

Appeal case: A003/2014

DECISIONⁱ

Concerning the appeal lodged by

Nador Cott Protection S.A.R.L. (NCP)

51 Rue Jules Barbier, Le Stanislas B, 83700 St Raphael, France

Represented by Mrs Pi i Amorós from Uría Menéndez Abogados S.L.P.

Príncipe de Vergara, 187

Plaza Rodrigo Uría, 28002 Madrid, Spain

Appellant

Community Plant Variety Office

3, Boulevard Maréchal Foch,

CS 10121, 49101 Angers CEDEX 2, France

Represented by its President, Mr M. Ekvad

The Regents of the University of California (UCR)

1111 Franklin Street, 12th Floor, US – Oakland, CA 94607

Represented by Mr Muñoz-Delgado from Gómez-Acebo & Pombo Abogados S.L.P.

Castellana 216, 28046 Madrid, Spain

Other parties to the proceedings

Relating to Community Plant Variety Right application No 2011/1544

Variety denomination: **Tang Gold**

Species: Citrus reticulata Blanco

On 3 March 2016, the Board of Appeal of the Community Plant Variety Office, composed of Mr P. van der Kooij (Chairperson), Mr H. Ghijsen (Rapporteur) and Mr M. Pinheiro de Carvalho (Member), gave the following decision:

1. The appeal is inadmissible.

2. The appellant shall bear the costs of the appeal proceedings according to Article 85, paragraph 1, of Council Regulation (EC) No 2100/94 of 27 July 1994.

I. SUMMARY OF FACTS

UCR is the applicant of the mandarin variety Tang Gold that has been obtained as a mutant, by means of a radiation method from the variety Nadorcott, owned by NCP. The most important difference between the varieties is the lack of seeds in the fruit of Tang Gold and its low fertility of male pollen during flowering.

NCP requested in its letter of 26 September 2013 access to all documents, procedures, forms and reports in relation to the DUS testing of Tang Gold. NCP also requested to visit the DUS trial and to take samples from the DUS material during that visit in order to check the material for possible diseases. The request for taking the samples is dealt with in appeal case A001/2014. For the present case it is relevant to mention the letter of 5 November 2013 which the CPVO (hereinafter also: the Office) sent to UCR in order to ask, pursuant to Article 88(4) of Regulation 2100/94 (hereinafter the basic regulation), whether UCR would give its permission for such request.

On 14 February 2014 NCP repeated its request for access to all DUS related documents of Tang Gold. The Office represented by its president Mr. Ekvad answered by e-mail d.d. 24 February 2014 that it had decided to provide the documents as required by Regulation 1049/2001 (hereinafter regulation 1049).

By letter of 7 March 2014 the Office informed NCP that after consulting the Spanish Examination Office the Office decided not to send any documents as it had come to the conclusion that all documents as requested by NCP were already in the possession of NCP.

On 28 March 2014 NCP filed a confirmative request for the decision of the Office that all relevant documents had been sent to NCP, in which letter NCP argued that the documents were incomplete and asked the Office to revise its decision and to acknowledge that it was obliged on the basis of regulation 1049 to provide all documents. In this letter NCP mentioned in particular Article 7.2 of regulation 1049 as the legal basis of its request for the documents and referred in a general way to the basic regulation as providing the basis for protection. In its conclusion NCP referred (for its right to inspect the DUS documents based on the notion of transparency) to Article 1 of the EU basic treaty, which treaty in fact has led to regulation 1049.

The Office, in its letter of 23 April 2014, held that based on regulation 1049 it was obliged to deliver only all the documents in its possession. Nevertheless it asked the National Spanish Examination Office IVIA (Instituto Valenciano de Investigaciones Agrarias) to provide NCP with the documents that are available within the framework of administrative cooperation with national Offices, which IVIA had subsequently done.

