 72 of the basic Regulation provides as follows:

‘The Board of Appeal shall decide on the appeal on the basis of the examination carried out pursuant to Article 71. The Board of Appeal may exercise any power which lies within the competence of the [CPVO], or it may remit the case to the competent body of the [CPVO] for further action. The latter one shall, in so far as the facts are the same, be bound by the *ratio decidendi* of the Board of Appeal.’

8 Article 75 of the basic regulation provides as follows:

‘Decisions of the [CPVO] shall be accompanied by statements of the grounds on which they are based. They shall be based only on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing.’

9 Article 76 of the basic regulation provides as follows:

‘In proceedings before it the [CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55. It shall disregard facts or items of evidence which have not been submitted within the time limit set by the [CPVO].’

Protocol CPVO-TP/14/2 final

10 Point I of Protocol TP/14/2 final of the CPVO of 14 March 2006 on examination of distinctness, uniformity and stability (Apple) (‘Protocol CPVO-TP/14/2’) provides as follows:

‘The protocol describes the technical procedures to be followed in order to meet the [basic regulation]. The technical procedures have been agreed by the Administrative Council and are based on general [International Union for Protection of New Varieties of Plants] document TG/1/3 and [International Union for Protection of New Varieties of Plants] guideline TG/14/9 dated [6 April] 2005 for the conduct of tests for distinctness, uniformity and stability. This protocol applies to fruit varieties of *Malus domestica* Borkh.’

11 The last subparagraph of point III.5 of Protocol CPVO-TP/14/2 provides as follows:

‘Observations on the fruit should be made [...] at the time of ripeness for eating.’

12 Point Ad 56 of Protocol CPVO-TP/14/2 states as follows:

‘Time for harvest

Time for harvest is the optimum time of picking to achieve fruit in peak condition for eating (see [point] Ad 57).’

13 Point Ad 57 of Protocol CPVO-TP/14/2 provides as follows:

‘Time of eating maturity

Time of eating maturity is the period when a fruit has reached optimum colour, firmness, texture, aroma and flavour for consumption. Depending on the type of fruit, this period can occur directly after removal from the tree (e.g. early varieties) or after a period of storage or conditioning (e.g. later varieties).’

Background to the dispute

14 On 20 May 2009, Mr. Johann Huber, the owner of the applicant, Mema GmbH LG, submitted an application to the CPVO for the grant of a Community plant variety right under the basic regulation. The plant variety for which the right was thus sought was the variety Braeburn 78, belonging to the species *Malus domestica Borkh.*

15 The CPVO instructed the French Variety and Seed Study and Control Group (GEVES), an examination site of the Institute for Agricultural Research (INRA), in Angers-Beaucouzé (France), to carry out the technical examination of the candidate variety in accordance with Article 55(1) of the basic regulation.

16 The technical examination was carried out on the basis of Protocol CPVO-TP/14/2.

17 GEVES, whose examination report was submitted to CPVO on 21 May 2014, considered that the variety Braeburn 78 was not sufficiently distinct from the comparison variety Royal Braeburn, on the basis of the following findings:

‘On the basis of the distinctness, uniformity and stability observations 2012-2013, the candidate variety is not clearly distinct from Royal Braeburn and X9466. That finding is based on the following elements:

In 2012: first significant fruit harvest

Variety/ Characteristic	Date of harvest	Starch regression	Firmness (kg/cm ²)	Refractometric index (%)	Acidity (g/l malic acid)	Shade (spectrocolorimetry)*
Candidate variety	11/10	5.5	9.2	12.8	7.39	18.64
Royal Braeburn	11/10	-	-	-	-	20.19
X9466 (1)	11/10	6.3	9.3	12.8	7.31	18.71

* A difference of 2 degrees is clearly visible to the naked eye

(1) trees one year older than the candidate variety

The candidate variety includes even and striped fruits, like Royal Braeburn and X9466. The shade and colour of the candidate variety’s skin is close to that of Royal Braeburn and X9466. The maturity of the candidate variety is close to other mutants of Royal Braeburn with a standard maturity period.

In 2013: second significant fruit harvest

Variety/ Characteristic	Date of Harvesting	Starch regression	Firmness (kg/cm ²)	Refractometric index (%)	Acidity (g/l malic	Shade (spectrocolorimetry)*
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					acid)	
Candidate variety	11/10	5.5	10.5	11.7	7.8	22.49
Royal Braeburn	11/10	6.0	10.0	11.6	8.08	23.55
X9466 (1)	11/10	5.7	10.2	11.2	7.53	22.07

* A difference of 2 degrees is clearly visible to the naked eye

(1) trees one year older than the candidate variety

The candidate variety includes fruits with an even surface and striation, like Royal Braeburn and X9466. The shade and colour of the candidate variety's skin is too close to that of Royal Braeburn and X9466. The maturity of the candidate variety is close to other mutants of Royal Braeburn with a standard maturity period. The slight difference in the shape of the fruit, referred to by the applicant in comparison with the Royal Braeburn, has not been observed.

The variety is rejected on account of lack of distinction in respect of Royal Braeburn and X9466.'

18 On the basis of that report and having received the applicant's comments, the CPVO dismissed that application for the grant of a Community plant variety right by decision of 18 December 2014.

19 The applicant appealed against the CPVO's decision to reject the application. That appeal was dismissed as unfounded by the Board of Appeal of the CPVO by decision of 15 December 2015, notified to the applicant on 22 February 2016 ('the contested decision').

20 First, the Board of Appeal considered, in essence, that the examination site, namely Angers-Beaucouzé, challenged by the applicant, was the site where the technical examination had to be performed under the applicable provisions.

21 Second, as regards the date of harvest and the date of maturity, in respect of which the applicant essentially challenged the conditions and findings of the technical examination, the Board of Appeal found as follows:

'The characteristics 'date of harvest' and 'date of eating maturity' were defined in rather vague terms in the UPOV guidelines (TG/14/9) as was the test protocol for the resulting apple [CPVO TP/14/2], in so far as the instructions cover a wide maturity range, from early to late, and from suitable for immediate consumption to suitable for long-term storage. Effective use of the protocol guidelines requires experience in DUS testing and detailed knowledge of the seed.

Instructions are given in the 'Explanation and methods' section in the table of characteristics of the test protocol for the apple. The instructions relating to the time of harvest and the time of eating maturity are given in points Ad 56 and Ad 57 on page 32.

In the opinion of the Board of Appeal, those instructions were correctly implemented by the Examination Office. For the purposes of a good comparison, fruits of the candidate and reference varieties were harvested on the same date and (in that case) as soon as the starch regression index was approximately 5 for all the varieties concerned.

The 'time of maturity' can be disputed, but since the GEVES examiners have experience of that seed, the Board of Appeal relies on their assessment of the time of eating maturity, which corresponds to the stage during which all the characteristics of the fruits were assessed. The characteristics of the ripe fruit of the Braeburn mutants were noted and/or measured on the same date (where possible), that is to say around mid-November, as required.'

22 Finally, as regards the points of distinction relating to the striation of the fruits, their shape and size, points on which the applicant disputed the observations of the Examination Office, the Board of Appeal considered that the characteristics relating to the 'size of the fruit', the 'shape of the fruit', the 'base colour of the fruit', the 'relative extension of the skin colour', the 'intensity of the skin colour', the 'pattern of the skin colour and the 'width of the stripes' could in general be assessed visually, while other characteristics such as the 'height of the fruit', the 'diameter of the fruit' and the 'height/diameter ratio' needed to be measured; the visually observed characteristics were in that regard sometimes confirmed by measurements. The Board of Appeal concluded that the Examination Office had carried out all the tests in accordance with the applicable guidelines and the protocol.