In its letter of 24 April 2014 NCP appealed the decision of the Office, to take no further action on the confirmative request of NCP, dated 28 March 2014, to provide all documents related to the DUS test of Tang Gold, included those in the possession of IVIA.

NCP did not agree that the decision of the Office of 23 April 2014 to take no further action was only based on regulation 1049 and not also on Article 88 of the basic regulation. In the opinion of NCP Article 88 of the basic regulation provided more opportunities regarding the inspection of documents. Furthermore, Article 59 of the basic regulation offered the opportunity of appeal against the grant of a plant breeders right if the conditions for such a grant were not met. Herewith the provisions of Article 27 of Regulation 874/2009 (hereinafter regulation 874) together with Articles 55 and 56 of the basic regulation regarding the technical examination requirements were also taken into account.

Therefore NCP requested

- (i) The Office to take a decision on the request of NCP which was based on Article 88 of the basic regulation, providing NCP the right to inspect the documents supporting the DUS report and to deliver all these documents to NCP, and
- (ii) In the case the Office considered that the decisions of 24 February 2014 and 7 March 2014 forbid or prevent the request for inspection of the supporting documents of the DUS report pursuant to Article 88 of the basic regulation, it requested the Board of Appeal to quash these decisions.



NCP stated that the appeal is admissible on the basis of Article 67 of the basic regulation, because in the letter from the Office of 5 November 2013 to UCR the request of NCP was treated as a request of public inspection in conformity with Article 88 of the basic regulation and this inspection was allowed to NCP.

In its reply to the appeal by letter to NCP of 12 May 2014 the Office stated that because regulation 1049 was a later legislation it superseded the basic regulation on this issue and had the same effect as Article 88 of the basic regulation. Therefore it was sufficient to base the request on regulation 1049. Moreover according to the Office NCP had not mentioned a legal basis when requesting the documents.

In the grounds of appeal, by its letter of 24 June 2014, NCP argued that regulation 1049 does not provide the legal basis for access to these specific documents, which is or should be possible under Article 88 of the basic regulation. Moreover in case of denial of access NCP would have the possibility of appeal based on Article 67 of the basic regulation.

NCP referred to Regulation 1650/2003 of 18 June 2003 (hereinafter regulation 1650) modifying the basic regulation in order to make regulation 1049 applicable to the CPVO, by inserting Article 33a in the basic regulation, but leaving Articles 88 and 67 unchanged. This fact, in the opinion of NCP, clearly demonstrated the intention of the legislator to maintain the right of access for interested parties as an autonomous right as well as the possibility of appeal against decisions based on Article 88 of the basic regulation.

The argument of the Office that NCP did not clearly state the legal basis of its request of access to the documents is disputed by NCP by referring to its earlier letters and the letter of the Office to UCR of 5 November 2013 in which the request of access by NCP to the DUS trials, the testing material for taking samples and the documents, was presented as a request under the regime of Article 88(4) of the basic regulation. Moreover NCP pointed to the general principle of good administration by which in case of doubt the administrative body must take care to obtain the correct information.

Based on these arguments and on its right of defence, NCP considered it necessary that the Board of Appeal declares the appeal admissible.

Secondly NCP stated that the right of inspection as provided for in Article 88 of the basic regulation implied the necessity to revise the documents supporting the DUS reports by NCP. This inspection provided an essential instrument to an interested party in the granting procedure for community plant breeder's rights in order to control whether the technical examination validated the conclusion that the candidate variety was new, distinct, uniform and stable.

Furthermore NCP repeated the complaints concerning the documents already received, concluding that it did not receive all the documents it asked for and therefore was prevented to exercise its fundamental rights of defence in the procedure of granting protection to the variety Tang Gold. Therefore NCP argued that Article 88 of the basic regulation imposed the right of NCP to examine all the supporting documents of the DUS report. NCP further supported its request by referring to Articles 41, 47 and 48 of the Charter of fundamental rights of the EU (hereinafter the Charter) providing the right to good administration, an effective remedy, a fair trial and defence.