Forms of order sought

23 The applicant claims that the Court should:

- annul the contested decision and refer the case back to the Board of Appeal for further decision with the direction to annul the contested decision and order the CPVO to carry out a complementary examination pursuant to Article 57(3) of the basic regulation;
- in the alternative, annul the contested decision;
- in the alternative, in the event that the Court does not uphold the first two heads of claim, stay the present proceedings pursuant to Article 69(d) of the Rules of Procedure of the General Court until a final decision has been issued in the proceedings on the cancellation of plant variety rights granted for the reference variety Royal Braeburn (Application No 1998/1082; Plant variety No 11960).
- order the CPVO to pay the costs.

24 The applicant, however, withdrew its second head of claim submitted in the alternative, which was recorded in the minutes of the hearing.

25 The CPVO contends that the Court should:

- dismiss the action in part as inadmissible;
- dismiss the action in part as unfounded;
- order the applicant to pay the costs.

Law

26 The applicant puts forward three pleas in law in support of its action, alleging, respectively, in essence, (i) misuse of power and infringement of Article 57(3) of the basic regulation, (ii) that the technical examination is vitiated by various errors and, finally, (iii) infringement of the right to be heard and failure to state reasons.

27 Having ruled on the admissibility of the applicant's first head of claim, it is necessary, first, to examine the third part of the second plea in law and the second part of the third plea in law which both concern failure to state the reasons on which the contested decision is based.

Admissibility of the applicant's first head of claim

28 By its first head of claim, the applicant claims that the Court should respectively 'annul the contested decision and refer the case back to the Board of Appeal for a further decision with the direction to annul the contested decision and order the CPVO to carry out a complementary examination pursuant to Article 57(3) of the basic regulation'.

29 It must be noted that, in actions before the Courts of the European Union against a decision of a Board of Appeal, the CPVO is required, under Article 73(6) of the basic regulation, to take the measures necessary to comply with judgments of those Courts. Accordingly, it is not for the General Court to issue directions to the CPVO. It is for the latter to draw the appropriate inferences from the operative part and grounds of the Court's judgments (see, to that effect, Case T-443/05, *El Corte Inglés v OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)*, EU:T:2007:219, paragraph 20 and case-law cited).

30 Accordingly, the first head of claim is inadmissible in so far as it seeks that the Court should refer the case back to the Board of Appeal for a further decision with the direction to annul the contested decision and order the CPVO to carry out a complementary examination pursuant to Article 57(3) of the basic regulation.

The third part of the second plea in law and the second part of the third plea in law, alleging failure to state the reasons on which the contested decision is based

31 In support of the third part of the second plea in law and the second part of the third plea in law, the applicant alleges, in particular, failure to state reasons.

32 In that regard, the applicant claims, in essence, that the Board of Appeal failed to explain why, on the one hand, it did not take into account certain evidence adduced by the applicant which was capable of establishing, inter alia, that the clear marbling of the variety applied for was sufficiently clearly distinguishable from that of the reference variety to differentiate them (third part of the second plea in law) and, on the other hand, why it is necessary to rely on the assessments of the examiners of the Examination Office and, accordingly, not to take into account the technical evidence and expert opinions raised by the applicant in support of its action (second part of the third plea in law).

- 33 As a preliminary point, it is necessary to recall the principles which determine the scope of the examination which the Board of Appeal of the CPVO is required to carry out.
- 34 First, it must be noted that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for the grant of Community plant variety rights and, accordingly, the CPVO must be accorded a broad discretion in carrying out its functions (see, to that effect, judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraph 50 and the case-law cited). That discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of the basic regulation (see judgment of 8 June 2017, *Schniga v CPVO*, C-625/15 P, EU:C:2017:435, paragraph 46 and the case-law cited).
- 35 However, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine all the relevant particulars of an application for the grant of a Community plant variety right with care and impartiality and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings which it sets in motion (see judgment of 8 June 2017, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-625/15 P, EU:C:2017:435, paragraph 47 and the case-law cited).
- 36 In addition, it should be recalled that 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 come under the examination pursuant to Articles 54 and 55'.
- 37 Furthermore, the Court has held that, under Article 51 of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of the basic regulation as regards proceedings before the CPVO (OJ 2009 L 251, p. 3), the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46).
- 38 Thus, on the one hand, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46). On the other hand, the Board of Appeal is also 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 (judgment of 23 November 2017, *Aurora v CPVO — SESVanderhave (M 02205)*, T-140/15, EU:T:2017:830, paragraph 74).
- 39 Secondly, Article 72 of the basic regulation provides that the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further action.
- 40 In that regard, it must be noted that, as regards Article 71(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), which is drafted in similar terms to Article 72 of the basic regulation, it has consistently been held that it follows from that provision, and from the scheme of Regulation 2017/1001, that the Board of Appeal has the same powers as the department which was responsible for the decision appealed and that its examination concerns the dispute as a whole as it stands on the date of its ruling. It also follows from that article that there is continuity in terms of their functions between the different departments of the European Union Intellectual Property Office (EUIPO) and the Boards of Appeal from which it follows that, in the context of the review which the Boards of Appeal must undertake of the decisions taken by the EUIPO departments which heard the application at first instance, the Boards are required to base their decisions on all the matters of fact and of law which the parties put forward either in the proceedings before the department which heard the application at first instance, or in the appeal (see judgment of 10 July 2006, *La Baronía de Turis v EUIPO — Baron Philippe de Rothschild (LA BARONNIE)*, T-323/03, EU:T:2006:197, paragraphs 56 to 58 and the case-law cited).
- 41 It has also been held that the extent of the examination which the Boards of Appeal of EUIPO are required to conduct with regard to the decision under appeal does not depend upon whether or not the party bringing the appeal has raised a specific ground of appeal with regard to that decision, criticising the interpretation or application of a provision by the department of EUIPO which heard the application at first instance, or upon that department's assessment of a piece of evidence. Therefore, even if the party bringing the appeal before the Board of Appeal has not raised a specific plea, the Board of Appeal is nonetheless bound to examine whether or not, in the light of all the 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 (see judgment of 8 July 2004, *Sunrider v OHIM — Espadafor Caba (VITAFRUIT)*, T-203/02, EU:T:2004:225, paragraph 21 and the case-law cited).