Therefore NCP considered it unacceptable to refuse the inspection of the requested documents maintained by the Spanish Authority with the argument that those were not in the possession of CPVO. NCP underlined its position by referring to several publications and cases from which it appeared that the EU procedures required the access to all relevant information whether in the possession of the EU institution or a national body.

Finally, in its grounds of appeal NCP presented its redress against the decisions of the Office of 24 February and 7 March 2014 and requested the Board of Appeal to modify the decisions as follows:

1. To permit NCP to inspect the requested documents as listed in its previous letters dated 26 September 2013, 11 February 2014, 14 February 2014 and 28 March 2014,

and

2. To grant the possibility to NCP to provide new observations in writing, including new observations concerning the DUS reports of IVIA, as soon as the decision of access to all documents has been reconsidered by CPVO and all documents have been transmitted to NCP.



In the hearing of the case on 3 March 2016 NCP complained that it still did not have received all the documents, but without specifying which documents were lacking.

Comments by UCR

By letter of 30 September 2014 UCR delivered its comments.

In short it stated that the appeal is inadmissible as Article 33(a) overrules Article 88(2) of the basic regulation. NCP did not invoke Article 88, which in fact does not give different results compared to regulation 1049 in this case. Moreover, according to UCR NCP had already received all the documents it asked for. As a result UCR concluded that there did not exist a violation of any right of NCP.

UCR referred in this respect to the letter from NCP of 28 March 2014 in which NCP invoked Article 7.2 of regulation 1049 for its request of the documents.

Furthermore UCR reported the case before the Spanish National High Court and the related correspondence between the Spanish Authority OEVI and the Court and between OEVI and CPVO as mentioned on page 27 of its letter, which correspondence is not present in the present appeal file.

UCR stated that in its letter of 16 July 2014 the OEVI explained that the absence of the Nadorcott data in the documents was due to the applied rules of confidentiality where only the data of the variety in question (Tang Gold) were provided. For Nadorcott data of many seasons were available, which had been provided to the Spanish National Court.

Observations of the CPVO

In its observations of 28 January 2015 the Office requested the Board of Appeal to declare the appeal inadmissible for non-compliance with Article 67(1) of the basic regulation or in the alternative to decide to declare the appeal unfounded. Secondly the Office considered UCR not to be admissible as a party in this case.

Concerning UCR the Office reasoned that it had no obligation to involve a party in the proceedings unless based on the exception of Article 4 of regulation 1049 or in a case based on Article 88(4) of the basic regulation. In short the Office considered that the appeal only concerned the two parties NCP and the Office.

For the inadmissibility of the appeal lodged by NCP the Office reasoned as follows:

The decision of the Office as sent per email to the appellant on 24 February 2014 to provide the requested documents on the basis of regulation 1049 was a mere act of communication and not a formal decision of the Office as prescribed by Article 53 of regulation 874 and therefore not eligible for appeal based on Article 67(1) of the basic regulation. Instead appellant should have complained to the European Ombudsman as provided for in regulation 1049.

To declare the appeal to be unfounded the Office reasoned as follows:

1. Regulation 1049 has replaced all rules concerning full access to documents by any interested party. The Office repeated here that the proper institution for an appeal is the Ombudsman.
2. The provisions and rules in the basic regulation are for greater transparency to be interpreted in the light of regulation 1049, which has expressly been provided for by the EU bodies the Commission, the Council and the EU Parliament, superseding all existing rules in this regard.
3. The fact that Article 88 of the basic regulation has not been deleted is the result of a simple implementation procedure of regulation 1049 in the basic regulation instead of a more extensive but time consuming complete recasting of the basic regulation. Article 88 is in this respect less transparent as it provides the access to documents only for interested parties in particular cases.

The Office further referred to the rule: *lex posterior derogat legi priori*.



The Office had a great margin of discretion in order to exercise its administrative decisions. Procedural rights of the parties were safeguarded by appeal and complaint procedures. Provisions for good administration were provided for in Articles 75, 81(2) and 48 of the basic regulation.