- 42 It must be held that, in the light of the similarity of the provisions of Regulation 2017/1001 and the basic regulation, similar principles are applicable to the procedures applied by the CPVO.
- 43 Thirdly, it should be noted that, under the first sentence of Article 75 of the basic regulation, decisions of the CPVO must state the reasons on which they are based. The obligation to state reasons thus established has the same scope as that under Article 296 TFEU and has the twofold purpose of enabling the parties concerned to know the reasons for the measure adopted in order to be able to defend their rights and of enabling the EU courts to review the legality of the decision (see judgment of 23 February 2018, *Schniga v CPVO (Gala Schnico)*, T-445/16, EU:T:2018:95, paragraph 27 and case-law cited).
- 44 The obligation to state reasons may be satisfied without it being necessary expressly and exhaustively to address all the arguments raised by an applicant, provided that the CPVO has set out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 23 February 2018, *Gala Schnico*, T-445/16, EU:T:2018:95, paragraph 28 and the case-law cited).
- 45 In the present case, it must first be noted that the question whether, in particular, the criterion of distinctness is satisfied is assessed in a technical examination, which, according to Article 56 of the basic regulation, must be carried out in accordance with the test guidelines issued by the CPVO's Administrative Council and any instructions given by the CPVO. Those guidelines describe, inter alia, the plant material required for the technical examination, the methods to be applied, the observations to be made and the table of characteristics to be examined.
- 46 Protocol CPVO-TP/14/2 describes the technical procedures to be followed in order to comply with the basic regulation.
- 47 According to the last subparagraph of Point III.5 of Protocol CPVO-TP/14/2, observations on the fruit should be made at the time of ripeness for eating, which is, in the words of point Ad 57 of that protocol 'the period when a fruit has reached optimum colour, firmness, texture, aroma and flavour for consumption'. Depending on the type of fruit, this period can occur directly after removal from the tree (for early varieties) or after a period of storage or conditioning (for later varieties). Time for harvest is, itself, defined as 'the optimum time of picking to achieve fruit in peak condition for eating', according to point Ad 56 of that protocol.
- 48 Thus, for a later variety such as that in the present case, in order to make a correct assessment of the distinction between the variety applied for and the reference variety, it is necessary, on the one hand, to pick the fruits of the respective varieties at the optimum time for obtaining fruit in peak condition for eating and, on other hand, to observe the characteristics of the fruit when they reach their time of eating maturity, that is to say when they have reached optimum colour, firmness, texture, aroma and flavour for consumption.
- 49 It follows that, in the event that they are picked at a time that does not allow the fruits to reach optimum colour, firmness, texture, aroma and flavour and where the characteristics are observed at a time when the fruit has not yet reached its time of eating maturity, it would be necessary to consider that the criteria relating to the time for harvest and the time of eating maturity have not been met, which would accordingly hinder a correct comparative assessment of the variety applied for and the reference variety.
- 50 In the present case, it cannot be ruled out that the criticisms made by the applicant in the present case concerning the alleged lack of compliance with the protocol criteria relating to the time for harvest and the time of eating maturity were likely, if established, to affect the question whether the assessment of the distinction had been made in accordance with the protocol. Consequently, the Board of Appeal was required to rule on those considerations, since they had decisive importance in the context of the decision which the Board of Appeal had to make at the end of the examination that it was required to carry out in accordance with the principles set out in paragraphs 34 to 42 above.
- 51 It must be noted that, in response to the arguments raised by the applicant against the assessments made by GEVES as regards, in particular, first, the date of harvest and the considerations relating to the starch regression index and, second, the date of eating maturity, the Board of Appeal (see paragraph 21 above), on the one hand, merely considered that while the criteria to be applied were defined in a vague manner, they had, in its opinion, been 'implemented' and, on the other hand, indicated that it relied on the findings of the experts, without giving any explanation as to why the technical arguments and evidence, in particular the expert reports relied on by the applicant, were irrelevant and should therefore be rejected.
- 52 The contested decision thus does not set out in a clear and unequivocal fashion the reasoning of the Board of Appeal which led it to rely on the deficient findings of GEVES and to disregard the arguments put forward by the applicant.
- 53 In that regard, it should also be noted that, as regards the reference variety, the table drawn up by GEVES in support of its examination report (see paragraph 17 above) does not include, for 2012, any indication relating to the starch regression index — even though the CPVO itself recognised that this was a key criterion —, to firmness, acidity or the refractometric index respectively.

- 54 Moreover, the CPVO failed to provide any explanation making it possible to understand the absence of those elements when questioned on the subject at the hearing.
- 55 This is also the case with regard to the precise date on which the CPVO carried out the examinations relating to the characteristics of the ripe fruit for the Braeburn mutants, which does not appear in the GEVES report and about which the CPVO was unable to provide clarification to the Court at the hearing.
- 56 It must therefore be considered that the reasoning which led the Board of Appeal to reject the arguments raised by the applicant is so deficient that it must be held that the reasons on which the contested decision is based have not been stated or are, at the very least, inadequate.
- 57 Accordingly, it is necessary to uphold the third part of the second plea in law and the second part of the third plea in law, alleging infringement of the obligation to state reasons laid down in Article 75 of the basic regulation and, consequently, to annul the contested decision, without it being necessary to rule on the other parts raised in support of the second and third pleas in law, or on the first plea in law.

Costs

- 58 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the CPVO has essentially been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 15 December 2015 (Case—A 001/2015) concerning an application for the grant of a Community plant variety right for the plant variety Braeburn 78;**
2. **Dismisses the remainder of the action;**
3. **Orders the CPVO to pay the costs.**

Frimodt Nielsen

Kreuschitz

Półtorak

Delivered in open court in Luxembourg on 5 February 2019.

[Signatures]