Appellant had ample opportunity to provide written observations during the testing and granting procedure. Appellant filed six requests for access to documents between 18 February 2013 and 25 November 2014 which requests were met.

The Office had provided all information on which it had based its decisions with the right to be heard, except on the decisions itself, which was based on case law explaining it had the right to do so.

Finally when the Office requested all documents from the Spanish Examination Office on 24 February 2014 the latter Office replied on 5 March 2014 that all documents had already been sent to the appellant.

Appellants' second request to submit new written observations including observations to the DUS report was inadmissible as it dealt with the merits of the granting procedure for the pending cases A006, 007 and 008/2014.

Article 41 of the Charter did not apply here. Moreover Article 17 of the Charter provided that intellectual property rights should be protected, as laid down in the basic regulation.

The Office requested the inadmissibility of the appeal or the appeal to be declared unfounded on the grounds mentioned above.

II. REASONS

A. ON THE ADMISSIBILITY OF THE APPEAL

The question before the Board of Appeal is whether, according to the appeal as formulated by NCP in the letter of 24 April 2014, the request for access to all documents that provide the basis for the DUS report of Tang Gold has been correctly treated by founding this request on regulation 1049 or whether the access to these documents should have been treated based on Article 88 of the basic regulation.

The contested 'decision' to send the requested documents to the appellant was communicated by an e-mail message dated 24 February 2014 against which no appeal procedure is available. The Office, in its letter of 23 April 2014, points as means of redress to the possibility of a complaint to the European Ombudsman or to bring the case before the Court of Justice of the European Union. As mentioned above, NCP, as it considers the contested decision to be based on Article 88 of the basic regulation founds its appeal on Article 67 of the basic regulation.

According to the facts NCP has asked for all documents in relation to the DUS testing of Tang Gold several times without mentioning the legal basis in relation to the basic regulation for this request. In its letter of 28 March 2014 NCP expressly refers to Article 7.2 of regulation 1049 for the right to inspect the complete versions of the DUS documents and refers in a global way to the basic regulation.

NCP refers also to its letter of 5 November 2013 in which, besides the access to the documents, it requested permission to take samples from the testing material based on paragraph 4 of Article 88 of the basic regulation. This is the subject of appeal case A001/2014.

It appears from the facts that at the time of the lodging of the appeal the Office had taken all necessary steps to provide appellant with the requested documents that were in the possession of the CPVO as well as in the possession of the Spanish Examination Office. This is apart from the issue that due to confidentiality rules and presumably a misunderstanding, the data of the variety Nadorcott were eventually provided to NCP in June 2014 after a procedure before the Spanish Court.

With regard to the rights provided by regulation 1049 and by the basic regulation, no differences can be observed in relation to appellant's wishes to have the right of inspection and revision of the DUS documents. Both legislations provide the possibility to read and inspect the documents and to make comments or improvements as appellant prefers. However, in these rules no obligation of the Office has been laid down to take any amendments of the documents into account.



The Board concludes that there is no material difference between regulation 1049 and the basic regulation in this respect. Therefore there is no material interest for the appellant in this procedure.

As to the means of redress for appellant we have the unique situation here that the appeal is directed against the legal basis on which the documents have been provided and not against a refusal to send the documents. Moreover as stated above, the documents have been delivered and can be used by appellant for his defence, for inspection and for amending the documents as appellant wishes, which leads to the conclusion that appellant has no interest in the current appeal.

Therefore the Board concludes that the appeal is inadmissible.

Concerning the issue raised by the Office whether UCR is admissible as a party, the Board is of the opinion that in this particular case, where appellant is demanding more than just having access to documents, it is in the light of the equality of arms necessary that the owner of the variety is involved in the procedure in order to get all information regarding this appeal procedure and is able to provide its observations.

B. ON THE SUBSTANCE

For the sake of precedence and completeness it is, in spite of the inadmissibility of the appeal, worthwhile to consider its substance.

It has to be noted here that the claims in the letter of 24 June 2014 differ from the official grounds of appeal as laid down in the letter of 24 April 2014. The main ground of the appeal, to base the decision of providing all DUS documents on Article 88 of the basic regulation has been left out here and the wish to provide the possibility to bring in appellant's own observations on the DUS documents is new, although it could possibly be derived from the French verb "réviser" in the earlier documents. Nevertheless, although it may be possible to provide comments and observations on the DUS documents by an interested party, under the present legislation and rules in force the CPVO is not in the position to have its decision being influenced by non-independent and non-impartial contributions.

In its letter of 26 September 2013 appellant requests access to all DUS documents of Tang Gold from the Spanish Examination Office. This request is repeated in the letter of 5 November 2013 in combination with the request, based on Article 88(4) of the basic regulation, to take samples of Tang Gold and to visit the DUS trials. After having received the letter of 14 February 2014, the Office takes the 'decision' on 24 February 2014 to grant the access to the documents on the basis of regulation 1049 and subsequently sends this message by e-mail to appellant. Appellant does not directly object to this message. Even in his letter of 28 March 2014 appellant refers to regulation 1049 to support its right to have access to all relevant documents. Only in the appeal letter of 24 April 2014 appellant requests to base the access on Article 88 of the basic regulation with the argument that this article provides a larger scope than regulation 1049 concerning inspection, commenting and amending the DUS documents and the DUS report. Additionally this article provides the possibility of appeal.

Notwithstanding the question whether Article 88 of the basic regulation is still valid or not after the basic regulation was amended by the implementation of regulation 1049, the issue here is whether there are significant material differences to the advantage of appellant if the access is based on the basic regulation instead of regulation 1049.

The formal differences between the basic regulation and regulation 1049 are the possibility of an appeal procedure, the inclusion of all relevant documents - not only those in the possession of the Office - and the requirement to be an "interested party".

Looking at the material side one can conclude that the Office and the Spanish Examination Office have done their best to provide all the requested documents to the appellant. The only missing data were those of Nadorcott in spite of the fact that in its extensive letters appellant complained that the comparative data of Nadorcott were not available. It might be possible that this complaint has simply been overlooked in the extensive exchange of documents regarding this matter.

The Office and the Spanish Examination Office had no specific motives to withhold these data rather than for privacy reasons. On the other hand the direct sending of these data to appellant could have prevented the



further increase of the case file. Nevertheless this problem is not linked to the legal basis of the access to the documents.

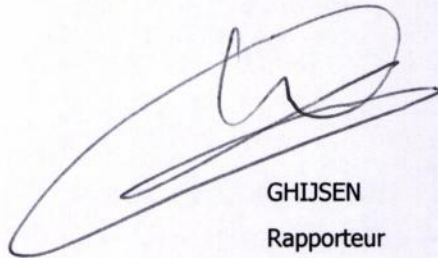
The alleged wider scope of Article 88 of the basic regulation for comments, inspection, revision and amending, as stated by appellant, cannot be followed. The scope in this case is the access to all the information with regard to the DUS testing. Appellant may unlimitedly comment, revise and amend the documents both under regulation 1049 as well as under Article 88 of the basic regulation but the Office is not obliged to take any notice of these amended or revised papers.

Regardless of the legal basis, appellant has eventually obtained access to all documents, which it may use in the appeal procedure against the granting of the CPVR for Tang Gold.

Therefore the Board concludes that it does not make any difference whether the access is provided based on regulation 1049 or on Article 88 of the basic regulation.



VAN DER KOOIJ
Chairman



GHIJSEN
Rapporteur

ⁱ An action may be brought before the Court of Justice of the European Union against a decision of the Board of Appeal within 2 months of the date of service of the decision (Article 73 of Council Regulation (EC) 2100/94)